Sandra Hill v. U.S. General Accounting Office

Docket No. 96-06

Date of Decision: April 30, 1998

Cite as: Hill v. GAO (4/30/98)

Before: Leroy Clark, Chair; Harriet Davidson, Vice-Chair, *en banc*; Michael Wolf, Member, dissenting.

Settlement agreement

Reduction-in-Force

Contract law

DISSENT

Administrative Judge Michael Wolf, dissenting:

I respectfully dissent from the decision reached by my colleagues.

The Federal Circuit has cautioned that "[i]n construing a contract, we look first to the terms of the agreement itself. . . . Only if there is ambiguity should parol evidence be considered." *Greco v. Department of Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). Therefore, before we give any consideration to extrinsic evidence, we must consider the contractual language at issue. Paragraph 4(a) of the settlement agreement provides that the agreement expires when the "employee terminates her employment with GAO or GAO lawfully removes employee from employment." Paragraph 4(a) unambiguously addresses a situation in which the Agency takes action that is directed personally against Petitioner (*i.e.,* removal). Paragraph 4(b) of the settlement agreement addresses a different circumstance. It provides that the Agency will take certain actions in the event that it eliminates the issue area library:

> This agreement shall expire under any of the following circumstances:
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> * * *
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> (b) GAO determines in good faith to discontinue the Issue Area Library, in which case GAO will reassign employee to duties that it determines in good faith will continue to provide employee with opportunities to develop skills, knowledge and capability to qualify her for upward mobility. . . .

There is no lack of clarity in the above language. Nor is there any doubt that the conditions for invoking paragraph 4(b) arose: the Agency, in good faith, discontinued the issue area library. As a result, the Agency eliminated Petitioner's position in that library. In my view, there is no reason to consider extrinsic evidence to interpret language that is patently unambiguous.[1]

In fact, I do not believe that the Agency is arguing that the above contract language was ambiguous. Indeed, the Agency's motion for summary judgment was premised on the belief that the agreement was unambiguous and that there was no disputed material issue of fact relating to the agreement. Instead, what the Agency has argued is that the elimination of Petitioner's position was brought about by circumstances that were unforeseen at the time of the execution of the settlement agreement.[2] In effect, the Agency contends that the parties did not contemplate the occurrence of the Agency-wide RIF that resulted in the closure of the issue area library and, therefore, did not intend to apply paragraph 4(b) to that eventuality. However, there is abundant case law addressing unforeseen circumstances as a defense to non-performance of a contract, and that case law is clearly contrary to the Agency's position.

The Agency cannot credibly contend that paragraph 4(b) of the settlement agreement did not encompass the possibility of a RIF. After all, when an encumbered position is eliminated because of a reorganization, lack of work or lack of appropriations and, as a result, an employee is released from his or her job group (*e.g.*, demotion), a RIF, by definition, occurs. GAO Order 2351.1, ch. 1, ¶1. *Cf. Rojas v. GAO*, PAB Docket No. 96-08 (March 5, 1998). Clearly, paragraph 4(b) was to apply whenever the issue area library was discontinued (in good faith) while Petitioner occupied a position in that library. Because the elimination of Petitioner's position while she occupied it was likely to result in a RIF situation, the Agency cannot argue that a RIF was an unforeseen possibility.

Instead, what was unforeseen by the parties was the big RIF that resulted from Congressional budget cuts imposed on GAO in 1995. This position was made clear in the Agency's post-hearing brief:

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[1]The majority seems to believe that an ambiguity exists merely because a contract fails to address a future contingency. Decision at 4. However, the agreement at issue here does not contain a *force majeure* clause. The failure to include such a clause does not render the contract ambiguous. Similarly, the settlement agreement's failure to discuss an Agency-wide RIF does not mean that it is ambiguous. Instead, lack of foresight in drafting the terms of this settlement agreement raises the legal issue of unforeseen circumstances (as discussed below), not ambiguity.

[2]A review of the Agency's post-hearing brief also reveals that it did not argue "ambiguity." If anything, it argued that paragraph 4(a) of the settlement unambiguously covered the situation confronted by Petitioner when she was terminated as the result of a RIF. I do not believe that this Board should render a decision on non-jurisdictional grounds that the prevailing party did not even argue.

> There is absolutely no extrinsic evidence to support the notion that the parties intended to provide petitioner with RIF immunity <u>where an agency-wide RIF was being conducted</u>. Rather, it is clear that the parties did not actually anticipate the possibility of <u>an agency-wide RIF</u> or discuss such a scenario during the settlement negotiations. [Brief at 12, emphasis added; citations omitted.]
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> * * * *
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> In essence, petitioner is now seeking to convert a clause in the settlement agreement - which her representative has asserted was meant to protect petitioner in very limited circumstances - into total RIF immunity, including those instances where the agency has a genuine need to reduce staffing and conduct an <u>agency-wide RIF</u>. Such broad-sweeping immunity was never envisioned by the parties and clearly not bargained for by petitioner in 1992. [Brief at 19, emphasis added.]

The Agency reiterated this theme in its brief in response to Petitioner's appeal to this Board:

> As the Judge correctly found, neither party considered the possibility of an <u>agency-wide</u> RIF at the time of the negotiations. Mr. Thompson testified that the possibility of an <u>agency-wide</u> RIF "wasn't even on the radar screen" at the time the parties were negotiating the agreement. At one point in her testimony Ms. Wind testified that she intended for the provision to preclude any RIF affecting the position being created by the agreement. She also stated that it was "extremely likely" that she and Mr. Thompson had discussed the possibility of a RIF during the negotiations; however, she later thought better about such an untruthful assertion and modified her testimony, stating that she did not recall a discussion about "formal RIFs." Given Ms. Winn's [sic] reversal in testimony, it was entirely appropriate for the Judge to conclude that neither party had in mind an <u>agency-wide</u> RIF when they negotiated the settlement. [Brief at 14-15, emphasis added; citations omitted.]

I concur with Judge Clark that the evidence shows that neither party contemplated an Agency-wide RIF at the time that the settlement agreement was executed. Where I disagree is in the legal conclusions to be drawn from this fact.

It is a long-honored principle of contract law that:

> There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and not within his control, he will not be excused.

Boyden v. United States, 80 U.S. 17, 22 (1871).

Similarly, the Supreme Court has held that:

> But where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not foreseen by the party or within his control.

Jacksonville Railway v. Hooper, 160 U.S. 514, 528 (1896) (quoting *Jones v. United States*, 96 U.S. 24, 29 (1877)). In *Hooper*, the Court held that a party was not relieved of its contractual obligation simply because the building which was at the heart of the contract had been destroyed by fire.

To be sure, this rule has been liberalized over the years, but not in ways helpful to the Agency's position in this case. See Restatement (Second) of Contracts, §§ 261, 264. The changes focus, in part, on the distinctions between events that are unforeseen and those that are reasonably unforeseeable:

> Contract liability is strict liability. . . . The obligor is therefore liable in damages for breach of contract even if he is without fault and even if circumstances have made the contract more burdensome or less desirable than he had anticipated. . . . The obligor who does not wish to undertake so extensive an obligation may contract for a lesser one by using one of a variety of common clauses: he may agree only to use his "best efforts"; he may restrict his obligation to his output or requirements; he may reserve a right to cancel the contract; he may use a flexible pricing arrangement such as a "cost plus" term; he may insert a *force majeure* clause. . .
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> Even where the obligor has not limited his obligation by agreement, a court may grant him relief. An extraordinary circumstance may make performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance.

Restatement (Second) of Contracts, Ch. 11, Introductory Note (emphasis added).

The unforeseeable circumstances most often cited by the courts as an excuse for non-performance of contractual obligations are acts of God and changes in the law:

> It is a general rule of the common law that when the consideration for a promise wholly fails, the promisor is relieved from liability. Failure of consideration may result from impossibility of performance, but before one will be relieved from performance on that account, the impossibility must consist in the nature of the thing to be done and not merely in the incapacity or inability of the promisor to do it. When a covenantor has agreed to an obligation possible to be performed, unforeseen difficulties will not excuse performance, and he must abide by his obligation unless performance is rendered impossible by an act of God, by law, or by the other party.

Gulf, Mobile & Ohio Railroad v. Illinois Central Railroad, 128 F. Supp. 311, 323-24 (N.D. Ala. 1954) (citing *Columbus Railroad, Power & Light Co. v. Columbus*, 249 U.S. 399 (1919)).

A circumstance that was unforeseen at the time of a contract's making does not automatically excuse the parties from performing under the contract. However, a reasonably unforeseeable circumstance may vitiate a party's contractual obligations. The Ninth Circuit addressed the standards to be used in cases of unforeseeability:

> Let us fully grant that a party should not be bound by a contract, the purpose of which is frustrated by an unforeseeable supervening event. . . . The question then becomes, how do we determine when the parties should remain bound? The answer is that the parties should be bound unless their contractual purpose was frustrated by a completely unforeseeable clause. And the test of foreseeability should be an objective one; not a subjective inquiry into the state of mind of the parties.

United States v. Buffalo Coal Mining Co., 345 F.2d 517, 518 (9th Cir. 1965) (emphasis added). In *Buffalo Coal*, the Circuit Court concluded that a mine owner could not defend its non-performance of a contract by citing unforeseen geological impediments to completion of its work. The Court noted that such obstacles are inherent in the mining business.

The instant case does not involve an act of God. The only intervening event cited by the Agency is a decision by Congress to cut GAO's budget by 25%. Congress may wield significant powers, but they are not celestial. At best, the Agency could argue that the budgetary decision was akin to a change in law that rendered completion of the contract with the Petitioner impossible or impracticable.

Assuming, for present purposes, that the budgetary decision should be likened to the passage of a law, the Agency still would fall short in its effort to cite that action as an excuse for non-performance. The Supreme Court's recent decision in *United States v. Winstar Corp.*, 58 U.S. 839, 116 S. Ct. 2432 (1996) provides some guidance. In that case, the government entered into contracts with financial institutions that took over failing thrifts during the 1980's savings and loan crisis. The government agreed that the financial institutions could apply special accounting principles to the acquired thrifts. However, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"),[3] prohibiting those special accounting rules, and the government withdrew its approval for the rules. The financial institutions sued the government for breach of contract. The government, in turn, argued that a change in the law had rendered the performance of the contract, as originally agreed upon, impossible.

The Supreme Court rejected the government's argument. A plurality of the Court[4] held that an impossibility defense to a contractual breach is dependent on proof that the non-occurrence of the intervening event was a basic assumption of the parties. If the event was foreseeable, then the risk of occurrence was deemed to be assumed. With regard to FIRREA, the Court concluded that Congressional adoption of this law was not unforeseeable, especially given the regulatory environment that existed at the time that the original contracts were executed. While the exact nature of the regulatory reforms could not be predicted, the possibility that some reforms would be enacted was foreseeable. The Court approvingly cited a long list of precedent holding that an unforeseeable event under contract law must be something that is unexpected and "could not have been foreseen or guarded against in the contract." 116 S. Ct. at 2470, n.53 (quoting *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 519 N.E.2d 295 (1987)). In the Supreme Court's view,

> there is no reason to look further where, as here, the risk was foreseen to be more than minimally likely, went to the central purpose of the contract, and could easily have been allocated in a different manner had the parties chosen to do so. . . .

116 S.Ct. at 2470, n.53.

The plurality's standard of unforeseeability in *Winstar* can and should be applied to the instant case. The question then becomes whether an Agency-wide RIF was a foreseeable event that the parties could have provided for in the contract. Did the failure to so provide leave the Agency with an obligation to complete its part of the bargain? Certainly, the possibility of a RIF -- to the

[3]Pub. L. No. 101-73, 103 Stat. 183.

[4]A majority of the Court agreed that judgment should be entered against the United States. A plurality, consisting of Justices Souter, Stevens, Breyer and O'Connor, voted in favor of the language regarding the unforeseeability/impossibility defense quoted in the text.

extent that a RIF involves the elimination of a position -- was a central consideration in the settlement agreement. Paragraph 4(b) of the agreement unmistakably addressed that possibility. The real question is whether a large-scale or Agency-wide RIF should be considered so unexpected that it was unforeseeable.

Using either the "minimally likely" standard adopted by the Supreme Court or the "completely unforeseeable" standard enunciated by the Ninth Circuit in *Buffalo Coal*, I am hard pressed to understand how a large-scale RIF within the Agency could be deemed unforeseeable. Many federal agencies throughout the 1980's and early 1990's were forced to undergo office closings, reorganizations, etc. Numerous RIFs were undertaken as the federal government was downsized. The settlement agreement between the Petitioner and the Agency was executed in 1992. It defies common sense to state that a large-scale RIF was unforeseeable in a legal sense. Such a possibility may not have been on the "radar screen" of the people negotiating the agreement, but that radar screen is not the measure of contractual enforceability adopted by either the Ninth Circuit or the Supreme Court. We should require the Agency to satisfy an <u>objective</u> standard of unforeseeability; that standard has not been met.

I would conclude that a large RIF in the Agency was at least "minimally likely" and therefore something which the parties needed to explicitly address in their agreement; absent such provision, the parties accepted the risk of the occurrence. In short, the Agency cannot, as a matter of law, prevail in a defense that unforeseeable circumstances excused it from performing its obligations under paragraph 4(b) of the settlement agreement.

In addition, I question whether the Agency can plausibly argue that the Agency-wide RIF rendered compliance with the contract "impossible" or "impracticable." While there may be an <u>argument</u> that literal compliance with paragraph 4(b) would run afoul of the RIF regulations, there is an inadequate record to support that argument. To say that the contract and the RIF laws could not both be respected is an assumption in search of evidence. In its post-hearing brief, the Agency addressed this issue as follows:

> [P]etitioner points to a proposal which she shared with RCED managers, relating to other types of duties which she could perform in the event the library was closed. The record supports, however, that had petitioner been reassigned into a position such as the one she proposed, the agency, in good faith, could not have recommended it survive the agency-wide RIF. Mr. Robinson testified that the position petitioner proposed was not one which he would have considered critical, particularly given the gravity of the budget reductions. Tr. 152-153. Similarly, Mr. Wells testified that had she been assigned to such a position in November 1995, he nevertheless could not have recommended to ACG-OPS in March 1996 that such a position be spared in the RIF. Tr. 126-27. [Brief at 22].

These comments, including the testimony of Messrs. Robinson and Wells, go to the inadvisability of reassigning Petitioner to a different position, but not the impossibility of doing so. *Cf. W.R. Grace & Co. v. Local 759, International Union of Rubber Workers*, 461 U.S. 757, 768 n.12 (1983) ("Economic necessity is not recognized as a commercial impracticability defense to a breach-of-contract claim. . . . [I]ncreased cost of performance does not constitute impossibility"). The record, as it stands now, simply does not support the assertion that it would have been impossible (or impracticable) to enforce paragraph 4(b) while still complying with the RIF regulations. The impossibility or impracticability of complying with the contract because of unforeseen circumstances was a defense raised by the Agency. It had the burden of proving that defense, but failed to present evidence to meet that burden.

This conclusion is buttressed by the Supreme Court's decision in *W.R. Grace*. That case stands for the proposition that a settlement agreement cannot be unilaterally obviated by an employer merely because enforcement of the agreement would directly conflict with another legal obligation (in that case, a lawful seniority system). When the employer has created a conflict by entering into a settlement agreement that is inconsistent with another legal obligation, the employer cannot demand release from either its contractual or legal obligations; instead, the employer must find a means of reconciling the two obligations or must compensate employees who are damaged by the failure to fulfill both obligations. 461 U.S. at 767-70.

The employer in *W.R. Grace* argued that the need to comply with the dictates of public law (*i.e.*, Title VII) relieved it of the obligation of also complying with the collective bargaining agreement (much as the Agency here argues that it cannot comply with Petitioner's interpretation of the settlement agreement because it would conflict with its obligations under the RIF regulations).

The Supreme Court had little sympathy for the employer's situation:

> it is undeniable that the Company was faced with a dilemma: it could follow the conciliation agreement as mandated by the District Court and risk liability under the collective-bargaining agreement, or it could follow the bargaining agreement and risk both a contempt citation and Title VII liability. The dilemma, however, was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations.
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> * * *
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> The Company was cornered by its own actions, and it cannot argue now that liability under the collective-bargaining agreement violates public policy. [Id. at 767, 770.]

The majority dismisses *W.R. Grace's* discussion of this issue as mere dicta. Decision at 11. In fact, the majority in *W.R. Grace* extensively discusses the issue of impossibility arising out of conflicting contractual obligations; that conflict was central to the case. For this reason, other courts have interpreted *W.R. Grace* in the same way that I have. For example, the Fourth Circuit has summarized the holding in *W.R. Grace* as follows:

> company that signed Title VII conciliation agreement that conflicted with seniority provisions of collective bargaining agreement was held to terms of both.

White v. National Steel Corp., 938 F.2d 474, 486 (4th Cir. 1991) (emphasis added). See also *West Texas Transmission v. Enron Corp.*, 907 F.2d 1554, 1568 n.18 (5th Cir. 1990) ("While the decision [in *W.R. Grace*] recognizes that a company cannot necessarily avoid its obligations under a prior contract because these obligations violate the terms of a subsequent consent order, the court also found that the company's liability for breach of the agreement might be limited to an award of damages rather than specific performance"); *EEOC v. Sheet Metal Workers' International*, 889 F. Supp. 642, 682 (S.D.N.Y. 1995) ("The Supreme Court [in *W.R. Grace*] found that it was within the employer's power to enter into a conciliation agreement which required him to breach his collective bargaining agreement but that the CBA required him to bear the costs caused by the breach") (emphasis in original).

The principle in *W.R. Grace* can and should be applied to this case. The Agency should not be permitted to argue that public law considerations (*i.e.*, the RIF regulations) relieved it of the contractual commitment it made to Petitioner.

Finally, the Agency should not be able to avail itself of an unforeseen circumstance defense in light of the settled principle in contract law that an obligor cannot be discharged of a contractual duty where the intervening event was caused by the obligor. See Restatement (Second) of Contracts, §261, Comment d; *Baumer v. Franklin County Distilling Co.*, 135 F.2d 384 (6th Cir. 1943). See also *W.R. Grace*, 461 U.S. at 767 n.10 ("it is far from clear that the [impossibility] defense is available to the Company, whose own actions created the condition of impossibility"). The Agency cannot argue in this case that an outside force compelled it to take the action against the Petitioner's position. Congress ordered a massive budget cut for the Agency, but the Agency was given wide latitude in deciding where to make its cuts. The linchpin of the Agency's impossibility defense is that the closing of the issue area library was the result of an unforeseen Agency-wide RIF. But the administration of that RIF was totally within the control of the Agency. No one forced the Agency to discontinue the issue area library or Petitioner's position; there may have been compelling economic reasons to do so, but that was a decision made by GAO. Therefore, the Agency cannot satisfy this essential element of an unforeseeability defense. It cannot bootstrap itself into this defense when the Agency was the immediate cause of the very contingency that it claims was unforeseen.

In sum, I would require the Agency to live up to the bargain that it made in paragraph 4(b) of the settlement agreement.