NOT DESIGNATED FOR PUBLICATION

No. 119,367

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JAMES L. BOGUE, JR.,
Appellant,

v.

PALOMINO PETROLEUM, INC.,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; WILLIAM S. WOOLLEY, judge. Opinion filed January 21, 2020. Affirmed.

Kevin M. McMaster, of McMaster & McMaster LLC, of Wichita, for appellant.

James A. Walker and *Shane A. Rosson*, of Triplett Woolf Garretson, LLC, of Wichita, for appellee.

Before ATCHESON, P.J., MALONE, J., and DANIEL D. CREITZ, District Judge, assigned.

PER CURIAM: James L. Bogue, Jr., appeals a jury verdict against him in Sedgwick County District Court in his employment dispute with Palomino Petroleum, Inc. Bogue contends he was due contributions to a pension plan that Palomino failed to make during part of his two-year tenure with the company. Although Bogue has asserted several errors, they all depend upon a letter sent on behalf of Palomino's president to him being an employment contract guaranteeing those contributions. It isn't. We, therefore, find no error in the jury verdict and otherwise affirm the judgment for Palomino.

FACTUAL AND PROCEDURAL BACKGROUND

Given the narrow legal issue, we needn't delve deeply into the background facts. In early 2014, Palomino, an oil exploration and well-drilling company, purchased two private aircraft and hired Bogue to maintain the planes and to generally oversee their use. Bogue was employed elsewhere at the time and negotiated with Palomino and its president K. Robert Watchous mostly through intermediaries. As a result, the negotiations seem to have been somewhat convoluted; but those convolutions do not have any direct bearing on the disputed issues.

The negotiations yielded an agreement on annual salary; contributions to a form of retirement account known as a simplified employee pension or SEP, a kind of individual retirement arrangement; and paid health insurance apparently among other things. Bogue asked for something in writing from Palomino before he quit his current job. In response to his request, he received a letter on Palomino stationery dated May 29, 2014, and signed on behalf of Watchous. The letter, in full, stated:

> "This letter is to confirm your employment with Palomino Petroleum, Inc. effective July 7, 2014. Your salary will be $95,000 annually. You will also receive a benefit that Palomino Petroleum, Inc. contributes 25% of your gross pay into a SEP plan. Your benefits also includes [*sic*] health insurance at no cost to you.
>
> "If you have any questions, please feel free to call."

After receiving the letter, Bogue resigned from his position with an aircraft company in Wichita and began work at Palomino. Bogue understood he would receive the stated salary, the SEP contributions, and the same fringe benefits as other Palomino employees. Bogue left Palomino in mid-2016.

The crux of the dispute between Bogue and Palomino rests on the SEP contributions. Bogue received a SEP contribution in 2014. In December 2015, Palomino announced no SEP contributions would be made for that year because the company had

acquired affiliated business entities whose employees would otherwise be eligible for those contributions—imposing a prohibitive expense. Palomino says it retained the discretionary authority to make contributions to its employees' plans each year, consistent with the governing regulations for that kind of pension account. An employer must make SEP contributions for a given year to all participating employees or none of them. Bogue counters that Palomino had unconditionally agreed in the May 29 letter to make those contributions for him every year he worked for the company. So Bogue asserts he was contractually entitled to SEP contributions for 2015 and the first half of 2016.

Bogue filed an action against Palomino for the unpaid contributions based on a breach of his employment contract and, in turn, for a violation of the Kansas Wage Payment Act, K.S.A. 44-312 et seq. Palomino denied any liability to Bogue for SEP contributions for 2015 and 2016. Throughout the litigation, Bogue premised his legal arguments on the May 29 letter being a contract establishing Palomino's unconditional promise to make the SEP contributions. During a three-day trial, the jury found for Palomino. Consistent with Bogue's legal theory, the district court asked the jury to answer this question on its verdict form: "Do you find that the letter dated May 29, 2014 is a written employment agreement (also called a contract)?" The jury answered, "No"—resulting in a verdict for Palomino. The district court denied Bogue's request for a new trial and entered a judgment for Palomino consistent with the verdict. Bogue has appealed.

LEGAL ANALYSIS

On appeal, Bogue continues to argue the May 29 letter is a contract and bases his claimed errors on that premise. As a necessary condition for granting Bogue any relief, we have to find the letter is a contract requiring SEP contributions. Or stated in the negative, if the letter is not a contract, Bogue loses on appeal. He likewise loses if the letter is a contract but does not unconditionally require Palomino to make SEP contributions for him.

An enforceable contract consists of an offer, acceptance of the offer, and consideration or something of value given by each party. See *M West, Inc. v. Oak Park Mall*, 44 Kan. App. 2d 35, 49, 234 P.3d 833 (2010). In a written contract, as Bogue characterizes the May 29 letter, each of those components typically would be in writing. But contracts can be oral (unwritten) or partly written and partly oral. In an employment contract, the employer commonly will offer to hire a person for a particular job in exchange for specified compensation, usually wages (or sometimes a commission based on sales or some other job performance) and often fringe benefits. The potential employee may accept the offer or make a counteroffer for a higher wage or more benefits. Assuming the parties reach an acceptable understanding, each, then, agrees to the negotiated terms. In effect, the employer says I promise to compensate you this much if you will fill the particular position. And the employee-to-be responds I promise to come to work for the stated compensation.

The parties then have a contract, since their mutual promises provide legal consideration. *Peoples Exchange Bank v. Miller*, 139 Kan. 3, 7, 29 P.2d 1079 (1934). The terms of the contract must be complete and sufficiently definite that a court would be able to enforce them in the event of a dispute. See *Lessley v. Hardage*, 240 Kan. 72, Syl. ¶ 4, 727 P.2d 440 (1986). In short, "[t]o form a legally binding contract, the parties must agree on the essential terms of their bargain and manifest an intention to be bound by those terms." *Rosen v. Hartstein*, No. 108,479, 2014 WL 278717, at *3 (Kan. App. 2014) (unpublished opinion).

In a written contract, all of the agreed upon terms must be set out in the writing. If some of the terms are agreed upon orally but are not contained in the writing, then the contract is partly oral and partly in writing. *Chilson v. Capital Bank of Miami*, 237 Kan. 442, 446, 701 P.2d 903 (1985) (distinguishing between written and oral contracts in determining appropriate statute of limitations for breach); *Stonehouse Rentals, Inc. v. Doran*, No. 17-CV-4046-JAR-GLR, 2018 WL 324262, at *5 (D. Kan. 2018)

(unpublished opinion). Commonly, parties to a fully written contract will express their acceptance by signing the document. But one party may accept a signed written offer from the other party orally or by conduct, such as by beginning performance, and the contract will be considered to be written. *Chilson*, 237 Kan. at 446; see *Stonehouse Rentals*, 2018 WL 324262, at *5.

Given those principles, the May 29 letter can't perform the contractual chores Bogue requires to prove his claim. The letter does not look to be a written contract in the sense of setting forth a complete statement of the parties' agreement. The language of the letter states its purpose as merely confirming the fact of Bogue's future employment. The letter identifies a starting salary, the SEP contributions, and unspecified "benefits," including health insurance. So the job appears to come with other compensation, presumably including paid vacation and possibly sick leave among other benefits. That's consistent with Bogue's understanding that he would receive the same benefits as other Palomino employees.

Similarly, the letter does not invite some form of acceptance from Bogue. For example, it could have included a place for Bogue to sign, manifesting his acceptance of the letter as a written contract, with instructions to return a signed copy. Nor does the letter solicit some other acceptance, such as a telephone call to Watchous or another corporate officer. All of that shows the parties meant the letter to be a general confirmation of an existing oral agreement—not a written contract. Contrary to Bogue's suggestion, the district court could not have found the May 29 letter to be a written contract as a matter of law and correctly declined to so rule. The jury likewise properly determined the letter itself was not a contract. See *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 901, 220 P.3d 333 (2009) ("[W]hether a contract exists is a question of fact."); *Short v. Sunflower Plastic Pipe, Inc.*, 210 Kan. 68, 75, 500 P.2d 39 (1972) ("Whether the parties intended to be bound absent a written executed contract is a question of fact.").

Even if the May 29 letter were a written contract, Bogue couldn't garner what he wants from its language. The letter defines no fixed period or duration of employment. So based on the letter, Bogue would have been an at-will employee. An employer may terminate an at-will employee at any time, as long as the decision is not made for a legally prohibited reason, such as race or gender. And an employer may modify the terms and conditions under which an at-will employee works at any time. *Smith v. Kansas Orthopaedic Center*, 49 Kan. App. 2d 812, 816, 316 P.3d 790 (2013).

In that respect, the letter contains no guarantee Palomino would make SEP contributions for as long as Bogue worked there. As we have said, under the regulations for SEP plans, an employer has the discretion to make or withhold contributions for a given year as long as all employees are treated the same. The letter does not purport to limit that discretion. Bogue could have apprised himself of those regulations at any time, so he should have known how SEP plans typically operate.

Moreover, had Palomino made such a guarantee in the letter (though the language doesn't read that way), it could have rescinded the commitment after Bogue began working there. Palomino, through its agent handling benefits, informed Bogue in late 2014 that the SEP contributions were discretionary. That would have modified any guarantee Bogue incorrectly ascribes to the letter going forward—covering 2015 and 2016, when Palomino did not make SEP contributions.

We find no reversible error in the district court's handling of the issues the parties framed and presented.

Affirmed.