U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

LAXMI N. KHANDELWAL, **ARB CASE NO. 97-050**

COMPLAINANT, **ALJ CASE NO. 97-ERA-6**

v. **DATE: March 31, 1998**

SOUTHERN CALIFORNIA EDISON,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER OF REMAND

This case presents a question regarding the effect of a severance agreement executed by the parties prior to the time the complainant filed this complaint under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. §5851 (1994). Complainant Laxmi N. Khandelwal was employed as an engineer at Respondent Southern California Edison (SCE) for 23 years, until July 1995, when he executed a severance agreement and accepted early retirement. On September 21, 1995, Khandelwal, who is proceeding *pro se*, filed this complaint alleging that the employment severance and several earlier personnel actions were retaliatory and unlawful under the ERA.

The Wage and Hour Division of the Department of Labor notified SCE of the complaint and indicated that it first would attempt to assist the parties in reaching a mutually agreeable settlement of the charges. SCE responded that the matter already had been settled by virtue of the severance agreement in which Khandelwal released SCE from all claims related to his employment, including the employment severance and any action leading to the severance. SCE requested dismissal. SCE further requested that the Administrator issue a formal policy determination concerning the issue.

The Administrator ruled that she would apply the same standards to settlements executed prior to the filing of complaints that the Secretary has applied to settlements reached during or after preliminary investigations. The Administrator elaborated that if the Wage and Hour Division finds, after investigation, that: (1) the terms of the settlement are fair, adequate, and

reasonable, (2) the provisions of the agreement are not contrary to public policy, and (3) the complainant's consent was knowing and voluntary, the Division will terminate the investigation and dismiss the complaint. Subsequently, the Wage and Hour Division issued preliminary findings in this case that Khandelwal's termination was not discriminatory and that he voluntarily elected to accept the severance package and early retirement.

Khandelwal appealed, and shortly after the case was assigned to the Administrative Law Judge (ALJ), SCE filed a Motion for Summary Decision. After considering Khandelwal's response to the motion, the ALJ issued a Recommended Order Granting Summary Decision and Dismissal of Complaint (R. O.) on January 17, 1997.

The ALJ found that the Severance Agreement and Release constitutes a binding settlement, even though it was executed before Khandelwal filed this complaint and even though it does not specifically release any claims filed under the ERA. The ALJ further found that the terms of the agreement do not violate public policy and that Khandelwal executed the severance agreement knowingly and without coercion. R. O. at 6-8. Finally, the ALJ added that by retaining the monetary consideration for the agreement, Khandelwal ratified the agreement and negated any claim of duress. R. O. at 9.

The parties as well as the Acting Assistant Secretary for Occupational Safety and Health (OSHA), as *amicus curiae*, have filed briefs before the Board.[1/] OSHA agrees with the Wage and Hour Division policy to accept severance agreements as a defense to whistleblower allegations, subject to the three criteria outlined above. It takes no position, however, regarding whether the criteria were met in this case. OSHA urges the Board to reject the ALJ's conclusion that Khandelwal's retention of the monetary consideration constitutes ratification of the settlement. In its reply brief SCE disputes OSHA's position on ratification.

Upon careful review of the arguments and applicable law, we reject the ALJ's recommendation and remand the case for further proceedings consistent with this decision.

DISCUSSION

The ERA and the implementing regulations do not address the effect or validity of agreements reached before a complaint is filed. The ERA provides that "[u]pon receipt of a complaint . . ., the Secretary shall conduct an investigation of the violation alleged in the complaint." 42 U.S.C. §5851(b)(2)(A). The statute, however, does not contemplate that the Department conduct a full investigation in every case without regard to the arguments or evidence of the parties. *See, e.g.*, 42 U.S.C. §5851(b)(3)(A). We find that an employer named in an ERA complaint should be allowed to request termination of the proceeding on the basis of an agreement reached before the complaint was filed. The issue is properly raised as an

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[1/] Authority to investigate alleged ERA violations has been transferred from the Wage and Hour Division of the Department of Labor to OSHA. *See* 61 Fed. Reg. 19,978 (May 3, 1996).

affirmative defense, much like requests based on the statute of limitations and other matters constituting affirmative defenses.

As a matter of public policy, however, the parties cannot agree to bar the complainant from filing an ERA complaint with the Department of Labor. Paragraph 6 of this particular Severance Agreement and Release improperly seeks to prohibit Khandelwal from filing the instant complaint. Following Paragraphs 4 and 5, which contain the general release of all actions relating to Khandelwal's employment with SCE, the agreement provides:

> 6. You agree not to initiate, participate, or aid, in any way, in any lawsuit or proceeding upon any claim released by you under paragraphs 4 and 5 of this Agreement. You understand and agree that if you violate your promise in the preceding sentence, you have engaged in a material breach of this agreement. This paragraph, however, shall not prohibit you from participating in an investigation or proceeding regarding such claim if requested to do so by a state or federal agency. . . .
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> 7. You agree not to use, disclose, publicize, or circulate any confidential or proprietary information concerning SCE or its affiliated companies which has come to your attention during your employment with SCE, unless authorized by SCE or required by law. . . . Nothing in this Agreement, however, shall be construed to prohibit you from reporting any safety concern to the United States Nuclear Regulatory Commission or any other federal or state agency or legislature, or prohibit you from participating in any proceeding or investigation regarding such a safety concern.

Although Paragraph 7 expressly permits Khandelwal to report and participate in proceedings regarding a nuclear safety concern, it does not permit Khandelwal to file an ERA complaint. Substantive issues related to nuclear safety arise in ERA cases, but foremost, an ERA complaint charges employment discrimination, retaliation or reprisal in the workplace. Significantly, even the ALJ found, and SCE admits, that this particular clause in Paragraph 7 does not permit Khandelwal to file "a claim related to an employment related dispute." R. O. at 9; *see* Reply Brief dated April 2, 1997, at 11-12. We conclude that SCE intended through the severance agreement, among other things, to bar Khandelwal from filing this ERA complaint.

It has been held under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621-34, that a waiver of the right to file a charge in exchange for a severance package upon termination is void as against public policy. *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1088-89 (5th Cir. 1987). Citing *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987), the court applied the well-established legal principle that a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement. It concluded that the public interest in private dispute settlement is outweighed

by the public interest in EEOC enforcement of the ADEA. The court also distinguished waivers of ADEA "causes of action" and explained that while an employee may waive the right to recover in his or her own lawsuit, an employee cannot waive the right to file a charge with the EEOC. *Cosmair*, 821 F.2d at 1091.

We apply the same principles here. While an employer may proffer as an affirmative defense to an ERA complaint an agreement containing a waiver of the employee's right to recover damages,[2/] any waiver of his right to file an ERA claim as a condition of the agreement is void. The public interest in the Department of Labor's administration of the ERA greatly outweighs the public interest in dispute resolution through settlement. An ERA complaint is filed with the Department for the purpose of initiating an investigation on behalf of the Secretary, who has been charged with the responsibility of administrating the whistleblower provision of the ERA. *Richter v. Baldwin Assoc.*, Case Nos. 84-ERA-9, *et. al*, Sec. Dec., Mar. 12, 1986, slip op. at 9; *see also English v. General Electric Co.*, Case No. 85-ERA-2, Sec. Dec., Feb. 13, 1992, slip op. at 11. The investigation and ensuing discovery in a whistleblower proceeding may well uncover questionable employment practices and nuclear safety deficiencies about which the government should know. *Cf. Timmons v. Mattingly Testing Servs.*, Case No. 95-ERA-40, ARB Dec., June 21, 1996, slip op. at 5-6 (opportunity for extensive discovery is crucial to serving ERA purposes of protecting employees and public interest). In fact, pursuant to a Memorandum of Understanding, 47 Fed. Reg. 54585 (1982), the Department is to notify the Nuclear Regulatory Commission (NRC) of any allegation of discrimination filed under the ERA, and each agency agrees to exchange information. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1509 (10th Cir. 1985).

Even though this severance agreement permits the employee to raise safety concerns directly with the NRC, an employee might prefer instead to first entrust his concerns with the Department of Labor. The Department of Labor's line of communication cannot be severed through agreement between the parties.[3/]

As Administrator of the ERA, the Secretary represents the public interest in deterring employer intimidation, thereby encouraging the reporting of safety violations and keeping open channels of information regarding reprisals and questionable employment practices in the nuclear industry. *See English v. General Electric Co.*, 496 U.S. 72 (1990); *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *James v. Ketchikan Pulp Co.*, Case No. 94-WPC-4, Sec. Dec., Mar. 15, 1996, slip op. at 8; *Timmons*, Case No. 95-ERA-40, ARB Dec., June 21,

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[2/] *See Cosmair*, 821 F.2d at 1091, and authority cited therein, regarding the validity of a waiver of the right to recover damages.

[3/] Thus, we disagree with the ALJ's comments, R. O. at 6, that the clause in Paragraph 7 permitting direct communication with the NRC is sufficient to preserve the public interest. In addition, the fact that Khandelwal subsequently contacted both the NRC and the Department of Labor, does not cure this express contractual prohibition, which could adversely affect or have chilling effects on future complainants.

1996, slip op. at 6; *Polizzi v. Gibbs & Hill, Inc.*, Case No. 87-ERA-38, Sec. Ord., Jul. 18, 1989, slip op. at 3. Obviously, the public interest in the safe operation of nuclear plants is immense. The statutory requirement at 42 U.S.C. §5851(b)(2)(A) that the Secretary "enter[] into" settlement agreements is another indicator of this strong public interest in ERA claims.

We reject the arguments that Khandelwal ratified the void provision by retaining the monetary consideration. Provisions which are contrary to public policy cannot be validated by ratification. *See* Samuel Williston, Williston on Contracts §1629 (3d ed. 1972); Restatement (Second) of Contracts §85 (1981); 17 C.J.S. *Contracts* §279, page 1209 (1963); *see also Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1534-36 nn.10, 11 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 1033 (1998). Furthermore, the Supreme Court recently has disapproved such arguments even when the contract at issue was merely voidable, as opposed to void, and the Court further noted that a person suing to rescind a contract generally is not required to restore the consideration at the outset of the litigation. *Oubre v. Entergy Operations, Inc.*, 118 S. Ct. 838, 840-41 (1998). It is similarly unnecessary to discuss whether Khandelwal's assent to the void provision was knowing and voluntary.

Accordingly, SCE is not entitled to prevail as a matter of law, and its Motion for Summary Decision is therefore denied. *See* 29 C.F.R. §§18.40, 18.41. This case IS **REMANDED** to the ALJ for a hearing and further proceedings consistent with this order.[4/]

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Presiding Member

[4/] In remanding to the ALJ, we reach no conclusions, nor should any be inferred, as to the merits of this case.