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According to the Sixth Circuit, Employee Who Contends She Signed Release Agreement Under Duress Does Not Have To Return Severance Before Suing Under Federal Civil Rights Statutes

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In 1998, the Supreme Court, in *Oubre v. Energy Operations*, opined that when a release agreement did not contain language necessary under the Older Workers' Benefit Protection Act in order to waive a federal age discrimination claim, the doctrine of "tender back" and "ratification" does not apply.

This doctrine means that an individual who claims that she signed an agreement under duress, mistake or fraud must return any benefits she received under the contract, or she has been said to have "ratified" the agreement. Therefore, in the case of an employee severance agreement, the doctrine would require that the employee return all severance monies and benefits to the employer before commencing any action.

Oubre was decided on the narrow issue of a release agreement that did not comport to specific requirements of the Older Worker Benefit Protection Act that required certain language demonstrating that the agreement was "knowing and voluntary." These requirements are: (1) that the waiver is understandable; (2) that the waiver specifically refer to ADEA claims; (3) an assurance that the employee does not waive rights or claims that arise after the agreement is executed; (4) that the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the employee is already entitled; (5) that the employee is advised in writing to consult with an attorney prior to executing the agreement; (6) that the employee is given at least 21 days to review the agreement (or 45 in the event of a group layoff); (7) that the employee is given at least seven days to revoke the agreement; and (8) in the event of a group layoff, certain group layoff information relating to the unit covered by such layoff and the ages and job titles selected for layoff and of those who remain. The Supreme Court has not addressed whether the "tender back/ratification" doctrine applies to claims brought under other federal civil rights statutes (like Title VII or the Equal Pay Act, for example) that do not require specific language to be included within release agreements, although all contracts must be "knowing and voluntary." Moreover, there is very little appellate authority on whether the tender back/ratification doctrine applies to federal civil rights act claims, and the district courts are all over the spectrum. The Second Circuit (which encompasses Connecticut) has not yet opined on this issue.

Recently, on August 17, 2018, in *McClellan v. Midwest Machining, Inc.*, the Court of Appeals for the Sixth Circuit ruled that the "tender back/ratification" doctrine is inapplicable to Title VII and Equal Pay Act claims. Thus, an employee who signs a severance agreement waiving her rights to bring these claims and later claims that she signed under duress can still sue her former employer without having to return the settlement monies. Instead, the monies/benefits received will be subtracted from any award that she receives in the event of a judgment in her favor.

In *McClellan*, Plaintiff was formerly employed by Midwest Machining, Inc. According to her complaint, she announced that she was pregnant, after which she was overly criticized for her missed attendance due to medical appointments and addressing other medical needs relating to her pregnancy. She was later terminated. On the day of her termination, she claimed that the president of the company called her into his office and presented her with an agreement to "sign then if she wanted any severance." While plaintiff admitted that the two read the agreement together, the president did not ensure the plaintiff's understanding as they went along at a "rapid pace." Plaintiff testified that she felt bullied throughout the meeting, that she felt she could not ask any further questions, and that the president's tone was "raised" during the entire conversation and that the president shut the door and she did not feel free to leave. Plaintiff claimed that she signed the agreement without the benefit of a lawyer because she felt pressured to do so.

The agreement provided that plaintiff would waive legal claims that she had against the Company. Plaintiff alleges that she did not understand that the term "claims" meant discrimination complaints. Instead, she "assumed it referred to any unpaid wages or benefits." Under the terms of the severance agreement, the defendant agreed to pay plaintiff $4,000, payable in eight weekly installments. Defendant made each payment and plaintiff accepted them.

Plaintiff later sued under Title VII, the Equal Pay Act and under applicable Michigan state law, claiming that the company terminated her because of her pregnancy, that it maintained a segregated workforce on the basis of sex and that it violated the Equal Pay Act.

After receiving Plaintiff's complaint, the Company's counsel informed Plaintiff's counsel of the severance agreement. A few weeks later, Plaintiff sent a letter to the Company saying that she was "rescinding the severance agreement . . . because she wanted to litigate matters relating to her former employment and termination." Enclosed with the letter was a check for $4,000. The Company responded by returning the check to Plaintiff a week later, asserting that "there is no legal basis for rescinding the severance agreement."

The Company filed a summary judgment motion, arguing that the severance agreement barred Plaintiff's claims. They further argued that Plaintiff's claims were also barred because she did not "tender back" the money she received under the severance agreement before commencing her lawsuit. The court held that while there was a factual dispute as to whether plaintiff "knowingly" and "voluntarily" executed the severance agreement, the district court granted summary judgment for the Company based on "the common-law doctrines of release and tender back." The court held that, even if a severance agreement is voidable on grounds of duress or involuntariness, a plaintiff will still ratify the contract unless she returns the consideration" as a precondition to filing suit, and she did not "tender back" the $4,000 prior to filing suit.

The Sixth Circuit Court of Appeals reversed the district court claiming that the "tender back" doctrine does not apply to Title VII or Equal Pay Act claims due to the remedial purpose of these laws, believing it would violate public policy by deterring such claims.

This case underscores the importance of ensuring that release agreements are entered into knowing and voluntarily. They should be understandable,

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employees should be given ample opportunity to consider their rights and obligations under the agreement and should be advised to have it reviewed by an attorney before execution. Additionally, when employees are age 40 or older, employers should ensure that all release agreements comport with the Older Worker Benefit Protection Act to ensure that they are valid.

This case also emphasizes the public policy permitting litigation of civil rights cases, undoubtedly in light of the recent #metoo movement and the public debate about the validity of such waivers and non-disclosure agreements. Accordingly, employers, even outside the Sixth Circuit, should be mindful of the *McClellan* decision to ensure that employers get the benefit of release agreements.

Robin Kallor is a partner at Rose Kallor, LLP. Rose Kallor, LLP regularly represents and advises private and public sector employers on matters pertaining to the employer-employee relationship, including the selection process, discrimination and harassment related issues and frequently conducts neutral workplace investigations. If you have questions about this legal update, please contact us at 860-361-7999. If you wish to receive future updates on labor and employment related topics,please contact Carolyn Field, CIRMA Communications Supervisor at cfield@ccm-ct.org.

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