2023 WL 9315384 (Mass.Super.) (Trial Order)
Superior Court of Massachusetts.
Essex County

John MUSACHIA, Plaintiff,
v.
ABIOMED, INC., Defendant.

No. 2377CV00310-B.
December 12, 2023.

Memorandum and Order on Cross Motions for Judgment on the Pleadings or, in the Alternative, for Summary Judgment

James F. Lang, Judge.

I. INTRODUCTION

***1** The plaintiff, John Musachia, an Illinois resident, was hired by, and worked briefly for, the defendant, Abiomed, Inc. (Abiomed), a medical device company that is incorporated in Delaware and based in Danvers, Massachusetts. Following Musachia's termination from his position as a Surgical Account Manager (SAM), he brought suit against Abiomed, alleging that Abiomed violated the Massachusetts Wage Act, G.L. c. 149, s. 148, by failing to timely pay him for accrued commissions and to pay him at all for accrued vacation time.

Abiomed has moved pursuant to Mass. R. Civ. P. 12(c) for judgment on the pleadings, and it has alternatively moved pursuant to Mass. R. Civ. P. 56 for summary judgment. Musachia has cross moved for judgment in his favor, also either on the pleadings or, alternatively under a summary judgment analysis. The parties thus agree that the court can permissibly rule on the summary judgment cross motions, thereby allowing it to consider all of the evidence contained in the summary judgment record, including the Joint Appendix of Exhibits and the Parties' Joint Statement of Undisputed Facts Pursuant to Super. Ct. R. 9A(b)(5)(i). The court reviews the cross motions for summary judgment in accordance with the principles articulated in *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 714 (1991); and *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989).

II. FACTS

The court sets forth the undisputed material facts as follows. Abiomed employs people throughout the country, including SAMs. In a letter dated April 7, 2022 (the Offer Letter) and sent to Musachia's residence at Oak Park, Illinois, Abiomed offered Musachia employment as a SAM, with an assigned territory in the Chicago area, including that city, Milwaukee, and the Quad Cities. The Offer Letter provided that Musachia would be paid a $100,000 salary and that he would "be eligible for variable compensation with an annual target pay-out of $250,000 should your assigned regional territory's performance reach 100% of Operating Plan." The letter further provided that Musachia would receive a commission payment of $15,000 per month for each of the first three months of his employment and that, if his actual commissions exceeded that base amount, he would be paid the actual commissions earned. The Offer Letter stated that, "except for the NCA, your employment shall be governed by the laws of the state where you reside."

Musachia began working on or about June 6, 2022. He had an initial training period in Massachusetts. Thereafter, he worked from his home in Oak Park, Illinois. As a SAM, Musachia travelled to a number of other states to perform his work, but not back to Massachusetts. He had two different direct supervisors, one who lived and worked in Utah and the other in Tennessee. Illinois taxes were withheld from Musachia's pay. Abiomed terminated Musachia's employment on July 27, 2022, after only 51 days with the company. On July 28, 2022, Abiomed issued a payment to Musachia for regular earnings in the amount of $4,166.67. On July 29, 2022, Abiomed issued a $15,000 payment to Musachia for his June 2022 commission. On August 30, 2022, Abiomed issued a prorated $13,065 payment to Musachia for his July 2022 commission, which payment was based the 27 days that he worked that month. [1]

III. DISCUSSION

***2** Relying primarily on *Dow v. Casale,* 83 Mass. App. Ct. 751 (2013), Abiomed argues that it is entitled to summary judgment because the Wage Act is inapplicable to Musachia as an Illinois resident who was working in that state. Musachia counters that *Dow* supports the validity of his Wage Act claim and of his entitlement to summary judgment in his favor. That case therefore bears some discussion.

In *Dow,* the eponymous plaintiff was a Florida-based employee of a Massachusetts-based company, Starbak, that was incorporated in Delaware. *Id.* at 751-752. Dow brought a Wage Act claim against Casale, a Starbak executive. *Id.* at 752. Casale asserted that the claim was an impermissible extraterritorial application of the Wage Act, given that Dow did not reside in Massachusetts and did not primarily perform his work there. *Id.* The Appeals Court rejected the notion that "the physical place where work is performed trumps all other considerations" with respect to the applicability of the Wage Act, and it also rejected the notion that "an employer's presence in Massachusetts is all that is necessary for an employee-wherever situated and whatever the circumstances of employment-to bring a private action against the employer under the Wage Act." *Id.* at 755-756. It concluded that "a more refined analysis is necessary." *Id.* at 756. The *Dow* court went on to elaborate:

> In accordance with choice-of-law doctrine, so long as the requisite criteria are met, the application by a State of its local law is not an impermissible "extraterritorial" assertion of its authority. The overarching limiting principle, as set forth in the Restatement (Second) Conflict of Laws s. 9 (1971), is that "[a] court may not apply the local law of its own [S]tate to determine a particular issue unless such application of this law would be reasonable in the light of the relationship of the [S]tate and of other [S]tates to the person, thing or occurrence involved."

Id. at 656-657. Ultimately, on the facts presented in that case, the *Dow* court held that "Massachusetts has by far the most significant relationship not only to Starbak and Casale as citizens of the Commonwealth, but also to Dow's employment relationship with them." *Id.* at 758.

Both parties accept that the analysis that governs resolution of their cross motions for summary is the "functional choice-of-law" approach and that such approach is in accord with the Restatement (Second) of Conflict of Law. *See Taylor v. Eastern Connection Operating, Inc.,* 465 Mass. 191, 195-196 (2013). *See also Bushkin Associates, Inc. v. Raytheon Co. (Bushkin),* 393 Mass. 622, 631, 473 N.E.2d 662 (1985) (the functional choice-of-law approach "responds to the interests of the parties, the States involved, and the interstate system as a whole"). And, as noted, both parties point to the particular facts of *Dow* and to that court's application of the choice-of-law analysis to those facts to bolster their respective positions. Abiomed argues that the *Dow* facts were appreciably different, and more robust in terms of the connection between that plaintiff's work and Massachusetts, than the facts of the instant case. Consequently, Abiomed contends that a different outcome is dictated here. For his part, Musachia asserts that the *Dow* facts were materially identical to those in the case at bar and that this court must therefore come to a like determination as the Dow court, i.e., that the Wage Act applies.

***3** The *Dow* court set forth the facts it found to be determinative in that plaintiff's favor thusly:

> Throughout Dow's employment, Starbak was headquartered in Massachusetts, and all of its physical facilities were located in the Commonwealth. The customers Dow acquired entered into business with Starbak in Massachusetts; Dow's business cards identified Starbak's Massachusetts contact information as his own; Dow's paychecks were issued from Massachusetts; Dow came to Massachusetts on business multiple times each year, often working from Starbak's office, using the same cubicle each time he was there; Dow communicated with Casale in Massachusetts via e-mail almost daily and spoke with him numerous times each week by telephone; and Dow's employment agreement provided that it "shall be governed by and interpreted under the law of the Commonwealth of Massachusetts."
>
> Indeed, given the particular nature of Dow's work, his employment with Starbak had no substantial relationship to any place but Massachusetts. Dow essentially was a mobile employee, untethered to any particular workplace. His duties as a salesperson required him to travel throughout the United States on Starbak's behalf irrespective of where he lived; and he was allowed and expected to perform his duties whether he was in residence at Starbak's office, traveling on business, or working from home. In that sense, his work sensibly may be viewed as having "occurred" in Massachusetts where it benefited Starbak, no matter where he physically was located from day to day.

Id. at 657-658 (internal citation and footnote omitted). [2]

Musachia aptly notes that there are a several similarities between the facts of *Dow* and those of this case. The most significant one is that Abiomed, like Starbak, is based in, and appears to perform most of its fundamental business functions from, Massachusetts. Nevertheless, the court is of the view that the factual differences between the two cases are consequential. These differences include the following: Musachia's assigned work region was in Illinois, the state of his residence, whereas Dow had a multi-state or national territory and no special work connection to Florida, his state of domicile; Musachia's direct managers were not in Massachusetts, but in Utah and Tennessee, whereas Dow reported directly to Casale in Massachusetts, see id. at 753; Musachia performed no work in Massachusetts and, aside from his initial training there, has had no reason to travel to the Commonwealth, whereas Dow serviced customers in Massachusetts and traveled to this state eight to twelve times a year, see id.; Illinois taxes were withheld from Musachia's paychecks; and Musachia's Offer Letter stated that Illinois law would govern his employment, whereas Dow's employment agreement stated that it would be governed by Massachusetts law. [3] All that being so, the court concludes that, if the choice-of-law provision in Musachia's Offer Letter is valid and enforceable, his Wage Act claim fails as a matter of law because, in that event, Illinois unquestionably has the more significant relationship to the employment agreement and the parties. [4] It is to that issue that the court therefore next turns.

***4** "Where the parties have expressed a specific intent as to the governing law, Massachusetts courts will uphold the parties' choice as long as the result is not contrary to public policy." *Steranko v. Inforex, Inc., 5* Mass. App. Ct. 253, 260 (1977), cited with approval in *Hodas v. Morin,* 442 Mass. 544, 549-550 (2004). The SJC has set forth the required public policy analysis as follows:

> In deciding whether the result of a choice of law agreement is contrary to public policy, we conduct the two-tiered analysis set forth in the Restatement (Second) of Conflict of Laws s. 187(2) (1971). We will not honor the parties' choice of law where "'(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) [where] application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state [in the determination of the particular issue]' and is the State whose law would apply ... 'in the absence of an effective choice of law by the parties.'"

Oxford Global, 480 Mass. at 468-469, quoting *Hodas,* 442 Mass. 550 and Restatement (Second) of Conflict of Laws s. 197(2) (internal citations omitted).

As a threshold matter, the court readily concludes that, through the Offer Letter, the parties expressed a specific intent that Illinois would apply not just to the employment agreement (as in *Dow*) but, more broadly, to the employment relationship (with the noted exception of the NCA). The fact that the letter referenced the selected forum as "the state where you reside" and did not specifically name Illinois does not dictate a contrary determination. The parties knew and understood that Musachia lived at the address in Illinois to which the Offer Letter was sent and that he was going to be working in that state. There was no ambiguity in the choice-of-law provision as to which state's laws would apply to Musachia's employment.

Turning to the public policy issue, and applying the *Oxford Global* standard, the court concludes that the choice-of-law provision is not contrary to public policy. With respect to the first prong, the court has already concluded that Illinois has a substantial relationship to the parties and the transaction. As for the second prong, as the court has also already made clear, it does not consider Massachusetts to have a materially greater interest than Illinois in the matter, and Massachusetts is not the state whose law would apply in the absence of the choice-of-law provision.

Citing *Melia v. Zenhire,* Inc., 462 Mass. 164, 170-171 (2012), and G.L. c. 149, s. 148, Musachia argues that the choice-of-law provision in the Offer Letter constitutes a prohibited and unenforceable special contract. The Wage Act provides that "[n]o person shall by a special contract with an employee or by any other means exempt himself from [the Wage Act]." G.L. c. 149, s. 148. The SJC in *Melia* held that "a forum selection clause operates as a special contract only when three conditions are met: the employee's claim is covered by the Wage Act; the court of the forum State, applying its choice-of-law principles, would choose a law other than that of Massachusetts to govern the dispute; and application of the foreign law will deprive the employee of a substantive right guaranteed by the Wage Act." 462 Mass. at 165. Further illuminating the analysis, the court stated:

> ***5** [W]e now recognize a presumption that forum selection clauses are enforceable with respect to Wage Act claims. A party seeking to rebut this presumption must produce some evidence indicating that (1) the Wage Act applies; (2) the selected forum's choice-of-law rules would select a law other than that of Massachusetts; and (3) application of the selected law would deprive the employee of a substantive right guaranteed by the Wage Act. On the introduction of such evidence, the proponent of the forum selection clause would retain the ultimate burden of demonstrating that the clause does not operate as a "special contract."

Id. at 181.

Musachia's initial burden of production to overcome the presumption in favor of the enforceability of the choice-of-law provision fails at the first juncture, i.e., applicability of the Wage Act. Assuming, however, that he has produced "some evidence" that the Wage Act applies,[5] the court proceeds to consider whether Illinois would apply its law or that of Massachusetts regarding payment of wages to Musachia following his termination.

Illinois, like Massachusetts, has adopted the Restatement (Second) of Conflict of Laws. It therefore enforces a choice-of-law provision contained in a contract unless the chosen state has no substantial relationship to the parties or the transaction, or application of the chosen law would be contrary to a fundamental public policy of a state with a materially greater interest in the issue in dispute. *See Brown and Brown, Inc. v. Mudron,* 887 N.E.2d 437, 439-440 (App. Ct. Ill. 2008). Based on the court's prior analysis regarding Illinois' relationship to the parties and employment relationship, the court concludes that Illinois would apply its own Wage Act, 820 Ill. Comp. Stat. Ann. 115/5. That statute provides: "Every employer shall pay the final compensation of separated employees in full, at the time of separation, if possible, but in no case later than the next

regularly scheduled payday for such employee." That provision, unlike the Massachusetts Wage Act, does not mandate payment at the time of termination of all wages due and owing, and it does not provide for a trebling of the amount of any late paid wages. *See and cf.* G.L. c. 149, ss. 148 and 150; *Reuter v. City of Methuen,* 489 Mass. 465, 470-472 (2022). It is nevertheless questionable whether application of the Illinois Wage Act, rather than the Massachusetts Wage Act, could properly be deemed a deprivation of a substantive right afforded Musachia under the latter. Illinois requires full payment by the next payday, and it imposes its own potentially significant penalty for late payments of 5% per month. *See* Wage Act, 820 Ill. Comp. Stat. Ann. 115/5. Because of the modest difference in the timing requirements for final wage payments in the two statutes, and the possibility that, in a given case, the Illinois penalty for a late payment will near or exceed that of the Massachusetts treble damages penalty provision, arguably the Massachusetts Wage Act provisions at issue do not confer a substantive right. The court will nevertheless assume for present purposes that Musachia can satisfy this second criterion. The court therefore proceeds to consider whether there was any late payment of compensation under Massachusetts law, an inquiry that necessarily takes the court to the merits of Musachia's Wage Act claim.

***6** The timeliness of Abiomed's commission payments to Musachia turns on whether they were definitively ascertainable at the time of his termination. *See* G.L. c. 149, s. 148 ("This section shall apply, so far as apt, to the payment of commissions when the amount of such commissions ... has been definitely determined and has become due and payable to such employee ...."). Musachia argues that he was due a $15,000 base commission payment for his one full month of work in June 2022 and a pro rata share of a $15,000 payment for his second partial month in July 2022. He asserts in his unverified complaint, and in his summary judgment pleadings, that he was ineligible for any commission payments above those base amounts because he had no certification. Consequently, Musachia contends that Abiomed could have calculated the precise amount of the commission payments that were owed to him on the date of his termination and that Abiomed was therefore required to remit such payment to him that day.

In challenging that contention, Abiomed relies on the express terms of the Offer Letter, which stated that "should your actual commissions exceed [the base commission amount], you will be paid the actual commission earned." Abiomed also relies on the uncontested affidavit of Robert Quinn, Abiomed's Manager of Financial Planning and Analysis and the overseer for the implementation and calculation of commission compensation for SAMs. Quinn avers therein that there was no certification requirement for SAMs to achieve commissions beyond their base commission during the first nine months of employment and that Musachia was eligible to earn such higher commissions. Quinn also avers that the calculation of earned commissions for SAMs is a roughly three-week process at the end of each month, as revenue data must be submitted by SAMs and reviewed and reconciled by him and another Abiomed employee before the calculations are then made and double checked. According to Quinn, Abiomed completed its commissions calculations for June 2022 on July 25, 2022, and it completed its commissions calculations for July 2022 on August 23, 2022. Abiomed made commission payments to Musachia for June 2022 on July 29, 2022, and for August 2022 on August 30, 2022.

The court agrees with Abiomed that, on the undisputed facts, Musachia was eligible for commissions above the base amount and that Abiomed could not determine whether he was entitled to payment of some amount above the $15,000 base for both June and July 2022 until after Musachia had been terminated. The court also agrees that Abiomed was not required to make the commission payments to Musachia piecemeal, paying the unquestionably earned base commission for each month on the date of his termination and any earned commissions sometime thereafter. The court therefore concludes that, on the facts presented, Massachusetts law does not afford Musachia any substantive rights with respect to the commission payments that he is not afforded under Illinois law. It follows that, whether stated as a determination that the Wage Act is inapplicable to Musachia or as a determination that it applies but is unavailing, the result is the same: Musachia's Wage Act claim fails as a matter of law with respect to the alleged late payment of commissions.

That leaves but one remaining aspect of Musachia's Wage Act claim: Abiomed's alleged late payment of 20 hours of vacation pay, which is valued at $961.54. The court eschews considering this issue in terms of whether application of Illinois versus Massachusetts law would deprive Musachia of a substantive right, because, here again, the court concludes that, even under our

Wage Act, the claim cannot survive summary judgment for Abiomed. Musachia alleges, again only in his unsworn complaint, that he was not paid for his accrued vacation time. In conclusively disputing that assertion, Abiomed relies on the affidavit of its Director of Human Resources Business Partners, Adrienne Carney, in which she avers that, on the date of Musachia's termination, Abiomed issued him a check for the full amount he was owed for his accrued vacation time. That averment has not been contested by any competent evidence in the summary judgment record.

IV. ORDER

***7** For the foregoing reasons, the defendant Abiomed, Inc's motion for summary judgment is **ALLOWED** (Paper No. 5), and the plaintiff John Musachia's cross motion for summary judgment is **DENIED** (Paper No. 5.3). The single-count complaint is, therefore, hereby dismissed.

SO ORDERED.

<<signature>>

James Lang

Associate Justice, Superior Court

December 12, 2023

Footnotes

1 In his opposition, Musachia provides some adornment to several of the undisputed facts of record, which he draws from his complaint. They include the following: Musachia's training in Massachusetts lasted two weeks; Abiomed did not have an office in Illinois during his employment; his travel to other states as a SAM included Florida, Ohio, Washington, Utah, and Mississippi; he was terminated by a phone call from Massachusetts; Abiomed's human resources department is located in Massachusetts, and that is where the largest percentage of its employees is located. Abiomed does not appear to dispute most of these assertions, even though it has not expressly admitted several of them. Abiomed did deny in its answer to the complaint that the termination phone call originated in Massachusetts. None of these asserted facts are material to the court's resolution of the competing motions.

There are a few apparent factual disputes between parties. These include whether Abiomed paid Musachia for the value of 20 hours of accrued vacation time ($961.54). The parties also disagree about whether Musachia, who did not have a "certification," was eligible during his brief tenure to earn commissions in excess of the base/minimum commissions set forth in the Offer Letter. The court will address these below.

2 Starbak was a Massachusetts-based developer and manufacturer of video conferencing software and hardware, and Dow was its only salesperson, serving customers in at least thirty States and traveling to nineteen of them, including Massachusetts. *Dow,* 83 Mass. App. Ct. at 752-753.

3 The *Dow* court treated the choice-of-law provision in that case as "some additional indication that Massachusetts is at the 'core of the employment relationship.'" 83 Mass. App. Ct. at 757 n.12, quoting *Cormier v. Pezrow New England, Inc.,* 437 Mass. 302, 307 (2002). In so doing, the court questioned "whether the clause, as phrased, extends to

an extracontractual claim under the Wage Act." *Id.* That referenced phrasing was that the "employment agreement" was to be governed by Massachusetts law. The choice-of-law provision in this case is more broadly written, as it pertains to Musachia's "employment," not just his employment agreement. It would thus appear that his Wage Act claim falls squarely within the ambit of the provision. For that reason, the court is of the view that the choice of law provision in this case is entitled to greater weight in the court's analysis than was accorded the more circumscribed provision in *Dow.*

4 In *Oxford Global Resources, LLC v. Hernandez (Oxford Global),* 480 Mass. 462 (2018), the Supreme Judicial Court (SJC) stated that, "[u]nder Massachusetts choice of law principles, if [an] agreement [is] silent as to choice of law, the rights of the parties would be 'determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties.'" *Id.* at 467, quoting *Bushkin,* 393 Mass. at 632. The court notes in that regard that, even apart from the choice-of-law provision in the Offer Letter, the court views Illinois as the forum with the more significant relationship to Musachia's employment. If the provision is valid, however, the scale tips even more definitively in favor of that state.

5 It is unclear what the SJC meant by its usage of the phrase "some evidence" with respect to the initial burden of production of a party challenging a choice-of-law provision, as least as it pertains to the first criterion, whether the Wage Act applies.

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