UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

ANTHONY E. WILLIAMS	)	
	)	
V.	)	
	)	NO. 2:01-CV-232
TENNESSEE FARMERS MUTUAL	)	
INSURANCE COMPANY,	)	
d/b/a FARM BUREAU INSURANCE	)	
COMPANY and HAWKINS COUNTY	)	
FARM BUREAU AGENCY	)	

MEMORANDUM OPINION

At all times pertinent to this litigation, plaintiff was an insurance agent, soliciting customers to buy the various insurance policies offered by Tennessee Farmers Mutual Insurance Company.

The plaintiff claims that he became disabled in 1999, and submitted his resignation as an insurance agent for Tennessee Farmers Mutual Insurance Company because he could no longer perform the work. He subsequently filed this suit against Tennessee Farmers Mutual Insurance Company and Hawkins County Farm Bureau Agency, asserting that he was an employee of both, but was denied benefits under ERISA[1] and FMLA[2] which Tennessee Farmers Mutual Insurance Company extended to its employees.[3]

Both defendants deny that plaintiff was an employee.

For the sake of convenience, the parties will be referred to as follows: the plaintiff Anthony Williams hereafter will be referred to as "plaintiff"; the defendant Tennessee

[1]The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq.

[2]The Family and Medical Leave Act, 29 U.S.C. § 2601, et seq.

[3]Plaintiff also sued for common law breach of contract regarding commissions he claims were earned on insurance policies. That issue, however, is not germane at the moment.

Farmers Mutual Insurance Company will be referred to as "TFMIC"; and the defendant Hawkins County Farm Bureau Agency [sic: Hawkins County Farm Bureau] will be referred to as "HCFB."

All three parties have moved for summary judgment regarding the basic issue: Was plaintiff an independent contractor, or was he an employee of TFMIC and HCFB?[4]

Summary judgment is proper only if the record reveals that there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). Moreover, the opposing party must be indulged with every possible favorable inference from the facts. Plott v. Gen. Motors Corp., 71 F.3d 1190 (6th Cir. 1995).

That the parties have filed cross-motions for summary judgment does not necessarily mean that one motion or the other must be granted. Each motion must be analyzed separately under the strictures of Fed.R.Civ.P. 56. In other words, notwithstanding that all parties have moved for summary judgment, it is still possible that there could be disputed issues of material facts, or contrary inferences that can be drawn from the adduced facts, any of which could preclude summary judgment. See, B. F. Goodrich Co. v. United States Filter Corp., 245 F.3d 587, 593 (6th Cir. 2001).

In one sense, the depositions and affidavits filed in support of and in opposition to the motions for summary judgment do not reveal any real disputed fact. However, the parties have extremely divergent opinions on the weight to be given to some facts as opposed to others, one party emphasizing some facts, and minimizing the importance or significance of others. If one of several possible inferences, if drawn by the Court, is material and would preclude the grant of a judgment to the moving party, then summary judgment is not

[4]Docs. 10, 13 and 14..

proper.[5] If, however, all possible contrary inferences are of no legal significance, then summary judgment is proper.

With respect to the dispute between plaintiff and HCFB, what few contrary inferences that can be drawn from the facts are not material and therefore summary judgment for one party or the other is appropriate. As between plaintiff and TFMIC, however, some of those contrary inferences are of more significance and militate against the grant of summary judgment to either party. However, realizing that the facts would be unchanged even if presented in the context of a trial, the parties have agreed that the Court should decide the issues on the basis of the record as it now exists.[6]

General Background Information

The Tennessee Farm Bureau Federation was organized in 1921 to promote agriculture in the State of Tennessee; it is composed of 95 county farm bureaus, of which the HCFB is one. The entire Tennessee Farm Bureau Federation currently has approximately 521,000 family memberships across the state. The purpose of the Tennessee Farm Bureau Federation and its component county farm bureaus is to represent the interests of Tennessee's farmers and their families. It provides numerous services to farm families, including probably its most important function – it is a potent lobbyist on behalf of the farming interests before the Tennessee State Legislature.

In 1947, perceiving that many rural farm families lacked health insurance coverage, the Tennessee Farm Bureau Federation formed or created "Tennessee Rural Health" to

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[5]See, Lillie v. BTM Corp., 958 F.2d 746, 750 n.1 (6th Cir. 1992).

[6]*See,* 245 F.3d at 593, n. 3; and Order, Doc. 27.

make that coverage available to farm bureau members. Today, that program is the largest group health insurance program administered in Tennessee by Blue Cross/Blue Shield of Tennessee. In this same vein, in 1948 the Tennessee Farm Bureau Federation noted a lack of available fire insurance in some rural areas and therefore formed TFMIC as a "for profit" insurance company to serve this need. In 1952, TFMIC was converted to a mutual company and thus is owned by its policyholders.

In 1995, plaintiff and TFMIC entered into a contract by which plaintiff was designated as an "independent contractor agent" to sell TFMIC's insurance policies and service the policies in effect. Notwithstanding that the contract explicitly provided that he was an independent contractor, plaintiff insists that in reality he was an employee and thus entitled to the various benefits provided by TFMIC to its other employees.

Plaintiff's Motion for Summary Judgment with
Respect to Hawkins County Farm Bureau [Doc. 10] and
Hawkins County Farm Bureau's Motion for Summary Judgment [Doc. 13]

Plaintiff alleges in his complaint that not only was he an employee of TFMIC, he also was an employee of HCFB.[7] He insists that the local Farm Bureau is an agent of TFMIC, and that the two entities were either a "single employer," or, alternatively, that they were "joint employers."

Under a single employer theory, two nominally separate entities in reality are so intertwined that they practically amount to a single entity. Under a joint employer theory, there are two entities which truly are independent and separate, but both of which exercise

[7]In addition to TFMIC, plaintiff filed suit against "Hawkins County Farm Bureau Agency," which apparently is not a legal entity. It is tacitly agreed that the Hawkins County Farm Bureau is the defendant which plaintiff intended to sue.

such control of the hired person that each can be considered as the person's employer. See, Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990 (6th Cir. 1997).

The Court has considered the affidavits and depositions filed in support of and in opposition to the parties' Motions for Summary Judgment.

Determining whether an individual is an employee or an independent contractor for purposes of ERISA, the courts are to utilize the common law test set out in Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992):

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other facts relevant to this inquiry are the skill required: the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id., at 323-24.

After aptly noting that there is no quick and easy way to determine if an individual is an independent contractor or employee, the Court noted that "all the incidents of the relationship must be assessed and weighed with no one factor being decisive." Id., at 324. As plaintiff himself pointed out in his brief, all of the factors tend to coalesce into one primary inquiry: Did the hiring party have any right to control the worker in the performance of his job and, if so, what was the extent of that control?

TFMIC and HCFB are separate corporations, and plaintiff's contract was with TFMIC only. Although TFMIC and HCFB enjoy a symbiotic relationship to some extent, from which each reaps a benefit, there is no evidence from which the trier of fact could

reasonably conclude that HCFB was the agent of TFMIC, or the HCFB was plaintiff's employer under either a "single employer" or "joint employer" theory. TFMIC provided office space to TFMIC's Agency Manager, as well as plaintiff, but that is to be expected in light of TFMIC's history: it was created by the Farm Bureau Federation to serve farm and rural families. What better locale from which to do so than the local farm bureau office? More importantly, the HCFB is reimbursed by the TFMIC agents for that office space. However, even if it be assumed for the sake of argument that HCFB is the agent of TFMIC, such begs the question, which is: Were there any indicia that HCFB exercised any control over plaintiff to suggest that it was, along with TFMIC, plaintiff's employer? The answer is, there are no such indicia. The relationship of TFMIC to HCFB, and thus the relationship of plaintiff to HCFB, was simply the natural result of HCFB fulfilling its raison d'etre to the farming community. See, Swallows v. Barnes & Noble Book Stores, Inc., supra. What control HCFB exercised over plaintiff – and it was very little – was not so extensive that a judge or jury reasonably could find that it created the relationship of employer/employee. Many of the factors listed by plaintiff in support of his contention that TFMIC exercises control over HCFB's operations and personnel are attributable to the fact that HCFB appoints TFMIC's agency manager as its own office manager. In other words, in most of the ninety-five counties in this state, TFMIC's agency manager serves as the local county Farm Bureau's office manager. However, it does not follow therefrom that TFMIC effectively controls the local Farm Bureau through its agency manager; HCFB is controlled by its own board of directors, which is wholly independent of TFMIC's board. Nor is it of any significance that the separate identities of TFMIC and HCFB might be somewhat blurred in the eyes of the general public; it almost is to be expected, considering TFMIC's

roots. Plaintiff must present evidence of control by HCFB over his job. He never was under any misapprehension that he was working for anyone other than TFMIC; estoppel can play no role here.

Inasmuch as plaintiff had no contract with HCFB, and since he was not an employee of HCFB, plaintiff's Motion for Summary Judgment with respect to his suit against HCFB shall be DENIED, and HCFB's Motion for Summary Judgment shall be GRANTED. Plaintiff's suit against HCFB shall be DISMISSED.

Plaintiff's Motion for Summary Judgment with Respect to TFMIC [Doc. 10], and TFMIC's Motion for Summary Judgment [Doc. 14]

Defendant points out that the Northern (Knoxville) Division of this Court in Alfred v. Tennessee Farmers Mutual Insurance Co., 8 F.Supp.2d 1024 (E.D. Tenn. 1997, Jordan, J.), held that TFMIC's agents are independent contractors, not employees. Plaintiff responds that Alfred was decided on the basis of facts presented to that court, whereas plaintiff herein has presented additional evidence that compels a different result.

Contrary to plaintiff's argument, most if not all of the facts presented to this Court also were presented to Judge Jordan in Alfred. But putting aside for the moment the factual similarity or lack thereof between Alfred and the instant case, it is acknowledged that Alfred is not binding; indeed, it is not even binding on the judge who decided it. But it nevertheless should be taken into consideration. Alfred was a Title VII action in which the plaintiff, a female, claimed that TFMIC refused to hire her as an insurance agent because of her gender. TFMIC moved for summary judgment on the basis that its agents were independent contractors, not employees, and therefore not protected by Title VII. District Judge Jordan concluded that all the facts indicated that TFMIC's agents indeed were independent

contractors, and dismissed the plaintiff's action.[8]

There are facts which, if considered alone, arguably could support a finding that TFMIC exercised enough control over plaintiff's work that he should be held to be an employee, the parties' contract notwithstanding. And there are other facts which, if considered separately, indicate that TFMIC exercised only minimal control over plaintiff's work, such that plaintiff should be held to be an independent contractor as the contract provides. The relative importance, i.e., weight, of these facts will determine the outcome of this case, and therefore summary judgment for either party is not appropriate, and the Motions for Summary Judgment filed by plaintiff and TFMIC are DENIED.

However, after considering all the facts together and the reasonable inferences that can be drawn from those facts, this Court is constrained to hold that the plaintiff was an independent contractor, and not an employee of TFMIC.

The contract between TFMIC and plaintiff unequivocally provided that plaintiff was to be an independent contractor; in addition to explicitly so stating, it provided that plaintiff was to control the "time, method and procedure" of acquiring and maintaining insurance business, that he was to furnish his own office facilities and equipment, and that he was to be responsible for filing his own tax reports and returns, as well as directly paying his income and other pertinent taxes.

Although the contract recited that plaintiff was subject to TFMIC's rules and regulations respecting the conduct of the business of selling its insurance products, it also recited that such rules and regulations would not "infringe upon [plaintiff's] freedom of

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[8]In 1995, Judge Thomas G. Hull of this Court, i.e., the Northeastern or Greeneville Division, concluded that TFMIC's agents were independent contractors. Although Judge Hull held that Title VII applied to those independent contractors, which was contrary to Judge Jordan's decision in Alfred, the two district judges agreed on the one issue relevant to this suit – TFMIC's agents are independent contractors.

action to determine his own time and manner of soliciting business." In actual practice, it does not appear that those rules appreciably interfered with plaintiff's discretion regarding the conduct of his business.

Plaintiff asserts that TFMIC in reality exercised such control over its agents in the performance of their jobs that they are employees, not independent contractors. He points out that TFMIC is in the business of providing insurance, and it is necessary to have a cadre of agents to sell that insurance. In other words, insurance agents are necessary to TFMIC's business. This, of course, is quite true but, in the context of selling insurance, is not of overriding importance. Many industries, including the insurance industry, retain independent contractors to market their products.

Plaintiff further notes that TFMIC trains its new agents at its offices in Columbia, Tennessee, as well as providing sporadic local training by company officials, and that TFMIC expects its agents to keep abreast of developments in the insurance business by receiving continuing education. This, too, is true, but neither is it of great significance; the training is for the mutual benefit of the parties. And both parties reported the income from this training as income – to plaintiff – generated by self-employment.

The contract prohibits the agents from sub-contracting out their work to other individuals. This is of little significance. TFMIC entered into a contract with plaintiff, and with plaintiff alone; it is not unreasonable for TFMIC to insist that plaintiff do the work he contracted to do.

The contract also requires agents to have a state insurance license, which indicates that agents' work must be performed personally. In this regard, TFMIC merely requires its agents to comply with state law.

TFMIC expects its agents to support the Farm Bureau. Again, recalling the antecedents of TFMIC, this is to be expected, not to mention in the mutual interests of the parties.

Although plaintiff asserts that various customer service representatives and receptionists were provided for the insurance agents by TFMIC, the record simply does not back up that assertion. The customer service representatives and receptionists are provided by the agency manager, the salaries for whom are paid from commissions earned by the agency manager and the agents; there is nothing in the record to support the conclusion that TFMIC pays the salaries of the customer service representatives or assistants.

Plaintiff goes on to note that the parties' contract is actually a continuous contract with an automatic renewal, indicative of an employer-employee relationship. The contract provides for an initial one-year term, with automatic successive renewal terms of like duration. To that extent, such does suggest an employer-employee relationship. However, the contract also provides for a mutual right of termination, without cause, upon thirty days' notice.

Plaintiff suggests that the agents are required to work certain hours, but the record does not support that conclusion. To be sure, the agency manager suggested that plaintiff (as well as any other agent) should maintain certain office hours for the sake of producing business (from which the agency manager, as well as the agent, would receive a benefit), but there was no requirement that any agent maintain a rigid office schedule. In a similar vein, plaintiff argues that the job required "total commitment" and that the company expects its agents to work full time. Respectfully, that expectation is a reasonable one to make of an independent contractor; an independent contractor, no less than employee, benefits his

principal by selling a great deal of insurance, and the agent can do so only by devoting time and attention to his job.

Plaintiff notes that he does his work on the "employer's premises," i.e., at the local Farm Bureau office. However, his argument in this regard is a circular one, having as a necessary premise that the local Farm Bureau was a joint employer with TFMIC, which it was not.

Plaintiff next points out that TFMIC requires its agents to perform certain tasks in a set order, e.g., submitting property reviews each month, meeting with company clients, making himself available at the Farm Bureau offices, and following various underwriting and money-handling procedures. To the extent that an agent is selling TFMIC's insurance policies, and collecting monies owed to TFMIC, it is not unreasonable to require even an independent contractor to follow certain procedures regarding these matters.

TFMIC's agents are paid the same time each month which, plaintiff asserts, suggests that the payments in reality are not commissions. Respectfully, that is a non sequitur; even earned commissions can be paid at a set time, and doing so makes a great deal of sense from a logistical standpoint, taking into consideration the number of agents and commissions involved.

Plaintiff argues that an agent in some instances receives commissions which the agent actually did not earn, but rather is paid on business generated by a prior agent. Such does not reasonably indicate, however, that the commissions paid on such pre-existing business are not "earned," inasmuch as the current agent is expected to service that business and, of course, any policyholder can allow the coverage to lapse if unsatisfied with that service.

Plaintiff notes that he was required to make no "significant investment" to become an

agent to TFMIC. In a sense, this is true, although it must be remembered that he did contribute toward the rental of his office space in the Farm Bureau facility by deductions from his earned commissions. Of course, he could have maintained an office literally any place he wished, although it would have been self-defeating to do so since he was undertaking to sell insurance primarily intended for farmers. But in another sense, plaintiff was required to make a significant investment – his skills as a salesman, and his knowledge of the insurance underwriting business. In short, this is not a factor that militates in favor of finding plaintiff was an employee.

Plaintiff argues that he was a "captive agent"prohibited from working for another insurance company or selling other lines of insurance. Within his argument that TFMIC's agents are captive, plaintiff notes that he could not sell TFMIC's policies to the general public, but only to members of the local Farm Bureau. At the risk of belaboring the point, the history of the Farm Bureau and TFMIC must be taken into account: TFMIC was created by the Farm Bureau Federation to service rural and farm families. A requirement that a proposed insured be a member of the local Farm Bureau is little different than a requirement that a person be over the age of fifty to be entitled to AARP-sponsored insurance coverage. Judge Jordan's opinion in Alfred is applicable:

> The defendant's agents are captive agents in the sense that they do not sell insurance policies which compete with the defendant's policies, and the plaintiff relies on this fact heavily. An insurance agent's status as a captive agent, however, is no more determinative of the issue presented than, for example, a manufacturer's representatives' agreement to market the manufacturer's products exclusively. [Citation omitted.] Furthermore, as stated above, the defendant's agents are not entirely captive; many sell non-competing policies issued by a variety of insurers.

8 F.Supp.2d at 1028.

Plaintiff next suggests that the "right to discharge" provision in the contract is

indicative of an employer-employee relationship. It is recalled that plaintiff earlier argued that the contract, which provided for successive and automatic one-year renewal terms, constituted a long-term relationship indicative of an employer-employee relationship. But at this juncture he argues that the mutual right of termination suggests that TFMIC is the employer of its agents. In reality, the duration of the contractual relationship, under all the circumstances, are indicative of very little, one way or the other.

Analyzing the relationship between plaintiff and TFMIC in light of the criteria set forth in Darden, supra, the Court is constrained to find that plaintiff indeed was, as his contract provided, an independent contractor.

As earlier indicated, the Motion for Summary Judgment by the Hamblen County Farm Bureau is granted, and this suit should dismissed in its entirety as to it.

With regard to plaintiff's suit against TFMIC, the Court has found, as fact, that plaintiff was an independent contractor insurance sales agent of TFMIC, and not an employee. Accordingly, plaintiff's claims under ERISA and FMLA will be DISMISSED. Plaintiff of course has a claim against TFMIC for breach of contract, and that issue remains viable for trial.

E N T E R :

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DENNIS H. INMAN
UNITED STATES MAGISTRATE JUDGE