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LEGAL ALERT

Federal Court Dismissal of EEOC Suit Leaves Employers Hanging

In a closely watched ruling, an Illinois federal district court handed a victory to one particular employer, but ducked a broader ruling that would have provided general guidance to companies generally that are trying to avoid litigation by entering into severance agreements with employees.

Background

Earlier this year, the EEOC raised the stakes on its war on standard-form severance agreements by filing a lawsuit under Title VII of the Civil Rights Act against CVS Pharmacy, Inc. The agency alleged that the employer's severance agreement unlawfully violated employees' right to communicate with the EEOC and file discrimination charges.

Employers across the country were reasonably troubled, because the provisions the EEOC found problematic are truly "garden variety." But the EEOC's shot across the bow clarified its message: reexamine your severance agreements, no matter how standard, or prepare for battle.

Employers have been paying careful attention to the CVS action (as well as a similar suit against CollegeAmerica), unsure how to minimize risk and fearful of becoming the EEOC's next target. On October 7, 2014, a federal district court dismissed the complaint in *EEOC v. CVS*. But while the dismissal was a tactical victory for CVS, the court did not determine the legality of CVS' severance agreement and provided no meaningful guidance to employers on this issue.

The EEOC's Argument

The EEOC filed its complaint against CVS in order to "correct a pattern or practice of *resistance* to the full enjoyment of the rights secured by Title VII . . .," alleging that for more than two years, CVS conditioned its employees' receipt of severance pay on an overly broad, misleading and unenforceable separation agreement that interfered with employees' right to communicate voluntarily with the EEOC. The EEOC was also disturbed that the separation agreement was five pages and single spaced.

These attacks on severance agreements are not the EEOC's first. In 2006, the Commission sued Kodak over its standard-form agreement. As a result, Kodak included language in its future releases that expressly noted the agreement did not prohibit the employee from filing a discrimination charge or participating in any investigation or proceeding conducted by the EEOC or comparable state or local agency, though the release acknowledged the employee waived his or her right to recover monetary damages.



In 2013, the EEOC filed a similar suit against Baker and Taylor, Inc., and like Kodak, Baker and Taylor, Inc. modified its separation agreement to appease the EEOC. The EEOC required Baker and Taylor to add the following statement in its agreements: "employees retain the right to participate in such any [sic] action *and to recover any appropriate relief.*"

The CVS litigation is notable because CVS already expressly provided in its severance agreements that the former employees may participate in proceedings before state and federal agencies and cooperate in the investigations. Nonetheless, the EEOC took issue with five provisions of the severance agreements: cooperation, non-disparagement, nondisclosure of confidential information, general release of claims, and covenant-not-to-sue. All the provisions are routinely included in most standard severance agreements and are used by employers across the country.

The EEOC criticized the covenant-not-to-sue provision because it contained only a "single qualifying sentence," which existed nowhere else in the agreement that informed employees that the paragraph was not intended to interfere with the employee's right to participate in a proceeding or cooperate with an investigation with the EEOC or similar agency. The EEOC also took issue with the agreement's requirements that employees acknowledge that a breach would result in an irreparable injury to CVS, and that employees would be responsible for all attorneys' fees in the event of a breach. Of course, one or all of these provisions can be found in most separation agreements.

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CVS' Defense

CVS fought back, asking the judge to throw out the suit, arguing that inclusion of certain contractual provisions in a standard severance agreement does not violate Title VII where the employee is free to participate in an agency's investigation.

Additionally, CVS reasoned that even if the severance agreement deterred former employees from filing EEOC charges or cooperating in EEOC investigations, it would not constitute a pattern or practice of violating Title VII - at most it would render the agreement unenforceable. CVS argued alternatively that the EEOC failed to comply with statutorily required conciliation efforts before filing suit.

The Retail Litigation Center, Inc. (RLC), a public policy organization that identifies and engages in legal proceedings involving important issues that affect the retail industry, filed a friend-of-the-court brief in support of CVS' Motion. RLC urged that CVS' severance agreement should survive EEOC scrutiny because the terms have been repeatedly approved by federal courts and employees were explicitly afforded the right to participate in future EEOC investigations. RLC also argued that the EEOC's unprecedented theory gave employers like CVS zero notice that such conduct violated the law, and the EEOC notably failed to identify any statement or provision of the law that was false, misstated or applied in a discriminatory way.

A Victory For CVS - But No Guidance

On October 7, 2014, the district court dismissed the EEOC's complaint on a technicality. Unpersuaded by the EEOC's arguments, the court held that the EEOC was only authorized to sue after it attempted to secure a conciliation agreement with CVS. The court reasoned that while the EEOC could proceed without first filing a charge on pattern or practice claims, it still must abide by the law's conciliation requirement.

To the disappointment of many, the court did not rule on the legality of CVS' severance agreement. In a footnote, the court did at least warn the EEOC that it was unreasonable to construe the agreement's covenant-not-to-sue, together with the general release, to prohibit an employee from filing an EEOC charge. Moreover, the court stated that even if the agreement explicitly prohibited an employee from filing a charge, "those provisions would be unenforceable and could not constitute resistance to the [Civil Rights] Act."

The Takeaway

While this decision is a step in the right direction, it is doubtful that the EEOC will raise a white flag anytime soon. Many expect the EEOC to appeal the dismissal to the U.S. Court of Appeals for the 7th Circuit, and the dismissal is not likely to have much impact on the EEOC's enforcement efforts and scrutiny of standard separation agreements. In the meantime, employers should be sure that their separation and arbitration agreements carve out EEOC and other agency charges. Here is some suggested language:

Nothing in this Agreement is intended to, or shall, interfere with the employee's rights under federal, state, or local civil rights or employment discrimination laws to file or otherwise institute a charge of discrimination, to participate in a proceeding with any appropriate federal, state, or local government agency enforcing discrimination laws, or to cooperate with any such agency in its investigation, none of which shall constitute a breach of this Agreement. Employee shall not, however, be entitled to any relief, recovery, or monies in connection with any such action or investigation brought against the Employer, regardless of who filed or initiated any such complaint, charge, or proceeding.

Employers should also continue to consult with employment counsel to stay abreast of further developments in this area.

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