

CLIENT ALERT

EEOC Challenge of CVS Severance Agreements Dismissed

October 22, 2014

On October 7, 2014, Judge John Darrah of the Northern District of Illinois issued a [decision](#) granting CVS Pharmacy, Inc.'s motion to dismiss in a case that has been closely watched by employers. The EEOC filed a complaint against CVS in February 2014, alleging that CVS was engaged in a pattern or practice of "resistance" to employees' enjoyment of rights protected by Title VII. In particular, the EEOC alleged that certain terms of CVS's standard separation agreement violate Title VII. These allegedly improper terms included a clause prohibiting the employee from disclosing confidential information and a clause prohibiting the employee from filing a lawsuit. The latter clause specifically stated that the employee retained the right to participate in an EEOC or similar agency's investigation, charge, or complaint. CVS sought dismissal for two reasons: first, because the EEOC did not properly undertake its pre-litigation duties, and second, because the separation agreement at issue was a standard agreement containing terms used by employers nationwide that have been widely upheld by both the EEOC and federal courts.

Judge Darrah did not address the terms of the separation agreement, other than a few comments in the dicta of his opinion, and instead granted CVS's motion to dismiss solely because the EEOC failed to engage in conciliation prior to filing the lawsuit. Specifically, the court rejected the EEOC's argument that it need not engage in pre-suit obligations when bringing a "pattern or practice" claim against an employer. In a series of footnotes, Judge Darrah indicated his skepticism about the merits of the EEOC's complaint, suggesting that the terms of a separation agreement cannot be "resistance" to Title VII rights unless there is "some retaliatory or discriminatory act." Judge Darrah also noted his belief that the covenant not to sue, with the specific carve-out for participation in EEOC investigations, could not reasonably be construed as excluding "the right of the employee from filing an EEOC charge."

Employers are still left without guidance on appropriate terms to include in severance agreements because of the narrow basis for the court's decision here. The next opportunity for a court to address the substance of such agreements is likely to be in the District of Colorado, which is expected to decide the employer's motion to dismiss in *EEOC v. CollegeAmerica Denver, Inc.*, No. 1:14-cv-01212. In that case, the EEOC challenges language in an individual settlement agreement, where the former employee agreed not to file any charge with a government agency or to disparage the employer. It remains to be seen whether a decision by the court in *CollegeAmerica* will provide helpful guidance on the enforceability of severance or separation agreements like the one at issue in the CVS case.

In the meantime, however, the EEOC is likely to continue to pursue employers for using severance agreements that it believes are unlawful, as the EEOC has indicated that one of its strategic priorities for fiscal years 2013-2016 is "preserving access to the legal system." Because many standard severance and separation agreements may be susceptible to an EEOC challenge, employers should determine whether to revise their agreements to remove riskier clauses or to accept the risk of potential litigation. Finally, employers should continue to monitor any new developments in this area.

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