FILED
United States Court of Appeals
Tenth Circuit

April 14, 2023

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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FRANCIS STUCKENS,

Plaintiff - Appellant,

v.

SAGE DINING SERVICES, INC.,
a Delaware corporation,

Defendant - Appellee.

No. 22-1171
(D.C. No. 1:20-CV-00065-CMA-GPG)
(D. Colo.)

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**ORDER AND JUDGMENT***

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Before **TYMKOVICH**, **BALDOCK**, and **PHILLIPS**, Circuit Judges.

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Plaintiff Francis Stuckens sued Defendant SAGE Dining Services, Inc., alleging the defendant had wrongfully discharged him from his job as a food services director in violation of public policy. The district court granted summary judgment against Mr. Stuckens, and he timely appealed. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

## I. Background

Mr. Stuckens was employed by SAGE ("the company") as a food services director at Aspen Country Day School from November 2016 to December 2017. His responsibilities included production, inventory, sanitation, menu development, and food purchase. Mr. Stuckens reported to Todd Fogel, an employee of the company.

During his tenure as food services director, Mr. Stuckens became concerned about nutritional differences between baked and fried chicken fingers, although he testified he had the discretion to decide which would be served. He also complained to Mr. Fogel that despite a company policy posted in the dining room declaring that it only served humane-certified eggs and locally sourced beef, the company insisted that Mr. Stuckens use pre-made, pre-peeled eggs and procure beef from a national provider. Mr. Stuckens did not report these issues to anyone outside of the company.

Mr. Stuckens received a mostly positive performance review for 2016, and received a modest salary raise. But he received three written warnings from the company in 2017: one in January for inappropriate behavior during certain interactions with his team; another in March for allowing a prospective employee on school grounds before a background investigation and drug screen had been completed; and a third in November for failure to follow company communication protocols relating to two food safety incidents. In the third warning, the company notified Mr. Stuckens of the possibility of termination for failing to meet company standards.

In late November 2017, the company received an email reporting that Mr. Stuckens had placed moldy fruit out for service, although Mr. Stuckens vigorously disputes that report. The company terminated Mr. Stuckens in December 2017.

Mr. Stuckens filed a lawsuit in Colorado state court alleging wrongful termination in violation of public policy. He premised his claim on the allegation that the company's actions violated the Colorado Consumer Protection Act ("CCPA"), Colo. Rev. Stat. § 6-1-105(1).

The company removed the case to federal district court and, after completing discovery, moved for summary judgment. In response, Mr. Stuckens produced a declaration containing new allegations he had not asserted before, including: (1) Mr. Stuckens refused Mr. Fogel's request that he falsify an employee's wage-earning statement so that the employee could qualify for discounted housing from the Aspen Pitkin County Housing Authority; (2) the tomato sauce was not made from scratch as the school's menu claimed; and (3) he reported to a company nutritionist his concern about the use of liquid eggs rather than eggs from humanely raised chickens.

The district court granted the motion for summary judgment. As for the declaration, the district court disregarded it on the ground that it was an impermissible attempt to create a "sham fact issue" under *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986). Mr. Stuckens filed a timely notice of appeal.

## II. Discussion

Mr. Stuckens argues the district court erred in granting summary judgment in the company's favor. We reject his arguments and affirm.

### A. Standard of Review

We review summary judgment decisions de novo, "view[ing] the evidence and draw[ing] reasonable inferences therefrom in the light most favorable to the nonmoving party." *Talley v. Time, Inc.*, 923 F.3d 878, 893 (10th Cir. 2019) (internal quotation marks omitted). Summary judgment is required when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

### B. Whether the Evidence Established a Violation of Public Policy

Colorado law presumes that an employment relationship is terminable at will by either party.[1] *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 104-05 (Colo. 1992). Termination of employment in violation of public policy, however, is a common law exception to the at-will presumption. *Id.* at 109. A plaintiff asserting such a claim must show "[1] that he or she was employed by the defendant; [2] that the defendant discharged him or her; and [3] that the defendant discharged him or her in retaliation for exercising a job-related right or performing a specific statutory duty, or that the termination would undermine a clearly expressed public policy." *Kearl v.*

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[1] Mr. Stuckens's lawsuit is based on Colorado state law. We therefore apply Colorado substantive law in analyzing his wrongful discharge claim. *See Elm Ridge Expl. Co. v. Engle*, 721 F.3d 1199, 1210 (10th Cir. 2013).

*Portage Env't, Inc.*, 205 P.3d 496, 499 (Colo. App. 2008) (citing *Lorenz*, 823 P.2d at 109). "[The] public policy must concern behavior that truly impacts the public in order to justify interference into an employer's business decisions." *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 525 (Colo. 1996). Indeed, "[n]ot all potential sources of public policy are of sufficient gravity to outweigh the precepts of at-will employment." *Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540, 553 (Colo. 1997).

The district court rejected Mr. Stuckens's claim because the evidence failed to establish a violation of the CCPA and his termination therefore did not implicate a matter of public policy. The district court further held that even if the evidence had shown that the company violated the CCPA, the undisputed facts do not show that Mr. Stuckens was wrongfully terminated in violation of public policy. It is true that a CCPA violation can support a claim for wrongful termination in violation of public policy. *See Jones v. Stevinson's Golden Ford*, 36 P.3d 129, 132-34 (Colo. App. 2001). But to rise to the level of a CCPA violation, the alleged deceptive practice must "significantly impact[] the public as actual or potential consumers of the defendant's goods, services, or property." *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 147 (Colo. 2003).

We agree that the facts of this case, viewed in the light most favorable to Mr. Stuckens, do not establish a violation of public policy—either under the CCPA

or otherwise.[2] Mr. Stuckens's concerns about the nutritional difference between baked and fried chicken tenders do not establish behavior that "truly impacts the public," *Mariani*, 916 P.2d at 525. The same is true of the company's procurement practices. Whether it served humane-certified eggs or locally sourced beef is not "a matter that affects society at large," *Crawford*, 938 P.2d at 552. Rather, it reflects "a purely personal or proprietary interest of the plaintiff or employer." *Id.*

In short, the district court correctly concluded that Mr. Stuckens has not established a genuine issue of material fact concerning a public policy violation in support of his wrongful termination claim.

**C. Whether the District Court Correctly Disregarded Mr. Stuckens's Declaration**

In response to the motion for summary judgment, Mr. Stuckens submitted a declaration containing allegations he had not made previously.[3] The company asserted that the declaration was an impermissible attempt to create a "sham fact issue," *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986), and the district court agreed. Mr. Stuckens contends the district court erred. We reject his argument.

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[2] Mr. Stuckens additionally argues the record raises a genuine issue of material fact concerning the company's performance-related rationale for his termination, giving rise to an inference that the real reason for his termination was his refusal to engage in unethical or illegal conduct. We need not address this argument, however, given Mr. Stuckens's failure to establish any public policy violation.

[3] Under 28 U.S.C. § 1746, an unsworn declaration submitted under penalty of perjury is deemed to have the same force and effect as a sworn affidavit.

We have explained that "the utility of summary judgment as a procedure for screening out sham fact issues would be greatly undermined if a party could create an issue of fact merely by submitting [a declaration] contradicting his own prior testimony." *Id.* In determining whether a declaration should be disregarded under this rule, we consider whether "[1] the [declarant] was cross-examined during his earlier testimony; [2] whether the [declarant] had access to the pertinent evidence at the time of his earlier testimony or whether the [declaration] was based on newly discovered evidence; and [3] whether the earlier testimony reflects confusion which the [declaration] attempts to explain." *Id.*

In his declaration, Mr. Stuckens asserted that Mr. Fogel demanded he falsify an employee's wage-earning statement for the Aspen Pitkin County Housing Authority so that the employee could qualify for discounted housing.[4] Mr. Stuckens further asserted that Mr. Fogel became upset when Mr. Stuckens refused his request. At his deposition, however, Mr. Stuckens was asked which local, state, or federal laws he claimed the company violated over his objection. In response, Mr. Stuckens said nothing about Mr. Fogel's alleged demand that Mr. Stuckens falsify a wage-earning statement. The deposition was conducted more than three years after Mr. Stuckens's employment had been terminated, so his allegation was not based on

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[4] The declaration contained additional allegations, including: (1) the tomato sauce was not made from scratch as the school's menu claimed, and (2) Mr. Stuckens reported to the company nutritionist his concern about the use of liquid eggs rather than eggs from humanely raised chickens. Even accepting these allegations as true, they do not change our conclusion that the evidence failed to establish the requisite public impact, as discussed above.

newly discovered evidence. Nor does the deposition reflect any confusion that the declaration attempts to clarify. Under these circumstances, we discern no error in the district court's disregard of the declaration.

**III. Conclusion**

We affirm the judgment of the district court. We grant Mr. Stuckens's motion for leave to proceed on appeal without prepayment of costs or fees.

Entered for the Court

Bobby R. Baldock
Circuit Judge