

NO. A09-1855

State of Minnesota
In Court of Appeals

Darwin Roberts, Dave Dubs, Greg Morse, John Westhoffl,
Kenneth Mathewson, Jeff Small, Arthur Buntrock,
Roger Grindstaff, James Baron, Jack Herr, Vincent Bernu,
Richard Sydow, Steve Eklund, Leroy Atkinson,
Michael Kroupa, Diana Makimen, Suzzy Harper, Gary Harper,
and Thomas Kimmes, individually and on behalf of
all others similarly situated,

Appellants,

vs.

Brunswick Corporation and Lund Boat Company,

Respondents.

APPELLANTS' BRIEF, ADDENDUM AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE LEGAL ISSUES

- I. Did the district court err in declining to find a breach of contract, and instead finding that Respondents modified the Genmar vacation policy in October 2004, thereby excusing their failure to credit Appellants with earned vacation pay on July 1, 2005?**

The district court declined to find a breach of contract, and instead found that Respondents modified the unilateral contract in October 2004 after performance had begun, and that Appellants “knew or should have known” of the modification.

Apposite cases:

Pine River State Bank v. Mettille,

333 N.W.2d 622 (Minn. 1983)

Feges v. Perkins Rest., Inc.,

483 N.W.2d 701 (Minn. 1992)

Brown v. Tonka Corp.,

519 N.W.2d 474 (Minn. Ct. App. 1994)

- II. Did the district court err in finding that even if Respondents breached the Genmar vacation policy, Appellants suffered no damages?**

The district court found that even if Respondents breached the Genmar vacation policy, Appellants did not suffer damages because they received the same amount of vacation under the new Brunswick vacation policy as they would have under the Genmar policy.

Apposite cases:

A.O. Smith Corp. v. Kan. Dep't of Human Res.,

No. 93-477, 2005 WL 3434010 (Kan. Ct. App. 2005)

STATEMENT OF THE CASE

Appellants in this case are current and former employees of Lund Boat Company and Brunswick Corporation (“Respondents”) who worked at the Lund boat manufacturing facility in New York Mills, Minnesota. Appellants were employed by Lund and Genmar Industries, Inc. (“Genmar”) until Lund was purchased by Brunswick.

On June 26, 2007, Appellants filed this lawsuit as a class action in Otter Tail County District Court, the Honorable Mark F. Hansen presiding, to recover earned but unpaid vacation pay under the Genmar vacation policy for the model year beginning July 1, 2004 and ending June 30, 2005. (AA. 1-9.)¹ Plaintiffs asserted claims for (1) breach of contract, (2) failure to pay wages under Minn. Stat. § 181.101, (3) promissory estoppel, and (4) unjust enrichment. (AA. 4-7.)

On August 25, 2008, the district court granted Appellants’ motion for class certification pursuant to Minn. R. Civ. P. 23.03. (AA. 23-34.) The Court defined the class as: “All persons employed by Defendants at the New York Mills, Minnesota plant through July 1, 2005, whose vacation time was calculated according to the model year (beginning July 1 and ending June 30), and who ordinarily would have earned vacation time on July 1, 2005 under the Genmar vacation policy in the Genmar handbook.” (AA. 25.)

Also on August 25, 2008, the district court denied the parties’ cross-motions for summary judgment on liability. (AA. 16-22.) The parties subsequently requested that

¹ All references to the Appendix are cited as “AA.” followed by the relevant page number(s). All references to the Addendum are cited as “AD.” followed by the relevant page number(s).

the court reconsider the limited issue of whether the Genmar handbook constituted a valid contract. (AA. 35-41.) On October 21, 2008, the district court granted Appellants' motion for summary judgment, and held that the Genmar handbook constituted a unilateral contract for vacation pay. (AA. 36.)

Both parties waived their right to a jury trial, and the case was tried to the district court on January 27-29, 2009. The only issues for trial were whether Respondents breached their contract with Appellants and, if so, the amount of damages. After receiving closing arguments and proposed findings from both parties, the court returned a judgment in favor of Respondents on June 11, 2009. (AD. 1-16.) The district court found that although a valid contract for vacation pay existed under the Genmar handbook, the contract had been effectively modified by Brunswick in October 2004, and that Plaintiffs "knew or should have known" of the modification. (AD. 9.) The court further held that Plaintiffs suffered no damages as a result of the modification. (Id.)

Appellants filed motions for a new trial and for amended findings of fact, conclusions of law, and order of judgment. (AA. 42-43.) In an order dated August 12, 2009, the district court amended its findings of fact to correct errors in its description of the handbook language at issue, but otherwise denied Appellants' motions. (AD. 18.) The court further modified its findings of fact to correct additional clerical errors in an order dated August 24, 2009. (AD. 24-25.) Appellants now appeal the district court's judgment, and the denial of Appellant's motion for a new trial and amended findings.

STATEMENT OF FACTS

A. The Genmar Vacation Policy.

Appellants in this case are current and former employees of Respondents who worked at the Lund boat manufacturing facility in New York Mills, Minnesota. Appellants were employed by Lund and Genmar Industries, Inc. until Lund was purchased by Brunswick on April 1, 2004. (Tr. 24:2-6.)²

Prior to Brunswick's acquisition of Lund, employees at the New York Mills facility earned vacation pay under the policy contained in Genmar's employee handbook. The policy reads, in relevant part, as follows:

The following paid vacation will be granted to employees meeting the qualifications. Vacation pay is earned on July 1 of each model year and calculated based on time in service during the previous model year. A model year starts on July 1 of one calendar year and ends June 30 of the following calendar year. All service with the Company will be calculated as of June 30 for purposes of determining vacation pay earned on the following July 1.

(Ex. 102 at 20 (emphasis added).)

Under the policy, employees at the New York Mills facility received no vacation pay at the start of their employment. (Tr. 93:20-25, 105:9-22, 137:6-13, 165:12-14, 175:10-13, 198:10-16, 229:19-21; Ex. 105.) Instead, they were credited with a lump sum of vacation pay at the beginning of the model year (July 1), which was given in exchange for the work that they had performed during the previous model year (July 1 through June 30). (Tr. 28:12-16, 29:2-5, 30:19-25, 31:12-16, 32:4-7, 94:1-8, 137:17-19, 165:18-20,

² All references to the Trial Transcript are cited as "Tr." followed by the relevant page number(s). All references to the exhibits received at trial are cited as "Ex." followed by the relevant exhibit number(s).

175:10-13, 198:10-16, 229:19-21.) Vacation pay was credited according to the following schedule:

Years of service on June 30th	Paid vacation
Less than 240 regular working days but more than 20 regular working days	1/2 day (4 hours) for every 24 regular working days served
One year or 240 working days	1 week (40 hours) pay
One and one-half years	1 week and 1 day (48 hours) pay
Two years	1 week and 2 days (56 hours) pay
Three years	2 weeks (80 hours) pay
Four years	2 weeks (80 hours) pay
Five years	2 weeks (80 hours) pay
Eight years	3 weeks (120 hours) pay
Fifteen years	4 weeks (160 hours) pay

(Ex. 102 at 21; Tr. 65:12-19.)

If an employee under the Genmar policy did not use all of his or her earned vacation during the model year, any unused vacation time was paid out in cash at the employee's hourly rate. (Tr. 29:22-30:10, 48:13-16, 65:15-24, 137:20-23.) In other words, employees had the option of either using all of their vacation each year, or saving it and being paid out in cash. (Tr. 30:2-6.)

B. The Brunswick "Earn-and-Burn" Vacation Policy.

Lund was acquired by Brunswick on April 1, 2004. (Tr. 32:8-12.) Shortly after the acquisition, Lund President Larry Lovold held a meeting to announce the purchase to the employees in New York Mills. (*Id.*) Mr. Lovold assured the employees that nothing was going to change about the company "except the flag." (Tr. 167:8-15, 177:10-178:11, 214:2-6, 231:11-22.) There was no discussion of a change in the company's vacation policy. (Tr. 32:20-22, 200:1-3.)

Despite Mr. Lovold's assurances, Brunswick decided to change the old Genmar health and benefits policies in an effort to make them consistent with Brunswick's company-wide policies. (See, e.g., Tr. 78:5-80:25.) This included switching to Brunswick's vacation policy. Unlike the Genmar policy, the Brunswick vacation policy was an "earn-and-burn" system that ran on the calendar year. (Ex. 112 at 22.) Beginning on January 1 of each year, employees earned vacation pay on a per-day basis to use ("burn") as it accumulated over the course of the year. (Id.) Unlike the Genmar policy, earned but unused vacation pay was forfeited at the end of each year under the Brunswick policy. (Id.)

C. Brunswick's Announcement of the Earn and Burn Vacation Policy.

Respondents announced the transition to Brunswick's health and benefits policies, including the new vacation policy, in a series of meetings in October 2004. Employees were initially told that they would start earning vacation pay under the Brunswick earn-and-burn policy on January 1, 2005, but that date was eventually pushed back to July 1, 2005. The evidence at trial showed that a vast majority of employees understood that on July 1, 2005, as usual, they would be credited with earned vacation in exchange for the work they had performed from July 1, 2004 to June 30, 2005. (Tr. 157:2-19, 162:15-23, 166:12-16, 200:12-22, 216:12-18.)

1. The Town Hall Meeting.

On October 5, 2004, Respondents held a meeting in the New York Mills town hall to discuss the process for employees to enroll in Brunswick's health and benefits plans. (Tr. 66:22-25, 96:3-5.) This was the only meeting about the new benefits where all of the

employees were in attendance. (Tr. 118:5-7; see Ex. 113.) The presentation was given by Benefits Manager Noreen Cleary and Director of Human Resources Gary Ilkka. (Tr. 67:3-6, 97:2-5.)

Although the Brunswick vacation policy was discussed at the meeting, employees testified that they were not told that they were no longer earning vacation pay under the Genmar policy. (Tr. 97:8-14, 179:4-6.) Ms. Cleary also confirmed that “the clear message [at the meeting] was what was going in effect; so we weren’t talking about what was going away.” (Tr. 322:10-17.) She confirmed that there was no discussion about the Genmar policy and what, if anything, was happening to it. (Tr. 322:23-323:4.)

The presentation materials used by Mr. Ilkka at the meeting contain no discussion of the Genmar policy. (See Ex. 109; Tr. 98:4-13, 132:1-8, 271:22-272:5.) The slides simply show that employees would start earning vacation on an earn-and-burn basis as of January 1, 2005, which was later extended to July 1, 2005. (Ex. 109; Tr. 258:18-23, 265:9-18, 317:7-22.) Mr. Ilkka, however, testified that he “revoked” the Genmar policy at the meeting. (Tr. 256:22-257:25.)

Despite Mr. Ilkka’s claims that he revoked the Genmar policy during the town hall meeting, Plant Manager James Hegarty testified that he thought he would still be getting his vacation under the Genmar policy in addition to his “earn-and-burn” vacation going forward under the new Brunswick policy. He stated:

Well, when I left the meeting I remember going back to the main office building where my office was and I remember thinking that, well, if it’s earn as you go, which it was announced to be . . . my first thought was, as a veteran employee, that I will have eight weeks during the next year to use

because I'll get my snapshot credit of four weeks plus I'll earn as I go an additional four weeks.

(Tr. 111:5-17.) Mr. Hegarty only learned that Brunswick was not planning on giving him the vacation he had earned under the Genmar policy after he personally sought clarification from someone in human resources. (Tr. 112:1-7.) Likewise, Diana Makinen testified, "The thing that kept in my mind the whole time was that nothing is going to change. Everything's the same. And that was told by my human resource[s] manager." (Tr. 204:7-20; see also Tr. 208:5-12 209:20-210:7.)

2. The User's Guide.

Brunswick also mailed a User's Guide to employees in October 2004 explaining many of the new Brunswick benefits, such as health benefits, 401(k), and stock options. (Ex. 111, 112; Tr. 74:11-19, 263:10-13.) The User's Guide explained how the Brunswick vacation policy would work, but contained no notice to employees that the Genmar policy would not remain in place for the rest of the current model year, or that the employees would not be credited with vacation pay on July 1, 2005 as they had in the past. (See Ex. 111, 112.)

3. Informational Meetings.

On October 14-15, 2004, in response to questions from employees about the Brunswick vacation policy, Ms. Guse and Mr. Hegarty held informational meetings to explain the new policy. (Tr. 33:5-7, 69:19-70:2, 98:22-99:6, 119:19-25.) Only 65 out of 450 employees attended the meetings. (Ex. 113.) Employees were not informed at the meeting that they were no longer operating under the Genmar policy, or that they would

not receive their vacation under the Genmar policy on July 1, 2005. (See Tr. 158:15-24.) They were simply told that the new Brunswick policy would go into effect on July 1, 2005. (Tr. 70:17-23.) Ms. Guse admitted, after being impeached, that she had no knowledge of employees ever being told that they would not be credited on July 1, 2005 with the vacation pay that they had earned the previous model year. (Tr. 35:10-36:4.)

4. The Gain Share Meetings and “Transition Period.”

In late October 2004, Defendants held a “gain share” meeting at the New York Mills facility. (Tr. 74:24-75:11.) Employees attended the meeting in shifts because the training center only held 35 to 40 employees. (Tr. 125:2-10.) At the meeting, James Hegarty announced that the company would be implementing an 18-month transition plan for the new earn-and-burn vacation policy. (Tr. 75:12-16; Ex. 113.) Under the plan, employees would receive 18 months of vacation to use any time between July 1, 2005 and December 31, 2006. (Tr. 72:1-6.) Mr. Hegarty used a slideshow presentation at the meeting. (Ex. 105; Tr. 75:17-24.) Once again, the presentation contained no statement that employees would not be credited on July 1, 2005 with the vacation pay that they had earned for their work the previous model year under the Genmar policy. (See Ex. 105; Tr. 86:2-10, 270:18-23.)

5. Employees Were Not Told of a “Modification.”

At trial, employees confirmed that they received no notice during the October 2004 meetings that they would not receive their vacation under the Genmar policy on July 1, 2005. For example, Norman Koch testified that although he attended one of the informational meetings, “they gave no specific that this is taking effect at any point in

time.” (Tr. 158:16-24.) He was not told that he was no longer earning vacation under the Genmar policy until he eventually requested his pay in mid-July 2005. (Tr. 162:15-23.) Jack Herr testified, “Well, I thought I had earned vacation for the following year; I had worked 2004 to 2005 to earn my vacation for the next year. When I got to that next year, I was told I didn’t have any vacation.” (Tr. 166:3-11; see also Tr. 166:12-16.) Likewise, Jim Baron only first learned in July or August of 2005 that he was not going to be credited with his earned vacation for the prior model year. (Tr. 216:12-16; see also Tr. 214:7-15, 216:16-18.) Other employees provided similar testimony. (E.g., Tr. 200:12-22, 204:7-20, 232:7-9, 232:15-233:1.)

6. Some Employees Express Anger and Confusion About the Change to the Brunswick Vacation Policy.

Understandably, some employees were confused and upset about the change to the Brunswick vacation policy. After the town hall meeting, Darwin Roberts spoke with Carol Guse about his concerns that employees would not get their vacation pay under the Genmar policy on July 1, 2005. (Tr. 186:1-15, 188:19-22.) Ms. Guse assured Mr. Roberts that he was not losing any vacation pay under the Brunswick policy. (Tr. 187:2-14.) Ms. Guse, along with Mr. Hegarty, also discussed the Brunswick policy with a group of employees in the carpet department of the New York Mills facility. (Tr. 113:23-114:25, 179:18-23.) Thomas Kimmes was at this informal meeting, and recalled being told that by Mr. Hegarty that he would not be earning vacation pay under the Genmar policy from that point on. (Tr. 141:1-8.)

In late October 2004, Mr. Roberts wrote an anonymous letter expressing concerns about the transition to the Brunswick vacation policy. (Ex. 114; Tr. 181:17-25.) A few other employees wrote similar letters. (Ex. 115, 116.)

D. Brunswick Fails to Credit Employees With Earned Vacation Pay Under the Genmar Policy on July 1, 2005.

The Brunswick handbook containing the new earn-and-burn vacation policy was not distributed to, nor acknowledged by, the employees at the New York Mills facility until July 18, 2005.³ (Ex. 6, 7; Tr. 38:14-39:6, 52:3-14.) Despite this, and despite the fact that Appellants had worked from July 1, 2004 through June 30, 2005 in exchange for vacation pay under the Genmar policy, Respondents did not credit Appellants with their earned vacation under the Genmar policy on July 1, 2005. (Tr. 139:8-13, 148:12-17, 165:21-24, 176:24-177:9, 197:14-16, 213:13-15, 230:2-9; Ex. 19.)

³ Carol Guse and James Hegarty both confirmed that the new handbook went into effect when it was distributed to the employees. (Tr. 42:8-21, 44:5-12, 91:3-9, 95:18-22.) Vice President of Operations Mark Dockter also believed the company was legally obligated to follow the Genmar policy until the new handbook was distributed. (Ex. 15.)

SUMMARY OF THE ARGUMENT

The district court erred in finding that Respondents effectively “modified” the Genmar vacation policy during the October 2004 meetings. Under Minnesota law, an offer for a unilateral contract may not be modified or revoked once performance has begun. Feges v. Perkins Rest., Inc., 483 N.W.2d 701, 708 (Minn. 1992). Accordingly, once Respondents’ employees began working on July 1, 2004 in exchange for vacation pay under the Genmar policy, the contract could not be altered. And even assuming the Genmar policy could be modified, the elements of an effective modification were not met. A valid contract modification requires (1) an offer which is sufficiently definite and specific, and not merely a general statement of policy, (2) communication of the offer to the employee, (3) acceptance of the offer, and (4) consideration. Pine River State Bank v. Mettelle, 333 N.W.2d 622, 626 (Minn. 1983); Feges, 483 N.W.2d at 708. Here, the only definite and specific communication of an intention to modify the Genmar vacation policy took place when Respondents issued the new Brunswick handbook on July 18, 2005. Because the policy was not modified prior to that time, Appellants were entitled to the vacation pay that was due to them on July 1, 2005 under the Genmar policy.

The district court also erred in finding that even if Respondents breached their agreement, Appellants suffered no damages. Contrary to the district court’s conclusion, the fact that employees might have been able to take the same amount of vacation under the Brunswick policy as they had under the Genmar policy is irrelevant. The “earn-and-burn” vacation under the new Brunswick vacation policy was being given in exchange for the employees’ work going forward from July 1, 2005. In contrast, the vacation pay

Appellants are seeking in this case is for the work they performed under the Genmar policy from July 1, 2004 to June 30, 2005. Appellants suffered damages.

ARGUMENT

I. STANDARD OF REVIEW.

Under Rule 52.01 of the Minnesota Rules of Civil Procedure, when an action is tried without a jury, the district court's findings may be set aside if they are clearly erroneous. Minn. R. Civ. P. 52.01; Northern States Power Co. v. Lyon Food Prods., Inc., 229 N.W.2d 521, 524 (Minn. 1975). Of course, due regard should be given to the trial court's judgment of the credibility of the witnesses. Minn. R. Civ. P. 52.01. But the reviewing court may order reversal if, after reviewing all of the evidence, the court "is left with a definite and firm conviction that a mistake has been committed." Northern States Power, 229 N.W.2d at 524. A finding may be deemed clearly erroneous by the reviewing court even though there is some evidence to support the finding. In re Probate Court, Henn. County, 198 N.W.2d 260, 261 (Minn. 1972). Conclusions of law should be overturned if the trial court erroneously construed and applied the law to the facts. O'Brian v. Comm'r of Pub. Safety, 552 N.W.2d 760, 761 (Minn. Ct. App. 1996) (citing Dehn v. Comm'r of Pub. Safety, 394 N.W.2d 272, 273 (Minn. Ct. App. 1986)).⁴

⁴ Appellants have also appealed the district court's denial of their motion for a new trial and amended findings because the court's findings were contrary to law and unsupported by the evidence at trial. Minn. R. Civ. P. 59.01(g). On review of a denial of a new trial motion in an action tried to a judge without a jury, the court's findings may be reversed if they are clearly erroneous. Duffy v. Park Terrace Supper Club, Inc., 206 N.W.2d 24, 27 (Minn. 1973).

II. BRUNSWICK BREACHED ITS CONTRACT BY FAILING TO CREDIT EARNED VACATION PAY ON JULY 1, 2005.

In Minnesota, an employer's liability for employee vacation pay is a matter of contract. Lee v. Fresenius Med. Care, Inc., 741 N.W.2d 117, 123 (Minn. 2007); Tynan v. KSTP, Inc., 77 N.W.2d 200, 206 (Minn. 1956); Brown v. Tonka Corp., 519 N.W.2d 474, 477 (Minn. Ct. App. 1994). Indeed, "[c]ourts have long recognized that an employer is obligated to provide vacation pay when employees have met the vacation pay eligibility requirements." Brown, 529 N.W.2d at 477. "It is beyond dispute that an agreement to pay vacation pay to employees made to them before they performed their services, and based upon length of service and time worked, is not a gratuity but is a form of compensation for services[.]" Id. (quoting Tynan, 77 N.W.2d at 206). "[W]hen the services are rendered, the right to secure the promised compensation is vested as much as the right to receive wages or other form of compensation." Id.; accord Lee, 741 N.W.2d at 124-25 (holding that vacation pay constitutes earned wages under Minn. Stat. § 181.13(a)).

The elements of a claim for breach of contract are (1) the existence of a valid contract, (2) performance of any conditions precedent, (3) breach, and (4) damages. E.g., Indust. Rubber Applicators, Inc. v. Eaton Metal Prods., Co., 171 N.W.2d 728, 731 (Minn. 1969) overruled on other grounds by Standslast v. Reid, 231 N.W.2d 98 (Minn. 1975). The district court correctly granted summary judgment in favor of Appellants on the issue of contract formation, and affirmed its decision after trial. The court found that under Minnesota law, the Genmar employee handbook created a valid unilateral contract for

vacation benefits between Appellants and their employer. (AD. 9; AA. 36.) Under that agreement, as confirmed by the witness testimony at trial, Respondents promised to credit their employees with vacation pay each July 1 in exchange for their service for the company the during the previous model year, which started July 1 and ended June 30. (Ex. 102 at 20; Tr. 28:12-16, 29:2-5, 30:19-25, 31:12-16, 32:4-7, 94:1-8, 137:17-19, 165:18-20, 175:10-13, 198:10-16, 229:19-21.)

There was also no dispute at trial regarding the elements of performance and breach. Appellants were employed by Respondents on July 1, 2004, and worked for the company through the end of the model year on June 30, 2005. (Tr. 139:8-13, 148:12-17, 165:21-24, 176:24-177:9, 197:14-16, 213:13-15, 230:2-9; Ex. 19.) Accordingly, they were entitled to their earned vacation pay under the Genmar policy on July 1, 2005. See Brown, 519 N.W.2d at 477 (explaining that vacation pay must be credited once the employer receives the benefit of the employee's work product); Berglund v. Grangers, Inc., No. C8-97-2362, 1998 WL 328382, at *4 (Minn. Ct. App. June 23, 1998) (“[T]he right to vacation benefits attaches as soon as an employee has performed the work for which the benefits constitute consideration.”). Despite this, Respondents did not live up to their end of the bargain. No employees were credited with the vacation pay they earned under the Genmar vacation policy on July 1, 2005. (See Tr. 141:19-22, 151:24-152:1, 165:25-166:5, 176:24-177:9, 200:12-22, 216:12-15, 230:7-9.) In view of the evidence at trial that Appellants fulfilled their obligations under the Genmar policy, and that Respondents failed to credit earned vacation on July 1, 2005, the district court's failure to make these findings was erroneous.

III. THE DISTRICT COURT ERRED IN FINDING THAT BRUNSWICK MODIFIED THE GENMAR CONTRACT IN OCTOBER 2004, AND THAT APPELLANTS “KNEW OR SHOULD HAVE KNOWN” OF THE MODIFICATION.

Despite the evidence that Appellants fulfilled their obligations under the terms of the Genmar vacation policy, the district court declined to find that a breach occurred. Specifically, the district court concluded (1) that Brunswick modified the Genmar vacation policy in October 2004, and (2) that Appellants “knew or should have known” of the modification because the change was communicated to them, as evidenced by complaints about the new earn-and-burn policy. (AD. 8 ¶¶ 24-27.)

The district court erred. Because Appellants began performance under the Genmar policy when they started working on July 1, 2004 in exchange for the vacation pay to be credited on July 1, 2005, Respondents’ claims that they “revoked” the policy are ineffective as a matter of law. Moreover, to the extent that Respondents did have the power to modify or revoke the Genmar policy in October 2004, their attempts fell short of the requirements set forth by the Minnesota Supreme Court in Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983) and its progeny.

A. Brunswick Could Not Revoke the Genmar Policy After Appellants Began Performance.

It is well-settled that “[a]n offeror of a unilateral contract always retains the power to modify or revoke the offer so long as the offeree has not begun performance, but retention of that power does not preclude the offer from becoming a contract once accepted by the offeree by tender of performance.” Feges v. Perkins Rest., Inc., 483 N.W.2d 701, 708 (Minn. 1992) (emphasis added). An offer for a unilateral contract may

neither be changed, nor revoked, once the offeree begins the performance requested by the offer. Peters v. Mutual Bene. Life Ins., 420 N.W.2d 908, 914 (Minn. Ct. App. 1988). Brunswick could not change or “revoke” the Genmar policy after its employees had already begun performance under the agreement, i.e., working during the model year beginning July 1, 2004 and ending June 30, 2005. Accordingly, as a matter of law, the district court’s finding that the Genmar policy was modified in October 2004 was clearly erroneous.⁵

B. The Genmar Policy Was Not Modified Prior to the Distribution of the Brunswick Handbook in Mid-July 2005.

In spite of the fact that, as a matter of law, Brunswick could not change or revoke the Genmar policy once performance began, the court held that the Brunswick effectively modified the Genmar vacation policy, and that complaints by several employees showed that the modification was communicated in October 2004. (AD. 8 ¶¶ 24-27, AD. 9 ¶¶ 2-4.) The court erred. To the extent that Brunswick did have the power to “modify” the unilateral contract even after its employees had begun performance, the evidence at trial was insufficient to show a definite and specific offer that was communicated by Appellants, and accepted with consideration.⁶ To the contrary, the evidence showed that

⁵ The district court found that the contract could be modified because it contained a provision reserving the right change the handbook as necessary. (AD. 12.) But “retention of [the ability to change a policy] does not preclude the offer from becoming a contract once accepted by the offeree by tender of performance.” Feges, 483 N.W.2d at 708.

⁶ The question of whether a contract has been modified is an issue of fact. Feges, 483 N.W.2d at 707; see also Pershern v. Fiatallis N. Am., Inc., 834 F.2d 136, 139 (8th

the purpose of the October 2004 meetings was merely to announce that there would be a modification in the future and that going forward from July 1, 2005 employees would receive vacation pay on an “earn-and-burn” basis.

It is well-settled in Minnesota that employee handbooks can create unilateral contracts of employment between employers and their employees. Following basic principles of contract formation, there must be (1) an offer which is sufficiently definite and specific, and not merely a general statement of policy, (2) communication of the offer to the employee, (3) acceptance of the offer, and (4) consideration. Pine River State Bank v. Mettill, 333 N.W.2d 622, 626 (Minn. 1983).

Of course, the same rules apply to subsequent contract modifications. As the Minnesota Supreme Court stated in Pine River, “[b]y preparing and distributing its handbook, the employer chooses, in essence, either to implement or modify its existing contracts with all employees covered by the handbook.” Id. at 627. The court in Pine River explained that “modification of the employment contract may be a repetitive process[,]” and that “language in the handbook itself may reserve discretion to the employer in certain matters or reserve the right to amend or modify the handbook provisions.” Id.

But merely reserving the right to change an existing handbook does not mean that an employer may singlehandedly “modify” a contract without first (1) making a definite and specific offer (and not a mere statement of policy) to its employees, and (2) clearly

Cir. 1987) (applying Minnesota law); Brookshaw v. South St. Paul Feed, Inc., 381 N.W.2d 33, 36 (Minn. Ct. App. 1986).

communicating that offer to its employees so that they may accept it. Feges, 483 N.W.2d at 708 (“Perkins did not reserve for itself the power to ignore the HRPM or to act arbitrarily; it merely reserved the power to change the HRPM.”); Brown v. Tonka Corp., 519 N.W.2d 474, 478 n.2 (Minn. Ct. App. 1994) (explaining how a handbook might be effectively modified).

1. The Genmar Policy Was Not Modified in Writing Prior to the Distribution of the Brunswick Handbook in July 2005.

As the Minnesota Supreme Court explained in Feges, an employer may modify its employee handbook “without great difficulty” by simply distributing a new one. See Feges, 483 N.W.2d at 708. But that is not what Brunswick chose to do in this instance. The Brunswick handbook supplanting the old Genmar policy was not given out to the New York Mills employees until July 18, 2005.⁷ (Ex. 6, 7; Tr. 38:14-39:6, 52:3-14; AD. 4 ¶ 7.) This was long after July 1, 2005, the date the employees’ vacation pay under the Genmar policy was due. Regardless, the Brunswick handbook only addressed how employees would earn vacation pay going forward, and not whether they would be given vacation pay that already been earned under the Genmar policy.

Other than the Brunswick handbook, the only other written materials that might have arguably been able to modify the Genmar policy were (1) the User’s Guide that was sent out to the employees, and (2) the various slide presentations used during the October 2004 benefits meetings. None of these documents met the requirements to modify a contract that are set forth in Pine River. See 333 N.W.2d at 626.

⁷ The employees acknowledged receipt of the new handbook at various times after the July 18, 2005 distribution date. (Ex. 9.)

First, the User's Guide undisputedly did not inform the employees that they were no longer earning vacation under the Genmar policy, or that they would not be credited with their earned vacation on July 1, 2005. (See Ex. 112 at 22.) It was just a preview of the new earn-and-burn policy that would be used in the future. (See id.)

Second, the same is true for the materials used by Gary Ilkka and James Hegarty during their presentations to the employees in October 2004. Mr. Ilkka's materials from the October 5, 2004 town hall meeting contained no definite and specific communication that the Genmar vacation policy was no longer in effect, or that vacation pay earned under that policy would not be credited on July 1, 2005. (See Ex. 109; Tr. 98:4-13, 132:1-8, 271:22-272:5.) The slides simply show that the Brunswick vacation policy would start on January 1, 2005, which was later extended to July 1, 2005. (Ex. 109; Tr. 258:18-23, 265:9-18, 317:7-22.) Mr. Hegarty's slides from the "gain share" meeting are similarly deficient. (See Ex. 105; Tr. 86:2-10, 270:18-23.)

2. The Genmar Policy Was Not Modified Orally Prior to the Distribution of the Brunswick Handbook in July 2005.

Brunswick's attempts to show an oral modification of the Genmar policy failed as well. When a party asserts that there has been an enforceable oral modification of the terms of a written contract, that party has the burden of proving the modification of the written contract by clear and convincing evidence. Bolander v. Bolander, 703 N.W.2d 529, 541 (Minn. 2005). Contrary to the district court's findings, Brunswick fell far short of meeting its "clear and convincing" burden in this regard.

First, although Director of Human Resources Gary Ilkka testified that he “revoked” the Genmar policy at the October 5, 2005 town hall meeting, his claim only came to the surface after several leading questions from his counsel, to which Appellants properly objected. (See Tr. 256:8-257:25.) Directly refuting this contention, Benefits Manager Noreen Cleary, Mr. Ilkka’s co-presenter at the meeting, confirmed that there was no discussion about modification of the Genmar vacation policy at the October 5, 2004 meeting. She testified:

Q. Okay. What was communicated to them about whether that would continue or not?

[Objections omitted.]

A. The clear communication, the clear message in here was what was going into effect; so we weren’t talking about what was going away. It was what was going to be in effect January 1.

(Tr. 322:6-13 (emphasis added).) She also confirmed on cross-examination:

Q. So if I understand your testimony just now is that there was no discussion about the Genmar policy and what, if anything, was happening to it; just that there were dates in the future where the earn-and-burn was going to go into effect, which originally was said to be January and then ultimately was July 1; correct?

A. Yes.

(Tr. 322:23-323:1-4 (emphasis added).) In view of the inability of other individuals who attended the town hall meeting to corroborate Mr. Ilkka’s claim, his statement certainly does not show that a definite and specific offer to modify was communicated.

Second, Human Resources Manager Carol Guse and Plant Manager James Hegarty were also forced to admit by impeachment (after attempting to change their

deposition testimony) that they had no recollection of the employees being told that they were not earning their vacation pay under the Genmar policy, or that they would not be credited with their earned vacation on July 1, 2005. Specifically, Ms. Guse admitted by impeachment that she had no knowledge of the employees being told that they would not be credited with their earned vacation on July 1, 2005. (Tr. 34:7-36:14.) She testified:

Q. But isn't it true that the – that there was no communication to the employees; they were never actually told that they would not be credited any vacation weeks on July 1, 2005?

A. I don't believe that's correct because if they were not told they would assume that they were getting it, and the question all came about because they weren't getting it.

* * *

Q. Now if you look at page 54, line 20 [of your deposition]. And I'll ask the question, and then if you can read your answer.

Question: "Okay. Do you know if employees were ever told they would not be credited on July 1, 2005 with the vacation that they earned from the previous model year?" What was your answer?

A. My answer says, "Not to my knowledge."⁸

(Id. (emphasis added).) Mr. Hegarty, the Plant Manager, also admitted, after being impeached, that he could not recall the employees being told that they were not earning vacation for the model year ending June 30, 2005. (Tr. 130:11-135:1.)

Third, testimony from employees also confirms the conclusion that the Genmar policy was never orally modified during the October 2004 meetings, and that the employees in New York Mills only became aware that it had been "revoked" when they

⁸ The district court struck from the record Ms. Guse's attempt to further qualify her answer. (Tr. 35:21-36:4.)

were not credited with their paid vacation on July 1, 2005. As Steve Ecklund explained it, "Well, the fact is I've earned my vacation. And I'm not asking for anything that I don't have coming to me. I earned that vacation. It belongs to me. I would like it. And if they come along with another policy afterwards and tell me ahead of time, then I have an opportunity to either stay there or leave. And I didn't have that opportunity here."

(Tr. 230:10-17.) Other employees testified:

Norman Koch – Mr. Koch testified that although he attended one of the informational meetings, "they gave no specific that this is taking effect at any point in time." (Tr. 158:16-24.) Mr. Koch was never told that he was not earning vacation pay until he eventually requested his pay in mid-July 2005. (Tr. 162:15-23.)

Jack Herr – Mr. Herr was never told at any time between July 1, 2004 and June 30, 2005 that he was not earning vacation pay for that time period. (Tr. 166:12-16.) He testified, "Well, I thought I had earned vacation for the following year; I had worked 2004 to 2005 to earn my vacation for the next year. When I got to that next year, I was told I didn't have any vacation." (Tr. 166:3-11.)

Diana Makinen – Ms. Makinen was never told at any point between July 1, 2004 and June 30, 2005 that she was not earning vacation pay that year, and never agreed that she would not be credited with her earned vacation on July 1, 2005. (Tr. 200:12-22.) Although she recalls attending a benefits meeting, she testified: "The thing that kept in my mind the whole time was that nothing is going to change. Everything's the same. And that was told by my human resource manager." (Tr. 204:7-20.)

Jim Baron – Mr. Baron only first learned in July or August of 2005 that he was not going to be credited with his earned vacation for the 2004/2005 model year. (Tr. 216:12-16.) His reaction was, "[W]here did my four weeks go that I had earned from '04 to '05?" (Tr. 216:16-18.) He recalls the October 2004 benefits meetings, and remembers being told that "we would eventually probably be going on an earn-and-burn system." (Tr. 214:7-15 (emphasis added).)

Steve Ecklund – Mr. Ecklund did not recall any discussion of vacation policies at the October 2004 benefits meeting. (Tr. 232:7-9.) He was never

told during the 2004/2005 model year that he was not earning vacation pay under the Genmar policy, and never agreed that he would not be credited with his earned vacation time. (Tr. 232:15-233:1.)

But the district court dismissed Appellants' testimony at trial. (See AD. 8 ¶¶ 24-27.) The court held that a "fair reading" of the Brunswick policy was that it modified the prior Genmar vacation policy, (*id.* ¶ 26), and that complaints by certain employees showed that the modification had been communicated, (*id.* ¶ 24). But evidence that a small number of employees were confused or upset about whether they would receive their vacation pay under the Genmar policy is a far cry from "clear and convincing" evidence of contract modification. As set forth in detail above, the vast majority of the witnesses at trial testified that they were never told that they would not be credited with their vacation pay under the Genmar policy on July 1, 2005.⁹

⁹ The court dismissed some testimony because some employees could not recall attending each of the October 2004 meetings:

[The employees'] voluntary failure to attend such meetings does not make notice of the contract modifications invalid or ineffective. The [employees] had an affirmative obligation to attend meetings or to keep abreast of modifications in the contract, particularly since Lund Boat had recently been purchased and was under new ownership and management.

(AD. 8 ¶ 27.) First, there was no evidence at trial that employees were required to attend each of the October meetings. (See Ex. 113.) Indeed, Lund President Mr. Lovold had assured them that nothing was going to change "except the flag." Second, the proposition that the employees had an "affirmative obligation" to inquire about potential contract modifications and therefore "should have known" that the Genmar vacation policy would be modified simply has no foundation in Minnesota law. See *Feges*, 483 N.W.2d at 708 ("The decisive question is whether the manual was communicated to the employee . . . in a way that objectively manifests an offer to contract for employment."); *Nabry v. MV Transp. Inc.*, 07-CV-0124, 2007 WL 4373107, at *6 (D. Minn. Dec. 13, 2007) (finding the presence of a handbook in the break room inadequate communication of an offer to contract).

The Minnesota Supreme Court has made clear that an employment contract must be created, and modified, through (1) a “definite and specific” offer that is (2) communicated to the employee, and (3) accepted by the employee. Pine River State Bank, 333 N.W.2d at 626; Feges, 483 N.W.2d at 708; Brown, 519 N.W.2d at 478 n.2. That did not happen here. In view of the lack of evidence of a written or oral modification of the Genmar policy prior to July 1, 2005, the date Appellants’ vacation pay was due under the Genmar policy, the district court’s conclusion that the contract was modified should be set aside.

IV. THE DISTRICT COURT ERRED IN FINDING THAT APPELLANTS DID NOT SUFFER DAMAGES.

In an action for breach of contract, a plaintiff may seek expectation damages, or “damages that attempt to place the plaintiff in the same position as if the breaching party had complied with the contract.” E.g., Logan v. Norwest Bank Minn., N.A., 603 N.W.2d 659, 663 (Minn. Ct. App. 1999); Peters v. Mutual Benefit Life Ins. Co., 420 N.W.2d 908, 915 (Minn. Ct. App. 1988). “The determination of actual damages is a fact question reviewable under the clearly erroneous standard.” Teachout v. Wilson, 376 N.W.2d 460, 464 (Minn. Ct. App. 1985) (citing Neilan v. Braun, 354 N.W.2d 856, 858 (Minn. Ct. App. 1984)).

After trial, the district court found that even if Brunswick had breached its contract, Appellants suffered no damages. (AD. 8-9 ¶¶ 28-31, AD. 9 ¶ 5.) The court rationalized its conclusion by explaining that “while the Brunswick policy differs from the Genmar policy, the net result is that the [Appellants] each received the same vacation

working for Brunswick as they did working for Genmar.” (AD. 8-9 ¶ 29.) The district court’s conclusion rests on an erroneous understanding of Appellants’ claims in this case. This case is not about whether Appellants were allowed to take more or fewer days off under the Brunswick policy as they had under the Genmar policy. It is about the fact that they provided work for Respondents in exchange for vacation pay under the Genmar policy, but were never compensated for it.

Missing from the district court’s analysis is the fact that the “earn-and-burn” vacation under the new Brunswick vacation policy was being given in exchange for the employees’ work going forward from July 1, 2005. (Ex. 6 at 29 (“[Y]ou are accruing that allotment on a per pay period basis throughout the year.”).) In contrast, the vacation pay Appellants are seeking in this case is for the work they performed under the Genmar policy from July 1, 2004 to June 30, 2005. (Ex. 102 at 29 (“Vacation pay is earned on July 1 of each model year and calculated based on time in service during the previous model year.”) This distinction is critical.

As already explained, prior to Brunswick’s acquisition of Lund from Genmar, the New York Mills manufacturing facility used a “model” year, which ran from July 1 to June 30. Under the Genmar vacation policy, employees had no vacation pay to use at the start of their employment, because they were just beginning to work to earn it. (Tr. 93:20-25, 105:9-22, 137:6-13, 165:12-14, 175:10-13, 198:10-16, 229:19-21; Ex. 105.) Starting on July 1 of their first full model year, however, employees were credited with vacation pay as a form of compensation for their work for the company during the previous model year. (Ex. 102 at 20; Tr. 28:12-16, 29:2-5, 30:19-25, 31:12-16, 32:4-7,

94:1-8, 137:17-19, 165:18-20, 175:10-13, 198:10-16, 229:19-21.) Each subsequent year, the employees worked in order to receive their vacation pay the following July.

When July 1, 2005 came, Brunswick failed to credit its workers with the vacation pay they had earned under the Genmar policy. Like the district court, Brunswick erroneously assumed that since the workers would be able to take the same amount of vacation under the new “earn-and-burn” policy as they would have any other year, nothing was being taken from them. This could not be more wrong. Under the terms of the Genmar policy, Appellants provided work for their employer from July 1, 2004 to June 30, 2005 in exchange for vacation pay on July 1, 2005.¹⁰ They were entitled to it, regardless of how they would earn their vacation going forward. See A.O. Smith Corp. v. Kan. Dep’t of Human Res., No. 93-477, 2005 WL 3434010, at *8 (Kan. Ct. App. Dec. 9, 2005) (“If [one employer’s] employees were due vacation in the year 2001 from [that employer] as a result of their work in the year 2000, this obligation cannot be fulfilled with vacation earned for working for [another employer] in 2001; as the employees argue, they have lost a year of vacation ‘somewhere.’”); see also Brown v. Tonka Corp., 519 N.W.2d 474, 477 (Minn. Ct. App. 1994) (“Having received the benefit of respondents’ work product, appellant is obligated to pay respondents for the accrued vacation time they accumulated during that period.”).

¹⁰ Although the district court found it significant that vacation pay was “earned” on July 1 and not “accrued” during the year, (AD. 5 ¶ 10, AD. 6 ¶ 17), that distinction is irrelevant. It is undisputed that Appellants and the class members were employed by the company on July 1, 2005.

Because Appellants never received the vacation pay that they earned on July 1, 2005, awarding them the cash value of their vacation pay puts them in the same position that they would have been had Brunswick chose to comply with its obligations under the contract. Employees working under Genmar vacation policy had the option of either using all of their vacation pay each year, or saving it and having it paid out in cash. (Tr. 29:22-30:10, 48:13-16, 65:15-24, 137:20-23.)

Damages for Appellants were calculated at trial by determining each employee's years of service as of June 30, 2005, and crediting each employee with the appropriate number of hours of paid vacation under the schedule set forth in the Genmar vacation policy at their hourly rate of pay. The damages of Appellants and the certified class total \$501,476.70. (Ex. 20.)

CONCLUSION

For all of the reasons set forth herein, Appellants respectfully request that this Court set aside the district court's erroneous findings and enter judgment in favor of Appellants on their breach of contract claim in the amount of \$501,476.70.

Dated: 11/4/09

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Appellants certify that this brief complies with the following requirements:

1. This brief was drafted using Microsoft Word 2007 word processing software;
2. The brief was drafted using Times New Roman, 13-point font, compliant with the typeface requirements; and
3. There are 7,860 words in this brief.

Dated: 11/4/09

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