6/17/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00412 COA

WALLACE DOMINEY APPELLANT

v.

WYMAN DOROUGH, MISSISSIPPI STATE UNIVERSITY, AND THE BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING OF THE STATE OF MISSISSIPPI APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN M. MONTGOMERY

COURT FROM WHICH APPEALED: OKTIBBEHA COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT: WILBUR O. COLOM

BRYAN KELLY HARDWICK

ATTORNEYS FOR APPELLEE: CHARLES L. GUEST

ROBERT G. JENKINS

JOHNNIE M. HALEY

NATURE OF THE CASE: CIVIL - EMPLOYEE RIGHTS

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR DEFENDANT

MANDATE ISSUED: 7/8/97

BEFORE THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Wallace Dominey, a former assistant professor at Mississippi State University, brought suit against the University, the College Board, and the dean of the Department of Biological Sciences. His claims arose from the University's failure to continue his employment at the end of his second one-year contract. Summary judgment was granted to the defendants by the Circuit Court of Oktibbeha County. On appeal, Dominey argues that there were disputes as to material fact regarding the reasons that he was not rehired. We disagree that any material facts were in dispute, find that the trial court properly analyzed the law, and affirm.

STATEMENT OF FACTS

Dr. Wallace Dominey signed the first of two one-year contracts of employment with Mississippi State University on October 15, 1987. The contract covered the period of August 16, 1987 until May 15, 1988, and provided that Dominey would be an assistant professor of Biological Sciences. According to Dominey's allegations, all was well with his work at MSU until he spoke up at a faculty meeting and disagreed with the head of the department, Dr. Wyman Dorough. The disagreements as alleged later in the litigation centered on "updated computer facilities" and the need to seek "a larger pool of applicants for a position that was vacant."

On February 12, 1988, after the disagreements had begun, the department head Dorough gave a letter to Dominey that explained what was expected of Dominey: he was to have a "viable research program," demonstrate dedication and skill in the classroom, and accept his role in the department. Dominey went to the Dean of Academic Affairs regarding the February 12 letter, and thereby began the MSU grievance process regarding the treatment he was receiving from Dorough..

Dominey provided Dorough with information about his research project by a April 1 deadline. Dominey mentions meetings and other communications between the two men that alternately appeared to remove the tension or exacerbated it. Dominey was granted a second one-year contract on August 18, 1988. It was a "terminal" contract, meaning that among its terms was the statement that employment "will not be offered for academic year 1989-90." A letter of September 13, 1988 transmitted this contract to Dominey.

Dominey brought suit in federal district court on November 29, 1988, alleging a violation of his free speech rights. He sued under 42 U.S.C. 1983, and also brought pendent state claims for breach of contract. On March 29, 1990, the district court held for the defendants on the federal free speech issues. The court found that the words that allegedly caused Dominey's trouble with his department head were not on public issues, were solely communicated within the Biological Sciences Department community, and therefore were not protected by the First Amendment nor could be the basis for suit under section 1983. The state contract claims were dismissed without prejudice.

On April 24, 1990 Dominey brought similar claims in state court. This time he alleged a violation of his free speech rights as protected by the Mississippi Constitution, and also claimed a breach of contract. Leave to file an amended complaint was granted on May 15, 1992, that would add allegations of slander, violation of due process, and interference with contract. No amended complaint was filed until September 30, 1993, two days after a pre-trial conference made the plaintiff

aware that the amended complaint had not yet been filed.

Summary judgment was granted the defendants on all issues on March 30, 1994.

DISCUSSION

I. The trial judge failed to make proper findings of fact and conclusions of law.

Dominey alleges that the trial court's summary judgment opinion is "practically a verbatim, both in content and style of print, reproduction of the summary judgment brief rendered by MSU." We have examined the opinion and the brief. The assumption that the trial court adopted the successful party's brief as the bulk of its opinion seems correct. A busy trial judge's use of one party's brief or proposed findings and conclusions is neither a novel nor invalid method of expressing a decision. However, when that occurs the traditional deference to the trial court's findings is reduced:

While an appellate court may not summarily disregard findings adopted by a trial judge verbatim from the submission of the prevailing party, the appellate court must view the challenge findings of fact and the appellate record as a whole with a more critical eye to insure that the trial court has adequately performed its judicial function.

Rice Researchers, Inc. v. Hiter, 512 So. 2d 1259, 1269 (Miss. 1987).

The adoption of the prevailing party's either proposed findings or brief "is within the Court's sound discretion." *Hiter*, 512 So. 2d at 1266. "Case complexities and crushing caseloads necessitate substantial reliance upon the submissions of trial counsel." *Id.* We see no evidence that the trial court abdicated its responsibilities to make an independent review, such as merely adopting the language of the successful party in expressing its conclusion. We will not reverse on this basis.

II. Summary Judgment Standards

Dominey alleges that the trial court erred in determining that there were no disputes of material fact. It is axiomatic that summary judgment may not be granted if fact questions exist that are material to the application of the relevant law. M.R.C.P. 56(c). We agree with Dominey's statement of the law, but we cannot decide whether the trial court exceeded the permissible bounds for summary judgment until we look at specific allegations of disputes of material fact. Those are addressed in the subsequent sections.

III. Is the MSU faculty handbook assimilated into the employment contract?

Dominey appears to acknowledge that the two employment contracts by themselves do not support his breach of contract claim. As Dominey stated in his amended complaint, "he was summarily discharged without a fair and adequate review of work for factors not related to academic performance or research skills and in violation of the express and implied provisions of the contract of employment that he would not be discharged for engaging in activities that were protected by the MSU handbook for faculty members." The contract of October 15, 1987, for the academic year 1987-1988, is a one year contract of employment that provides no right of renewal. The second contract, dated August 18, 1988, is specifically a "terminal contract." It is for the 1988-1989

academic year, and provides that employment would not be offered after that time. Neither of these contracts grant on their face any rights beyond the rights to be an assistant professor during the two academic years. Under neither contract is there a right of re-employment.

The first allegation of additional rights arises from a purported oral agreement that Dominey would not be terminated. It is evident that Dominey's department head, Wyman Dorough, did not have authority nor did anyone else to enlarge upon the written contract executed by the University and the College Board. Whether Dominey ever reasonably believed he had some sort of warranty of future employment, a matter hotly in dispute, does not create enforceable rights. The contracts, signed by the Board of Trustees of State Institutions of Higher Learning, cannot have their terms diluted or amended by other employees of the University. As the supreme court stated regarding an alleged contract with an assistant football coach, "we can only remind the appellant of the legal maxim, which states that a person, dealing with an agent, must know at his peril the extent of the agents authority to bind his principal." *Bruner v. University of Southern Mississippi.*, 501 So. 2d 1113, 1116 (Miss. 1987). Thus, even if Dorough said something that might have caused Dominey to believe he had assurances of future employment, a fact question neither the trial court nor we need to resolve, it did not create enforceable rights.

The separate question of the assimilation of a faculty handbook has been addressed in several cases. A handbook may supplement the express terms of a contract only if it is intended to do so. That "intent is manifested only where the contract expressly provides that it will be performed in accordance with the policies, rules and regulations of the employer." *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086, 1088 (Miss. 1987). The only language that Dominey cites from either the contract or the handbook states that "it is the intention for this handbook to reflect policies and rules of the Board of Trustees of the state's institution of higher learning. . . . " That provision also states that any changes or additions to the policies or the rules will be reflected on the official minutes of the Board and the manual of rules. We have little doubt that the handbook in *Perry* also "reflected" the policies and the rules of the employer there. As the *Perry* court stated, the issue is not whether a handbook creates policies, rules and regulations of the employer -- that's the very purpose of policy handbooks. *Perry,* 508 So. 2d 1086, 1088, citing *Robinson v. Board of Trustees of East Central Junior College,* 477 So. 2d 1352, 1353 (Miss. 1985). The question is whether "the contract expressly provides that it will be performed in accordance with the policies, rules and regulations of the employer." *Perry*, 508 So. 2d at 1088.

In one case dealing with a junior college, the contract itself provided that it would be performed "in accordance with the policies, rules and regulations of the state board of education. . . ." *Robinson,* 477 So. 2d at 1353. The court found that this was a specific incorporation of the relevant faculty handbook. No such language appears in the contract at issue here. Indeed, there is no reference at all in the contract to any other policies or rules.

The trial court found the contract of employment to be unambiguous and that the policy handbook was not incorporated. There were no disputes of material fact regarding either conclusion. We find those conclusions to be correct.

IV. The MSU Faculty Handbook is an independent obligation

Dominey alleges that even if the handbook is not incorporated into the employment contract, it

should serve as an independent obligation that is enforceable. We are not dealing here with policy decisions on what a university should do, but on the legal implications of what it must do. We find no independent obligation arising out of the faculty handbook.

V. Statutes of Limitations

The trial court found that the relevant statute of limitations were not tolled during the pendency of federal court litigation over Dominey's claims. There are no pleadings or orders from the federal court action in this record. However, the final judgment was made an attachment to the appellees' brief. The circuit court's final judgment states that Dominey filed a complaint in federal district court on November 29, 1988. The allegation was that the defendants had violated his right to free speech; also alleged was a state pendent claim regarding breach of contract. On March 29, 1990, the federal court held against Dominey on the free speech allegation. The pendent state contract claim was dismissed. A complaint was then filed in circuit court on April 24, 1990.

Two separate issues are raised by this allegation of error. The first concerns determining what are the causes of action that are actually involved in the present suit. Two different complaints were filed, with procedural issues arising as to the second. The other question concerns the statute of limitations on the claims properly before this court.

Dominey's first state complaint alleged that he had been wrongfully discharged for expressing "his views for improving the education of students," which was a violation of his free speech rights under the Mississippi Constitution. He also alleged he had been fired in violation of the express and implied provisions of the contract of employment and the MSU handbook, including an implied right of good faith and fair consideration of his performance. On October 3, 1991, Dominey filed a motion to amend his complaint in order to attach copies of the relevant contract and other materials. No order approving the amendment was ever issued. On April 1, 1992, plaintiff filed for leave to submit another, or second amended complaint. The motion was granted on May 15, 1992 and the plaintiff was directed to serve that complaint. It was not until September 28, 1993 that Dominey's counsel pointed out his failure ever to serve the second amended complaint. It was filed two days later.

Since April 1, 1992, the proposed amended complaint with attachments of the relevant contracts had been of record. That complaint was served upon the attorney for MSU, as part of the motion for leave to file the amendment. Since May 15, 1992, Dominey had the right actually to file the new complaint. The order of that date said the plaintiff "shall serve his Amended Complaint as provided by Rules of this Court." Under Uniform Circuit Court Rule 2.01, in effect on May 15, 1992, a copy of this pleading "shall be delivered in person or by mail to opposing counsel. . . ."

Dominey's failure to serve the new complaint was in violation of the court rules. However, the defendants knew of the language of the amended complaint and that the circuit court had granted leave for its filing. If the defense attorneys noticed that Dominey did not actually file or serve the amended complaint after being granted leave to do so, they might well have been uncertain of the ultimate effect of that failure to file would be when the issue arose later. Other than that question, the only other result of failure to file is that the defendants did not file an answer.

The trial court in its opinion and order of March 30, 1994, found that the second amended complaint was a new complaint for purposes of which Mississippi Rule of Civil Procedure 4 should have been

followed. This would have meant an actual summons being issued. We find that determination to be in error. Since the parties were the same, and they all were aware of the amended complaint and the right for it to be filed and served, no purpose would be served by requiring a new summons, even if only by first class mail. The plaintiff negligently failed to file the amendment, but no prejudice resulted. The court went on to resolve the merits of the complaint, and we will also.

a. Contract Claim

We have already ruled that the contract claim, based on the allegation that the handbook was incorporated into the contract, has no merit. We also have held that there can not be an enforceable oral contract arising from statements of any MSU employee. Thus, whether the statute of limitations would also bar the claim is an issue we need not address.

b. State free speech rights

The Complaint alleges that Dominey's disagreement regarding the ways to improve the Department of Biological Sciences were protected under the Mississippi Constitution's provisions for free speech. These same claims when cast as being protected under the federal constitution were dismissed by the federal district court. The thoroughness with which this issue was addressed is suggested by the fact that nowhere in Dominey's pleadings nor in his brief to this court does he cite any case law nor even the provision of the Mississippi Constitution that he invokes. The provision is that the "freedom of speech. . . shall be held sacred. . . ." Miss. Const. Art. 3, 13.

What was alleged in the trial court was that Dominey had disagreements with his department head regarding a need for "updated computer facilities" and the need to seek "a larger pool of applicants for a position that was vacant." It is evident that under the First Amendment, an "employee's speech is entitled to judicial protection only if it concerns matters of public concern, and this protection does not extend to comments of personal interest." *Bulloch v. City of Pascagoula*, 574 So. 2d 637, 643 (Miss. 1990), citing *Connick v. Myers*, 461 U.S. 138 (1983). Dominey's free speech allegations were found without merit by the federal court because complaints about the computer program and the need to seek additional applicants for a university position were not matters of public concern. *Connick* states that a balance exists for freedom of speech in the public sector: the "First Amendment's primary aim is the full protection of speech upon issues of public concern. . . ." *Connick*, 461 U.S. at 154. The federal district court found that Dominey's statements were "primarily private interest" subjects. The issue of computer services for the Department of Biological Sciences and the credentials of incoming faculty members, were "matters of concern only to members of the University community." There is no allegation that Dominey took these University issues to a forum involving the general public. Therefore under *Connick* the district court reached an inevitable conclusion dismissing the First Amendment claims.

The district court then dismissed the pendent state contract claims. There is no evidence that an appeal was taken. Regardless, the propriety of the resolution of the First Amendment issues is not before us.

Dominey then filed a complaint that alleged a violation of state free speech rules. The language of Section 13 of the Mississippi Constitution, that "freedom of speech and the press shall be held sacred, " suggests the absence of judicially enforceable standards. Sacred obligations are measured by a far

wiser judge than are earthly duties. Still, the Mississippi Supreme Court has said that it "was of the opinion, without deciding," that this language actually was "more protective of the individual's right to freedom of speech than does the First Amendment since our constitution makes it worthy of religious veneration." *ABC Interstate Theatres, Inc. v. State*, 325 So. 2d 123, 127 (Miss. 1976). Before determining whether section 13 protects more than does the First Amendment, we must determine if such a decision is necessary. Needless resolutions of constitutional questions are to be avoided by appellate courts. *Mississippi Public Service Commission v. Mississippi Power & Light Co.*, 593 So. 2d 997, 1003 (Miss. 1991).

Dominey's claim is that the refusal to rehire him was because of the exercise of a state constitutionally-protected right of free speech. In federal court, the claim was one for violation of Dominey's civil rights under 42 U.S.C. 1983. The most that Dominey in the state suit has argued is that an arm of the state -- a state-funded university -- refused to grant him a new contract because of his exercise of state-protected rights. This would be a failure to employ based on improper motives. Do these factual allegations state a cause of action? Dominey's complaint, his response to summary judgment, and now his papers on appeal make no reference to what this cause of action entails, other than he has a year to bring it.

The phrase "failure to employ" was added in 1983 to the otherwise long-unchanged statute of limitation applying to intentional torts. 1983 Miss. Laws ch. 394; Miss. Code Ann. 15-1-35. Though the session law itself makes no explanation of the purpose, there is little doubt that the reason for this amendment was that there was no clear Mississippi statute of limitation that would apply to violations of federal civil right statutes in hiring decisions. The law was in controversy for several years in determining the appropriate state statute of limitation for section 1981, 1982, and 1983 actions. *Hanner v. Mississippi*, 833 F. 2d 55, 59 (5th Cir. 1987). U.S. Supreme Court authority had held that the statute of limitation to be used for federal civil rights claims was the "most appropriate one provided by state law." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975), *But see, Wilson v. Garcia*, 471 U.S. 261, 275 (1985). No Mississippi limitation statute explicitly addressed torts for failure to hire, as indeed the cause of action has not existed under state law. Barely a month before the 1983 legislature convened, the Fifth Circuit struggled with what Mississippi limitations statute was applicable to an action under 42 U.S.C. 1981. *White v. United Parcel Service*, 692 F.2d 1 (5th Cir. 1982). After the legislative change, any section 1983 suit over a refusal to hire would have a one-year statute of limitation. Miss. Code Ann. 15-1-35.

Dominey's section 1983 suit was resolved against him in federal court. Mississippi Code section 15-1-35 is a limitation statute; it has no language creating a cause of action. There is no state statute analogous to 42 U.S.C. section 1983. Thus the state circuit court only could look at whether some common law right had been violated for the failure to employ Dominey. We find no common law right to sue for failure to employ. Thus to the extent Dominey's complaint can be read to include a claim that MSU improperly refused to enter a contract of employment with him because of his exercise of his right of free speech as guaranteed by section 13 of the Mississippi Constitution, he has not stated a cause of action cognizable under state law. His only claim was under 42 U.S.C. section 1983, and that claim was rejected by the federal district court.

c. Implied covenant of good faith and fair dealing

The second amended complaint also alleges that the discharge was in violation "of the express and implied provisions of the contract that there would be a good faith and fair consideration of his performance." Such a claim was examined in *Perry v. Sears*, 508 So. 2d at 1089. There the supreme court refused to adopt an implied covenant of good faith and fair dealing in employment contracts, and we similarly decline to do so. *Id.*

d. Malicious interference with contract

Dominey also alleges that Dorough "wilfully, maliciously and intentionally interfered" with his contract with the University. Dorough was Dominey's department head, and an agent of the University. It is evident that tortious interference of a contract requires a valid contract plus interference by a third party outside of the contract. *Nichols v. Tri-State Brick & Tile*, 608 So. 2d 324, 328 (Miss. 1992). Since Dorough was an agent of the other contracting party, the tort does not lie. *Robinson v. Coastal Family Health Center, Inc.*, 756 F. Supp. 958, 964 (S.D. Miss. 1990).

e. Slander

Next Dominey alleged in the Amended Complaint that Dorough slandered him by communicating "to members of the faculty and other non-privileged parties statements of the Plaintiff was disruptive, incompetent, mentally unstable and other allegations intended to damage and destroy" Dominey's reputation. This slander allegation was never made in the federal lawsuit, nor was it raised in the state court action until leave to file a second amended complaint was made on April 1, 1992. No date is placed on the alleged slander. The circuit court read the allegation in context and determined that any slander must have been prior to the time the decision was made to terminate Dominey. That decision was indicated on the face of the second contract, dated August 18, 1988. Even were we to say that the second amended complaint does not make it clear that the alleged slander occurred prior to August, 1988, we do find that the allegation must be read that it occurred while Dominey was still working at the University. His employment terminated in May, 1989. Thus at the latest, the cause of action for slander arose in May, 1989. There is a one year statute limitation to bring a slander claim. Miss. Code. Ann. 15-1-35.

The complaint that was filed in April, 1990, which began the process in state court, did not include any allegations of slander. At the earliest, those allegations could be considered as having been properly raised when the circuit court granted leave to file the second amended complaint on May 15, 1992. That was definitely more than one year after the slander potentially occurred.

The final question for resolving this issue is whether the slander allegation "relates back" under Rule 15. M.R.C.P. Rule 15. Under Rule 15(c), the amendment will not be time barred so long as the original complaint is timely filed, under the following circumstances:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . . .

M.R.C.P. 15(c). The "conduct" alleged in the original pleading was the wrongful termination because of Dominey's exercise of his right to free speech. The conduct that underlay that free speech and contract abridgement action are separate from any conduct that would underlay communications "to

members of the faculty" that the plaintiff was disruptive and mentally unstable.

One of the principal authorities on the identical federal rule states that an amendment will relate back "if the factual situation upon which the action depends remains the same and had been brought to defendant's attention by the original pleadings." *6A CHARLES ALAN WRIGHT, et al., FEDERAL PRACTICE AND PROCEDURE,* 1497 at 94-95 (1990). An allegation that the defendants may have squelched Dominey's free speech does not begin to suggest that the defendants had slandered him.

The amendment to add a slander allegation at least three years after the events that allegedly undergird the slander, was not an amendment that related to the same events as the original complaint dealing with a breach of contract and free speech. It is therefore time-barred.

f. Due process

Finally, Dominey alleged that "defendants arbitrary and capricious action in not continuing plaintiff's employment is violative to due process." That position is not argued in the brief, and is difficult to address on appeal. It is enough to say that there are insufficient allegations of even what that ground for relief might be for us to find any error in the trial court's dismissal of it.

In summary, only one statute of limitation question need be resolved by applying a statute of limitation. That question concerned the attempt to amend the complaint and to add an action for slander. None of the other amendments need be considered under the "relation back" rules of standards of Rule 15(c), and were properly dismissed for other reasons.

VI. Requirement that Amended Complaint be served under M.R.C.P. 4

As already indicated, the trial court held that the Second Amended Complaint should have been served under Rule 4 because it dramatically changed the basis for suit. There is no further need to address the validity of the second amended complaint. In all respects, the claims that were added by those amendments were properly dismissed on summary judgment. We do not find that it needed to be served under Rule 4, but regardless the question is moot.

VII. Disputes as to Material Fact.

In this section of his brief, Dominey argues that various issues of material fact remained that would have barred summary judgment. The only specific allegation of such disputed facts address the question of slander. We have found that action to be time barred, and thus whether material disputes existed is irrelevant.

THE JUDGMENT OF THE CIRCUIT COURT OF OKTIBBEHA COUNTY OF MARCH 30, 1994, IS AFFIRMED. ALL COSTS ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.