UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SCOTT KINGSTON, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.	CASE NO. C19-1488 MJP ORDER ON MOTION FOR PARTIAL DISMISSAL

The above-entitled Court, having received and reviewed:

1. Defendant's Partial Motion to Dismiss Plaintiff's Amended Complaint (Dkt. No. 24),
2. Plaintiff's Response to Defendant's Partial Motion to Dismiss Plaintiff's Amended Complaint (Dkt. No. 25),
3. Defendant's Reply in Support of Partial Motion to Dismiss Plaintiff's Amended Complaint (Dkt. No. 26),

all attached declarations and exhibits, and relevant portions of the record, rules as follows:

IT IS ORDERED that the motion is PARTIALLY GRANTED and PARTIALLY DENIED; Counts 2 – 5 (breach of express unilateral contract, breach of implied-in-fact contract, unpaid wages on termination, and failure to pay wages) will be DISMISSED with prejudice. Count 6, Plaintiff's claim for unjust enrichment, will be permitted to go forward.

Background[1]

Plaintiff was a sales manager for Defendant International Business Machines Corporation ("IBM") whose wages consisted of a combination of base salary and commissions. (FAC, ¶¶ 1, 7, 12) In April of 2018, Plaintiff alleges that he was terminated for complaining about the discriminatory treatment (an inequitable application of the company's commission policy) of an African-American sales representative. (Id., ¶¶ 42-29, 55). He further alleges that, at the time he was terminated, he was owed $124,425 in commissions generated by sales during the first quarter of 2018. Id., ¶¶ 58-60, 72-90). According his complaint, Plaintiff was paid no commissions for the final quarter of his employment at IBM. Id., ¶ 61.

Plaintiff has filed a lawsuit against his former employer, alleging causes of action for retaliation, breach of express unilateral contract, breach of implied-in-fact contract, unpaid wages on termination, failure to pay wages, unjust enrichment, wrongful termination, and wage discrimination. Defendant does not, at this time, challenge Plaintiff's claims for retaliation, wrongful termination, and wage discrimination, but seeks dismissal of all his other causes of action.

Standard of Review

Defendant brings its motion under FRCP 12(b)(6). Under FRCP 12(b)(6), the Court may dismiss a complaint for "failure to state a claim upon which relief can be granted." In ruling on a

[1] All factual allegations derived from Plaintiff's First Amended Complaint (Dkt. No. 20; "FAC").

motion to dismiss, the Court must construe the complaint in the light most favorable to the non-moving party. Livid Holdings, Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005). The Court must accept all well-pleaded allegations of material fact as true and draw all reasonable inferences in favor the plaintiff. Wyler summit Partnership v. Turner Broad. Sys., 135 F.3d 658, 661 (9th Cir. 1998).

Dismissal is appropriate where a complaint fails to allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)/ A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Aschcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). As a result, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555.

Discussion

During the time period at issue in this litigation – the first quarter of 2018 – Plaintiff was operating under a written commission plan called an Incentive Plan Letter ("IPL"; Dkt. No. 24, Ex. 1). Plaintiff alleges the existence of the IPL in his complaint (FAC, ¶¶ 73-75); Defendant cites case authority for the Court's right to consider documents referenced in the complaint in ruling on a motion to dismiss. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 194) *overruled on other grounds*, 307 F.3d 1119 (9th Cir. 2002).

Defendant cites several provisions of the IPL which it contends defeat the causes of action it attacks in this motion. The first provision concerns the "Right to Modify or Cancel:"

> **Right to Modify or Cancel:** IBM reserves the right to adjust the Plan terms, including, but not limited to, changes to sales performance objectives, assigned territories or account opportunities, applicable incentive payment rates or similar earnings opportunities, or to modify or cancel the Plan, for

> any individual or group of individuals, including withdrawing an offered or accepted Incentive Plan Letter.

Dkt. No. 24-1 at 2.

The second provision cited relates to "Review of a Specific Transaction:"

> **Review of a Specific Transaction:** If a specific customer transaction has a disproportionate effect on an incentive payment when compared with the opportunity anticipated during account planning and used for the setting of sales objectives, or is disproportionate compared with your performance contribution towards the transaction, IBM reserves the right to review and, in its sole discretion, adjust the incentive achievement and/or related payments.

Id.

A third provision of the IPL covered Defendant's right to change its incentive payment calculations in the event of an error:

> **Adjustment for Errors:** IBM reserves the right to review and, in its sole discretion, adjust or require repayment of incorrect incentive payments resulting from incomplete incentives processes or other errors in the measurement of achievement or the calculation of payments, including errors in the creation or communication of sales objectives. Depending on when an error is identified, corrections may be made before or after the last day of the full-Plan period, and before or after the affected payment has been released.

Id. at 3.

Finally, Defendant quotes the "Earnings" clause from the document:

> **Earnings:** Incentive payments you may receive for Plan-to-Date achievement are a form of advance payment based on incomplete business results. Your incentive payments are earned under the Plan terms, and are no longer considered Plan-to-Date advance payments, only after the measurement of complete business results following the end of the full-Plan period. (Or, if applicable, after the date you left the Incentive Plan early.) Incentive payments will be considered earned only if you have met all payment requirements, including: (1) you have complied with the

> Incentive Plan; (2) you have not engaged in any fraud, misrepresentation or other inappropriate conduct relating to any of your business transactions or incentives; and (3) the customer has paid the billing for the sales or services transaction related to your incentive achievement.

Id.

The IPL indicates that, in accepting the arrangement, Plaintiff had read and understood the terms of the document. The Court concludes that Counts 2 - 5 rise or fall on whether these provisions permitted Defendant, at its discretion, not simply to reduce Plaintiff's rate of compensation on his commissions, but to pay him nothing. If that question is answered in the affirmative, then that authority becomes an term of the contract and Defendant was simply performing under its agreed-upon authority (or, conversely, there was no meeting of the minds and no contract at all); similarly, Plaintiff's "wages" (what he was statutorily entitled to by way of compensation) must be assessed in that light. If the answer is that the law did not permit Defendant to exercise its discretion in that fashion, Plaintiff has plead valid claims under Washington statutory legislation; conversely, if IBM was within its contractual rights to determine Plaintiff was entitled to no commissions for the time period at issue, the state statutes do not afford Plaintiff a remedy.

Defendant cites a plethora of legal opinions from various districts and circuits (fourteen, to be exact) upholding similar terms in other IPLs subjected to similar legal claims. There is some variation in the terms of the IPLs (e.g., some of them explicitly state "this is not a contract," and/or "we make no promise to make distributions"), but all of them contain language asserting that IBM maintains the authority, up until the moment the commission is finally determined, to "modify or cancel" the commission agreement. And, in many cases in many jurisdictions, courts have found that those terms are clear and give IBM the right to pay only a portion of commissions generated, or none at all, with impunity.

Plaintiff's attempt to repudiate Defendant's legal theory and its authority – particularly as regards the critical element of "mutual assent" – is unpersuasive. First, he asserts:

> To the extent that Mr. Kingston is required to plead facts evidencing mutual assent, he has done so. He alleges that IBM sent him the incentive plan letter and promised to pay commissions *in accordance with the plan* and that Mr. Kingston accepted the offer by performing work for IBM. Dkt. No. 20 ¶¶ 73-76.

Dkt. No. 25, Response at 12 (emphasis supplied). Plaintiff only succeeds in making Defendant's point – IBM promised to pay "in accordance with [a] plan" which gave the company the authority to both recalculate the commission or decline to offer any commission at all.

Second, Plaintiff asserts that Defendant's cases are inapposite because "[m]ost were decided in the context of summary judgment or trial" (naming two out of the 14 cases cited by Defendant). Id. at 13. It is equally unpersuasive. Eight of Defendant's fourteen cases are based on motions to dismiss or for judgment on the pleadings; even those which are not FRCP 12(b) motions remain purely legal calls in which the facts (basically, the wording of the IPLs) are undisputed and no extraneous circumstances (e.g., oral amendments) are cited.

Tellingly, Plaintiff cites only a single case to the contrary (Redman v. Nevada Bell Telephone Co., No. 3-05-CV-0094-ECR-VPA, 2006 WL 8442502 at *7 (D. Nev. June 16, 2006))("although the Plan's language explicitly retains [Defendant]'s right to 'amend, change, or cancel' the incentive plan 'solely at its discretion,' that language does not explicitly identify *retroactive* changes;" emphasis in original). It is over 13 years old, a District Court opinion (i.e, persuasive authority at best), and has never been cited anywhere else since. The Court considers the opinion an "outlier."

Breach of unilateral contract/Breach of contract implied-in-fact (Claims No. 2 and 3)

The parties agree that a unilateral contract consists of an offeror's promise to do something in the event the offeree performs a certain act. Cook v. Johnson, 37 Wn.2d 19, 23 (1950); Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc., 169 Wn.App.11, 129 (2012). The traditional elements of a contract are met by the promise (offer) and the performance (acceptance); unilateral contracts also require the same mutual assent or "meeting of the minds" as other valid contractual arrangements.[2]

Likewise, a party attempting to establish a contract implied-in-fact

> must establish the following elements: (1) the defendant requests the plaintiff to perform some service, (2) the plaintiff expects the payment for the service, and (3) the defendant knows or should know the plaintiff expects payment for it.

25 David K. DeWolf et al., Washington Practice: Contract Law & Practice § 1:9 (3d ed. Nov. 2019 Update). This type of contractual agreement, "[l]ike an express contract, '[] grows out of the intentions of the parties to the transaction, and there must be a meeting of the minds.'" Heaton v. Imus, 93 Wn.2d 249, 252 (1980)(*quoting* Milone v. Tucci, Inc. v. Bona Fide Builders, Inc., 49 Wn.2d 363, 368 (1956)). Just as with an express contract, a plaintiff must "prove each

---

[2] As with bilateral contracts, unilateral contracts are defined by traditional contract concepts of offer, acceptance, and consideration… In addition, as with bilateral contracts, unilateral contracts require mutual assent, also known as a meeting of the minds. *Multicare*, 114 Wn.2d at 586-88, 586 n.24.

Regarding mutual assent, we follow the objective manifestation theory of contracts. *Id.* at 586. "[T]he unexpressed subjective intention of the parties is irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations. To determine whether a party has manifested an intent to enter into a contract, we impute an intention corresponding to the reasonable meaning of a person's words and acts." *Id.* at 587 (citations omitted).

Landes v. Cuzdey, No. 51841-4-II, 2019 Wash. App. LEXIS 2218, at *16 (Ct. App. Aug. 20, 2019).

essential fact [of the contract], including the existence of a mutual intention." Cahn v. Foster & Marshall, Inc., 33 Wn.App. 838 (1983).

The facts alleged in this complaint, along with the clear terms of the IPL, establish that Plaintiff and Defendant either (1) reached an agreement via the IPL giving Defendant unfettered authority to modify or cancel the agreement up until the determination of the "final business result" or (2) did not have a meeting of the minds about the nature of the commission payment procedure at IBM. If the answer is (1), there is no breach of any sort of contract created by Defendant doing what it was entitled by the terms of the agreement to do. If the answer is (2), there is no mutual assent and therefore no contract. Either way, Plaintiff cannot state a claim sufficient to entitle him to relief on his contractual causes of action.

Plaintiff cites Washington contract law for the proposition that, "[w]hen an employer offers to compensate an at-will employee for work performed, the employer may change the terms of compensation *prospectively* if the employee is notified of the changes and continues working." Response at 13; Duncan v. Alaska USA Fed. Credit Union, Inc., 148 Wn.App. 52 (2008)(emphasis in original). The problem with this argument is that, in altering the commission agreement after the close of the quarter, Defendant was not "chang[ing] the terms of compensation;" it was exercising its rights under the agreement to modify the terms of compensation or cancel the agreement altogether.

Finally, Plaintiff attempts to argue that his performance under the terms of the agreement somehow negates the unilateral control IBM reserved for itself in the IPL. *See* Response at 17. But the case he cites for that proposition says exactly the opposite of what he intends to establish. SAK & Assocs, Inc. v. Ferguson Constr., Inc., 189 Wn.App. 405 (2015) involved a construction subcontract where the general contractor inserted a "termination for convenience" provision

which allowed it to terminate the subcontractor's services at any point for any reason. When the general contractor exercised the option and terminated the subcontract, the company sued, arguing that the unilateral right to terminate without cause created an "illusory promise" and rendered the contract unenforceable. The Washington Court of Appeals, in upholding the grant of summary judgment for Defendant, ruled that "[i]t is well recognized that partial performance provides adequate consideration for enforcement of what otherwise might be an illusory provision granting unilateral control to one party." Id. at 414. In other words, Plaintiff's partial performance of the subcontract work didn't destroy the "illusory promise," it *established* Defendant's right to invoke the unilateral termination for convenience clause. Plaintiff's argument has no support in general contract law or Washington state law.

The Court finds that Defendant is entitled to a dismissal of the contract causes of action.

Statutory wage claims/RCW 49.48.010 and 49.52.070 (Claims No. 4 and 5)

Washington's Wage Rebate Act provides that an employer who, "[w]illfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract" shall be guilty of a misdemeanor (RCW 49.52.050(2)), and "shall be liable in a civil action by the aggrieved employee." RCW 49.52.070.

The operative phrase here, of course, is "the wage such employer *is obligated to pay*." Plaintiff argues that his claims that "he had an explicit or implied contract with IBM" that required the company to pay the commissions, and that Defendant owed him the commissions he seeks through this lawsuit (FAC, ¶¶ 72-90) are sufficient to plead a claim under the Wage Rebate Act. The Court agrees with Defendant – these are the kind of conclusory allegations prohibited by Iqbal and Twombly. As discussed above, the language of the IPL unambiguously establishes

that Defendant was *not* obligated to pay Plaintiff the commissions he is seeking. Without such an obligation, there can be no Wage Rebate Act violation.

RCW 49.48.010 provides that "[w]hen any employee shall cease to work for an employer, whether by discharge or by voluntary withdrawal, the wages due him or her on account of his or her employment shall be paid to him or her at the end of the established pay period." The term "wages" has been held to include commissions. Int'l Assoc. of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 35 (2002).

The claim is fatally flawed. The "wages due [Plaintiff]" in the form of commissions at the end of the established pay period were those he agreed to under the IPL, which included Defendant's right to cancel the commissions altogether. He agreed to allow IBM to modify or cancel the plan under which the commissions were paid – the wages due him (at least as far as commissions to which he might be entitled) were what IBM determined them to be.

The Court will grant Defendant's motion to dismiss the Washington statutory claims.

Unjust enrichment

Adequately pleading an unjust enrichment claim requires Plaintiff to assert "a benefit conferred upon the defendant by the plaintiff," plus "the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value." Young v. Young, 164 Wn.2d 477, 484 (2008).

The Court is unpersuaded that this cause of action must be dismissed. Although Defendant cites a number of cases in support of its position, they are (with one exception) either distinguishable or poorly reasoned.

1. Four of Defendant's cases (Middleton v. IBM, No. 19-11824, 2019 U.S. App. LEXIS 20967 at *9-10 (11th Cir. Sept. 26, 2019); Snyder v. IBM, No. 1:16-cv-03596-WMR,

2019 U.S. Dist. LEXIS 66583, at *13-16 (N.D. Ga. Mar. 18, 2019); Morris v. IBM, No. 1:18-cv-0042-LY, 2018 U.S. dist. LEXIS 222568, at *9-11 (W.D. Tex. Nov. 29, 2018); Fessler v. IBM, No. 1:18-cv-798, 2018 U.S. Dist. LEXIS 202725, AT *13-15 (E.D. Va. Nov. 28, 2018)) are based on either "quantum meruit" or unjust enrichment claims which have as an element a justified "expectation" by plaintiff or defendant that payment was due. Because of the language of the IPL discussed *supra*, it was easy in those cases to rule that no reasonable expectation existed. "Expectation" is not an element of the Washington cause of action, thus these cases are inapplicable to Plaintiff's circumstances.

2. A fifth case (Pero v. IBM, N. 12-CV-07484 (KM), 2014 U.S. Dist. 2461 (D.J.J. Jan. 2, 2014) is, to put it simply, too poorly reasoned as to stand as persuasive authority. There, Plaintiff's unjust enrichment claim was dismissed, not on "lack of reasonable expectation" grounds but based on the reasoning that Plaintiff, an IBM sales representative who had generated tens of millions of dollars in revenue for the company, had failed to articulate exactly what benefit he conferred on IBM. The case has been cited nowhere else for its holding, and (as an opinion from another District Court) is persuasive authority at best. The Court declines to follow it.

3. Defendant's sixth case (Martignetti v. IBM, No. RDB-18-2431, 2019 U.S. Dist. LEXIS 168525 (D. Md. Sept. 30, 2019) is actually on all fours with the instant matter in terms of the elements of the unjust enrichment cause of action and reached a result in alignment with Defendant's position.

> Plaintiff cannot claim that IBM's acceptance of Martignetti's services was "inequitable." As previously indicated, the IPL expressly indicated that the Plan could be modified or canceled at any time, and that IBM retained complete discretion concerning the disbursal of payments. Although these terms are highly advantageous to IBM, this alone does not render them actionable

> under an unjust enrichment theory. Martignetti agreed to make sales under these terms; if he found them unacceptable, he was free to raise the issue or seek employment elsewhere.

The Court simply disagrees with the rationale expressed in Martignetti. Merely because the terms of an agreement are in writing and a party agreed to them does not make them "equitable" – if that were true, there would be no such thing as a contract of adhesion. Martignetti is a non-binding District Court decision from another circuit, cites no authority for its reasoning, and is currently on appeal. The Court does not find it persuasive and declines to follow its lead.

Unjust enrichment is an equitable remedy. The concept of equitable jurisdiction exists to permit the court to do justice when the letter of the law either does not cover the situation or may tend to dictate an inequitable result. Plaintiff has plead sufficient facts upon which a judge could reasonably find the terms of this IPL inequitable, and the acceptance or retention of the benefit conferred by Plaintiff upon Defendant without payment of its value equally inequitable. The Court is further confirmed in this conclusion by the circumstances under which Plaintiff alleges he was terminated, allegations which the Court accepts as true for purposes of analyzing this motion.

The motion to dismiss the unjust enrichment cause of action is DENIED.

Conclusion

The clear and unambiguous language of the agreement that Plaintiff indicated he read and understood precludes either the finding of a breach of contract (if there was a meeting of the minds of the parties) or the finding of a valid contract (if there was not mutual assent regarding the terms). This conclusion dictates the dismissal both of Plaintiff's contractual causes of action and of the state statutory claims premised on the theory that Plaintiff was contractually entitled to

the commissions which he was denied. Because there are no set of facts under which Plaintiff could plead adequate causes of action under principles of contract law or state wage laws, the dismissal will be with prejudice.

However, Plaintiff has plead sufficient facts under which a reasonable jury could find for him on his claim of unjust enrichment, and Defendant's motion to dismiss that claim will not be granted.

The clerk is ordered to provide copies of this order to all counsel.

Dated April 15, 2020.

Marsha J. Pechman
United States Senior District Judge