



DELAWARE

EMPLOYMENT LAW LETTER

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BREACH OF CONTRACT

You made me promises, promises

by Lauren E. Moak

A recent decision by the Delaware Superior Court permitted an employee's case to go to trial based on his supervisor's vague statement that he would be "taken care of" if he stayed on through completion of a project. The employee inferred from the statement that he would receive a substantial and unprecedented preretirement bonus. He received a bonus that was much smaller than expected, and he sued for the rest. This decision serves as an important reminder of the inherent risk when managers make oral representations regarding compensation.

Facts

John Gallagher, who was approaching retirement, applied to take part in DuPont's Career Transition Program. The program was essentially an early retirement program that provided select DuPont employees with a lump-sum payment in exchange for early retirement. If Gallagher had been selected for the program, he would have received \$148,632.

Selection for the program was made at DuPont's complete discretion, and Gallagher wasn't selected. The company told him that he had "vital responsibility" for a "business critical" project and that it couldn't spare him. As a result, it requested that he continue his employment until the project was finished. Gallagher told DuPont that he was planning on retiring before the project was completed and that he would need a financial reason to stay.

In response to Gallagher's statement, his supervisor, Martin Breucker,

promised that he would "take care" of him if he postponed his retirement until the project's completion. While Breucker meant he would provide an undefined bonus, Gallagher understood the statement to mean that he would receive a bonus similar in size to the program payment. As a result of Breucker's promise, Gallagher agreed to postpone his retirement until his project was completed.

Gallagher was true to his word and remained with DuPont until his project was completed. At that time, Breucker arranged for a bonus to be paid to Gallagher's entire team. Gallagher received a \$30,000 bonus. Believing he was entitled to a much larger sum, he sued DuPont, asserting multiple claims, including breach of contract and misrepresentation.

Promises you know you can't keep

As a preliminary matter, you should always remember that oral contracts may be enforceable! In Gallagher's case, the court found there was no contract because the understanding between Gallagher and Breucker wasn't "clear and unequivocal." You may not be so lucky if you have "rogue" managers making commitments to employees you may not be aware of.

While the court didn't find a contract between Gallagher and Breucker, it permitted Gallagher to move forward on his claim for misrepresentation. The court based its holding on the fact that DuPont hadn't paid out a bonus exceeding \$20,000 in the previous 10 years. Based on that fact, the court found that Breucker may have failed to exercise reasonable care in determining whether he would be able to live up to the promise he made to Gallagher. The fact that he had *intended* to keep his promise wasn't enough to protect DuPont from liability. In the end, the court found that "Breucker knew or should have known that he could never come close to the dollars being discussed, and he misled [Gallagher] into believing otherwise." As a result, Gallagher's claim was allowed to move forward to trial. *Gallagher v. E.I. DuPont de Nemours & Co.*

Bottom line

You must ensure that your managers aren't entering into "side agreements" with employees about compensation or benefits that you aren't aware of. Your policy should be that any such agreements must be put in writing and approved at a high level. A properly drafted agreement will include a merger clause, which will prevent any oral agreements from superseding or amending its terms. If these steps are followed, expectations will be clear on all sides and the company won't wind up on the hook for an unreasonable promise.

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