**Affirmed in Part, Reversed and Rendered in Part, and Majority and Dissenting Opinions filed April 28, 2016.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-14-00829-CV**

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**MICHAEL QUEEN AND IAN MAGEE, Appellants**

**V.**

**RBG USA, INC., Appellee**

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**On Appeal from the 268th District Court**
**Fort Bend County, Texas**
**Trial Court Cause No. 09-DCV-175886**

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## D I S S E N T I N G O P I N I O N

The Majority Opinion reverses, finding legally insufficient evidence that Queen had an oral employment contract with RBG, notwithstanding direct evidence that Queen's authorized supervisor offered Queen the employment contract and that Queen was terminated for failing to follow the terms of that

employment contract. The trial court, as fact finder,[1] believed that Queen adduced sufficient evidence to establish that Queen and RBG had a meeting of the minds and, thus, concluded that Queen had an oral contract of employment with RBG.[2] I would affirm on that point. Because the Majority does not, I respectfully dissent.

## *I. Introduction*

The Majority holds that Queen failed to overcome the presumption of at-will employment. I agree with the Majority that to overcome the presumption, Queen needed to establish that RBG unequivocally indicated "a definite intent to be bound not to terminate the employee except under clearly specified terms." Maj. Op. at 12–13 (citing *Montgomery Cnty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998)). I do not agree that the fact finder had insufficient evidence to conclude Queen met that burden. Moreover, I do not believe the Majority applies an appropriately deferential standard in reviewing the trial court's fact findings, explicit and implicit. Viewing the evidence in the light most favorable to the fact finder's determination, as we must, there is ample evidence to overcome the presumption of an at-will relationship between Queen and RBG.

## *II. There is ample evidence that the parties altered Queen's at-will status.*

The Majority concludes that Queen's subjective "belief" that he was not an at-will employee is insufficient evidence to support the finding of oral contract.

[1] "Where a meeting of the minds is contested, . . . determination of the existence of a contract is a question of fact." *Angelou v. African Overseas Union*, 33 S.W.3d 269, 278 (Tex. App.—Houston [14th Dist.] 2000, no pet.). "If the factfinder determines that one party reasonably drew the inference of a promise from the other party's conduct, that promise will be given effect in law." *Id.* (citing *Copeland v. Alsobrook*, 3 S.W.3d 598, 604 (Tex. App.—San Antonio 1999, pet. denied).

[2] Although the trial court did not set forth all of the terms of the "oral contract" it found to exist, the court determined that Queen's oral employment agreement was similar in nature to Magee's own written employment agreement ("the Magee model agreement").

Maj. Op. at 15. However, the Majority errs in its failure to acknowledge the ample evidence of the parties' mutual actions that demonstrate a departure from an at-will employment status. We must determine whether the parties had a meeting of the minds to alter the at-will relationship based upon an objective standard of what the parties said and did rather than on their subjective state of mind. *See Wal–Mart Stores, Inc. v. Lopez,* 93 S.W.3d 548, 556 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (noting that, to determine mutual assent, the court should "consider the communications between the parties and the acts and circumstances surrounding those communications").

The Majority does not acknowledge the evidence the trial court may have believed and inferences the trial court may have indulged that (A) RBG [Neils Kastrup] acknowledged the specific terms of Queen's "contract" when it terminated Queen; (B) RBG terminated Queen for violating "the contract" they now disavow[3]; and (C) RBG resorted to "the contract" for termination policies and procedures when they terminated Queen.

**A. RBG acknowledged Queen's oral contract**

RBG Country Manager Ian Magee unambiguously testified that he offered Queen a contract:

> Q. Mr. Queen reported directly to you?
> A. Yes.
> Q. You're the one who hired him?
> A. Yeah.
> Q. Did you have the authority to hire him?
> A. Yes.
> Q. Did you offer him a contract?
> A. Yes.

[3] RBG even asserted in their answer to Queen's lawsuit that his oral contract claim was barred by his "prior material breach."

In Kastrup's November 14, 2008 termination letter, he states that Queen is "entitled to appeal against termination of *your contract* in terms of the Disciplinary and Dismissal Procedure." (emphasis supplied) The Magee model agreement shows that RBG intends that an employee's "acceptance of this contract indicates that you abide by the disciplinary rules."

**B. RBG terminated Queen for not following his oral contract**

RBG Group Human Resources Manager John McLeish also testified that Queen's termination was categorized as "gross misconduct" for disclosing confidential information. Again, the Magee model agreement shows explicitly, under Disciplinary & Dismissal Procedure, that "divulging confidential information to a third party" is one example of gross misconduct for which the right of "Summary Dismissal" is contractually reserved to RBG. It further states, under Confidentiality, that "[e]mployees must not divulge 'confidential information' which they may receive or obtain in the course of their employment, either during that employment or at any time thereafter" and "[a]ny contravention of this [policy] will be viewed as gross misconduct."

**C. RBG followed Queen's oral contract**

RBG followed Queen's oral contract in all of its essential terms[4]: term of employment; termination procedures; and compensation.

[4] It is true, as RBG alleges, that Queen and RBG did not agree on "the amount of work Queen was obligated to perform." There is no evidence that Magee and Queen specifically discussed whether Queen was to be a part-time or a full-time employee. In light of the fact that RBG placed Queen in charge of safety, it seems that a full-time job could be implied from the title. However, and more to the point, the trial court could have examined the Magee model agreement and concluded that such a term is not material to RBG. The Magee model agreement makes no reference to the "amount" of work. Instead, it explicitly states that he must "work such hours as may be necessary for the performance of [his] duties."

### *1. Term of Employment and Termination Procedures*

With regard to the parties' agreement on term of employment, Magee testified that the term of Queen's contract was "open-ended" with a retirement age of 65, just like Magee's contract. Gay Smith of RBG Human Resources explained that an open-ended contract is one based upon assignment, not time.[5] She also explained that under the open-ended "term" of such a contract, RBG may only terminate in accordance with the company's notice of termination provisions. That is, RBG could terminate immediately and without the necessity of notice in the event of gross misconduct. Otherwise, the company was required to give three months' written notice of termination. McLeish explained that the open-ended contract of employment is "the norm" for employment contracts at RBG.

RBG performed. In keeping with the "term of employment" and the "termination" terms of the contract, RBG notified Queen on November 14, 2008, in writing that he was being summarily and immediately terminated for gross misconduct and that he had a right of appeal. Kastrup testified that he specifically followed the contractual procedures in terminating Queen.

### *2. Compensation*

With regard to the parties' agreement on compensation, Magee said Queen's salary was "specified" at the time he and Queen discussed the contract and his recollection was that the salary was "circa $100k." Further, Magee and Queen testified they agreed on additional compensation, a $650 per month car allowance.

And, RBG performed. RBG paid Queen "circa $100,000" or precisely $126,442.40 as compensation. And, RBG paid Queen precisely $650.00 per month as a car allowance until it terminated him.

[5] RBG did not assert that the oral contract of employment urged by Queen violated the statute of frauds and does not make that argument on appeal.

From the above evidence of RBG's acknowledgement of the contract, compliance with the contract, and allegation that Queen breached the contract, the trial court could easily have determined that both parties objectively acted as though Queen was bound by the contract he was offered and he accepted; and that RBG knew that it was bound by a contract. At-will employees may be fired for any reason or no reason at all; neither gross misconduct nor three-month's written notice are required. *See Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 660 (Tex. 2012) (noting that "we have long held firm to the principle that, in Texas, an at-will employee may be fired for a good reason, a bad reason, or no reason at all") (internal citations omitted). The trial court was entitled to consider RBG's conduct and its adherence to these non-at-will terms in determining that RBG agreed that Queen would not be an at-will employee.

### ***III. There is ample legal authority that Queen's employment contract was not an unenforceable agreement to agree.***

The Majority repeatedly references the anticipated, but unexecuted, written employment agreement. Thus, the Majority appears to conclude that Queen's initial agreement with RBG did not rise beyond an unenforceable "agreement to agree." Maj. Op. at 16. If so, the Majority has neglected not only the ample evidence of "performance," detailed above, but also the ample legal authority on agreements to agree.

An agreement to formalize an agreement later does not render such agreement unenforceable. In 1988, the Texas Supreme Court held that a determination whether a "contemplated formal document [was] a condition precedent to the formation of a contract or merely a memorial of an already enforceable contract" rests upon the intent of the parties; and intent of the parties is a fact question. *Foreca, S.A. v. GRD Dev. Co.*, 758 S.W.2d 744, 745 (Tex. 1988).

Very recently, the Texas Supreme Court reaffirmed that holding. *See R.R. Comm'n of Tex. v. Gulf Energy Expl.* Corp., No. 14-0534, __ S.W.3d __, 2016 WL 363771 (Tex. Jan. 29, 2016). Relying upon *Foreca*, our court has also acknowledged that whether a contemplated formal document is in the nature of a condition precedent to an enforceable contract or is to be a memorial of an already enforceable contract is a question of intent; and where intent is disputed, it is a fact question. *See Martin v. Black*, 909 S.W.2d 192, 197 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

Even a somewhat indefinite agreement to agree may be enforced where the parties have performed or partially performed. Recently in *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231 (Tex. 2016), Justice Boyd, writing for a unanimous court, detailed the principles of agreements to agree. Following a bench trial in *Fischer*, the trial court declared that the 2010 adjustment provision contained within the parties' asset purchase agreement was not an unenforceable agreement to agree. *Id.* at 244. CTMI contended that the provision was an agreement to agree in part because the provision stated that the completion percentages "will have to be mutually agreed upon." *Id.* at 236. The Dallas Court of Appeals reversed the trial court, holding the provision "an unenforceable agreement to agree"; one that "fails for 'indefiniteness' as a matter of law." *Id.* at 237.

The Supreme Court noted as the Majority does here, that all material and essential terms must be agreed upon before an agreement to agree may be enforced. *Id.* at 238. However, the Supreme Court also noted that "'[a]greements to enter into future contracts are enforceable if they contain all material terms.'" *Id.* (alteration in original) (quoting *McCalla v. Baker's Campground, Inc.*, 416 S.W.3d 416, 418 (Tex. 2013)). Stated differently, "an agreement that contains all of its essential terms is not unenforceable merely because the parties anticipate some future agreement." *Id.*

The *Fischer* court then analyzed the language before the court to determine whether the language "will have to be mutually agreed upon" rendered the provision too indefinite to enforce. *See id.* at 242–44. The *Fischer* court returned to the familiar principles of the Restatement (Second) of Contracts[6] for its analysis: "[W]e are guided by the principle that '[p]art performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed.'" *Id.* at 240 (quoting Restatement (Second) of Contracts § 34(2) (1981)). Therefore, the court examined the parties' performance under the agreement and found substantial performance on the asset purchase agreement as a whole, though not on the adjustment provision. *See id.* at 244. Nevertheless, the court determined that "[w]hen parties have already rendered some substantial performance or have taken other material action in reliance upon their existing expressions of agreement, courts will be more ready to find that the apparently incomplete agreement was in fact complete and require . . . performance on reasonable terms." *Id.* at 242 (quotation omitted).

Queen's argument for enforcement is even better than *Fischer*. Queen adduced evidence of the essential terms of his oral employment agreement, in particular from the supervisor who offered him that agreement. Queen adduced evidence that RBG itself performed under that agreement. RBG's performance was not merely on the agreement as a whole. RBG performed on the very provision that rendered this employment contract not at-will. RBG knew that it

[6] *Fischer* is not decided in the context of an employment contract; however, the Texas Supreme Court frequently resorts to the Restatement (Second) of Contracts for employment-contract guidance. For example, in the seminal case relied upon by the Majority, *Montgomery Cnty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998), the court used the Restatement (Second) of Contracts to define "promise" between employer and employee. And, in *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 661 (Tex. 2006), the court used the Restatement (Second) of Contracts to examine covenants not to compete within employment contracts.

agreed to give Queen three months' notice unless it terminated him for gross misconduct. And, so, RBG terminated Queen for gross misconduct.

Having failed to persuade the trial court that Queen engaged in gross misconduct, RBG now pretends the contract does not exist. On appeal, RBG has persuaded the Majority to allow them to have their contract and reject it, too—as a matter of law. But, the Majority has disregarded a fundamental characteristic of agreements to agree that are themselves enforceable: The parties' actions are conclusive evidence of their intent to be bound even to the agreement to agree. *See Tex. Oil Co. v. Tenneco, Inc.*, 917 S.W.2d 826, 830 (Tex. App.—Houston [14th Dist.] 1994) ("[T]he actions of the parties may conclusively establish their intention to enter a binding agreement even if some terms are left for future agreement."), *rev'd on other grounds*, 958 S.W.2d 178 (Tex. 1997); *see also* Restatement (Second) of Contracts § 33 cmt. a ("[T]he actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon."). The trial court resolved RBG's intent to be bound to the oral contract of employment from RBG's own words and conduct.

Because I believe the trial court's determination that Queen and RBG had an oral employment contract is abundantly supported by the evidence, I would affirm the trial court's finding of an oral employment contract between Queen and RBG that required RBG to give Queen three-months' notice of termination in the absence of gross misconduct.

/s/ Sharon McCally
Justice

Panel consists of Justices Jamison, McCally, and Wise. (Jamison, J., Majority).