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Docket: 1684CV03297-BLS1

Date: January 30, 2019

Parties: Lukas v. Unidine Corporation, et al.

Judge: /s/Brian A. Davis

Decision and Order Regarding Defendant's Motion for Summary Judgment on AU Counts (Docket Entry No. 25.0), Plaintiffs Cross-Motion for Summary Judgment (Docket Entry No. 27.0), and Defendant's Motion to Strike Affidavits (Docket Entry No. 21.0):

Plaintiff Correna Lukas ("Plaintiff") commenced this action in October 2016 seeking compensation for certain unpaid sales commissions that she claims she is owed by her former employer, defendant Unidine Corporation ("Unidine"). The relevant background facts, which are essentially undisputed, are as follows.

Unidine is in the business of providing dining services to institutional clients, such as universities, senior living facilities, hospitals, and large businesses. Prior to June 2016, Plaintiff was employed by Unidine in the position of "Director of Business Development" ("DBD"). As a DBD, Plaintiff was responsible for identifying, cultivating, and enlisting new customers for Unidine's dining services. Plaintiff's employment compensation at Unidine was based, in part, on sales commissions that were calculated and paid according to Unidine's annual commission plan for DBD's. Each commission plan governed all incentive compensation earned within that calendar year.

Two commission plans are at issue in this proceeding: Unidine's "2015 Senior Living Culinary Group Commission Plan" (the "2015 Commission Plan") and Unidine's "2016 Commission Plan for Senior Living Culinary Group, Healthcare Culinary Group and Corporate Culinary Group Business Development Teams" (the "2016 Commission Plan" or, collectively with the 2015 Commission Plan, the "Plans" or "Commission Plans"). The 2015 Commission Plan states, in relevant part, that:

[t]he DBD is eligible to participate in the [Commission] Plan as long as he/she is actively employed and in good standing with [Unidine].... In no case shall a commission or bonus be paid or considered earned, or the [DBD] deemed eligible if he/she is on a formal performance termination procedure or has been terminated.... Commissions will be earned and paid ratably over a twelve (12) month period as described [herein].... Commission payments shall commence following the end of the first full month of the account's operation....

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Commission payments shall terminate at the earlier of any of the following events [including] ... Termination of the account contract prior to the twelve (12) months of commission payments ... [or] Non-payment of any Unidine invoices by the client during the twelve (12) month term of the commission payment[s].... Amendments, proforma assumption adjustments, or modifications to client contracts which reduce the [Total Facility Operating Profit] below 80% of the budgeted profitability within the first year of the contract will cause a recalculation of commissions retroactive to the start of payments....

2015 Commission Plan at 1-3.[1]

Similarly, Unidine's 2016 Commission Plan states, in relevant part, that,

[t]he DBD is eligible to participate in the [Commission] Plan as long as he/she is actively employed and in good standing with

[Unidine].... In no case shall a commission or bonus be paid or considered earned, or the [DBD] deemed eligible if he/she is on a formal performance termination procedure or has been terminated.... Commissions will be earned and paid ratably over a twelve (12) month period as described in this section.... Amendments, client requested assumption adjustments outside of the scope of services included in the contract, or modifications to client contracts which reduce the [Total Facility Operating Profit] below 80% of the proforma profitability within the first twelve (12) months of the contract will cause a recalculation of commissions.... Commission payments shall commence and be payable following the first full month of the account's operation.... Commissions paid for accounts lost within the first six (6) months from [the] contract signing date will be forfeited by

[1] A copy of the 2015 Commission Plan is included in the parties' Joint Appendix of Summary Judgment Exhibits ("Joint Appendix") at Tab 4.

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withholding equal amounts of commission already paid from future sales commissions....

2016 Commission Plan at 1,2 and 4.[2]

Plaintiff voluntarily left Unidine in June 2016 in order to pursue another job opportunity. No claim has been made that she was terminated by Unidine for the purpose of denying her any compensation that she purportedly is (or was) due.

Following her departure, Plaintiff sought payment of approximately \$197,000.00 in sales commissions for new dining service contracts that she claims she procured while employed at Unidine. The commissions at issue all are based upon contract payments that Unidine received after Plaintiffs departure from Unidine in June 2016. Plaintiff claims, however, that the commissions she seeks had been "definitely determined" as of the date of her departure and, therefore, were then "due and payable" under the terms of Unidine's Commission Plans, notwithstanding her departure. Complaint, ifj 22. When Unidine disagreed and declined payment, Plaintiff filed this lawsuit alleging, among other things, that Unidine and its President, Richard B. Schenkel ("Mr. Schenkel" or, collectively, with Unidine, "Defendants"), had violated the Massachusetts Wage Act, G.L. c. 149, § 148 (the "Wage Act" or "Section 148") and breached the terms of Plaintiffs employment contracts by refusing to pay her "wages earned" (i.e., the commissions at issue) while she was employed at Unidine.[3] Id., 1J 21-25. Defendants deny any liability to Plaintiff.

Both sides now have filed motions for summary judgment arguing that the terms of the Commission Plans are unambiguous and that Plaintiff is entitled (or not entitled), as a matter of law, to recover her purportedly earned, but unpaid commissions for the years 2015 and 2016. Unidine also has moved to strike certain third-party affidavits that Plaintiff submitted in conjunction with her summary judgment papers.

The Court conducted a hearing on the parties' motions for summary judgment and Unidine's motion to strike on December 5, 2018. Upon consideration of the written materials submitted by the parties, the information provided at the motion hearing, and the oral arguments of counsel, Unidine's motion for summary judgment is ALLOWED, and Unidine's motion to strike and Plaintiff's cross-motion for summary judgment are DENIED for the reasons stated on the record at the hearing and memorialized, briefly, below.

[2] A copy of the 2016 Commission Plan is included in the Joint Appendix at Tab 5.

[3] As President of Unidine, Mr. Schenkel potentially is personally liable for any unpaid "earned wages" owed to Plaintiff. See G.L. c. 149, § 148 ("The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section.").

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Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cargill, Inc. v. Beaver Coal & Oil Co.*, [424 Mass. 356](#), 358 (1997). A party who does not bear the burden of proof at trial may demonstrate the absence of a genuine issue of material fact either by submitting affirmative evidence negating an essential element of the nonmoving party's case, or by showing that the non-moving party has no reasonable expectation of proving an essential element of his or her case at trial. See *Kourouvacilis v. General Motors Corp.*, [410 Mass. 706](#), 716 (1991).

The relevant provisions of the Wage Act are relatively clear and have been made even clearer over time by interpretative case law. The first paragraph of Section 148 requires employers to pay the "wages earned" by "any employee leaving his employment ... in full on the following regular pay day...." G.L. c. 149, § 148, first paragraph (emphasis added). At the same time, the fourth paragraph of Section 148 and case law make it plain that commissions constitute "wages earned" for purposes of the Wage Act when they have been "definitely determined" and are "due and payable." G.L. c. 149, § 148, fourth paragraph. See also *Mui v. Massachusetts Port Auth.*, [478 Mass. 710](#), 713 (2018) (commissions "are considered wages when they ta[ve] been definitely determined and due and ha[ve] become payable to [the] employee," citing and quoting statute). Commissions are considered to be "definitely determined" if they are "arithmetically determinable." See *Wiedmann v. The Bradford Group, Inc.*, [444 Mass. 698](#), 708 (2005). Commissions are considered to be "due and payable" when "any contingencies relating to their entitlement have occurred." *McAler v. Prudential Ins. Co. of America*, 928 F. Supp. 2d 280, 288 (D. Mass. 2013) (internal citation omitted). See also *Mu!*, 478 Mass. at 713 ("The only contingent compensation recognized expressly in the [Wage] act is commissions....").

Applying the foregoing rules to the facts of this case, the critical question posed by the parties' respective motions for summary judgment is whether the commissions that Plaintiff claims she is owed "ha[di] been definitely determined and ha[d] become due and payable" prior to her departure from Unidine. G.L. c. 149, § 148, fourth paragraph. See also *Okerman v. VA Software Corp.*, [69 Mass. App. Ct. 771](#), 775 (2007) (quoting statute). The Court concludes, based upon the undisputed evidence, that they had not for at least two reasons.⁴

[4] Defendants urge this Court to follow the reasoning of *Smith v. Unidine Corp.*, 2017 WL 4411249 (Mass. Super. July 25, 2017), which involved commission plans containing the same material terms as those at issue here. As discussed *infra*, the Court reaches the same conclusion as in *Smith*, but based on somewhat different reasoning.

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First, the unambiguous terms of the Commission Plans establish that the commissions Plaintiff seeks to recover had not been "definitely determined" as of the date of her departure from Unidine in June 2016. Although Plaintiff undoubtedly could estimate the amount of her expected monthly commission payments on that date, the amount of commissions that Unidine actually would be obligated to pay Plaintiff was subject to various potential adjustments that depended, in part, on how the underlying contracts played out over time. For example, the 2015 Commission Plan expressly provides that Plaintiffs monthly commission payments for a particular account would "terminate" if the account contract was cancelled "prior to the twelve (12) months of commission payments," or if the customer failed to pay "any Unidine invoices ... during the twelve (12) month term of the commission payment[s]..." 2015 Commission Plan at 2. Similarly, the 2016 Commission Plan provides that "[c]ommissions paid for accounts lost within the first six (6) months from [the] contract signing date will be forfeited by withholding equal amounts of commission already paid from future sales commissions..." 2016 Commission Plan at 4. Neither Plaintiff, nor Unidine could know, as of June 2016, whether any adjustment or reduction of Plaintiffs monthly commissions eventually would be called for under the terms of Unidine's Commission Plans. Thus, Plaintiffs commissions were not "arithmetically determinable" or "definitely determined" when she left her position at Unidine and, therefore, they do not qualify as "wages earned" for purposes of the Wage Act.[5] See *Wiedmann*, 444 Mass. at 708. See also *Krause v. UPS Supply Chain So/s., Inc.*, 2009 WL 3578601, at *13 (D. Mass. Oct. 28, 2009) (commissions not "definitely determined" where commission plan's "measurement period -- i.e., the period during which revenue is measured for the purpose of calculating commissions -- began after the Plaintiff was terminated").

Second, the unambiguous terms of the Commission Plans also establish that the commissions Plaintiff seeks to recover were not "due and payable" as of the date of her departure from Unidine. Both the 2015 Commission Plan and the 2016 Commission Plan expressly state that DBD commissions are "earned and paid ratably over a twelve (12) month period" that commences "following the first full month of the account's operation..." 2015 Commission Plan at 1; 2016 Commission Plan at 2. As previously noted, both Plans also state that monthly commission payments on a particular new

[5] The commission adjustment provisions of the Plans cited in the main text are just examples. Other provisions of the Commission Plans permit the upward or downward adjustment of DBD commissions based upon the occurrence (or non-occurrence) of various other contingencies, including a potential commission decrease based on a reduction in "Total Facility Operating Profit" (as defined in the Plans) "below 80% of the proforma profitability within the first twelve (12) months of the contract" (2016 Commission Plan at 1), as well as a potential commission increase based on any lajdded-on sales from new business sold for a period of one year" from the effective date of a new customer contract (2015 Commission Plan at 3). These additional ways in which Plaintiffs commissions could be enhanced or reduced after she left Unidine only serve to further demonstrate that her commission payments were not "definitely determined" at the time of her departure. See *Wiedmann*, 444 Mass. at 708.

account contract are subject to termination if the customer fails to fulfill its monthly payment obligations to Unidine. 2015 Commission Plan at 2; 2016 Commission Plan at 4. Thus, the Plans make timely payment by the customer during the first year of the contract a material contingency that must be

satisfied in order to trigger Unidine's duty to make monthly commission payments to the responsible DBD. That contingency had not been fully satisfied, however, with respect to the new customers that Plaintiff had enlisted as of the date she left Unidine, which renders her commissions on those customer accounts not "due and payable" upon her departure. See McAleer, 928 F. Supp. 2d at 288.

Plaintiff argues, in response, that it is unfair and unlawful for an employer, such as Unidine, to condition payment of an employee's commission upon Unidine's receipt of payment from the customer on whom the commission is based, citing, in part, the Supreme Judicial Court's ("SJC") decision in Awuah v. Coverall North America, Inc., [460 Mass. 484](#) (2011). Plaintiffs Opposition to Defendant's Motion for Summary Judgment (Docket Entry No. 27.0) at 10-11. The Court disagrees. Such a condition is not unfair or unlawful where, as here, Unidine typically is paid by its customers in installments. Unidine has a legitimate and enforceable interest in ensuring that a new customer contract is real and generating revenue before it rewards a DBD with a commission for obtaining that contract.

Awuah does not hold otherwise. The SJC ruled in Awuah that an employer may not "lawfully withhold wages to an employee" based on an agreement between employer and the employee "that such wages are not earned until a customer remits payment." 460 Mass. at 491 (internal quotation marks omitted). In announcing its ruling in Awuah, however, the SJC explicitly stated that commission payments are subject to different rules.[6] Id. at 492 n.19 (noting that "[s]pecial provisions, not applicable here, apply to payment of commissions"). The SJC has since reaffirmed that commissions are "[t]he only contingent compensation recognized expressly in the [Wage] act...." Mui, 478 Mass. at 713.

[6] The other commission cases cited by Plaintiff are distinguishable because, in each case, all of the compensation plan contingencies necessary to trigger payment of the employee's commissions had been satisfied prior to the employee's departure. See, e.g., Micciche v. N.R.I. Data & Bus. Prod., Inc., 2011 WL 4479849, at *7 (D. Mass. Sept. 27, 2011) (Plaintiff employee "has shown that the contingencies relating to [his] entitlement of commission were satisfied" four months prior to his termination); McAleer, 928 F. Supp. 2d at 289 ("When a compensation plan specifically sets out the contingencies an employee must meet to earn a commission, courts apply the terms of the plan ... however, when the plan does not specify, courts generally consider that the employee earns the commission and it becomes due and payable when the employee closes the sale, even if there is a delay in actual payment on the sale."); and Israel v. Voya Institutional Plan Services, LLD, 2017 WL 1026416, at *7 (D. Mass. Mar. 16, 2017) (Plaintiff employee entitled to recover commissions that "were 'definitely determined' and 'due and payable as of the date of his departure where delay in payment was attributable solely to employer's protracted failure "to make a final calculation as to the exact amount of the commissions" owed).

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For the foregoing reasons, Plaintiffs Wage Act claim against the Defendants must be dismissed because the commissions Plaintiff alleges she is owed were neither "definitely determined," nor "due and payable" when she voluntarily ended her employment at Unidine in June 2016.

Plaintiff's remaining claims for breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, and promissory estoppel -- each of which is based on Unidine's failure to pay Plaintiff her claimed commissions after she left the company -- also must be dismissed. Because the unambiguous language of the Commission Plans did not

require Unidine to make any further commission payments to Plaintiff following her resignation, Unidine's failure to do so was not a breach either of any express contractual term or of any implied covenant embodied in the Commission Plans. See *Lino Restaurants, Inc. V. Boston Kenmore Realty Corp.*, [441 Mass. 376](#), 385 (2004) ("The [implied] covenant may not ... be invoked to create rights and duties not otherwise provided for in the existing contractual relationship...."). Plaintiff's quantum meruit and promissory estoppel claims likewise fail because Plaintiff cannot recover in quantum meruit where the parties' relationship is governed by one or more enforceable contracts, see *Boswell v. Zephyr Lines, Inc.*, [414 Mass. 241](#), 250 (1993) ("Recovery in quantum meruit presupposes that no valid contract covers the subject matter of a dispute"), and because no evidence exists that Unidine made any promise to pay Plaintiff commissions separate and apart from what is set forth in those contracts, see *Rhode Island Hosp. Trust Natl. Bank v. Varadian*, [419 Mass. 841](#), 848 (1995) (essential elements of promissory estoppel claim include unambiguous promise and reasonable reliance on promise).

Lastly, the Court declines to strike the affidavits of Sue McGinley, Toni Fisk, and Theresa Minnucci (collectively, the "Co-Worker Affidavits") from the record. Plaintiff submitted the Co-Worker Affidavits with her summary judgment papers primarily to establish that Unidine DBDs were not required, in the 2015-2016 time frame, to continue working on new customer accounts after a contract had been signed in order to earn a commission, as Defendants have argued. While this Court's rulings on the parties' summary judgment motions are not dependent on whether such a requirement in fact existed, it is possible that an appellate court may see the matter differently. Accordingly, the Co-Worker Affidavits shall remain part of the record.

/s/Brian A. Davis

Associate Justice of the Superior Court