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## EEOC Lawsuit Against CVS Pharmacy Challenging Severance Agreements Dismissed

By Kerry Notestine, Terri Solomon, and Dan Thieme

On October 7, 2014, District Judge John Darrah of the North District of Illinois dismissed the Equal Employment Opportunity Commission's lawsuit against CVS Pharmacy. *Equal Employment Opportunity Commission v. CVS Pharmacy, Inc.*, civil action no. 1:14-cv-00863, (N.D. Ill, October 7, 2014) ("10/7/2014 Memorandum and Order"). 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. While the decision is helpful for employers in that the EEOC did not prevail in this initial effort, the decision leaves many questions unanswered regarding the EEOC's recent enforcement efforts and the appropriate employer response to the EEOC's actions.

### Background

The Chicago District office of the EEOC sued CVS Pharmacy in the United States District Court of the Northern District of Illinois 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 (FEPAs). 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, *inter alia*, that the EEOC could not show that any particular individual had been unlawfully discriminated or retaliated against through the use of the company's standard severance agreements, establish a "pattern or practice" of unlawful conduct, plausibly allege or show intentional interference with protected rights, and/or show that the EEOC complied with its obligation to conciliate claims (attempt to settle) before filing the pattern and practice lawsuit. The parties fully briefed these issues before the district judge, and the Retail Litigation Center, Inc. also filed an amicus brief in support of CVS' motion to dismiss. The EEOC's lawsuit against CVS Pharmacy was the subject of a previous ASAP issued by Littler in March of 2014 that contained several recommendations regarding steps employers should consider taking in response to this lawsuit.<sup>1</sup>

<sup>1</sup> See Kerry Notestine, Terri Solomon, and Daniel Thieme, [Recommendations in Response to the EEOC's New Lawsuit on Severance Agreements](#), Littler ASAP (Mar. 4, 2014).

The Phoenix District Office of the EEOC filed a second suit in April of 2014, this time against CollegeAmerica Denver, Inc., in the United States District Court for the District of Colorado, making many of the same allegations as in the EEOC's lawsuit against CVS. The EEOC cited the Age Discrimination in Employment Act instead of Title VII as the statute allegedly violated. CollegeAmerica, like CVS, immediately moved to dismiss the EEOC's complaint and that motion is awaiting a decision from the district judge in that case. Littler authored another ASAP on this filing and restated our recommendations on this topic.<sup>2</sup>

## The Decision in the CVS Case

District Judge Darrah dismissed the EEOC's lawsuit against CVS because the EEOC failed to engage in conciliation (settlement) procedures that the judge found were required by Title VII.

It was uncontested that the EEOC had not engaged in conciliation. CVS stated in its statement of facts that the EEOC demanded that CVS sign a consent decree within 14 days of the EEOC's finding of reasonable cause, CVS rejected the offer to sign the consent decree and offered to engage in conciliation efforts, and the EEOC refused to participate in conciliation. The EEOC responded by admitting that it did not engage in conciliation, although it did participate in four telephone calls in an attempt to settle the matter. *Plaintiff's Response to CVS Statement of Facts, civil action no. 1:14-cv-00863, Document #28 (June 6, 2014)*.

The EEOC asserted that it was not required to engage in conciliation in a technical argument about whether the statutory duty to conciliate under section 706 of Title VII applies to actions under section 707(a) of Title VII governing certain "pattern and practice" claims. See 42 U.S.C. §20000e-5, §20000e-6. The EEOC claimed that it only had to find "reasonable cause" to justify a section 707(a) pattern and practice claim without prior conciliation. *EEOC's Memorandum in Opposition to Motion to Dismiss at pp. 19-20, civil action no. 1:14-cv-00863, Document #27 (June 6, 2014)*. The district judge rejected the EEOC's argument and held that the EEOC was required to conciliate before bringing the lawsuit against CVS. *10/7/2014 Memorandum and Order at pp. 8-9*. It is not entirely clear whether there may have been an argument that the four telephone calls about settlement could be considered conciliation, but the EEOC's admission in the response to CVS' statement of facts that it did not engage in conciliation was sufficient for the district judge to decide that the EEOC had not met this statutory duty. As a result, the district judge dismissed the EEOC's claims against CVS.

Because the district judge dismissed the case against CVS on the issue of conciliation, the judge did not make a specific ruling on the other arguments that CVS made for dismissal on the merits of the EEOC's claims. The judge, however, did address two of the substantive issues asserted by CVS in footnotes to his opinion. In one footnote, the judge 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 section 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. *10/7/2014 Memorandum and Order at p. 4, n. 2*. In another footnote, the 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 contains 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 termed "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, which it did not, then those provisions would merely be unenforceable and not constitute actionable resistance to Title VII. *10/7/2014 Memorandum and Order at pp. 4-5, n. 3*. As a result, District Judge Darrah's *dicta* provides employers faced with challenges to separation agreements reason to believe that the EEOC will fail on the merits of its recent efforts to invalidate separation agreements.

## Recommendations

Although CVS successfully defended this EEOC lawsuit over its form separation agreements, the decision did not reach important issues regarding the validity of standard clauses used in such agreements. The EEOC continues to look for opportunities to assert that terms included

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2 See Kerry Notestine, Terri Solomon, and Daniel Thieme, [They Really Mean It: the EEOC Sues Another Employer for Allegedly Overbroad Releases](#), Littler ASAP (May 13 2014).

in separation agreements and post-charge filing releases of claims infringe on statutory rights under Title VII and the ADEA. We are aware of at least two other examples of this activity since the EEOC filed the CVS and CollegeAmerica lawsuits. In both of those cases, the EEOC has arguably made efforts to engage in conciliation, thus potentially avoiding the defense of failure to conciliate that was successful in CVS. Judge Darrah's comments in the footnotes to the CVS decision provide support for employers' use of the challenged terms. Until this issue is finally resolved on the merits, we continue to recommend the following steps to protect separation agreements and releases from challenge.

- Review every separation agreement form to consider whether to strengthen existing provisions preserving the employee's right to file administrative charges and participate in agency investigations. To avoid potential claims, employers may wish to include greater specificity in these provisions than had been thought to be necessary in the past. We recommend that these rights be specifically stated, and also refer to Section 7 rights under the NLRA as appropriate. Also, prophylactically, we recommend 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 that 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, we recommend 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.

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