FILED
MAY 28 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARK KUTA,	)	
Plaintiff-Appellee,	)	Filed May 28, 1987
vs	)	167
DR MACDONALD'S, INC., a Corporation,	)	7-137 86-1183
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Webster County (51912), R.K. Richardson, Judge.

Plaintiff sued his former employer, alleging breach of an employment contract The district court ruled in favor of the plaintiff, and the defendant has appealed. **AFFIRMED.**

Kurt L. Wilke of Bennett, Wilke & Tarbox, Ft. Dodge, for defendnat-appellant.

James L. Kramer and Thomas J. Bice of Johnson, Erb, Latham, Gibb & Carlson, Ft. Dodge, for plaintiff-appellee.

Considered by Snell, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Plaintiff brought suit against defendant, his former employer, alleging breach of their employment contract. The district court decided in favor of plaintiff and awarded Mr. Kuta damages of $25,865.77. The defendant has appealed.

Prior to 1982, plaintiff was the sales and training dealer for Hubbard Milling Company in Mankato, Minnesota. In October 1982, plaintiff interviewed in Ft. Dodge with the president of defendant company. The interview was for the position of director of sales training and lasted approximately half a day. After returning home to Minnesota, plaintiff then flew to Chicago to talk to the owner of defendant corporation. Plaintiff received a letter dated October 21, 1982, from the president of defendant company setting forth the terms of his employment. The letter provided: the company would move plaintiff and his family to Ft. Dodge, plaintiff would receive a company car and reimbursement for expenses, the company would provide for all fringe benefits, and listed his base pay for his first three years with the company. The letter also provided a rough schedule of his suggested starting agenda. Plaintiff moved his family to Ft. Dodge at company expense, and began work on November 15, 1982. He continued working for defendant company until August 24, 1984, at which time he was fired.

On January 3, 1985, plaintiff filed a petition, alleging breach of employment contract. The case was tried to the court on July 23, 1985, and on the next day the court filed its decree. The court found a contract for a three-year period, concluded that defendant had breached this contract, and awarded damages. From this decision defendant has appealed.

In determining the proper scope of review the essential character of a cause of action and the relief it seeks, as shown by the complaint, determine

whether an action is at law or equity. Mosebach v. Blythe, 282 N.W.2d 755, 758 (Iowa App. 1979). Where the primary right of the plaintiff arises from nonperformance of a contract, where the remedy is money, and where damages are full and certain, remedies are usually provided at law. Id. Our scope of review is on assigned error only. Iowa R. App. P. 4.

Defendant contends: (1) plaintiff did not have an unequivocal contract of employment for a three-year period but was employed "at will;" (2) plaintiff waived his right to assert the existence of an employment contract; and (3) even if an employment contract existed, there was good cause for his discharge.

Defendant company contends the district court erred by holding the October 1981 hiring letter created a three-year contract of employment; it argues plaintiff was employed "at will" and could be terminated at any time for any reason. We disagree.

Clearly, the letter dated October 21, 1982, referred to plaintiff's earlier meeting and discussion with defendant's president. The letter provided for plaintiff's moving expenses, work expenses, fringe benefits, wage sequence for the first three years, a rough schedule of his first few weeks of work, and even the name of a possible secretary. Regarding the wage sequence the letter specifically provided:

> 4) Mr. Kuta shall receive a base salary of $30,000 his first year with the Company.
>
> 5) Mr. Kuta shall receive a base salary of $34,500 his second year with the Company.
>
> 6) Mr. Kuta shall receive a base salary of $39,330 his third year with the Company.

At trial plaintiff testified that letter fully set forth the terms of his employment, which had been decided in earlier meetings and conversations.

In our determination of this issue, we note the following:

> Whether correspondence with the purpose of entering into a contract is merely preliminary negotiation or a contract must be determined from the language used and the circumstances known to both parties under which the communications in writing were had. Whether letters passing between the parties to an alleged contract, which one of the parties suggests be put in writing, constitute a completed contract, or whether they are but steps in negotiations leading up to such a contract, is a question of the intention of the parties. Where it appears to the satisfaction of the court, however, that an offer and an unconditional acceptance have been made by letters and telegrams alone, the authenticity of which is not denied, the parties are bound by the contract resulting therefrom.

17 Am. Jur.2d Contracts § 25 (1964). Any preliminary negotiation in this case occurred during the parties' first meetings. The letter dated October 21, 1982, was a "memorial" of the previous meetings. General Realty Corp. v. Douglas Lowell, Inc., 223 Or. 244, 255, 354 P.2d 306, 311 (1960). We find no intention that the parties ever contemplated a written agreement be signed before the agreement became effective. The Iowa Supreme Court in Kitchen v. Stockman National Life Insurance Co., 291 N.W.2d 796 (Iowa 1971), addressed a fact situation similar to the one present here. In Kitchen defendant employer sent a "Letter of Understanding" to plaintiff employee, setting forth the details of plaintiff's employment. The court held this letter was an integrated contract, which defendant had breached, and awarded plaintiff damages. However, a major difference exists between our fact situation and the one found in Kitchen. In Kitchen, plaintiff received the letter, which the court concluded was an offer, and signed and returned the letter to defendant as an acceptance. Although we believe plaintiff made his actual acceptance in the phone conversation referred to in the October 21, 1982, letter, we have no proof, beyond plaintiff's own testimony. What we do have is the parties' actions subsequent to the October 21, 1982, letter. "An acceptance may be implied from acts or conduct, and performance by the offeree of the promise requested of him may amount to an acceptance." 17 Am. Jur.2d Contract § 45 (1964). Plaintiff

moved to Ft. Dodge at defendant company's expense; the defendant provided him with a car and fringe benefits; and he commenced work on November 15, 1982. From this we conclude plaintiff fully accepted the contract offered in the letter dated October 21, 1982. To reiterate, "When it appears to the satisfaction of the court that an offer and an unconditional acceptance has been made by letter and telegrams alone, the authenticity of which are not denied, the parties are bound by the contract resulting therefrom." Universal Products Co. v. Emerson, 36 Del. 553, 570, 179 A. 387, 394 (Super. Ct. 1935).

In the interpretation of a contract the parties made for themselves, the objective is to ascertain the meaning and intention of the parties as expressed in the language used. Mopper v. Circle Key Life Insurance, 172 N.W.2d 118, 124 (Iowa 1969). "It is the duty of the courts to give effect to the language of the contract in accordance with its plain and ordinary meaning, and not make a new contract for the parties." Id. The court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language. Allen v. Highway Equipment Co., 239 N.W.2d 135, 139 (1976). Where the language of the contract is clear and unambiguous, the intention expressed in the agreement prevails over the intent or interpretation of a party. Bidinger v. State, 341 N.W.2d 734, 737 (Iowa 1983). Finally, we note the rule that a contract should be read and interpreted as an entirety rather than in order of clauses and that the position of clauses in such instrument is not material or controlling. Allen, 239 N.W.2d at 139.

We conclude the language of the contract is unambiguous and the intent of the parties can be readily discerned. First, we observe the language found in each of the three sentences which refer to base pay. Each sentence has the language, "shall receive." The word "shall" generally relate to something which is imperative or mandatory; it's a word "excluding the idea of discretion,

and has the significance of operating to impose a duty which may be enforced." Black's Law Dictionary 1233 (5th ed. 1979). We find the three sentences setting forth plaintiff's base pay for his first three years of employment reflect an intent that the term of employment was at least three years. This conclusion is reinforced by plaintiff's testimony he had received another offer prior to accepting employment with defendant company, and the mandatory three-year period memorialized in the October 21 letter was intended by defendant company to match this other offer.

At this point in our analysis it is appropriate to consider defendant's third contention: that was terminated for a good cause.

An employment contract, which by its terms is for a definite time or until a specific day, presents no problem concerning its duration and termination. Allen v. Highway Equipment Co., 239 N.W.2d at 140. "The employer has the implied right to discharge the employee for cause, but otherwise the employment cannot be terminated of right during the term of its existence as expressed in the contract." Id. The burden of proof is upon the employer to show disobedience, misconduct, incompetence, or other justification for a valid dismissal for cause. Thomas v. Thomas Truck and Caster Co., 228 N.W.2d 52, 55 (Iowa 1975).

We agree with the trial court that defendant company failed to show good cause for plaintiff's dismissal. At trial defendant rightfully pointed out their sales had declined since plaintiff had joined the company. Defendant's explanation for this decline was plaintiff's incompetency. The record does not support this contention. Rather, we find sales declined because the farm economy dramatically worsened and plaintiff was fired because defendant company could no longer afford his services.

Finally, defendant argues plaintiff waived his right to increased salary and a three-year contract. Waiver is the voluntary or intentional relinquishment of a known right and it can be shown by the affirmative acts of a party, or can be inferred from conduct that supports the conclusion waiver was intended. Scheetz v. IMT Insurance Co., 324 N.W.2d 302, 304 (Iowa 1982). Defendant contends plaintiff's failure to enforce his employment contract, regarding wages, and change in his employment duties resulted in a waiver of his employment contract. In June of 1983 plaintiff assumed additional responsibilities as the new sales manager of the company and his duties as sales training director were diminished. Also at the start of his second year, November 15, 1983, the agreed increase in his salary was not forthcoming. These facts do not show an intentional relinquishment by plaintiff of any right established pursuant to the employment contract. His change of duties was a mutually agreed upon shift of responsibilities that was needed for the best interests of the company and could be viewed as a promotion. Regarding defendant's failure to provide the agreed upon pay raise, we find plaintiff did not agree to such failure, but rather complained of the denial. This failure does not reflect an intent on plaintiff's part to waive the employment contract; in fact, it is another example of defendant corporation's willingness to breach the employment agreement.

AFFIRMED.