

Federated States of Micronesia

Falcam v. Federated States of Micronesia Postal Service

Supreme Court (Pon.)
King C.J.
12 June 1987

Employment law - contract of employment - public service - statute which prohibits public officials from decision making in contracts in which close relatives have a financial interest - whether nephew is close relative to uncle the postmaster general.

Customary law - no evidence of custom and tradition submitted to court - common law principles to control.

The plaintiff, Albert Falcam, was named postmaster for the State of Pohnpei by his uncle, Leo Falcam, the postmaster general of the Federated States of Micronesia. The Attorney-General issued an opinion letter that the postmaster general's decision to hire Albert Falcam violated 11 F.S.M.C. 1305 (which prohibits, inter alia, contracts between close relatives). The plaintiff sought a declaratory judgment that his appointment as postmaster of Pohnpei was valid, and an order that he be paid from the date of his commencement in that position.

HELD: Plaintiff's application for declaratory judgment on his right to the position is denied. Further proceedings to be held on issue of pay during time served in office.

- (1) The statute in question, 11 F.S.M.C. 1305, is very broad, and in fact was drafted "to cover every conceivable area in which official malfeasance may arise". The statute embraces government employment decisions *l. 240*.
- (2) An uncle and a nephew are "close relatives" for purposes of the Act *l. 250*.
- (3) There are substantial public policy interests against enforcement of the postmaster general's decision, especially considering the disproportionate economic significance of government employment in the F.S.M. *l. 330*.

OBSERVATIONS: Given the affinity of extended family relationships, chiefly obligations and "wantok" expectations, as well as the small population base and even smaller pool of qualified applicants in most Pacific island states, a statute such as 11 F.S.M.C. 1305 is of major significance.

Cases referred to in judgment:

- Eldridge v. Johnson* 245 P.2d 239 (Or. 1952)
F.S.M. v. Skilling 1 F.S.M. Intrm. 464 (Kos. 1984)
Gates v. Rivers Construction Co. Inc. 515 P.2d 1020 (Alaska 1973)
McMullen v. Hoffman 174 U.S. 639, 19 S.Ct. 839, 43 L. Ed. 1117 (1899)
Nix v. Ehmes 1 F.S.M. Intrm. 115 (Pon. 1982)
Semens v. Continental Airlines Inc. 2 F.S.M. Intrm. 131 (Pon. 1985)

Legislation referred to in judgment:

11 F.S.M.C. 1305

18 U.S.C. 208

Other sources referred to in judgment:

1962 U.S. Code Cong. & Ad. News

S. Williston & G. Thompson, *Williston on Contracts* (1938)

50 E. McElwain and J. Vorenberg, "The Federal Conflict of Interest Statutes" 65 Harv. L. Rev. 955 (1952)

E. Murphy & R. Speidel, *Studies in Contract Law* (3rd ed. 1984)

R.B. Perkins, "The New Federal Conflict-of-Interest Law" 76 Harv. L. Rev. 1113 (1963)

Restatement (Second) of Contracts

F. Ramp for the plaintiff*J. Wardof* for the defendant**KING C.J.****Judgment:**

60 Plaintiff Albert Falcam was named postmaster for the State of Pohnpei by his uncle, Leo Falcam, who at that time was postmaster general of the Federated States of Micronesia.

Soon thereafter various government officials contended that the postmaster general's hiring decision was in violation of 11 F.S.M.C. 1305. That statute makes it a criminal offence, punishable by two years in prison and a \$10,000 fine, for any public official to participate "personally and substantially" in any "matter in which . . . his . . . close relatives [sic] . . . has a financial interest". The national government contends that any contract entered into in violation of 11 F.S.M.C. 1305 is illegal and therefore void.

70 The attorney general issued an opinion letter to the effect that the postmaster general's decision to hire Albert Falcam violated 11 F.S.M.C. 1305. The Department of Finance has refused to make any salary payments to Albert Falcam. Nonetheless he apparently has continued to work as the postmaster of Pohnpei even up to now. It is not clear what steps, if any, have been taken to terminate his employment. Plaintiff Falcam seeks from this Court a declaratory judgment that his appointment as postmaster of Pohnpei is valid. He also requests a permanent injunction reinstating him to that position and requiring the national government to award him back pay from 1 September 1986.

I. Factual Background

80 The matter is before the Court now on cross-motions of the parties for summary judgment. There is no dispute here as to many of the essential facts.

Pursuant to normal personnel procedures, the F.S.M. Personnel Office on 24 June 1986 announced an opening for the position of postmaster of Pohnpei. Albert Falcam applied. He and several other persons were certified by the personnel officer as eligible for the position.

Thereafter, Postal Inspector James Miller interviewed the four certified candidates. He reduced the list to two, one being Albert Falcam. On 27 August 1986

Postmaster General Leo Falcam offered Albert Falcam the job of postmaster of Pohnpei at an annual salary of \$20,400. On that same day, Albert Falcam accepted the postmaster position and resigned as associate country director of the United States Peace Corps.

For the first few days all proceeded smoothly. On 28 August 1986, Postmaster General Leo Falcam executed a personnel action to initiate Albert Falcam's employment. This personnel action was approved by the personnel and budget offices, and Albert Falcam began work as Pohnpei postmaster on 1 September 1986.¹

The parties are not in complete accord and the record is incomplete as to when and how objections by various governmental officials to the hiring of Albert Falcam became known to him. However, Mr Falcam admits that he learned of some controversy arising out of his familial relationship with the postmaster general when his first pay cheque, expected on 13 September 1986, was not delivered to him. The parties also agree that the government's position was formalized on 8 October 1986 when F.S.M. Attorney General Carl V. Ullman issued an opinion concluding that the postmaster general's decision to hire Albert Falcam violated 11 F.S.M.C. 1305. At that point, Albert Falcam retained counsel, who approached both the postmaster general and the attorney general in an attempt to salvage his position.

Subsequently, the postmaster general made several efforts to cure any defects in the hiring of Albert Falcam. On 10 October 1986 he offered to delegate reconsideration of the hiring decision to the President, the personnel officer or any other independent person President Nakayama might choose. The President declined to take any action along these lines.

Later, on 17 March 1987, the postmaster general promoted James Miller to serve as assistant postmaster general of the F.S.M. postal service. In the letter appointing Mr Miller, the postmaster general asked him to "assume total responsibility" concerning the employment status of Albert Falcam. The 17 March letter instructs Mr Miller to "thoroughly review the matter and make a decision as to what should be done and carry out your decision". The postmaster general added, "I do not wish to be consulted about the matter. Make your decision entirely on your own. I assure you that whatever your decision is it will not influence our personal or professional relationship one way or another".

On 9 April 1987 Mr Miller wrote to the attorney general advising him that in response to the postmaster general's 17 March directive, Mr Miller had conducted an audit inspection of the Pohnpei post office to assess the condition of the office and to "provide a more concrete assessment as to Mr Falcam's work." In that 9 April memorandum Mr Miller stated that the audit inspection "disclosed that both the financial and mail processing operations at the Pohnpei Post Office have greatly improved since Albert Falcam had been working in the office." Mr Miller concluded that Albert Falcam had been doing "excellent work." He said that he had decided not to terminate Albert Falcam and requested that Mr Falcam "receive back pay retroactive to September 1 1986."

The national government has not complied with that request. Although Falcam apparently still continues to serve as postmaster of Pohnpei, he has not yet received

¹ The postmaster position is exempt from the National Public Service System Act. See Pub. L. No. 3-13, section 6 (3rd Cong. 1st Reg. Sess. 1983). The record does not explain why the personnel office was involved in providing notice, certifying applicants or approving the personnel action.

any payment whatever for his work.

II. Legal Analysis

A. Coverage of the Statute

The statute in question, 11 F.S.M.C. 1305, reads as follows:

140 **Acts affecting a personal financial interest.** Whoever, being an officer, employee, or public official of any branch of the National Government, or of any independent Government entity, or an allottee as contemplated by the Financial Management Act of 1979, and who in any of these capacities participates personally and substantially in a judicial proceeding or other matter in which, to his knowledge, he, his spouse, minor child, close relatives, partner, organization in which he is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, shall be fined not more than \$10,000, or imprisoned not more than two years, or both. For purposes of this section, "substantial participation" includes, but is not limited to, the following: decision, approval, disapproval, recommendation, rendering of advice, and investigation. "Other matter" includes, but is not limited to, the following: application or request for a ruling or other determination, contract, claim, controversy, charge, accusation, or arrest.

150 Mr Albert Falcam contends that the meaning of this statute is "camouflaged in convoluted use of the English language" and that we should look for interpretations of 18 U.S.C. section 208, upon which the statute is based, for assistance in determining the meaning of 11 F.S.M.C. 1305.

160 He insists that 11 F.S.M.C. 1305 should not be applied to the postmaster general's decision to hire a postmaster. That contention is grounded upon his view that 18 U.S.C. section 208 was not aimed at official decisions concerning government employment. He further submits that even if employment decisions are viewed as falling within the statutory coverage, the term "close relatives" should be interpreted as meaning those relatives in whose activities the public official has a financial interest.

170 1. *Employment decisions* - Commentary and legislative history confirm Mr Falcam's contention that government employment decisions were not of major concern to the drafters of the United States legislation. The principal purpose of that legislation was to prevent a government official financially interested in a business from using his official position to cause the government to enter into transactions with that business. S. Rep. No. 748, 87th Cong., 2d Sess., reprinted in 1962 U.S. Code Cong. & Ad. News 3852, 3862; Perkins, "The New Federal Conflict-of-Interest Law" 76 Harv. L. Rev. 1113 (1963); see also McElwain & Vorenberg, "The Federal Conflict of Interest Statutes", 65 Harv. L. Rev. 955 (1952).

Yet no party has directed to the Court's attention, nor has our own research located, any authority discussing directly whether 18 U.S.C. section 208 applies to government employment decisions. It is by no means clear that the United States legislation is inapplicable to employment decisions.

The United States statute, like 11 F.S.M.C. 1305, is drawn in extraordinarily broad terms. Both apply to actions of public officials in connection with any "application or

180 request for a ruling or other determination" under consideration by the government. That term is sufficiently broad to include applications for government employment.

Both statutes also apply to "contract" decisions. The rights and obligations of government employees typically are spelled out in statutes, personnel regulations and other governmental policies and procedures. Even so, a government employee does have a contractual relationship with the government. Rights and responsibilities of the government and the employee may be determined by reference to contract principles, as supplemented by particular statutes, regulations and policies of the government. Falcam recognizes as much in his brief, asserting that he has a "contract of employment" with the postal service. A decision to hire a particular employee, 190 then, can be seen as both a decision in response to an "application or other request for a ruling or other determination" and a "contract" decision within the meaning of 18 U.S.C. section 208.

In any event, whether or not the United States statute would be applied to government employee decisions, there seems little doubt that Congress intended for the F.S.M. statute to apply to such decisions.

Legislative history confirms that Congress intended for this legislation to sweep broadly, establishing high standards for national government decision making in general.

200 The purpose of this bill is to assure the public that the National Government does not tolerate impropriety within its practices as a representative government body politic. To insure clean government requires strict standards, and the subject bill seeks to cover *every conceivable area in which official malfeasance may arise.*

S.C.R.E.P. No. 1-277 (1st Cong., 2d Reg. Sess. 1980) (emphasis added).

The committee report also reveals an intention to broaden coverage beyond that of 18 U.S.C. section 208 and to prevent exceptions permissible under the United States legislation. The committee added a provision prohibiting officials from making decisions in which their close relatives have a financial interest.

210 The committee also deleted from an earlier draft a subsection that had been drawn from the United States statute, 18 U.S.C. section 208(b). The deleted provision would have removed particular proposed actions from the coverage of 11 F.S.M.C. 1305 upon a finding by another designated official that the proposed action would not "affect the integrity of the services which the government may expect from such officer or employee." The committee explained these changes, saying:

220 The restriction on use of position in matters of personal financial interest extends to the close relatives of the affected party as well as business associates and other closely connected contacts. Your Committee has deleted Subsection (2) in its entirety in order to eliminate any exceptions based on the content of one's financial interest. Otherwise, an unwanted loophole could be created diminishing the intended effect of Section 5. Your Committee is cognizant of the need to avoid even an appearance of impropriety.

S.C.R.E.P. No. 1-277, *supra*.

The committee emphasized that this statute was intended to prohibit "any undue influence, unjust gains or conflicting interests on the part of a public official or any other person involved in the *official workings* of the National Government." *Id.*

(emphasis added).

230 Government employment constitutes a much higher proportion of economic activity within the Federated States of Micronesia than in the United States. It is unlikely indeed that in this milieu the Congress, seeking to prevent conflicting interests in the official workings of the national government, would regulate only government business transactions, and not government employment decisions.

240 Summarizing, I find the language of even the United States statute sufficiently broad to reach government employment decisions. In any event, 11 F.S.M.C. 1305 was modified so that it would have a wider reach and fewer exceptions than the United States statute. Finally, given the importance of government employment in the economy of the Federated States of Micronesia, the expressed intent of Congress to cover every conceivable area in which official malfeasance may arise surely included decisions concerning governmental employment. For all of these reasons, I conclude that a decision to hire a person as an employee of the government is one of the "other matters" covered by 11 F.S.M.C. 1305.

250 2. *Close relatives* - Mr Falcam also contends that he and his uncle should not be considered "close relatives" for purposes of the Act. An uncontradicted statement in the affidavit of Attorney General Ullman filed in support of the government's motion for summary judgment points out that the postmaster general acknowledged that in his opinion an uncle and a nephew are "close relatives". Albert Falcam apparently also does not dispute that fact. While the term "close relative" may be somewhat hazy at its outer edges, the relationship between an uncle and a nephew fits comfortably within that term.²

260 The Court notes, but rejects, the contention of Albert Falcam that the term "close relatives" should be interpreted as applying only to relatives whose enhanced financial circumstances will be of direct financial benefit to the decision making official. Insertion of the term "close relatives" in 11 F.S.M.C. 1305 is a departure from the United States statute, which prevents an official from acting only when the official has a financial interest in the decision. The F.S.M. statute is not restricted to financial interests of the official but also injects a status relationship test. Public officials are prevented from acting on decisions which will affect their close relatives, regardless of whether the public officials themselves have any interest in the decision.

I conclude that Albert Falcam is a close relative of the former postmaster general. Therefore, the action of Postmaster General Leo Falcam in personally and

2 There is some guidance from legislative history as to what Congress intended in using the words "close relatives". Approximately one year before enacting Public Law 1-132, now codified at 11 F.S.M.C. sections 1301-1307, Congress enacted the Judiciary Act of 1979, which contains a provision, like 11 F.S.M.C. 1305, pertaining to possible conflicts of interest in judicial proceedings. The same committee, Judiciary and Governmental Operations, reported out both bills.

As was the case with Public Law 1-132, the Judiciary Act of 1979 was based upon American legislation. In the case of the Judiciary Act, the only substantive change was insertion of the requirement that a justice disqualify himself if he or his spouse has a "close relationship" to a person involved in the litigation. 4 F.S.M.C. 124(2)(e); see also S.C.R.E.P. No. 1-19, J. of 1st Cong., 1st Reg. Sess. 246, 147 (1979); *F.S.M. v. Skilling*, 1 F.S.M. Intrm. 464, 472 n.3 (Kos. 1984).

Since the United States statute, 28 U.S.C. section 455(b)(5), requires refusal where the judge or his spouse is within the third degree of relationship to the other party, which includes uncle-nephew relationships, and the Judiciary and Governmental Operations said that its change was intended to make the rule stricter, S.C.R.E.P. No. 1-19, *supra* at 247, it is apparent that Congress considered an uncle and a nephew to have a "close relationship". It seems equally plain that the same committee, when inserting similar words in similar legislation about one year later, intended the same meaning. This suggests that an uncle and a nephew are to be considered "close relatives".

substantially participating in the decision to award his nephew, Albert Falcam, the position of postmaster of Pohnpei was violative of 11 F.S.M.C. 1305.³

B. *Enforceability of the Contract*

The government argues that the postmaster general's violation of 11 F.S.M.C. 1305 taints the employment arrangement and requires a conclusion that Albert Falcam may not be paid for the work he has done for the F.S.M. postal service.⁴

270 The government's claim is based upon a general rule, well established in the common law, that a party to an illegal contract, or one which is contrary to public policy, cannot recover damages for its breach.⁵ Under this rule, for example, if A asks B to assault C and agrees to pay C \$100 for doing so, neither A nor B may obtain court assistance to require the other to carry out the beating or the payment.

Courts refuse to enforce such agreements on the theory that this will tend to discourage parties from entering into them and because courts disfavour aiding immoral or illegal acts. *McMullen v. Hoffman*, 174 U.S. 639, 669-70, 19 S.Ct. 839, 851, 43 L. Ed. 1117 (1899).

Yet it must be remembered that the deeper and wider currents flow in the other direction.

280 In considering the contract executed by defendant, we are confronted with more than one principle of public policy. It is elementary that public policy requires that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice, and it is only when some other over-powering rule of public policy, such as the rule against perpetuities, intervenes, rendering such agreement illegal, that it will not be enforced. This rule respecting the sanctity of contracts is so firmly fixed in our system of jurisprudence that even where the agreement is partly legal or partly illegal, if the legal may be separated from the illegal, the legal part will be enforced.

280 *Eldridge v. Johnson*, 245 P.2d 239, 251 (Or. 1952).

The policy against enforcement of illegal contracts is important then, but must be applied cautiously.

If a statute says that particular conduct is illegal or void, there can be no question that the court must decline to enforce it. *Restatement (Second) of Contracts* section 178, comment a (1981). However, 11 F.S.M.C. 1305 speaks only of the criminal or civil liability of the decision making public officer. Nothing is said about liability of the "close relatives", or other persons involved. The statute also is silent

3 The contentions of the plaintiff that the statutory terms under consideration, and as applied here, are so vague as to violate due process are dismissed as without merit.

4 Plaintiff objects that he has been singled out while other violations of 11 F.S.M.C. 1305 have gone unheeded. In the absence of any showing by plaintiff of invidious discrimination, vindictiveness, or an attempt to chill exercise of constitutionally guaranteed rights, there is no occasion here for the Court to intrude on the normal discretion afforded the Executive Branch in enforcing and implementing the law. See *Nix v. Ehmes*, 1 F.S.M. Intrm. 115 (Pon. 1982).

5 This is the first case presenting to this Court an allegedly illegal national employment contract. No direct case precedent is available. No party has suggested any customary principles of law or traditional values which should guide our decision making. We therefore look to the common law as established in other jurisdictions to assist in developing principles suitable for Micronesia. See *Semens v. Continental Airlines Inc.* 2 F.S.M. Intrm. 131, 141-42 (Pon. 1985).

300 about the enforceability of the contract resulting from violation of the statute.

Under these circumstances the Court may not simply assume that the contract is unenforceable, but must make its own determination as to whether the public policy factors militating against enforcement so outweigh the interests in favour, that enforcement must be refused.⁶ *Gates v. Rivers Construction Co.* 515 P.2d 1020 (Alaska 1973); *Restatement (Second)* section 178 (1981).

The *Restatement (Second) of Contracts* sections 178(2) and (3) spells out factors to be considered:

- 310 (2) In weighing the interest in the enforcement of a term, account is taken of (a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term.
- (3) In weighing a public policy against enforcement of a term, account is taken of (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.

320 Application of the section 178(3) standards confirms that there are substantial public policy interests against enforcement of the postmaster general's decision to hire Mr Albert Falcam. The policy reflected by 11 F.S.M.C. 1305 is an important one bearing directly upon the integrity of government decision making. Refusal to enforce Albert Falcam's contractual claims surely would discourage other officials from violating 11 F.S.M.C. 1305. The postmaster general's decision was directly contrary to the statutory prohibition and, at least after the attorney general brought the statute to his attention, the postmaster general's insistence upon keeping his nephew in the postmaster position was open, deliberate defiance of the statute. Finally, the postmaster general's violation led directly to any claim Albert Falcam
330 has upon the position of postmaster.

Plainly, the public policy considerations underlying 11 F.S.M.C. 1305 and weighing against enforcement of Albert Falcam's claim to the postmaster position are far greater than any interests he has in continuing to hold that position. This Court must as a matter of law rule against his request for a judgment that he properly holds that position.

However, it is not equally clear that his claims for compensation for the work he has done are outweighed by public policy interests. It is significant that he did not violate any law either by accepting the postmaster position or by working in that

6 The government points to S. Williston & G. Thompson, *Williston on Contracts* section 1786A (1938) for the proposition that not even a quasi-contractual recovery can be had for a bargain with a public body which is either wholly or partially illegal. However, the cases cited by that text relate almost exclusively to attempts by governmental officials to enter into agreements beyond their powers. Moreover, the provision in the first *Restatement of Contracts* upon which Professor Williston relied has since been questioned and modified: "[T]he jump from the conclusion that the bargain or its performance is a crime or a tort or 'otherwise opposed to public policy' to the conclusion that it should not be enforced or restitution should be denied is not without difficulty. Suppose, for example, that the performance of the bargain is a crime but its making is not. Or *vice versa*. What if one party is ignorant of the illegality? Suppose that the court concludes that the public policy is strong enough to deny enforcement of the bargain but not to deny restitution. These and other variables suggest that the seemingly absolutist either-or approach of the first Restatement may be suspect." E. Murphy & R. Speidel, *Studies in Contract Law* 674 (3d ed. 1984).

340 capacity. He would sustain a substantial forfeiture of his time and previous work if his claim is denied. Moreover, while the government was entitled at any time to terminate Mr Falcam as postmaster, the record does not reveal what steps, if any, actually were taken toward termination. There is then a question of facts as to the extent of any justified expectations for compensation that Mr Falcam may have within the meaning of section 178(2)(a).

In addition, sections 197 to 199 of the *Restatement (Second) of Contracts* set out standards for granting restitution even where the requirements for enforcement of the contract itself are not met. These too call for presentation of factual information not presently in the record.

350 A summary judgment may be granted only where there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. F.S.M. Civ. R. 56. Factual issues pertaining to Mr Falcam's claim of a right to compensation prevent decision on that issue by summary judgment.

III. Conclusion

The decision of Postmaster General Leo Falcam to hire his nephew as postmaster of Pohnpei violated 11 F.S.M.C. 1305. Public policy considerations underlying that statute would have permitted the government at any time to terminate Albert Falcam's employment. Those same considerations require this Court to rule against Albert Falcam's claim that he is now entitled to retain the postmaster position by virtue of his uncle's appointment. Partial summary judgment will issue to this effect.

360 The Court is not satisfied that there are no genuine issues of material fact bearing upon the right of Albert Falcam to be compensated for his previous performance of the postmaster duties. Summary judgment is denied, and further proceedings are necessary, for that issue.

Reported by: D.V.W.