

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 February 2006

CASE NO.: 2005-STA-55

In the Matter of

THOMAS F. CALMEYN,
Complainant

v.

THE BOISE TRANSPORTATION COMPANY, d/b/a
BCT, INC.,
Respondent

**RECOMMENDED ORDER APPROVING SETTLEMENT
AND DISMISSING COMPLAINT**

This proceeding arises under Section 31105 of the Surface Transportation Assistance Act (STAA) of 1982 (49 U.S.C. §§ 31101) and the regulations promulgated thereunder at 29 C.F.R. Part 1978 (1989). The parties, on February 15, 2006, filed a Settlement Agreement ("Agreement") in accordance with 29 C.F.R. §§ 1978.111(d)(2). The Agreement resolves the controversy arising from the complaint of Thomas F. Calmeyn against OfficeMax, Inc. and Boise Transportation Company, a wholly-owned subsidiary of Boise Cascade Corporation which changed names to OfficeMax, Inc., under the statute. The Settlement Agreement is signed by the complainant and the employer.

The Settlement Agreement provides that complainant releases respondent from claims arising under the Surface Transportation Act as well as under various other laws. This review is limited to whether the terms of the settlement are a fair, adequate and reasonable settlement of complainant's allegations that respondent violated the STAA. *Kidd v. Sharron Motor Lines, Inc.*, 87-STA-2 (Sec'y July 30, 1987); *Poulos v. Ambassador Fuel Oil Co.*, Case No. 86-CAA-1, Sec. Ord., Nov. 2, 1987, slip op. at 2. As was stated in *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, (Nov. 2, 1987):

The Secretary's authority over the settlement agreement is limited to such statutes as are within [the Secretary's] jurisdiction and is defined by the applicable statute. *See Aurich v. Consolidated Edison Company of New York, Inc.*, Case No. 86-CAA-2, Secretary's Order Approving Settlement, issued July 29, 1987; *Chase v. Buncombe County, N.C.*, Case No. 85-SWD-4, Secretary's Order on Remand, issued November 3, 1986.

I have therefore limited my review of this Agreement to determining whether the terms thereof are a fair, adequate and reasonable settlement of Mr. Calmeyn's allegation that respondent had violated the STAA.

Under the STAA and implementing regulations, a proceeding may be terminated on the basis of a settlement provided either the Secretary or the Administrative Law Judge approves the agreement. 49 U.S.C. app. §§ 2305(c)(2)(A); 29 C.F.R. §§ 1978.111(d)(2). The parties must submit for review an entire agreement to which each party has consented. *Tankersley v. Triple Crown Services, Inc.* 92- STA-8 (Sec'y Feb. 18, 1993). The agreement must be reviewed to determine whether the terms are a fair, adequate and reasonable settlement of the complaint. *Macktal v. Secretary of Labor*, 923 F.2d 1150 (5th Cir. 1991); *Thompson v. U.S. Department of Labor*, 885 F.2d 551 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 89-ERA-10, Sec'y Ord. Mar. 23, 1989, slip op. at 1-2. This Order approving the settlement is final since all parties have joined in the Agreement. *Swischer v. Gerber Childrenswear, Inc.*, 93-STA-1 (Sec'y Jan. 4, 1993).

The Agreement provides that upon the issuance of an order dismissing the complaint with prejudice, Respondent will pay Mr. Calmeyn a specified sum of money, a portion of which is designated "wages" payment subject to payroll withholdings and a portion of which is designated as attorneys' fees. The parties agree that these payments will satisfy all claims against OfficeMax Inc. by the complainant and his counsel.

The Agreement provides a general release, in paragraph 3. That paragraph could possibly be construed as a waiver by complainant of a cause of action potentially arising in the future, unless it is construed as being modified by subparagraph 3b, which limits the waiver to causes "accruing on or before the date of this agreement..." The provision must be interpreted as limited to the right to sue in the future on claims or causes of action arising out of facts or any set of facts occurring before the date of the agreement. *Bittner v. Fuel Economy Contracting Co.*, Case No. 88-ERA-22, Sec. Ord. Approving Settlement Agreement and Dismissing Complaint (June 28, 1990), Slip op. at 2. Paragraph 9, dealing with future suits and proceedings, is appropriately limited to a waiver of action for matters arising on or before the date of the settlement agreement.

I find the overall settlement terms to be reasonable but some clarification is necessary. The Agreement contains a confidentiality provision limiting all disclosures except under certain stated circumstances. It has been held in a number of cases with respect to confidentiality provisions in Settlement Agreements that the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* (1988) (FOIA), requires federal agencies to disclose requested documents unless they are exempt from disclosure. *Faust v. Chemical Leaman Tank Lines, Inc.*, Case Nos. 92-SWD-2 and 93-STA-15, ARB Final Order Approving Settlement and Dismissing Complaint, March 31, 1998. The records in this case are agency records which must be made available for public inspection and copying under the Freedom of Information Act. However, the employer will be provided a pre-disclosure notification giving the employer the opportunity to challenge any such potential disclosure. In the event the Agreement is disclosed, pursuant to 5 U.S.C. § 552, *et seq.*, the parties have provided such disclosure is not a violation of the agreement and will not result in a violation of the agreement. (See paragraphs 5 and 7). The Agreement itself is not appended

and will be separately maintained and marked “PREDISCLOSURE NOTIFICATION MATERIALS.”

I find the terms of the “confidentiality” provision do not violate public policy in that they do not prohibit the Complainant from communicating with appropriate government agencies. *See, e.g., Bragg v. Houston Lighting & Power Co.*, 94-ERA-38 (Sec’y June 19, 1995); *Brown v. Holmes & Narver*, 90-ERA-26 (Sec’y May 11, 1994); *The Connecticut Light & power Cop. v. Secretary Of United States Department of Labor*, No. 95-4094, 1996 U.S. App. LEXIS 12583 (2d Cir. May 31, 1996); and, *Anderson v. Waste Management of New Mexico*, Case No. 88-TSC-2, Sec. Final Order Approving Settlement, December 18, 1990, slip opin. at 2, where the Secretary honored the parties’ confidentiality agreement except where disclosure may be required by law.

The Agreement also notes at Paragraph 19 that it is governed and interpreted in accordance with the laws of the State of Illinois, but that nothing shall restrict the authority of the Secretary or any U.S. Court. That provision is interpreted as not limiting the authority of the Secretary or any U.S. court to seek or grant appropriate relief under any applicable federal whistleblower statute or regulation. *Phillips v. Citizens Assoc. for Sound Energy*, Case No. 91-ERA-25, Sec. Final Order of Dismissal (Nov. 4, 1991).

As so construed, noting that the parties are represented by counsel, I find the terms of the Agreement to be fair, adequate and reasonable, and therefore recommend approval. Accordingly, I recommend the complaint filed by Thomas Calmeyn, be dismissed with prejudice.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF REVIEW: The Administrative Law Judge’s Recommended Order Approving Settlement, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary’s Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the Administrative Law Judge’s Recommended Order Approving Settlement, the parties may file briefs with the Administrative Review Board (“Board”) in support of, or in opposition to, the Administrative Law Judge’s order unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.