



Issue Date: 15 December 2011

OALJ CASE NO.: 2011-SOX-00021

In the Matter of:

RENAE GONZALES

Complainant,

v.

JC PENNEY COMPANY, INC.

Respondent.

Appearances: Renae Gonzales
Pro Se

Lisa Abram, Esq.
For J.C. Penney

DECISION AND ORDER

This case arises under the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002 (“the Act” or “SOX”), 18 U.S.C. § 1514A, enacted on July 30, 2002. Renae Gonzales (“Complainant”) filed a complaint against her former employer JC Penney Company (“Respondent” or “Company”) alleging retaliation and blacklisting for making complaints against her former District Manager, Thomas Kelly. Complainant initiated her first SOX “whistleblower” claim on or about August 6, 2009, when she filed a complaint with the Occupational Safety and Health Administration (“OSHA”). *See Renae Gonzales v. J.C. Penney Corp.*, 2010-SOX-00045 (ALJ Sept. 2010).¹ In April 2010, she and Respondent signed a settlement agreement, which resolved the claim, and submitted it to OSHA for approval. *Id.* at slip. op. 1. OSHA approved the settlement and closed the case on June 22, 2010. *Id.* On or about July 7, 2010, Complainant objected to the case closure and requested review. *Id.* at slip. op. 2. The case was referred to the Office of Administrative Law Judges and assigned to Judge Steven B. Berlin. *Id.* Respondent filed a motion to dismiss arguing that Complainant’s case was barred by the settlement agreement the parties entered into on April 19, 2010. *Id.* Complainant filed an opposition asserting that the settlement agreement should be rescinded because of the alleged problems she had with her attorney and the OSHA investigator during the execution of the

¹ From here on out cited as “D&O.”

agreement. *Id.* at slip. op. 2- 3. The Solicitor also briefed the motion in support of dismissal. *Id.* at 3. After analyzing all of the evidence submitted by the parties, Judge Berlin found the settlement agreement valid and binding and dismissed Complainant's case on September 16, 2010. Complainant's appeal is currently pending before the Administrative Review Board.

Complainant filed her second SOX retaliation complaint, which is the present matter currently before the undersigned, alleging that Respondent's decision to designate her as a "no-rehire" is a separate act of retaliation under SOX which is not covered by her April 2009 settlement agreement with Respondent. Complainant also argues that Respondent's decision to list her as a "no-hire" constitutes an act of blacklisting because the no-rehire classification is allegedly visible to other employers through the integrated HR services.

The undersigned held a duly noticed hearing in Long Beach, California on July 6 and 7, 2011. The following exhibits were admitted into evidence: Complainant's exhibit ("CX") A-1, A-2, B, B-1 through B-5, 2, 8-18, 20, 23; Respondent's exhibits ("RX") 1-22; Administrative Law Judge exhibits ("ALJ") 1-9. Trial Transcript ("Tr.") 10, 45, 65-66, 76, 263, 305, 324, 325.

FINDINGS OF FACT

Complainant began working for Respondent in Laguna Hills, California in 1992 and was subsequently promoted to a position of an Administrative Assistant within the District Administrative Office in May of 2005. Tr. 95-97, 99, 129. In this capacity, Complainant reported to the District Manager, Tim Deierling, and provided administrative support to the district office staff. *Id.* at 99. Deierling left the job in July of 2008 and was replaced by Thomas Kelly. *Id.* at 100-01. While working for Kelley, Complainant began to suspect that he engaged in violations of various laws and company policies. According to Complainant, Kelly routinely provided his investment advisor, James Bailey, with confidential company information, such as his company password, spent exorbitant sums of money using his company purchase card, and acted in a discriminatory manner towards various Latino employees. ALJ 4; Tr. 107-09, 112, 121.

Complainant began to complain about Kelley's conduct to Respondent's corporate HR office. Tr. 110, 120, 125-26. She also passed along complaints brought by other company employees. Respondent began to investigate Kelly and, in February of 2009, Kelly Harris, HR Director for the Central Region, and Michael Silipo, HR Manager, came to the district and interviewed Complainant and several other managers concerning the matter. *Id.* at 124-25. When the investigation commenced, Complainant felt that Kelly began harassing her. *Id.* at 125. For undisclosed reasons, Kelly was terminated around March 2009, and the company began a search for a new District Manager. *Id.* at 127-28, 133. At that time, Complainant did not know what the investigation revealed or the precise reason for Kelley's termination. *Id.* at 129, 131-32.

It took about two months before Peggy Creel from upstate New York was hired as the new District Manager. *Id.* at 135. Creel commenced working as the new District Manager the first week of May 2009. *Id.* at 135. Less than five weeks later, Complainant began having problems with Creel. Tr. 149. Complainant felt alienated and that Creel distrusted her because of her involvement in the events leading up to Kelly's termination. *Id.* at 144-45. For example, Creel would often change her work password, which Complainant needed to perform her job

duties. She also continued to rely on her old assistant instead of Complainant for reports. *Id.* at 150. On June 15, 2009, the situation escalated after Creel accused Complainant of telling another administrator that she was asked to work off the clock. *Id.* at 151; *see* CX 3. Creel was very concerned that Complainant was working off the clock and encouraging others to do so. *Id.* at 472. During the conversation, Creel discussed the time recording policies with Complainant. *Id.* Complainant took this opportunity to clear the air with Creel. *Id.* at 157. Complainant told Creel that she felt like Creel distrusted her because of the role she played in the Kelly investigation. *Id.* Creel denied this allegation and told Complainant that she did not know anything about the investigation. *Id.* at 158.

Complainant got so upset during the conversation that she had to take an extended lunch to compose herself. CX 3 at 6. Complainant returned to work in the afternoon and stayed beyond her usual working hours to make up for the extended lunch break. Tr. 161-63. On her timesheet, Complainant indicated the correct number of hours worked but did not list the exact time she started and stopped working. *Id.* at 166. Creel confronted Complainant with the timesheet on June 22, 2009. Even though Creel initially indicated that she would not give Complainant a policy violation for listing the wrong time on the timesheet, she subsequently issued a written Policy Violation Warning. *Id.* at 168-69; CX 8. After the incident, Complainant emailed Michael Silipo in the HR office asking for help. Tr. 169. At this time, Complainant felt that her job was in jeopardy and asked for a transfer. *Id.* at 181-82. The tension between Creel and Complainant continued to escalate. *Id.* at 169, 176-77. On July 1, 2009, Creel changed the password to her work account and took everything off Complainant's desk. Tr. 169-70. Complainant could not perform any of her job duties and took two days off work. *Id.* at 188. On July 8, 2009, Complainant submitted her two weeks' notice and resignation because she believed Respondent was going to terminate her employment. Tr. 159, 189-90.

Around July 10, 2009, Mark Morris from the HR department contacted Complainant to let her know that her resignation was accepted and that the company was going to pay her for the balance of her time. RX 19 at 15; Tr. 497, 488-89. During the conversation, Complainant asked whether she was terminated and inquired why she could not access her company email or benefits information.² Tr. 205, 275, 498. Morris continued to reiterate that Complainant voluntarily resigned from her position. *Id.* at 205. During a follow-up conversation, Complainant again inquired about her work status. *Id.* at 206-07, 500-01. Complainant testified that she was aware that certain employees received a no-rehire classification after they stopped working for a company. Tr. 215. According to Complainant, this designation was usually assigned to employees who committed serious violations. *Id.*

Complainant filed a retaliation complaint against Respondent with OSHA in August of 2009. Around October of 2009, OSHA asked Respondent to produce Complainant's personnel file. Tr. 210. The information that Respondents produced did not show the basic information pertaining to Complainant's employee status. On March 5, 2010, Complainant and Respondent attended mediation. In the course of the negotiation, the mediator informed Complainant that the company was unwilling to "include reinstatement or any discussion of being rehired in the settlement." Tr. 308-11. Complainant was represented by an attorney during the mediation and

² Morris testified that he later learned that it is not uncommon to block employees in sensitive positions from having access before their resignation or termination is processed. Tr. 504, 516.

the mediation was successful, at least initially, with the parties signing a settlement agreement. D&O at 3. Two days after the mediation Complainant exercised her contractual right to revoke the agreement. *Id.* at 4. It appears that immediately after the mediation Complainant took the initiative and contacted Powerline, a system utilized by Respondent to store certain employee information. Powerline was able to retrieve Complainant's records which showed that the company had designated her as a "non-rehire." Tr. 211, 212; *see* RX 18.

On March 8, 2010, Complainant wrote to OSHA that she attended mediation with Respondent and was represented by counsel. D&O at 3. Complainant complained that her attorney and the mediator pressured her to settle for a "very minimal amount without the company reinstating" her. *Id.* On March 9, 2010, Complainant's counsel at that time, Nordstrom, resumed the negotiations on Complainant's behalf. Judge Berlin found that Complainant sent defense counsel two alternative settlement demands, one for a lump sum payment and the other for money plus reinstatement. *Id.* at 4. Respondents rejected both of these demands on March 22, 2010. *Id.* at 5.

On April 5, 2010, Complainant sent an e-mail to her former attorney indicating that the company designated her as "un-re-hirable" and was refusing to reinstate her or rehire her.³ RX 20. In the e-mail, Complainant indicates that this is "further retaliation along with discrimination, regardless of whether the company or any attorney may view their actions as an ordinary response to the circumstances." *Id.* Complainant notes that after considering the situation, she now realizes that this status has "more disadvantages." *Id.* Complainant goes on to elaborate that the "un-re-hirable" status further damages her reputation because the management associates who she worked with at the company will see this status. Complainant also points out that her job, retirement, and lifetime associate discount will be impacted. *Id.* Complainant states that she learned about the "un-re-hirable" designation on March 5 and instructs her attorney to send Respondent a "provision to the agreement [she] requested" because "in order for [her] to truly feel any sense of resolution [her] employment status with JC Penney must be changed to 'Re-Hirable'..."⁴ *Id.* Complainant states that she feels extremely wronged by the company but the "usual legal process is too slow and the lagging enforcement of existing laws appears to be an advantage to the company ..." *Id.*

After further negotiations between the parties, Respondent's counsel drafted a new agreement and provided it to Complainant around April 8, 2010. D&O at 5. On April 10, 2010, Complainant emailed OSHA indicating that she had decided to accept the revised release agreement even though it was very similar if "not exactly the same as the original agreement." RX 21. Complainant noted that as soon as she received consideration from the company she would send a certified letter asking OSHA to withdraw her complaint. *Id.* The following day Complainant sent a follow-up email to OSHA and copied her attorney. In this e-mail,

³ The email was admitted into evidence because Complainant previously voluntarily offered this e-mail as an exhibit in her litigation before Judge Berlin thus waiving the attorney client privilege. Tr. 306. *See e.g., Joy v. North*, 692 F.2d 880 (2d Cir. 1982) ("the submission of materials to a court in order to obtain summary judgment utterly precludes the assertion of the attorney-client privilege or work-product immunity.").

⁴ At the hearing, Complainant denied having knowledge of the no-rehire status in March of 2010. Tr. 304-05.

Complainant indicated that she had provided proof that Respondents “made her non-hirable” when they terminated her and inquired whether this act constituted blacklisting or another form of retaliation which she can allege in her complaint. RX 21. Complainant elaborated that “[f]or whatever reason the company has placed me in a non-hirable status – viewed as legal or not- will have a very negative impact on my ability to get another job of any value ... but the only reason the company made me non-hirable would be because I complained to corporate that I [was being] harassed in retaliation for being a ‘whistleblower’...” *Id.* Complainant reiterated that the non-rehire status was a “very real problem that [she] has continued to point out but [does] not see anyone addressing, the very negative impact the company will continue to place on [her] ability to get another job since they put [her] in as non-hirable.” *Id.* Complainant concluded her email by requesting OSHA to provide advice on how to force the company to change the status because it will have an “on-going affect on [her] ability to replace [her] job.” *Id.*

Judge Berlin found that about a week later, on April 19, 2010, Complainant signed a second agreement “knowing that the agreement was largely the same as the first one and that it didn’t address her rehire eligibility or reinstate her...” D&O at 5. Robert Swan signed the agreement on behalf of Respondent on April 26, 2010. When Complainant failed to exercise her option to revoke, Respondent made the required payment to Complainant and her attorney on May 4, 2010. *Id.* Complainant subsequently requested OSHA to withdraw her complaint, and OSHA notified the parties on June 22, 2010, that it had found the settlement agreement “fair, adequate, and reasonable,” and had approved it insofar as it related to claims under Sarbanes-Oxley Act. *Id.*

Confidential Release Agreement

The settlement agreement that Complainant signed on April 19, 2010, is titled “Confidential Release Agreement.” *See* RX 22. The agreement indicates that Complainant releases Respondent from any claims that she may have against it “arising from or related to her employment with the company or the termination of such employment.” *Id.* at § 3.3. Specifically, Complainant agreed to released the following claims: 1) all claims arising under any federal, state or local anti-discrimination or anti-retaliation laws, including the Sarbanes-Oxley Act of 2002; 2) claims for lost wages and leave benefits; 3) any common law claims for breach of contract or tort such as promissory estoppels, fraud, breach of contract, wrongful discharge, and infliction of emotional distress; and 4) “any other Claim for any alleged unlawful act [she] may have or claim to have against any of the Releasees arising out of or related to [her] employment with [Respondent] or the termination of such employment.” *Id.* at § 4. The agreement indicates that Complainant has entered into the agreement voluntarily and was advised to consult an attorney prior to signing the agreement. *Id.* at § 5.2. Complainant was also given a period of at least twenty-one days to consider the agreement. *Id.* at § 5.4. The agreement specifies that it “constitutes the entire agreement between the Parties. It supersedes and replaced any and all prior verbal or written agreements pertaining to the same subject matter.” *Id.* at § 10. The agreement states that it “cannot be modified verbally. Rather, any changes to this Agreement must be in writing and signed” by Complainant and Respondent. *Id.* at § 11. In exchange for the release, Complainant received \$51,000 for her alleged emotional distress, \$9,000 for alleged lost wages, and \$39,999.99 for attorney’s fees. *Id.* at § 3.1.

FINDINGS OF LAW

Section 806 of the Act prohibits any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934, or required to file reports under section 15(d) of that Act, or any officer, employee, contractor, subcontractor, or agent of such company, from demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee who reported alleged violations of any rule or regulation of the Securities and Exchange Commission (“SEC”) or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A. In the current proceeding, Complainant argues that Respondent retaliated against her under SOX by classifying her as non-rehireable. According to Complainant, she never agreed to waive her right to seek future employment with Respondent, nor did she agree that the non-rehire status remain on her record. Complainant points out that the non-rehire status was also never voluntarily disclosed by Respondent. After examining the language of the April 19, 2010, settlement agreement and the circumstances surrounding its execution, the undersigned concludes that Complainant’s retaliation and blacklisting claims under SOX are barred.

Complainant Entered into a Valid Settlement Agreement

A settlement agreement is a contract, and is governed by principles generally applicable under contract law. *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152 (6th Cir. 1992). “Whether [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). Judge Berlin concluded that the April 19, 2010 Confidential Release Agreement was a valid contract which the parties entered into knowingly and voluntarily. D&O at 11. After examining the events surrounding the execution of the agreement, Judge Berlin determined that there are no grounds for rescission such as duress, menace, fraud, or undue influence. *Id.* He noted that, 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.” *Id.*; see Cal. Civ. Code § 1691 (requiring the party who seeks to rescind to refund the money). During the proceeding before Judge Berlin, Complainant argued 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. *Id.* Judge Berlin did not find this reasoning persuasive because by agreeing to settle, Respondent did not admit liability. *Id.* The parties agreed that by signing the agreement “JC Penny denie[d] any wrongdoing” and liability. *Id.* Thus, Judge Berlin held that “J.C. Penney had no obligation to offer reinstatement or adjust Complainant’s personnel records as part of any settlement” because the “settlement agreement represents the voluntary resolution of undecided, disputed claims, not more.” *Id.*

Complainant now argues that the agreement does not cover her right to seek employment with Respondent or a change in her employment status. The main goal of contract interpretation is to give effect to the parties’ mutual intent at the time of contracting. Cal. Civ. Code § 1636; *Bank of the West v. Superior Court* 2 Cal. 4th 1254, 1264 (1992). When a contract is reduced to writing, the parties’ intention is determined from the usual and ordinary meaning of the language

used in the agreement. Cal Civ. Code § 1644. If the parties intend a written agreement to be the final and complete expression of their understanding, an integrated document, that writing may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. *Alling v. Universal Mfg., Corp.*, 5 Cal. App. 4th 1412, 1433-34 (1992); *Banco Do Brasil, S.A. v. Latian, Inc.*, 234 Cal. App. 3d 973, 1000 (1991); Cal. Code Civ. Proc. § 1856. Under the parole evidence rule, if the contract is integrated, extrinsic evidence is admissible only to supplement or explain the terms of the agreement but only where such evidence is consistent with the terms of the integrated document, and only where the writing is not also intended as an exclusive statement regarding its subject matter. *Alling*, 5 Cal. App. 4th at 1435.

In order to determine if the agreement at issue is an “integration,” the “court must consider such factors as the language and completeness of the written agreement and whether it contains an integration clause, the terms of the alleged oral agreement and whether they contradict those in the writing, whether the oral agreement might naturally be made as a separate agreement...” *Brawthen v. H & R Block, Inc.*, 52 Cal. App. 3d 139, 146-47 (1975); *Mobil Oil Corp. v. Rossi*, 138 Cal. App. 3d 256, 266 (1982); *American Nat. Ins. Co. v. Continental Parking Corp.*, 42 Cal. App. 3d 260, 264-66 (1974). “Evidence of surrounding circumstances and prior negotiations may be admitted for the limited purpose of assisting the trial court in determining whether a document was intended to be the final agreement of the parties superseding all other transactions.” *Alling*, 5 Cal App. 4th at 1433; *Schwartz v. Shapiro*, 229 Cal. App. 2d 238, 251 (1964).

In this case, the undersigned concludes that the Confidential Release Agreement, which was executed by the parties on April 19, 2010, constitutes a complete integration. The agreement provides that in exchange for consideration, Complainant “agree[s] to release the Company and its affiliates ... from *any and all claims*, charges, complaints, actions, causes of action and lawsuits *arising from or related to [her] employment* with the Company or the *termination of such employment* (collectively, “Claims”) that [she] asserted or could have asserted prior to the Effective Date of this Agreement, whether such Claims are *presently known or unknown* to [her].” RX 22 at 2 (emphasis added). Specifically, Complainant released her right to file anti-discrimination and anti-retaliation claims under the Sarbanes-Oxley Act. *Id.* The agreement also contains an integration clause, expressly stating that the “Agreement constitutes the entire agreement between the Parties” and “supersedes and replaces any and all prior verbal or written agreements pertaining to the same subject matter.” *Id.* at 5. The evidence in this case shows that the Parties engaged in extensive negotiations over the exact language in the agreement. For example, after exercising her right to revoke the initial settlement, Complainant sent defense counsel two alternative settlement demands, one for a lump sum payment and the other for money plus reinstatement. D&O at 4. Respondents rejected both of these demands on March 22, 2010. *Id.* at 5. Accordingly, the language in the settlement agreement is the final expression of the Parties’ intent in this case and cannot be contradicted by extrinsic evidence.

Respondent’s decision to designate Complainant as a non-rehirable clearly stems from the circumstances surrounding her employment or separation from employment with the company and thus falls within the plain language of the settlement agreement. Even under Complainant’s theory of events, she was forced to resign and designated as non-rehirable in retaliation for making work related complaints in the course of her employment. The classification was assigned before Complainant signed the settlement agreement. The evidence

also clearly demonstrates that Complainant knew about the classification before signing the agreement even though she initially testified to the contrary.⁵ See Tr. 325-27, CX 25; CX 27 at 2; RX 20-21. Furthermore, the e-mail correspondence indicates that Complainant was not only aware of her “non-hirable” status but also knew that she could potentially bring an additional claim for retaliation predicated on this action. See RX 21. Nevertheless, Complainant signed a settlement agreeing to waive “all claims” arising under anti-retaliation laws, including Sarbanes-Oxley, and accepted \$51,000 for emotional distress and \$9,000 for lost wages as consideration for the waiver. See RX 22. If the undersigned allows Complainant to proceed with her current retaliation claim, he will be carving out an exception to the language in the settlement agreement which directly contradicts the plain meaning of the text.

Complainant points to an e-mail Respondent’s counsel sent to the OSHA investigator, Blake Wu, in response to several questions posed by OSHA on September 27, 2010. CX 20. Wu asked Respondent to “discuss why a waiver of future employment equivalent to “no hire” classification) was not in either of the settlement agreements signed by Ms. Gonzales in 2010 settling her “first” complaint.” *Id.* The questions goes on to ask “whether a waiver of future employment or “no rehire” decision was discussed with Ms. Gonzales during settlement negotiations, and if so, whether Ms. Gonzales agreed to the waiver of future employment or “no rehire” classification at the time of the settlement agreements.” *Id.* at 1-2. Respondent’s counsel, replied as follows: “As discussed on October 13, J.C. Penney did not seek a waiver of future employment in the settlement agreement entered into with Ms. Gonzales. Ms. Gonzales’ employment with J.C. Penney was not a term negotiated during the settlement process. As stated in J.C. Penney position statement, regardless of that fact, a Company has a right to refuse employment to anyone it chooses to, as long as the Company’s decision is not based on an illegal reason. J.C. Penney maintains that its decision was not based on any illegal motive. *Id.* The Company determined that the working relationship with Ms. Gonzales had become completely unworkable and was not likely to improve.” *Id.*

As discussed above, the settlement agreement entered into by the Parties is an integration and the plain meaning of its text controls. See *Alling*, 5 Cal. App. 4th at 1434 (The parties subjective thoughts and beliefs do not control when the parties to an agreement incorporate the complete and final terms of the agreement in writing). Respondent’s statements also cannot serve as a modification of the settlement agreement because any modification must be in writing pursuant to the terms of the settlement agreement. See RX 22. Furthermore, Complainant herself testified that the subject of reinstatement was brought up during negotiations with Respondent.

Complainant also seems to argue that the no-rehire status constitutes blacklisting because other employers can allegedly see the classification.⁶ CX 26. Complainant testified that she

⁵ Initially, Complainant testified that she did not become aware of her no-rehire status until after she signed the settlement agreement sometime in April of 2010. Tr. 209, 212, 221. After Respondent’s exhibit 20 was brought to her attention, Complainant acknowledged that she learned of the status before signing the agreement. Tr. 304.

⁶ Although not at issue in this case, California Civil Code § 47(c) provides a conditional privilege to defamation which is clearly meant to allow former employers to provide comments about job applicants to potential employers. It states in relevant part: “In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give

believes other employers can view Respondent's personnel records through Respondent's PeopleSoft system which integrates information. Tr. 213-14. Complainant failed to produce any evidence supporting this contention. *Id.* at 225. She also acknowledged that she does not know if Respondent utilizes integrated services. *Id.* During the hearing, Mark Morris, a former store Regional HR Director for Region Four, which includes stores in California, testified on the subject. *Id.* at 470. Morris stated that Respondent utilizes the PeopleSoft system to hold its employee data. *Id.* at 477. PeopleSoft is an enterprise resource management system or web-enabled software which runs across the company's internal network. *Id.* at 485. Because the system contains sensitive personnel information, it is stored at the company owned server farm, Lenexa. *Id.* at 486. According to Morris, third parties and other employers can't see the data contained in Respondent's PeopleSoft system. *Id.* Morris noted that Macy's and many other competitors have their own servers "that they guard just as jealously." *Id.* Morris noted that the company has an interest in keeping personnel information secure because it does not want competitors to poach its valued employees. Tr. 486-87. Morris testified that Respondent also uses another system, Powerline, which is accessible through the company's internal network, to store information pertaining to employee saving plans, pension plans, and healthcare insurance. *Id.* at 487. Powerline is maintained by Hewitt, an outside vendor. Morris testified that Hewitt is not authorized to share Respondent's employee information with third parties or other employers. *Id.* at 488. According to Morris, Complainant was able to retrieve her "no-hire" status from Powerline only because she is a former associate. *Id.* at 488-89. Morris testified that he does not know how a potential employer can find out about Complainant's "no-rehire" status with Respondent. *Id.* at 490-91. He noted that Respondent handles all of its reference requests through the automated VJS service which only provides the name, dates of employment, and job title. *Id.*

Complainant previously raised the issue of blacklisting in her first SOX complaint before Judge Berlin. Judge Berlin found that "Complainant's concerns about prospective employers' learning that she's ineligible for rehire might be groundless." D&O at 11, fn. 18. He pointed out that under the settlement, Respondent agreed that any reference will be handled through an automated service ("VJS") and that Respondent "will take no position on how Gonzales describes, explains, or classified her rehire status with JC Penney." RX 22 at 3. Judge Berlin took this provision to mean that "Complainant is free to tell prospective employers anything she like 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." D&O at 11, fn. 18. Attachment A to the settlement agreement specifies that with VJS a prospective employer can verify the employees dates of employment and last position held.⁷ See RX 22 at A; Tr. 491-92. Before a potential employer can access this information, the

the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee." Cal. Civ. Code § 47(c); see e.g., *Lee v. Eden Medical Center*, 690 F. Supp. 2d 1011 (N.D. Cal., Feb. 4. 2010); *Sullivan Aramark Uniform & Career Apparel Inc.*, 2011 WL 3360006 (N.D. Cal., Aug. 3, 2011).

⁷ Morris testified that the only categories of "job status" listed in PeopleSoft are "active," "termed," or "on leave." For example, the site does not provide additional information explaining why the employee was terminated. Tr. 495.

former employee has to provide him with her social security number, her company code, and a pin number. Tr. 495. Based on this evidence, Judge Berlin found that Respondent had “no obligation to offer reinstatement or adjust Complainant’s personnel records as part of any settlement.” D&O at 11. After examining the evidence before him, the undersigned agrees with this conclusion.

The Settlement Agreement is Enforceable

As discussed above, Section 806 of the Sarbanes-Oxley Act of 2002, prohibits certain companies from discriminating against employees who report alleged violations of any rule or regulation of the Securities and Exchange Commission (“SEC”) or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A. When Complainant entered into the settlement agreement with Respondent, employees could sign away their right to sue under Section 806 by entering into a valid settlement agreement. *See Moldauer v. Canadaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-26, slip of at 15 (ARB Dec. 30, 2005) (concurring opinion) (holding that a whistleblower may waive his discrimination claim under SOX by knowingly and voluntarily entering into a release agreement with respondent); *Winchester v. Walt Disney World*, 2010-SOX-00027, slip. op at 10 (ALJ May 25, 2010) (finding that a general release of all claims, which was entered into knowingly and voluntarily barred a SOX complaint); *see also Perdi v. Kaiser Permanente Hosp., Inc.*, 309 F.3d 840 (9th Cir. 2004); *Skrbina v. Fleming Co.*, 45 Cal. App. 4th 1353, 1366 (1996); *Bledsoe v. Palm Beach Cty. Soil & Water Conserv.*, 133 F.3d 816, 819 (11th Cir. 1998) (An employee can waive his “cause of action under Title VII as part of a voluntary settlement agreement” if “the employee’s consent to the settlement was voluntary and knowing.”); *Khandelwal v. S. Cal. Edison*, 97-ERA-6 (ALJ Jan. 17, 1997) (applying the “totality of the circumstances” test found in *Stroman v. West Coast Grocery Co.*, 884 F.2d 458 (9th Cir. 1989) to determine the validity of a severance agreement executed by an ERA whistleblower).

Here, the circumstances and conditions surrounding the execution of the release suggest that it was entered into voluntarily and deliberately. The language of the agreement is clear and unambiguous. Judge Berlin found no evidence of undue influence or duress during the execution of the agreement. D&O at 11. Notably, when Complainant signed the settlement agreement, she knew that she had an option to revoke and could have exercised that option. Judge Berlin also found that Complainant had the benefit of legal counsel and enough time, before the option to revoke expired, to get additional legal advice. *Id.* The release was supported by adequate consideration, and Complainant was compensated for emotional distress, back wages and attorneys’ fees. Based on Complainant’s correspondence, job experience, and background it appears that she is an intelligent woman who carefully weighed all of the pros and cons of

Other evidence on the record supports Morris’ contentions. On July 17, 2009, Betty Kuria, HR Manager, sent Complainant a letter indicating that any reference requests are handled through the Verify Job System (VJS) support line which provides only dates of employment, position and salary information. CX 14 at 13. On August 6, 2010, Store Manager Lori Feist replied to Complainant’s request for a reference also indicating that the company policy prohibits providing references to current or former associates and directed Complainant to provide her information through VJS. CX 18.

entering into the settlement agreement. Accordingly, the settlement agreement was valid and enforceable at the time it was signed.

After Complainant signed the agreement, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the “Dodd-Frank Act”)⁸ was enacted on July 21, 2010 and amended the whistleblower protections set for the in the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, by adding the following provision:

(e) NONENFORCEMENT OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES–

- (1) WAIVER OF RIGHTS AND REMEDIES – The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.
- (2) PREDISPUTE ARBITRATION AGREEMENTS – no predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

Dodd-Frank Act § 922, 124 Stat. at 1848.

The undersigned was unable to identify any recent cases which address the impact of this amendment on settlement agreements. However, several district courts have addressed whether the ban on predispute arbitration agreements imposed by the Dodd-Frank Act applies retroactively. *See Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225 (D. Mass. Mar. 2011); *Henderson v. Masco Framing Corp.*, 2011 WL 3022535 (D. Nev. 2011). In *Pezza*, an investment firm employee brought an action against defendants alleging that he was wrongfully retaliated against in violation of SOX after raising concerns regarding various securities transactions. 767 F. Supp. at 228. Defendants moved to dismiss the suit arguing that plaintiff’s employment agreement obligated him to submit such disputes to arbitration. *Id.* The Dodd-Frank Act was enacted while defendant’s motion to compel arbitration was pending before the court. After analyzing Section 922 of the Dodd-Frank Act, the court held that Congressional intent with respect to the statutes retroactivity is unclear. Nevertheless, it concluded that retroactive application of the provisions was appropriate because it merely affected the conferral of jurisdiction – a procedural right rather than the substantive right of the parties. *Pezza*, 767 F. Supp 2d at 234; *see also Desiderio v. Nat’l Ass’n of Sec. Dealers, Inc.*, 191 F.3d 198, 205-06 (2d Cir. 1999) (“The substantive rights found in the statute are not in any way diminished by our holding that arbitration may be compelled in this case, since only the forum – an arbitral rather

⁸ On December 7, 2011, The Labor Department’s Occupational Safety and Health Administration issued an interim final rule revising the existing regulations under the Sarbanes-Oxley Act’s whistleblower provision to reflect the changes mandated by the Dodd-Frank Act. The rule was published in the Federal Register on November 3, 2011. 76 FR 68085; 29 CFR 1980.

than a judicial one – is affected, and plaintiff’s rights may be as fully vindicated in the forum as in the latter.”).

In *Henderson v. Masco Farming*, the court disagreed with this reasoning. *Henderson*, 2011 WL 3022525 (D. Nev. Jul. 22, 2011). In *Henderson*, plaintiff also entered into a severance agreement with his employer which contained a provision mandating arbitration of employment claims. After he was dismissed from employment, allegedly in retaliation for complaining about the FICA tax money that was withheld from his bonus payments, plaintiff filed a SOX whistleblower claim with OSHA and sought a motion to compel arbitration in district court. The OSHA proceeding was stayed pending arbitration and/or mediation. *Id.* at *1. The court granted plaintiff’s motion to compel arbitration and held that even though the Dodd-Frank Act currently prohibits arbitration of SOX claims, its provisions are not retroactive.

First, the court reasoned that applying legislative enactments retroactively is typically disfavored. *Id.* at *3; see *Landgraf v. USI Film Products*, 511 U.S. 244, 264 (1994) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). This is especially true when retroactive application has prejudicial consequences by “impairing the rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Landgraf*, 511 U.S. at 280. Second, the court noted that “the largest category of cases in which ... the presumption against statutory retroactivity has [been applied] involve[s] new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.” *Henderson*, 2011 WL 3022525, *4. According to the court, a “retroactive application of Dodd-Frank’s SOX provisions would not merely affect the jurisdictional location in which such claims could be brought, it would fundamentally interfere with the parties’ contractual rights and would impair the ‘predictability and stability’ of their earlier agreement.” *Id.* at *5. Third, the Dodd-Frank Act provides an explicit date on which Section 922 will become effective thus suggesting that the Act’s amendments should not apply retroactively. See *Riddle v. DynCorp Int’l Inc.*, 733 F. Supp. 2d 743 (N.D. Tex 2010) (holding that because the plain language of the Act contained a specific date on which the provision became effective, the provision should not apply retroactively).

The undersigned finds the reasoning of the *Henderson* decision persuasive. The consequences of disrupting a valid settlement agreement between two parties are even more prejudicial than taking away one party’s right to demand arbitration. As in *Henderson*, at the time Complainant signed the agreement, she had a right to sign away her SOX claim and accept the settlement funds instead. Complainant accepted a substantial sum of money in exchange for giving up her right to pursue a retaliation claim predicated on her “no-hire” classification. In this case, applying the Dodd-Frank Act retroactively would be highly prejudicial to Respondent and require Respondent to relitigate claims that it has already legally settled and negotiated.

Conclusion

Based on the foregoing findings of fact and conclusions of law, the undersigned finds that Complainant voluntarily and knowingly entered into a settlement agreement with Respondent and signed away her right to pursue a retaliation claim under the Sarbanes-Oxley Act of 2002. The agreement is valid and enforceable and bars Complainant from pursuing her case further. Accordingly, Complainant’s case is hereby **DISMISSED**.

IT IS SO ORDERED.

A

Russell D. Pulver

Administrative Law Judge

San Francisco, California

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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party’s legal brief of points and authorities in

opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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).