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NO. A09-1855

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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 Kimmès, individually and on behalf of  
all others similarly situated,

*Appellants,*

vs.

Brunswick Corporation and Lund Boat Company,

*Respondents.*

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**APPELLANTS' REPLY BRIEF**

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## ARGUMENT

### **I. THE DISTRICT COURT CORRECTLY FOUND THAT THE GENMAR POLICY CONSTITUTES A UNILATERAL CONTRACT.**

In granting Appellants' motion for summary judgment, the district court properly found that the "disclaimer" in the Genmar handbook did not prevent the formation of an enforceable contract for vacation pay. (AA. 35-40.) The district court's decision was based on long-recognized principles of Minnesota law, and must be affirmed.

#### **A. Handbook Disclaimers Do Not Prevent the Formation of Contracts for Vacation Pay.**

The Minnesota Court of Appeals has indicated that an appropriate disclaimer may prevent the formation of an employment contract and preserve an employee's "at-will" status, even despite the presence of a clear progressive discipline procedure (or similar policy) in a company handbook. See, e.g., Michaelson v. Minn. Mining & Mfg. Co., 474 N.W.2d 174, 180 (Minn. Ct. App. 1991) (employee conduct guide); Audette v. Northeast State Bank, 436 N.W.2d 125, 127 (Minn. Ct. App. 1989) (employee probationary period before termination). This principle, however, is inapplicable to contracts for compensation, including vacation pay. Berglund v. Grangers, Inc., No. C8-97-2362, 1998 WL 328382, at \*3 (Minn. Ct. App. June 23, 1998). Where, as here, an employer makes a definite and specific offer for vacation pay, the presence of an otherwise valid disclaimer will not prevent the formation of a unilateral contract. See id.

Minnesota courts have long recognized that vacation pay benefits are not just a gratuity or gift, but are a form of compensation for services and part of the basic consideration for employment. See, e.g., Tynan v. KSTP, Inc., 77 N.W.2d 200, 206

(1956) (noting most courts agree that vacation pay “constitutes a form of additional earnings and is not to be regarded as a gratuity”); Brown v. Tonka Corp. 519 N.W.2d 474, 477 (Minn. Ct. App. 1994) (“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[.]”). Accordingly, when the requested services are provided, the right to secure promised vacation pay vests just as much as the right to receive wages or any other form of compensation. Brown, 529 N.W.2d at 477 (quoting Tynan, 77 N.W.2d at 206).

In recognition of these principles, this Court held in Berglund v. Grangers, Inc. that a disclaimer in an employee handbook will not preclude the formation of a contract for vacation pay. 1998 WL 328382, at \*3. The Berglund court distinguished case law addressing the effect of disclaimers on handbook provisions, such as discipline policies, that provide safeguards before termination where an employee would otherwise be terminable at will. Id. The court correctly reasoned that “[v]acation benefits, as a matter of law, are part of the consideration for employment, whereas in some cases an employee discipline policy may be nonbinding.”<sup>1</sup> Id. (citing Tynan., 77 N.W.2d at 206 ). The court

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<sup>1</sup> Brunswick’s claim that Berglund “misconstrued” Tynan and Brown is misguided. (Resp. Br. at 27-28.) The court in Berglund did not base its decision on the idea that vacation pay is a “matter of statutory right.” (Id. at 28.) Rather, the court correctly reasoned that promised vacation pay is a form of compensation for services, and cannot be retroactively “disclaimed” on the whim of the employer. Berglund, 1998 WL 328382, at \*3. This is the correct reading of Tynan and Brown. Indeed, in Lee v. Fresenius Medical Care, Inc., the Minnesota Supreme Court, citing both Tynan and Brown with approval, recently held that vacation pay constitutes earned wages (i.e., “compensation”) for purposes of Minn. Stat. § 181.13(a). See 741 N.W.2d 117, 124-25 (Minn. 2007).

held that handbook provisions dealing with vacation pay, as consideration for employment, are already part of the underlying employment agreement and are therefore unaffected by an otherwise valid disclaimer.<sup>2</sup> See id.

The rationale employed in Berglund is based on sound principles of Minnesota law, and should be adopted here. As this Court and others have noted, an employer may not unilaterally alter the amount of compensation that an employee has already earned. See, e.g., Guercio v. Production Automation Corp., 664 N.W.2d 379, 383 (Minn. Ct. App. 2003) (“Appellant correctly argues that his status as an at-will employee does not, by itself, allow PAC to unilaterally change the terms of his employment.”); Malone v. Am. Bus. Info., Inc., 647 N.W.2d 569, 575 (Neb. 2002) (“[E]ven if there is an at-will employment relationship, the employer cannot unilaterally alter the amount of compensation for work that has already been rendered[.]”); Cook v. Zions First Nat’l Bank, 919 P.2d 56, 60 (Utah Ct. App. 1996) (“That Cook was an at-will employee does not negate the existence of the sick leave contract between her and Zions.”); see also

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Brunswick’s further attempt to distinguish Brown because it cites to cases that involved union agreements fails as well. (Resp. Br. at 25.) The decision in Brown was not based solely on the fact that vacation pay is a matter of contract. It was based on the well-settled fact that when an employer agrees to provide vacation pay, it is a form of compensation for the services provided by the employee. Brown, 519 N.W.2d at 477 (“Having received the benefit of respondents’ work product, appellant is obligated to pay respondents for the accrued vacation time they accumulated during that period.”).

<sup>2</sup> Brunswick incorrectly argues that this Court’s decision in Garmaker v. Sterling, No. C4-95-1205, 1995 WL 606591 (Minn. Ct. App. Oct. 17, 1995) casts doubt on the validity of the reasoning in Berglund. The case in Garmaker involved a former-employee’s request for short-term disability and dental benefits following his termination. Id. at \*1. Garmaker did not involve a contract for vacation pay, and includes no discussion of Tynan or other Minnesota case law stating that vacation pay is a form of consideration for employment. See id. at \*1-3.

Wass v. Bracker Const. Co., 240 N.W. 464, 466 (Minn. 1931) (“An employee entitled to compensation cannot contract away that right.”).

To hold otherwise would give employers unfettered discretion to retroactively “un-earn” compensation that their employees have already worked to receive. This would be contrary to both logic and the law. “If an employee is not entitled to rely on the language of an employer’s written description of the consideration for his employment, the employer effectively is free to modify the contract retroactively by inserting compensation terms under which the employee might not have agreed to work.” Berglund, 1998 WL 328382, at \*3.<sup>3</sup>

Here, as the district court properly held, the Genmar handbook set forth a definite and specific offer for vacation pay. (AA. 35-40.) Employees were to be credited with vacation pay each July 1 in exchange for their service with the company during the previous model year. (See App. Br. at 4-5.) Once Appellants provided the requested services, their right to vacation pay vested and could not be “disclaimed.” See Brown, 529 N.W.2d at 477; Berglund, 1998 WL 328382, at \*3.

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<sup>3</sup> The same rationale applies to Brunswick’s claim that there could be no contract because the company reserved the right to amend the policy. (Resp. Br. at 30-31.) As the Supreme Court has made clear, “[r]etention 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 v. Perkins Rest., Inc., 483 N.W.2d 701, 708 (Minn. 1992). Similarly, an employer’s reservation of the right to change a policy does not reserve the right to ignore the policy or to act arbitrarily. Id.

**B. Brunswick Cannot Question the Communication of the Genmar Vacation Policy for the First Time on Appeal.**

Brunswick's belated argument that Appellants' trial testimony shows a lack of contract formation should be rejected for at least two reasons. (Resp. Br. at 29-30.) As an initial matter, the question of whether the Genmar policy was communicated to, and understood by, the employees was never challenged at the summary judgment stage, and was not tried to the district court during the bench trial. Brunswick should not be allowed to raise the issue for the first time on appeal.

As a general rule, "appellate courts will not consider questions which were not presented to or decided by the district court." Watson v. United Servs. Auto. Ass'n, 566 N.W.2d 683, 687 (Minn. 1997). Exceptions to this rule involve issues (1) that are plainly decisive of the entire controversy, and (2) where there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question. Id. (quoting Holen v. Minneapolis-St. Paul Metropolitan Airports Comm'n, 84 N.W.2d 282, 286 (Minn. 1957)).

Here, the parties engaged in significant motion practice at the summary judgment stage. In their motion, Appellants requested a determination that, as a matter of law, the Genmar policy constituted a contract under Pine River State Bank v. Mettelle, 333 N.W.2d 622 (Minn. 1983). (Pls.' Mem. Supp. Mot. Summ. J. at 18-23.) Brunswick did not argue, in their own motion or responsive briefing, that no contract was formed under Pine River and its progeny because the vacation policy had not been "communicated."

(See Defs.' Mem. Supp. Mot. Summ. J. at 11-14; Defs.' Mem. Opp. Pls.' Mot. Summ. J. at 4-7, 9-14; Defs.' Reply Mem. Supp. Mot. Summ. J. at 1-3.)

Nor was the communication of the Genmar policy under Pine River tried to the district court during the bench trial. Because summary judgment was granted on contract formation, the only issues for trial were (1) breach, and (2) damages. Indeed, Brunswick's own Pretrial Statement lists modification and damages as its only defenses for trial. (Defs.' Pretrial Stmt. at 3.) Appellants did not intend to present the issue of contract formation at trial, and properly objected to Brunswick's attempt to inject the issue into the proceedings. (E.g., Tr. 173:18-21 (district court acknowledging that contract formation was not an issue for trial).)

Given the fact that the issue of the communication of the Genmar policy under Pine River was never questioned by Brunswick until after summary judgment and trial, allowing the issue to be presented for the first time on appeal would greatly prejudice Appellants.

But even if the issue were properly before this Court, the record in this case confirms without question that the Genmar policy was communicated to the employees. Foremost, it is undisputed that employees each received a copy of the handbook containing the vacation policy. (See Pls.' Mem. Supp. Mot. Summ. J. at 21-23.) As a matter of law, the policy was effectively communicated. See Pine River, 333 N.W.2d at 624 (distribution of handbook satisfies communication); Lee, 741 N.W.2d at 123 (noting that "[defendant] issued a copy of its employee handbook to Lee, and she signed an acknowledgement form that she received the handbook."); Brown, 519 N.W.2d at 476

(policy disseminated to employees in a memorandum was “communicated” within the meaning of Pine River); Berglund, 1998 WL 328382, at \*2 (employee acknowledgement form signed by plaintiff sufficient to show communication); Anderson v. Odell, No. C8-91-2199, 1992 WL 138593, at \*2 (Minn. Ct. App. June 23, 1992) (“[T]o communicate the offer the handbooks must be disseminated to the employee.”).

On top of this, Appellants clearly testified that they expected to earn vacation under the policy, understood how it was earned, and knew that they were entitled to it. For example, Steve Ecklund testified:

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.) Likewise, Thomas Kimmes testified that he understood that he earned vacation under the Genmar policy “[w]hen you worked there a year.” (Tr. 137:17-19.) Norman Koch testified that he requested the vacation pay that was owed to him after he resigned from the company. (Tr. 148:24-150:5, 151:2-25.) Jack Herr testified, “Well, I had thought I had earned vacation for the following year; I had worked 2004 to 2005 to earn my vacation for the next year.” (Tr. 166:7-11.) Darwin Roberts also understood that he was earning vacation pay under the Genmar policy, and that he was owed that pay. (Tr. 175:7-19, 180:18-23, 193:22-194:9.) Other witnesses provided similar testimony. (Tr. 198:10-199:1, 200:12-22, 213:16-23, 216:12-17, 229:19-230:17.) The above testimony is omitted from Brunswick’s brief on the issue, and clearly establishes that the Genmar policy was communicated to, and understood by, Appellants.

In view of Brunswick's failure to raise the issue of the "communication" of the Genmar policy prior to this appeal, and coupled with the ample evidence supporting the fact that the policy was communicated to Appellants, Brunswick's claim that a contract was not created should be rejected.

**II. BRUNSWICK DID NOT EFFECTIVELY MODIFY THE GENMAR VACATION POLICY.**

Brunswick's contention that it was "free to modify" the Genmar policy at any time prior to July 1, 2005 is wrong. Once Appellants started performing under the unilateral contract, it could not be changed or revoked. And even if Brunswick did have the power to modify, the company fell far short of its burden of proving a definite and specific modification at trial. The district court erred in concluding that the Genmar policy was modified in October 2004, and must be reversed.

**A. Appellants' Work During the Previous Model Year Was Consideration for Vacation Pay Credited Each July 1.**

Brunswick's argument that Appellants' claim depends on them "earning" or "accruing" vacation pay on a day-by-day basis under the Genmar policy is misguided. (Resp. Br. at 32-35.) Appellants were undisputedly working each model year to earn their vacation for the next year. Once Brunswick obtained the benefit of these services, they were required to provide the promised compensation. Moreover, even if the Court were to construe the policy as requiring an additional condition of working until July 1, Appellants met the condition.

Under Minnesota law, vacation pay is a matter of contract. Lee v. Fresenius Med. Care, Inc., 741 N.W.2d 117, 123 (Minn. 2007); Brown v. Tonka Corp., 519 N.W.2d 474,

477 (Minn. Ct. App. 1994). When employees have met the vacation pay eligibility requirements, an employer is obligated to provide the promised compensation. Brown, 529 N.W.2d at 477; Berglund v. Grangers, Inc., No. C8-97-2362, 1998 WL 328382, at \*3 (Minn. Ct. App. June 23, 1998). “Absent an additional condition precedent, the right to vacation benefits attaches as soon as an employee has performed the work for which the benefits constitute consideration.” Berglund, 1998 WL 328382, at \*4 (citing Brown, 519 N.W.2d at 477).

“A court must read a contract as a whole, with the intent of the parties ascertained by all of the language rather than relying on isolated words or phrases.” Telex Corp. v. Data Prods. Corp., 135 N.W.2d 681, 685 (Minn. 1965); see also Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 394 (Minn. 1998) (“To ascertain the parties’ intentions, the court must interpret that contract as a whole and attempt to harmonize all of the contract’s terms.”). When a contract ambiguous, the ambiguity must be construed against the drafters. See Travelers Indem. Co. v. Bloomington Steel & Supply Co., 718 N.W.2d 888, 894 (Minn. 2006) (recognizing that when a contract is capable of different interpretations, it is construed in favor of the claimant).

Here, the Genmar policy contemplates that employees earned vacation pay in exchange for their work the previous model year. Under the policy, employees had no vacation pay to use at the start of their employment. (See Ex. 102 at 21; Ex. 105; Tr. 93:20-25, 105:9-22, 137:6-13, 165:12-14, 175:10-13, 198:10-16, 229:19-21.) Instead, they were credited with vacation pay each year on July 1, determined according to the schedule contained in the policy. (Ex. 102.) Accordingly, the “work for which the

benefits constitute consideration” is the work provided during the previous model year. See Berglund, 1998 WL 328382, at \*4. This was the understanding of the parties to the agreement, as confirmed by the testimony at trial. (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.) Significantly, Human Resources Manager Carol Guse specifically testified:

Q. And that July 1, 2004, payment was to compensate him for work that he had performed during the previous model year, that went from July 1, 2003, to June 30 2004, isn't that right?

A. That is correct.

(Tr. 31:12-16 (emphasis added).)

And even if this Court were to accept Brunswick's argument that the policy contains an additional condition requiring Appellants to remain employed on July 1 in order to “earn” their vacation pay, Appellants met this condition. It is undisputed that each member of the certified class was employed by the company on July 1, 2005. (Ex. 19; AA. 26 (district court defining the certified class as “All persons employed by Defendants . . . through July 1, 2005 . . . and who ordinarily would have earned vacation time on July 1, 2005 under the Genmar vacation policy[.]”).) Appellants were entitled to vacation pay under the Genmar policy.

**B. Brunswick Could Not, and Did Not, Revoke or Modify the Genmar Vacation Policy.**

**1. No Revocation.**

As Brunswick concedes, (Resp. Br. at 35), an offeror of a unilateral contract retains the power to modify or revoke the offer only “so long as the offeree has not begun

performance.” Feges v. Perkins Rest., Inc., 483 N.W.2d 701, 708 (Minn. 1992); Peters v. Mutual Bene. Life Ins., 420 N.W.2d 908, 914 (Minn. Ct. App. 1988); see also Restatement (Second) of Contracts, § 45 (1979).

As explained above, the “performance” requested under the contract at issue was for Appellants to work for Brunswick during the model year that began on July 1, 2004 and ended on June 30, 2005. They did. And even accepting Brunswick’s contention that the Genmar policy required Appellants to work into the next model year on July 1, 2005, the result is the same. Once Appellants began performance, i.e., working during the model year that started on July 1, 2004, the contract could not be changed or revoked.

## **2. No Written Modification.**

Even if Brunswick could modify the Genmar policy, the steps taken by the company were deficient as a matter of law. An employment contract must be created, and modified, through a “definite and specific” offer that is communicated to 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. This simply did not happen here.

As forth in detail in Appellants’ opening brief, and not repeated here, none of the written materials used by Brunswick specifically communicated that the Genmar policy was being immediately revoked, or that they would not be credited with vacation pay on July 1, 2005 in exchange for the work that they performed the previous model year. (See App. Br. at 20-21.) At best, these materials merely informed Appellants of a change to their vacation policy that would take place at some point in the future—originally

January 1, 2005, and later July 1, 2005.<sup>4</sup> (Id.) This is not enough to achieve a present contract modification.

Even the cases cited by Brunswick do not support the proposition that an employer can extinguish an existing policy merely by announcing that a new one will go into effect in the future. Brunswick's cases actually support Appellants' position.

For example, in Brown v. Tonka Corp., the policy at issue provided for the payout of two categories of vacation pay to terminating employees: (1) vacation time earned during the previous year to be taken during the current year; and (2) vacation time earned during the current year to be taken during the following year. Id. at 475-76. On November 8, 1989, Tonka sent a memo explaining that, effective January 1, 1990, the company would discontinue the practice of paying the second category of vacation pay. Id. The court reasoned (in a footnote) that the memo contained language specific enough to be an offer, and that Tonka communicated the offer by providing a copy of the memo to all employees. Id. at 478 n.2.

But the court in Brown unquestionably did not hold (the issue was not even before the court) that the old policy had been modified as of November 8, 1989, the date the memo was distributed. Of course, an employee leaving the company prior to the January

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<sup>4</sup> The fact that the Brunswick handbook containing the new earn-and-burn policy was not distributed until mid-July is also probative on this point. (See App. Br. at 20.) After July 1, 2005, employees knew that they would be working under the new vacation policy. Prior to that, they were still working under the Genmar policy, and the company was still obligated to honor it. 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 believed the company was legally obligated to follow the Genmar policy until the new handbook was distributed. (Ex. 15.)

1, 1990 effective date would be entitled to the benefits provided under the old policy. The same is true in this case. The User's Guide and presentation materials used by Brunswick in the fall of 2004 explained a policy change that would be in place going forward beginning on July 1, 2005. They had no effect on the Genmar policy that covered the model year beginning July 1, 2004 and ending June 30, 2005.

Nor does Landers v. Amtrak, 345 F.3d 669, 673-74 (8th Cir. 2003) lend support to Brunswick's position. There, an employee brought a breach of contract claim for Amtrak's failure to follow its progressive discipline procedures when he was terminated. The court found that the procedures did not apply because a new policy was put in place two weeks before the employee was fired. Id. at 674. Here, unlike the plaintiff in Landers, Appellants do not seek the benefits of a policy that did not apply to them. They seek compensation for the work performed from July 1, 2004 to June 30, 2005, while the Genmar policy was plainly still in effect.

In sum, there is no evidence that Brunswick effectively modified the Genmar policy in writing prior to July 1, 2005, the date the Brunswick earn-and-burn vacation policy went into effect.

### **3. No Oral Modification.**

Brunswick also failed to prove an oral modification, which it had the burden of proving by clear and convincing evidence. Bolander v. Bolander, 703 N.W.2d 529, 541 (Minn. 2005). "Satisfaction of this standard requires more than a preponderance of the evidence." Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1978).

Glaringly omitted from Brunswick's brief is any meaningful discussion of the overwhelming testimony of Brunswick employees who confirmed the company's failure to communicate a definite offer to modify. Appellants Norman Koch, Jack Herr, Diana Makinen, Jim Baron, and Steve Ecklund confirmed that employees were not told that that they were no longer working for their vacation under the Genmar policy, or that they only learned of the issue in July or August of 2005. (See Tr. 158:16-24, 162:15-23, 166:3-11, 166:12-16, 200:12-22, 204:7-20, 216:12-16, 216:16-18, 214:7-15, 230:10-17, 232:7-9, 232:15-233:1.) Appellants' testimony strongly rebuts that a clear and definite oral modification occurred.

On top of this, the company representatives who spoke at the October 2004 meetings provided no credible testimony that the Genmar policy was clearly modified or "revoked." For example:

- The testimony of Benefits Manager Noreen Cleary cited by Brunswick, (Tr. 302-03, 308-909), does not show that the Genmar policy was revoked in the fall of 2004. She specifically confirmed that there was no discussion about the Genmar policy or what, if anything, was happening to it. (Tr. 322:23-323:1-4; see also Tr. 322:6-13.)
- The testimony of Human Resources Manager Gary Ilkka cited by Brunswick, (Tr. 256-57), that he somehow "revoked" the Genmar policy only came out after several leading questions, to which Appellants properly objected. (Tr. 256:22-257:25.)
- Plant Manager James Hegarty and Human Resources Manager Carol Guse were both forced to admit, after attempting to alter their prior sworn deposition testimony, that they could not recall 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. (Tr. 130:11-135:1, 34:7-36:14.)

This is not clear and convincing evidence of a contract modification.

Finally, the fact that some employees thought there had been a change or had the issue explained to them in one-one-one/small group meetings is not clear and convincing evidence of oral modification. In view of the substantial employee testimony that no oral modification occurred, Brunswick did not carry its burden. Significantly, Plant Manager James Hegarty, who spoke at some of the meetings, testified that even he had initially 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 testified:

Well, when I left the [Town Hall] 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.) And to the extent that some employees were upset or confused about the transition to the earn-and-burn policy, (see Exs. 114, 115, 116), this is further evidence that the change was not clearly communicated.

Considering all of the evidence presented at trial, the district court erred in finding that Brunswick communicated a definite and specific offer to modify the Genmar vacation policy in October 2004. The district court's Findings of Fact and Conclusions of Law should be reversed.

### III. APPELLANTS SUFFERED DAMAGES.

Brunswick argues that the district court's findings on damages should be affirmed for two reasons: (1) because Appellants were not "accruing" vacation during the year under the Genmar policy; and (2) because Appellants were not prevented from taking time off following the transition to the earn-and-burn policy. Both of these arguments miss the point, and both arguments fail.

First, Appellants' claims clearly do not depend on them "accruing" vacation pay on a day-by-day basis during the model year. As explained in full detail supra (Part II.A) and also in Appellants' opening brief, the terms of the Genmar policy plainly support that the consideration provided for vacation pay under the Genmar contract was work during the previous model year (July 1 to June 30). Even if the Court holds that the policy contains an additional condition precedent requiring employment through July 1, Appellants met this condition. Appellants provided services in exchange for vacation pay, met the necessary contractual conditions, and were entitled to compensation.<sup>5</sup>

Brunswick's attempt to distinguish A.O. Smith Corp. v. Kansas Department of Human Resources No. 93-477, 2005 WL 3434010 (Kan. Ct. App. Dec. 9, 2005) is unpersuasive. As the court in that case reasoned:

Because the successor employer, CST, assured the employees vacation in 2001 pursuant to its earn-as-you-go policy, AOS argues that the employees lost no vacation in 2001 and that to order they receive vacation from both AOS and CST doubles what they expected for vacation in 2001. At first blush this argument may seem logical, but it does not withstand scrutiny

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<sup>5</sup> Brunswick does not, and cannot, contest the fact that employees had the option of either using their vacation pay under the Genmar policy, or having it paid out in cash. (See App. Br. at 5; Resp. Br. at 9.)

and must be rejected. If AOS employees were due vacation in the year 2001 from AOS as a result of their work in the year 2000, this obligation cannot be fulfilled with vacation earned for working for CST in 2001; as the employees argue, they have lost a year of vacation “somewhere.” Indeed, the only reason for double vacation entitlement in the year 2001 is that the sale to CST finally and effectively changed the policy to one of current entitlement rather than future entitlement.

Id. at \*8 (emphasis added). Here, as in A.O. Smith, Appellants were due vacation pay under the Genmar policy on July 1, 2005, as a result of the work during the previous model year. As Carol Guse, Brunswick’s own Human Resources manager testified, the vacation pay under the Genmar policy was “to compensate him for work that he had performed during the previous model year[.]” (Tr. 31:12-16.) Brunswick’s obligation could not be fulfilled with vacation from the new Brunswick policy, which provided vacation pay in exchange for the employees’ work going forward from July 1, 2005.

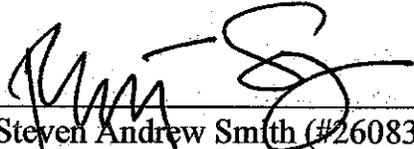
Second, Appellants do not seek to be put in a better position than they would have been absent the breach. The fact that Appellants were still able to take vacation after July 1, 2005 is irrelevant. Appellants provided work (from July 1, 2004 to June 30, 2005) in exchange for vacation pay under the Genmar policy, but were never compensated for it. They suffered damages. See Logan v. Norwest Bank Minn., N.A., 603 N.W.2d 659, 663 (Minn. Ct. App. 1999) (expectation damages “attempt to place the plaintiff in the same position as if the breaching party had complied with the contract.”); A.O. Smith Corp., 2005 WL 3434010, at \*8 (rejecting employer’s claim that vacation pay damages would result in “double dip” for employees).

**CONCLUSION**

For all of the reasons set forth herein, as well as those set forth in Appellants' opening brief, Appellants respectfully request that this Court set aside the district court's findings and enter judgment in favor of Appellants.

Dated: 12/17/2019

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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 5,025 words in this brief.

Dated: 12/17/2009

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