UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

July 19, 2019

S.,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 19B00008
	)	
NEIMAN MARCUS GROUP,	)	
Respondent.	)	
	)	

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b(a)(1)(B) (2017). S. (Complainant) filed a complaint, *pro se*, with the Office of the Chief Administrative Hearing Officer (OCAHO) on December 31, 2018, alleging that Neiman Marcus Group (Respondent or NMG) violated § 1324b by discriminating against him based on his citizenship status. Respondent's Motion to Dismiss is now pending. Respondent argues that the complaint should be dismissed because it fails to state a claim upon which relief can be granted and because Complainant executed two settlement agreements waiving and releasing all claims against Respondent. For reasons set forth herein, Respondent's Motion is granted.

II. BACKGROUND AND PROCEDURAL HISTORY

Complainant is a United States citizen who was hired by Respondent on August 21, 2017. Complainant resigned from Respondent's company on October 19, 2018.

On September 10, 2018, Complainant filed a charge against Respondent with the United States Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER). On October 15, 2018, IER sent Complainant a letter of determination informing him that IER

was dismissing the charge because Complainant did not allege unlawful conduct under 8 U.S.C. § 1324b.

On December 31, 2018, Complainant filed a complaint with OCAHO. Complainant alleges that Respondent retaliated against him and terminated him in violation of § 1324b. Compl. at 11. In the documents attached to the complaint, Complainant alleges: Respondent utilizes a different hiring process for employees who are United States citizens and non-citizen employees; Respondent treats contract employees and non-citizen employees better than U.S. citizen employees; Respondent is complicit as its contractors hire more non-citizen contract workers, while U.S. citizen employees are pushed out of their positions; Respondent "tricks" only U.S. citizen employees to sign a mandatory arbitration agreement; Respondent requires U.S. citizen employees to open a credit card with Respondent, but Respondent does not require non-citizens to open one; Respondent monitors U.S. citizen employees' laptops, but does not monitor noncitizen employees' laptops; Respondent micro-manages U.S. citizen employees and does not do the same for non-citizens; Respondent gives non-citizens two weeks' notice before it terminates them, but Respondent only gave Complainant eighty-six minutes to sign a settlement agreement and general release and agree to resign. Compl. Mot. at 1–14.

Respondent timely filed an answer on March 5, 2019.[1] On May 20, 2019, Respondent filed a motion to dismiss Complainant's complaint and a memorandum in support of the motion. On May 31, 2019, Complainant filed a response to the motion. Additionally, both parties filed prehearing statements.

Meanwhile, on August 14, 2018, Complainant filed a Charge of Discrimination against Respondent with the Equal Employment Opportunity Commission (EEOC) and the Texas Workforce Commission's Civil Rights Division. Mot. Dismiss Ex. 3 at 2. On October 1, 2018, Complainant filed an Unfair Labor Practice Charge against Respondent with the National Labor Relations Board (NLRB). Compl. Ex. D.

On October 19, 2018, Complainant and Respondent executed a Confidential Settlement Agreement and General Release (Release I). Compl. Ex. H; Mot. Dismiss Ex. 2. Under Release I, in consideration for a settlement payment, Complainant agreed to resign immediately and release all claims against Respondent, except claims under the Age Discrimination in Employment Act (ADEA). Release I at 2–3. Further, in Release I, Complainant affirmed that "he has not filed, caused to be filed, or presently is a party to any claim against NMG[,]" aside from the Charge of Discrimination he filed with the Texas Workforce Commission and the EEOC, and the Unfair Labor Practice Charge he filed with the NLRB. Release I at 2-3. In Release I, Complainant agreed to take all necessary steps to withdraw the Texas Workforce Commission, EEOC, and NLRB charges. Release I at 2. Pursuant to Release I, on October 19, 2018, Complainant resigned from his employment with Respondent.

On November 2, 2018, Complainant and Respondent entered into a second Confidential Settlement Agreement and General Release (Release II). Mot. Dismiss Ex. 3. In Release II, in

[1] Due to the lapse in appropriations which affected OCAHO, OCAHO did not serve the complaint and notice of case assignment until February 4, 2019.

consideration for an additional settlement payment, Complainant agreed to release claims against Respondent, including claims under the ADEA. Release II at 1. In Release II, Complainant again agreed to withdraw the charges with Texas Workforce Services, the EEOC, and the NLRB and affirmed that, aside from those charges, he had not filed and was not a party to any claim against Respondent. Release II at 2. Respondent paid Complainant the settlement payments as provided in Release I and Release II.

III. POSITIONS OF THE PARTIES

Respondent argues that the Court should dismiss the complaint because Complainant signed Releases I and II, in which he released any and all claims against Respondent, including, but not limited to, claims arising under IRCA. Respondent alleges, and Complainant does not dispute, that Complainant did not inform Respondent about the IER charge prior to signing the releases. Respondent alleges it first found out about the IER charge in February 2019, when it received the complaint in this matter.

In addition, Respondent argues that Complainant's allegations involve only conditions of employment; he does not allege that he was hired, terminated, or retaliated against for any activity protected under § 1324b.

In response, Complainant notes a paragraph in the executed settlement agreements which provides,

> c. Governmental Agencies. Nothing in this Agreement prohibits or prevents S. from filing a charge with or participating, testifying, or assisting in any investigation, hearing, or other proceeding before any federal, state, or local government agency. However, to the maximum extent permitted by law, S. agrees that if such an administrative claim is made, S. shall not be entitled to recover any individual monetary relief or other individual remedies.

Releases I and II at 2 [hereinafter "subsection C"]. Complainant asserts that he is not attempting to collect further damages and that he has brought the charge with the sole intention of highlighting the alleged various violations. In response to the assertion regarding the nature of the complaints, Complainant states that Respondent is oversimplifying the claims, and makes additional factual statements regarding his claims.

IV. STANDARDS

A. Motion to Dismiss

"OCAHO's rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted[.]" *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016) (citations omitted); 28 C.F.R. § 68.10. Section 68.10 is modeled after Federal Rule of Civil Procedure 12(b)(6). *Spectrum Tech. Staffing Servs.*, 12 OCAHO no. 1291 at 8; *see* 28

C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline" in OCAHO proceedings.). When considering a motion to dismiss, the Court must "liberally construe the complaint and view 'it in the light most favorable to the [complainant].'" *Spectrum Tech. Staffing*, 12 OCAHO no. 1291 at 8 (quoting *Zarazinski v. Anglo Fabrics Co.*, 4 OCAHO no. 638, 428, 436 (1994)).

Generally, when "considering a motion to dismiss, the [C]ourt must limit its analysis to the four corners of the complaint." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113 (1997) (citations omitted). "The court may, however, consider documents incorporated into the complaint by reference[.]" *Id.* at 113-14. Therefore, "documents attached to a motion to dismiss may be considered without converting the motion to one for summary decision if the documents are referred to in the complaint and are central to the claim." *S. v. Discover Fin. Servs.*, 12 OCAHO no. 1292, 8 (2016) (citing *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 661 (7th Cir. 2002); *Jarvis*, 8 OCAHO no. 930 at 113-14). Additionally, "a copy of a document attached to a pleading is a part of the pleading for all purposes." *Id.* (citing FED. R. CIV. P. 10(c)). Here, Complainant attached copies of the unexecuted October 19, 2018 and November 2, 2018 releases to the complaint and refers to the releases throughout his complaint. Respondent attached copies of the executed releases to the motion to dismiss and Complainant refers to those copies in his response to the motion to dismiss. Therefore, the Court will not convert the motion to dismiss to a motion for summary decision.

B. Settlement Agreements and Releases

OCAHO case law is clear that "[a]n accrued cause of action under 8 U.S.C. § 1324b may be waived as part of a settlement agreement," that a party who knowingly and voluntarily agrees to the terms of such an agreement is bound thereby, and that an Administrative Law Judge has the authority to compel or bind a party to adhere to the terms to which it previously agreed. *S.*, 12 OCAHO no. 1292 at 8 (quoting *Aityahia v. Sabena Airline Training Ctr., Inc.*, 9 OCAHO no. 1122, 4–5 (2006)).

"Public policy favors the enforceability of settlement agreements and the concomitant avoidance of litigation." *U.S. v. Cal. Mantel, Inc.*, 10 OCAHO no. 1168, 8 (2013) (citing *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989)). Settlement agreements are contracts, so state law generally governs the construction and enforcement of settlement agreements. *E. Energy, Inc. v. Unico Oil & Gas, Inc.*, 861 F.2d 1379, 1380 (5th Cir. 1988); *S.*, 12 OCAHO no. 1292 at 8 (citing *Lynch, Inc. v. SamataMason Inc.*, 279 F.3d 487, 489 (7th Cir. 2002)).
Texas law governs the settlement agreements at issue, both by the express terms of the agreements and as the law of the applicable forum state where the allegations arose. *See* Releases I and II at 4. "In interpreting a written contract, '[t]he court's primary concern is to enforce the parties' intent as contractually expressed, and an unambiguous contract will be enforced as written." *Amigo Broad., LP v. Spanish Broad. Sys., Inc.*, 521 F.3d 472, 480 (5th Cir. 2008) (quoting *Interstate Contracting Corp. v. City of Dallas*, 407 F.3d 708, 712 (5th Cir. 2005)). To ascertain the parties' true intentions as expressed in the contract itself, the Court must first consider the contract's express language. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America*, 341 S.W.3d 323, 333 (Tex. 2011) (citations omitted). Further, courts must

"consider the entire writing to harmonize and effectuate all provisions such that none are rendered meaningless." *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 63 (Tex. 2014) (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). A contract's language "should be accorded its plain, grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated." *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985) (citations omitted).

Furthermore, Texas has a strong policy of favoring settlement agreements. *Italian Cowboy Partners*, 341 S.W.3d at 333 (citations omitted). While "general categorical release clauses are narrowly construed[,]" *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991) (citations omitted), clauses releasing specific claims are enforceable when the settlement agreement mentions the claim to be released, *see Mem'l Med. Ctr. v. Keszler*, 943 S.W.2d 433, 434–35 (Tex. 1997).

Additionally, the Fifth Circuit has determined that while "[p]ublic policy favors voluntary settlement of claims and enforcement of releases, . . . a release of an employment or employment discrimination claim is valid only if it is 'knowing' and 'voluntary[.]'" *Williams v. Phillips Petrol. Co.*, 23 F.3d 930, 935 (5th Cir. 1994) (quoting *Rogers v. Gen. Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1990); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n. 15 (1974)). To determine whether a release is knowing and voluntary, the Fifth Circuit utilizes a "totality of the circumstances" test. *Smith v. Amedisys Inc.*, 298 F.3d 434, 441 (2002) (citations omitted). Once the employer has met its "burden of establishing that its former employee 'signed a release that addresses the claims at issue, received adequate consideration, and breached the release[,]'" the burden shifts to the employee to show that the release was invalid. *Id.* (citations omitted). To determine whether the employee established a valid defense, courts consider the following factors:

(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 [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 consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Id. (quoting *O'Hare v. Glob. Nat. Res.*, 898 F.2d 1015, 1017 (5th Cir. 1990)). A release can be valid even if all of the factors are not present. *See O'Hare*, 898 F.2d at 1017–18.

V. DISCUSSION

A. Knowing and Voluntary

It is undisputed that the Releases are written, signed, and submitted as part of the record; therefore, they are valid under Texas law in the absence of any legal defense. *See Williamson v.*

Bank of N.Y. Mellon, 947 F. Supp. 2d 704, 707 (2013) (citing TEX. R. CIV. P. 11; *Estate of Martineau v. ARCO Chem. Co.*, 203 F.3d 904, 910 (5th Cir. 2000)). Complainant makes no claim that the agreement was not entered into knowingly. While Complainant does not make an express claim that the agreements were not entered into voluntarily, he does assert that Respondent gave him a short time-frame, less than two hours, to sign the releases and that his counsel had trouble opening one of the releases attached to Respondent's email, thereby shortening the timeframe even more.

This Court finds that, viewing the totality of the circumstances, Complainant knowingly and voluntarily entered into the releases. Complainant attached a series of emails to his complaint regarding the settlement communication between Complainant's counsel at the time, Respondent, and Complainant.[2] (Compl. Ex. H). Both parties acknowledge that Respondent emailed both releases to Complainant's counsel on October 19, 2018. Respondent's condition for entering into the settlement agreement was that Complainant had to execute Release I on the same day, October 19, 2018. Per Respondent, Release II, on the other hand, which contained a release of claims under the ADEA, had to be signed twenty-one days after October 19, 2018. Release II contained an additional sum as consideration.

In Release I, directly above Complainant's signature line, a free-standing sentence states, "The parties knowingly and voluntarily sign this Agreement[.]" Release I at 5. Additionally, Complainant initialed each page of the Release, indicating that he had read the document. Release I. In exchange for Complainant's resignation and release of claims against Respondent, Respondent agreed to pay significant consideration, which both parties admit occurred. As noted above, Complainant had an attorney during the settlement negotiations and execution. The emails between Complainant and his counsel show that Complainant's counsel reviewed Release I and advised Complainant about it both in conversation and in writing before Complainant signed it. Counsel advised Complainant that if he did not accept the terms of Release I, then he should not sign it. Further, before Complainant reviewed the written agreement, the emails show that Complainant was closely involved in the negotiations, was aware of the terms and understood them as, on October 18, 2018, he proposed a higher consideration amount and a later resignation date, which Respondent rejected. In the late morning of October 19, 2018, Complainant proposed additional conditions on Respondent's final offer. As such, Complainant was aware of the terms of the Release at least a day before he executed it, was heavily involved in the negotiations, and continued to attempt to negotiate the terms throughout the day on October 19, 2018. Regarding the other factors identified by the Court, the Releases are relatively straightforward, and Complainant is a professional. Thus, while the Complainant was given a

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[2] Complainant waived attorney-client privilege by voluntarily attaching his privileged communications to his complaint. *See United States v. Bolton*, 908 F.3d 75, 100-01 (5th Cir. 2018) (quoting *In re Itron, Inc.*, 883 F.3d 553 (5th Cir. 2018)) ("a client waives the privilege '[b]y disclosing such communications to third parties – such as by revealing them in open court[.]'"); *In re JDN Real Estate-McKinney L.P.*, 211 S.W.3d 907, 922 (Tex. App. 2006) (citing TEX. R. EVID. 511) ("The client waives the attorney-client privilege if he discloses or consents to the disclosure of any significant part of the privileged matter[.]").

short time within which to review the Release, reviewing the totality of the circumstances, the Court finds that Complainant knowingly and voluntarily executed Release I.

Furthermore, Complainant had twenty-one days to review Release II and has not argued that this Release was not knowingly and voluntarily executed. While Complainant was given less than two hours to sign Release I, he was heavily involved in negotiating the terms, which indicates a valid release. *See Labouve v. Metso Minerals Indus*., No. 4:17-CV-95-DMB-JMV, 2018 U.S. Dist. LEXIS 51842, at *9 (N.D. Miss. Mar. 28, 2018) (finding that although the amount of time plaintiff was given to review the settlement agreement was not favorable to the defendant, this factor ultimately weighed in favor of the defendant because plaintiff had "ample time to negotiate the Agreement's terms"). Additionally, the twenty-one days that Complainant was given to sign Release II is sufficient. *See Alvarado v. Mainland Med. Ctr*., No. H-06-4047, 2007 U.S. Dist. LEXIS 30048, at *6-7 (S.D. Tex. Apr. 24, 2007) (concluding that the release was knowingly and voluntarily signed when plaintiff was given twenty-one days to sign); *see also* 29 U.S.C. § 626(f)(1)(F) (to knowingly and voluntarily waive an ADEA claim, the employee must have twenty-one days to consider the agreement).

B. Settlement Agreements

Having found that the Respondent knowingly and voluntarily executed Releases I and II, the Court now turns to the language of the agreement. As noted above, when construing a contract, the Court seeks to ascertain the parties' intent "as expressed in the agreement." *Wolf Hollow I, L.P. v. El Paso Mktg., L.P.*, 472 S.W.3d 325, 333 (Tex. App. 2015) (citations omitted). The parties' objective intent controls and, generally, "the writing alone is sufficient to express the parties' intentions[.]" *Id.* (citations omitted). When determining the parties' intent, the Court considers the entire writing "to harmonize and give effect to all provisions of the contract, so that none will be rendered meaningless." *Id.* (citations omitted). The Court must consider all the provisions "with reference to the entire instrument[,]" and "[n]o single provision controls[.]" *Id.* (citations omitted). The Court construes the contract in light of the specific activity it serves, and, when possible, will avoid "an unreasonable, inequitable, or oppressive construction." *Id.* at 334 (citations omitted). Further, when interpreting a contract, "specific provisions control general provisions." *Baton Rouge Oil & Chem. Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 377 (5th Cir. 2002) (citations omitted); *see Stafford v. Allstate Life Ins. Co.*, 175 S.W.3d 537, 541 (Tex. App. 2005).

Both agreements contain very similar release provisions that specifically list IRCA. The language in the section titled, the General Release, Claims Not Released, and Related Provisions (General Release provision) is nearly identical in both agreements. Subsection A of the General Release provisions states:

> S., on his own behalf, . . . knowingly and voluntarily releases and forever discharges NMG . . . of and from any and all claims, known and unknown, asserted or unasserted, which S. has or may have against [Respondent] as of the date of the execution of the Agreement[.]

> This release also includes, but is not limited to, claims asserted under . . . the Immigration Reform and Control Act (IRCA)[.]

Releases I and II at 1–2.

The Court finds that this specific and unambiguous language bars the instant complaint. First, the language in the general release provisions is specific: Complainant waived all claims he may have had as of October 19, 2019 (Release I) and November 2, 2018 (Release II) against Respondent under IRCA. Contrary to Complainant's argument, the release is not limited to claims under IRCA wherein Complainant seeks damages and other personal remedies. The release covers all claims under IRCA that he might have had as late as November 2, 2019. Complainant bases his claims on Respondent's alleged actions that began while Complainant was an employee, which was before October 19, 2019.

Second, the intent of the settlement agreement is likewise clear. The parties entered the settlement agreements after Complainant filed a charge against Respondent with the EEOC, the Texas Workforce Commission, and the NLRB. The terms of both agreements required Complainant to withdraw the charges he filed with the EEOC, the Texas Workforce Commission, and the NLRB. Additionally, subsection A of the release provisions lists at least twenty specific claims under which Complainant agreed to waive any claims he may have had on that date. Further, Complainant affirmed in both agreements that he had not filed nor was presently a party to any claim against Respondent. Clearly the intent was to foreclose litigation based on events that occurred while Complainant was employed by Respondent.

Third, if the Court interpreted subsection C as broadly as Complainant suggests, it would render the General Release of All Claims provision in subsection A superfluous. Respondent would be free to assert any claims he may have had prior to the agreement with agencies under any of the specific acts listed in subsection A. Arguably, under the Complainant's interpretation, Complainant could continue with the EEOC and NLRB charges, as long as he did not seek to recover personal remedies.

Considering the contract as a whole, the Court finds that the parties did not intend subsection C to permit Complainant to bring claims before OCAHO that he had prior to the agreement as long as he did not seek personal remedies. The purpose of a settlement agreement is "the conclusion of a disputed or unliquidated claim through a contract in which the parties agree to mutual concessions in order to avoid resolving their controversy through litigation." *Kerrville HRH, Inc. v. City of Kerrville*, 803 S.W.2d 377, 388 (Tex. App. 1990) (citations omitted).
Because the Court finds that the settlement agreements preclude Complainant's § 1324b claims before OCAHO, the Court need not reach Respondent's second argument that the Complainant's claims do not assert a cause of action.

VI. CONCLUSION

The Court finds that Complainant is bound by the waiver and release provisions of both settlement agreements, and those waiver and release provisions preclude Complainant's § 1324b claims before OCAHO. As such, the Court finds that Respondent's Motion to Dismiss is GRANTED. Complainant's complaint is DISMISSED.

SO ORDERED.

Dated and entered on July 19, 2019.

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Jean C. King
Chief Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.