Seventh Circuit Rejects EEOC's Attack on Severance Agreements

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On December 17, 2015, the U.S. Court of Appeals for the Seventh Circuit upheld the dismissal of a lawsuit by the EEOC against CVS Pharmacy, Inc. In *Equal Employment Opportunity Commission v. CVS Pharmacy, Inc.*, the EEOC alleged that CVS violated Title VII by offering terminated employees severance agreements that deterred former employees from filing charges with and participating in investigations by the EEOC. The case garnered national attention because the CVS agreement was fairly standard. Rejecting the EEOC's claims, the Seventh Circuit held that the EEOC's refusal to engage in pre-suit conciliation precluded it from suing CVS. More importantly, it also ruled that an employer's offer of a severance agreement to terminated employees cannot serve as a basis for a so-called "pattern or practice" suit under Title VII without some allegation that the employer engaged in discrimination or retaliation.

The case arose when CVS offered a fired store manager a severance agreement. In the agreement, CVS agreed to provide the former employee severance pay, subsidized health insurance, and outplacement assistance in exchange for a broad release of claims and a covenant not to sue from the employee. However, the agreement expressly preserved the employee's right to "participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws." After signing the agreement, the employee filed a charge of race and sex discrimination with the EEOC and, during the course of the investigation, CVS provided the EEOC with the employee's signed severance agreement. Despite the carve out for EEOC proceedings, the EEOC claimed that the agreement "interfere[d] with employees' right to file charges with the EEOC, . . . communicate with the EEOC[,] and participate in EEOC . . . investigations." The EEOC contended that, by offering the agreement, CVS had "engaged in a pattern and practice of resistance to the full enjoyment of rights secured by Title VII." It gave CVS 14 days to resolve the case through a consent decree that would be filed in court. CVS requested that the EEOC engage in conciliation over the dispute, but the EEOC refused and sued CVS in federal court.

The district court granted summary judgment for CVS. It held that the EEOC was required to conciliate its claim before suing CVS. The court was also skeptical of the merits of the EEOC's case. The EEOC appealed to the Seventh Circuit. Among other things, it argued that Section 707(a) of Title VII authorized it to bring civil suits over a "pattern or practices of resistance" to full enjoyment of Title VII rights without first engaging in conciliation. It also argued that CVS's use of the severance agreement could "chill" terminated employees from filing EEOC charges or participating in EEOC proceedings and therefore constitutes a "pattern or practice of resistance" under Section 707(a) of Title VII.

The Seventh Circuit rejected these arguments. In order to initiate "pattern or practice" suits, the Court found that the EEOC had to engage in pre-suit conciliation. It also rejected the EEOC's expansive view of its powers. According to the Court, a "pattern or practice" case is not a vehicle for the EEOC to attack "non-discriminatory employment practices that it dislikes," but is limited to claims that a practice is discriminatory or retaliatory. Here, there was no allegation that CVS discriminated against the former employee when it offered the severance agreement to her. Moreover, the court affirmed that, as a matter of law, conditioning benefits on promises not to file charges with the EEOC does not constitute retaliation prohibited by Title VII. Absent allegations of discrimination or retaliation, the Court held that the EEOC failed to state a claim against CVS.

The Seventh Circuit's dismissal of the EEOC's appeal is a significant development for employers. Recently, a number of federal agencies, including the EEOC, NLRB and SEC, have challenged provisions in employment agreements that were once considered to be standard, arguing that they deter individuals from filing agency complaints or participating in agency proceedings. The EEOC has been particularly aggressive on this front, pursuing its agenda through litigation against employers. However, the case means that the EEOC cannot sue an employer over the terms of a separation agreement, absent allegations of actual discrimination or retaliation. Despite this setback for the EEOC, the agency will undoubtedly continue to challenge agreements it believes chill employees' right to file EEOC charges and participate in EEOC investigations.

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