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Case Update: N.C. Wage and Hour Act

by Heather Adams & Francisco J. Benzoni

The North Carolina Court of Appeals recently clarified several issues related to the North Carolina Wage and Hour Act ("NCWHA"). In **Kornegay v. Aspen Asset Group, LLC** ("Aspen"), 693 S.E.2d 723 (N.C. App. 2010), plaintiff Timothy G. Kornegay contended that he had an oral contract with his employer, defendant Aspen Asset Group, LLC ("Aspen"), providing that, in addition to his salary, he would receive certain bonuses for investment properties that he originated and implemented or merely implemented but did not originate. Kornegay brought suit in 2004 alleging that Aspen and its owners, who were sued individually, failed to pay him bonuses for various investments. He asserted claims for violation of the NCWHA, quantum meruit, and fraud. Aspen disputed the existence of any valid contract. Aspen also argued that, even if there was a valid contract, it had given notice of the termination of the bonus program before any properties were sold.

After various claims were dismissed on summary judgment and by directed verdict, Kornegay's NCWHA claims remained for the jury. The jury returned a verdict in favor of Kornegay on the NCWHA claims in the amount of $996,147.60, which was reduced by the court to $825,070.40. Following the jury's verdict, the court declined Kornegay's request to award liquidated damages and attorneys' fees but awarded costs. Aspen appealed on two primary bases: (1) whether there was a valid oral contract between Kornegay and Aspen that included a bonus provision and (2) inasmuch as there was a valid contract, whether Aspen had to pay those bonuses under the NCWHA. Kornegay crossappealed the denial of liquidated damages and attorneys' fees.

As to its first issue, Aspen argued that Kornegay had presented insufficient evidence to create a jury question as to the existence of a binding oral contract. The Court of Appeals disagreed, holding that the evidence was sufficient. The court concluded that plaintiff's and Aspen co-owner Steve Clardy's testimony provided more than a scintilla of evidence that Clardy made an offer to plaintiff regarding the employment terms and that plaintiff accepted that offer. The court's conclusion was not affected by testimony that the parties intended to later reduce the arrangement to a written agreement. The court also rejected Aspen's argument that the contract was insufficiently definite because the term "profit" was not specifically defined.

As to the second issue, Aspen argued that in June 2002 – after Kornegay had acquired several properties but before any of the properties had been sold – it provided notice of termination of the bonus arrangement in the form of a handwritten memo on one of Kornegay's checks. The memo, in relevant part, stated: "No Bonuses. No Commissions. No Nothing until Aspen sees fit & confident [sic] we are making money."

Section 95-25.13(3) of the NCWHA requires an employer to "[n]otify employees, in writing or through a posted notice maintained in a place accessible to its employees, at least 24 hours prior to any changes in promised wages." The Court noted that the relevant regulation provides further that "[a]mbiguous policies and practices [relating to bonuses and commissions] shall be construed against the employer and in favor of employees." **Kornegay**, 693 S.E.2d at 734-35 (quoting N.C. Admin. Code tit. 13, r. 12.0307(c)). Analyzing the Aspen memo, the Court concluded that it nowhere stated that the bonus terms were being eliminated, and could be read to indicate that payment of any bonus was only being delayed. Because ambiguous notices are construed against Aspen, the court held that Aspen's memo was insufficient to constitute notice under the NCWHA. Thus, the memo did not eliminate Kornegay's entitlement to his bonus.

Aspen also argued that Kornegay was not entitled to a bonus because his employment ended before the investment properties were sold and because the amount of the bonus was not quantifiable at the time his employment ended. The court rejected these arguments, citing prior precedent as well as the NCWHA. *See* N.C.G.S. § 95-25.7 ("Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs.") It held that the bonuses were earned when Kornegay had done all of the work required to earn them and that the bonuses became reasonably calculable, and thus due, when Aspen earned a profit on the investment, even if that occurred after Kornegay's termination. Rejecting a statute of limitations defense, the court also held that the two-year NCWHA statute began to run only when the investment properties were resold, as that was when Aspen realized the profit and the bonus became due.

With regard to Kornegay's cross-appeal on liquidated damages, the court first addressed whether the trial court judge properly decided the issue rather than submitting it to the jury. Because the plain language of N.C.G.S. § 95- 25.22(a1) provides that the trial court judge has discretion to decide the issue, the court held that doing so was proper and also did not violate the constitutional right to a jury trial. Then, as to the proper standard of review and as a matter of first impression, the court held that because the liquidated damages issue presents a mixed question of law and fact, the underlying factual findings are reviewed under the competent evidence standard, the legal conclusions are reviewed de novo, and the overall determination is reviewed for abuse of discretion. The court's holding here follows the prevailing standard for reviewing liquidated damages decisions under the federal Fair Labor Standards Act.

On the merits of the liquidated damages issue, the court upheld the trial court's finding of Aspen's good faith because of the reasonably disputed question of whether there was a contract for bonuses. Thus, the trial court did not abuse its discretion in declining to award liquidated damages. For the same reason, the court also concluded that the trial court did not abuse its discretion by denying an award of attorneys' fees.

In summary, the court held that (1) to be effective, a notice intended to terminate a bonus or other variable compensation provision must be clear and unambiguous; (2) termination of employment does not terminate an employer's duty to pay a bonus or other variable compensation that the employee earned prior to the end of employment; (3) the amount of the bonus or variable compensation does not need to be quantifiable at the time employment ends as long as it is reasonably calculable thereafter; and (4) the question of liquidated damages is properly decided as a mixed question of law and fact by the trial court judge and reviewed under the abuse of discretion standard. ■

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