

13-0932

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

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CHRISTOPHER D. ADKINS,

Plaintiff,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

UHM

v.

Civil Action No. 11-C-307
Honorable Tod J. Kaufman

AMERICAN MINE RESEARCH, INC.,

Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This day came on for consideration by the Court the motions for summary judgment filed by both parties along with their respective memoranda in support thereof.

After considering the parties' motions and supporting memoranda, the exhibits to those memoranda, and the pleadings in this action, the Court is of the opinion that Defendant's motion for summary judgment should be granted pursuant to Rule 56 of the West Virginia Rules of Civil Procedure and that Plaintiff's motion should be denied based upon the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff Christopher D. Adkins (hereinafter referred to as "Plaintiff") was an at-will employee of defendant American Mine Research, Inc. (hereinafter referred to as "Defendant"), from October 1, 2000, to August 15, 2010, when he voluntarily resigned his position as Defendant's Eastern Territory Sales Representative.

2. Plaintiff was employed by Defendant on or about October 1, 2000, as the primary sales representative. Defendant supplied various mines with carbon monoxide (CO) monitoring systems, circuit breakers, ground monitors, tip switches and ground fault detectors. Plaintiff sold the Defendant products in West Virginia, Maryland, Ohio, Pennsylvania, Tennessee, Kentucky, Virginia and Alabama. Plaintiff's compensation consisted of a small base salary, plus a sales commission.

3. Plaintiff rendered services to Defendant by selling its products to customers. Once Plaintiff completed an equipment sale, a purchase order was placed. Plaintiff's commission was calculated and paid at the end of each month, based upon the volume of product shipped that month.

4. In 2006, the United States Congress passed the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"). In a nutshell, the MINER Act mandated that coal mining companies have tracking and communication systems in all mines by 2009. As a result of the passage of the MINER Act, Defendant began to manufacture devices (i.e., "tracking systems") that would meet the new federal mandate.

5. By 2008-2009, the development of the tracking systems had progressed to the point that Plaintiff was able to begin selling the new product for Defendant. In doing so, Plaintiff actually secured advanced sales of approximately \$15,000,000.00 of the new equipment. Plaintiff completed all of his sales services for Defendant and submitted the finished purchase orders. The parties agree that, at the time Plaintiff rendered his services necessary to secure these advanced sales, his commission rate was as follows: 1% on all sales from \$40,000 to \$80,000.00; 2% on all sales between \$80,000.00 and \$100,000.00; and 3% on all sales over

\$100,000.00. By the time Plaintiff had completed all of his sales of the new equipment, the shipping was initially delayed due to pending MSHA approval of the tracking systems.

6. In November 2009, Mr. Robert Saxton, the General Manager of Defendant, called Plaintiff to a meeting in Virginia. At this meeting, Plaintiff was informed that his then existing commission rate of 3% was being reduced and capped at \$85,000.00. He was further advised that new lower rate would be retroactively applied to his previous \$15,000,000.00 in sales of the tracking systems, which had not yet been shipped.

7. While acknowledging that Defendant could change his commission rate on future sales, Plaintiff objected to his commission rate being modified as to his prior sales—specifically with regards to the \$15,000,000.00 in prior equipment sales. Defendant ignored Plaintiff's objections and paid him the reduced commission of \$85,000.00, as the prior equipment sales had not been shipped at this point.

8. The issue central to this dispute is the amount of commission owed to Plaintiff on the sale of Defendant equipment valued at \$15,000,000.00. Plaintiff asserts he is owed commissions of 3%, or \$300,000.00, based upon his commission rate at the time he negotiated the sale of the equipment and provided his services to Defendant. Defendant asserts that it owes Plaintiff only \$85,000.00, due to the cap it unilaterally placed on Plaintiff's commissions after Plaintiff had provided his services to Defendant.

9. Throughout his employment tenure, plaintiff received from defendant a base salary coupled with, among other things, monthly commissions based on percentages of his gross sales with such commissions being calculated on equipment shipped during the preceding month.

10. Throughout plaintiff's employment tenure, Defendant made changes in his pay structure with the latest being in November 2009 when Plaintiff's base salary was increased to Fifty Thousand Dollars (\$50,000.00) coupled with new monthly commission rates subject to a commission cap of Eighty Five Thousand Dollars (\$85,000.00); Defendant even agreeing after that to pay Plaintiff a commission of one-half (1/2) of one percent (1%) on any new sales of tracking and communicating equipment for which he secured an order after a customer's initial order of such equipment had been delivered.

11. By his own concession, Plaintiff was paid all salary and commissions on equipment shipped prior to his leaving Defendant's employ.

12. Plaintiff alleges that Defendant violated the West Virginia Wage Payment and Collection Act (hereinafter referred to as "WPCA") in that Defendant did not have the right to change Plaintiff's pay structure in November 2009 and should have paid him under the then in effect salary/commission rate for approximately Fifteen Million Dollars (\$15,000,000.00) of tracking and communicating equipment that had been ordered by various customers of Defendant but not yet shipped.

CONCLUSIONS OF LAW

1. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c).

2. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the

nonmoving party has failed to make a sufficient showing on an essential element of the case that [he] has the burden to prove." *Syl. Pt. 4, Painter v. Peavy*, 451 S.E.2d 755 (W. Va. 1994).

3. "Summary judgment is a device designed to effect a prompt disposition of controversies on their merit without resort to a lengthy trial, if in essence there is no real dispute as to salient facts or if only a question of law is involved." *Hanks v. Beckley Newspapers Corp.*, 172 S.E.2d 816, 817 (W. Va. 1970).

4. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Syl. Pt. 1, Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W. Va. 1995) (citations omitted).

5. The WPCA provides that "[w]henver an employee quits or resigns, the person, firm or corporation shall pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail if requested by the employee." W. Va. Code § 21-5-4(c).

6. The term "wages" under the WPCA is defined as "compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation." W. Va. Code § 21-5-1(c).

7. The WPCA "does not regulate the amount of wages, and it does not establish how or when wages are earned" since "these are matters that arise from the employment agreement." *Gregory v. Forest River, Inc.*, 369 Fed.Appx. 464, 469 (4th Cir. 2010) (upholding an employment agreement that "established that commissions would be paid on shipped units" as "[its] provisions do not contravene any provision of the WPCA" because "they merely establish the amount of commissions and when they are earned"). *See also, Saunders v. Tri-State Block*

Corp., 535 S.E.2d 215, 219 (W. Va. 2000); *Meadows v. Wal-Mart Stores, Inc.*, 530 S.E.2d 676, 689 (W. Va. 1999). As the amount of wages is at issue in this matter, the Court finds that the implied agreement and custom and business practices of Defendant apply in this case and that those practices do not contravene any provision of the WPCA.

8. As conceded by Plaintiff, Defendant had the right to alter the terms of his pay and did so throughout the tenure of his employment based on Plaintiff being an at-will employee.

9. “When an employment agreement is terminable at will, it may be modified by the employer as a condition of its continuance,” and “[t]his right to modify unilaterally at-will employment terms applies to modifying compensation terms.” *Geary v. Tehular Corp.*, 793 N.E.2d 128, 131-133 (Ill. App. 2003) (upholding a compensation plan based upon shipped products) (citations omitted).

10. “As a general rule, a person employed on a commission basis to solicit sales orders is entitled to his commission when the order is accepted by his employer.” *Vector Engineering and Manufacturing Corp. v. Pequet (sic)*, 431 N.E.2d 503, 505 (Ind. App. 1982). “This general rule may be altered by written agreement by the parties or by the conduct of the parties which clearly demonstrates a different compensation scheme.” *Id.* The undisputed facts clearly demonstrate Defendant’s compensation package and Plaintiff’s agreement therewith constitute an exception to the “general rule” such that Plaintiff was not entitled to any commission compensation until shipment of ordered products.

11. The fact that there was no written agreement between the parties regarding that compensation arrangement is inconsequential and certainly does not establish that the arrangement somehow was not in effect or that Plaintiff earned a commission at any time other than the time of shipment. See *Davis v. All American Siding & Windows, Inc.*, 897 N.E.2d 936,

941 (Ind. App. 2008) (“We recognize, however, that a contract of employment, out of which the relationship of employer and employee arises, may be either express or implied, verbal or written.”).

12. By continuing to work after the changes in his compensation plan throughout the course of his employment, Plaintiff is deemed to have accepted his compensation plan as amended throughout the course of his employment. *See Geary*, 341 Ill. App. 3d at 698 (citing *Schoppert v. CCTC International, Inc.*, 972 F.Supp. 444 (N.D. Ill. 1997)).

13. Throughout the tenure of his employment, Plaintiff was paid by defendant all salary and commissions to which he was entitled on equipment for which he secured orders when such equipment was shipped in accordance with the long-standing arrangement covering Plaintiff's employment.

14. Defendant did not violate the WPCA as alleged by Plaintiff in that Defendant paid Plaintiff any and all amounts due and owing him in a timely manner, i.e., on or before the next regular payday following Plaintiff having voluntarily terminated his position with Defendant.

RULINGS

Based on all of the foregoing, it is hereby ORDERED and ADJUDGED as follows:

1. That Defendant's motion for summary judgment is GRANTED.
2. That Plaintiff's motion for summary judgment is DENIED.
3. That this action is hereby DISMISSED with prejudice and STRICKEN from the docket of this Court.

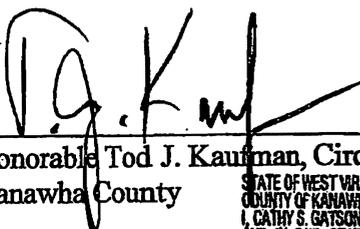
The Circuit Clerk shall send a certified copy of this Order to all counsel of record:

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Entered this 29 day of August, 2013.


Honorable Tod J. Kaufman, Circuit Court Judge for
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 30th
DAY OF August 2013

CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 