

IN THE COURT OF APPEALS OF IOWA

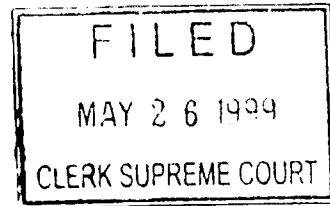
No. 9-187 / 98-924

Filed May 26, 1999

KARL GABELMANN,
Appellant,

vs.

NFO, INC.,
Appellee.



Appeal from the Iowa District Court for Story County, Joel Swanson, Judge.

Karl Gabelmann appeals the district court order setting the amount of attorney fees at \$3,500 and denying his request for liquidated damages for his successful breach of contract claim. **REVERSED AND REMANDED WITH INSTRUCTIONS.**

Stephen N. Greenleaf of Lynch, Greenleaf & Michael, L.L.P., Iowa City, for appellant.

Gayla R. Harrison, Ottumwa, for appellee.

Heard by Sackett, C.J., Vogel, J., and Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

VOGEL, J.

Karl Gabelmann appeals the district court order setting the amount of attorney fees at \$3,500 and denying his request for liquidated damages for his successful breach of contract claim. We reverse and remand with instructions.

Background facts. NFO, Inc. is a nonprofit corporation based in Ames, Iowa which provides marketing services and information to its farmer members. Gabelmann began working for NFO in 1973 out of his home. In May of 1975, Gabelmann's supervisor, Brynolf Grahn, sought permission to bring Gabelmann to NFO's office in Corning, Iowa. NFO's president, Oren Staley, agreed to the transfer and further agreed to pay Gabelmann's moving expenses and an \$80 per month housing allowance. For the next year, Gabelmann lived in a motel during the week and visited his family on the weekends. NFO paid his motel, food, and automobile expenses during this time. After his son completed high school the following May, Gabelmann moved his family to Corning. Shortly thereafter, Gabelmann sought reimbursement for his moving expenses and payment for his housing allowance. Roger Slottach, who succeeded Grahn's position, approved the request and prepared the necessary paperwork. The paperwork was passed on to Staley for his approval or rejection; however, the originals have never been found and only copies remain.¹

¹ The copies do not contain the signature or initials of the president. Although the supreme court recognized that there was no record evidence that Staley ever approved or rejected the request, it concluded: "The evidence is undisputed that Grahn offered Gabelmann a housing allowance of \$80 *per month*." *Gabelmann v. NFO, Inc.*, 571 N.W.2d 476, 482 (Iowa 1997) (emphasis in the original).

Gabelmann asked Slottach several times about the status of his requests, but apparently was not given an answer. In the late 1970s, NFO began experiencing such financial problems that at times they could not pay Gabelmann's salary. In 1982, Grahn returned to NFO as director of budget and finance and Gabelmann again asked about his moving expenses and housing allowances. Grahn told him that he couldn't authorize payment at the time because of the dire financial circumstances of the organization. In May of 1986, Grahn left NFO and was succeeded by Rene Niese. Shortly thereafter, Gabelmann filed a requisition form seeking \$689.01 for his moving expenses and \$10,640 for his accrued housing allowance.

In June of 1993, NFO dismissed Gabelmann, who immediately made a written demand for the moving expenses and housing allowance. NFO, finding no record of an obligation, refused to pay, and Gabelmann filed suit in March 1994 for breach of contract and wages under Iowa Code chapter 91A. A jury found in favor of Gabelmann and awarded him \$22,000. The trial court, however, granted NFO's motion for judgment notwithstanding the verdict, finding that the claim was time-barred and unsupported by substantial evidence.

On appeal, the Iowa Supreme Court reversed the district court, finding that the housing allowance amounted to wages under chapter 91A and that substantial evidence supported Gabelmann's claim. However, the court also found that a portion of Gabelmann's claim was time-barred and determined that he was only able to recover housing allowance payments that fell within two years of March 21, 1994, the

date the petition was filed. The court remanded the case for further proceedings not inconsistent with its opinion.

On remand, the parties stipulated that the district court could enter judgment in the amount of \$1,200 on Gabelmann's chapter 91A claim. The district court did so and then turned to the issues of liquidated damages,² costs, and attorney fees. The district court denied Gabelmann's claim for liquidated damages, finding that NFO's failure to pay Gabelmann was not intentional. On his claim for reasonable and necessary attorney fees in the amount of \$29,195.50, the court awarded Gabelmann \$3,500. Gabelmann now appeals.

I. Liquidated damages. Gabelmann first asserts that the district court erred in denying his claim for liquidated damages. He argues that the court erred in finding that NFO did not intentionally fail to pay his housing allowance.

An employee can recover liquidated damages where "it has been shown that an employer has *intentionally* failed to pay an employee wages or reimburse expenses pursuant to section 91A.3." Iowa Code § 91A.8 (1995) (emphasis added). It is the employee's burden to prove that the employer's failure to pay was intentional. *See Miller v. Component Homes, Inc.*, 356 N.W.2d 213, 216 (Iowa 1984). We review for errors at law. Iowa R. App. P. 4.

² We note that the supreme court did not mention liquidated damages in its directions for remand. However, these are appropriate damages to consider for a claim under Iowa Code § 91A.8. *See* Iowa Code § 91A.2 (6) (defining liquidated damages and providing that they shall not exceed the amount of the unpaid wages).

At the hearing before the district court, Gabelmann argued that NFO's failure to pay following his requests was conclusive evidence of their *intentional* failure. NFO argued that there was no conclusive evidence that Gabelmann's requisition was ever authorized by the president, and that NFO should not be penalized when their failure to pay was due, in part, to their inability in 1993 to determine whether Gabelmann's claim was valid. However, the supreme court unequivocally found that a contract was formed in 1975 for the housing allowance, and that each monthly failure to pay constituted a breach. Although the current staff at NFO may not have known that Gabelmann's claim was valid, Brynolf Grahn, who originally made the offer, did. Over the years, when Gabelmann inquired about being paid, he was given various reasons why the company could not pay. There was no evidence that NFO disputed the claim until 1993. *Cf. Halverson v. Lincoln Commodities, Inc.*, 297 N.W.2d 518, 523 (Iowa 1980) (agreeing that an employer should incur no penalty if there was an honest dispute between the employer and the employee as to the amount of wages due) (citation omitted).

We conclude that Gabelmann should be awarded \$1,200 in liquidated damages pursuant to Iowa Code section 91A.8.

II. Subpoena for billing records. When the case was remanded, Gabelmann requested that NFO accept service of a subpoena requesting NFO's billing records with regard to this litigation. NFO informed Gabelmann that they would object on the grounds of relevancy and attorney-client privilege. In lieu of a motion to quash the

subpoena or an application for a protective order, the parties signed a stipulation agreeing to argue the issue before the district court. The court determined that the records were irrelevant and did not need to be produced.

Gabelmann contends that the district court abused its discretion, arguing that the records were relevant to evaluate whether the fees sought by his counsel were reasonable and necessary. NFO disputes that this issue was properly preserved for appeal, but alternatively argues that its records were indeed irrelevant and the court did not abuse its discretion.

Our review is limited as the district court has wide discretion in ruling upon the question of whether requested information is discoverable. *See Shook v. City of Davenport*, 497 N.W.2d 883, 885 (Iowa 1993); *Schaffer v. Rogers*, 362 N.W.2d 552, 555 (Iowa 1985); *Griffith v. Moss*, 554 N.W.2d 571, 573 (Iowa App. 1996). We therefore reverse only for an abuse of discretion. *See Schaffer*, 362 N.W.2d at 555; *Griffith*, 554 N.W.2d at 573.

Gabelmann offered evidence by way of his own counsel's billing records and qualifications, a deposition taken of one attorney and affidavits from several other attorneys regarding the reasonableness of fees. Even so, we find that the billing records of NFO's counsel were relevant to the determination of Gabelmann's claim. Although NFO has stipulated that the rate charged by Gabelmann's counsel is reasonable, the best gauge of determining the reasonableness of the amount of time charged would be by comparison to the time charged by NFO's counsel. *See Murray v.*

Stuckey's Inc., 153 F.R.D. 151, 153 (N.D. Iowa 1993). We therefore find that this matter should be remanded for discovery of NFO's billing records, followed by a new hearing on Gabelmann's claim for reasonable trial and appellate attorney fees.

III. Conclusion. We remand for entry of judgment in favor of Gabelmann in the additional amount of \$1,200 for liquidated damages. We further remand to allow discovery of NFO's billing records, to be followed by a new hearing on reasonable trial and appellate attorney fees. We do not retain jurisdiction. Costs on appeal are assessed to NFO.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Schlegel, S.J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I dissent. I would affirm. There is substantial evidence to support the district court's finding the employer's failure to pay was not intentional.

I would not award additional attorney fees.