

***Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir., 1960)**

[...] Lind, the plaintiff-appellant, sued Park & Tilford Distiller's Corp.,¹ the defendant-appellee, for compensation that he asserts is due him by virtue of a contract expressed by a written memorandum supplemented by oral conversations as set out hereinafter. [...] The evidence, including Lind's own testimony, taking the inferences most favorable to Lind, shows the following. Lind had been employed for some years by Park & Tilford. In July 1950, Lind was informed by Herrfeldt, then Park & Tilford's vice-president and general sales-manager, that he would be appointed assistant to Kaufman, Park & Tilford's sales-manager for metropolitan New York. Herrfeldt told Lind to see Kaufman to ascertain what his new duties and his salary would be. Lind embarked on his new duties with Kaufman and was informed in October 1950, that some 'raises' had come through and that Lind should get official word from his 'boss', Kaufman. Subsequently, Lind received a communication, dated April 19, 1951, signed by Kaufman, informing Lind that he would assume the title of 'District Manager'. The letter went on to state: 'I wish to inform you of the fact that you have as much responsibility as a State Manager and that you should consider yourself to be of the same status.' The letter concluded with the statement: 'An incentive plan is being worked out so that you will not only be responsible for increased sales in your district, but will benefit substantially in monetary way.' The other two district managers under Kaufman received similar memoranda. Lind assumed his duties as district sales manager for metropolitan New York. During the weeks following Lind's new appointment, Lind inquired of Kaufman frequently what his remuneration would be under the incentive plan referred to in the letter of April 19, 1951, and was informed that details were being worked out. In July 1951, Kaufman informed Lind that he was to receive 1% commission on the gross sales of the men under him. This was an oral communication and was completely corroborated by Mrs. Kennan, Kaufman's former secretary, who was present. On subsequent occasions Lind was assured by Kaufman that he would get his money. Lind was also informed by Herrfeldt in the autumn of 1952 that he would get a 1% Commission of the sales of the men under him. [...]

The record also shows that Lind commenced his employment with Park & Tilford in 1941, that from 1942 to 1950 he worked on a commission basis, that on August 31, 1950, he became an assistant sales manager for the New York metropolitan area at \$125 a week, which was raised to \$150 a week on October 1, 1950, plus certain allowances. After Lind became district manager on April 19, 1951, he continued to receive the same salary of \$150 a week but this was increased to \$175 in January 1952. On February 1, 1952, Lind was transferred from New York to New Jersey to become state manager of Park & Tilford's business in New Jersey. He retained that position until January 31, 1957, when he was transferred back to New York. [...]

Two main classifications of authority are generally recognized, 'actual authority', and 'apparent authority'. The term 'implied authority' is often seen but most authorities consider 'implied authority' to be merely a sub-group of 'actual' authority. [...]

¹ Park & Tilford Distiller's Corp. was merged into Schenley Industries, Inc., a Delaware corporation, before the commencement of this action, with Schenley assuming all of Park & Tilford's obligations. [...]

‘Actual authority’ means, as the words connote, authority that the principal, expressly or implicitly, gave the agent. ‘Apparent authority’ arises when a principal acts in such a manner as to convey the impression to a third party that an agent has certain powers which he may or may not actually possess. [...]

The opinion of the court below and the argument of the appellee here rely heavily on *Gumpert v. Bon Ami Corporation*, a diversity case decided under New York law, upholding the lower court's reversal of a jury verdict for the plaintiff. The facts in that case showed that Gumpert had been hired by Rosenberg, a director and member of the executive board of the Bon Ami company for a salary of \$25,000 in cash plus \$25,000 worth of the company's common stock. The Court of Appeals found that the jury could not properly find that the Bon Ami company had clothed Rosenberg with apparent authority to offer Gumpert \$25,000 in common stock. This decision is inapposite for here we deal with an offer made by an employee's immediate superior, the man who represented the company to those under him, not a contract offered by one not an officer of a corporation to prospective employee. Furthermore a salary of \$25,000 in cash and \$25,000 in common stock might well be deemed unusual enough to put the prospective employee on notice as to a possible lack of authority in the director to make the offer but the same may not be said of an offer of a commission to a salesman who had been habitually working on that basis, in a corporation that confined itself to selling others' products. It should be borne in mind also that a director, even if he be a member of the executive board, does not ordinarily hire employees. Moreover in the case at bar there was evidence by an employee of Schenley that at least some state managers received 1% Commissions.

Testimony was adduced by Schenley tending to prove that Kaufman had no authority to set salaries, that power being exercisable solely by the president of the corporation, and that the president had not authorized Kaufman to offer Lind a commission of the kind under consideration here. However, this testimony, even if fully accepted, would only prove lack of actual or implied authority in Kaufman but is irrelevant to the issue of apparent authority. [...]

The judgment of the court below will be reversed and the case will be remanded with the direction to the court below to reinstate the verdict and judgment in favor of Lind.

HASTIE, Circuit Judge, with whom KALODNER, Circuit Judge, joins (dissenting).
[...]

The present record discloses a sharp conflict of testimony whether Kaufman, the metropolitan sales manager, ever promised plaintiff, his subordinate district manager, a 1% Commission on all gross sales of agents working under plaintiff. There are several remarkable aspects of this alleged promise which could reasonably have influenced the trial judge on this decisive issue. This commission would have more than quadrupled plaintiff's salary of \$150 per week, making him much higher paid than his immediate superior, Kaufman, or any other company executive, except the president. No other sales manager or supervisor received any such commission at all. Moreover, after the alleged promise was made, month after month elapsed with no payment of the 1% Commission or indication of any step to fulfill such an obligation. Yet plaintiff himself admits that he made no formal demand for or inquiry about the large obligation for several years, and said nothing even informally about it to anyone for many months save for an occasional passing verbal inquiry said to have been addressed to Kaufman. [...]