IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL J. GALLAGHER	:	CIVIL ACTION
v.	:	
MEDICAL RESEARCH CONSULTANTS, LLP	:	NO. 04-236

MEMORANDUM

Dalzell, J. October 1, 2004

Defendant Medical Research Consultants ("MRC") terminated plaintiff Michael Gallagher's job four months after he began working as its sales representative. Gallagher here sues MRC for its breach of an alleged employment contract, or, in the alternative, for inducing him to rely detrimentally on the promise of employment.

We now face MRC's motion for summary judgment and Gallagher's motion for partial summary judgment on his breach-of-contract claim. Both of these motions raise consequential choice-of-law issues. For the reasons that follow, we shall deny Gallagher's motion and grant MRC's.

Factual and Procedural Background

Defendant MRC is a limited liability partnership existing under the laws of Texas, with its principal place of business in Houston. Def.'s Mem. of Law in Support of Mot. for Summ. Judg. ("Def.'s Mem.") at 9. MRC describes itself as a "strategic litigation partner to clients in the legal, medical, pharmaceutical, insurance and manufacturing industries." Medical

Research Consultants, Homepage, at http://69.24.68.185/ (last visited September 28, 2004). MRC provides four major services: medical record retrieval and management; medical record review and analysis; expert witness services; and capabilities in WiseFiles browser-based knowledge-management software. Id. With only four sales representatives as of March 25, 2004, MRC is just beginning to penetrate the national market. Def.'s Mot. for Summ. Judg. ("Def.'s Mot."), Ex. R, at 14-15.

Plaintiff Michael Gallagher is a Philadelphia resident and citizen of Pennsylvania[1] with experience in personal sales work. From January 2001 to April 2003, he worked as a sales representative for RecordTrak, a record-retrieval company.[2] Pl.'s Mot. for Partial Summ. Judg. ("Pl.'s Mot.") at ¶ 2; Def.'s Mem., Ex. B, at 34.

In April of 2003, Gallagher had a telephone conversation with Doreen Wise, MRC's President. Def.'s Mem., Ex. B, at 35. During this conversation, Wise suggested that MRC and Gallagher discuss the possibility of Gallagher working for MRC as a sales representative. Id. On or about May 6, 2003, Wise and Gallagher again spoke. Pl.'s Mot. at ¶¶ 5, 14; Def.'s Mem., Ex. B, at 51, 68. They agreed that Gallagher would begin at once to

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[1] We have jurisdiction because of the parties' diverse citizenship and the requisite amount in controversy.

[2] Gallagher claims that he had a non-competition agreement with RecordTrak for an unspecified duration of time, a fact that will be relevant when we discuss Count II of Gallagher's Complaint, promissory estoppel. Pl.'s Comp. at ¶ 19; Def.'s Mem., Ex. B, at 41, 86-87.

work for MRC as a sales representative. Pl.'s Mot. at ¶¶ 5, 14; Def.'s Mem., Ex. B, at 51, 68. According to Gallagher, the two agreed that he would work for three years. Pl.'s Mot. at ¶¶ 22, 24; Def.'s Mem., Ex. B, at 48, 101. Consequently, on or about May 7, 2003, Gallagher left RecordTrak and started work for MRC. Pl.'s Comp. at ¶¶ 17, 18, 19, 20; Def.'s Mem., Ex. B, at 34-35.[3]

A week later, Gallagher traveled to MRC's Houston headquarters. There he met with Holly Robertson of MRC's Human Resources Department to discuss the terms of his employment. During the course of this meeting, Gallagher signed two documents in which he accepted responsibility for the contents of MRC's Employee Handbook and the Handbook's June 2001 Addendum. Def.'s Mem., Ex. B, at 58-66; Def.'s Mem., Ex. E. Both of these documents set forth key terms of Gallagher's employment, most notably the fact that he was an at-will employee. Id.

On May 20, 2003, MRC faxed to Gallagher's home the draft version of an employment agreement. Def.'s Mem., Ex. G; Def.'s Mem., Ex. H. This draft contained a Texas choice-of-law clause. Def.'s Mem., Ex. B, § 8.4. The draft also stated that Gallagher would work for three years. Id. § 4.1.

Some time during the next three months, Gallagher altered the terms of the May 20, 2003 draft in two ways. First, while the first sentence in the second paragraph of Section 5.1

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[3] On May 6, Gallagher signed a "Texas Employee Application" for health and life insurance. Def.'s Mem., Ex. S.

contained a two-year non-compete clause, the same sentence in the version that Gallagher eventually returned to MRC contained a one-year non-compete clause.

Second, while the May 20, 2003 draft left the time blank under Exhibit A, Section 4, "Vacation," in the version Gallagher returned to MRC he inserted, "(3) three weeks paid vacation (beginning in 2004)." Def.'s Mem. Ex. P, "Ex. A", at § 4. Gallagher added this second alteration despite two emails, two days earlier, from Doreen Wise stating that Gallagher would receive only two weeks of vacation, unpaid. Def.'s Mem., Ex. U.

At some point, Gallagher signed the altered draft in Philadelphia and on August 27, 2003 mailed it to MRC. Def.'s Mem., Ex. P. Rather than sign this altered draft, Molly Baer Holub, MRC's attorney, emailed Gallagher two days later. Among other things, Holub wrote, "The draft that was sent to you sometime ago was for discussion purposes only. MRC never agreed to an employment contract with you and will not enter into one." Def.'s Mem., Ex. Q.

To place MRC’s reaction into context, we briefly examine Gallagher's activities during his roughly four-month stint as MRC's sales representative. During this time, he continued to live in Philadelphia, with MRC compensating him for basic expenses. Def.'s Mem., Ex. B, at 117. Every three weeks, Gallagher traveled to MRC's Houston headquarters for skills training, sales meetings, employment discussions, company tours, and performance appraisals. Def.'s Mem., Ex. B, at 81-82, 84,

87. On a weekly basis, he called Doreen Wise to discuss his performance. Def.'s Mem., Ex. B, at 87.

That performance was lackluster. He closed no sales. Def.'s Mem., Ex. B, at 133. Also, although required to account for his daily performance each week, Gallagher failed to submit detailed weekly status reports on May 19, May 27, June 2, June 16, June 30, July 14, July 21, and August 18. Def.'s Mem. at 6 n.4. When Gallagher did submit reports, they, in MRC's view, lacked the specificity expected. Id. Thus, Gallagher's marginal sales performance, coupled with his recurring failure to submit timely or complete reports, led Doreen Wise repeatedly to reprimand him, to no avail. Def.'s Mem., Ex. B, at 118-38.

Thus, MRC's August 29, 2003 email terminated him. On December 19, 2003, Gallagher filed a complaint in the Court of Common Pleas of Philadelphia County, and on January 20, 2004, MRC removed the case here.

Gallagher asserts three claims against MRC. First, he alleges that it breached an employment contract (Count I); second, that it induced him to rely detrimentally on the promise of employment (Count II); and third, that it violated Pennsylvania's Wage Payment and Collection Law, 43 Pa. Cons. Stat. Ann. §§ 260.1-260.12 (West 2004) (Count III).[4] As noted, we here consider Gallagher's partial motion for summary judgment

[4] In addition, Gallagher initially sued for intentional infliction of emotional distress and defamation. He subsequently withdrew both claims.

on Count I and MRC's motion for summary judgment as to all counts.

Analysis[5]

A. Count I: Breach of Contract

Gallagher asserts that he formed a three-year employment contract with MRC. He proffers two theories. First, Gallagher asserts that he formed a three-year, "oral contract" with MRC. Pl.'s Comp. at ¶ 9. Gallagher predicates this theory on the May 6, 2003 telephone conversation he had with Doreen Wise. Pl.'s Mot. at ¶¶ 5, 14, 22, 24; Def.'s Mem., Ex. B, at 48, 51, 68, 101.

Second, Gallagher contends that he and MRC formed a three-year written contract. Pl.'s Mot. at ¶¶ 20, 22, 24; Def.'s Mem., Ex. B, at 48. He claims that MRC offered him employment through the May 20, 2003 draft employment agreement, Pl.'s Mot.

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[5] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In resolving a motion for summary judgment, the Court must draw all reasonable inferences in the nonmovant's favor and determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Where, as here, the nonmoving party bears the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if admissible, would be insufficient to carry the nonmovant's burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies its burden, the nonmoving party must go beyond its pleadings and designate specific facts by the use of affidavits, depositions, admissions or answers to interrogatories showing that there is a genuine issue for trial. Id. at 324.

at ¶¶ 14, 16, 18, 20, and when he signed this draft, he accepted MRC's offer, even though MRC never signed it and even though he unilaterally modified two terms. Id. at ¶ 20.[6]

As a threshold matter, our resolution of both of these theories hinges on whether we apply Texas or Pennsylvania law. Specifically, the Texas Statute of Frauds bars an agreement for a definite term that is incapable of being performed within one year unless the agreement is written and signed by the person to be charged. See Tex. Bus. & Com. Code Ann. § 26.01(a) & (b)(6) (Vernon 2004). Thus, because Gallagher claims that he formed a three-year employment contract with MRC, applying Texas law to his claim will dispose of both of his formative theories. The oral-contract theory would fail because the alleged contract was unwritten; the written-contract theory would fail because MRC, the party to be charged, never signed the draft.

By contrast, Pennsylvania has no law requiring parties to memorialize contracts that they cannot perform within one year. See 33 Pa. Cons. Stat. Ann. §§ 1-6 (West 2004) (Pennsylvania's Statute of Frauds); Hornyak v. Sell, 427 Pa. Super. 356, 362, 629 A.2d 138, 141 (1993) ("[T]he Pennsylvania Statute of Frauds does not contain a provision for agreements that cannot be performed within one year, the principle [sic] obstacle confronting such agreements") (quoting Kohr v. Kohr, 271

[6] Pursuant to our July 19, 2004 Order (docket entry # 21), Gallagher is precluded from asserting that he formed an implied-in-fact contract with MRC.

Pa. Super. 321, 330 n.3, 413 A.2d 687, 691 n.3 (1979)). Hence, if we apply Pennsylvania law, no statute of frauds obstacle would block Gallagher's claim.

1. Choice-of-Law Framework

A federal court should apply the choice-of-law rules of the state in which it sits. See Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941); Shuder v. McDonald's Corp., 859 F.2d 266, 269 (3d Cir. 1988). Thus, Pennsylvania choice-of-law rules will determine whether Texas or Pennsylvania substantive law controls the disposition of Gallagher's breach-of-contract claim.

As is well-rehearsed, in Griffith v. United Airlines, Inc., 416 Pa. 1, 21-22, 203 A.2d 796, 805 (1964), the Pennsylvania Supreme Court abandoned the rule of *lex loci delicti* -- which applied the law of the place where the tort was committed -- and adopted "a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court." Id. Pennsylvania courts employ a hybrid of the most significant relationship approach of the Restatement (Second) of Conflicts and the governmental interest approach. Troxel v. A.I. DuPont Inst., 431 Pa. Super. 464, 467-68, 636 A.2d 1179, 1180-81, appeal denied, 538 Pa. 648, 647 A.2d 903 (1994). Our Court of Appeals has held that Pennsylvania's flexible methodology applies to contract actions as well as tort actions. See Melville v. Am. Home Ins. Co., 584 F.2d 1306, 1311-

13 (3d Cir. 1978). Hence, Pennsylvania's hybrid approach governs the Texas-Pennsylvania conflict that we now confront.

In applying the hybrid approach, Pennsylvania courts conduct a two-step analysis: "First, the court must look to see whether a false conflict exists. Then, if there is no false conflict, the court determines which state has the greater interest in the application of its law." LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1071 (3d Cir. 1996).

2. Step 1: True Conflict, False Conflict, or Unprovided-for Case

Applying LeJeune, we begin by determining whether the laws of Texas and Pennsylvania really conflict. To do this, Pennsylvania law mandates that we compare the ostensibly competing state laws and the governmental interests the laws represent to determine whether there is a true conflict, false conflict, or unprovided-for case. Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 & n.15 (3d Cir. 1991); see also LeJeune, 85 F.3d at 1071.

In other words, at this stage of Pennsylvania's choice-of-law analysis, a court should first compare the court's disposition of the issue if it follows the law of one state with its disposition of the same issue if it follows the law of the other state; and, second, consider whether the governmental interests that the laws represent clash. Lacey, 932 F.2d at 187

& n.15; see also LeJeune, 85 F.3d at 1071.[7]

Here, like white and black, the laws of Texas and Pennsylvania clash.

The Texas Statute of Frauds is found in Tex. Bus. & Com. Code Ann. § 26.01 (Vernon 2004) and provides in pertinent part that:

> (a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is
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> (1) in writing; and
>
> (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.
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> (b) Subsection (a) of this section applies to . . . .
>
> (6) an agreement which is not to be performed within one year from the date of making the agreement; . . . .

In other words, under Texas law, an agreement for a definite term that cannot be performed within one year is unenforceable unless the agreement is "in writing" and "signed by the person to be charged."

As noted earlier, Gallagher claims that he formed an oral contract or, alternatively, written contract with MRC. He

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[7] At the one extreme, a true conflict exists "when the governmental interests of *both* jurisdictions would be impaired if their law were not applied." Lacey, 932 F.2d at 187 n.15. At the other extreme, a false conflict arises when "only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's law." Id. at 187. Finally, an unprovided-for case "arises when neither jurisdiction's interests would be impaired if their law were not applied." Budget Rent-A-Car Sys., Inc. v. Chappell, 304 F. Supp.2d 639, 644 (E.D.Pa. 2004).

argues that, under both of these contracts, he agreed with MRC to work as MRC's sales representative for a definite term of three years. Pl.'s Mot. at ¶¶ 20, 22, 24; Def.'s Mem., Ex. B, at 48, 101. The Texas Statute of Frauds unambiguously requires that parties memorialize any contract of definite duration that cannot be completed within one year. It was impossible for Gallagher to complete his alleged three-year employment contract within one year; therefore, if Texas law applies, Gallagher's oral contract claim fails. Furthermore, Texas's Statute of Frauds requires that the party to be charged sign the contract. Hence, if Texas law applies, Gallagher's written-contract theory also fails because no MRC agent ever signed the draft.

As mentioned earlier, unlike Texas's statute, Pennsylvania's Statute of Frauds has no comparable limitation on the enforcement of oral agreements. See 33 Pa. Cons. Stat. Ann. §§ 1-6 (West 2004); see also Hornyak v. Sell, 427 Pa. Super. 356, 362, 629 A.2d 138, 141 (1993) ("[T]he Pennsylvania Statute of Frauds does not contain a provision for agreements that cannot be performed within one year, the principle [sic] obstacle confronting such agreements") (quoting Kohr v. Kohr, 271 Pa. Super. 321, 330 n.3, 413 A.2d 687, 691 n. 3 (1979)). Consequently, if we apply Pennsylvania law to Gallagher's breach-of-contract claim, his oral-contract and written-contract theories would survive.[8]

[8] Subject, of course, to the other claims against enforcement and validity that MRC makes.

Thus, the disposition of Gallagher's breach-of-contract claim if we apply Pennsylvania law differs drastically from the disposition if we apply Texas law, and therefore a true conflict exists between Pennsylvania and Texas law. We must now consider whether there is a clash between the governmental interests that the laws represent. See LeJeune, 85 F.3d at 1071.

Texas's limitation on the enforcement of oral agreements advances at least one significant governmental interest.[9] As the Texas Court of Civil Appeals put it, "The primary purpose of the Statute of Frauds is of course to prevent fraud and perjury in certain types of transactions by requiring the agreement of the parties to be evidenced by a writing signed by them." Davis v. Crockett, 398 S.W.2d 302, 305 (Tex. App. 1965). Because Texas employs an at-will employment doctrine, see Montgomery County Hosp. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998), it has a compelling interest in preventing terminated employees from overcoming their at-will status merely by claiming that an oral contract for a term of years existed.

Because the Pennsylvania General Assembly never enacted

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[9] Texas's limitation presumably advances other governmental interests, too. For example, the limitation "ensures that the parties will act with deliberation and not improvidently, suggesting not only an evidentiary, but also a cautionary, function." Samuel Williston & Richard A. Lord, 9 A Treatise on the Law of Contracts § 21:1 (4th ed. 1999). Furthermore, the limitation guards against courtroom mistakes that would otherwise occur simply because of the fallibility of human memory or the dying or moving away of witnesses. Caroline N. Brown, 4 Corbin on Contracts § 19.1 n.1 (rev. ed. 1997) (quoting Boydell v. Drummond, 11 East 159, 1 Ld. Raym. 316 (1809)).

a provision like Texas's, we are wary of divining legislative intent from legislative silence.[10] Nevertheless, a fair inference here is that Pennsylvania's silence reflects a belief that the Commonwealth's interest in enforcing oral contracts exceeds its interest in preventing fraud and perjury.[11]

In short, just as the laws themselves clash, the policies that underlie them also clash. We therefore conclude that a true conflict exists between Texas's limitation on the enforcement of oral contracts and Pennsylvania's lack thereof because "the governmental interests of *both* jurisdictions would be impaired if their law were not applied." Lacey, 932 F.2d at 187 n.15.

3. Step 2: Most Significant Relationship

When a case presents a true conflict, Pennsylvania choice-of-law rules "call for the application of the law of the state having the most significant contacts or relationships with the particular issue." In re Estate of Agostini, 311 Pa. Super.

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[10] For an example of the dangers one encounters when attempting to derive legislative meaning from legislative inaction, see William N. Eskridge, Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 90-108 (1988).

[11] Another possible reason the Pennsylvania Legislature has never enacted such a provision is that few have ever discovered a satisfactory rationale for it. See generally Joseph M. Perillo, The Statute of Frauds in the Light of the Functions and Dysfunctions of Form, 43 Fordham L. Rev. 39 (1974). See also Caroline N. Brown, 4 Corbin on Contracts § 19.1 n.3 (rev. ed. 1997) ("The one-year period runs from the making of the contract to the completion of performance, rather than to the time when the contract is sought to be proven, which makes the statute an ineffective tool to reach any of the suggested purposes.").

233, 252, 457 A.2d 861, 871 (1983). To identify the jurisdiction with the most significant relationship, courts apply Section 188 of the Restatement (Second) of Conflict of Laws. See, e.g., Melville v. Am. Home Ins. Co., 584 F.2d 1306, 1314-15 (3d Cir. 1978) (applying Second Restatement of Conflicts as the "second branch of the Griffith rule"); Schoenkopf v. Brown & Williamson Tobacco Corp., 483 F. Supp. 1185, 1194-95 (E.D.Pa. 1980) (applying Section 188 to contractual conflict-of-law issue).

Section 188(1) states that "[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6." Restatement (Second) of Conflict of Laws § 188(1) (1971). Section 188(2), presented in full shortly, then sets forth the contacts a court should consider when applying the principles of Section 6. Id. § 188(2).

To synthesize, the second prong of Pennsylvania's hybrid approach requires that we follow two steps. First, we must apply Section 188(2) to identify the relevant contacts between each state, the parties, and the subject matter. Second, we must then weigh those contacts according the policy oriented factors of Section 6.

We begin by identifying the relevant contacts between each state, the parties, and the subject matter. Section 188(2) sets forth the contacts a court should consider:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

Id. § 188(2); see also, e.g., Schoenkopf, 483 F. Supp. at 1194-95 (applying Section 188(2) to contractual conflict-of-law issue).

In this case, three factors weigh in favor of both states, and two factors weigh in favor of Texas.

The first factor weighing in favor of both states is the place the parties contracted. On the record before us, it is unclear where the parties formed the alleged contract. The basis of the alleged oral contract, for example, a telephone call, was initiated by Doreen Wise in Texas but received by Gallagher in Pennsylvania. The basis of the alleged written contract, the draft employment agreement, was composed by MRC in Texas, signed by Gallagher in Philadelphia, and then mailed back to MRC in Texas. Hence, this first factor weighs in favor of both states.

The second factor weighing in favor of both states is the place of performance. While he operated from his home in Philadelphia and MRC funded his basic expenses, Gallagher himself emphasized in his deposition that he was MRC's "national" sales representative, with "the whole United States" as his territory. Def.'s Mem., Ex. B, at 80. Moreover, much activity occurred in Texas. In his deposition, Gallagher reported that he "was going down [to Texas] about every three weeks." Def.'s Mem., Ex. B, at

81. He visited Texas for skills training, sales meetings, employment discussions, company tours, and performance appraisals. We thus conclude that performance occurred in Pennsylvania, Texas, and the other states to which Gallagher traveled during his stint as MRC's sales representative.

The final factor that weighs in favor of both states is the citizenship of each party. While Gallagher is a citizen of Pennsylvania, MRC's corporate citizenship is in Texas.

Two factors, however, suggest that we should apply Texas law.

The first such factor is the location of the subject matter. "In an employment agreement the subject matter of the contract is the service to be rendered." DuSesoi v. United Refining Co., 540 F. Supp. 1260, 1270 (W.D.Pa. 1982). Here, MRC's primary service consists of synthesizing data in medical files to enable lawyers to understand more clearly the medical issues posed by their cases. From MRC's Texas headquarters, a team of medical experts conducts these syntheses. Def's Mem., Ex. B, at 82-83. Consequently, the location of the subject matter is Texas, and Texas only.

The second factor that suggests that we should apply Texas law is the place of negotiation. On May 14, 2003, Gallagher traveled to MRC's Houston headquarters and met personally with Holly Robertson of Human Resources to discuss the terms of his employment. During the course of this meeting, Gallagher signed documents that made him responsible for the

contents of MRC's Employee Handbook and the Handbook's June 2001 Addendum. Def.'s Mem., Ex. B, at 58-66; Def.'s Mem., Ex E. These two documents impose key terms of Gallagher's employment, most notably that he was an at-will employee. That Gallagher met with Robertson at MRC's Texas headquarters and signed these documents there militates strongly in favor of applying Texas law.

Hence, we conclude that the balance of significant contacts surrounding Gallagher's employment centered in Texas. Our analysis, however, remains incomplete because we must now take the second step, weighing the five contacts we just articulated according the policy oriented factors of Section 6 of the Restatement (Second). See Restatement (Second) of Conflict of Laws § 188(1) (1971) (requiring a court to consider the Section 188(2) contacts in light of the policies identified in Section 6); see also Knauer v. Knauer, 323 Pa. Super. 206, 215-16, 470 A.2d 553, 557-58 (1983); Normann v. Johns-Manville Corp., 406 Pa. Super. 103, 110, 593 A.2d 890, 894 (1991).

Section 6(2) lists seven factors a court may consider in choosing the applicable rule of law:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity

> of result, and
> (g) ease in the determination and application of the law to be applied.

First, the "protection of justified expectations" tips in favor of Texas law. This is because the very written contract that Gallagher now contends is valid specifically provided that the agreement "shall be governed by and interpreted in accordance with the laws of the State of Texas, and venue for any cause of action arising under this Agreement shall lie in Harris County." Def.'s Mem., Ex. H, § 8.4, "Governing Law." Furthermore, on or around May 6, 2003, Gallagher signed a *"Texas Employee* Application" for insurance (emphasis added). Def.'s Mem., Ex. S. Based on the Texas choice-of-law clause and on the fact that he signed an application identifying himself as a "Texas employee", it should indeed surprise Gallagher were he to learn that any law other than Texas's applies to his claim.

Second, we consider the relevant policies of each forum. While Pennsylvania's election not to enact a one-year provision akin to Texas's may reflect a belief that Pennsylvania's interest in enforcing oral contracts exceeds its interest in preventing fraud and perjury, that interest seems to us quite diffuse and is, in any event, only a conjecture. In contrast, Texas's limitation advances that State's particularized interest in preventing -- in cases like this one -- disgruntled, terminated employees from surmounting their at-will status by falsely alleging that an oral contract existed. Thus, we find that this factor also weighs heavily in favor of applying Texas

law.

Third, we consider certainty, predictability, and uniformity of result. Like Texas and unlike Pennsylvania, most jurisdictions in America require that parties memorialize all contracts of definite duration that cannot be completed within one year. See Restatement (Second) of Contracts § 130 (1981) (and cases cited therein); see also Caroline N. Brown, 4 Corbin on Contracts § 12.1 n.18 and accompanying text (rev. ed. 1997). Moreover, in three similar cases, federal courts in Pennsylvania concluded that the law of another state, not Pennsylvania, governed a plaintiff's breach-of-employment-contract claim. See Dusesoi v. United Refining Co., 540 F. Supp. 1260, 1268-71 (W.D.Pa. 1982) (selecting Texas's one-year limitation on oral contracts rather than Pennsylvania's lack thereof); Shannon v. Keystone Info. Sys., Inc., 827 F. Supp. 341, 343 (E.D.Pa. 1993) (applying New Jersey, not Pennsylvania, contract law to breach-of-employment-contract claim); Zerby v. Hechinger Co., Civ. A. No. 91-2108, 1991 WL 175452, at *6-8 (E.D.Pa. September 5, 1991) (choosing Maryland's one-year limitation on oral contracts rather than Pennsylvania's lack thereof). In Dusesoi, the Court specifically concluded it should apply Texas's, not Pennsylvania's, statute of frauds to a plaintiff's breach-of-employment-contract claim. 540 F. Supp. at 1268. Thus, to promote certainty, predictability and uniformity of result, Texas law should govern.

Fourth, we consider the basic policies underlying the

particular field of law which, here, is contracts. Several policies favor written instruments. Memorializing agreements not only prevents fraud and perjury but also thwarts courtroom mistakes that would otherwise occur simply because of the fallibility of human memory or the unavailability of witnesses. Furthermore, reducing agreements to writing ensures that parties will act cautiously and with deliberation. Finally, use of the written word compels parties to identify in one document all material terms and conditions, thereby forestalling future disputes and, as this case exemplifies, future litigation. In short, major policies underlying contract law favor the application of Texas law.

Thus, under Section 6, applying Texas law will protect the justified expectations of the parties, advance the relevant policies of Texas, foster predictability, and advance basic policies underlying contract law. Because we found earlier that Section 188(2) also favors the application of Texas law, we conclude that Texas law governs Gallagher's breach-of-contract claim.

We now apply Texas law to both of Gallagher's formative theories.

4. Oral Contract Theory

In his Complaint, Gallagher asserts that he formed a three-year, "oral contract" with MRC. Pl.'s Comp. at ¶ 9. Gallagher predicates this theory on a telephone conversation he

had with Doreen Wise on or about May 6, 2003. Pl.'s Mot. at ¶¶ 5, 14, 22, 24; Def.'s Mem., Ex. B, at 48, 51, 68, 101.

Accepting, arguendo, Gallagher's claim that he formed with MRC an oral, three-year employment contract, under Texas law an agreement for a definite term that is incapable of being performed within one year is unenforceable unless that agreement is in writing and signed by the person to be charged. See Tex. Bus. & Com. Code Ann. § 26.01(a) & (b)(6) (Vernon 2004); see also Massey v. Houston Baptist University, 902 S.W.2d 81, 83-84 (Tex. App. 1995) (holding that contract for lifetime employment was unenforceable because it was oral). It is undisputed that, to the extent any agreement existed, it provided for three years' duration; indeed, in his motion, Gallagher himself argues that "Michael Gallagher was not an 'at will' employee of MRC as the oral agreement and subsequent written contract, created by the Defendant, *was for three years.*" Pl.'s Mot. at ¶ 22 (emphasis added). Consequently, the parties' failure to reduce the terms of the alleged three-year employment agreement to a writing that MRC signed renders the hypothesized oral agreement unenforceable.

5. Written Contract Theory

Gallagher also claims that he and MRC formed a three-year, written contract. Pl.'s Mot. at ¶¶ 20, 22, 24; Def.'s Mem., Ex. B, at 48. He contends that MRC offered him employment for a term of three years in the draft employment agreement that

it faxed to his home on May 20, 2003. Pl.'s Mot. at ¶¶ 14, 16, 18, 20. Gallagher argues that, when he signed this draft and mailed it to MRC on August 27, 2003, he accepted MRC's alleged offer, even though MRC never signed it and even though Gallagher altered the terms. Id. at ¶¶ 7, 20.

Instead, just two days later, Holly Baer Holub, MRC's attorney, sent Gallagher an email stating, in part, "The Human Resources department received the draft of the contract that you signed. The draft that was sent to you some time ago was for discussion purposes only. MRC never agreed to an employment contract with you and will not enter into one." Def.'s Mem., Ex. Q; Def.'s Mem., Ex. B, at 161.

Texas law requires not only that parties reduce to writing contracts of a definite duration that cannot be performed within one year but also that the party to be charged *sign* the document. See Tex. Bus. & Com. Code Ann. § 26.01(a) & (b)(6) (Vernon 2004); see also Gold Kist, Inc. v. Carr, 886 S.W.2d 425, 430 (Tex. App. 1994) (holding that an alleged contract "fails to satisfy the requirement of the statute of frauds that the writing be signed by a person either 'charged' with the agreement or legally authorized to sign for the person so 'charged.'"). It is undisputed that no agent of MRC, the party to be charged in this action, ever signed the draft that Gallagher mailed it. Accordingly, even if we were to find legal significance in Gallagher's act of signing the draft agreement, the document would nevertheless be unenforceable because MRC never signed it.

Furthermore, after receiving the draft on May 20, 2003, Gallagher subsequently altered it in two major ways. The first was his unilateral change to the first sentence in the second paragraph of Section 5.1 of the May 20, 2003 draft, reducing the two-year non-compete clause to one year. The second unilateral change was to vacation time, which was blank in MRC's draft and "three weeks paid vacation" in Gallagher's version. It bears noting that Gallagher added this second alteration despite two emails, two days earlier, from Doreen Wise stating that he would receive only two weeks of vacation, unpaid. Def.'s Mem., Ex. U.

As the Texas Court of Appeals has emphasized, "It is elementary that an acceptance must not change or qualify the terms of an offer; if it does, there is no meeting of the minds between the parties because the modification then becomes a counteroffer." Lewis v. Adams, 979 S.W.2d 831, 834 (Tex. App. 1998)[12]; see also Chapman v. Mitsui Eng'g and Shipbuilding Co., Ltd., 781 S.W.2d 312, 316-17 (Tex. App. 1989); Antonini v. Harris County Appraisal Dist., 999 S.W.2d 608, 610-11 (Tex. App. 1999). The alteration made, however, "must be material in order to qualify as a rejection of the original offer and to constitute a

[12] Although the Texas Court of Appeals, Texas's intermediate court, decided this case, the Texas Supreme Court has long held that it is "well settled that an acceptance must not change or qualify the terms of the offer. If it does, the offer is rejected." United Concrete Pipe Corp. v. Spin-Line Co., 430 S.W.2d 360, 364 (Tex. 1968), citing Humble Oil & Refining Co. v. Westside Investment Corp., 428 S.W.2d 92 (Tex. 1968). Since Lewis applies settled jurisprudence of the Texas Supreme Court, we repose Erie-confidence in it as stating Texas law.

counteroffer." Lewis, 979 S.W.2d at 834; see also MTrust Corp. N.A. v. LJH Corp., 837 S.W.2d 250, 254 (Tex. App. 1992).

Texas courts hold that an offeree's alteration of an offer is material when a reasonable person, standing in the shoes of the offeror, would consider the alteration to be "an extra burden . . . not anticipated by the parties." Lewis, 979 S.W.2d at 834.

Lewis is instructive for our purposes. There, a seller mailed to a group of buyers an offer to sell one-half of a mineral estate. Id. at 833. The buyers altered this offer in three ways. First, the offer noted that the tract would be conveyed in its "present condition;" however, the buyers inserted under "Special Provisions," "Removal of pile of building debris prior to closing." Id. Second, the offer in Lewis stated that third parties owned "½" of the minerals and that the seller would retain no rights to these minerals. The buyers changed this provision to state that the seller owned 100 percent of the minerals but would still retain no interest in them. Id. at 833-34. Thus, the buyers would get a 100 percent, rather than 50 percent, interest. Third, while the mineral-rights offer was silent as to any surface control rights, the buyers altered the offer so that they would receive "100% of surface control." Id. at 834.

The buyers eventually sued for breach of contract. The trial court granted the seller's summary judgment motion. Id. at 833.

Finding that each of the buyers' three changes materially altered the seller's offer, the Texas Court of Appeals held that the parties never formed a contract. Id. at 834. First, the court found that the buyers' insertion of the provision regarding the condition of the property at closing was a "material alteration" because it "add[ed] an extra burden on [the seller] not anticipated by the parties", id., i.e., the seller would have to remove building debris, an unanticipated burden. The Texas court also found that changing the "½" provision to state that the seller owned 100 percent of the minerals also materially altered the offer. Id. The court reasoned that, read in context, the alteration implied that the seller would convey a 100-percent interest, rather than a 50-percent interest, in the minerals. Id. Thus, because this language would impose an extra burden on the seller, the court found that it, too, materially altered the offer. Third, the court concluded that the addition of the phrase, "100% of surface control," when that clause never appeared in the offer constituted a material alteration because the seller conveyed to the buyer only a 50-percent interest in the minerals, and the residuary holders of the other 50-percent would also have the right "to use so much of the surface as may be reasonably necessary to enjoy his minerals." Id. Thus, this insertion would impose an extra burden on the seller in that it would require him to surrender more than he intended; therefore, it materially altered the offer.

Because the court concluded that the buyers materially altered the offer in three distinct ways, it held that the buyers rejected the seller's offer. Id. Instead, they presented a counter-offer. Id. Because the seller never accepted this counter-offer, there was no meeting of the minds, and because there was no meeting of the minds, there was no contract. Id. Hence, the Texas Court of Appeals affirmed the trial court's grant of summary judgment in the seller's favor.[13] Id. at 836.

Like the buyers in Lewis, Gallagher altered the written offer that he allegedly accepted by decreasing the length of his non-compete agreement from two years to one year, and by inserting a three-week, paid vacation provision. Both of these alterations were material because they "add[ed] an extra burden on [MRC] not anticipated by the parties." Lewis, 979 S.W.2d at 834. Indeed, the difference in non-competition terms alone suffices to confirm that no contract was formed under Texas law.

By materially altering, in two independent ways, the document that he contends constituted an offer, Gallagher rejected the alleged offer. He instead presented a counter-offer to MRC, and MRC rejected it via the August 29, 2003 email from MRC's attorney, Ms. Holub, to Gallagher.

6. Summary

We shall therefore deny Gallagher's Motion for Partial

[13] The court also affirmed on statute-of-frauds and procedural grounds. Id. at 835-36.

Summary Judgment and grant MRC's Motion for Summary Judgment on Count I of Gallagher's Complaint.

B. Count II: Promissory Estoppel

In support of his claim of promissory estoppel, Gallagher alleges that MRC promised to employ him for three years and that, in reliance on this promise, he quit working for his former employer, RecordTrak. Pl.'s Comp. at ¶¶ 17, 18, 19, 20. Gallagher argues that he relied on this promise to his detriment because, by quitting his former job, he triggered a non-compete restriction (of unspecified duration)[14] with RecordTrak. Id. at ¶ 19; Def.'s Mem., Ex. B, at 41, 86-87. This restriction allegedly barred him from "continuing in the record retrieval sales field where he had worked successfully for several years." Pl.'s Resp. to Def.'s Mot. for Summ. Judg. at 11. Gallagher claims that MRC should have reasonably foreseen his detrimental reliance. Pl.'s Comp. at ¶ 20.

In the context of at-will employment, it is "firmly established" that Pennsylvania courts[15] do not recognize a cause

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[14] Gallagher never produced evidence of the purported restrictive covenant with RecordTrak.

[15] It is unnecessary for us to perform a conflict-of-law analysis regarding Gallagher's claim for detrimental reliance or claim under the Pennsylvania Wage Payment and Collection Law because there is no conflict between Texas law and Pennsylvania law on these counts. When no conflict exists, federal courts deciding state law issues should apply the law of the forum state: "Where the different laws do not produce different results, courts presume that the law of the forum state shall apply." Pilot Air Freight Corp. v. Sandair, Inc., 118 F. Supp.2d 557, 561 n.3 (E.D.Pa. 2000) (quoting Fin. Software Sys., Inc. v.

of action for promissory estoppel.[16] Paul v. Lankenau Hosp., 524 Pa. 90, 94-95, 569 A.2d 346, 348 (1990); Stumpp v. Stroudsburg Mun. Auth., 540 Pa. 391, 397, 658 A.2d 333, 336 (1995); Walden v. Saint Gobain Corp., 323 F. Supp.2d 637, 646 (E.D.Pa. 2004). Absent an employment contract, Pennsylvania courts presume that all employment relationships are at-will, terminable by either party at any time and for any reason. McLaughlin v. Gastrointestinal Specialists, Inc., 561 Pa. 307, 314, 750 A.2d 283, 287 (2000) ("[A]s a general proposition, the presumption of all non-contractual employment relations is that it [sic] is *at-will* and that this presumption is an extremely strong one"); see also Cashdollar v. Mercy Hosp. of Pittsburgh, 406 Pa. Super. 606, 611, 595 A.2d 70, 72 (1991).

Here, we do not merely presume that Gallagher was an at-will employee. Gallagher himself affirmed that status. On two occasions, Gallagher acknowledged in writing that his employment was at-will. First, on May 14, 2003, Gallagher signed an Employee Handbook Acknowledgment form. Def.'s Mem., Ex. B, at

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First Union Nat'l Bank, Civ. A. No. 99-623, 1999 WL 1241088, at *3 (E.D.Pa. December 16, 1999) (citing McFadden v. Burton, 645 F. Supp. 457, 461 (E.D.Pa. 1986)). Furthermore, by citing only Pennsylvania law regarding Gallagher's remaining counts, neither party seemed to contemplate conflict-of-law issues regarding Gallagher's additional claims. Accordingly, we apply Pennsylvania law to these claims.

[16] In holding that there is no promissory estoppel exception to the employment at-will doctrine, the Pennsylvania Supreme Court reasons, "An employee may be discharged with or without cause, and our law does not prohibit firing an employee for relying on an employer's promise." Paul v. Lankenau Hosp., 524 Pa. 90, 95, 569 A.2d 346, 348 (1990).

58-66; Def.'s Mem., Ex. E. A provision of this form reads:

> My employment with MRC is "at will." I understand that either I or MRC may terminate the employment relationship, for any reason or no reason, at any time with or without notice, regardless of the length of my employment or the granting benefits of any kind, including but not limited to benefits which provide for vesting based on length of employment.

Id. Hence, Gallagher specifically affirmed the at-will nature of his employment with MRC.

Second, on the same day, Gallagher signed a form acknowledging that he would also be held responsible for information in the June 2001 Addendum of MRC's Employee Handbook. Id. This form contained the same at-will provision quoted above. Id. Gallagher also signed this document. During his deposition, Gallagher acknowledged that he refrained from crossing out any words or objecting in any other way to the content of these two forms. Def.'s Mem., Ex. B, at 66. Thus, Gallagher understood his employment relationship with MRC to be at-will. See Walden v. Saint Gobain Corp., 323 F. Supp.2d 637, 647 (E.D.Pa. 2004) (holding that existence of a specific agreement for at-will employment defeats any effort to supplant the at-will presumption); Sharp v. BW/IP Int'l Inc., 991 F. Supp. 451, 459 (E.D.Pa. 1998) (same); Permenter v. Crown Cork & Seal Co., Inc., 38 F. Supp.2d 372, 379-80 (E.D.Pa. 1999) (same).

In short, Pennsylvania courts do not recognize a cause of action for promissory estoppel in the context of at-will employment, and Gallagher specifically affirmed that he was an

at-will employee[17]. We shall therefore grant MRC's Motion for Summary Judgment as to Count II of Gallagher's Complaint.

C. Count III: Alleged Violation of Pennsylvania Wage Payment and Collection Law

Gallagher predicates his claim under the Pennsylvania Wage Payment and Collection Law, 43 Pa. Cons. Stat. Ann. §§ 260.1-260.12 (West 2004),[18] on his breach-of-contract claim. As we held earlier, the Texas Statute of Frauds precludes enforcement of Gallagher's alleged employment contract with MRC. Furthermore, the Wage Payment and Collection Law relieves employees who have been wrongfully deprived of wages for services rendered. In his deposition, however, Gallagher testified that MRC compensated him for the whole period that he rendered services. Def.'s Mem., Ex. B, at 73. Hence, because MRC paid Gallagher for all past work and owes Gallagher nothing for any future work, Gallagher's claim under the Wage Payment and

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[17] In rare circumstances, an employee can defeat the at-will presumption by proving that he provided to his employer additional consideration by affording the employer "a substantial benefit other than the services which the employee is hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform." Stumpp v. Stroudsburg Mun. Auth., 540 Pa. 391, 396, 658 A.2d 333, 335 (1995). "The burden is on the employee to prove that the parties had an intention to overcome the at-will presumption and to create an employment relationship different than employment-at-will." Sharp v. BW/IP Int'l, Inc., 991 F. Supp. 451, 459 (E.D.Pa. 1998) (citing DiBonaventura v. Consol. Rail Corp., 372 Pa. Super. 420, 424, 539 A.2d 865, 867 (1988)). Gallagher does not contend that he provided additional consideration to MRC.

[18] For the same reasons articulated in footnote 15, supra, we apply Pennsylvania law to Count III of Gallagher's Complaint.

Collection Law fails.

We shall grant MRC's Motion for Summary Judgment on Count III of Gallagher's Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL J. GALLAGHER	:	CIVIL ACTION
v.	:	
MEDICAL RESEARCH CONSULTANTS, LLP	:	NO. 04-236

ORDER

AND NOW, this 1st day of October, 2004, upon consideration of defendant's Motion for Summary Judgment (docket entry # 25), plaintiff's response (docket entry # 28), plaintiff's Motion for Partial Summary Judgment (docket entry # 26), and defendant's response (docket entry # 27), it is hereby ORDERED that:

1. Defendant's Motion for Summary Judgment is GRANTED; and

2. Plaintiff's Motion for Partial Summary Judgment is DENIED.

BY THE COURT:

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Stewart Dalzell, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL J. GALLAGHER	:	CIVIL ACTION
v.	:	
MEDICAL RESEARCH CONSULTANTS, LLP	:	NO. 04-236

ORDER

AND NOW, this 1st day of October, 2004, summary judgment having been granted in favor of defendant, it is hereby ORDERED that:

1. JUDGMENT IS ENTERED in favor of defendant Medical Research Consultants, LLP and against plaintiff Michael J. Gallagher; and

2. The Clerk shall CLOSE this case statistically.

BY THE COURT:

_____
Stewart Dalzell, J.