

**U.S. Department of Labor**

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**Issue Date: 16 September 2010**

CASE NO. 2010-SOX-00045

*In the Matter of*

**RENAE GONZALES,**  
Complainant,

v.

**J.C. PENNEY CORPORATION, INC.,**  
Respondent.

Appearances:       Renae Gonzales,  
                                  in *pro per*

Lisa Abram, Esq.  
for Respondent

Lawrence Brewster, Esq.  
Christopher Wilkinson, Esq.  
Rose Darling, Esq.  
Office for the Solicitor,  
U.S. Department of Labor  
for the Occupational Health & Safety Administration

**DECISION AND ORDER GRANTING**  
**SUMMARY DECISION**

Procedural History and Background

This is a “whistleblower” case in which Complainant alleges that her former employer J.C. Penny took adverse action against her in retaliation for activity protected under the Sarbanes-Oxley Act of 2002 (“SOX”), 18 U.S.C. section 1514A. Currently before me is Respondent’s case dispositive motion, in which it asserts that the parties voluntarily settled this matter when it was before the Occupational Health & Safety Administration and that the case therefore should be dismissed.

Complainant initiated her claim on or about August 6, 2009, when she filed a complaint with the Occupational Safety and Health Administration. In April 2010, she and Respondent signed a settlement agreement, which resolved the claim, and submitted it to OSHA for approval. OSHA

approved it and closed the case on June 22, 2010. On or about July 7, 2010, Complainant objected to the case closure and requested review. The case was referred to this Office and assigned to me, and I set it for trial on October 25, 2010 in Los Angeles, California.

In her request for hearing, Complainant asserts that she should be relieved of the settlement agreement and the release contained in it. She contends that the OSHA investigator “intentionally excluded [her] from important information regarding [her] case”; that her case is unresolved; that she no longer trusted her former attorney because she’d had “problems with disclosure by this attorney”; that her attorney pressured her to take a settlement; that the settlement failed to address information in her personnel file that would adversely affect her employment prospects; that she’d told this to OSHA and wanted her case reinstated; that the OSHA investigator assured her that she (the investigator) would review the settlement to be sure it was fair; and that despite Complainant’s direction to the contrary, the investigator communicated with her lawyer rather than directly with her, approved the settlement (without a provision to expunge the adverse information in the personnel file), and closed the case.

After the Solicitor alerted me to the settlement agreement, I held a telephonic status conference on August 19, 2010. Complainant was present *in pro per*. Respondent was present through counsel of record. The Solicitor was present with a representative of OSHA.

Respondent stated, through counsel, that it intended to assert the settlement and release as a bar to these proceedings. That being the case, I urged Respondent to file a dispositive motion. I advised Complainant that, if the motion was decided against her, it would result in the dismissal of her claim; that although I could help her understand the process, I couldn’t give legal advice; that she had the right to represent herself, but that Respondent’s motion would raise technical, legal issues, and that this would be a good time to get a lawyer, if not for the entire case, at least for this motion; that she must have on file in this Office an opposition to the motion within 15 days after Respondent served the anticipated motion;<sup>1</sup> that if she needed more time to look for a lawyer or to file an opposition, she should request more time in writing; and that if she failed to file a timely opposition (or get more time), I would dismiss her case.

Later that day, Complainant submitted an “Objection to Dismissal of appeal . . .” (filed August 23, 2010). She wrote: “I am objecting to the dismissal of my appeal. While is abundantly clear that my objection is futile and no consideration will be taken [sic].”

I took Complainant’s “objection” as an opportunity to restate in writing the advice I’d given her at the status conference. I issued an order overruling the objection, emphasized to Complainant that I had *not* dismissed her case, and reminded her that I would determine whether to dismiss when I decided Respondent’s motion. I repeated that Complainant must file a timely opposition (or get an extension of time), that she should strongly consider getting a lawyer, and that the result of the motion could be a dismissal of her claim.<sup>2</sup>

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<sup>1</sup> Our procedural rules require the filing of oppositions to motions within 10 days with an additional 5 days if service of the moving papers is by mail. See 29 C.F.R. §§18.4(c); 18.6(b).

<sup>2</sup> I explained that, as the presiding administrative law judge, I am responsible, not only for a fair process, but also an efficient one. When a determination of certain legal issues before trial can make the trial unnecessary, parties file

Respondent filed a dispositive motion on August 25, 2010. Complainant timely filed an opposition on September 8, 2010.<sup>3</sup> The Solicitor briefed the motion as well and supported a dismissal. All parties submitted evidentiary exhibits in support of their respective positions. I construe Respondent's motion as for summary decision. *See* 29 C.F.R. §18.40.<sup>4</sup>

### Undisputed Facts<sup>5</sup>

Complainant appears to have been represented by counsel throughout most, if not all, of the process at OSHA. Although Heide Hutchinson and Desiree Nordstrom of the firm Sessions and Kimball, LLP, agreed to represent her July 2008, it appears that Complainant agreed that she would take care of any filing with government agencies. Decl. of Boyadjian, Exh. 5. She filed her OSHA complaint in *pro per*. But on September 15, 2009, she wrote to OSHA that attorneys Hutchinson and Nordstrom were representing her. Decl. of Boyadjian, Exh. 1, 2 (at 3). Two months later, on December 30, 2009, she contravened this, writing to OSHA that these attorneys no longer represented her. *Id.*, Exh. 3. Shifting again, on March 8, 2010, Complainant wrote to OSHA that she had attended a mediation on March 5, 2010 and was represented by counsel.<sup>6</sup> *Id.*, Exh. 4.

The record shows that Complainant's attorneys did represent her at the mediation and that the mediation was successful, at least initially, with the parties signing a settlement agreement. Respondent's Exh. 1. Consistent with the Older Workers' Benefit Protection Act, 29 U.S.C. §626(f), the agreement provides that Complainant could revoke for seven days by notifying Respondent in writing and that the agreement would not become effective until the expiration of the revocation period (assuming that Complainant did not revoke). *Id.* at 3.

By the time Complainant wrote to OSHA about the mediation three days later, she was complaining that her attorney and the mediator pressured her to settle for a "very minimal amount without the company reinstating me." *Id.* She said that she'd "vehemently expressed" during the mediation to both her attorney and the mediator that the agreement as proposed was

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pre-trial motions. This allows an orderly presentation of evidence and argument so that the judge may decide the issue. Depending on the ruling, the parties might avoid expending the resources involved in a trial.

<sup>3</sup> Complainant filed an untimely supplemental opposition on September 13, 2010. Our rules do not provide for supplemental opposition briefs, but in view of Complainant's proceeding in *pro per*, and this being a dispositive motion, I allow the supplemental opposition and have considered it.

<sup>4</sup> Hearings under the Act are conducted under the procedural rules in 29 C.F.R. §18, Part A. 29 C.F.R. §1980.107(a). Where those rules are silent, we are guided by the Federal Rules of Civil Procedure. 29 C.F.R. §18.1.

Respondent styled the present motion as to dismiss. When matters outside the pleadings are presented on a motion to dismiss, and these matters are not excluded from evidence, the motion must be treated as for summary judgment. *See* F.R.Civ.P. 56(d).

<sup>5</sup> I find these facts to be undisputed in the light most favorable to the non-moving party, Complainant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

<sup>6</sup> Complainant's husband also came with her but might not have sat in while the parties negotiated; he might have been available in the hall. Decl. of Boyadjian, Exh. 5.

unacceptable, but that by 8:30 p.m., she was “so emotionally drained and tired from being there the whole day” that she’d signed it. Decl. of Boyadjian, Exh. 4.

What Complainant did not mention in the email to OSHA is that she’d revoked the agreement the day before, on March 7, 2010 by a letter, a fax, and an email all sent to the person at J.C. Penney designated in the agreement to receive notice of any revocation. Respondent’s Exh. 2 at 1, 2. In the revocation letter, Complainant wrote: “The minimal amount offered does not justify releasing this company from their liability of the damage.” *Id.* at 3.<sup>7</sup>

On March 9, 2010, Complainant’s counsel Nordstrom resumed the negotiations on Complainant’s behalf. She sent defense counsel two alternative settlement demands, one for a lump sum payment and the other for money plus reinstatement. Respondent’s Exh. 3.

Curiously, with Ms. Nordstrom continuing to negotiate on Complainant’s behalf, Complainant emailed OSHA on the next day, March 10, 2010, that “my attorney is still not representing me in the Sarbanes-Oxley complaint.”<sup>8</sup> Decl. of Boyadjian, Exh. 5. It appears though that Complainant meant more that she was dissatisfied with the representation than that Ms. Nordstrom and Ms. Hutchinson weren’t her lawyers. In particular, Complainant complained to OSHA in the same email that she was stuck with her agreement with her attorneys, which she’d signed in July 2008.<sup>9</sup> *Id.* She complained as well that her attorney had misinformed her by saying that the Act does not provide for fee-shifting and that her attorneys want “their 40%” (apparently of any settlement). *Id.*<sup>10</sup>

But there was more. Complainant reports that at a meeting on March 8, 2010 with her attorney Ms. Hutchinson and named partner Don David Sessions, Mr. Sessions threatened her house and her “family’s security” and “created a level of fear and intimidation as soon as [she] revoked the agreement on March 7, 2010.” Complainant’s Objection to Motion at 2. Complainant states that Ms. Hutchinson continued to call her and said, “Time is running out, and Don isn’t going to let too much time pass.”<sup>11</sup>

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<sup>7</sup> Complainant’s characterization of the settlement amount as “minimal” notwithstanding, the amount was far from minimal. *See* Respondent’s Exh. 3.

<sup>8</sup> Complainant also spoke to the OSHA investigator on the telephone. She said that her attorney had threatened her “with legal action and financial ruin” if she “continued to refuse the offer Respondent made on March 5, 2010.” Complainant’s Opp. at 1.

<sup>9</sup> Complainant also complained that the mediator was unfamiliar with Sarbanes-Oxley and thought OSHA didn’t investigate complaints under the Act. *Id.* She wrote: “The mediator claimed not to have knowledge of Sarbanes-Oxley and told me it meant nothing.” *Id.* Although for purposes of this motion I accept that the mediator said this, I cannot draw any inferences from it without more context. In any event, if the mediator made such a statement, Complainant was on notice that she shouldn’t rely on the mediator for any opinion or legal advice about Sarbanes-Oxley.

<sup>10</sup> Whatever counsel might in fact have said, OSHA does provide for fee-shifting for prevailing complainants. 18 U.S.C. §1514A(c)(2)(C).

<sup>11</sup> Complainant states that she reported this to the OSHA investigator, but that generally OSHA wouldn’t respond unless it was about a possible settlement agreement, which would relieve OSHA of “the burden of investigating my complaint.” *Id.*

Respondent declined both of Complainant's alternative settlement demands on March 22, 2010. Respondent's Exh. 4. The Company expressly stated that it chose to extend no counter-offer. *Id.* Shortly afterward, Ms. Hutchinson contacted defense counsel, further negotiation followed, and counsel agreed to terms. After Complainant reviewed a draft and requested additional changes, there were further negotiations and another agreement. Defense counsel drafted the agreement and provided it to Ms. Hutchinson on April 8, 2010. Respondent's Br. at 2. Complainant was disappointed with a letter stating her employment history, asked to have it removed, and Respondent agreed. *Id.* at 3; Complainant's Objection, Exh. 2.

On April 10, 2010, Complainant emailed OSHA that she'd decided to settle. Decl. of Boyadjian, Exh. 6 at 1. She wrote that, "The revised release agreement is very similar to, if not exactly the same as the original agreement." *Id.* She acknowledged that she would be requesting a withdrawal and dismissal of her claim. *Id.* She stated that she understood that OSHA had to review the agreement and expressed concern about whether this could be done consistent with her obligation under the terms of the settlement. She attached a copy of the relevant term, which required her, "to maintain the confidentiality of the terms, contents and conditions of [the settlement] Agreement [and not to] disclose or discuss the Agreement except to: (i) government officials [and certain specific others]." *Id.* at 1-2.

Complainant followed-up with another email to OSHA on the next day, April 11, 2010. Decl. of Boyadjian, Exh. 6 at 1. She begins: "I have a question and have copied my attorney on this note." Her question seems directed to Respondent's notation in Complainant's personnel file that she was ineligible for rehire, which Complainant characterizes as Respondent's making her "non-hirable" when it "entered" her termination (apparently in its records). Complainant states that Respondent's placing her in this category "will have a very negative impact on [her] ability to get another job of any value." *Id.* She asks OSHA to make Respondent change her status in its records. *Id.*

About a week later, on April 19, 2010, knowing that the agreement was largely the same as the first one and that it didn't address her rehire eligibility or reinstate her, Complainant signed the second settlement agreement. Respondent's Exh. 5. The agreement includes, among numerous other provisions, Complainant's release of all claims, known and unknown, against Respondent, including claims under the Sarbanes-Oxley Act; Complainant's agreement to seek the dismissal of all claims she has filed, including those with OSHA; and a statement that all job references and verifications should be directed to Respondent's automated telephonic employment verification service. *Id.* Respondent expressly acknowledges "that it will take no position on how [Complainant] describes, explains, or classifies her rehire status with JCPenney." *Id.* at 4. The agreement again includes the revocation option consistent with the Older Workers' Benefit Protection Act. *Id.* at 3.

Respondent signed the agreement on April 26, 2010. *Id.* at 6. When Complainant had not exercised her option to revoke, on May 4, 2010, Respondent made the required payments under the agreement, both to Complainant and to her attorneys. Respondent's Exh. 6. Complainant wrote to OSHA on May 13, 2010, requesting to withdraw her complaint and that the matter be "dismissed immediately." She copied both attorneys, Ms. Hutchinson and for Penney's, Ms. Abram, on the letter. Decl. of Boyadjian, Exh. 9, 10; Respondent's Exh. 7. Before approving

the withdrawal, OSHA requested a copy of the settlement, which J.C. Penney provided.<sup>12</sup> Decl. of Boyadjian, Exh. 11. OSHA notified the parties on June 22, 2010 that it had found the settlement agreement “fair, adequate, and reasonable,” had approved it insofar as it related to claims under the Sarbanes-Oxley Act, and that this constituted the final order of the Secretary. *Id.*, Exh. 12.

Complainant dated her request for hearing 15 days later, on July 7, 2010. Nothing on the record suggests that Complainant has returned the money Respondent paid her or her attorneys under the settlement agreement, and I conclude that she has not.

### Discussion

On a motion for summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. § 1905.40(c) (1994); F.R.Civ.P. 56.<sup>13</sup>

I consider the facts on summary decision in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under F.R.Civ.P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson* at 252.

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<sup>12</sup> J.C. Penney redacted the settlement amounts from the copy it gave OSHA. Decl. of Boyadjian, Exh. 11. Its counsel explained that this was “due to the confidentiality of the agreement.” *Id.*

To the same effect, Complainant’s counsel advised Complainant on April 8, 2010, that the OSHA investigator misunderstood OSHA’s role; that Complainant was to request a dismissal, not request OSHA’s approval of the settlement; that the settlement agreement requires confidentiality; and that if Complainant provided a copy to OSHA, she would be violating the terms of the agreement and “exposing [herself] to significant financial penalty.” As Ms. Hutchinson wrote: “I advise you NOT to give OSHA a copy of the settlement agreement and to NOT discuss this matter with OSHA or anyone else.” Complainant’s Opp., attachment. Of course, it was J.C. Penney, not Complainant, that provided the agreement to OSHA.

Both attorneys seem to miss that the confidentiality provision expressly allows disclosures to government officials. Ms. Hutchinson’s advice to Complainant misstates OSHA’s responsibilities. Any request for withdrawal because of settlement during the course of OSHA’s investigation requires OSHA to agree to the settlement. *See* 29 C.F.R. §1980.111 (a), (d). OSHA’s demand to review the settlement agreement therefore was proper.

<sup>13</sup> “Where material facts concerning the existence or terms of an agreement to settle are in dispute, the parties must be allowed an evidentiary hearing.” *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987). “Summary enforcement of a settlement agreement is ‘ill-suited to situations presenting complex factual issues related either to formation or the consummation of the [settlement] contract, which only testimonial exploration in a more plenary proceeding is apt to satisfactorily resolve.’” *Russell v. Puget Sound Tug & Barge Co.*, 737 F.2d 1510, 1511 (9th Cir. 1984) (citations omitted). Thus, the question may be resolved on a motion such as this one only on a showing that the result is mandated as a matter of law based on undisputed facts, the standard for summary decision.

*Choice of law.* Settlement agreements are a type of contract and are therefore governed by contract law. *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152 (6th Cir. 1992).

Thus, “[w]hether [a settlement agreement] is a valid contract between the parties is determined by reference to state substantive law governing contracts generally.” *White Farm Equip. Co. v. Kupcho*, 792 F.2d 526, 529 (5th Cir. 1986); see also *Lockette v. Greyhound Lines*, 817 F.2d 1182, 1185 (5th Cir. 1987) (“In this case, where jurisdiction is based upon diversity of citizenship, we will apply the substantive law of Louisiana to determine whether the settlement agreement allegedly entered into . . . is enforceable.”); *Wong v. Bailey*, 752 F.2d 619, 621 (11th Cir. 1985) (“The construction and enforcement of settlement agreements are governed by principles of the state’s general contracts law.”).

*Id.*; accord *Olam v. Congress Mortgage Co.*, 68 F.Supp.2d 1110, 1119 (N.D. Cal. 1999) (applying California law to determine validity of a settlement agreement involving a federal statutory claim as “there is no general federal law of contracts”).

*Burden of proof.* California acknowledges that generally “private transactions are fair and regular.” Cal. Civ. Code §3545. Generally, this results in the burden of persuasion falling on the party who seeks to prove the opposite. See *Olam v. Congress Mortgage Co.*, 68 F.Supp.2d at 1139-40; citing *Dorn v. Pichinino*, 105 Cal.App.2d 796, 801 (1951). It is therefore Complainant’s burden to show sufficient facts to avoid the release she gave in the settlement agreement.<sup>14</sup>

*Grounds for rescission.* California law provides, in relevant part, that a party to a contract may rescind a contract if the party gave consent by mistake or if her consent was obtained through duress, menace, fraud, or undue influence, when these were “exercised by or with the connivance of the party as to whom [the party] rescinds . . .” Cal. Civ. Code §1689(b)(1). For the party’s consent, when given under these circumstances, “is not real or free.” *Id.* §1567.

Duress consists in the unlawful detainment of the person or property of a person (or others closely related to the person). See Cal. Civ. Code §1569. Menace is a threat of duress or of violent injury to the person or property of a person, or of injury to the character of a party. See Cal. Civ. Code §1570. To have legal effect, the duress or menace must be unlawful. *Odorizzi v. Bloomfield School District*, 246 Cal.App.2d 123, 128 (1966). For example, a threat to take legal action is not unlawful, and thus neither duress nor menace, “unless the party making the threat knows the falsity of his claim.” *Id.*

Fraud may be actual or constructive. See Cal. Civ. Code §1571. I set out the definitions of each in the margin.<sup>15</sup>

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<sup>14</sup> The rule differs when one of the parties acts as a trustee for the benefit of the other. In such cases, there is a presumption that an advantage gained in a confidential relationship is gained by undue influence. See Cal. Prob. Code §16004 (“A transaction between the trustee and a beneficiary . . . by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee’s fiduciary duties”). Here, Complainant’s relationship with J.C. Penney was at arm’s length and not fiduciary.

<sup>15</sup> The California Civil Code provides:

Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

Cal. Civ. Code §1577. A mistake of law can arise only from:

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or, 2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

*See* Cal. Civ. Code §1578.

Finally,

Undue influence consists: 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or, 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

Cal. Civ. Code §1575. Undue influence,

Involves the use of excessive pressure to persuade one vulnerable to such pressure, pressure applied by a dominant subject to a servient object. In combination, the elements of undue susceptibility in the servient person and excessive pressure by the dominating person make the latter's influence undue, for it results in the apparent will of the servient person being in fact the will of the dominant person.

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Actual fraud . . . consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; 3. The suppression of that which is true, by one having knowledge or belief of the fact; 4. A promise made without any intention of performing it; or, 5. Any other act fitted to deceive.

Cal. Civ. Code §1572.

Constructive fraud consists: 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

Cal. Civ. Code §1573.

*Odorizzi*, 246 Cal.App.2d at 131. Thus, “A party cannot successfully invoke the doctrine of “undue influence” to escape an apparent contract unless that party proves two things: (1) that she had a lessened capacity to make a free contract and (2) that the other party applied its excessive strength to her to secure her agreement.” *Olam, supra*, 68 F.Supp.2d at 1140.

The “weakness of mind” required for undue susceptibility,

Need not be long-lasting nor wholly incapacitating, but may be merely a lack of full vigor due to age, physical condition, emotional anguish, or a combination of such factors. The reported cases have usually involved elderly, sick, senile persons alleged to have executed wills or deeds under pressure.

*Odorizzi* at 131 (citations omitted). Thus, a person had sufficiently pleaded undue susceptibility when he alleged that he’d agreed to a contract after “he had just completed the process of arrest, questioning, booking, and release on bail and had been without sleep for forty hours.” *Id.*

The court should consider whether – in light of the entire context – there is a “supremacy of one mind over another by which that other is prevented from acting according to his own wish or judgment, and whereby the will of the person is over-borne and he is induced to do or forbear to do an act which he would not do, or would do, if left to act freely.”

*Olam* at 1141, citing *Webb v. Saunders*, 79 Cal.App.2d 863, 871 (1947).

*Procedure required for rescission.* The procedure to effect a rescission requires that the party seeking rescission (once free of the duress or similar circumstance and once aware of his right to rescind): “(a) Give notice of rescission to the party as to whom he rescinds; and (b) Restore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise . . .” Cal. Civ. Code §1691.

*Complainant’s contentions.* Complainant does not specify in her pleadings, briefs, or supporting documentation the theory under which she asserts an entitlement to rescind the settlement agreement. From her arguments and the facts she advances, however, it appears that her theory turns on the conduct of her attorneys and of certain representatives of OSHA. She contends essentially that her attorneys forced her to settle against her will and her interest, and that OSHA failed in its duty to evaluate the settlement before agreeing to it.<sup>16</sup>

Considering the facts in the light most favorable to Complainant, I must assume that Complainant’s attorney threatened her with a lawsuit and financial ruin if she didn’t agree to

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<sup>16</sup> Complainant also complains that the mediator was unfamiliar with SOX and pressured her into agreeing to the settlement. That would not be a basis for rescission because it is not a failure on the part of J.C. Penney, and because Complainant doesn’t specify how the mediator’s lack of knowledge created a mistake of law or fact that would allow for rescission. *See* discussion below. More to the point is that Complainant wound up revoking the settlement reached at the mediation; the agreement before me is a different document negotiated between the parties (through counsel) and without the mediator’s involvement.

settle on terms similar to those in the agreement that she revoked. I must assume that at times Complainant's counsel misinformed her about the law. I must assume that OSHA communicated with Complainant's counsel at times when Complainant wanted OSHA to communicate directly with her and not through her counsel.<sup>17</sup> I must consider Complainant's view that the settlement is inadequate because it provides for neither reinstatement nor the expungement of the record in Complainant's personnel file that she is ineligible for rehire.

*Analysis.* The first difficulty with Complainant's theories is that they are misdirected. Her disputes related to the process by which the parties reached their settlement are with her former attorneys and with OSHA, not with J.C. Penney. To avoid the settlement, it is Complainant's burden to show either mistake (of fact or law) or that there was duress, menace, fraud, or undue influence that was "exercised by or with the connivance of the party as to whom [she] rescinds," that is, J.C. Penney. See Cal. Civ. Code §1689(b)(1).

Complainant offers no facts to show that the parties entered into the settlement under a mistake of law or fact. Her argument is that her attorneys exercised duress, menace, or undue influence, the result of which was that her consent to the settlement was not freely given. But none of this points to J.C. Penney's conduct.

As the Court stated in *Olam*,

We know of no California authority for the notion that the requirements of the doctrine of undue influence can be satisfied by a showing that a party's lawyer pressured her into signing the contract. We decline to expand California law to embrace any such theory. The law provides other vehicles for relief when a party's own lawyer is the source of the misconduct.

68 F.Supp.2d at 1141 n. 46.

Second, even if Complainant had grounds for rescission, she failed to effectuate any rescission because she didn't return to J.C. Penney (the party against whom she would rescind) the money that it paid her and her attorneys under the settlement agreement. California law requires that of any party who seeks to rescind a contract. See Cal. Civ. Code §1691. Complainant cannot keep the benefit of the contract and at the same time avoid the consequences of the release.

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<sup>17</sup> I have not set out in detail every complaint that Complainant has about OSHA. Even assuming, as I must for purposes of this motion, that all of the complaints are factually accurate, I find the complaints irrelevant. OSHA's only task related to the settlement was to evaluate it after Complainant and Respondent signed and submitted it and decide whether it was fair, adequate, and reasonable. OSHA did that. Nothing on the face of the agreement brings OSHA's determination into question. If Complainant didn't want OSHA to finalize the settlement by approving it, she had only to revoke the settlement under its terms.

Complainant complains that OSHA spoke and wrote with her attorney, not herself, about the settlement agreement and the dismissal. For example, she complains that OSHA sent the notice that it had closed the case to Complainant's counsel, not Complainant. She asked OSHA for advice, such as on disclosing the settlement terms to the OSHA investigator, and it appears that OSHA might not have responded to her. But none of this, true or not, gives Complainant a basis to avoid the settlement agreement as it does not point to conduct by J.C. Penney. See discussion in the text, *supra*.

This aside, Complainant has failed to show a basis for rescission in any event. She offers no facts to show that anyone detained her or threatened to detain her or inflict violence against her, her property, or her family, as required for duress or menace. Although her lawyers might have misguided her about some legal points, assuming as I must for this motion that Complainant's rendition of the facts is correct, she doesn't offer the facts to show fraud. Complainant's central theory would have to be undue influence.

Complainant's showing on that theory fails as well. When Complainant signed the second settlement agreement, she knew she had the option to revoke it. The second agreement contained the same language as did the first in this regard, and Complainant exercised the option to revoke the first agreement. She could have revoked again. That's exactly why the Older Workers' Benefit Protection Act requires such a provision: to be certain that waivers of statutory rights are knowing and *voluntary*.

If Complainant felt that her attorneys were unduly pressuring her around March 8, 2010, or if she didn't trust her attorneys, she could have sought legal counsel elsewhere. She could have consulted with the State Bar of California. She didn't sign the second agreement until April 19, 2010, some six weeks after the meeting with Mr. Sessions and Ms. Hutchinson at which, according to Complainant, Mr. Sessions threatened her, and she had still another week to revoke after she signed the agreement. That was time enough to get additional legal advice. At the least, it was time for Complainant to regain her mental capacity to the point that she wasn't susceptible to the undue influence of her attorneys.

Finally, there is nothing inadequate about the settlement that required the Secretary to reject it. Complainant argues that the Act provides for reinstatement as a remedy, and that, to be adequate, the settlement should have either required Respondent to reinstate her, or at the least, it should have required Respondent to change her personnel record to show her as eligible for rehire. Complainant specifically asked OSHA to make Respondent change her eligibility for rehire.

What Complainant neglects is that, by agreeing to settle, Respondent did not admit liability. The parties to the settlement acknowledged in it as follows: "JCPenney denies any wrongdoing. It also denies any liability . . ." Respondent's Exh. 5 at 1. The parties' stated purpose in the agreement was to resolve all disputes between them arising out of Complainant's employment. *Id.* Thus, J.C. Penney has never admitted or been found to have violated SOX; nothing has established that Complainant to the remedies provided in that statute. The settlement agreement represents the voluntary resolution of undecided, disputed claims, not more. J.C. Penney had no obligation to offer reinstatement or to adjust Complainant's personnel records as part of any settlement.<sup>18</sup>

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<sup>18</sup> It appears that Complainant's concern about prospective employers' learning that she's ineligible for rehire might be groundless. Complainant does not address the agreement's provision under which Penney's agrees that any reference will be handled through an automated service and that Penney's "will take no position on how Gonzales describes, explains, or classifies her rehire status with JCPenney." *Id.* at 4. I take this provision to mean that Complainant is free to tell prospective employers anything she likes about her eligibility for rehire and that Penney's job automated referral system will state no information on the subject, thus leaving Complainant's characterization of her rehire status undisturbed.

### Conclusion and Order

Complainant has failed to show that Respondent engaged in any of the conduct that under California law gives rise to a right to rescind. She failed to restore to Respondent the money that it paid to comply with the settlement agreement. Complainant's complaints about her own attorneys' conduct do not permit her to rescind her agreement with Respondent. OSHA complied with its statutory and regulatory obligations with respect to the settlement agreement, and in any event, any failure would not allow Complainant to rescind, especially in that the agreement is fair, adequate, and reasonable. Accordingly,

Respondent's motion for summary decision is GRANTED. The complaint is DISMISSED.

SO ORDERED.

**A**

STEVEN B. BERLIN  
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, N.W., Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).