

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 0530

MARK H. FOSHEE

VERSUS

GEORGIA GULF CHEMICALS & VINYLs, L.L.C.

Judgment Rendered: OCT 21 2009

APPEALED FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF IBERVILLE
STATE OF LOUISIANA
DOCKET NUMBER 62551, DIVISION "C"

THE HONORABLE ALVIN J. BATISTE, JR., JUDGE

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

McDONALD, J.

The plaintiff, Mark H. Foshee, began working as an engineer at Georgia Gulf Chemicals & Vinyls, L.L.C. (Georgia Gulf) on October 31, 1997. Georgia Gulf provided a discretionary profit sharing program to its regular, full-time employees who were not covered by a collective bargaining agreement. The profit sharing was an incentive program based on both company performance and individual job performance.

In January of 2004, Mr. Foshee was called into his supervisor's office due to inappropriate use of the office email system. Mr. Foshee was advised to stop sending blind copies of emails to managers of the plant. In October of 2004, Mr. Foshee was given a smaller than standard raise (3% compared to the 3.7% standard that year) and was told he needed to improve his interpersonal skills.

On January 28, 2005, Mr. Foshee was notified that his employment with Georgia Gulf was being terminated. He requested that Georgia Gulf maintain his employment while he searched for another job. Georgia Gulf agreed to allow Mr. Foshee to remain employed through March 11, 2005. In mid-February of 2005, Mr. Foshee was informed that he would not receive a profit-sharing distribution for the 2004 plan year. He voluntarily resigned from Georgia Gulf on March 7, 2005.

On May 25, 2005, Mr. Foshee filed suit against Georgia Gulf, asserting that when he was hired, he was provided employee benefits that included a profit sharing plan, and that his statement of total compensation in 2004, including a profit sharing amount, totaled \$124,895.00. Mr. Foshee asserted that a letter from Ed Schmitt, President and CEO of Georgia Gulf, dated May 7, 2004, informed him that he had accumulated 10,215 profit sharing points for 2004, which could be converted into dollars after the end of the year, based on Georgia Gulf's attainment of its target profit for the year 2004. Mr. Foshee further asserted that, in accordance with La. R.S. 23:631 et seq., Georgia Gulf owed him for 90 days of

penalty wages and for reasonable attorney fees. Mr. Foshee prayed for \$17,263.35, along with penalty wages, reasonable attorney fees, legal interest from date of demand, and all costs and equitable relief allowed under the law. Georgia Gulf answered the petition, asserting that it had already paid Mr. Foshee all amounts owed to him under the terms of his employment.

Thereafter, Mr. Foshee filed a motion for summary judgment, asserting that there was no genuine issue of material fact and that he was entitled to judgment awarding him unpaid compensation in the amount of \$17,263.35, penalty wages, attorney fees, legal interest, and costs. Georgia Gulf filed a cross motion for summary judgment, asserting that there was no genuine issue of material fact and that the profit sharing plan was a discretionary plan, rather than a wage, and that Mr. Foshee was not entitled to the profit sharing for 2004 due to problems with his job performance. In the alternative, Georgia Gulf asserted that in the event the court determined that the profit-sharing distributions were a wage, Mr. Foshee had failed to demonstrate the 2004 profit-sharing distribution was earned at the time of his cessation of employment. Georgia Gulf further stated that it had presented a good-faith defense to any penalty wages allowed by La. R.S. 23:632, as Mr. Foshee had been repeatedly counseled concerning his performance and need to improve his interpersonal skills; thus, he had not met all of the requirements to receive a profit-sharing distribution. Georgia Gulf asked for judgment in its favor dismissing Mr. Foshee's claim, with prejudice, at his cost.

After a hearing, the trial court granted Georgia Gulf's motion for summary judgment in part, dismissing Mr. Foshee's claims pursuant to La. R.S. 23:631; denied the remainder of Georgia Gulf's motion for summary judgment; and further, denied Mr. Foshee's motion for summary judgment. Mr. Foshee filed a motion for new trial, which was denied by the trial court. He appealed the partial

summary judgment and the denial of the motion for new trial. However, this court declined to review his appeal until a final judgment was rendered in the case.¹

The case went to trial on the merits. Thereafter, the trial court ruled in favor of Mr. Foshee and against Georgia Gulf, finding that the elimination of Mr. Foshee's share of the profit sharing program was a breach of the promise that Georgia Gulf made to Mr. Foshee under its profit sharing program. The trial court awarded Mr. Foshee \$17,263.35 in profit sharing from Georgia Gulf, with legal interest from date of demand.

Mr. Foshee appeals the summary judgment dismissing his claim pursuant to La. R.S. 23:631, the judgment denying his motion for new trial, and the final judgment awarding him profit sharing, but no penalty wages. Georgia Gulf appeals the final judgment awarding Mr. Foshee profit sharing.

On appeal, Mr. Foshee asserts that the trial court erred in not determining that the profit sharing amounts due to him were a "wage" under La. R.S. 23:631 *et seq.*; that the trial court erred in determining that the payment of the amounts due from the profit sharing plan to Mr. Foshee was discretionary with Georgia Gulf; that the trial court erred in determining that the profit sharing program was based on the performance of the individual employees, rather than as a company-wide program that was not individually performance based; that the trial court erred in not finding that Georgia Gulf was obligated to make a payment in 2005 for profit sharing earned in 2004 after Mr. Foshee had fulfilled all of the stated obligations to receive payment by the end of the 2004 year; that the trial court erred in not

¹ This court found that the partial summary judgment did not constitute a final judgment for purposes of an appeal, because the issues decided therein were so closely linked to the remaining issues of whether Mr. Foshee was entitled to receive the profit sharing payment under any theory. Thus, review of the summary judgment was delayed until the trial court made a final determination of all issues in the case. See Foshee v. Georgia Gulf Chemicals and Vinyls, L.L.C., 2007-0557 (La. App. 1 Cir. 11/14/07), WL 3357948 *2-3 (unpublished).

finding Georgia Gulf in bad faith and in not assigning penalty wages for bad faith conduct; and that the trial court erred in not awarding attorney fees to Mr. Foshee.

Georgia Gulf asserts on appeal that the trial court erred in finding that Georgia Gulf was contractually obligated to pay a profit-sharing distribution to Mr. Foshee because he was employed as of December 31, 2004, and that the trial court erred in finding that Georgia Gulf was not entitled to eliminate Mr. Foshee's profit sharing payments based on his poor performance, but was only entitled to reduce payments.

**THE PARTIAL SUMMARY JUDGMENT DISMISSING MR. FOSHEE'S
CLAIMS PURSUANT TO LA. R.S. 23:631**

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Lewis v. Four Corners Volunteer Fire Department**, 08-0354 (La. App. 1st Cir. 9/26/08), 994 So.2d 696, 699. The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2).

Louisiana Revised Statute 23:631 provides in part:

A. (1)(a) Upon the discharge of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, on or before the next regular payday or no later than fifteen days following the date of discharge, whichever occurs first.

(b) Upon the resignation of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, on or before the next regular payday for the pay cycle during which the employee was working at the time of separation or no later than fifteen days following the date of resignation, whichever occurs first.

Louisiana Revised Statute 23:632 provides that:

Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation.

Our *de novo* review of the evidence shows that the profit sharing plan was a discretionary motivational program that rewarded employees for individual performances that helped the company achieve its targeted profit goals for each year. The plan was subject to change, and benefits were not guaranteed under the plan. We find no genuine issue of material fact that a profit-sharing distribution was not an “amount then due” in accordance with La. R.S. 23:631. Thus, we affirm the trial court judgment granting partial summary judgment in favor of Georgia Gulf on this issue.

THE TRIAL COURT DETERMINATION THAT GEORGIA GULF OWED MR. FOSHEE \$17,263.35 IN PROFIT SHARING FOR 2004

After a trial on the merits, the trial court found that Georgia Gulf could reduce, but not totally eliminate, the profit sharing award to Mr. Foshee, and awarded him \$17,263.35, based on his profit sharing points for 2004. Absent “manifest error” or unless it is “clearly wrong,” the jury or trial court's findings of fact may not be disturbed on appeal. **Canter v. Koehring Co.**, 283 So.2d 716, 724

(La. 1973). Where there is conflict in testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel its own evaluations and inferences are as reasonable. **Sistler v. Liberty Mutual Insurance Co.**, 558 So.2d 1106, 1111-12 (La. 1990).

Under the profit sharing plan, eligible employees were awarded points in the first half of each year based on a percentage of their salaries on January 1st of that year. The points were converted to dollars at the end of the year based on Georgia Gulf's level of earnings performance. After being awarded, points did not increase; however, the employee's payment under the plan could be reduced due to the employee's poor performance. Further, no profit sharing payments were made unless Georgia Gulf's profits reached a certain level. To be eligible to participate, employees had to be employed through December 31st of the plan year. If the company's profit levels warranted payment under the plan, the payments were made on or about February 15th of the next year.

Each year eligible employees receive correspondence from Georgia Gulf indicating the points which they have been assigned. The Georgia Gulf Company Benefits brochure states that "The Georgia Gulf Profit Sharing Plan motivates employees by creating the *potential* for increased compensation tied directly to company operating results *and individual performance*." (Emphasis added.) The letter sent to Mr. Foshee on May 7, 2004, signed by Ed Schmitt, President and CEO of Georgia Gulf, states in part that "[t]his program provides the *potential* for you to earn additional cash compensation for your efforts." (Emphasis added.) The letter also states "[a]s you can see, the Profit Sharing Program is an important part of our compensation program and one that distinguishes our company from others in our industry by offering you the *possibility* of a significant increase in your

compensation.” (Emphasis added.) The letter also refers the employee to the Georgia Gulf website for more information.

When Mr. Foshee began his employment at Georgia Gulf, he was a production engineer in the VCM Unit. He remained there until 2003, at which time he was transferred to the Phenol Unit due to problems with his performance in the VCM Unit. His transfer was an opportunity for him to improve his performance by working in a different operational area. In the Phenol Unit he reported to Steve Farho, his new supervisor. Shortly after the transfer, Mr. Foshee was out for several months following surgery in October of 2003; he returned to work in January of 2004.

After his return to work, Mr. Foshee repeatedly sent inappropriate and sarcastic emails to various people at Georgia Gulf. He also sent out copies and blind copies of those emails to supervisors and senior managers. In particular, Mr. Foshee emailed Mr. Farho on January 15, 2004, at 3:39 a.m., stating that he would be out on vacation for the rest of the week. Mr. Farho testified at trial that the email was inappropriate, because Mr. Foshee should have gotten approval from a supervisor *prior* to taking vacation time. Mr. Farho testified that he wanted to fire Mr. Foshee at that point, but instead, he turned the matter over to the human resources department.

Linda Johnson, the human resources representative, emailed Mr. Foshee and requested that he meet with her and Jay Sciambra, the Division Human Resources Manager, when he returned to work. Mr. Foshee clearly knew that his job was in jeopardy at that point, as he emailed Ms. Johnson to ask “Can I just keep my job and promise never to do it again?” He also emailed Ms. Johnson to ask “So after considerable reflection the last days, do I still have a job to come back to on Monday? Seriously.”

When Mr. Foshee returned to work, he met with Mr. Farho, who advised him that his use of email was inappropriate. Nonetheless, on September 10, 2004, Mr. Foshee blind copied Jim Demand (Mr. Farho's supervisor) on a sarcastic email questioning the quality of an incoming line of raw material for the Phenol Unit. On October 4, 2004, Mr. Foshee sent Mr. Farho an email regarding issues related to environmental performance and again, blind copied the email to Mr. Demand. Mr. Farho testified at trial that it was inappropriate for Mr. Foshee to send emails out on these issues, rather than trying to resolve these issues more privately. He also stated that these emails should not have been copied to the managers above Mr. Farho, particularly after Mr. Farho had told Mr. Foshee to stop copying and blind copying emails in that fashion.

Ms. Johnson testified at trial that there were several issues with Mr. Foshee's employment, noting that Mr. Foshee's failure to get prior approval for vacation time was inappropriate; that managers at Georgia Gulf found that Mr. Foshee's general behavior was not appropriate for a professional engineer; and further, that when problems arose at the plant, the engineers were expected to stay at the plant until the problems were resolved, but Mr. Foshee would leave at his usual time rather than stay late to help. She also testified that the employees in the control room complained about the way Mr. Foshee talked to them.

There was no real conflict in the testimony. All of the Georgia Gulf witnesses testified that there were problems with Mr. Foshee's work in 2004. This included Mr. Farho, who left Georgia Gulf for other employment two years prior to the trial. In contrast, Mr. Foshee's testimony centered on his belief that his work performance was satisfactory, despite evidence to the contrary, and his belief that the profit sharing plan guaranteed a payout as long as the company met its profit target for 2004 and he stayed employed through December 31st of 2004.

After a thorough review of the record, we find that the trial court manifestly and legally erred in finding that Georgia Gulf owed Mr. Foshee \$17,263.35 based on his profit sharing points for 2004. The profit sharing plan was an incentive plan used by Georgia Gulf to motivate its employees to help the company reach its targeted goals. The profit sharing plan materials clearly stated that the plan created the potential for increased compensation tied directly to company operating results *and* individual performance, and that there was no guarantee of payment. Mr. Foshee's individual performance was clearly a problem in 2004, and these problems were pointed out to him by his supervisors several times and led to his termination in early 2005.

Therefore, for the foregoing reasons, the trial court judgment granting partial summary judgment in favor of Georgia Gulf is affirmed; the trial court judgment awarding Mr. Foshee \$17,263.35 from Georgia Gulf is reversed. Costs are assessed against Mr. Foshee.

AFFIRMED IN PART AND REVERSED IN PART.