



1998

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Original Citation

Susan J. Becker, ADEA Claimant Can Retain Severance Payments and Sue Former Employer, 23 *Litigation News* no. 3 (March 1998) at p. 1

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Citation: 23 Litig. News 1 1997-1998

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ADEA Claimant Can Retain Severance Payments and Sue Former Employer

By SUSAN J. BECKER
LITIGATION NEWS ASSOCIATE EDITOR

Former employees can maintain claims under the Age Discrimination in Employment Act (ADEA) without first repaying the consideration received for an invalid release of claims.

The Supreme Court's pronouncement, *Oubre v. Energy Operations, Inc.*, 1988 U.S. Lexis 646 (Jan. 26, 1988), may change the way many employers negotiate and execute severance packages and settlements with terminated employees.

"*Oubre* is important to employers because it requires that they strictly comply with the requirements of the Older Workers Benefit Protection Act (OWBPA)," observes Barbara Ryniker Evans, New Orleans, LA, Co-Chair of the Section of Litigation's Employment and Labor Relations Law Committee. "If they fail to meet all the requirements,
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employers risk paying for a settlement and then being sued anyway."

Arthur Bryant, Washington, D.C., Executive Director of Trial Lawyers for Public Justice and a Section of Litigation member, agrees with Evans regarding the importance of the *Oubre* decision.

"But the principles of this decision reach far beyond the ADEA," Bryant adds. "If employers want valid releases, they had better follow the specific requirements of all the laws that apply to the situation."

Bryant believes that decisions like *Oubre* are critical to ensuring that terminated employees are treated fairly. "The reality is that in most employment terminations, the employees don't know their rights," Bryant says. "They are in no way in an equal position to their employer. The Supreme Court has recognized this inequality, and that, at least in part, prompted the Court to rule as it did. The Court realizes that the employer is in the best position to make sure the law is followed, and if it isn't, it is the employer who should suffer the consequence."

Plaintiff Delores Oubre worked as a scheduler at the defendant Entergy Operations' power plant in Louisiana. Oubre received a poor performance evaluation, and Entergy offered to let her improve her performance or accept a voluntary severance agreement. During the 14 days she was given to consider her options, Oubre consulted with attorneys. In the release she signed upon accepting the severance deal, the 41-year-old Oubre "agreed to waive, settle, release, and dis-

charge any and all claims, demands, damages, actions or causes of action" that she might have against Entergy.

The document Oubre signed, however, did not comply with the requirements for a valid release of ADEA claims as enumerated in the OWBPA, by which Congress amended the ADEA in 1990. The release failed to refer specifically to waiver of ADEA claims and to give Oubre 21 days before signing to consider her options and seven days after signing to change her mind.

After receiving the last of six severance payments totaling \$6,258, Oubre filed a claim of age discrimination with the Equal Employment Opportunity Commission (EEOC), claiming that Entergy constructively discharged her. The EEOC dismissed the merits of her claim but issued a right-to-sue letter. Oubre pursued her ADEA and state law claims in federal court.

Relying on common law contract

principles, Entergy successfully moved for summary judgment by arguing that Oubre's failure to return the severance monies received from Entergy constituted her ratification of the defective release. Thus, the trial court held that the admittedly defective release barred Oubre's ADEA claim. The Fifth Circuit affirmed the dismissal and the Supreme Court granted certiorari to resolve a split among the circuits.

The Court held, 6-4-3, that the OWBPA's requirements for a valid release of an ADEA claim trump all common law contract principles, including the doctrines of

ratification, tendering-back, and equitable estoppel.

"The statutory command is clear: An employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements," Justice Anthony M. Kennedy wrote on behalf of the majority. "The policy of the [OWBPA] is likewise clear from its title: It is designed to protect the rights and benefits of older workers. The OWBPA implements Congress's policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word."

Justice Kennedy also delineated practical aspects of the Court's holding, stating that many discharged employees

would likely spend the money, making it impossible to tender back the funds prior to filing suit. "These realities might tempt employers to risk non-compliance with the OWBPA's waiver provisions, knowing

it would be difficult [for former employees] to pay the monies and relying on ratification," Justice Kennedy opined. "We ought not open the door to an evasion of the statute by this device."

The Court recognized that, in the proper case, the employer still may have a right to restitution, recoupment, or setoff against an employee for the severance amounts paid.

The dissent contended that the language of the OWBPA is not sufficiently clear to overrule the common law contract doctrines relied upon by the employer. *W*

"If they fail to meet all the requirements [for a valid release under the statute], employers risk paying for a settlement and then being sued anyway."
