

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

NOAH SHAFFER,  
Plaintiff,

v.

BNP/COOPER NEFF, INC.,  
Defendant.

Civil Action  
No.98-71

O R D E R

AND NOW, this 4th day of September, 1998, Defendant's Motion for Summary Judgment is GRANTED, and judgment is entered in favor of defendant and against plaintiff.

BY THE COURT:

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Robert S. Gawthrop, III J.

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Gawthrop, J.

September 4, 1998

M E M O R A N D U M

Before the court in this diversity, breach-of-contract case, is defendant's motion for summary judgment. Plaintiff, Noah Shaffer claims that he had an employment contract with defendant for a definite term of "at least two years," granted as part of a temporary assignment overseas, and that defendant breached that contract when it fired him less than six months into the arrangement.

In the alternative, plaintiff claims that he moved to Asia, thereby supplying sufficient additional consideration to the defendant and estopping defendant from discharging Mr. Shaffer for a reasonable time. I find that, as a matter of law, neither a contract for a term of years nor sufficient additional consideration to overcome the Pennsylvania presumption of employment-at-will exists. I shall thus grant defendant's motion for summary judgment.

## **Background Facts**

The case principally turns on plaintiff's employment status: was he an at-will employee, or did he have a two-year employment contract? Mr. Shaffer was employed by Cooper Neff in New York from 1990 to 1995, eventually rising to manage the small New York office. In January 1995, Cooper Neff (CN) merged with the Banque National de Paris (BNP). As part of the merger, Cooper Neff's New York office was closed, and Mr. Shaffer moved to Chicago to work for the combined BNP/CN.

Upon his move to the Chicago BNP/CN office, Mr. Shaffer received the BNP Paris US Eastern Group Employee Handbook (Handbook). Section 1.2 of the Handbook is titled "Employment at will," where it explicitly proclaims that employment with BNP is at will, and that "BNP may terminate your employment at any time with or without cause." Handbook, Def. Ex. F, p.3. Mr. Shaffer signed a form acknowledging receipt of the handbook; the form also stated, "I understand that my employment with BNP is for no definite period . . . ." BNP/CN is a Delaware corporation, with its personnel office, from which the alleged contract documents originated, located in Radnor, Delaware County, Pennsylvania. BNP, the parent/affiliate of BNP/CN, has offices around the globe.

Mr. Shaffer had been asking for a more active, "better" job than his position in Chicago, and in late summer 1995 the

parties began to discuss the possibility of Mr. Shaffer's moving to a new post in Singapore. Pl. Dep 98. Mr. Shaffer stated that his supervisors were surprised at his interest in Singapore, because, for personal reasons, he had previously turned down positions in Frankfurt and Paris. Pl. dep. 123. BNP/CN paid for Mr. Shaffer to visit Singapore, which he "really liked," and discussions about the assignment continued. Pl. Dep. 124-30. While considering the move, plaintiff had discussions with BNP personnel in Illinois, Pennsylvania, and France about the terms and conditions of employment. Notable is a 1995 discussion with Alec Petro, BNP director of global trading, that occurred while Mr. Shaffer was in Paris on other business. On the issue of the duration of the assignment, Mr. Petro stated that he expected the assignment to last two years. Plaintiff's testimony on the issue is as follows:

Q: ... You said that you also discussed the length [of the Singapore assignment]?

A: Yes

Q: And what was said about that?

A: Two years.

Q: Can you remember exactly what was said?

A: That he [Mr. Petro] expected that I would stay there for two years.

Pl. dep. 164 (emphasis added).

On January 8, 1996, and without having yet reached written agreement as to compensation, benefits or duration, Mr. Shaffer moved to the BNP Singapore office to lead a new practice group. A month later, BNP sent Mr. Shaffer a "secondment

letter,"<sup>1</sup> which described the conditions and benefits of the Singapore job. Instead of signing and returning the letter, however, Mr. Shaffer contacted Mr. Petro and expressed a desire to change several of the proposed terms.<sup>2</sup> On May 29, 1996, Mr. Shaffer received another "secondment letter" reflecting some, but not all, of the changes he had requested.<sup>3</sup> The May 29 letter specifically required that Mr. Shaffer indicate his acceptance of the terms by signing the letter and returning it to BNP/CN Chief Financial Officer Thomas Mahoney by June 7, 1996. However, because he wanted five more vacation days, he never signed this second secondment letter, despite several requests from BNP personnel.

On July 2, 1996, professedly for business reasons unrelated to his failure to sign the letter, BNP/CN terminated

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<sup>1</sup>"Secondment" is a term used at BNP to refer to temporary, foreign assignments from one BNP entity to another. Secondment letters propose compensation, benefits, and duration for an overseas assignment for a former Cooper Neff employee. Their dual purpose was to assure the employee that they would remain a BNP/CN employee (rather than becoming an employee of the foreign BNP office to which they were assigned), and to satisfy immigration requirements.

<sup>2</sup>The revisions Mr. Shaffer wanted are not at issue in this case. That he disputed the terms of the secondment letters is highly germane.

<sup>3</sup>Mr. Shaffer wanted 30 days vacation a year and he believed that Mr. Petro had approved this; the May 29 letter only allocated 25.

Mr. Shaffer's employment, effective July 5, 1996,<sup>4</sup> whereupon Mr. Shaffer moved to London. Mr. Shaffer does not allege that the reason for the termination was pretextual and admits that he, too, thought the struggling Singapore desk, which he managed, should have been closed. Pl. dep. at 259-269.

BNP/CN paid all of Mr. Shaffer's costs associated with moving to Singapore. While in Singapore, Mr. Shaffer received, in addition to salary and bonus, a generous housing allowance, an allowance for costs, and paid memberships to several clubs. As part of a rejected severance package, BNP also offered to pay Mr. Shaffer's expenses to return to the United States, which he refused.

### **The Controlling Law**

There is conflict as to which substantive law should apply in this case. Plaintiff, who had only Illinois ties, argues for Pennsylvania while the defendant, whose principle place of business is Pennsylvania, argues for Illinois.

To determine which substantive law applies in this diversity action, one turns to the choice-of-law rules of the forum state--here, Pennsylvania. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Kruzits v. Okuma Mach. Tool, Inc., 40 F.3d 52, 55 (3d Cir. 1994). Pennsylvania has adopted a

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<sup>4</sup>Plaintiff does not allege termination in violation of public policy, only violation of an employment contract.

flexible approach to choice of law, considering both the state-contacts analysis of the Restatement (Second) of Conflicts of Law and the policies and interests of the relevant jurisdictions. See generally, Griffith v. United Air Lines, Inc., 203 A.2d 796 (1964); Blakesley v. Wolford, 789 F.2d 236 (3d Cir. 1986). The initial analysis in a contractual state-contacts test focuses upon five elements: i) the place of contracting, ii) the place of negotiation of the contract, iii) the place of performance, iv) the location of the subject matter of the contract, and v) the domicile, residence, nationality, place of incorporation, and place of business of the parties to the contract. Knauer v. Knauer, 470 A.2d 553, 558 (Pa. Super. 1983).

I consider these in turn. The place of alleged contracting was a combination of France, Singapore, and Pennsylvania, as the negotiations begun in the discussion with Mr. Petro continued via the exchange of offers and telephoned comments. The alleged contract was negotiated in Illinois and Pennsylvania, as well as in several foreign nations. The place of performance was Singapore. So also would Singapore most likely be deemed the situs of the subject matter of the contract. The contract was for Mr. Shaffer to work for the defendant, and since he was to perform that work in Singapore, that would seem to be the spot. The fifth factor tips the scales only slightly in favor of Pennsylvania: although Mr. Shaffer was domiciled in

Illinois at the time of the initial discussions, he currently claims Massachusetts citizenship; BNP/CN's principle place of business was, at all relevant times, Pennsylvania.

Where, as here, the state-contacts doctrine fails to yield a clear choice, one next examines the interests of each jurisdiction in the outcome of the suit, including "the interests each jurisdiction might seek to protect." Aydin Corp. v. RGB Sales, Civ. A. No. 89-8084, 1991 WL 152465, at \*8 (E.D. Pa. Aug. 5, 1991), aff'd, 983 F.2d 1049 (3d Cir. 1992). "[U]nder Pennsylvania choice-of-law principles, the place having the most interest in the problem and which is the most intimately concerned with the outcome is the forum whose law should be applied." Complaint of Bankers Trust Co., 752 F.2d 874, 882 (3d Cir. 1984) (citing Griffith, 203 A.2d at 805-06). General discussions may have occurred in Illinois, but the bulk of the negotiations occurred on a French golf course and over the phone between Paris, Singapore and Pennsylvania. Although Mr. Shaffer briefly resided in Illinois in 1995, he did not live there during the time at issue and no longer lives nor maintains any continuing contact with that state. At all relevant times, defendant maintained an office in Illinois and its principle place of business in Pennsylvania. Pennsylvania is the only state with a continuous contact with either of the parties to this dispute. See Aydin Corp., 1991 WL 152465, at \*8. I agree

with plaintiff's contention that the balance of factors favors application of Pennsylvania substantive law.

### **Summary Judgment Standard**

Summary judgment is proper "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). Unless evidence in the record would permit a jury to return a verdict for the non-moving party, there are no issues for trial, and summary judgment becomes appropriate. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, a court does not resolve factual disputes or make credibility determinations and must view facts and inferences in the light most favorable to the party opposing the motion. Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1127 (3d Cir. 1995). Although questions of contractual intent are often inappropriate for resolution on summary judgment, in an employment context "whether the evidence is sufficient to overcome the at-will presumption is a question of interpretation normally left to the court." Schoch v. First Fidelity Bancorp., 912 F.2d 654, 660 (3d Cir. 1990). The party opposing the summary judgment motion must come forward with sufficient facts to show that there is a genuine issue of

material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

### **Employment-at-Will in Pennsylvania**

"[I]f there is a dispute over the discharge of an employee, the threshold inquiry is whether or not the employment was at-will." Veno v. Meredith, 515 A.2d 571, 577 (Pa. Super. 1986). Under Pennsylvania law, employers may discharge employees at-will, that is, with or without cause, unless the discharge would violate an employment contract or a clear mandate of public policy. See Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1341-44 (3d Cir. 1990). An employment relationship is presumed to be at will unless the employee presents evidence of definite and specific terms of employment regarding length of employment or cause for termination. Engstrom v. John Nuveen & Co., Inc., 668 F. Supp. 953, 957 (E.D. Pa. 1987); see also Murray v. Commercial Union Ins. Co., 782 F.2d 432, 435 (3d Cir. 1986) (citing Cummings v. Kelling Nut Co., 84 A.2d 323, 325 (Pa. 1951)); Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974). It is a "settled principle that great clarity is necessary to contract away the at-will presumption." Scott v. Extracorporeal, Inc., 545 A.2d 334, 338 (Pa. Super. 1988) (citing Clay v. Advanced Comp. App., 536 A.2d 1375 (Pa. Super. 1988)(en banc)).

Vague or conclusory statements promising extended employment are insufficient to overcome the at-will presumption.

See Schoch, 912 F.2d at 660. However, the "parties' intentions regarding the agreement, gleaned by examining the surrounding circumstances, may enable an agreement to rise to the requisite level of clarity." Marsh v. Boyle, 530 A.2d 491, 493 (Pa. Super. 1987) (citation omitted). The burden is on the plaintiff to produce "clear and convincing evidence" that the parties intended to change the employment arrangement to a contract of definite length. Greene v. Oliver Realty, Inc., 526 A.2d 1192, 1200 (Pa. Super.), appeal den., 536 A.2d 1331 (Pa. 1987); Buckwalter v. ICI Explosives USA, Inc., Civ. A. No. 96-4795, 1998 WL 54355, at \* 6 (E.D. Pa. Jan. 8, 1998) (concluding that clear and convincing standard is correct burden because majority of Pennsylvania courts have so held and because Third Circuit described the burden as "very great").

Thus, in order to prevail, Mr. Shaffer must show, by clear and convincing evidence, that he had an employment contract for a definite term. Absent a specific contract, Mr. Shaffer was an at-will employee, both by legal presumption and by written agreement. BNP specifically contracted for, and later preserved, an employment-at-will relationship with plaintiff. Mr. Shaffer generally understood that BNP could end the employment relationship at any time, i.e., that the relationship was that of employment-at-will. Said he: "If I quit BNP/Cooper Neff, I quit Singapore as well or I guess the other case is true too in

reverse. If they let me go from BNP/Cooper Neff, they are letting me go from BNP Singapore." Pl. dep. 223. Plaintiff also testified in his deposition that he knew his employment with BNP was "for no definite period." Pl. Dep. at 86.

Mr. Shaffer claims an employment contract on two bases: that the May 29 secondment letter created a binding written contract, and that discussions in Fall 1995 gave rise to an oral employment contract.

Plaintiff argues that BNP/CN's May 29 secondment letter created a contract, specifically an employment contract for a term of two years. Assuming, arguendo, that the secondment letter constituted an offer, it never became a contract for lack of plaintiff's acceptance of the offer. For there to be an acceptance, the acceptance must be the "mirror image" of the offer, accepting, without change, the terms of that offer. Edward E. Goldberg & Sons, Inc., v. Jersey Central Power & Light Co., Civ. A. No. 88-8199, 1991 WL 262955 at \*3 (E.D. Pa., Dec. 6, 1991)(discussing New Jersey law). For contracts not involving the sale of goods, "an acceptance that varie[s] any term of the offer operated as a rejection of the offer, and simultaneously as a counteroffer." Step-Saver Data Sys., Inc., v. Wyse Tech., 939 F.2d 91, 99 (3d. Cir. 1991) (citations omitted) (applying Pennsylvania law). Because he did not accept the written, offered terms, Mr. Shaffer in fact and in law rejected the May 29

letter, and instead counter-offered, seeking to up his vacation to 30 days. That BNP/CN did not accept the counteroffer, and thus, not having reached agreement, the parties continued to operate under their prior agreement.

Alternatively, Mr. Shaffer claims that a contract was formed when he accepted defendant's offer by beginning performance. This argument has three flaws. First, Mr. Shaffer rejected the letter offer. A rejection terminates an offer and a terminated offer, unless revived by the offeror, may not later be accepted by the offeree, either expressly or by performance. Minneapolis & St. L. Ry. Co. v. Columbia Rolling-Mill Co., 119 U.S. 149, 155 (1886); Jenkins Towel Serv., Inc., v. Fidelity-Phila. Trust Co., 161 A.2d 334 (Pa. 1960). Thus, the express rejection would prohibit later acceptance by performance. Second, the May 29 letter specifically stated that to accept, Mr. Shaffer had to sign and return the letter by June 7, 1996. That he did not do. Where a limited time for acceptance is specified, the acceptance must be made within that time. In re Keifer, 243 A.2d 336 (Pa. 1968); Van Shoiack v. United States Liability Ins. Co., 133 A.2d 509 (Pa. 1957). Third, the record reveals no hint of a change in Mr. Shaffer's position, after the date of the offer, which could be construed as an acceptance of the terms of the secondment letter by performance. I thus conclude that the May 29 letter did not give rise to a contractual relationship.

Mr. Shaffer next argues that his conversations with defendant before his secondment to BNP Singapore gave rise to an oral contract. In this case, the question of whether the parties entered into an oral contract is one of material fact, on which a reasonable jury could differ. But since, at most, the oral contact was only for employment-at-will, and not for a term of years, it fails to carry the day for plaintiff.

Other than the secondment letters, offers which he declined to accept, plaintiff points to his own testimony about a 1995 conversation with Alec Petro where Mr. Petro, the BNP director of global trading, expressed that he "expected that [Mr. Shaffer] would stay [in Singapore] for two years." Completely crediting plaintiff's testimony, as I must on a motion for summary judgment, Mr. Petro's words were mere words of expectation, not of temporal warranty. The record does not contain a contractual pledge of employment for two years. Schoch, 912 F.2d at 660. Under Pennsylvania law, plaintiff's employment in the absence of a contractual pledge is, by definition, employment-at-will. Engstrom, 668 F. Supp. at 957.

#### **Additional Consideration**

Mr. Shaffer's second argument is that the at-will presumption has been rebutted by evidence that he provided sufficient additional consideration to BNP/CN to transform his employment relationship from at-will to one that must be

continued for a reasonable time. He claims that moving to Singapore constituted additional consideration, a "self-evident hardship," tendered from Mr. Shaffer to and for the benefit of BNP/CN.

Even without an employment contract, a plaintiff may overcome the at-will presumption by showing that he gave his employer additional consideration beyond simple job performance. Cashdollar v. Mercy Hospital, 595 A.2d 70, 72 (Pa. Super. 1991). Although a promise may not be sufficiently definite to be enforced on its own, if the employee had provided additional consideration, that tends to show that the parties intended to overcome the employment-at-will presumption. Scott v. Extracorporeal, Inc., 545 A.2d 334, 336 (Pa. Super. 1988); Anderson v. Haverford College, 851 F. Supp. 179, 181 (E.D. Pa. 1994). If the employment-at-will presumption is burst, the employer is estopped from terminating employment for a reasonable length of time. Marsh, 530 A.2d at 494; Veno, 515 A.2d at 577.

Additional consideration exists when "an employee affords his 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." Scott, 545 A.2d at 339 (Pa. Super. 1988) (citation omitted). For example, an employee who,

upon imploring by his employer, sold his house and moved his pregnant wife and young child from Virginia to Pittsburgh granted the employer sufficient additional consideration. Cashdollar, 595 A.2d at 72 (finding for the employee when the employer fired him only sixteen days after the move).

One factor useful in determining whether additional consideration was present is to inquire whether "a termination of the relation by one party will result in great hardship or loss to the other, as they must have known it would when they made the contract." Darlington v. General Electric, 504 A.2d 306, 315 (Pa. Super. 1986) (quotation omitted), overruled on other grounds, Clay v. Advanced Computer App., Inc., 559 A.2d 917 (Pa. 1989). See generally, Buckwalter v. ICI Explosives USA, Inc., Civ. A. No. 96-4795, 1998 WL 54355 (E.D. Pa. Jan. 8, 1998) (discussing law on additional consideration).

The primary factor upon which the courts tend to focus is relocation, particularly relocation of a family. See e.g., Scullion v. EMECO Ind., Inc., 580 A.2d 1356 (Pa. Super. 1990), appeal den., 592 A.2d 45 (1991) (additional consideration present when employee moved family from California to Pennsylvania and rejected higher offer from previous employer). Also important are the sale of a home (particularly if sold at a loss), reduced salaries, and the rejection of other, specific opportunities.

See, e.g., Cashdollar, 595 A.2d at 73-74; Martin v. Safeguard Scientifics, Inc., Civ. A. No. 96-8293, 1998 WL 306528 (E.D. Pa. June 5, 1998)(employee's relinquishing goodwill and profit of proprietary business to join employer's firm constituted sufficient additional consideration); Greene v. Oliver Realty, Inc., 526 A.2d 1192 (Pa. 1987) (finding additional consideration where lifetime employment was promised in exchange for working at sub-union wages). But see Veno v. Meredith, 515 A.2d 571, 580 (Pa. Super. 1986), appeal den., 616 A.2d 986 (Pa. 1992) (no additional consideration where employee resigned one job, moved his family from Newark to Philadelphia, and refused other employment offers; employee worked for eight years before discharge); Duvall v. Polymer Corp., Civ. A. No. 93-3801, 1995 WL 581910, at \*17 (E.D. Pa., Oct. 2, 1995) (foregoing opportunities for employment with other companies was not substantial hardship). "The at-will presumption is not overcome every time a worker sacrifices theoretical rights and privileges." Scott v. Extracorporeal, Inc., 545 A.2d 334, 339 (Pa. Super. 1988) (plaintiff relied upon a pledge of "permanent employment" in deciding to accept a position).

Although the existence of additional consideration is normally a question of fact for the jury, the court may rule on the issue when the "evidence is so clear that no reasonable [person] would determine the issue before the court in any way

but one . . . ." Darlington, 504 A.2d at 350. Courts "have given a narrow reading to 'additional consideration,' generally requiring a showing of some extraordinary detriment or extraordinary benefit before allowing the question to reach the jury." Geiger v. AT&T Corp., 962 F. Supp. 637, 649 (E.D. Pa. 1997).

There is nothing in the record to demonstrate that Mr. Shaffer's relocation enriched BNP. The transfer to BNP Singapore was originally Mr. Shaffer's idea, as the move provided him access to a "better" job. Pl. dep. 123-30. Nor did he appear to suffer a special detriment. Mr. Shaffer neither sold a home nor relocated family. In fact, it was BNP which provided significant additional benefits, including a housing allowance, travel benefits, relocation expenses, club memberships, and a possibility of a large annual bonus in a warm climate with year-round good golf, features which were very important to him. Nor does Mr. Shaffer allege that the relocation was a condition of continued employment. In short, this appears to be a professional and personal opportunity into which Mr. Shaffer thrust himself. I thus conclude that no reasonable jury could find that Mr. Shaffer provided sufficient additional compensation to BNP/CN or any of its affiliated entities so as to burst the presumption of employment at will.

### **Conclusion**

The parties did not have a written employment contract. Whether there was an oral contract is unclear, but if so, it was, at most, merely for employment-at-will, rather than for a definite term. Nor did plaintiff provide sufficient additional consideration to defendant that would estop BNP/CN from six months thereafter showing him out the door.

An order follows.