

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2015

(Argued: January 13, 2016 Decided: June 16, 2016)

Docket No. 15-0603-cv(L)

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WILLIAM W. GILMAN, EDWARD J.
McNENNEY, JR.,

Plaintiffs-Appellants,

- v. -

MARSH & McLENNAN COMPANIES, INC.,
MARSH INC., MARSH USA INC., MARSH
GLOBAL BROKING INC., MICHAEL
CHERKASKY,

Defendants-Appellees.
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1 Before: KEARSE, WINTER, and JACOBS, Circuit Judges.

2 Faced with the prospect of criminal indictment premised on the actions of
3 two employees, a company demanded that those employees explain themselves
4 under the threat of termination. They refused, and were fired. The ex-employees
5 seek to recover certain employment benefits they lost by reason of termination.
6 We agree with the summary judgment ruling of the United States District Court
7 for the Southern District of New York (Oetken, J.) that the company had cause to
8 fire the two employees for refusal to comply with its reasonable order, and did so.

9 Affirmed.

10 DAVID I. GREENBERGER (Jeffrey L.
11 Liddle, Blaine H. Bortnick, James W. Halter,
12 on the brief), Liddle & Robinson, LLP, New
13 York, NY, for Plaintiffs-Appellants.

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15 JONATHAN D. POLKES (Gregory Silbert,
16 Nicholas J. Pappas, on the brief), Weil,
17 Gotshal & Manges LLP, New York, NY, for
18 Defendants-Appellees Marsh.

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20 JAMES O. HEYWORTH (Andrew W. Stern,
21 on the brief), Sidley Austin LLP, New York,
22 NY, for Defendant-Appellee Cherkasky.

1 DENNIS JACOBS, Circuit Judge:

2 Faced with the prospect of criminal indictment premised on the actions of
3 two employees, a company demanded that those employees explain themselves
4 under the threat of termination. They refused, were fired, and in this suit seek to
5 recover employment benefits they lost by termination. They appeal from the
6 judgment of the United States District Court for the Southern District of New
7 York (Oetken, J.), dismissing their complaint on summary judgment. We agree
8 with the district court that the defendant company – Marsh (i.e., Marsh &
9 McLennan Cos., Marsh Inc., Marsh USA Inc., and Marsh Global Broking Inc.) –
10 had cause to fire William Gilman and Edward McNenney, Jr., for refusal to
11 comply with its reasonable order. Accordingly, we affirm.¹

12 **BACKGROUND**

13 In April 2004, the New York Attorney General (the “AG”) began
14 investigating “contingent commission” arrangements by which insurance brokers

¹ We also affirm the district court’s dismissal of Gilman and McNenney’s claims for (i) abuse of process against Marsh and the CEO of Marsh, Michael Cherkasky, and (ii) misconduct against Cherkasky as an attorney, in a summary order filed simultaneously with this Opinion.

1 were thought to be steering clients to particular insurance carriers. Marsh, as one
2 of the brokers under investigation, retained outside counsel, Davis Polk &
3 Wardwell LLP, to conduct an internal investigation of the AG's allegations. The
4 internal investigation included interviews with Gilman and McNenney in the
5 spring and summer of 2004.

6 The focus of the AG investigation shifted, in September 2004, to an alleged
7 bid-rigging scheme involving Marsh and several insurance carriers. On October
8 13, 2004, two individuals at American International Group, Inc. ("AIG") pleaded
9 guilty to felony complaints charging them with participation in a bid-rigging
10 scheme with Marsh. In the allocution of one of the AIG employees, Gilman and
11 McNenney were identified as co-conspirators. The next day, the AG filed a civil
12 complaint against Marsh for alleged fraudulent business practices and antitrust
13 violations.

14 The fallout from the civil complaint was swift and severe. Marsh's stock
15 price plunged, a raft of private civil suits were filed, and Marsh's directors,
16 clients, and shareholders demanded answers to the bid-rigging allegations.

1 Marsh responded by expanding the ongoing internal investigation; on October 19,
2 2004, Marsh suspended Gilman and McNenney (with pay). More or less at the
3 same time, Marsh's counsel asked Gilman and McNenney to sit for interviews
4 and warned that failure to comply would result in termination. Gilman was
5 asked to interview with a lawyer from Davis Polk as soon as possible. McNenney
6 alleges that he was asked to submit to an interview with a lawyer from the AG
7 and that he was told to do so without presence of counsel. (Marsh vigorously
8 denies that McNenney was asked to interview with the AG, let alone to do so
9 without counsel.)

10 On October 25, 2004, the CEO of Marsh's parent company resigned and
11 was replaced by Michael Cherkasky. The same day, Cherkasky met with Eliot
12 Spitzer, then-Attorney General of New York, to discuss the investigation. Gilman
13 and McNenney contend that the upshot of the meeting was that the AG would
14 forgo criminal prosecution of Marsh itself in exchange for its cooperation with the
15 AG's investigation, including waivers of attorney-client privilege and work-
16 product immunity for information developed in the (expanding) internal

1 investigation. That day, an AG press release announced that a civil proceeding
2 would suffice to punish and reform Marsh, and that criminal prosecutions arising
3 out of the alleged bid-rigging scheme would be limited to individuals. This press
4 release was widely understood to mean the AG would indict Gilman and
5 McNenney – as it eventually did.

6 By the time of the October 25 meeting and agreement between Cherkasky
7 and Spitzer, neither Gilman nor McNenney had complied with Marsh’s counsel’s
8 requests that they sit for interviews. On October 27, 2004, McNenney’s attorney
9 conveyed McNenney’s refusal to Davis Polk; Marsh fired him the next day. On
10 October 28, 2004, Gilman’s attorney scheduled an interview for his client on
11 November 2. But on November 1, 2004, Gilman submitted paperwork purporting
12 to effectuate an early retirement; later that day, his attorney conveyed Gilman’s
13 refusal to be interviewed. Marsh fired Gilman the next day, and did not accept
14 Gilman’s purported retirement.

15 As Marsh employees, Gilman and McNenney were eligible for some
16 valuable employment benefits. Under Marsh’s Stock Award Plans, they received

1 grants of stock options, stock bonus units, and/or deferred stock units, some of
2 which they could have been entitled to upon termination if (for example) they
3 had retired or were fired without cause. If, however, they were terminated “for
4 cause,” any unvested stock benefits were forfeited. Under Marsh’s ERISA-
5 governed Severance Pay Plan, Gilman and McNenney were entitled to severance
6 if, inter alia, they remained in good standing with Marsh on their last day of work
7 and if their employment terminated (i) because they lacked job skills, or (ii) in
8 connection with a restructuring, or (iii) because Marsh had eliminated their
9 position. An otherwise-eligible employee whose employment was terminated
10 “for cause” was not entitled to severance. Marsh took the position that it fired
11 Gilman and McNenney “for cause,” and denied them unvested, deferred
12 compensation as well as severance.

13 As relevant here, Gilman and McNenney sued Marsh to obtain the lost
14 employment benefits, alleging violations of ERISA, breach of contract, and breach
15 of the implied covenant of good faith and fair dealing. The district court granted
16 summary judgment in favor of Marsh, concluding that the interview requests

1 were reasonable, that Gilman's and McNenney's refusal to sit for interviews gave
2 Marsh cause for termination, that Marsh did in fact fire them for cause (and did
3 not breach the implied covenant), and that Gilman's purported retirement was
4 ineffective. Gilman and McNenney appeal.

5 DISCUSSION

6 We review the grant of summary judgment de novo, construe the evidence
7 in the light most favorable to the non-moving party, and draw all reasonable
8 inferences in its favor. Noll v. Int'l Bus. Mach. Corp., 787 F.3d 89, 93-94 (2d Cir.
9 2015).

10 The first question is whether the demand that Gilman and McNenney
11 submit to interviews was reasonable as a matter of law. If so, Marsh had cause to
12 fire them and deny them employment benefits. If not, Gilman's and McNenney's
13 claims against Marsh for benefits should have withstood summary judgment. We
14 conclude that the interview demands were reasonable as a matter of law because
15 at the time they were made, Gilman and McNenney were Marsh employees who
16 had been implicated in an alleged criminal conspiracy for acts that were within

1 the scope of employment and that imperiled the company. The second question
2 is whether there is a triable issue of fact as to whether Marsh fired them for cause.
3 We conclude that there is not and reject the argument that Gilman and McNenny
4 were let go routinely as part of a reduction in force and the argument that Gilman
5 could not be fired because he had preemptively resigned. Finally, we reject
6 Gilman's and McNenney's contention that, in light of Marsh's cooperation with
7 the AG, Marsh's requirement that they answer potentially incriminating
8 questions amounted to state action, and was thus unreasonable. Accordingly,
9 Marsh had cause to fire them, as it did, and Gilman and McNenney are entitled to
10 none of the employment benefits they seek.

11 I

12 Under Delaware law, which governs Marsh's employment contracts with
13 Gilman and McNenney, "cause" for termination includes the refusal to "obey a
14 direct, unequivocal, reasonable order of the employer." Unemployment Ins.
15 Appeal Bd. v. Martin, 431 A.2d 1265, 1268 (Del. 1981). Gilman and McNenney do
16 not dispute that Marsh's orders that they sit for interviews were direct and

1 unequivocal. So the decisive issue is whether the orders were reasonable.

2 When Gilman and McNenney were named as co-conspirators in a criminal
3 bid-rigging scheme for their conduct *as Marsh employees*, it was obvious (as
4 Gilman and McNenney themselves affirmatively argue) that the AG intended to
5 prosecute them criminally. At that time, Marsh had sufficient basis to act on the
6 allegations, made under oath in open court, and would have had cause to
7 terminate Gilman and McNenney, regardless of the ultimate resolution of the
8 allegations. See Smallwood v. Allied Waste N. Am., Inc., 2010 WL 5556177, at *2
9 (Del. Super. Ct. Dec. 30, 2010) (holding that an employer had “just cause” to fire
10 an employee for allegedly criminal conduct notwithstanding the employee’s
11 eventual acquittal on criminal charges). “When an employer, because of an
12 employee’s wrongful conduct, can no longer place the necessary faith and trust in
13 an employee, [the employer] is entitled to dismiss such employee without
14 penalty.” Barisa v. Charitable Research Found., Inc., 287 A.2d 679, 682 (Del.
15 Super. Ct. 1972); cf. Moeller v. Wilmington Sav. Fund Soc., 723 A.2d 1177, 1179
16 (Del. 1999) (concluding that, for purposes of claiming unemployment benefits, an

1 employer would have “just cause” to terminate employees if they had engaged in
2 illegal or criminal conduct). If Marsh had indeed fired them then, it would have
3 been for cause, and Gilman and McNenney would for that reason have been
4 ineligible for the employment benefits they currently seek. It is difficult to see
5 how their claims for benefits improved because Marsh instead gave them the
6 chance to explain themselves, and they refused to comply.

7 Marsh was presumptively entitled to seek information from its own
8 employees about suspicions of on-the-job criminal conduct. Marsh could take
9 measures to protect its standing with investors, clients, employees, and
10 regulators. Marsh also had a duty to its shareholders to investigate any
11 potentially criminal conduct by its employees that could harm the company. See,
12 e.g., In re Caremark Int’l Inc. Derivative Litig., 698 A.2d 959, 968-70 (Del. Ch.
13 1996). And as corporate officers, Gilman and McNenney had a duty to Marsh to
14 disclose information they had about the AG’s allegations. See, e.g., Beard
15 Research, Inc. v. Kates, 8 A.3d 573, 601 (Del. Ch. 2010).

16

1 Marsh's demands placed Gilman and McNenney in the tough position of
2 choosing between employment and incrimination (assuming of course the truth
3 of the allegations). But though Gilman and McNenney "may have possessed the
4 personal rights to [not sit for interviews], that does not immunize [them] from all
5 collateral consequences that come from [those] act[s]," including leaving Marsh
6 "with no practical option other than to remove [them]." Hollinger Int'l, Inc. v.
7 Black, 844 A.2d 1022, 1077 (Del. Ch. 2004). "[T]here would be a complete
8 breakdown in the regulation of many areas of business if employers did not carry
9 most of the load of keeping their employees in line and have the sanction of
10 discharge for refusal to answer what is essential to that end." United States v.
11 Solomon, 509 F.2d 863, 870 (2d Cir. 1975). Marsh had to use the "sanction of
12 discharge for refusal to answer," id., because in the absence of an exculpatory
13 explanation, Marsh needed to assume the worst: that the bid-rigging allegations
14 were true and that Marsh was vicariously liable for their criminal conduct.

15 Gilman and McNenney argue that the October interview requests were
16 unreasonable because Marsh had already interviewed them earlier in the year.

1 This is nonsense. In the spring and summer of 2004, the AG was investigating
2 potential civil infractions involving insurance brokers steering clients to certain
3 insurance carriers. Come September, however, the AG shifted focus to a criminal
4 bid-rigging scheme. Then, in mid-October, Gilman and McNenney were named
5 as co-conspirators in the criminal conspiracy and the AG filed a civil complaint
6 against Marsh in which Gilman and McNenney were named. Circumstances had
7 altered and stakes were raised. There is no reason to believe the October
8 interviews would have been duplicative of the earlier interviews; and even if all
9 Marsh sought was updated reassurance, the demand for interviews would have
10 been reasonable. No doctrine limits a company's inquiries as to allegations of
11 employee misconduct.

12 Gilman and McNenney also argue that the interviews were intended to
13 produce incriminating evidence that Marsh could turn over to the AG to assist in
14 the looming prosecution of Gilman and McNenney, and that Marsh did that as
15 quid pro quo to save itself from criminal prosecution by the AG. But this
16 argument ignores the incontestable fact that Marsh's interview requests *predated*

1 Gilman and McNenney fail to proffer evidence in support, and certainly create no
2 triable issue of fact on this question.

3 Gilman also argues that he successfully pulled off what disgruntled
4 employees eventually tell their employers: “You can’t fire me; I quit.” However,
5 Delaware courts “read a contract as a whole and . . . will give each provision and
6 term effect, so as not to render any part of the contract . . . meaningless or
7 illusory.” Osborn ex rel. Osborn v. Kemp, 991 A.2d 1153, 1159 (Del. 2010)
8 (internal quotation marks omitted). The definitions of “cause” in the Stock
9 Award and Severance Plans would be rendered “meaningless or illusory” if an
10 employee could preempt a known, imminent, for-cause termination with a
11 voluntary retirement, and thereby reap all of the benefits of being a faithful
12 employee.²

² The Severance Plan defines “cause” as including “insubordination,” “willful misconduct,” “failure to comply with [Marsh] policies or guidelines,” and “commission of an act rising to the level of a crime.” The Stock Award Plans governing stock bonus units and deferred stock units define “cause” as including “willful misconduct in the performance of the employee’s duties,” “continued failure after notice, or refusal, to perform the duties of the employee,” “breach of fiduciary duty or breach of trust,” and “any other action likely to bring substantial discredit to [Marsh].” To the extent this footnote (or any other record citation in this opinion) is drawn from the sealed appendix, the sealed material that is referenced is hereby deemed

1 There is no genuine dispute that Gilman filed his retirement papers in
2 direct response to Marsh’s (reasonable) interview request, or that Gilman would
3 be fired immediately if he did not comply with Marsh’s (reasonable) interview
4 request. Marsh’s internal investigators tried for weeks to schedule Gilman for an
5 interview; they were finally able to pin him down for November 2; and just the
6 day before, Gilman faxed retirement paperwork to Marsh. Coincidence is not that
7 convenient.

8 For the same reasons, Gilman’s and McNenney’s argument that Marsh
9 breached its duty of good faith and fair dealing also fails. Delaware law implies a
10 “covenant of good faith and fair dealing” in every contract, which “requires a
11 party in a contractual relationship to refrain from arbitrary or unreasonable
12 conduct which has the effect of preventing the other party to the contract from
13 receiving the fruits of the bargain.” Dunlap v. State Farm Fire & Cas. Co., 878
14 A.2d 434, 441-42 (Del. 2005) (internal quotation marks omitted). But the conduct
15 complained of here – Marsh’s interview requests and subsequent termination of

unsealed.

1 their employment – was neither arbitrary, nor, as just discussed, unreasonable.

2

3

III

4 Gilman and McNenney argue that Marsh’s interview demands constitute
5 state action that infringed their right against self-incrimination. This is “the legal
6 equivalent of the ‘Hail Mary pass’ in football.” In re Lionel Corp., 722 F.2d 1063,
7 1072 (2d Cir. 1983) (Winter, J., dissenting). They advance the following argument:
8 if Marsh’s request that Gilman and McNenney sit for interviews under the
9 penalty of termination is deemed state action (because of Marsh’s cooperation
10 with the AG), and if that demand and threat violated their Fifth Amendment
11 right, then Marsh’s request was unreasonable as a matter of law, and their refusal
12 to comply with the interview demands cannot support their loss of benefits.

13 The claim that Marsh was a state actor leans heavily on United States v.
14 Stein, 541 F.3d 130 (2d Cir. 2008); but Stein cannot support that weight. In Stein,
15 federal prosecutors were investigating potential criminal conduct by employees
16 of the accounting firm KPMG. Under a longstanding policy, the firm was bound

1 to pay the legal defense bills of its employees, and it was willingly doing so.

2 During its discussions with prosecutors, KPMG got the unsubtle message that, if

3 it wished to avoid its own indictment, it would have to adopt a new Fees Policy

4 and stop paying for its employees' defense. We upheld the district court's finding

5 of fact that this change was "a direct consequence of the government's

6 overwhelming influence," id. at 136, which would not have happened "but for"

7 the prosecutors' conduct, id. at 144. In effect and in fact, the prosecution arranged

8 to strip criminal defendants of their chosen counsel by stopping at the source the

9 defense fees to which defendants were entitled by contract from an employer

10 willing to pay. The government's influence in Stein was "overwhelming" in

11 several respects: KPMG's "survival depended on its role in a joint project with the

12 government to advance government prosecutions," id. at 147; "the government

13 forced KPMG to adopt its constricted Fees Policy," id. at 148; the government

14 "intervened in KPMG's decisionmaking," id.; the prosecutors "steered KPMG

15 toward their preferred fee advancement policy and then supervised its

16 application in individual cases," id.; and "absent the prosecutors' involvement . . .

1 KPMG would not have changed its longstanding fee advancement policy,” id. at
2 150. Since the government steered KPMG to adopt a policy it otherwise would
3 not have adopted, and then supervised KPMG’s implementation of that policy,
4 KPMG’s conduct was found to constitute state action.

5 Stein has no bearing on this case. Marsh had good institutional reasons for
6 requiring Gilman and McNenney to sit for interviews or else lose their jobs: the
7 company’s stock price was sinking and its clients, directors, investors, and
8 regulators were demanding answers about the allegations. There is no evidence
9 that the AG “forced” Marsh to demand interviews, “intervened” in Marsh’s
10 decisionmaking, “steered” Marsh to request interviews, or “supervised” the
11 interview requests. Nor is there evidence that the nature and scope of the
12 pending interviews were framed by the government, or changed after
13 Cherkasky’s October 25 meeting with Spitzer. The expansion of Marsh’s internal
14 investigation was precipitated by allegations advanced by the government, but it
15 is not a measure it would have forgone “but for” the AG’s influence.

16

1 Even if, as McNenney contends, Davis Polk sought to interview him
2 without counsel and with the AG present, that request occurred well before
3 October 25, and McNenney adduced no evidence that Marsh's request for an
4 interview arose out of pressure or coercion from the AG. And Marsh, which
5 already had cause to fire McNenney, could presumably put additional conditions
6 on its interview request anyway, as it still gave McNenney fundamentally the
7 same choice to explain himself or be fired.

8 Gilman and McNenney invite us to consider that the occasion for the
9 corporate investigation was a criminal initiative by government, and that a likely
10 use of the internal investigation was that Marsh would offer up its findings
11 (together with the employees' testimony) in the nature of a sacrifice to an angry
12 prosecutor. No doubt, Marsh was compelled by circumstances to conduct an
13 investigation (with expectation that any privileges attached to it would be
14 waived) and that one mighty circumstance was a possible prosecution of the firm.
15 But in the ordinary course, allegations of serious wrongdoing would provoke
16 such an investigation, whether or not the allegations were made by prosecutors

1 and whether or not the company itself was at risk of prosecution. The interests of
2 prudent directors alone would justify or compel such a measure. Stein is properly
3 distinguished because (among other things) KPMG had no institutional interest in
4 stripping its employees of their chosen defense counsel and KPMG was forced to
5 abandon a longstanding policy that it had decided to continue; it was therefore
6 found that government compulsion was the “but for” reason for the new Fees
7 Policy.

8 This is not a Stein case. This case is more nearly an analog of D.L.
9 Cromwell Investments, Inc., v. NASD Regulation, Inc., 279 F.3d 155 (2d Cir. 2002),
10 in which the government and a private actor, NASD, simultaneously investigated
11 certain stockbrokers for suspected criminal activity. The stockbrokers argued that
12 the Fifth Amendment protected them from complying with NASD’s demand for
13 on-the-record interviews (made on the pain of expulsion from their profession)
14 because NASD had become a state actor. As Stein recognized, the holding of D.L.
15 Cromwell is that there was no state action because NASD “had independent
16 regulatory interests and motives for making [its] inquiries and for cooperating

1 with [a] parallel investigation[] being conducted by the government.” Stein, 541
2 F.3d at 150. That is, “[NASD] would have requested interviews regardless of
3 governmental pressure.” Id. We arrived at this conclusion notwithstanding
4 “informal and formal sharing of documents and information between the
5 government and the NASD” and “the fact that the NASD interview demands
6 followed shortly after [the stockbrokers] contested grand jury subpoenas.” Id.

7 Gilman and McNenney urge that we adopt, in effect, this categorical rule:
8 acts that are taken by a private company in response to government action, and
9 that have as one goal obtaining better treatment from the government, amount to
10 state action. But a company is not prohibited from cooperating, and typically has
11 supremely reasonable, independent interests for conducting an internal
12 investigation and for cooperating with a governmental investigation, even when
13 employees suspected of crime end up jettisoned. A rule that deems all such
14 companies to be government actors would be incompatible with corporate
15 governance and modern regulation. See Solomon, 509 F.2d at 870.

16

1

CONCLUSION

2

For the foregoing reasons, we affirm.