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Johnston v. Carnegie Corporation of New York: How Strong Are Your Nonprofit's Severance Agreements?

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Nonprofits often feel like Davids in a world of Goliaths. Struggling with tight budgets and lean staffs, the last thing they want to add to their basket of worries is a complex regime of human resource policies. Often, overworked senior staffers rely on outdated, internally generated employment documents that haven't been reviewed by a lawyer in years. Worse still, these documents have frequently been overwritten to the point where they are so ambiguous and confusing so as to become meaningless. In these moments, the would-be Davids become vulnerable themselves to legal challenges from disgruntled employees.

This phenomenon appears to be perfectly captured in a recent New York federal court decision, *Johnston v. Carnegie Corporation of New York*,[2] wherein Magistrate Judge Debra Freeman allowed a *pro se* plaintiff's state and federal disability discrimination claims to survive a motion to dismiss, even though the plaintiff-employee had signed a severance agreement that included a full release of those claims. Why? Applying a multi-factor analysis, Judge Freeman concluded that the severance agreement was confusing and ambiguous to the point that it created a factual issue as to whether the employee's release was knowing and voluntary.[3]

The Facts of the Case

The plaintiff, Dylan Johnston, suffered from bipolar disorder and depression, and complained vocally that he was being treated unfairly by his nonprofit employer, the Carnegie Corporation (the "Foundation"), and its principals. For months, Johnston attempted to increase both his hours and his pay at the Foundation but the Foundation repeatedly refused to adjust his part-time status.[5] In a January 8, 2009 email, Johnston suggested that the Foundation had performed "a background check and found that I was disabled…." In this email, Johnston also claimed that the Foundation's refusal to increase his hours was due to its reluctance to increase its medical insurance payment obligations relating to his disability.[6] The next day, in a meeting with the Foundation's Chief of Staff and Vice President of Human Relations, Johnston's employment was terminated. At the meeting, the Foundation offered Johnston a severance package and a letter agreement containing a release.[7]

The release in the agreement – offered in exchange for a severance payment of $4,050 (subject to employment taxes) – was broad, encompassing "any and all causes of action…by reason of plaintiff's employment and/or cessation of employment with [the Foundation]… Such claims include, without limitation, any and all claims under…the American with Disabilities Act, … and any and all other federal, state or local laws, statutes, rules and regulations pertaining to employment, as well as any and all Claims under state contract or tort law." The letter agreement further contained a sentence that warned: 'DO NOT SIGN THIS RELEASE UNLESS YOU THOROUGHLY UNDERSTAND IT." The agreement also gave Johnston 21 days to consider the agreement and provided for a seven-day revocation period.[8]

Johnston signed the agreement and release on January 15, 2009, and returned it to the Foundation. He stayed on at the Foundation in an unpaid capacity until February 27, 2009 and claims the Foundation promised him positive job recommendations that never materialized. He filed a charge with the EEOC on October 2, 2009, received a "right to sue" letter from the EEOC on November 10, 2009, and commenced his *pro se* action against the Foundation on February 3, 2010. The complaint alleges disability discrimination under both the Americans with Disabilities Act, New York State and

New York City law, and retaliation for having brought his disability to the Foundation's attention.[9]

The Decision

On June 22, 2010, the Foundation moved to dismiss the complaint based upon the release and on the ground that the complaint failed to state a cause of action.[10] The court principally focused on the validity and enforceability of the release under a "totality of the circumstances" analysis, applying the Second Circuit Court of Appeals' six part test that includes:

> (1) the plaintiff's education and business experience; (2) the amount of time plaintiff had possession of or access to the agreement before signing it; (3) the role of the 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; and (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.[11]

But, as Judge Freeman emphasized, "[t]hese factors are neither exhaustive nor must all the factors be satisfied before a release is held unenforceable."[12]

Applying these six factors, Judge Freeman concluded that it would be premature to conclude, on the face of the pleadings, that plaintiff's release of his claims was "knowing and voluntary."[13] With respect to the first factor, Judge Freeman noted that, despite having received a college education, Johnston was a "low level employee" who lacked work experience. Given "the confusing nature of certain aspects of the parties' release agreement, it is not clear that Plaintiff's education and experience gave him sufficient sophistication to understand all of the agreement's terms." Judge Freeman found that the second factor – the amount of time provided to consider the release – supported the release's validity. As to the third factor, the court found that the absence of any negotiations between Johnston and the Foundation "slightly favors a finding of invalidity." Given the remaining factors in the analysis, Judge Freeman held that "at this stage of the litigation, the release cannot be deemed knowing and voluntary."[14]

Judge Freeman placed great significance on the fourth and sixth factors – the clarity of the agreement and the extent to which Johnston received consideration for giving his release – to tilt her analysis toward finding the release invalid.[15] She pointed to several confusing terms, and inconsistencies and ambiguities in the language of the release agreement that muddied whether Johnston was actually being paid both severance payments *and* an additional lump-sum payment of $4,050 for giving the release, or whether the lump-sum payment was the sole compensation offered in exchange for the release. In fact, in analyzing the sixth factor, she noted that there was a dispute as to whether the lump sum actually constituted a payment given in exchange for the release or whether it represented, as Johnston contends, back pay and benefits.[16]

Considering the "totality of the circumstances," Judge Freeman held that the court could not conclude that the release was "knowing and voluntary." Indeed, crucial to this finding was the dispute as to the amount of consideration actually paid to Johnston in exchange for the release.[17]

Avoiding the Pitfalls of Sloppy Severance Agreements

Nonprofit employers preparing to terminate an employee and utilize a severance and release approach should carefully review their existing "form" severance agreements to see if they make sense, both as to the release that is being provided and the amount of any additional payments that are being offered to secure the release. For example, if severance is being paid to the departing employee pursuant to an organization’s stated severance policy, make that clear in the agreement. If an additional payment or other consideration is then offered in exchange for the release (which generally is required for the release to be binding and enforceable), denominate it with a separate description like "Additional Payment" or "Release Payment" that makes this special consideration clear to the average reader.

In addition, in any severance agreement, it is wise to give the departing employee a clear sense of what the organization expects of him or her. Give a clear date for the last day of employment, what the departing employee's responsibilities are, if any, during the provided severance period, and what, if any, back health, salary and/or vacation benefits are being paid for as part of the severance plan.

One might argue that, notwithstanding the inclusion of several unambiguous and routinely enforceable provisions within the severance agreement, the court in *Carnegie Corporation* was giving the *pro se* former employee the benefit of the doubt on a preliminary motion to dismiss. There is no doubt,

however, that several confusing internal inconsistencies and poorly defined terms in the severance agreement contributed to the suggestion that it should not be enforced against a college-educated individual who had been invited to consult an attorney for as many as 21 days. By bringing fresh scrutiny to each severance agreement that an organization offers to departing employees, nonprofit employers may be able to avoid the court costs and litigation headaches that often flow from confusing and ambiguous documents.

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[2] 2011 WL 1085033 (S.D.N.Y. Feb. 24, 2011)(PAC)(DF).
[3] Judge Freeman's analysis is set forth in her February 24, 2011 report and recommendation to the Honorable Paul A. Crotty, U.S.D.J. By order dated March 23, 2011, Judge Crotty adopted Judge Freeman's report and recommendation in full. 2011 WL 1118662 (S.D.N.Y. Mar. 23, 2011)
[4] Id. at *1.
[5] Id. at *1-2.
[6] Id. at *3.
[7] Id.
[8] Id. at *4.
[9] Id. at **4-5.
[10] Id. at *5.
[11] Id. at *7 (citing Borman v. AT&T Comm., Inc., 875 F.2d 399, 403 (1989))
[12] Id. (quoting Laramee v. Jewish Guild for the Blind, 72 F. Supp.2d 357, 360 (S.D.N.Y. 1999)) (remaining citations omitted).
[13] Id. at *8.
[14] Id.
[15] Judge Freeman determined that the parties failed to address the fifth factor – whether Johnston consulted with a lawyer prior to signing the agreement even though the agreement – specifically recommended that Johnston do so. Id. at *9.
[16] Id. at **8-9.
[17] Id. at *9.