STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2004

Henry Hempel,
Appellant,

vs.

NOR-SON, Inc.,
Respondent.

Filed July 6, 2010
Reversed
Collins, Judge[*]

Crow Wing County District Court
File No. 18-CV-08-6969

Lawrence P. Schaefer, Benjamin R. Elwood, Schaefer Law Firm, LLC, Minneapolis, Minnesota (for appellant)

Alec Beck, Brittany J. Mayer-Schuler, Seaton, Beck & Peters, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Hudson, Judge; and Collins, Judge.

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

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

COLLINS, Judge

Appellant challenges the grant of summary judgment disposing of his breach-of-employment-contract and promissory-estoppel claims. Because we conclude that there are unresolved issues of material fact, we reverse.

FACTS

Appellant Henry Hempel had discussions in February 1999 with representatives of respondent NOR-SON, Inc. about potential employment. Discussions continued over a nine-month period. According to appellant, during these discussions Robert Sweeny, respondent's president and CEO, repeatedly stated that "everybody is replaceable" in references to other employees who had been terminated. This concerned appellant and, when he was offered a job in a commission-only position and later a salary-plus-commission position, appellant refused the offer stating that he was concerned about job stability and wanted "a commitment from the company." After conferring with an attorney, appellant requested a written contract and made it clear to representatives of respondent that he wanted his job with respondent to continue through retirement. Appellant sought such assurance because he would be resigning what he considered a secure position with his then-current employer Kraus-Anderson. According to appellant, when he stated his desire for a contract that would keep him employed until he retired, Sweeny agreed and replied, "Fine."

The documentation of the employment agreement was in the form of a letter dated November 2, 1999. The letter contained an offer of employment that specified salary,

location, vacation and benefits, and expressed: "It is our intent that this will be a long term position with it being understood that you will be evaluated on effort and performance. We understand that it will take 6 months to a year before a noticeable amount of work will be attributable to your efforts." Believing that this letter confirmed the agreement that his status was not at-will employment and that the employment would continue until his retirement, appellant accepted the offer of employment.

Appellant testified in oral deposition that the conduct of respondent's representatives served to confirm his understanding of the terms of the agreement. The first instance of such conduct occurred after appellant had been employed for approximately one year. Appellant testified that, after learning that another employee had been abruptly terminated, he approached Sweeny and said "You and I have an agreement that you can't just do this to me." According to appellant Sweeny responded that the company would never do that to appellant and "If we ever had any problems or issues, we would talk about these things."

In May 2004 appellant received a copy of the employee handbook and signed a document indicating that he received and read the handbook. The document also stated "I also acknowledge that my employment relationship with Nor-Son, Inc. is 'At-Will' employment as described in Section II.A." According to appellant, when he was asked to sign the handbook he explained to respondent's chief financial officer that he had an agreement with the company and he explained its terms to the CFO. Appellant testified that the CFO said "we just need your signature anyway on this to acknowledge that

you've gotten the book" and appellant understood the CFO's statement as assurance that he should not worry about the "at-will" clause.

The second instance of conduct that appellant asserts confirmed the employment-through-retirement understanding came during a 2007 discussion about appellant's retirement. Appellant testified that during his 2007 year-end review, he and Sweeney discussed what appellant's role with respondent would be until his retirement. On February 1, 2008, appellant's employment was terminated. The reasons, although not relevant to this appeal, stemmed from allegations of appellant's unsatisfactory working relationships with certain other employees.

Appellant commenced this action asserting claims for breach of contract, promissory estoppel, defamation, and invasion of privacy. Respondent moved for judgment on the pleadings and the district court denied the motion. After discovery had been conducted, respondent moved for summary judgment. The district court granted summary judgment on all claims. Regarding the breach-of-contract and promissory-estoppel claims, the district court concluded that appellant had not presented evidence creating an issue of fact supporting a lifetime contract for employment and failed to identify any statements made by representatives of respondent that could be construed as a clear, definite, and unequivocal promise of employment. This appeal, limited to the summary judgment and dismissal of the claims for breach-of-contract and promissory-estoppel, followed.

D E C I S I O N

"On an appeal from summary judgment we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Appellate courts review both questions de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). In doing so, this court reviews the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted).

I.

The first issue is whether the district court erred in granting summary judgment on the breach-of-contract claim after concluding that appellant failed to present evidence creating a fact issue regarding a lifetime contract for employment. "In the absence of an express or implied agreement to the contrary or sufficient consideration in addition to the services to be rendered, Minnesota law presumes that employment for an indefinite term is at will." *Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 181 (Minn. App. 2001) (citing *Skagerberg v. Blandin Paper Co.*, 197 Minn. 291, 294-95, 266 N.W. 872, 874 (1936)), *review granted* (Minn. July 24, 2001), *appeal dismissed* (Minn. Aug. 17, 2001). The supreme court in *Skagerberg* stated the general rule that "a contract for 'permanent employment' will be construed to be terminable at the will of either party

except in compelling circumstances, such as where the employee in effect purchases the permanent employment by giving a valuable consideration other than his customary daily services or otherwise giving up more than one normally gives up when he agrees to take on a new employment." *Bussard v. College of St. Thomas, Inc.*, 294 Minn. 215, 223, 200 N.W.2d 155, 161 (1972). However, the supreme court has clarified that this is only a rule of contract construction and is not a rule of substantive limitation on contract formation. *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 628-29 (Minn. 1983).

In discussing the requirement for additional consideration the supreme court in *Pine River State Bank* stated that the rule

> makes sense as a presumption in construing contracts. Where the "permanent" employment is purchased with additional consideration, we have better reason to believe that the parties, in discussing "permanent" employment, were referring to lifetime employment and were not, instead, simply making a distinction between temporary or seasonal employment and employment which is steady or continuing although nevertheless terminable at will.

Id. Lack of consideration "does not preclude the parties, if they make clear their intent to do so, from agreeing that the employment will not be terminable by the employer except pursuant to their agreement, even though no consideration other than services to be performed is expected by the employer or promised by the employee." *Id*. at 629.

Here, the district court concluded that appellant failed to present evidence that would sustain a finding that appellant had a lifetime contract for employment. In reaching this conclusion, the district court relied on four appellate and supreme court cases. First is *Skagerberg* in which Skagerberg was a prospective employee who turned

down another job offer to accept a job with the employer on the condition "that the job will be a permanent one." *Skagerberg*, 197 Minn. at 293, 266 N.W. at 873. The supreme court noted the general rule that "permanent" employment, without some additional consideration or the specification of a definite period, means nothing more than at-will employment. *Id.* at 294-95. The court specifically rejected Skagerberg's argument that declining an alternative job offer constituted sufficient consideration. 197 Minn. at 301-02, 266 N.W. at 876-77. However, in *Skagerberg*, although there was a negotiated agreement between the parties, there was no evidence of a discussion between them about the length of the term of employment or whether "permanent" meant that the employee could only be terminated for cause.

The second case relied upon by the district court was *Aberman v. Malden Mills Indus., Inc.*, 414 N.W.2d 769 (Minn. App. 1987). Aberman was a current salesperson for the employer-company who agreed to continue representing the company at the lower commission rate after learning that his commission would be cut. *Id*. at 770. Aberman claimed that he agreed to this lower rate only in return for the company's promise that he would always represent the company. *Id*. But Aberman could not recall any specific statements that he believed created a lifetime contract, and this court concluded that what Aberman could recall amounted to "only general statements about job security and the company's desire to keep him on indefinitely." *Id.* at 771. We determined that these general job-security statements did not modify the existing at-will employment relationship. *Id.* at 772. Aberman's alleged consideration was also deemed insufficient because "[f]orgoing work opportunities is not additional consideration." *Id.*

Next, the district court relied on *Dumas v. Kessler & Maguire Funeral Home, Inc.*, 380 N.W.2d 544 (Minn. App. 1986). Dumas began working for the employer based on an oral employment agreement that did not provide for a definite term of employment. *Id*. at 545. Dumas claimed that during his employment, "he had been specifically informed by his supervisors upon several occasions that they would 'retire together.'" *Id*. This court concluded that the employer's statements about retiring together were intended as general statements that did not alter Dumas's status as an at-will employee. *Id*. at 548.

Finally, although not explicitly relied upon by the district court, many of the cases relied upon by the district court cited *Cederstrand v. Lutheran Bhd.* for the proposition that the statement that a person could "have a job as long as they wished until retirement" is a statement of policy that does not create a contract of definite duration. 263 Minn. 520, 523, 533-34, 117 N.W.2d 213, 216, 222 (1962). But in *Cederstrand*, similar to *Dumas*, the statement was made in the context of a speech to current employees, not potential employees, and the speech was one that conveyed a general policy that "as long as there was willingness to work and the ability and wanting to learn, there would be no dismissals." *Id*. at 523-24, 117 N.W.2d at 222. Although the supreme court in *Cederstrand* recognized that in certain situations such words could create an employment contract terminable only for cause, there the "tone of bargaining or negotiating in the statement quoted [was] clearly lacking" and therefore the statements did not constitute an offer for which the employer intended to be bound. *Id*.

Thus both *Dumas* and *Cederstrand* are distinguishable; each was brought by an incumbent employee who alleged receiving assurances concerning the security of their

ongoing employment, not bargaining for of contracting for such terms. Likewise, in *Aberman* the employee was already in an at-will relationship with the employer and this court determined that general statements about job security did not modify the extant at-will employment relationship. Here, the context is very different. Appellant presented testimony that the employment-until-retirement agreement was arrived at in the course of bargaining for acceptable employment terms, and that appellant's acceptance of the employment offer was conditioned on respondent's inclusion of an employment-until-retirement provision.

Also, *Skagerberg* does not compel summary judgment here because that case involved a promise of indefinite or permanent employment, whereas appellant here contends his agreement with respondent was a bargained-for agreement for employment through retirement. As the supreme court in *Pine River State Bank* observed, one of the concerns with interpreting "permanent" employment as meaning lifetime employment is that "permanent" can be used to distinguish between "temporary or seasonal employment and employment which is steady or continuing although nevertheless terminable at will." 333 N.W. 2d at 629. But "employment through retirement," at issue here, cannot be taken to mean temporary or seasonal employment.

On appeal respondent cites *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732 (Minn. 2000), and argues that the language found there controls our decision. *Martens* examined whether a company policy creating a "dual ladder" system of promotion was sufficiently definite to constitute a unilateral offer of specific levels of compensation. 616 N.W.2d at 740, 742. While the supreme court there examined a number of cases

involving alleged unilateral contracts for permanent employment, the court was not addressing a contract for permanent employment. *Id*. at 742. Further, even if *Martens* were examining a unilateral offer of permanent employment as opposed to an alleged unilateral offer of specific compensation, we would not find the rationale there dispositive. The *Martens* court addressed a situation in which the employer allegedly made a unilateral offer through brochures and individual statements, not a situation where the employer and potential employee bargain for employment contract terms. *Id*. at 742-43

Respondent also argues that *Gunderson* controls our decision.[1] But again, *Gunderson* is a case not involving an allegation of bargained-for contractual terms but only the alleged vaguely framed assurance that Gunderson would "always be taken care of." 628 N.W.2d at 182. We stated there that "[i]n ascertaining the nature of the employment relationship, courts must consider, among other things, the written and oral negotiations of the parties and the particular circumstances at issue." *Id*. Not only was there no allegation of negotiated terms of the agreement, there was no evidence that Gunderson was induced to leave his previous employment in which he was confident of job security. *Id*. at 182-83. Conversely, here there is a showing of evidence of extended negotiations, that job security was a focal point of negotiations, and that appellant would not have left his previous job in which he felt secure without the assurance of job security.

[1] Respondent cites additional unpublished court of appeals cases. These cases are factually distinguishable and unpublished cases are not binding precedent. Minn. Stat. § 480A.08, subd. 3(c) (2008).

Appellant relies heavily upon *Eklund v. Vincent Brass & Aluminum Co.*, 351 N.W.2d 371 (Minn. App. 1984), *review denied* (Minn. Nov. 1, 1984). Eklund engaged in oral negotiations with the employer, and stated that he would only accept the offered position if it was permanent so long as he performed satisfactorily. *Id*. at 373. He insisted on that assurance because he would be giving up a 26-year career at his current employer, he would have to relocate, and his wife would have to give up her present job. *Id*. Although there was no written agreement confirming the terms of the agreement, Eklund contended both parties to the agreement understood that the position was permanent; so long as he performed satisfactorily Eklund would be employed until retirement. *Id*. This court partially reversed and remanded the district court's grant of summary judgment in favor of the employer, concluding that the terms of the contract were in dispute and therefore summary judgment was not appropriate on the breach-of-contract claim. *Id*. at 376. Specifically, we stated that questions of fact remained as to "(1) what type of contract was created" and "(2) the duration and terms of the contract." *Id*. The case was remanded to the district court with instructions that Eklund be afforded the opportunity to prove "(1) his contract was for a definite period (until retirement, if that is at a specific age); (2) his contract was for an indefinite period but was enforceable because he supplied additional valuable consideration; or (3) his contract included a job security provision, limiting his dismissal to unsatisfactory performance." *Id*. at 377.

Respondent argues that *Eklund* is inapposite because the former officer of the employer that hired Eklund testified he had intended that Eklund would be employed

until retirement. But the reasoning supporting our decision in *Eklund* does not rely on any concession binding the employer.

Following *Eklund*, in *Rognlien v. Carter* this court reversed a grant of summary judgment in favor of the employer under similar facts. 443 N.W.2d 217, 219 (Minn. App. 1989), *review denied* (Minn. Sept. 21, 1989). Being concerned about job security if he were to leave his current job and, therefore, having specifically requested the assurance of permanent employment, Rognlien asserted he accepted the new job only upon the representation by the employer that he would not have to worry about his job so long as he did good work. *Id.* at 219-20. We held that such an oral representation in the employment negotiation constituted an offer of permanent employment and that summary judgment was improper. *Id.* We concluded that, if proved, the employer's representation that Rognlien "would not have to worry about his job so long as he did good work" was sufficiently definite in the context of the pre-employment request for job stability, "as a matter of law," to constitute an offer of permanent employment. *Id*.

Here, there is a dispute about what exactly respondent agreed to orally while negotiating with appellant. Respondent argues that Sweeny's statement "fine" during his discussion with appellant about employment until retirement and the "long term" language in the contract are vague and do not create a fact issue as to whether the contract was for something other than at-will employment. Although the language in the letter documenting the employment agreement alone may be insufficient to create an issue of fact regarding the parties' intent for permanent or durational employment, the addition of the alleged oral commitments by respondent to continue appellant's

employment through retirement raises a fact question as to whether the "long term" employment specified in the letter created something other than at-will employment.

In determining the nature of the employment relationship, we are compelled to examine "the written and oral negotiations of the parties and the particular circumstances at issue." *Gunderson*, 628 N.W.2d at 180. The facts viewed in the light most favorable to appellant show that there were extensive negotiations during which appellant expressed concerns about job security; appellant did not want to leave his current job, in which he felt secure, without assurances from respondent granting him similar job security; there was an oral agreement of employment until retirement; and, language in the letter memorialized the agreement indicating that the agreement was for "long term" employment and that appellant would be "evaluated on effort and performance." Like in *Eklund*, because the terms of the contract are in dispute and because the alleged oral agreement about employment-until-retirement presents a fact question of intent, we conclude that the case was not ripe for summary judgment.

II.

The second issue is whether the district court erred in granting summary judgment on the promissory-estoppel claim. Promissory estoppel is an equitable remedy that implies a "contract in law where none exists in fact." *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981). The elements of promissory estoppel require proof of: (1) a clear and definite promise; (2) the intent by the promisor that the promisee rely on that promise; (3) the promisee relied to his or her detriment and (4) the "promise must be enforced to prevent injustice." *Martens*, 616 N.W.2d at 746. Whether a promise is

sufficiently definite to meet the first element of promissory estoppel is a question of law reviewed de novo. *Id*. This court has held that if a promise of permanent employment is insufficient to support an element of a contract claim, it would be insufficient to support a claim of promissory estoppel. *Aberman*, 414 N.W.2d at 773.

Appellant argues that respondent specifically agreed to the condition of employment until retirement, and that the statement in the letter documenting the employment agreement about "long term" and the terms by which he would be evaluated confirmed that the employment agreement was not for at-will employment. While there may be a question as to the reasonableness of appellant's reliance on the language in the letter and Sweeny's statement, it is an unresolved question properly left to the fact-finder. Just as in *Eklund*, where the employee was allowed to proceed on his claim of promissory estoppel based on his alleged reliance and the detriment of leaving his previous employment, because there are unresolved questions of material fact, we conclude that summary judgment on this claim was inappropriate.

Reversed.