RENDERED: MARCH 15, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001648-MR

CAROL MULLEN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA BISIG, JUDGE
ACTION NO. 15-CI-005080

HOUSTON-JOHNSON, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KRAMER, AND L. THOMPSON, JUDGES.

KRAMER, JUDGE: Carol Mullen appeals from the Jefferson Circuit Court order granting Houston-Johnson, Inc.'s ("HJ") motion for summary judgment. Mullen is a former employee of HJ. She alleges that she is entitled to continued commissions based on sales generated during her employment with HJ. She claims ongoing commissions were promised to her in an oral contract entered into

by the parties near the time she began employment. After careful review of the record and applicable case law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Carol Mullen began her employment with HJ in February 2014, as a Business Development Executive. On February 1, 2014, two weeks prior to her official start date, Mullen signed an Employment Agreement ("Agreement") with HJ. The Agreement stated, in relevant part:

> **Bonus (Commission) Potential:** Effective upon satisfactory completion of the first 90 days of employment, and based upon the goals and objectives agreed to in the performance development planning process with your manager, you may be eligible for a bonus. The bonus plan for this year and beyond will be based on the formula determined by the company for that year.

The agreement also listed Mullen's base salary and indicated that she was an at-will employee and that "either party can terminate the relationship at any time with or without cause and with or without notice."

In March 2014, Mullen received an e-mail from HJ's Vice President of New Business Development, Derek Bland, titled "HJI 2014 Sales Commission Plan – Revised 3/17" ("2014 Commission Plan"). The 2014 Commission Plan laid out the new scale on which commissions would be paid for that year. It also contained "rules" for the payment of commissions, including:

1. Sales rep will be paid any commissions due in the pay period following the invoice being paid by the customer.

. . .

3. If you separate from company, commissions due as of date of separation will be paid in your final paycheck.

4. The company can change any/all elements of this plan based upon our business requirements, but the rules in existence at the time of contract award will remain in effect for the duration of the contract.

There is nothing in the record to show that Mullen responded to this e-mail or otherwise objected to its contents. Mullen continued to work for HJ until she was terminated in June 2015.

At the end of May 2015, Mullen was presented with a written commission agreement styled "Non-Automotive Compensation Plan Effective June 1, 2015," and a non-compete agreement styled "Protection From Unfair Competition Agreement." Mullen, unsatisfied with the terms of both agreements, refused to sign the documents. This refusal was a primary reason for her termination. In the "Notice of Termination of Employment" letter formalizing Mullen's separation from the company, HJ noted that one of the reasons for this separation was Mullen's refusal to sign the "Protection From Unfair Competition Agreement." The termination letter also stated that, "all commissions for projects currently in process or projected for which you might have otherwise received commission will be paid according to the then current contractual agreement."

After her termination, Mullen reached out to HJ requesting her commission on sales income that had been collected after her termination, but earned--she argues--before her termination. Mullen claimed that the parties had entered into an oral contract that she would receive a base salary of $55,000 plus a commission of total contract value for any business she generated. The commission would be payable on a scale of: 5% for year one, 4% for year two, and 3% the remaining years. Mullen conceded that these terms were never reduced to writing. When HJ refused to pay Mullen the commission she requested post termination, she filed suit against HJ alleging breach of contract, breach of fiduciary duty, violation of the Kentucky wage and hour laws, fraud, and unjust enrichment.

Mullen moved for partial summary judgment in March 2017, alleging that she was entitled to commissions earned in 2015. HJ moved for summary judgment in April 2017. On May 26, 2017, the circuit court entered summary judgment in favor of HJ. The circuit court's order stated that, "Mullen has not presented any evidence that a verbal contract existed in which the parties agreed to pay Mullen commissions on money not yet received from customers after the end of her employment." In June 2017, Mullen moved to alter, amend or vacate the order of summary judgment. The circuit court denied the motion. This appeal followed. Further facts will be developed as necessary.

STANDARD OF REVIEW

The standard of appellate review for summary judgment is well established.

> When ruling on a party's motion for summary judgment, the trial court must view all evidence in the light most favorable to the nonmoving party and resolve all doubts in his favor. The movant bears the initial burden of showing that no genuine issue of fact exists. Then, the burden shifts to the nonmovant to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial. Summary judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.
>
> On appellate review, we are not required to defer to the trial court's ruling because the trial court's determination only involves questions of law. Appellate review shall be conducted under a de novo standard. Therefore, our review is limited to whether the trial court correctly found there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.

Grass v. Akins, 368 S.W.3d 150, 152 (Ky. App. 2012) (internal citations and quotation marks omitted).

ANALYSIS

On appeal, Mullen argues that summary judgment was inappropriate because there was an abundance of evidence in the record to support an oral contract to pay commissions following her termination. She asserts that: (1) the Agreement is unrelated to her receiving commissions; (2) the March 2014 e-mail

containing the 2014 Commission Plan was only a proposal; (3) the terms of the 2014 Commission Plan are ambiguous; and (4) she should be allowed to pursue a claim under the theory of unjust enrichment. We disagree.

1. The Agreement is related to Mullen's commission.

Mullen asserts that the Agreement she signed is unrelated to the issue of commissions. She argues that the commission structure was part of an oral contract between the parties and not addressed in the Agreement. The relevant part of the Agreement states:

> **Bonus (Commission) Potential:** Effective upon satisfactory completion of the first 90 days of employment, and based upon the goals and objectives agreed to in the performance development planning process with your manager, you may be eligible for a bonus. The bonus plan for this year and beyond will be based on the formula determined by the company for that year.

Mullen contests that this part of the Agreement applies to her commissions because the word "Commission" is in a parenthetical and not the body of the agreement. She argues that this provision refers only to the potential for an annual bonus each year and that it does not refer to commissions as part of a salary structure. Mullen argues that the parties orally contracted that she would receive commission based on the contract amount for all business generated. This was to be 5% for year one; 4% for year two; and 3% for the remaining years—including after termination of employment. We disagree.

The Supreme Court of Kentucky has previously held that, "[u]nder Kentucky law, an enforceable contract must contain definite and certain terms setting forth promises of performance to be rendered by each party. Mutuality of obligations is an essential element of a contract, and if one party is not bound, neither is bound." *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997). The Agreement that Mullen voluntarily signed included: (1) the date her employment effectively began; (2) the amount of her base salary; (3) the explanation that she must sign a non-compete agreement before she began her employment; (4) the current company benefits to which she would have access; and (5) the explanation that she was an at-will employee. Regarding her commission, the Agreement specified that, "[t]he bonus plan for this year and beyond will be based on the formula determined by the company for that year." The Agreement included all "definite and certain terms" necessary to make it binding and enforceable between the parties.

Mullen primarily argues that the provision is inapplicable because the parties had orally contracted to the commission scale. She states that this was "around the time" of her employment. However, the only evidence of a verbal contract is Mullen's assertion that there was one. She was unable to provide any documentation or state when or precisely with whom the verbal contract was made. The trial court was correct in its determination that no verbal contract existed.

In the alternative, Mullen asserts that the Agreement was not an enforceable contract because it left the door open for future negations regarding the commission structure. We disagree. This Court has previously explained that, "[w]here an agreement leaves the resolution of material terms to future negotiations, the agreement is generally unenforceable for indefiniteness[.]" *Cinelli v. Ward*, 997 S.W.2d 474, 477 (Ky. App. 1998). However, the Agreement did not leave the door open for future negotiations. The provision does not indicate, and therefore the parties did not agree, that any commission would be based on future negotiations between the Mullen and HJ. Rather, Mullen agreed that the plan for commissions would be based on a formula determined by HJ on a yearly basis. In fact, she received that formula in an e-mail on March 27, 2014.

Furthermore, the record shows that Mullen did know that the Agreement related to her commissions when she signed it. After she had been terminated, Mullen e-mailed Condrad Daniels, HJ's Chief Operating Officer, the following on June 17, 2015:

> **Subject: Commission**
>
> Condrad,
>
> *I knew what my employment contract read when I signed it.* At the time I thought how cold and inhumane that would be, to let someone put work on your floors, terminate them and not pay them for all of it. *I figured it was to satisfy some attorney.* I had no idea that your family would fire me and keep the commissions. I am

> pretty blown away and hurt and definitely not prepared. I took home $19K for what I brought to the table.

(Emphasis added.)

Mullen understood the meaning of the provision related to bonus/commission when she signed the Agreement. It is an enforceable contract that addressed her commissions and, therefore, the circuit court did not err by granting summary judgment on this matter.

2. The 2014 Commission Plan was not a proposal.

Mullen asserts that the March 2017 e-mail, which contained the 2014 Commission Plan, was merely a proposal from HJ and that she did not agree to it. Mullen contends that, because the email did not provide a signature line, she did not sign it, and it is therefore unenforceable. However, the circuit court determined that Mullen had assented to the 2014 Commission Plan's terms by her continued employment at HJ after receiving it. We agree with the circuit court's determination. The Supreme Court of Kentucky has previously stated that

> [a]n express personnel policy can become a binding contract once it is accepted by the employee through his continuing to work when he is not required to do so.
> . . .
>
> [E]mployer statements of policy . . . can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer

> without notice to the employee, and contains no reference to a specific employee, his job description or compensation, and although no reference was made to the policy statement in preemployment interviews and the employee does not learn of its existence until after his hiring.
> . . .
>
> **Once an employer establishes an express personnel policy and the employee continues to work while the policy remains in effect, the policy is deemed an implied contract for so long as it remains in effect.** If the employer unilaterally changes the policy, the terms of the implied contract are also thereby changed.

Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354, 362-63 (Ky. 2005) (emphasis added) (internal citations and quotations omitted) (alterations in original).

In the present case, the 2014 Commission Plan is a personnel policy of HJ. Mullen received the 2014 Commission Plan, via e-mail, from Bland on March 27, 2014. Although she claims that she was not in agreement with the terms, Mullen continued to work for HJ for over a year until her termination. The record contains no indication that she made HJ aware of her dissatisfaction with the 2014 Commission Plan after receiving the e-mail. Also, an e-mail in the record dated February 21, 2014, from Bland, explains that Mullen had notice and input as to what would be in the 2014 Commission Plan. The e-mail states in relevant part:

> She expressed concern over the fact that she had not yet been informed of the commission plan that would be in place for her. Her feelings were that she had all of this potential business that she is prepared to go after and she didn't want to get burnt and not be compensated for her

> efforts. I reminded her that during our interview process we discussed that a plan was in place in 2013 that was being reviewed for changes to make it more applicable for our business. . . . She did like the proposal plan that I presented that paid the employee a % of the monthly recurring revenue. That is what she is accustomed to in her experience and she felt that was a fair approach.

The March 2014 e-mail was not a proposal, but a personnel policy that became a binding contract. Mullen accepted its terms by continuing to work for HJ after receipt of the policy.

3. The terms of the 2014 Commission Plan are not ambiguous.

Mullen also asserts that even if the March 2014 e-mail is construed as a contract, it is unenforceable because its terms are ambiguous. The relevant parts of the 2014 Commission Plan are as follows:

> **For single projects and no monthly recurring revenue:**
>
> 1. **New customer contracts**: Sales rep will be paid a commission equal to 5% of the Total contract Value (TVC) the 1st year, 4% the 2nd year, and 3% ***the remaining years***. This assumes there is no change in the work scope.
> . . .
>
> **Rules:**
> . . .
>
> 3. If ***you separate*** from company, commissions due as of date of separation will be paid in your final paycheck.

(Emphasis added.)

Mullen first asserts that the language "remaining years" indicates that "both parties are to receive the benefit of this bargain so long as business with the customer continues," even if she is no longer employed by HJ. She claims that receipt of commissions beyond employment is also consistent with her alleged verbal contract with HJ prior to the start of her employment. She also asserts that the language "[i]f you separate from company" did not include involuntary termination; that it only applied if Mullen voluntarily terminated her employment. We disagree with Mullen's claims of ambiguity. This Court has previously stated that

> [i]n the absence of ambiguity a written instrument will be strictly enforced according to its terms. Further, [a] contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent, yet reasonable, interpretations. [W]e are not permitted to create an ambiguity where none exists even if doing so would result in a more palatable outcome.

New Life Cleaners v. Tuttle, 292 S.W.3d 318, 322 (Ky. App. 2009) (internal citations and quotations omitted) (alterations in original).

Further, the Supreme Court of Kentucky has previously held that

> [w]hen no ambiguity exists in the contract, we look only as far as the four corners of the document to determine the parties' intentions. If the language is ambiguous, the court's primary objective is to effectuate the intentions of the parties. The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms.

Kentucky Shakespeare Festival, Inc. v. Dunaway, 490 S.W.3d 691, 695 (Ky. 2016) (internal citations and quotation marks omitted).

The language "remaining years" is not ambiguous. It is unreasonable to interpret this phrase to mean that Mullen is entitled to commission for an indefinite period of time—perhaps even a lifetime—once her employment terminates. The remainder of the pertinent section explains that the stated commission payments are applicable if "there is no change in the work scope." Clearly, termination of employment would qualify as a "change in the work scope." Contracts must be construed consistent with common sense and in a manner that avoids absurd results. *Kellogg Co. v. Sabhlok,* 471 F.3d 629, 636 (6th Cir. 2006). Given a commonsense reading, "remaining years" does not mean that Mullen is entitled to commissions indefinitely after termination of employment, even if HJ continues to do business with the company.

Likewise, the language "you separate" is not ambiguous. Separate means "*to sever contractual relationships with*." Merriam –Webster's Collegiate Dictionary 1134 (11th ed. 2005) (emphasis added). Again, construing the provision consistently with common sense, "you separate" encompasses the possibilities of both resignation and termination—it cannot be construed to mean only resignation or voluntary termination. Mullen produced no evidence to support her claim that she is entitled to commissions for invoices that had not been

paid at the time of her termination, or that the commissions would only end if she voluntarily left HJ, as opposed to involuntary termination.

The record also shows that Mullen clearly understood what these terms meant. On June 15, 2015, Mullen sent the following e-mail to Daniels, in relevant part:

> Subject: Re: Commission and new opportunity
>
> Condrad,
> ***You are correct, HJI's Rule 3.*** [sic] ***makes it clear your company operating choice is to not pay commission in work not finished and collected before payment of commission.*** Personally, if I had a sales person working extremely hard to help start a division and fired them at the same point major PO's were secured, I would pay them commission and not rely on a technicality to avoid it. ***Yes, you are adhering to your contract. Given the choice personally, it would be a moral business judgment I would make to pay someone for the opportunities I would be collecting on from PO's brought to the company.*** I had hoped you would allow that.

(Emphasis added.)

It is clear from this statement that Mullen fully understood the terms of the 2014 Commission Plan; that she fully understood that those terms in HJ's Rules "1" and "3" governed her commission; and that she should not have been expecting any further payments after her final paycheck. Nevertheless, however, the record shows that HJ sent Mullen a check for $285.87 on March 7, 2017, for

three small commission payments that were due to her during her time of employment at HJ.[1]

The record is devoid of any indication--other than Mullen's assertions--that commissions were to be paid to Mullen by way of any method other than after payment had been received from the customer. The record is also devoid of any indication that commission payments would continue after termination of employment. Mullen received her first commission payment on May 14, 2014. This is consistent with the provision in the Agreement that stated she would be eligible for commission "[e]ffective upon satisfactory completion of the first 90 days of employment[.]" Mullen's next commission payment was not received until four months later, on September 15, 2014. Mullen acknowledges that, although the timing of customer payment is beyond her control, it is "also common in the industry [that] payment of the commission is withheld until the customer pays the invoice."[2] That all commission payments evidenced in the record were paid to Mullen at a rate of 5% is consistent with the terms of the 2014 Commission Plan. Mullen is correct that HJ's paperwork does indicate commission due on the various accounts after termination of Mullen's

[1] A payment was received from Buffalo Trace on December 17, 2014; from Brown Forman on December 31, 2014; and from Owens International on May 5, 2015.

[2] Appellant's brief, page 3.

employment. However, Mullen provided no evidence whatsoever to support her contention that these payments should be made to her, rather than to the employee who assumed responsibility for the accounts upon her exit from HJ. Notably, HJ's paperwork in the record documenting commission payments to Mullen uses the code "Bonus" for each payment made.

There was no ambiguity in 2014 Commission Plan. It is clear that payments were to be received after the customer paid any outstanding invoice and would cease upon Mullen's termination of employment. The circuit court did not err in granting summary judgment on this matter.

4. The theory of unjust enrichment is inapplicable.

Lastly, Mullen asserts that there is adequate proof in the record to allow her to proceed on a theory of unjust enrichment. However, the Supreme Court of Kentucky has stated that, "unjust enrichment is unavailable when the terms of an express contract control." *Furlong Dev. Co., LLC v. Georgetown-Scott Cty. Planning & Zoning Comm'n*, 504 S.W.3d 34, 40 (Ky. 2016). In this case, the facts provided do not give us reason to abandon this principle. In alignment with our analysis, Mullen's employment and commissions were expressly controlled by the terms of the Agreement and 2014 Commission Plan. Therefore, Mullen cannot proceed under this theory.

CONCLUSION

For the above stated reasons, the circuit court did not err in finding that Mullen did not present any evidence of an oral agreement between the parties, in which HJ agreed to pay her commissions after her termination. Therefore, we AFFIRM the decision of the Jefferson Circuit Court granting summary judgment in favor of HJ.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kirk Hoskins
Louisville, Kentucky

BRIEF FOR APPELLEE:

John T. Lovett
Griffin Terry Sumner
Jennifer L. Bame
Louisville, Kentucky