

Syverson v. IBM

United States District Court for the Northern District of California, San Jose Division

May 4, 2004, Decided ; May 4, 2004, Filed

No. C-03-04529 RMW, [Re: Docket Nos. 31 and 39]

Reporter: 2004 U.S. Dist. LEXIS 27844

WILLIAM SYVERSON, RUTH ALICE BOYD, DALE CAHILL, JACK FRIEDMAN, PAUL GROMKOWSKI, SYLVIA JONES, ROLF MARSH, WALTER MASLAK, JAMES PAYNE and ANTONIO RIVERA, individually and on behalf of others similarly situated, Plaintiffs, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.

Subsequent History: Reversed by, Remanded by, Vacated by Syverson v. IBM, 461 F.3d 1147, 2006 U.S. App. LEXIS 22504 (9th Cir. Cal., 2006)

Reversed by, Remanded by Syverson v. IBM, 472 F.3d 1072, 2007 U.S. App. LEXIS 16 (9th Cir. Cal., Jan. 3, 2007)

Counsel: [*1] For William Syverson, individually, and on behalf of others similarly situated, Ruth Alice Boyd, individually, and on behalf of others similarly situated, Dale Cahill, individually, and on behalf of others similarly situated, Jack Friedman, individually, and on behalf of others similarly situated, Paul Gromkowski, individually, and on behalf of others similarly situated, Sylvia Jones, individually, and on behalf of others similarly situated, Ralph Marsh, individually, and on behalf of others similarly situated, Walter Maslak, individually, and on behalf of others similarly situated, James Payne, Individually, and on behalf of others similarly situated, Antonio Rivera, individually, and on behalf of others similarly situated, Plaintiffs: Jeffrey Neil Young, Patrick McTeague, McTeague Higbee Case Cohen Whitney & Tok, Topsham, ME; Robert E. Jesinger, Wylie McBride Jesinger Platten & Renner, San Jose, CA.

For International Business Machines Corporation, Defendant: Jeffrey D. Wohl, Kerri N. Harper, Paul, Hastings, Janofsky & Walker LLP, San Francisco, CA.

For International Business Machines Corporation, Counter-claimant: Jeffrey D. Wohl, Paul, Hastings, Janofsky & Walker LLP, [*2] San Francisco, CA.

For Ruth Alice Boyd, individually, and on behalf of others similarly situated, Dale Cahill, individually, and on behalf of others similarly situated, Jack Friedman, individually, and on

behalf of others similarly situated, Paul Gromkowski, individually, and on behalf of others similarly situated, Sylvia Jones, individually, and on behalf of others similarly situated, Ralph Marsh, individually, and on behalf of others similarly situated, Walter Maslak, individually, and on behalf of others similarly situated, James Payne, Individually, and on behalf of others similarly situated, Antonio Rivera, individually, and on behalf of others similarly situated, William Syverson, individually, and on behalf of others similarly situated, Counter-defendants: Jeffrey Neil Young, McTeague Higbee Case Cohen Whitney & Tok, Topsham, ME.

Judges: RONALD M. WHYTE, United States District Judge.

Opinion by: RONALD M. WHYTE

Opinion

ORDER GRANTING DEFENDANTS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT AND DENYING WITHOUT PREJUDICE PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM

Defendant International Business Machines Corporation ("IBM") moves to dismiss plaintiff's first amended [*3] complaint, and plaintiffs move to dismiss IBM's counterclaim. The motions were heard on April 30, 2004. The court has read the moving and responding papers and heard the argument of counsel. For the reasons set forth below, the court GRANTS defendant's motion to dismiss and DENIES without prejudice plaintiffs' motion to dismiss.

I. BACKGROUND

Between January 2001 and June 2002, IBM terminated the employment of numerous employees across various offices.¹ Upon notice of employment termination, IBM offered each employee severance pay and benefits in exchange for signing a document entitled "MICROELECTRONICS RESOURCE ACTION (MERA) GENERAL RELEASE AND COVENANT NOT TO SUE" ("waiver"). First Am. Compl. ("FAC") Ex.'s L,

¹ Defendant IBM is incorporated under the laws of the State of New York, with its principal place of business in the State of New York. IBM also has offices operating in Tucson, Arizona; San Jose, California; Boulder, Colorado; Atlanta, Georgia; Armonk,

M. ² The document also states in the header that "YOU ARE ADVISED TO CONSULT AN ATTORNEY BEFORE YOU SIGN THIS RELEASE." *Id.*

EEOC then issued right-to-sue letters to plaintiffs Syverson, Rivera, Marsh, Cahill, Gromkowski and Maslak. FAC Ex.'s F-K.

In conjunction with the offered waiver, and before the affected employee was asked to sign the waiver, IBM provided to each affected employee a 50-page document entitled "Microelectronics Division Resource Action Employee Information Package" ("Information Package"). FAC PP 8(a), (d). This document contains a list of job titles, ages, and numbers of individuals selected and not selected for layoff in IBM's Worldwide Semiconductor Manufacturing, Global Services, Business Consulting Services and other IBM units. ³ Plaintiffs claim that the termination trends in the Information Package reflect IBM's discriminatory termination policy based on age. For example, plaintiffs contend that a significant fact indicating employment discrimination based on age is that the "percent laid off is 25%, 32%, 48%, and 67% for those 46-50, 51-55, 56-60, and 61-65." FAC P 8(a). Each plaintiff signed the waiver [*5] and received added severance pay and benefits in exchange. Plaintiffs assert that, faced with unemployment, they were under economic duress to sign the waiver and receive the added benefits.

On October 7, 2003, plaintiffs filed this action ⁵ on behalf of themselves and other similarly situated employees. ⁶ Plaintiffs allege that IBM discriminated on the basis of age when terminating plaintiffs, violating [*7] the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621; the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f)(1); and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001.

On February 12, 2004 IBM filed a counterclaim seeking costs and expenses incurred while defending this suit. IBM bases its claim on the waiver, which includes a covenant not to sue for claims other than under the ADEA. IBM now files this motion to dismiss plaintiffs' first amended complaint, and plaintiffs file a motion to dismiss defendant's counterclaim. The parties dispute whether the waiver satisfies the statutory requirements of the OWBPA, ADEA and ERISA.

II. ANALYSIS

A. OWBPA

Plaintiffs Syverson, Rivera, Marsh, Cahill, Gromkowski and Maslak subsequently filed charges of age discrimination with various state attorneys general and the Equal Employment Opportunity Commission (EEOC). ⁴ The EEOC dismissed plaintiffs' charges on the merits, finding that the signed release and covenant not to sue waived any claims of age discrimination. FAC at 6. In plaintiff Cahill's action, for example, the EEOC found that the waiver "met the Older Workers Benefit Protection Act (OWBPA) criteria and was not the product of economic duress[.]" and "met the requirements of the OWBPA's knowing and voluntary' standard and [was] not in violation of the statute." FAC Ex. I at 1 (Letter [*6] of 7/16/03 from EEOC to Cahill); *see also*, e.g., FAC Ex. F at 1-2 (Letter of 7/9/03 from EEOC to Syverson). The

Congress amended the ADEA in 1990 [*8] by passing the OWBPA. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426, 139 L. Ed. 2d 849, 118 S. Ct. 838 (1998). "The OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law. The statute creates a series of prerequisites for knowing and voluntary waivers and imposes affirmative duties of disclosure and waiting periods." *Id.* at 426. "The Older Workers Benefit Protection Act (OWBPA) imposes specific requirements for releases covering ADEA claims." *Id.* at 424 (citing OWBPA § 201, 29 U.S.C. §§ 626(f)(1)(B), (F), (G)). As the party asserting validity of the waiver, IBM has the burden of proving that the waiver

East Fishkill, Endicott, Poughkeepsie, Somers and Yorktown Heights, New York; Charlotte and Research Triangle Park, North Carolina; Beaverton and Portland, Oregon; Austin, Texas; and Essex Junction, Vermont. FAC P 6.

² Ex. L is an example of an earlier waiver provided to affected employees, and Ex. M is an example of a later waiver. The differences between the two waivers are not significant for purposes of this motion.

³ Plaintiffs claim that the termination trends in the Information Package reflect IBM's discriminatory termination policy based on age.

⁴ Syverson filed with the Vermont Office of the Attorney General and the EEOC on October 23, 2002. Rivera filed with the EEOC on February 3, 2003. Marsh filed with the New York State Division of Human Rights and the EEOC on July 8, 2003 and Cahill filed with the Vermont Office of the Attorney General and the EEOC on September 3, 2002. *See* FAC at 3-5 Ex. 's B, C, D, and E. The other named plaintiffs allegedly filed charges of age discrimination with the EEOC and the State Fair Employment Practices Agency in the state they where they were employed. FAC at 5.

⁵ Plaintiffs filed a first amended complaint on December 19, 2003.

⁶ For purposes of this motion, and as there has been no class certification, only the named plaintiffs' claims are addressed.

was "knowing and voluntary" pursuant to 29 U.S.C. §§ 626(f)(1)-(2). See 29 U.S.C. § 626(f)(3).

A waiver may not be knowing and voluntary under the OWBPA unless at a minimum: (A) it is part of an agreement between the individual and employer and is written and calculated to be understandable; (B) the waiver specifically refers to rights or claims arising under the ADEA; (C) there is no waiver of future rights or claims; (D) the consideration [*9] provided is in addition to anything to which the individual is already entitled; (E) the individual is advised in writing to consult an attorney prior to signing the agreement; (F) the individual is given at least a 21 day period to consider the agreement; and (G) the individual is given at least a 7 day revocation period following execution of the agreement. 29 U.S.C. § 626(f)(1)(A)-(G). In addition, if the waiver is requested in connection with an employment termination program offered to a group or class of employees, the individual must be given a period of at least 45 days to consider the agreement, and must be provided with understandable information as to: (i) any class, unit, or group of individuals covered by the program, eligibility factors, and time limits; (ii) job titles and age of all individuals 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. 29 U.S.C. § 626(f)(1)(H). It is undisputed that (B) -- (H) are met. Plaintiffs contest only the first requirement, that the waiver is written in language calculated to be [*10] understood by the average individual. Pl.'s Opp. to Def.'s Countercl. ("Pl.'s Opp.") at 7; see 29 U.S.C. § 626(f)(1)(A).

Plaintiffs assert that by renaming both the General Release and Covenant Not to Sue as a "Release," the waiver conflates the separate sections in the document addressing each provision. Specifically, page 2 of the waiver states that "this covenant not to sue does not apply to actions based solely under the Age Discrimination in Employment Act of 1967, as amended." Waiver at 2. Plaintiffs apparently contend that this combination of statements misled them into believing that their ADEA claims were preserved. Pl.'s Opp. at 8-9.

The waiver provides:

In exchange for the sums and benefits received . . . [name] (hereinafter "you") agrees to release and hereby does release International Business Machines Corporation . . . from all claims, demands, actions or liabilities you have against IBM of whatever kind including, but not limited to, those that are related to your employment with IBM, the termination of that employment, or other severance payments. . . . You also agree that this Release covers, but is not limited to, claims from [*11] the Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil Rights Act of 1964, as amended, the Worker Adjustment and Retraining Notification Act, and any other federal, state or local law dealing with discrimination in employment including, but not limited to, discrimination based on sex, sexual orientation, race, national origin, religion, disability, veteran status or age, and claims for attorneys' fees. You also agree that this Release includes, but is not limited to, claims based on theories of contract or tort, whether based on common law or otherwise. FAC Ex. M at 1. ⁷

Page 2 of the waiver notes that "this Release does not prevent you from enforcing your non-forfeitable rights to your accrued benefits . . . which are not released hereby but survive unaffected by this document." FAC Ex.'s L, M at 2.

The last paragraph on page 2 of the waiver [*12] includes a covenant not to sue. It provides that the signatory "will never institute a claim of any kind against IBM [] including, but not limited to, claims related to your employment with IBM or the termination of that employment or other severance payments or your eligibility for participation in the retirement bridge." *Id.* The paragraph further provides that IBM is entitled to attorney's fees and costs incurred by defendant against any suit brought in violation of the covenant not to sue. However, "this covenant not to sue does not apply to actions based solely under the Age Discrimination in Employment Act of 1967, as amended." *Id.*⁸ Plaintiffs argue that the language of the covenant not to sue, combined with the language of the release, makes the waiver contradictory and confusing. IBM asserts that this

⁷ The first waiver does not specifically reference the Worker Adjustment and Retraining Notification Act. See FAC Ex. L at 1.

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You agree that you will never institute a claim of any kind against IBM, or those associated with IBM including, but not limited to, claims related to your employment with IBM or the termination of that employment or other severance payments or your eligibility for participation in the Retirement Bridge Leave of Absence. If you violate this covenant not to sue by suing IBM or those associated with IBM, you agree that you will pay all costs and expenses

provision was necessary to comply with the EEOC's mandate that an employee suing under the ADEA may not be held liable for damages in breach of a covenant not to sue. Reply Supp. Def.'s Mot. Dismiss FAC at 5 (citing 29 C.F.R. § 1625.23(b)).

[*13] Although plaintiffs take issue with the language of the waiver, the court is satisfied that this language is written in a manner calculated to be understood by an average individual selected by IBM for employment termination. See Thomforde v. IBM, 304 F. Supp. 2d 1143, 1144 (D. Minn. 2004). The language of the waiver releases all forfeitable claims arising under the ADEA, but does not release rights for benefits that have already accrued. Additionally, the waiver provides for recovery of fees and costs incurred by IBM in the event a previously waived claim is brought, but does not provide for fees and costs incurred by IBM if a claim is brought under the ADEA. In other words, although IBM may not recover fees and costs if a claim is brought under the ADEA, IBM may still defend against any ADEA claim by asserting that it was previously waived. To the extent the language of the waiver requires clarification, the waiver explicitly advises affected employees to consult an attorney, their manager, the MERA Project Office or Human Resources prior to signing.

Plaintiffs also contend that IBM fails to inform employees that the filing of a charge of age discrimination with [*14] the EEOC does not constitute the filing of litigation in violation of the covenant not to sue, and that such a finding may result in determinations legally binding on IBM. Pl.'s Opp. at 10. In contrast, any suit filed in court could be deemed to violate the covenant. *Id.* As discussed above, filing an ADEA claim does not violate IBM's covenant not to sue, but IBM may raise a defense that any claim under the ADEA has been knowingly and voluntarily waived. The court is not convinced that either 29 C.F.R. § 1625.22(a) or § 1625.22(b)(4) requires an employer to inform an employee of the right to file a claim with the EEOC pursuant to 29 U.S.C. § 626(d).

B. Contract

Plaintiff asserts, alternatively, that IBM's waiver constitutes a contract of adhesion that is unconscionable and thus unenforceable. Pl.'s Opp. at 11. "Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or adhering' party will not be enforced against [*15] him. [Citations omitted.] The second -- a principle of equity applicable to all contracts generally -- is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or unconscionable." Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 113, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000) (citing Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 820, 171 Cal. Rptr. 604, 623 P.2d 165 (1990)). Plaintiffs' allegations, taken as true, do not show that the parties' reasonable expectations were not met, or that the waiver was unduly oppressive or unconscionable.

C. ERISA

Plaintiffs assert that notwithstanding the waiver of any ADEA claims, their ERISA claims survive. In Chaplin v. NationsCredit Corp., the parties disagreed over whether language in a release must specifically mention ERISA claims to cover them. 307 F.3d 368, 372 (5th Cir. 2002).⁹ Applying federal common law, and finding no statutory basis for requiring specific mention of ERISA claims in a release, the Chaplin court noted that "public policy favors voluntary settlement of claims and enforcement [*16] of releases[,] (citation omitted)" and "it would be an odd public policy that favored settlements and releases, but then forced employers to scour the United States Code and the state statutes and reports to identify every possible cause of action." *Id.* at 373; see also Stroman v. West Coast Grocery Co., 884 F.2d 458, 461 (9th Cir. 1989) (in Title VII action, "an agreement need not specifically recite the particular claims waived in order to be effective."). Thus, specific mention of ERISA claims is not required for IBM's release of any such claims to be valid and enforceable.

of defending against the suit incurred by IBM or those associated with IBM, including reasonable attorneys' fees, and all further costs and fees, including attorneys' fees, incurred in connection with collection. This covenant not to sue does not apply to actions based solely under the Age Discrimination in Employment Act of 1967 as amended. That means if you were to sue IBM or those associated with IBM only under the Age Discrimination in Employment Act of 1967, as amended, you would not be liable under the terms of this Release for their attorneys' fees and costs and expenses of defending against a suit. This Release does not preclude filing a charge with the U.S. Equal Employment Opportunity Commission. FAC Ex. L at 2, Ex. M. at 2.

⁹ "[Plaintiffs] hereby agree to release [NationsCredit] from any and all claims, suits, demands, or other causes of action of any kind . . . arising at any time in the unlimited past . . . [including] all claims arising by reason of or in any way connected with [plaintiffs'] employment relationship with NCDF." Chaplin, 307 F.3d at 372.

Both parties agree, however, that the waiver [*17] does not give up accrued ERISA benefits or prevent plaintiffs from enforcing such nonforfeitable rights under the following provision:

This Release does not prevent you from enforcing your nonforfeitable rights to your accrued benefits (within the meaning of §§ 203 and 204 of the Employee Retirement Income Security Act of 1974 as amended), as of the date of termination of your IBM employment, under the IBM personal pension plan or the IBM retirement plan as applicable and the IBM PDSP 401(K) which are not release hereby but survive unaffected by this document.FAC Ex.'s L, M at 2; Pl.'s Opp. at 12; Def.'s Opp. Pl.'s Mot. Dismiss Countercl. at 3. Thus, to the extent plaintiffs can assert claims for their nonforfeitable rights, those claims are not barred by the release.

D.Leave to amend

Under *Rule 15(a)*, leave to amend a pleading shall be freely granted when justice so requires. *FED. R. CIV. P. 15(a)*. However, since any amendment against IBM would be futile, the court dismisses plaintiffs' First Amended Complaint with prejudice.

D. Dismissal of counterclaim

Both parties agree that under the covenant not to [*18] sue IBM may not recover costs and attorney's fees for actions brought by plaintiffs pursuant to the ADEA. Plaintiffs do not argue, however, that their claims for relief are brought only pursuant to the ADEA, but rather that their ERISA claims are inextricably intertwined with the ADEA claims. The court is not convinced that, at least for purposes of costs and attorney's fees, the ERISA claim may not be reasonably separated from plaintiffs' ADEA claims.

III. ORDER

For the foregoing reasons, the court GRANTS defendant's motion to dismiss with prejudice, and DENIES without prejudice plaintiffs' motion to dismiss defendant's counterclaim. The parties are to contact the courtroom deputy, Jackie Garcia, (408) 535-5375, to arrange a telephone case management conference.

DATED: May 4, 2004

RONALD M. WHYTE

United States District Judge