Connecticut Law Tribune
Special Section | January 26, 2015
An ALM Publication

Employment and Immigration LAW

An Aggressive Stance on Settlement Agreement Provisions

EEOC often won't drop case even when both parties want to do so

By MARY A. GAMBARDELLA and CHRISTINE SALMON WACHTER


Mary A. Gambardella


Christine Salmon Wachter

You just finalized the settlement terms of a sexual harassment claim comprised of fairly provocative allegations. The employee initially filed a charge with the Equal Employment Opportunity Commission before suing in state court. The employer contested the material allegations, but is settling to avoid the costs, burdens and uncertainties of litigation and, in no small part, the potential public attention that would result from airing those ugly allegations. The employee, represented by experienced counsel, is similarly relieved that she was able to put the matter behind her and avoid unwanted attention. She did not get the amount demanded, but got enough to feel that the past is past and she has been "compensated."

Of course, the terms of this agreement will include a general, comprehensive release of claims; mutual nondisparagement and confidentiality provisions; and some collateral terms which all sides agree are mutually beneficial. As is typical, one of the reasons the employer is paying a fairly generous sum of money is to make sure the contested matter is concluded, and thus, the settlement is conditioned on the EEOC's consent to the withdrawal of the charge.

If this scenario is a familiar one, be wary: the EEOC may refuse to permit the withdrawal and reject the employee's acceptance of these and other standard provisions.

The agency has recently escalated its challenges to standard settlement agreements, even bringing challenges without any complaining employee. Provisions under scrutiny include: (a) a general release of claims and/or covenant not to sue which does not expressly preserve the right to file or pursue an EEOC charge; (b) a nondisparagement clause; (c) a confidentiality clause; (d) any requirement that the employer be notified if the employee is contacted to provide information governed by the agreement; and (e) a breach clause that entitles the employer to injunctive relief and/or attorney fees.

In the first case to garner national attention on this issue, the EEOC sued CVS Pharmacy in the U.S. District Court for the Northern District of Illinois. The agency alleged that CVS had engaged in a "pattern or practice of resistance to the full enjoyment of the rights secured by Title VII" by requiring their employees to sign "overly broad and misleading" severance agreements. Specifically, the EEOC claimed that

Mary A. Gambardella is a partner in the Stamford office of Wiggin and Dana and chairs the firm's the labor, employment and benefits department. She represents employers in litigations, negotiations and before administrative bodies. Christine Salmon Wachter is an associate at the firm, where she focuses her practice on employment litigation and counseling.

while the agreement contained a carve-out provision stating that the covenant not to sue was subject to the employee's right to file an EEOC charge, the agreement failed to reconcile the carve-out with other provisions in the agreement (e.g., the nondisparagement and confidentiality provisions) creating a "restrictive regime" that would "chill the exercise of Title VII rights."

CVS moved to dismiss, arguing that the stand-alone, carve-out language was sufficient, but, even if not, such insufficiency did not translate into a pattern or practice of violating Title VII, as opposed to simply rendering the agreement unenforceable. CVS argued in the alternative that dismissal was warranted because the EEOC failed to engage in statutorily required conciliation efforts.

Footnotes Offer Illumination

Despite the opportunity presented to define the EEOC's authority to challenge these agreements, particularly without an actual, aggrieved party, and to the disappointment of practitioners, the court dismissed the complaint on procedural grounds based on the alternate, conciliation argument. However, some hint of the court's substantive opinion was presented in footnotes. First, the court questioned the sufficiency of the EEOC's complaint based on its failure to allege "unlawful employment practices" defined by Sections 703 and 704 of Title VII. The court rejected the EEOC's argument that because it was bringing a claim under Section 707(a) of Title VII, which authorizes suit for a pattern and practice of "resistance" to Title VII, it was not confined to allegations of discrimination and retaliation.

Second, the court characterized the EEOC's position that the carve-out language in the covenant not to sue could be construed to prohibit an employee from filing a claim with the EEOC as "unreasonable." Finally, the court agreed with CVS that, even if the provision could be viewed as discouraging charges, the agreement would simply be unenforceable rather than establishing a pattern of "resistance" to Title VII. Although encouraging, the EEOC appears undaunted by such dicta. For example, as it awaits a decision on a similar case filed against CollegeAmerica Denver Inc. in Colorado, the agency continues to pursue its challenges. Interestingly, the EEOC's own website includes confidentiality and nondisparagement provisions in its form settlement agreement strikingly similar to those it has been challenging.

When drafting and negotiating severance or settlement agreements, be prepared for the EEOC's refusal to recognize provisions that are a generally agreed-on part of every negotiation.

For example, in a recently settled Title VII claim by these authors, the settlement agreement contained the desired carve-out language in multiple provisions. A condition of the settlement was that the EEOC agree to the employee's withdrawal of the charge. No systemic discrimination was alleged in the charge; the complainant was represented by highly regarded, experienced counsel; the claims were settled after multiple days of private mediation paid for by the parties; and the complainant personally expressed a desire to accept the thoroughly negotiated settlement terms.

The EEOC representative indicated, among other things, that the agency's "mandate" was to reject any restriction on the complainant to discuss the claim on social media; to proceed at least with EEOC-controlled conciliation and, if the EEOC so determined, with investigation; and to rejected clauses as basic as one requiring the complainant to notify the employer in the event she was subpoenaed to provide information covered by the confidentiality provision. In another "real-world" scenario, an employer was advised by the agency that even the notion of general releases would face future challenges.

The lesson to employment counsel is obvious; when drafting and negotiating severance or settlement agreements, be prepared for the EEOC's refusal to recognize provisions that are a generally agreed-on part of every negotiation. Consider the costs and burdens of continued EEOC involvement in arriving at settlement amounts and conditions, and even the timing of concluding settlements. Finally, work with plaintiff's counsel to present a united front to the EEOC; it will increase your chances of walking away with your settlement agreement intact. ■