

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00753 COA

RICHARD GITHENS

APPELLANT

v.

**MISSISSIPPI RIVERBOAT AMUSEMENT, LTD., D/B/A BILOXI BELLE CASINO
RESORT**

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. JERRY OWEN TERRY SR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

TEMPLETON FOWLKES

ATTORNEY FOR APPELLEE:

WILLIAM P. WESSLER

NATURE OF THE CASE: CIVIL: WRONGFUL DISCHARGE AND DEFAMATION

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT IN FAVOR OF
DEFENDANT/APPELLEE MISSISSIPPI RIVERBOAT AMUSEMENT CORPORATION

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

KING, J., FOR THE COURT:

Richard Githens brought an action against his former employer, Mississippi Riverboat Amusement Corporation d/b/a Biloxi Belle Casino (Biloxi Belle), alleging wrongful discharge and defamation. Biloxi Belle filed a motion to dismiss the complaint, or in the alternative, motion for summary judgment contending that no genuine issue of material fact existed and that it was entitled to a judgment as a matter of law. The Circuit Court of Harrison County granted Biloxi Belle's motion, and Githens appeals the judgment. We affirm.

FACTS

Biloxi Belle hired Richard Githens on August 17, 1992, as a "craps" game pit supervisor. Githens' employment was not conditioned upon a contractual agreement, nor at any time did he receive, or sign an employment contract. On December 21, 1992, Biloxi Belle distributed an employment handbook to its employees, including Githens, that outlined and discussed Biloxi Belle's policies, procedures, regulations, and benefits. Throughout the handbook, Biloxi Belle clearly stated that no contract rights were intended nor conferred upon the employees of Biloxi Belle Casino by the terms and conditions of the employee handbook and that its employees were at-will employees. Githens executed an Employee Acknowledgment Form indicating that he understood that the contents expressed therein did not create an expressed or implied contract of employment, nor did it create such rights, or in any way alter the employment-at-will relationship.

On June 13, 1993, after several weeks of internal investigation, Biloxi Belle's security arrested a patron high-roller and several employees believed to have conspired to cheat the casino at the craps table. As part of the ongoing investigation, Biloxi Belle's security attempted to interview Githens after the arrests, but he refused. Biloxi Belle then suspended Githens for misconduct and violation of the following company rules: (41) Gross misconduct or gross negligence in the performance of job duties; (44) Failure to perform assigned tasks efficiently and in accordance with departmental standards; and (46) Failure to cooperate with security. As a result of violating these rules of conduct, Githens was discharged by Biloxi Belle on June 26, 1993.

On August 5, 1993, Githens filed a complaint against Biloxi Belle alleging that he was wrongfully discharged and that Biloxi Belle engaged in libel and slander by making false accusations concerning his dismissal. Githens requested actual damages as ascertained by the court and punitive damages in the amount of \$2,000,000.00 with interest from the date of the complaint.

Biloxi Belle filed a Rule 12(b) motion to dismiss and in the alternative, a Rule 56 motion for summary judgment pursuant to the Mississippi Rules of Civil Procedure. In its motion, Biloxi Belle contended that Githens was not employed under contract; therefore, he was an at-will employee subject to dismissal at any time, for any reason, and that Githens did not claim that a employment contract existed. Biloxi Belle also contended that Githens failed to request a hearing subsequent to his suspension pursuant to the employee handbook. It argued that he had failed to allege that Biloxi Belle had published any defamatory, or otherwise actionable statement concerning him to any unprivileged third party, nor did the complaint state with particularity what statements, if any, were made.

After a hearing, the trial court granted Biloxi Belle's motion for summary judgment, finding that Githens was an at-will employee whose employment was terminable at will and that Githens failed to demonstrate any facts sufficient to show that Biloxi Belle engaged in defamatory conduct against

him. Githens appeals the court's findings and asserts:

I. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT AS THERE WERE MATERIAL ISSUES OF FACT REGARDING WHETHER BILOXI BELLE VIOLATED THE RULES AND REGULATIONS PROVIDED IN THE EMPLOYEE HANDBOOK AND WHETHER GITHENS ENGAGED IN MISCONDUCT AND/OR WHETHER HE WAS SUSPENDED OR DISMISSED WITHOUT CAUSE.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS THERE WERE MATERIAL ISSUES OF FACT REGARDING WHETHER BILOXI BELLE LIBELED AND SLANDERED GITHENS.

SCOPE OF REVIEW

When a party appeals a grant of a motion for summary judgment, we conduct a de novo review of all evidentiary matters before the trial court, including admissions, depositions, pleadings, answers to interrogatories, and affidavits, etc. *Nationwide Mutual. Ins. Co. v. Garriga*, 636 So. 2d 658, 661 (Miss. 1994); *Pace v. Financial Sec. Life*, 608 So. 2d 1135, 1138 (Miss. 1992); *Short v. Columbus Rubber & Gasket Co.*, 535 So. 2d 61, 63 (Miss. 1988). The movant and nonmovant's burdens of production and proof are consistent with the burdens borne by the parties at trial. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993). The movant bears the burden of production that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law, just as he would bear the burden of proof at trial. *Id.* Conversely, if the nonmovant would bear the burden of proof of an issue at trial, that party is "responsible for 'producing supportive evidence of significant and probative value' in opposition to the motion for summary judgment." *Id.* at 600 (quoting *Palmer v. Biloxi Regional Medical Ctr, Inc.*, 564 So. 2d 1346, 1355 (Miss. 1990)). We view the evidence in the light most favorable to the non-moving party. *Garriga*, 636 So. 2d at 661.

I. DID BILOXI BELLE VIOLATE THE REGULATIONS AND GUIDELINES AS SET OUT IN ITS EMPLOYEE HANDBOOK WHEN IT SUSPENDED AND DISCHARGED EMPLOYEE RICHARD GITHENS FOR MISCONDUCT.

This State has long followed the common law doctrine of at-will employment. *See Butler v. Smith & Tharp*, 35 Miss. 457 (1858). The employment at-will doctrine provides that employment without a contract or an employment contract without a definite term may be terminated at the will of either party, for any reason, or no reason at all. *Rosen v. Gulfshores, Inc.*, 610 So. 2d 366, 368 (Miss. 1992); *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086, 1088 (Miss. 1987); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874, 875 (Miss. 1981). In the present case, Githens was employed by Biloxi Belle without the benefit of a contract. However, Githens contends that Biloxi Belle wrongfully discharged him in breach of the rules and regulations of its employee handbook. Githens

alleges that Biloxi Belle suspended him for misconduct without a hearing as proscribed in the handbook and subsequently discharged him without cause.

Biloxi Belle's employee handbook states in pertinent part:

The purpose of this handbook is to provide you with basic information about policies, procedures, regulations, and your benefits. It is not intended to constitute an express or implied contract.

....

The Company and the employee have [an] at-will employment relationship. This means that you and the Company both have the right to terminate the employment relationship at any time, with or without cause and with or without notice.

....

You may request an Employee Review board hearing if you have completed your first evaluation period. All requests must be made in writing and if the request is the result of a suspension, it must be submitted within seven days of the incident.

In addition to the above disclaimer, Githens also signed an Employee Acknowledgment Form indicating that he had received and understood that the employee handbook was not an expressed or implied contract of employment, nor did it create any rights in the nature of an employment contract, or in any way alter the employment-at-will relationship. Yet, Githens contends that the trial court's grant of summary judgment was inappropriate, because there were issues of material fact regarding whether Biloxi Belle violated the rules and regulations set forth in its employee handbook when it suspended and discharged him. We disagree.

First, our review of the record indicates that Biloxi Belle employed Githens without a written or implied employment contract. The absence of an employment contract or any intention of forming an employment contract was further supported by the many disclaimers to such throughout the employee handbook and Githens' signing of the Employee Acknowledgment Form conceding that he understood the employee-at-will relationship. Therefore, Githens was an employee at will, and Biloxi Belle could terminate him at any time with or without cause.

Second, notwithstanding the fact that Githens was an employee at will, the record does not indicate that Biloxi Belle refused him a suspension hearing, thus violating the rules and regulations set forth in the employee handbook. There is nothing in the record of this case that evidences Biloxi Belle's failure to grant Githens a hearing before the Employee Review Board, or that Githens ever requested such a hearing. In total, review of this evidence, or the lack thereof, in the light most favorable to Githens, the nonmoving party, we find no genuine issue of material fact and that Biloxi Belle is

entitled to a judgment as a matter of law.

Although Githens recites numerous cases pertaining to the employee-at-will doctrine in an effort to persuade us to lessen the harsh effects of the doctrine, we find none of them dispositive of the present case. For example, he relies on *Bobbitt v. Orchard, Ltd.*, which held that where an employer has specifically provided for employee disciplinary action in an employee handbook, the employer must follow its manual. *Bobbitt v. Orchard, Ltd.*, 603 So. 2d 356, 361 (Miss. 1992). In *Bobbitt*, the Orchard discharged Bobbitt for insubordination after her first infraction. *Id.* at 360. Under the provisions of the employee manual, Bobbitt should have received counseling and a formal written warning. *Id.* The court specifically held that the Orchard had an obligation to follow the provisions specifically set forth in the manual, which provided for reprimanding, suspending, or discharging an employee. *Id.* at 361. Also fatal to Githens, the *Bobbitt* court held its decision was fostered by the fact that the Orchard did not have an express disclaimer that the manual did not affect the employer's right to terminate the at-will employee. *Id.* at 362. In the present case, even if the latter were not determinative, under Biloxi Belle's employee handbook, the onus was upon Githens to request, in writing, a hearing before the Employee Review Board within seven days of the incident giving rise to the suspension. Nothing in the record of this case shows that Githens requested such a hearing. Biloxi Belle does provide an affidavit sworn to by Thomas J. Reckert, Director of Human Resources for the casino, which states that Githens did not request a hearing pursuant to the handbook. Accordingly, Rule 56(e), of the Mississippi Rules of Civil Procedure requires that when a summary judgment motion is made and supported by affidavits, the mere allegations and denials of the adverse party are not sufficient to withstand the motion; the party must set forth specific facts showing that a genuine issue exists for trial. M.R.C.P. 56(e). Githens failed to meet this requirement; therefore we find that the trial court appropriately granted Biloxi Belle's motion for summary judgment.

II. DID GITHENS' PRODUCE SUFFICIENT EVIDENCE OF LIBEL AND SLANDER TO WITHSTAND BILOXI BELLE'S MOTION FOR SUMMARY JUDGMENT.

Githens alleges that Biloxi Belle accused him of misconduct and violation of Rules 41, 44, and 46 of the employee handbook, which amounted to failure to perform tasks efficiently and in accordance with departmental standards, and failure to cooperate with security. Githens claims that Biloxi Belle made representations to third parties that he organized, participated in, and condoned illegal activities, including theft while working in the craps pit of the casino. An action for defamation must show "(1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and, (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Blake v. Gannett Co.*, 529 So. 2d 595, 602 (Miss. 1988) (citing *Chatham v. Gulf Pub. Co.*, 502 So. 2d 647, 649 (Miss. 1987)). In the case sub judice, the trial court found that Githens failed to demonstrate any facts sufficient to show that Biloxi Belle, or anyone with authority to bind it for such purpose, had made a false and defamatory statement concerning Githens. We agree.

Our review of the record in this case reveals that Githens produced several affidavits from various individuals attesting to what allegations of misconduct and cheating can do to the reputation of

casino employees. However, none of the affiants testifies to having direct knowledge of Biloxi Belle having engaged in slanderous or libelous remarks about Githens. While Githens claims that the media carried the story of his termination and the surrounding facts, he produced not one newspaper article as proof of such allegation. Nor did Githens produce evidence that Biloxi Belle had made any representations concerning his termination to the media. Githens also claimed that Biloxi Belle made it impossible for him to gain employment after the termination, but he did not produce one potential employer who could attest to having received comments from Biloxi Belle about him.

In an action alleging defamation, the alleging party bears the burden of proof at trial. *See Blake*, 529 So. 2d at 602. This becomes detrimental where the summary judgment movant can show a failure by the nonmovant to provide proof of an essential element of the claim, which makes another issue immaterial, thus entitling the moving party to judgment as a matter of law. *Grishman v. John Q. Long V.F.W. Post*, 519 So. 2d 413, 416 (Miss. 1988); *see also Galloway v. Travelers Ins., Co.*, 515 So. 2d 678, 684 (Miss. 1987). We find that Githens' claim of defamation fell victim to this rule. Viewing all the evidence in the light most favorable to Githens, we find his claims could not withstand Biloxi Belle's motion for summary judgment and that the trial court correctly entered the judgment against him. We affirm the trial court's judgment in this case.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF SUMMARY JUDGMENT IN FAVOR OF MISSISSIPPI RIVERBOAT AMUSEMENT CORPORATION d/b/a BILOXI BELLE CASINO IS AFFIRMED. COSTS ARE ASSESSED AGAINST THE APPELLANT.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

THOMAS, P.J., NOT PARTICIPATING.