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Validity of Settlement Agreements Containing a “Will Not Reapply for Employment” Provision

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❖ Introduction

Employees sometimes lodge administrative complaints or initiate litigation that claim retaliation or discrimination due to: age; ancestry; color; disability; family, marital or parental status; biological gender or gender identity; military status; national origin; race; religion; sexual orientation; and whistleblower activities.

If the process is acrimonious, a court might award several years of front pay. If a settlement is successfully negotiated, management sometimes insists that the plaintiff resign and promise not to reapply.

Without such an agreement, if the person’s subsequent reemployment application is denied, it will inevitably result in another discrimination and retaliation lawsuit. With the agreement, management can refuse the application on contractual grounds. [1]

❖ **Raytheon decision**

The Supreme Court reviewed an action brought by a man who had been terminated by [Raytheon](#) for cocaine use. Later he reapplied, offering proof that he no longer abused drugs.

Management rejected his application, citing a company policy against rehiring employees who are fired for misconduct. The ex-worker sued under the [Americans with Disabilities Act](#), claiming that his rejection was based on his prior drug addiction or that management “regarded” him as a drug addict.

Viewing this as a disparate treatment claim, the Supreme Court concluded that employer’s neutral no-rehire policy “is, by definition, a legitimate, nondiscriminatory reason” for rejecting the application.

In the 7-to-0 opinion, Justice Thomas wrote that the employer’s neutral no-rehire policy “plainly satisfied its obligation ... to provide a legitimate, nondiscriminatory reason for refusing to rehire respondent.” [Raytheon Co. v. Hernandez](#), #02-749, 540 U.S. 44 (2003).

❖ **Anti-claim provisions distinguished**

While parties are free to contract and waive respective rights, courts will not enforce clauses that undermine an employee’s ability to bring a lawsuit or to assert a valid claim.

The EEOC Enforcement Guidance, at III-B, states:

“Agreements that attempt to bar individuals from filing a charge or assisting in a Commission investigation run afoul of the anti-retaliation provisions because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission. By their very existence, such agreements have a chilling effect on the willingness and ability of individuals to come forward with information that may be of critical import to the Commission as it seeks to advance the public interest in the elimination of unlawful employment discrimination.”

Does a prohibition on reemployment run afoul of the anti-retaliation provisions?

An American Bar Association article noted:

“The settling employee is being treated differently from other employees not because he or she filed a charge of discrimination, but because he or she is willing to settle that charge on terms satisfactory to the employer.” [2]

The EEOC upheld a no-reemployment clause in the settlement agreement with a former federal employee. It also declined to impose a reasonable time limit on the prohibition. The Commission wrote:

“The agreement explicitly provided that complainant would not seek reemployment with the agency in a career position. In light of such clarity and there being no mention within the settlement agreement of a time limit, we discern no valid rationale upon which complainant can claim that a time limitation exists on the prohibition. A settlement agreement made in good faith and otherwise valid will not be set aside simply because it appears that one of the parties made a bad bargain.”

[Jablonski v. Battista](#), #01A23730, 2003 EEOPUB Lexis 5476 (EEOC 2003).

❖ **Provision is sensible**

A university agreed to pay \$1 million to settle discrimination claims raised by two employees. They objected to a provision barring re-employment. The court rejected that viewpoint, writing:

“Absent such a provision, the settlement judgment would leave defendants open to a claim of retaliatory discrimination if plaintiffs reapplied to CUNY and were rejected. * * *

“Under all these circumstances, it is wholly reasonable to conclude that defendants did not intend to spend over a million dollars to purchase another lawsuit, nor can plaintiffs reasonably have expected to receive this substantial settlement without a basic understanding that their relationship with CUNY was at an end. Accordingly, we have incorporated a paragraph in the Settlement Judgment ... by which plaintiffs will not apply for or accept employment at CUNY and acknowledge that CUNY has no obligation to rehire them.”

[Salerno v. City University of New York](#), #99 Civ. 11151, 2005 WL 578944, 2005 U.S. Dist. Lexis 3825, 95 FEP Cases (BNA) 864 (S.D.N.Y.). “Take the money and goodbye” means just that.

- The Tenth Circuit upheld a no-reemployment settlement provision as non-retaliatory, writing that holding a person to the terms of a “fairly negotiated settlement agreement is not a harm.” [3]

❖ **Content of the agreement**

The settlement process and formal agreement should observe several important points:

1. It should be written in language that is easily understood by the average employee;
2. It should refer to the rights or claims that form the basis of the dispute;
3. It cannot waive rights or claims that might arise after the date the agreement is executed;
4. It should recite that the employee has consulted with an attorney prior to executing the agreement (*if that is the case*);
5. The employee should be given at least [21] days in which to consider the agreement;
6. The agreement should contain a [7] day revocation period.

The 21 and 7 day periods are part of the [Older Workers' Benefit Protection Act of 1990](#), Section 201 (f)(1), parts (F) and (G). Although those periods are not required when settling other types of claims, the Congress has found those to be a minimum for age discrimination claims. It is a precautionary and wise practice to include them in other settlements agreements.

Notes:

1. If an individual who has signed a waiver agreement or otherwise settled a claim subsequently files a charge with the EEOC based on the same claim, “the employer will be shielded against any further recovery by the charging party, provided the waiver agreement or settlement is valid under applicable law.” [EEOC Notice 915.002](#) (Apr. 10, 1997).
2. 23 The Labor Lawyer (ABA) 151 at 158 (2007).

3. [Jencks v. Modern Woodmen of America](#), #05-5130, 479 F.3d 1261, at 1265-66 (10th Cir. 2007).

References: (*chronological*)

1. Validity and Effect of Will-Not-Reapply Covenants in Employment Discrimination Settlement Agreements, 23 *The Labor Lawyer* (ABA) 151-161 (Fall, 2007). Available on Lexis and Westlaw.
2. [Essential Elements of Severance Agreements and Releases](#), American Bar Association Employment Law CLE presentation by Terence Connor and Anna Lazarus, 2007 (Philadelphia, PA).
3. [Raytheon v. Hernandez: The Americans with Disabilities Act and its Effect on Neutral, Non-Discriminatory Hiring Policies of Employers](#), *Richmond Journal of Law and the Public Interest* 78-86 (Winter/Spring 2005).
4. [Settlement Agreements](#), a presentation by Ellen C. Kearns at the 1999 American Bar Association annual meeting, pp. 15-16 (Atlanta, GA).

Appendix

Pertinent settlement agreement clauses:

1. [*Name of employee*] represents and agrees that [*his or her*] employment with [*the employing entity*] terminates upon the execution of this Agreement, and that [*he or she*] will not apply for or seek employment with [*the entity*] at any time hereafter.
2. [*Name of employee*] further represents and states that:
 - a. He [*or She*] has not filed any complaints or charges against [*the entity*] with a local, state, or federal agency or court, other than the one(s) listed above;
 - b. He [*or She*] will not file any complaints or charges against [*the entity*] with a local, state, or federal agency or court relative to any matter occurring prior to the execution of this Agreement; and

- c. If a complaint or charge is filed on his [*or her*] behalf or for his [*or her*] benefit, he [*or she*] will take all reasonable steps necessary to effectuate the withdrawal of such complaint or charge.
 3. The parties agree that if either party litigates the validity of this agreement, the prevailing party shall be entitled to an award of reasonable legal fees and expenses, at the customary rate.
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- *The law differs between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as "legal advice." Lawyers often disagree as to the meaning of a case or its application to a set of facts.*
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