IN THE COURT OF APPEALS OF IOWA

No. 0-085 / 99-191
Filed May 31, 2000

DENNIS E. LEAHY,
Plaintiff-Appellee,

vs.

DEERE & COMPANY,
Defendant-Appellant.

FILED
MAY 31 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Deere & Company appeals the judgment, entered upon a jury verdict, in favor of Dennis Leahy in his wrongful termination suit. **AFFIRMED.**

Frank Harty, Richard J. Sapp and W. Don Brittin, Jr. of Nyemaster, Goode, Voigts, West, Hansell, & O'Brien, P.C., Des Moines, for appellant.

John J. Rausch and Robert L. Rausch Law Firm, Waterloo, for appellee.

Heard by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

VAITHESWARAN, J.

A jury awarded Dennis Leahy $347,250 in his breach of contract action against employer Deere & Co. On appeal, Deere contends the district court should have granted judgment in its favor on the grounds that: (1) federal labor law preempted Leahy's claims; (2) there existed no enforceable contract; and (3) the statute of limitations expired. Deere also challenges a jury instruction and certain evidentiary rulings. We affirm.

I. Background Facts and Proceedings

Leahy worked for Deere from March 1972 through October 3, 1995. At the time of his discharge, Leahy worked for the heat treatment department, where he hardened gear teeth to increase the wear and strength of the part. Deere first terminated Leahy on June 13, 1993. Leahy contested the termination by filing a grievance with his union. The parties and the union resolved the grievance by agreeing that Leahy would be reinstated for a probationary period. The memorandum of understanding states:

> [t]he Company agrees to return Dennis Leahy, Clock Number 22123, to active employment effective Monday, 21 February 1994[.] This reinstatement is being made under the terms of a three (3) year probationary period from the effective date of this agreement. Should the Company find it necessary to discipline Mr. Leahy for any misconduct violation during this three (3) year probationary period, he will be discharged without recourse to the grievance procedure.[1]

On August 16, 1994, Leahy manufactured fifty parts, forty of which were defective. The company referred him to its physician, Dr. Buck, for an evaluation. Dr. Buck noted Leahy had a history of sleep apnea and restricted him from operating hazardous machinery and company vehicles, including an

[1] This document is also referred to as a "last chance agreement."

induction furnace. On December 22, 1994, Dr. Buck released Leahy to work without restriction. On September 28, 1995, Leahy checked ninety two parts of an internal gear. Deere determined Leahy failed to detect visible defects in all the parts. Deere terminated him on October 3, 1995, following a disciplinary hearing.

On August 1, 1996, Leahy sued Deere, alleging the company's decision to discharge him amounted to: (1) a breach of the memorandum of understanding; (2) a breach of the collective bargaining agreement governing employment at Deere; and (3) a violation of the Americans with Disabilities Act. Deere moved for summary judgment on the third count, asserting Leahy did not file his action within ninety days after receiving a right-to-sue letter, as prescribed by federal and state statutes.[2] The district court granted the motion. The remaining two counts were tried to a jury in September 1998.

At the close of Leahy's case, Deere moved for a directed verdict on the grounds that: (1) the action was time-barred under section 10(b) of the National Labor Relations Act; (2) Leahy did not mitigate damages; (3) Leahy failed to establish Deere breached its contractual agreement as set forth in the collective bargaining agreement and memorandum of understanding; (4) the uncontroverted evidence established Leahy committed misconduct; (5) Leahy failed to establish a causal connection between his termination and claimed damages; and (6) Leahy's claim for future damages was inappropriate. The

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[2] Leahy's petition sought relief for asserted disability discrimination only under the federal ADA and not under the Iowa Civil Rights Act. Therefore, the basis for Deere's state law statute of limitations defense is unclear. *See Dominguez v. City of Council Bluffs*, 974 F.Supp. 732, 735 (S.D. Iowa 1997) (stating person filing ADA claim must timely file charge with the Equal Employment Opportunity Commission).

district court preliminarily ruled that the statute of limitations did not bar the action. The court reserved ruling on the failure to mitigate and future damages issues and ruled the issue of whether a breach occurred would be submitted to the jury. Following trial, the jury found Deere discharged Leahy in violation of the terms of an employment contract, and awarded damages of $347,250. The district court denied Deere's post-trial motions and this appeal followed.

II. Preemption

Deere maintains section 301 of the Labor Management Relations Act preempts Leahy's state breach of contract action. *See* 29 U.S.C. § 185 (1994). Leahy counters that Deere did not preserve error.

Our review of a district court's ruling on a directed verdict motion is limited to the grounds raised in the motion. *Podraza v. City of Carter Lake*, 524 N.W.2d 198, 203 (Iowa 1994). An appellate court will not consider grounds the movant did not place before the district court, except where the record establishes that the district court, counsel, and both parties "had no doubt what the grounds for the motion were and these grounds were obvious and discussed thoroughly below." *Id.* A motion for judgment notwithstanding the verdict must rest on grounds raised in a motion for directed verdict. *Fed. Land Bank of Omaha v. Woods,* 480 N.W.2d 61, 65 (Iowa 1992). When considering either motion, a court must view the evidence in the light most favorable to the non-moving party regardless of whether the evidence was contradicted. *Id.*

Our review of the record confirms Deere's trial counsel did not alert the district court to the preemption defense appellate counsel now raises. Although Deere's motion for directed verdict referred to section 301, that reference was

made in the context of its argument that Leahy's action was barred by a federal statute of limitations. The record does not reveal Deere ever used the term "preemption" in its fairly lengthy argument supporting its motion for directed verdict.[3] While the doctrine was mentioned in Deere's oral arguments supporting its post-trial motions, that reference again was in the context of its statute of limitations argument and, in any event, came too late. Finally, the district court's verbal and written rulings make no reference to the preemption doctrine. As Deere did not give the district court an opportunity to consider the issue it now raises, we normally would have nothing to review. *Podraza*, 524 N.W.2d at 203.

Our inquiry does not end here, however. Despite Deere's failure to raise the issue below, we may address the preemption defense if we deem it a challenge to the court's subject matter jurisdiction or if we find compelling policy reasons to consider the issue. *See Christie v. Rolscreen Co.*, 448 N.W.2d 447, 450 (Iowa 1989) (noting subject matter jurisdiction may be raised at any time); *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210, 1215-16 (6th Cir. 1987) (considering issue in light of policy favoring uniform application of federal law, after conceding preemption was not raised as an affirmative defense).

Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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[3] Deere maintains in its reply brief that its trial brief referred to the preemption doctrine. That brief was not made a part of the trial record. *See* Iowa R. Civ. P. 106(d) (stating most briefs are not filed with clerk of court). Therefore, we cannot consider defense counsel's summary of what the brief said.

29 U.S.C. § 185(a). Federal courts have construed this provision to also preempt state law claims that are "substantially dependent" upon analysis of a collective bargaining agreement or are "inextricably intertwined" with consideration of the terms or provisions of a collective bargaining agreement. *Oberkramer v. IBEW-NECA Serv. Ctr., Inc.*, 151 F.3d 752, 756 (8th Cir. 1998) (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219-20, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985)).

Certain federal courts have stated the preemption doctrine raises a question of subject matter jurisdiction. *See Luecke v. Schnucks Mkts., Inc.* 85 F.3d 356, 358 (8th Cir. 1996); *Harris v. Alumax Mill Prod., Inc.*, 897 F.2d 400, 402 (9th Cir. 1990). These courts, however, have not specifically been faced with an error preservation issue. Other courts have presumed that the doctrine does not raise an issue of subject matter jurisdiction. These courts have concluded the doctrine may be waived under certain circumstances. *See Sweeney v. Westvaco Co.*, 926 F.2d 29, 40-41 (1st Cir. 1991); *Johnson v. Armored Transp. of Cal., Inc.*, 813 F.2d 1041, 1043 (9th Cir. 1987).

After carefully considering the cited cases, we find *Sweeney* and *Johnson* more persuasive on this issue. These cases specifically addressed the waiver question and refused to find the preemption defense is one the parties have an absolute right to raise at any time. *See Sweeney*, 926 F.2d at 39. In *Johnson*, the court stated, "a preemption argument that affects the choice of forum rather than the choice of law is not waivable," whereas a preemption argument implicating a choice-of-law question is waived unless it is timely raised. *Johnson*, 813 F.2d at 1043-44.

The issue Deere raises on appeal is whether federal law preempts this action. This is a choice-of-law question which, under the *Johnson* rationale, is a type of preemption argument that may be waived if not properly asserted in the district court. We see no reason to deviate from that reasoning. The preemption argument asserted by Deere does not affect the district court's power to hear a class of cases, the hallmark of a challenge based on lack of subject matter jurisdiction. *See Christie*, 448 N.W.2d at 450. Accordingly, we conclude the preemption argument raised here may be waived because it does not implicate the court's subject matter jurisdiction.

We next turn to the question whether policy reasons warrant consideration of the preemption issue despite Deere's failure to raise preemption before the district court. Although we recognize the strong policy in favor of promoting uniform application of federal law, we discern an equally compelling policy in favor of requiring parties to specifically identify the law on which they intend to rely. *See State v. Mann*, 602 N.W.2d 785, 790 (Iowa 1999). As one federal court stated with respect to the identical preemption argument Deere seeks to raise,

> an issue is not properly reserved by perfunctory invocation of a vast and variegated body of law--by pointing to Title 29 of the United States Code and inviting the district judge to thumb through it for some ground on which the party extending the invitation can win.

Nat'l Metalcrafters v. McNeil, 784 F.2d 817, 825 (7th Cir. 1986) (nevertheless proceeding to consider the issue where parties raised an analogous preemption argument). We conclude Deere waived its preemption argument by failing to raise it before the district court.

III. Existence of Independent State Contract Action

Deere next contends "the trial court erred by failing to conclude that the Last Chance Agreement was nothing more than an adjunct to the collective bargaining agreement." Leahy counters that Deere did not preserve error on this issue. We conclude Deere raised this issue, but not the related contention that Leahy was foreclosed from asserting an independent state breach of contract claim.

During argument on the motion for directed verdict, Deere's counsel urged that: (1) the collective bargaining agreement as amended by the memorandum of understanding constituted the contract; (2) any breach of contract action premised on that contract had to be filed within six months of final action under the collective bargaining agreement; and (3) Leahy presented no evidence that the contract was breached.[4] The only disagreement between the parties concerned what documents comprised the contract. Deere argued the contract consisted of the collective bargaining agreement as amended by the memorandum of understanding. Leahy countered that the memorandum of understanding alone comprised the contract.

The district court recognized the memorandum of understanding could not stand on its own as an employment agreement. The court in fact agreed with Deere that the contract consisted of the collective bargaining agreement supplemented by the memorandum of understanding and other documents. The

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[4] Deere stated, "the plaintiff has failed to show by a preponderance of the evidence or even introduce a scintilla of evidence tending to show that this defendant breached its contractual agreement with this plaintiff as set forth in the master collective bargaining agreement by and between this defendant and Local 838 of the United Auto Workers as amended by the letter agreement of February 21, 1994."

court stated, "the parties, I think, both acknowledge that the contract that's involved here is the collective bargaining agreement as amended by the local rules and rules of conduct and the memorandum of understanding, and, in fact, I think we have a stipulation of that effect in the record in this case." The court later stated, "we're dealing with the collective bargaining agreement as modified by the memorandum of understanding."[5]

As the court agreed with Deere that the memorandum of understanding was an adjunct to the collective bargaining agreement, we have no reason to review this issue on appeal. However, we believe Deere is really challenging the district court's failure to further conclude that the memorandum of understanding was so inextricably intertwined with the collective bargaining agreement that it could not form the basis of an independent state breach of contract claim. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 395-96, 107 S. Ct. 2425, 2431, 96 L. Ed. 2d 318, 329 (1987); *cf. Barske v. Rockwell Int'l. Corp.*, 514 N.W.2d 917, 921 (Iowa 1994) (noting employees covered by labor contracts could assert legal rights independent of the labor contract as long as they did not rely on the collective bargaining agreement). This again is a preemption issue that the district court did not consider because it was not raised.

Deere nevertheless maintains it preserved the issue by advising the court, "it's impossible to divorce the cause of action brought by the plaintiff from the collective bargaining agreement, because if one would divorce it, that would

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[5] Despite this ruling that a contract existed, the jury received instructions requiring it to decide whether a contract existed. *See* Instruction No. 17 (requiring Leahy to prove that he "had a contract of employment with the defendant Deere and Co.). The court wondered aloud if it needed to submit the instruction in light of the parties' agreement on the issue. However, the parties did not object to the instruction.

make the plaintiff an at-will employee, and as an at-will employee, this defendant would have the right to terminate the employee at any time for any reasons." The statement was made in the context of Deere's contention that the federal statute of limitations should apply. Therefore, we disagree that this statement preserved error on Deere's specific contention that Leahy was preempted from bringing an independent state breach of contract claim.

We also are not persuaded that Deere's reference to *Yockey v. State*, 540 N.W.2d 418 (Iowa 1995) is sufficient to preserve error. The court there affirmed dismissal of a breach of employment contract claim. *Yockey*, 540 N.W.2d at 422-23. However, Deere cited the court to this case, not for the proposition that no contract existed, but for precisely the opposite proposition that "the matter does arise out of the employment relationship governed by the contract." Additionally, the fact that Deere did not assert the absence of a state breach of contract claim as an affirmative defense or file a dispositive motion on this ground lends credence to our belief that, by citing this case, Deere did not intend to raise the issue it now raises. Accordingly, we conclude Deere failed to preserve error on its contention that Leahy was foreclosed from asserting an independent state breach of contract claim.

IV. Statute of Limitations

Following the close of Leahy's case, Deere moved to amend its answer to assert the action was time barred by provisions of the National Labor Relations Act. The district court preliminarily denied the motion, concluding that the time deadlines contained in the National Labor Relations Act did not apply, in light of Leahy's February 1994 agreement to forego grievance procedures. The court

also denied that portion of Deere's motion for judgment notwithstanding the verdict, which raised this issue. On appeal, Deere contends its statute of limitations defense was not an affirmative defense that had to be pled in the answer but a statute of repose. Leahy responds that this contention was not preserved below, the defense is an affirmative defense which is waived if not pled, and the district court did not abuse its discretion in denying Deere's motion to amend its answer.

A statute of repose differs from a statute of limitations, although both have comparable effects. *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.* 507 N.W.2d 405, 408 (Iowa 1993) (quoting *Hanson v. Williams County*, 389 N.W.2d 319, 321 (N.D. 1986)). A statute of limitations bars the right to prosecute an accrued cause of action after a certain period of time, while a statute of repose terminates any right of action after a specified time even if an injury has yet to occur. *Id.*

We agree with Leahy that Deere did not raise below its specific contention that section 10(b) of the National Labor Relations Act is a statute of repose. Deere did not used the term "repose" during its argument to the court. Further, Deere moved to amend the pleadings, an act which is inconsistent with a belief that section 10(b) is a statute of repose. It did so without caveat. Accordingly, we conclude we have nothing to review. *Podraza*, 524 N.W.2d at 202-03.[6]

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[6] We note trial counsel's decision not to argue that section 10(b) of the National Labor Relations Act was a statute of repose finds abundant support in federal case precedent. *See Barlow v. Am. Nat'l Can Co.*, 173 F.3d 640, 642 (8th Cir. 1999) (characterizing provision as statute of limitations); *United States Postal Serv. v. Am. Postal Workers Union*, 893 F.2d 1117, 1122 (9th Cir. 1990) (holding section 10(b) was a statute of limitations defense which was waived because it was not affirmatively pled).

V. Jury Instruction

Deere contends the district court erred in submitting to the jury Instruction No. 15 on impossibility of performance. This instruction states, "[p]erformance is excused if the other party prevents it or makes it impossible."[7] We review objections to jury instructions for errors of law. *Franklin v. Andrews*, 595 N.W.2d 488, 489 (Iowa 1999); *see also Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999) (stating review is for prejudicial error). We determine whether the instruction is supported by substantial evidence and properly states the law. *Collister v. City of Council Bluffs*, 534 N.W.2d 453, 454 (Iowa 1995). When weighing the sufficiency of the evidence to support the instruction, we examine the evidence in the light most favorable to the party requesting the instruction. *Franklin*, 595 N.W.2d at 489.

> Impossibility of performance is
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> > an excuse for nonperformance generally where that which has been promised becomes [o]bjectively impossible to perform due to no fault of the nonperforming party. However, ordinarily a contingency which reasonably may have been anticipated must be provided for by the terms of the contract, or else the impossibility of performance resulting therefrom does not operate as an excuse.

Nora Springs Coop. Co. v. Brandau, 247 N.W.2d 744, 747 (Iowa 1976).

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[7] The court did not submit Model Jury Instruction 2400.9 which defines impossibility of performance as

> [E]xtraordinary circumstances which:
> 1. Prevent a person from carrying out the terms of the contract.
> 2. Could not reasonably have been anticipated; and
> 3. Are not the fault of that party.

This instruction further states, "[p]erformance is not excused if the party who promised to perform created the circumstances which made performance impossible, or just because performance became economically burdensome or unattractive."

On appeal, Deere contends Instruction No. 15 should not have been given because impossibility of performance is an affirmative defense rather than a doctrine that a plaintiff can use offensively. *See Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 229 (Iowa 1998); *see also* Iowa R. Civ. P. 86 (characterizing excuse as an affirmative defense). *But see* Model Jury Instruction 2400.10 comment (stating, "this instruction may be used where a plaintiff claims this ground as an excuse for nonperformance or where defendant raises this affirmative defense as a discharge of a duty."). However, Deere did not challenge the jury instruction on this basis, nor did it generally challenge the applicability of this doctrine to this case. It is clear, therefore, that the impossibility of performance issue was tried by consent. Accordingly, we conclude Deere did not preserve error on its present contention that the district court erred as a matter of law in giving Jury Instruction No.15. *Midwest Home Distrib., Inc. v. Domco Indus. Ltd.*, 585 N.W.2d 735, 744 (Iowa 1998).

Deere also challenges the sufficiency of the evidence to support the instruction. In deciding to submit the instruction, the district court stated, "[i]t appears to me that the evidence presented as to that issue is thin, but an issue is presented, and the jury needs to be aware of how it might use such evidence." The court summarized the plaintiff's evidence as follows:

> The plaintiff had a condition, that Dr. Buck knew about it, that certain treatment recommendations were made, that Dr. Buck was aware that those treatment recommendations were not being complied with and, nevertheless, authorized him to return back to full-service duty.

In its ruling on Deere's motion for judgment notwithstanding the verdict, the court stated,

> A jury issue was presented as to the causative relationship between plaintiff's sleep apnea and the event leading to his termination. Plaintiff did make a statement to his employer to the effect that he could not conclusively state at the time of his termination that his failure to perform was caused by his sleep apnea. However, evidence was presented regarding the issue as to whether an individual could be affected by an apneic condition such as plaintiff's and not be aware of it. Evidence of the sleep apnea condition was relevant and material to the issues in the case. Defendant was aware prior to termination of plaintiff's apneic condition. Defendant was, in fact, involved in treatment and monitoring of the condition.

We conclude the evidence was sufficient to support the impossibility of performance instruction. *See* Arthur L. Corbin, *Corbin on Contracts* §§ 1334-35, at 374-84 (1962) (noting promisor may be discharged insofar as performance is prevented by illness). Leahy's medical expert Dr. Risk testified "[m]y opinion is that he should not have been released to work in a potentially hazardous situation without restriction." He further opined Leahy could have had sleep apnea without being aware of it. This testimony would explain Leahy's reluctance to attribute his work problems to that condition. In light of Dr. Risk's testimony, the district court did not err in submitting Instruction No. 15.

VI. Evidentiary Rulings

Deere finally argues that the district court abused its discretion in: (1) prohibiting Deere from offering evidence of Leahy's prior misconduct; (2) admitting evidence of post-termination modifications in Deere's part testing procedure; and (3) allowing Dr. Risk to testify. We review a district court's rulings on the admissibility of evidence for abuse of discretion. *Bingham v. Marshall Huschart Machinery Co.*, 485 N.W.2d 78, 80-81 (Iowa 1992).

With respect to the prior misconduct issue, Deere initially took exception to the district court's ruling that it would only be allowed to inquire into Leahy's last

act of misconduct. However, Deere later stipulated to a limitation on this type of testimony. Therefore, error was waived error. *State v. Davis*, 581 N.W.2d 614, 616 (Iowa 1998).

Deere also waived error on the subsequent remedial measures issue by failing to direct this court to those portions of the lengthy transcript that contained the asserted error and by apparently abandoning the issue in its reply brief. Iowa R. App. P. 14; *Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171, 174 (Iowa 1990).[8]

Finally, Deere contends the district court abused its discretion in allowing Dr. Risk to testify. Before trial, Deere filed a motion in limine seeking to exclude all information relating to Leahy's dismissed Americans with Disability Act claim. The district court ruled Leahy would be precluded from making reference to that claim. The court, however refused to exclude evidence of Leahy's sleep apnea condition, concluding this information was relevant to the question of whether Leahy committed misconduct. Deere only challenges admission of Dr. Risk's testimony.

We assume without deciding that Deere's motion in limine was sufficient to preserve error on its specific challenge to Dr. Risk's testimony.[9] By the time of trial the parties had agreed to submit a breach of contract claim to the jury. The

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[8] The record reflects at least two rulings on this issue. First, the district court admitted evidence that certain procedures were changed in the operations Leahy was involved with to make it easier for machine operators to detect flaws. Second , the court allowed limited testimony on the frequency of scrap produced from the heating process. However, the court expressly gave Deere the opportunity to explain the reasons behind the amounts of scrap produced at various times and the difference in types of cracks that were detected. Deere elected not to present this information to the jury. Therefore, we have doubts as to whether this issue was preserved even if Deere had cited to the transcript in its appellate briefs.

[9] A ruling excluding all ADA related evidence likely would have precluded Leahy from calling Dr. Risk or Dr. Buck or from introducing any medical records.

parties also had agreed that the key issue was whether Leahy breached the previously defined contract by committing misconduct. Leahy asserted he did not engage in misconduct because his sleep apnea condition prevented him from performing his job, and Deere knew of this condition but released him to return to work without restriction. Deere asserted that Leahy did commit misconduct by turning metal pieces into scrap. With the issues framed in this fashion, we cannot conclude the court abused its discretion in permitting introduction of sleep apnea evidence which presumably included Dr. Risk's testimony. Indeed, by the time Dr. Risk testified, Dr. Buck had already testified that Leahy's condition would be relevant to a determination of whether he committed misconduct. Accordingly, we affirm this evidentiary ruling.

VII. Summary

Our opinion is necessarily based on the posture of the case before the district court. The parties essentially agreed to try a state breach of contract action which included offensive use of the impossibility of performance doctrine. The case proceeded to the jury on these theories. Based on the record created by the parties, we affirm the judgment in favor of Leahy.

AFFIRMED.