STATE OF MINNESOTA
IN COURT OF APPEALS
A10-820

Rick Newland,
Appellant,

vs.

Connexus Energy,
Respondent.

Filed January 25, 2011
Affirmed
Lansing, Judge

Anoka County District Court
File No. 02-CV-08-5925

Lawrence P. Schaefer, Douglas M. Micko, Schaefer Law Firm, LLC, Minneapolis, Minnesota (for appellant)

Sara Gullickson McGrane, Richard R. Voelbel, Jessica M. Marsh, Felhaber Larson Fenlon & Vogt, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Lansing, Presiding Judge; Schellhas, Judge; and Huspeni, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

LANSING, Judge

The district court granted summary judgment dismissing Rick Newland's breach-of-employment-contract and promissory-estoppel action against Connexus Energy. On appeal Newland argues that he presented sufficient evidence to withstand summary judgment on his claim that Connexus modified his at-will employment to permit termination only for cause until he was sixty-five years old. Because the evidence is insufficient to show a clear and definite promise that would overcome the presumption of at-will employment and because Newland repeatedly acknowledged his at-will employment status in the signed documents on which he relies as evidence in this litigation, we affirm.

F A C T S

Rick Newland was employed by Connexus Energy as President and Chief Executive Officer from 1988 to 2008. In April 2002 Newland and Connexus entered into a Severance Pay Agreement (severance agreement), which provided Newland with benefits to be determined by a percentage of his prior year's salary and bonuses. The percentage, which was coordinated with his pension plan, increased until Newland reached sixty years of age and then decreased. Thus, if Newland's employment terminated in 2002, he would receive twenty percent of his 2001 salary and bonuses. If Newland's employment terminated in 2007, when he was sixty years old, the severance benefits would be at the maximum of one-hundred-thirty-five percent. In 2011, at age sixty-four, Newland would receive only thirty-three percent.

Section 1(b) of the severance agreement provided that Newland would receive the benefits unless he was terminated "for cause." The severance agreement specifically provided, however, that Newland's status as an "at-will" employee was not altered by the severance agreement. Accordingly, the "for-cause" provision only addressed whether Newland could be deprived of severance benefits and did not affect his at-will employment relationship with Connexus.

Newland's pension plan was separate but was designed to supplement the severance agreement as its benefits declined after Newland became sixty years old by giving him Key Employee Share Option Plan (KEYSOP) grants. The KEYSOP grants were aimed at providing Newland an incentive to remain employed past the age of sixty. In 2003, however, the IRS ruled that KEYSOP grants were taxable, which significantly reduced the value of the grants to Newland. As a result, Newland no longer had a financial incentive to continue working past age sixty when his benefits under the severance agreement would begin to decline.

In 2004, when Newland was fifty-seven, he decided that he would not want to retire at age sixty. In light of the IRS ruling on KEYSOP grants, Newland approached board chair Peter Wojciechowski to ask if the board of directors would consider any alternative incentives for him to continue working past age sixty. Wojciechowski responded by emphasizing that Newland "had to stay" and "couldn't leave" and that the board would do whatever necessary to keep him employed until age sixty-five.

The board of directors approved a Defined Benefit Pension Plan (defined benefit plan) in September 2004. The plan was designed to replace the benefits provided under

the severance agreement and to make up for the diminished value of the old pension plan by providing Newland with equal or greater benefits. The defined benefit plan provided that Newland would accrue benefits at four percent of his final average salary for each year of accrued service. Under the defined benefit plan, if Newland's employment was terminated in 2008, when he was sixty-one, his monthly pension would increase from $5,472 to $15,000. The defined benefit plan also states that it is not to "be construed as a contract of employment between the [c]ompany and any employee, or as a right of any employee to be continued in the employment of the [c]ompany, or as a limitation of the right of the [c]ompany to discharge any of its employees, with or without cause."

In connection with the defined benefit plan, Newland and Connexus, through Wojciechowski, executed a termination of the severance agreement on December 9, 2004. Newland's affidavit alleges that he only signed the document terminating the severance agreement after Wojciechowski assured him that he would be employed as the chief executive officer until at least age sixty-five. Newland understood Wojciechowski's assurance to mean that he could only be fired for cause until age sixty-five.

Three weeks after terminating the severance agreement, Newland and Connexus executed a Change of Control Severance Agreement (change-of-control agreement) designed to encourage Newland's full attention and dedication to Connexus and provide Newland with satisfactory compensation and benefits upon a change-of-control event. The change-of-control agreement provided that Newland's at-will employment with Connexus was not altered. Similar to the severance agreement, a "for cause" provision in

the change-of-control agreement provides only for the circumstances under which Newland could be deprived of severance benefits, and did not change his at-will employment relationship with Connexus.

Connexus discharged Newland in February 2008, when Newland was sixty-one, for engaging in a consensual romantic relationship with a Connexus accounts-payable employee. Newland has been receiving benefits under the defined benefit plan since his termination.

Newland sued Connexus for breach of contract, promissory estoppel, defamation, tortious interference with prospective business relationships, and for violating Minn. Stat. § 308A.327 (2008), which regulates closed board meetings. Connexus moved for summary judgment. Newland withdrew his Minn. Stat. § 308A.327 claim and subsequently agreed to dismiss his defamation and tortious-interference claims. Newland's remaining claims were breach of contract and promissory estoppel.

Newland opposed summary judgment, arguing that Connexus could only fire him for cause based on Wojciechowski's assurances that he would be employed at least until age sixty-five. The district court granted Connexus's motion for summary judgment, concluding as a matter of law that the statements that Newland "had to stay" and "couldn't leave" were too general to constitute a clear and definite promise of employment until age sixty-five. The district court also concluded that Newland gave no consideration in return for an employment contract modifying his at-will employment relationship with Connexus.

Newland appeals the summary-judgment dismissal, arguing that the board's statements are sufficiently clear and definite to create a genuine issue of material fact on whether his at-will employment was modified. He further argues that he provided consideration uncharacteristic of the employment relationship that supports modification of his at-will employment. In a notice of related appeal, Connexus challenges the district court's rejection of its arguments, advanced as alternative bases for summary judgment, that Newland's causes of action are barred by the statute of frauds and preempted by the Employee Retirement Income Security Act.

D E C I S I O N

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 we determine whether issues of fact exist and "whether the [district] court erred in its application of the law." *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). "[T]he party resisting summary judgment must do more than rest on mere averments"; it must provide concrete evidence of genuine and material fact issues for the elements necessary to prove its claim. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). We "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).

I

"In the absence of an express or implied agreement to the contrary or sufficient consideration in addition to the services to be [performed], Minnesota law presumes that employment for an indefinite term is at will." *Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 181 (Minn. App. 2001) (citing *Skagerberg v. Blandin Paper Co.*, 197 Minn. 291, 294-95, 266 N.W. 872, 874 (1936)), *review granted* (Minn. July 24, 2001), *appeal dismissed* (Minn. Aug. 17, 2001). At-will employment permits an employer to terminate an employee with or without cause. *Id*.

To rebut the presumption of at-will employment and establish that the employer could only terminate the relationship for cause, an employee must show that the employer "clearly intended to create such a contract." *Aberman v. Malden Mills Indus., Inc.*, 414 N.W.2d 769, 771 (Minn. App. 1987). "General statements about job security, company policy, or an employer's desire to retain an employee indefinitely are insufficient to overcome the presumption that employment is at will." *Gunderson*, 628 N.W.2d at 182. The employee must present objective evidence of the employer's specific and definite statements that rise to the level of an offer to modify the at-will employment relationship and cannot merely rely on his own subjective belief that such a contract had been created. *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804, 810 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). In ascertaining the nature of the employment relationship, courts must consider, among other things, the written and oral negotiations of the parties and the particular circumstances at issue. *Eklund v. Vincent Brass & Aluminum Co.*, 351 N.W.2d

371, 376 (Minn. App. 1984) (quoting *Rowe v. Noren Pattern & Foundry Co.*, 283 N.W.2d 713, 716 (Mich. Ct. App. 1979)), *review denied* (Minn. Nov. 1, 1984).

The district court concluded as a matter of law that Connexus's alleged oral assurances that Newland would be employed at least until age sixty-five and its statements that Newland "had to stay" and "couldn't leave" were not sufficiently definite or clear to overcome the presumption that Connexus could terminate him with or without cause. The court also concluded that Newland failed to produce any document requiring good cause to terminate him.

In his affidavit, Newland alleges that board chair Wojciechowski assured him that he would remain at Connexus until at least age sixty-five if he waived his rights under the severance agreement. Newland claims that he terminated the severance agreement in reliance on Wojciechowski's assurance and understood it to mean that he could not be terminated without cause until at least age sixty-five. Newland relies on his affidavit in support of his argument that Connexus intended to modify his at-will employment. It is not clear whether the district court considered Newland's affidavit in granting summary judgment.

As a preliminary matter, Connexus argues that we should not consider the allegations contained in Newland's affidavit when determining whether there is a genuine issue of material fact on the existence of an employment contract because the affidavit contradicts Newland's prior deposition testimony. A self-serving affidavit that contradicts prior deposition testimony is not sufficient to create a genuine issue of material fact. *Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App.

1995). We do not address the merits of Connexus's argument, however, because even assuming the allegations in Newland's affidavit are true, we conclude that Connexus's statements were not sufficiently definite and clear to overcome the presumption that Newland's employment was at-will.

Connexus's statements in this case are similar to statements in other cases that have been determined to be insufficient to overcome the presumption of at-will employment. *See, e.g.*, *Cedarstrand v. Lutheran Bhd.*, 263 Minn. 520, 523, 533-34, 117 N.W.2d 213, 216, 222 (1962) (concluding that employer's promise to give employees "job[s] as long as they wished until retirement" was insufficient to modify at-will employment); *Aberman*, 414 N.W.2d at 770-72 (concluding that employer's alleged promise, characterized as, "I will always take care of you, you will always be with [the company]," was insufficient to modify at-will employment); *Dumas v. Kessler & Maguire Funeral Home, Inc.*, 380 N.W.2d 544, 548 (Minn. App. 1986) (concluding that supervisor's statement to employee that they would "retire together" was insufficient as matter of law to constitute agreement that employee could be discharged only for cause).

Newland alleges that Connexus "assured" him that he would remain the chief executive officer until at least age sixty-five. Newland's allegation, however, does not contain specific and definite language that would rise to the level of an offer to modify his at-will employment. Connexus's statements "assuring" him that he would continue to be the chief executive officer and that he "had to stay" and "couldn't leave" are too general and not sufficiently definite or clear to overcome the presumption that Newland's employment status was at-will. At most the statements express Connexus's interest in

retaining Newland indefinitely and are no more definite or clear than an employer promising an employee that he will be employed for as long as he wishes until retirement. Newland has failed to provide objective evidence that Connexus clearly intended to modify his at-will employment based on Wojciechowski's oral statements.

In addition, Newland has failed to produce any documentary evidence that purports to modify his at-will employment relationship with Connexus. To the contrary, the provisions of the severance agreement, the defined benefit plan, and the change-of-control agreement that address Newland's employment relationship with Connexus all indicate that he was an at-will employee and continued in that status under the agreements. Newland's reliance on assurances made by Wojciechowski on December 9, 2004, is also inconsistent with the change-of-control agreement that Newland executed three weeks later on December 30, 2004. Section 7.3 of the change-of-control agreement specifically provides that "[n]othing herein is to be construed as modifying in any way the at-will nature of the employment relationship between [Newland] and [Connexus]." This provision not only provides objective evidence that Newland and Connexus did not intend to modify their at-will employment relationship; it also invokes application of the parol-evidence rule.

The parol-evidence rule excludes evidence outside a written agreement, including oral discussions before or contemporaneous with the execution of the agreement, if the evidence contradicts the plain terms of the agreement. *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 17 (Minn. 1982). Because Newland's claims are based on oral statements made prior to executing the change-of-control agreement that clearly contradict the plain

terms of the written agreement, the parol-evidence rule excludes evidence of those oral statements and provides another, albeit superfluous, basis on which to affirm the district court's summary judgment. *See Montgomery v. Am. Hoist & Derrick Co.*, 350 N.W.2d 405, 408 (Minn. App. 1984) (affirming summary judgment based on parol-evidence rule when employee claimed that at-will employment relationship was modified by oral discussions occurring before parties reduced terms of employment relationship to writing).

Alternatively, Newland argues that the district court erred when it concluded that he did not provide additional consideration beyond his employment services sufficient to create a contract modifying his at-will employment relationship with Connexus. "[C]onsideration may consist of some benefit accruing to one party or some detriment suffered by the other." *Estrada v. Hanson*, 215 Minn. 353, 355, 10 N.W.2d 223, 225 (1943). "To come within the independent-consideration exception to the at-will doctrine, consideration must be both uncharacteristic of the employment relation and regarded by the parties as consideration for a promise of job security." *Gunderson*, 628 N.W.2d at 182.

Newland claims that he provided consideration for the board's alleged promise of job security in two ways: by terminating the severance agreement and by continuing to work past age sixty. First, although Newland argues that by terminating the severance agreement he gave up valuable severance benefits, he did not. He had to terminate the severance agreement in order to receive the benefits under the defined benefit plan, which provided him with equal or greater benefits than he was entitled to under the severance

agreement. Thus, terminating the severance agreement did not constitute consideration because Newland did not suffer a detriment and Connexus did not receive a benefit as a result of the termination.

Nor could Newland's continued service as chief executive officer past age sixty constitute consideration. Continuous service and good performance is not additional consideration uncharacteristic of the employment relationship. *See Dumas*, 380 N.W.2d at 546 (stating that long-term service and good performance do not constitute consideration); *accord Braziel v. Loram Maint. of Way, Inc.*, 943 F. Supp. 1083, 1107-08 (D. Minn. 1996). Newland relies on *Pine River State Bank v. Mettille* for the proposition that his continued performance despite his freedom to leave constitutes consideration for Connexus's modification of his at-will employment. The *Pine River* opinion addresses personnel-handbook provisions under a unilateral-contract-formation analysis. *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 629 (Minn. 1983). This case, however, addresses oral statements under a bilateral-contract-formation analysis making *Pine River* factually and legally distinguishable. Thus, Newland's reliance on *Pine River* is misplaced.

The evidence establishes as a matter of law that Connexus's alleged statements were not sufficiently clear or definite to constitute an offer to modify Newland's at-will employment status. Newland also failed to show that he gave any additional consideration uncharacteristic of the employment relationship in exchange for

Connexus's alleged promise of employment. Thus, the district court did not err when it granted summary judgment dismissing Newland's breach-of-employment-contract claim.

II

Newland claims that even if there was no contractual employment relationship, Connexus should be liable under a promissory-estoppel theory. Promissory estoppel "requires proof that (1) a clear and definite promise was made, (2) the promisor intended to induce reliance and the promisee in fact relied to his or her detriment, and (3) the promise must be enforced to prevent injustice." *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 746 (Minn. 2000).

The district court concluded that Newland's promissory-estoppel claim failed for the same reason that his breach-of-employment-contract claim failed: Connexus's statements assuring Newland that he would remain as the chief executive officer until at least age sixty-five were too general to constitute a clear and definite promise of employment. If an employer's promise is not sufficiently definite or clear "to support an employment contract, the promise is also insufficient to support a claim of promissory estoppel." *Aberman,* 414 N.W.2d at 773; *accord Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 372 (Minn. 1995). Thus, the district court did not err when it granted summary judgment dismissing Newland's promissory-estoppel claim.

Because we affirm the district court's summary judgment based on our conclusion that there was no definite and clear promise of employment, we need not reach

Connexus's alternative arguments for affirming summary judgment based on the statute of frauds or an Employee Retirement Income Security Act preemption.

Affirmed.