1983 WL 181754 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
February 16, 1983

***1** Honorable Irene K. Rudnick
310-D Blatt Building
Columbia, South Carolina 29211

Dear Representative Rudnick:
Your letter of January 27, 1983, to the Attorney General has been referred to me for response.

You have asked whether, as a condition of granting severance pay to an employee, an employer could lawfully require that the employee promise never to institute a sex discrimination suit against the employer. Assuming that the employer is subject to the requirements of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e et seq.) [1], and further assuming that the employer's practice is designed to get employees to release him from liability for acts of sexual discrimination that may be committed in the future, he cannot lawfully impose any such condition.

While an employer is not required by law to grant severance pay to an employee upon the employee's termination, if the employer chooses to do so, he cannot condition that severance pay on an advance waiver by the employee of his or her statutory rights under Title VII. [2] The rights conferred on employees by Title VII are not a proper subject for bargaining between an employer and his employees. United States v. Allegheny-Ludlum Industries, 517 F.2d 826, 858 (5th Cir. 1975), cert. den. 425 U.S. 944. And the United States Supreme Court has unequivocally declared that Title VII rights of employees may not be waived prospectively. Alexander v. Gardner-Denver Co., 415 U.S. 36, 51, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). Thus, even if an employee were to agree to the condition sought to be imposed by the employer in order to get severance pay, the employee's promise never to assert his or her Title VII rights in a suit against the employer for acts of sex discrimination not yet committed would not be binding. See Chastang v. Flynn and Emrich Co., 365 F.Supp. 957, 967-8 (D.Md. 1973), aff'd. 541 F.2d 1040 (4th Cir. 1976) (employees' execution of a prospective release whereby they agreed not to sue employer as a result of operation of pension plan and released the employer from all liability in connection therewith did not bar employees' Title VII suit claiming that pension plan was administered in sexually discriminatory manner). But cf. McCrackin v. University of Washington, 25 E.P.D. (CCH) ¶ 31,763 (W.D. Wash. 1981), aff'd. w/out op. 29 E.P.D. ¶39,918 (9th Cir. 1982) (where university acceded to employee's request for transfer but conditioned same on stipulation that ‘no claims, lawsuits or other legal actions will be initiated by or against either party . . . as a result of [transfer] or as a consequence of [plaintiff's] employment at the University [employer]‘, Title VII action by plaintiff against employer was barred in absence of evidence that plaintiff was overreached by employer.)

A clear distinction must be drawn, however, between an employee's prospective waiver of Title VII rights, which is ineffectual, and an employee's settlement or waiver of an existing Title VII claim, which is effectual and is binding on the employee providing that the settlement was entered into or the claim was waived knowingly and intelligently. See United States v. Allegheny-Ludlum Industries, Inc., supra, 517 F.2d at 851-862 for an excellent discussion of this distinction. In other words, a purported waiver of Title VII rights by an employee in advance of any controversy between the employee and employer concerning whether the employer has violated the employee's rights under Title VII is invalid under Gardner-Denver, but an employee may release (i.e., waive) any claims he may have under Title VII provided (1) that the released claims date from antecedent discriminatory events and (2) the release is voluntarily executed with knowledge of its effect. Id., 517 F.2d 853; 856. See also Kuykendall v. Rockwell International Corp., 20 E.P.D. paras. 30,015 and 30,016 (C.D.Cal. 1979), for an application of this distinction.

***2** In conclusion, an employer covered by Title VII can lawfully refuse to pay severance pay to any of his employees unless he has otherwise bound himself by contract; however, such an employer cannot lawfully condition the payment of severance pay on the prospective surrender of Title VII rights.

Sincerely,

Vance J. Bettis
Assistant Attorney General

Footnotes

1 Employers who are engaged in an industry affecting commerce and who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year are subject to Title VII. 42 U.S.C. § 2000e(b). Tax-exempt bona fide private membership clubs are specifically exempted, and employers with less than the requisite number of employees are simply not subject to the Act. Id. The advice contained in this letter assumes that the employer to which you make reference is an employer within the meaning of Title VII.

2 Title VII provides, in pertinent part:

(a) It shall be an unlawful employment practice for an employer—

(1) to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ., or

(2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . .. [42 U.S.C. § 2000e-2(a)]

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