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United States Court of Appeals
Tenth Circuit

December 14, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DAVID HIGGINS; JOHNNA VOSSELLER; TANNER MCCLURE; DEAN HICKLIN; JAKE RIFFEL,

Plaintiffs - Appellants,

v.

REV GROUP, INC.,

Defendant - Appellee.

No. 21-3066
(D.C. No. 6:20-CV-01201-SAC)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES**, **PHILLIPS**, and **EID**, Circuit Judges.

Plaintiffs David Higgins, Johnna Vosseller, Tanner McClure, Dean Hicklin, and Jake Riffel are former employees of Defendant REV Group, Inc. (REV Group). They appeal the district court's grant of summary judgment on their claims for unpaid bonuses, unpaid severance pay, and violation of § 44-315 of the Kansas Wage Payment Act (KWPA). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

BACKGROUND

REV Group, a Delaware corporation, is the former owner of a manufacturing company called El Dorado National (Kansas) Inc. (ENK). Plaintiffs were members of ENK's management team. Effective May 8, 2020, REV Group sold ENK to Forest River Inc. (Forest River). Prior to the completion of the sale, Forest River identified ENK employees it expected to work for Forest River after the sale, including Plaintiffs. After the sale, Higgins and McClure left employment with ENK after two days, Vosseller resigned after six weeks, and Hicklin was laid off after four months. Only Riffel still works at ENK.

As members of ENK's management team, Plaintiffs were eligible for a management incentive plan (MIP) for 2020. Under the MIP, eligible employees could receive a bonus based on the company's performance per quarter. The size of the bonus depended on ENK's annual adjusted earnings before interest, taxes, depreciation, and amortization, which would be impossible to calculate until the end of the fiscal year. A written condition of eligibility for a bonus payment under the MIP required that beneficiaries be active REV Group employees at the time of payout—i.e., at the end of the fiscal year. In its motion for summary judgment, REV Group asserted as a statement of material fact that "[a]s a condition of eligibility for MIP payout, participants must be actively employed by REV Group (or one of its subsidiaries) at the time of the payout." Aplt. App. vol. 1 at 29. Plaintiffs acknowledged this fact as "uncontroverted," but they also asserted "the MIP bonus accrued on a monthly and quarterly basis even though it was not paid out at that

time." *Id.* at 88. The MIP did not include any language addressing the effect a change in ownership of ENK would have on bonus eligibility. The fiscal year ended in October 2020. Because REV Group had sold ENK to Forest River by that time, Plaintiffs were not actively employed by REV Group, so it did not pay them an MIP bonus.

Regarding severance pay, although it did not have an active severance policy, from November 2017 to November 2020 REV Group made severance payments to departing employees 2,668 times. Vosseller, McClure, and Riffel testified REV Group had a policy of paying severance to employees who separated from REV Group involuntarily and without fault. REV Group did not make any severance payments to Plaintiffs after it sold ENK to Forest River.

Plaintiffs sued REV Group, alleging breach of contract for failure to pay MIP bonuses for the first two quarters of 2020 and failure to pay severance. They also alleged violations of the KWPA stemming from these failures to pay. The district court, exercising diversity jurisdiction under 28 U.S.C. § 1332(a)(1) and applying Kansas law, granted summary judgment to REV Group. It concluded REV Group did not owe bonuses to Plaintiffs under the MIP because the requirement of employment at the time of the payout was a valid condition precedent to receiving the payment under the MIP. It further concluded as a matter of law that no contract existed requiring the payment of severance in circumstances like those here—the sale of ENK to another entity that intended to continue employing Plaintiffs. Finally, the

district court dismissed the KWPA claims because they were contingent on Plaintiffs' claims for MIP bonuses and severance payments. This appeal followed.

DISCUSSION

We review the grant of summary judgment de novo. *May v. Segovia*, 929 F.3d 1223, 1234 (10th Cir. 2019). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "We examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty.*, 546 F.3d 1299, 1306 (10th Cir. 2008) (internal quotation marks omitted).

1. MIP Bonus Payment

Plaintiffs first argue the district court overlooked four pieces of evidence that created a genuine issue of material fact regarding whether the MIP bonus accrued on a quarterly basis: (1) Vosseller's testimony that she attended a training where an unnamed HR representative said the MIP was earned on a quarterly basis; (2) Riffel's testimony that, in training, "he was told that the MIP bonus was now going to be a quarterly thing and would accrue on a quarterly basis," Aplt. Opening Br. at 11, (3) Hicklin's testimony that there were "group discussions" to the same effect, *id.*, and (4) an email from REV Group's CFO stating that "MIP should be based on [year-to-date] vs budget for determining payout % and accrued," Aplt. App. vol. 1 at 92, 125.

These arguments are unpersuasive. Kansas law distinguishes between lawful conditions precedent and unlawful attempts to impose a forfeiture. "A condition precedent is something that it is agreed must happen or be performed before a right can accrue to enforce the main contract." *Morton Bldgs., Inc. v. Dep't of Hum. Res.*, 695 P.2d 450, 453 (Kan. App. 1985). "[A]n employer may condition entitlement to a benefit on the performance of some act other than actual job tasks. However, a benefit earned under the employment contract cannot be reduced or forfeited by subsequent act or circumstance." *Id.* Here, REV Group conditioned entitlement to a benefit—the MIP bonus payment—on employment with REV Group at the end of the fiscal year. If they did not fulfill that condition, employees did not earn the benefit.

In response, Plaintiffs invoke *Kephart v. Data Systems International, Inc.*, 243 F. Supp. 2d 1205, 1230 (D. Kan. 2003), where the court denied summary judgment on a claim for unpaid bonuses that were due after the employer terminated the employees. But in *Kephart* the employer unilaterally changed the bonus payment date without ever informing its employees, *see* 243 F. Supp. 2d at 1230 ("[A] jury might reasonably conclude that any effort to retroactively implement the purported change constituted a forfeiture of bonuses which [the employees] earned under the original Bonus Plan."). Here, REV Group never changed the condition requiting employment at the end of the fiscal year, so there was no basis to conclude enforcing it constituted an invalid forfeiture.

The testimony of Vosseller, Riffel, and Hicklin that Plaintiffs highlight on appeal does not compel a contrary conclusion. The continued-employment condition

to receiving an MIP payout was in writing. Assuming they were admissible,[1] the statements Plaintiffs described in their testimony were too indeterminate to modify the written terms of the MIP plan. *See EDO Corp. v. Beech Aircraft Corp.*, 911 F.2d 1447, 1454 (10th Cir. 1990) ("Although Kansas law allows modification of the terms of a written agreement on the basis of oral promises under certain circumstances, the burden is on the plaintiff to prove by clear and convincing evidence an intent to so modify the agreement. Evidence of vague, indefinite, or ambiguous statements will not suffice." (citations omitted)).

For similar reasons, the district court correctly concluded the email from REV Group's CFO discussing the accrual of MIP payments reflected a balance sheet inquiry and did not evidence a mutual intent on the part of REV Group and its employees to modify the written terms of the plan. In any event, Plaintiffs now disclaim any reliance on a theory of contract modification altogether, arguing the district court "emphasized the wrong analysis," when it evaluated whether any of REV Group's statements modified the MIP. Aplt. Opening Br. at 10. So, we find no error in the court's conclusion that the requirement of continued employment with

[1] Although statements of a party opponent are not hearsay, *see* Fed. R. Evid. 801(d)(2), "[u]nder our controlling precedent, an employee's statements are not attributable to his employer as a party-opponent admission in an employment dispute unless the employee was involved in the decisionmaking process affecting the employment action at issue." *Johnson v. Weld Cnty.*, 594 F.3d 1202, 1208–09 (10th Cir. 2010) (internal quotation marks omitted). Plaintiffs presented no evidence that the employees they spoke to regarding the MIP bonus plan were involved in setting its terms.

REV Group at the end of each fiscal year in the MIP was a valid, unmodified, and unfulfilled condition precedent to receiving a payout.

2. Severance Pay

Plaintiffs argue the district court erred in dismissing their claim for severance pay "by failing to even address their claim of an actual contract" and misanalysing their claim of an implied contract. Aplt. Opening Br. at 16. Plaintiffs did not produce a written contract; their evidence of an "actual" contract consisted of Higgins' testimony that he reviewed a document stored somewhere on REV Group's intranet describing the company's severance procedures and that he discussed it with his human resources manager. But Higgins acknowledged he never confirmed with anyone at REV Group whether the policy he located was active, Aplt. App. vol. 1 at 113, and REV Group's Human Resources Business Partner attested that "REV Group . . . did not have as of May 2020, an active written policy or practice that required payment of severance," *id.* at 85. Plaintiffs offered no evidence to controvert that assertion, so their claim that there existed an enforceable, written contract requiring severance payments fails as a matter of law.

Regarding Plaintiffs' claims of an implied contract, even if there was sufficient evidence that REV Group had a general policy to pay severance benefits to employees who left employment, as the district court concluded, Plaintiffs presented "no evidence of severance payments . . . to employees who remained at ENK after the sale to Forest River, or of a policy or practice of doing so under the same or similar circumstances." Aplt. App. vol. 1 at 179. Plaintiffs argue this position was

flawed because severance pay can be intended for purposes other than unemployment insurance, such as rewarding employees for past service to the company. They also argue the nature of their employment with Forest River was not the same as it was with REV Group, and so once they were no longer REV Group employees, they were entitled to severance. *See* Aplt. Opening Br. at 19–20.

But even if severance policies *can* be so intended, Plaintiffs presented no evidence REV Group maintained a severance policy that *was* so intended. "While the existence of an implied contract of employment is generally a jury question, an employer can prevail on summary judgment if the employee[s] only present[] evidence of [their] unilateral expectations," of an employment benefit. *Inscho v. Exide Corp.*, 33 P.3d 249, 253 (Kan. App. 2001). Here, beyond evidence of their unilateral expectations that they would receive a severance payment, Plaintiffs presented no evidence that REV Group maintained a policy that obligated it to make such a payment to employees who conveyed to another company. The district court therefore properly granted summary judgment to REV Group on Plaintiffs' claims for severance payments.

3. KWPA Claims

Under the KWPA, "[w]henever an employer discharges an employee or whenever an employee quits or resigns, the employer shall pay the employee's earned wages. . . ." Kan. Stat. Ann. § 44-315(a). Failure to do so can result in liability for the unpaid wages and civil penalties. *See id.* § 44-315(b). Although an employee's "wages" are not limited to salary, *see id.* § 44-313(c), Plaintiffs' KWPA

claims are contingent upon their claims for MIP and severance payments. Because Plaintiffs were not entitled to either, they cannot establish they were owed any "earned wages," so the district court correctly dismissed their KWPA claims.

CONCLUSION

We affirm the judgment of the district court.

Entered for the Court

Allison H. Eid
Circuit Judge