UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60820
Summary Calendar

ROBERT W. NIEMI,

Plaintiff-Appellant,

versus

AKZO COATINGS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi
(3:93-CV-676-BN)

(June 7, 1995)

Before KING, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:[*]

In this diversity action, Robert Niemi sued his former employer, Akzo Coatings, Inc., for wrongful termination by breach of an employment contract. The district court granted summary judgment in favor of the employer, holding that Niemi was employed at will and that the facts of his employment and termination did

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

not fall within the limited exception to Mississippi's employment at-will doctrine announced in Bobbitt v. The Orchard, Ltd., 603 So. 2d 356 (Miss. 1992). We affirm.

Our Court reviews the grant of summary judgment *de novo*, applying the same standard as did the district court. Solomon v. Walgreen Co., 975 F.2d 1086, 1089 (5th Cir. 1992). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). We review the facts by drawing all inferences in the light most favorable to Niemi, the non-movant. Solomon, 975 F.2d at 1089.

FACTS

From March 1986 until January 1988, Robert Niemi served as production manager for Akzo's predecessor in interest, Reliance Universal, Inc., at their Zion, Illinois plant. In January 1988, Niemi voluntarily resigned that position to take a job with another, unrelated company. Ten months later Reliance Universal rehired Niemi, this time to work as production manager at the company's Clinton, Mississippi plant. As part of the rehire agreement, Reliance Universal orally agreed to back-date Niemi's record to reflect a March 1986 start date and to extend to him the same benefits that he enjoyed at the Zion plant. In August 1989, Akzo Coatings purchased Reliance Universal. Akzo retained Reliance Universal's employees but substituted its own employee benefit plan.

On the morning of September 29, 1992, William Poole, plant

manager of the Akzo Clinton facility, called a production meeting. In attendance were Poole and six members of his staff, including Niemi, four other managers and a sales coordinator. Niemi claims that Poole inexplicably lost control during the meeting and began berating Niemi. Affidavits from all of the other employees in attendance state that Niemi was argumentative and unwilling to follow Poole's directives. After Poole threatened to get a new production manager, Niemi told Poole "do what you have to do" and left the meeting without permission. Shortly thereafter, Niemi left the plant for lunch and went home to rest. While at home Niemi took medication for a sinus headache and inadvertently slept away the rest of the work day. Akzo interpreted Niemi's sudden departure and absence without leave as a voluntary resignation of his position and refused to reinstate him when Niemi called the plant that evening. Niemi claims he never resigned, and that under Akzo's company policy, he could not be terminated without first being subjected to less extreme disciplinary measures. For purposes of this opinion we will assume that the facts are as Niemi claims and that he was discharged.

APPLICABLE LAW

Mississippi adheres to the employment at-will doctrine. Under that doctrine, an employment contract for an indefinite term may be terminated by either the employee or the employer for "a good reason, a wrong reason, or no reason" at all. Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 874-75 (Miss. 1981). Niemi does

not dispute that he was an employee at will, but claims that the circumstances of his discharge fall within the exception to the at-will doctrine recognized by the Mississippi Supreme Court in Bobbitt v. The Orchard, Ltd., 603 So.2d 356 (Miss. 1993). Bobbitt held:

> [W]hen 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. Under Bobbitt, the employment manual does "not give the employees `tenure,' or create a right to employment for any definite length of time." Id. at 361. But when "given to all employees," an employment manual can impose on the employer an obligation to "follow its provisions in reprimanding, suspending, or discharging an employee for infractions specifically covered therein." Id. at 361. Niemi claims that both Reliance Universal and Akzo followed "progressive discipline" procedure, under which an employee was first warned that performance was inadequate, then warned that continued inadequate performance would result in discharge, and finally, absent improvement, discharged. Thus, Niemi maintains that the entitlement to a progressive discipline measure before discharge was an implied term of his employment contract, which was breached when he was discharged without the benefit or a warning or any other less severe measure.

As proof of the progressive discipline policy, Niemi testified by deposition that he recalled or believed that there "were

references to the advisability of progressive discipline" in an employment manual given to him the first time he was employed by Reliance Universal in Zion, Illinois. Despite full discovery, there is no other evidence in the record that is probative on the existence or content of the Zion employment manual. See Perry v. Sears, Roebuck & Co., 508 So. 2d 1086 (Miss. 1987) (employment manual set down specific termination procedures but also stated that procedures did not alter the at-will nature of the employment). Further, record evidence demonstrates that Niemi was specifically given notice of Akzo's own employment policies, which superseded those provided by Reliance Universal, which would have been expressed in the manual.

Niemi also testified that he had always understood from conversations with Reliance Universal and Akzo management that progressive discipline procedures were to be used with plant employees. It is clear from the record that these conversations with Niemi's supervisor and with the Human Resources Director related to Niemi's treatment of his own plant employees. In addition, the record reflects that Niemi understood that there were exceptions to the general practice of progressive discipline.

Niemi contends there is no reason to limit Bobbitt, as did the district court, to situations in which written employment manuals are disseminated to all employees. In his view, oral communications of company policy can also impose a binding obligation on the employer and alter the at-will nature of an employment relationship. Alternatively, Niemi argues that the issue

is appropriate for certification to the Mississippi Supreme Court. Akzo argues that Bobbitt is expressly limited to the facts of that case and that further abandonment of the historic at-will doctrine in Mississippi is the province of the state legislature.

Although we think that the limited nature of Bobbitt is plain, we need not venture any *Erie*-guess. Regardless of whether Mississippi would allow an oral communication to take the place of a written employment manual, Bobbitt plainly requires that a specific and detailed procedure for progressive discipline be articulated to all employees. Niemi's vague description of the policy, his acknowledgement that there were exceptions to the progressive discipline policy, the fact the policy was communicated to him as a manager of other employees rather than as a term of his own contract, and the complete lack of any evidence that the policy was disseminated generally to all plant employees, all lead us to agree with the district court that Niemi did not produce sufficient proof to raise a genuine fact issue about whether the circumstances of his departure from Akzo fall within the narrowly defined parameters of Bobbitt. The district court is AFFIRMED.