



In the Matter of:

DONALD J. WILLY,

ARB CASE NO. 06-090

COMPLAINANT,

ALJ CASE NO. 85-CAA-1

v.

DATE: March 20, 2007

**THE COASTAL CORPORATION AND
COASTAL STATES MANAGEMENT CO.,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Donald J. Willy, Esq., Houston, Texas, and Stuart M. Nelkin, Esq., *Nelkin & Nelkin, P. C.*, Houston, Texas

For the Respondents:

J. Richard Hammett, Esq., *Baker & McKenzie*, Houston, Texas

FINAL ORDER APPROVING SETTLEMENT AND DISMISSING COMPLAINT

This case arises pursuant to an administrative complaint that Donald J. Willy filed with the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) in October 1984, alleging that the Respondents, the Coastal Corporation (now known as El Paso CPG Company) and Coastal States Management Co. (Coastal collectively) terminated his employment in retaliation for activities that were protected by the whistleblower provisions of certain federal environmental statutes.¹ Numerous decisions

¹ The complaint was filed pursuant to the employee protection provisions of the Clean Air Act, 42 U.S.C. § 7622 (2000), the Water Pollution Control Act, 33 U.S.C. § 1367 (2000), the Safe Drinking Water Act, 42 U.S.C. § 300J-9(i) (2000), the Resource Conservation and Recovery Act, 42 U.S.C. § 6971 (2000), the Toxic Substances Control Act, 15 U.S.C. § 2622 (2000), and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 (2000). We refer to these provisions collectively as “the Environmental Acts.”

by DOL Administrative Law Judges (ALJs), the Secretary of Labor, this Board, and federal courts (and Texas courts in parallel state proceedings) have followed. In relevant part, an ALJ determined in a 1988 decision that the Respondent terminated Willy's employment, in part, due to protected activity. Nevertheless, the ALJ held that Willy had forfeited his right to damages. On automatic review, the Secretary agreed in a 1994 decision that Willy's employment was terminated, in part, due to protected activity, but held that Willy was entitled to relief and, therefore, remanded the case to the ALJ to calculate back pay. In 1997, the ALJ issued a decision on damages, fees and costs that the Respondent subsequently appealed to the Administrative Review Board.

On appeal, the Board determined in a 2004 decision, under its *de novo* review authority, that the federal common law of attorney-client privilege and its exceptions mandated exclusion of evidence necessary to prove Willy's environmental whistleblower complaint against Coastal. Thus, the Board denied Willy's complaint and vacated all orders for remedial relief.² But on appeal, the United States Court of Appeals for the Fifth Circuit vacated the Board's ruling that the attorney-client privilege mandates exclusion of the evidence necessary to prove Willy's complaint and remanded the case to the Board for a review of the merits of the original holding of the ALJ and of the previous Secretary in light of the facts that they had before them when they rendered their final decisions.³

On February 27, 2007, the parties mutually submitted to the Board an Agreed Motion of Dismissal With Prejudice, along with a signed copy of a Confidential Settlement Agreement and Release. The parties have informed the Board, thereby, that they have settled Willy's complaint and, therefore, request that the Board grant the motion to dismiss all claims alleged or that they could have alleged in this case with prejudice, with the parties to bear their own costs. Pursuant to well-established precedent, the Board will not dismiss a complaint under the Acts, based upon a settlement between private parties, unless the settlement is provided to the Board for its review and approval.⁴ As the parties have submitted the settlement, the Board has reviewed it.

Our review reveals that the settlement is intended to also settle matters under laws other than the Environmental Acts and potential claims involving entities other than the parties in this case.⁵ Our authority to review settlement agreements is limited to those

² *Willy v. The Coastal Corp.*, ARB No. 98-060, ALJ No. 85-CAA-1 (ARB Feb. 27, 2004).

³ *Willy v. Admin. Review Bd.*, 423 F.3d 483, 501 (5th Cir. 2005).

⁴ *See e.g., Macktal v. Sec'y of Labor*, 923 F.2d 1150, 1154 (5th Cir. 1991); *Darr v. Precise Hard Chrome*, 95-CAA-6 (Sec'y May 6, 1995); *Heffley v. NGK Metals*, 89-SDW-2 (Sec'y Apr. 29, 1990).

⁵ Confidential Settlement Agreement and Release at ¶¶ 1.1, 1.3, 3.1, 3.2, 3.3, 3.4, 3.5, 5.2, 7.1, 7.3.

reached by the parties pursuant to statutes within our jurisdiction and is defined by the applicable statutes.⁶ Therefore, we have restricted our review of the Confidential Settlement Agreement and Release to ascertaining whether its terms fairly, adequately and reasonably settle this case between the parties under the Acts over which we have jurisdiction and we have determined that the terms do so settle the case. *Id.*

However, we note that if the provisions in paragraphs 6.4 and 7.3 of the Confidential Settlement Agreement and Release were interpreted to preclude Willy from communicating with federal or state enforcement agencies concerning alleged violations of law, they would violate public policy and therefore constitute unacceptable “gag” provisions.⁷

Additionally, we construe paragraph 7.1, the governing law provision, as not limiting the authority of the Secretary of Labor and any Federal court, which shall be governed in all respects by the laws and regulations of the United States.⁸

Finally, the Board notes that the settlement includes a confidentiality agreement at paragraph 6.1. The parties are on notice that the settlement agreement becomes part of the record of the case and is subject to the Freedom of Information Act (FOIA).⁹ Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestors from denials of such requests, and for protecting the interests of submitters of confidential commercial information.¹⁰

⁶ *Bhat v. D.C. Water and Sewer Auth.*, ARB No. 06-014, ALJ No. 03-CAA -17, slip op. at 2-3 (ARB May 30, 2006); *Saporito v. GE Med. Sys.*, ARB No. 05-009, ALJ Nos. 03-CAA-1, 03-CAA-2, slip op. at 3 (ARB May 24, 2005).

⁷ *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-33, slip op. at 6 (ARB Nov. 10, 1997); *Conn. Light & Power Co. v. Sec’y, U.S. Dep’t of Labor*, 85 F.3d 89, 95-96 (2d Cir. 1996) (employer engaged in unlawful discrimination by restricting complainant’s ability to provide regulatory agencies with information; improper “gag” provision constituted adverse employment action).

⁸ *Phillips v. Citizens’ Ass’n for Sound Energy*, 1991-ERA-25, slip op. at 2 (Sec’y Nov. 4, 1991).

⁹ 5 U.S.C.A. § 552 (West 2006).

¹⁰ 29 C.F.R. § 70 *et seq.* (2006).

Accordingly, we **APPROVE** the Settlement Agreement and **DISMISS WITH PREJUDICE** Willy's complaint in accordance with the parties' Confidential Settlement Agreement and Release.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge