U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

WILLIAM VINNETT, **ARB CASE NO. 2023-0005**

COMPLAINANT, **ALJ CASE NO. 2022-ERA-00002**

v. **DATE: March 31, 2023**

EXELON GENERATION,

RESPONDENT.

Appearances:

***For the Complainant*:**
William Vinnett; *pro se*; Winter Park, Florida

***For the Respondent*:**
Todd D. Steenson, Esq.; *Constellation Energy Generation, LLC*; Warrenville, Illinois

Before PUST, BURRELL, and WARREN Administrative Appeals Judges

DECISION AND ORDER

BURRELL, Administrative Appeals Judge:

This case arises under the Energy Reorganization Act of 1974 (ERA), as amended.[1] William Vinnett (Vinnett) filed a complaint against Exelon Generation

[1] 42 U.S.C. § 5851; 29 C.F.R. Part 24 (2022) (the ERA's implementing regulations).

alleging that it violated the whistleblower protection provisions of the ERA.[2] On October 11, 2022, a Department of Labor Administrative Law Judge (ALJ) issued an Order Granting Respondent's Motion to Dismiss Complaint (Order Granting Motion to Dismiss). Vinnett appealed to the Administrative Review Board (ARB or Board). The Board affirms.

BACKGROUND

Exelon Generation hired Vinnett as a Senior Corporate Turbine Engineer on October 30, 2018.[3] During his employment, Vinnett sent several e-mails and wrote two reports raising safety concerns related to his assigned turbines.[4] Following these e-mails and reports, Vinnett claims that his supervisor harassed him, blocked him from receiving a bonus, and limited his job responsibilities.[5]

Exelon Generation terminated Vinnett's employment via a phone call on June 30, 2020.[6] Exelon Generation followed up with a June 30 letter providing Vinnett with written notice that his employment was terminated and informing him of his severance benefits.[7] Another letter dated June 30, 2020, confirmed the date of termination and the terms and conditions of available benefits, and encouraged Vinnett to consult with an attorney before signing an enclosed waiver and release (Severance Agreement).[8]

The Severance Agreement, if signed and returned within twenty-one days and not revoked in the following seven days, would entitle Vinnett to twelve weeks' base salary and other benefits in exchange for his release of all monetary damages

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2 *Vinnett v. Exelon Generation*, ALJ No. 2022-ERA-00002, slip op. at 1-2 (ALJ Oct. 11, 2022).

3 Order Granting Motion to Dismiss at 5.

4 *Id*.

5 *Id*.

6 *Id*.

7 *Id*.

8 *Id*.; Exelon Generation Company, LLC's Brief in Support of Motion to Dismiss Complaint's Claims as Barred by Settlement Agreement, Waiver and Release and as Barred by the Statute of Limitations or in the Alternative for Summary Disposition on those Grounds (Motion for Summary Decision), Exhibit (Ex.) 1.

and claims against Exelon Generation.[9] Specifically, the Severance Agreement stated:

> I understand and agree that, in signing this Waiver and Release, I am waiving and releasing any and all claims of whatever nature that I now have or that I may ever have had against the Released Parties up until the date I sign this Waiver and Release, including but not limited to . . . [c]laims of discrimination in employment or retaliation under any federal, state or local statute, ordinance, regulation, or constitution[.][10]

The Severance Agreement also stated that it did not prohibit Vinnett from filing a charge, reporting possible violations of law or regulation, or making other disclosures to any governmental agency or entity, including but not limited to the Nuclear Regulatory Commission (NRC) or the Department of Labor (DOL).[11] Even so, the Severance Agreement contained an explicit waiver of all rights to recover any and all monetary damages from Exelon Generation.[12] Vinnett signed the Severance Agreement on July 16, 2020.[13] Vinnett did not take advantage of the provided window of opportunity to revoke the Severance Agreement, which by its terms became effective on July 24, 2020.[14]

On December 15, 2020, Complainant filed a letter with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that he was retaliated against for reporting safety concerns to members of Exelon Generation's management.[15] Acting on behalf of the Secretary of the Department of Labor (Secretary), OSHA investigated Vinnett's complaint but dismissed the

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9 Order Granting Motion to Dismiss at 5.

10 Motion for Summary Decision, Ex. 2, para. 2 (signed agreement).

11 Order Granting Motion to Dismiss at 6; Motion for Summary Decision, Ex. 2, para. 10.

12 Motion for Summary Decision, Ex. 2, para. 10.

13 *Id*.

14 Order Granting Motion to Dismiss at 6. The Severance Agreement stated, "I understand and intend that, in the event I do not revoke my acceptance of this Waiver and Release within the seven-day period described in this paragraph, this Waiver and Release will be legally binding and enforceable." Motion for Summary Decision, Ex. 2, para. 13.

15 Order Granting Motion to Dismiss at 1-2.

complaint after it determined that Vinnett "understood and freely" signed the Severance Agreement.[16] Vinnett objected to OSHA's determination and requested a hearing before an ALJ.[17]

Prior to the hearing, Exelon Generation moved for dismissal or, in the alternative, summary decision, arguing that: (1) Vinnett waived his right to recovery by signing the Severance Agreement; (2) Vinnett did not allege that his termination was an adverse action under the ERA; and (3) Vinnett's complaint was untimely as to the adverse actions he alleged.[18] On October 11, 2022, the ALJ issued an Order Granting Motion to Dismiss. On October 21, 2022, Vinnett petitioned the Board for review of the ALJ's Order Granting Motion to Dismiss.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated to the Board the authority to review ALJ decisions under the ERA.[19] The ARB reviews an ALJ's grant of summary decision de novo, the same standard the ALJ applies.[20] Summary decision should be entered when there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law.[21] The ARB reviews the record on the whole in light most favorable to the non-moving party.[22]

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16 *Id.* at 2.

17 *Id.*

18 *Id.*

19 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

20 *Mansell v. Tenn. Valley Auth.*, ARB No. 2020-0060, ALJ No. 2019-ERA-00010, slip op. at 3 (ARB May 12, 2022) (citing *Johnson v. The Wellpoint Cos., Inc.*, ARB No. 2011-0035, ALJ No. 2010-SOX-00038, slip op. at 5 (ARB Feb. 25, 2013)).

21 *Brown v. BWSR, LLC*, ARB No. 2019-0060, ALJ No. 2019-ERA-00003, slip op. at 2 (ARB Feb. 19, 2020) (citing 29 C.F.R. § 18.72).

22 *Mansell*, ARB No. 2020-0060, slip op. at 3 (citing *Tran v. S. Cal. Edison Co.*, ARB No. 2018-0024, ALJ No. 2017-ERA-00008, slip op. at 2 (ARB Oct. 24, 2019)).

DISCUSSION

Respondent moved for dismissal or, in the alternative, summary decision. Although titled "Order Granting Respondent's Motion to Dismiss," the ALJ analyzed the motion as one for summary judgment.[23] The Board will as well. The ALJ concluded that Vinnett raised no genuine issue of material fact regarding his knowing and voluntary execution of the Severance Agreement.[24] Since Vinnett released his right to recover from any retaliation claim occurring before the Severance Agreement, the ALJ determined that Vinnett's ERA claim was barred.[25]

On appeal, Vinnett argues that: (1) the ALJ erred in granting the motion for summary decision by disregarding his "documentation of alarming unsafe maintenance practices that threaten public health and safety;" (2) the ALJ erred in granting the motion to dismiss by disregarding his employment-based and retaliation claims; and (3) the ALJ abused her discretion by granting the motion for summary decision based only on the waiver and release.[26]

1. Severance Agreements Before the Board

As a preliminary matter, the Board considers whether the Severance Agreement precluded the ALJ from considering Vinnett's claim. In adjudicating an ERA whistleblower complaint, the ALJ and the Board have only the authority expressly or implicitly provided by law.[27] Under the ERA, OSHA is required to conduct an investigation of the violation alleged in a complaint.[28] Parties may settle a complaint filed with OSHA if approved by the Department.[29] However, the ERA and its implementing regulations do not address the effect or validity of agreements

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23 *See* Order Granting Motion to Dismiss at 2-4.

24 *Id*. at 9-10.

25 *Id*. at 10.

26 Appellant William Vinnett's Opening Appellate Brief (Comp. Br.) 5.

27 *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 2011-0019, ALJ No. 2010-STA-00022, slip op. 5 (ARB Nov. 28, 2012)).

28 42 U.S.C. § 5851(b)(2)(A); 29 C.F.R. § 24.104.

29 29 C.F.R. § 24.111.

reached before a complaint is filed.[30] Nonetheless, numerous courts, including the Board, have held that employees can waive their right to recover damages for violations of employment statutes.[31] For example, in *Khandelwal v. S. Cal. Edison*, the Board held that an employer named in a whistleblower complaint under the ERA may request termination of the proceeding on the basis of an agreement reached before the complaint was filed.[32] Similar to the Board's evaluation of post-filing settlement agreements, the Board adopts a three-part test to determine when a court should accept a pre-filing agreement as a defense in whistleblower cases.[33] These three conditions include: (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.[34] As discussed below, these three conditions are met in the present case.

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[30] We note that pre-filing severance agreements are not binding on the Department. Regulation 29 C.F.R. § 24.108 empowers the Assistant Secretary for OSHA, at her discretion, to participate as a party or participate as amicus curiae at any time at any stage of the proceeding. 29 C.F.R. § 24.108(a)(1). This right includes, but is not limited to, the right to petition for review of a decision of an ALJ, including a decision approving or rejecting a settlement agreement between the complainant and the respondent. *Id.* In the present case, the Assistant Secretary for OSHA did not participate as a party or participate as amicus curiae.

[31] *Gupta v. Headstrong, Inc.*, ARB Nos. 2015-0032, -0033, ALJ No. 2014-LCA-00008, slip op. at 2, 3-4 n.4 (ARB Jan. 26, 2017) (holding that the parties' settlement and release of claims extinguished all claims against the employer); *Myricks v. Fed. Rsrv. Bank of Atlanta*, 480 F.3d 1036, 1042-43 (11th Cir. 2007) (noting that employees can release causes of action under Title VII of the Civil Rights Act of 1964 (Title VII)); *Equal Emp. Opportunity Comm'n v. SunDance Rehab. Corp.*, 466 F.3d 490, 499 (6th Cir. 2006) (holding that employees can release causes of action under Title VII, the Age Discrimination in Employment Act of 1967, and the Equal Pay Act).

[32] *Khandelwal v. S. Cal. Edison*, ARB No. 1997-0050, ALJ No. 1997-ERA-00006, slip op. at 2-3 (ARB Mar. 31, 1998) (Decision and Order of Remand).

[33] The Acting Assistant Secretary for OSHA filed an amicus brief in *Khandelwal* agreeing with the policy to accept severance agreements as a defense to whistleblower allegations, subject to three conditions. *Id.* at 1-2 (noting that the Acting Assistant Administrator would apply the same standards to pre-filing agreements as to agreements reached during or after investigations).

[34] *Id.*

2. The Severance Agreement is Fair, Adequate, and Reasonable

The Board reviews agreements to determine if they are fair, adequate, and reasonable.[35] Vinnett argues that the Severance Agreement is not fair, adequate, or reasonable because: (1) it fails to impose any specific waiver-related requirements on Exelon Generation; (2) it reduces the amount of severance benefits offered to him (and similar situated employees) since Exelon Generation and other cost-conscious employers reduce such benefits to offset their anticipated legal expenses; and (3) it was only offered to him after Exelon Generation broke the law.[36] Yet, even with these concerns, Vinnett signed the Severance Agreement and accepted the money and other severance benefits.[37] The record does not show that Vinnett revoked the Severance Agreement or ever relinquished or offered to repay the consideration. Upon careful review of the Severance Agreement and the record before the Board, we find that the terms of the Severance Agreement are fair, adequate, and reasonable.

3. Vinnett Knowingly and Voluntarily Entered into the Severance Agreement

When a party challenges its release as not being knowingly or voluntarily entered into, courts either examine the totality of the circumstances surrounding the execution of the release or apply general principles of contract formation.[38] In the present case, the ALJ relied upon *Pierce v. Atchison, Topeka and Santa Fe Ry.*

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[35] *Clem v. Comput. Scis. Corp.*, ARB No. 2020-0025, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 2 (ARB May 16, 2022) (Decision and Order Approving Settlement and Dismissing Case with Prejudice) (reviewing whether an agreement's terms fairly, adequately, and reasonably settle an ERA claim).

[36] Appellant William Vinnett's Rebuttal Brief (Comp. Reply) 10.

[37] Order Granting Motion to Dismiss at 5; Motion to Dismiss, Ex. 1. (letter regarding severance benefits).

[38] *See Moldauer v. Canandaigua Wine Co.*, ARB No. 2004-0022, ALJ No. 2003-SOX-00026, slip op. at 15-18 (ARB Dec. 30, 2005) (Beyer, W., concurring); *see, e.g.*, *Myricks,* 480 F.3d at 1037-43; *Runyan v. Nat'l Cash Reg. Corp.*, 787 F.2d 1039, 1045 (6th Cir. 1986); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 540-51 (8th Cir. 1987).

Co.,[39] and analyzed the totality of the circumstances surrounding the execution of the Severance Agreement.[40] The ALJ considered a number of factors, including:

> (1) the employee's education and business experience; (2) the employee's input in negotiating the terms of the settlement; (3) the clarity of the agreement; (4) the amount of time the employee had for deliberation before signing the release; (5) whether the employee actually read the release and considered its terms before signing it; (6) whether the employee was represented by counsel or consulted with an attorney; (7) whether the consideration given in exchange for the waiver exceeded the benefits to which the employee was already entitled by contract or law; and (8) whether the employee's release was induced by improper conduct on the defendant's part.[41]

On appeal, Vinnett claims that the Severance Agreement is unenforceable because Exelon Generation acted improperly,[42] he did not have the opportunity to negotiate or provide input on the Severance Agreement,[43] he did not have time to consider the Severance Agreement due to personal and economic issues,[44] and he did not consult with an attorney prior to signing the Severance Agreement.[45]

The ALJ concluded that Vinnett had not raised a genuine issue of material fact regarding his knowing and voluntary execution of the Severance Agreement.[46] The ALJ conducted a thorough and detailed analysis of the record and determined that Vinnett's waiver was knowing and voluntary, based on the totality of the

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39 *Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 65 F.3d 562 (7th Cir. 1995).

40 Order Granting Motion to Dismiss at 4-5. The ALJ correctly determined that if this case were appealed, it would be appealed to the Seventh Circuit.

41 *Id*. (citing *Pierce*, 65 F.3d at 571).

42 It appears that Vinnett focuses on Exelon Generation's alleged "improper conduct" during his employment with company and not the circumstances surrounding the signing of the Severance Agreement. Comp. Br. 17-26, 28.

43 *Id*. 10-11, 28.

44 *Id*. 13-14.

45 *Id*. 12-15, 28.

46 Order Granting Motion to Dismiss at 9.

circumstances.[47] The Board agrees with the ALJ's analysis. First, while Vinnett is not trained in business practices or as an attorney, Vinnett is educated and has experience with severance agreements.[48] Vinnett sued a former employer in federal court, and the court found, among other things, that Vinnett knowingly and voluntarily released his claims arising before the agreement was executed.[49] Second, the Severance Agreement's terms are clear and unambiguous. It clearly states that Vinnett should consult with an attorney and provides procedures for signing and revoking the Agreement. Further, it indicates that by signing the Agreement, Vinnett waives his right to recover in any discrimination or retaliation claim but is not prohibited from making disclosures or reporting possible violations to the DOL or NRC.[50] Third, Vinnett was provided twenty-one days to sign the Severance Agreement and had an additional seven days to revoke it.[51] Vinnett signed the Severance Agreement after sixteen days and did not revoke it.[52] Fourth, Vinnett did not allege that he did not read the Severance Agreement or consider its terms before signing it.[53] Fifth, by signing the Severance Agreement, Vinnett became entitled to severance payments, partial payment for any converted health care coverage, and reimbursement for certain tuition and related costs by Exelon Generation.[54] Sixth, there was no evidence of duress or other impropriety by Exelon Generation.[55] These factors support the conclusion that Vinnett knowingly and voluntarily entered into the Severance Agreement.

Vinnett's other arguments are also unpersuasive. In addition to challenging the knowing and voluntary nature of a release, a party may assert challenges to the formation of the contract, such as offer, acceptance or consideration, or other

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47 The ALJ acknowledged Vinnett's lack of input in negotiating the Severance Agreement and his lack of attorney representation or advice prior to signing the Severance Agreement, yet still found under the totality of the circumstances that Vinnett knowingly and voluntarily entered into the Severance Agreement. *Id.* at 10.

48 *Id*. at 6-7.

49 *Id*.

50 *Id*. at 7-8.

51 *Id*. at 8.

52 *Id*.

53 *Id*.

54 *Id*.

55 *Id*. at 9.

defenses, such as duress or fraud.[56] Vinnett contends that Exelon Generation took advantage of his vulnerability[57] and that there was no "meeting of the minds" in the formation of the contract.[58] Specifically, Vinnett claims that following his termination he was under "economical and psychological pressure," had to relocate, had to file for unemployment benefits, and urgently needed the money.[59] Vinnett provided no facts or evidence to support his assertions. The Board has consistently held that general assertions are insufficient to avoid summary judgment.[60] Furthermore, as previously noted by the ALJ, "if every loss of employment (which by its nature entails financial hardship) were sufficient to establish economic duress, no settlement involving it would ever be free from attack."[61] Thus, the Board concludes that Vinnett raised no genuine issue of material fact regarding his knowing and voluntary execution of the Severance Agreement and that he failed to establish a defense to the formation of the Severance Agreement.

4. The Severance Agreement Does Not Violate Public Policy

The Board has consistently noted that the "purpose of the employee protections that [the DOL] administers is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public."[62] Agreements which restrict an employee's right to file a complaint with the appropriate enforcement agency are void as against public policy.[63] The Severance Agreement in the present case does not restrict Vinnett

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56 *Pierce*, 65 F.3d at 572.

57 Comp. Br. 17-26, 28.

58 *Id*. 28.

59 *Id*. 14.

60 *Oberg v. Quinault Indian Nation*, ARB No. 2019-0036, ALJ No. 2017-ACA-00003, slip op. at 9 (ARB Feb. 22, 2021) (general averments are not sufficient to avoid summary decision); *Nieman v. Se. Grocers, LLC*, ARB No. 2018-0058, ALJ No. 2018-LCA-00021, slip op. at 17 (ARB Oct. 5, 2020) (mere speculation and unsupported allegations are insufficient to avoid summary judgment); *Latigo v. ENI Trading & Shipping*, ARB No. 2016-0076, ALJ No. 2015-SOX-00031, slip op. at 3 (ARB Mar. 8, 2018).

61 Order Granting Motion to Dismiss at 9 (citing *Macktal v. Brown & Root, Inc.*, No. 1986-ERA-0023, 1989 WL 549876, at *3-4 (Sec'y Nov. 14, 1989)).

62 *Melton v. Yellow Transp., Inc.*, ARB No. 2006-0052, ALJ No. 2005-STA-00002, slip op. at 20 (ARB Sept. 30, 2008).

63 *Khandelwal*, ARB No. 1997-0050, slip op. at 3-4; *Macktal v. Brown & Root, Inc.*, No. 1986-ERA-0023, slip op. at 2-3 (Sec'y Oct. 13, 1993) (Order Disapproving Settlement and

from filing a whistleblower complaint or providing agencies with information to carry out their responsibilities. Specifically, the Severance Agreement provides:

> [N]othing in this Agreement . . . shall be construed to prohibit me from filing a charge with, or reporting possible violations of law or regulation to any governmental agency or entity, . . . or making other disclosures that are protected under the whistleblower provisions of applicable law or regulation. I understand that I am not required to seek authorization from (or notify) the Company of any such reports or disclosures, and this Waiver and Release does not limit my right to receive an award for the provision of such information. I acknowledge, however, that I am specifically waiving all rights to recover any and all monetary damages from [Exelon Generation] including but not limited to lost wages and benefits, lost pay, damages for emotional distress, punitive damages, reinstatement, attorneys' fees and costs.[64]

Upon filing a complaint with the DOL, the ERA's implementing regulations require agencies to be notified about the complaint and permit these agencies to participate at any time during a whistleblower proceeding. For example, 29 C.F.R. § 24.108(a) permits the Assistant Secretary for OSHA, at their discretion,[65] to participate as a party or amicus curiae, while § 24.108(b) permits the Environmental Protection Agency, the NRC, and the Department of Energy, if interested, to participate as amicus curiae at any time in the proceedings.[66] Thus, because Vinnett's severance agreement does not restrict his ability to contact an agency, file a whistleblower complaint, or obstruct an agency from carrying out its responsibilities, it does not violate public policy.

Remanding Case); *see also Equal Emp. Opportunity Comm'n v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987).

64 Motion for Summary Decision, Ex. 2, para. 10.

65 In recognition of the fact that the person holding the position of Assistant Secretary of OSHA has changed over time, the Board uses plural pronouns when referring to the Assistant Secretary of OSHA in this decision.

66 29 C.F.R. § 24.108; see also 42 U.S.C. § 5851(b) ("Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the Commission, and the Department of Energy.").

CONCLUSION

Because the Board concludes that the Severance Agreement is fair, adequate, and reasonable; does not violate public policy; and was knowingly and voluntarily executed, the Board **AFFIRMS** the ALJ's Order Granting Motion to Dismiss.

SO ORDERED.

THOMAS H. BURRELL
Administrative Appeals Judge

TAMMY L. PUST
Administrative Appeals Judge

IVEY S. WARREN
Administrative Appeals Judge