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DENISE BRODO

Plaintiff,
vs.

TOWNSHIP OF HADDON; HADDON
TOWNSHIP POLICE
DEPARTMENT; AND JOHN DOES 1-
5 AND 6-10

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CIVIL PART
CAMDEN COUNTY

Docket No.: L-1517-16

Civil Action

BRIEF IN SUPPORT OF MOTION TO
DISMISS

I. FACTS AND PROCEDURAL HISTORY

This matter is a filed under the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 et seq by Plaintiff, Denise Brodo ("Brodo"), a former employee of the Township of Haddon ("the Township"), alleging a wrongful termination by the Township as a result of her engaging in protected activity. Specifically, Plaintiff alleges that she refused to pay Officer Robert Preziosi of the Haddon Township Police Department a check for his detail at a scholastic sporting event when she learned that he had already been paid in cash at the event. Thereafter, Plaintiff was allegedly denied side jobs, suffered a five (5) day suspension for tardiness and insubordination, was stripped of her duties of payroll and opening the mail, and demoted from being a Class II Officer. (See Plaintiff's Complaint attached as Exhibit "A").

Plaintiff subsequently filed a lawsuit under CEPA on August 13, 2013 against the same defendants as in the instant matter. (See Plaintiff's 2013 Complaint attached as Exhibit "B"). In

the 2013 Complaint, the first 38 averments are verbatim to the instant matter. On July 17, 2015, Plaintiff signed a "Settlement Agreement and General Release". (See Agreement attached as Exhibit "C"). On August 31, 2015, a Stipulation of Dismissal with Prejudice was filed with the Superior Court of New Jersey, Law Division, Camden County. (See Stipulation attached as Exhibit "D").

In the "Settlement Agreement and General Release, Plaintiff specifically waived her right to pursue the claim upon which this current lawsuit is based. The Agreement provides, in pertinent part:

WHEREAS, the parties settled all controversies between them, including plaintiff's claims in the Lawsuit and including any and all related claims which were or could have been asserted as of the effective date of the settlement as defined in paragraph 13 herein, whether such claims are presently known or unknown; and

WHEREAS, all parties acknowledge that the merits of the controversy are in dispute and have not been finally adjudicated, and that no party admits any liability to any other, but all have reasons to desire amicable resolution of the matter, including to avoid the costs of litigation . . .

1. **The terms of settlement: . . .**

(c) Plaintiff represents that her allegations against the defendant arise out of the alleged conduct which plaintiff contends resulted in economic and non-economic damages, notwithstanding the fact that the defendants vigorously and wholly deny plaintiff's allegations and are settling this matter for reasons other than the merits of plaintiff's claims, including the avoidance of the cost of litigation. Settlement does not represent an admission of liability by any party.

(d) Plaintiff agrees that, but for this settlement agreement and general release, **she would not be entitled to the aforesaid payments and other terms of settlement described herein. . . .**

3. **Release in Consideration for the Payment and Other Consideration Provided for in this Agreement:** In consideration of the payment and other consideration provided for in this agreement, **plaintiff, personally and for her estate and her heirs,**

waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that she may have against all defendants, their agents, representatives and employees (present and former), and their respective successors and assigns, heirs, executors and personal or legal representatives, based upon any act, event or omission occurring before the execution of this Agreement, including, but not limited to, any events related to, arising from, or in connection with plaintiff's employment, and/or association with the defendants. Plaintiff specifically waives, releases and gives up any and all claims arising from or relating to plaintiff's employment, and/or association with the defendants based upon any act, event or omission occurring before the date of execution of this settlement agreement, including but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations and/or common law. Plaintiff specifically waives, releases and gives up any and all claims arising from or relating to her employment and/or relationship and/or association with defendants, based upon any act, event or omission occurring before the effective date of the settlement as defined in paragraph 10, including but not limited to, any claim that was asserted or could have been asserted under any Federal and/or State statutes, regulations and/or common law, expressly including, but not limited, to any potential claim relating to the following (along with any amendments thereto): . . .

(g) The New Jersey Conscientious Employee Protection Act;

(r) Any anti-retaliation provision of any statute or law; . . .

4. No Claims Permitted/Covenant Not to Sue: Plaintiff waives her right to file any charge or complaint on her own behalf and/or participate as a complainant, a plaintiff, or charging party in any charge or complaint which may be made by any other person or organization on their behalf, with respect to anything which has happened up to the execution of this Agreement before any federal, state or local court or administrative agency including the EEOC and the DCR, against the defendants, except if such waiver is prohibited by law. Should any charge or complaint be filed, plaintiff agrees that she will not accept any relief or recovery therefrom. Plaintiff confirms that no such charge, complaint or action exists in any forum or form other than the Complaint bearing Docket No. CAM-L-3310-13, and hereby covenants not to file any charge, complaint or action in any forum or form against the defendants based upon anything

which is encompassed by the terms of this Agreement. Except as prohibited by law, in the event that any such charge, complaint or action is filed by plaintiff, it shall be dismissed with prejudice upon presentation of this Agreement. . . .

6. No Admission of Liability: It is expressly understood that neither the execution of this agreement nor any other action taken by the defendants in connection with plaintiff's alleged claims or this settlement, constitutes an admission by any of the defendants of any violation of any law, duty or obligation, or that any decisions or actions taken in connection with plaintiff's employment were unwarranted, unjustified, retaliatory, discriminatory, wrongful or otherwise unlawful. . . .

7. Entire Agreement: This Agreement contains the sole and entire agreement between the parties hereto and fully supersedes any and all prior agreements and understanding pertaining to the subject matter hereof, and is intended to memorialize the settlement of plaintiff's claims. Plaintiff represents and acknowledges that, prior to executing this Agreement, she consulted her attorney, that she had ample time to do so that she obtained the advice of counsel prior to making the decision to execute the Agreement and that she had not relied upon any representation or statement not set forth in this Agreement made by any defendants thereto, or, defendants' counsel or representatives, with regard to the subject matter of this Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Agreement. . . .

11. Plaintiff understands and acknowledges that she is aware of her legal right to consider the Agreement for a period of 21 DAYS, which such period shall expire on July 27, 2015. Plaintiff further understands and acknowledges that, at her option alone, the Agreement may be executed prior to the expiration of the 21 DAY period.

12. Plaintiff understands and acknowledges that she has seven (7) days following the execution of the Agreement to revoke the terms of the Agreement. Any notice of revocation hereunder must be made in writing and delivered within seven (7) days of the execution of the Agreement to HOWARD C. LONG, JR., ESQ., WADE, LONG, & WOOD, LLC, 1250 CHEWS LANDING ROAD, LAUREL SPRINGS, NJ 08021. For the revocation to be effective, written notice must be received by HOWARD C. LONG, JR., ESQ. no later than the close of business on the seventh (7th) day after Plaintiff signs

the Agreement. If Plaintiff revokes the Agreement, it shall be null and void, and the obligations or entitlements of both parties under the Agreement shall be eliminated.

14. BY SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, PLAINTIFF ACKNOWLEDGES:

A. SHE HAS READ IT;

B. SHE UNDERSTANDS IT AND KNOWS SHE IS GIVING UP IMPORTANT RIGHTS;

C. SHE AGREES WITH EVERYTHING IN IT;

D. HER ATTORNEY NEGOTIATED THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE WITH HER KNOWLEDGE AND CONSENT;

E. SHE HAS BEEN ADVISED TO CONSULT WITH HER ATTORNEY PRIOR TO EXECUTING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, AND HAS IN FACT DONE SO; AND

F. SHE HAS SIGNED THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE KNOWINGLY AND VOLUNTARILY.

(Emphasis added).

Plaintiff was terminated from her employment with the Township on October 22, 2015 for excessive tardiness. (See Letter attached as Exhibit "E"). However, as explained in the letter, Plaintiff was not terminated because she filed the 2013 lawsuit under CEPA. Rather, this was the culmination of several tardiness issues that had occurred over years of her employment pursuant to the doctrine of progressive discipline. Plaintiff had been given a previous thirty (30) day suspension and was told any further issues may result in termination.

II. DISCUSSION OF APPLICABLE LAW

A. Standard of Review

When considering a motion to dismiss pursuant to New Jersey Court Rule 4:6-2(e) for failure to state a claim upon which relief can be granted, the court's inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. Rieder v. Department of Transportation, 221 N.J.Super. 547, 552 (App.Div.1987). The court treats all factual allegations as true, and considers only whether the complaint states a cognizable cause of action. Ibid. Where the factual allegations are insufficient to support a claim upon which relief can be granted, the court must dismiss the complaint. Ibid.

B. Plaintiff Waived Her Right to File Under CEPA and for Retaliatory Discharge Pursuant to the July 17, 2015 Settlement Agreement

Waiver is defined "as the voluntary and intentional relinquishment of a known and existing right. Quigley v. KPMG Peat Marwick, LLP, 330 N.J.Super. 252, 267 (App.Div.2000). Thus, waiver "presupposes full knowledge of the right and an intentional surrender." Ibid. To be given effect, any waiver of a statutory right must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively. Id. at 271, citing Red Bank Reg' Educ. Ass'n v. Red Bank Reg'l High School Board of Educ., 78 N.J. 122, 140 (1978).

It must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them. Petrillo v. Bachenberg, 263 N.J.Super. 472, 480 (App.Div.1993), aff'd 139 N.J. 472 (1995). Waiver implies an election by the party to dispense with something of value or to forego some advantage which that party might have demanded and insisted upon. Ibid. It must be supported either by an agreement with adequate consideration, or by such conduct as to estop the waiving party from denying the intent to waive. Ibid.

Waivers of claims by employees as against their employers are to be examined under the "totality of the circumstances" standard. Keelan v. Bell Communications Research, 289 N.J.Super. 531, 541 (App.Div.1996). This includes whistle blowing claims brought under the Conscientious Employee Protection Act ("CEPA"). Ibid.

Under the totality of the circumstances test, courts apply the following non-exhaustive seven-factor list in determining the validity of a given release: (1) the plaintiff's education and business experience, (2) the amount of time the plaintiff had possession of or access to the agreement before signing it, (3) the role of plaintiff in deciding the terms of the agreement, (4) the clarity of the agreement, (5) whether the plaintiff was represented by or consulted with an attorney, (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law, (7) whether an employer encourages or discourages an employee to consult an attorney and whether the employee had a fair opportunity to do so. Id. at 541-542. See also Riddell v. Medical Inter-Insurance Exchange, 18 F.Supp.2d 468, 471-472 (D.N.J.1998).

With respect to the length of time the plaintiff had possession of or access to the agreement before signing it, eight days has been previously held to be enough time. Swarts v. Sherwin-Williams Co., 244 N.J.Super. 170 (App.Div.2000). A release may be found to lack clarity if it did not specifically identify the cause of action at issue, thus precluding its waiver. Keelan v. Bell Communications Research, 289 N.J.Super. 531, 543-545 (App.Div.1996).

A plaintiff who brings a cause of action pursuant to CEPA must demonstrate that: (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3(c); (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the

whistle-blowing activity and the adverse employment action. Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

Here, Plaintiff's claim is necessarily predicated upon events that occurred prior to July 17, 2015, the date which she signed the Settlement Agreement and General Release. In Paragraph 3 of the Agreement, Plaintiff "specifically waives, releases and gives up any and all claims arising from or relating to plaintiff s employment, and/or association with the defendants based upon any act, event or omission occurring before the date of execution of this settlement agreement." Specifically covered in the Agreement as enumerated causes of action that Plaintiff waived were: the New Jersey Conscientious Employee Protection Act, and any anti-retaliation provision of any statute or law.¹

In Paragraph 4 of the Settlement Agreement, Plaintiff covenanted "not to file any charge, complaint, or action in any forum or form against the defendants based upon anything which is encompassed by the terms of this Agreement. Except as prohibited by law, in the event that any such charge, complaint or action is filed by plaintiff, it shall be dismissed with prejudice upon presentation of this Agreement." (Emphasis added).

It is unmistakable that the Settlement Agreement and General Release represents the voluntary and intentional relinquishment of a known and existing right, the standard enunciated by the Appellate Division in Quigley. In fact, the Agreement itself in Paragraph 14 states that Plaintiff expressly acknowledges that she has read it, she understands it and knows she is giving up important rights, and she agrees with everything in it. There is adequate consideration as part of the Agreement, a settlement in the amount of \$48,000.00, which Plaintiff agreed that, but for the settlement, she would not be entitled to.

¹ "Any anti-retaliation provision of any statute or law" specifically covers Plaintiff's alternative claim under Pierce v. Ortho Pharmaceuticals, and her request for equitable relief.

Likewise, the seven factor test delineated by the Court in Keelan lead to the conclusion that this waiver is enforceable. Throughout the entire litigation and settlement process, Plaintiff was represented by and consulted with an attorney. The Agreement provides Plaintiff with a consideration period of twenty-one (21) days, followed by a seven (7) day period under which she could have revoked the terms of the agreement. This twenty-eight (28) day period is well beyond the eight (8) day period upheld in Swarts. The amount she received in consideration of the waiver, \$48,000.00, is well in excess of the employee benefits to which she was already entitled by contract or law.

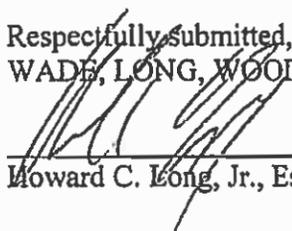
Due to Plaintiff's waiver, she cannot meet the Dzwonar standard for recovery under CEPA. In her current lawsuit, her allegation of the conduct by the Township which she believed was a violation of law or policy, as well as her whistle blowing activity, all occurred in February of 2013, and have been expressly waived by her signing of the Settlement Agreement and General Release.

III. CONCLUSION

Due to Plaintiff's waiver of "any and all claims arising from or relating to plaintiff's employment, and/or association with the defendants based upon any act, event or omission occurring before the date of execution of this settlement agreement", and the fact that there is no viable CEPA claim without events that have been waived, Defendants, the Township of Haddon and the Haddon Township Police Department respectfully request that the Court dismiss the Plaintiff's Complaint for failure to state a claim.

Respectfully submitted,
WADE, LONG, WOOD & LONG, LLC

By:


Howard C. Long, Jr., Esquire

Dated: June 30, 2016