

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 31683

CARA HANNA KOERNER,

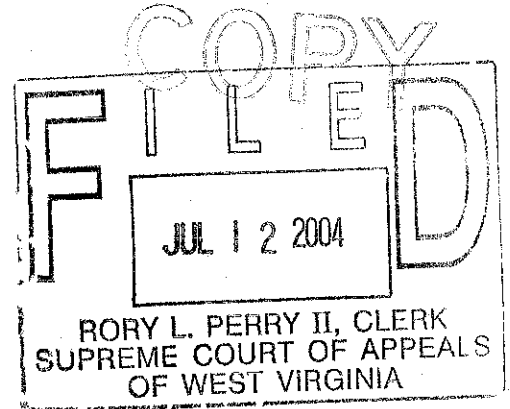
Plaintiff Below,

Appellant,

v.

WEST VIRGINIA DEPARTMENT OF  
MILITARY AFFAIRS AND PUBLIC  
SAFETY, and OTIS G. COX, JR., in  
his official capacity,

Defendants Below,  
Respondents.



**BRIEF OF AMICUS CURIAE**  
**WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION**

**INTRODUCTION**

Pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, the West Virginia Employment Lawyers Association (WVELA) provides this brief in support of the appeal filed by Cara Hanna Koerner. The interest of WVELA in the issues raised in this appeal and the reasons that this brief amicus curiae is desirable were set forth in the motion for leave to file brief amicus curiae of the WVELA filed contemporaneously herewith. In this context, amicus curiae address important issues regarding the construction and validity of releases in the context of employment discrimination cases. Significantly, this is not an isolated issue. Amicus curiae is aware of at least one other circuit court in West Virginia that has applied the Fourth Circuit's "substantial compliance" and "tender back" doctrine to uphold the validity of a release that did not comply with

the waiver requirements.

### **ISSUES PRESENTED**

A. Whether the lower court erred in ignoring the objective criteria for determining whether a waiver of a West Virginia Human Rights Act (WVHRA) claim is knowing and voluntary?

B. Whether the lower court erred in applying the restrictive and discredited “tender back” doctrine to a claim filed pursuant to the WVHRA?

### **DISCUSSION**

A. THE OBJECTIVE CRITERIA FOR VALID WAIVERS OF WEST VIRGINIA HUMAN RIGHTS ACT CLAIMS SHOULD BE APPLIED STRICTLY.

The settlement agreement at issue in this case was not a valid waiver of claims under the West Virginia Human Rights Act (WVHRA). Valid waivers of rights derived from the protections of the Act must comply with stringent guidelines set forth in the legislative rules of the West Virginia Human Rights Commission (Commission). The rules promulgated by the Commission regarding waivers of rights are modeled on the provisions governing waiver and release set forth in the Older Workers Benefit Protection Act of 1990 (OWBPA) in order to provide “common criteria in federal and state standards concerning voluntary waiver and release.” 6 W. VA. C.S.R. § 77-6-1.2.

Pursuant to the rules, “[a]n individual may not waive any right or claim under the West Virginia Human Rights Act unless the waiver is knowing and voluntary.” *Id.* at § 3.1. The Commission sets forth detailed criteria required of a “knowing and voluntary” waiver, including *inter alia*, that the: (1) waiver specifically refer to rights or claims arising under the WVHRA; (2) waiver is executed; and (3) the individual waives a right only in exchange for consideration that is in addition to anything of value to which the individual already is entitled. *Id.* at § 3.2, 3.2b, and 3.2.d. The waiver requirements under the WVHRA are virtually identical to those required by the

OWBPA.<sup>1</sup>

The United States Supreme Court considered the OWBPA waiver provisions in Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998). In Oubre, the petitioner signed a release agreeing to “waive, settle, release, and discharge any and all claims, demands, damages, actions, or causes of action” against Entergy. *Id.* at 424. The Court held that this release was not a knowing and voluntary waiver because it did not comply with the strictures of the OWBPA. The Court reasoned that:

The OWBPA implements Congress’ policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word. Congress imposed specific duties on employers who seek releases of certain claims created by statute. Congress delineated these duties with precision and without qualification. An employee ‘may not waive’ an ADEA claim unless the employer complies with the statute.

*Id.* at 427. Thus, the Court adopted a strict, objective test in deciding whether a release validly waives rights under the Age Discrimination in Employment Act (ADEA).<sup>2</sup>

The same analysis applies to the waiver requirements in the rules governing waivers of claims under the WVHRA. The Commission modeled its waiver provisions on the OWBPA to provide “common criteria” between federal and state standards for voluntary waivers of claims. In this case, the Appellant did not execute a knowing and voluntary waiver. The settlement agreement clearly did not meet the standards<sup>3</sup> for a knowing and voluntary waiver in that it: (1) did not

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<sup>1</sup> See, Older Workers Benefit Protection Act, § 201, 104 Stat. 983, 29 U.S.C. § 626(f).

<sup>2</sup> The OWBPA was a 1990 amendment to the ADEA.

<sup>3</sup> The circuit court concluded that Appellant’s “agreement to release ‘all’ claims arising out of her employment was a knowing and voluntary waiver of any claims under the [WVHRA] since that decision was made with the advise and consent of counsel well versed in the [WVHRA].” However, the rules governing waivers of rights do not contain such an exception. Indeed, the rules do contain an exception in § 3.3 for releases entered into with the direct assistance of an attorney, but only for the waiver requirements found in §§ 3.2e, f, and g. The fact that such

specifically refer to rights or claims arising under the West Virginia Human Rights Act; and (2) was not signed by the Appellant.<sup>4</sup> Therefore, the release in this case is invalid as to Appellant's WVHRA claims.<sup>5</sup>

The strict criteria for valid waivers of civil rights reflects the purpose of the WVHRA – to protect citizens against discrimination. To this end, the objective waiver requirements ensure that employees are made aware of their rights to pursue valid discrimination claims through the WVHRA.<sup>6</sup> This purpose will be frustrated if invalid waivers provided by employers are approved through the “substantial compliance” theory espoused by the Fourth Circuit. The only incentive for employers to comply with the objective waiver requirements is the potential risk that noncomplying waivers will be held invalid. Otherwise, employers who discharge employees for discriminatory reasons will be tempted to provide the least amount of information possible to potential claimants in order to avoid claims. The strict standards of the waiver requirements provide a bright-line rule with which to determine minimum compliance with the WVHRA. These standards should be

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an exception was carved out for these criteria demonstrates that the Commission and Legislature contemplated the effect of assistance of counsel in a release and rejected any other exceptions to the objective criteria for valid waivers of rights, such as that of §3.2b.

<sup>4</sup> In this case, the closest provision is found in the settlement agreement. It contains language that the Appellant “agrees to execute [ ] a release of all claims [ ] arising out of her employment.” Such language is much more akin to the blanket waiver of all claims found invalid in Oubre, supra at 2, than the quite detailed release language held valid by the Fourth Circuit in Adams v. Moore Business Forms, Inc., 224 F.3d 324, 326 (4<sup>th</sup> Cir. 2000). In any event, the release was never executed by the Appellant.

<sup>5</sup> Whether such invalid waivers are void or merely voidable presents interesting issues that will not be addressed in this brief; however, *see* Butcher v. Gerber Products Co., 8 F.Supp.2d 307, 316 (S.D. N.Y. 1998) (finding that “if a former employee’s procedurally invalid promise note to sue were absolutely void, it might become possible for an employer to cancel its own reciprocal obligation to pay the worker or provide ongoing health benefits whether or not the worker ever intended to bring a lawsuit.”)

<sup>6</sup> See e.g., Howlett v. Holiday Inns, Inc., 120 F.3d 598, 602 (6<sup>th</sup> Cir. 1997).

applied strictly and objectively to fully protect the rights of employees.

Significantly, a majority of courts considering waiver provisions have consistently followed the Oubre analysis.<sup>7</sup> Indeed, other jurisdictions have even applied Oubre to claims arising out of other statutes enacted to protect against discrimination. For instance, the Northern District of Illinois applied the Oubre analysis to a waiver issue in an Americans with Disabilities Act (ADA) claim. Haswell v. Marshall Field & Co., 16 F.Supp.2d 952 (N.D. Ill. 1998). The court reasoned that “[a]lleged waivers of ADA claims are evaluated based on standards similar to waivers of claims under the [ADEA] because parallel policy rationales drove the enactment of both statutes.” Id. at 958. Similarly, the District Court of New Mexico applied Oubre reasoning to a Title VII claim, noting that:

[a]lthough it is true that Title VII, unlike the OWBPA, does not have provisions mentioning specifically waivers and/or releases, the statutory goals of the two statutes are very similar in that the objectives of both are to expand employment opportunities and to combat workplace discrimination.

Rangel v. El Paso, 996 F.Supp. 1093, 1096 (D.N.M. 1998).

For the same reasons, the Oubre waiver analysis should be applied to waivers of claims under the WVHRA. The WVHRA was also enacted to combat workplace discrimination and to expand employment opportunities without regard to race, religion, color, national origin, ancestry, sex, blindness, disability or familial status. W. VA. CODE § 5-11-2. The objective standards for waivers of claims were subsequently promulgated in an effort to provide protection for employees with potential discrimination claims under the WVHRA. Here, neither the settlement agreement nor the

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<sup>7</sup> See e.g., Hodge v. New York College of Podiatric Medicine, 157 F.3d 164 (2<sup>nd</sup> Cir. 1998), Bennett v. Coors Brewing Co., 189 F.3d 1221 (10<sup>th</sup> Cir. 1999), Suhy v. AlliedSignal, 44 F.Supp.2d 432 (D.Conn. 1999), Rangel v. El Paso Natural Gas Co., 996 F.Supp. 1093 (D.N.M. 1998).

unsigned release met criteria for valid waivers under the WVHRA. Therefore, the Court should find that there was no waiver of Appellant's WVHRA claims.

B. THE "TENDER BACK" DOCTRINE SHOULD NOT BE APPLIED TO WAIVERS OF CLAIMS FILED PURSUANT TO THE WEST VIRGINIA HUMAN RIGHTS ACT.

Requiring claimants to tender back consideration defeats the purpose of the waiver provisions and creates the need for additional litigation of complex and nebulous issues about the amount of consideration paid to release multiple claims. The circuit court cites Adams v. Moore Business Forms for the proposition that an employee must tender back to the employer the benefits she received under a settlement agreement in order to assert claims that were released under the terms of that agreement. Adams v. Moore Business Forms, Inc., 224 F.3d 324 (4<sup>th</sup> Cir. 2000). Adams relies on an extremely pinched and narrow interpretation of the United States Supreme Court's decision in Oubre and ignores clear West Virginia regulatory and statutory mandate.<sup>8</sup> This minority-view decision by the Fourth Circuit should be rejected in favor of the more equitable and balanced reasoning found in Oubre. Specifically, the Oubre Court held that the employee did not have to tender back consideration for the release because the release did not constitute a knowing and voluntary waiver of claims. The Court also reasoned:

The rule proposed by the employer would frustrate the statute's practical operation as well as its formal command. In many instances a discharged employee likely will have spent the moneys received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the moneys and relying on ratification. We ought not to open the door to an evasion of the statute by this device.

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<sup>8</sup> See Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 64, 479 S.E.2d 561 (1996) (explaining that the WVHRA should be liberally construed). Adams also relies on a decision of the Southern District of West Virginia, Spradling v. Blackburn, which held valid a release of claims under the WVHRA because it "substantially complied" with the regulations. Notably, this decision was made before the United States Supreme Court's decision in Oubre. Adams, 224 F.3d at 331, citing Spradling v. Blackburn, 919 F.Supp. 969, 975 n. 13 (S.D.W. Va. 1996).

Oubre, 522 U.S. at 427.

In Oubre, the Court also recognized the practical considerations faced by a discharged employee. This Court should also acknowledge the hardships that claimants who have been discharged and induced to sign invalid waivers of their rights would face if they were required to tender back the consideration received for those waivers as a prerequisite to filing a discrimination claim. Also, such a rule would, in effect, provide an incentive for discriminatory employers to discharge employees while providing invalid waivers of rights with the expectation that the potential claimant would be unable to tender back the consideration, and thus would be foreclosed from bringing a valid claim.

Finally, this Court should reject the tender back rule because such a rule would be difficult to apply in the context of workplace discrimination where multiple claims are present. In many cases, employees may have potential claims under various state and federal statutes meant to combat discrimination in the workplace, such as the ADEA, FMLA, Title VII, and the WVHRA. If an employee later brings an action under one or more of these statutes, difficult issues arise if tendering back consideration is required. For instance, how can the employee (or the courts) determine which portion of the consideration paid is allocable to the release of the WVHRA claim, rather than to the potential ADEA, FMLA, or Title VII claim? How much consideration is due back to the employer where the employee brings an ADEA action as well as an action under the WVHRA? These questions will require extensive fact-finding and create the need for more litigation.<sup>9</sup>

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<sup>9</sup> Allowing a set-off for consideration paid at the end of claim decided in favor of the claimant may resolve part of the problem, but the same difficulties arise in that the amount of the set-off would require extensive fact-finding as to the allocation of the consideration paid to various claims. See, Kulling v. Grinders for Industry Inc., 185 F.Supp.2d 800, 815 (E.D. Mich. 2002) (holding that no offset required and asserting that "this Court need not

A majority of jurisdictions that have considered the issue have rejected the tender back rule in the context of remedial statutes such as the WVHRA. Even before the United States Supreme Court's pronouncements in Oubre, the Second, Third, and Ninth Circuits "suggested that federal policies and statutes relating to anti-discrimination should override traditional principles of contract law, such as the tender back rule, and should render those principles inapplicable." Rangel, 996 F.Supp at 1098, citing Long v. Sears Roebuck & Co., 105 F.3d 1529 (3d Cir. 1997); Botefur v. City of Eagle Point, 7 F.3d 152 (9<sup>th</sup> Cir. 1993); and Bormann v. AT & T Communications, Inc., 875 F.2d 399 (2<sup>nd</sup> Cir. 1989).<sup>10</sup>

The same considerations apply to the WVHRA. The regulations provide that waivers of claims can only be deemed knowing and voluntary if they strictly comply with the criteria set forth in the regulations. No exceptions – whether in contract law or otherwise – are applicable. In this case, the settlement agreement was invalid because it did not comply with the criteria for waivers of claims in the rules. Accordingly, Appellant did not subsequently waive her rights under the WVHRA (or ratify the otherwise invalid release) by not tendering back the consideration received.

### CONCLUSION

In a discriminatory workplace, employees are already at a distinct disadvantage. Most employees are not armed with the knowledge of their rights under state and federal laws, and many can be easily induced by unscrupulous employers to sign away these rights with invalid waivers. The strict criteria for waivers of claims under the WVHRA is one small step on the long road to

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attempt the near-impossible task of apportioning Plaintiffs' severance payments among their ADEA and other potential claims, and then determining the appropriate amounts to setoff against the back pay damages Plaintiffs have been awarded under the ADEA").

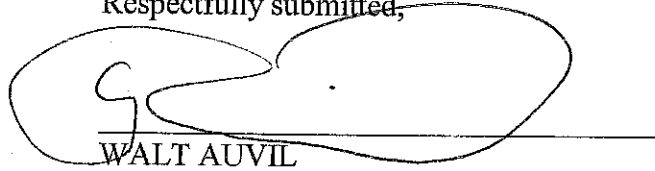
<sup>10</sup> See also, Hodge v. New York College of Podiatric Medicine, 157 F.3d 164 (2<sup>nd</sup> Cir. 1998); Butcher v. Gerber Products Co., 8 F.Supp.2d 307 (S.D.N.Y. 1998).

workplace fairness by requiring the employer to provide employees with information about their rights. Without the required information, employees are much less likely to be aware of, much less exercise, their rights under the WVHRA. Employers bear very little risk by providing inadequate releases to discharged employees. Therefore, only truly knowing and voluntary waivers of rights should be deemed valid. To ensure that the purpose of the WVHRA is served, the criteria for knowing and voluntary waivers must be evaluated by a strict, objective standard.

Further, claimants should not be required to tender back consideration in order to bring claims under the WVHRA. Such a requirement would serve only to encourage employers to take a chance on misleading an employee with an invalid waiver, with the hope that the employee would thereby "ratify" the release by spending the consideration. The tender back rule also runs counter to the spirit and purpose of the WVHRA to eradicate discrimination and to encourage the exercise of rights under the WVHRA.

WHEREFORE, for the reasons stated herein, amicus curiae respectfully urge this Court to affirm the importance and validity of the WVHRA's waiver provisions by reversing the lower court's ruling.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Walt Auvil', is written over a horizontal line. The signature is enclosed in a large, hand-drawn oval.

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