UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ELAINE L. CHAO,	***)***	
Secretary of Labor,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 04-102-P-H***
	)	
ALPINE, INC.,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTION TO ENFORCE SETTLEMENT

The defendant, Alpine, Inc., asks this court to enforce a settlement between the parties. The complaint in this action was filed on April 16, 2004. Docket No. 1. On July 19, 2004, the parties, having notified the court that they had reached a settlement, were ordered to complete the settlement within 30 days and to file a stipulation of dismissal with prejudice. Docket No. 9. Instead, on August 18, 2004 the plaintiff filed a motion to "re-open" the case. Docket No. 10. Because the case had never been closed, I advised counsel for the parties by telephone conference that no action need be taken on the motion. Docket No. 12. During that conference, I ordered counsel for the parties to file memoranda setting forth the factual and legal bases of their respective positions on the status and effect of their settlement agreement. *Id*. After the parties filed those memoranda, Docket Nos. 14 & 15, I held another telephone conference during which counsel for the parties agreed that the defendant's memorandum should be treated as a motion to enforce the settlement and the plaintiff's memorandum as a response to that motion. Docket No. 17. At the same conference, the defendant indicated that it would not be filing a reply memorandum. *Id*.

The defendant contends that the parties entered into a binding settlement agreement on July 19, 2004. Defendant's Memorandum of Law ("Motion") (Docket No. 15) at 1. On July 14, 2004 the attorney for the plaintiff faxed to the attorney for the defendant a written settlement demand for payment of back wages to Stephan Drew. Affidavit of Lawrence C. Winger ("Winger Aff.") (attached to Motion) ¶ 2. Later that same day the attorney for the defendant left a message for the attorney for the plaintiff rejecting the demand and offering $2,000 to settle the case. *Id*. ¶ 3. On July 15, 2004 the two attorneys had a telephone conversation, followed by an e-mail from the defendant's attorney to the plaintiff's attorney reiterating the $2,000 offer. *Id*.¶ 4. On July 19, 2004 the attorney for the defendant received an e-mail from the attorney for the plaintiff stating "Plaintiff accepts Defendant's settlement offer of $2000. I'll call to work out the details." *Id*. ¶ 5.

In a telephone conversation later that day, the attorneys agreed that the attorney for the plaintiff would prepare an "STAA" release and that the settlement check would be made payable to Stephan Drew but mailed to the attorney for the plaintiff. *Id*. During the conversation, the attorney for the defendant asked whether Drew had agreed to the settlement and the attorney for the plaintiff said "yes." *Id*. The attorneys did not discuss the possibility that the settlement would be contingent on Drew's signature or that Drew could revoke the settlement by refusing to sign any document. *Id*. The attorney for the defendant then informed his client and the court that settlement had been reached. *Id.*¶ 6.

On July 21, 2004 the attorney for the defendant mailed to the attorney for the plaintiff the defendant's check in the amount of $2,000 payable to Stephan Drew. *Id*. ¶ 7. The check has not been returned. *Id*. One or two days later, the attorney for the defendant received by mail from the attorney for the plaintiff the form that the attorney wanted to use to formalize the settlement. *Id*. ¶ 8. He asked that the defendant execute the document and then return it for signing by Drew, after which a copy

would be sent to the attorney for the defendant. *Id*. The letter asked that the check then be sent to him. *Id*. On August 3, 2004 the attorney for the defendant mailed the executed form back to the attorney for the plaintiff. *Id*. The attorney for the defendant heard nothing more from the plaintiff or her attorney until he received the plaintiff's motion to reopen the case. *Id*. ¶ 9.

The written settlement agreement drafted by the attorney for the plaintiff states, *inter alia*, that Stephan W. Drew agrees to release the defendant from any and all claims for discrimination and wrongful discharge under the Surface Transportation Assistance Act, 49 U.S.C. § 31,105(a)(1)(A), in return for the payment of $2,000, and has lines for the signatures of Drew and a representative of the defendant. Settlement Agreement, Exh. 2 to Plaintiff's Memorandum in Support of Her Motion Requesting that This Case Remain Open ("Opposition") (Docket No. 14), at 1.

According to the plaintiff, whose factual assertions are not presented other than in unsworn fashion in her memorandum, Drew had "indicated that he was amenable to a settlement" at some time before July 19, 2004 but on August 16, 2004 he "notified the Plaintiff that he refuses to accept and sign the settlement." *Id*. at 1-2. She contends that "the Defendant has always known that signature by Mr. Drew was a prerequisite to settlement." *Id*. at 2. This contention is directly denied by counsel for the defendant in his affidavit:

> During the above-described settlement negotiations and proceedings, I never understood, believed, or agreed that Mr. Drew's signature on a document was essential or required to the settlement or that Mr. Drew could revoke the settlement by refusing to sign a document.

Winger Aff. ¶ 10. The plaintiff relies on the correspondence between the attorneys and the written settlement agreement as evidence in support of her position. Opposition at 2.

"Parties can agree on every term in a contract, yet not be bound until they sign a written agreement, if they so indicate." *Salem Laundry Co. v. New England Teamsters & Trucking Indus. Pension Fund*, 829 F.2d 278, 280 (1st Cir. 1987). Contrary to the plaintiff's assertion, there is no

such indication in the correspondence between the attorneys. The letter from the plaintiff's attorney merely conveys the written settlement agreement "[i]n accordance with out agreement to resolve the above-entitled matter and preliminary to our filing a Rule 41 Stipulation of Dismissal with prejudice," asking that the document be signed and returned for signing by Drew. Letter dated July 21, 2004 from Kevin E. Sullivan to Lawrence Winger, Exh. 1 to Opposition. The fact that the attorney for the defendant, before receiving this letter, sent a letter to the attorney for the plaintiff enclosing the settlement check "on the express understanding and agreement that you will hold this check and not allow it to be negotiated by Mr. Drew until the settlement in this case is completed," Letter dated July 21, 2004 from Lawrence C. Winger to Kevin E. Sullivan, Exh. 3 to Opposition, does not establish agreement that Drew's signature on a written settlement agreement was a requirement of the settlement. At most, the letter demonstrates that the defendant's attorney expected to receive, before Drew negotiated the check made payable to him at the plaintiff's request, assurance in some permanent form, whether in a written settlement agreement or by dismissal of the case with prejudice, that the claims asserted against the defendant could not be raised again. The letter cannot reasonably be construed to allow the drawing of an inference that counsel for the defendant "knew" that Drew's signature was "a prerequisite to settlement" or that Drew could revoke the agreement entered into by the plaintiff's attorney. *See Kelley v. Maine Eye Care Assocs., P.A.*, 37 F.Supp.2d 47, 51-52 (D. Me. 1999) (with respect to settlement, intent of parties must be assessed on basis of what parties say and do).

It is significant that Drew is not a named party in this action. Complaint (Docket No. 1). The plaintiff asked that the settlement check be made payable to Drew and tendered a draft settlement agreement which bore a space for Drew's signature but none for hers. She is bound by the agreement of her counsel to the settlement, which her counsel did not expressly condition on Drew's signature on a written settlement agreement or even on Drew's acceptance of the terms of the agreement. *See*

generally Quint v. A.E. Staley Mfg. Co., 246 F.3d 11, 13-15 (1st Cir. 2001) (rejecting contention that no settlement agreement exists until written agreement is executed, even in absence of evidence of mutual intent to be bound only upon such execution). Indeed, it was counsel for the defendant in this case who inquired whether Drew had agreed to the settlement and was informed by the plaintiff's attorney that he had. There is no evidence that the plaintiff's attorney stated at that or any other time during the settlement negotiations that such agreement was an element of the settlement and could only be achieved by Drew's signature on the settlement agreement that he would draft.

Here, there is no indication that express agreement had not been reached on all the terms to be included in the settlement before Drew apparently refused to sign the written document. There is a suggestion that the settlement is of a type that is usually put in writing, given the attorneys' reference to an "STAA release." There is no indication that the agreement needed a formal writing for its full expression. It had few details. The amount of money involved is not large. The settlement does not appear to be unusual in its terms. There is no evidence that a standard form of contract is widely used in similar transactions. The defendant clearly performed its portion of the settlement by tendering the check before receiving the written agreement which the plaintiff's attorney asked it to sign. These considerations, listed in the Restatement (Second) of Contracts § 27, comment c, as helpful indicia of intent when there is a question whether a written agreement is merely a memorial of an agreement already reached or itself the consummation of a negotiation, *J.D. Irving, Ltd. v. Allen*, 1999 WL 33117101 (D. Me. Mar. 25, 1999), at *13-*14, on balance, weigh in favor of the defendant's position.[1]

[1] The plaintiff contends that enforcing the settlement "would be unjust in that it would enable the Defendant, which was found to have violated a Whistleblower statute by retaliating against a safety advocate, to escape liability for its violation." Opposition at 3. Since the plaintiff was perfectly willing to enter into the settlement until Drew refused to sign the release, this argument obviously lacks merit.

For the foregoing reasons, I recommend that the defendant's motion to enforce the settlement be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge'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 and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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 this 20th day of September, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge