



Issue Date: 21 March 2007

CASE NO.: 2006-SOX-00131

In the Matter of:

SUMMER HERBERT,
Complainant,

V.

PULTE MORTGAGE, LLC and PULTE HOMES, INC.,
Respondents.

ORDER APPROVING SETTLEMENT

This is a proceeding under the provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ("Act"), 18 U.S.C. §1514A. The Complainant, Summer Herbert, filed a complaint of discrimination with the Department of Labor against respondents, Pulte Mortgage, LLC and Pulte Homes, Inc. On March 15, 2007, the parties submitted a "Stipulated Motion to Dismiss with Prejudice," and a signed Confidential Settlement and Release Agreement which resolves all issues raised in the Complaint, for review and approval by the undersigned administrative law judge.

My review of the settlement agreement is limited to a determination of whether its terms are fair, adequate and reasonable. The settlement must adequately protect the whistleblower. Furthermore, the settlement must not be contrary to the public interest.

Paragraph 9 provides that the agreement shall be governed and construed under the laws of the State of Colorado. This choice of law provision is construed as not limiting the authority of the Secretary of Labor and any Federal court, which shall be governed in all respects by the laws and regulations of the United States. See *Phillips v. Citizens. Ass.n for Sound Energy*, No. 91-ERA-25, slip op. at 2 (Sec.y Nov. 4, 1991).

Paragraph 2 of the settlement agreement provides that both parties will keep the existence and terms of the settlement agreement confidential, with certain specified exceptions. In the Stipulated Motion, the parties stated that the settlement agreement is confidential and asked that the settlement agreement be destroyed upon approval of its terms.

Because the Office of Administrative Law Judges is a government agency, and this is a public proceeding, the parties' submissions in the case, including the settlement agreement, become a part of the record in this case and are subject to the Freedom of Information Act

(“FOIA”), 5 U.S.C. §552 (1988). FOIA requires agencies to disclose requested records unless they are exempt from disclosure under FOIA. *Gerald Fish v. H and R Transfer*, ARB No. 01-071; ALJ Case No. 00-STA-56 (ARB April 30, 2003).

The parties in this matter have indicated that the settlement agreement comprises and includes confidential information which may be exempt from disclosure under FOIA. The Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestors from denials of requests and for protecting the interests of submitters of confidential commercial information. See 29 C.F.R. §70.26. The settlement agreement in this case will be placed in a separate envelope and identified as being confidential commercial information pursuant to the parties’ request. The agreement will not be destroyed as requested.

Paragraph 3 of the agreement seeks to limit the Complainant’s ability to cooperate with administrative, legislative and judicial bodies. Such a “gag” provision seeks to prevent the goals of whistleblower provisions such as that involved herein and is void and unenforceable as against public policy insofar as it seeks to restrict Complainant from cooperating with any federal or state governmental agencies or bodies. *Connecticut Light & Power Co. v. Reich*, 85 F. 3d 89 (2d Cir. 1996); *Macktal v. Secretary of Labor*, 923 F. 2d 1150 (5th Cir. 1991). However, paragraph 9 of the Agreement states that the provisions of the agreement shall be severable and that invalidity of one provision shall not affect the other provisions of the Agreement.

After careful consideration of the settlement agreement, I find that none of the terms or conditions are unacceptable with the exception of paragraph 3 which shall be considered void and unenforceable insofar as it seeks to restrict Complainant from cooperating with any federal or state agencies or bodies. Moreover, I find the terms of the agreement to be fair and reasonable and adequately protect Ms. Herbert. Furthermore, I believe it is in the public interest to approve the agreement as a basis for administrative disposition of this case and I therefore approve the settlement agreement.

Accordingly, this case is **DISMISSED** with prejudice.

A

Russell D. Pulver
Administrative Law Judge

San Francisco, California