

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALBERT BALZANTI,)
)
 Petitioner,)
)
 vs.) Case No. 13-0814
)
 SHARED SOLUTIONS AND SERVICES,)
 INC./ARROW ELECTRONICS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER OF DISMISSAL

On March 27, 2013, Respondent filed a Motion to Relinquish Jurisdiction and Memorandum of Law. Petitioner filed a response on April 8, 2013. In response to an Order to Produce entered March 27, 2013, Respondent filed an affidavit on April 11, 2013.

Respondent essentially contends that the case should be dismissed because Petitioner has released the claim set forth in his Petition for Relief. Petitioner counters that he was not aware of the discriminatory act until after the termination of his employment, so he should not be held to any release.

APPEARANCES

Petitioner: Albert Balzanti, pro se
4547 Northwest 93rd Avenue
Fort Lauderdale, Florida 33351

Respondent: Holly A. Dincman, Esquire
Melissa F. Sale, Esquire
Coppins, Monroe, Adkins & Dincman, P.A.
1319 Thomaswood Drive
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

The issue is whether the claim of employment discrimination contained in the Petition for Relief must be dismissed due to Petitioner's execution of a release at the time of his termination from employment.

PRELIMINARY STATEMENT

On August 2, 2012, Petitioner filed with the Florida Commission on Human Relations a Charge of Discrimination against Respondent. The Charge of Discrimination alleges that Petitioner was laid off on August 15, 2011. Two days later, the supervisor who laid off Petitioner allegedly called him and said that he had been laid off because "the Jew from New York hated the Italian from New York." The Charge of Discrimination alleges discrimination on the basis of his Italian national origin.

On February 1, 2013, the Florida Commission on Human Relations issued a Determination: No Cause.

On March 7, 2013, Petitioner filed a Petition for Relief, alleging that he was terminated due to his Italian national origin. Concerning his execution of a release, Petitioner alleges that he did so before he learned of the discriminatory

statement and discriminatory animus that drove his termination. Petitioner alleged that he would not have signed the release, if he had known of these facts.

On March 27, 2013, Respondent filed a Motion to Relinquish Jurisdiction, which includes a copy of the entire Severance Agreement and Release signed by Petitioner on August 17, 2011 (Release).

By subsequent affidavit, Respondent established that Petitioner did not exercise his right to revoke the Release, and Petitioner has never tendered back to Respondent the severance payment.

FINDINGS OF FACT

1. Effective August 15, 2011, Petitioner's employment with Respondent was terminated. Two days later, Petitioner signed and delivered the Release.

2. In the Release, Respondent agreed to pay Petitioner "severance pay" of about \$5,000, net several items, provided Petitioner did not exercise his right to revoke the agreement within the seven days following execution, as provided by the Release. Petitioner did not revoke the agreement, and Respondent discharged its obligations under the Release.

3. In exchange, Petitioner agreed to release Respondent
from any and all charges, complaints,
claims, liabilities, obligations, promises,
sums of money, agreements, controversies,

damages, actions, suits, rights, demands, sanctions, costs . . . , losses, debts, and expenses of any nature whatsoever, existing on, or at any time prior to, the date hereof, in law, in equity or otherwise, which [Petitioner] . . . had or [has] by reason of any fact, matter, cause or thing whatsoever. This Release includes . . . a release of all claims or causes of action arising out of or related to [Petitioner]'s employment and/or separation from employment with [Respondent] and . . . claims or causes of action arising under any federal, state or local law, including . . . Title VII of the Civil Rights Act of 1964"

4. Even taken as true, the above-quoted statement is not, on its face, evidence of discrimination based on national origin because it does not reveal that the speaker acted on his hatred of Petitioner; it merely describes hatred, the national origin or religion of the speaker, and the national origin of Petitioner. However, for the purpose of ruling on Respondent's Motion to Relinquish Jurisdiction, it is assumed that a Jewish supervisor fired Petitioner on the ground of national origin. More importantly, perhaps, is the fact that, after concluding that his termination had constituted unlawful discrimination, Petitioner has not tendered back to Respondent the severance payment, nor has he offered to do so.

CONCLUSIONS OF LAW

5. The Division of Administrative Hearings has jurisdiction. §§ 120.569, 120.57(1), and 760.11(7), Fla. Stat.

6. In its Motion to Relinquish Jurisdiction, Respondent has raised a threshold issue concerning whether the Release bars the present proceeding. It does.

7. A party may release his claims of discrimination against an employer. See, e.g., Wastak v. Lehigh Valley Health Network, 342 F.3d 281 (3d Cir. 2003).

8. A former employee may not escape the effect of a release by claiming that elements of the claim did not occur until after termination, such as when the employer replaced him with a younger worker. The claim of discrimination accrues on the date of discharge, not on the later date that the discharged employee becomes aware, or should become aware, of the existence and source of an injury. Id. at 286-87.

9. A release of liability under employment discrimination laws is enforceable unless it is ambiguous or the product of mutual mistake. Anzuetto v. Washington Metropolitan Area Transit Authority, 357 F. Supp. 2d 27, 30-33 (D.C. D.C. 2004). The Release is unambiguous, and Respondent, of course, does not suggest that it entered into the agreement on the basis of mistake.

10. As it is clear that Petitioner signed the Release, received consideration for doing so, and now seeks to prosecute this proceeding in breach of the Release, it is his burden to raise and prove an affirmative defense to the Release in order

to set it aside. Faris v. Williams WPC-1, Inc., 332 F.3d 316, 322-23 (5th Cir. 2003). He has not raised such a defense to the Release. Even if he had, Petitioner would not be able to prove the defense unless he has returned the consideration that he received under the agreement because his failure to have done so ratifies the agreement. Id.; Cheung v. New York Palace Hotel, 2005 U.S. Dist. LEXIS 34659 (E.D. N.Y. 2005). See also Hampton v. Ford Motor Co., 561 F.3d 709, 717 (7th Cir. 2009) (if setting aside of release is treated under theory of rescission, rather than ratification, employee must still tender back to the other party--or at least offer to do so--the consideration that he received for the release).

11. Absent any suggestion that Petitioner has tendered back the consideration that he has received for the Release, he is unable even to raise an affirmative defense to the Release. Because there are no impediments to its enforcement, the Release precludes Petitioner's prosecution of this proceeding.

RECOMMENDATION

It is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 12th day of April, 2013, in
Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of April, 2013.

COPIES FURNISHED:

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

Albert B. Balzanti
4857 Northwest 93rd Avenue
Fort Lauderdale, Florida 33351

Holly A. Dincman, Esquire
Melissa F. Sale, Esquire
Coppins, Monroe, Adkins,
and Dincman, P.A.
1319 Thomaswood Drive
Tallahassee, Florida 32308

Cheyenne Costilla, Interim General Counsel
Florida Commission on Human Relations
Suite 100
2009 Apalachee Parkway
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.