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Employment Law

When Is an Employee Not an Employee for Purposes of the Pa. WPCL?

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When is an employee not an employee for purposes of the Pennsylvania Wage Payment and Collection Law (WPCL), 43 Pa. Cons. Stat. Section 260.1? More specifically, when is the company's executive vice president, hired as a senior member of the company's management team, who is to receive \$140,000 per year, plus \$400 per month in ongoing expenses as a base salary, plus participation in the company's benefits package, not an employee? That was the question raised in a recent case filed in the Eastern District of Pennsylvania in *Weber Miller v. Cerebain Biotech*, No. 16-cv-03943 (E.D. Pa. Nov. 8).

According to her complaint, Miriam Weber Miller, who was hired by Cerebain in May 2014, to provide services and support relating to Cerebain's public relations, investor relations and corporate growth strategies, was to be a senior member of the company's management team. The details of the negotiations leading up to Weber Miller's hiring were memorialized in an email from her to Cerebain's CEO, defendant Eric Clemons, who was also named as a defendant in the case. That email stated, in pertinent part that Weber Miller would receive a base salary of \$140,000 per year, plus \$400 per month in ongoing expenses; a stipend in lieu of participating in the company's - benefits plan; stock options; and a formal start date of July 1. Thereafter, the company issued an announcement naming Weber Miller as "executive vice president."

In the court's written opinion, it was noted that Weber Miller provided all requested services to Cerebain, including functioning as the "corporate spokesperson" for the company and carried out the rebranding of Cerebain, including the creation of a new corporate logo, color scheme, business card, marketing material and slogan. While she submitted monthly invoices for her services, the complaint alleged that the defendants failed to pay her the wages she was due despite repeated promises to the contrary.

On July 21, Weber Miller filed suit alleging three claims: breach of contract; violation of the Pennsylvania Wage Payment and Collection Law and unjust enrichment. The defendants filed a motion to dismiss all claims, arguing first that Weber Miller was not an employee of Cerebain, but rather an independent contractor, thereby rendering the WPCL inapplicable. Second, they argued

that even if Weber Miller could be characterized as an employee, she failed to plead the existence of a valid employment agreement pursuant to which her wages were due.

On the issue of whether she was an employee, the court outlined the factors paramount in determining the existence of an employment relationship, i.e., the right of an individual to control the manner that another's work is to be accomplished. Upon review of the foregoing facts, the court was satisfied that the factual allegations allow a reasonable inference that Weber Miller qualified as an employee under the WPCL.

The court was not persuaded by the company's argument that Weber Miller served only as a consultant providing "marketing communication and investor relations services" through her own limited liability company as an independent contractor. In support, the company pointed to attachments to the complaint evidencing the plaintiff's monthly invoicing of Cerebain for sums to be paid to her consulting group, the plaintiff's contemplation of a write-off for the alleged unpaid invoices, and text messages from CEO Clemons showing that the defendants never officially authorized the plaintiff to take on the role of corporate spokesperson at Cerebain. According to the opinion, the factors identified by the defendants could support an inference that the plaintiff acted only as an independent contractor for Cerebain, however, it is equally plausible, based on the facts raised by Weber Miller, that she was an actual employee under the WPCL. For example, the court wrote, Weber Miller's submission of invoices to Cerebain "could either reflect her independent contractor relationship with the company or suggest that plaintiff accepted an alternative form of payment while Cerebain faced a capital shortfall." The defendants' arguments were merely an attempt to impose a higher burden of proof on a plaintiff than is required at the pleading stage.

The defendants also argued that even if Weber Miller could be deemed an employee, her WPCL claim must fail because she had not adequately pleaded the existence of a valid employment contract. The court detailed the facts supporting the existence of an implied contract, including the fact that the plaintiff was hired by Cerebain as a senior member of its management team at an agreed upon \$140,000 per year, plus \$400 per month in ongoing expenses; Cerebain subsequently named the plaintiff as corporate vice president on the executive team; and the plaintiff submitted invoices to Cerebain for "professional fees and expenses for marketing communication and investor relations," as well as "approved expenses" for various costs. These allegations and the exhibits attached to the complaint, according to the opinion, provided sufficient evidence of a contract to pay wages in exchange for the plaintiff's service and justified the plaintiff's maintenance of a reasonable expectation of being compensated at a specific rate for her work.

Contrarily, the defendants argued that the email reflecting the terms of the employment was simply a summary of a conversation, not a summary of an agreement. The email's use of phrases such as "PLMK" (please let me know), "TBD" (to be determined) and "your feedback is greatly appreciated," suggest that the terms of any agreement were uncertain along with the term of employment. The court countered by explaining that the existence of various uncertainties in the agreement, such as plaintiff's official title and the amount of her compensation for her work as a consultant prior to her official start date, do not negate the existence of an employment agreement for purposes of the WPCL. In fact, the court opined, a contract can be formed even if many of the particulars or specifics have not been discussed or agreed upon.

The court also analyzed the plaintiff's breach of contract and unjust enrichment claims in a similar fashion. In focusing on the email at issue, the court noted that it was described as a "summary of

our conversation" and suggested a memorialization of the parties' long-term agreement" that had already been reached on the essential elements of their arrangement. The parties' subsequent course of conduct, including the defendants' announcement of plaintiff over the business wire as executive vice president, the plaintiff's provision of all requested services to the defendants and Cerebain's initial payments to the plaintiff according to the terms set forth in the email, all constituted objective manifestations of the parties' assent to the precise terms contained within the email.

The takeaways from this particular decision are twofold. First, an employee is an employee is an employee. Suffice to say that hiring a senior member to your management team and paying a large base salary with benefits and stock options will quite naturally lend itself to an employer-employee relationship. Second, in order to form an employment contract, not all the terms need to be definite or specific, so long as there is a meeting of the minds on the essential terms. Some terms are more essential than others, which may cause the court to look at the manifestation of the parties intent through subsequent conduct to fill in those gaps. •

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.

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