STATE OF MINNESOTA
IN COURT OF APPEALS
A10-473

Nick Schwarzrock,
Appellant,

vs.

Remote Technologies, Incorporated,
Respondent.

Filed January 11, 2011
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-07-15796

Steven A. Smith, Adrianna Shannon, Nichols Kaster, PLLP, Minneapolis, Minnesota (for appellant)

Heather N. Hoecke, Adam C. Trampe, Oppenheimer Wolff & Donnelly LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

This appeal involves a dispute arising from respondent-employer's refusal to pay a bonus to appellant-employee. Appellant challenges the district court's grant of summary

judgment to respondent on appellant's breach-of-contract and statutory wage claims and asserts that the district court erred in granting judgment as a matter of law (JMOL) to respondent on appellant's whistleblower claim. Respondent has filed a related appeal, challenging the district court's denial of respondent's request for a new trial should it be determined that the district court erred in granting JMOL. Because we conclude that the district court did not err in granting summary judgment or JMOL, we affirm.

FACTS

Respondent Remote Technologies, Inc., is a Minnesota-based manufacturer of home theater and home automation controls. Respondent employs national product trainers who conduct training sessions throughout the country for its dealers. National product trainers also provide troubleshooting assistance by phone and e-mail.

In January 2007, appellant Nick Schwarzrock contacted respondent through Peter Baker, respondent's vice-president of sales and marketing, to express his interest in employment with respondent. After some negotiations, Baker offered appellant a position as a national product trainer. By a letter dated February 15, Baker memorialized the terms of the parties' agreement. The letter provided that appellant's compensation was "$60,000 per year salary, *plus bonus*. The bonus program will provide you with an additional $2.50 for every dealer trained. This is expected to provide you with an additional $5,000-7,500 of additional annual income."[1] (Emphasis added.)

[1] The number of dealers trained refers to the number of people that attend a training session.

Appellant began working for respondent on March 1. On March 2, appellant was given an employment agreement (EA) to sign. The EA stated that it "supersede[d] all previous correspondence, promises, representations, and agreements, if any, either written or oral." Among other aspects of appellant's employment, the EA also had two specific provisions regarding compensation:

> 5. Salary is Full Compensation
>
> Employee understands that Employee's salary will constitute the full and exclusive monetary consideration and compensation for all services performed by Employee and for the performance of all Employee's promises and obligations hereunder.
>
> 6. Other Compensation
>
> Employee understands and agrees that any additional compensation to Employee (*whether a bonus or other form of additional compensation*) shall rest in the sole discretion of [respondent] and that Employee shall not earn or accrue any right to additional compensation by reason of Employee's employment.

(Emphasis added.) Appellant signed the EA on March 6.

In a supervised training session in late March, appellant made a joke involving respondent's competitors as part of his presentation. Appellant recalled the joke as: "I wouldn't be using any blasphemy in this training such as Universal Remote or Phillips Pronto." Respondent's central United States sales manager, who supervised this session, remembered the joke as: "[W]e'd like to thank Universal and Phillips, two of our competitors, we'd thank them for giving us so many customers." The sales manager spoke with appellant at the break about the unprofessional nature of his comment and

instructed him not to disparage respondent's competitors. At another training session, respondent's East-coast regional sales manager overheard appellant use profanity.

On April 3, the day of his first individual training session, appellant overslept and was then delayed in traffic by a military convoy. He was 45 minutes to an hour late to prepare for the session and greet attendees. Appellant did, however, complete the session on time. Following the incident, appellant received a written warning.

Approximately a week later, appellant e-mailed Baker, asking about the process for receiving his per-dealer bonus, and then submitted the necessary paperwork for dealers trained between March 7 and April 6. Respondent's CEO, John Demskie, received a copy of appellant's written warning at the same time he received appellant's bonus request. Demskie denied the request in light of appellant's tardiness at the training session. The next day, Baker met with appellant and told him that Demskie denied the bonus request, but that Baker "believed [appellant] had a long future ahead with [respondent]."

After the meeting, appellant took his lunch break and called his father. Appellant's father is the CEO of a small research and development company and has approximately 30 years of experience in sales management. Appellant explained the situation to his father, who suggested that appellant talk with Baker again. Appellant's father also stated that, in his opinion, it was illegal for respondent to withhold the bonus.

Later that same day, appellant requested a second meeting with Baker. Appellant told Baker that he did not agree with Demskie's decision and stated respondent had left him with two options: "Number 1, that I could accept their decision and go unpaid for all

my hard work, Or, Number 2, that I could report the—what they were doing to them, that I believed that it was unfair, um, unacceptable and illegal and as a result lose my job." Appellant stated there was a change in Baker's demeanor and characterized his response as "alarmed." Baker then ended the meeting.

Baker met with Demskie to discuss appellant's concerns regarding the legality of the decision. Demskie responded that the per-dealer payment was a bonus and therefore discretionary. Afterwards, Baker told appellant that Demskie had not changed his mind and that appellant would not receive the bonus. Baker also told appellant that he "should[] [not] be discouraged because he had plenty of earning potential" with respondent.

Approximately a week later, appellant spoke with Janice Downing. Downing is employed by Fredrikson Human Resources Consulting, which is a subsidiary of Fredrikson & Byron. Downing provides "human resources consulting services, training, development, coaching, [and] staffing services."[2] Appellant explained his employment situation to Downing and asked for her advice. Appellant stated that Downing believed what respondent was doing was illegal. It was Downing's position that appellant was not asking for her opinion, and Downing referred him to an employment attorney. Appellant stayed in contact with Downing throughout the remainder of his employment with respondent.

In the weeks following, respondent's accounting and human resources manager, Stacy Olson, began tracking appellant's time in the office. Olson stated that, when

[2] Downing is not an attorney.

appellant was not traveling, he was responsible for helping with tech support and taking customer calls. Respondent's receptionist had been having difficulties getting phone calls to appellant and observed that appellant was taking long lunches, seemed to be leaving early, and was out of the office even when he was not traveling. Olson reported her concerns to Demskie.

Appellant submitted a second bonus request for training sessions conducted since his first request. When appellant received his paycheck for the pay period at the end of April, he again did not receive the bonus. Appellant complained to Baker, who explained that failure to pay the bonus was an oversight. That same day, Baker decided to terminate appellant's employment. On the afternoon of May 16, Baker booked a flight to Scottsdale, Arizona, where appellant was staying for the weekend.

At approximately 1:00 a.m. on May 17, appellant sent an e-mail to Demskie asking about the first unpaid bonus. Appellant stated that respondent's failure to pay was unacceptable and requested that payment be made immediately.

Baker met appellant in the lobby of his hotel and terminated appellant on May 17. Baker explained that appellant was being terminated for arriving late to the training session and for not showing up to work on the afternoon of May 11. Appellant then provided Baker with an e-mail in which Baker approved appellant's request to attend a doctor's appointment that day. Baker then told appellant his termination "was for lots of reasons." Baker also provided appellant with his last paycheck and the second bonus.

Appellant sued respondent for violations of Minnesota's whistleblower act, failure to pay wages, breach of contract, promissory estoppel, and unjust enrichment.

Respondent moved for summary judgment on all five counts. The district court denied the motion in regard to the alleged violations of the whistleblower act and the breach-of-contract and statutory wage claims concerning appellant's vacation pay, but granted summary judgment on the breach-of-contract and statutory wage claims concerning appellant's bonus.[3]

As for the per-dealer bonus, the district court concluded that the bonus was discretionary, stating that "[w]hile the offer letter implies that the bonus is not discretionary the EA either clarifies or modifies the offer letter by clearly stating that the bonus is discretionary." The district court held that there can be no breach of contract where respondent abided by the terms of the parties' agreement and that appellant "cannot ignore the blatant terms of the [EA] to which he clearly assented."

The matter proceeded to a jury trial. The jury found that (1) respondent breached a contract with appellant when it failed to pay appellant a full ten days of vacation pay upon his termination, with damages totaling $2,192.22; (2) appellant had proved the elements of his whistleblower claim, entitling him to $71,897.15 in wages and benefits lost and $30,000 in emotional distress; and (3) respondent failed to promptly pay appellant's vacation pay, warranting a ten-day penalty against respondent.[4]

[3] The district court also granted respondent's motion on the promissory-estoppel and unjust-enrichment claims.

[4] The jury also found that appellant had installed software on his computer that was not licensed to himself or respondent, but that respondent did not have a settled company policy at the time of appellant's termination that would have allowed for termination solely on grounds of having installed or used the unlicensed software on his company laptop.

Respondent subsequently moved for JMOL on appellant's whistleblower, breach-of-contract, and wage claims or for a new trial. The district court denied the motion for a new trial and the motion for JMOL on the breach-of-contract and wage claims concerning appellant's vacation pay, but granted JMOL on the whistleblower claim, concluding that appellant failed to establish a prima facie case of retaliatory discharge. In a thoughtful and well-reasoned opinion, the district court determined that appellant (1) had not engaged in statutorily protected conduct because his report regarding respondent's refusal to pay the first bonus was not in good faith and did not implicate an actual violation of law; (2) presented no evidence of causation between his alleged report and subsequent termination; and (3) confused the jury with testimony that he believed respondent's refusal to pay the bonus was a violation of Minnesota law, notwithstanding the district court's prior ruling that, as a matter of law, these payments were discretionary. The district court concluded that the jury's verdict on the whistleblower claim was "manifestly against the preponderance of the evidence and reasonable minds cannot differ as to the outcome." This appeal follows.

D E C I S I O N

I. The district court did not err in granting summary judgment on the breach-of-contract and statutory wage claims regarding appellant's bonus.

"On appeal from summary judgment, we ask two questions: (1) whether there are genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriate "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). The interpretation of a written contract is a question of law, which this court reviews de novo. *Borgersen v. Cardiovascular Sys., Inc.*, 729 N.W.2d 619, 625 (Minn. App. 2007) (citing *Alpha Real Estate Co. of Rochester v. Delta Dental Plan, Minn.*, 664 N.W.2d 303, 311 (Minn. 2003)).

An offer of employment on particular terms for an unspecified duration generally creates a binding unilateral contract once it is accepted by the employee. *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983). Here, respondent offered appellant a position as a national product trainer on particular terms, which included compensation, for an unspecified amount of time. Although appellant alleges that his "compensation package was an essential term of a bilateral negotiated contract," he provides no support for the alleged bilateral nature of the contract.

The EA presented appellant with another unilateral offer of employment, which explained that the per-dealer payment, a "bonus," was discretionary: "Employee understands and agrees that any additional compensation to Employee (whether a *bonus* or other form of additional compensation) shall rest in the sole discretion of [respondent] . . . ." (Emphasis added.) Appellant signed the EA and continued working for respondent.

> In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer.

Mettille, 333 N.W.2d at 627; *see also Stream v. Cont'l Machs., Inc.*, 261 Minn. 289, 293, 111 N.W.2d 785, 788 (1961) ("Where an employee accepts or retains employment with knowledge of new or changed terms or conditions, a contract results embodying the new or changed terms or conditions."). By signing the EA and continuing to work for respondent, appellant acquiesced to bonuses at respondent's discretion. *See Mettille*, 333 N.W.2d at 630 (employee's "continued performance of his duties despite his freedom to quit constitutes acceptance of [employer's] offer and affords the necessary consideration for that offer"); *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 384 (Minn. App. 2003) (employee's "continued employment . . . after [employer] announced the change in his commissions constitutes acceptance of the offer of a unilateral contract").[5]

[5] We distinguish this change in terms from a situation in which an employee is asked to sign a non-compete agreement that is not ancillary to the original employment contract. "Independent consideration must exist to support a non-compete entered into after the original employment contract." *Guercio*, 664 N.W.2d at 386. "When an employer fails to inform prospective employees of noncompetition agreements until after they have accepted jobs, the employer takes undue advantage of the inequality between the parties." *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. App. 1993) (quotation omitted). Although the EA appellant was asked to sign included non-compete and non-solicitation provisions, appellant has not challenged these provisions.

As the district court noted, the EA "cannot exclusively control because it does not state the amount of [appellant's] salary or the details of the bonus program." This analysis comports with the logic of the parol evidence rule. "When parties reduce their agreement to writing, parol evidence is not ordinarily admissible to vary, contradict, or alter the written agreement. *But parol evidence is admissible when the written agreement is incomplete or ambiguous to explain the meaning of its terms.*" *Flynn v. Sawyer*, 272 N.W.2d 904, 907-08 (Minn. 1978) (emphasis added). The EA specifies neither the dollar amount of appellant's salary nor the details of the bonus program. While the EA states that it "supersedes all previous correspondence, promises, representations, and agreements," it is not a complete embodiment of the parties' agreement, given the absence of appellant's salary and the bonus terms.[6]

"It is well established that where contracts relating to the same transaction are put into several instruments they will be read together and each will be construed with reference to the other." *Anchor Cas. Co. v. Bird Island Produce, Inc.*, 249 Minn. 137, 146, 82 N.W.2d 48, 54 (1957). "The prohibition of the parol evidence rule is not against the use of extrinsic circumstances for the purpose of interpretation but against making them the instruments of contradiction of an expressed contractual intent." *Id.* at 147, 82 N.W.2d at 55 (quotation omitted). Respondent intended to offer appellant both a specified salary and a bonus program; the offer letter and the EA do not contradict each other on these terms. Reading them together, we conclude that the plain terms of the

[6] *But see Alpha Real Estate*, 664 N.W.2d at 312 ("A merger clause establishes that the parties intended the writing to be an integration of their agreement.").

parties' agreement stated that payment of the bonus was within respondent's discretion. *Cf. id.* at 146, 82 N.W.2d at 54 (refusing to read together bond applications with the issued bond when parties to the instruments were not the same and "the plain provisions of the applications and the bond are incompatible").

II. The district court did not err in granting JMOL to respondent on appellant's whistleblower claim.

JMOL "is appropriate when a jury verdict has no reasonable support in fact or is contrary to law." *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). JMOL

> should be granted [] only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the [district] court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case.

Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd., 711 N.W.2d 811, 816 (Minn. 2006) (quotation omitted) (applying standard in context of a directed verdict). Appellate courts "view the evidence in the light most favorable to the nonmoving party and determine whether the verdict is manifestly against the entire evidence or whether despite the jury's findings of fact the moving party is entitled to judgment as a matter of law." *Longbehn*, 727 N.W.2d at 159 (quotation omitted). A district court's grant of JMOL is a question of law, which we review de novo. *Id.*

Under Minnesota's whistleblower act, an employer is prohibited from discharging, disciplining, threatening, otherwise discriminating against, or penalizing an employee when "the employee, or a person acting on behalf of an employee, in good faith reports a

violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer." Minn. Stat. § 181.932, subd. 1(1) (2010). A whistleblower claim is not limited to reports implicating public policy. *Abraham v. Cnty. of Hennepin*, 639 N.W.2d 342, 354 (Minn. 2002). The employee is not required to identify the specific law or rule he suspects his employer violated,

> so long as there is a federal or state law or rule adopted pursuant to law that is implicated by the employee's complaint, the employee reported the violation or suspected violation in good faith, and the employee alleges facts that, if proven, would constitute a violation of law or rule adopted pursuant to law.

Id. at 355. But the whistleblower act is not to be read too broadly. *See Kratzer v. Welsh Cos., LLC*, 771 N.W.2d 14, 22 (Minn. 2009) (recognizing dicta from *Williams v. St. Paul Ramsey Med. Ctr., Inc.*, 551 N.W.2d 483, 484 n.1 (Minn. 1996), stating that the whistleblower act does not protect reports based on an employee's subjective notions of wrongdoing, but protects only "an action by a neutral—one who is not personally and uniquely affronted by the employer's unlawful conduct"). The "mere report of behavior that is problematic or even reprehensible, but not a violation of the law, is not protected." *Id.*

To establish a prima facie case of retaliation under the whistleblower act, the employee must show that (1) he engaged in statutorily protected conduct, (2) his employer took adverse employment action, and (3) there was a causal connection between the protected conduct and the adverse employment action. *Cox v. Crown CoCo,*

Inc., 544 N.W.2d 490, 496 (Minn. App. 1996). Because we conclude that appellant's report was not made to expose an illegality, we focus only on the first prong.

To satisfy the "good faith" requirement, the employee's report "must be made for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim." *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 227 (Minn. 2010) (quotation omitted). "In determining good faith, we consider not only the content of the report, but also the employee's purpose in making the report." *Id.* The central question is whether the report was made to expose an illegality. *Id.*; *see also Anderson-Johanningmeier v. Mid-Minn. Women's Ctr., Inc.*, 637 N.W.2d 270, 277 (Minn. 2002) (noting that the good faith requirement limits the nature of actionable whistleblower claims so that lawsuit or threatened lawsuit cannot occur whenever an employee is terminated).

The jury found that appellant made the report for the purpose of exposing an illegality. But, as the district court concluded when it granted respondent's motion for JMOL: "[Appellant's] purpose in making his report was to get paid. The mention of the word 'illegal' was nothing more than a negotiation tactic."

Appellant asserts that the district court explicitly discredited appellant and engaged in fact-finding against the evidence. Appellant maintains that he repeatedly stated that his purpose in reporting the withholding of his bonus was that respondent's refusal to pay was illegal. Respondent argues that appellant "failed to present any evidence that the public or any third person or persons would be protected by his allegations" and failed to establish that he was a "neutral" party, only showing that he

was "personally and uniquely affronted by [respondent's] denial of his individual bonus request."

We agree with the district court that, as a matter of law, appellant's report was not made to expose an illegality. Appellant asserts that whether he "stood to receive some form of personal benefit . . . is irrelevant as a matter of law[] when his purpose in reporting was to expose an illegality." But "the whistleblower statute protects the conduct of a neutral party who blows the whistle for the protection of the general public or, at the least, some third person or persons in addition to the whistleblower." *Kidwell*, 784 N.W.2d at 227 (quotations omitted); *see id.* at 228 ("[T]he purpose behind our [whistleblower] statute as evidenced by the requirement of 'good faith,' is to protect disclosures made by neutral parties who report violations of the law for the public good."). Appellant's purpose in reporting the alleged illegality was for his own exclusive benefit—to obtain a bonus. *See id.* at 230 (concluding that text of alleged e-mail report "confirms that [employee's] purpose was not to 'expose an illegality,' but was to provide legal advice to his client" (quotation omitted)); *see also id.* at 231 n.11 (stating "the fact that [employee] was thinking about protecting his own interests [by researching the whistleblower statute prior to the alleged report] does not support the conclusion that he sent the email to expose an illegality"); *accord Tapley v. Wageworks, Inc.*, No. 09-14182, 2010 WL 2560443, at *3 (E.D. Mich. June 15, 2010) (denying plaintiff's motion for reconsideration of dismissal of whistleblower claim as "[p]laintiff's dispute with a private employer over her personal commissions is not a matter of public concern"). Appellant

did not act in good faith, and the district court properly granted respondent's motion for JMOL.

Because we conclude that appellant's report was not made to expose an illegality, we need not address whether the report implicated an actual federal or state law or rule or whether there was a causal link between appellant's report and his termination.[7] Similarly, because we affirm the district court's grant of JMOL to respondent on appellant's whistleblower claim, we do not address respondent's related appeal challenging the district court's denial of respondent's motion for a new trial.

Affirmed.

[7] Appellant asserts in his reply brief that the district court's conclusion that appellant did not make a statutorily protected report violates the Equal Protection clause. This argument is waived. Appellant did not raise this issue to the district court and did not argue it in his principal brief. *See* Minn. R. Civ. App. P. 128.02, subd. 4 ("The reply brief must be confined to new matter raised in the brief of the respondent."); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating appellate courts generally do not consider matters not argued to and considered by the district court).