MATTHEWS & BOLDT

Attorneys at Law

Memorandum

Re: Who Does the Pastry?

To: Alex Associate

From: Daphne Matthews

Joseph Collins has retained this firm to represent him in a lawsuit with Crest Hotel Management. Suit has been filed and discovery is underway. Collins' attorney was recently appointed a county judge, and we are assuming representation.

Collins was a widely known head chef at an Atlanta hotel. The hotel specialized in hosting conventions, and Collins' fame was attributable to his ability to produce gourmet meals for large groups of customers. It was this ability that caused the Marrimount Hotel and Convention Center (the "Hotel" or the "Marrimount") in Saratoga, New York, to seek Collins' services as head chef . Collins was reluctant to leave Atlanta but was persuaded to do so by a generous five-year contract to be the head chef at the Marrimount. There was no detailed employment agreement, but there was a letter signifying the contract terms.

The first year of the contract went well, but problems arose in the second year. The pastry chef and the dessert chef left the hotel to open a resort hotel in Colorado. When Collins began a search to replace these assistant chefs, hotel management—the hotel is owned and managed by Crest—told Collins that one of the two new assistant chefs must be Hispanic. Collins had already offered the dessert chef position to an applicant who accepted. Management then insisted that the pastry chef be selected from Hispanic applicants, of which there were two.

Collins refused, insisting that the right to choose assistant chefs was his prerogative as head chef. Collins made the pastry chef offer to Mary Banks, but Hotel management refused to process Banks' application. Instead, management offered the position to one of the Hispanic applicants, who accepted.

These facts seem to be undisputed, but the parties characterize subsequent events quite differently. Collins believes, and his lawsuit alleges, that the Hotel breached his employment contract by preventing him from choosing his own assistant chefs. The Hotel denies this was a breach and further contends that Collins breached his contractual duty of loyalty to the employer by soliciting customers not to do business with the Hotel but instead to contract with The Teadwell Center, with which Collins has a secret business arrangement.

The Hotel has barred Collins from working in its kitchen. It is paying neither his salary nor the present and future bonus payments stipulated in his employment contract. It seeks to enjoin Collins from working as a head chef at the Teadwell Center and from soliciting any of the Hotel's former customers. Collins seeks damages measured by lost salary and bonus payments. He also asks for a declaratory judgment that he will not breach a contract with the Marrimount if he assumes the position of head chef at the Teadwell Center.

Both sides are preparing motions for preliminary relief. How strong is our case?

Memorandum

Re: Who Does the Pastry?

To: Alex Associate

From: Perry Paralegal

I have attached some of the materials from discovery that may help.

Joint Exhibit 1

Crest Hotel Management
Ithaca, New York

February 15

Mr. Joseph Collins
Atlanta, Georgia
via UPS Overnight

Dear Mr. Collins,

On behalf of the Crest Hotel Management Corporation I am pleased to confirm the following:

- On March 1, you will assume the duties of head chef at the Marrimount Hotel, Saratoga, New York.
- This contract will expire five years from the signing thereof, unless mutually agreed otherwise.

- Your annual salary, paid monthly, will be $137,000 for the first year. Each year thereafter, your salary will increase by 12%.
- In addition to your annual salary, you will be paid a bonus of 8% of the gross dining room revenues of the Marrimount Hotel. Where a guest uses the dining room as part of a package, 24% of the package price will be attributed to dining room revenue.

We look forward to a successful collaboration.

Sincerely yours,

John Dane, President

From a deposition of Harriet Stein:

Mr. Ordway [counsel for Collins]: What is your position with Crest Hotel Management, Ms. Stein?

Stein: That is Mrs. Stein.

Ordway: Yes, Mrs. Stein.

Stein: I am the manager of the Marrimount Hotel.

Ordway: How long have you held that position?

Stein: Six years.

Ordway: And your immediate superior is?

Stein: Eliott Kerner. He is Vice President for Hotel Management for the Crest Company. He is in Ithaca.

Ordway: Part of your duties were to oversee the dining facilities at the Marrimount, correct?

Stein: Generally correct. The head chef runs the dining room. I am a kind of conduit between management in Ithaca and the dining room.

Ordway: Did there come a time when you asked . . . withdraw that. Did there come a time when you told Mr. Collins that he no longer had control over the hiring of his assistant chefs?

Stein: No, I never told him that.

Ordway: Didn't you refuse to process the employment application of Mary Banks, who was Mr. Collins' choice for pastry chef?

Stein: Yes, I did.

Ordway: Why?

Stein: I was under orders from Eliott Kerner to hire a minority in a supervisory position in the kitchen, preferably a Hispanic. The Hotel has received some criticism for under-employing members of certain minority groups.

Ordway: What was Mr. Collyers', excuse me, Mr. Collins' reaction to that?

Stein: He became quite agitated. He said that he was all in favor of hiring minorities but that the choice of assistant chefs was his to make.

Ordway: And what was the outcome of this disagreement?

Stein: Well, I guess this lawsuit will determine the outcome. If you mean what happened next, when the new pastry chef came to work, Mr. Collins introduced himself and said, "There is nothing personal here, but I can't have this." He then left the Hotel.

Ordway: Were you there? Did you see this personally?

Stein: Yes, I was there. I had brought the new pastry chef to the kitchen.

Ordway: How long was it between the time that you told Mr. Collins that the Banks' application would not be processed and when he left the Hotel?

Stein: About three months.

Ordway: And did you call Mr. Collins after he left the Hotel?

Stein: Yes, several times. I urged him to return.

Ordway: But the last time you spoke to him it was not to urge him to return, was it?

Stein: No, I told him that he was terminated for disloyalty.

Ordway: Why did you tell him that, Mrs. Stein?

Stein: Because we heard from the booking agent for the National Casketmakers Association that Collins had told him that he, Collins, was probably not going to be with the Marrimount long and was likely to be at the Teadwell instead. Collins suggested the Casketmakers shift their convention.

Ordway: When do you understand that conversation to have taken place?

Stein: Within ten days of our refusal to process the Banks application.

Ordway: Did you receive the information from the booking agent directly?

Stein: If you mean personally, no. It was told to my assistant manager, Mr. Jerome.

Ordway: Did you or Mr. Jerome hear similar remarks from any other customers?

Stein: Not to my knowledge.

Ordway: Whose decision was it to discharge Mr. Collins?

Stein: Mr. Kerner's, after I told him about Collins walking out of the Hotel and about the statements made to the Casketmakers.

Ordway: After Mr. Collins left the Hotel, did you order the accounting department to cease sending him salary checks?

Stein: Yes.

Ordway: And bonus checks?

Stein: Yes, those too.

Ordway: And are you aware that some of those salary and bonus payments are for periods during which Mr. Collins was working in the kitchen?

Stein: Yes, our lawyer said we didn't have to pay him. He was disloyal.

Ordway: I have nothing further.

Mr. Haley [counsel for Crest]: Ms. Stein, are you, is Crest, presently searching for a head chef to replace Mr. Collins?

Stein: Yes we are.

Haley: And have you been successful?

Stein: Not at the level of salary and bonus that we were paying Collins. A head chef with a reputation for excellence is hard to come by. We will almost certainly have to pay more.

Haley: Do you know how much more?

Stein: Not for sure, but we have been turned down by two chefs, and we offered them 25% more than Collins was making.

From a deposition of Joseph Collins:

Mr. Haley [counsel for Crest]: And when you were negotiating to leave Atlanta and join the Marrimount, was there any mention of who would be responsible for hiring assistant chefs?

Collins: No, there didn't have to be.

Haley: Why is that?

Collins: Part of being a head chef is choosing and controlling your assistants, everyone knows that. It's . . . .

Haley [interrupting]: Well . . . .

Ordway: Let the witness finish.

Haley: Sorry, go ahead.

Collins: It's like a head basketball coach.

Haley: What's like a head basketball coach?

Collins: Being a head chef—selecting your staff is a key to success. You don't let someone else do it for you.

Haley: And it's your position that Mr. Kerner and Mrs. Stein knew that, that they agreed?

Collins: I don't know what they know. That is how the industry operates.

Haley: And did you communicate with Mr. Kerner on this?

Collins: No, only with Mrs. Stein.

Haley: And you are now working for the Teadwell Center, is that correct?

Collins: Yes.

Haley: In what capacity?

Collins: Dining room consultant.

Haley: And do you go there every night? Do you supervise food production?

Collins: Most nights.

Haley: What about supervising?

Collins: Yes, I supervise some.

Haley: And is the Teadwell Center a competitor of the Marrimount?

Collins: Yes, that is right.

Haley: Now isn't it the case that you agreed to go to work for the Teadwell while you were still working for the Marrimount?

Collins: No, I had discussions with the Teadwell people after Ms. Stein refused to process the Banks' application; but I didn't formally agree until the new pastry chef was brought in.

Haley: Did you tell the Teadwell people that you would go to work for them if the Marrimount brought in an assistant chef that you hadn't chosen?

Collins: I indicated that I would.

Haley: And did you indicate what salary you would demand?

Collins: We spoke about it, yes.

Haley: Do you know Charles Galloway?

Collins: Yes, he and I went to college together.

Haley: What is Galloway's occupation?

Collins: He owns a company that books hotels and convention centers for groups.

Haley: And you had occasion to speak to him, did you not, about booking the Casketmakers' Convention into the Marrimount?

Collins: I saw him at our college reunion. He asked if I was still with the Marrimount.

Haley: What did you tell him?

Collins: That I was, but it might not be for long.

Haley: Did you tell him why?

Collins: I told him there was some trouble in the kitchen.

Haley: Didn't you also tell him that by the time of the Casketmakers' Convention, you would be at the Teadwell?

Collins: I don't remember.

Haley: But if he were to testify that you told him that, would you say he was mistaken?

Collins: No, I wouldn't say he was mistaken.

Haley: Did you speak to any other customers of the Marrimount about the fact that you might be leaving the hotel?

Collins: I can't remember. I was pretty upset. I may have. I just don't know.

Haley: So you may have, isn't that right?

Mr. Ordway: Objection, asked and answered.

Haley: I'll withdraw the question. I have nothing more at this time.

RUDMAN v. COWLES COMMUNICATIONS, INC.

30 N.Y.2d 1, 280 N.E.2d 867
Court of Appeals of New York, 1972

BREITEL, J.

. . . [Jack] Rudman, with 30 years' experience as a school teacher and college instructor, began publishing examination test manuals on a part-time basis in 1954. In 1961, by which time he was publishing several hundred titles, he started to devote full time to the business. His books prepared readers for aptitude tests; State, Federal, and local civil service positions; high school admissions; and graduate, professional and business school examinations. He also published model lesson plans and specialty materials for teachers.

Rudman, with the assistance of his wife and half a dozen part-time employees, operated from a Brooklyn loft. His sales rose from $86,543.19 for the whole of 1963 to $105,216.82 for the first six months of 1966, with correspondingly increased profits.

Rudman, realizing that his small enterprise reached but a fraction of the potential market, engaged a financial consultant, one Zoes, to advise him how to expand. Preferring merger to alternatives for raising capital, Zoes sought to interest various large publishers, including McGraw Hill, Crowell-Collier, Holt Reinhardt, and Cowles.

Cowles was a diversified broadcasting and periodical publishing enterprise, then with gross sales of about $135,000,000. It owned Look and Family Circle magazines, television and radio stations, newspapers, and trade papers. Cowles became interested when shown samples of Rudman's publications and financial statements, and after visiting his plant. Impressed with Rudman's prolific output of some 600 titles, Maurer, a high Cowles executive, offered for Cowles to purchase the company and employ Rudman.

Maurer and Whitney, an editor of the Cowles educational division, had some reservations: the books, they thought, were not well written, were pegged at too high an intellectual level, and would have to be revised. But these reservations did not discourage them because they attributed existing shortcomings to Rudman's lack of personnel, market research, and design talent; and, in any event, they wished and were even anxious for Rudman to continue as editor of his publications. They wanted the prolific Rudman to join Cowles as editorial head of a proposed test book division, and concededly told Rudman, at the outset, that he would be a "number one man" in some context.

Two separate agreements, one for acquisition of the company and the other for Rudman's employment, were executed in June, 1966. Plaintiffs received 9,000 shares of restricted Cowles stock, with a then market value, if unrestricted, of $157,500. Under the plan plaintiffs conveyed the company assets to College Publishing Corporation, a wholly-owned subsidiary of Cowles. By the employment agreement Rudman undertook to perform "such executive and administrative services in the educational publishing operations of [Cowles] or its wholly-owned subsidiaries as shall from time to time be reasonably assigned to him by the Company's Board of Directors and subject to the instructions, direction and control of senior executives of the Company." The agreement provided no further detail as to Rudman's duties. The employment was for five years, subject to renewal at the company's option, at an annual salary of $30,000 with an increment based on sales. Mrs. Rudman was also to be employed by Cowles.

After the closing, Rudman continued for the summer months in the Brooklyn loft. The new subsidiary, College Publishing, with Rudman as vice-president, was placed under the educational division of Cowles. Maurer was vice-president of the division, Whitney the editor, and one Francine Klagsbrun the managing editor. In July, Maurer directed Rudman to clear most matters through Whitney during the summer months. During this period Rudman was requested by Whitney to furnish detailed information about his customers, to annotate the source materials for about 200 of his 600 manuals, and, at Rudman's suggestion, to prepare a new publication to be called the College Entrance Examination Series. Rudman was to prepare the manuscript in installments, with the last installment due in August, followed by publication in September.

By the end of the summer the scheduling of the College Entrance Series was far behind, and Whitney was not satisfied with the source annotations. This prompted a meeting among Maurer, Whitney and Rudman. On September 2 the parties attempted to realign the scheduling and allay the trouble over source materials. No satisfactory conclusion was reached but Maurer and Whitney remained optimistic.

Later that September, revised copy of two old books was forwarded to Rudman by Mrs. Klagsbrun, the so-called managing editor of the educational division and actually a young assistant to Whitney, who was supervising revisions. Rudman was upset by the magnitude of the revisions and the inclusion of new test questions without his prior approval. When he visited Klagsbrun at the Look offices in Manhattan, he was amazed to see a staff of 20 to 30 people under Klagsbrun working on his books. The offense to him was compounded by discovery that he was not to be listed as author on the cover of the manuals. Rudman voiced vehement objections to Whitney that the latter's staff was tampering with his material.

Concerned with these objections, a meeting was arranged for September 29 among Maurer, Whitney, Klagsbrun and Rudman. Before the meeting, Maurer had an organizational chart drafted which showed College Publishing as a subsidiary under the educational division, and more important, Rudman under the supervision of Klagsbrun and Whitney. Rudman remonstrated and refused to accept the proposed organizational structure. He said Whitney and Klagsbrun were inferior in rank to him and he would perform his duties only if he did not have to report to Whitney; any other arrangement would be inconsistent with his status as editor and vice-president of College Publishing. Maurer met again the next day with Rudman in a private attempt at reconciliation. Rudman then presented Maurer with his own organizational chart giving him direct access to Maurer in accord with his view of the employment agreement. Maurer told him that it was unacceptable and that Rudman was expected to conform to Maurer's chart and "cooperate" with Whitney and Klagsbrun.

Four days later, October 4, 1966, Rudman wrote Maurer summarizing his position and reasons. He offered reconciliation but asserted that Maurer's organizational chart was "irrevocably unacceptable." He refused to take directions from Whitney or Klagsbrun, and wanted sole responsibility for the content of his books.

Following these events, Rudman was largely ignored by Cowles, and it was recognized that they might have to discharge him. On October 30 Rudman moved into the Look building in Manhattan. There Rudman had no subordinates, except his wife, no editorial staff to supervise, and his new work and his old books were handled by others over whom he had no control or direction. On his first day in Manhattan he refused to accept a memorandum from Whitney. On December 14 he restated his views in a letter to Maurer. Then, on January 12, 1967, he was discharged.

Within three weeks Rudman set up a new publishing company, National Learning Corporation, with a considerable number of new titles and had initiated arrangements for public financing. As might be anticipated, in its early stages it did not show great return, gross or net. On the other hand, Cowles appears thereafter to have done quite well with the Rudman titles it had taken over. The gross sales figures of the Cowles-produced Rudman books in 1967 and 1968 were respectively $699,400 and $796,000 with “gross profit” of $387,000 and $520,100.

Rudman rests on the agreement that he was employed to perform executive and administrative functions subject only to the supervision of “senior executives of [Cowles]” and that Whitney and Klagsbrun were not “senior executives.” Consequently, his refusal to work under either was not insubordination. Moreover, plaintiffs contend there were misrepresentations, established as a matter of law, in the acquisition of the business entitling plaintiffs to rescission. . . .

The fraud issue may be disposed of summarily. There is no doubt that a misrepresented intention to perform a contract may constitute actionable fraud. It is not true, however, as argued by plaintiffs that misrepresentations were made out as a matter of law, despite manipulative and ambiguous testimony by defendant’s witnesses of terminology in the prior negotiations that Rudman would be the “number one man”. . . .

Reviewing the entire record and applying settled principles, Cowles’ discharge of Rudman was actionable. If an employee, a fortiori an executive employee, is engaged to fill a particular position, any material change in his duties, or significant reduction in rank, may constitute a breach of his employment agreement. As a necessary corollary, acts done by the employee in defense of his contract rights, or in assertion of an agreed status or function in the enterprise, are not insubordination.

The role permitted Rudman was not that described by Cowles in the negotiations or described in the employment agreement. Rudman’s inevitable expectation was that he would supervise, not without still higher direction, but still supervise, the test book subsidiary, using available auxiliary services with responsibility only to the board of directors of Cowles and their senior executives.

In analyzing the basis for Rudman’s expectation there is no problem dependent on the parol evidence rule. The evidence of the negotiations and such documentation as was received are not inconsistent with, and, hence, do not vary or contradict the written agreement. Moreover, on any view, if it were necessary to reach for that basis, the broad language in the agreement was patently ambiguous in referring, without other specification, to executive and administrative responsibilities. Accordingly, the court may and should look to the prior negotiations to determine what was intended.

The Cowles position, during the negotiations, on Rudman’s future role, while obviously not definite in all respects, was definite in describing an executive and supervisory role. This expectation was brought home to Rudman more than once. Rudman was to be head of the test book division, lending assistance to the educational division when called upon by the board. Moreover, it was understandable that, absent express provision or advice to the contrary, an independent entrepreneur like Rudman would not expect and probably would not accept a subordinate scrivener’s role.

Several other circumstances are revelatory of the intention. A press release, dated two weeks before the closing, announced the acquisition and stated, with some qualifications: “Jack Rudman, founder and President of College Publishing Corp., will serve as editor of the newly-formed subsidiary." Maurer in pretrial deposition stated that prior to the closing management had concluded that Rudman's "role would be as the editor in charge of this the editorial program of this test book operation." "We felt that, based on his represented strengths as an editor, as a creator of these, that we envisioned that we would want Mr. Rudman to continue in his role as editor of these publications." "We discussed that he would be editor of what we, for want of a better word, would regard as a test book division." He also conceded that by editor he meant that Rudman would be "the number one man" in the test book division, and that this was implied in discussion with Rudman. The witness later corrected himself to say that he did not think that he had told Rudman he would be "number one man" in the test book division but only that he would be "number one editor." Nonetheless, he admitted that he had told Rudman he would be in over-all charge of major editorial decisions.

Rudman testified that Maurer had told him he was to be the editor of College Publishing. "I was to be the editor of College Publishing, the test book division. I was to be in charge. I was to supervise and edit and hire and fire personnel such as assistant editors and clerical staff and so on that would be attached to my sector." Maurer defined "editor" to him as "the man in charge of the division or section"; it was the "title used at Cowles to denote the executive in charge of the section or operation or business or company."

Of defendants' side of the controversy the best that can be said is that a mistake was made, the entrepreneur Rudman could not be housebroken to conform to the large multi-million dollar corporate bureaucracy. This is not enough. The written agreement is plain, and the prior negotiations are equally plain and consistent rather than contradictory of the agreement, that Rudman was to come on as an executive and administrator and not merely as a writer supervising nobody but himself. He could be discharged for nonperformance or misperformance; he could not be reduced to a rank or responsibility beneath that defined by the agreement and explained by the preagreement negotiations. Nor could he at the end be put into a state of "deep-freeze" until he was provoked into such gross disobedience of "orders" that a discharge for insubordination would be plausible.

Responsibilities assigned Rudman during the summer and certainly in the fall months of 1966 were not consonant with executive position. It oversimplifies the issue if it be stated only whether Rudman was required to accept direction from or through Whitney without access to Maurer, and that as a consequence he was also "subordinated" to Whitney's young assistant, Klagsbrun. To be sure, that is part of the issue. But the more embracive issue is whether Rudman, in the face of the written agreement and the preagreement negotiations, could be reduced to being only a productive writer who supervised no one and was subject to supervision by just about every other editor and junior executive. Thus stated, there must be a resolution of the issue in favor of plaintiff Rudman. . . .

[T]here remains the matter of damages. Under the employment agreement, if performed, Rudman would have earned $150,000 as salary which with fringe benefits would aggregate $153,753.99. In the 28-month period following discharge up to the trial he earned $2,100 from his new enterprise, National Learning Corporation. Rudman argues that mitigation is limited to this sum. Instead the trial court assessed his prospects and concluded it would consider the salaries stipulated in the agreement with his new enterprise, namely, $20,000 and $25,000 for each of two successive years. True, the agreement was contingent on prospective public financing. (The contingency has since been realized.) The trial court concluded that Rudman "will eventually be compensated at the rate of $15,000 yearly, if not more, by the time his employment contract [with Cowles] would have expired." It, therefore, deducted by way of mitigation $66,250, leaving a balance from the agreed salary and benefits of $87,503.99 as damages for the wrongful discharge.

Prospective as well as actual earnings were properly considered in assessing damages for wrongful discharge.

Because the Appellate Division reversed the finding of wrongful discharge, it did not pass on the Rudman and Cowles contentions respecting the mitigation of damages. Involving as it does questions of fact, the case should be remitted to the Appellate Division. . . .

R. Barnnagle
Quotable Quotes for Lawyers

Contracts (2002)

FUSION, INC. v. NEBRASKA ALUMINUM CASTINGS, INC. 1997 WL 51227, United States District Court, D. Kansas, 1997

A party is not liable for a material failure of performance if it can show that the other party committed a prior material breach of the contract; in such event, the prior breach discharged the first party's own duty to perform.

RW POWER PARTNERS, L.P. v. VIRGINIA ELECTRIC AND POWER CO., 899 F. Supp. 1490, United States District Court, E.D. Virginia, 1995

As the Supreme Court of Virginia held in Neely v. White: The controlling legal principle is clearly and succinctly stated in 12 Am.Jur., § 360, as follows: "It does not follow in every case of mutual and dependent promises that upon a failure of one party to perform his promise the other party will be exonerated or excused from performing his promise. Before partial failure of performance of one party will excuse the other from performing his contract or give him a right of rescission, the act failed to be performed must go to the root of the contract. A failure of consideration of such a degree that the remaining consideration may be deemed to be no substantial consideration is an excuse for nonperformance of a promise. . . . But a failure of an unsubstantial part of the consideration for a contract is not such an excuse. Such failure of the consideration is merely a ground for an abatement of the damages."

PRETE v. MADISON, 1995 WL 570243, Superior Court of Connecticut, 1994

It does not follow from the fact that a breach is material that the breacher can recover nothing for his performance. In an appropriate case, the courts have allowed a party who did not substantially perform to recover in restitution. This remedy is limited to the contract rate lest the promisor be made better off by his breach.

HANDICAPPED CHILDREN'S EDUCATION BOARD OF SHEBOYGAN COUNTY v. LUKASZEWSKI

112 Wis.2d 197, 332 N.W.2d 774
Supreme Court of Wisconsin, 1983

CALLOW, J.

In January of 1978 the Handicapped Children's Education Board (the Board) hired Elaine Lukaszewski to serve as a speech and language therapist for the spring term. Lukaszewski was assigned to the Lightfoot School in Sheboygan Falls which was approximately 45 miles from her home in Mequon. Rather than move, she commuted to work each day. During the 1978 spring term, the Board offered Lukaszewski a contract to continue in her present position at Lightfoot School for the 1978-79 school year. The contract called for an annual salary of $10,760. Lukaszewski accepted.

In August of 1978, prior to the beginning of the school year, Lukaszewski was offered a position by the Wee Care Day Care Center which was located not far from her home in Mequon. The job paid an annual salary of $13,000. After deciding to accept this offer, Lukaszewski notified Thomas Morrelle, the Board's director of special education, that she intended to resign from her position at the Lightfoot School. Morrelle told her to submit a letter of resignation for consideration by the Board. She did so, and the matter was discussed at a meeting of the Board on August 21, 1978. The Board refused to release Lukaszewski from her contract. On August 24, 1978, the Board's attorney sent a letter to Lukaszewski directing her to return to work. The attorney sent a second letter to the Wee Care Day Care Center stating that the Board would take legal action if the Center interfered with Lukaszewski's performance of her contractual obligations at the Lightfoot School. A copy of this letter was sent to the Department of Public Instruction.

Lukaszewski left the Wee Care Day Care Center and returned to Lightfoot School for the 1978 fall term. She resented the actions of the Board, however, and retained misgivings about her job. On September 8, 1978, she discussed her feelings with Morrelle. After this meeting Lukaszewski felt quite upset about the situation. She called her doctor to make an appointment for that afternoon and subsequently left the school.

Dr. Ashok Chatterjee examined Lukaszewski and found her blood pressure to be high. Lukaszewski asked Dr. Chatterjee to write a letter explaining his medical findings and the advice he had given her. In a letter dated September 11, 1978, Dr. Chatterjee indicated that Lukaszewski had a hypertension problem dating back to 1976. He reported that on the day he examined Lukaszewski she appeared agitated, nervous, and had blood pressure readings up to 180/100. It was his opinion that, although she took hypotensive drugs, her medical condition would not improve unless the situation which caused the problem was removed. He further opined that it would be dangerous for her to drive long distances in her agitated state.

Lukaszewski did not return to work after leaving on September 8, 1978. She submitted a letter of resignation dated September 13, 1978, in which she wrote:

> I enclose a copy of the doctor's statement concerning my health. On the basis of it, I must resign. I am unwilling to jeopardize my health and I am also unwilling to become involved in an accident. For these reasons, I tender my resignation.

A short time later Lukaszewski reapplied for and obtained employment at the Wee Care Day Care Center.

After Lukaszewski left, the Board immediately began looking for a replacement. Only one qualified person applied for the position. Although this applicant had less of an educational background than Lukaszewski, she had more teaching experience. Under the salary schedule agreed upon by the Board and the teachers' union, this applicant would have to be paid $1,026.64 more per year than Lukaszewski. Having no alternative, the Board hired the applicant at the higher salary.

In December of 1978 the Board initiated an action against Lukaszewski for breach of contract. The Board alleged that, as a result of the breach, it suffered damage in the amount of the additional compensation it was required to pay Lukaszewski's replacement for the 1978-79 school year ($1,026.64). A trial was held before the court. The trial court ruled that Lukaszewski had breached her contract and awarded the Board $1,249.14 in damages ($1,026.64 for breach of contract and $222.50 for costs).

. . . There are two issues presented on this review: (1) whether Lukaszewski breached her employment contract with the Board; and (2) if she did breach her contract, whether the Board suffered recoverable damages therefrom.

I.

It is undisputed that Lukaszewski resigned before her contract with the Board expired. The only question is whether her resignation was somehow justified. Lukaszewski argues that, because she resigned for health reasons, the trial court erred in finding a breach of contract. According to Lukaszewski, the uncontroverted evidence at trial established that her employment with the Board endangered her health. Therefore, her failure to fulfill her obligation under the employment contract was excused.

We recognize that under certain conditions illness or health dangers may excuse nonperformance of a contract. This court held long ago that "where the act to be performed is one which the promisor alone is competent to do, the obligation is discharged if he is prevented by sickness or death from performing it." Jennings v. Lyons, 39 Wis. 553, 557 (1876). See also Restatement (Second) of Contracts sec. 262 (1981); 18 S. Williston, A Treatise on the Law of Contracts sec. 1940 (3d ed. 1978). Even assuming this rule applies to Lukaszewski's failure to perform, we are not convinced that the trial court erred in finding a breach of contract.

A health danger will not excuse nonperformance of a contractual obligation when the danger is caused by the nonperforming party. Nor will a health condition or danger which was foreseeable when the contract was entered into justify its breach. It would be fundamentally unfair to allow a breaching party to escape liability because of a health danger which by his or her own fault has precluded performance.

[The court affirmed the finding below that the danger to Lukaszewski's health was self-induced and that Lukaszewski did not resign for health reasons, but to take a better job.]

II.

This court has long held that an employer may recover damages from an employee who has failed to perform an employment contract. Damages in breach of contract cases are ordinarily measured by the expectations of the parties. The nonbreaching party is entitled to full compensation for the loss of his or her bargain—that is, losses necessarily flowing from the breach which are proven to a reasonable certainty and were within contemplation of the parties when the contract was made. Thus damages for breach of an employment contract include the cost of obtaining other services equivalent to that promised but not performed, plus any foreseeable consequential damages.

In the instant case it is undisputed that, as a result of the breach, the Board hired a replacement at a salary exceeding what it had agreed to pay Lukaszewski. There is no question that this additional cost ($1,026.64) necessarily flowed from the breach and was within the contemplation of the parties when the contract was made. Lukaszewski argues and the court of appeals held, however, that the Board was not damaged by this expense. The amount a teacher is paid is determined by a salary schedule agreed upon by the teachers' union and the Board. The more education and experience a teacher has the greater her salary will be. Presumably, then, the amount of compensation a teacher receives reflects her value to the Board. Lukaszewski argues that the Board suffered no net loss because, while it had to pay more for the replacement, it received the services of a proportionately more valuable teacher. Accordingly, she maintains that the Board is not entitled to damages because an award would place it in a better position than if the contract had been performed.

We disagree. Lukaszewski and the court of appeals improperly focus on the objective value of the services the Board received rather than that for which it had bargained. Damages for breach of contract are measured by the expectations of the parties. The Board expected to receive the services of a speech therapist with Lukaszewski's education and experience at the salary agreed upon. It neither expected nor wanted a more experienced therapist who had to be paid an additional $1,026.64 per year. Lukaszewski's breach forced the Board to hire the replacement and, in turn, to pay a higher salary. Therefore, the Board lost the benefit of its bargain. Any additional value the Board may have received from the replacement's greater experience was imposed upon it and thus cannot be characterized as a benefit. We conclude that the Board suffered damages for the loss of its bargain in the amount of additional compensation it was required to pay Lukaszewski's replacement.

This is not to say that an employer who is injured by an employee's breach of contract is free to hire the most qualified and expensive replacement and then recover the difference between the salary paid and the contract salary. An injured party must take all reasonable steps to mitigate damages. Therefore, the employer must attempt to obtain equivalent services at the lowest possible cost. In the instant case the Board acted reasonably in hiring Lukaszewski's replacement even though she commanded a higher salary. Upon Lukaszewski's breach, the Board immediately took steps to locate a replacement. Only one qualified person applied for the position. Having no alternative, the Board hired this applicant. Thus the Board properly mitigated its damages by hiring the least expensive, qualified replacement available.

We hold that the Board is entitled to have the benefit of its bargain restored. Therefore, we reverse that portion of the court of appeals' decision which reversed the trial court's damage award.

ORKIN EXTERMINATING CO. v. RATHJE

72 F.3d 206
United States Court of Appeals, First Circuit, 1995

BOWNES, J.

Plaintiff-appellant, Orkin Exterminating Company, Inc. ("Orkin") operates a nationwide chemical application lawn care business. Defendant-appellee, Arthur Walter Rathje, III, was the manager of the Hingham, Massachusetts, branch office from May, 1987, until his resignation on April 9, 1993. In the winter of 1992, defendant's wife created a business entity called "Nature's Way," later changed to "Global Green" (collectively—Global). Global was in the chemical application lawn care business and operated in the same area as did Orkin's Hingham branch.

On August 3, 1993, Orkin sued defendant, Arthur Rathje, and his wife, Karen, on the following grounds: (1) defendant, Arthur Rathje, while an employee of Orkin breached his fiduciary duty to Orkin by working for Global as a management employee. . . .

Breach of fiduciary duty

Under Massachusetts law, "[e]mployees occupying positions of trust and confidence owe a duty of loyalty to their employer and must protect the interests of the employer." Chelsea Indus., Inc. v. Gaffney, 389 Mass. 1, 11, 449 N.E.2d 320 (1983). It follows that "an executive employee is 'barred from actively competing with his employer during the tenure of his employment, even in the absence of an express covenant so providing.'" Id. at 11-12, 449 N.E.2d 320 (citations omitted).

Under Massachusetts law there are two remedies available to an employer for breach of fiduciary duty by an employee. If the conduct caused a loss to the employer, it can recover as damages the amount of such loss.

The second remedy is forfeiture of compensation by the employee during the period of breach of fiduciary duty. An employee "can be required to forfeit the right of compensation even absent a showing of actual injury to the employer." Chelsea Indus., Inc. v. Gaffney, 389 Mass. at 12-13, 449 N.E.2d 320.

We discuss the district court's findings and rulings *seriatim*.

We agree with the district court's conclusion that defendant breached his fiduciary duty of loyalty to Orkin by helping his wife operate a lawn care business in competition with the Orkin branch office which he managed. There is no need to restate the factual findings leading to this conclusion. They are set forth clearly and explicitly in the district court opinion and we adopt them.

The district court further found that Orkin had not proven that defendant's conduct, reprehensible as it may have been, caused any damage to Orkin. It held that Orkin did not prove a causal connection between defendant's conduct and its claim that the branch office defendant managed became worthless. We have reviewed the trial record carefully and can find no basis for setting the conclusion aside as clearly erroneous. . . .

We next address the district court's finding that Orkin could not recover the compensation paid defendant during the period he breached his fiduciary duty—April 1, 1992 to April 9, 1993. There is no dispute about the period of time during which the breach of fiduciary duty took place. The court found:

> [T]he value of his [defendant's] work was equivalent to his salary notwithstanding what he was doing for his wife's small business. Therefore, Mr. Rathje satisfied his burden of showing that the value of the work he performed for Orkin equalled the compensation he received during the period he breached his duty of loyalty.

We turn to the applicable Massachusetts law. In Chelsea Indus., Inc. v. Gaffney, the court held that "unless defendants proved the value of their services, the plaintiff was entitled to recover their entire compensation." 389 Mass. at 14, 449 N.E.2d 320. The court then went on to note that, although given the opportunity to do so, defendants had failed to present evidence as to the fair value of their services. In Meehan v. Shaughnessy, [404 Mass. at 441, 535 N.E.2d 1255,] the court held that a fiduciary may be required to repay only that portion of his compensation that exceeded the worth of his services to his employer. Clearly, under Massachusetts law the employee must prove the value of his/her services during the breach period.

We hesitate to set aside the factual finding of the district court that defendant "satisfied his burden of showing that the value of the work he performed for Orkin equaled the compensation he received during the period he breached his duty of loyalty." But we are persuaded that the finding is clearly erroneous for two related reasons. First, there was no explicit evidence as to the fair value of defendant's services during the period of breached loyalty as would seem to be required under Massachusetts law. This standing alone, however, would not render the finding clearly erroneous. There was evidence which, in the ordinary case, would suffice to sustain the district court's finding despite the lack of explicit evidence by defendant that the salary paid to him during the period equaled the fair value of the services performed.

This, however, is not the ordinary case. Because of the court's finding that defendant's energies were diverted away from his responsibilities to Orkin, and given the burden on him to prove the value of his services, the court's finding that he was worth everything Orkin paid him is very hard to credit. It could be argued that Orkin set up fairly precise standards for measuring the job performance of an employee in defendant's position and that defendant satisfied them. There may be certain jobs where it is possible to measure an employee's performance so accurately that evidence of the employer's positive evaluation would sustain a finding that the amount paid the employee would equal the fair value of his services. But this is not such a case.

In this case, such a measurement was not possible. As a branch office manager, defendant not only operated with relatively little direct monitoring, but also contributed to the criteria used to judge his performance. In a "1st quarter review letter" authored by defendant, dated March 27, 1993, which was within the breached-loyalty period, he stated, in effect, that he was ahead of Orkin's goal for customer confirmations and its profit/loss target. The evidence establishes that defendant helped formulate his own branch office goals. . . .

Affirmed in part. Remanded for the district court to determine an appropriate amount of defendant's salary for reimbursement to Orkin.