Retracting an employment offer: What recourse is there?

By Deanna L. Maxfield

In our practice, we primarily represent clients who have been wrongfully terminated. But recently we have begun to see a different type of case in which an employee receives a firm job offer and gives notice to their current employer, only to have the job they are preparing to start evaporate.

The Bay Area recruiting climate is aggressive, and not always to the advantage of employees. After all, this is the same environment that spawned the "Techtopus" scheme, in which Adobe, Apple, Google, Intel, Intuit, Pixar, Lucasfilm, and eBay colluded to deflate employees' pay by "fixing" wages and agreeing not to recruit employees from each other's companies.

In the race to acquire the best candidate, it seems that it is becoming increasingly common for companies to decide to make a hire without fully thinking it through in advance, only to retract after reconsidering the business implications. However, the retraction often does not come early enough for the new hire, who has already quit their existing job in anticipation of a new one. And as is also typical in the Bay Area, that employee – having quit – is not welcome back at the old employer.

In short, a once-gainfully employed worker, who thought they were about to take a step up, is now out of a job. And they are likely to remain that way, given that they don't have a very good answer to the typical interview question: Why did you leave your last employer? After all, hanging in the air after the phrase "I left for something better" is, "And I might do the same to you."

And although these cases do not involve an individual losing a job they already had (sometimes for a long period of time) for an illegal reason, in some ways they are even worse than a typical wrongful termination. The defendant employer, in hastily snatching a candidate out of the job pool before anyone else can and then throwing them back, has caused that candidate to sever an employment relationship with someone else, thereby pushing all of the risk of the hiring process onto the candidate.

So what is the job-seeker's recourse? Of course, if the job offer was retracted on the basis of a protected characteristic, then the job seeker can state claims under state and federal anti-discrimination law. And if the job seeker relocated for the new job, then a cause of action could lie for violation of California Labor Code § 970 (assuming there was some sort of willful misrepresentation at the time of the offer).

But what if neither set of circumstances applies? A breach of contract action may work in some situations, but as is discussed below, there are various legal difficulties with this claim on facts such as these.

Breach of contract challenges

At first glance, these actions might appear to be best brought as breach of contract cases. After all, the employer made a job offer, the employee accepted, and then the employer breached. Breach of contract, right? In the employment context, it's not so simple.

Once the employment has actually begun, there is a contract between the employee and the employer. The employer has offered employment on a certain set of terms (work schedule, rate of pay, etc.), and by continuing to render services to the employer, the employee is accepting those terms. While California courts do not use the terminology as much as they used to, this is in essence a unilateral contract, which the employee has accepted by performance. (See *Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 10 n. 4.)

If a party is seeking to enforce a contract before any performance has begun (in other words, is asserting the existence of a bilateral contract), "[t]he doctrine of mutuality of obligation requires that the promises on each side be binding obligations in order to be consideration for each other." (1 Witkin, Summary 10th (2005) Contracts, § 225, pp. 260-261.)

So when the employee has not started working yet, where is the consideration? California Civil Code § 1605 describes consideration:

> Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.

As employers are quick to mention in these cases, California's presumption of at-will employment (often confirmed in

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writing by the employer) means that either party can terminate the employment relationship for any reason that is not prohibited by law – seeming to preclude either side from being bound to any obligations under the purported employment contract. Of course, the employer has presumably agreed to pay the employee wages at a particular rate, *once the employee starts working*, but there is no obligation to pay if the employee never shows up to work.

And finally, while a job seeker who has resigned from their previous employer has certainly suffered a prejudice, that is not consideration within the definition provided by the Civil Code. Obviously, it was the offer which caused the employee to quit, not the other way around. The *purpose* of the job offer/employment agreement was not, from the prospective employer's perspective, to have the job seeker resign from their previous employment. Therefore, that resignation was not an "inducement to the promisor [the employer]."

Thus, employers' usual emphasis on the at-will nature of most employment agreements in California is correct, but for the wrong reasons: Rather than giving an employer a "get out of jail free" card to breach a contract with impunity, it means there really was no contract in the first place. This simply means that a breach of contract cause of action often doesn't fit the facts of these job-offer-retraction cases.

Expectancy damages, which are usually the primary measure of damages for breach of contract, are also not a very good fit for these types of cases. (See 1 Witkin, Summary 10th Contracts § 869 (2005).) Expectancy damages attempt to provide the injured party with "as nearly as possible the equivalent of the benefits of performance." (*Id.*) But here, the "benefits of performance" would have been a job with the prospective employer, for an undetermined amount of time. Because of the at-will presumption, it is difficult to predict how long the new employee would have lasted at the new job, and of course the defendant employer will always argue that the employee would have been fired immediately upon starting.

The more appropriate measure of damages for job-offer-retraction cases is reliance – that is, what the job seeker lost as a result of relying on the promise of employment, which in most cases is wages from the job they left. The job candidate has at least *some* job history with the former employer, so it is more feasible to estimate their expected longevity in that job. While, as will be discussed below, such reliance damages *can* be awarded in breach of contract cases, they fit more naturally with a cause of action for promissory estoppel.

Promissory estoppel and the implied covenant

For these reasons, our firm has pursued these cases by focusing on a cause of action for promissory estoppel. While there is not an abundance of precedent for this approach, California law does support it. In *Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal.App.3d 61, the plaintiff was a stock analyst employed and living in California, who was contacted by an investment banking and stock brokerage firm in Tennessee about a job opening. (*Id.* at 64.) The plaintiff traveled to the defendant employer's offices in Memphis for an interview, during which the employer offered the plaintiff a job with a specific salary and expected minimum bonus. (*Id.* at 64-65.) About two weeks later, the plaintiff telephoned the defendant company and accepted the offer. (*Id.* at 65.)

The plaintiff quit his job in California and flew back to Memphis, where he set up his new office, filled out insurance forms with his new employer, and signed a lease on an apartment. (*Id.*) More than two weeks after he had accepted the position, while the plaintiff was back in California packing up his belongings, the defendant employer informed him by telephone that he had been "separated" from employment before he began working. (*Id.*)

The court declined to hold that there was an implied-in-fact promise that the plaintiff's employment could only be terminated "for cause." Therefore, the plaintiff could not pursue a breach of contract cause of action, as the employment contract could be terminated at any time. However, the court did find that the employer may have breached the implied covenant of good faith and fair dealing:

> [I]mplicit in such an employment agreement, and certainly implicit within the implied covenant of good faith and fair dealing, is the understanding that an employer cannot expect a new employee to sever his former employment and move across the country only to be terminated before the ink dries on his new lease, or before he has had a chance to demonstrate his ability to satisfy the requirements of the job.

(*Id.* at 67.)

More importantly, the Court of Appeal further held that *"the employer's conduct here is governed by the doctrine of promissory estoppel."* (*Id.*, emphasis added.) In

so holding, the court found the reasoning from a decision by the Minnesota Supreme Court to be persuasive:

> The Supreme Court of Minnesota applied the doctrine in a similar situation in *Grouse v. Group Health Plan, Inc.* (Minn. 1981) 306 N.W.2d 114. In *Grouse,* the plaintiff left his employment after accepting a new offer of employment from defendant. When defendant revoked its offer before plaintiff commenced work on the new job, plaintiff sued for damages. Defendant contended plaintiff was not entitled to recover because the agreement was terminable at will. The Minnesota Supreme Court applied promissory estoppel, concluding "that under the facts of this case the [plaintiff] had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of [defendant] once he was on the job." [citation] We conclude the same reasoning applies here.

(*Id.*)

The court in *Grouse* relied on promissory estoppel precisely because it found that no employment contract existed since the employment never actually commenced. Like California, Minnesota is an "at-will employment" state. The court reasoned, "On these facts no contract exists because due to the bilateral power of termination neither party is committed to performance and the promises are, therefore, illusory." (*Grouse v. Group Health Plan, Inc.* (Minn. 1981) 306 N.W.2d 114, 116.)

The Minnesota Supreme Court (again, in a case relied upon by the California appellate court in *Sheppard*) further held:

> [U]nder the facts of this case the appellant had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of respondent once he was on the job. He was not only denied that opportunity but resigned the position he already held in reliance on the firm offer which respondent tendered him. Since, as respondent points out, the prospective employment might have been terminated at any time, the measure of damages is not so much what he would have earned from respondent as what he lost in quitting the job he held and in declining at least one other offer of employment elsewhere.

(*Id.*)

The U.S. District Court for the Northern District of California has followed *Sheppard*. In *Gilberd v. Dean Witter Reynolds, Inc*. (N.D. Cal. 1992) 1992 WL 880089, the plaintiff was hired by Dean Witter on June 7, 1990, and gave notice of his resignation to his then-current employer on June 11, 1990. On June 27, 1990, prior to performing any services for Dean Witter, he was informed that his new position had been eliminated in a reorganization. (*Id*. at *1.) The court granted summary judgment to the defendant employer on the plaintiff's breach of contract cause of action, on the grounds that the contract was for at-will employment, the at-will term of the contract was effective from the moment the plaintiff accepted the job offer on June 7, and therefore the employment could be terminated at any time, even before it started. (*Id.* at *3.)

However, the court *denied* the defendant's motion for summary judgment on causes of action for breach of the implied covenant of good faith and fair dealing as well as promissory estoppel. The court recognized that even when there is no breach of contract, "[t]he implied covenant ... remains available as a cause of action, even in the face of an at-will employment contract, where a plaintiff alleges that conduct other than his discharge violated the covenant." (*Id*. at *3, quoting *Comeaux v. Brown & Williamson Tobacco Co.* (9th Cir. 1990) 915 F.2d 1264, 1272.) Therefore, drawing on *Sheppard*, the court in *Gilberd* held, "there is at least a triable issue of fact as to whether defendant breached the implied covenant of good faith and fair dealing when it represented to plaintiff that a job existed and allowed him to quit his prior job based upon that representation." (*Id.* at *4.)

The court also recognized the facts in *Gilberd* as analogous to *Sheppard* with respect to the promissory estoppel cause of action and held:

> [F]acts plainly exist upon which a jury could determine that defendant was estopped from terminating plaintiff. Whether defendant should reasonably have expected plaintiff to change his position in reliance upon defendant's representation that a job awaited him at Dean Witter, and whether plaintiff's reliance upon that promise was reasonable, are questions for a jury.

(*Id.*)

Another California Court of Appeal case, *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, was brought on similar facts and had a similar result, although the appellate court opinion focused primarily on damages. The plaintiff resigned from his job as the general manager of a piano store after accepting a job as a sales manager with the defendant employer. (*Id.* at 689.) After his resignation but before the new employment commenced, the defendant employer withdrew the job offer. (*Id.* at 689-690.) The California Court of Appeal held:

> [A] plaintiff such as Toscano, who relinquished his job in reliance on an unfulfilled promise of employment, may on an appropriate showing recover the lost wages he would have expected to earn from his former employer but for the defendant's promise. Under these circumstances, such a damage measure is in keeping with the equitable nature of promissory estoppel.

(*Id.* at 693.)

Pleading the claims

Of course, a not-quite-employee seeking to hold an employer accountable for withdrawing a job offer must still prove all of the elements of promissory estoppel, namely "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Aceves v. U.S. Bank, N.A.* (2011) 192 Cal. App.4th 218, 225.)

This means that it is important to consider the specificity of the job offer. A communication from a potential employer that says, "We really like you and think you're a strong candidate," without more, is unlikely to support a promissory estoppel claim. "You're hired! We'll follow up with specifics" is better, and even better than that is a communication that includes a start date, a rate of pay, and benefits information. The more specific the job offer, the more "clear and unambiguous" the promise, and the more reasonable and foreseeable the reliance.

In most cases, a job seeker who incurred damages after a job offer was withdrawn can also plead an alternative cause of action for breach of the implied

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covenant of good faith and fair dealing, on the basis of conduct other than the termination, i.e., representing that there was a job for the plaintiff and allowing (or even encouraging) a plaintiff to quit their previous job as a result of that representation.

Of course, unlike most wrongful termination cases, these contract-type claims do not provide an opportunity to make a claim for emotional distress damages. However, many job candidates who are sought-after enough to be placed in this predicament are six- or seven-figure earners, meaning that the wage losses can be significant. And one advantage that promissory estoppel cases have over many wrongful termination cases is that promissory estoppel cases do not require a showing of motive on the part of the employer. While the reliance must have been foreseeable, the employer need not have had any unlawful motive in either making or breaking the promise.

If there *is* evidence that the employer did not intend to follow through on the job offer when it was made, then a cause of action for promissory fraud may also lie. As the California Supreme Court wrote in *Lazar v. Superior Court* (1996) 12 Cal.4th 631, "[a] promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention there is an implied misrepresentation of fact that may be actionable fraud." (*Id.* at 638.) Thus, for example, where there is evidence that one company is trying to "tie up" a competitor's "best and brightest," without actually intending to hire them, such a promissory fraud claim may lie. In addition to a knowing misrepresentation regarding the intent to perform, a promissory fraud plaintiff must also allege the employer's intent to induce reliance, justifiable reliance by the plaintiff, and resulting damage. (*Id.*) Those, elements, of course, are not difficult to establish.

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Alleging breach of contract

In some cases, it may be also worthwhile to plead breach of contract. While, as explained above, there are usually significant difficulties in alleging that termination of employment before it began breached a contract for at-will employment, California law has been held to supply a legal basis for the cause of action in limited circumstances.

In *Comeaux v. Brown & Williamson Tobacco Co.* (9th Cir. 1990) 915 F. 2d 1264, the plaintiff was offered a job, contingent on a physical examination and an agreement that the plaintiff would move his residence to within five minutes of work as soon as possible. (*Id.* at 1266.) The plaintiff passed the physical exam, gave notice to his prior employer, and moved with his wife from San Jose, California, to Fremont, California. The defendant employer informed the plaintiff during this time that his start date was being delayed, but told him that there was no problem with his employment status. (*Id.*) Without notifying the plaintiff in advance, the employer performed a credit check on the plaintiff and ultimately "rejected his employment" on the basis of his poor credit history. (*Id.* at 1266-1267.)

The court in *Comeaux* acknowledged that the plaintiff's anticipated employment was at-will, per the following language in the employment application he had signed:

> It is agreed and understood that by assigning me work with such salary as may be incident thereto, that this application shall constitute the terms of the contract of employment and that the relation between me and the Corporation shall be a hiring at will, terminable at any time by either of the parties thereto.

(*Id.* at 1269-1270.)

However, the court interpreted this language, and specifically the phrase "by assigning me work," to mean that the at-will term of the contract would not come into effect until the defendant assigned work to the plaintiff, which it never did. (*Id.* at 1270.)

The court went on to hold that in a phone conversation with the plaintiff, a company representative had set forth the terms of the contract that would apply before work was assigned:

> The company promised to assign [the plaintiff] work and salary on or about August 18, 1987, if he met the following conditions: (1) taking a physical examination; (2) resigning his then-current job with at least one week's notice; and (3) moving his place of residence to Fremont "as soon as possible."

(*Id.*)

Because the plaintiff had met all of these contingencies, the company breached the contract by refusing to assign the plaintiff work. (*Id.* at 1271.) In the end, the court in *Comeaux* reached the same conclusion as in *Sheppard* and *Toscano* and ruled that the plaintiff was entitled to reliance damages, albeit under a breach of contract theory. (*Id.* at 1272.)

Clearly, the result in *Comeaux* arose from very specific language in the employment agreement. However, those seeking to recover reliance damages for the withdrawal or cancellation of a job offer before employment begins should carefully review the employment agreement, written, oral, or both, to see if any such language provides an alternative theory of liability.

In sum, while it can require significant analysis and trial-and-error to determine the correct legal approach, California courts have demonstrated that they are sympathetic to the job seeker who detrimentally relies on a firm job offer that, through no fault of the job seeker's, never materializes. ■

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