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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-585 / 88-1734

WAYNE DALLENBACH,

Appellee,

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vs.

MAPCO GAS PRODUCTS, INC.,

Appellant.

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Plaintiff brought this suit pursuant to Iowa Code section 91A.8 seeking unpaid compensation due from his employer. The employer had unilaterally reduced all bonuses for the year 1985 by 31%. The district court awarded plaintiff his bonus plus liquidated damages and attorney fees as provided by the statute. The employer now appeals. **AFFIRMED.**

W. Michael Shinkle and Ted Breckenfelder, Davenport, for defendant-appellant.

Tom Hyland of Hyland, Laden & Pearson, P.C., Des Moines, for plaintiff-appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ., but considered en banc.

SCHLEGEL, P.J.

The defendant appeals the district court judgment awarding its former employee compensation due plus liquidated damages and attorney fees as provided by statute. We affirm.

Plaintiff, Wayne Dallenbach, was employed by defendant Mapco Gas Products, Inc., as a district manager for the Des Moines area. He was paid a base salary and a bonus. The bonus was based on the percentage of net operating profits for his district. The bonus was calculated at the end of a calendar year and paid during the first part of the following year. The formula for calculating the bonus was adjusted in 1978, but remained largely the same thereafter until 1986. In 1986, Mapco retroactively reduced the 1985 bonuses by 31%. Dallenbach received $6,403.12 less because of the reduction. He retired on June 30, 1986.

Dallenbach brought this suit pursuant to Iowa Code section 91A.8, alleging that Mapco intentionally failed to pay him all of his wages because it had reduced his bonus for 1985. The district court determined that "wages," as defined in section 91A.2(4), included Dallenbach's base salary and bonus. The court found that Mapco attempted to change the compensation agreement after Dallenbach had performed his part of the employment contract. The court awarded Dallenbach $6,403.12, plus liquidated damages of

$6,403.12, and attorney fees as provided for in section 91A.8.

Mapco now appeals. It contends that the bonus should not be considered a "wage" for purposes of chapter 91A. Mapco points out that section 91A.3(1) provides that "wages" must be paid at least monthly, while the bonus was only paid once a year. The company states that there was no written agreement for a specific bonus amount. Also, if the bonus is not a "wage," Dallenbach is not entitled to liquidated damages or attorney fees.

Mapco claims there was no contract between it and Dallenbach whereby it agreed to pay him a specific bonus for 1985 pursuant to a predetermined formula. Mapco asserts that the formula for calculating the bonuses often changed from year to year.

Mapco's third argument is that Dallenbach was an at-will employee, and that since he continued to work until June 1986, he acquiesced to the change in the terms of his employment. The retroactive change concerning the 1985 bonus was made in January 1986. Dallenbach did not complain of this change until after he voluntarily terminated his employment in June 1986.

Mapco contends that the court should not have substituted its judgment for that of the company's management in determining the amount of Dallenbach's bonus. Mapco believes that the court should not interfere

with the business judgment of the company. It states that it had actual business reasons for reducing the amounts of the bonuses.

Initially, we consider 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. Moseback 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 the 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. The trial court's findings of fact and conclusions of law and judgment are binding on appeal if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

Mapco contends the yearly bonus given to Dallenbach, specifically for the year of 1985, was not wages within the meaning of Iowa Code chapter 91A. The pertinent portion of chapter 91A regarding wages states as follows:

> "Wages" means compensation owed by an employer for:
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> a. Labor or services rendered by an employee, whether determined on a time, task, piece, commission, or other basis of calculation.

Iowa Code section 91A.2(4).

> An employer shall pay all wages due its employees, less any lawful deductions specified . . . at least in monthly, semimonthly, or biweekly installments on regular paydays which are at consistent intervals from each other and which are designated in advance by the employer.

> However, if any of these wages due its employees are determined on a commission basis, the employer may upon agreement with the employee, pay only a credit against such wages. If such credit is paid, the employer shall, at regular intervals, pay any difference between a credit paid against wages determined on a commission basis. These regular intervals shall not be separated by more than twelve months.

Iowa Code section 91A.3(1).

There is a certain ambiguity between the above two sections of the Iowa Code. To resolve this ambiguity, we resort to statutory construction. Metier v. Cooper Transport Co., Inc., 378 N.W.2d 907, 912 (Iowa 1985). We may consider the language used in the statute, the objects sought to be accomplished, the evils and mischief sought to be remedied, and place a reasonable construction on the statute which will best effectuate its purpose rather than defeat it. Id. We must examine both the language used and the purpose for which the legislation was enacted and consider all parts together without giving undue importance to one single or isolated portion. Id.

The definition of wages in section 91A.2(4) suggests that a bonus should be considered a wage. It does so by the use of the language, "or other basis of calculation." Certainly a year-end bonus is another basis of calculation. Section 91A.3(1), on the other hand, appears to require that all wages be paid at least in semi-monthly intervals, which would seem to preclude a yearly bonus. However, if the entire language of 91A.3(1) is examined, it

can be seen that the statute recognizes a different type of wage called a commission, which can be paid yearly. The term bonus is not used in the statute, but it is clear that the bonus in this situation is in reality a commission. It must be stressed that this "bonus" is not discretionary. It is based on a specific yearly computation. A bonus which rests solely and exclusively within the employer's discretion and is not predicated upon an announced plan or schedule, is not a "wage." A commission is a percentage of money taken in on sales, given as pay to a sales clerk or agent, often in addition to salary or wages. The statute clearly states that money paid every twelve months for a commission is wages within the meaning of the chapter 91A. The commission defined in the Code and the bonus in our situation are not exactly the same, but the importance of the latter portion of section 91A.3(1) is to show that an amount paid yearly can be considered a wage. If we read the statute as a whole, the yearly bonus in this situation was clearly intended to be a "wage," and therefore entitled to the protections afforded for failure to pay under Iowa Code chapter 91A.

The trial court determined that there existed a contract to receive a year-end bonus based on a set percentage of the profits. That calculation has remained substantially the same since 1978. The court also concluded that the appellee had performed the work

necessary to receive the bonus before the change was made. Mapco clearly had an obligation to pay the bonus, and under chapter 91A, Dallenbach is entitled to recover.

Mapco additionally argues that the plaintiff should be estopped from claiming the bonus because he cashed his bonus check, has accepted changes in the past, and continued in his employment until his retirement in June of 1986. There was nothing in the answer which could be construed as raising the theory of estoppel. There is no indication such issue was tried consensually and the trial court made no ruling regarding it. Since the issue of estoppel has been neither pleaded nor set out in factual allegations, there is nothing presented for us to review. See Olberding Construction Co., Inc. v. Ruden, 243 N.W.2d 872, 879 (Iowa 1976).

Finally, the district court did not substitute its business judgment for that of Mapco. The district court merely applied the Iowa Code to this situation. The statute required that Dallenbach recover and the district court correctly complied. In addition, Mapco cannot use its business judgment to breach a contract with an employee. We affirm the district court in toto.

AFFIRMED.

Oxberger, C.J., and Hayden, J., concur; Donielson, Sackett, and Habhab, JJ., specially concur and dissent.

DONIELSON, J. (concurring in part and dissenting in part)

I would concur with the majority's decision to affirm the trial court's determination as to the amount of bonus due Dallenbach. This court has previously recognized the right of an employee to sue for breach of an employment contract when an employer refuses to pay an employee a specific bonus based on a fixed agreement existing between the parties. Moody v. Bogue, 310 N.W.2d 655, 659-60 (Iowa App. 1981).

I am not willing, however, to find the bonus in this case constituted wages within Chapter 91A. While in some cases a bonus may in fact constitute a commission, I do not believe this was such a bonus. The majority defines a commission as a percentage of money taken in on sales. The bonus at issue in this case was based on a percentage of the net operating profits for Dallenbach's district. Factors other than the amount of sales go into a determination of net profits. The record in this case reveals the employer had the right to retroactively modify the figures used in calculating net profits. In April 1985, it increased the percentage of adjusted annual assets deducted in determining profits. The effect of this change effectively decreased the amount of net profits from which Dallenbach's 1985 bonus was taken.

In finding this bonus does not constitute wages under Chapter 91A, I would reverse that part of the trial court's decision awarding Dallenbach attorney fees and liquidated

damages pursuant to Iowa Code section 91A.8 (1989). I would affirm Dallenbach's recovery of the $6,403.12 withheld from his 1985 bonus.

Sackett and Habhab, JJ., join this partial concurrence and dissent.