

U.S. Department of Labor

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Issue Date: 26 September 2016

OALJ No. 2016-SOX-00025
OSHA No. 2-0750-15-011

In the Matter of:

JUDITH MOKHIBER,
Complainant,

v.

HSBC BANK USA, N.A.,
Respondent.

ORDER APPROVING SETTLEMENT AND DISMISSING COMPLAINT

This action involves a complaint under the employee protection provisions of the Corporate and Criminal Fraud and Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, *et seq.* (“Sarbanes-Oxley,” “SOX,” or “Act”) and the implementing regulations at 29 C.F.R. Part 1980, and Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“CFP”), 12 U.S.C. § 5567, and the applicable regulations issued thereunder at 29 C.F.R. Part 1985.

A hearing was scheduled for September 13, 2016 in Buffalo, New York before the undersigned Administrative Law Judge. On June 8, 2016, Counsel for the parties submitted a joint request for appointment of a settlement judge in this matter. By Order dated June 10, 2016, Chief Administrative Law Judge Stephen R. Henley appointed Administrative Law Judge Jonathan C. Calianos as the settlement judge, noting that the undersigned would remain the presiding judge in this matter. On September 19, 2016, the parties filed a Joint Motion for Approval of Settlement and to Dismiss with Prejudice with the executed Settlement Agreement attached as Exhibit A (hereinafter “Agreement”).

The SOX regulations address settlements at 29 C.F.R., section 1980.111(d)(2) which states as follows:

At any time after the filing of objections to the Assistant Secretary’s findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the administrative law judge if the case is before the administrative law judge. . . A copy of the settlement will be filed with the administrative law judge . . .

A settlement approved by the administrative law judge shall constitute the final order of the Secretary and may be enforced in United States District Court pursuant to section 1980.113 (Federal District Court). 29 C.F.R., section 1980.111(e).

I have carefully reviewed the terms of the Agreement which encompass settlement and release of matters arising under the Act, as well as other federal, state, and local statutes and principles of contract and common law. It should be noted that my authority extends only to approving matters properly before the U.S. Department of Labor, Office of Administrative Law Judges, i.e., the SOX case, and therefore my review is limited to those matters over which I have proper jurisdiction. *See Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1, slip op. at 2 (Sec'y Nov. 2, 1987).

The Respondent has asserted its pre-disclosure notification rights in accordance with 29 C.F.R. §70.26.¹ It has been held in a number of cases, with respect to confidentiality of settlement agreements, that the Freedom of Information Act, 5 U.S.C. section 552, *et seq.* (1988) (“FOIA”), requires federal agencies to disclose requested documents unless they are exempt from disclosure. *Faust v. Chemical Leaman Tank Lines, Inc.*, 92-SWD-2 and 93-STA-15 (ARB 1998). The records in this case are agency records which may be made available for public inspection and copying under the FOIA. However, the Respondent will be provided a pre-disclosure notification giving it the opportunity to challenge any such potential disclosure. The Agreement itself is not appended and will be separately maintained and marked “PREDISCLURE NOTIFICATION MATERIALS.”

The parties have also requested restricted access to the Settlement Agreement under 29 C.F.R. §18.56 (Restricted Access). It should be noted that the regulation cited by the parties has been supplanted by 29 C.F.R. §18.85 in the revised rules of practice before the Office of Administrative Law Judges which took effect on June 18, 2015. Under Section 18.85 the administrative law judge, upon the motion of an interested person or on the judge’s own, may seal a portion of the record to protect against undue disclosure of privileged, sensitive or classified material. Section 18.85(b)(2) provides that notwithstanding the judge’s order, all parts of the record remain subject to statutes and regulations pertaining to public access to agency records. I have already determined that the agreement will be kept in a separate envelope and marked “PREDISCLURE NOTIFICATION MATERIALS” in compliance with 29 C.F.R. §70.26. It will also be noted on the envelope that the predisclosure notification will apply to all requests for disclosure of this document. Therefore, should disclosure be requested, the parties will have the opportunity to state their positions in regard to whether disclosure is proper or warranted by law.

¹The parties are afforded the right to request that information be treated as confidential business information. See 29 C.F.R. §70.26 (2016). The DOL is then required to take steps to preserve the confidentiality of that information, and must provide the parties with predisclosure notification if a FOIA request is received seeking release of that information. Accordingly, an unredacted copy of the Settlement Agreement in this matter will be placed in an envelope marked “PREDISCLURE NOTIFICATION MATERIALS.” Consequently, before any information in this unredacted file is disclosed pursuant to a FOIA request, the DOL is required to notify the parties to permit them to file any objections to disclosure. *See* 29 C.F.R. § 70.26 (2016).

I find that both parties were ably represented by counsel in this matter, and that the provisions of the settlement agreement are fair, adequate, reasonable and not contrary to the public interest. Accordingly, I approve the parties' settlement and grant the parties' motion for dismissal of the complaint with prejudice. The parties shall implement the terms of the approved settlement as specifically stated in their agreement. This Order shall have the same force and effect as one made after a full hearing on the merits.

ORDER

Wherefore, it is ordered that:

1. The Settlement Agreement is **APPROVED**;
2. The complaint is **DISMISSED WITH PREJUDICE**; and,
3. The Settlement Agreement is designated as confidential business information, under 29 C.F.R. § 70.26, and shall be afforded the protections thereunder, for purposes of a FOIA request. Predisclosure notification will also be provided to the parties in relation to other requests for disclosure as well.

RICHARD A. MORGAN
Administrative Law Judge