RENDERED: January 10, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2002-CA-000273-MR

STANLEY H. KIMMEL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 99-CI-005117

PROGRESS PAINT MANUFACTURING COMPANY — APPELLEE

OPINION
AFFIRMING IN PART,
AND REVERSING AND REMANDING IN PART
** ** ** ** **

BEFORE: COMBS, MILLER[1], AND McANULTY, JUDGES.

MILLER, JUDGE: Stanley Kimmel brings this appeal from a Summary Judgment of the Jefferson Circuit Court entered September 17, 2001. We affirm in part and reverse and remand in part.

Appellant filed a complaint against appellee in the Jefferson Circuit Court alleging breach of an employment contract. Specifically, appellant alleged that appellee improperly terminated his employment and failed to pay him certain commissions upon sales. Appellee filed a motion for

[1]Judge Miller concurred in this opinion prior to his retirement effective January 1, 2003.

summary judgment. The circuit court ultimately granted the motion, thus precipitating this appeal.

Summary judgment is proper where there exists no material issue of fact, and movant is entitled to judgment as a matter of law. Ky. R. Civ. P. 56; Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). Appellant contends that the circuit court erred by concluding that appellee did not breach his employment contract. It appears that appellant had been employed with appellee for approximately twenty-five years. He was terminated in January of 1999. At the time of his termination, the terms of appellant's employment were set out in a January 12, 1994 letter of agreement (1994 agreement)[2], which read as follows:

> As under the previous agreement, Mr. Kimmel will represent Progress Pain [sic] Mfg. Co., Inc. as a straight commission sales agent selling to Kentucky Manufacturing, Leaseway Transportation Corp., auto transport companies and others.
> Progress Paint will pay 8% commission, in full, on the 22nd of each month, for the previous months [sic] sales.

---

[2]Prior to 1994, appellant was employed under the terms of a letter of agreement dated December 9, 1991, which reads as follows:

> As under the previous agreement, Mr. Stanley Kimmel will be paid 8% commission on sales. Primary accounts are Kentucky Manufacturing, Leaseway Transportation Corps' Auto Transport Companies and General Cable and others as may be agreed upon. Effective December 1, 1991, Mr. Kimmel will be paid $1500.00 per month, plus expenses.
> Salary and expenses will be reconciled in the last quarter of each Fiscal year.
> Mr. Kimmel will continue to participate in company insurance plans and E.S.O.P.

Jefferson Circuit Court Summary Judgment p. ii.

> Mr. Kimmel will pay his own expenses and is entitled to all company benefits such as, ESOP, health insurance, etc.
> Mr. Kimmel will represent no other coatings supplier while working under this agreement.

Jefferson Circuit Court Summary Judgment p. i.

Under the 1994 agreement, appellant received eight percent commission on sales with the commission paid on a monthly basis. It appears that appellant received a small portion of his commissions on an annual basis. These commissions were attributable to Acash sales@ of a *de minimis* nature.

It has been correctly observed that in Kentucky Aunless the parties specifically manifest their intention to condition termination only according to express terms, employment is considered 'at will.'@ Bailey v. Floyd County Board of Education, 106 F.3d 135, 141 (6th Cir. 1997)(citing Shah v. American Synthetic Rubber Corporation, Ky., 655 S.W.2d 489 (1983); Nork v. Fetter Printing Company, Ky. App., 738 S.W.2d 824 (1987)). An at-will employee may be dismissed at any time, and without cause. Shaw, 655 S.W.2d 489. A contract of employment may be terminable only for cause if such intention is clearly stated therein. Id.

Pointing to the 1994 agreement and the fact that he received a small amount of commissions on an annual basis, appellant argues that the agreement should be interpreted as creating a yearly employment contract. In support thereof, appellant cites this Court to Putnam v. Producers' Livestock Marketing Association, 256 Ky. 196, 75 S.W.2d 1075 (1934). Therein, the Court recognized that employment for an indefinite

period of time may be terminated by either party at-will, but that employment for a definite period of time creates a contract of employment terminable only for cause within such period. The Court noted:

> [T]he circumstances of agreeing on weekly, monthly, quarterly, or semiannual payments of wages is sufficient of itself to establish the presumption of a hiring for the period covered by each payment.
>
> . . . .
>
> There is abundant authority for the conclusion. It is the view indicated, if not positively declared, by our opinions, that the specification in the contract of an annual salary creates the inference of annual employment.

Id. at 1076-1077.

In the case at hand, the 1994 agreement did not provide that appellant would be compensated upon a yearly basis. Instead, it specifically stated that appellant was to be compensated on a monthly basis. Indeed, there was nothing in the 1994 agreement specifying the duration of appellant's employment with appellee, nor was there a provision in the agreement clearly stating the parties' intention that appellant's employment be terminable Afor cause.@ We are of the opinion the mere fact that appellant received a small portion of his commissions upon a yearly basis is not sufficient to construe his term of employment as yearly. Under these circumstances, we think, as a matter of law, the 1994 agreement did not create a yearly contract of employment.

Appellant next contends that the circuit court committed error by concluding that he was not entitled to

commissions upon Adefective product credits.@ Under the 1994 agreement, appellant claims that he was wrongfully denied commissions in the 1980's when free paint was given to a customer, Ohio Coach. Ohio Coach was given free paint because of a complaint lodged with appellee. It appears that trailers painted with appellee's paint began to rust. Appellee agreed to provide the necessary paint at no charge to repaint the trailers. Appellant was not paid a commission upon the free paint provided to Ohio Coach for the repainting of the trailers.

Appellant also claims that he was wrongfully denied commission upon defective product credits issued by appellee to Kentucky Manufacturing Company (Kentucky Manufacturing) in 1996, 1997, and 1998. It appears that Kentucky Manufacturing complained that the paint on certain trailers was Apeeling.@ Appellee agreed to cover one-half the cost of repainting the trailers and did so by issuing credits to Kentucky Manufacturing equal to same. Appellant complained to appellee several times concerning the loss of commissions upon Kentucky Manufacturing credits. Appellee continually informed appellant that it did not consider the credits a sale; thus, no commissions would be paid thereupon.

As the relevant facts are undisputed, we are left with but an issue of law C construction of the 1994 agreement. In the 1994 agreement, appellant was to receive an eight percent commission on Asales.@ Appellant urges this Court to adopt the definition of Asale@ found in Article 2 of the Uniform Commercial

Code (UCC). Kentucky Revised Statutes (KRS) 355.2-101 *et seq*. That definition is codified in KRS 355.2-106(1):

> A Asale@ consists in the passing of title from the seller to the buyer for a price (KRS 355.2-401).

This section of the UCC applies to transactions in goods. An employment contract is simply not within its scope. KRS 355.2-102. Moreover, we do not believe it reasonable to assume the parties intended to use such definition. Indeed, it is well established that words in a contract should be given their ordinary meaning unless there appears a contrary intention. Black Star Coal Corporation v. Napier, 303 Ky. 778, 199 S.W.2d 449 (1947). We observe the 1994 agreement is silent as to the definition of Asale.@

By its ordinary definition, sale means A[t]he exchange of goods . . . for an amount of money or its equivalent; . . . .@ The American Heritage Dictionary 1085 (2d College ed. 1985). Under the above definition, a sale takes place when: (1) goods are exchanged, and (2) compensation or its equivalent is received therefore.

It is undisputed that appellee did not receive compensation for the defective products, nor do we believe that the defective product credits are equivalent to compensation. We think an Aequivalent to compensation@ must confer a direct benefit in exchange for the goods. Here, the defective product credits conferred no direct benefit to appellee. Appellee neither made money nor directly profited from the issuance of the credits. We must, therefore, conclude that the transactions

involving defective product credits were not sales under the 1994 agreement. As such, we are of the opinion that appellant was not entitled to a commission upon the defective product credits.

Appellant also cites this Court to KRS 337.060(1). He argues that appellee's failure to pay the required commissions violated this statute. It reads in pertinent part:

> No employer shall withhold from any employee any part of the wage agreed upon. This section shall not make it unlawful for an employer to withhold or divert any portion of an employee's wage when the employer is authorized to do so by local, state, or federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital and medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute, nor shall it preclude deductions for union dues where such deductions are authorized by joint wage agreements or collective bargaining contracts negotiated between employers and employees or their representative.

Under KRS 337.060(1), it is impermissible to withhold Aany part of the wage agreed upon.@ Here, the agreed wage is in dispute; thus, we do not think KRS 337.060(1) applicable. Simply put, we do not believe the legislature intended KRS 337.060 to apply where there exists a *bona fide* dispute concerning wages.

Finally, appellant argues that appellee improperly lowered his commission on sales of Aclear floor finish@ to Kentucky Manufacturing. In January of 1996, it appears that appellant quoted Kentucky Manufacturing a price for clear floor finish; Kentucky Manufacturing eventually accepted the quote and placed an Ainitial@ order. Some time thereafter, appellant

received a phone call from Ken Lawrence, a sales manager for appellee. Lawrence informed appellant that he had lowered the Aselling price@ of the clear floor finish, and that appellant's commission would be reduced to three percent. A memorandum dated January 15, 1996 memorializes the phone conversation. On the initial sale and on all subsequent sales of clear floor finish to Kentucky Manufacturing, appellant received three percent commission. Appellant complains of the reduced commission upon these sales.

In granting summary judgment, the circuit court reasoned:

> Progress wanted the business of Kentucky Manufacturing and agreed to a reduction in the price of clear floor coverings. To cover some of the loss, Lawrence decided to reduce Kimmel's commission. A contract for indefinite duration of employment may be modified by agreement of the parties. Roshong v. American Saw & Tool Company, Ky., 244 S.W.2d 974 (1951). The Friction Materials Company, Inc. v. Stinson, Ky. App. 833 S.W.2d 388 (1992), cited by the Plaintiff, is easily distinguishable. In Stinson, there was a definite period of employment and provision for terminating the contract. Further, the agreed modification was effective on the day the Defendant signed the proposal although sales which preceded the agreement were subject to the original contract. In the case *sub judice* there was no employment contract, and the sales contract was not final until Lawrence agreed to the reduced product price and Kimmel was immediately notified by phone and memo. Kimmel continued his employment even though he initially disagreed with the reduced commission.

Circuit Court Summary Judgment pp. iv-v.

Employment contracts may, of course, be modified at the instance of the parties. AIn an at-will employment relationship,

the employer may be able to unilaterally impose prospective changes in the conditions of employment, or the parties may have to modify the employment relationship by contract.@ (Footnotes omitted). 27 Am. Jur. 2d Employment Relationship § 23 (1996). In this Commonwealth, an employer may unilaterally modify an at-will employment contract ***prospectively*** upon reasonable notice to the employee. See Roshong v. American Saw & Tool Company, Inc., Ky., 244 S.W.2d 974 (1951); Meyers v. Brown-Forman Distillery Company, 289 Ky. 185, 158 S.W.2d 407 (1942); see also Thomas G. Fischer, Annotation, *Sufficiency of Notice of Modification in Terms of Compensation of At-Will Employee Who Continues Performance to Bind Employee*, 69 A.L.R.4th 1145 (1989). Upon reasonable notice of a prospective modification of an at-will employment contract, we think an employee's continued employment constitutes implied assent to such modification.

Under our interpretation of the 1994 agreement, appellant was entitled to an eight percent commission on Asales.@ A sale takes place when: (1) goods are exchanged, and (2) consideration or its equivalent is received therefore.

By appellant's continued employment, we think he impliedly assented to the reduced commission upon *subsequent sales*[3] of clear floor finish to Kentucky Manufacturing. As to subsequent sales, it is clear that appellee's reduction of

[3]Subsequent sales are all sales of clear floor finish to Kentucky Manufacturing Company that occurred after the initial sale and after Ken Lawrence's phone call informing appellant of the lowered commission.

commission was prospective and that appellant received reasonable notice of the reduction.

We, however, cannot reach the same conclusion as to the *initial sale*. The record is unclear as to when the initial sale actually took place.[4] We know not when the floor finish and consideration, or its equivalent, were exchanged. As to the initial sale, we are unable to say whether the reduction of commission was prospective, and whether appellant received reasonable notice thereof.

In sum, we are of the opinion that summary judgment was properly entered upon the reduction of commission on subsequent sales and improperly entered upon the reduction of commission on the initial sale of clear floor finish to Kentucky Manufacturing. On remand, the circuit court shall reconsider the initial sale; the circuit court shall determine whether modification of the at-will employment contract was made before the initial sale and whether appellant received reasonable notice thereof. If the modification was prospective and appellant received reasonable notice, his continued employment would constitute assent to the decreased commission rate of three percent. Conversely, if the modification was not prospective or appellant did not receive reasonable notice, appellant would be entitled to the usual eight percent commission upon the initial sale.

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed in part, and reversed

[4]It appears the initial sale occurred sometime around January of 1996.

in part and the cause remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jack E. Ruck
Louisville, Kentucky

BRIEF FOR APPELLEE:

David L. Hoskins
Louisville, Kentucky