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Mass. Ruling Highlights Exec Employment Pact Pitfalls

By **Brian MacDonough and Nancy Shilepsky** (May 26, 2021, 4:07 PM EDT)

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Are the terms of a job offer enforceable? If the offer is accepted, the answer is usually a resounding yes, even if the employment offered is at will.

However, a case recently decided by the Massachusetts Superior Court, Moore v. LGH Medical Group LLC,[1] provides a cautionary tale regarding ambiguous drafting by an employer and potential pitfalls for an executive who relied thereon.

In uncertain economic times, employers seeking maximum flexibility in staffing decisions may be wary of extending binding job offers. Likewise, given COVID-19 concerns, an increasing number of transitioning executives may prefer flexible start dates of increasingly long duration. This is particularly the case for executives who may be hesitant to move their families across the country or across borders unless and until they believe such moves are prudent.

If one outcome of the global pandemic is more carefully drafted employment agreements, it would be to the benefit of all concerned. However, amid of these uncertain times, many employers seeking a balance between recruitment and caution may draft offers of employment replete with ambiguity, which may drive the parties into litigation.

The Dangers of Ambiguity

Consider, for example, the case of Hooker v. Trusted Life Care Inc.,[2] where in 2009 the Massachusetts Superior Court held that once a job offer was signed and accepted, the employer had a contractual obligation to allow the employee to begin employment, even though the employment offered was at will. Needless to say, once employment begins, contractual terms and other job-related protections apply; and the employer cannot avoid liability by unilaterally revoking the offer.

In other words, upon acceptance of the offer, even an at-will employee may become entitled, for example, to severance for termination without cause and other benefits of employment without putting in even a full day's work.

However, according to court documents in Moore v. LGH Medical Group, Dr. Elizabeth Moore received a

letter from LGH Medical offering her a position as medical director at Lowell General Hospital. The offer letter was attached to an email, and the email stated:

> Upon your signature accepting this offer, we will finalize an employment agreement based on [the offer letter's financial] terms.

The offer letter itself stated:

> This is not a legally binding document, but your signature on this will confirm your acceptance of the financial terms which will prompt us to generate an employment contract.

Moore timely accepted the job offer, but the employment contract was not forthcoming. Thereafter, Moore sued LGH for breach of contract and, in the alternative, under the equitable doctrine of promissory estoppel. LGH moved for summary judgement on both counts.

The court sided with LGH, putting an end to Moore's case prior to trial. The court found that the specific intent of the parties was that the offer letter was, itself, not enforceable as a contract. Rather, both the language of the offer letter and the surrounding facts — including admissions by Moore — "indicate that the parties contemplated the execution of a final written agreement." The job offer was, effectively, an unenforceable letter of intent.

What was more surprising was the court's rejection of Moore's promissory estoppel claim. The promissory estoppel doctrine has long held that prospective employees may recover damages despite the employment offered being at will.

For example, in Bower v. AT&T Technologies Inc. in 1988,[3] the employer promised favorable rehire benefits to former employees, such as bridged seniority and pension credits, upon which the former employees relied to their detriment by foregoing other employment. The U.S. Court of Appeals for the Eighth Circuit held that recovery was possible under a promissory estoppel theory even though the employment that did not materialize was at will.

Generally, the elements of promissory estoppel include that a prospective employer made a representation intended to induce reliance by the prospective employee, the prospective employee detrimentally relied, and such reliance was reasonable.

This claim is akin to a tort claim for fraud in the inducement. It is possible that some prospective employees may be more successful under the tort claim, but the damages and remedies under the tort claim may be more limited — solely reliance damages rather than, in some jurisdictions, the benefits of the bargain.

In either case, under promissory estoppel or fraud in the inducement, a necessary element is that the reliance was reasonable and, in LGH Medical, the court found it was not. The court relied heavily on a statement made by Moore two days after she accepted the job offer.

In an email, Moore said, "I am really hoping that all continues to go smoothly." Under the circumstance, such hope could easily have been related to what would be in the employment contract, e.g., the proposed nonfinancial terms, not whether an employment contract would be forthcoming.

Again, however, the LGH Medical court relied on Moore's own admission under oath that she used the word hope to describe her potential employment with LGH — conflating whether an employment

contract would be forthcoming with whether it would contain favorable noneconomic terms. Consistent with that conflation, the court held that a hope for employment, even if well-founded, is not sufficient to support a promissory estoppel claim.

Proactive Steps for Avoiding Litigation

Needless to say, neither employers nor executives want to end up in court. To avoid that, the parties should consider the following proactive steps.

First, as with any good faith negotiation, the parties should avoid using ambiguous language. Second, the parties should avoid relying on representations made in written or oral negotiations, and should, instead, wait to act until the contract, regardless of its form, is fully executed.

Third, if preexecution reliance is necessary, such as for the executive to have counsel review the terms of the agreement and compensation and equity plans, the parties should consider entering into a separate agreement to cover the associated costs.

Fourth, as appropriate, the parties should consider entering into a prenegotiated off ramp should either party have a change of heart before the employment starts.

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[1] Moore v. LGH Medical Group, LLC, No. 1981CV00081, 2021 WL 1514311 (Mass. Super. Mar. 5, 2021).

[2] No. 07-0174C, 2009 WL 839094, *6 (Mass. Super. Mar. 11, 2009).

[3] 852 F. 2d 361, 363 (8th Cir. 1988).