

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GABRIEL BOVEA,)
)
 Petitioner,)
)
 vs.) Case No. 09-0394
)
 MERCANTILE COMMERCEBANK,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 17, 2009, by video teleconference, with the parties appearing in Miami, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Sheila M. Cesarano, Esquire
Shutts & Bowen
1500 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131

For Respondent: Donn S. Dutton, Esquire
Donn S. Dutton, P.A.
4300 Biscayne Boulevard, Suite 305
Miami, Florida 33137

STATEMENT OF THE ISSUE

Whether the Petitioner waived his statutory rights to pursue a cause of action under the Florida Civil Rights Act of

1992 when he signed a post-termination agreement containing a general release of all claims against the Respondent, thus rendering the Florida Commission on Human Relations without jurisdiction.

PRELIMINARY STATEMENT

On September 8, 2008, Gabriel Bovea filed an Employment Charge of Discrimination with the Florida Commission on Human Relations ("FCHR") alleging that Mercantil Commercebank ("Commercebank") discriminated against him on the basis of his marital status and retaliated against him. On December 18, 2008, the FCHR entered a Determination: No Jurisdiction, in which it found that Mr. Bovea had signed a general release agreement in which, for consideration, he had agreed to forego any claims against his employer. Mr. Bovea timely filed a Petition for Relief, and the FCHR forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the final hearing was held on March 17, 2009.

At the hearing, Mr. Bovea testified in his own behalf, and Petitioner's Exhibits 1 and 2 were offered and received into evidence. Commercebank presented the testimony of Juan Carlos Pró-Rísquez and Magdalena Mata; Respondent's Exhibits 1 through 4 were offered and received into evidence.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on March 31, 2009, and the parties timely filed proposed findings of fact and conclusions of law and closing arguments, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Mr. Bovea was employed by Mercantil Banco Universal ("Banco Universal"), a Venezuelan corporation, from October 27, 1986, to June 15, 2003. During this time, Mr. Bovea worked in Venezuela, and he eventually became manager of the Banco Universal's call center, which handled inquiries from customers. Mr. Bovea also earned an undergraduate degree and a master's degree in business administration.

2. Mr. Bovea was promoted and transferred to Miami, Florida, where, on June 16, 2003, he began working as the manager of the call center for Commercebank, which is incorporated in the United States.

3. Upon his separation from Banco Universal, Mr. Bovea was paid the employment benefits that were due to him under Venezuelan law for his employment that commenced in October 1986 and ended on June 15, 2003.

4. In 2005, Mr. Bovea was promoted to manager of global electronic banking operations for both Commercebank in Florida and Banco Universal in Venezuela. He had a supervisor in Venezuela, Hilda Monsalve, and also one in Miami, Florida, Herbie Folgueira.

5. After he was promoted in 2005, Ms. Monsalve told Mr. Bovea that she wanted him to work with her in Venezuela at Banco Universal and that he should request a transfer from Commercebank. Ms. Monsalve continued to ask him to transfer to Venezuela during 2005, 2006, and 2007, and Mr. Folgueira, Mr. Bovea's supervisor at Commercebank in Miami, also told him during this time that he would have to go back to Venezuela. Mr. Bovea did not request the transfer because he wanted to remain in Miami, and he chose to search for a different position with Commercebank in Miami.

6. Finally, Ms. Monsalve told Mr. Bovea in or around September 2007 that his opportunity to transfer to Venezuela would expire on December 31, 2007.

7. Mr. Bovea met several times with Magdalena Mata, Commercebank's Human Relations Manager, to discuss any job vacancies that he might fill with Commercebank in Miami.

8. Mr. Bovea's final meeting with Ms. Mata was on December 20, 2007, when Ms. Mata reviewed the vacant positions and told him that there was nothing available for him at that

time. Ms. Mata advised Mr. Bovea that he had until December 31, 2007, to find a position with Commercebank or his employment would be terminated.

9. At the December 20, 2007, meeting, Ms. Mata gave Mr. Bovea a document entitled "Separation Agreement," and she read the entire document to Mr. Bovea and explained it to him.

10. The Separation Agreement provided that Mr. Bovea would be separated from employment with Commercebank and all its affiliated companies effective December 31, 2007. It also provided that Commercebank would pay Mr. Bovea six weeks' base salary, less payroll deductions, "in full satisfaction of any and all claims" and that this sum "is not a benefit to which Employee would otherwise be entitled as a result of Employee's employment" with Commercebank and its affiliated companies.

11. Ms. Mata advised Mr. Bovea that he had 21 days, or until January 10, 2008, in which to sign the Separation Agreement and return it to her. Ms. Mata also told Mr. Bovea that, if he obtained another position at Commercebank, the Separation Agreement would be invalid.

12. Mr. Bovea asked Ms. Mata if he was entitled to any benefits under Venezuelan law. She told him she was not familiar with Venezuelan law. She later telephoned him and told him he should speak with her counterpart in Venezuela, Jose Gregorio Silverio, to discuss any benefits to which he would be

entitled as a result of his employment between June 2003 and December 2007.

13. Mr. Bovea left for vacation in Venezuela on December 21, 2007, and he contacted Mr. Silverio at the Banco Universal. Mr. Silverio arranged to meet with Mr. Bovea early on the morning of January 8, 2008, the day Mr. Bovea was to leave Venezuela to return to Florida. Mr. Bovea believed that he and Mr. Silverio would discuss any benefits to which he might be entitled under Venezuelan labor and employment law.

14. Mr. Bovea and Mr. Silverio were acquainted because they had worked together through the years he had been employed by Banco Universal, but they were not friends. As a result of their relationship as colleagues, Mr. Bovea trusted Mr. Silverio, and, as described by Mr. Bovea, the meeting was cordial and friendly.

15. Mr. Bovea estimated that his meeting with Mr. Silverio lasted about one hour. Mr. Silverio began the meeting by advising Mr. Bovea that the purpose of the meeting was to discuss his employment situation. After Mr. Bovea told Mr. Silverio his story about what had happened, Mr. Silverio produced a document that Mr. Bovea was to sign and a check. Mr. Silverio told Mr. Bovea that the purpose of the document, which was a settlement agreement, and the check was to protect the company and its image.

16. The settlement agreement was presented to Mr. Bovea in Spanish, his native language. The first paragraph of the settlement agreement stated in pertinent part that Mr. Bovea and Banco Universal, identified in the settlement agreement as the "COMPANY," "agreed, based on our freedom to contract, to sign this document describing the reason for voluntarily terminating our employment relationship, in accordance with the settlement agreement regulating the economic aspects of voluntarily [sic] termination of the employment relationship."¹

17. The first clause of the Background section of the settlement agreement, on page one of the document, confirmed that Mr. Bovea had been employed by Banco Universal in Venezuela and by Commercebank in the United States, both of which were owned by Mercantil Servicios Financieros C.A. ("Mercantil"), and the second clause provided the Mr. Bovea's employment extended from October 27, 1986, through December 31, 2007, the inclusive dates of his employment with Banco Universal and Commercebank.

18. The settlement agreement provided that Mr. Bovea agreed, in exchange for the payment of 175,000 Strong Bolivars, or approximately \$81,000.00, that he had no further claims against Banco Universal or any other company or entity related to Banco Universal, "based on its activities, nor for any other item" and that the purpose of the settlement amount was "to finally resolve all claims, disagreements, and disputes between

the EMPLOYEE and the COMPANY." The settlement agreement also provided that Mr. Bovea released

the COMPANY, as well as any other entity or parent, subsidiary, or related company, without any remaining pending obligation or responsibility between the parties. In addition, it is deemed that the settlement indemnity set forth in this document resolves any difference that could arise based on activities at institutions forming the group of companies [known as] MERCANTIL SERVICIOS FINANCIEROS C.A.

The settlement agreement contains several other provisions to the same effect.

19. At the January 8, 2008, meeting, Mr. Silverio and Mr. Bovea discussed benefits that might be due Mr. Bovea under Venezuelan law. Mr. Silverio told Mr. Bovea that, as set out in the settlement agreement, he was entitled to no benefits in addition to those he had received in June 2003, when he left his employment with Banco Universal and moved to the United States to work at Commercebank in Miami, Florida. Mr. Silverio also told Mr. Bovea that he was owed nothing under Venezuelan law as a result of his employment with Commercebank in Miami.

20. Mr. Silverio advised Mr. Bovea that the check accompanying the settlement agreement, which was in the amount of 175,000 Strong Bolivars, or about \$81,000.00, was the best deal Mr. Bovea could get because, even if Mr. Bovea was owed benefits under Venezuelan law, they would be less than the

amount he was being offered. Mr. Silverio also told Mr. Bovea that he needed to sign the settlement agreement that day or it would be withdrawn.

21. Mr. Bovea asked Mr. Silverio whether he could sign the settlement agreement presented to him by Mr. Silverio and the Separation Agreement presented to him by Ms. Mata in Miami. Mr. Silverio told him that the two documents were "mutually exclusive." Mr. Bovea testified that he believed this meant that the agreements were "complementary" and that he had the option of signing both.

22. Mr. Bovea asked Mr. Silverio if he could consult his attorney regarding the settlement agreement, and Mr. Silverio told him that he could call his attorney but that he could not take the document outside of the bank. Mr. Bovea did not, however, have an attorney in Venezuela, so he had no one to call. Mr. Silverio told Mr. Bovea that he had arranged for an independent attorney, Ingrid Zuleima Castro Aldana, to be present to answer any questions Mr. Bovea might have about the settlement agreement. According to Mr. Bovea, Ms. Aldana did not enter the room until after he had signed the settlement agreement, but, in any event, Mr. Bovea did not ask her any questions regarding the document.

23. Mr. Silverio gave Mr. Bovea the opportunity to review the settlement agreement, and Mr. Bovea looked through it.

Mr. Bovea understood that the settlement agreement was a legal document that was a binding agreement, but he also noted that it was lengthy and complex.

24. A Notary Public was present and prepared a certification statement in which he indicated that Sergio E. Rodriguez Bastardo, Mr. Bovea, and Ms. Aldana were present in the room when he arrived, together with two witnesses; there is no indication that Mr. Silverio was present at the signing. The Notary Public acknowledged in the statement that he had received a copy of the settlement agreement on January 7, 2008, for his review and that the parties all attested that the signatures appearing on the document were theirs and that the contents of the document were true.

25. In Venezuela, a Notary Public is an employee of the government and must be a lawyer with at least five years' experience. It is the responsibility of the Notary Public to review the documents presented to him and to be prepared to answer questions about the documents. Mr. Bovea did not ask the Notary Public any questions about the settlement agreement.

26. After signing the settlement agreement, Mr. Bovea received a check for 175,000 Strong Bolivars, which he cashed. Mr. Bovea has not returned or offered to return this money.²

27. At the January 8, 2008, meeting, Mr. Bovea, who was single, discussed with Mr. Silverio his belief that he had been

discriminated against because of his marital status, especially by Ms. Monsalve, his supervisor at Banco Universal in Venezuela. Mr. Bovea and Mr. Silverio discussed Mr. Bovea's complaints of discrimination, and Mr. Bovea told Mr. Silverio that he thought he had a claim for employment discrimination under the laws of Florida and of the United States. Mr. Bovea had previously, on or about July 2007, discussed his claims that he was the object of employment discrimination with Mr. Silverio, and he told Mr. Silverio that he believed his termination was to retaliate against him because of his discrimination complaints.

28. On or about January 10, 2008, Mr. Bovea telephoned Ms. Mata and told her that he was not going to sign the Separation Agreement she had offered to him in Miami.

Summary

29. The evidence presented by Mr. Bovea is insufficient to establish with the requisite degree of certainty that he did not knowingly and voluntarily release all claims against Banco Universal and Commercebank by signing the settlement agreement presented to him by Mr. Silverio and taking the check presented to him in the amount of 175,000 Strong Bolivars. Mr. Bovea presented himself through his testimony as being confused by everything that "happened" to him, but it is also clear from his testimony that he was very aware of his situation. He knew his employment with Commercebank and its affiliates would terminate

on December 31, 2007; he knew that the document Ms. Mata presented to him and discussed with him in detail on December 20, 2007, was a separation agreement; and he knew that, in exchange for a severance payment, the Separation Agreement provided that he would release Commercebank and its affiliates from any claims he might have against them should he sign the agreement.³

30. Mr. Bovea's testimony that, when he met with Mr. Silverio on January 8, 2008, he was unaware that his employment with Commercebank and Banco Universal was terminated and that he was confused about the purpose and effect of the settlement agreement presented to him by Mr. Silverio is not persuasive. Mr. Bovea is an experienced businessman, having earned a master's degree in business administration and having been in middle management with Banco Universal and Commercebank for many years. Mr. Bovea was given the opportunity to read the document; to call a lawyer of his choice regarding the document; and to ask questions about the document of an independent lawyer retained on his behalf by the bank. The document clearly states in numerous places that the purpose of the settlement agreement was to settle all claims Mr. Bovea might have against Banco Universal and its affiliates, which would include Commercebank, in return for 175,000 Strong Bolivars and that the effect of the document was to resolve all "claims, disagreements, and

disputes" Mr. Bovea might have with Banco Universal and its affiliates. This language appears in bold typeface under the section of the document entitled "SETTLEMENT."

31. Mr. Silverio gave Mr. Bovea the opportunity to read the settlement agreement presented to him on January 8, 2008, and to contact his lawyer, but the amount of time Mr. Silverio gave Mr. Bovea was inordinately short. Nonetheless, the amount of time Mr. Bovea had to review the document and the opportunity he had to consult with an independent lawyer was, under the circumstances, adequate to apprise Mr. Bovea that he would be giving up his claims against Banco Universal and its affiliates. It is clear from his testimony that Mr. Bovea was aware that the Separation Agreement presented to him by Ms. Mata on December 20, 2007, included a release of any claims he might have against Commercebank and its affiliates, and he had had ample time to consider the terms of the Separation Agreement. During the January 8, 2008, meeting, Mr. Silverio and Mr. Bovea discussed the relationship between the Separation Agreement presented to Mr. Bovea in Miami and the settlement agreement Mr. Silverio had presented to him, and Mr. Bovea's primary concern was whether he could sign the Separation Agreement and receive the six weeks' of salary pursuant to that document and also sign the settlement agreement presented by Mr. Silverio and receive the approximately \$81,000.00 offered in that agreement.

32. Mr. Bovea testified that Mr. Silverio told him the Separation Agreement presented to him by Ms. Mata and the settlement agreement presented to him by Mr. Silverio were "complementary" and "mutually exclusive." The use of these two terms is contradictory, since "complementary" means that one document supplements the other, while "mutually exclusive" means that either document excludes the other. Both agreements, however, expressly provide that they govern the employment relationship between Mr. Bovea and both Banco Universal and Commercebank, as affiliates of one another. Given the level of Mr. Bovea's education and the clear intention expressed in the documents themselves that the Separation Agreement and the settlement agreement each apply to both Banco Universal and Commercebank, Mr. Bovea's testimony that he thought the one agreement applied only to his employment in the United States and the other applied only to his employment in Venezuela, especially since he had dual employment in the United States and Venezuela from 2005 until his termination in December 2007, is not creditable.

33. With respect to the sufficiency of the consideration paid to Mr. Bovea under the settlement agreement, Mr. Bovea presented no evidence to establish the amount to which he was entitled under Venezuelan law. He merely expressed his belief that he was entitled to much more than the 175,000 Strong

Bolivars he accepted upon signing the settlement agreement and stated that he had filed suit in Venezuela claiming that the amount he accepted was inadequate under Venezuelan law. In the absence of a verdict in the Venezuelan case, it was incumbent upon Mr. Bovea to provide proof that the consideration paid under the settlement agreement was much less than the amount to which he was entitled.

34. Finally, although the settlement agreement presented to Mr. Bovea by Mr. Silverio indicated that it would be presented to a labor official in the Venezuelan government "to approve this settlement so that it may be deemed as res judicata," the failure of Banco Universal to obtain the signature of a labor official does not affect the legal validity of the settlement agreement.

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

36. Mr. Bovea has the burden of proving by a preponderance of the evidence that he was the object of employment discrimination, see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), and this burden includes proof that he

has a claim that is cognizable under the Florida Civil Rights Act of 1992, as amended.

37. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000)(relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

38. Section 760.10, Florida Statutes (2007), part of the Florida Civil Rights Act of 1992, as amended, provides in pertinent part:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

* * *

(7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in

an investigation, proceeding, or hearing under this section.

39. Florida courts routinely rely on decisions of the federal courts construing Title VII of the Civil Rights Act of 1964, codified at Title 42, Section 2000e et seq., United States Code, ("Title VII"), when construing the Florida Civil Rights Act of 1992, "because the Florida act was patterned after Title VII." Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998), citing, inter alia, Ranger Insurance Co. v. Bal Harbor Club, Inc., 549 So. 2d 1005, 1009 (Fla. 1989), and Florida State University v. Sondel, 685 So. 2d 923, 925, n. 1 (Fla. 1st DCA 1996).

40. It is settled law that a person may waive his or her rights to pursue an employment discrimination claim pursuant to Title VII in a settlement agreement if the waiver of these rights is knowing and voluntary. The court in Puentes v. UPS, 86 F.3d 196, 198 (11th Cir. 1996) explained the requirements for a knowing and voluntary waiver as follows:

When an employee knowingly and voluntarily releases an employer from liability for Title VII . . . claims with a full understanding of the terms of the agreement, he is bound by that agreement. E.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 & n. 15, 94 S. Ct. 1011, 1021 & n. 15, 39 L. Ed. 2d 147 (1974); Freeman v. Motor Convoy, Inc., 700 F.2d 1339, 1352 (11th Cir. 1983). However, the waiver of such remedial rights must be closely scrutinized. Freeman, 700 F.2d at 1352; see

also Coventry v. United States Steel Corp., 856 F.2d 514, 522-23 (3d Cir. 1988) ("In light of the strong policy concerns to eradicate discrimination in employment, a review of the totality of the circumstances, considerate of the particular individual who has executed the release, is also necessary.").

In determining whether a release was knowingly and voluntarily executed, courts look to the totality of the circumstances. Factors that guide a court include:

the plaintiff's education and business experience; the amount of time the plaintiff considered the agreement before signing it; the clarity of the agreement; the plaintiff's opportunity to consult with an attorney; the employer's encouragement or discouragement of consultation with an attorney; and the consideration given in exchange for the waiver when compared with the benefits to which the employee was already entitled.

Beadle v. City of Tampa, 42 F.3d 633, 635 (11th Cir. 1995); see also Gormin v. Brown-Forman Corp., 963 F.2d 323, 327 (11th Cir. 1992).

* * *

There is no bright-line test for determining what is a sufficient amount of time for an employee to consider a release and consult with an attorney before the employee is considered to have signed the release knowingly and voluntarily.

41. Based on the findings of fact herein and a consideration of the totality of the circumstances surrounding

Mr. Bovea's execution of the settlement agreement in light of the six factors set forth in Puentes, Mr. Bovea has failed to carry his burden of proving that his release of all claims against Banco Universal and Commercebank was unknowing or involuntary. Accordingly, it is concluded, based on the findings of fact herein, that Mr. Bovea released Commercebank, as an affiliate of Banco Universal, from all claims he might have against them in the Settlement Agreement he executed January 8, 2008. Mr. Bovea, therefore, has no claim cognizable under the Florida Civil Rights Act of 1992, as amended, and the FCHR has no jurisdiction in this matter.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that Gabriel Bovea released his claims for employment discrimination and retaliation against Commercebank and dismissing Mr. Bovea's Petition for Relief from employment discrimination for lack of jurisdiction.

DONE AND ENTERED this 30th day of June, 2009, in
Tallahassee, Leon County, Florida.



PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of June, 2009.

ENDNOTES

^{1/} The quotations included herein are from the certified translation into English of the original document.

^{2/} Mr. Bovea has filed suit in Venezuela, alleging that he is due additional benefits under Venezuelan law. It appears, however, that he has not challenged the validity of the settlement agreement in the Venezuelan lawsuit.

^{3/} Mr. Bovea's testimony that he did not know the document Ms. Mata gave him was a separation agreement terminating his employment and that he did not know what was "happening" to him is rejected as not credible. Mr. Bovea had known since at least September 2007 that he must either transfer to Banco Universal in Venezuela or find another position in Miami at Commercebank. Additionally, Mr. Bovea's own testimony supports the inference that he was aware that the document Ms. Mata presented to him on December 20, 2008, was an agreement governing the terms of his separation from employment with Commercebank and its affiliates and releasing any claims he might have against Commercebank and its affiliates. Mr. Bovea admitted that Ms. Mata went over the document with him in detail and explained it to him "very well,"

and his only question to her was whether he was entitled to any additional benefits under Venezuelan law.

COPIES FURNISHED:

Sheila M. Cesarano, Esquire
Shutts & Bowen
1500 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131

Donn S. Dutton, Esquire
Donn S. Dutton, P.A.
4300 Biscayne Boulevard, Suite 305
Miami, Florida 33137

Larry Kranert, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Derick Daniel, Executive Director
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.