

IN THE COURT OF APPEALS OF IOWA

FILED

DEC 29 1982

CLERK SUPREME COURT

HENRY L. WOLFE,

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Plaintiff-Appellant,

)

Filed December 29, 1982

vs.

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**JOHN M. GRAETHER and
WOLFE CLINIC, P.C.,**

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637037

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Defendants-Appellees.

)

Appeal from Marshall District Court - M. D. Seiser, Judge.

Plaintiff appeals from a summary judgment for defendant, Wolfe Clinic, P.C., and dismissal of his petition for failure to state a cause of action against defendant, John M. Graether, based upon an employment contract between plaintiff and defendant-clinic. REVERSED AND REMANDED.

Mark J. Wiedenfeld of Grefe & Sidney, Des Moines, Iowa, for plaintiff-appellant.

Michael H. Figenshaw and Denny M. Dennis, Des Moines, Iowa, for defendants-appellees.

Considered en banc.

Plaintiff, Henry Wolfe, appeals from a summary judgment for defendant, Wolfe Clinic, P.C., and a dismissal of his petition for failure to state a cause of action against defendant, John Graether, based upon an employment contract between plaintiff and defendant-clinic. We reverse and remand.

While plaintiff has appealed from the trial court's order dismissing defendant, Graether, from this action, plaintiff neither raised nor briefed this issue on appeal. Failure to brief and cite authority for an issue is deemed a waiver of that issue. Iowa R. App. P. 14(3). Accordingly, we address only the issue of summary judgment and any further reference to defendant is to the Wolfe Clinic, P.C., only.

Plaintiff's father founded the defendant clinic. Plaintiff, who is an optometrist, and two brothers, who are medical doctors, joined it. Through the sixties the clinic was run as a partnership and as additional doctors joined they were made partners. Around 1970, however, the clinic became the first professional corporation under Iowa's new statute. Believing that medical doctors could not form a professional corporation with an optometrist, plaintiff's partners convinced him to accept being treated as if he were a shareholder as to voting, et cetera, without actually making him one.

The clinic has written employment agreements with each person who was a partner in the old clinic. The agreements have an integration clause. Paragraph 3 contains a provision that employment is for life, or until retirement or permanent disability. This provision is followed by: "Involuntary retirement shall be determined by the unanimous vote of all of the other shareholders of the corporation." Paragraph 12 states that "in the event either party . . . find[s] the employment situation intolerable, the employment relationship may be terminated by either party"

On February 21, 1980, the clinic sent plaintiff a notice stating that he was being discharged "for the following independent reasons: 1. Your employment situation . . . is intolerable[;] 2. . . . [;] 3. You are being involuntary retired." The notice was signed by all shareholders.

Plaintiff filed suit against the clinic for compensatory damages arising from breach of the employment agreement. The court granted the clinic's motion for summary judgment on the ground that the employment agreement properly provided for termination (by involuntary retirement) at the will of the clinic, and that the agreement therefore was not breached. The court also found that the clinic properly terminated the agreement as the result of an intolerable employment situation. From the granting of summary judgment in favor of defendant, plaintiff appeals.

I. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4.

II. Propriety of Summary Judgment. The principles governing our review of the propriety of granting summary judgment were detailed in Millwright v. Romer, 322 N.W.2d 30 (1982).

In reviewing the granting or denial of summary judgment motions, we view the underlying facts contained in the pleadings and the inferences to be drawn therefrom in the light most favorable to the party opposing the motion, and give to such party the benefit of any doubt as to the propriety of granting summary judgment. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied, and to reverse the grant of summary judgment if it appears from the record there is an unresolved issue of material fact.

Id. at 31 (quoting Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979)). Iowa Rule of Civil Procedure 237(c) places the burden on the movant "to establish by evidentiary matter the absence of a genuine issue . . ." Midwest Management Corp. v. Stephens, 291 N.W.2d 896, 900 (Iowa 1980). "If reasonable minds could

draw different inferences and reach different conclusions from undisputed facts, the issues must be reserved for trial and summary judgment is improper." Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978).

III. Employment Contract. Of initial importance to our disposition of the controversy is the determination of whether the employment contract is terminable at will. Plaintiff contends the contract could not be terminated without cause. Defendant argues in the alternative that: 1) the contract is terminable at will; 2) the plaintiff was involuntarily terminated in accordance with the contract; and 3) the plaintiff was terminated because the employment relationship was intolerable. We find the contract to be terminable at will.

The distinction between an employment contract which is for a definite term and one which is for an indefinite term was discussed by the court in Allen v. Highway Equipment Co., 239 N.W.2d 135, 139-40 (Iowa 1976).

Unlike contracts of employment for an indefinite term, where employment is "at will" and terminable "at any time by either party for any reason or for no reason at all," [citations omitted] contracts for a definite term do not leave the parties so unconstrained.

* * *

"A contract of employment which by its express terms is for a definite time or to last until a definite day presents, of course, no problem concerning its duration and termination. 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." [citations omitted]

* * *

Whether in any particular case an employer can discharge his employee without cause, and not incur liability, is a question which is to be resolved with reference to the express and implied terms of the contract." [citations omitted]

Id. at 139-40. See also Janda v. Iowa Industrial Hydraulics, Inc., No. 372/67351, slip op. at 5 (Iowa 1982); Moody v. Bogue, 310 N.W.2d 655, 658-59 (Iowa Ct. App. 1981).

Paragraph 12 of the contract states that "this contract of employment is a contract of employment for a period of specified time," although intolerability of the relationship could lead to termination. However, paragraph 3 states that the term of employment was from the date of the contract to the death of the employee or retirement or permanent disability. Additionally, the notice provided to plaintiff upon termination stated that the contract was for an indefinite period. Reviewing the above principles and facts, we conclude that the employment contract was indefinite in nature and, as such, terminable at will. This finding, however, is not conclusive as to the propriety of summary judgment since an indefinite contract may be enforceable if additional independent consideration is given by the employee.

IV. Additional Independent Consideration. The court in Allen distinguished indefinite contracts where additional consideration is given from those contracts without it. 239 N.W.2d at 142. In analyzing those principles, the court stated:

Generally, a contract for permanent (as opposed to temporary) employment that is indefinite as to time of duration, and one wherein the employee merely promises to perform services, is terminable at will by either party, with or without cause. [citations omitted] However, where consideration in addition to services is provided by the employee, "a contract for permanent or lifetime employment is valid and enforceable and continues to operate so long as the employer remains in business and has work for the employee once the employee performs competently. [citations omitted]" Stauter, 188 N.W.2d at 311. With the additional independent consideration, the contract is enforceable even though the promisee has the right to terminate at any time. Collins v. Parsons College, 203 N.W.2d 594, 598 (Iowa 1973). Further, the additional consideration need not move to the employer or promisor. Id. at 599.

Moody v. Bogue, 310 N.W.2d at 658.

We must now examine whether there was sufficient additional independent consideration to warrant enforcing the provisions of this employment contract. This court in Moody considered and analyzed the many cases in this and other jurisdictions on the sufficiency of additional independent consideration. Generally, the relinquishment of employment terminable at will to accept a permanent employment contract is insufficient, see 310 N.W.2d at 658-59 (citing Laird v. Eagle Iron Works, 249 N.W.2d 646, 648 (Iowa 1977)), as is incurring mere incidental costs involved in procuring the new employment. 310 N.W.2d at 659 (citing Bixby v. Wilson & Company, Inc., 196 F. Supp. 889, 901-02 (N.D. Iowa 1961)). Sufficient independent consideration has been found, however, where "'an employee . . . gives up other employment to accept an offer of a permanent job . . .'" 210 N.W.2d at 659 (quoting Collins v. Parsons College, 203 N.W.2d 594, 599 (Iowa 1973)).

Determining the sufficiency of the additional independent consideration ordinarily is a question of fact.

Whether the essential element of a consideration is present or embraced in the agreement is a question of law, and where there is no evidence of a consideration for the agreement, questions relating thereto should not be submitted to the jury.

Ordinarily, however, the question of the presence of a benefit or detriment to the promisor, sufficient to constitute consideration, is a question of fact, to be determined by the jury where the evidence relating thereto is conflicting, as is the question of what constitutes the consideration, where it is uncontroverted, and its adequacy.

17A C.J.S. § 613 at 1233 (1963). The court in Whitlock v. Norris, 218 Iowa 1066, 256 N.W. 734 (1934), held that the question of whether the defendant promised a mere gratuity as distinguished from consideration was a question for the jury. Id. at 1067, 256 N.W. at 734.

Extrinsic evidence is generally admissible to show the real consideration of a contract, so long as it does not vary the legal effect of the contract. See Fidelity & Deposit Co. v. Maryland v. Wheeler, 34 F.2d 892, 895 (8th Cir. 1929). "[E]xtrinsic evidence is admissible as an aid to interpretation when it throws light on the situation of the parties, antecedent negotiations, the attendant circumstances and the objects they were striving to attain." Fashion Fabrics of Iowa v. Retail Investors, 266 N.W.2d 22, 25 (Iowa 1978). "The parol evidence rule should not be involved to prevent a litigant the chance to prove a writing does not in fact describe what the parties understood to be their agreement." I.G.L. Raquet Club v. Midstates Builders, Inc., 323 N.W.2d 214, 216 (Iowa 1982).

In the present case, plaintiff introduced evidence that, in order for the defendant to gain the status of a professional corporation, plaintiff was persuaded to relinquish his status as a partner in the clinic and accept an employment relationship. The privileges and protections afforded a partner are considerably more than those afforded an employee in an employment relationship which is terminable at will. Plaintiff further argues that it was his understanding that the contract could be terminated only for cause. Accordingly, we find sufficient evidence to raise a fact question.

V. Termination Pursuant to Contract. Assuming arguendo the presence of sufficient additional consideration to render the contract enforceable the plaintiff's employment must be terminated in accordance with the contract. Defendants argue that plaintiff was involuntarily retired or, in the alternative, terminated due to the intolerability of the employment relationship.

A. Involuntary Retirement. The only provision in the contract relating to involuntary retirement stated that it required an unanimous vote of the shareholders to accomplish it. Nowhere in the instrument is a definition or standard for involuntary retirement set forth. The trial court in discussing this provision stated:

It is not realistic to believe that a professional person can function in that capacity for the rest of his life if he has a normal life expectancy with the normal disabilities that occur with advancing age. It is for that reason the contract did provide for the possibility of disability or the voluntary or involuntary termination [sic].

The trial court considered the problems of advanced age and the physical and mental disabilities which often attend the aging process. This consideration is consistent with the dictionary meaning of "retire." In construing a contract, we endeavor to give terms used their ordinary meaning. See State v. Starzinger, 179 N.W.2d 761, 764 (Iowa 1970).

While we may agree with the trial court's interpretation of involuntary retirement, we believe the court erred in construing its legal effect. We do not believe that inclusion of the term "involuntary retirement" warrants the finding that defendants could terminate the contract at their whim irrespective of the aging process of the plaintiff. If defendants had intended this result, it could have been more able to protect its interests in the drafting of the instrument, for we refuse to give the term involuntary retirement such an effect. We generally construe any ambiguity against the drafter. See Village Supply Co, Inc. v. Iowa Fund, Inc., 312 N.W.2d 551, 555 (Iowa 1981). To construe the contract to fit defendant's argument would indirectly give more credence to plaintiff's argument concerning the possible illusory nature of the agreement.

By the same token we do not intimate that defendants could not have properly involuntarily retired plaintiff. On the record before us, however, we find that a genuine issue of fact exists as to whether plaintiff was involuntarily retired due to the problems of advancing age or whether his employment was terminated in contravention of the employment agreement.

B. Intolerability. Defendants argue that plaintiff was terminated because of the intolerability of the employment relationship pursuant to the employment contract. It appears from the corporate minutes that the alleged intolerability was based upon plaintiff's role as clinic manager.

The provision permitting termination on the basis of intolerability is not absolute in its definition or effect. The defendants have the duty "to exercise that discretion in a reasonable manner on the basis of fair dealing and good faith." See Midwest Management Corp. v. Stevens, 291 N.W.2d 896, 913 (Iowa 1980). We conclude that whether termination of plaintiff's employment was exercised in such a fashion by defendants is a question of fact to be resolved by the trier of fact.

VI. Summary. For the foregoing reasons, we find that genuine issues of fact exist in this controversy. Accordingly, we reverse the granting of summary judgment to the defendants by the trial court and remand this action for further proceedings.

REVERSED AND REMANDED.