

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

AUG 27 1990

ROBERT L. HOECKER
Clerk

MICHAEL C. ROBERTS,
Plaintiff-Appellant,
v.
CONOCO, INC.,
Defendant-Appellee.

No. 89-1309
(D.C. No. 88-B-1352)
(D. Colo.)

ORDER AND JUDGMENT*

Before SEYMOUR, BRORBY, and EBEL, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff-appellant Michael C. Roberts appeals from an order of the district court granting summary judgment in favor of defendant-appellee Conoco, Inc. In his complaint, Roberts alleged statutory fraud, in violation of Colo. Rev. Stat. § 8-2-104, in that Conoco induced him to leave his employment in Montana and

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

move to Colorado through falsely and deceptively representing the nature and length of his employment. Based on the same supporting assertion, Roberts alleged common law negligent misrepresentation by Conoco. The district court granted summary judgment on the statutory fraud claim on the grounds that Conoco's representations of the nature of Robert's employment were true, Conoco did not promise to employ Roberts for a particular period of time, and Roberts failed to prove under section 8-2-104 that Conoco made a false representation of a material existing fact or promise to perform future acts without the intention to fulfill the promise. The district court determined the negligent misrepresentation claim failed because Roberts did not prove either a false representation by Conoco or that Conoco failed to exercise reasonable care as to any of its representations about the nature and length of employment. We affirm.

Roberts was employed by Conoco as a transport driver at Conoco's terminal in Great Falls, Montana. In 1985, Conoco determined it needed an assistant terminal manager at its Commerce City, Colorado, terminal. Douglas Franssen and Barry Garvin, employees of Conoco, contacted Roberts and discussed the possibility of Roberts assuming the assistant terminal manager position in Commerce City. After the discussions, Franssen offered Roberts the assistant terminal manager position. Conoco represented that Roberts' employment duties would include supervising and disciplining personnel, handling crisis situations, participating in safety meetings, maintaining trucks,

completing administrative paperwork, and scheduling and dispatching trucks.

Before accepting the position, Roberts expressed his concern about his future with Conoco. Franssen told Roberts that he could expect to be employed as an assistant terminal manager for three to four years before being promoted. According to Roberts, he then accepted the job based on his understanding that he would be trained and that he would be employed for three to four years as an assistant terminal manager at Commerce City. His employment commenced in August, 1985. Roberts worked on emergency situations, called on customers to promote asphalt and industrial sales, supervised and disciplined transport drivers, attended safety meetings, helped maintain truck safety, coordinated schedules and dispatching, and did paperwork.

By January, 1986, friction had developed between Roberts and the transport drivers. According to Roberts, the friction developed due to a lack of training and lack of support from Joseph Meuren, the terminal manager. Roberts was given a negative performance review in January and placed on a three-month probation. Roberts maintained he was to be provided training during this time. Although Roberts' performance initially improved after he was placed on probation, the improvement did not last. He was terminated on May 12, 1986, for unsatisfactory performance.

We review the granting of summary judgment . . . de novo, applying the same standard as the district court. Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230 (10th Cir. 1990). . . . Summary judgment is to be

granted if no material issues of fact remain, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). We presume all allegations reasonably pleaded are true, [and] . . . we resolve all conflicts in favor of the party resisting the motion. . . . Abercrombie, 896 F.2d at 1230.

Apodaca v. Rio Arriba County Sheriff's Dep't, 905 F.2d 1445, 1446 (10th Cir. 1990).

On appeal, Roberts first argues that the district court erred in requiring a scienter element for statutory fraud not found in section 8-2-104. Section 8-2-104 provides in part:

It is unlawful for any . . . corporation . . . doing business in this state, by itself or its agents . . ., to induce, influence, persuade, or engage workmen to change from one place of employment to another in this state, or to bring workmen of any class or calling into this state to work in any of the departments of labor in this state, through or by means of false or deceptive representations . . . concerning the kind and character of the work to be done

According to Roberts, this statute, contrary to the district court's determination, does not include the elements of common law fraud.

The Colorado courts have recognized this statute, see Pittman v. Larson Distrib. Co., 724 P.2d 1379, 1386 (Colo. Ct. App. 1986), but have not interpreted it. We need not decide in this case, however, whether the common law fraud elements are included in section 8-2-104. In the complaint, Roberts alleged Conoco represented he would be promoted to assistant terminal manager and would perform duties as a "Conoco Transportation Public Relations and Marketing Representative." The record supports the district court's conclusion that Roberts did receive the promotion and perform these duties. Also, Roberts alleged Conoco represented

Roberts would be employed as an assistant terminal manager for three to four years before being promoted, so long as he did a satisfactory job. We agree with the district court's conclusion that Conoco did not make a promise of guaranteed employment.

Roberts contends the district court erred in finding that he was an employee at will. Rather, Roberts contends an employee at will issue should be resolved by a jury. Because, as indicated above, there was no promise Roberts would be employed for a definite period, there is no issue of fact for a jury to resolve. Cf. Justice v. Stanley Aviation Corp., 530 P.2d 984 (Colo. Ct. App. 1974). Roberts' individual belief that he would be employed for three to four years is insufficient to create a promise. Thus, we conclude the district court correctly decided that Roberts was an employee at will.

Roberts also asserts that he did not receive the training he was promised. As the district court found and the record reflects, Roberts was not promised formal training. He did, however, receive some on the job training, but chose not to take advantage of this training to the full extent offered.

Roberts' final argument is that the district court did not view all of the evidence regarding negligent misrepresentation in his favor. After reviewing the record on appeal, we conclude the district court's determination that Roberts failed to establish a genuine issue of material fact as to the elements of negligent misrepresentation was correct.

The judgment of the United States District Court for the
District of Colorado is AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM