

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JOSEPH ALBERT,

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Plaintiff-Appellant,

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Filed November 26, 1985

vs.

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DAVENPORT OSTEOPATHIC HOSPITAL,)

5-481

85-360

Defendant-Appellee.)

Appeal from the Iowa District Court for Scott County - L. D. Carstensen,
Judge.

Plaintiff appeals from judgment for defendant in an action for wrongful discharge, asserting that the evidence of additional consideration was sufficient to establish that his employment was not terminable at will. **REVERSED AND REMANDED.**

Michael J. McCarthy of McCarthy & McCarthy, Davenport, for plaintiff-appellant.

Greg A. Egbers of Betty, Neuman, McMahon, Hellstrom & Bittner, Davenport, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

Plaintiff appeals from judgment for defendant in an action for wrongful discharge, asserting that the evidence of additional consideration he furnished was sufficient to establish that his employment was not terminable at will.

From 1966 through 1979 plaintiff was employed as a hospital maintenance employee under a collective bargaining agreement providing, inter alia, that he could only be discharged "for cause." He ceased to be a member of the bargaining unit in 1979 when he took the position of weekend supervisor with an increase in salary. Except for two periods during which he temporarily acted as director of maintenance, he performed substantially the same maintenance duties as previously. He was discharged in 1983 as part of a staff reduction. At trial, he testified that he would not have accepted the weekend supervisor position if he had known that he could be discharged for any reason. The trial court entered judgment for defendant on the ground that the employment was terminable at will.

The issue presented is whether Albert was a permanent employee terminable only for just cause or an at-will employee terminable with or without cause. Albert claims the additional consideration he provided by leaving the collective bargaining unit made him a permanent employee.

Albert requests this court to find that when an employee leaves a collective bargaining unit which provided for only just cause discharge such a concession constitutes sufficient consideration, in addition to services provided, to make the employment contract permanent.

The district court held this case was controlled by Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978), and found Albert's employment was terminable at will. The Abrisz plaintiff conceded she could be discharged without cause but contested whether such a discharged violated public policy. Albert

presents a different issue because he does not concede he could be discharged without cause; on the contrary, Albert submits he could only be terminated for just cause. Thus, we think a closer review of the law and facts is merited.

Albert directs us to Collins v. Parsons College, 203 N.W.2d 594 (Iowa 1973). In Collins, the plaintiff was a tenured professor at another university and left that position to accept a tenured position at Parsons College. Subsequently, Collins was forced to leave Parsons College. When addressing the issue of whether leaving one position constitutes consideration for accepting another position, the court stated:

After considering the question, we think the better rule to be that an employee who gives up other employment to accept an offer of a permanent job provides independent consideration—at least, when as here the employment surrendered was itself permanent and the new employer is aware of the facts. (Authorities)

Id. at 599.

We are willing to find that Albert, while in the collective bargaining unit, was a permanent employee as was Collins when he was a tenured professor at another university. This case, however, poses a different problem because Collins' employer offered a permanent position to him; whereas Albert was not offered a permanent position when he assumed the managerial position.

A subsequent case which relied on Collins and, to a certain extent, expanded its holding was Rowe v. Noren Pattern & Foundry Co., 91 Mich. App. 254, 283 N.W.2d 713 (1979). Rowe provides a factual scenario which is very similar to the case at hand: The plaintiff was involved in maintenance work and virtually had a permanent position; a person from the defendant-company solicited him to work at his plant; and a salary raise was provided. The cases differ in that the Rowe plaintiff specifically asked his prospective employer about his status in the event he was discharged. The company offered him a 45-day trial period

where he was terminable at will and at the end of the period would become a member of the union. After 43 days, he was discharged. The Rowe plaintiff testified he would not have left his former position, even for an increased salary, without being in a union. The court held the employee could not be terminated at will under this situation.

Similarly, this case presents an unfortunate situation for Albert. If Albert stayed in the collective bargaining unit, he could have been discharged only for just cause; but because he took on a managerial position, he could be terminated with or without just cause. Albert claims he was unaware of the ramifications of accepting the supervisory position. He testified that if he knew he could be terminated at will he would not have taken the position even though he received a raise. Albert further testified that his job responsibilities remained essentially intact after he changed positions. The employer did not inform Albert of the consequences of accepting the managerial position. Albert apparently became aware of the change several weeks later when he noticed that union dues were not being deducted from his salary.

The situation is exacerbated by the fact that there was no dispute Albert was a competent employee and that after he was discharged a maintenance position was available. The employer stated that Albert was not able to be considered for the maintenance position because their policy was that once a person entered a management position they could not return to a labor position.

Given that Albert provided consideration of leaving a permanent position and was unaware of the consequences of his action, particularly when his job responsibilities did not change and he did not seek the position, we hold that Albert could not be terminated at will. Therefore, we reverse and remand for proceedings consistent with this opinion.

Our decision to reverse and remand to the trial court in no way suggests that defendant was without just cause to discharge plaintiff. On that issue we take no position

REVERSED AND REMANDED.