2004 WL 692231
United States District Court,
E.D. Pennsylvania.

Gene R. ROMERO, et al.
v.
ALLSTATE INSURANCE COMPANY, et al.
Gene R. ROMERO, et al.
v.
THE ALLSTATE CORPORATION, et al.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
v.
ALLSTATE INSURANCE COMPANY, et al.

No. Civ.A. 01-3894, Civ.A. 01-6764, Civ.A. 01-7042. |
March 30, 2004.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER

FULLAM, J.

***1** The three above-captioned actions arise from a common set of facts, and have, in effect, been consolidated. Civil action 01-3894 will be referred to herein as "Romero I"; civil action 01-6764 will be referred to as "Romero II," and civil action 01-7042 will be referred to as "EEOC." This opinion deals with pending motions in all three cases.

I. *FACTUAL BACKGROUND*

For many years, Allstate Insurance Company hired, as its employees, all of the agents who sold its insurance policies, handled claims, etc. Management apparently came to believe that its interests would be better served by agents who were independent contractors, rather than employees. All newly-retained agents thereafter were deemed to be independent contractors. The employee-agents operated under one or the other of two types of employment contracts, designated the R830 and the R1500. The independent-contractor agents operated under R3001 contracts (after a brief period of actual employment, as trainees, under an R3000 contract).

Beginning in 1991, Allstate amended its pension plan, allegedly in order to comply with the Tax Reform Act of 1986 and implementing IRS regulations, to make clear that service as an independent-contractor agent under an R3001 contract would not be credited toward pension entitlements or calculations. The amendments also made it more difficult for covered employees to qualify for early retirement benefits and phased-out certain particularly favorable features of the early retirement benefits (which had enabled some employees to retire at age 55, but have their retirement benefits calculated as if they had continued to work until age 63).

After having adopted the policy of hiring only independent contractors in the future, Allstate also embarked upon a plan to persuade employee agents to switch to independent-contractor status, by offering financial inducements (e.g., a payment of $5,000, and more generous commissions on sales). Although some employee-agents made the switch, many others did not.

By 1999, the situation was as follows: of the approximately 15,000 agents nationwide, approximately 6,200 continued as employee-agents, under either the R830 or the R1500 contract. In November 1999, Allstate announced its "Preparing for the Future" Reorganization

Plan, under which the employment of all employee-agents would be terminated as of June 30, 2000. Each such employee-agent was offered a choice: if the agent signed a comprehensive release, he or she could (1) sign an R3001 contract and continue in the service of Allstate, (2) serve as an R3001 independent-contractor for a brief period, and then sell his or her interest in their book of business to a buyer approved by Allstate (frequently, another Allstate agent), or (3) sign an R3001 contract but then immediately resign, in exchange for severance pay amounting to one year's earnings, to be paid monthly over a period of two years. Agents who refused to sign the release were simply discharged as of June 30, 2000, with little or no severance pay.

***2** Confronted with these choices, most of the employee-agents (99.7%) signed releases. Only 19 agents did not sign, and several of their cases have been disposed of in the interim. As of the present date, the parties estimate that there are 16 potential claimants who did not sign releases.

In Romero I, the 29 named plaintiffs seek to represent a class which includes the 6,200 former employee-agents, to nullify all of the releases, and to pursue a wide range of claims: for breach of contract, for violations of the ADEA, ADA, Title VII and ERISA. As can readily be seen from the foregoing recital, the proposed class includes persons who did not sign the release, persons who signed the release and continue in the service of Allstate as independent contractors, persons who sold their blocks of business to other agents and then resigned, and persons who not only continue in the service of Allstate as independent contractors, but who have purchased blocks of business from retiring former agents. The class-action issues will be addressed below.

In Romero II, plaintiffs seek to represent a class of persons whose rights under ERISA were allegedly violated by the changes in the pension plan, and by their changes in status.

In its case, the EEOC contends that requiring the employee-agents to release all their claims under the ADEA, the ADA and Title VII in order to continue working as sales agents constituted retaliation in violation of § 4d of the ADEA, § 503a of the ADA, and § 704a of Title VII, and also constituted interference, coercion, and intimidation in violation of § 503b of the ADA. Attached to the EEOC complaint is a list of the 300-odd persons who filed charges with the EEOC-on whose behalf, presumably, the EEOC brought its lawsuit.

II. *DISCUSSION*

A. *Validity of the Releases*

An overarching issue in all of these cases is the validity and enforceability of the releases signed by most of the affected employee-agents. Obviously, if the releases are enforceable, only the 16 remaining agents who did not sign the releases could possibly prevail in this litigation. Defendants contend that this issue is not appropriate for class treatment, because of the conflicting interests of the putative class members, many of whom have no desire to be restored to the *status quo ante.* I believe, however, that the issue can properly be addressed on a class-wide basis by way of a declaratory judgment. That is, if the releases are found to be unenforceable, a declaratory judgment to the effect that they are voidable at the option of each class member would benefit those who wish to sue Allstate, without harming those who choose not to do so.

I conclude, further, that the releases should indeed be voidable at the option of the employee-agent. In the first place, the releases, on their face, violate § 626 of the Older Workers' Benefit Protection Act, 29 U.S.C. § 626 ("OWBPA") and 29 C.F.R. § 1625.22(i)(2), which provides "no waiver agreement may include any provision prohibiting any individual from ... filing a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC."

***3** Allstate contends that it had no intention of precluding the filing of charges, and notes that more than 300 employee-agents did file charges with the EEOC, without any repercussions. The difficulty with this argument, however, is that we have no way of knowing how many other employee-agents failed to pursue charges before the EEOC simply because they accepted the release language at face value.

Moreover, as the EEOC points out, it is illegal to either retaliate, or threaten to retaliate, against an employee to prevent him from exercising rights under the EEOC, Title VII, ADEA, ADA, etc. Those employees who did not sign releases were in fact treated less favorably than those who did sign, and the signers had all been threatened with such an outcome if they exercised their right to refuse to sign the proposed release.

I conclude, therefore, that the releases are voidable.

Defendants' motion for summary judgment with respect to all claims by persons who signed releases will therefore be denied, and plaintiffs' motion for partial summary judgment on that issue will be granted, to the extent of a declaratory judgment as discussed above.

B. ***Substantive Issues***

Entering declaratory judgment to the effect that the signed releases are voidable at the option of the signing employee does not, of course, signify that any of the employees actually have valid claims to assert. It is therefore appropriate to consider whether any of the claims asserted in the various complaints are subject to summary dismissal. I have concluded that some of them are indeed vulnerable to dismissal.

1. ***ADEA Claims***

I have concluded that, on the undisputed facts of record, there is no basis for claims of age discrimination, for the simple reason that employees of all ages were treated alike. An employer who visits adverse consequences upon all employees, irrespective of age, cannot be held liable for age discrimination. The fact, if it is a fact, that many of the affected employees, or even a majority, are within the protected age group, is irrelevant. On this point, I agree with the November 25, 2003 decision of Judge Herndon in the related case of *Isbell and Schneider v. Allstate Insurance Co.,* (U.S.D.C. Southern District of Illinois, No. 01-cv-00252).

2. ***The Claims in Romero II***

To the extent that the plaintiffs in Romero II complain about the amendments to the pension plan made in 1991, 1994, and 1996, their complaint, filed December 20, 2001 is, on its face, time-barred. To the extent that they lost pension entitlements when they became independent contractors or former employees, that consequence would be an element of damages if they establish that their change of status was a breach of contract or otherwise illegal-claims which are being asserted in Romero I and the EEOC action. I conclude that Romero II should be dismissed in its entirety.

3. ***Breach of Contract***

If, as Allstate contends, the employment of all employee-agents was terminable at will, then Allstate's action in terminating all those contracts on June 30, 2000 was entirely permissible. Plaintiffs contend, on the other hand, that the R830 and R1500 contracts were not at-will, but only terminable for cause. They note that the review procedures specified in the R830 contract clearly prevents at-will terminations, and that the same provisions were included in the manual which accompanied the R1500 contracts. The present record does not permit resolution of this issue on summary judgment. Although the language of the two forms of contract was drafted by Allstate, and ambiguities should be resolved in favor of the employees, it is also possible that parol evidence not yet in the record may shed light upon the issue.

4. ***Allstate's Counterclaim***

***4** In its counterclaim, Allstate seeks damages against the persons who signed releases, to the extent that they have, or may in the future, sue Allstate, contrary to the terms of the releases. Inasmuch as I have determined that the releases are voidable, plaintiffs' motion for summary judgment dismissing the counterclaim will be granted. Allstate's later motion for leave to amend its counterclaim will be dismissed as moot.

C. ***Class Action Issues***

In accordance with the foregoing discussion, I will certify a class under 23(b)(2) with respect to the voidable releases, so that any former employee-agent who signed such a release may, by notifying Allstate in writing within 90 days, effectively rescind the release (including, of course, repayment of all sums received in exchange for the release). If a sufficiently large number of agents rescind their releases, plaintiffs may apply for certification of a Rule 23(b)(3) class, when the contours of such a putative class will have been clarified.

A class consisting of the 16 remaining persons who did not sign releases will be certified, under Rule 23(b)(3), with respect to all issues not summarily disposed of herein. In all other respects, plaintiffs' applications for class certification will be denied without prejudice to a later motion for class certification, in accordance with the views expressed above.

The accompanying Order is intended to implement the views expressed above.

ORDER

AND NOW, this day of March 2004, IT IS ORDERED:
1. Civil Action No. 01-6764 ("Romero II") is dismissed with prejudice.

2. In all other respects, defendants' motion for summary judgment is denied.

3. The motions for partial summary judgment filed by plaintiffs in Civil Action NO. 01-3894 ("Romero I") and the EEOC in Civil Action No. 01-7042, are granted, to the extent of the declaratory judgment being entered as a separate document.

4. Plaintiffs' motion to dismiss defendant's counterclaim is granted. Defendant's counterclaim is dismissed with prejudice.

5. Defendant's motion for leave to file an amended counterclaim is dismissed as moot.

6. Counsel for plaintiffs shall submit a proposed order certifying a Rule 23(b)(3) class consisting of those former employee-agents who did not sign releases.

7. Except as above set forth in this Order, all pending motions are dismissed.

DECLARATORY JUDGMENT

AND NOW, this day of March 2004, IT IS ORDERED, ADJUDGED AND DECLARED that:

1. The releases signed by the former employee-agents of Allstate Insurance Company pursuant to the "Preparing for the Future" Reorganization Plan are voidable at the option of the persons who signed the releases.

2. Each employee-agent who signed such a release may rescind the release by taking the following action: within 90 days after receiving notice of this Order, notifying Allstate Insurance Company, in writing, of his or her wish to rescind the release, and, within 30 days thereafter, tendering to Allstate Insurance Company repayment of any and all benefits received by the signer in exchange for signing the release.

***5** 3. Counsel for plaintiffs in the above-captioned actions shall submit to this Court for approval a proposed form of notice implementing the foregoing.