Perna
Employment Law

QUESTION I

On May 5, 1985, McClendon Construction Co., Inc. hired Perry Jones as a salesperson and distributor of heavy construction equipment. Perry came to McClendon with a wealth of experience in the construction equipment industry and a variety of contacts in the southwestern part of the United States. Perry had previously worked for a number of other companies in the construction business and had at the time of his hire, over thirty (30) years experience in the industry. At the time that he was hired in 1985 by McClendon, Perry was fifty-nine (59) years old.

Perry was a particularly attractive candidate for the McClendon position because of his wealth of experience in the industry and because of his contacts in the southwest. Perry was flattered by McClendon's offered compensation package and he decided to leave his position with a competitor firm located in the New York metropolitan area. Perry accepted McClendon's offer of employment and moved to Dallas, Texas where he became the head of McClendon's southwest regional sales force (which numbered approximately twenty-five (25) persons excluding Perry).

The negotiations which led to Perry accepting the McClendon job were relatively quick and straight forward. For Perry the deal was completely economic. Although he was well off financially, Perry feared his impending retirement because he had not adequately prepared himself. This new position with McClendon offered him some financial security because of the potential for very large yearly compensation which was tied to the gross sales of the entire southwest sales office. McClendon also had a very lucrative pension program for highly compensated executives for which Perry qualified.

In his discussions with McClendon, Perry was very forthright about his concern about retirement income. John Dawes, the President of McClendon and the person with whom negotiations were conducted, was equally honest with Perry when he told him, "Perry, I believe that your retirement future will be economically rosy if you come to work for McClendon. Remember,we have a great pension plan and it will vest for you in five short years."

Perry entered into the following written "Employee Compensation Agreement" with McClendon:

Employee Compensation Agreement

THIS AGREEMENT is made as of the fifth day of May, 1985, between Perry N. Jones ("Employee") and McClendon COnstruction CO. Inc., ("Company").

AND NOW THEREFORE, the parties, in consideration of the mutual promises contained in this Agreement and intending to be bound under this Agreement AGREE as follows:

1. Company agrees to hire the Employee and the Employee accepts employment with the Company as Sales Manager for its southwestern sales region;

2. Company agrees to compensate the Employee as follows:

a) Employee shall be paid a base salary of Ninety-Five Thousand Dollars ($95,~~.~) per year;

b) In addition to the base salary, the Employee shall be paid annual commission of one half of one percent (.~5%) of the gross annual sales credited to the southwest region.

Employee:

Perry Jones

Company:

McClendon Construction Co., Inc.

by its President, John M. Dawes

John M. Dawes, President

Perry signed the Agreement, moved to Dallas and began to work in the new position. Everything went well initially and both Perry and the office flourished. In fact, Perry became the most highly compensated individual in the national sales division as a direct result of his lucrative commission deal. During the first three years of the job Perry received very satisfactory performance reviews and his office was rated first in the country in terms of gross sales. Needless to say, Perry's commissions were substantial and he was on his way to fulfilling his economic goals for retirement.

However, things began to sour in Perry's fourth year of employment. The gross sales of his office began to falter in part because of the severe downturn in the real estate market in the southwest. The need for heavy construction equipment was not very high in a real estate market punctuated with foreclosures and bankruptcies. Faced with declining revenues, Perry's immediate supervisor was concerned about the fate of Perry's office in an economically depressed area of the country. Given the office's poor performance, he began to have doubts about Perry as the head of the office especially in light of the changes in Perry's personal life.

Despite the business downturn, Perry's personal life away from work was bright. A confirmed bachelor for all his life, Perry announced plans to marry and hopefully raise a child or two. His friends and co-workers were happy for him even if they believed that his plans to raise a family were a bit optimistic for a man in his early sixties.

In an ironic twist on the usual ethic found in corporate life, the Company was quite pleased with Perry's bachelor lifestyle because it fit well the heavy drinking, heavy party, heavy macho environment of the construction building trades. The image of Perry changing diapers sent shivers throughout Corporate headquarters. Nothing was ever said to Perry about his decision to marry (in fact, the company gave him a lavish engagement present) but he sensed that something was wrong. He just assumed that the front office was concerned about the poor economic performance of his office.

Despite the bad economic performance of his office, Perry was optimistic because he was on the verge of closing a major deal with a Latin American country that would have vaulted the southwest region back to the top of the regional sales offices. It was the biggest deal of his life and there was a significant possibility of other hefty sales over the course of the next five years.

Abruptly and without advance notice, on January 5, 1990, four months before his fifth anniversary at McClendon, Perry was
terminated from his job. Perry received a letter from John Dawes which said that the company was

reluctantly terminating him due to external economic factors which resulted in the poor performance of the southwest regional sales office. Needless to say, Perry was irate and believed that he was being treated unfairly. He immediately sought the advice of an attorney.

Subpart A

Assume that you are the chief-in—house employment law attorney at McClendon. Immediately following Perry's termination you receive a call from John Dawes who tells you that he believes that Perry will probably pursue whatever legal remedies are available to him. Dawes wants to know whether the company has any exposure and if so, how much? Analyze the company's position in this case and determine:

(1) The available claims which you believe Perry could assert and the potential remedies of each;

(2) The available defenses that you would raise to each; and

(3) Which side is likely to win each claim and why.

In answering, you should assume that the case is governed by the law of the mythical jurisdiction of Ames. Ames has no statute addressing the termination of employees from their jobs and the Supreme Court of Ames has not directly addressed the rights of terminated employees under the common law of Ames. Therefore, in analyzing this problem you should feel free to use the common law as it is currently being developed in the United States.

Without regard to how you answered Subpart A above, assume that Perry decided to immediately seek other employment by answering an ad for a salesperson position with Acme Construction, a major competitor of McClendon. Jim Marshall, the President of Acme had never met Perry but was aware of who he was and his experience in the business. He was particularly interested in Perry's sales contacts, especially those in Latin America. Marshall decided to interview Perry and liked what he saw in the interview.

Marshall was inclined to hire Perry on the strength of the interview alone but decided to speak with other members of his management committee before actually making the offer. The members of the committee were skeptical about Perry and particularly concerned because of his abrupt termination from McClendon. They felt that there could well be more of a "story" about Perry than met the eye. In light of

Perry’s long employment in the construction equipment industry, the committee was convinced that there was a long “track record” that could be verified. The committee recommended that a full background and reference check would be appropriate.

Marshall felt that a full background and reference check was unnecessary under the circumstances and decided on a much more limited reference check only. Marshall then put together a plan to “check-out” Perry. He decided that he would begin by calling John Dawes at McClendon. He also decided that he would call a number of major buyers of construction equipment to get their insights about Perry from a customer perspective.

Marshall knew Dawes personally so it was not difficult to approach him about Perry during his tenure at McClendon. When asked about Perry, Dawes revealed the following:

> “I never worked directly with Perry while he was employed here but my impression is that he was highly regarded during his first few years here at McClendon. However, something seemed to go wrong after a few years. His office was not as productive as it had been. Some people in our organization -felt that Perry lost his zeal to sell. I think that there were some discussions about life style changes that might have interfered with his management of the office. You know, there are some old rumors around about a drinking problem. Anyway, that is about all I can tell you about Perry.”

After his call to Dawes, Marshall decided that he had heard enough and that additional calls were not necessary. Marshall had serious concerns about an aging single man with a drinking problem -- especially one who was having “life style” difficulties. Marshall concluded (obviously incorrectly) that the chances were high that Perry was gay. Marshall immediately notified Perry that he had not been selected for the job.

Subpart B

After being notified that he was not selected for the job, Perry immediately suspected that McClendon was responsible and that he was being “black listed” from the industry. Assume that Perry consults you about the possibility of suing over McClendon’s failure to hire him. Analyze his position in this case and determine:

> (1) The available claims which you believe Perry could assert and the potential remedies of each;

(2) The available defenses that could be raised; and

(3) Which side is likely to win each claim and why.

In answering, you should assume that the case is governed by the law of the mythical jurisdiction of Ames. Ames has no statute that specifically addresses the problem. Therefore, in analyzing this problem you should feel free to use the common law as it is currently being developed in the United States.

Subpart C

Without regard as to how you answered the previous two subparts, assume that after his discussion with Dawes, Marshall was inclined to proceed to offer the position to Perry. However, Marshall had some concern that he should conduct a more intensive background check on Perry before proceeding with an offer of employment. Assume that you are counsel for Acme. If Marshall sought your advice concerning whether he should conduct a more thorough background check of Perry before making an offer of employment, how would you advise him and why?