

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY)	
COMMISSION,)	
)	
Plaintiff,)	
)	Civil Action No.
v.)	01-CV-7042
)	
ALLSTATE INSURANCE COMPANY,)	Consolidated With:
)	Civil Action No.
_____)	01-CV-3894
Defendant.)	
_____)	

**PLAINTIFF EEOC’S MOTION FOR CLARIFICATION OR IN THE
ALTERNATIVE RECONSIDERATION OF THE ORDER OF
MARCH 30, 2004, AND TO AMEND DECLARATORY JUDGMENT**

Comes now Plaintiff, Equal Employment Opportunity Commission, pursuant to Rule 59(e) and moves the Court for clarification or reconsideration of its Memorandum and Order entered in this case on March 30, 2004, (amended on March 31, 2004), and to amend its Declaratory Judgment. In support of its motion, Plaintiff Equal Employment Opportunity Commission states:

1. On December 27, 2001, Plaintiff EEOC filed its action against Allstate Insurance Company (“Allstate”) alleging that Allstate’s release requirement of its “Preparing for the Future Group Reorganization Plan” violated the anti-retaliation provisions of Title VII, the ADEA, and the ADA and seeking injunctive relief and backpay, compensatory and punitive damages for approximately 6,200 employee-agents subject to the release requirement.
2. On May 2, 2003, Plaintiff EEOC moved for partial summary judgment on the issue of liability.

3. On May 23, 2003, the Romero Plaintiffs moved for partial summary judgment on the issue of liability for their retaliation claims similar to those of the EEOC.

4. On March 30, 2004, the Court granted the EEOC's motion for partial summary judgment and that of the Romero Plaintiffs concerning their retaliation claims.

5. In its Memorandum and Order, the Court held that Allstate Insurance Company had retaliated against its employee-agents in violation of the ADEA, Title VII and the ADA. The Court also ruled that there was no basis for claims of age discrimination because employees of all ages were treated alike.

6. In its Declaratory Judgment, the Court ordered that each employee-agent who signed a release may rescind the release by notifying Allstate Insurance Company in writing of his or her wish to rescind the release, and tendering to Allstate any and all benefits he or she received for signing the release.

7. It is not clear to Plaintiff EEOC whether employee-agents must tender back all benefits they received for the release in order for the EEOC to obtain monetary relief for them under the ADEA, Title VII and the ADA.

Accordingly, Plaintiff Equal Employment Opportunity Commission, seeks clarification from the Court on this question and an amendment of the Declaratory Judgment. If the Court intends that such tender back is required by employee-agents in order for the EEOC to seek monetary relief for them, then the EEOC seeks reconsideration of the Court's Order and amendment of the Declaratory Judgment for the reasons stated in the accompanying memorandum.

Respectfully submitted,

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/s/ C. Felix Miller

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2004, I caused a copy of the foregoing Equal Employment Opportunity Commission's Memorandum in Support of its Motion for Clarification or in the Alternative Reconsideration of the Order of March 30, 2004, and Amend Declaratory Judgment to be served upon the following persons by first class United States Mail, postage prepaid :

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PLAINTIFF EEOC’S MEMORANDUM IN SUPPORT OF ITS MOTION FOR CLARIFICATION OR IN THE ALTERNATIVE RECONSIDERATION OF THE ORDER OF MARCH 30, 2004 AND TO AMEND DECLARATORY JUDGMENT

On December 27, 2001, Plaintiff EEOC filed its action against Allstate Insurance Company (“Allstate”) alleging that Allstate’s release requirement of its “Preparing for the Future Group Reorganization Plan” violated the anti-retaliation provisions of Title VII, the ADEA, and the ADA and seeking injunctive relief and backpay, compensatory and punitive damages for approximately 6,200 employee-agents subject to the release requirement. The EEOC’s action was consolidated with *Romero, et al. v. Allstate Insurance Company, et al.*, No. 01-3894, an action brought by twenty-nine former Allstate employee-agents who alleged age discrimination, breach of contract, violations of ERISA, breach of fiduciary duty, and retaliation under the ADEA.

Plaintiff EEOC moved for partial summary judgment on the issue of liability for its retaliation claims and the *Romero* Plaintiffs moved for partial summary judgment on the issue of liability for their retaliation claims. The Court granted the EEOC’s and the *Romero* Plaintiffs’ motions for partial summary judgment on their retaliation claims and entered a declaratory

judgment. The Court also found that Allstate Insurance Company's release violated the Older Workers Benefit Protection Act ("OWBPA"). In its Declaratory Judgment, the Court ordered that each employee-agent who signed a release may rescind the release by notifying Allstate Insurance Company in writing of his or her wish to rescind the release, and tendering to Allstate any and all benefits he or she received for signing the release. It is unclear to Plaintiff EEOC whether employee-agents must tender back any benefits they received in order for the EEOC to seek monetary relief for them under the anti-retaliation provisions of the ADEA, Title VII, and the ADA. Accordingly, EEOC has asked the Court for clarification of its Order and Declaratory Judgment.

Tender back of benefits should not be required as to the EEOC's claims and the *Romero* Plaintiffs' ADEA retaliation claim. The Court found the release to be voidable because it violated OWBPA by forbidding employee-agents who signed the release from filing charges with the EEOC. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 118 S.Ct. 838, 139 L.Ed. 849 (1998), held that in respect to claims under the ADEA, there can be no ratification of a release by the releasor's retention of the consideration he received for the release, nor can there be any tender back requirement. Since the EEOC and the *Romero* Plaintiffs have brought retaliation claims under Section 4(d) of the ADEA, 29 U.S.C. §623(d), *Oubre* prevents any tender back requirement in order for the EEOC or the *Romero* Plaintiffs to pursue those ADEA retaliation claims on behalf of those employee-agents who signed releases. *See also Long v. Sears, Roebuck & Company*, 105 F.3d 1529 (3d Cir.1997).

The Court also found that the requirement to sign the release in order to remain as an Allstate agent constituted unlawful retaliation under the ADEA, Title VII and the ADA. The

Third Circuit’s analysis in *Long* is instructive. There the Court noted “that courts have regularly applied the analysis in [*Hogue v. Southern Railway Company*, 390 U.S. 516, 88 S.Ct. 1150 (1968)] to reject tender requirements in lawsuits brought under a variety of federal remedial statutes.” The Third Circuit went on to rule that the ADEA was a federal remedial statute and held:

In light of the clear recognition of the purpose of the ADEA, we are confident that the tender back rule rejected in suits under the FELA should be rejected in suits under the ADEA as well.

Id. at 1541. Thus, even independent of the OWPBA, there should be no tender back requirement for the EEOC to pursue retaliation claims under the ADEA on behalf of former employee-agents of Allstate.

Moreover, the Third Circuit also noted in *Long* that Title VII was a federal remedial statute, *id.* at 1541, n. 21, and thus a tender back requirement to pursue Title VII claims would be inconsistent with *Long*. Likewise, the ADA is a federal remedial statute, *see Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113, 118 (3rd Cir. 998), and therefore there should be no tender back requirement to pursue ADA retaliation claims as well.

Conclusion

The OWBPA precludes a tender back of any consideration for a release in order to pursue claims under the ADEA, whether they are for age discrimination or retaliation. Similarly the policy behind Title VII, the ADEA, and the ADA, all of which are federal remedial statutes, precludes the tender back of any consideration in order to pursue claims brought under those statutes. Accordingly, the Court should clarify or reconsider its Memorandum and Order and amend the Declaratory Judgment and clearly state that no tender back is required in order for

employee-agents to receive monetary relief through the EEOC's retaliation claims brought under the ADEA, Title VII and the ADA, or the *Romero* Plaintiffs' retaliation claims brought under the ADEA.

Respectfully submitted,

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/s/ C. Felix Miller

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