



Issue Date: 17 September 2010

CASE NO.: 2010-SOX-39

IN THE MATTER OF

KEN MOYER

Complainant

v.

KINDRED HEALTHCARE, INC.

Respondent

**DECISION AND ORDER GRANTING
RESPONDENT'S MOTION FOR SUMMARY DISMISSAL**

This case arises from a complaint filed by Ken Moyer (Complainant) with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleges that the Respondent (Kindred), discriminated against him in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (the Act).

Background

Complainant formerly worked as an Area Maintenance Manager in Kindred's Idaho healthcare facilities. On January 6, 2010, Complainant was informed via letter from Peter Corless, Senior Vice President of Human Resources, that he was being terminated as of January 11, 2010, due to a regional reduction in force. Thereafter, Mr. Corless offered Complainant a severance package in exchange for a full release of all claims against Kindred. Complainant signed this agreement release on January 11, 2010.

At the time Complainant signed this agreement, there was some dispute as to whether his termination fell under the group layoff provisions of the Older Workers Benefit Protection Act (OWBPA). In order to allay Complainant's concerns, Mr. Corless sent him a revised agreement and release, which was signed by Complainant on February 8, 2010. Both the original and revised agreements included a general release of all claims against Kindred, including those brought under the Act. Mr. Corless signed the revised agreement for Kindred on March 15, 2010, and Complainant cashed his severance check in the amount of \$20,928.00 on March 22, 2010.

Nine days later, Complainant filed his initial complaint with OSHA on March 31, 2010, alleging he was improperly terminated on January 11, 2010, on pretextual grounds under the Act. On June 7, 2010, OSHA dismissed the complaint in light of the "Confidential Separation Agreement and General Release" signed by the parties on February 8, 2010. On July 7, 2010, Complainant appealed OSHA's decision. On September 7, 2010, Respondent filed a Motion for Summary Dismissal pursuant to 29 C.F.R. § 18.40. Complainant responded on September 10, 2010.

Discussion and Findings

An administrative law judge may grant summary decision for either party if the pleadings, affidavits, discovery materials, or matters officially noted show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40(d). A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When considering a motion for summary decision, the administrative law judge must view the evidence and inferences in a light most favorable to the non-moving party. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

Here, Respondent argues a dismissal of the case is warranted as a matter of law for the following two reasons: (1) Complainant has failed to make a *prima facie* claim under the Act, and (2) even if Complainant's claim is valid, there is no genuine issue of material fact with respect to Respondent's "general release" defense.¹ I agree with Respondent as to the latter argument, and I find summary dismissal appropriate in this case.

¹ In addition to case law, Respondent has supported his motion with declarations documenting Complainant's termination from Kindred, his execution of the agreement and release, and OSHA's dismissal of his claim.

On February 8, 2010, Complainant signed a revised severance agreement from Respondent in which he expressly released Kindred from “any and all known and unknown claims whether asserted and unasserted that [Complainant] has or may have against Kindred as of the date of execution of this Agreement, including claims for...[any] alleged violation of...The Sarbanes Oxley Act of 2002.”

Complainant has failed to raise any genuine issue of material fact regarding his knowing and voluntary execution of this waiver. Instead, Complainant focuses his appeal on the non-enforceability of waivers of claims under other federal acts, such as the OWBPA, the Fair Labor Standards Act, and the Family Medical Leave Act. Complainant’s reliance on these related statutes is misplaced, especially in light of the case law on point.

In 2005, Judge Wayne C. Beyer of the Administrative Review Board (ARB) concluded that “in executing a general release of all claims against [his employer], [a party] also knowingly and voluntarily release[s] any claim for discrimination he might have had under the SOX.” *Moldauer v. Canadaigua Wine Co.*, ARB No. 04-022 (ARB Dec. December 30, 3005). Judge Beyer based this conclusion on his analysis of the applicable case law surrounding the execution of such agreements and their effect on a party’s ability to subsequently file suit. See, e.g., *Pardi v. Kaiser Permanente Hosp., Inc.*, 309 F.3d 840 (9th Cir. 2004); *Smith v. Amedisys*, 298 F.3d 434 (5th Cir. 2002); *Morgan v. Federal Home Loan Mortgage Corp.*, 172 F.Supp 2d 98 (D.D.C. 2001); *Kaufman and Broad-South Bay v. Unisys Corp.*, 822 F.Supp. 1468 (N.D. Cal. 1993). Judge Beyer recently reiterated this opinion in *In re: Daryanani v. Arrowpoint Capital Corp.*, ARB No. 08-106 (ARB Dec. May 27, 2010) (Beyer, J. concurring), in which he concluded the complainant’s execution of a general release “was effective in releasing any claim [he] had arising from his employment” including a claim under SOX.²

Although the opinions of Judge Beyer outlined above are concurrences only, I agree with their reasoning, and consequently, I find Complainant waived his ability to raise a SOX claim against Respondent when he executed the severance agreement and general release offered to him for valid consideration on February 8, 2010. In the Ninth Circuit, where Complainant’s alleged claims occurred and where the agreement was signed, such a waiver is valid and enforceable when it is knowingly and voluntarily entered, clear, and unambiguous. *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 462-63 (9th Cir. 1989).

² It is worth noting that in both *Moldauer* and *Daryanani*, the releases in question failed to specifically mention SOX claims. In this case, however, the general release signed by Complainant on February 8, 2010, expressly included the Act in its enumeration of claims waived by the agreement.

As noted above, Complainant has raised no genuine issue of material fact with respect to his knowing and voluntary execution of the clear and unambiguous release. The agreement, which he signed on February 8, 2010, clearly states that Complainant “knowingly and voluntarily waives, releases, and forever discharges, to the full extent permitted by law...Kindred...of and from any and all known and unknown claims whether asserted or unasserted that [Complainant] has or may have against Kindred as of the date of execution of [the] Agreement, including claims for...[any] alleged violation of...The Sarbanes-Oxley Act of 2002.” I find this language serves as a clear and unambiguous waiver of any SOX claims Complainant may have against Respondent.

In his response to Respondent’s motion, Complainant asserts he signed the agreement “as a last resort, believing that it was not a valid document.” However, the terms of the agreement gave Complainant twenty-one days to consider the agreement before signing it, as well as an additional seven days in which he could have revoked the agreement and waiver. This gave Complainant ample time to consider the consequences of signing the agreement and release. Nevertheless, Complainant chose to sign the document, and went on to receive and deposit the \$20,928.00 he received in severance.

Based on these circumstances, I find there is no genuine issue of material fact with respect to Complainant’s knowing and voluntary execution of the “Confidential Separation Agreement and General Release” of February 8, 2010. Therefore, summary decision is appropriate in this case, and the claim shall be dismissed.³

ORDER

Respondent’s Motion for Summary Dismissal is hereby **GRANTED**, and the formal hearing scheduled in this matter for October 13, 2010 is hereby **CANCELED**.

So **ORDERED** this 17th day of September, 2010, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

³ Having found summary decision and dismissal appropriate on these grounds, I need not reach the substance of Complainant’s SOX claim.

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, NW, 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).