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"Take the Money and Run – Please": Severance Payments and Waiver-of-Claim Clauses Under the Age Discrimination in Employment Act

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Case at a Glance

A former employee wants to sue her former employer for age discrimination even though she kept a severance payment and signed a waiver of claims, a waiver that was invalid under federal age discrimination law. The employer says that the waiver, though invalid, is binding because the employee did not return the severance payment. The Supreme Court decides who is right and, in doing so, will resolve a lower court conflict over whether federal law supplants the common law rule that funds paid for a waiver must be returned before the waiver can be challenged.

"Take the Money and Run – Please": Severance Payments and Waiver-of-Claim Clauses Under the Age Discrimination in Employment Act

by Alison Barnes

PREVIEW of United States Supreme Court Cases, pages 68–71.

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ISSUE

Can a right-to-sue waiver that fails to meet the requirements of the Age Discrimination in Employment Act bar an ex-employee's age discrimination suit against a former employer because the ex-employee failed to return or offer to return a severance payment given in exchange for the waiver?

FACTS

Dolores Oubre, the petitioner, worked for Entergy Operations, Inc. ("Entergy"), an electric company and the respondent, for more than six years, beginning in June 1987. Oubre progressed from an hourly wage position as a clerk to that of computer operator and in 1992 was promoted to computer operator II.

In 1994, Oubre and others in her department received the title of assistant outage scheduler and became salaried personnel. Oubre's evaluations in the two years prior to the incidents at issue, involving some similar duties and performance criteria, were very positive. At the end of her employment for Entergy, Oubre was 41.

In late 1994, Entergy's management instituted a new employee evaluation system, the Management Planning and Review Ranking Process, to evaluate salaried, managerial, and professional employees. Under the new evaluation system, all employees would be ranked in relation to their peers on two factors — performance and potential for promotion.

Each employee's ranking was converted into one of nine groups, the lowest of which ("group nine") was mandated to include 10 percent of the ranked employees. Employees in group nine could be terminated without severance pay at any time in the year after the ranking occurred. Group nine employees were to be given individual action plans devised by Entergy, apparently to identify areas of improvement required for continued employment.

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FROM: THE FIFTH CIRCUIT

However, even those who met all the goals of an employee-improvement action plan were not guaranteed continued employment or severance benefits in the event of termination.

Evaluated against all salaried, non-managerial employees in her department, Oubre was ranked in group nine. On January 17, 1995, Oubre's department manager told her of the ranking and that if she again ranked in group nine the following year, she would be terminated immediately and without benefits. The manager also told Oubre that if she continued with Entergy, an action plan would be developed for her. The manager explained that if she failed to meet the goals of the plan, she would be terminated immediately.

The manager then presented Oubre with a voluntary severance package that included a payment of $6,258, which represented one month of administrative leave plus one week's pay for every year of her employment with Entergy. She was told to take time off from work to consider her decision.

Meeting again with management on January 31, Oubre was told it would be virtually impossible for her to improve her ranking, ensuring she would be terminated without benefits in the near future. Oubre then agreed to waive all legal claims against Entergy by signing a document that recited that she was advised to consult an attorney, had no less than 14 days in which to consider the matter, and received valuable consideration to which she would not otherwise be entitled. The waiver, however, did not state that among the claims being released were all claims that might exist under the Age Discrimination in Employment Act of 1967, as amended ("ADEA"). 29 U.S.C. §§ 621-634 (1994).

Entergy paid Oubre the agreed severance amount over a period of six months. At her deposition, Oubre declined to return the severance payment. She explained that subsequent jobs provided less than half of her former income, and she "would have to think really hard" and "weigh the consequences" before taking the amount from her savings that she was using for part of her monthly living expenses.

Shortly after her departure from Entergy, Oubre filed an age discrimination charge with the Equal Employment Opportunity Commission (the "EEOC"), the federal agency that implements the ADEA. The EEOC determined it had insufficient evidence to make a determination on Oubre's charge.

Oubre then filed an age discrimination suit against Entergy in federal district court. In an unreported decision, the district court dismissed the case on Entergy's motion for summary judgment *(see* Glossary). In so ruling, the court acknowledged that the waiver of claims Oubre signed did not satisfy the ADEA because it made no mention that ADEA claims were covered, but concluded that the waiver was effective to bar her suit because she had not returned or attempted to return the severance payment. The Fifth Circuit affirmed in an unpublished order.

The case is now before the Supreme Court, which granted Oubre's petition for a writ of certiorari. 117 S. Ct. 1466 (1997).

Case Analysis

Oubre seeks damages *(see* Glossary) under the ADEA, which prohibits discrimination by employers on the basis of age against employees and applicants for employment in the protected class, age 40 and over. In order to prevent employers from pressuring employees into choices against their interests, the ADEA was amended in 1990 by the addition of Section 7(f), known as Title II of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), which provides that an individual may not waive any right to bring any claim under the ADEA unless the waiver is knowing and voluntary.

Section 7(f) recites a number of requirements for a knowing and voluntary waiver of ADEA claims, including a requirement that the affected employee be told expressly that the waiver covers claims under the ADEA. In addition, Section 7(f) requires that the employee be given at least 21 days to consider the waiver and 45 days in which to consider any waiver requested in connection with an exit incentive offered to a group or class of employees. Section 7(f) further provides that in any dispute that may arise over whether a waiver satisfies its requirements, the party asserting the validity of a waiver — the employer — has the burden of proving that the waiver was knowing and voluntary.

Oubre, who must defeat the waiver in order to proceed with her ADEA suit, has Section 7(f) squarely on her side. But Entergy, which must protect the waiver or defend itself at trial, has the common law, tender back doctrine on its side.

The tender back doctrine is a principle of contract law. It prohibits a party to a contract — the waiver in this case — from challenging the validity of the contract after receiving a benefit — the severance payment — unless the party first returns, or attempts to return (tender back), the benefit.

The circuit courts of appeals are divided over application of the doc-

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trine in cases involving an invalid waiver of ADEA rights. The Fifth Circuit in this case and the Fourth Circuit, *Blistein v. St. John's College,* 74 F.3d 1459 (4th Cir. 1996), hold that an invalid waiver under the ADEA is merely voidable, not void. When a former employee retains severance funds, according to the Fifth Circuit, the voidable waiver is ratified and becomes binding. To void a waiver that fails to meet the requirements of Section 7(f), the Fourth and Fifth Circuits require the former employee to return or offer to return any funds received in exchange for the waiver. As the Fifth Circuit said in *Wamsley v. Champlin Refining & Chemicals, Inc.,* 11 F.3d 534 (5th Cir. 1993), retaining severance benefits constitutes a choice not to void an invalid release and is a new promise not subject to the waiver requirements of Section 7(f).

Other circuits, however, have held that Section 7(f) supersedes the tender back doctrine. The Seventh Circuit, for example, in *Oberg v. Allied Van Lines, Inc.,* 11 F.3d 679 (7th Cir. 1993), observed that Section 7(f) plainly restricts an employee's freedom to waive his or her rights under the ADEA. Recently the Third Circuit, in *Long v. Sears Roebuck & Co.,* 105 F.3d 1529 (3d Cir. 1997), said still more clearly that unless the enumerated requirements of Section 7(f) are met, an individual may not waive ADEA rights.

The principal Supreme Court case explicating similar issues is *Hogue v. Southern Railway Co.,* 390 U.S. 516 (1968), which held that an employee was not required to tender back the consideration he had received from his employer in exchange for a release of claims as a condition for suing the employer under the Federal Employers' Liability Act ("FELA"). 45 U.S.C. §§ 51-60. Applying federal law and excluding state common law, the Court concluded that requiring a tender back as a prerequisite to suit under FELA is contrary to the policy of the statute — to provide an injured employee a right to recover for injuries negligently inflicted by his or her employer. The employer's payment was to be deducted from any recovery the employee might obtain in a FELA suit.

Under Section 7(f) as noted above, Oubre's waiver cannot be considered valid at the time of execution because the minimum statutory requirements for a knowing and voluntary waiver were not met. About this there is little dispute. The parties agree that the waiver failed to make specific reference to ADEA rights and that the waiting periods were not met. Thus Oubre's right to maintain her ADEA suit against Entergy depends on the validity of her waiver in light of having taken a severance payment and not returning or offering to return it.

Oubre asserts that her waiver was not knowing and voluntary in fact or in law and that failure to return the severance payment cannot validate an invalid waiver. She contends that Section 7(f)'s minimum requirements for a valid waiver of ADEA rights are intended to displace any presumptions that an individual ratified a waiver because of a failure to tender back payment.

The legislative history of Section 7(f) appears to support Oubre's view. Prior to its enactment, the EEOC had promulgated a regulation that permitted knowing and voluntary waivers of ADEA claims without EEOC supervision. Congress considered the EEOC rule contrary to law and suspended its implementation. A variety of rules and bills followed proposing more limited circumstances for waiver. The result was Section 7(f).

Oubre also argues that the *Hogue* rationale should apply because the ADEA is a federal remedial statute like FELA, designed to compensate employees and deter employers from engaging in the prohibited conduct. Oubre maintains that the tender back requirement would be contrary to the purposes of the ADEA because an employer could escape sanctions when a terminated employee lacks resources to return severance benefits. Indeed, an employer might be encouraged to omit specific provisions about ADEA rights with the expectation that by the time the employee discovers that the waiver is invalid, he or she is in no position to tender back.

Entergy responds that the initial failure to comply with the ADEA is not dispositive; rather, it is Oubre's failure to return the severance payment that caused the invalid waiver to become binding on her.

The tender back principle, Entergy argues, applies to ADEA claims because the statute does not address the issue directly, and the purposes and legislative history of the ADEA as amended by Section 7(f) do not forbid application of the principle. Entergy looks to *Wamsley,* citing the Fifth Circuit's assertion that Congress' failure to use the term *void* is significant.

Abrogation of the tender back doctrine, Entergy argues, should be rejected because it would allow employees such as Oubre to engage in a form of fraud by accepting severance payments while planning to sue. Here Entergy references Oubre's consultation with two lawyers before accepting the severance offer and throughout the pay-

out period as evidence of her intention to sue and of bad-faith acceptance. As a matter of public policy, Entergy contends, employers would be deterred from reaching out-of-court settlements, contrary to the ADEA's explicit preference for voluntary settlement of age discrimination disputes.

Finally, Entergy argues, if the Court does not choose to apply the tender back doctrine, it should recognize an employee-fraud exception whenever the employer can show that the employee accepted a severance payment while planning to sue. Under such an exception, an employee who takes the money while intending to sue, and then does sue, would be required to give the money back before proceeding.

Significance

Entergy's position asks the Supreme Court to sanction to some degree employers who withhold information from employees that is required by the ADEA. In other words, there is a real risk that a decision applying the tender back doctrine to an employee's waiver of ADEA rights will encourage employers to withhold information required by the ADEA. That, in turn, would make it easier for employers to pressure older employees into accepting severance packages, taking the risk that the severance money will be spent before an employee discovers that the waiver is invalid. For many older workers who may have a more difficult time finding work than younger ones, giving back a severance payment often is impossible.

The proposed employee-fraud exception might soften the impact of rejecting the tender back rule. However, it would add an additional layer of dispute to an ADEA lawsuit, a result Congress probably did not contemplate. Moreover, the exception simply is not needed if an employer complies with the requirements of Section 7(f).

Attorneys of the Parties

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Amicus Briefs

In support of Dolores M. Oubre

American Association of Retired Persons (Counsel of Record: Cathy Ventrell-Monsees; American Association of Retired Persons; (202) 434-2060);

National Employment Lawyers Association (Counsel of Record: Thomas R. Meites; Meites Frackman Mulder & Burger; (312) 263-0272);

Joint brief: United States and Equal Employment Opportunity Commission (Counsel of Record: Walter Dellinger, Acting Solicitor General; (202) 514-2217).

In support of Entergy Operations, Inc.

Joint brief: Equal Employment Advisory Council, Chamber of Commerce of the United States, and Edison Electric Institute (Counsel of Record: Ann Elizabeth Reesman; McGuiness & Williams; (202) 789-8600);

Illinois State Chamber of Commerce (Counsel of Record: Brian W. Bulger; Bates Meckler Bulger & Tilson; (312) 474-7900).