

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
FREDRICK M. GETZSCHMAN,	)	CASE NO. BK91-81834
	)	
DEBTOR	)	A92-8057
	)	
FREDRICK M. GETZSCHMAN,	)	
	)	CH. 7
Plaintiff	)	
vs.	)	
	)	
OAKVIEW CONSTRUCTION, INC.,	)	
	)	
Defendant	)	

MEMORANDUM

Trial was held on May 11, 12; July 25 and August 31, 1993, on the adversary complaint. Appearing on behalf of plaintiff was Timothy Cuddigan of Omaha, Nebraska. Appearing on behalf of the defendant was Mary Kay Frank of 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)(A).

Background

The debtor, Fredrick M. Getzschman, was employed by defendant, Oakview Construction, Inc. (Oakview), as director of marketing in September of 1989. He and his spouse filed a Chapter 7 bankruptcy petition on or about September 4, 1991. His employment was terminated at Oakview on October 25, 1991. He filed this adversary proceeding to allege that his employment termination violated his right to protection against discriminatory treatment guaranteed by the terms of 11 U.S.C. § 525(b) of the bankruptcy code.

Decision

The debtor has failed to present sufficient evidence that his termination resulted solely because the debtor filed a bankruptcy petition. Judgement shall be entered in favor of the defendant and against the plaintiff.

Findings of Fact, Conclusions of Law and Discussion

A. Legal Framework

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

No 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 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;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

In an attempt to determine the procedural elements concerning burden of proof in a Section 525(b) case, the allocation of the burden of proof for establishing a discriminatory discharge due to bankruptcy can be framed by analogy to race, color, religion, sex or national origin cases. In re Tinker, 99 B.R. 957, 960 (Bankr. W.D. Mo. 1989). The most recent Supreme Court decision clarifying procedural elements to be followed in a discrimination case is St. Mary's Honor Center v. Hicks, \_\_\_ U.S. \_\_\_, 113 S. Ct. 2742 (1993). In Hicks, the Court reaffirmed a line of cases which support the proposition that the ultimate burden of persuasion lies with the plaintiff. Disbelief over an employer's asserted reason for discharge, alone, does not automatically entitle a plaintiff to judgment. Plaintiff must first establish a prima facie case which in effect creates a presumption that the employer unlawfully discriminated against the employee. See Id. at 2747. Once the plaintiff establishes a prima facie case, the defendant has the burden of producing an explanation to rebut such a case. The defendant is required to produce evidence that the adverse employment actions taken were for a legitimate non-discriminatory reason. Id. at 2747. Production of this evidence rebuts any legal presumption

in plaintiff's favor. The ultimate burden of persuasion remains with the plaintiff.

Plaintiff then has an opportunity to demonstrate that the employer's proffered reason was not the true reason for discharge and that some discriminatory reason was. Plaintiff is not required to come forward with any further evidence. Disbelief of defendant's proffered reason for discharge does not automatically compel a finding for the plaintiff. The Supreme Court, however, did provide guidance to the lower courts by stating that the fact finder's disbelief of the reasons put forward by the defendant may, together with the elements of the prima facie case, be sufficient to show intentional discrimination. Hicks, 113 S. Ct. at 2749.

In addition to the burden of proof issues, the finder of fact must consider a number of other factors such as:

1. Evidence of discrimination will probably be circumstantial, rather than direct. No employer will freely admit that he or she discharged an employee in violation of the law. There will be no proverbial "smoking gun." Rossy v. Roche Prod., Inc., 880 F.2d 621 (1st Cir. 1989).

2. An employer may exercise business judgment in making personnel decisions and employment discrimination laws are not intended to be used as a means of reviewing the propriety of a business decision. Walker v. AT&T Technologies, 995 F.2d 846 (8th Cir. 1993). In Walker, the court stated that an employer may develop arbitrary, ridiculous, and even irrational policies, as long as they are applied in a non-discriminatory manner; the employer has the right to make business decisions concerning the assignment of work, changes in an employee's duties and the discharge of the employee for good, bad or no reason at all, absent intentional discrimination. A court may not find such a decision unlawful simply because the court disagrees with the employer's stated reasons or because the court believes the decision was harsh or unreasonable if the employer would have reached the same decision regardless of plaintiff's protected status. Id. at 850.

- (3) Specifically when dealing with a case brought under 11 U.S.C. § 525(b), at least two courts have found that evidence presented by the plaintiff that the employer was displeased by plaintiff's bankruptcy filing was insufficient to support a finding that plaintiff was discharged solely because of the bankruptcy. Stockhouse v. Hines Motor Supply, Inc., 75 B.R. 83 (Bankr. D. Wyo. 1987); In re Tinker, 99 B.R. 957 (Bankr. W.D. Mo. 1989).

B. Factual Findings

Mr. Getzschman began his employment with Oakview in September of 1989. He was employed as the marketing director and performed his job quite well. During the time of his employment, he received at least one raise and negotiated a written contractual arrangement dealing with bonuses. The business appears to have prospered during his tenure, and there is no evidence that management of the company questioned his ability or his contributions to the success of the business.

Several employees testified, however, that Mr. Getzschman had commented to them on more than one occasion that he questioned whether the business was well run and whether his immediate supervisor was competent. He also made derogatory remarks to various employees about the company, its founders, and its current management.

These comments finally made their way to Mr. Getzschman's immediate supervisor, Mike Gawley, in mid-October of 1991. When Mr. Gawley was informed of the type of comments that had been made by Mr. Getzschman, he had a meeting with Mr. Getzschman where the comments were discussed. In addition to the comments, there apparently was a discussion about Mr. Getzschman's confidence in his immediate supervisor and other management.

Mr. Getzschman took great offense at being accused of questioning the competency of management, or at being accused of disloyalty to the business. As a response to the meeting with Mr. Gawley, Mr. Getzschman wrote a several page letter to the president of the company and Mr. Gawley. The letter, rather than apologizing to management as management had hoped would happen, instead suggested that his own hopes, plans, methods, and policies were appropriate for the future success of the business and suggested that if his opinions were incorrect or inconsistent with the philosophy of management, something should be done about it rather quickly.

Mr. Gawley and the president decided that the written response from Mr. Getzschman was not only unsatisfactory, but was derogatory, sarcastic and missed the point. They conversed and determined that the relationship between management and Mr. Getzschman had soured to such an extent that he should be terminated.

Mr. Getzschman is convinced that Mr. Gawley and the president of the company did not terminate him solely because of

innuendo, rumors, comments and his responsive letter. He believes the only reason that he was terminated was because he had filed bankruptcy in September of 1991.

The evidence he presented to support his position is a conversation with Mike Gawley in the summer of 1991. In that conversation, Mr. Getzschman explained to Mr. Gawley that he would be forced because of certain financial pressures to file a Chapter 7 bankruptcy petition. He asserts that Mr. Gawley responded that such a filing would not be good for the company. He also claimed he had another conversation with Mr. Gawley prior to the filing where Mr. Gawley strongly suggested that a bankruptcy filing would not look good for the company.

Mr. Gawley agrees that he was informed that Mr. Getzschman was going to file bankruptcy. However, he denies that he ever suggested a filing would look bad for the company or that the filing had any influence upon him when making the determination that Mr. Getzschman should be terminated.

The question of what Mr. Gawley said to Mr. Getzschman about the bankruptcy filing is interesting, but is not determinative of the issue of whether or not Mr. Getzschman was fired solely because of the filing of bankruptcy. It is not necessary for this Court to determine what was said by Mr. Gawley concerning Mr. Getzschman's bankruptcy. Assuming that Mr. Gawley's statements were made as alleged by Mr. Getzschman, such evidence is not sufficient to support the finding requested by Mr. Getzschman.

Mr. Gawley and the president of the corporation testified that they had no written or unwritten policy concerning employees filing bankruptcy. Several employees had filed bankruptcy with the knowledge of management. None of those employees had been disciplined or terminated as a result of the bankruptcy filing. They did not believe a bankruptcy filing had any impact upon the ability of the employees to perform their duties or upon the image of the company.

Several current and former employees who had filed bankruptcy testified. They testified that their positions required customer contact, that management was fully aware of their bankruptcy filings, and that there had been no adverse impact on their employment as a result of the bankruptcy filings. One employee testified that the president of the company permitted him time off from work to attend bankruptcy hearings and that he suffered no adverse employment action as a result.

The Court finds as a fact that Mr. Gawley and the president of the company terminated the services of Mr. Getzschman for reasons unrelated to his bankruptcy filing. Although the reasons given by the company for the termination may not be logical or persuasive to Mr. Getzschman, and may, with the benefit of hindsight and the limited understanding of the business that this Court possesses, seem trivial, it is not appropriate for this Court to find fault with the reasons given, as long as such reasons are not discriminatory in violation of Section 525(b) of the Bankruptcy Code. The reasons given are that management felt, after hearing the comments about it by Mr. Getzschman and receiving his written response, that management had lost confidence in its ability to work with Mr. Getzschman and felt Mr. Getzschman had been or was "disloyal" to the company. Such reasons, without more evidence of discrimination under Section 525(b) than was provided at the trial, are sufficient for a finding in favor of Oakview and against the plaintiff.

Judgment will be entered in favor of defendant Oakview and against plaintiff Getzschman.

Separate journal entry will be filed.

DATED: November 18, 1993.

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.

