

## THE EXECUTIVE IN PERIL

Executives are accustomed to being in control of the workplace and their careers. But a shift in power or circumstances can threaten an executive's position and financial security. Suddenly, an executive may hear that there are questions about the terms of the employment contract, hints that there may be need for a change, or concerns expressed over ones ability to lead the organization in the future.

What protections are provided for the executive to preserve a career and financial security? This article reviews three common factual patterns, based on actual cases, which illustrate the interplay of laws which may provide some protection to the imperiled executive.

### Case Study 1: Compensation Contract

**The Case:** A corporate officer is a securities trader whose compensation agreement is oral and consists of a salary, plus benefits and bonus. The bonus amount is objectively determined (10% of the annual net income earned for the company by the officer's trades). For five years, the company paid a bonus to the officer based on this agreement. At the end of last year, without prior notice, the company reduced the percentage rate used to calculate the bonus from 10% to 5%, contending that the amount of the bonus is discretionary. Since the officer had an extraordinary year, the company's unilateral decision has cost her a substantial portion of her compensation.

**The Law:** The starting point for an analysis of the officer's rights is her compensation agreement. Employment agreements, like most other contracts, may be oral or written. In contract disputes, the court must determine whether there was a "meeting of the minds" on the critical terms. If the contract is in writing, and the terms are not ambiguous, then the written document governs. If the contract terms are ambiguous, then other evidence as to the intent of the parties may be presented. In oral agreement, the intent of the parties is discerned from the parties' words and their actions.

In employment contracts, an agreement to pay certain compensation is enforceable for the duration of the contract, as long as either the amount of the compensation or the formula providing its calculation is clearly specified. While a contract may be modified by the parties, any modification is generally prospective—it will not affect the employee's right to compensation previously earned under the original contract.

In addition to the contract rights, an executive's compensation is also protected by the North Carolina Wage and Hour Act, which provides substantial additional rights and remedies to all employees. *N.C. Gen. Stat. §95-25.1 et seq.* There are several important features of this law which make it particularly advantageous for an employee who has been denied promised compensation. First, the law requires that prior to any modifications of the promised compensation, the company must notify the employee "in writing or through a posted notice maintained in a place accessible to its employees, of any changes ...prior to the time of such changes." *N.C.Gen.Stat. §95-25.13(3)*. Second, the Act provides enhanced remedies to the employee, permitting the recovery of all unpaid

compensation, plus an additional equal amount (double damages), and reasonable attorneys' fees. *N.C.Gen.Stat. §95.25.22.*

The officer depicted above would have claims for breach of her contract law and for a violation of the North Carolina Wage and Hour Act. She would attempt to prove the terms of her oral agreement using (1) her own testimony, (2) the testimony of any witnesses, (3) documents and written communications between the parties in implementing the agreement over the years (e-mails, check stubs, spread sheets), (4) the actions of the company in paying the officer based on the 10% calculation in the past, and (5) the failure of the company to provide written notice of any subsequent change. Upon proof of the agreement, the officer would be entitled to her unpaid compensation for the current year and possibly double damages and attorneys' fees.

### **Case Study 2: Age Discrimination**

***The Case:*** A 59-year old regional manager of a large corporation is told that the company is re-organizing to reduce costs and that his position has been eliminated as part of a reduction in force. The manager is assured that he will be "taken care of" through a severance package. He learns that his 43 year old assistant regional manager will keep his job and assume most of most of the manager's duties. He discovers that the company's take it or leave it severance plan is grossly inadequate to take care of him.

***The Law:*** Assuming the manager does not have a contract for a specific time period, his status as an at-will employee will determine his rights and potential remedies. The manager is protected by federal and state discrimination laws. These laws protect employees from discrimination based on age, race, gender, disability, national origin, color and religion.

Generally, in order to prove age discrimination, the manger must demonstrate, through direct or circumstantial evidence, that the company's decision was substantially motivated by his age. Direct evidence would include "smoking gun" statements revealing a decision maker's bias against older employees and that the manager was selected for termination because of his age. Circumstantial evidence includes evidence that the manager is in the protected category (age); that at the time of the discharge, the manager was performing satisfactorily; that the manager was replaced by a considerably younger employee; and that the company had fired other older employees or there was other evidence which tends to indicate that the company was motivated by the manager's age.

In order to seek the protection of the federal anti-discrimination laws, an employee must file a charge of discrimination with the Equal Employment Opportunity Commission within 180 days of the act of discrimination. If the EEOC is unable to resolve the claim and does not decide to bring legal action on the manager's behalf, the agency will issue a notice of right to sue which gives the manager 90 days to file a lawsuit in state or federal court. In addition, our North Carolina courts have recognized an action for wrongful discharge in violation of the state's public policy against discrimination. The manager has three years to bring this claim. If the manager prevails, he would be entitled to reinstatement, lost income and benefits, potential double damages, and attorneys' fees, and other damages under state law.

The manager's bargaining strength in negotiating a better severance package largely depends on the strength of his discrimination claims. If he can demonstrate that he has performed and was currently performing well for the company; that he was "effectively" replaced by his younger assistant; and if he can disprove the "non-discriminatory reasons" advanced by the company for its decision to select the manager, then he can bargain from a position of strength. If the company seems to be engaged in a pattern of eliminating older managers, his case is stronger. With this leverage, if he is still unable to negotiate a satisfactory agreement, litigation could be explored as an alternative.

### **Case Study 3: Disability—ADA or LTD**

**The Case:** An executive vice president, known for long hours of hard work, is shocked at the age of 55 with a diagnosis of rectal cancer. Her doctor tells her that her condition is grave and that emergency surgery is required to remove the cancer. A colostomy will be performed. The vice president is expected to remain out of work for 4-6 weeks, but then will be able to return to full duties. Her long-term prognosis is questionable, but she should have several years of good work ahead. The vice president informs the company of her medical condition and need for short term medical leave. Shortly after her return to work, she is terminated for poor performance

**The Law:** An executive whose employment is threatened because of a serious disability may seek protection in several alternative laws. If the executive is able to continue working and job security is the primary concern, she may be covered by the Americans with Disabilities Act (ADA), which protects employees from disability discrimination.

The ADA prohibits discrimination in employment against any "qualified individual with a disability." Generally, to be disabled one must establish "a physical or mental impairment that substantially limits one or more ...major life activities." A person meets the definition of a "qualified individual with a disability." if she is disabled, but able to perform the essential responsibilities of the position, either with or without some reasonable accommodations in the physical facilities or the job requirements. An employee seeking to protect her employment under the ADA must show : (1) either that she has a substantial impairment to a major life activity or is wrongly perceived by her employer as having a substantial impairment to a major life activity; and (2) that she is able to perform the essential responsibilities of her job.

If on the other hand, the employee is not able to work, she may be entitled to short or long term disability benefits, if provided by the employer's benefit plan and thus governed by the Employee Retirement Income Security Act (ERISA). To seek benefits, the employee must apply with the company (or insurance carrier) and provide specific evidence that she is disabled from working, first in her own occupation and later in any occupation. The plan administrator will decide

whether, based on the medical records and other evidence, the employee is totally disabled. If so, the employee will receive benefits (usually 50% to 66% of her monthly earnings), reduced by any Social Security benefits. If the company denies disability, the employee may file a lawsuit under ERISA claiming that the plan administrator abused its discretion in denying disability.

This executive has two options. Under the ADA, she can pursue her rights to continue to work, seeking reinstatement, lost income and benefits, and other non-economic damages for emotional distress and loss of quality of life. Or, she can accept the closure of her career and apply for disability benefits.

### **Conclusion**

The above illustrations represent a few of the common issues which affect executives. Limitations of space prevents a comprehensive discussion of the issues or the applicable law. Nevertheless, the all-important *bottom line* is that the executive's knowledge of her rights and remedies under the law is essential in preserving her security for the future.