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Promissory Fraud

*By Michael Starr and Adam J. Heft**

Employers often assume that they may freely terminate the employment of their at-will employees without consequence as long as the decision is not based on a discriminatory or other illegal reason. This ain't necessarily so. Sometimes, what an employer said, or allegedly said, while trying to recruit someone can come back to haunt it later on. Even an employee who was unquestionably at will may succeed in an action alleging that she was induced to accept employment based on promises made by the employer at the time of hire, either by claiming promissory estoppel or, if the employee is able to show more egregious behavior, promissory fraud. In such cases, the at-will employee can sue his employer after being discharged for promises unkept while he was still employed.

California court permits promissory fraud claim

The possible consequences of a promise made during recruiting were demonstrated recently in *Helmer v. Bingham Toyota Isuzu*, 129 Cal. App. 4th 1121 (2005). Not only did this decision reaffirm precedent applying promissory estoppel to the employment context, it extended an employer's potential liability to include promissory fraud and, with an extra helping of potential trouble for employers, for the first time awarded as a remedy future lost profits to the allegedly defrauded employee.

At the time of his employment interviews with the automobile dealership, Kelvin Helmer had just recently been promoted by his then-current employer, a different automotive company. Helmer told Bob Clark, Bingham's director of parts and services, that he could not accept a job offer unless he earned at least $5,700 per month, which was what he expected from his current job. Clark then made some back-of-the-envelope calculations and assured Helmer that if he had been working for Bingham, he would have earned approximately $70,000 for the first nine months of the year-far above Helmer's $5,700 a month target.

Armed with those assurances, Helmer resigned his existing job and accepted a position with Bingham. Alas, things did not go as hoped for, and Helmer's compensation did not meet his expectations. After five months of employment and two days after he complained about his compensation, Helmer was fired. Girded by the high regard that his former employer had previously expressed, Helmer tried to get his old job back, but was told that a strict no-rehire policy make that impossible. Helmer eventually found other work, but his annual compensation was far below that of his original job.

Helmer sued for promissory fraud. After the defendant's motion for summary judgment was denied, Helmer's expert testified at trial that if he earned $70,000 per year at Bingham-as promised-and worked there until he was 61 years of age, Helmer would have earned almost $300,000 more than he would earn at his current job. The jury awarded Helmer nearly $500,000 in economic damages, $50,000 in noneconomic damages and $1.5 million in punitive damages, which was later reduced to $675,000. Thus, though Helmer had no employment contract and was

lawfully terminated, he walked away from trial with a $1.2 million judgment based on what Clark said in an effort to recruit him.

In affirming the judgment, the California Court of Appeal readily approved the promissory fraud theory of liability, but paused only to consider the availability of future lost income as a remedy. Earlier, in *Toscano v. Greene Music*, 124 Cal. App. 4th 685 (2004), a plaintiff successfully sued a prospective employer after he resigned from a position to accept an alleged promise of employment that was not fulfilled, but was denied such damages because the plaintiff, Joseph Toscano, had not established an expectation of continued employment with his former employer. The court in *Helmer* distinguished *Toscano*, and held that future lost income can be recovered for promissory fraud if the plaintiffs can show such an expectation.

The court called damages for future lost income "part of the benefit of the bargain," and reasoned that when an employer recruited an employee who resigned from "steady" employment elsewhere, "it is only fair" to compensate that employee for damages resulting from the termination of that steady employment. Thus, Helmer was awarded damages not for having been fired from his job at Bingham but for having been induced by it to leave his prior job. As evidence that Helmer's expectation of continued employment at his prior job was not speculative or remote, the court was satisfied by the testimony of Helmer's former supervisor, who stated that he was "sad" to see Helmer leave and that he had been a "good" and "reliable" employee. Though one could question whether being considered "good" and "reliable" constitutes a guarantee of continued employment until retirement, the court apparently thought it was.

Although employers are at risk for promissory estoppel claims based on optimistic, forward-looking assessments made by their agents trying to recruit a new hire, they are not wholly defenseless. The first step should be to recognize that the law varies across jurisdictions and that employers in other states do not face the same potential liability as Bingham Toyota Isuzu did in *Helmer*. For example, New York does not recognize a cause of action for promissory estoppel in the employment context when an employee alleges that he was induced to leave a job after receiving unfulfilled oral assurances because such liability is viewed as inconsistent with the idea of at-will employment. See, e.g., *Mayer v. Publishers Clearing House*, 613 N.Y.S.2d 190 (N.Y. App. Div. 2d Dep't 1994). Rather, to establish a claim for fraudulent inducement distinct from a claim for contract breach, a plaintiff must allege "a misrepresentation of a then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract and not merely a misrepresented intent to perform." *Woodie v. Azteca Int'l Corp.*, No. 603582/04, 2005 WL 2171181, at 6 (New York Co., N.Y., Sup. Ct. July 1, 2005). Thus, in New York, Helmer would have had no claim because the alleged promise of minimum annual compensation was not collateral to his employment contract.

Even in states like New York where the threshold for promissory fraud in employment is high, litigation costs are also high. There are also often insurmountable difficulties to prevailing on summary judgment, since denying that any promises were made or arguing that the so-called promises were just stated expectations merely creates a fact issue that only a trial can resolve. But one way to land a "knock out" punch in such cases is to undermine the linchpin of the employee's claim-that she never would have left her previous job were it not for the promises made when she was recruited. That the employee never actually relied on assurances made during the puffery of the hiring process or that her reliance was not reasonable are often the best defenses to promissory fraud. And, if precautions are taken in the hiring process, this can be the foundation for summary judgment dismissing such claims.

Promises must be memorialized in a writing

In cases where the employee received a written offer letter or employment agreement, the employer could effectively argue that reliance on a promise not included in that document was not reasonable. Such defenses have succeeded against promissory fraud claims brought by a sophisticated businessperson who claimed that he had been promised a significant benefit that

was not referenced in his offer letter, since it is unreasonable as a matter of law to rely on an oral promise that was not memorialized in a writing that addressed the other terms of employment. See *Caron v. Travelers Property & Casualty Corp.*, 71 F. Supp. 2d 269 (S.D.N.Y. 1999), aff'd 210 F.3d 354 (2d Cir. 2000).

Even greater protection may be available if, as part of the hiring process, the employment candidate expressly affirms that he is not relying on any oral assurances. There are ways employers can cause this to happen. Many employers routinely give new employees an offer letter that lists the basic terms of employment and reiterates that employment is at will. These offer letters often contain a boilerplate merger clause stating that the document embodies the entire agreement of the parties and merges with and supersedes any and all prior discussions, agreements or understandings. There is no real purpose for doing this: If the employment is at will, the terms can be changed at any time, so promises made during recruitment have no real significance as a matter of contract. But, since promissory fraud sounds in tort, not contract, the boilerplate merger clause is useless as a defense.

A better approach is to replace the merger clause with a "nonreliance" clause. Such a clause is an acknowledgement by the prospective employee that no representative of the employer has authority to make any representations other than those expressly stated in the offer letter and, even more importantly, that the employee has not relied on an assurance or representation not stated in that writing. With such a clause, employers have a better chance of prevailing in summary judgment against claims of promissory estoppel and promissory fraud as, they can argue, the document speaks for itself.

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