U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 November 2014

CASE NO.: 2014-STA-00029

In the Matter of:

PHILLIP HORN,
Complainant,

v.

TIMEX LOGISTICS CO., BEYOND TRANSPORT, INC., BEYOND LOGISTICS, INC., MILDA KRAPUKAITYTE, JANIS JUSHKEVICH, JOHN DOE, and MARY ROE,
Respondents.

ORDER DISAPPROVING SETTLEMENT AGREEMENT

This complaint arises under the whistleblower protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105. The parties have settled. On November 6, 2014, Complainant submitted an unopposed motion to approve the parties' proposed settlement agreement (a copy of which was attached) and to dismiss the claim.

The settlement of a claim in litigation under the Act requires the approval of the administrative law judge. 29 C.F.R. § 1978.111(d)(2). Once approved, the settlement constitutes the final order of the Secretary and may be enforced in United States district court under 49 U.S.C. § 31105(e). 29 C.F.R. § 1978.111(e). In this case, the parties' proposed settlement agreement is disapproved for several reasons.

First, the release to which Complainant agrees in the proposed agreement is so overbroad as to contravene public policy. In return for a settlement of $3,333.33 (plus half again that much for his attorney), Complainant releases both the corporate and individual respondents of all claims known and unknown of any and every kind. But there is much more.

- As to the corporate respondents, Complainant also releases "all related companies, affiliated corporations, partnerships, or joint ventures" and for each of those, their parents, subsidiaries, predecessors and successors, and for all of them, "its past and present employees, servants, officers, directors, stockholders, owners, members, partners, representatives, assigns, attorneys, agents, insurers, [and] employee benefit programs,"

and for each of the employee benefit programs, "the trustees, administrators, fiduciaries, and insurers of such programs."

- For the individual respondents, Complainant releases not only them, but also "their heirs and assigns and other persons acting by, through, under, or in concert with any of the persons or entities listed in this subsection."

The Administrative Review Board has allowed some settlements that contain general releases (*i.e.*, releases going beyond the scope of the pending litigation to include all claims generally). It has accomplished this by approving only so much of the release that relates to the claim within the Secretary's jurisdiction and not commenting on the rest.

But by adding in categories of persons such as all employees and stockholders of the corporate respondents and any number of affiliated corporations and corporations with which respondents have engaged in joint ventures, Respondents have gone too far. I am unable to approve this agreement even with caveats such as those on which the Board has relied, for I find the scope of the release overbroad and inadequately defined; I cannot determine who is being released, except that it likely is a very large number of persons and entities, almost none of whom have anything to do with Complainant's claim or the present litigation.

For example, if Complainant's neighbor's daughter has hit a baseball through Complainant's window, the release might extent to that event. Her parents' liability for her actions while under their (perhaps negligent) supervision could fall within the release: One of the baseball playing child's parents might once in the past have been an employee of a predecessor corporation of a company that at some time was in a joint venture with one of the corporate respondents. The acts of the child "under" the supervision of her parent would come within the release, as the release extends to persons acting "under" the persons listed in the release provision. Or maybe one of the parents had once upon a time acted "in concert" with one of the individual respondents, whatever that means.

Perhaps another entirely hypothetical example is useful. If a stockholder of a corporation that once years ago did a joint venture with one of the corporate respondents recently burned down Complainant's house, the stockholder could argue that this agreement released him of all liability, including for injuries to persons who were in the house. Some corporations have millions of stockholders. Some have thousands of employees, who also would benefit from the release.

The potential breadth of the release is greater because it includes currently existing claims unknown to Complainant. At least with the examples above, Complainant would know that he has claims against someone in particular and might be on notice to research whether signing this release would arguably foreclose his claims against those people. But for unknown claims, Complainant would have no notice that he needed to research whether this release would extend to those claims.

It is inconsistent with public policy to approve a release when the scope of those being released is so undefined and broad that it could include a large number persons and entities who had no

involvement with the present claim and who are exceedingly difficult for the Complainant (or anyone) to identify.[1]

And yet this release goes still further. It would preclude Complainant from applying for employment, being employed, or being reemployed by any of the potentially hundreds or thousands or tens of thousands of persons and entities covered as "released parties." I could imagine an acceptable provision under which a complainant agreed not to apply for employment with those whom he has named as a respondent in this case. But it is entirely different to extend the preclusion so broadly that its scope is unknowable. Public policy supports broad access to the labor market and discourages covenants to the contrary. If an employee of one of Respondent's sibling corporations was a stockholder in a widely-held, publicly traded corporation that employs tens of thousands, Complainant would be precluded from applying to work for that company; if he unknowingly applied and was hired and later discovered the relationship to a "released party," he would arguably be breaching the settlement agreement by continuing his employment and would have to resign.

Second, the agreement requires Complainant to release Respondents from any payment of attorney's fees beyond $1,666.67 and to take responsibility for any fees owed beyond that amount without any statement of what those additional fees are. For example, some counsel in a scenario like this might charge a complainant in a case like this an additional $3,333.33 in fees and costs. That would leave that complainant with nothing, while counsel would take the entire $5,000.00 settlement amount. That is not an arrangement that I could approve without receiving an explanation. I certainly do not suggest that Complainant's counsel here has any such plan; I am confident that he does not. But the agreement is silent as to any additional fees that Complainant's counsel might exact from Complainant. If there are no additional attorney's fees or costs for Complainant to incur, the agreement should say so and be signed by counsel as well as the parties.

Third, the requirement that Complainant hold Respondents harmless on any taxes except those for which Respondents are "solely and independently liable" is overbroad. Holding Respondents harmless could include an obligation to pay Respondents' cost of defense on any investigation by taxing authorities. When Respondents are paying Complainant $3,333.33, they cannot expect him to pay legal fees on any governmental tax investigation except one that is limited to his own failure to report income that is reportable: the fees on the investigation might readily amount far more than the settlement amount. The language of the agreement also requires Complainant to assume undefined tax obligations for which he and any Respondent are jointly liable. Respondents may not shift tax liability on an obligation for which the liability is joint without explicitly stating what is being shifted and what it will cost. If the parties wish to address the tax obligations, they might wish to agree that Complainant is solely liable and will hold Respondents harmless if he is fails to comply with any legal obligation to report and pay taxes on the $3,333.33 that Respondents are paying him under the agreement.

[1] It is possible that each of the three corporate respondents is a privately owned small business with one or two stockholders, few employees, and no affiliated or predecessor corporations. If so, I question the need for such broad language in the settlement agreement. Perhaps the parties could identify the persons being released by name or in some other way that would make explicit (or at least readily ascertainable) the breadth of the release and of the agreement not to work for potential future employers.

These reasons require that I disapprove the parties' proposed settlement. There is, however, another concern: the parties' provision for confidentiality. It is unclear why the parties and their lawyers want the agreement to be confidential. Whatever their rationale, however, the parties should be aware that this Office's approval of any settlement is required, *see supra*, and this Office's files are public and subject to the Freedom of Information Act. *See, e.g.*, *Seater v. Southern California Edison Co.*, 1995-ERA-13 (ARB March 27, 1997). The parties should know that there is a real likelihood and anyone could access a copy of the parties' current proposed agreement, this Order, any revised proposed settlement agreement, and any Order approving or disapproving any other settlement agreement.[2]

Order

The parties' proposed settlement agreement, filed on November 3, 2014, is DISAPPROVED. The parties may submit a revised proposed settlement agreement consistent with this Order within 21 days of the date of this Order. If the parties do not submit a timely revised proposed settlement agreement or obtain an extension of time before the due date, I will restore this matter to the trial calendar and set it for trial.

SO ORDERED.

Digitally signed by STEVEN BERLIN
DN: CN=STEVEN BERLIN, OU=ADMIN LAW JUDGE, O=Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

STEVEN B. BERLIN
Administrative Law Judge

[2] If the matter were litigated to decision before the administrative law judge, the decision would be published to the internet.