

Pursuant to Fed. R. Civ. P 56(c), the court shall render summary judgment if there remains "no genuine issue as to any material fact" and if "the moving party is entitled to a judgment as a matter of law." The undisputed material facts may be briefly summarized.² In February 1989 the plaintiff contacted Behny and asked him whether he might know of any contacts who could help him find a new job. Behny indicated that he felt that there was potential for the plaintiff to join Towery, and that he would talk to Robert Towery, its president, and get back to the plaintiff. The plaintiff subsequently received a message to call Robert Towery. After a series of negotiations between the plaintiff and Robert Towery, the plaintiff signed an employment and confidentiality agreement ("contract") with Towery. The contract named the plaintiff as the regional manager for the New York and New England area and calculated his salary on a commission basis. In addition, the contract contained a termination clause which stated in relevant part:

9. Term. The original term of this Agreement shall be three (3) months. Thereafter, the term hereof may be extended for additional periods of time by written mutual consent of the parties. If no written consent is entered into, the term will automatically be extended for additional one (1) month periods (the "Extended Term"). The Original Term and any Extended Term are referred to collectively as the Term.

10. Termination.

² The plaintiff failed to file both a written objection and a statement of material facts as to which he contends that there exists a genuine issue to be tried. *See* Local Rule 19(b)(2). As a consequence of this failure, all material facts set forth in the defendants' statement of material facts which are supported by appropriate record citation are deemed admitted. *Id.*; *McDermott v. Lehman*, 594 F. Supp. 1315, 1321 (D. Me. 1984). Although the plaintiff filed an affidavit in support of his objection, this affidavit will not be considered because it was not accompanied by a statement of material facts.

(a) When the Term of this Agreement expires, whether the Original Term, or any Extended Term, either party may terminate this Agreement on 14 (14) [sic] days prior written notice. The prior written notice may be given fourteen (14) days prior to the end of the Term so that the termination coincides with the end of the Term.

(b) During the Term of this Agreement, [the plaintiff] may terminate this Agreement by giving fourteen (14) days prior written notice to the Company. During the Term of this Agreement, Company may only terminate the employment of [the plaintiff] For Cause. A termination ``For Cause" will be effective immediately upon written notice. The phrase ``For Cause" as used herein shall include, but not by way of limitation, the following: . . . (iv) willful refusal to perform or substantial disregard of the significant duties assigned

Contract && 9-10 (found at Exh. 1 to Deposition of Frederick L. Yerdon). The plaintiff was not told during the contract negotiations that Towery would need cause for nonrenewal at the end of a contract termination. The employment relationship ended during the original term of the contract. On March 31, 1989 Behny called the plaintiff's office in Portland, Maine and spoke to Katy Vogt, a receptionist with the Lawyers Office Center with whom the plaintiff had arranged for telephone coverage. Behny read the following message to Vogt:

In light of your apparent abdication of responsibilities, please be advised that the performance clause of your agreement specifically requires that you accept direction and responsibility as given by management. Because of your actions this date, your salary and employment shall be terminated.

Affidavit of Frederick L. Yerdon & 4 (docket #11). The plaintiff's emotional distress arose only out of the termination of his employment with Towery.

Behny contends he is entitled to summary judgment on all counts because he was not a party to the contract. In addition, both defendants argue that they are entitled to partial summary judgment for five reasons: (1) the contract unambiguously states that Towery Publishing may terminate the plaintiff's employment upon 14 days notice at the end of any employment term; (2) there is no promissory

estoppel because the plaintiff could not reasonably rely on representations made outside the contract; (3) the plaintiff may not recover damages under 26 M.R.S.A. ' ' 626 and 626-A; (4) the defamation claims do not lie because the statements made were true and the defendants were protected by a conditional privilege; and (5) the emotional distress claims are barred by Maine's Workers' Compensation Act. The plaintiff contends there are genuine issues of material fact on all of these questions.

At the outset, Behny contends that he is entitled to summary judgment on all counts because he was not a party to the contract. To the extent the plaintiff's claims are grounded on the contract, I agree. Counts I and III of the complaint assert claims based entirely on the alleged breach of contract. Although the plaintiff contends that these counts also contain claims against Behny for tortious interference with a business relationship, I find this argument unconvincing. Nothing in these counts even hints at such a claim. It is undisputed that Towery and the plaintiff were the only parties to the contract. Accordingly, I conclude that there is no genuine issue as to any material fact on these claims and that Behny is entitled to judgment as a matter of law on Counts I and III. I therefore recommend that his motion for summary judgment be granted on these claims.

Towery argues that it is entitled to summary judgment on Counts III and IV³ because the contract unambiguously states that the plaintiff may be terminated upon 14 days notice at the conclusion of the original term or of any extended term. The plaintiff contends that Towery could only terminate his employment for cause during the duration of his employment relationship with it. He argues that the language of the contract entitles him to employment until age 65. Under Maine's

³ The plaintiff concedes that defendant Behny is not jointly and severally liable for the damages asserted in Counts II and IV and accordingly concedes that summary judgment should be granted on those counts. *See Plaintiff's Memorandum in Opposition to the Defendants' Motion for Summary Judgment* at 1. Therefore I recommend that defendant Behny's motion for summary judgment be

choice-of-law rules, parties to a contract may expressly choose the law governing their agreement.⁴ See *Baybutt Const. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914, 917-19 (Me. 1983), *rev'd on other grounds*, *Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 385 (Me. 1989); *Restatement (Second) of Conflicts* ' 187 (1971). Here the contract provides that its terms are to be governed and construed under the laws of Tennessee. Contract & 14. In Tennessee, "where there is no ambiguity in a contract, parol evidence is not admissible to vary the plain meaning of its terms. However, where there exists an ambiguity in a contract, parol evidence is admissible to explain the actual agreement." *Jones v. Brooks*, 696 S.W.2d 885, 886 (Tenn. 1985) (citations omitted). "If a contract is plain and unambiguous the meaning thereof is a question of law and it is the Court's function to interpret the contract as written according to its plain terms." *In re Estate of Espey*, 729 S.W.2d 99, 101-02 (Tenn. Ct. App. 1986) (citing *Petty v. Sloan*, 277 S.W.2d 355 (Tenn. 1955)). Yet, ambiguous language in a contract is to be construed against the drafter. *Reliance Ins. Co. v. Olsen*, 678 S.W.2d 59, 61 (Tenn. 1984).

granted as to Counts II and IV.

⁴ As a federal court sitting in a diversity action, this court must apply the choice-of-law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941).

The provisions of the contract at issue here are ambiguous. Paragraph 9 allows the parties to extend the contract by written mutual consent. Absent written mutual consent, the agreement is extended automatically on a month-to-month basis, apparently *ad infinitum*, until terminated by one of the parties. Paragraph 10 establishes that either party may terminate the contract on 14 days prior written notice at the expiration of the original or any extended term. It also states, however, that the plaintiff may terminate the agreement at any time during its term upon 14 days written notice, but that "[d]uring the Term⁵ . . . [Towery] may only terminate the employment of [the plaintiff] for cause." This apparent inconsistency is susceptible either to the plaintiff's interpretation, that his employment could only be terminated for cause, or to Towery's construction, that the plaintiff could be terminated for any reason at the end of the original or any extended term on 14 days notice, but only terminated for cause during the original or any extended term of the agreement. Because I conclude the contract is ambiguous, parol evidence may be offered "to explain the actual agreement." *Jones v. Brooks*, 696 S.W.2d at 886. No such evidence is before the court on the present record. Accordingly, I recommend that Towery's motion for partial summary judgment be denied on this issue.

⁵ "Term," as used in the contract, refers collectively to the original three-month term and any and all one-month extensions.

The defendants next argue that the plaintiff's promissory estoppel claims in Counts IV⁶ and V must fail because the contract "` establishes the extent of the promises and representations upon which [the plaintiff] reasonably could rely." Defendants' Memorandum in Support of Motion for Partial Summary Judgment at 7. In Maine' "` [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Stone v. Waldoboro Bank*, 559 A.2d 781, 782 (Me. 1989) (quoting *Restatement (Second) of Contracts* ' 90 (1981)). Because I conclude that the contract between the parties is ambiguous and can be supplemented with parol evidence, I also conclude that the defendants are not entitled to summary judgment on the plaintiff's promissory-estoppel claim. On this record it is unclear what promises the defendants may have made to the plaintiff and which of those promises, if any, were memorialized in the written agreement. Thus, viewing the facts in the light most favorable to the plaintiff and indulging

⁶ As noted above, the plaintiff has already conceded that Count IV states no claim against Behny.

⁷ Although the provisions of the employment contract are controlled by the law of Tennessee, Maine's choice-of-law rules require that the remaining claims be determined by application of the law of the state with the greatest interest in the resolution of the underlying controversy. *See Baybutt Const. Corp. v. Commercial Union Ins. Co.*, 455 A.2d at 917-19. Because Maine is the place where the plaintiff signed the contract and where the alleged breach and the ensuing mental distress occurred, *see* Supplemental Affidavit of Frederick L. Yerdon in Opposition to Defendants' Motion to Dismiss && 10, 16-17, I conclude that Maine has the greatest interest in the resolution of the underlying controversy. Accordingly, Maine law applies to all of the non-contract claims.

all inferences favorable to him, *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 895 (1st Cir. 1988), the conclusion may be drawn that the plaintiff relied upon statements made by the defendants that he would only be terminated for cause and that he acted accordingly. I therefore conclude that the defendants have not sustained their burden of establishing that they are entitled to judgment as a matter of law and accordingly recommend that the motion for summary judgment be denied on this issue.

Towery next argues that it is entitled to summary judgment on the plaintiff's claims in Counts II and IV that it is liable for damages under 26 M.R.S.A. ' ' 626 & 626-A.* It contends that the plaintiff's claims for breach of contract and promissory estoppel are not covered by these provisions because they are not "wages" and because the plaintiff is not the type of employee these provisions were intended to protect. I agree. In *Knoppers v. Rumford Community Hosp.*, 531 A.2d 1276 (Me. 1987), the Law Court held that: "[These provisions] apply only to employees heavily dependent upon weekly compensation to meet living expenses. The Legislature did not intend, for instance, that salaried corporate executives be treated as 'employees' within the meaning of [' ' 626 and 626-A]

* 26 M.R.S.A. ' ' 626 states in relevant part:

Any employee leaving his . . . employment shall be paid in full within a reasonable time after demand at the office of the employer where payrolls are kept and wages are paid

. . .

An employer found in violation of this section shall be liable for the amount of unpaid wages and, in addition, the judgment rendered in favor of the employee or employees shall include a reasonable rate of interest, an additional amount equal to twice the amount of those wages as liquidated damages and costs of suit, including a reasonable attorney's fee.

Section 626-A provides, in addition to the relief set out in ' ' 626, for a "forfeiture of not less than

[Furthermore,] the Legislature intended to limit [the term] `any employee' under section 626 to those employed by the employers specified in section 621(1)." *Id.* at 1280. The employers specified in ' 621(1) are:

Every corporation, person or partnership engaged in a manufacturing, mechanical, mining, quarrying, mercantile, restaurant, hotel, summer camp, beauty parlor, amusement, telegraph or telephone business; in any of the building trades; in logging or lumbering operation; upon public works, or in the construction or repair of roads, bridges, sewers, gas, water or electric light works, pipes or lines; every incorporated express company or water company; and every steam railroad company

26 M.R.S.A. ' 621(1). Here the plaintiff was hired as Towery's regional manager for the New York and New England area, *see* Contract && 1-2, and his salary was based on a commission against which weekly draws were charged, *id.* at && 4-5. In addition, Towery was not a corporation which engaged in any of the businesses specified in ' 621(1). *See* Deposition of Frederick L. Yerdon at 59. I conclude that the plaintiff was a salaried corporate executive working for an employer not specified in ' 621(1). Accordingly, I conclude that there is no genuine issue as to any material fact on this question and that Towery's motion for partial summary judgment should be granted on this issue.

Both defendants argue that the plaintiff's defamation claims in Counts VI and VII do not lie because the statements made in the allegedly defamatory message were true. They argue in the alternative that, even if the statements were defamatory, the communication was protected by a conditional privilege. It is long established in Maine that "`words falsely spoken are slanderous per se if they relate to a profession, occupation or official station in which the plaintiff was employed." *Saunders v. VanPelt*, 497 A.2d 1121, 1124-25 (Me. 1985). The *Restatement* defines defamation as "`[a] communication . . . [that] tends so to harm the reputation of another as to lower him in the

\$100 nor more than \$500 for each violation." 26 M.R.S.A. ' 626-A.

estimation of the community or to deter third persons from associating or dealing with him."

Restatement (Second) of Torts ' 559 (1977). Here Behny is alleged to have made the following defamatory statement:

In light of your apparent abdication of responsibilities, please be advised that the performance clause of your agreement specifically requires that you accept direction and responsibility as given by management. Because of your actions this date, your salary and employment shall be terminated.

Affidavit of Frederick L. Yerdon & 4. The only fact which the defendants have put before the court on this issue is that the plaintiff's termination took place during the original term of the contract. *See* Statement of Undisputed Material Fact in Support of Defendants' Motion for Partial Summary Judgment & 3. Accordingly, they have failed to establish the truth of these statements. I therefore conclude that they are not entitled to judgment as a matter of law on this issue based on their claim that the statements were true.

The defendants claim in the alternative that they enjoy a conditional privilege for the statements read to Vogt because Vogt was employed by the plaintiff to answer his calls when he was away from the office. The Law Court has held as conditionally privileged communications made by an employee ``engaged in an activity of benefit to his employer in reviewing another employee's credentials." *Gautschi v. Maisel*, 565 A.2d 1009, 1011 (Me. 1989) (citing *Restatement (Second) of Torts* ' 596 comment d (1977)); *see also Onat v. Penobscot Bay Medical Center*, 574 A.2d 872, 874 (Me. 1990). The privilege arises ``if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know." *Restatement (Second) of Torts* ' 596. If the conditional privilege applies it ``entitle[s] the defendants] to immunity for slander unless [they] abused the privilege -- for example by making the statement outside normal channels or

with malicious intent." *Gautschi v. Maisel*, 565 A.2d at 1011. The defendants, however, bear the burden of proving the circumstances necessary to establish the existence of a conditional privilege. *Saunders v. VanPelt*, 497 A.2d at 1125.

On this record the defendants have failed to establish that Vogt, who was not an employee of Towery, had either a common interest in the plaintiff's employment credentials or that Behny, who made the statements to her, had a reasonable belief that the plaintiff's employment status was information that Vogt was entitled to know. Unlike the facts in *Gautschi*, where the defendant was an employee reporting to a tenure committee established by the employer, *see Gautschi v. Maisel*, 565 A.2d at 1010-11, in this case Behny left a message with a receptionist who was unaffiliated with Towery and whose only responsibility was to answer the plaintiff's telephone when he was not in his office. I conclude that Towery has failed to establish the circumstances necessary for the existence of a conditional privilege. Accordingly, I recommend that Towery's motion for summary judgment be denied on this issue.

Finally, the defendants argues that the plaintiff's emotional distress claims in Counts VIII and IX are barred by the Maine Workers' Compensation Act, 39 M.R.S.A. ' ' 1-195 (``Act"). They contend that the exclusivity provisions of the Act bar claims for emotional distress which arise out of the wrongful termination of employment. In *Knox v. Combined Ins. Co. of America*, 542 A.2d 363 (Me. 1988), the Law Court recognized that mental injuries are ``compensable under the . . . Act provided that the criteria set out in 39 M.R.S.A. ' 51(1) are met." *Id.* at 365 n.5. In order for an injury to be compensable under the Act, the employee must ``1) suffer a personal injury, 2) that arises out of and 3) in the course of the employment." *Id.* at 366. Thus, the question for the factfinder to determined is ``whether there is `some causal connection between the conditions under which the

employee worked and the injury he received." *Id.* (quoting *Chase v. White Elephant Restaurant*, 418

A.2d 175, 176 (Me. 1980)). In addition, ' 51(3) of the Act states that:

Mental injury resulting from work-related stress does not arise out of and in the course of employment unless it is demonstrated by clear and convincing evidence that:

A. The work stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee; and

B. The work stress, and not some other source of stress, was the predominant cause of the mental injury.

The amount of work stress shall be measured by objective standards and actual events rather than any misperceptions by the employee.

A mental injury is not considered to arise out of and in the course of employment if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action, taken in good faith by the employer.

39 M.R.S.A. ' 51(3). Here it is undisputed that the plaintiff's emotional injury arose out of the termination of his employment and that his termination is the sole source of his mental distress. In addition, the plaintiff's complaint alleges that the termination was accomplished in bad faith. These facts compel the conclusion that the plaintiff's claims for negligent and intentional infliction of emotional distress are barred by the Act. Accordingly, I conclude that there is no genuine issue of material fact on this question and recommend that the defendants' motion for summary judgment be granted as to these claims.⁹

In Count X of the complaint the plaintiff asserts a claim for punitive damages. The defendants, however, have failed to address this claim in their memoranda. It is well settled that

⁹ The defendants argue in the alternative that the plaintiff should be barred from pressing his emotional distress claims because he prevented the defendants from obtaining meaningful discovery on the issue. Because I conclude that these claims are barred by the Act, I do not reach the

issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Collins v. Marina-Martinez*, 894 F.2d 474, 481 n.9 (1st Cir. 1990). Thus, for purposes of this summary judgment motion the defendants have waived this issue.

For the foregoing reasons I recommend that: (1) defendant Behny's motion for summary judgment as to Counts I through IV, VIII and IX be **GRANTED** and that the motion as to the remaining counts involving him be **DENIED**; and (2) defendant Towery's motion for partial summary judgment as to Counts II, VIII and IX, and that part of Count IV which relates to 26 M.R.S.A. ' ' 626 and 626-A, be **GRANTED** and that the motion as to the remaining counts and that part of Count IV affecting it which relates to claims for breach of contract and promissory estoppel be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 5th day of September 1990.

***David M. Cohen
United States Magistrate***

defendants' alternative argument.