



TEXAS SUPREME COURT RULES CONTRACTUAL SILENCE IS GOLDEN FOR A TERMINATED COMMISSION SALESMAN

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The Texas Supreme Court ruled on May 20, 2022 that an employment contract containing no exceptions to an employer's obligation to pay commissions allowed a terminated at will employee to collect more than \$1.5M in commissions on sales made following the termination of his employment. This is a wake-up call for any employer paying employees commissions.

Here Are The Facts. Baylor Miraca Genetics Laboratories, LLC (BMGL) hired Thomas Perthuis (Perthuis) as the VP of Sales and Marketing at an annual base salary, plus a commission of "3.5% of your net sales." The employment agreement specified that Perthuis was an at-will employee but did not define net sales or place any parameters on the employer's obligation to pay commissions.

VP of Sales Fired Shortly After Big Sale, What About Commissions? In January 2017, Perthuis successfully negotiated a lucrative contractual amendment with a customer. Perthuis advised BMGL of his success on a Thursday. BMGL fired Perthuis the following Monday, executed the contractual amendment on Tuesday and refused to pay Perthuis commissions on any sales finalized after his termination. In the ensuing litigation, Perthuis asserted that he was the procuring cause of sales made by BMGL to customers he brought to it and was entitled to commissions on those sales after his termination. The Harris County trial court accepted Perthuis' theory of recovery and awarded him the damages found by the jury. The Court of Appeals reversed the judgment of the trial court, holding that since no future sales had occurred at the time he was terminated Perthuis had not earned a commission on them.

When are Commissions Owed Post-Termination? The Texas Supreme Court reversed the Court of Appeals, holding that Perthuis' employment agreement was unambiguous and lacked any language addressing exceptions to the employer's duty to pay commissions to him. Consequently, the court held that the procuring cause doctrine, traditionally used in real estate brokerage transactions, is the default rule for a contract that does not place any conditions on an employer's duty to pay commissions. Under that

doctrine a broker is entitled to a commission when a "purchaser is produced through the broker's efforts, ready, willing and able to buy the property upon the contracted terms." The Texas Supreme Court held that employers are free to place any conditions they wish on their duty to pay commissions to employees but that the legal consequence of silence is that the default rule applies, allowing a terminated employee to collect commissions on sales made after the termination of employment.

Employers Beware, Commissions Can be Owed Post Employment. Most employers believe that they have no obligation to pay commissions on sales finalized after the employment relationship ends. Some employers place that condition in a written contract. Others have oral contracts to that effect or rely upon the custom of their business or their industry to not pay commissions on post termination sales. This decision makes it imperative for employers to spell out all terms of commission agreements in writing. Otherwise a commission agreement may turn into the equivalent of a post-employment annuity for the employee.

If you have any questions or would like to discuss further, please contact our [Labor, Employment and Benefits team](#).

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