

News & Types: Employment, Labor & Benefits Update

# EEOC's Failure to Engage in Conciliation Results in Dismissal of the CVS Case

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Practices: Employment, Labor & Benefits

As we discussed at our Annual Employment, Labor and Benefits Seminar on October 2, recently, the EEOC has been attacking severance agreements containing language commonly used by employers as violating the anti-discrimination law. In February, the EEOC filed suit in Chicago against CVS Pharmacy, Inc. ("CVS") alleging that CVS engaged in a "pattern or practice of resistance to the full enjoyment of rights secured by Title VII." On October 7, 2014, the Court issued its opinion finding that the EEOC was not authorized to file the suit because it failed to engage in any conciliation procedure with CVS. Therefore, it granted CVS's Motion for Summary Judgment and dismissed the case.

Employers were hoping that the Court's opinion in CVS would provide guidance regarding the use of releases in severance agreements. However, the decision turns on a procedural issue and does not rule directly on the severance provisions being challenged by the EEOC.

Most of the facts were undisputed. Tonia Ramos was a former CVS pharmacy manager who was discharged in July 2011. After signing a separation agreement, Ms. Ramos filed a charge with the EEOC alleging sex and race discrimination. The EEOC dismissed the charge, but sent a letter to CVS stating that there was reasonable cause to believe that, based on the severance agreement, CVS was engaged in a pattern or practice of resistance to the full enjoyment of rights secured by Title VII. The EEOC and CVS engaged in settlement negotiations via telephone twice. However, it was undisputed that no conciliation procedure was implemented.

Section 706 of Title VII provides that when there is a reasonable belief that a person has engaged in an unlawful employment practice, the EEOC "shall endeavor to eliminate any such alleged employment practice by informal methods of conference, conciliation and persuasion." The EEOC argued that the Section 706 requirements did not apply because it was bringing the suit under Section 707 that empowers the EEOC to bring civil complaints when there was "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by" Title VII.

The Court noted that when Title VII was amended in 1972 to transfer enforcement authority from the Attorney General to the EEOC, the amendment did not create a new cause of action. Therefore, the Section 706 prerequisites applied equally to pattern and practice cases brought by the EEOC under Section 707.

In a lengthy footnote, the Court provides some nuggets for employers regarding severance terms. The Court rejects the EEOC's definition of resistance and finds that a case alleging a pattern and practice of "resistance" to the full enjoyment of rights secured by Title VI requires some retaliatory or discriminatory act. Moreover, the Court states that even if the Separation Agreement explicitly banned the filing of administrative charges, those provisions would be unenforceable and not in and of themselves violative of Title VII.

It remains to be seen whether the EEOC will appeal the decision, change its procedures or strategies with respect to attacking severance agreements. This decision does not provide employers with comfort that certain provisions commonly used in severance agreements will be upheld, nor should it cause employers to abandon the practice of using severance agreements. As we stressed at the Seminar, employers should not use old agreements or ones they obtain from the Internet without having the agreements reviewed by legal counsel.