

WHAT THE HECK HAPPENED!?!

An Employment Law Update

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I. PROMISSORY ESTOPPEL AND EMPLOYMENT – AT WILL

In Zeltner v. Univ. of Northwestern Ohio, 159 Ohio App.3d 310, 2004, Jamilee Zeltner, who worked for the University of Northwestern Ohio in Lima, reported to Cheryl Mueller. When Zeltner started having problems with her supervisor, Mueller, she followed the procedure described in the company's policy manual and complained to the human resource department. Human resources recommended that Zeltner speak with the president of the university, Jeff Jarvis. Zeltner was reluctant to meet with Jarvis, because she feared how Mueller would react. Jarvis, however, assured Zeltner that he had an open-door policy and she would not lose her job by coming to him.

The conflict between Zeltner and Mueller then continued. When Mueller later disciplined her employee and put her on probation, Zeltner refused to sign the disciplinary notice and instead went directly to Jarvis. Mueller eventually discharged Zeltner for failing to follow the chain of command by speaking to Jarvis first rather than directly with her.

Zeltner sued the university for wrongful discharge. Because she did not have a specific employment contract, the university argued that Zeltner was an at-will employee and could be discharged at any time for any reason as long as her discharge did not violate a statute or recognized public policy.

Zeltner claimed, however, that the doctrine of promissory estoppel prevented her termination.

Under the doctrine of promissory estoppel, an employer may be prevented from discharging an employee if the employer has made promises on which the employee has reasonably relied. The key question to ask in such cases is whether the employer should have **reasonably** expected the employee to rely on the statements and assurances given, and if so, whether the employee **actually** relied on those statements to his/her detriment. These statements cannot be some vague assertion made by the employer. Instead, in order to have any legal significance, these statements must amount to a specific promise of continued employment.

In this case, the employee had been assured by the university president that she could come to him with her employment concerns without losing her job as a result. Although she had not in fact followed the proper chain of command, she had approached the president instead of speaking directly with her supervisor based on his earlier assurance that she was free to do so. Therefore, the court of appeals decided that Zeltner had a valid claim for wrongful discharge based on promissory estoppel.

II. EMPLOYMENT AT WILL DISCLAIMERS: NEW LANGUAGE REQUIRED

In Miller v. Lindsay-Green, Inc., 2005-Ohio-6366, (Honda East of Columbus), Bert Lindsay, primary shareholder of Lindsay-Green, Inc., contacted Ron Miller, in the fall of 2000 in effort to recruit Miller to come and work at Honda East in Columbus, Ohio as their General Sales Manager. Miller, who was General Sales Manager for Rick Case Honda of Akron at the time, told Lindsay that he was not interested and did not want to leave the Akron area.

Lindsay then called Miller again just days later and convinced him to visit Honda East. After numerous telephone calls and two visits to Columbus, Miller telephoned Lindsay and told him that he was seriously considering Lindsay's job offer, but that his compensation package would have to be substantial to convince him and his family to leave Akron. Miller claimed that it was during these telephone conversations that Lindsay first offered to employ Miller for **ten years**.

Lindsay told Miller that he would expect Miller to spend the first year revitalizing Honda East, which at the time was losing money, and the next four years managing both Honda East and Lindsay Acura, another dealership Lindsay owned. Also, during the first five years, Lindsay wanted Miller to train his two sons to manage the two dealerships. Miller would then spend the last five years of his employment overseeing and mentoring Lindsay's sons as they managed the dealerships.

Miller then wrote an agreement between he and Lindsay that outlined the terms of his compensation. This agreement was referred to as the "Terms of Acceptance." The "Terms of Acceptance" outlined the provisions of Miller's compensation but it did not mention Lindsay's offer to employ Miller for 10 years.

Miller then accepted Lindsay's offer of employment. Miller next went to Barry Freeder, the president and chief financial officer of the Rick Case Dealership, and resigned. Freeder told Miller he would be willing to place him at any of its larger dealerships in order to retain him. Miller declined this offer, telling Freeder he had already accepted the position with Honda East and was anticipating the challenge of turning the dealership around.

Miller officially began his employment with Honda East in early November 2000. On or about November 1, 2000, Miller signed a document entitled, "Acknowledgment of Receipt of Employee Handbook" ("Acknowledgment"). This acknowledgment read:

"It should be noted that your employment is considered an 'at-will' arrangement, meaning that you may terminate your employment at any time and the dealership has the same right."

Further, Miller was given a copy of the handbook, which also stated:

"Each employee is free to resign at will, at any time and for any reason. Similarly, the dealership may terminate the employment relationship at will, at any time and for any reason."

Both the Employee Handbook and the "Receipt of Acknowledgment" warned Honda East employees that neither constituted a "contract of employment and none of the provisions are to be construed as a contract or guarantee concerning terms and conditions of employment."

Further, the handbook stated that:

"Employment with Honda East is not offered, contracted or promised for any specific length of time. Each employee is free to resign at will, at any time and for any reason. Similarly, the Dealership may terminate the employment relationship at will, at any time and for any reason."

Under Miller's leadership, the profitability of Honda East greatly improved. However, just two years after he was hired, Lindsay wanted to change Miller's compensation package as it was stated in their "Terms of Acceptance." Miller reluctantly agreed, but further conflicts arose over the interpretation of Miller's compensation package as stated in the "Terms of Acceptance."

Miller got into several arguments with the owner's two sons, who claimed Miller "degraded" them. On April 11, 2002, Lindsay called Miller into his office and terminated his employment.

On May 29, 2002, Miller filed suit against Lindsay-Green and Bert Lindsay personally for breach of contract and promissory estoppel. In his complaint, Miller asserted that because Lindsay-Green breached the "Terms of Acceptance" agreement, he was entitled to damages in the amount of his year-end bonus and other compensation that Lindsay-Green failed to pay him during his actual employment with the company.

Second, and most importantly, Miller asserted that he was entitled to equitable relief because Lindsay-Green and Bert Lindsay himself (“collectively referred to as the “company.”) broke their **promise** to employ him for 10 years (promissory estoppel). Miller therefore claimed that the defendant owed him for the next eight years of his “promised” employment with the company.

At trial, Miller argued that he had a contract with the company in the form of his “Terms of Acceptance.” Miller also argued that Bert Lindsay had promised him 10 years of employment if he came to work at Honda East. Miller now argued that this promise of 10 years of employment was “missing” from their “Terms of Acceptance” contract and should be included as part of that contract.

Honda East claimed that Miller was employed “at-will” according to its Employee Handbook, which Miller signed for and acknowledged upon hire. Honda East claimed that this “employment-at-will” language barred Miller’s claim under the legal theory of the “parol evidence rule.”

In contract law, the “parol evidence rule” (“outside evidence”) states that where the parties have reduced their agreement to final written form (a contract), as Miller did with his “Terms of Acceptance” document, evidence of all “prior or contemporaneous agreements” instantly become moot and inadmissible to change or contradict the terms of the final written agreement, such as Lindsay’s promise to employ Miller for 10 years.

The reasoning behind the parol evidence rule is actually very simple:

If two parties have taken the time to reduce their agreement to writing, and if a court determines that the parties intended this writing to be a “complete and exclusive statement” of their agreement, then other outside (parol) agreements, “side agreements” and prior negotiations are barred. Such agreements are referred to as being “fully integrated” into the written agreement. So, if it is not written into the written contract, the “side” or “parol” agreement does not legally exist.

As a result, a “fully integrated” written contract is viewed as a “complete and final embodiment of the terms of their agreement.” So, other verbal agreements, such as Lindsay’s promise, become moot and are not allowed to vary the terms of the written contract.

However...

The crucial issue in determining whether there has been an “integration of all of the terms of the contract into the written agreement” is whether the **parties intended their writing to serve as the exclusive embodiment of their agreement.** Proof of another external oral agreement is admissible if the oral agreement is one that might **naturally have been made as a separate agreement under the circumstances.** If so, then the written contract might be viewed by the court as **NOT** having been fully integrated (“all inclusive”)...so other

agreements, such as Miller's verbal agreement with the owner of Honda East, would become a "natural" and valid part of the "Terms of Acceptance" contract.

The jury found for Miller and awarded him \$1.1 million dollars. Honda East appealed to the 10th District Court of Appeals. In reviewing this case, the 10th District Court of Appeals reviewed the factors that must exist in order to form a claim of promissory estoppel. In short, an employee must prove:

- (1) A clear and unambiguous promise was made to the employee,
- (2) By the employer,
- (3) Which the employer should have reasonably and foreseeably expected to induce reliance by the employee, and
- (4) Upon making this promise, the employee must have **actually** relied on the promise and actually **suffered injury** as a result of this reliance.

In this case, the company maintained that Miller could not establish the first element of his claim for promissory estoppel because the parol evidence rule barred him from introducing evidence that contradicts any term of the "Terms of Acceptance" agreement. The company argued that under the law, whenever an employment agreement is silent regarding the duration of the employee's employment, the law **presumes** that the employment relationship is "at-will." Therefore, the company argued that one of the terms included in this "Terms of Acceptance" agreement as a matter of law was that Miller was in fact employed "at-will." Since an oral promise of 10 years of employment is contradictory to "at-will employment," the company argued that Lindsay's oral promise is inadmissible parol evidence.

The court agreed with the company's interpretation of the law...partially. The court agreed that when a contract exists between an employer and an employee, and the contract is **silent** regarding the duration of the employee's employment, the "**presumption**" under the law is that the employee's employment is terminable at will. However, the court also held that this is a "**rebuttable presumption.**" If the "terms of the contract **or other circumstances clearly manifest the parties' intent to bind each other**" to a specific duration of employment, then **this presumption is overcome and outside agreements can be used to explain the parties' intent in forming the contract.**

In this case, the court found that even though the "Terms of Acceptance" agreement did not contain any indication of the duration of Miller's employment, it reasoned that the intent of the parties was to do otherwise. Lindsay raised the issue of 10 years of employment, it was discussed as to what was to take place throughout this 10 year period and it played a large role in Miller's decision to accept employment with the company.

Consequently, the “Terms of Acceptance” agreement was incomplete on its face, and therefore, only **partially integrated**. Accordingly, Miller’s claim of promissory estoppel **did not contradict** his “Terms of Acceptance” contract and could be used to interpret this contract as providing for 10 years of employment, thus overriding the employment-at-will doctrine.

The company then tried to argue that the Employee Handbook Miller signed and the “Acknowledgement Receipt” Miller signed when he joined the company was also a contract that contradicted the “Terms of Acceptance” agreement. The court disagreed.

The court reasoned that both the “Acknowledgment” and the Employee Handbook clearly stated that they were not contracts. Therefore, there was no possible way Miller and the company could have had a “meeting of the minds” in order to form a contract. In order for a meeting of the minds to occur, **both parties** to an agreement must mutually assent to the substance of the exchange. In other words, when entering into a contract, the parties must have a distinct and common intention which is communicated by each party to the other.

Further, the company’s own language negates any belief that the company had any intent to form a contract with its “Acknowledgement” or Employee Handbook. Instead, these documents merely “memorialize” the employee’s receipt of the company’s policies or “guidelines.” Nothing in the Acknowledgment or the Employee Handbook indicates that agreeing to comply with these “guidelines” would convert the handbook’s policies, including the at-will employment provision, into a legally enforceable contract.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Lindsay-Green, Inc. (Honda East) had **MANY** problems here.

First of all, they created a “Push-Me-Pull-You” with their documentation...a creature that does not exist. The company tried to use its handbook to create an enforceable Agreement, or contract. However, the contents of the handbook clearly stated that it was **NOT** a contract. The company cannot have it both ways: Either the handbook is a contract (or Agreement) or it is a mere statement of rights (policies). You cannot have it both ways.

I have seen this type of thing happen several times. Employers try to “oversimplify” their documentation, so they “lump” everything together into one document. **That** is a mistake.

KEEP CONTRACTS (AGREEMENTS) WITH CONTRACTS AND POLICIES WITH POLICIES.

“Non-Compete Agreements” are contracts. They should not be included in the Employee Handbook. “Confidentiality Agreements” are contracts and should also not be included in Employee Handbooks. Requiring employees to agree to limit their statute of limitations to

sue the company to a six month period of time (Thurman v. DaimlerChrysler, No. 02-2474 (Sixth Cir. 2004)) is an “agreement,” so it is a contract and should **NOT** be put into the handbook. Separate documents should be used for contracts.

(Of course, there is nothing wrong with putting statements in a handbook explaining how the company feels about such matters...but when an employer puts these items into a handbook, they are **NOT** contracts. What is the difference? When a contract exists, the parties, which basically means in this case the employee, are bound to follow the terms of the agreement. The employee has no choice but to follow its terms. In many cases, the employee must follow the dictates of the contract even once the employment relationship has ended. Also, many different avenues of legal enforcement exist for employers to use when a contract is in place. That is not necessarily so under a mere policy.)

All that is needed to form a contract is:

OFFER + ACCEPTANCE + CONSIDERATION (Money: \$1.00) = CONTRACT

In order for employers to protect themselves legally as much as possible, the best time to preserve their rights is **clearly** at the beginning of the employment relationship, especially in light of the recent Miller decision. Therefore, as part of the employment process, employers should clearly specify the more important aspects of the prospective employee’s terms and conditions of employment will be in some form of written Agreement, or contract. One excellent place to do this is on the employment application.

The job candidate is expected to read the rights being preserved by the employer listed on the last page of the employment application, usually referred to as the “Agreement.” The applicant must then sign and date the application, indicating that he/she has read, understands, and **agrees** to all of the rights being secured by the employer as a condition of his employment. The reasoning here is clear:

If the applicant does not agree to these terms and conditions of employment, then he should not accept the position.

From the outset, employers can secure numerous legal protections for themselves by having a thorough documentation process in place, which begins with the employment application.

Typically, these items should be included in the employment application Agreement page:

1. A statement indicating that the employer is an employment-at-will employer, meaning that it can terminate the employee’s employment at any time with or without just cause.
2. A statement reserving the right to change the employee’s compensation at any time for any reason, regardless of whether or not the employer has just cause to do so.

This “compensation clause” is particularly important for salaried employees since some courts have found that placing any employee on an annual salary not only provides that employee with an implied contract of employment for that year, but it

also guarantees his level of compensation for that period of time. Such a disclaimer alleviates that concern for employers.

This clause also allows employers to reduce an employee's wages in case the employee steals from the employers, damages goods, fails to return equipment or fails to perform properly after being warned to improve.

3. A statement reserving the right to change the terms and conditions of the employee's employment at any time.
4. A statement that any other agreements made with the employee are superseded by the agreements made on the application. Such disclaimers should also state that no one other than the president of the company, the chairman of the board of directors, the board of directors as a whole, or any other specifically named company representative can make any binding agreement with the employee....and even then the agreement must be in writing.

Such a clause helps to alleviate the employer's concern that any of its supervisors or other representatives might make their employees or prospective employees any promises that may be used later to form an implied contract of employment or a promissory estoppel argument, as occurred in the Miller case,

5. A statement granting permission to the employer to perform whatever background investigation checks it deems appropriate. Such clauses should:
 - a) Grant permission to all parties to release reference information to the employer, as well as for the employer itself, should it ever later release information regarding this employee to anyone in the future, and
 - b) Provide a release of liability for anyone providing this reference information, as well as for the employer itself, should it ever later release information regarding this employee to anyone in the future.

If the employer intends to use a consumer reporting agency to perform a background check on the applicant, the employer should be sure to comply with the requirements of the Fair Credit Reporting Act, or "FCRA," which is discussed in more detail later in these materials.

6. A statement that the applicant releases all parties from liability and agrees to take any medical, drug or chemical test required by the employer at any time throughout the applicant's employment with the employer, or before, upon request.

(Still, under the Americans With Disabilities Act of 1990, a physical examination of the applicant cannot be performed until after the offer of employment has been made, even though the offer can be made contingent upon successfully passing such an examination that is shown to be related to the applicant's work.)

7. The application “Agreement” should state that this is in fact the “supreme” and only agreement between the two parties, and if the employee is made an **OFFER** of employment, and if the employee does **ACCEPT** this offer of employment, then part of the wages paid to the employee for showing up to work on first day of employment will serve as sufficient **CONSIDERATION** to bind this Agreement. Therefore, this Agreement only takes affect if the employee is hired, accepts and shows up for work on his/her first day of employment.
8. A verification by the job candidate that all of the information provided on the application is true, while reminding applications that providing false information will be grounds for dismissal. (Some courts hold that employers may still only terminate employees under this clause for falsehoods that are substantially related to the position or to the employer's business on the whole, depending on the jurisdiction.)

Again, it is important for employers to understand that their handbooks are **NOT** contracts. Handbooks should be used to place the employees on notice as to what rights the employer is reserving for itself. **NOWHERE** in the handbook should the word “**AGREE**” appear, which tends to suggest that the handbook is in fact a contract, which will most likely work against the employer later.

The last page of the employment application, on the other hand, can be a **GREAT** place to put this “Agreement,” or “contract” for the employee to sign. This Agreement can be used to reserve all of the rights an employer ant to preserve **BEFORE** the employee even starts work.

Also, having the employee sign a separate Agreement reserving all of these rights on his/her first day is a dangerous proposition. Human resource people know such forms tend to fall between the cracks or get misplaced. Further, what will the employer do if the new employee refuses? It is best to have all of these details “squared away” and preserved before the employee even starts work for the employer. Placing this Agreement on the employment application form alleviates all of these concerns.

It is also important to note that in this case a contract was involved, which was the “Terms of Acceptance.” However, in promissory estoppel cases, no written contract is required. If no contract exists, written or otherwise, an employee can still potentially make this promissory estoppel argument and override the employment-at-will language included in a handbook.

So remember ... when it comes to Employment Law and Human Resources, the biggest part of your budget...

AN OUNCE OF PREVENTION TRULY IS WORTH A POUND OF CURE.

(If you do not believe me...call Bert Lindsay and ask him.)

APPLICANT'S AGREEMENT

“I understand and agree that, if I am employed by the Company, my employment is entirely “at will,” which means neither are guaranteed for any definite period of time, and that my employment can be modified or terminated, with or without cause, and regardless of the date of payment of my wages and salary, and with or without prior notice at any time, at the option of either the Company or myself. I understand and agree that the Company reserves the right to establish and/or change any of the terms or conditions of any aspect of my employment, including my compensation, at its discretion at anytime with or without notice. I understand and agree that no other oral or written agreements of any kind pertaining to the terms of my employment and/or my compensation exist outside of this Agreement, and if I believe that any such previous agreements between any Company representative and myself have been made, I agree they are **superseded by the contents of this Agreement.** I understand and agree that no representative of the Company, other than the President, the Chairman of the Board, or the Board of Directors as a whole, have any authority to enter into any other agreement or with me or provide me with any assurances relating to any aspect of my employment with the Company, except that the above-mentioned officials of the Company may do so in writing, although the terms of that Agreement cannot contradict the contents of this one. The terms of this Agreement will supersede all others.

I understand that if I am offered employment by the Company, and if I accept that offer, this document will serve as the only and primary Agreement between the Company, its representative and myself. I also agree that \$1.00 of the wages I am paid when I report to work on my first day of employment will serve as sufficient consideration to bind this Agreement.

I authorize the Company to investigate my background, qualifications and/or any other information from whomever it deems appropriate. I also authorize anyone the Company contacts as part of its investigation to release any information they have regarding me or my employment to the Company or its representatives. I also release all parties from all liability for any damage that may result from furnishing this information to the Company. Further, I release the Company from all liability for any information it might deem appropriate to lease regarding me and my employment in the future.

I further agree to take any lawful medical examination, chemical, drug or alcohol test upon request by the Company at its sole discretion as a condition of my employment, or, if I am hired, as a condition of my continued employment at any time as deemed appropriate by the Company. I agree that my refusal to take any such examinations or tests immediately upon request may be cause for my not being hired or, if I am hired, may be cause for the immediate termination of my employment. I hereby release all persons or companies conducting such examinations from all liability.

I also certify that the facts contained in this application are true and complete to the best of my knowledge and understanding that if I am employed, any statements I have falsified on this Application shall be grounds for dismissal. I further certify that I have read all of the foregoing, understand the same and do hereby voluntarily agree to all of the provisions contained herein.”

READ CAREFULLY BEFORE SIGNING

"I agree that any claim or lawsuit relating to my service with ABC Corporation or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary."

If you are hired, this employment application will become part of your official employment record.

APPLICANT'S SIGNATURE

Date

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Scott's academic background and awards include:

- Capital University College of Law (Class Valedictorian (1st out of 233))
- Master of Labor & Human Resources and B.A. in Organizational Communication: The Ohio State University
- The Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of Human Resource Management and the Ohio State Human Resource Council's David Prize for Creativity in Human Resource Management

Solving Employee Problems BEFORE They Happen!