



Issue Date: 02 July 2009

CASE NO. 2009-SOX-00016

In the Matter of:

DANIEL FISHER,
Complainant,

vs.

WELLS FARGO & CO.
WELLS FARGO INVESTMENTS, LLC
WELLS FARGO BANK, N.A.
FRED BERTOLDO
SUZANNE BUI
DIANA SUN
MICHAEL BILLECI,
Respondents.

**ORDER APPROVING SETTLEMENT AND
DISMISSING COMPLAINT WITH PREJUDICE**

This matter arises under the employee protection provisions of the Corporate and Criminal Fraud Accountability Act of 2002 (also known as Section 806 of the Sarbanes-Oxley Act, Public Law 107-204), codified at 18 U.S.C. § 1514A. This matter has not yet been scheduled for trial.

On June 16, 2009, Complainant's counsel filed a Joint Motion to Approve Settlement and Dismiss Proceeding with Prejudice. In addition to seeking approval of a negotiated settlement and dismissal of the proceeding with prejudice, the Joint Motion requests that the settlement agreement between Complainant and Respondent be filed under seal.

When parties settle whistleblower complaints under the Sarbanes-Oxley Act that are before an administrative law judge (ALJ), the ALJ must approve the settlement. 29 C.F.R. § 1980.111 (a), (d)(2). Any settlement approved by an ALJ constitutes a final order on the complaint and may be enforced pursuant to 29 C.F.R. § 1980.113. 29 C.F.R. § 1980.111 (e).

Request to File Settlement Agreement Under Seal

The parties have requested that their settlement agreement be filed under seal because it “contains private and confidential commercial and financial information” protected from disclosure under Exemption 4 of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b)(4). I find, however, that I am without authority to grant the parties’ request to file their settlement under seal. In *Bettner v. Crete Carrier Corp.*, 2007-STA-033, slip op. at 3, n.11 (ARB Sept. 27, 2007), the Administrative Review Board (“ARB”) concluded that an ALJ’s statement that a settlement was filed under seal was erroneous as it was not in accordance with the law. In reaching this conclusion, the Board cited the Secretary’s decision in *Brown v. Holmes & Narver, Inc.*, 1990-ERA-026, (Sec’y May 11, 1994), which held that an ALJ’s statement that a settlement agreement was considered to be confidential commercial or financial information was overly broad because no request under FOIA to produce the agreement had yet been filed. *Bettner*, 2007-STA-033, slip op. at 3, n.11 (citing *Brown*, 1990-ERA-026.). Thus, the Secretary concluded, it was premature for him to determine whether the settlement contained commercial or financial information that FOIA protected from disclosure. *Bettner*, 2007-STA-033, slip op. at 3, n.11 (citing *Brown*, 1990-ERA-026.).

The ARB has agreed that settlement agreements may be subject to 29 C.F.R. § 70.26’s pre-disclosure notification provisions prior to release under the FOIA. *Davis v. Ecoscape Solutions Group*, 2008-STA-048, slip op. at 2-3 (ARB July 31, 2008). The ARB has also concluded that noting the applicability of these pre-disclosure notifications in a case file is consonant with the ARB’s decision in *Bettner*. *Id.* at 3. Therefore, the parties’ request to file their settlement agreement under seal is DENIED. However, a notice shall be prominently placed in the case file noting the parties’ request and directing that the procedures set forth in 29 C.F.R. § 70.26 be followed if a FOIA request is received which encompasses the parties’ settlement agreement.¹ *Accord Davis*, 2008-STA-048, slip op. at 2-3.

Fairness, Adequacy, and Reasonableness

The terms of a settlement agreement must reflect a fair, adequate, and reasonable settlement of the complaint. *See, e.g., Bricklen v. Great Lakes Chemical Corp.*, ARB No. 05-144, ALJ No. 2005-CAA-8 (ARB Oct. 31, 2007); *Beliveau v. Naval Undersea Warfare Center*, ARB Nos. 00-073, 01-017, 01-019, ALJ Nos. 97-SDW-1, 4, 6 (ARB Nov. 30, 2000); *Marcus v. U.S. Environmental Protection Agency*, ARB No. 99-027, ALJ No. 1996-CAA-3,7 (ARB Oct. 29, 1999). The terms of the instant agreement indicate that it was arrived at fairly. Both parties were represented by counsel, and nothing indicates the undue imposition of the will of one party

¹ In approving the Agreement, I must discuss specific terms in order to delineate the extent of my approval. The parties agree that the Agreement contains private and confidential commercial and financial information that would be subject to exemption from disclosure under Exemption 4 of FOIA, 5 U.S.C. § 552(b)(4). They have not, however, specified which of the information in their Agreement is exempted from disclosure. Without deciding the applicability of FOIA Exemption 4 to the provisions of the Agreement, I have restricted my discussion of specific terms of the Agreement to those which I have concluded do not contain private and confidential commercial and financial information. *See, e.g., Wash. Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982); *Am. Airlines, Inc. v. Nat’l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978); *Landfair v. United States Dep’t of the Army*, 645 F. Supp. 325, 327 (D.D.C. 1986)

against the other. *See Bray v. The Hospital Center at Orange*, 93-ERA-13 (ALJ May 11, 1993, Sec'y June 30, 1993). The parties agree that they understand the agreement and its legal effect and that they enter into the agreement freely and voluntarily. In addition, I find that the terms of the agreement are a fair, adequate and reasonable settlement of Complainant's allegation that Respondent Wells Fargo violated the employee protection provisions of the Corporate and Criminal Fraud Accountability Act of 2002.

Side Agreements

The authority of an ALJ to approve settlements extends only to those claims arising under employee protection statutes that the ALJ has jurisdiction to adjudicate. *See, e.g., Brodeur v. Westinghouse Hanford Co.*, 92-SWD-3 (Sec'y Oct. 16, 1992); *Scott v. Yeargin, Inc.*, 91-SDW-1 and 2 (Sec'y May 6, 1992); *Aurich v. Consolidated Edison Co. of New York, Inc.*, 86-CAA-2 (Sec'y July 29, 1987). When parties resolve claims both within and outside the ALJ's jurisdiction that arise from the same factual circumstances, the settlement must disclose the agreement(s) on the claim(s) outside the ALJ's jurisdiction, or certify that the parties did not enter into such side agreements. *Biddy v. Alyeska Pipeline Service Co.*, 95-TSC-7 (ARB Dec. 3, 1996). The settlement agreement here resolves claims under the employee protection provisions of the Corporate and Criminal Fraud Accountability Act of 2002, which I have jurisdiction to adjudicate. It also provides for withdrawal of a related complaint filed with the United States District Court for the Northern District of California, which is outside my jurisdiction. I find, therefore, that the settlement has made the required disclosure of side agreements required by *Biddy*.

Attorney Fees

When a settlement agreement contains a provision for payment of attorney fees an ALJ does not approve the fee amount. If, however, an agreement provides for a complainant to pay his attorney, the ALJ must take into consideration whether the net amount to be received by the complainant is fair, adequate, and reasonable. *Tinsley v. 179 South Street Venture*, 1989-CAA-3 (Sec'y Aug. 3, 1989). As the agreement here does not require Complainant to pay his attorney, I need not make any determination nor take any action regarding the provisions involving attorney fees.

Confidentiality

Confidentiality agreements are carefully reviewed to insure that they are not contrary to public policy, *See, e.g., Brown v. Holmes & Narver, Inc.*, 90 ERA-26 (Sec'y May 11, 1994); *Stites v. Houston Lighting & Power*, 89-ERA-1, 41 (Sec'y Mar. 16, 1990); *Polizzi v. Gibbs & Hill, Inc.*, 87-ERA-38 (Sec'y July 18, 1989). Such agreements are disfavored when they restrict a Complainant's ability to provide information to the Department of Labor or other authorities. *See, e.g., Macktal v. Brown & Root*, 1986-ERA-23 (Sec'y Oct. 13, 1993); *Williams v. Indiana Vocational Technical College*, 1989-SWD-1 (Sec'y Apr. 23, 1990). As the Secretary noted in *Polizzi*, 87-ERA-38, the effect of restrictions that do so "would be to 'dry up' channels of communication which are essential for government agencies to carry out their responsibilities." *Polizzi*, 87-ERA-38 (quoting *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972).)

The Agreement provides that Complainant shall disclose the existence of the agreement and the facts and circumstances of the dispute only to his attorneys and accountants, in response to an order from a court of competent jurisdiction, or in response to an official inquiry from a governmental, accreditation, or regulatory agency.

In *Brown v. Holmes & Narver, Inc.*, 1990-ERA-26 (Sec'y May 11, 1994) (Final Order Approving Settlement and Dismissing Complaint) a provision in the settlement provided, in relevant part:

Except to carry out the specific covenants of this Agreement or *unless specifically required by court order or government agency order*, none of the parties shall directly or indirectly, or by any means or manner whatsoever disclose, urge, encourage, cooperate in, cause or permit the disclosure. . . [or] dissemination to any person or entity the contents or substances of this Agreement. . . . (emphasis added)

Similarly, the settlement agreement at issue in *Wampler v. Pullman-Higgins Co.*, 1984-ERA-13 (Sec'y Feb. 14, 1994) (Final Order Disapproving Settlement and Remanding Case) provided that "[n]either party will discuss or disclose the facts of this case except if ordered to do so by [a] *court, tribunal or agency of competent jurisdiction.*" (emphasis added) In both cases, the Secretary found that the provision was void as contrary to public policy and was not enforceable to the extent that it could be construed as restricting Complainant from communicating with, or providing information to any Federal or state government agencies.

As the Secretary did in *Brown* and *Wampler*, I find that the instant agreement is void as contrary to public policy and unenforceable to the extent that it restricts Complainant from voluntarily communicating with and providing information to federal or state government agencies.

I find that the Agreement, as construed in this decision, is a fair, adequate, and reasonable settlement. Accordingly, the Settlement Agreement is APPROVED as herein construed and the complaint is DISMISSED WITH PREJUDICE.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge