

EEOC's Attempt to Limit Reach of Severance Agreements Hits Roadblock...Again

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A federal judge in Colorado has once again stymied the EEOC's efforts to successfully challenge an employer's standard separation agreement as violating the Age Discrimination in Employment Act. The **decision in [Equal Employment Opportunity Commission v. CollegeAmerica Denver, Inc.](#)**, **comes on the heels of another recent federal court decision in Illinois dismissing similar claims against CVS.** As in the [CVS decision](#), the judge here also faulted the EEOC for failing to engage in conciliation with CollegeAmerica before filing a lawsuit.

The dispute arose after CollegeAmerica threatened to sue, and later did sue, its former campus director for violating the non-disparagement clause set forth in her separation agreement and demanded that she return the separation payment. After the former campus director filed a series of discrimination charges, the EEOC issued a letter of determination finding reasonable cause to believe that the EEOC had engaged in unlawful employment practices in violation of the ADEA. The parties unsuccessfully attempted to resolve the matter as to the former campus director's separation agreement through conciliation and the EEOC subsequently sued CollegeAmerica.

The EEOC was troubled by a provision in the former campus director's separation agreement obligating her to "refrain from personally . . . contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance that shall bring harm to CollegeAmerica." This provision, the EEOC claimed, would prevent the former campus director from filing EEOC charges or cooperating in an EEOC investigation. It was also troubled by the fact that CollegeAmerica sued her in state court after she filed her first discrimination charge.

The EEOC asserted three claims against CollegeAmerica. First, it alleged that through the separation agreement – namely through the provision cited above – CollegeAmerica deprived its former campus director of her ability to exercise her rights under ADEA and interfered with EEOC's right to investigate charges of discrimination. Second, the EEOC expanded the scope of these violations to reach all employees who had executed separation agreements with CollegeAmerica. Third, the EEOC claimed that CollegeAmerica violated ADEA's anti-retaliation provision by filing a lawsuit against the former campus director in state court.

The Court disposed of the first claim because, it concluded, CollegeAmerica had represented to the former campus director both before and after the EEOC filed its lawsuit that it would not rely on this

provision in the separation agreement to interfere with her ADEA rights or the EEOC's ability to investigate charges of discrimination. The issue, therefore, was moot.

Next, the Court dismissed the EEOC's second claim, and its reasoning was similar to the reasoning employed in the *CVS* case. Importantly, at the time the EEOC sent its letter of determination to CollegeAmerica, the EEOC had limited its investigation to the separation agreement between the CollegeAmerica and its former campus director. Her agreement differed from the standard separation agreement that CollegeAmerica used for other employees and which CollegeAmerica provided to the EEOC only *after* the EEOC issued its letter of determination. Further, the conciliation process was limited to the EEOC's attempt to resolve its issues as to just the former campus director's agreement. Thus, according to the Court, the EEOC's claim failed because first, the EEOC did not properly notify CollegeAmerica that it believed that its standard separation agreements violated the ADEA, and second, the EEOC failed to cure this notice deficiency by engaging in conciliation with respect to these agreements.

This case will continue for the moment however, because the Court refused to dismiss the retaliation claim. It found that the EEOC pleaded facts in its complaint sufficient to support a reasonable inference that CollegeAmerica filed the state court lawsuit against its former campus director in response to her first charge of discrimination.

Between the *CVS* case and now the *CollegeAmerica* case, the EEOC has shown a continued willingness to challenge separation agreements that, it claims, chill employees' rights to file charges and that discourage employees from cooperating with investigations. We would expect this effort to continue. And that is why, like in the *CVS* case, the decision here cannot be viewed as a total victory for employers; it's just a jurisdictional one. At some point, the EEOC could conciliate one of these disputes before filing a lawsuit, thereby forcing a court to decide whether certain provisions in a separation agreement – like the ones challenged in the *CVS* and *CollegeAmerica* cases – violate federal statutes like Title VII and the ADEA. In the meantime, consider sharing your most recent iteration of your standard separation agreement with your trusted employment counsel to see whether they think it would withstand scrutiny from the EEOC or a court.

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