FILED
MAR 21 1977
CLERK SUPREME COURT

334

IN THE COURT OF APPEALS OF IOWA

PETER A. CAMPAGNA,

Appellee,

vs.

GENERAL GROWTH DEVELOPMENT CORPORATION,

Appellant.

Filed March 21, 1977

53
2-57864

Appeal from Polk District Court - J. P. Denato, Judge

Defendant employer appeals a jury verdict awarding recovery to plaintiff employee for breach of employment contract. Affirmed.

David L. Brodsky, of Des Moines, for Appellant.

Theodore T. Duffield, of Des Moines, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

OXBERGER, J.

Appellant, General Growth Development Corporation, the defendant employer, appeals the jury verdict for Peter A. Campagna, the plaintiff employee. Campagna was awarded an $8,361.03 recovery for breach of an alleged employment contract.

General Growth raises two major issues on appeal: 1) whether contracts for permanent employment or for an indefinite term are terminable at will so that no right to damages arises upon their termination and 2) whether the duty to mitigate required Campagna to pursue all reasonable avenues of available employment in order to minimize damages.

General Growth urged before the trial court and upon appeal that permanent contracts are not enforceable. In Laird v. Eagle Iron Works, #2-57657, filed January 19, 1977, the Iowa court found a contract for permanent employment to be enforceable upon a showing of independent consideration. General Growth's requested Jury Instruction No. 1 made no mention of independent consideration, rather it recited that under Iowa law a contract for permanent employment or for an indefinite period of time is terminable at will and not enforceable. X. 28. Such a contract, it was argued, could not support an award of damages. General Growth supported its jury instruction request by citations to Bixby v. Wilson & Co., 196 F. Supp. 889 (N.D. Iowa 1961); Drake v. Black, 247 Iowa 517, 74 N.W.2d 577 (1956); Lewis v. Minnesota Mutual Life Ins. Co., 240 Iowa 1249, 37 N.W.2d 316 (1949); and Faulkner v. Des Moines Drug Co., 117 Iowa 120, 90 N.W. 585 (1902).

Bixby was also cited in the recent *Laird* decision; however, there it was cited for the proposition that " . . . the law requires some independent consideration before the employer's promise (of permanent employment) is enforceable." *Laird, supra* at 4 citing *Bixby, supra.*

A close reading of *Drake* reveals that it merely repeats the contract principle that "mutuality of obligation must exist in order to create a contract of employment that is binding and enforceable, short of execution." 247 Iowa at 520, 74 N.W.2d at 580.

The *Lewis* decision clearly recognized that the "claimed lifetime agreement" failed in the absence of evidence showing any additional consideration for the permanent employment. 240 Iowa at 1260, 37 N.W.2d at 323.

In *Faulkner* the court distinguished as inapposite to the issue before it cases cited in which railroad companies had been held liable upon contracts for permanent employment. In fact, the court expressly recognized the enforceability of the railroad contracts which rested on the additional independent consideration of the release, from liability for employment related personal injuries, given by the employees. 117 Iowa at 124, 90 N.W.at 587.

Laird relied also on Stauter v. Walnut Grove Products, 188 N.W.2d 305 (Iowa 1971) which held the employee's mere promise to perform services could not support a contract for permanent employment. However, "where the employee furnishes consideration in addition to his services, a contract for permanent . . . employment is valid and enforceable . . . " *Laird*, #2-57657, filed January 19, 1977 at 4 citing *Strauter*, 188 N.W.2d at 311.

The rule of law regarding permanent employment contracts urged as a basis for General Growth's Jury Instruction No. 1 was erroneous and was properly rejected by the trial court.

General Growth's alternative argument for the Jury Instruction No. 1 was that the employment agreement with Campagna was for an indefinite term and was therefore unenforceable. The decision in Kitchen v. Stockman National Life Ins. Co., 192 N.W.2d 796, 801 (Iowa 1971) resolved such an allegation by finding the employee Kitchen was instantly

employed for an initial period of one year. *Kitchen* relied upon Restatement, (Second) of Agency § 442:

> "Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party . . . "

and cited approvingly the Restatement, Comment b. which states circumstances which operate to create a fixed term of employment.

> "Thus, an agreement for the period of time mentioned as that for payment, or as the basis for payment, is indicated * * * if the agency is an important one and of a kind such that a temporary appointment would not be likely to be made; or if, as the principal has notice, the employee has made an important change in his general relations in order to accept the position, such as the removal of himself and his things to a new place; or if he has given up a position of some value in order to enter the employment." *Kitchen*, 192 N.W.2d at 802.

General Growth did not include any testimony from the trial in its appendix upon appeal; we are, therefore, precluded from any determination of whether the facts support such a finding. Certainly on the law as developed in *Kitchen* the jury was properly instructed that if it found a contract for employment, its term was for one year. Without a record of "sufficient clarity and completeness" of the matters before the trial court which are urged as a basis for reversal, we must presume a proper decision. Enslow v. Miner, 231 Iowa 590, 591, 1 N.W.2d 700, 701 (1942).

Kitchen disposes also of General Growth's claim regarding mitigation of damages.

> "It is therefore self-evident Stockman's absent good cause termination of Kitchen's employment within the initial one year period constituted a breach of contract. For this Kitchen was entitled to judgment for all wages past due and future promised earnings, less what was or could be reasonably earned by him in similar employment for the remainder of the initial one year, plus unpaid moving expenses." 192 N.W.2d at 802.

In the instant case the jury was instructed, "The measure of Plaintiff's recovery would be the full amount provided for in the employment contract less any sum the Plaintiff might have earned by other similar employment. . . ." X. 33. Compagna argues this instruction under *Kitchen* properly limited the duty for mitigation to the search for other "similar employment." We agree.

General Growth also objected to the trial court's refusal to instruct the jury they *must* reduce plaintiff's verdict if they found Campagna failed to mitigate damages. The trial court instructed that if General Growth had met its burden of proving the claimed failure of Campagna to take reasonable steps to mitigate his damages, "you are entitled to reduce his damages thereby." X. 33. General Growth argues such a reduction would be mandatory.

To the extent "entitled" may indicate a discretion on the part of the jury, we agree with General Growth. However, the proffered Requested Instruction No. III did not itself accurately state the applicable law:

> " . . . If you find that the plaintiff failed to make use of reasonable means to obtain other employment as soon as could be reasonably accomplished under all the circumstances, then the plaintiff has breached his duty to mitigate damages and cannot recover damages from the defendant." X. 29.

General Growth failed to preserve the error for appeal. It objected to the suggestion that reduction for failure to mitigate damages was discretionary by representing to the court that such a failure would bar Campagna from recovery. Such a failure, rather would result in a reduction of recovery. *Kitchen*, 192 N.W.2d at 802.

Further, without any record of the testimony heard by the jury, we cannot determine whether there was any evidence from which the jury could have found failure by Campagna

to mitigate damages. Consequently, we are unable to rule that General Growth as a matter of law was prejudiced by the jury instruction given. We will not presume an improper decision. Enslow, 231 Iowa at 591, 1 N.W.2d at 701.

The last issue raised by General Growth is the question whether unemployment payments received by Campagna are deductible from his award.

This is a case of first impression in Iowa. The Iowa statute is silent on the issue. The trial court accepted the reasoning set forth by the California court in Billetter v. Posell, 94 Cal.App.2d 858, 211 P.2d 621 (1949) and refused to instruct the jury to reduce Campagna's recovery. See Marshall Field & Co. v. NLRB, 318 U.S. 253, 255 (1943); Sporn v. Celebrity, Inc., 129 N.J.Super. 449, 324 A.2d 71 (1974). We support this ruling.

Billetter refused to allow an employer a set-off for an employee's unemployment compensation:

> "Such funds are not deductible as compensation received from other employment in mitigation of damages. Benefits of this character are intended to alleviate the distress of unemployment and not to diminish the amount which an employer must pay as damages for the wrongful discharge of an employee." 94 Cal. App.2d at 860, 211 P.2d at 623.

We hold General Growth was not entitled to any reduction of damages for unemployment benefits received by Campagna.

Affirmed.

All judges concur except Donielson, J., who concurs specially.

DONIELSON, J. (concurring specially)

I concur specially. I would affirm this case before the court, but I do not accept the principles set forth in that last portion of the majority opinion adopting Billetter v. Posell, 94 Cal.App.2d 858, 211 P.2d 621 (1949).

I know of no one disagreeing with the portion of the quote in that case, *"Benefits of this character are intended to alleviate the distress of unemployment ..."*, however, I do not agree with the balance of the sentence, *"... and not to diminish the amount which an employer must pay as damages for the wrongful discharge of an employee."* I do not see any reason for the latter portion of that sentence to effectuate the noble purposes of the California statute nor 96.2 of ours that relates to unemployment security and the declaration of state public policy.

I would adhere to the general rule of damages relating to mitigation and just compensation for losses flowing from a breach of contract. That a party whose contract is breached should not be placed into a better position because of the breach than he would have had had the contract been performed.

The majority adopted the first impression rule that although relatively insignificant as it relates to this case for which I am willing to concur. However, in adopting that rule, one could well envision that suits in the future ranging from individuals to literally thousands could be effected in the future. See Dehnart v. Waukesha Brewing Co., 124 N.W.2d 664 (Wis. 1963). Present day employment security laws involve 39 weeks for unemployment compensation at a maximum of $116 per week tax free, so we are deciding a major case of first impression.

I would make the victim whole, not reward him for the unfortunate incident. I could visualize perhaps where there is submissible case of bad faith in the breach of contract that the

jury might be permitted to consider whether this element of mitigation could be considered. They then could decide whether or not to exclude that sum from the amount of recovery to the victim. I would not exclude it as a matter of law as provided by *Billetter* and by the majority.

I prefer the rationale of Dehnart v. Waukesha Brewing Co., 124 N.W.2d 664 (Wis. 1963). Also Blair v. United States, 150 F.2d 676, 678 (8 Cir. 1945); United Protective Workers v. Ford Motor Co., 223 F.2d 49 (7 Cir. 1955), 48 A.L.R.2d 1285.

I am not unmindful of Sporn v. Celebrity, Inc., 324 A.2d 71 (N.J. 1974) which carries *Billetter* even further in its explanation by incorporating an unemployment compensation in the collateral source rule, and essentially expands on the punitive theory which I would be willing to accept only on some version of a bad faith theory.