No. S147190

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RAYMOND EDWARDS II,

Plaintiff and Appellant,

vs.

ARTHUR ANDERSEN, LLP,

Defendant and Respondent.

After a Decision by the Court of Appeal
Second Appellate District, Division Three, Case No. B178246
Los Angeles Superior Court Case No. BC 294853
Andria K. Richey, Judge Presiding

ANSWER TO THE AMICUS BRIEF OF THE EMPLOYERS GROUP

LAW OFFICES OF RICHARD A. LOVE
Richard A. Love, SBN 61944
Beth A. Shenfeld, SBN 116223
11601 Wilshire Boulevard, Suite 2000
Los Angeles, California 90025-1756
(310) 477-2070 / Facsimile (310) 477-3922

GREINES, MARTIN, STEIN & RICHLAND LLP
Marc J. Poster, SBN 48493
Robin Meadow, SBN 51126
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036-3626
(310) 859-7811 / Facsimile (310) 276-5261

Attorneys for Plaintiff and Appellant
RAYMOND EDWARDS II

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INTRODUCTION

Contrary to the frantic concerns expressed in the Employers Group ("Group")[1] amicus brief, the sky is not falling. Plaintiff Raymond Edwards II is not asking this Court to void all existing general releases between employers and employees. The Court of Appeal did not do so, and this Court does not have to, either. Plaintiff only asks this Court to hold that an employer cannot lawfully require an employee to release future claims to indemnification for employment-related expenses under labor Code section 2802 as a condition of future employment.

We briefly explain each of these points.

LEGAL DISCUSSION

I. ANDERSON COULD NOT LAWFULLY REQUIRE PLAINTIFF TO GENERALLY RELEASE "ANY AND ALL CLAIMS" AS A CONDITION OF FUTURE EMPLOYMENT BECAUSE LABOR CODE SECTION 2804 SPECIFICALLY PROHIBITS WAIVER OF AN EMPLOYEE'S CLAIM FOR REIMBURSEMENT OF EMPLOYMENT-RELATED EXPENSES.

The Group seems confused as to plaintiff's position. What plaintiff asks the Court to rule is this: That an employer violates public policy when (1) the employer requires its employee to sign a release of any and all

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[1] The Group does not speak for all employers. See, for example, the amicus brief of employers St. Jude Medical, S.C., Inc., Pacesetter, Inc. and Advanced Bionics Corporation filed May 23, 2007, in support of plaintiff's position.

claims – past, present and future, known or unknown – relating to his or her employment (except for accrued claims for employee benefits) as a condition of obtaining future employment,[2] and when (2) the employer knows the employee may have an unaccrued claim for reimbursement for employment-related expenses that by law the employee cannot be required to waived.[3]

That's all the Court of Appeal held. That's all this Court needs to hold in order to protect plaintiff's rights.

Contrary to the Group's fears, such a ruling will not cause a mad rush to the courthouse in every case in which the parties signed a general release, in the employment context or in any other context. (Group Brief, p. 10.) As plaintiff posits the rule, only if an *existing* release implicates nonwaivable claims, *and* only if an issue arises over the validity of the

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[2] Andersen's proposed release was as broad and general as its lawyers could conceivably make it, specifically excluding only *accrued* claims for employee benefits: "Employee does hereby release and forever discharge [Andersen] from any and all actions, causes of action, claims, demands, debts, damages, costs, losses, penalties, attorney's fees, obligations, judgment, expenses, compensation or liabilities of any nature whatsoever, in law or equity, whether known or unknown, contingent or otherwise, that Employee now has, may have ever had in the past or may have in the future against any of the Released Parties by reason of any act, omission, transaction, occurrence, conduct, circumstance, condition, harm, matter, cause or thing that has occurred from the beginning of time up to and included the date hereof, including, without limitation, claims that in any way arise from or out of, are based upon or relate to Employee's employment by, association with or compensation from [Andersen] or any of its affiliated firms, except for claims (i) arising out of [Andersen's] obligations set forth in this Agreement or (ii) for any accrued and unpaid salary or other employee benefit or compensation owing to Employee as of the date hereof." (3AA 579.)

[3] The Group concedes that "requiring an employee (or any other party) to execute such a release could potentially be a 'wrongful act' and the basis for tort liability." (Group Brief, p. 17.)

release *as to the portion that is nonwaivable, and* only if the parties to the release cannot agree on its enforceability (three big "ifs"), then and only then would there even be an occasion for a court to intervene. Plaintiff does not dispute that when all those "ifs" have occurred, a court could presume that the parties intended to act lawfully and uphold the release only as to claims that can lawfully be released. In appropriate circumstances, a court could conform the release to the law.

But again, the Court doesn't have to go there. None of the "ifs" have occurred in this case. Plaintiff never signed the release that Andersen insisted he sign in order to obtain future employment with HSBC. And as a direct, harmful consequence, Andersen improperly denied him the opportunity to work for HSBC.

The Group simply begs the question of whether a release of "any and all" claims purports to release claims that can't lawfully be released. The Group makes the entirely circular argument that a release is intended to extinguish a legal duty and "by definition" one cannot extinguish a duty that cannot by law be extinguished. (Group Brief, p. 13.) Plaintiff agrees that one cannot lawfully extinguish something that is lawfully inextinguishable, but that does answer the question whether "any and all" means "some but not others." The words "any and all" are as inclusive as lawyers can make them. They do not reasonably permit of a non-inclusive meaning.

The ultimate question here is whether Andersen's attempt to extinguish its inextinguishable legal duty under Labor Code sections 2802 and 2804, by threatening to withhold (and in fact withholding) from plaintiff future employment with HSBC, is a wrongful act. Plainly, it is. (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1145.) That's all plaintiff asks the Court to decide in this regard.

The Group asserts, *ipse dixit*, that "employers do not typically ask employees to surrender rights which they are legally incapable of

surrendering." (Group Brief, p. 14.) This assertion runs counter to plaintiff's (and his co-employees') experience with Andersen, and to the experience of the employees of other companies referred to in the amicus briefs of Kastner Banchero LLP (at pp. 6-10) and St. Jude Medical, S.C., Inc. et al. (at pp. 2-3, fn. 1). Moreover, the Group's assertion flies in the face of its own argument that general releases of "any and all claims" are routinely required by employers in every employment severance situation (Group Brief, pp. 1-2), even though such releases may be suspect in a particular case. The Group wants the Court to assume that employers typically act reasonably but employees and their lawyers typically do not. The Group can't have it both ways.

The Group also asserts, in one breath, that "employees are presumed to know the law" (Group Brief, p. 14) and, in the next breath, that "unsophisticated parties do not know where the limits of legal enforcement lie" (Group Brief, p. 15). Again, the Group can't have it both ways. Moreover, if employees are presumed to know the law, so are employers. And since in the vast majority of cases it is the employer who drafts the release and presents it to a departing employee on a take or leave it basis, the burden should be on the employers to ensure that the releases do not on their face violate the law. If employers legitimately want to "buy their peace," then they should take care to do so lawfully.

II. ANDERSEN'S RELEASE WRONGFULLY PURPORTED TO WAIVE PLAINTIFF'S FUTURE CLAIMS FOR INDEMNITY UNDER LABOR CODE SECTION 2802.

The Group asks this Court to decide whether a release of a claim arising from past events claim for reimbursement of employment-related

expenses should be barred by Labor Code sections 2802 and 2804. (Group Brief, p. 11.)

The Group again misunderstands the situation. Andersen's proffered release purported to cover claims that have already accrued *and* claims that might accrue in the future. The release says: "Employee does hereby release and forever discharge [Andersen] from *any and all . . . claims* . . . whether known or unknown, contingent or otherwise, *that Employee . . . may have in the future . . . .*" (3AA 579, emphasis added.)[4]

Plaintiff did not have an accrued claim under section 2802 arising from past events. The critical issue for plaintiff was whether he could be required to waive *future* rights under section 2802 based on any events, past or future, as a condition of employment with HSBC. Clearly not. Plaintiff in fact faced potential claims in the future relating to sales of Andersen-created financial programs that proved to be invalid as tax-avoidance schemes. Those sales *events* may have happened in the past, but no *claim* had yet accrued. The lawsuits against plaintiff regarding Andersen's abusive tax shelters would happen in the future. If plaintiff were sued in the future, he would have the non-waivable right to indemnity from Andersen under sections 2802 and 2804 for expenses incurred in defending his conduct as an Andersen employee. (*Douglas v. Los Angeles Herald-Examiner* (1975) 50 Cal.App.3d 449, 461.) He could not seek indemnity now, because he has not incurred the expenses. Indemnity is one party's

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[4] The Group purports to intuit Andersen's and plaintiff's mutual intent as to the scope of the release (Group Brief, pp.17-18, citing *Safeco Ins. Co. of America v. Robert S.* (2001) 26 Cal.4th 758), but the Group is apparently under the misapprehension that Andersen and plaintiff actually executed the release. They didn't. Plaintiff refused, for the very reason that Andersen intended the release to include nonwaivable claims. An agreement's intent cannot be gleaned when it there no agreement to start with.

obligation to make good a loss or damage that another party has *already* incurred. (See *Rooz v. Kimmel* (1997) 55 Cal.App.4th 573, 582.)

The Court of Appeal decision, now depublished, did not hold that waivers of accrued claims regarding past events would be invalid. The issue was not presented. That Court even noted the potential distinction between waivers of accrued claims and waivers of future claims when it stated: "Assuming arguendo that indemnity was encompassed within 'compensation,' the exception was limited to compensation owing as of the date the TONC was executed, *improperly excluding any future indemnity claims*." (Slip Opinion, p. 30, emphasis added.)

Andersen knew it was a distinct possibility that plaintiff would incur employment-related expenses if he were sued for conduct arising out of his employment (such as a suit or even criminal prosecution for selling Andersen-created tax shelters that had since been declared invalid), but no such expenses had yet been incurred. (7AA 1316-1317, Exh. 24; 1263-1264, ¶ 44; 1265, ¶ 51; 8AA 1509, Exh. 84.) The release would therefore have been a purported advance waiver of non-waivable rights. Even the Group would concede a waiver of future such rights would be impermissible and violate public policy.

CONCLUSION

The Employers Group amicus brief has offered the Court no meaningful assistance in deciding the issues presented by the facts of this case with regard to a general release of any and all claims. There will be no calamitous repercussions if the Court holds, as it should, that an employer violates public policy when it insists that an employee waive nonwaivable claims as a condition of obtaining future employment.

Dated: June ___, 2007

LAW OFFICES OF RICHARD A. LOVE
Richard A. Love
Beth A. Shenfeld

GREINES, MARTIN, STEIN & RICHLAND LLP
Marc J. Poster
Robin Meadow

By_____
Marc J. Poster, Esq.

Attorneys for Plaintiff and Appellant
RAYMOND EDWARDS II

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204 (c)(1), the attached Answer To The Amicus Brief Of The Employers Group was produced using 13-point Times New Roman type style and contains 1,784 words not including the tables of contents and authorities, caption page, signature blocks, or this Certification page, as counted by the word processing program used to generate it.

Dated: June ___, 2007

LAW OFFICES OF RICHARD A. LOVE

GREINES, MARTIN, STEIN & RICHLAND LLP

By_____
Marc J. Poster, Esq.