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IN THE COURT OF APPEALS OF IOWA

FRANK N. DONNELLY,	)	
Appellee,	)	Filed September 9, 1977
vs.	)	
FORT DODGE BROADCASTING, INC.,	)	185 / 2-58843
Appellant.	)	

Appeal from Webster District Court - Ed J. Kelley, Judge.

Appeal from district court's judgment finding breach of an oral contract.

AFFIRMED.

Howard Hamilton, of Hamilton & Schill, of Fort Dodge, counsel for appellant.

Herbert R. Bennett, of McCarville, Bennett, Beisser, Ferguson & Wilke, of Fort Dodge, counsel for appellee.

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

DONIELSON, J.

The defendant, Fort Dodge Broadcasting, Inc., appeals from an adverse judgment on an oral contract. The trial court found that the defendant had breached the contract and ruled in favor of the plaintiff, awarding him $3,878.20 and costs.

Plaintiff-Frank Donnelly worked for Northwest Broadcasting Co. and radio station KVFD for almost 15 years as an advertising salesman. He was paid a fixed salary of $90 per week for the first $2000 of advertising business produced, with a 10 percent commission on the business he secured from $2,000 to $3,500 per month, 15 percent from $3,000 to $9,000, and 20 percent of amounts over $9,000. Both Donnelly and the employer were required to give each other two weeks notice of termination of employment, and, upon such termination, Donnelly was to collect 5 percent commission on the contracts that were sold by him individually until the date of expiration or the end of one year, if no expiration date appeared on the contract.

In 1971, the radio station was sold to the defendant-corporation and Donnelly continued to work there, having assumed that the terms of employment would be the same as they were with Northwest. Approximately one month after the purchase of the station by the defendant, Max Landes, General Manager and part-owner, presented a written copy of the station's new Statement of Policy to the sales force. Although much of the language was identical to that contained in the previous agreement with Northwest, the amounts of compensation were omitted. The new policy also provided that upon the termination of the employment of any salesman, that person would be paid (salary, commission, or both) to the end of that current month and no longer.

Upon being advised of this new policy, Donnelly informed Landes that he would not work under the policy containing this provision regarding the nonpayment of commissions upon termination. Landes responded that it didn't matter whether Donnelly approved this policy statement or not; it was the policy statement for the entire sales staff and constituted the rules under which they would work. However, the defendant took no further action, and Donnelly continued to work and perform well as a salesman and sales manager.

Throughout this period, Donnelly was in the process of seeking a license and construction permit from the Federal Communication Commission for a new radio station nearby. Both were subsequently granted on November 1, 1974. Donnelly informed Landes of these plans on November 11, and Landes, who had been aware of the pendency of this application since 1973, told him that he could remain on the job until March 1, 1975. However, on November 25, Landes and another owner of the company met with Donnelly and terminated his employment, effective immediately. Although he received the commissions for December, 1974 and January, 1975, he received no further commissions on contracts that he had already written.

On appeal, defendant-corporation asserts that the evidence admitted was insufficient to sustain the judgment of the trial court. Our standard of review in this case was set forth in Arbie Mineral Feed Co. v. Nissen, 179 N.W.2d 593, 595 (Iowa 1970):

> "In a law action tried without a jury, the trial court's findings have the same effect as a special jury verdict. We are bound by the facts thus established if there is substantial evidence to support them. We do not weigh the evidence; we only decide if there is a proper basis upon which the trial court could find as it did." (citations omitted) (emphasis in original).

Accord, Baker v. Beal, 225 N.W.2d 106, 109 (Iowa 1975); rule 14(f)(1), Rules of Appellate Procedure. In such an action, the burden of proof is upon the plaintiff to establish by means of objective evidence, Rotterman v. General Mills, Inc., 245 Iowa 229, 237-238, 61 N.W.2d 718 (1953), the existence of a contract of employment and the terms thereof, Service Emp. Intern., Etc. v. Cedar Rapids, Etc., 222 N.W.2d 403, 408 (Iowa 1974). The court in Rotterman summarized our role in a case such as this:

> "The court must take an objective view in determining the parties' intent. It is not necessarily the actual intent we seek, but the intent manifested objectively. [citations omitted] We seek the intent a reasonably intelligent person would derive from the expressions used, under the circumstances and knowledge of the parties at the time of the transaction."

In attempting to determine whether the parties intended to create or continue a contractual relationship, this court must ascertain whether there was a mutual manifestation of assent to the same terms of the agreement. Service Emp.

Intern., Etc. v. Cedar Rapids, Etc., supra, at 408; Fairway Center Corp. v. U.I.P. Corp., 502 F.2d 1135, 1140-1141 (8 Cir. 1974) (interpreting Iowa law). Furthermore, where parties have given a contractual agreement practical construction by their conduct, we will give such constructon great, if not controlling, weight in determining the proper interpretation of such agreement. V.L. Dodds Co. v. Consolidated School District, 220 Iowa 812, 816-817, 263 N.W. 522 (1935); Gendler Stone Products v. Laub, 179 N.W.2d 628, 631 (Iowa 1970).

We are satisfied that the trial court implicitly found that the defendant's failure to take further action after Donnelly strenuously objected to the new Statement of Policy reflected a manifestation of assent to be bound by the terms of the prior agreement. This is especially true in light of the fact that Donnelly continued to work without objection from the defendant. Furthermore, the trial court could well have found that a reasonably intelligent individual would view defendant's relative silence and failure to take any further steps to resolve this dispute as a manifestation of assent, or at least an acquiescence sufficient to bind the defendant-broadcasting company.

Rather than permit Donnelly to continue to sell advertising under the reasonably mistaken notion that the old agreement was still effective, the trial court apparently determined that the defendant had an obligation to attempt to resolve the disagreement and misinterpretation, or terminate Donnelly if resolution was not possible. The fact that Fort Dodge Broadcasting did not pursue either of these two courses of action indicated to the court below that the defendant did not believe that the inclusion of this new compensation provision was a crucial aspect of the employment agreement.

The trial court's decision amounts to a finding that an ambiguity in this agreement arose because Fort Dodge continued to employ Donnelly when it was undoubtedly aware that he expected[1] to be paid commissions earned at the time of the termination of employment. Iowa courts resolve any ambiguity against the party responsible for creating the ambiguous term. Kinney v. Capitol-Strauss, Inc.,

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[1] Such expectations seem reasonable and justified in light of defendant's inaction after Donnelly objected to the new Statement of Policy regarding commissions and Donnelly's continued performance without objection by Fort Dodge.

207 N.W.2d 574, 577 (Iowa 1973). Because an essential term regarding compensation was rendered ambiguous and Fort Dodge realized this but failed to adequately resolve it, the plaintiff may enforce the contract according to his reasonable understanding of the ambiguous term. Evans v. McConnell, 99 Iowa 326, 336-337, 68 N.W. 790 (1896).

Additional support for this position can be found in § 622.22, The Code, which provides:

> When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.

In effect, if one party knows another party's interpretation of ambiguous terms and does not object or otherwise attempt to resolve the dispute, the other party's interpretation will control. A practical and reasonable interpretation of the ambiguity in the instant case dictates an affirmance of the trial court. See Webb v. Lake Mills Community School District, 344 F.Supp. 791, 800-801 (N.D. Iowa 1972).

The plaintiff also sustained his burden of proof in establishing that he was entitled to damages, B-W Acceptance Corp. v. Saluri, 258 Iowa 489, 497-498, 139 N.W.2d 399 (1966). The award of damages was consistent with and justified by the evidence properly introduced at trial.

Therefore, we affirm the judgment of the trial court.

AFFIRMED.

All judges concur except Oxberger, J., and Carter, J., who dissent.

OXBERGER, J. (dissenting)

I dissent. I think when Donnelly continued to work after his employer's announcement of the new station policy regarding nonpayment of commissions upon termination, he agreed to work under this new policy.

After Donnelly's protest, the employer responded that "it was the policy statement for the entire sales staff and constituted the rules under which they would work." The Iowa Supreme Court has not been called upon to answer this specific question. In other jurisdictions the employee who continues to work after his employer announces changes in the terms of his employment does so under the newly announced policy. In L. G. Balfour Co. v. Brown, 110 S.W.2d 104, 107 (Ct. of Civ. App., Tex. 1937) the court ruled when the employer made a change in the employee's compensation at variance with the contract, the employee

> ". . . was called upon to elect whether he would accept the modified contract or rely upon the old and sue for its breach. He could not continue his services under the new or modified contract and later rely upon the terms of the old; his election must have been made within a reasonable time after the condition arose . . . of course this continued service was not without protest; however, an earnest protest was not sufficient, he was called upon to act; this he did by continuing in the service."

Donnelly continued to work for Fort Dodge Broadcasting Inc. for several years after the announcement of the new policy. Such employment was subject to the new policy since Donnelly by continuing to perform in effect consented to the modification. See Weiss v. Daro Chrome Corp., 207 F.2d 298, 300 (8th Cir. 1953). I would hold that where an employee accepts or retains employment with knowledge of new or changed terms or conditions, the resulting contract embodies the new or changed terms or conditions. See Stream v. Starkey, 111 N.W.2d 785, 788 (Minn., 1961); Yoselowitz v. Peoples Bakery, 277 N.W. 221, 223 (Minn. 1938).

I would reverse the trial court finding of breach of oral contract and awarding damages.

Carter, J. joins in this dissent.