IN THE COURT OF APPEALS OF IOWA

No. 8-927 / 08-0372
Filed March 11, 2009

BRUCE J. ISHMAN, Individually
and on behalf of all others similarly situated,
Plaintiff-Appellant,

vs.

FEATHERLITE, INC., a/d/b/a
FEATHERLITE MANUFACTURING, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Howard County, Monica Ackley, Judge.

An employee appeals a district court ruling granting his employer's motion for summary judgment on his class action claims for unpaid wages, loss of vacation benefits, and loss of personal/sick days. **AFFIRMED.**

Mark B. Anderson, Cresco, for appellant.

Brent Green and Kirk Bainbridge of Duncan, Green, Brown & Langeness, Des Moines, for appellee.

Heard by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

An employee appeals a district court ruling granting his employer's motion for summary judgment on his class action claims for unpaid wages, loss of vacation benefits, and loss of personal/sick days.

I. Background Facts and Proceedings

The undisputed facts are as follows. Bruce Ishman was an employee of Featherlite, Inc. (Featherlite). Under the policy existing at the time of his hire and through December 2004, the anniversary of his hire governed the amount of vacation and personal time he earned.

Ishman's six-year anniversary with Featherlite fell on June 1, 2004. At that time, he earned 160 hours of vacation leave and twenty-four hours of personal/sick leave to be taken during the following twelve-month period.

On December 30, 2004, Featherlite changed its policies regarding vacation and personal/sick leave. Effective January 1, 2005, the anniversary of an employee's hire no longer controlled. Instead, all employees were to accrue and use their time on a calendar-year basis. Employees were advised that any balance of vacation and personal leave was cancelled.

Shortly thereafter, in response to employee comments, Featherlite decided to pro-rate, rather than cancel, vacation and personal/sick leave earned in 2004. The company counted the days remaining in 2004 after the employee's anniversary date, divided that number by the number of days in the year, multiplied that figure by the number of vacation hours the employee earned in 2004, and arrived at the number of vacation hours to which the employee was entitled for 2004. The company then subtracted the number of vacation hours

used by the employee from the anniversary date through December 31, 2004. The balance was carried over to 2005. Featherlite used the same formula to calculate the number of personal/sick hours to be carried over.

Featherlite determined that Ishman earned ninety-four hours of vacation leave between June 1, 2004, and December 31, 2004. He used eighty-eight hours of vacation during this period, leaving six hours to carry over into 2005. Featherlite made the same calculation with respect to Ishman's personal/sick days and determined he had 3.25 hours to carry forward.

Ishman took issue with this calculation. He asserted that he had 160 hours of vacation to use as of June 1, 2004, and he only used eighty-eight hours through the remainder of the year, leaving a seventy-two hour balance when Featherlite converted to its new policy. He sued Featherlite individually and on behalf of all others similarly situated alleging claims of breach of contract, non-payment of wages under Iowa Code chapter 91A (2005), and fraud.

Ishman subsequently moved for class certification. That motion was granted and the ruling was affirmed on appeal. *Ishman v. Featherlite, Inc.*, No. 05-1760 (Iowa Ct. App. Nov. 30, 2006).

Next, Featherlite moved for summary judgment and sought decertification of the class. Ishman filed a resistance and an affidavit but no statement of disputed facts. Following a hearing, the district court granted the summary judgment motion and decertified the class. This appeal followed.

II. Summary Judgment Ruling

Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Iowa R. Civ. P. 1.981(3). The moving party has the burden of showing the material issues of fact are undisputed. *McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). "Summary judgment is inappropriate if reasonable minds would differ on how the issue should be resolved. However, where the evidence compels only one reasonable conclusion, the question presented is one of law." *Swartzendruber v. Schimmel*, 613 N.W.2d 646, 649 (Iowa 2000) (citation omitted).

As a preliminary matter, we must determine whether Ishman appropriately resisted the summary judgment motion. As noted, he did not file the statement of disputed facts required by Iowa Rule of Civil Procedure 1.981(3). Featherlite argues that, as a result, its statement of undisputed facts should be deemed admitted. *See Rohlin Constr. Co. Inc. v. Lakes, Inc.*, 252 N.W.2d 403, 406 (Iowa 1977) ("Defendants responded to Rohlin's motion for summary judgment only by filing a resistance and supporting brief. Accordingly Rohlin's factual assertions are considered to be unchallenged."). This argument does not account for Ishman's submission of a series of exhibits and affidavits in support of his resistance.[1] Included among these documents was Ishman's affidavit, which challenged Featherlite's assertion that he and others did not lose vacation and personal/sick leave in the transition to the new policy. We conclude this affidavit was the equivalent of a statement of disputed facts. Accordingly, we decline Featherlite's invitation to deem its statement of undisputed facts admitted.

[1] Although submitted several months after the summary judgment motion was filed, it appears that the deadlines for resisting the summary judgment were extended multiple times, making the submission timely.

Having said that, even if we were to accept Featherlite's assertion that Ishman's resistance to its motion was improper, we are not persuaded by its contention that this procedural deficiency automatically entitles it to judgment as a matter of law. As the court stated in *Rohlin*, an improper resistance simply means that a party "must then succeed, if he succeeds at all, not on the strength of his own case, for he has made none, but on the weakness of his adversary's." *Id.* at 406 (*quoting McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 154 (Iowa 1976)).

As noted, Ishman attempted to generate a genuine issue of material fact on the question of whether he lost vacation and personal time in the transition to a new vacation policy. However, Ishman did not dispute the underlying figures used by Featherlite to calculate his vacation and personal sick time. He conceded that the company prorated the 160 hours of vacation time he earned as of June 1, 2004, and allowed him to carry over the balance of unused time. As these material facts are undisputed, the only question is whether they entitle Featherlite to judgment as a matter of law. We will turn to that question.

A. Existence of a Contract.

We begin with Ishman's breach-of-contract claim. Ishman was obligated to prove the existence of a contract. *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 283 (Iowa 1995). On this question, the district court determined that Featherlite's employee handbook did not create a contract. The court stated:

> The issue as the Court sees it based on the record is whether or not the Featherlite employees had a vested interest in their vacation time under the old policy and whether or not the implementation of the new policy caused them to lose a portion of their vested interest. The employees of the Defendant company

> are non-unionized and are employees at will under Iowa law. The benefits available to the employees are determined by Defendant's Board of Directors and are memorialized in an employee handbook to be used for the benefit of uniformity in the implementation of rules and regulations pertaining to the employees of the company. The facts do not support a finding that the employee handbook rises to the level of a unilateral contract. This is true especially in light of the disclaimers written in to the acceptance page of the handbook acknowledged by Mr. Ishman and other similarly situated employees. No reasonable person reading the documentation could say otherwise.

On appeal, Ishman concedes that the employee handbook is not the basis of his contract claim. Instead, he premises his claim on "the contract of employment" that, he maintains, "existed independently of the policy manual." In his view, "employment at will is a unilateral contract of indeterminate duration."

Ishman's view is inconsistent with established authority. The employment at-will doctrine is a judicially created presumption utilized when parties to an employment contract are silent as to duration. *Anderson*, 540 N.W.2d at 281. The doctrine presumes that "[i]n the absence of a valid employment contract either party may terminate the relationship without consequence." *Id.*

It is undisputed that Ishman was not operating under a "valid employment contract." Therefore, Ishman had to establish that he fell within "two narrow deviations [from the employment at will doctrine]: tort liability when a discharge is in clear violation of a 'well-recognized and defined public policy of the State' and employee handbooks that meet the requirements for a unilateral contract." *Id.* at 282 (citation omitted). Ishman makes no public-policy argument for deviating from the employment-at-will doctrine and, as noted, he concedes that the employee handbook exception does not apply. Therefore, Ishman's breach-of-contract claim fails as a matter of law.

B. Wage Claim

Ishman also asserts he is entitled to compensation under Iowa's wage-payment law. *See* Iowa Code ch. 91A. Section 91A.3 provides that "[a]n employer shall pay all wages due its employees . . . ." Wages include "[v]acation, holiday, sick leave, and severance payments which are due an employee under an agreement with the employer or under a policy of the employer." Iowa Code § 91A.2(7)(b). Ishman argues that he and similarly situated employees are "due" vacation and sick/personal pay "under a policy of the employer." *Id.*[2] Featherlite responds that vacation pay and sick pay were not "due" until they were taken. Given the undisputed facts, we find it unnecessary to wade into a discussion of whether Ishman's 2004 vacation/personal time was due when he became entitled to it or when it was taken.

Specifically, it is undisputed that Ishman was entitled to 160 hours of vacation time and twenty-four hours of personal time as of June 1, 2004, and that Featherlite afforded him a credit for the balance of the vacation he was owed as of June 1, 2004. It is also undisputed that, on January 1, 2005, he began accruing another 160 hours for the 2005 calendar year which he could take at any time subject to his supervisor's approval and subject to reimbursement of the un-accrued portion in the event of termination. The seventy-two hours of

[2] Ishman concedes there is no case law supporting his contention "that wages are due pursuant to a policy of an employer, not an express written contract with the employer." The case law addressing similar issues establishes the contrary. *Willets v. City of Creston*, 433 N.W.2d 58, 62 (Iowa Ct. App. 1988) (stating "[a]n employment contract terminable at will is subject to modification at any time by either party as a condition of its continuance"); *Moody v. Bogue*, 310 N.W.2d 655, 660-661 (Iowa Ct. App. 1981) (same).

vacation time that he claimed he lost were in fact included in the carried-over hours and the new award for 2005.

Ishman declined to address the ramifications of the carried-over hours, arguing this change was "not really . . . relevant to the case." He also did not address the accrual of 2005 vacation time as of the first of the year. These unaddressed but undisputed facts establish as a matter of law that Ishman suffered no loss and Featherlite did not intentionally fail to pay him wages under Iowa Code chapter 91A. *See* Iowa Code § 91A.8.

Our resolution of this issue also resolves Ishman's third issue regarding damages.

III. Disposition

We affirm the district court's summary judgment ruling. In light of that disposition, we decline Ishman's request to reinstate the fraud claim and recertify the class.

AFFIRMED.