COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2253

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

PEGGY KAMKE,

PLAINTIFF-APPELLANT,

V.

DCI MARKETING, INC. AND
HARRY G. BLOOM,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Peggy Kamke appeals from an order granting summary judgment in favor of DCI Marketing, Inc., and Harry G. Bloom, and dismissing Kamke's complaint alleging breach of employment contract and breach of trust. Kamke claims: (1) the trial court erred when it concluded she was an "at

will" employee, subject to discharge without cause; (2) DCI breached her employment contract by violating the two-week notice provision regarding termination of employment; and (3) DCI breached its fiduciary duty as trustee when it held Kamke's commissions in a non-interest-bearing account. Because Kamke's employment agreement did not require cause for dismissal, because the breach of the two-week notice provision did not damage her, and because there was no trust created, we affirm.

I. BACKGROUND

¶2 In September 1991, Kamke began working for DCI as an account executive. A written account executive agreement, signed by Kamke and a DCI representative, described the terms and conditions of such employment. In October 1994, Kamke and DCI executed an addendum modifying the employment agreement to change Kamke's status to a part-time account executive. The addendum stated, in pertinent part: "There is no guaranteed term or timeframe related to your part-time status (nor was there in your full-time status) and you will be evaluated as in the past on your sales performance."

¶3 On June 15, 1995, Kamke was told that the part-time arrangement was not working and that the company wanted her to return to full-time status. She refused and was terminated. Subsequently, Kamke filed a lawsuit alleging breach of the employment contract and breach of trust. DCI moved for summary judgment, which was granted. Kamke now appeals.

II. DISCUSSION

A. Breach of Contract.

¶4 Kamke asserts that DCI breached the employment contract in two ways: by terminating her without cause and by failing to give her the required two-week notice. She bases both of these claims on the termination clause located in the original account executive agreement. That clause provided, in pertinent part:

> Termination. Account Executive's service as an employee of DCI shall terminate upon the happening of any of the following events:
>
> (a) Two (2) weeks['] notice of termination given in writing by one party to the other.
>
> (b) The death of Account Executive.
>
> (c) The dissolution or liquidation of DCI.
>
> (d) The breach by Account Executive of any material condition or covenant of this Agreement.
>
> (e) The commission by Account Executive of an act of dishonesty involving DCI.

¶5 The trial court rejected her claim, ruling that this clause did not create a "cause" requirement before termination and that, although the two-week notice of termination clause was breached, Kamke failed to produce any evidence that the breach damaged her. We agree with the trial court's determinations.[1]

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[1] In so ruling, however, the trial court did observe:

> [W]hile the plaintiff feels strongly that she was treated shab[b]ily by her employer, and she may well be right, under the present state of the evidence there is no legally cognizable claim here. If she's right about the way she was treated this may be hard for her to understand, but the law is simply not able to right every work place insult, mend every wrong decision that an employer

(continued)

¶6 This case comes to us after a grant of summary judgment. The standard of review governing such cases is well-known and need not be repeated here. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 314-17, 401 N.W.2d 816, 820-21 (1987). Our review is *de novo*. *See* ***id.*** at 315, 401 N.W.2d at 820. Further, this case involves the interpretation of a contract, which is a question of law that we review independently. *See* ***Tara N. v. Economy Fire & Cas. Ins. Co.***, 197 Wis.2d 77, 84, 540 N.W.2d 26, 29 (Ct. App. 1995).

¶7 Kamke argues that the termination clause, when read together with the clause in the addendum referencing sales performance, indicates she cannot be terminated except for cause. We disagree. The termination clause in the original contract indicates that employment will cease upon the happening of *any* one of five events. The first event is two-weeks' notice by either party. This provision clearly indicates that no "cause" is needed. The addendum supports this interpretation by clarifying that there is "no guaranteed term or timeframe related to your part-time status (nor was there in your full-time status)." When no timeframe is guaranteed, an employee is considered to be an "at will" employee. *See* ***Holloway v. K-Mart Corp.***, 113 Wis.2d 143, 145, 334 N.W.2d 570, 572 (Ct. App. 1983) ("Employment contracts which specify no term of duration and which fix compensation at a certain amount per day, week or month are terminable at the will of either party.").

¶8 Kamke argues that the reference in the addendum that she would be "evaluated as in the past on [her] sales performance," transforms the contract into one requiring cause before termination. We are not persuaded. In Wisconsin, there is a strong presumption that an employment relationship is "at will" unless

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> might make, provide a remedy for a good decision that is clumsily or rudely executed.

the parties' agreement clearly manifests an intent to bind each other for a particular term. *See* ***Forrer v. Sears, Roebuck & Co.***, 36 Wis.2d 388, 393, 153 N.W.2d 587, 589-90 (1967). A "cause" requirement will not be read into the agreement unless the employee can show that both employee and employer clearly manifested an intent to do so. *See* ***Matthew v. American Family Mut. Ins. Co.***, 54 Wis.2d 336, 340, 195 N.W.2d 611, 613 (1972). Nothing in Kamke's original contract demonstrates such intent. The phrase Kamke relies on in the addendum is insufficient to meet the required standard. "Evaluation" does not necessarily imply termination, but may be linked to salary. Thus, the clause referencing evaluation of sales performance does not manifest an intent on DCI's part to create a "cause" requirement.

¶9 Kamke also argues that the two-week notice provision, which was concededly breached, requires the reversal of summary judgment. She argues that the trial court erred in concluding that, because DCI voluntarily paid her four-weeks' severance upon termination, she cannot prove any damages. She claims that, although this would cover the salary for the additional two weeks, it is not known whether it would also cover any additional commissions she may have been able to earn during those two weeks. We reject her claim.

¶10 We have reviewed her submissions in opposition to the summary judgment motion. She did not submit any evidence to demonstrate that she could have earned commissions in excess of what she was paid.[2] Thus, the trial court did not err in granting summary judgment.

[2] Kamke argues that the severance payment was made on an unconditional basis and did not require the waiver of any rights against DCI. Although this is true, it does not eliminate the need to produce evidence of damages to withstand summary judgment. A wrong that does not cause any damages is not actionable. *Damnum absque injuria.*

¶11 Kamke also argues that because the addendum was supported by additional consideration, the court is to impute a just cause requirement into the contract. She argues that the consideration included a reduced salary and a waiver of benefits in exchange for part-time status. She cites ***Forrer***, 36 Wis.2d at 393-94, 153 N.W.2d at 589-90 in support of this claim. In ***Forrer***, our supreme court discussed contracts for permanent employment and when these are valid. *See* ***id.*** The supreme court observed that "conceivably the plaintiff could state a cause of action if it were affirmatively shown that he furnished 'additional consideration' in exchange for the defendant's promise of permanent employment." ***Id.*** at 394, 153 N.W.2d at 590. We do not interpret this case in favor of Kamke's claim that a cause requirement was imputed into her contract because she accepted a reduction in salary and benefits when she went to part-time status. Kamke was not promised permanent employment, which is what was at issue in ***Forrer***. Accordingly, that case does not support her argument and this claim is rejected.

B. Breach of Trust.

¶12 Kamke also argues that the trial court erred when it concluded there was no breach of trust. She also claims that her commission account constitutes a trust and that DCI breached a fiduciary duty by failing to invest, at a reasonable rate of return, the money held in her commission account. We reject this claim.

¶13 The relationship of employer and employee does not give rise to a fiduciary duty. *See* ***Hale v. Stoughton Hosp. Ass'n, Inc.***, 126 Wis.2d 267, 274, 376 N.W.2d 89, 93 (Ct. App. 1985). The rights and duties between DCI and Kamke are defined by the employment agreement, which did not impose any obligation on DCI to invest the money held in Kamke's commission account. Kamke received the compensation to which she was entitled under the contract.

Accordingly, we affirm the trial court's determination that there was no cognizable breach of trust action.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.