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UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

XXXXXXXX

Docket No. BD 01-09

Creditor Claim
Norlarco Credit Union

Decision and Order on Appeal

This matter comes before the National Credit Union Administration Board (Board) pursuant to §709.8 of NCUA Rules and Regulations (12 C.F.R. 709.8), as an appeal from the denial by the Liquidating Agent for Norlarco Credit Union (Norlarco) of a creditor claim filed by Mr. XXXXXXXX. Mr. XXXXXXXX, a former employee of Norlarco, sought damages of \$ xxxxxx for alleged wrongful termination of employment.

Background

Norlarco Credit Union (Norlarco) originally received a federal credit union charter in 1959 to serve employees of Colorado State University and the Poudre School District; in 1979 it converted to a state charter. On May 15, 2007, the Division of Financial Services of the State of Colorado placed the Credit Union into conservatorship and appointed NCUA as conservator. NCUA placed Norlarco into involuntary liquidation on February 29, 2008.¹ Public Service Credit Union (PSCU) entered into a purchase and assumption agreement with NCUA, acquiring most of the assets and liabilities of Norlarco upon its liquidation.

Mr. XXXXXXXX's Claim

XXXXXXXX was employed as a training specialist with Norlarco. In March 2004, at age 52, he suffered a stroke, requiring hospitalization and a lengthy

¹ NCUA named itself as the liquidating agent; various AMAC staff were named as agents for the liquidating agent. References in this memo to AMAC refer to those staff in their capacity as agents for the liquidating agent.

recuperation period. Eventually he was able to return to work and, with the benefit of non-paid leave available to him under the federal Family and Medical Leave Act (FMLA), was able to do so on a schedule that he thought he would be able to sustain indefinitely. Norlarco, however, determined that he was not able to fulfill the demands of full-time employment and terminated his employment in December 2004.

Settlement and Release. Norlarco and Mr.XXXXXXXXXX signed a severance and release agreement (Agreement) in December 2004 (exact date is uncertain from the file materials). The Agreement provides as follows:

- Norlarco to pay Mr.XXXXXXXXXX \$xxxxx as severance, subject to withholdings for income taxes and other authorized withholdings;
- Norlarco to pay health insurance premiums for Mr.XXXXXXXXXX for the remainder of 2004, in the event Mr.XXXXXXXXXX elected to continue participating in the credit union's group health coverage, pursuant to COBRA;
- Norlarco to continue to honor a discount made available to employees with first mortgages obtained from the credit union for a period of four years or until Mr.XXXXXXXXXX refinanced his mortgage with another lender, whichever occurred first; and
- Mr.XXXXXXXXXX to release Norlarco from all charges, claims and causes of action of any sort, including specifically any claims arising from or related to his employment or termination of employment.

The Agreement specifically noted that Mr.XXXXXXXXXX was provided with a period of twenty-one days in which to consider whether to sign the document; the Agreement also recites that Mr.XXXXXXXXXX was provided with a rescission period of seven days following execution in which he could rescind it. He signed the document and did not rescind it. Norlarco paid the amount specified as severance and continued to honor Mr.XXXXXXXXXX's mortgage discount until May 2008.

Breach. PSCU acquired Norlarco's mortgage portfolio in the purchase and assumption transaction, including Mr.XXXXXXXXXX's mortgage, but did not assume the obligation to honor the discount that had been extended with respect to any of former Norlarco employee mortgagors, including Mr.XXXXXXXXXX. Through its servicer, PSCU notified Mr.XXXXXXXXXX in April 2008 that he would be required to pay the non-discounted, contract rate effective with the payment due for May, 2008. The difference in the monthly payment was \$108.46. Mr.XXXXXXXXXX contacted PSCU but was advised to contact NCUA to discuss his concerns. He did so, and was advised of the procedure by which any claim he believed he might have against Norlarco should be filed with AMAC.

The claim. After PSCU drafted Mr.XXXXXXXXXX's account for the May 2008 mortgage payment in the undiscounted amount, Mr.XXXXXXXXXX took the view

that his obligations under the Agreement had been excused. Therefore, on May 27, 2008,² he filed a claim with the liquidating agent seeking damages of \$xxxx for wrongful termination. The claim alleges that Norlarco may have engaged in age discrimination, in that it conducted a separate “layoff and downsizing” at around the time of his termination in which the majority of the persons let go were over age 40, even though, he asserts, most employees of Norlarco were under the age of 40. Further, the claim asserts that Norlarco hired another, younger individual to take over many of his former duties within a year after he was terminated. Mr.XXXXXXXXXX also alleged Norlarco had improperly calculated the amount of FMLA leave that he was entitled to and that, but for Norlarco’s miscalculation, he would have been able to fulfill his employment obligations indefinitely with a combination of work and FMLA leave. He also asserted that he was under considerable financial and emotional stress at the time he signed the Agreement and should not be bound by its terms.

Mr.XXXXXXXXXX calculated the dollar amount of the claim by multiplying his ending annual salary times the thirteen and one half years until he reaches age 66; his calculations include a built in raise of 6% annually, together with amounts representing benefits and the employer portion of his §401(k) retirement plan, as well as \$xxxx representing his loss of unvested §401(k) employer contributions. He does allow a credit for the \$xxxx in severance already paid to him.

There is some confusion in the file as to whether Mr.XXXXXXXXXX also intended to assert a breach of the agreement to provide a mortgage discount as a separate component of the claim. It is clear, however, that AMAC viewed it as such. In a letter dated October 16, 2008, the agent for the liquidating agent allowed the claim for the loss of the mortgage discount, which AMAC calculated as \$976.14 (nine months times the differential amount of \$108.46), but disallowed the claim for damages for wrongful termination. The rationale provided for the rejection of the remainder of the claim was that Mr.XXXXXXXXXX had not provided sufficient information to support a claim of discrimination based on age or disability. In a follow up letter, AMAC elaborated on the basis for denial of the termination claim by stating that, upon the liquidating agent’s payment of the \$976.14, the Agreement was “fully performed” and that, as a result, the liquidating agent did not believe Mr.XXXXXXXXXX could assert the wrongful termination claim.

AMAC noted Mr.XXXXXXXXXX’s appeal rights as set forth in Part 709 of the NCUA Rules and Regulations. 12 C.F.R. Part 709. Section 709.7 authorizes the claimant to either file an administrative appeal pursuant to Section 709.8 or to file suit against the liquidated credit union. In his appeal to the Board, Mr.XXXXXXXXXX did not request a hearing on the record; accordingly, the matter was treated as the relatively less formal appeal to the Board pursuant to §709.8(c)(1).

² There is a typographical error in the file copy of the claim cover letter, indicating its date as 2006.

Analysis

The Agreement, pursuant to which Norlarco paid Mr. XXXXXXXX over xx dollars in exchange for his release of any potential claims arising from his termination, is supported by consideration on both sides. It recites that Mr. XXXXXXXX had a chance to thoroughly review the Agreement before signing it, and that he had a chance to obtain review of the Agreement by an attorney if he so chose. It also contains specific language that must be included to effectively release any claims associated with age discrimination, as required by federal law. 29 U.S.C. §626(f). The Agreement is properly worded, unambiguous in its purpose and meaning and legally sufficient, in itself, to accomplish its stated effect. It meets the standard, as established by the Supreme Court, for effectiveness of the release of claims under the federal anti-discrimination statutes, in that it was entered into “knowingly and voluntarily.” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974).

Mr. XXXXXXXX does not assert that the Agreement was misleading or that he did not fully understand its purpose or effect; nor does he assert that he was fraudulently induced to sign it or that he signed it under duress. Indeed, Mr. XXXXXXXX has not alleged any legal impropriety on the part of Norlarco relative to the initial presentation and execution of the Agreement, nor has he asserted that he did not understand the ramifications of his signing it. He asserts that he was mentally and physically fatigued and in a fragile emotional state with significant financial pressures confronting him, all of which, he states (in his initial claim letter) enabled Norlarco to “gently bully him into accepting a meager severance.” He did not offer any evidence to support this allegation. Mr. XXXXXXXX may believe, in hindsight, that it was a mistake for him to sign the Agreement, but that is not sufficient, from a legal standpoint, to excuse his obligations under it.

Mr. XXXXXXXX may only assert his claim for wrongful termination if he can somehow escape or set aside the legal effect of the Agreement. He makes the argument that the failure of AMAC to honor the provision in the Agreement regarding the mortgage discount excuses him from his obligations under the Agreement. In his view, the breach has completely voided the Agreement and rendered it of no legal effect; therefore, he is freed from its constraints, no longer bound by his release of rights, and free to resurrect and assert his claim for wrongful termination. Mr. XXXXXXXX cites no authority for this proposition, other than to indicate his belief that this is a legal principle that is applicable in this case.

His view is mistaken. As a general principle of contract law, breach of a settlement agreement gives rise to a claim for damages arising from the breach, but does not undermine or abrogate the settlement itself. Unless the breach is

so significant and material as to completely undo the terms of the settlement (i.e., to prevent a party from receiving substantially what he bargained for), the remedy for breach is to seek damages, and not to set aside the entire settlement. According to the *Restatement (Second) of Contracts*, criteria to use in determining whether a breach is material include:

(1) the extent to which the injured party will be deprived of the benefit which can reasonably be expected; (2) the extent to which the injured party can be adequately compensated for the part of the benefit of which she will be deprived; (3) the extent to which the breaching party will suffer forfeiture; (4) the likelihood that the breaching party will cure; and (5) the extent to which the behavior of the breaching party comports with the standards of good faith and fair dealing.

Section 241, Restatement (Second) of Contracts.

Application to the facts of this case of the criteria in the *Restatement* and the rationale of court decisions evaluating similar facts establishes that the breach in this case was not sufficient to warrant setting aside the Agreement. For example, in a similar federal case arising in Minnesota and involving a private sector employee, the court refused to allow the plaintiff to litigate aspects of a claim for which a settlement and release had been executed, finding that:

[A]bsent allegations of fraud or duress, a clear and unambiguous release of claims against a party bars a plaintiff from bringing a subsequent action based on the same facts as underlie the settled claims. The principles of release and waiver apply to Title VII claims. Even where the plaintiff alleges a breach of the underlying settlement agreement, the plaintiff's exclusive remedy is for breach of contract; she is precluded from reviving the underlying claims.

Breen v. Norwest Bank Minnesota, N.A., 865 F. Supp 574 (D. Minn. 1994).

Several other courts have reached similar conclusions, holding that parties who enter into Title VII settlement agreements waive their rights to proceed on the underlying claim. See, e.g., *Pilon v. University of Minnesota*, 710 F.2d 466 (8th Cir. 1983); *Sherman v. Standard Rate Data Service Inc.*, 709 F. Supp. 1433 (N.D. Ill. 1989); *Vermett v. Hough*, 606 F. Supp. 732, 745 (W.D. Mich. 1984).

The Equal Employment Opportunity Commission (EEOC), in applying these principles to cases involving federal sector employees, has taken a similar view. Recently it noted that, when parties have already performed several aspects of a settlement agreement, specific performance rather than reinstatement of the complaint is the appropriate remedy. *Rawlings v. Attorney General*, EEOC ruling no. 05910554, 3094/A9 (1991) (as reported in the *Guide to Federal Sector Equal Employment Law and Practice*, (Dewey Publications, Inc., Arlington, VA 2006), p. 378.

In this case, Mr.XXXXXXXXXX received the full lump sum severance payment promised by Norlarco upon execution of the Agreement. He also received over three years' worth of the employee discount on his mortgage, or more than three-quarters of the financial benefit associated with that aspect of the Agreement. The differential in amount between what he contracted for and what he was actually paid was, in terms of the overall Agreement, immaterial. Moreover, the liquidating agent paid Mr.XXXXXXXXXX the full amount of the mortgage discount to which he was entitled. In fact, he received the full amount of the remaining differential in October, which was sooner than he would have received it had the Agreement not been breached.

Even if Mr.XXXXXXXXXX were able to demonstrate a material breach of the Agreement, his claim is barred by the statute of limitations. Norlarco terminated his employment in December 2004. Even though the filing period for claims against the liquidation estate of Norlarco had not passed, the underlying claim is in the nature of illegal employment discrimination, which must be asserted under applicable federal law within specified time frames and in accordance with specified administrative procedures.³

Under Title VII of the Civil Rights Act, claimants seeking to establish liability for discrimination based on disability are required first to file an administrative claim with the EEOC. 42 U.S.C. §2000e-5(e)(1). A claimant asserting an age discrimination claim may file either with the EEOC or directly in court. 29 U.S.C. §626(d). An individual has the option under the FMLA of filing a claim with the Department of Labor or pursuing his claim individually in court. 29 U.S.C. 2607; 29 C.F.R part 825, Subpart D, §825.400. Under both federal statutory regimes, claims must be initiated within a specified period after the allegedly illegal actions occurred. For discrimination claims, the period is 300 days (because Colorado is a "deferral jurisdiction," meaning that a claimant has the option of pursuing a claim first with the Colorado Civil Rights Division); for FMLA claims, the period is two years. Claims not filed within those periods are barred. *Id.*

To avoid this statutory bar, Mr.XXXXXXXXXX must be able to show that his failure to file these claims within the relevant time periods is excused. Mr.XXXXXXXXXX has not addressed this issue in the materials included with his claim, and has not identified any reasons that would justify an equitable modification of these statutory requirements. Norlarco immediately initiated comprehensive settlement discussions, the parties agreed to terms, and Mr.XXXXXXXXXX received the benefit of his bargain (even though a portion of that benefit was paid to him only after he identified and complained of a partial breach). The breach was immaterial and in any event AMAC's payment of the amounts owed operates as a cure, placing Mr.XXXXXXXXXX in the same, if not better, position than he would have been absent the breach.

³ He has not specified any relevant Colorado statute; however, for purposes of this analysis, provisions of state and federal law essentially overlap.

In summary, an immaterial breach of a legally sufficient settlement agreement, entered into knowingly and voluntarily and supported by consideration, is not sufficient to warrant setting aside the Agreement. In addition, the execution of the Agreement did not toll the statute of limitations, which had run at the time of the alleged breach. The appropriate remedy is to cure the breach, which AMAC has done.

Order

For the reasons set forth above, it is ORDERED as follows:

The decision of AMAC denying XXXXXXXX's claim in the amount of \$xxxxx is affirmed and XXXXXXXX's appeal is denied.

The Board's decision constitutes a final agency determination. Pursuant to 12 CFR 709.8(c)(1)(iv)(B), this final determination is reviewable in accordance with the provisions of Chapter 7, Title 5, United States Code, by the United States Court of Appeals for the District of Columbia or the court of appeals for the Federal judicial circuit where the credit union's principal place of business was located. Such action must be filed within 60 days of the date of this final determination.

So **Ordered** this 21st day of May, by the National Credit Union Administration Board.

_____/S/_____
Mary Rupp
Secretary of the Board