

A Tale of Two Job Offers

3/12/2010

By Harris Neal Feldman

Employers are finding out the hard way that verbally extending a job offer and later rescinding it may lead to costly litigation. The revocation of a job offer often leads to trouble for employers, and challenges turn on very narrow factual circumstances.

Two decisions in New Jersey illustrate the dangers of revoking a job offer and should serve as a warning to employers.

In *Schley v. Microsoft Corp.*, Civ. No. 08-3589, unpublished (D.N.J. 2008), the court refused to let the prospective employer off the hook when a Microsoft supervisor encouraged the prospective employee, a New Jersey resident, to quit his job and start looking for a home near Microsoft's headquarters in Redmond, Wash. The prospective employer offered the applicant details about good neighborhoods and real estate agents, but after completing a background check decided to revoke the job offer.

An employer may not be able to avoid litigation if it revokes a job offer, but it may be able to ultimately persuade a court that no law was broken. For example, in *Sercia v. Red Bull North America Inc.*, No. A-2530-07T3 (N.J. App. Div. 2008), the court ruled that even though the prospective employee resigned from her old job in reliance on the prospective employer's detailed promise of employment, she nonetheless failed to show that she had suffered a significant enough detriment in relying on the alleged promise of employment because she had not been induced to spend money or give up her home in an effort to relocate for the prospective employer.

These decisions point to some lessons for employers and executives.

Concern over Criminal Complaint

Mitchell Schley, a New Jersey resident, responded to an Internet job posting for an attorney position at Microsoft in Redmond, Wash. After several telephone interviews, he traveled to Washington to meet with members of Microsoft's legal department. Michele Gammer, Microsoft's associate general counsel, offered Schley the position, negotiated the terms and finalized a written employment offer that Schley signed. The offer provided that employment was at-will and "terminable at any time without cause," and it did not fix any minimum period of employment. It also cautioned that employment was "contingent upon the successful completion of a background check and professional references."

After Schley signed the agreement, Gammer encouraged him to give notice to his employer, which he did. Shortly thereafter, Schley again traveled to Washington. While there, Gammer suggested that he begin looking for housing near Microsoft's headquarters and even recommended a real estate agent. While still in Washington, Schley put down a \$30,000 deposit on the purchase of a home.

Two weeks later, Gammer advised Schley that his background check had revealed a felony charge. Providing additional details, Schley explained that this was a frivolous criminal complaint from five years earlier that had been subsequently dropped. He followed up by sending Microsoft official documents verifying this explanation. A few days later, Gammer advised Schley that despite successful completion of the background check process, his employment offer was revoked. Schley decided to complete the purchase of the home after already investing \$30,000 and sold it two months later. He remained out of work for two years.

Schley's complaint against Microsoft and Gammer alleged numerous claims, including

promissory estoppel, breach of contract, breach of the implied covenant of good faith and fair dealing, fraud and misrepresentation, reckless misinterpretation, negligent misrepresentation, intentional infliction of emotional distress, reckless infliction of emotional distress and negligent infliction of emotional distress.

The defendants moved to dismiss the promissory estoppel, breach of contract, and breach of implied covenant of good faith and fair dealing claims against Microsoft for failure to state a claim upon which relief may be granted and to dismiss all claims against Gammer for lack of personal jurisdiction.

The court denied Microsoft's motion to dismiss the claim for promissory estoppel under New Jersey law. The defendants made "a clear and definite promise" that they were giving Schley a highly paid position, the court explained. The defendants expected Schley would quit his job and purchase a new home in reliance on this promise and actually encouraged him to quit. When he quit "in reasonable reliance on their promise," the court found that "as a result, he suffered definite and substantial losses in the form of continued unemployment and lost wages, expenses associated with purchasing a new home in Washington, and emotional damages."

In a partial victory for Microsoft, the court did find in Microsoft's favor on the breach of contract and covenant claims and dismissed them, finding that because Microsoft was not contractually bound to provide Schley with any minimum term of employment, the revocation could not be a breach of contract.

Motor Vehicle Infractions Unearthed

In the other decision, Sarah Sercia was employed as a beverage marketing professional when Red Bull contacted her about a job opening in the Philadelphia area. After twice meeting with Red Bull employees, she was asked whether she would like to accept the position. Sercia said she wanted to give proper notice to her current employer, but she conditionally accepted the job offer.

Even though she had asked that Red Bull not contact her current employer until after she had given notice, one of the Red Bull employees informed her approximately a half hour after the meeting that he had told her employer about Red Bull's job offer to her because he wanted her to start immediately. The next day at work, Sercia's employer gave her one day to decide whether to remain or accept Red Bull's offer. She contacted Red Bull to confirm the details of the offer: "a base salary of \$48,000, a 20 percent commission bonus, use of a company vehicle, laptop computer and cell phone, and an unspecified amount of money to set up a home office." Sercia accepted Red Bull's offer and resigned from her current position.

Two days later, she completed Red Bull's formal application for employment and also executed a disclosure and authorization to obtain information. The application stated, in part, that "nothing contained in this application, or conveyed during any interview ... is intended to create an employment contract. ... [E]mployment will be at-will, for no definite or determinable period. ... [N]o promises or representations contrary to the foregoing are binding on the complaint. ... This is the entire agreement ... [and] any job offer is conditional, based upon the satisfactory review of my qualifications including any and all background or drug screening which may be required." The application added, "You will be informed of a final decision once the entire interview process is completed, which includes a complete background check." The disclosure and authorization permitted the employer to access "public records including, but not limited to, Social Security number, motor vehicle operation history/driving records, workers' compensation information and criminal history to the extent permitted by law."

Sercia claimed that Red Bull advised her that the application was only for administrative purposes. Subsequently, Red Bull informed her that "something had come up relative to her background investigation," and it rescinded the job offer. Sercia later learned that the

revocation was based on excessive motor vehicle infractions.

Sercia filed a complaint alleging promissory estoppel. The trial court granted Red Bull's motion for summary judgment dismissing the complaint, and the appellate court affirmed the lower court's ruling. The court recognized that Sercia was offered employment at will, such that Red Bull could have rescinded the offer at any time before she started working or terminated her at any time after she started working.

While Red Bull did not require a reason for its actions since the offer of employment was at-will, the court nonetheless noted that Sercia's driving record would have caused a reasonable employer to question giving her a company vehicle. The court concluded that the complaint must be dismissed because Sercia had "not established that she incurred a detriment of a definite and substantial nature in reliance on the promise of employment." The court explained that Red Bull did not induce her to relocate or to sell her home and move to another state; therefore, merely leaving one job to take another is insufficient to create a promise of employment.

Lessons for Employers and Executives

These cases illustrate the risks in making verbal offers of employment and demonstrate the need to expressly condition any offer while still awaiting results of employer-mandated background checks and authorizations. Employers should counsel management and HR professionals to avoid making verbal representations and offering encouragement to potential employees.

Despite the power of the written word, sometimes written words explaining in multiple ways and in bold type that employment is at-will nonetheless will be found insufficient to overcome relied-upon verbal promises and to prevent a lawsuit or convince a court to dismiss such a complaint. Nevertheless, all employers should ensure that their applications and policies are comprehensive and up-to-date. In short, careful planning and training can better insulate employers from these claims.

Finally, a tip for any executives entertaining a job offer at a new company: Proceed with caution while still employed at your current company. Any executive would be wise to wait to resign from any current position until the new job offer has been fully explored, is in writing and is as unequivocally final as possible.

Harris Neal Feldman is a partner with the law firm of Schnader Harrison Segal & Lewis LLP in the Cherry Hill, N.J., office. His broad litigation practice includes representation of corporations and professionals in defense of employment litigation in state and federal courts and agencies at the trial and appellate level.