IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50044

Summary Calendar

WILLIAM J. CARPENTER and
ROSA E. CARPENTER,

Plaintiffs-Appellees,

versus

THE SOUTHLAND CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-93-CA-269-B)

(July 14, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

I.

William Carpenter worked for Southland Corporation as a convenience store clerk. He participated in the Southland Corporation Group Health/Dental Plan and elected dependent coverage under the plan for Rosa Carpenter, his wife. The plan falls under the Employee Retirement Income Security Act as amended by the

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Consolidated Omnibus Budget Reconciliation Act of 1986, 29 U.S.C. §§ 1161-1168.

On April 22, 1992, Rosa Carpenter arrived at Vista Hills Medical Center complaining of severe abdominal pains. She received treatment, but was not admitted as a patient. Dr. Tim Lambert, Rosa Carpenter's family physician, referred her to Dr. Richard Harris, a surgeon, who saw her on April 24 and scheduled her for surgery at Sierra Medical Center on April 28. The Carpenters received preauthorization on April 24 from the health plan administrator for the procedure.

Prior to the operation, William Carpenter was fired on April 25. The Carpenters and Southland disagreed over whether the policy covered Rosa Carpenter's treatment after William Carpenter's discharge because Rosa Carpenter had not been admitted to a hospital prior to William Carpenter's firing. The Carpenters sued for payment of medical expenses incurred after April 25. The district court found that Southland had fired William Carpenter in response to his request for coverage and entered judgment for the Carpenters on a retaliatory discharge theory. We reverse the judgment and remand for a new trial.

II.

Southland contends that the Carpenters sued only to recover benefits under the policy and did not sue for retaliatory discharge. The pretrial order did not list retaliatory discharge as a basis of recovery, although there was testimony at trial regarding the circumstances of the firing. Southland argues that

the district court disregarded the pretrial order and decided the case on a theory of recovery never asserted by the Carpenters and expressly disavowed by them at trial. See Flannery v. Carroll, 676 F.2d 126, 129 (5th Cir. 1982).

The district court held that the retaliatory discharge issue was tried by consent under Fed. R. Civ. P. 15(b). This provision applies only where the parties expressly or impliedly have consented to interjection of a new issue at trial. International Harvester Credit Corp. v. East Coast Truck, 547 F.2d 888, 980 (5th Cir. 1977). Southland did not expressly consent to the retaliatory discharge theory and the conclusion that its failure to object to evidence of the firing implied consent is problematic, at best. See Moody v. FMC Corp., 995 F.2d 63, 66 (5th Cir. 1993); Jimenez v. Tuna Vessel Granada, 652 F.2d 415, 421 (5th Cir. 1981). Defendant is entitled to defend any claim resting on the contention that the discharge was pretextural. We are not persuaded that Southland was accorded that right.

It is plain that plaintiffs' state law claims asserted that William Carpenter was wrongfully terminated. The pretrial order was skimpy, but did not appear to bring the contention of wrongful firing forward as a basis for recovery under their federal claim. On the other hand, the evidence at trial regarding the firing was not relevant to any issue under the pretrial order. That William Carpenter was fired on the 25th was stipulated.

We are persuaded that the district court erred; that Southland was not given fair notice of the claim upon which the district

court rendered judgment. At the same time, in deference to the trial judge and in light of the confusion about the issue, we are persuaded that reversing and remanding for full trial is the appropriate relief.

REVERSED and REMANDED.