

1950

Walter P. Henoch v. W. H. Bintz Company : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

WALTER P. HENNOCH,

Respondent,

VS.

W. H. BINTZ COMPANY, A Corpor-
 ation,

Appellant.

Case No.
 7578

BRIEF OF RESPONDENT

FILED

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In the Supreme Court of the State of Utah

WALTER P. HENOCH,

Respondent,

VS.

W. H. BINTZ COMPANY, A Corpor-
ation,

Appellant.

} Case No.
7578

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The plaintiff, respondent herein, accepts the statement of facts contained in the brief of appellant.

The parties hereto will be designated herein as they were in the lower court. The respondent herein will be referred to as the plaintiff, and the appellant will be referred to as the defendant.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE IS UNCONTRADICTED THAT VOLUNTARY GIFT OF \$100.00 BY THE DEFENDANT TO THE PLAINTIFF CHRISTMAS OF 1947, WHICH WAS PRIOR TO THE DATE DEFENDANT WAS REQUIRED UNDER CONTRACT TO PAY PLAINTIFF A BONUS, WAS GIVEN TO PLAINTIFF WITHOUT A REQUEST BY THE PLAINTIFF FOR AN ADVANCEMENT OF HIS BONUS, AND SO CAN NOT BE CONSIDERED A PAYMENT ON THE CONTRACT, BUT ONLY A GIFT.

POINT II.

THE PROMISE TO PUT PLAINTIFF ON THE INCENTIVE BONUS PLAN, "THE SAME AS THE OTHER SALESMEN," BEGINNING AS OF MARCH 1, 1948, WAS DEFINITE AND CERTAIN, WHERE THE BONUS WAS NOT PAYABLE UNTIL MARCH 1, 1949, AND THE OTHER SALESMEN, AS WELL AS THE PLAINTIFF, WERE INFORMED, PRIOR TO THAT DATE, THAT THEY WOULD ALL BE ON THE SAME INCENTIVE BONUS PLAN BEGINNING MARCH 1, 1948, AND THEY WERE ACTUALLY PLACED ON SUCH A BONUS PLAN, AND BEFORE THAT DATE PLAINTIFF WAS INFORMED THAT HE WAS ON A BONUS BASIS OF 1 PER CENT ON TOTAL SALES IF HE SOLD A QUOTA OF \$100,000.00, WHICH HE DID SELL.

POINT III.

PLAINTIFF WAS ENTITLED TO A BONUS OF 1 PER CENT ON THE TOTAL SALES OF \$197,553.00, OF WHICH HE RECEIVED ONLY \$1,000.00.

POINT IV.

DEFENDANT HELD SORENSEN OUT AS HAVING AUTHORITY TO HIRE AND FIX PAY AND BY THEIR FAILURE TO TIMELY INFORM PLAINTIFF THAT SORENSEN DID NOT HAVE SUCH AUTHORITY, DEFENDANT IS ESTOPPED TO THEREAFTER DENY SORENSEN'S AUTHORITY.

POINT V.

THE DEFENDANT IS ESTOPPED TO DENY PLAINTIFF A BONUS ON THE STAR VALLEY CHEESE TRANSACTIONS INVOLVED IN POINT V FOR THE REASON THAT DEFENDANT FAILED TO INFORM PLAINTIFF AT THE TIME OF HIS HIRING OR WITHIN A REASONABLE TIME THEREAFTER THAT SUCH SALES SHOULD BE EXCLUDED FROM BONUS COMPUTATIONS FOR PLAINTIFF OR FOR THE OTHER DAIRY SALESMEN.

POINT VI.

EVIDENCE IS UNDISPUTED THAT PLAINTIFF GAVE UP A VALUABLE CONSIDERATION FOR THE DEFENDANT'S PROMISE OF A 1 PER CENT BONUS AND WAS DISCHARGED BY DEFENDANT WITHOUT

CAUSE, BEFORE THE END OF THE 1949-1950 FISCAL YEAR, AND SINCE PLAINTIFF GAVE A VALUABLE CONSIDERATION FOR SAID PROMISE, PLAINTIFF IS ENTITLED TO HIS BONUS ON ALL SALES FOR THE SAID PERIOD TO THE DATE OF HIS DISCHARGE, AS DEFENDANT, BY DISCHARGING PLAINTIFF, MADE IT IMPOSSIBLE FOR PLAINTIFF TO COMPLETE THE YEAR, OR COMPLETE HIS QUOTA.

POINT VII.

THERE WAS NO EVIDENCE OF A TENDER OR SETTLEMENT IN ACCORD AND SATISFACTION BY THE DEFENDANT TO THE PLAINTIFF AND WHETHER OR NOT THERE WAS A DEFINITE AND CERTAIN TENDER IN ACCORD AND SATISFACTION IS A QUESTION OF FACT FOR THE JURY, AND WHEN THE JURY DETERMINED FROM THE EVIDENCE THAT THERE WAS NOT AN ACCORD AND SATISFACTION, THE TRIAL COURT AND THE APPELLATE COURT ARE BOUND THEREBY.

POINT VIII.

THE COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTIONS FOR NON SUIT, FOR DIRECTED VERDICT, FOR JUDGMENT NOTWITHSTANDING, AND FOR NEW TRIAL, AS ALL OF THE POINTS ON WHICH DEFENDANT RELIED WERE QUESTIONS OF FACT AND THERE WAS SUFFICIENT EVIDENCE ON EACH POINT TO SUPPORT THE JURY'S VERDICT.

ARGUMENT

POINT I.

THE EVIDENCE IS UNCONTRADICTED THAT VOLUNTARY GIFT OF \$100.00 BY THE DEFENDANT TO THE PLAINTIFF CHRISTMAS OF 1947, WHICH WAS PRIOR TO THE DATE DEFENDANT WAS REQUIRED UNDER CONTRACT TO PAY PLAINTIFF A BONUS, WAS GIVEN TO PLAINTIFF WITHOUT A REQUEST BY THE PLAINTIFF FOR AN ADVANCEMENT OF HIS BONUS, AND SO CAN NOT BE CONSIDERED A PAYMENT ON THE CONTRACT, BUT ONLY A GIFT.

There is only one question involved in defendant's first point: Was the Christmas present of \$100.00 given to plaintiff December 25, 1947, by the defendant, a gratuity, or was it a part of the contract to pay plaintiff the promised \$500.00 incentive bonus at the end of the fiscal year March 1, 1948? The jury must have decided that the Christmas present was a pure gratuity and not a partial satisfaction of the contract to pay \$500.00.

By the contract of hiring, the defendant was obligated to pay the plaintiff \$500.00 on or about the 1st of March, 1948, the end of the 1947-1948 fiscal year. Any sum which the defendant voluntarily gave to the plaintiff prior to the end of the said fiscal year, without a request from the plaintiff, (and there was no evidence of a request for an advancement by the plaintiff) would be purely a gift, not chargeable against the contractual obligation to pay \$500.00.

That this was the intent of the parties is shown from the acts of the defendant. When DeVine was questioned as to why \$400.00 was paid instead of \$500.00, he did not say that plaintiff had received \$500.00—\$100.00 at Christmas and \$400.00 then. He merely attempted to deny Sorensen's authority to promise \$500.00 (R. 98). Again the following year, according to DeVine's statement, \$1,000.00 was promised (which plaintiff claims should have been 1% of all sales). \$100.00 was paid at Christmas time and \$1,000.00 at the end of the fiscal year. They did not pay \$100.00 at Christmas and \$900.00 at the end of the fiscal year. The defendant thus, by its own acts, placed its own interpretation upon the Christmas gratuity and showed that it was not intended to apply against the contractual bonus obligation (R. 101, L. 13-15).

POINT II.

THE PROMISE TO PUT PLAINTIFF ON THE INCENTIVE BONUS PLAN, "THE SAME AS THE OTHER SALESMEN," BEGINNING AS OF MARCH 1, 1948, WAS DEFINITE AND CERTAIN, WHERE THE BONUS WAS NOT PAYABLE UNTIL MARCH 1, 1949, AND THE OTHER SALESMEN, AS WELL AS THE PLAINTIFF, WERE INFORMED, PRIOR TO THAT DATE, THAT THEY WOULD ALL BE ON THE SAME INCENTIVE BONUS PLAN BEGINNING MARCH 1, 1948, AND THEY WERE ACTUALLY PLACED ON SUCH A BONUS PLAN, AND BEFORE THAT DATE PLAINTIFF WAS INFORMED THAT HE WAS ON A BONUS BASIS OF

1 PER CENT ON TOTAL SALES IF HE SOLD A QUOTA OF \$100,000.00, WHICH HE DID SELL.

The contention of defendant in Point II, that the "methods or factors upon which incentive pay was to be computed" were too uncertain and indefinite upon which to base a contract to pay plaintiff a bonus during the fiscal year of 1948-1949, is certainly unfounded from the evidence. There was an incentive plan with a definite bonus based on a sales quota, under which the plaintiff then became entitled to a bonus of a specific sum.

At the time of the original hiring, plaintiff was promised by defendant's agent, Sorensen, that he would receive the incentive plan "the same as the other fellows in the dairy department" (R. 24, 48, 63). Sorensen, on cross-examination, was asked the question, "I think you testified, didn't you, that Mr. Henoch would be treated like the rest of the salesmen in the discussion with regard to bonuses?" To which he answered, "That's right, Mr. Richards" (R. 86, L. 14-17). Sorensen also testified that the incentive plan, as applicable to other salesmen, was explained to Henoch (R. 79, L. 4-5). Sorensen was asked, "But you said he would be treated like the rest of the salesmen," to which he answered, "If he earned it, yes." He was then asked, "And when you told him if he earned that, you meant if he sold his quota?" and he answered, "Yes, but the quota was part of the incentive plan. I couldn't tell him what the quota would be" (R. 79, L. 9-15).

When the bonus basis and quota were established for the other salesmen, and, as plaintiff contends, likewise estab-

lished for plaintiff, it thereupon became binding upon the defendant and could not be arbitrarily withdrawn or amended by the defendant. 56 C. J. S. 529, n. 95.

The defendant makes a point of the fact that the other fellows who were selling in the dairy department were at that time, on different incentive pay programs. These divergent incentive programs only carried them up to the end of the fiscal year of 1947-1948, at which time another incentive program was being discussed by the defendant which was to, and which did, go into effect as of March 1st 1948. To cover the 1947-1948 period, when there was divergence between the bonus plans as set up for the other employees, plaintiff was promised a flat \$500.00 bonus. From and after March 1st, 1948, all of the salesmen in the dairy department, of the defendant company, were on the same incentive plan (R. 107, L. 27-30; R. 108, L. 1-5). The plaintiff was informed by Sorensen in the fall of 1948 that he was on the incentive plan the same as the other salesmen and that if he sold \$100,000.00, he would receive 1% upon total sales in his territory, whether or not he himself, or the defendant company, made the sale (R. 63 and 64).

Note the conflict in the testimony of Sorensen and DeVine, defendant's witnesses, with regard to the date the incentive bonus plan was born. DeVine said the plan was not born until January of 1949 and that Kilgore and Cole were notified January 7, 1949, that the new plan would take effect and be retroactive to March 1, 1948 (R. 108, L. 14-17) ; but Sorensen said that he had learned of the plan in the "fall of 1948" from discussions with DeVine (R. 73, L.

6-9). It is only reasonable to suppose that if Sorensen learned of the plan in the fall of 1948, that Sorensen did promise plaintiff the same bonus that the other fellows in the dairy department were receiving during the same time. It was reasonable, too, for plaintiff to write to DeVine in the fall of 1948, after Sorensen had explained the new bonus plan, and ask for an official confirmation of Sorensen's promise. This refers to the letter which the defendant presents as an argument to show indefiniteness and uncertainty of the terms of the contract. The plaintiff knew by all the promises obtained from the defendant that his bonus would be the same as the other dairy salesmen would receive and he wanted official confirmation of the fact as it had been then determined. Plaintiff was also in the dark about the application of sales made by others in his territory which had been promised to him.

The jury had to choose between the direct testimony of the plaintiff and the conflicting testimony of the defendant's witnesses. The defendant, by its witnesses, tried to show that there was no quota and no promise of a 1% bonus based upon that quota, but again the acts of the company and the attitudes of the parties support the testimony of the plaintiff and controvert the verbal, conflicting testimony of the witnesses for the defendant. The plaintiff testified that his sales quota was \$100,000.00 (R. 30, L. 30-31; R. 31, L. 1; R. 34, L. 7-19, 26-30; R. 42, L. 17-24; R. 44, L. 12-13, 20-29; R. 53, L. 13-14; R. 63, L. 22-30; R. 64, L. 1; R. 66, L. 1-11).

Now note the acts and indirect, off-guard statements of the witnesses for the defendant, which bring out the truth in support of plaintiff's direct testimony as follows:

(a) Other salesmen were getting a bonus of 1% based upon a \$100,000.00 quota (Sorensen, R. 82; DeVine, R. 107, L. 27-30; R. 108, L. 1-5).

(b) Plaintiff was to be treated like other salesmen (R. 86, L. 14-17; R. 79, L. 9-11).

(c) Plaintiff was better trained than the other salesmen and was left in charge in Sorensen's absence (R. 81).

(d) An incentive plan was explained to plaintiff (R. 79, L. 4-5) and the quota was an integral part of that incentive plan (R. 79, L. 14-17; R. 85, L. 10 and 11).

(e) Sales quotas were established for plaintiff and other salesmen (R. 72 and 74).

(f) Plaintiff's territory was enlarged at his request in order that he might more readily attain his quota (R. 48, L. 27-30).

(g) The defendant voluntarily agreed to pay the plaintiff \$1,000.00 to keep him encouraged (R. 99, L. 12) and half-way satisfied (R. 103, L. 17-22) at a time when DeVine did not think plaintiff would attain his quota (R. 34, L. 7-17).

(h) The promise was confirmed by payment of the \$1000.00.

(i) The reaction of DeVine when informed plaintiff expected to attain his quota confirmed instead of refuting

the quota, and the bonus based thereon, when DeVine said, "Well, it will only go over a few dollars anyway. It is only a matter of \$40 or \$50" (R. 34, L. 7-19).

Each of these points supports plaintiff's testimony. Considered together, they constitute irrefutable proof that the quota was established on which the promised bonus was based for plaintiff, as well as for the other salesmen.

"Absolute certainty in every deal is not required as basis for an action at law. When only legal relief is sought, only 'reasonable certainty' is demanded of contract, requirement being fulfilled if meaning of contract, as whole, is intelligible to court." *Kann v. Wausau Abrasives Co.*, 153 A. 823, 85 N. H. 41; *Cowles v. Cole*, 244 N. Y. S. 4, 137 Misc. 491; 17 C. J. S. 366, Note 79 (2).

POINT III.

PLAINTIFF WAS ENTITLED TO A BONUS OF 1 PER CENT ON THE TOTAL SALES OF \$197,553.00, OF WHICH HE RECEIVED ONLY \$1,000.00.

The contention of defendant, that plaintiff received more than was due him, is not sound. The plaintiff contends that defendant sold in plaintiff's territory, during the fiscal year commencing March 1, 1948, to February 28, 1949, dairy equipment in the sum of \$197,553.00, based upon which the bonus should have been \$1,975.53, of which plaintiff received only \$1,000.00.

Defendant admitted that the sales made by defendant during the year ending February 28, 1949, in plaintiff's

territory was \$105,860.00. Bonus on this amount would be \$1,058.60. Defendant contends \$100.00 was paid at Christmas 1948 and \$1,000.00 in March 1949, thus overpaying the bonus by \$41.40. The argument set forth under Point 1 with reference to the Christmas gratuity in 1947, applies with equal force to the Christmas gratuity paid at Christmas in 1948.

Plaintiff contends that in addition to the \$105,860.00, two additional items (the amounts of which and the profits made thereon by defendant were undisputed), one for \$49,270.80 and the other for \$42,422.00, were actually sales by the defendant in plaintiff's territory and which, added to the \$105,860.00, made up the total of \$197,553.00. Defendant contends that these two latter items were not sales by the defendant. The plaintiff concedes that these two items were not sales of dairy equipment from the floor of the defendant company, but were sales by the defendant company as brokers or agents for the manufacturer. It is undisputed that the defendant company did receive from these two sales, profits of \$2,463.54 and \$2,121.00, respectively, during the fiscal year ending February 28, 1949 (R. 88, L. 18-20). From the conflicting testimony, the jury believed these two transactions to constitute sales by the defendant upon which bonus was due to the plaintiff.

Let us summarize the evidence on which the jury based their findings. The plaintiff testified (R. 31) that Sorensen made a trip to Star Valley and was instrumental in selling the boilers. They were handled by or through Pace Turpin Company. This sale was in plaintiff's territory (R. 31, L. 22-23). The dryer was also sold through the in-

strumentality of Mr. Sorensen (R. 32, L. 8-12; R. 55, L. 22-26). Plaintiff's cross-examination shows that the sales were made by W. H. Bintz Company (R. 56, L. 1-3; R. 57, L. 2-6). Plaintiff, who was an engineer, took measurements for installation of the boilers and assisted in the installation (R. 54, L. 10-24). Both commissions were received during the summer of 1948 (R. 77 and 78 and R. 88).

The jury rightfully disregarded the nomenclature of the defendants when they stated these transactions were not "sales" and concluded that they were actually sales by the defendant, on which defendant received a brokerage or commission, of which plaintiff was entitled to his bonus percentage.

Furthermore, if such sales were not to be included in the basis of the compensation of defendant's dairy department salesmen, the defendant was under a duty to inform plaintiff *before* the obligation arose and not after the transaction had been fully consummated and after plaintiff had rendered service in connection with the transactions and after he had been promised that *ALL* sales made in his territory would be taken into account in computing the bonus. This profit, commission, or brokerage, or whatever defendant chose to call it, was received by defendant in the summer of 1948 (R. 88, L. 17) but it was not until November of that same year that plaintiff was informed that it was not the intention of the defendant to pay commission on items of this nature (R. 100, L. 15-28; R. 34). The defendant denied (R. 74 and R. 94) that these transactions were sales, but since defendant received \$2,463.54 on the boilers and \$2,121.00 on the dryer, the jury was justified in de-

termining that these two items were sales by defendant, and plaintiff was therefore entitled to 1% on such sales.

POINT IV.

DEFENDANT HELD SORENSEN OUT AS HAVING AUTHORITY TO HIRE AND FIX PAY AND BY THEIR FAILURE TO TIMELY INFORM PLAINTIFF THAT SORENSEN DID NOT HAVE SUCH AUTHORITY, DEFENDANT IS ESTOPPED TO THEREAFTER DENY SORENSEN'S AUTHORITY.

The defendant, by this point, seeks to deny liability by attempting to deny Sorensen's authority to employ and fix incentive pay.

At the time of the employment, the defendant held Sorensen out as having authority, both to hire and fix pay. That he had authority to hire is affirmed by DeVine's testimony (R. 107). If Sorensen had the power to hire, as testified to by DeVine, he certainly had the apparent authority to fix rates of compensation, and DeVine, by his acts, confirmed and acknowledged Sorensen's authority to hire and to fix rates of pay, as shown by his acts at the time of the hiring.

At the time of the original employment, plaintiff had an offer of another job which would have paid him more money. He therefore insisted that Sorensen tell him definitely what his compensation would be with the defendant (R. 23). At that time the defendant held Sorensen out as having authority to hire and to fix pay; and Sorensen did

fix the monthly salary, the expense account, and the incentive bonus, (Henoeh, R. 23; Sorensen, R. 69, L. 24-27). When the act of hiring was completed, Sorensen then took plaintiff upstairs to meet Mr. DeVine. Regarding this conversation, DeVine testified (R. 96 and 97), "Mr. Sorensen brought him in and introduced him to me and said *he was* employing him and (it) was just more or less of a welcome to the organization." At this conversation nothing was said by DeVine or Sorensen respecting compensation. On the other hand, the company confirmed Sorensen's hiring and establishment of compensation by paying regularly the agreed salary and expenses. Not until eight months after the hiring, in March of 1948, was Sorensen's authority first called into question. If Sorensen actually had no authority, then Mr. DeVine had a duty at the time plaintiff was hired to inform plaintiff what his compensation would be. He could not wait for eight months and then, for the first time, deny Sorensen's authority.

Nothing more was said about Sorensen's authority until November of 1948, which was sixteen months after the time of hiring, but again DeVine's actions conflict with his spoken word because his actions in offering the \$1,000.00 bonus, even though he thought plaintiff was not going to attain the \$100,000.00 quota, indicates that he knew all about the incentive program which Sorensen had promised and that he was ratifying Sorensen's authority and promise (R. 34).

The direct testimony of the plaintiff, together with the omission of the defendant and the subsequent acts of the defendant, justified the jury in finding that Sorensen had not

only apparent but actual authority to hire and to fix compensation.

POINT V.

THE DEFENDANT IS ESTOPPED TO DENY PLAINTIFF A BONUS ON THE STAR VALLEY CHEESE TRANSACTIONS INVOLVED IN POINT V FOR THE REASON THAT DEFENDANT FAILED TO INFORM PLAINTIFF AT THE TIME OF HIS HIRING OR WITHIN A REASONABLE TIME THEREAFTER THAT SUCH SALES SHOULD BE EXCLUDED FROM BONUS COMPUTATIONS FOR PLAINTIFF OR FOR THE OTHER DAIRY SALESMEN.

With reference to Point V, we need merely to state that the plaintiff, at the time he was hired, was informed that he would receive a bonus, based upon all sales in his territory, by the defendant company, and there was no reservation of any deals wherein the defendant company sold, as agent or broker, for the manufacturer. Plaintiff was not informed that items of this nature were not to be included until sixteen months after he was hired, and after the company had received \$4,584.54 profit from the two transactions in question. This matter is fully argued under Point III above.

The defendant is estopped by its failure to inform the plaintiff, at the time of hiring, of the reservation of any sales on which the plaintiff, or the other salesman, would not be entitled to bonus.

POINT VI.

EVIDENCE IS UNDISPUTED THAT PLAINTIFF GAVE UP A VALUABLE CONSIDERATION FOR THE DEFENDANT'S PROMISE OF A 1 PER CENT BONUS AND WAS DISCHARGED BY DEFENDANT WITHOUT CAUSE, BEFORE THE END OF THE 1949-1950 FISCAL YEAR, AND SINCE PLAINTIFF GAVE A VALUABLE CONSIDERATION FOR SAID PROMISE, PLAINTIFF IS ENTITLED TO HIS BONUS ON ALL SALES FOR THE SAID PERIOD TO THE DATE OF HIS DISCHARGE, AS DEFENDANT, BY DISCHARGING PLAINTIFF, MADE IT IMPOSSIBLE FOR PLAINTIFF TO COMPLETE THE YEAR, OR COMPLETE HIS QUOTA.

The question here raised is the right of the plaintiff to receive his 1% on sales by the defendant in plaintiff's territory during the 1949 fiscal year and up to the date of plaintiff's discharge.

The plaintiff was discharged by the defendant on December 15, 1949 (Answer to Interrogatory 10 (b) R. 6). On page 101 of the Record, line 19, appear the words, "Not up to the time that *he* severed his employment with us." It is the sincere contention of the plaintiff and of the plaintiff's counsel that the witness DeVine stated this answer, "Not up to the time that *we* severed his employment with us," which statement would be in accordance with the actual fact; and motion to correct the record in this regard is being concurrently filed, with the filing of this brief.

There is nothing in the record to show that the defendant was discharged for cause, either in the pleadings or in the proof. If defendant elected to rely upon this as an affirmative defense it should have been pleaded and proved at the trial.

The obligation to pay a bonus is contractual, and in this case was based upon a valid and valuable consideration, to-wit: the giving up of a better-paying job (R. 24, L. 7-8).

“Bonus at end of year. A promise to pay an employee a bonus at the end of the year is a mere gratuity and not enforceable where the employee is not shown to have done or foregone something which otherwise he was not obliged to do or forego; but if the employee is induced thereby to do something which he is not under legal obligation to do, or to forego something which he does not have to forego, the promise is enforceable.” 56 C. J. S. 529.

As authority, C. J. S. quotes *Redd v. Williams Radiator Co.*, 296 P. 676, 678, 112 Cal. App. 353 and cases cited in 39 C. J. 159, Note 96.

The following cases support the rule of law that where an employee has given up a good and valuable consideration for a promise of a bonus at the end of the year, he is entitled to a proportionate share of the bonus where he is discharged without cause, prior to the end of the year, and the burden of proof rests upon the defendant employer, if it sets up the discharge as a defense, to prove that the discharge was for valid cause:

Willoughby Camera Stores vs. Commr. Int. Rev.,
C. C. A. 2, 125 F. 2nd 607

Roberts, et ux v. Mills, Inc., 114 S. E. 530, 28
A. L. R. 338

Payne v. United States, 269 Fed. 871, 50 App.
D. C. 219

Youngberg v. Lamberton, 91 Minn. 100, 97 N.
W. 571

Mile v. California Growers, etc., 114 P. (2d) 651

In accordance with the provisions of the law as above quoted, and in the absence of any showing of discharge for cause, the jury was justified in awarding plaintiff a bonus, for the proportionate part of the year, based upon the \$62,453.18 sales which he had made up to the time of his discharge in his territory (R. 24, L. 7-8).

POINT VII.

THERE WAS NO EVIDENCE OF A TENDER OR SETTLEMENT IN ACCORD AND SATISFACTION BY THE DEFENDANT TO THE PLAINTIFF AND WHETHER OR NOT THERE WAS A DEFINITE AND CERTAIN TENDER IN ACCORD AND SATISFACTION IS A QUESTION OF FACT FOR THE JURY, AND WHEN THE JURY DETERMINED FROM THE EVIDENCE THAT THERE WAS NOT AN ACCORD AND SATISFACTION, THE TRIAL COURT AND THE APPELATE COURT ARE BOUND THEREBY.

This point considers whether or not there has been an accord and satisfaction at the end of each pay period.

Whether or not the plaintiff accepted these checks from the defendant in full satisfaction of the plaintiff's claim, and whether or not an accord and satisfaction existed, is a question for the jury, and if there is any evidence upon which to base their verdict the trial court, as well as the appellant court, is bound thereby. This is the law as set forth in the only case which defendant has cited in its brief, as authority for its position, to-wit: *Ashton vs. Skeen*, 85 Utah 489, at 489-499, 39 Pac. 2nd, last PP pg 1077, where the court said:

"In the present case the court has found and the finding was amply justified by the evidence *and this court is bound by that finding*, that Ford Brothers refused to accept it in full settlement of their claim, and notified Skeen that they wanted more money."

The case of *Shell v. McCrum*, 179 Iowa 1232, 162 N. W. 759, held that accord and satisfaction and settlement involved an aspect of the essentials of a contract, and of the law of estoppel. The Court said:

"In other words there is no settlement and no accord and satisfaction unless both parties act knowingly, with intent to execute the accord * * * It suffices where stated, that upon the record and on authority it was at least a question for the jury whether the claimed accord, satisfaction and settlement were executed. Since that was a jury question, the court did not err in refusing to hold that the accord was established as a matter of law."

The jury had the evidence of the checks and the evidence of the acts of the parties. All the checks, the Christmas gratuities, the monthly salary and expense checks, and

the bonus checks, all bore the same statement, "Your endorsement of the attached check is an acknowledgment of its correctness. This is an exact copy of our payroll record. W. H. Bintz Company. Payroll Receipt."

If these words were intended as an offer in accord and satisfaction, such offer, at best, was ambiguous and could be interpreted by the recipient and by the jury as a partial payment on account, especially in view of the defendant's evidence that there was no "payroll record" of a promised incentive bonus (R. 101, L. 9-10). If there was no payroll record of a bonus, any statement on the check with reference thereto could have no probative value. Then the only thing left on the check is the acknowledgment of its "correctness." Correct may mean anything. It could be "correct" as a payment on account. It did not purport to be payment in full, or settlement in full, as is required for an accord and satisfaction.

On the question of ambiguity of the terms employed in the offer of an accord and satisfaction, the court, in the case of *Crucible Steel Co. of America v. Premier Mfg. Co.*, 94 Conn. 652, 110 Atl. 52, said:

"When the assent of the creditor is sought to be inferred from the acceptance of a lesser sum than that claimed to be due, the fact that such amount is offered in full discharge of the whole claim must have been communicated to the creditor in some unmistakable manner."

The law is well stated to be:

"To constitute such a payment an accord and satisfaction, it must be offered as FULL SATIS-

FACTION of a claim and acknowledgment by such declaration or under such circumstances as would amount to a condition that if accepted by the creditor it would be in full satisfaction of the debt." *Harrison v. Henderson*, 67 Kans. 194, 62 L. R. A. 760, 100 Am. St. Rep. 386, 72 P. 875; 34 A. L. R. 1052. 1 C. J. p. 558. Notes 62, and p. 559. Notes 69 and 70."

As each monthly check was given to the plaintiff, certainly such checks were not considered by either plaintiff or defendant to constitute a settlement of the promised bonus, which promise the defendant acknowledged by its acts, as hereinabove argued. When the \$400.00 check was given, there was absolutely no statement, prior thereto, that it was intended as an accord and satisfaction, nor was plaintiff informed by defendant that defendant considered the check payment in full. When plaintiff received the \$400.00 check, he went to Sorensen, who had promised him \$500.00, and complained about the amount of the check and Sorensen said, "They probably deducted the \$100.00 Christmas present from it" (R. 26). Sorensen did not say the balance would not be paid or that the \$400.00 was all he would get. Plaintiff, after receiving said check, went to DeVine, the defendant's manager, and complained about having received only \$400.00 instead of \$500.00, and DeVine did not say that the \$400.00 was all he would get, but said, "Well, we have been trying to find out for two weeks what Bob had promised you" (R. 41, L. 10-20). And when plaintiff demanded the balance, DeVine did not answer one way or another. He certainly did not inform the plaintiff that he would not get the balance of \$100.00 owing plain-

tiff, and DeVine, on direct examination, did not assert that it was payment in full (R. 98, L. 1-18).

At the time the \$1,000.00 was paid, the last words prior thereto were to the effect that DeVine did not expect the bonus check would amount to more than \$40.00 or \$50.00 in excess of the \$1,000.00 (R. 34, L. 16-17). When plaintiff received this \$1,000.00 check, he protested that it was insufficient, and still expected to receive more (R. 35, L. 19-23).

The jury must have believed (a) that since the monthly checks all contained the same statement, but the defendant nevertheless paid Christmas gratuity and bonus, the defendant itself did not rely upon the statement on the checks as constituting a tender of an accord and satisfaction; or (b) that the wording on the checks is so vague and uncertain and ambiguous that it did not constitute an accord and satisfaction; or (c) that the plaintiff was not at any time informed that the payments tendered to him were intended to be tendered as an accord and satisfaction, the checks not to be used unless the payee was willing to accept them as payment in full. In any event the jury must have found that no accord and satisfaction existed, and the trial court and appellate court are both bound by such finding.

POINT VIII.

THE COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTIONS FOR NON SUIT, FOR DIRECTED VERDICT, FOR JUDGMENT NOTWITHSTANDING, AND FOR NEW TRIAL, AS ALL OF THE POINTS ON WHICH DEFENDANT RELIED WERE

QUESTIONS OF FACT AND THERE WAS SUFFICIENT EVIDENCE ON EACH POINT TO SUPPORT THE JURY'S VERDICT.

It is apparent that Point VIII raises only the question of whether there was sufficient evidence upon which the jury could find, on all of the issues, for the plaintiff.

Plaintiff has heretofore, in this brief, set forth a resume of the evidence as to each of the items (a) to (e) contained in defendant's Point VIII justifying the jury in finding for the plaintiff. It is not deemed necessary nor proper to repeat the argument here. Therefrom, it is clear that the jury had sufficient evidence before it to determine all of these questions of fact raised by the defendant in Point VIII and decided all of them in favor of the plaintiff and against the defendant, and the court did not err in denying the defendant's motion for non-suit, for directed verdict, for judgment notwithstanding, and for new trial.

CONCLUSION

In conclusion, plaintiff submits that the verdict of the jury is supported by sufficient evidence in every particular and that the judgment of the trial court should be sustained.

Respectfully submitted,

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