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In a rare decision on compensation issues, the Connecticut Supreme Court has decided that an employee is not required to repay advances of unearned commissions unless there is an express or implied agreement that requires such repayment. The decision in *Ravetto v. Triton Thalassic Technologies, Inc.*, makes clear that Connecticut employers that pay commissions need to carefully review their commission plans and all documents that describe commission to ensure they are sufficiently clear and specific to require an employee to repay advances of commissions that he or she has failed to earn.

East Coast Edition

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Connecticut Employees Can Keep Unearned Commissions Unless Employment Agreement Expressly Requires Repayment of Advances

By George E. O'Brien, Jr. and Stephen P. Rosenberg

In a rare decision on compensation issues, the Connecticut Supreme Court has decided that an employee was not required to repay advances of unearned commissions because his employment agreement did not expressly require such repayment. In *Ravetto v. Triton Thalassic Technologies, Inc.*, 285 Conn. 716 (2008), the court held that merely using the word "advance" or "draw" in an employment agreement is not sufficient to require an employee to repay advances on commissions that the employee failed to earn.

The plaintiff, W. Frederick Ravetto, was a vice-president of sales who earned an annual salary of \$110,000 plus commissions on sales to certain industries. Ravetto's employment agreement with Triton Thalassic Technologies provided him, in addition to his salary, with a draw in each pay period as an advance against his future commissions. In September 2001, Triton notified employees that because of financial difficulties it was unable to make payroll. Some employees resigned but most, including Ravetto, continued working in the hope that the company would become able to pay them. In March 2002, the company furloughed all employees until further notice.

Ravetto sued Triton under Connecticut's state wage statute for unpaid salary plus interest. Triton contended it was entitled to deduct from the amount of salary it owed Ravetto the approximately \$40,000 of commission advances that the company had paid to Ravetto

in excess of the commissions he actually earned. The trial court concluded that the employment agreement did not expressly require Ravetto to repay such advances, so he could keep the \$40,000 and also recover unpaid salary. Triton appealed.

Triton argued that the term "advance" in the employment agreement required Ravetto to repay amounts he had been advanced in excess of the commissions he actually earned. The Connecticut Supreme Court looked to decisions from other states, including California, Georgia, Massachusetts, New York and Wisconsin that had addressed similar issues of contract interpretation. Following the reasoning of courts in those states, the Connecticut court concluded that "the use of terms such as 'advance' or 'draw,' standing alone, is not sufficiently indicative of the parties' intent to obligate the employee to repay the advances."¹ "[B]ecause the employer generally enjoys superior bargaining power in the employment relationship, it is incumbent upon the employer to make any obligation for reimbursement explicit in the employment agreement."²

The court drew an analogy between employment relationships that are commission based, and joint ventures:

[W]hen an employee works for an employer on a commission basis, the employee and employer are engaged in a joint venture.... If an employee were to be required to repay all excess advances when the business

did not produce sufficient commissions to cover the advances, the entire risk of the joint undertaking would be placed on the employee, and such an outcome would be contrary to the nature of the relationship as a joint venture.³

The court thus held that “absent a contractual provision expressly holding [an employee] personally liable for advances, [an employer] must show that [the employee], by his [or her] conduct, exhibited an intent to be held personally liable for the repayment of the advances.”⁴

Justice Peter Zarella dissented. He would have required the trial court to consider extrinsic evidence of the parties’ negotiations and employment relationship to determine the meaning of the word “advance” in the employment agreement. Justice Zarella disagreed with the majority’s decision to adopt a rule that requires evidence of an express or implied agreement by the employee to repay advances on unearned commissions. Instead, he would rely on traditional contract principles that “require the employer to prove by a fair preponderance of the evidence that the parties contemplated repayment.”⁵ Justice Zarella also disagreed that an employer necessarily possesses superior bargaining power in all its employment relationships, noting that Ravetto was a highly compensated professional whereas Triton was a start-up company with limited resources.

The majority opinion in *Ravetto* makes clear that Connecticut employers that pay commissions need to carefully review their commission plans and all documents that relate to commissions with these points in mind:

- Any commission arrangement should be thoroughly and accurately described in writing. In a dispute about payment, Connecticut is likely to construe any ambiguity about

the commission system against the employer.

- Whether the rules governing commissions are described in a contract or separate commission plan document, each sales employee must sign the document indicating his or her agreement to its terms. The employer needs to obtain and preserve such signed acknowledgments systematically.
- Words like “advance” or “draw” will not by themselves create an obligation for the employee to repay unearned commissions.
- Where the employee will be obligated to repay unearned commissions, or have them credited against future earnings, this must be explained in crystal clear language in the governing document. That language must be crafted to ensure that the employee’s signature clearly constitutes his or her agreement to this obligation.
- Both the timing of periodic commission reconciliations and the procedure for settling commissions upon the end of employment should be specifically covered in the document that the employee signs.
- Because of the complexities of Connecticut Department of Labor regulations that govern the timing of periodic commission reconciliations and the form of commission agreements, employers would be well advised to consult with legal counsel when implementing or amending a commission arrangement.

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¹ *Ravetto*, 285 Conn. at 738.
² *Id.* at 740.
³ *Id.* at 741 (internal citations omitted).
⁴ *Id.* at 741-42.
⁵ *Id.* at 754.