

Discriminating in Severance Pay Will Cost You

By James Hammerschmidt

For most employers, the object of offering severance pay in exchange for a release is to prevent the former employee from suing and to “buy” peace. When the County of Chesterfield, Virginia, made a severance offer to one of its long-time, female employees, however, it created a Title VII discrimination lawsuit that would not otherwise have existed. That’s a major oops!

Karla Gerner began working for Chesterfield in 1983. In 2009, after having served the previous 12 years as the Director of Human Resources Management (as it turns out, Gerner clearly knew her stuff), she was informed that, due to re-organization, her position was being eliminated. Gerner was told that if she voluntarily resigned and waived any cause of action against Chesterfield, she would receive severance in the form of three months pay and health benefits. There ensued one problem for Chesterfield: Gerner said “no thanks, see you in court.” She claimed that Chesterfield had not offered her the same “sweetheart” severance package it made available to male employees with similar circumstance, some of whom were being kept on the payroll for up to 6 months with salary and benefits. When she refused her offer, Chesterfield fired her retroactively.

The employer argued, and the trial court agreed, that Gerner had no claim. The federal district court reasoned that the disparate severance package was not an adverse employment action (which Gerner needed in order to prove discrimination) because (1) it was not a contractually entitled benefit, and (2) the offer was made after Gerner was terminated from employment.

The Fourth Circuit Court of Appeals, however, came to Gerner’s rescue [here]– and all employers should take heed. In reversing the district court, the appellate court emphasized that Supreme Court law makes clear that an employment benefit need not be a contractual right in order to be the basis of a Title VII claim. The Court also held that Title VII protects former employees as well as prospective and current employees from adverse employment action.

Despite confidentiality provisions in severance agreements, employees know what other employees are being offered, particularly when one of them is the Director of Human Resources! In group layoffs, employers should avoid ad hoc decision-making. Severance benefits should, instead, be developed based on criteria such as years of service, position or compensation so that all employees who are being laid off are treated equally if they are similarly situated.