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New Jersey Decision Offers Cautionary Tale to Employers Regarding How Courts May Interpret Whether Employee's Release is Knowing and Voluntary

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On August 26, 2013, the New Jersey Appellate Division reversed a grant of summary judgment to an employer upon concluding, based on little more than the plaintiff's self-serving statements, that its former employee's detailed release of claims was not "knowing and voluntary." Although this decision may later prove to be an outlier, it serves as a warning to employers of the highly critical manner in which some courts may scrutinize release agreements.

The plaintiff in *Carey v. NMC Global Corp.* (N.J. App. Div. Aug. 26, 2013) worked for the defendant company for less than three years as a dispatcher before the company terminated his employment upon his return to work following a two-month medical leave of absence. He was a high school graduate who had previously been employed in various positions, including supervisory positions, during his fifteen years of experience in the petroleum industry.

Upon his return, the company's office manager and vice president presented the plaintiff with a Separation and Release Agreement (Release), which offered him two weeks' severance pay and contained the following release language:

> 3. *Employee's Release*. In exchange for this foregoing consideration, [the employee] on behalf of Employee, Employee's heirs, representatives, agents and assigns hereby RELEASES, INDEMNIFIES, HOLDS HARMLESS, and FOREVER DISCHARGES (i) [the company] . . . from any and all actions, charges, claims, demands, damages, or liabilities of any kind or character whatsoever, known or unknown, which Employee know has or may have had through the effective date of this Agreement.
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> 4. *Employee's Release Continued*. Without limiting the generality of the foregoing release, it shall include: (i) all claims or potential claims arising under any federal, state or local laws relating to the Parties' employment relationship, including, but not limited to, any claims Employee may have under the Civil Rights Act of 1866, 1964, and 1991, as amended, 42 U.S.C. §§ 1981 and 2000e; the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12,101 et seq.; the Fair Labor Standards Act 29 U.S.C. §§ 201 et seq.; the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101, et seq.; the Sarbanes-Oxley Act of

> 2002, including the Corporate and Criminal Fraud Accountability Act, 18 U.S.C. §§ 1514A; the Employee Retirement Income Security Act, 29 U.S.C. §§ 1101 et seq.; the Family and Medical Leave Act of 1993 as amended, 29 U.S.C. §§ 2601 et seq.; the New Jersey Conscientious Employee Protection Act, N.J.S.A. §§ 34:19-1 et seq; the New Jersey Law Against Discrimination, N.J.S.A. §§ 10:5-1 et seq.; (ii) any claims on account of, arising out of or in any way connected with Employee's employment with [the company] or leaving of that employment; (iii) any claims which could have been alleged in any church [*sic*] or complaint against [related companies]; (iv) any claims relating to the conduct of any employee, officer, director, agent or other representative of [related companies]; (v) any claims of discrimination, harassment, or retaliation on any basis; (vi) any claims arising from any legal restrictions on an employer's right to separate its employees; (vii) any claims for personal injury, compensatory or punitive damages or other forms of relief; and (viii) all other causes of action sounding in contract, tort or other common law or statutory law basis, including, but not limited to, (a) the breach of any alleged or oral or written contract, (b) negligent or intentional misrepresentation, (c) defamation, (d) wrongful discharge, (e) interference with contract or business relationship, (f) invasion of privacy or related claims, (g) negligent or intentional infliction of emotional distress.
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> 5. *Employee's Waiver and Assignment*. . . . Employee agrees that with Employee's release of claims in this Agreement, Employee has waived any right Employee may have to recover monetary or other personal relief in any proceeding based in whole or in part on claims released by Employee in this Agreement . . . .

The Release also contained the following acknowledgment, in capital letters and bold typeface:

> 16. *EMPLOYEE'S ACKNOWLEDGEMENT*. EMPLOYEE ACKNOWLEDGES AND WARRANTS THAT HE IS SIGNING THIS AGREEMENT OF HIS OWN FREE-WILL, KNOWINGLY AND VOLUNTARILY, AND THAT HE HAS NOT BEEN COERCED OR THREATENED IN ANY MANNER. EMPLOYEE AGREES THAT HE FULLY UNDERSTANDS IT TO BE A FINAL AND BINDING SEPARATION AND RELEASE AGREEMENT.

The plaintiff admitted that he recognized the Release as a "legal document" and that he did not read every page before initialing them and signing the last page. He also admitted that he did not ask any questions about the document or even try to negotiate its terms. Instead, he claimed that the company's vice-president told him that he could either sign the agreement and receive two weeks' additional pay, or not sign it and receive no additional pay. He also claimed (and the company denied) that he was given "five minutes" to sign the agreement while the vice-president "glared" at him. Four days later, the plaintiff met with an attorney and notified the company that he had "thought things over" and that "I don't accept the terms of the severance package."

The plaintiff then sued the company for disability discrimination and medical leave retaliation under the New Jersey Law Against Discrimination. The trial court dismissed his case on summary judgment based upon the Release, particularly noting the "Employee's Acknowledgment" paragraph demonstrated that the release was knowing and voluntary.

The Appellate Division reversed the dismissal and reinstated the case, finding that there were issues of fact as to whether the plaintiff's release had been knowing and voluntary. In so doing, the court applied the U.S. Court of Appeal for the Third Circuit's totality-of-the-circumstances test to determine the validity of the Release and looked to the following factors:

1. the employee's education and business experience;
2. the amount of the time the employee had possession of or access to the agreement before signing it;
3. the employee's role in deciding the terms of the agreement;
4. the clarity of the agreement;
5. whether the employee was represented by or consulted with an attorney and had a fair opportunity to do so;
6. whether the employer encouraged or discouraged the employee to consult an attorney; and
7. whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

The court also noted that this set of factors is not exhaustive and that courts also consider whether the employee was aware of the rights being waived.

With respect to the first factor (the plaintiff's education and business experience), the court noted that it did not weigh in favor of either determination because while the plaintiff did not have a college education, his work experience may compensate for that fact.

The court then found that the second factor (the amount of the time that the plaintiff had to review the agreement) presented a genuine issue of material fact as to whether the release was knowing and voluntary because he had executed the Release within five minutes of receiving it, and testified that he felt "pressured" to sign it because he was being "glared at." The court reached this conclusion despite the plaintiff's admission that he was not instructed as to when the Release needed to be signed, and the company's contention that there was no evidence that he was denied an opportunity to deliberate.

The court also inexplicably found a genuine issue of material fact as to the third factor (the plaintiff's role in deciding the terms of the agreement) because the plaintiff was given a "Hobson's choice" as to whether to sign the Release in exchange for the additional two weeks' pay or receive nothing. The court noted that although the plaintiff admittedly did not attempt to negotiate the terms, he was also not offered the opportunity to do so. The court provided no further explanation as to why the typical take-it-or-leave-it severance offer would raise a genuine issue of voluntariness.

The court also found in the plaintiff's favor on the fourth factor (clarity of the agreement), concluding that a credibility determination was required as to whether the plaintiff was aware of the rights that he was waiving. The court ruled that the agreement lacked clarity despite the Release's exhaustive list of statutes and types of claims, and the plaintiff's explicit acknowledgment, in bold and capital letters (which the plaintiff admitted reading), that he had knowingly and voluntarily signed the agreement and understood it to be a "final and binding separation and release agreement."

Because the plaintiff did not consult with an attorney, the court found that the fifth and sixth prongs (whether he was represented by or consulted with an attorney and whether he was encouraged to do so) did not support a finding of a knowing and voluntary release, noting that "the onus is on the employer to encourage the employee to consult with an attorney."

As to the final prong (whether the consideration exceeded that to which the plaintiff was already entitled), the court stated that "the record is not clear regarding what benefits other than two weeks' salary, if any, supported the agreement." The court did not explain why that raised any issue at all, since there appeared to be no question that such payments constituted additional, post-termination compensation.

Recommendations

The *Carey* decision puts employers on notice of how critically New Jersey courts may analyze whether employee releases are knowingly and voluntarily signed. Employers should heed the following lessons from this decision in obtaining releases from employees and former employees:

- Draft release agreements in clear and simple language considering the individual employee's education level and work experience. Assume the reader is less sophisticated than he or she may actually be.
- Provide employees with ample time to consider and review the agreement before signing. This should include expressly advising the employee, verbally and in the agreement, that it need not be signed immediately but must still be received by a specific date in the future. The *Carey* decision suggests that at least one week should be provided. Employers should also consider not allowing the employee to sign a release at the termination meeting.
- Advise the employee to seek counsel before signing the agreement and provide ample time for the employee to do so. Include that instruction in the text of the agreement.
- Avoid intimidating or pressuring comments and gestures, or any behavior that could be interpreted as such.
- Advise the employee that he or she is free to contact a human resources department representative or other appropriate person with any questions about or to discuss the agreement. Employers may also wish to consider, depending on the circumstances, agreeing to minor changes in the language of the agreement or slight increases in consideration (such as a letter of reference) to demonstrate that the employee had some level of negotiating the terms of the agreement.

- Employers should consider including the terms of the Older Worker Benefit Protection Act in all releases, even for employees under the age of 40. In addition to expressly advising the employee to consult an attorney, such terms also include a 21-day review period and a 7-day revocation period. Courts may consider such terms to be additional support that the release is knowing and voluntary. Moreover, employees rarely exercise the right to revoke, and including such a provision would provide strong evidence that the employee fully considered, and was not railroaded into, the release that he or she signed.

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