UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 66

Docket Nos. DE-3443-06-0454-X-1
DE-3443-06-0455-X-1

Victor R. Ziegler, Sr,

Appellant,

v.

Department of the Interior,

Agency.

June 28, 2011

Victor R. Ziegler, Sr., Fort Thompson, South Dakota, pro se.

Sharon Pudwill, Esquire, Twin Cities, Minnesota, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This case is before the Board on the agency's petition to enforce the parties' settlement agreement. For the reasons set forth below, we DENY the petition for enforcement because the appellant did not breach the agreement by challenging the validity of the provisions waiving his rights and claims under the Age Discrimination in Employment Act (ADEA).

BACKGROUND

¶2 The appellant has filed multiple civil and administrative actions against the agency in U.S. District Court, the Equal Employment Opportunity Commission (EEOC), and the Board. *See*, *e.g.*, Compliance-2 File (C2F), Tab 1, Exhibit 1 (appendix 1 to the parties' settlement agreement identifying 16 matters brought by the appellant). On October 15, 2008, the appellant and the agency executed a global settlement agreement in which the appellant promised to withdraw and release all claims against the agency in exchange for reinstatement to his former position (for purposes of retirement) and the payment of back pay. *Id*. The agreement includes a "tenderback provision," which requires the appellant to return "any and all benefits" he received pursuant to the agreement within 60 days of filing or reinstating any cases withdrawn pursuant to the agreement. *Id*. (Settlement Agreement ¶ 23).

¶3 The administrative judge found that the agreement was lawful on its face, that the parties understood its terms, and that they freely and voluntarily entered into the agreement. *Ziegler v. Department of the Interior*, MSPB Docket Nos. DE-3443-06-0454-M-2, DE-3443-06-0455-M-2 (Initial Decision, Nov. 7, 2008). The administrative judge therefore accepted the agreement into the record for enforcement purposes and dismissed the appeal as settled. *Id*. The initial decision became the final decision of the Board on December 12, 2008, when neither party filed a petition for review.

¶4 Subsequently, the agency filed a petition for enforcement alleging that the appellant filed pleadings in U.S. District Court and the EEOC in violation of the agreement.[*] C2F, Tab 1. In response, the appellant stated that he had abided by

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[*] The appellant separately filed a petition for enforcement of the settlement agreement, and the administrative judge denied his petition. *Ziegler v. Department of the Interior*, MSPB Docket No. DE-3443-06-0454-C-1 (Initial Decision, April 6, 2010). The initial decision in that enforcement proceeding became final on December 8, 2010, when the Board denied the appellant's petition for review.

the settlement agreement with the exception of his attempts to file "in the proper forum" a challenge to the validity of the agreement's waiver of his ADEA rights. C2F, Tab 4 at 2.

¶5 The administrative judge recommended that the agency's petition for enforcement be granted in part and denied in part. *Ziegler v. Department of the Interior*, MSPB Docket Nos. DE-3443-06-0454-C-2, DE-3443-06-0455-C-2 (Recommendation, Oct. 19, 2010); C2F, Tab 8. He found that the appellant materially breached the terms of the settlement agreement. *Id*. at 13. He stated that "[t]he appellant recognized in his filings with the EEOC and the district court that they might be in violation of the settlement agreement but proceeded to make them anyway." *Id*. He informed the agency that it could recoup the money paid to the appellant if it elected rescission of the agreement rather than enforcement. *Id*. at 14. Because the administrative judge recommended that the Board find the appellant in noncompliance, the matter was referred to the Board for its consideration. *See* 5 C.F.R. § 1201.183(b).

¶6 Before the full Board, the appellant asserts that in his filings with the District Court and the EEOC, he was only challenging whether the agreement met the requirements of the Older Workers Benefit Protection Act (OWBPA) provisions of the ADEA. Compliance Referral File (CRF), Tab 4 at 6. He contends, among other things, that the settlement agreement's requirement that he must pay back the money he received under the agreement prior to bringing such a challenge violates the OWBPA and EEOC regulations. *Id*. at 5-6. In response, the agency requests that the Board adopt the administrative judge's recommendation finding that the appellant breached the terms of the settlement agreement. CRF, Tab 6 at 5. The agency requests that the Board issue an order prohibiting the appellant from pursuing any cause of action waived by the agreement, "including Appellant's alleged ADEA and OWBPA claims." *Id*.

ANALYSIS

¶7 Generally, because a settlement agreement is a contract, claims of breach must be adjudicated in accordance with contract law. *See Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). That is not the case, however, with respect to a waiver of rights and claims under the ADEA. The OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998). The OWBPA governs the effect under federal law of waivers or releases on ADEA claims and incorporates no exceptions or qualifications. *Id*. Therefore, we agree with the appellant that the administrative judge erred by applying general contract law in reaching his determination that the appellant breached the settlement agreement. CRF, Tab 4 at 9-11.

¶8 Pursuant to EEOC regulations, an employee has the right to challenge the validity of an ADEA waiver agreement. 29 C.F.R. § 1625.23(b). Section 1625.23(b) states that:

> No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement. This prohibition includes but is not limited to provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorney's fees and/or damages because of the filing of an ADEA suit. This rule is not intended to preclude employers from recovering attorney's fees or costs specifically authorized under federal law.

Id. Thus, "an employee may waive claims and covenant not to bring suit on any claims under the ADEA, but cannot surrender the right to challenge the *validity* of the waiver or covenant." *Ridinger v. Dow Jones & Co., Inc.*, 717 F.Supp.2d 369, 371 (S.D.N.Y. 2010) (emphasis in original). *See also* 29 C.F.R. §§ 1625.22(i) (prohibiting waiver provisions that preclude an individual from filing a charge or complaint, including a challenge to the validity of the ADEA waiver itself).

Moreover, an employee cannot be required to tender back the consideration he received as a condition to exercise that right. *See Ridinger*, 717 F.Supp.2d at 371 (employer cannot condition the right to challenge waiver on the return of any consideration previously received or the payment of attorney's fees if the employee is unsuccessful). We conclude that the appellant was within his rights in seeking to challenge the validity of the ADEA waiver before the EEOC, and he was not obligated to tender back the consideration he was paid in order to do so.

ORDER

¶9 Accordingly, we DENY the petition for enforcement. This is the final order of the Merit Systems Protection Board in this enforcement proceeding. Title 5 of the Code of Federal Regulations, section 1201.183(b)(3) (5 C.F.R. § 1201.183(b)(3)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.