IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60758
Summary Calendar

WILLIAM J. CONNER,

Plaintiff-Appellant,

v.

MOORE BUSINESS FORMS, INC., ET AL.,

Defendants,

MOORE BUSINESS FORMS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

July 27, 1995

Before KING, HIGGINBOTHAM and DEMOSS, Circuit Judges.

PER CURIAM:[*]

William J. Conner appeals from the district court's grant of summary judgment for Moore Business Forms and from its grant of

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Moore Business Forms' motion to strike portions of Conner's amended complaint and/or in the alternative to dismiss. Finding no merit in Conner's arguments, we affirm the judgment of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

William Conner began working for Moore Business Forms ("Moore") in its Hattiesburg, Mississippi office in 1972. In 1981, Conner entered into a Sales Representative's Employment Agreement (the "Agreement") with Moore that provided for termination at any time without notice for reasonable cause. Absent reasonable cause, the Agreement still provided for termination at any time without notice upon the payment of fourteen days pay.[1]

The Agreement explicitly incorporated a "Sales Compensation Plan" (the "Plan"), and the Plan contained a similar termination clause. It provided for termination at any time with fourteen days written notice along with a severance settlement as indicated in

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[1] Paragraph five of the Agreement states the following:

> Your Termination -- The first 90 days of your employment represents a probationary period during which time your service or employment with the COMPANY may be terminated at any time by the COMPANY or by you without notice to the other party. Following this probationary period, your service or employment with the COMPANY may be terminated at any time by the COMPANY upon fourteen (14) days written notice or by the payment to you of a sum equal to the salary paid to you during the fourteen (14) day period prior to such termination; provided, however, that no such notice will be given and no such salary payment in lieu of notice will be paid if you shall elect to terminate your service or employment or if the COMPANY shall terminate your services or employment for reasonable cause.

the Plan, or for termination without notice (or without pay in lieu of notice) if the termination was for cause.[2]

In December of 1987, Moore transferred Conner to its Jackson, Mississippi office, and Conner was given responsibility for handling the account with Methodist Medical Center of Jackson ("MMC-Jackson"). MMC-Jackson was covered by an agreement between Moore and American Healthcare Systems ("AmHS") that provided for a discount on purchases of "measured volume" items. After Conner relocated to the Atlanta office in August of 1992, Moore discovered that Conner had failed to give MMC-Jackson the discounts required by the Moore-AmHS agreement. As a consequence, Moore issued a $65,000 credit to MMC-Jackson, and Moore was terminated on February 18, 1992 for his failure to properly give the discounts. Moore

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[2] Paragraph XIX of the Plan provides in the following relevant part:

A. Introductory Period

1. The first ninety (90) days of employment represent an introductory period during which time a sales representative's service or employment may be terminated by request or voluntarily without notice and with no severance settlement.

2. Following the introductory period a sales representative's service or employment may be terminated as follows:

a. by the sales representative or Company submitting fourteen (14) days written notice with severance settlement as indicated under XIX.B.

b. by the Company for cause (i.e., violation of a Company rule that results in discharge) without notice or pay in lieu of notice.

paid Conner for the remainder of February, but he was apparently given no written notice of his termination.

Conner alleges that Moore justified its issuance of the $65,000 credit because of the contents of a "Cost Benefit Log" ("CBL"), which was filled out by Moore employee L.F. Pfister. Conner contends that the CBL was erroneous and was negligently prepared, and he further argues that "these employees negligently misrepresented facts as to the accuracy of the CBL for which Moore used as a basis for the issuance of a credit and in terminating Conner."

In his original complaint, Conner sued Moore and two of its employees, Pfister and Ken Pinkerton, for breach of express and implied contracts of employment, breach of implied covenant of good faith and fair dealing, promissory estoppel, intentional infliction of emotional distress, and defamation. In October of 1993, the court granted summary judgment to Pinkerton and Pfister, and they were dismissed from the lawsuit. The court rejected Conner's request to amend his complaint against Pinkerton and Pfister to include negligence claims.

Moore filed a summary judgment motion in the district court, and three weeks later, Conner filed an amended complaint. Conner included Pfister and Pinkerton as defendants, again alleging that they were responsible for breaches of contract, promissory estoppel, intentional infliction of emotional distress, and defamation. Conner also brought claims of negligent representation and negligence against Moore, apparently grounded on alleged errors

of Pfister and Pinkerton in maintaining and reporting information of the CBL. The district court granted summary judgment for Moore on October 14, 1994, and Conner now appeals.

II. STANDARD OF REVIEW

We review the district court's grant or denial of summary judgment de novo, "reviewing the record under the same standards which guided the district court." Gulf States Ins. Co. v. Alamo Carriage Serv., 22 F.3d 88, 90 (5th Cir. 1994) (internal quotations omitted). Summary judgment is proper "when no genuine issue of material fact exists that would necessitate a trial." Id. In determining on appeal whether the grant of summary judgment was proper, we view all factual questions in the light most favorable to the non-movant. See Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994).

III. ANALYSIS AND DISCUSSION

A. A Contractual Ambiguity?

Conner contends that an "ambiguity" in the termination language of the Agreement and the Plan presents a genuine issue of material fact as to whether written notice of his termination was required. As Conner argues, "[c]learly there is an ambiguity in the contract because the termination language in the employment agreement document differs from the termination language in the sales compensation plan . . . ."

Unfortunately for Conner, we disagree with his assertion of ambiguity. Both the Agreement and the Plan clearly state that Moore may terminate its employees for reasonable cause without

notice or a severance payment. Moreover, we believe that Moore had reasonable cause to terminate Conner. The evidence is undisputed that Conner was terminated because he failed to issue $65,000 in discounts to MMC-Jackson in violation of Moore policy. Even though Conner attempts to frame a genuine issue of material fact over whether he received wages in lieu of notice and vacation pay, these provisions pertain to termination ***without*** cause. As mentioned, however, we conclude that Conner's termination was for reasonable cause; thus, as both the Agreement and the Plan state, it is immaterial whether Conner received notice and proper severance payments. His "ambiguity" assertions do not create a genuine issue of material fact.[3]

B. The Moore-AmHS Agreement

Conner argues that the agreement between Moore and AmHS providing for "measured volume" discounts required each individual hospital to sign a letter of intent signifying its participation "in the overall forms management program with Moore." Conner contends that MMC-Jackson did not sign such a letter of intent; thus, according to Conner, there is a genuine issue of material

[3] Conner also argues that "a genuine issue of material fact exists as to the interpretation and application of measured volume items." The letter of intent signed by Methodist Health Systems in Memphis, Tennessee (the parent of MMC-Jackson), however, stated that "[w]e understand the following criteria used to determine which orders are considered measured volume, therefore eligible for the cost assurances described in the AmHS/Moore Agreement." The letter of intent then set forth eight criteria that defined and explained what was and what was not "measured volume." Therefore, we cannot agree with Conner's argument, and without further evidence of an ambiguity in the definition of "measured volume," this contention cannot defeat summary judgment.

fact as to whether MMC-Jackson was validly entitled to receive the "measured volume" discounts.

The evidence does not support Conner's attempt to deny MMC-Jackson's coverage under the Moore-AmHS agreement. MMC-Jackson is owned by Methodist Health Systems in Memphis, Tennessee, and the record contains a letter of intent signed by Methodist-Memphis and covering "All-MHS hospitals." The deposition testimony of Les Swanson clearly indicates that Methodist-Memphis's signature would bind MMC-Jackson as well:

> [I]f they are owned by the Methodist group in Memphis, their signature up there by Don Searcy who is a corporate officer would have covered them equally as well. So you would not necessarily had to have gotten the signature from somebody on-site at Methodist in Jackson. . . . Methodist really was in the category that they felt that the corporate signature was sufficient to obligate all the facilities to the agreement.

Most importantly, Moore's issuance of a $65,000 credit to MMC-Jackson, which Conner does not deny, is compelling evidence that MMC-Jackson was privy to the agreement between Moore and AmHS, and that Moore recognized MMC-Jackson's entitlement to the discounts provided by the Moore-AmHS agreement. In essence, Conner is attempting to deny basic principles of agency law by taking selective deposition statements out of context. We conclude that the evidence clearly demonstrates that MMC-Jackson was a party to the Moore-AmHS agreement, and as such, Conner's arguments are unavailing.

C. Moore's Disciplinary Policy

Conner also alleges that Moore breached an implied contractual obligation by failing to comply with its own policy and procedure

relating to discipline and termination. Conner cites the deposition testimony of King Rhodes, who stated that Moore had a "progressive disciplinary policy" that begins with a verbal warning and culminates in termination. Conner argues that this progressive policy was not implemented in his case. Moreover, as an example of the disparate treatment applied to him, Conner cites the example of a co-employee's misconduct that did not lead to termination.

In Perry v. Sears, Roebuck & Co., 508 So.2d 1086 (Miss. 1987), the Mississippi Supreme Court reiterated its earlier holding that the policies of an employer can only become part of a written employment contract "where the contract ***expressly provides*** that it will be performed in accordance with the policies, rules and regulations of the employer." Id. at 1088 (citing Robinson v. Bd. of Trustees, 477 So.2d 1352, 1353 (Miss. 1985)) (emphasis added). In Conner's case, the Agreement and the Plan comprise his written employment contract, and they both incorporate no additional company policies or rules. Thus, we cannot conclude that any disciplinary "policy" was part of Conner's official employment contract, and we will not imply such a provision.[4]

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[4] Conner's reliance on Bobbitt v. The Orchard, Ltd., 603 So.2d 356 (Miss. 1992) and McGlohn v. Gulf & S.I.R.R., 174 So. 250 (Miss. 1937), is misplaced. In Bobbitt, the court held that "when an employer publishes and disseminates to its employees a manual setting forth the proceedings which will be followed in event of an employee's infraction of rules, ***and there is nothing in the employment contract to the contrary***, then the employer will be required to follow its own manual in disciplining or discharging employees for infractions or misconduct specifically covered by the manual." 603 So.2d at 357 (emphasis added). In the instant case, however, Conner provides no evidence to indicate that a Moore disciplinary policy was published and disseminated to the employees. More importantly, Conner's

In addition, the testimony of King Rhodes also indicates that Moore's progressive disciplinary policy can be "bypassed in cases of flagrant violations of company policy," and we believe that a failure to issue $65,000 worth of discounts can be construed as a flagrant violation. Finally, to the extent that Conner relies upon the non-termination of co-employee Mike Zimmerman, we note that Zimmerman's situation significantly differed from Conner's situation, as the evidence indicates that Zimmerman's district manager was ultimately deemed responsible for the misconduct at issue in Zimmerman's situation. Moore's disciplinary policy raises no genuine issue of material fact.

D. The Negligence Claims

Conner asserts that the district court erred in dismissing Conner's negligent representation and negligence claims against Moore. According to Conner, his claims are not mere attempts to resuscitate his previously dismissed defamation claims against Pfister and Pinkerton. Instead, Conner maintains that Moore was

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employment agreement sets forth Moore's termination procedures with no mention of any "progressive" disciplinary policy.

Similarly, in McGlohn, 174 So. at 250-53, the court found that the terminated employee was covered by a union contract that provided explicit termination procedures, but the employer-railroad did not follow the procedures. Conner's employment agreement also provides explicit termination procedures, but there is no mention of a "progressive" disciplinary policy. Thus, unlike in McGlohn, Moore did not fail to follow termination procedures that were detailed in the employment agreement. McGlohn provides no support for the proposition that the employer must comply with policies and procedures that are extrinsic to the employment agreement. See Shaw v. Burchfield, 481 So.2d 247, 254 (Miss. 1985) (implying that employment agreements are "privately made law" that govern the rights and powers of the parties).

vicariously liable for the negligent acts or omissions of its employees in preparing reports concerning "measured volume" items.

The essence of Conner's negligence contentions is that alleged inaccuracies in the CBL damaged his reputation with Moore, resulting in his discharge. The district court found that Conner's negligent representation and negligence claims against Moore were impermissible attempts to evade the one-year statute of limitations applicable to defamation claims. See Dennis v. Travelers Ins. Co., 234 So.2d 624, 626 (Miss. 1970) ("There can be no escape from the bar of the statute of limitations applicable to intentional torts by the mere refusal to style the cause brought in a recognized statutory category and thereby circumvent prohibition of the statute."). It is true that the underlying factual contentions of these actions are similar, if not identical, to Conner's earlier defamation claims against Pfister and Pinkerton. Nevertheless, we need not rely on this rationale to affirm the district court's grant of summary judgment on Conner's negligent representation and negligence claims.

Simply put, the record is completely devoid of any evidentiary support for Conner's negligent representation and negligence actions. Conner has presented no evidence relating to how the CBL was in error, and he presents no evidence to support his contention that the CBL improperly accounted for "measured volume" items. Moreover, there is simply no evidence that Moore was negligent in any manner in allowing its employees to prepare the CBL, and there is no evidence that any of the employees were directly negligent in

their preparation of the CBL. Conner's action had been pending in federal court since March 25, 1993, and summary judgment was not granted until October 14, 1994. Despite approximately eighteen months to conduct discovery to present evidence on these actions, Conner failed to uncover any valid summary judgment evidence. Even after receiving a sixty-day extension to conduct discovery on June 22, 1994 (pursuant to his motion to amend), Conner produced no summary judgment evidence to support his negligence claims against Moore. Moreover, he does not even allege that discovery will eventually provide relevant summary judgment evidence. Without support for his allegations, we cannot quarrel with the district court's grant of summary judgment on these claims.

IV. CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment is AFFIRMED.