

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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| IN THE MATTER OF |) | |
| |) | |
| ERIC DOWELL, |) | CASE NO. BK90-82120 |
| |) | |
| DEBTOR |) | A91-8202 |
| |) | |
| ERIC DOWELL |) | |
| |) | CH. 13 |
| Plaintiff |) | |
| vs. |) | |
| |) | |
| SAM'S CLUB, |) | |
| |) | |
| Defendant |) | |

MEMORANDUM

Hearing was held on January 25 and 26, 1994, on the complaint filed under 11 U.S.C. § 525(b). Appearing on behalf of debtor was David Hicks of Pollak & Hicks, Omaha, Nebraska. Appearing on behalf of defendant was T. Randall Wright of Dixon & Dixon P.C., Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(O).

This case was brought by the plaintiff/Chapter 13 debtor against Sam's Club, his former employer, alleging that his employment was terminated because he filed bankruptcy and that such termination was in violation of 11 U.S.C. § 525(b).

Mr. Dowell had been employed at a Sam's Club store in Colorado. He voluntarily left that employment to take similar employment with a competitor, Pace Stores. While he was at the Pace operation, he and his spouse had marital difficulties, and he had some differences of opinion with regard to the policies and procedures at Pace. He, therefore, decided to apply once again at Sam's Club and decided that he would move from Colorado if he could obtain a position at a similar salary level.

In August or early September of 1990, he telephoned a prior supervisor at Sam's Club and inquired about the possibility of re-employment. The supervisor suggested that he submit an

employment application, which he did. Shortly thereafter, he was informed by telephone from the supervisor, Carlton Wall, that he could begin employment in Omaha at the end of September, 1990.

Between the time that he made the initial telephone contact with Mr. Wall and the time that Mr. Wall offered him employment, Mr. Dowell had further difficulties at Pace. He was accused of the theft of a diamond ring. He denied the theft and took a polygraph test which he failed. He was then given the choice to resign voluntarily and receive severance pay or be terminated. He voluntarily resigned prior to the offer of re-employment from Sam's Club.

He moved to Omaha and took a position in a Sam's Club operation in Omaha. Shortly thereafter, he met with Carlton Wall, and Mr. Wall inquired of the reason Mr. Dowell decided to leave Pace. Mr. Dowell informed him that the position was not comfortable when his former wife was working in the same store and that he thought it was better if he left.

Later in the fall of 1990, Mr. Wall received information that there had been a problem with a ring at Pace. He inquired of Mr. Dowell and was informed about the Pace situation. However, according to Mr. Wall, Mr. Dowell said that he had refused to take a polygraph test and decided to resign voluntarily when his employer continued to question him about the ring.

In December of 1990, Mr. Dowell filed for Chapter 13 bankruptcy protection. At approximately the same time, his supervisor, Mr. Wall, was transferred to another district and was replaced by Bruce Redding. On one of Mr. Redding's regular trips to Omaha, he met with Mr. Dowell and asked Mr. Dowell why he had left Pace. According to Mr. Redding, Mr. Dowell said that he had left Pace because Pace had found out that he had been inquiring about employment at Sam's, and he knew that that would cause him problems at Pace. No statement was made about the ring.

Rumors about the ring problem eventually reached Mr. Redding and Mr. Nation who was with the personnel department at headquarters. They both were visiting Omaha for another reason in late May of 1991 and decided to discuss the ring problem with Mr. Dowell. At the meeting with Mr. Dowell, Mr. Redding and Mr. Nation were told the story about the ring, Mr. Dowell's failure of the lie detector test, and the alternatives that Pace gave him with regard to resignation. Prior to the meeting, Mr. Redding and Mr. Nation had been made aware of the bankruptcy filing by virtue of anonymous contacts from employees.

At the meeting with Mr. Dowell, Mr. Redding decided to terminate Mr. Dowell for giving inconsistent statements. Mr. Dowell had been a member of management but had misled both Mr. Wall and Mr. Redding about his reasons for leaving Pace. Mr. Redding believed then and testified at trial that it is important for management employees to be honest with their supervisors and that he could see no justification for the inconsistent stories.

There were four witnesses at trial who testified on behalf of Sam's Club. Each of them were members of management and had been for several years. Each of them claimed that Sam's Club had neither written nor unwritten policies concerning termination of management employees for filing bankruptcy. In contrast to such policies, Mr. Nation testified that the company had particular programs to help employees who had financial difficulties. He further testified that there were 1,300 assistant managers and that when he was involved in the personnel department he had contacts with assistant managers many times concerning the bankruptcy problems of the management members and their employees. He testified that no employee has ever been terminated for filing bankruptcy.

The Bankruptcy Code at 11 U.S.C. § 525(b) provides:

[N]o private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt--

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act. . .

The operative term in this statutory section is the word "solely." Case law has interpreted the statute literally. In the case of In re Hicks, 65 B.R. 980 (Bankr. W.D. Ark. 1986), and In re Hopkins, 81 B.R. 491 (Bankr. W.D. Ark. 1987), the bankruptcy court was faced with termination actions by employers which clearly resulted solely from the employees' bankruptcy. No other cause existed for the actions taken by the employer. On the other hand, in Stockhouse v. Hines Motor Supply, 75 B.R. 83 (D. Wyo. 1987), Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990), and Laracuente v. Chase Manhattan Bank, 891 F.2d 17 (1st Cir. 1989), the courts made clear that even if management was displeased with a bankruptcy filing, if management had any legitimate reason for terminating or

discriminating against the employee, the employee could not be successful in an action based on 11 U.S.C. § 525(b).

In the case before this Court, it is clear that the debtor strongly believes that the filing of bankruptcy was the reason for his termination. However, the evidence is overwhelming that Sam's Club management had at least one other reason for terminating the debtor's employment. That reason is that he did not give clear and consistent answers to direct supervisors when they inquired of him about his reasons for leaving a competitor. He either did not give them any information about a polygraph test or gave them inaccurate information about the polygraph test. When asked directly for the reasons why he left the competitor, he failed to inform his supervisors about the controversy concerning the alleged theft of a ring. It was only after he was confronted with the rumors about the ring, by his initial supervisor, Mr. Wall, and later by Mr. Redding, that he acknowledged the allegations concerning the ring.

There is no evidence that Mr. Dowell was anything but an "at will" employee at Sam's Club. Sam's Club, therefore, has the right to terminate Mr. Dowell for any legitimate business reason as long as the reason is not in violation of a federal or state statute.

The Court finds as a fact that Sam's Club did, at the time of the exit interview and at the time of trial, articulate a legitimate business reason for termination. Since the Court cannot find that the termination of Mr. Dowell's employment was "solely" as a result of filing bankruptcy, the Court must find against Mr. Dowell and in favor of Sam's Club.

Separate journal entry shall be entered.

DATED: March 2, 1994.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S. Trustee
Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

