

**Unilateral Contracts & Future Payment Promises To At-Will Employees:  
Vanegas v. American Energy Services Adds Clarity to “Illusory Contracts”**

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## **I. INTRODUCTION & SUMMARY OF ARTICLE.**

***The Cloud:*** The economy is bad, and the company is in a slump. The company has cut expenses down to the bone, including layoffs. Despite the high unemployment rate, some key employees are looking for other jobs. Losing such key employees only further hurts the company's performance; and many are "at-will" employees who can take another job if they want (assuming they maintain appropriate confidences, non-comps, etc.).

But the company can't afford to raise their pay or take on more overhead.

***The Silver Lining:*** Another corporation is looking to purchase the company in a year - - if the company can just hold its numbers or do a little better.

So an Executive Vice President of the company assembles some key employees in a conference room. She welcomes the employees to vent their complaints about the company and the circumstances. Then, she tells the employees about the anticipated buy-out. And, despite the fact that they are "at-will," she tells the employees that the company will pay them five per cent (5%) of the company's purchase price if they stay with the company until the buy-out is completed.

Not one of the employees jumps up and says: "That sounds great. I agree!" Any one of these employees can leave the company before the buy-out if he or she so chooses. Moreover, if they stay with the company, these employees would only continue performing the duties/work they were performing before the EVP made her announcement.

***The question:*** Is such a seemingly "one-sided" promise enforceable? ***The answer:*** Probably in Texas and certain other states, if the employees perform under such a "unilateral contract."

This article will examine the recent opinion by the Texas Supreme Court - - *Vanegas v. American Energy Services*, 2009 Tex. LEXIS 1121, 53 Tex. Sup. J. 204 (Tex. December 18, 2009). In *Vanegas*, the Court clarified the concept of "unilateral contracts," and gave more direction on when a company needs to "make good" on a promise to make a payment in the future to an "at-will" employee under Texas law.<sup>1</sup> This article also will discuss how certain courts have addressed this issue interpreting various other states' laws.

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<sup>1</sup> PLEASE NOTE that this article focuses on the doctrine of unilateral contracts, and not other legal theories sometimes posited under such circumstances - - such as claims for intentional or negligent misrepresentation, fraudulent inducement, promissory estoppel and *quantum meruit*. Moreover, this article does not address other common attacks on oral contracts, such as the statute of frauds and the required specificity/inclusion of necessary terms for a binding contract. For a good discussion of such legal theories and the concept of "hiring fraud," see Perna, *Deceitful Employers: Intentional Misrepresentation in Hiring and the Employment-at-Will Doctrine*, 54 U. Kan. L. Rev. 587 (2006); see also, e.g., *Griffin v. GMAC Commer. Fin., L.L.C.*, 2006 U.S. Dist. LEXIS 48599 (N.D. Ga. July 18, 2006) (interpreting Georgia law).

## **II. THE VANEGAS CASE: PROMISE FOR FUTURE PAYMENT TO AT-WILL EMPLOYEES.**

In *Vanegas*, the employer was American Energy Services (hereinafter, “AES”). When it was formed in 1996, AES hired certain individuals as at-will employees (hereinafter, the “employees”). Therefore, the employees were free to leave the company at any time

In an operational meeting in June 1997, the employees apparently voiced concerns to AES Vice President John Carnett regarding the continued viability of the company, and the long hours they had to work with antiquated equipment. According to the employees, Mr. Carnett then promised that “in the event of sale or merger of AES, the original [eight] employees remaining with AES at that time would get 5% of the value of any sale or merger of AES.”<sup>2</sup>

When the company was acquired in 2001, seven of the eight original employees were still with AES. However, AES refused to pay those employees 5% of the value of the sale. Those employees proceeded to sue AES for breaching the oral agreement.

### **A. The Texas Court Of Appeals Holds The Promise Was Illusory, And Dismisses The Employees’ Case.**

In a summary judgment motion, AES argued that any such promise was “illusory” and unenforceable because the employees were “at-will.” Thus, AES argued that it could have avoided the promise by firing the employees at any time. The employees argued that the promise was a unilateral contract. Therefore, they argued that their performance (*i.e.*, staying with AES until it was acquired) made AES’s promise enforceable.<sup>3</sup>

The trial court granted the summary judgment motion, and dismissed the case. In affirming the trial court’s decision, the court of appeals relied upon two relatively recent opinions by the Texas Supreme Court concerning the enforceability of non-competition agreements under Texas law - - *Sheshunoff v. Johnson*, 209 S.W.3d 644 (Tex. 2006) and *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642 (Tex. 1994).<sup>4</sup> Specifically, in *Light*, the Texas Supreme Court stated:

- ❖ “Consideration for a promise, by either the employee or the employer in an at-will employment, cannot be dependent on a period of continued employment. Such a promise would be illusory because it fails to bind the promisor who always retains the option of discontinuing employment in lieu of performance. When illusory promises are all that support a purported bilateral contract, there is no contract.”<sup>5</sup>
- ❖ “Any promise made by either employer or employee that depends on an additional period of employment is illusory because it is conditioned upon something that is exclusively

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<sup>2</sup> *Vanegas*, 2009 Tex. LEXIS 1121 at \*2.

<sup>3</sup> *Id.* at \*1, 3.

<sup>4</sup> See *Vanegas v. American Energy Services*, 224 S.W.3d 544, 550 (Tex. App.--Eastland 2007).

<sup>5</sup> *Light*, 883 S.W.2d at 644–45 (citation omitted).

within the control of the promisor.”<sup>6</sup> [In other words, since either may simply terminate the relationship *at will*, the promise is illusory.]

- ❖ “If only one promise is illusory, a unilateral contract can still be formed; the non-illusory promise can serve as an offer, which the promisor who made the illusory promise can accept by performance.” [Footnote 6 of the opinion]<sup>7</sup>

Moreover, in *Sheshunoff*, the Texas Supreme Court again addressed the issue of illusory promises in covenants not to compete. In so doing, it overruled *Light*'s holding in part, stating: “[W]e disagree with footnote six insofar as it precludes a unilateral contract made enforceable by performance from ever complying with the [Covenants Not to Compete] Act [Tex. Bus. & Com. Code § 15.50(a)] because it was not enforceable at the time it was made.”<sup>8</sup>

Relying on such holdings, the court of appeals dismissed the employees' case for breach of unilateral contract. It reasoned that the alleged promise to pay the employees the 5% bonus was illusory at the time it was made because the employees were at-will, and AES could have fired them prior to the acquisition.<sup>9</sup>

**B. The Texas Supreme Court Explains Why The Promise Was An Enforceable Unilateral Contract, And Reverses The Dismissal.**

The Texas Supreme Court reversed the court of appeals' decision. It explained that the lower court “erroneously applied” the holdings in *Light* and *Sheshunoff*, and did not evaluate the difference between a unilateral contract and a bilateral contract.<sup>10</sup> The Court explained that what the employees had was a unilateral contract which became enforceable upon their performance - not a “bilateral” contract, as was involved in *Light* and *Sheshunoff*.<sup>11</sup>

**1. Unilateral Contract Law.**

Citing Texas cases and respected treatises, the Texas Supreme Court's opinion in *Vanegas* provided a good primer on the law of unilateral contracts:

A unilateral contract... is “created by the promisor promising a benefit if the promisee performs. The contract becomes enforceable when the promisee performs.” Both *Sheshunoff* and *Light* concerned *bilateral* contracts in which employers made promises in exchange for employees' promises not to compete with their companies after termination.... The court of appeals' explanation of these cases - - describing an exchange of promises where one party makes an

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<sup>6</sup> *Id.* at 645 n.5.

<sup>7</sup> *Id.* at 645 n.6.

<sup>8</sup> *Sheshunoff*, 209 S.W.3d at 650–51.

<sup>9</sup> 224 S.W.3d at 549.

<sup>10</sup> *Vanegas*, 2009 Tex. LEXIS 1121 at \*7.

<sup>11</sup> *Id.* at \*8.

illusory promise and the other a non-illusory promise - - describes the attempted formation of a *bilateral* contract, not a unilateral contract.... Our discussion in footnote six of *Light* was confined to situations where a non-illusory promise could salvage an otherwise ineffective bilateral contract by transforming it into a unilateral contract, enforceable upon performance. This was not a blanket pronouncement about unilateral contracts in general.<sup>12</sup>

To provide further clarity, the Texas Supreme Court explained that “[a]lmost all unilateral contracts begin as illusory promises,” and gave a “classic textbook example of a unilateral contract: ‘I will pay you \$50 if you paint my house.’ The offer to pay the individual to paint the house can be withdrawn at any point prior to performance. But once the individual accepts the offer by performing, the promise to pay the \$50 becomes binding.”<sup>13</sup>

The Court held that “whether the promise was illusory at the time it was made is irrelevant; what matters is whether the promise became enforceable by the time of the breach.... The employees allege that AES made an offer to split five percent of the proceeds of the sale or merger of the company among any remaining original employees. Assuming that allegation is true, the seven remaining employees accepted this offer by remaining employed for the requested period of time. At that point, AES’s promise became binding.”<sup>14</sup>

In addition, the Court found AES’s promise to pay the bonus did not become “any less enforceable” because the employees were at-will and already being compensated for remaining employed. Even though the employees made no promise and there was no mutuality of obligation, the Court found that they gave “valuable consideration” by remaining with AES.<sup>15</sup>

## 2. The Texas Supreme Court Discusses “Far-Reaching” Effects.

In reversing the court of appeals’ decision, the Texas Supreme Court noted that none other than “Corbin on Contracts” had criticized that decision:

The [*Vanegas*] court [of appeal]’s analysis may attempt to prove too much. The argument that a promise to grant a raise to a terminable-at-will employee is necessarily illusory raises the question, why is an employer’s original promise to

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<sup>12</sup> *Id.* at \*7-9 (emphasis in original). Although citations are omitted from this quote, the citations include well-recognized treatises such as RESTATEMENT (FIRST) OF CONTRACTS § 12; 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1.17 (4th ed. 2007) (“A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance or forbearance.”). The opinion also cites to 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 6.2 (1995) for the proposition that “unilateral contract analysis is applicable to the employer’s promise to pay a bonus or pension to an employee in case the latter continues to serve for a stated period.” *Id.* at \*10.

<sup>13</sup> *Vanegas*, 2009 Tex. LEXIS 1121 at \*10-11.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*12-13. In so holding, the *Vanegas* opinion cited to 2 CORBIN ON CONTRACTS § 6.2; Elizabeth T. Tsai, Annotation, *Promise By Employer to Pay Bonus as Creating Valid and Enforceable Contract*, 43 A.L.R.3d 503 (1972) (listing cases from several states upholding validity of employers’ promises to pay bonuses in exchange for employees’ future service); and 1 WILLISTON ON CONTRACTS § 1.17 (“The performance or forbearance constitutes both acceptance of a promisor’s offer and consideration.”). *Id.* at \*13.

pay a certain wage to an at-will employee enforceable when the employee performs? The court's analysis would suggest that the employer's promise was never enforceable. If an at-will employee is hired at a promised compensation and performs for some period, the court's analysis would suggest that the promised rate of compensation was never enforceable.<sup>16</sup>

The Court also stated that the "court of appeals' holding would potentially jeopardize all pension plans, vacation leave, and other forms of compensation made to at-will employees that are based on a particular term of service.... We agree that the court of appeals' opinion could have far-reaching adverse effects on well established forms of compensation."<sup>17</sup>

### **III. VANEGAS GENERALLY REFLECTS THE (OFTEN CONVOLUTED) REASONING OF SOME COURTS INTERPRETING OTHER STATES' LAWS.**

The cases discussed below involve facts and legal issues that diverge in some respects from those in *Vanegas*. Moreover, their analyses are often quite fact intensive, and involve issues not addressed in *Vanegas* - - such as: the distinction between "compensation already earned" versus future "unearned compensation;" disclaimers, "gratuities" and discretionary bonuses; specificity of terms; substantial performance; and/or termination for cause *versus* termination unrelated to employee performance.

It is beyond the scope of this article to examine and discuss all the various circumstances, issues and legal theories involved in such cases. Rather, the following section will discuss certain decisions interpreting other states' laws, in order to highlight facts, holdings and reasoning as they concern the doctrine of unilateral contracts. The purpose of this section is to shed light on how certain courts interpreting such other states' laws might determine the enforceability of a unilateral contract if presented with a case similar to *Vanegas*.

#### **A. New York - - Case enforcing bonus promise.**

In *Kaplan v. Aspen Knolls Corp.*, the plaintiff alleged that - - as an inducement to his continued employment - - he entered into an oral contract with defendant. In particular, plaintiff alleged that defendant agreed to pay him a \$2,000 bonus for each house sold in a residential development known as Aspen Knolls Estates after the sale of the 334<sup>th</sup> home.<sup>18</sup>

Plaintiff worked as defendant's chief operating officer from May 1999 through October 7, 2001. Approximately 800 Aspen Knolls Estates homes had been sold prior to plaintiff's last day of employment. According to plaintiff, defendant paid him \$425,000 in bonuses, but owed him over \$500,000 for the 466 houses sold during his employment.<sup>19</sup>

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<sup>16</sup> *Id.* at 11-12 (quoting 1 JOHN E. MURRAY, JR. & TIMOTHY MURRAY, CORBIN ON CONTRACTS § 1.17 (Supp. Fall 2009)).

<sup>17</sup> *Id.* at 11-12. Of note, the Texas Supreme Court did not address what would have happened if the employees - - for example - - would have been *terminated a few weeks before the acquisition*.

<sup>18</sup> *Kaplan v. Aspen Knolls Corp.*, 290 F.Supp.2d 335, 337 (E.D.N.Y. 2003).

<sup>19</sup> *Id.* at 337.

After terminating his employment, plaintiff brought suit against defendant for breach of the oral bonus contract. Defendant filed a motion to dismiss for failure to state a claim. The United States District Court for the Eastern District of New York held that plaintiff's continued employment with defendant following the alleged oral promise provided sufficient consideration to obligate defendant to pay plaintiff the promised bonus payments.<sup>20</sup>

According to the Court:

Performance rendered by an at-will employee, before any notice of revocation, creates a unilateral contract binding the employer to pay the specified wage and to perform all other promises that he may have made in the agreement. Thus, the continued service by an employee is sufficient consideration to support an employer's promise to pay an at-will employee a bonus.<sup>21</sup>

**B. Missouri - - Case enforcing bonus promise.**

In *Cook v. Coldwell Banker*, the Missouri Court of Appeals enforced a unilateral bonus promise to an "at-will" employee/real estate sales agent.<sup>22</sup> At a March 1991 sales meeting, defendant "orally announced a bonus program in order to remain competitive with other local brokerage firms and to retain its agents."<sup>23</sup> During a September 1991 sales meeting, defendant announced that bonuses would be paid at a banquet in March of 1992 - - instead of at the end of the year. In response to this announcement, plaintiff "asked if that meant an agent had to be 'here' in March in order to collect the bonus." Defendant reportedly "indicated that is not what it meant."<sup>24</sup>

According to plaintiff, while she had no intention of leaving defendant in September 1991, she nonetheless "stayed with defendant until the end of 1991 in reliance on the promise of a bonus." In January 1992, plaintiff accepted a position with another real estate firm (that apparently had offered her employment sometime in 1991) and advised defendant of same. Upon being so apprised, defendant informed plaintiff she would not be paid her bonus.<sup>25</sup>

Plaintiff sued defendant for the bonus. The jury returned a verdict for plaintiff. Defendant appealed. The Missouri Court of Appeals affirmed the verdict. It held the oral announcement of the bonus program in March 1999 was a unilateral contract by defendant to pay plaintiff a bonus at the end of the year, which plaintiff accepted by substantial performance prior to defendant's attempt to modify the offer in September 1991.

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<sup>20</sup> *Id.* at 338.

<sup>21</sup> *Id.* (citations omitted).

<sup>22</sup> *Cook v. Coldwell Banker*, 967 S.W.2d 654, 656 (Mo. App. 1998).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* ("At the end of 1991, plaintiff had total earnings of \$ 75,638.47, which made her eligible for a combined bonus of \$ 17,391.54.").

The Court reasoned:

A promise to pay a bonus in return for an at-will employee's continued employment is an offer for a unilateral contract which becomes enforceable when accepted by the employee's performance.... Where one party makes a promissory offer in such form that it can be accepted by the rendition of the performance that is requested in exchange, without any express return promise or notice of acceptance in words, the offeror is bound by a contract just as soon as the offeree has rendered a substantial part of that requested performance.<sup>26</sup>

**C. Iowa - - Case enforcing bonus promise.**

In *Dallenbach v. Mapco Gas Products, Inc.*, the Supreme Court of Iowa enforced a bonus promise to an at-will employee. More specifically, in 1969, defendant Mapco promised to pay plaintiff (a district manager) a monthly base salary and certain benefits, plus an annual "bonus" of 10% of his district's "bonus income." "Bonus income" was the district's net operating profit with certain adjustments - - most notably a downward adjustment of 6% of the district's "adjusted average annual assets." Defendant paid an annual bonus to plaintiff from 1969 to 1977 pursuant to this formula.<sup>27</sup>

In July 1978, defendant modified the bonus formula to allow a bonus of 7% of the first \$100,000 of "bonus income," 10% of any excess "bonus income," and 5% of the district's "associate dealer and industrial account" profits." Defendant paid an annual bonus to plaintiff from 1979 to 1984 pursuant to this formula.<sup>28</sup> In April 1985, defendant again changed its bonus program by increasing the "adjusted average annual asset" deduction from 6% to 10%. Defendant made this change retroactive for 1985 bonuses.<sup>29</sup>

On January 10, 1986, defendant sent a memorandum to all district managers stating it was going "to reduce the amount of salary and bonuses it paid its district managers and so bring Mapco Gas in line with its competitors."<sup>30</sup> The memorandum stated the "changes mentioned [would] not affect the 1985 bonus..."<sup>31</sup> However, during the annual Mapco district managers meeting on January 21, 1986, a Mapco executive announced that defendant was going to reduce the 1985 bonuses to bring them into line with the industry average. Plaintiff subsequently

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<sup>26</sup> *Id.* at 657-58. ("In this case there was evidence that, before the offer was modified in September, 1991, plaintiff had remained with defendant and had earned over \$ 32,400.00 in commissions, making her eligible for the offered bonus. This constitutes sufficient evidence of substantial performance. Plaintiff adduced evidence that defendant offered to pay a bonus at the end of 1991 if she would continue to work for it, that she stayed through 1991 with an intent to accept the offer, that she sold and listed enough property to qualify for all three bonus levels, that defendant knew of plaintiff's performance, that defendant paid \$ 500.00 of the bonus but did not pay the remainder, and that she was damaged.") (citations omitted).

<sup>27</sup> *Dallenbach v. Mapco Gas Products, Inc.*, 459 N.W.2d 483, 484 (Iowa 1990).

<sup>28</sup> *Id.* at 484-85.

<sup>29</sup> *Id.* at 485.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

received his bonus, which reflected a straight 31% reduction.<sup>32</sup> Plaintiff resigned, and filed suit against defendant.

The trial court held that defendant's unilateral 31% reduction of plaintiff's 1985 bonus was a breach of contract. After losing in the court of appeals, defendant appealed to the Supreme Court of Iowa - - which also affirmed the trial court's judgment. The Supreme Court of Iowa seemingly based its decision on the tenets of a unilateral contract: "Dallenbach [plaintiff] accepted the job of district manager because Mapco Gas promised him that he would receive a monthly salary, benefits, and an annual bonus calculated on a certain formula. Dallenbach performed his end of the bargain for 1985."<sup>33</sup> Thus, the Court found that plaintiff was entitled to his full annual bonus under the 1985 formula.<sup>34</sup>

#### **D. Ohio - - Two cases enforcing bonus promises post termination.**

##### **1. *Harwood v. Avaya Corp.***

In *Harwood v. Avaya Corp.*, the United States District Court for the Southern District of Ohio was asked to decide "whether an employer which offers a retention bonus payable only if the at-will employee remains employed on a future day may thereafter terminate such employee prior to such date, without paying the retention bonus."<sup>35</sup> The Court held the employer must pay the bonus.

The plaintiffs in *Harwood* were employees of Expanets. Expanets implemented a retention bonus program where, in "order to receive any part of the bonus, you *must* remain with the company until at least March 31, 2005, at which point you will qualify for the retention bonus."<sup>36</sup> Shortly thereafter, plaintiffs received individualized statements indicating the amount of his or her potential bonus under the program, as well as a letter stating "you must remain an employee with Expanets until at least March 31, 2005 in order to receive this bonus. If your employment terminates for any reason before March 31, 2005, you will not be eligible to receive this bonus."<sup>37</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 487.

<sup>34</sup> *Id.* at 486. In reaching its opinion, the Court distinguished its 1956 opinion *Drake v. Block* wherein the Court reversed a jury verdict for the plaintiff on a bonus question stating: "There is no question under this record but that a bonus or profit sharing plan was discussed by the parties and contemplated by both. *However, all parties are agreed that at no time was any definite amount agreed upon. It appears without dispute that all matters concerning this bonus, time of payment and the amount thereof rested solely and exclusively with [the defendant.] He states that he had no fixed plan or schedule to be followed in determining the amount. The record clearly shows such bonuses, as were paid, followed no set plan or percentage of salary paid.* Under the well-recognized rules of law here applicable, any attempt to recover a bonus under an express contract must fail as too indefinite and uncertain." (quoting *Drake v. Block*, 74 N.W. 2d 577, 580 (Iowa 1956)) (emphasis added in *Dallenbach* opinion).

<sup>35</sup> *Harwood v. Avaya Corp.*, 2007 U.S. Dist. LEXIS 38722 at \*16 (S.D. Ohio May 25, 2007).

<sup>36</sup> *Id.* at \*4 (emphasis in original).

<sup>37</sup> *Id.* at \*5-6.

By late 2003, as the result of a corporate acquisition, Avaya hired Expanets' employees and assumed Expanets' responsibilities under the bonus plan.<sup>38</sup> Soon thereafter, Avaya determined it could not absorb all of the recently hired Expanets employees, and terminated thousands of them (including the majority of the plaintiffs) during February and March of 2004. Avaya did not pay the retention bonus to any Expanets employees terminated prior to March, 31, 2005.<sup>39</sup>

Plaintiffs sued Avaya for their bonuses, alleging multiple causes of action. With regard to their breach of contract claim, plaintiffs alleged that "the promise of a retention bonus created a unilateral contract, which Avaya was obligated to observe, and that once they began to perform by staying in their jobs, Avaya could not revoke the promise to pay it."<sup>40</sup> The Court denied the defendant employer's motion for summary judgment regarding the breach of contract claim - - notwithstanding the fact that Expanets expressly stated "you must remain an employee with Expanets until at least March 31, 2005 in order to receive this bonus. If your employment terminates for any reason before March 31, 2005, you will not be eligible to receive this bonus."<sup>41</sup>

The Court explained that "Ohio courts long ago recognized that an employee bonus plan by which the employer offers to pay a bonus based upon the company's annual net profit gives rise to a contractual obligation on the part of the employer."<sup>42</sup> To support its decision, the court relied heavily on the 1988 Ohio Court of Appeals case *McKelvey v. Spitzer Motor Center, Inc.*,<sup>43</sup> and on Corbin on Contracts (also relied on by the Texas Supreme Court in *Vanegas*).<sup>44</sup> The Court reasoned:

In summary, despite the fact that the Plaintiffs were at-will employees, the Defendant offered these employees a substantial bonus, if the employees continued their employment with an ailing company to a specific, future date. The offer made no mention that the bonus would be extinguished if the employer laid off the employees. The bonus was conditioned on the employees remaining employed with the Defendant through a particular date, which the Plaintiffs undisputedly intended

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<sup>38</sup> *Id.* at \*5-7.

<sup>39</sup> *Id.* at \*10-12.

<sup>40</sup> *Id.* at \*19-20.

<sup>41</sup> *Id.* at \*5.

<sup>42</sup> *Id.* at \*21.

<sup>43</sup> *Id.* at \*21-22 (quoting *McKelvey v. Spitzer Motor Center, Inc.*, 545 N.E.2d 1311, 1313 (Ohio Ct. App. 8th Dist. 1988)).

<sup>44</sup> *Id.* at \*22-23 ("Corbin on Contracts sets forth the following discussion of unilateral contracts with regard to bonus programs offered by employers: The same unilateral contract analysis is applicable to the employer's promise to pay a bonus or pension to an employee in case the latter continues to serve for a stated period. It is now recognized that these are not pure gratuities but compensation for services rendered. The employer's promise is not enforceable when made, but the employee can accept the offer by continuing to serve as requested, even though the employee makes no promise. There is no mutuality of obligation, but there is consideration in the form of service rendered. The employee's one consideration, rendition of services, supports all of the employer's promises, to pay the salary and to pay the bonus. Indeed, although the bonus is not fully earned until the service has continued for the full time, after a substantial part of the service has been rendered the offer of the bonus cannot be withdrawn without a breach of contract.").

to do. The Defendant prevented the employees from meeting the one condition necessary to obtain the bonus, the continuation of employment. As Corbin, *supra*, notes, contract law is not so one-sided as to permit one party to induce the other's substantial, part performance and thereafter allow the inducing party to simply, unilaterally, terminate the agreed-upon arrangement.<sup>45</sup>

In a footnote to the above quoted paragraph, the Court specifically stated that it did "not address an issue not involved in this case, which involves the circumstances under which an employee, having partly performed, is working towards a retention bonus and nonetheless engages in conduct that could be an independent breach of both the conditions of employment and the implied conditions of the retention bonus."<sup>46</sup>

## 2. *McKelvey v. Spitzer Motor Center, Inc.*

The *Harwood* opinion relied heavily on this earlier decision by the Ohio Court of Appeals. In *McKelvey*, plaintiff's employer had an annual bonus program which stated that the "profit pool bonus accrued will be paid upon completion of year end audit."<sup>47</sup> In December 1982, plaintiff informed defendant he intended to terminate his employment - - which he did on February 10, 1983. The bonus program did not set a specific date for completion of the audit; and the audit occurred one month after plaintiff left. Defendant refused to pay plaintiff any bonus for 1982. Plaintiff sued defendant for breaching its contract to pay his 1982 bonus.

Both parties filed motions for summary judgment in the trial court. Because he continued employment with defendant through 1982, plaintiff argued defendant's unilateral contract became enforceable. Therefore, he argued defendant's refusal to pay his 1982 bonus was a breach of that contract. Defendant argued that by voluntarily terminating his employment prior to the completion of the 1982 audit (which occurred on March 10, 1983), plaintiff failed to meet the conditions of the bonus plan (being employed at the completion of the 1982 audit). The trial court granted defendant's motion for summary judgment. Plaintiff appealed.

The Ohio Court of Appeals stated: "Ohio courts have recognized that an employee bonus plan by which the employer offers to pay a bonus based upon the company's annual net profit gives rise to a contractual obligation on the part of the employer."<sup>48</sup> Thus, "[t]he employer's offer to share profits in consideration of the employee's remaining in the employment and rendering service for a specified time creates a unilateral contract binding upon the employer."<sup>49</sup>

According to the Court, the provision in the bonus agreement requiring the employee to remain employed into the following year until completion of the audit "acted as a penalty for failure to remain with the company into the next year even though an entire year's service had

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<sup>45</sup> *Id.* at \*31-32.

<sup>46</sup> *Id.* at \*32 n. 11.

<sup>47</sup> *McKelvey v. Spitzer Motor Center, Inc.*, 545 N.E.2d 1311, 1312 (Ohio Ct. App. 8th Dist. 1988).

<sup>48</sup> *Id.* at 1313.

<sup>49</sup> *Id.*

been rendered upon which the bonus was based.”<sup>50</sup> After noting “[i]t is well-established that forfeiture is not favored in law,” the Court stated that, “[g]iven the facts of this case, we find that equitable considerations require the denial of a forfeiture.”<sup>51</sup> Thus, the Court held that the trial court erred in granting summary judgment for defendant, and “as a matter of law, summary judgment should have been granted in favor of [plaintiff].”<sup>52</sup>

**E. Oregon - - Case enforcing bonus promise post termination.**

Nearly forty years ago, the Supreme Court of Oregon addressed the enforceability of a unilateral contract for an annual bonus to at-will employees in *Thompson v. Burr*. Plaintiff testified that when being hired, defendant told him “employees who were on the payroll on December 31st of each year would be paid a bonus in the amount of ten per cent of their gross earnings for the previous calendar year, payable in April of the following year, but that nothing was said about any further requirement of continued employment until April 1st of the following year in order to qualify for payment of the bonus.” Defendant paid such a bonus to plaintiff in 1966 and 1967.<sup>53</sup>

On March 10, 1969, defendant terminated plaintiff, refused plaintiff’s request to continue his employment until April 1, 1969, and refused to pay his 1968 bonus.<sup>54</sup> Plaintiff sued to recover his bonus. The trial court held plaintiff was entitled to his bonus. The Supreme Court of Oregon affirmed the trial court’s ruling. The Court reasoned:

[T]he bonus was offered to employees as “an incentive to stay on the job.” That offer became binding as a unilateral contract upon acceptance by plaintiff by staying on the job for the entire calendar year of 1968 and until the date of his discharge in March 1969. It is clear that plaintiff also would have “stayed on the job” until April 1, 1969, but for his discharge less than three weeks before that date....

[T]he bonus payments were not a mere “gratuity,” to be paid to qualified employees, or withheld from them, at defendant’s whim or caprice, but that it was an offer to make a bonus payment to any employee who “stayed on the job” and qualified for such payments, so as to become a binding unilateral contract upon such an acceptance by such an employee and in consideration of his continued employment.<sup>55</sup>

Based on the foregoing, the Supreme Court of Oregon affirmed the trial court’s ruling, holding that plaintiff was entitled to his bonus for 1968 because defendant did not have good

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<sup>50</sup> *Id.* (“By this provision, an employee who had worked the entire year of 1982 would not benefit from the 1982 profits unless he continued to work in 1983 until the audit was completed. He then would not benefit from the plan for the time worked in 1983 unless he continued service in 1984 until the completion of that audit.”).

<sup>51</sup> *Id.* at 1313 (citations omitted).

<sup>52</sup> *Id.* at 1314.

<sup>53</sup> *Thompson v. Burr*, 490 P.2d 157, 158 (Ore. 1971).

<sup>54</sup> *Id.* at 158-59.

<sup>55</sup> *Id.* at 159-60.

cause to terminate plaintiff less than one month before his bonus would become due.<sup>56</sup> The Court stated:

There is ample authority to the effect that where the payment of a bonus is a matter of contract (as in this case), rather than a gratuity, such an agreement by an employer to pay a bonus to an employee may not be defeated by the employer by discharging the employee shortly before he has completed his eligibility for the bonus unless the discharge was for “good cause” and that if such an employee is discharged ‘without good cause’ he is still entitled to payment of the bonus even if the employer did not act in bad faith.<sup>57</sup>

**F. Pennsylvania - - Case enforcing bonus promise post termination.**

In *Pilkington v. CGU Insurance Co., Inc.*, the United States District Court for the Eastern District of Pennsylvania enforced an employer’s unilateral contract for a bonus.<sup>58</sup> On March 26, 1998, defendant announced a bonus incentive program for its employees to encourage “information systems associates to remain with the company through a transition period and into the new millennium.”<sup>59</sup> Under the program, “employees who left defendant’s employ ‘due to no fault of their own such as reduction in work force, relocation of work assignment, etc. will become immediately eligible for the payment of any credited moneys.’” Moreover, it provided that “employees who are ‘terminated for cause immediately cease participation in the program and lose any accredited money and accrued interest.’”<sup>60</sup>

On November 1, 1999, defendant terminated plaintiff for cause after he was accused of sexually harassing a subordinate female employee.<sup>61</sup> Plaintiff subsequently brought suit against defendant alleging various causes of action, including breach of contract regarding the bonus incentive program and wrongful termination. Defendant filed a motion to dismiss for failure to state a claim.

With regard to the breach of contract claim, defendant argued that plaintiff could not bring such a claim because he was an at-will employee who could be fired at any time. The Court noted that absent “evidence to the contrary, employment relationships in Pennsylvania are presumed to be at-will.” The Court then stated that “[a]n employer, however, can create a unilateral contract by offering additional terms of employment conditioned upon the employee’s continued performance of his job... [and an] employer who offers various rewards to employees who achieve a particular result or work a certain amount of overtime, for example, may be obligated to provide those awards to qualifying employees, although retaining the right to terminate them for any or no reason.”<sup>62</sup>

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<sup>56</sup> *Id.* at 160.

<sup>57</sup> *Id.*

<sup>58</sup> 2001 U.S. Dist. LEXIS 3668 (E.D. Pa. Feb. 9, 2001).

<sup>59</sup> *Pilkington v. CGU Insurance Co., Inc.*, 2001 U.S. Dist. LEXIS 3668, \*1-2 (E.D. Pa. Feb. 9, 2001).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at \*1-4.

<sup>62</sup> *Id.* at \*21-22 (citations omitted).

Defendant did not promise continued employment for any fixed term. However, the Court found that it “did offer payments for the express purpose of encouraging employees to remain [with defendant].”<sup>63</sup> Then, it reasoned that “[d]efendant’s retention program by its terms created four unilateral contracts (one for each incentive period) which conditioned acceptance upon plaintiff’s continued employment through the respective incentive period. Plaintiff remained employed by defendant through three of the incentive periods. According to the terms of the retention program, plaintiff was entitled to receive his accrued bonus money for these periods unless he was terminated for cause.”<sup>64</sup>

Therefore, the Court held that plaintiff could proceed with his breach of contract claim based on his allegation that “defendant knowingly used an unfounded charge of sexual harassment to discharge him and evade its obligation to pay him the accrued bonus money.”<sup>65</sup> According to the Court, “[i]f, as he alleged, plaintiff can prove that defendant knowingly discharged him without cause, he could qualify for the accrued incentive payments under the ‘due to no fault of their own’ provision in the retention program statement.”<sup>66</sup>

**G. Georgia - - Case enforcing future payment promise post termination focusing on “compensation earned” versus “future compensation.”**

In *Tart v. IMV Energy Systems of American, Inc.*, the defendant recruited plaintiff as Vice President of Marketing and Sales for the eastern United States. Plaintiff was one of defendant’s first four employees, and was an at-will employee.<sup>67</sup>

Plaintiff commenced employment on June 1, 2000. Plaintiff claimed defendant promised him a \$10,000 bonus if he performed certain duties related to a “Chevron contract.” In April 2001, defendant gave plaintiff six months notice (as required by his employment contract) that his employment would end in October. Plaintiff subsequently brought suit against defendant for, among other things, payment of the \$10,000 bonus related to the Chevron contract -- claiming he “did everything required to earn” the bonus.<sup>68</sup>

In its motion for summary judgment, defendant argued that plaintiff’s breach of contract claim regarding the Chevron contract bonus must fail because plaintiff’s “employment could be terminated at will and there was no breach of his employment agreement.”<sup>69</sup> The United States

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<sup>63</sup> *Id.* at \*22.

<sup>64</sup> *Id.* at \*22-23 (Noting in a footnote following the above quotation that: “As plaintiff was employed at the close of the first three periods, the court assumes that he received the promised 33% of the incentive for those periods and is seeking the balance of 67%. Should plaintiff prevail on his Title VII claim, of course, he would be entitled to all such amounts he would have received had he not been unlawfully terminated.”).

<sup>65</sup> *Id.* at \*23-24 (“Defendant drafted the retention program statement. Defendant could have specified in the termination for cause provision that a determination of ‘cause’ shall be at the sole discretion of the employer or for any reason so characterized by the employer. It did not do so. In the absence of any such qualification, the term ‘cause’ signifies just or reasonable cause.”) (citations omitted).

<sup>66</sup> *Id.* at \*24.

<sup>67</sup> *Tart v. IMV Energy Systems of American, Inc.*, 374 F.Supp.2d 1172, 1174-1175 (N.D. Ga. 2005).

<sup>68</sup> *Id.* at 1177.

<sup>69</sup> *Id.*

District Court for the Northern District of Georgia denied defendant's motion for summary judgment regarding the \$10,000 bonus. In so doing, the Court quoted a 1987 opinion by the Georgia Court of Appeals -- *E.D. Lacey Mills, Inc. v. Keith* -- which distinguished between claims for payment of future compensation to at-will employees and claims to recover compensation allegedly earned during the course of employment:

It is true an employee cannot sue to enforce future performance of a terminable-at-will employment agreement. However, an employee may sue on an oral contract for employment terminable at will for the amount of compensation due him, based upon services actually performed by him up to the time of his discharge, and not for damages or for compensation for services not performed or for any breach of contract.<sup>70</sup>

Although the *Tart* Court did not use the term "unilateral contract," it did state that defendant's "focus on Plaintiff's at-will status and the promise of future compensation misses the mark. Plaintiff claims the \$ 10,000 bonus on the grounds it is for compensation that he had earned under a contract he had with the Company. Defendant does not point to any evidence that Plaintiff did not earn this bonus before he was terminated."<sup>71</sup>

#### **H. Nevada - - Case construing bonus promise to deny bonus.**

In *Sterbens v. Nevadacare, Inc.*, the United States District Court for the District of Nevada granted defendant summary judgment on plaintiff's claim for bonus payments pursuant to an oral contract. In so doing, the Court did not reject the unilateral contract doctrine. Rather, it held the terms of the alleged oral contract lacked sufficient specificity to support the formation of a contract.

More specifically, plaintiff worked as a supervisor for defendant (a healthcare management company) until her termination for failure to follow work related instructions in April of 2005. According to plaintiff, defendant's CEO orally promised her a bonus of two months' salary if she met targeted reduction "goals" related to "in bed days."<sup>72</sup> Defendant refused to pay plaintiff any bonus pursuant to the alleged oral bonus agreement. After defendant terminated plaintiff, she sued defendant for breach of the oral bonus contract. Defendant moved for summary judgment.<sup>73</sup>

The Court found that by continuing her employment with defendant after the alleged oral promise for bonus, plaintiff provided consideration for the bonus contract under Nevada law:

[I]f an employer announces a change in the terms of compensation for subsequent services to be rendered by an employee and the employee continues her employment, the parties have agreed to new terms for the employee's subsequent services to the employer. That the change in terms of compensation is labeled as a

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<sup>70</sup> *Id.* at 1181 (quoting *E.D. Lacey Mills, Inc. v. Keith*, 359 S.E.2d 148, 152 (Ga. Ct. App. 1987)).

<sup>71</sup> *Id.* at 1181.

<sup>72</sup> *Sterbens v. Nevadacare, Inc.*, 2008 U.S. Dist. LEXIS 19727 at \*12 (D. Nev. March 12, 2008).

<sup>73</sup> *Id.* at \*1-4.

“bonus” for reaching an employment-related goal does not render the agreement unenforceable.<sup>74</sup>

However, the Court granted defendant summary judgment because the alleged oral promise for bonus lacked sufficient specificity to support the formation of an enforceable contract.<sup>75</sup>

**I. Nebraska - - Case construing bonus promise to deny bonus.**

*Feola v. Valmont Industries* involved a bonus plan designed to give “administrative employees a direct financial reason for striving continually for more effective operation of the business.”<sup>76</sup> The bonus plan provided that: “Payment will be made only to eligible participants who are on the payroll on December 25, 1976, the end of the fiscal year.”<sup>77</sup>

On November 26, 1976, defendant terminated plaintiff (an at-will employee) “due to a general work force reduction because of economic conditions.”<sup>78</sup> As plaintiff was not on defendant’s payroll on December 25, 1976 (as required by the bonus plan), defendant refused to pay plaintiff any bonus for 1976. Plaintiff filed suit against defendant for payment of the bonus. The trial court dismissed the case. Plaintiff appealed to the Supreme Court of Nebraska.

The Supreme Court of Nebraska affirmed the trial court’s ruling. According to the Court, “Valmont had a perfect right to terminate Feola’s employment and acted within its legal rights in so doing, which the record in this case reveals was done as a result of economic necessity in the reduction of the work force of the company....”<sup>79</sup> Because defendant terminated plaintiff on November 26, 1976, and the bonus plan “specifically provides that payment will be made only to *eligible participants* who are on the payroll on December 25, 1976,” the Court held plaintiff did not qualify for a bonus under the plan.<sup>80</sup> “Since, as we have demonstrated, Valmont was perfectly within its rights in terminating Feola’s employment in response to economic problems in the division, the fact of Feola’s termination makes moot any question as to whether the bonus plan was a gratuity or a unilateral contract, since Feola did not satisfy the conditions precedent necessary to be entitled to the bonus.”<sup>81</sup>

**J. Wisconsin - - Case construing bonus promise to deny bonus.**

In *Compton v. Shopko Stores, Inc.*, plaintiff brought suit to recover a bonus allegedly due under an “Executive Bonus Plan.” The bonus plan started as a verbal commitment by defendant

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<sup>74</sup> *Id.* at \*11-12.

<sup>75</sup> *Id.* at \*12-13 (“In reviewing Sterbens’ opposition, and the record as a whole, the court can only conclude that the general reference to ‘these goals’ is so indefinite that a meeting of the minds could not occur. Sterbens, herself, fails to identify ‘these goals’ in other than a vague and general reference to a reduction in bed days.”).

<sup>76</sup> *Feola v. Valmont Industries*, 304 N.W.2d 377, 380 (Neb. 1981).

<sup>77</sup> *Id.* at 380-81.

<sup>78</sup> *Id.* at 379.

<sup>79</sup> *Id.* at 382.

<sup>80</sup> *Id.* at 384.

<sup>81</sup> *Id.*

that certain qualified executives (including plaintiff) were entitled to share in the profits of the company "if they were employed by the company at the end of the fiscal year [the first Sunday in February]."<sup>82</sup>

Defendant eventually included the bonus plan in an "Executive Group Manual" dated September 1, 1973. This manual did not include the requirement that an executive must be employed at the end of the fiscal year to be eligible for that year's bonus. However, on June 19, 1974, defendant distributed a written rule specifically stating that "[b]onus payments shall not be made to any person not employed at the end of the fiscal year."<sup>83</sup>

On December 27, 1974, Defendant terminated plaintiff due to inadequate performance. While defendant did not pay plaintiff a bonus for fiscal year 1974-1975, it did provide plaintiff eight weeks severance pay.<sup>84</sup> Plaintiff brought suit against defendant to recover his bonus for fiscal year 1974-1975. The trial court found plaintiff to be an employee of defendant on February 22, 1975 (the end of defendant's fiscal year 1974-1975) and, thus, entitled to the bonus.<sup>85</sup>

The Wisconsin Supreme Court disagreed. According to the Court, "[e]mployment means the performance of services or occupation."<sup>86</sup> The Court went on to explain that:

Compton's employment with Shopko terminated with his discharge on December 27, 1974. It is not argued that this discharge was not for good cause. He performed no services for Shopko after that date, was free to seek other employment the following day, and in fact began working for another company two or three weeks after his termination. The fact that he received severance pay did not extend his employment and he was not employed by Shopko as of February 22, 1975.<sup>87</sup>

The Court found the bonus plan to be a unilateral contract which could be accepted by plaintiff's performance. Nevertheless, the Court held that no binding unilateral contract was formed because: "The formation of a binding [unilateral] contract under which the employer would be obligated to deliver the benefits under the terms of the plan occurs only upon the employee's completion of the required service. Since Compton did not perform services and was not employed until the end of the fiscal year, February 22, 1975 [as required by the plan], Shopko was not obligated to pay him a bonus for the 1974-1975 fiscal year."<sup>88</sup> With regard to unilateral contracts, the Supreme Court of Wisconsin also noted that "[n]otice of acceptance of the offer is not necessary; performance constitutes acceptance, and intent to accept is inferred from performance of the act."

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<sup>82</sup> *Compton v. Shopko Stores, Inc.*, 287 N.W.2d 720, 721-22 (Wis. 1980).

<sup>83</sup> *Id.* at 722.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 723.

<sup>86</sup> *Id.* at 724.

<sup>87</sup> *Id.* at 725.

<sup>88</sup> *Id.* at 726 (citations omitted).

**K. Maryland - - Case not enforcing bonus promise, and rejecting Vanegas reasoning concerning “consideration.”**

In *Windesheim v. Verizon Network Integration Corporation*, plaintiff claimed that the defendant employer failed to pay him a bonus due under an incentive plan. The United States District Court for the District of Maryland granted summary judgment in favor of the defendant, refusing to award the alleged bonus.

More specifically, in *Windesheim*, plaintiff became an employee of defendant through a series of corporate mergers,<sup>89</sup> and worked in a division called the Enterprise Business Group (“EBG”). The incentive plan at issue reserved the right of the EBG to pay or not pay the incentives contained therein in its “sole” and “unlimited” discretion.<sup>90</sup> In addition, plaintiff executed an acknowledgment upon receipt of the incentive plan that provided:

I understand and agree that my base salary is my agreed upon rate of pay, wage, or required compensation. Any other payment is discretionary. I understand and agree that neither this Plan nor any other document or statement, establishes or constitutes an agreement by Bell Atlantic to pay incentive awards or other compensation.<sup>91</sup>

Plaintiff’s claim for unpaid bonus stemmed from a July 1999 Sales Promotion Incentive Plan (“July SPIFF”) which offered a bonus for each sale of certain “services with contract signed between July 1, 1999 and September 30, 1999.”<sup>92</sup> The incentive plan defined the term “sale” as “any single sales effort documented by an executed contract or Application for Service, including, but not limited, to, the following criteria . . . single or multi-product sale for one or more customer applications, locations and/or subsidiaries sold through a single, concerted sales effort....”<sup>93</sup>

Plaintiff claimed he was entitled to more bonus than he actually received due to a sale to CAIS on September 30, 1999. Defendant modified the July 1999 SPIFF on September 23, 1999 - - during the time the Corporate Account Managers were finalizing the sale which culminated in an agreement that CAIS would purchase 1,350 internet access lines. The modification limited the “bonus payout on sales of multiple lines/services to a single customer . . . to 5 lines/services per customer.”<sup>94</sup> By September, 30, 2000, CAIS had installed only 30 of the 450 lines to which it

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<sup>89</sup> *Windesheim v. Verizon Network Integration Corp.*, 212 F.Supp.2d 456, 458-59 (D.Md. 2002) (memorandum opinion).

<sup>90</sup> *Id.* at 460 (“The Incentive Plan states: Bell Atlantic and/or Enterprise Sales reserve the exclusive right with unlimited discretion . . . to reduce, modify, recover or withhold incentive pay pursuant to changes in business conditions, individual performance or any other reason management deems appropriate in their sole discretion.”) (“The Company reserves the right, in its sole discretion, to amend, change or cancel Bonus Programs and to reduce, modify or withhold Bonus Program Incentives pursuant to changes in business conditions, individual performance or management modification.”).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 461.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

had committed for year 2000. As of October 2001, CAIS installed only six additional lines prior to filing for bankruptcy.

Plaintiff filed suit against defendant seeking over \$670,000 in bonuses allegedly due to him related to the CAIS sale (presumably seeking to recover \$500 per each of the 1,350 lines CAIS committed to install). The Court granted defendant's motion for summary judgment based both on the terms of the incentive plan, and on Maryland law. With regard to Maryland law, the Court stated:

Longstanding Maryland legal principles recognize that no enforceable contractual obligation is created when an employer offers employees a bonus for doing that which an employee is already required to do pursuant to the terms of the engagement of employment. *Johnson v. Schenley Distillers Corp.*, 181 Md. 31, 28 A.2d 606 (Md. 1942) (collecting cases). The rationale for the rule is that there is no consideration -- critical to contract formation -- to support the employer's promise of additional compensation. Thus, the employer's promise is "illusory" in the sense that it is not legally enforceable in an action for breach of contract.<sup>95</sup>

With regard to the incentive plan, the Court stated:

[T]he Incentive Plan unmistakably reserves to the Business Enterprise Group the "unlimited discretion . . . to reduce, modify, recover or withhold incentive pay pursuant to changes in business conditions, individual performance or any other reason management deems appropriate in their sole discretion." Accordingly, by its very terms, as informed by the Incentive Plan, the July SPIFF was not an offer to sales team members to enter into a binding contract. Rather, under the Incentive Plan, the Enterprise Business Group has expressly set forth what *Johnson, supra*, has already adopted as Maryland law.<sup>96</sup>

This Court's decision relied, in part, on certain Maryland law contrary to the *Vanegas* opinion as it concerns the "consideration" necessary for a binding contract. However, this *Windesheim* opinion did not specifically discuss the unilateral contract doctrine. Moreover, unlike the *Vanegas* decision, this *Windesheim* opinion also involved a very detailed, written bonus plan that contained express disclaimers regarding any obligation to pay incentive bonuses, and also reserved a good deal of discretion to the employer with regard to such incentive bonuses. The "promise" in *Vanegas*, as reported by the Texas Supreme Court, did not involve any such disclaimers or discretion reserved to the employer.<sup>97</sup>

#### IV. CONCLUSION.

Is a "promise made *always* a promise kept"? As with many matters in the law, it depends. The state and federal reporters are replete with cases interpreting contracts, and the enforceability of both oral and written promises.

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<sup>95</sup> *Id.* at 462.

<sup>96</sup> *Id.* at 463.

<sup>97</sup> *Id.* at 464.

Nevertheless, in *Vanegas*, the Texas Supreme Court did reject a company's argument that a promise to pay its at-will employees 5% of the proceeds of a company sale or merger in the future is necessarily "illusory" - - because the company could terminate the employees at any time. The Court held that AES's oral promise to pay certain at-will employees this amount was a unilateral contract under Texas law, which became enforceable upon those employees' full performance. In so doing, the Court most notably distinguished prior (often cited) Texas cases involving non-competition agreements and the doctrine of "bilateral" contracts. As a result, the Court not only addressed the "consideration" given by an employee who stays with the company, but also added clarity to the concept of "illusory promises" under Texas law.

The Texas Supreme Court's opinion in *Vanegas* did not discuss various facts and legal theories often involved in such scenarios, which may have affected its decision. However, the decision does send a message to companies to be careful what they offer their at-will Texas employees (orally or in writing), as it may be considered a unilateral contract that can be accepted by the employees' continued performance of the same work they have been performing for years. This may be the case - - even though both the company and its employees may terminate the relationship at any time.

Accordingly, companies should take precautions to particularly define the terms and conditions of any such "promises" concerning future payments. For example, companies should consider specifically defining the nature of the particular payment or "bonus," and how it is to be calculated - - as well as the discretion, disclaimers and "obligations" involved with regard to such a payment. As a further precaution, companies should consider documenting any such "promises" in writing, and including appropriate terms regarding compensation and "bonuses" in company policy manuals - - all of which to be acknowledged and executed by their employees.

If you would like a copy of the *Vanegas* opinion, or to discuss the issues raised in further detail, please do not hesitate to call one of the attorneys at Clouse Dunn Khoshbin LLP.

**THIS ARTICLE IS FOR INFORMATIONAL PURPOSES ONLY. IT DOES NOT, AND IS NOT INTENDED TO, CONSTITUTE LEGAL ADVICE. EACH CASE DEPENDS ON ITS FACTS, AND LAWS SOMETIMES CHANGE OVER TIME. FOR LEGAL ADVICE, CONTACT LEGAL COUNSEL LICENSED IN YOUR STATE.**

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