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Seventh Circuit Affirms the Dismissal of Lawsuit Based on the EEOC's Failure to Conciliate Claims Related to Releases

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On December 17, 2015, the U.S. Court of Appeals for the Seventh Circuit affirmed a district court's dismissal of the Equal Employment Opportunity Commission's lawsuit against CVS Pharmacy.¹ This lawsuit has been the subject of significant media attention due to the EEOC's challenge to common provisions included in many standard severance agreements. Like the district judge's decision, the appellate court panel of three judges resolved the case based on the EEOC's failure to engage in conciliation required by Title VII of the Civil Rights Act, but also provided important commentary on the merits of the EEOC's claims.²

Background

The EEOC's Chicago District office sued CVS Pharmacy in the U.S. District Court of the Northern District of Illinois in February 2014, alleging that several provisions of CVS' standard release of claims violated Title VII of the Civil Rights Act of 1964 because those provisions allegedly interfered with employees' rights to file administrative charges, communicate voluntarily, and participate in investigations with the EEOC and other fair employment practice agencies. The provisions that the EEOC challenged included clauses on cooperation, non-disparagement, non-disclosure of confidential information, the general release of claims, pending actions, and the covenant not to sue. The EEOC also noted that CVS' standard separation agreement was five single-spaced pages, implying that the agreement could be too long and complicated to be understood by the individuals asked to sign the agreement.

CVS immediately moved to dismiss the claims, asserting the EEOC could not (a) show that any particular individual had been unlawfully discriminated or retaliated against

1 *Equal Employment Opportunity Commission v. CVS Pharmacy, Inc.*, ___ F.3d ___, 2015 US App. Lexis 21963 (7th Cir. Dec. 17, 2015).

2 To read about the history of this lawsuit, see Kerry Notestine, Terri Solomon, and Daniel Thieme, *Recommendations in Response to the EEOC's New Lawsuit on Severance Agreements*, Littler Insight (Mar. 4, 2014) and *EEOC Lawsuit Against CVS Pharmacy Challenging Severance Agreements Dismissed*, Littler Insight (Oct. 20, 2014).

through the use of the company's standard severance agreements, (b) establish a "pattern or practice" of unlawful conduct, (c) plausibly allege or show intentional interference with protected rights, and/or (d) show that the EEOC complied with its obligation to conciliate claims (attempt to settle) before filing the pattern and practice lawsuit. District Judge Darrah granted CVS' motion based on the EEOC's failure to engage in required conciliation, or settlement negotiations, prior to filing suit in federal court.

The district judge did not specifically decide whether CVS' release was itself unlawful because he made the decision based on the EEOC's failure to engage in conciliation efforts prior to filing suit. Judge Darrah, however, indicated in two footnotes that the EEOC had not demonstrated that CVS engaged in unlawful discrimination or retaliation merely by including certain terms in the company's form separation agreement and that a "carve-out" in CVS' release agreement protecting the right to file an administrative charge undermined the EEOC's claim that CVS interfered with protected rights.³

The Seventh Circuit's Decision

The Seventh Circuit panel in a unanimous decision affirmed the dismissal. Circuit Judge Joel M. Flaum authored the opinion and held that the district court properly dismissed the EEOC's claims because the EEOC was obligated to engage in conciliation prior to filing the lawsuit against CVS and it was undisputed that the agency failed to do so.

The EEOC took the position on appeal that the statutory provision under which it brought suit did not require the agency to conciliate. Specifically, the EEOC brought the case under § 707(a) of Title VII alleging that CVS engaged in a "pattern or practice of resistance" to the full enjoyment of rights under Title VII by requiring employees to sign what the EEOC considered to be an overbroad release. Under the original version of Title VII, the Department of Justice (DOJ) was the government entity authorized to pursue claims under § 707(a) and the statute did not require the DOJ to conciliate with the respondent before filing suit. Congress amended Title VII to transfer the authority to pursue pattern or practice lawsuits to the EEOC and added that such actions "shall be conducted in accordance with the procedures set forth in [section 706]." See 42 U.S.C. §20000e-6(e). Section 706 specifically requires that the EEOC engage in conciliation prior to filing lawsuits. See 42 U.S.C. §20000e-5(f).

The EEOC argued it was not bound to follow the conciliation procedures set forth in § 706 because the DOJ had not been obligated to engage in conciliation when it had authority under § 707(a) to bring pattern and practice lawsuits and cited to legislative history indicating that Congress intended to transfer the DOJ's authority to the EEOC when it amended the statute. The EEOC also asserted that its claim was under § 707(a) challenging a "pattern or practice of resistance," which is different from a claim under § 707(e) challenging a "pattern or practice of discrimination." Because § 707(e) requires compliance with § 706 procedures and the EEOC claimed it was not pursuing a claim under § 707(e), the EEOC asserted that it was not required to conciliate. The court of appeals dismissed this argument, reasoning that the EEOC's position essentially read § 707(e) out of the statute. The court stated there is no difference between a claim brought under § 707(a) challenging a "pattern or practice of resistance" and a claim brought under § 707(e) challenging a "pattern or practice of discrimination" and that conciliation requirements applied to any action alleging a pattern or practice of illegal conduct. Because the EEOC was required to but did not conciliate, the court of appeals affirmed the district court's dismissal.

³ The Phoenix District Office of the EEOC filed a similar lawsuit in April of 2014, this time against CollegeAmerica Denver, Inc., in the U.S. District Court for the District of Colorado, making many of the same allegations as in the EEOC's lawsuit against CVS. The EEOC alleged that the employer violated the Age Discrimination in Employment Act instead of Title VII by including certain terms in the company's standard release agreement. The EEOC also alleged that certain actions by CollegeAmerica taken after the claimant had filed charges related to the release were retaliatory. CollegeAmerica, like CVS, immediately moved to dismiss the EEOC's complaint and the district judge in that case granted the motion as to the interference claim, but declined to dismiss the retaliation claim. That case remains pending. Littler authored another Insight on this filing and restated our recommendations on this topic. See Kerry Notestine, Terri Solomon, and Daniel Thieme, *They Really Mean It: the EEOC Sues Another Employer for Allegedly Overbroad Releases*, Littler Insight (May 13, 2014).

These technical arguments about statutory authority to pursue certain types of discrimination claims do not provide much guidance to employers regarding what should or should not be included in release agreements. The district judge had provided some guidance for employers in two footnotes in his opinion. In one footnote, Judge Darrah addressed CVS' argument that the EEOC had not demonstrated that CVS engaged in unlawful discrimination or retaliation merely by including certain terms in the company's form separation agreement. The judge stated that the EEOC's attempt to expand the right to pursue a pattern and practice claim under § 707(a) beyond "acts of discrimination and retaliation" was without merit and that actual discrimination or retaliation had to be shown to establish a statutory violation. In other words, language in a release agreement cannot be the basis for a discrimination or retaliation claim. In another footnote, the district judge addressed CVS' argument that the agreement included a carve-out protecting the right to file an administrative charge, which undermined the EEOC's claim of interference with protected rights. The judge noted that the general release contained an exclusion for "any rights that the Employee cannot lawfully waive" and the covenant not to sue included a carve-out for the employee's right to participate in administrative proceedings and cooperate with such agency investigations. The court considered "not reasonable" the EEOC's argument that the exclusion allowing participation in administrative proceedings did not protect the right to file a charge. The court also stated that even if the agreement banned filing of charges, those provisions would merely be unenforceable and not constitute actionable resistance to Title VII.

The court of appeals also addressed these two issues in its opinion and perhaps elevated the issues above the non-precedential dicta offered by the district judge. Regarding whether including certain provisions in a form release could be unlawful discrimination, the appellate opinion specifically stated that § 707(a) did not "create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes – it simply allows the EEOC to pursue multiple violations of Title VII [involving unlawful discrimination or retaliation] in one consolidated proceeding." The appellate court did not include this analysis in a footnote but incorporated it into the reasoning that led to its conclusion that there was no difference between claims brought under §§ 707(a) and 707(e) as the EEOC claimed. The court also cited to decisions from other circuits indicating that conditioning benefits on promises not to file charges was not itself sufficient to constitute unlawful retaliation, thus leading the court to state its agreement with the district judge's opinion that the EEOC failed to state a claim under Title VII against CVS.

The court of appeals also stated in a footnote that CVS's "carve-out" of the right to file a charge and participate in EEOC investigations would still cause the EEOC's claim to fail even if it were to agree with the EEOC's positions regarding its powers under § 707(a) and conciliation. The court specifically stated that the carve-out in the agreement "makes clear that it does not obstruct the signatory's ability to file charges with the EEOC." In addition, the court of appeals said that the release language expressly stating that the general release "does not apply to rights that the signatory cannot lawfully waive" supports the district judge's conclusion that the release agreement did not restrict the signatory from "filing a charge or otherwise participating in EEOC proceedings." The court noted also that the EEOC did not dispute that the parties could locate and read the carve-out, thus undermining its claim that the agreement was "confusing because of its small font and 'legalese'"; the agreement advised the terminated employee to consult with a lawyer and required the employee to attest that he or she understood and voluntarily accepted its terms; the EEOC did not argue that there was a disparity in bargaining power between the parties; and the EEOC presented no evidence that anyone was misled by the agreement. Instead, the EEOC admitted that the claimant filed a charge a month after signing the release agreement. The appellate court did not comment on these facts, but their reference clearly was intended to support the reasonableness of the release agreement.

Recommendations

Even though the appellate decision resolved the CVS case on the conciliation issue, the appellate opinion is helpful when considering terms that employers should include in release agreements. It is anticipated that the EEOC will continue to challenge terms included in separation agreements and post-charge filing releases of claims that it asserts infringe on statutory rights under Title VII and the ADEA. In addition, individual plaintiffs may make these or similar arguments when challenging

the enforceability of releases in litigation that does not involve the EEOC. Employers may want to consider the following steps to help protect release agreements from challenge under the theories asserted by the EEOC against CVS:

- Review every separation agreement form to consider whether to strengthen existing “carve-out” provisions preserving the employee’s right to file administrative charges and participate in agency investigations. Employers may wish to include greater specificity in these provisions than had been thought to be necessary in the past. It is recommended that the right to file a charge and participate in agency investigations be specifically stated. Employers may also consider referring to Section 7 rights under the National Labor Relations Act as appropriate because the National Labor Relations Board (NLRB) asserts similar theories as does the EEOC. Also, prophylactically, it may be advisable for the employer to indicate that these rights apply to any government agency charged with enforcement of any law (not just the EEOC and NLRB, and not just employment laws).
- Despite the EEOC’s allegations in the *CVS and CollegeAmerica* complaints, it is far from clear whether an employer must repeat these rights in every paragraph of a separation agreement that could potentially be determined to limit an employee’s right to engage in legally protected conduct. That would seem to make a separation agreement cumbersome and redundant, and may open the employer to challenges if the limitations are included in some but not all paragraphs. In light of the EEOC’s now more aggressive posture on these issues, however, it is recommended that the employer set off a statement of the protected rights in a separate paragraph of a separation agreement, perhaps in bold. In addition, to avoid any doubt, the employer could specifically refer to each paragraph containing restrictions on an employee’s rights (such as confidentiality and non-disparagement provisions) in the set-off paragraph, or begin each such section with language stating “Except as otherwise provided in paragraph [refer to paragraph protecting employee’s right to file charges and participate in investigations],” thus reinforcing that nothing in any section of the agreement limits those rights.
- Employers should continue to provide in their separation agreements that, despite the employee’s retention of the right to file a discrimination charge, the employee is waiving the right to recover monetary damages or other individual relief in connection with any such charge.
- Employers should freshly review any separation agreement provisions mandating cooperation with the employer in connection with litigation and proceedings in light of the EEOC’s now more aggressive posture on these issues. Employers may wish to consider modifying terms that might spark concern from the EEOC.