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United States Court of Appeals
Tenth Circuit

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ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KERMIT E. LACKEY; WILLIAM A. SHIPLEY; and MURRAY F. TYSINGER, JR.,

Plaintiffs-Appellees,

v.

WHITEHALL CORPORATION,

Defendant-Third-Party-Plaintiff-Appellant,

v.

WALLACE C. WILSON,

Third-Party Defendant.

No. 89-3314
(D.C. No. 85-2639-S)
(D. Kan.)

ORDER AND JUDGMENT*

Before MOORE, BRIGHT,** and BRORBY, Circuit Judges.

**Honorable Myron H. Bright, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

This case comes to us on appeal after a trial to the court. The district court, applying Florida law, found that appellee Lackey's continued employment constituted consideration rendering appellant's promise to pay deferred compensation an enforceable

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

contract. The only issue on appeal is whether the district court erred in this finding.

The material facts in this case are not disputed. Sometime in late 1981, defendant-appellant Whitehall Corporation (Whitehall), determined to expand its previous business by entering and competing in the radio frequency crystals market. This business plan was to be carried out through Whitehall's Crystek Division headquartered in Fort Myers, Florida. In November 1981, Whitehall hired a team of key management personnel to develop and market the new products, offering deferred compensation arrangements as a hiring incentive. Whitehall extended the same offer of deferred compensation to other existing personnel, including plaintiff-appellee Kermit E. Lackey (Lackey).

After the failure of the new marketing venture, Lackey and the other members of the marketing team resigned. When Whitehall and plaintiffs were unable to agree on the amount of the deferred compensation due them upon resignation, plaintiffs brought suit alleging violation of the Employee Retirement Income Security Act of 1971, as amended, 29 U.S. C. §1001 et seq. (ERISA), and breach of contract. The court found for Whitehall on the ERISA claim but concluded that plaintiffs had prevailed on the breach of contract claim. In so doing, the court found that Whitehall had offered the deferred compensation and that plaintiffs had accepted the offer. Memorandum and Order (Dec. 12, 1988) at 10. Specifically with regard to Lackey, the court found that, under Florida law, continued employment is consideration for a promise by an employer of deferred compensation. Id. at 11. Whitehall only appeals that portion of the district court's order involving Lackey.

The presence of consideration in an agreement is a question of law. See Harrington v. Harrington, 365 N.W.2d 552, 555 (N.D. 1985); Keeter v. John Griffith, Inc., 241 P.2d 213, 214 (Wash. 1952); 17A C.J.S. Contracts § 613 (1963 & Supp. 1989). Questions of law are reviewed by this court de novo. See Boise City Farmers Coop. v. Palmer, 780 F.2d 860, 866 (10th Cir. 1985).

In finding that an enforceable contract existed between these parties, the court relied on Tasty Box Lunch Co. v. Kennedy, 121 So. 2d 52 (Fla. Dist. Ct. App. 1960), which held that in an employment at will situation, "the continued employment and agreement to pay commissions was consideration for the employee's agreement not to compete." Id. at 54. The payment of commissions by the employer in Tasty Box Lunch was part of the original employment arrangement, and there does not seem to have been any additional consideration given in return for the covenant not to compete.[1]

Whitehall cites other Florida cases in which continuing employment was coupled with other forms of consideration to create an enforceable contract. See Criss v. Davis, Presser & LaFaye, P.A., 494 So. 2d 525, 527 (Fla. Dist. Ct. App. 1986); Wright & Seaton, Inc. v. Prescott, 420 So. 2d 623, 626 (Fla. Dist. Ct. App. 1982); Atlas Travel Serv., Inc. v. Morelly, 98 So. 2d 816, 817 (Fla. Dist. Ct. App. 1957). While we acknowledge those cases,

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[1] Indeed, the dissent complained that more than continuing employment may have been needed under Florida precedent. Id. at 54 (Horton, C.J., dissenting).

none of them indicate that their outcomes depended on the presence of consideration over and above continuing employment. We agree with the district court that Tasty Box Lunch remains the controlling law in Florida and conclude that it was properly applied in this case.

The discussion in Whitehall's brief regarding recent criticism of Tasty Box Lunch and its progeny is also misplaced. In Wright & Seaton, Inc. v. Prescott, 420 So. 2d 623 (Fla. Dist. Ct. App. 1982), the court criticized Tasty Box Lunch and similar later cases, lamenting the fact that none of those cases discussed mutuality of obligation, a concept the court had previously distinguished from the concept of consideration. See id. at 628. Whitehall quotes selectively from Wright & Seaton and ignores later language in the case in which the court, referring to Tasty Box Lunch and its successors, states that "they represent the governing law in Florida on which employers and employees have relied for over twenty years and appellee has not provided us with argument sufficiently persuasive to disregard them." Id. We find the argument of Whitehall here to be similarly deficient.

Because we have found that Lackey's continued employment is valid consideration for Whitehall's promise to pay him deferred compensation, it is unnecessary for Lackey to also demonstrate reliance.

The judgment of the United States District Court for the District of Kansas is AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM