

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

KEVIN L. FORAN,)
)
 PLAINTIFF)
)
 v.)
)
 WILLIAM HENDERSON, UNITED)
 STATES POSTMASTER GENERAL,)
)
 DEFENDANT)

Civil No. 98-230-P-H

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff Kevin Foran suffers from a learning disability that limits his ability to read and is also obese. The Postal Service hired him as a casual mail handler for a term of under one year but failed either to rehire him for that position or to appoint him to a permanent mail handler position. Foran filed this lawsuit, claiming that the Postal Service failed to accommodate his disability and failed to hire him as a permanent mail handler in violation of the Rehabilitation Act of 1973. 29 U.S. § 791 (1999). He alleges that while the litigation was pending he entered into a settlement agreement with the Postal Service in which the Postal Service agreed to reinstate him as a permanent mail handler if a designated vocational expert determined he was able to perform the essential functions of that job, with or without reasonable accommodation. He alleges that the Postal Service then proceeded to repudiate the settlement agreement. He amended his complaint accordingly by adding three additional counts. I ruled that he was not entitled to a jury trial on Count V, the count alleging a breach of the settlement agreement. After a bench trial solely on whether such a settlement agreement existed, I conclude that there was an enforceable agreement to have an independent expert

examine Foran's ability to perform Postal Service job functions and an agreement that her report and testimony could not be used by either party in subsequent litigation, but that there was no agreement to settle the case, in whole or in part.

FINDINGS OF FACT

1. On June 22, 1998, Attorney Bruce Hochman, on behalf of Kevin Foran, filed a complaint with this court. Shortly thereafter, Assistant United States Attorney James Moore contacted Mr. Hochman to inquire about the case before filing the Postal Service's answer. The contact culminated in a face-to-face meeting in late July, 1998, with Foran, his parents, Hochman, Moore and Elaine Parsons, a lawyer employed by the Postal Service. At that meeting, both Moore and Hochman explored whether the plaintiff could be reinstated.

2. Moore subsequently suggested a settlement conference call, which occurred on September 28, 1998. Participating in the call were the Forans, Hochman, Moore, Parsons, and United States Attorney Jay McCloskey. During the conference call, there was discussion that the Postal Service was prepared to award Foran a 90-day reinstatement as a probationary mail handler, with the understanding that if Foran completed that period successfully, he would be expected to apply for a transfer to a custodial position and then be given another 90-day probationary period. The plaintiff was not satisfied with such a resolution. Both sides agreed to explore finding a vocational rehabilitation expert to evaluate Foran's abilities.

3. On September 30, 1998, Hochman sent Moore a letter rejecting the temporary reinstatement idea. Hochman discussed other unresolved issues including back pay, front pay wage differentials, lost benefits and compensatory damages. Hochman also stated that he thought the "likelihood of settling this matter on a global basis is very small." He then proposed a "partial resolution," either (1) hiring Foran as a Postal Service custodian with seniority credit; or

(2) engaging an independent vocational counselor to evaluate Foran and to determine whether he could “perform the essential functions with or without reasonable accommodation of an appropriate and acceptable permanent position.” If the counselor were to find Foran capable of an appropriate and acceptable permanent position, Hochman proposed that Foran be appointed. Hochman also proposed that in any event Foran retain all his litigation rights “with respect to any other claim for damages or injunctive relief, including but not limited to claims for back pay, front pay wage differential, compensatory damages, reinstatement of seniority, reinstatement of benefit levels, and attorneys’ fees.”

4. On October 2, 1998, Hochman submitted further information regarding Foran’s compensatory and punitive damage claims to McCloskey and recommended that Eileen Kalikow perform the vocational evaluation. On October 9, 1998, Moore responded by letter agreeing only that Kalikow should perform an evaluation.

5. On October 13, 1998, Moore called Hochman, who was meeting with the Forans in his office. In that conversation, Moore and Hochman agreed to engage Kalikow at the Postal Service's expense. Kalikow was to evaluate Foran's ability to perform the job and to identify any needed accommodations. Both sides agreed that she could not subsequently be called as a witness and that her opinions and conclusions could not be used in subsequent litigation. I find that Hochman believed that a positive finding by Kalikow would result in Foran's reinstatement into a permanent position, but that Moore did not state to Hochman that the Postal Service would reinstate Foran as a mail handler if Kalikow found him capable of performing that job and, moreover, that Moore never possessed authority from the Postal Service to make such a commitment.

6. On October 13, 1998, Moore sent a letter to Kalikow with a copy to Hochman stating "We appreciate your prompt attention to this matter as we are under a deadline of November 4 to determine whether we can settle this case."

7. On October 13, 1998, Hochman wrote Moore a letter outlining their "agreement to use Vocational Resources (Eileen Kalikow) to meet with Kevin Foran and determine his job capacity and whether he will require accommodations to perform his job." The letter stated that the Postal Service would pay Kalikow's fees, and that the parties agreed not to use her or her report if the litigation continued. The letter proposed additional terms—such as that any position should be a full-time permanent position and that Foran should receive certain wage and seniority levels—and referred to the need to resolve other monetary issues. At the bottom of this letter, Hochman provided a "seen and agreed to" line for Moore to sign if he agreed with the proposal.

8. Moore did not sign the agreement. Instead, Moore called Hochman to state his unwillingness to sign the agreement. The Postal Service, Moore related, did not want to be "boxed in" especially before Kalikow's evaluation was completed. Moore had no actual authority to agree to Hochman's terms. He also had no authority to agree to a partial settlement.

9. On October 15, 1998, Moore wrote to Hochman outlining his understanding of the October 13th agreement. Specifically, Moore agreed that Kalikow was to be employed to evaluate Foran's job capacity and to identify any accommodations necessary for his return to employment with the Postal Service; that the Postal Service would pay her fees and expenses; and that the Postal Service agreed that Vocational Resources would not be used as an expert or fact witness and that none of the facts, opinions or conclusions generated by Vocational Resources would be used by any experts or witnesses should they fail to settle the case. Further, Moore agreed that Foran could continue pursuing his litigation if the settlement attempts failed. Moore notified Hochman that the

Postal Service would “be in a position to negotiate a settlement of this case including the terms of any reinstatement after completion of the evaluation by Vocational Resources and . . . the provision of information [regarding Foran's claim for compensatory damages].” This letter did not address Hochman’s other proposals but directed Hochman to call Moore if the outline was “inconsistent with your understanding of our agreement to use Vocational Resources.” Hochman did not call.

10. Once both sides received Kalikow’s October 29, 1998 evaluation, Moore called Hochman to arrange a meeting for the Postal Service to make a final settlement proposal. Moore indicated that the Postal Service was interested in making a global settlement offer. After an initial scheduling and postponement, Parsons called Hochman to state that she was canceling the settlement meeting and that the Postal Service would consider only a monetary settlement and would not reinstate Foran.

CONCLUSIONS OF LAW

A. Federal jurisdiction exists because the cause of action is based upon an alleged settlement agreement of a still-pending federal cause of action. See Malave v. Carney Hospital, 170 F.3d 217 (1999) (holding that if a settlement agreement collapses before the original suit under federal jurisdiction is dismissed, a party may sue for its enforcement in federal court).

B. In determining whether a settlement agreement was reached when the underlying cause of action is federal in nature, I use federal common law. See id. at 220; Mathewson Corp. v. Allied Marine Indus., Inc., 827 F.2d 850, 853 n.3 (1987).

C. The parties in this case entered into an enforceable agreement to engage Eileen Kalikow, at the Postal Service’s expense, to evaluate whether Foran could perform the essential functions of the mail handler position with or without reasonable accommodation, and to prohibit the subsequent use of her or her findings. There was no meeting of the minds between Hochman and

Moore concerning any other consequences of the arrangement to hire Kalikow. See Restatement (Second) of Contracts §§ 3, 17 cmt. c. (1981).¹ Specifically, Moore did not agree that if her report yielded a positive finding for Foran he would automatically receive a position.

D. Even if Moore had promised to reinstate Foran, he never possessed actual authority to bind the Postal Service in this manner. See Malave, 170 F.3d at 221 (holding that an attorney must have actual authority to enter into a settlement agreement to bind its client). Further, Foran has not demonstrated that the Postal Service held Moore out as having authority to do so. See id. at 221 n.6.

Accordingly, the Clerk shall enter judgment for the defendant on Count V.

In light of this conclusion, and the agreement not to use Kalikow for this litigation, the plaintiff shall show cause by November 15, 1999, why I should not enter judgment for the defendant on Counts VI and VII.

SO ORDERED.

DATED THIS 8TH DAY OF NOVEMBER, 1999.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

¹ The same result would occur under Maine law, which also requires a "meeting of the minds" to form a contract. See e.g., Zamore v. Whitten, 395 A.2d 435, 440 (Me. 1978), overruled in part on other grounds by Bahre v. Pearl, 595 A.2d 1027 (Me. 1991); Clark v. Stetson, 97 A.2d 273, 274 (Me. 1916) (holding that if there is an actual and honest misunderstanding between the parties, no contract is formed).