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RICK STEVENSON V. BEAVER CREEK COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

RICK STEVENSON,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

BEAVER CREEK COAL COMPANY,
RESPONDENT

Docket No. WEST 89-130-D

DENV CD 89-02

Trail Mt. No. 9 Mine

INTERIM ORDER

This case involves a discrimination complaint filed by complainant on his own behalf pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act").

Now pending for a ruling is the motion of respondent Beaver Creek Coal Company, ("BCCC"), for a summary decision pursuant to Commission Rule 64, 29 C.F.R. 2700.64.

Before considering the merits of the motion it is appropriate to consider the relevant procedural history of the case.

On March 6, 1989, complainant Stevenson, appearing pro se, filed his complaint pursuant to section 105(c) of the Act.

On April 7, 1989, BCCC filed its answer denying any discrimination. Further, BCCC raised several defenses. In part, BCCC asserts complainant signed a general release of all claims arising out of the termination of his employment.

On April 13, 1989, the case was set for a hearing on the merits.

On April 20, 1989, BCCC filed interrogatories, a request for documents and a request for admissions.

On May 15, 1989, BCCC moved for a rescheduling of the hearing.

On May 16, 1989, the hearing was rescheduled to August 8, 1989.

On May 22, 1989, after a conference call, complainant was ordered to answer BCCC's interrogatories and to appear for a deposition.

On June 6, 1989, complainant filed his answer to interrogatories.

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On June 20, 1989, the hearing of August 8, 1989, was rescheduled to a full hearing on the merits.

On August 1, 1989, at the request of complainant, the hearing of August 8, 1989 was cancelled.

On August 14, 1989, BCCC filed a motion and brief for a summary decision.

On September 7, 1989, counsel entered his appearance for complainant.

On October 10, 1989, complainant filed his affidavit and brief in opposition to BCCC's motion.

On October 23, 1989, BCCC filed a reply memorandum.

Allegations

1. Complainant states that while he was a representative of miners he made numerous complaints to the Mine Safety and Health Administration ("MSHA"). These complaints resulted in MSHA inspections and in the issuance of numerous citations.

2. On September 26, 1988, complainant was laid off. He claims this was because of his safety and health activities.

3. It is uncontroverted that the day following his termination complainant executed and delivered to BCCC a general release. The agreement reads, in its pertinent part, as follows:

Part III

Notice: Various State and Federal laws prohibit employment discrimination based on on age, sex, race, color, national origin, religion, handicap or veteran status. These laws are enforced through the Equal Employment Opportunity Commission (EEOC), Department of Labor and State Human Rights Agencies. If you feel that your election of the Atlantic Richfield Special Termination Plan was coerced and is discriminatory, you are encouraged to speak with your Employee Relations representative or follow the steps described in the Employee Problem Resolution procedure. You may also want to discuss the following release language with your lawyer. In any event, you should thoroughly review and understand the effect of the release before acting on it. Therefore, please take this Release home and consider it for at least (5) working days before you decide to sign it.

General Release:

In consideration for the Atlantic Richfield Special Termination Plan offered to me by the Company I release and discharge the Company, its successors, subsidiaries, employees, officers and directors (hereinafter referred to as "the Company") from all claims, liabilities, demands and causes of action known or unknown, fixed or contingent, which I may have or claim to have against the Company as a result of this termination and do hereby covenant not to file a lawsuit to assert such claims. This includes but is not limited to claims arising under federal, state, or local laws prohibiting employment discrimination or claims growing out of any legal restrictions on the Company's right to terminate its employees. This release does not have any effect on any claim I may have against the Company unrelated to this termination. I have carefully read and fully understand all of the provisions of this Separation Agreement and General Release which sets forth the entire agreement between me and the Company and I acknowledge that I have not relied upon any representation or statement, written or oral, not set forth in this document.

4. In support of its position that complainant is bound by the release BCCC further cites portions of complainant's disposition (taken July 25, 1989). The relevant portions are as follows:

A. When delivering the general release to Beaver Creek Complainant Stevenson also delivered a handwritten statement which stated that Stevenson was signing the form with the "sole purpose of receiving any and all moneys (sic) owed me by Beaver Creek Coal. No other purpose is intended" (Tr. 119, 120, BC-19).

B. Beaver Creek refused to accept Stevenson's conditional note (BC-19) along with the BC-18 agreement, (Tr. 120, 121).

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C. Stevenson received a letter dated October 4, 1988 from Beaver Creek which states in pertinent part: ". . . in order to get your severance pay you must sign the release given to you on September 27, 1988 without any conditions." The October 4, 1988 letter also noted that Stevenson had "already received all monies owed" to him. (Emphasis in original) (Tr. 121, BC-20).

D. Stevenson delivered to Beaver Creek a handwritten signed note dated October 10, 1988 which read, "Disregard previous note concerning severance pay and all related conditions." (Tr. 122, 123, BC-21)

E. Stevenson knew that the severance pay of nearly \$8,000.00 was a company benefit given in exchange for the unconditional execution of the General Release (Tr. 116-123).

F. Stevenson knew that upon signing the release and receiving the severance pay he "could not pursue . . . a Federal Mine Health and Safety Discrimination case." (Tr. 114, 122).

G. Stevenson testified that with respect to signing the release:

a) He thought about not signing it. (Tr. 114, 115).

b) He kept it a couple days before signing it. (Tr. 113, 114).

c) His wife witnessed his signature. (Tr. 114, 115, BC-18).

d) He was aware that by signing, he released Beaver Creek of liability. (Tr. 115).

e) He talked it over with his wife and also talked it over with a friend. (Tr. 115, 117).

f) Upon signing, he was unconditionally releasing Beaver Creek. (Tr. 123).

g) He had a right not to sign the release and not receive the severance pay. (Tr. 124).

h) He considered consulting a lawyer. (Tr. 125).

i) He was not forced to sign the release. (Tr. 126).

j) He "knew perfectly well what [I] was signing. (Tr. 122).

H. Stevenson has not refunded the nearly \$8,000.00 in severance money to Beaver Creek. (Tr. 124).

I. Stevenson is a high school graduate (Tr. 5) with substantial mining experience and has had six years experience operating a video store which he owned. (Tr. 5-8).

Complainant, in opposition to BCCC's motion, asserts he is not bound by the release. In support of his position he states in an affidavit as follows:

1. His mailing address is Box 170, Star Route, East Carbon, Utah 84520.

2. He was employed at Trail Mountain Mine No. 9 on July 30, 1985 to September 26, 1988, for a period of over three years.

3. Respondent purchased the above mine on or about September 24, 1987, and agreed to honor, among other things, the existing severance pay benefit.

4. Upon becoming separated from BCCC, Stevenson was eligible for the severance pay benefit, which he earned as part of his compensation package during over three years of employment at said mine. The amount of his entitlement was based upon his length of service at said mine.

5. BCCC improperly required Stevenson to sign a document entitled "Special Termination Plan Documentation, Acknowledgment and Payment Schedule", which contained a "General Release" provision (refer to Deposition Exhibit BC-18 attached to Respondent's Brief), as a condition of obtaining his severance benefit money owed to him upon his separation for past service, notwithstanding the incorrect statement of Mr. J. F. Kasper, Employee Relations Manager of BCCC in his letter of October 4, 1988 to the contrary (refer to Deposition Exhibit BC-20, attached to Respondent's Brief).

6. BCCC did not offer him an Enhanced Retirement Program, which is described on the above acknowledgment form, so that he wasn't provided any opportunity to elect between a severance pay benefit and an Enhanced Retirement Program benefit. The above form indicates that he could decline to sign the release language and receive an Enhanced Retirement Program benefit instead of the severance pay benefit. He was not provided with this option to elect. He was simply told by BCCC that if he refused to sign the above document with the general release language, he would not receive any severance pay benefit or any other additional benefit.

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7. BCCC never advised Stevenson, or any other coal miner to his knowledge prior to separation, that a general release would be required to receive the severance pay benefit, and no such requirement existed, to his knowledge, prior to the BCCC takeover. Moreover, he received nothing in return for giving to BCCC a general release, because he was owed the severance pay benefit anyway, whether he agreed to the release or not.

8. BCCC would not agree to his request to delete the effect of the general release language and required that said language be included for him to obtain his severance pay benefit. BCCC refused to negotiate or agree to any change.

9. Stevenson was forced to retract his attempt to delete the effect of the general release language, because of economic duress and coercion resulting from his child support obligation (over \$900.00 per month for four children); the loss of his video business; his inability to qualify for Unemployment Insurance benefits because of the availability of a severance pay benefit, his lack of a job and lack of outside income and because of additional pressing economic obligations. (Refer to page 126 of his deposition of July 25, 1989.)

10. At the time that Stevenson submitted the signed document with the release language, he doubted that the release language was valid or enforceable. This was because it was obtained by coercion and duress ("blackmail") and because he was owed the severance pay money anyway, whether I signed the release or not.

11. At his deposition of July 25, 1989, Stevenson offered to pay back the severance pay money upon his reinstatement. (Page 124 of his deposition of July 25, 1989).

Discussion

As a threshold matter Complainant contends BCCC's motion was untimely.

Commission Rule 64 simply provides that a motion for summary decision may not be filed before the scheduling of a hearing on the merits. In this case the hearing on the merits then scheduled for August 8, 1989, was cancelled on August 1, 1989. BCCC filed its motion for summary decision on August 14, 1989 when there was no scheduled hearing. This factual scenario causes me to conclude that Commission Rule 64 is not applicable.

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The writer believes the applicable case law governing the effect of a release as a valid waiver of rights is generally expressed in an ADEC(FOOTNOTE 1) case, Cirillo v. Arco Chemical Company, a Division of Atlantic Richfield Company and Ramey, 862 F.2d 448 (3rd. Cir. 1988).

Specifically, therein the Court adopted a "totality of the circumstances" approach, necessitating careful evaluation of the release form itself as well as the complete circumstances in which it was executed.

Relevant factors to be considered in the totality of the circumstances include, but are not limited to, the following considerations: (1) the clarity and specificity of the release language; (2) the plaintiff's education and business experience; (3) the amount of time plaintiff had for deliberation about the release before signing it; (4) whether plaintiff knew or should have known his rights upon execution of the release; (5) whether plaintiff was encouraged to seek, or in fact received benefit of counsel; (6) whether there was an opportunity for negotiation of the terms of the Agreement; and (7) whether the consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law. 862 F.2d at 451.

It is apparent on the facts presented herein that a genuine issue of fact exists under the totality of circumstances rule. In particular, the issue arises as to whether the consideration was adequate. Or as otherwise stated: was the consideration given for the waiver and accepted by Stevenson in excess of the benefits to which he was already entitled by contract or law.

Since a genuine issue of fact exists on this point it follows that BCCC's motion for a summary decision should be denied.

Accordingly, the following order is appropriate:

