

2002 WL 32769010 (S.D.N.Y.) (Trial Pleading)
United States District Court, S.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
UBS BRINSON, INC. and UBS AG, Defendants.

No. 02 CV 3748.
May 16, 2002.

Jury Trial Demand

Nature of the Action

This is an action under the Age Discrimination in Employment Act of 1967 as amended, 29 U.S.C. §621*et seq.* (“ADEA”), and the Older Workers Benefit Protection Act of 1990, codified as part of the ADEA at 29 U.S.C. §626(f) (“OWBPA”), to correct employment practices made unlawful by the ADEA and OWBPA. Plaintiff asks that the Court declare that Defendants UBS Brinson, Inc.’s and UBS AG’s Lock-In Agreements and Separation Agreement and General Releases violated the ADEA, as amended by OWBPA, because they required employees to return their severance pay and Lock-In Payments if they filed a claim against Defendants, and required employees to pay Defendants’ legal fees and costs if they filed a claim against Defendants. The EEOC further asks the Court to declare that Defendants UBS Brinson, Inc. and UBS AG did not meet the requirements of the ADEA, as amended by OWBPA, by failing to provide sufficient information on the group of individuals covered by its employee termination program and the eligibility factors for said program. The EEOC further alleges that the afore-mentioned actions by Defendants UBS Brinson and UBS AG interfered with the right of terminated employees to file a charge with the EEOC.

The EEOC also asks the Court to declare that Defendants UBS Brinson and UBS AG violated the ADEA and OWBPA by not providing employees who signed Defendants’ LockIn Agreements with additional consideration in return for signing the Separation Agreement and General Release. The EEOC further asks the Court to declare that Defendants UBS Brinson and UBS AG violated the ADEA and OWBPA by not providing employees who signed Defendants’ Lock-In Agreements with a copy of the General Release and the information required by OWBPA, *i.e.*, information on the class or group of employees eligible for termination, at the time the Lock-In Agreements were signed.

The EEOC further alleges that Defendants UBS Brinson and UBS AG violated the ADEA by withdrawing their Lock-In Offer to Kinne S. Yon, and by terminating her, in retaliation for asking to see a copy of the Separation Agreement and General Release at the time she was asked to sign the Lock-In Agreement and protesting Defendants’ refusal to show her the release.

JURISDICTION AND VENUE

1. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §§451, 1331, 1337, 1343, and 1345. This action is authorized and instituted pursuant to Section 7(b) of the ADEA, 29 U.S.C. §626(b), which incorporates by reference Sections 16(c) and 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§216(c) and 217.
2. The employment practices alleged to be unlawful were and are now being committed within the jurisdiction of the United States District Court for the Southern District of New York.

PARTIES

3. Plaintiff Equal Employment Opportunity Commission (“EEOC”) is an agency of the United States of America charged with the administration, interpretation and enforcement of the ADEA and is expressly authorized to bring this action by Section 7(b) of the ADEA, 29 U.S.C. §626(b), as amended by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, and by Public Law 98-532 (1984), 98 Stat. 2705.
4. At all relevant times, Defendant UBS Brinson, Inc. (“UBS Brinson”) has continuously been and is now a corporation doing business in the State of New York, and has continuously had and does now have at least twenty (20) employees.
5. At all relevant times, Defendant UBS Brinson has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Sections 11(b), (g) and (h) of the ADEA, 29 U.S.C. §§630(b), (g) and (h).
6. At all relevant times, Defendant UBS AG has continuously been and is a corporation doing business in the State of New York, and has continuously had and does now have at least twenty (20) employees.
7. At all relevant times, Defendant UBS AG has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Sections 11(b), (g) and (h) of the ADEA, 29 U.S.C. §§630(b), (g) and (h).

CONCILIATION

8. Prior to the institution of this lawsuit the EEOC’s representatives attempted to eliminate the unlawful employment practices alleged below and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference, and persuasion within the meaning of Section 7(b) of the ADEA, 29 U.S.C. §626(b).

STATEMENT OF CLAIMS

9. Prior to 1995 Brinson Partners, Inc. was a North American institutional asset manager. In January, 1995 Brinson Partners, Inc. and Swiss Bank Corporation (“SBC”) combined. *See Profile of UBS Brinson*, appended as Attachment A.
10. In January, 1997 SBC created SBC Brinson as a division of SBC by incorporating its Swiss-based institutional and asset management activities into Brinson Partners, Inc. *See Profile of UBS Brinson*, appended as Attachment A.
11. In December, 1997 SBC and Union Bank of Switzerland (“UBS”) announced a merger, which was completed on or about July 29, 1998, becoming Defendant UBS AG. *See Profile of UBS Brinson*, appended as Attachment A.
12. Following the July 29, 1998 merger SBC Brinson became UBS Brinson, a division of UBS AG. *See Profile of UBS Brinson*, appended as Attachment A; *UBS Brinson WebPage: “About Us”* (accessed at 10:59 a.m. at <http://www.brinsonpartners.com> on February 15, 2001), appended as Attachment B.
13. Defendant UBS Brinson is the successor to SBC Brinson.
14. Defendant UBS AG is the successor to both SBC and UBS.
15. Beginning in January, 1998, UBS and SBC, in anticipation of their merger, began a reduction-in-force, eventually reducing their combined pre-merger workforce from 69,000 employees to a post-merger workforce of 56,000 employees. *See*

UBS AG Press Release dated June 26, 1999 (accessed at 3:01 p.m. at <http://www.ubs.com> on October 12, 1999), appended as Attachment C.

16. Since at least February, 1998 SBC and UBS identified redundant employees whose services would not be needed post-merger, for the purpose of terminating said redundant employees. See “*SBC/UBS Merger: Revised HR Integration Guide for Managers*” dated February 25, 1998, appended as Attachment D.

17. Since at least March, 1998 Defendants UBS Brinson and UBS AG identified employees who would become “redundant” but whose services were deemed critical for at least three (3) months. See “*SBC/UBS Merger: Revised HR Integration Guide for Managers*” dated February 25, 1998, appended as Attachment D, at pg. 3.

18. Since at least March, 1998 and continuing since, Defendants UBS Brinson and UBS AG asked employees who would become redundant but whose services were deemed critical for at least three (3) months to sign “Lock-In Agreements” in which, in return for working for such time as was identified in the Lock-Agreement, the signing employees (the “Locked-In Employees”) would receive “Lock-In Payments” consisting of a bonus and a discretionary payment, if they completed their employment in a satisfactory manner. See “*SBC/UBS Merger: Revised HR Integration Guide for Managers*,” appended as Attachment D. A sample “*Lock-In Agreement*” is appended as Attachment E (name deleted by EEOC) (hereinafter “*Sample Lock-In*”).

19. Between the period March 12, 1998 and December 31, 1998 Defendants UBS Brinson and UBS AG had a separate benefits program for individuals made redundant by the merger. See “*Benefits Information for UBS Employees Made Redundant Due to the UBS/SBC Merger (Valid for the Period March 12, 1998 through December 31, 1998)*,” appended as Attachment F.

20. Since at least March, 1998 and continuing since, Defendants UBS Brinson and UBS AG required terminated employees to execute a General Release and Severance Agreement (hereinafter “the release”) in order to receive severance payments and, if applicable, Lock-In Payments. A copy of a *General Release and Severance Agreement* is appended as Attachment G (name deleted by EEOC) (“*Sample General Release*”).

21. Without any limitation or exception, the release provided that the employee agreed to waive “all causes of action, claims, damages, judgments or agreements of any kind” including “any and all alleged claims” under the ADEA.

22. The release further provided that “[b]y signing this Agreement and Release, you are providing a complete waiver of all claims that may have arisen, whether known or unknown, up until the time that this Agreement and Release is executed. If you breach this Agreement and Release by filing a claim against UBS or by disclosing confidential or proprietary information about UBS, you agree to repay all severance pay and other benefits provided to you herein and to pay all legal fees and costs that UBS incurs to obtain the dismissal of any such claims.”

23. UBS Brinson and UBS AG failed to provide employees terminated from any one of the two predecessor companies, UBS or SBC, with information regarding employees from the other company.

24. UBS Brinson and UBS AG failed to provide employees terminated from any one of the two predecessor companies, UBS or SBC, with any eligibility factors for the terminations.

25. Employees who executed the release were also required to sign an “Acknowledgment” in which the employee agreed not to disclose the release “to anyone except to [sic] my immediate family and any tax, legal or other counsel that I have consulted regarding the meaning of this agreement.”

26. Because of the features of the release described in paragraphs 21-25, the waiver agreements have a chilling effect on the willingness and ability of individuals to engage in activity protected by the ADEA, including filing charges, filing a lawsuit and participating in an EEOC investigation.

27. The Lock-In Agreements provided that, in order to receive the Lock-In Payments, signatories would have to sign the release. See "Sample Lock-In," appended as Attachment E.

28. Employees offered the Lock-In Agreement were forced to decide whether to remain employed through the lock-in date without being provided a copy of the release that each would be required to sign by the end of the lock-in period in order to obtain lock-in payments.

29. Employees who signed the Lock-In Agreement did not receive any additional consideration in return for signing the release.

30. At all relevant times Kinne S. Yon was employed by, successively, Brinson Partners, Inc., SBC Brinson, Defendants UBS Brinson, and Defendant UBS AG.

31. On April 20, 1998 Defendants determined that Ms. Yon was an employee who would become redundant but whose services were deemed critical for at least three (3) months and offered her a Lock-In Agreement.

32. On or about April 20, 1998 Ms. Yon asked to see a copy of the release she would ultimately have to sign; Defendants refused to give her a copy of the release and she protested such refusal to Defendants' legal counsel.

33. On or about May 1, 1998 Defendants UBS Brinson and UBS AG withdrew the Lock-In Offer to Ms. Yon and informed her that she was being terminated immediately.

34. Since at least March, 1998 and continuing since, Defendants UBS Brinson and UBS AG engaged in unlawful practices by offering waiver agreements that threaten to take adverse action by seeking tenderback of severance benefits and recoupment of attorneys' fees and costs if an individual engages in activity protected by the ADEA, in violation of Sections 4(d) and 7 of the ADEA, 29 U.S.C. §623(d) and 29 U.S.C. §626.

35. Since at least March, 1998 and continuing since, Defendants UBS Brinson and UBS AG engaged in unlawful practices by not providing employees terminated in Defendants' employee termination program (regardless of whether Locked-In or otherwise) with the information required to be provided, in writing, by OWBPA, in violation of Sections 4(a), 4(d), and 7 of the ADEA, 29 U.S.C. §623(a), §623(d), and §626. Defendants' unlawful employment practices included, but were not limited to:

A. failing to provide the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who were not eligible or selected for the program, in that Defendants failed to provide employees terminated from any one of the two predecessor companies, UBS or SBC, with information regarding employees from the other company; and,

B. failing to provide the eligibility factors for the program.

36. Since at least March, 1998 and continuing since, Defendants UBS Brinson and UBS AG engaged in unlawful practices by offering a release which required terminated employees (whether Locked-In or otherwise) to remit all severance pay if they filed a claim against Defendants and to reimburse Defendants for all legal fees and costs incurred in dismissing any claim filed by the employee, in violation of Sections 4(a) 4(d), and 7 of the ADEA, 29 U.S.C. §623(a), §623(d), and §626.

37. Since at least March, 1998 and continuing since, Defendants UBS Brinson and UBS AG engaged in unlawful practices by not providing employees terminated in Defendants' employee termination program who were offered Lock-In Agreements with the information required to be provided, in writing, at the time of the Lock-In Offer by OWBPA, in violation of Sections 4(a), 4(d), and 7 of the ADEA, 29 U.S.C. §623(a), §623(d), and §626. Defendants' unlawful employment practices included, but were not limited to:

A. failing to provide the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who were not eligible or selected for the program, in that

Defendants failed to provide employees terminated from any one of the two predecessor companies, UBS or SBC, with information regarding employees from the other company; and,

B. failing to provide the eligibility factors for the program.

38. Since at least March, 1998 and continuing since, Defendants UBS Brinson and UBS AG have not provided employees who signed Defendants' Lock-In Agreements with additional consideration in return for the General Release, in violation of Section 4(a) and Section 7 of the ADEA, 29 U.S.C. §623(a) and §626.

39. Since at least March, 1998 and continuing since, at the time Defendants UBS Brinson and UBS AG asked employees to sign Lock-In Agreements Defendants did not provide employees with a copy of the General Release and Severance Agreement which they would later be required to sign, in violation of Sections 4(a) and 7 of the ADEA, 29 U.S.C. §623(a) and §626.

40. Since at least March, 1998 and continuing since, Defendants UBS Brinson and UBS AG have, by the actions identified in Paragraphs 21 through 39 above, interfered with their employees' rights to file a charge with the EEOC, in violation of Sections 4(a), 4(d) and 7 of the ADEA, 29 U.S.C. §623(a), §623(d), and §626.

41. The effect of the practices complained of in Paragraphs 21 through 39 above have been to deprive a class of employees aged 40 and over the benefits of a valid waiver of ADEA claims, in violation of Sections 4(a), 4(d), and 7 of the ADEA, 29 U.S.C. §623(a), §623(d), and §626.

42. Since at least April 20, 1998 Defendants UBS Brinson and UBS AG retaliated against Kinne S. Yon in violation of Section 4(d) of the ADEA, 29 U.S.C. §623(d), by withdrawing their Lock-In Offer to Ms. Yon after she asked to see a copy of the release and protested Defendants' refusal to grant her request.

43. Since at least May 1, 1998 Defendants UBS Brinson and UBS AG retaliated against Kinne S. Yon in violation of Section 4(d) of the ADEA, 29 U.S.C. §623(d), by immediately terminating her because she opposed practices made unlawful by the ADEA and OWBPA by asking to see a copy of the release and protesting Defendants' refusal to grant her request.

43. The unlawful employment practices complained of in Paragraphs 21 through 42 above were and are willful within the meaning of the ADEA.

JURY TRIAL DEMAND

44. The EEOC requests a jury trial on all questions of fact raised by its Complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff EEOC respectfully requests that this Court:

A. Grant a permanent injunction restraining the Defendant UBS Brinson and UBS AG, their officers, management personnel, employees, agents, successors, assigns, and all persons in active concert or participation with them, from engaging in employment practices which adversely affect employees and former employees in violation of Sections 4(a), 4(d), and 7 of the ADEA, 29 U.S.C. §623(a), §623(d), and §626.

B. Order the Defendants UBS Brinson and UBS AG to institute and carry out policies, practices and programs which provide

equal employment opportunities for individuals who participate in activity protected by the ADEA, and which eradicate the effects of their past and present unlawful employment practices;

C. Order the Defendants Brinson and UBS AG to institute and carry out policies and practices, and programs which provide equal employment opportunities to individuals age forty (40) and over, and which eradicate the effects of their past and present unlawful employment practices;

D. Declare that Defendants Brinson and UBS AG's Lock-In Agreements do not meet the requirements of the ADEA, as amended by OWBPA;

E. Declare that Defendants UBS Brinson's and UBS AG's Separation Agreements and General Releases do not meet the requirements of the ADEA, as amended by OWBPA;

F. Order Defendants UBS Brinson and UBS AG to provide such other affirmative relief as is necessary to eradicate the effects of their unlawful practices, including, but not limited to, providing notice to all persons who signed Lock-In and Separation Agreements and General Releases advising them of the invalidity of said and of their right to pursue discrimination charges against Defendants under the ADEA;

G. Order Defendants UBS Brinson and UBS AG to provide such other affirmative relief as is necessary to eradicate the effects of their unlawful practices, including, but not limited to, providing all persons who did not receive the information required by OWBPA with information on the group(s) and/or unit(s) affected by Defendants' employee termination program and the eligibility requirements for said programs;

H. Enjoin Defendants UBS Brinson and UBS AG from raising a timeliness or statute of limitations defense to ADEA charges, or to suits based upon such charges, filed by employees who did not earlier file their ADEA charges because they had signed invalid LockIn's and Separation Agreements and General Releases;

I. Grant a judgment requiring Defendants to pay Kinne Yon appropriate lost wages in an amount to be determined at trial, an equal sum as liquidated damages due to Defendants' willful behavior, prejudgment interest, and Ms. Yon's attorneys fees and costs.

J. Grant such further relief as the Court deems necessary and proper in the public interest;

K. Award the EEOC its costs in this action.

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