State of Wisconsin

Labor and Industry Review Commission

Susan Coenen, Complainant	**Fair Employment Decision**
Plexus Corp., Respondent	
	Dated and Mailed:
ERD Case No. CR201703306 EEOC Case No. 26G201800293C	January 8, 2021 coenesu1_rsd.doc:164

The decision of the administrative law judge is **affirmed,** subject to **modification**. Accordingly, the complainant's complaint is dismissed with prejudice as to her claims that the respondent violated the Wisconsin Fair Employment Act.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
David B. Falstad, Commissioner

/s/
Georgia E. Maxwell, Commissioner

Procedural History

On December 15, 2017, the complainant filed a complaint with the Equal Rights Division (hereinafter "Division") of the Department of Workforce Development alleging that the respondent discriminated against her based upon her age, disability, and in retaliation for opposing discrimination in the workplace and filing a prior complaint, all in violation of the Wisconsin Fair Employment Act (hereinafter "WFEA"). An Equal Rights Officer for the Division issued an initial determination finding no probable cause to believe that discrimination occurred. The complainant filed a timely appeal, and a hearing was scheduled for March 12, 2019.

On March 1, 2019, the complainant submitted her witness and exhibit list, which included the names of 33 witnesses. On March 6, a week before the hearing, the respondent's attorney contacted the complainant's attorney by telephone to discuss settlement. During that call the complainant's attorney asked whether the respondent would be willing to accept subpoenas for more than 20 individuals named on the complainant's witness list. In her brief to the commission, the complainant's attorney asserts that the respondent's attorney indicated she would be willing to do so and asked the complainant's attorney to send the subpoenas first thing in the morning. The respondent's attorney disputes this, and states that there was no such agreement and that she indicated she would need to consult with her client. It is undisputed that first thing the next day, Thursday, March 7, the complainant's attorney emailed the respondent's attorney 26 witness subpoenas and that, just a few minutes later, the respondent's attorney responded that she was not authorized to accept service of the subpoenas, some of which were for witnesses who were no longer employed by the respondent.

On Friday, March 8, 2019, three business days before the hearing, the complainant's attorney sent an email to the administrative law judge stating that a "change in the expected level of cooperation between the parties has seriously and irreversibly damaged the complainant's ability to proceed as scheduled."[1] The complainant's attorney requested a telephone conference.

A telephone conference was held at 9:30 a.m. on Monday, March 11, 2019, one day prior to the hearing. During the telephone conference the complainant's attorney explained that, because the respondent had agreed to serve subpoenas on the respondent's employees in conjunction with a prior hearing involving the same employer, the complainant assumed that it would do so again. The respondent's attorney offered a variety of reasons why she was not willing or able to assist this time, including that her client had new leadership and that, while the prior hearing

[1] In his brief to the commission the complainant's attorney asserts that over the course of March 7 and 8, 2019, he was able to reach two witnesses, neither of whom was still employed by the respondent, and neither of whom was available for testimony before midafternoon on March 12. The complainant's attorney does not specify whether or not he attempted to locate all 26 witnesses during that time.

had involved a more manageable total of five subpoenas, the complainant's attorney had not provided sufficient notice for the respondent to make arrangements to produce over 20 witnesses. The complainant's attorney asked the administrative law judge to postpone the hearing so that he could arrange for the attendance of the complainant's witnesses. The administrative law judge denied the request for a continuance. The administrative law judge stated that in her experience it was unprecedented to hold a probable cause hearing with 26 witnesses and, further, that although parties are expected to cooperate, the complainant's expectations of the respondent were not reasonable. The administrative law judge indicated that if the complainant could identify three to five witnesses who were essential to her case, the administrative law judge would work with the parties to arrange for them to be at the hearing. The complainant did not avail herself of this opportunity.

The following day the complainant appeared for the hearing with no witnesses and renewed her request for a continuance. The administrative law judge again denied the request. The administrative law judge indicated that the number of witnesses the complainant sought to present was excessive and that the complainant's attorney had not made appropriate arrangements for them to appear. The parties agreed to attempt settlement one more time. They went off the record and held a successful settlement discussion which resulted in a signed confidential settlement agreement. The complainant then signed a request to withdraw her complaint, which the administrative law judge stated she would hold "in trust" until the parties notified her that the terms of the settlement agreement had been completed. Prior to closing the record, the administrative law judge asked the complainant if she had had an opportunity to review the terms of the settlement agreement, if the document was explained to her by her attorney, and if she felt she understood it. The complainant responded yes to those questions and indicated that she had no questions or concerns about the agreement.

On March 14, 2019, prior to any further action by the administrative law judge, the complainant notified the administrative law judge that she wanted to revoke the settlement agreement. The respondent subsequently filed a motion asking the administrative law judge to enforce the settlement as agreed to by the parties. On November 14, 2019, the administrative law judge issued a decision enforcing the settlement agreement and dismissing the complainant's discrimination claim. The complainant has filed a timely petition for commission review of that decision.

The commission has considered the petition and the positions of the parties, and it has reviewed the information that was before the administrative law judge. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own, except that it makes the following:

Modification

In the second full paragraph on page 4 of the administrative law judge's DECISION ON MOTION TO ENFORCE SETTLEMENT AGREEMENT the name "Attorney Kilborn" is deleted and the name "Attorney Kuborn" is substituted therefor.

Memorandum Opinion

In her petition for commission review the complainant states that there are two issues to decide: whether the administrative law judge's refusal to grant a continuance amounted to a denial of due process and whether the administrative law judge properly determined that the complainant's claims were voluntarily and knowingly waived. The complainant asks the commission to "remove the defective settlement agreement" and remand the matter to the Division for further proceedings, including what she describes as a "reasonable continuance."

The question of whether the administrative law judge's refusal to grant a continuance amounted to an abuse of discretion is not before the commission at this time. A party who wishes to challenge an administrative law judge's procedural ruling must proceed with the hearing and make the objection on the record, then file an appeal once the decision has been issued. To allow parties to bail out of hearings when they receive rulings they disagree with (either by failing to appear or, as here, by entering into a settlement that they later attempt to revoke) would essentially have the effect of allowing parties to appeal non-final, interlocutory decisions. *See*, *Mullins v. Wauwatosa School District*, ERD Case No. CR200800326 (LIRC May 17, 2013), and cases cited therein. Once the complainant entered into a settlement agreement and withdrew her complaint, she waived her opportunity to challenge the administrative law judge's procedural ruling. Thus, the only question presented is whether there is any basis to set aside the settlement agreement.

Complainants are generally required to tender back any consideration received in exchange for the waiver of their rights to pursue discrimination claims, as a condition precedent to challenging the validity of such waiver. *Musial v. Aecom Government Services, Inc.*, ERD Case No. CR201203059 (LIRC July 21, 2014), citing *Giese & Field v. Wausau Ins. Cos.,* ERD Case Nos. 8600691, No. 8600731 (LIRC, Oct 25, 1988). *See*, also, *Xu v. Epic Systems Corp.*, ERD Case No. CR201301600 (LIRC Jan. 31, 2017)(fn 2). In its brief to the commission the respondent presents copies of checks written to the complainant and her attorney on March 18 and 19, 2019, which it contends have not been returned. The complainant maintains that the respondent did not attempt to provide any consideration until after she had already taken action to revoke the agreement and, further, that no settlement checks were ever received. It is not possible to determine, based upon what is before the commission, whether or not the settlement checks were in fact received by the complainant, and therefore it cannot be affirmatively found that the complainant failed to return the consideration she received. If the commission were inclined to consider invaliding the settlement agreement, it might ask the parties to submit further proof on this issue. However, seeing no basis to set aside the settlement agreement in this case, the commission

will proceed to analyze whether the agreement was entered into knowingly and voluntarily, in spite of the complainant's possible failure to have returned the consideration she received.

It is the commission's policy to treat settlements as final, provided the party has entered into the agreement knowingly and voluntarily. *Summers v. Northwest Airlines, Inc.*, ERD Case No. 199801405 (LIRC May 26, 2000). "There would be no incentive to enter into a settlement if, once entered into, it could be repudiated by the other party simply because they thought better of it later. If settlement is to be encouraged, settlements must be treated as final when made." *Scott v. Oconomowoc Area Sch. Dist.*, ERD Case No. CR200301885 (LIRC Jan. 30, 2004).

A party alleging that he or she has entered into a settlement agreement under duress is required to specifically allege conduct constituting duress which would, if true, justify voiding the agreement. *Gribbons v Chart Industries, Inc.,* ERD Case No. CR20002829 (LIRC March 26, 2002). Parties who have entered into settlement agreements providing for the dismissal of their complaints, or who have executed and filed requests to withdraw their complaints based on settlements, cannot have their cases reopened by alleging that they exercised poor judgment in agreeing to the settlement, *Pustina v. Fox & Fox, S.C.*, ERD Case No. 9100377 (LIRC April 27, 1993), or that they agreed under "duress" of the financial difficulty presented by being out of work, *Kaufer v. Miller Brewing Co.*, ERD Case No. 9051914 (LIRC Nov. 19, 1993), or that they were poorly represented, misled by, or otherwise ill-served by their attorneys, *Kellar v. Copps Gas Station* ERD Case No. CR200203601(LIRC Jan. 28, 2004).

It is also a condition of according final and binding effect to a settlement agreement that there is nothing in the terms of the settlement agreement itself which makes it invalid on its face. *Crymes v. County of Milwaukee*, ERD Case No. CR200201569 (LIRC Feb. 24, 2004). "Once a complainant, personally or through counsel, makes an unconditional request for the withdrawal of a complaint, dismissal by the department is required pursuant to Wis. Adm. Code § DWD 218.03(7), and collateral attacks on the finality of the settlement will not be entertained by the commission in the absence of an allegation of misrepresentation or intimidation by a representative of the department, or an allegation that a provision of the underlying settlement agreement is *per se* invalid." *Oehldrich v. Wausaukee Rescue Squad, Inc.*, ERD Case No. CR200104064 (LIRC Oct. 29, 2004), citing *Leggett v. County of Milwaukee*, ERD Case No. 199902500 (LIRC Feb. 13, 2004); *Kellar v. Copps Gas Station*, ERD Case No. CR200203601 (LIRC Jan. 28, 2004); and *Johannes v. County of Waushara*, ERD Case No. 9321736 (LIRC Nov. 1, 1993).

In this case, the commission is satisfied that the complainant's waiver of her right to proceed under the WFEA was both knowing and voluntary. The settlement agreement is clearly written and easily understandable. Per the terms of the

agreement, the complainant received consideration in the form of a cash payment in exchange for the release of her claims, which exceeded those benefits to which the complainant was entitled by contract. Although it does not appear that the complainant had much time to examine the agreement before signing it, given that the negotiations took place on the morning of the hearing, she was represented by counsel and was informed of her rights. When asked, the complainant told the administrative law judge that she had an opportunity to review the terms of the settlement agreement, that her attorney explained it to her, and that she understood it. The complainant indicated that she had no questions or concerns about the agreement.

Notwithstanding the above, the complainant argues that, as a result of the administrative law judge's decision not to grant a continuance, she was under duress and did not knowingly or voluntarily enter into any settlement discussion. The commission does not find this argument persuasive. The complainant requested a continuance because she was not ready for the hearing and had not secured her witnesses. Even accepting the complainant's assertion that this was not her fault and that the administrative law judge should have given her more time to prepare--and the commission wishes to emphasize that it makes no findings on this point--the failure to grant the requested continuance did not force the complainant into accepting a settlement. That the complainant was worried she would not prevail at her hearing does not amount to duress; after all, fear of losing the hearing is often the reason why parties choose to settle. *See*, *Lokken v. General Casualty of Wisconsin*, ERD Case No. CR20001635 (LIRC May 30, 2002)(It is legitimate for a respondent to attempt to persuade a complainant to settle her complaint by explaining that it plans to present evidence that would defeat her case, and a complainant's decision not to go forward under those circumstances might well be considered a rational response to a concern that she was not going to prevail.) The fact that the complainant may have made the calculation that she had no other reasonable option but to settle does not mean the settlement was not voluntary. There were no threats or wrongful acts that induced the complainant to settle[2]--the complainant simply made what seemed like the best decision at the time, and then thought better of it later.[3]

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[2] "Duress involves 'wrongful acts . . . that compel a person to manifest apparent assent to a transaction without his volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction." Restatement of Contracts, sec. 493 (1932), cited in *Wurtz v. Fleishman*, 97 Wis. 2d 100 (1980). *See*, also, *Hope v. Ziegler*, 127 Wis. 2d 56, 60 (Ct. App. 1985).

[3] It is worth pointing out that the complainant is now seeking a third option that was not available to her on the day of the hearing, at which time she could either choose to proceed with the hearing without her witnesses or accept the settlement. What the complainant is asking the commission to do now is set aside the settlement agreement and then allow her to proceed with the hearing under the terms she requested, but that were denied by the administrative law judge: i.e., with a continuance to allow her to arrange for the appearance of her witnesses.

The complainant also argues that the settlement is invalid and unenforceable on its face because it does not comply with the terms of the federal Older Workers Benefit Protection Act (OWBPA). The OWBPA contains some safeguards for individuals in the protected age group who sign settlement agreements. *See*, 29 U.S.C. § 626(f). Among other things, the employee must be given 21 days to think about it before signing, as well as a 7-day revocation period. Neither of these safeguards were included in the settlement agreement the complainant signed. However, the commission agrees with the administrative law judge that any potential failure to comply with the requirements of the OWBPA might affect the complainant's rights under the federal ADEA, but have no bearing on her claims under the WFEA. *See*, *Crymes v. County of Milwaukee*, ERD Case No. CR200201569 (LIRC Feb. 24, 2004)(the fact that a settlement agreement did not contain notice of the 7-day revocation period required under the OWBPA for agreements waiving ADEA claims did not make it invalid with respect to its plainly stated effect of foreclosing the complainant's WFEA claim). The administrative law judge's decision, finding that the complainant has waived her rights to proceed with her claim under the WFEA, is therefore affirmed.

cc: Michael Kuborn
Lindsey Davis