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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JENA MCCLELLAN, *Plaintiff-Appellant*, *v.* MIDWEST MACHINING, INC., *Defendant-Appellee*.	No. 17-1992

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:16-cv-01308—Paul Lewis Maloney,
District Judge.

Argued: June 13, 2018

Decided and Filed: August 16, 2018

Before: COLE, Chief Judge; CLAY and THAPAR,
Circuit Judges.

COUNSEL

ARGUED: William F. Piper, WILLIAM F. PIPER, PLC, Portage, Michigan, for Appellant. Gregory N. Longworth, CLARK HILL PLC, Grand Rapids, Michigan, for Appellee. Philip M. Kovnat, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. **ON BRIEF:** William F. Piper,

WILLIAM F. PIPER, PLC, Portage, Michigan, for Appellant. Gregory N. Longworth, CLARK HILL PLC, Grand Rapids, Michigan, for Appellee. Philip M. Kovnat, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

CLAY, J., delivered the opinion of the court in which COLE, C.J., joined, and THAPAR, J., joined in part. THAPAR, J. (pp. 18–24), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. Plaintiff Jena McClellan brought suit against her former employer to enforce her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), and the Equal Pay Act, 29 U.S.C. § 206(d). The district court granted summary judgment for Defendant on the grounds that Plaintiff's federal claims were barred by the common law tender-back doctrine. Because we conclude that the tender-back doctrine does not apply to claims brought under Title VII and the Equal Pay Act, we **REVERSE** the district court's judgment and **REMAND** for further proceedings.

BACKGROUND

Factual Background

In 2008, Defendant Midwest Machining, Inc., a maker of component parts for complex tools and machines, hired Plaintiff Jena McClellan as a telemarketer and quickly promoted her to work in their "inside sales" department. In late August of 2015, Plaintiff announced to her employer that she was pregnant. According to Plaintiff, her supervisor made negative comments for weeks in response to the announcement, including "commenting sardonically and jealously about her perfect life," (R. 1, Compl., PageID #3), and was annoyed by Plaintiff's absences for pre-natal appointments. About three months later, Plaintiff was terminated "[d]espite [her] many years of service for the company in its inside sales department and no record of discipline in over six years." (R. 33, Second S. J. Order PageID #230.)

Plaintiff testified that on the day of termination, Philip Allor, Midwest's president, called her into his office. There, he presented Plaintiff with an agreement and said that she "needed to sign then if [she] wanted any severance." (R. 17-3, McClellan Aff., PageID #90.) As the district court explained, although the two reviewed the agreement together, "Allor did not ensure McClellan's understanding as they went along at a rapid pace." (R. 33, Second S. J. Order, PageID #231 (citing R. 31-4, McClellan Dep., PageID #202).) Plaintiff testified that she felt bullied throughout the meeting, that she felt she could not ask any further

questions, and that Allor's tone was "raised" during the entire conversation. (R. 31-4, McClellan Dep., PageID #203–04.) "[W]hen McClellan challenged a paragraph early on, and stated, 'I still should have had one week [of vacation] left,' Allor forcefully replied, '[you] do not,' and moved on." (R. 33, Second S. J. Order, PageID #231 (citing R. 31-4, McClellan Dep., PageID #202).) Plaintiff also testified that Allor shut the door and she did not feel free to leave.

"Feeling pressured," Plaintiff signed the agreement, without the benefit of a lawyer. (R. 17-3, McClellan Aff., PageID #90.) The agreement provided that Plaintiff would waive "any and all past, current and future claims" she had against Midwest. (R. 16-1, Severance Agreement, PageID #62.) Plaintiff would later affirm that she "did not understand that the 'claims' referred to in . . . the severance agreement meant discrimination complaints." (R. 17-3, McClellan Aff., PageID #90.) Instead, she "assumed it referred to any unpaid wages or benefits." (*Id.*)

Under the terms of the Severance Agreement, Defendant Midwest agreed to pay Plaintiff $4,000, payable in eight weekly installments beginning November 27, 2015. Defendant made each payment and Plaintiff accepted them.

Procedural History

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission, which issued her a right-to-sue letter on August 11, 2016. On

November 6, 2016, Plaintiff met with an attorney and explained what had transpired during her employment with Midwest. Given that any Title VII claim was about to expire, Plaintiff's attorney "immediately drafted a lawsuit." (R. 17-2, Piper Aff., PageID #83.)

On November 9, 2016, Plaintiff filed a complaint, naming Midwest Machining, Inc. and Self Lube, Inc. as defendants. The complaint alleges that Midwest "terminated Ms. McClellan because of her pregnancy." (R. 1, Compl., PageID # 4.) It also accuses Midwest of maintaining a sex-segregated workforce insofar as "all 20 or so people who worked in inside sales . . . were women," and "all three people who worked in outside sales were men." (*Id.* at PageID # 2.) The complaint further avers that Midwest "paid male outside sales persons substantially higher commissions and paid them substantially more overall than female inside sales persons, even though the positions required substantially similar duties, requirements, equal skill, effort and responsibility, under the same or similar working conditions." (*Id.* at PageID # 3.) The suit brought claims for "pregnancy discrimination" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), under 42 U.S.C. § 1981a, and under the Michigan Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq*. (Count I); and for equal pay violations under the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d) *et seq.*, under the Michigan Minimum Wage Law of 1964, MCL 408.381 *et seq*. (repealed 2014), and under the Elliot-Larsen Act (Count II).

After receiving Plaintiff's complaint, Midwest's counsel informed Plaintiff's counsel of the severance agreement. On or around December 1, 2016, about three weeks after Plaintiff filed suit and before any responsive pleading was due, Plaintiff sent a letter to Midwest, at the direction of her attorney, saying that she was "rescinding the severance agreement . . . because [she] want[ed] to litigate matters relating to [her] former employment and termination." (R. 17-2, McClellan Letter, PageID # 85; R. 17-2, Piper Aff., PageID # 83.) Enclosed with the letter was a check for $4,000. Midwest responded by returning the check to Plaintiff a week later, asserting that "[t]here is no legal basis for rescinding the severance agreement." (R. 17-2, Midwest Resp., PageID # 87.)

On February 24, 2016, Defendants filed a motion for summary judgment, arguing that the severance agreement barred Plaintiff's claims. They further argued that Plaintiff's claims were also barred because she did not "tender back" the monetary consideration she received under the severance agreement before commencing her lawsuit. On April 18, 2017, the district court granted in part and denied in part Defendants' motion for summary judgment. The court dismissed Defendant Self Lube, Inc., holding that there was no such legal entity known as Self Lube, which instead is a valid assumed name for Midwest Machining, Inc. The court then denied summary judgment for Defendant Midwest without prejudice and held that "at this stage and on this factual record, the Court cannot conclude the release was valid under

federal law." (R. 19, First S. J. Order, PageID # 101.) The court permitted the parties to conduct discovery limited to the issue of whether Plaintiff "knowingly and voluntarily executed the agreement." (*Id.* at PageID # 102-04.) The court also ordered further briefing as to whether federal law required a plaintiff to tender back any consideration received under a severance agreement before commencing suit under Title VII and the EPA.

On May 30, 2017, Defendant Midwest Machining, Inc. filed a renewed motion for summary judgment. And on August 3, 2017, the court granted it. The court held that genuine disputes of material fact precluded summary judgment on the issue of whether Plaintiff "knowingly" and "voluntarily" executed the severance agreement. Indeed, the court found that on the morning Plaintiff signed the agreement, "she was 'blindsided' by an unexpected meeting" to terminate her employment; "she felt 'bullied,' did not feel free to leave the room, and did not feel like she could ask any questions." (R. 33, Second S. J. Order, PageID # 232.) Further, Philip Allor had "insisted [Plaintiff] sign the agreement and forcefully said if she wanted any money after her abrupt termination, she would need to sign the agreement; she had no time to consider whether to sign the release, and certainly no time to consult with a lawyer." (*Id.*) The court added that Plaintiff "received a small sum of money to extinguish any claims if she truly suffered unlawful discrimination" and found that "she did not understand the broad scope of the agreement." (*Id.*) Based on these facts, the district court

concluded that a jury could find that Plaintiff did not enter into the agreement knowingly and voluntarily.

Nonetheless, the district court granted summary judgment for Midwest based on "the common-law doctrines of release and tender back." (*Id.* at PageID # 229.) The court held that, even if a severance agreement is voidable on grounds of duress or involuntariness, a plaintiff will still ratify the contract unless she "return[s] the consideration" as a precondition to filing suit, (*id.* at PageID # 233), and Plaintiff "did not 'tender back' [the consideration] prior to filing suit." (*Id.* at PageID # 232.) The court did not mention that Plaintiff had offered to tender back the money shortly after filing suit. The court declined to exercise supplement jurisdiction over her state law claims.

Plaintiff subsequently filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

We review a district court's grant of summary judgment de novo. *Maben v. Thelen*, 887 F.3d 252, 263 (6th Cir. 2018). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of showing that no genuine issues of material fact exist. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The moving party must

demonstrate the "basis for its motion, and identify[] those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323 (internal citations and quotation marks omitted). The nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (internal citations and quotation marks omitted). The reviewing court must then determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52. A court should view the facts and draw all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

II. Analysis

A. The common law tender-back doctrine does not apply to claims brought under Title VII or the Equal Pay Act.

"Federal law controls the validity of a release of a federal cause of action." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1481 (6th Cir. 1989); *accord Gascho v. Scheurer Hosp.*, 400 F. App'x 978, 981 (6th Cir. 2010). And when evaluating a plaintiff's challenge to the validity of a release, courts must "remain[] alert to ensure that employers do not defeat the policies of . . . Title VII by taking advantage of their superior

bargaining position or by overreaching." *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995).

The district court dismissed Plaintiff's Title VII and EPA claims on the ground that she did not "tender back" the $4,000 she received under the severance agreement prior to filing her lawsuit. The court held that, under the tender-back doctrine, "even if a party signs a release under duress, she must 'as a condition precedent to suit, . . . return the consideration in exchange for a release.'" (R. 33, Second S. J. Order, PageID # 233 (quoting *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 436 (1998) (Thomas, J., dissenting).))

This "tender-back doctrine" is rooted in "general principles of state contract jurisprudence." *Oubre*, 522 U.S. at 425. The doctrine provides that "contracts tainted by mistake, duress, or even fraud are voidable at the option of the innocent party," but "before the innocent party can elect avoidance, she must first tender back any benefits received under the contract." *Id.* (citations omitted). "If she fails to do so within a reasonable time after learning of her rights . . . she ratifies the contract and so makes it binding." *Id.* (citations omitted). At the heart of this appeal is whether the tender-back doctrine applies to claims brought under Title VII and the EPA, a question of first impression in this Circuit. We now hold that a plaintiff is not required to tender back consideration received under a severance agreement before bringing claims for violations of Title VII or the EPA.

In a number of unpublished opinions, we have discussed the application of the tender-back doctrine to other federal statutes. For instance, in *Samms v. Quanex Corp.*, 99 F.3d 1139 (6th Cir. 1996) (unpublished table decision), this Court endorsed the tender-back doctrine in the context of a claim brought under the Employee Retirement Income Security Act ("ERISA"), where the plaintiff had not tendered back money received in exchange for signing a release before filing suit. We recognized, however, that "[t]here are times when, as a matter of public policy, courts have refused to apply the tender back doctrine." *Id.* at *3. Then, in *Bittinger v. Tecumseh Prods. Co.,* the Eastern District of Michigan held that tender back was a "prerequisite to plaintiff's maintenance of a claim challenging the validity of a release in a non-ADEA context." 83 F. Supp. 2d 851, 871 (E.D. Mich. 1998). We adopted that opinion without commentary. *Bittinger v. Tecumseh Prods. Co.*, 201 F.3d 440 (6th Cir. 1999) (unpublished table decision). Next, in *Halvorson v. Boy Scouts of Am.*, 215 F.3d 1326 (6th Cir. 2000) (unpublished table decision), this Court affirmed the granting of summary judgment for the defendant on the grounds that the plaintiff released the defendant from claims brought under the ADA, the FMLA, and ERISA, and subsequently ratified that release by retaining the severance money. The Court did not explicitly address the tender-back rule.

The only published decision from this Court identified by the parties that discusses the tender-back doctrine in the context of a release of federal claims is

Raczak v. Ameritech Corp., 103 F.3d 1257 (6th Cir. 1997). In *Raczak,* Judge Jones rendered the opinion of the Court on the tender-back issue, writing that he "[did] not believe Plaintiffs are required to tender back the consideration they received as a precondition to bringing suit against the Defendants under the Age Discrimination in Employment Act." *Id.* at 1268–69. Judge Jones reasoned as follows:

> [T]o require Plaintiffs to tender back benefits would be inequitable. A tender-back requirement would deter meritorious ADEA filings. Potential Plaintiffs would be faced with the Hobsonian choice of releasing their claims and receiving payments immediately or filing an age discrimination claim that would likely take years to resolve. It is doubtful that few claimants would choose the latter. If Plaintiffs had already received release consideration they would have to recover any amounts spent before they could bring a claim. This would bar Plaintiffs from litigating their age discrimination claims in court. Rather than a bar to suit, a release should be considered as a factor that would reduce the judgment amount received by a plaintiff upon bringing suit.

Id. In reaching this conclusion, Judge Jones relied on the Supreme Court's decision in *Hogue v. Southern R.R. Co.*, 390 U.S. 516 (1968).

In *Hogue*, the Supreme Court held that a plaintiff was not required to tender back payments received prior to bringing suit under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* The district

court in the instant case distinguished *Hogue* as relying on a provision in the FELA that "seemingly supplanted common law." (R. 33, Second S. J. Order, PageID # 235.) That provision states that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void[.]" 45 U.S.C. § 55. But the Court in *Hogue* explicitly disclaimed reliance on this provision. *See* 390 U.S. at 518 ("There is no occasion to decide whether the release here involved violated [42 U.S.C. § 55]."). Instead, the Court held that it was "sufficient for the purposes of [its] decision to note that a rule which required a refund as a prerequisite to institution of suit would be 'wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers.'" *Id.* (quoting *Dice v. Akron, C. & Y.R. Co.*, 342 U.S. 359, 362 (1952)). Defendant distinguishes *Hogue* on the grounds that "[t]he Supreme Court could easily have relied on Section [55] of the FELA." (Brief for Appellee at 16.) Significantly, however, it did not.

In *Raczak*, Judge Jones held that "*Hogue* may be extended logically to ADEA claims" as "[b]oth statutes are designed to make employees whole again from injuries received, whether physical or emotional, during the course of employment." *Id.* at 1270. Notably, he too did not rely on any particular provision of the ADEA in reaching his conclusion.

Just one year later, the Supreme Court would bear out Judge Jones' reasoning in *Raczak,* marking the second time that the Supreme Court has disavowed the tender-back rule in the context of remedial employment statutes. In *Oubre*, the plaintiff signed a release as part of a termination agreement from her position with Entergy that purported to discharge Entergy from any claims arising from her employment. 522 U.S. at 422. Oubre later brought an age discrimination claim under the ADEA, and Entergy asserted that the claim was barred by the release. The release, however, did not comply with a provision in the ADEA (created by the Old Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f)(1)) that prescribes standards that must be followed for a release of claims to be valid. Entergy admitted the release was defective, but argued that the doctrines of tender-back and ratification still barred Oubre's suit. The Court disagreed, holding that because the agreement did not conform to the OWBPA, which "sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law," the employer had no defense based on the plaintiff's failure to tender back the severance money, "notwithstanding how general contract principles would apply to non-ADEA claims." *Id.* at 427.

Although this conclusion was specific to the OWBPA and the ADEA, it offers some guidance for other cases involving federal remedial statutes. First, the Court rejected the employer's claim that the general rule in contract law is that a plaintiff must tender back benefits received under a contract before bringing

suit. *Id.* at 426. The Court highlighted cases to the contrary and noted that in equity "a person suing to rescind a contract, as a rule, is not required to restore the consideration at the very outset of the litigation." *Id.* (internal citations omitted). Further, the Court explained that applying the tender-back doctrine to ADEA lawsuits "would frustrate the statute's practical operation. . . ." *Id.* at 427. Justice Kennedy, writing for the Court, explained as follows:

> 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.

Id.

Evidently, the Supreme Court was motivated in part by the remedial goals of the statute. And as *Amicus*, Equal Employment Opportunity Commission, points out, "[t]he same policy concerns apply with equal if not greater force here. If the district court's decision is affirmed, employers within this Circuit will have every incentive to pressure employees into executing waivers under duress, or even engage in deceptive practices to induce them to do so, knowing that it will be difficult for those employees, especially lower-paid ones, to tender back the consideration and rescind the agreement." (Brief for Amicus Curiae at 12.)

Courts have applied *Oubre* and *Hogue* to bar tender prerequisites in lawsuits involving other federal statutes. *See Botefur v. City of Eagle Point*, 7 F.3d 152, 156 (9th Cir. 1993) (recognizing that "the rule announced in *Hogue*, that tender back is not required for suit under the FELA, is generalizable to suits under other federal compensatory statutes" and finding no tender back requirement for § 1983 plaintiff); *Smith v. Pinell*, 597 F.2d 994, 996 (5th Cir. 1979) (same for Jones Act plaintiff). In *Long v. Sears Roebuck & Co.*, which was a pre-*Oubre* decision, the Third Circuit considered tender back and ratification in the context of the ADEA. 105 F.3d 1529 (3d Cir. 1997). Although part of the court's discussion was based on the OWBPA, the court also addressed more general issues and looked to *Hogue* for guidance, concluding that "courts have regularly applied the analysis in *Hogue* to reject tender requirements in lawsuits brought under a variety of federal remedial statutes." *Id.* at 1541.

The Third Circuit explained that the ADEA was clearly a "federal remedial statute," and, because the purpose of the ADEA was to provide redress for discrimination, the court held that the tender-back rule should be rejected in suits under the ADEA, just as it was for suits under the Federal Employers Liability Act. The court explained that "[t]he mandate of *Hogue* is that tender back requirements imposed in connection with the release of federal rights be evaluated in light of the general policy of the statute in question." *Id.* at 1541 n.22. Further, the court identified the

challenge involved in calculating the proper amount for tender back:

> A tender requirement in such cases would . . . create a conundrum as to how much [consideration] should be tendered to restore the pre-release status quo. There is no available method of forcing the parties to agree on what an appropriate amount would be, since typically the employer does not specify how much of the consideration paid to the employee is for the retirement and how much is for the release.

Id. at 1543–44 (quoting *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359, 1368 (C.D. Ill. 1991)) (alteration in *Long*). The court reasoned that this confusion as to the amount of consideration to be returned would require "an employee to return a sum that typically incorporates consideration for multiple factors not challenged in an age case: waivers for other violation of law or contract, rolled-in vacation and sick time, and a public relations benefit to the employer that itself may deter other litigation." *Id.* at 1544. Thus, the court determined that it would best serve the purposes of the ADEA to reject the tender requirement in such cases.

Later, the Third Circuit cited *Oubre* to reaffirm the approach it took in *Long* and extended *Hogue* to claims brought under ERISA. *See Jakimas v. Hoffmann-La Roche, Inc.*, 485 F.3d 770 (3d Cir. 2007). The court explained that "ERISA, like the ADEA and the FELA, is a 'federal remedial statute.' It was 'designed to promote the interests of employees and their beneficiaries

in employee benefit plans.'" *Id.* at 784 (quoting *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 520 (3d Cir. 1997)). Further, "[t]he same deterrence concerns exist in this context as well. A plaintiff should not be deterred from bringing a meritorious claim." *Id.* "Additionally, as the Court explained in *Oubre* the application of the doctrine of ratification to ERISA claims may frustrate the practical operation of the protections ERISA affords. It is likely that many employees discharged in violation of § 510 may have spent the moneys they received as severance pay. Employers could risk noncompliance with the requirement that a release must be made knowingly and voluntarily and simply rely on ratification." *Id.*

Returning to the instant case, the reasoning in *Hogue* and *Oubre* is clearly relevant to claims brought under Title VII and the EPA. The Supreme Court has recognized that the ADEA (the statute at issue in *Oubre*) and Title VII "share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)). The Court explained as follows:

> Congress designed the remedial measures in these statutes to serve as a "spur or catalyst" to cause employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417-418 (1975)

> (internal quotation marks and citation omitted); see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). Deterrence is one object of these statutes. Compensation for injuries caused by the prohibited discrimination is another. *Albemarle Paper Co. v. Moody*, *supra*, at 418, 95 S.Ct. at 2372; *Franks v. Bowman Transp. Co.*, *supra*, at 763-64. The ADEA, in keeping with these purposes, contains a vital element found in both Title VII and the Fair Labor Standards Act: It grants an injured employee a right of action to obtain the authorized relief. 29 U.S.C. § 626(c). The private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) ("[T]he private litigant [in Title VII] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices"); see also *Teamsters v. United States*, 431 U.S. 324, 364, 97 S.Ct. 1843, 1869, 52 L.Ed.2d 396 (1977).

Id. Similarly, the Supreme Court has explained that "[t]he Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve." *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974).

Like the ADEA, Congress designed Title VII so that the enforcement of its substantive measures against employers would be effected, at least in substantial part, through private individuals asserting a

claim. "In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). And the Court recognized that imposing a tender-back rule in the ADEA context would undermine this feature of the statute insofar as "[i]n many instances a discharged employee likely will have spent the moneys received and will lack the means to tender their return," thereby tempting employers to "risk noncompliance . . . knowing it will be difficult to repay the moneys and relying on ratification." *Oubre*, 522 U.S. at 427. The same could be said in the Title VII and EPA contexts, which confront the same economic realities; indeed, employees discharged following instances of sex discrimination (and especially those fired because they are pregnant) are just as likely to need their severance funds for living expenses as are employees discharged following any other form of discrimination.

Only the Eighth Circuit has a published, post-*Oubre* case that explicitly discusses the application of the tender-back rule to Title VII claims. *See Richardson v. Sugg*, 448 F.3d 1046, 1057 (8th Cir. 2006) (applying *Oubre*'s policy considerations to a prospective Title VII waiver and finding "that the doctrines of tender-back and ratification do not bar [Plaintiff's] suit."). As for district courts, some have followed *Hogue* and *Oubre* to find that the tender-back doctrine does not create a prerequisite to filing suits under Title VII. For

instance, a district court in New Mexico explicitly applied *Oubre* to a Title VII case, holding that:

> [a]n inflexible application of the tender back rule would, as a practical matter, prevent courts from determining the conditions under which a release has been obtained. Plaintiffs with meritorious suits effectively would be precluded from bringing their claims. As emphasized in *Hogue*, *supra,* this would be contrary to Congress' purposes in passing statutes such as the FELA, ADEA, or Title VII.

Rangel v. El Paso Nat. Gas Co., 996 F. Supp. 1093, 1097 (D.N.M. 1998) (collecting cases). Some district courts in our circuit, however, have instead chosen to extend our Court's decisions in *Bittinger* and *Samms* and have required tender back in Title VII cases. *See, e.g.*, *Larkins v. Reg'l Elite Airline Servs., LLC*, No. 1:12cv139, 2013 WL 1818528, at *6 (S.D. Ohio Apr. 29, 2013); *Williams v. Detroit Pub. Sch.*, No. 10-10856, 2011 WL 6945729, at *7 (E.D. Mich. Dec. 6, 2011).

Defendant relies on *Fleming v. United States Postal Serv. AMF O'Hare*, 27 F.3d 259 (7th Cir. 1994), a pre-*Oubre* case, which held that the plaintiff in a Title VII case had to tender back payments received under a severance agreement with the postal service before she could bring an employment suit. The court decided that, since Title VII does not statutorily regulate releases (unlike the FELA, the Jones Act, and the ADEA), ordinary contract rules of tender back and ratification apply. *See id.* at 262 ("This is a garden-variety

rescission case requiring tender back of consideration received."). In reaching this conclusion, the court relied on a "free-market" contract law analysis: "[A] premise of a free-market system is that both sides of the market, buyers as well as sellers, tend to gain from freedom of contract." *Id.* at 261. However, as the Eighth Circuit recognized, *Fleming* "was decided without the aid of *Oubre*'s policy underpinnings to the effect that releases of claims under remedial statutes like the ADEA and Title VII frustrate the purposes of those statutes." *Richardson*, 448 F.3d at 1057. Indeed, the language in *Oubre* and its emphasis on the economic realities of the recently-discharged cast serious doubt on the Seventh Circuit's approach. "Title VII was created precisely to combat a deficiency in the market, namely inappropriate discrimination, which had the effect of placing parties in unequal bargaining positions." *Rangel*, 996 F. Supp. at 1097. Thus, "[i]t would appear contrary to Congressional intent to apply a free market approach in interpreting a statute aimed at fighting the market deficiency of improper discrimination." *Id.* at 1098.

In sum, we conclude that the language and reasoning of *Oubre* and *Hogue* apply equally to claims brought under Title VII and the EPA. In *Oubre,* the Supreme Court was worried about "tempt[ing] employers to risk noncompliance . . . knowing it will be difficult to repay the moneys and rely[ ] on ratification." 522 U.S. at 427. Similarly, we worry that requiring recently-discharged employees to return their severance before they can bring claims under Title VII and the EPA would serve only to protect malfeasant employers at

the expense of employees' statutory protections at the very time that those employees are most economically vulnerable. We therefore hold that the tender-back doctrine does not apply to claims brought under Title VII and the EPA. Rather, as the Supreme Court said in *Hogue*, "it is more consistent with the objectives of the Act to hold . . . that . . . the sum paid shall be deducted from any award determined to be due to the injured employee." 390 U.S. at 518.[1]

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[1] The dissent ignores the peculiarities of Title VII and claims brought under other federal remedial statutes and would treat them no differently than any other claims. Indeed, the dissent cites to numerous state commercial cases to explain how the tender-back doctrine should apply to the instant case and even admonishes the majority that "there is no federal general common law." (internal quotation marks, alteration, and citation omitted). But of course, the dissent also acknowledges that "[b]oth the Supreme Court and the Sixth Circuit have broadly stated that federal law governs the validity of an agreement to release a federal cause of action." Contrary to the dissent, the issues presented by this case require us to look to federal law, not to state law.

The dissent's refusal to look away from state law helps explain the confusion in its preferred approach to the tender-back doctrine. After presenting a largely superfluous history lesson on the doctrine's application in courts of law and courts of equity, the dissent suggests that "[t]o decide which version of the rule to apply courts should consider the requested remedy." If the requested remedy is damages, then, the dissent argues, the rule should be strict and it should require the return of consideration before initiating suit; if, however, the remedy requested is an equitable one, then the rule should be more flexible, asking whether the plaintiff returned the consideration within a reasonable time. Thus, the dissent would remand this case to the district court to analyze the remedies Plaintiff seeks and determine which rule to apply. This approach does not make sense in the context of a claim brought under Title VII.

Remedies under Title VII are different than remedies for violations of state commercial law. As the Supreme Court has highlighted, the Congressional Record regarding Title VII makes clear that:

> [t]he [remedy provisions of Title VII] are intended to give the courts wide discretion exercising their equitable powers to fashion *the most complete relief possible.* In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

Albemarle Paper Co., 422 U.S. at 421 (emphasis added) (quoting 118 Cong. Rec. 7168 (1972)). Thus, Title VII remedies aim "to make the victims of unlawful discrimination whole by restoring them, so far as possible . . . to a position where they would have been were it not for the unlawful discrimination." *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 230 (1982) (internal quotation marks and alterations omitted) (quoting *Albemarle Paper Co.*, 422 U.S. at 421). And "[w]here a court finds that invidious discrimination has taken place in violation of Title VII, the district court has broad discretion to fashion remedies to make the victims whole[.]" *Oakley v. City of Memphis*, 566 F. App'x 425, 429 (6th Cir. 2014). Further, "[t]he [Title VII] scheme implicitly recognizes that there may be cases calling for one remedy but not another, and . . . these choices are, of course, left in the first instance to the district courts." *Albemarle Paper*, 422 U.S. at 415–16.

As this Court has explained, "Congress' purpose in vesting a variety of 'discretionary' powers in the courts was . . . to make possible the 'fashion(ing) (of) the most complete relief possible.' " *Isabel v. City of Memphis*, 404 F.3d 404, 414 (6th Cir. 2005) (quoting *Albemarle*, 421 U.S. at 425) (alteration in *Albemarle*). That a party requests a particular form of relief does not decide the

B. Plaintiff effectively tendered back the consideration prior to bringing suit.

Assuming *arguendo* that Plaintiff were required to tender back in order to file her claims under Title VII and the EPA, the district court still erred by granting summary judgment for Defendant. The record is undisputed that upon Plaintiff's counsel learning that the parties had entered into a severance agreement, Plaintiff sent a check to Defendant for the full amount she received. Instead of accepting the check, however, Defendant returned it a week later, baldly asserting that "[t]here is no legal basis for rescinding the severance agreement." (R. 17-2, Midwest Resp., PageID # 87.)

For the district court, the timing of the return attempt was the deciding factor. The court held that Plaintiff could not pursue her federal claims because she did not tender back the consideration "*prior to*

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appropriate relief in a Title VII case. *See Selgas v. American Airlines, Inc*., 104 F.3d 9, 13 n.2 (1st Cir. 1997) ("It is clear that in a Title VII case, it is the court which has discretion to fashion relief comprised of the equitable remedies it sees as appropriate, and not the parties which may determine which equitable remedies are available."). And it should be clear that the district court cannot predict what relief will be appropriate for a case before discovery has completed and before the type and scope of the injury have been established at trial. In short, the dissent's preferred approach—*i.e.,* to have the district court decide at the outset the appropriate form of relief and then use that to decide how to apply the tender-back rule—does not make sense in the context of a Title VII case: a district court simply will not know how or what relief to fashion at the outset of the case.

filing suit."[2] (R. 33, Second S. J. Order, PageID # 232.) But "[e]ven assuming that federal law requires that Plaintiff tender back the consideration that she received under the release, federal law does not require that the tender back be before, or contemporaneous with, the filing of the original complaint." *Gascho v. Scheurer Hosp.*, 589 F. Supp. 2d 884, 891 (E.D. Mich. 2008). In reaching the alternative conclusion, the district court erroneously relied on Michigan law and Justice Thomas' dissent in *Oubre,* where he wrote that a party seeking to void a release must "as a condition precedent to suit, . . . return the consideration received in exchange for a release." *Oubre*, 522 U.S. at 436 (Thomas, J., dissenting) (citing *Buffum v. Peter Barceloux Co.*, 289 U.S. 227, 234 (1933)). The *Oubre* majority, however, held that the party "elect[ing] avoidance" may tender back any benefits received under the severance agreement not only before filing suit, but at any point "*within a reasonable time after learning of her rights.*" 522 U.S. at 425 (emphasis added). This comports with the Restatement of Contracts, which provides that "[t]he power of a party to avoid a contract for . . . duress . . . is lost if, after the circumstances that made it voidable have ceased to exist, he does not *within a reasonable time* manifest to the other party

[2] It is worth noting that *Fleming* faulted the plaintiff's attorney for not asking the court of appeals to remand the case so that the plaintiff could offer to tender back the funds, 27 F.3d at 262—the clear implication being that, even under *Fleming*'s framework, Plaintiff would be allowed to proceed with her suit, given that she did offer to return the consideration.

his intention to avoid it." Restatement (Second) of Contracts § 381(1) (1981) (emphasis added).

Accordingly, even if Plaintiff were required to tender back the consideration, she was required to do so not before filing suit but within a "reasonable time" after she discovered that the severance agreement revoked her right to bring a discrimination claim. And given the district court's factual finding that Plaintiff "did not understand she had given up her right to sue for discrimination" until engaging counsel to represent her in this matter, (R. 33, Second S. J. Order, PageID # 231), and that her counsel drafted a complaint immediately after speaking with her, it stands to reason that Plaintiff's offer to tender back the consideration fell "within a reasonable time after learning of her rights," *Oubre*, 522 U.S. at 425.

In sum, even if we were to hold that plaintiffs are required to tender back consideration prior to bringing claims under Title VII and the EPA, the plaintiff in this case effectively did so.

CONCLUSION

For the reasons set forth above, we **REVERSE** the district court's decision and **REMAND** for further proceedings consistent with this opinion.

CONCURRING IN PART AND DISSENTING IN PART

THAPAR, Circuit Judge, concurring in part and dissenting in part.

Congress does not write statutes on a blank slate. Instead, it legislates against the backdrop of existing common law. So, when Congress wants to displace the existing common law, it must do so clearly. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* § 52 (2012). Because Congress did not clearly override the common law ratification and tender-back doctrines when it passed Title VII or the Equal Pay Act, I would apply both rules in McClellan's case and remand for further fact-finding.

I.

Jena McClellan claims that she entered into a release agreement with her employer while under economic duress. She now seeks to rescind that agreement so she can sue her employer for discrimination. In a typical case, two common law doctrines would pose an obstacle to her suit. First, she would have to prove that she did not ratify the agreement with her employer. And second, she would have to tender back (i.e., return) the money she received in exchange for signing the agreement.

The majority, however, holds that neither doctrine applies in McClellan's case because she filed suit under Title VII and the Equal Pay Act. According to the majority, the ratification and tender-back doctrines are inconsistent with these remedial statutes' objectives and, as a result, we should set both rules aside for this category of plaintiffs. I respectfully disagree.

Statutes and the common law coexist in our legal system. So when Congress sets out to regulate a particular subject, chances are that some common law rules touching on that subject already exist. Courts are then left to decide how much of the common law, if any, Congress displaces when it passes new legislation. Fortunately, an age-old presumption guides us in this inquiry: Unless Congress *clearly and explicitly* states otherwise, courts should assume that Congress expected the existing common law to apply in conjunction with the statute. *See United States v. Texas*, 507 U.S. 529, 534 (1993) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles." (internal quotation marks omitted)); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812) ("The common law, therefore, ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.").

Congress did not clearly and explicitly displace the common law ratification or tender-back rule in either Title VII or the Equal Pay Act. The statutes' texts contain no such displacement. And we know Congress knows how to displace the common law. Indeed, in two

similar statutes, Congress specifically regulated releases. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998) (Older Workers Benefit Protection Act); *Hogue v. S. Ry. Co.*, 390 U.S. 516 (1968) (per curiam) (Federal Employers' Liability Act). By regulating releases, Congress "necessarily implie[d] a negative" and because Congress devised its own rules to govern release agreements, we could fairly infer that Congress did not want to retain the common law rules that would have otherwise applied. 1 William Blackstone, *Commentaries on the Laws of England* *89 (explaining that the common law only "gives place" when the "statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative"); *see also Oubre*, 522 U.S. at 424–25 (noting the Older Workers Benefit Protection Act "imposes specific requirements for releases"); *Hogue*, 390 U.S. at 516-17. In other words, Congress spoke directly to the question addressed by the common law. *Texas*, 507 U.S. at 534.

Tellingly, Congress *did not* include a similar release-agreement provision in Title VII or the Equal Pay Act. *See Fleming v. U.S. Postal Serv. AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994) (stating the "common law rule requiring tender as a prerequisite to rescission may have to give way" only in cases where federal law "regulates releases"). And McClellan has not pointed to any other statutory provision that might negate the ratification and tender-back rules. Accordingly, I see no reason to conclude that Title VII or the

Equal Pay Act displaced these doctrines and would apply them in McClellan's case.

II.

Since Title VII and the Equal Pay Act do not abrogate the ratification and tender-back doctrines, several difficult questions emerge about how to apply them in McClellan's case.

Federal or state law. Should courts apply state federal or state common law to determine whether McClellan has ratified the release agreement or tendered back? At first blush, the answer appears to be federal law. Both the Supreme Court and the Sixth Circuit have broadly stated that federal law governs the validity of an agreement to release a federal cause of action. *Dice v. Akron, Canton, & Youngstown R.R.*, 342 U.S. 359, 361 (1952) ("[The] validity of releases under [FELA] raises a federal question to be determined by federal rather than state law."); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243–45 (1942) (holding releases under the Jones Act to be governed exclusively by federal law); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1481 (6th Cir. 1989) (applying the "federal common law of release" to determine whether a release "obtained by a fiduciary from a beneficiary" was valid).

But in recent years, the Supreme Court has reminded courts and litigants that "[t]here is no federal general common law" and refused to apply it in contexts similar to this one. *O'Melveny & Myers v. FDIC*,

512 U.S. 79, 83 (1994) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)) (characterizing litigant's argument that federal common law should apply as "so plainly wrong"). And consistent with *Erie*'s longstanding principle, a handful of circuits have held that state, not federal, common law applies when determining whether a plaintiff has validly released or settled federal claims. *Makins v. District of Columbia*, 277 F.3d 544, 547–48 (D.C. Cir. 2002) (joining "[t]he Seventh, Eighth, Tenth, and Eleventh Circuits, and perhaps the Third, Fourth, and Ninth," in "look[ing] to state law [to] determin[e] if" a party validly settled federal claims); *Morgan v. S. Bend Cmty. Sch. Corp.*, 797 F.2d 471, 476 (7th Cir. 1986) (doubting "the authority for and scope of any general rule that federal law governs all aspects of the settlements in Title VII litigation").

Despite this tension in the case law, neither party has asked us to reconsider whether federal common law should apply. Instead, each asks us to evaluate the doctrines under federal common law. But even applying federal common law, questions remain.

Ratification. A party can ratify a contract in many ways, including (1) asserting a willingness to go along with the bargain, or (2) delaying filing suit while using the money received under the deal. *See* Restatement (Second) of Contracts § 380 cmts. a–b (Am. Law Inst. 1981). Initially, it appears that McClellan ratified the agreement through option two: she collected all of the money from her employer and may have spent it before filing suit. But the story is more complicated. McClellan claims that she signed the release agreement

under economic duress. And a party who enters an agreement under economic duress cannot subsequently ratify that agreement until the duress has ended. *See Oubre,* 522 U.S. at 434 (Scalia, J., dissenting) ("[A] party who has contracted under duress cannot ratify until the duress is removed."); 28 *Williston on Contracts* § 71:9 (4th ed.) ("No acts can constitute a ratification, however, that are or were done although the fear or influence that operated to induce the original transaction is still effective."). So to determine whether McClellan ratified, we must know whether she was still under the alleged economic duress when she cashed the checks. Since the record remains unclear on that point, I would remand for further fact-finding before deciding whether the ratification doctrine bars McClellan's suit.

Tender-Back. Under the tender-back doctrine, a plaintiff cannot file a lawsuit and keep the money she received in exchange for her promise *not to sue. See Oubre,* 522 U.S. at 440 (Thomas, J., dissenting) (one cannot "simultaneously retain[] the benefits of the release and su[e] to vindicate released claims"). Here, McClellan offered to give the money back to her employer three weeks after filing her lawsuit. But the employer argues that by waiting three weeks, McClellan missed her window for effectively tendering back.

The tender-back rule is a centuries-old doctrine that emerged in an era when we still had courts at law

and courts in equity.[1] *See Badger v. Phinney*, 15 Mass. 359, 363–64 (1819) (requiring the avoiding party to restore money before suing to recover goods from a general store); *see also Stewart v. Dougherty*, 33 Ky. (3 Dana) 479, 481 (1835) (stating "a party wish[ing] to rescind the contract . . . must tender back the horse he got"); *Bristol v. Braidwood*, 28 Mich. 191, 195 (1873) (discussing that the plaintiff's right to rescind accrued after "tendering back the mortgage"); *Miller v. Bieghler*, 174 N.E. 774, 776 (Ohio 1931) (stating tender back is a general rule of contract); *see also* 2 James Kent, *Commentaries on American Law* 194, 197 (1st ed. 1827) (discussing void-ability on account of infancy and ratification); 1 Joseph Story, *Commentaries on Equity Jurisprudence* §§ 307, 346 (1st ed. 1836). Because courts at law and courts in equity performed different functions, they applied the rule differently. Generally, courts at law required plaintiffs to return the money *before* initiating lawsuits. *See* Restatement (Second) of Contracts § 384 cmt. b. And courts in equity applied a

[1] The majority opinion calls my consideration of history "superfluous." But one must look at past common-law cases to understand the development of the *common law*. *See, e.g.*, *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 525–29 (2009) (discussing history of common law visitation powers while interpreting National Bank Act); *id* at 540–46 (Thomas, J., concurring in part and dissenting in part) (writing for the other four Justices with a different interpretation of the common law history); *see also Kirtsaeng v. John Wiley & Sons, Inc*, 568 U.S. 519, 537–539 (2013) (common law history of the first sale doctrine); *Samantar v. Yousuf*, 560 U.S. 305, 311-13 (2010) (common law history of sovereign immunity). No more so is this true than when trying to understand why two distinct tender-back rules developed in the common law and how they may respectively apply today.

more flexible approach, asking only whether the plaintiff tendered back within a *reasonable time. Id.*

The formal law-equity divide no longer endures. Yet both versions of the rule continue to exist today. *Compare Talmer Bank & Trust v. Malek*, 651 F. App'x 438, 444 (6th Cir. 2016) (Ohio common law), *with Atwell v. Tenn. State Emps. Ass'n*, No. 3:14-cv-1808, 2015 WL 5697311, at *4 (M.D. Tenn. Sept. 28, 2015) (Tennessee common law). And modern courts struggle to determine which version of the rule applies in each case. *Fleming*, 27 F.3d at 261. Nevertheless, federal courts have applied *some version* of the rule to agreements releasing an individual's rights under contemporary federal statutes. *See Samms v. Quanex Corp.*, 99 F.3d 1139, *3 (6th Cir. 1996) (unpublished table decision) (ERISA); *see also Hampton v. Ford Motor Co.,* 561 F.3d 709, 717 (7th Cir. 2009) (citing *Fleming*, 27 F.3d at 260–61) (Title VII); *Brown v. City of S. Burlington*, 393 F.3d 337, 346 (2d Cir. 2004) (False Claims Act).

To decide which version of the rule to apply, courts should consider the requested remedy. If a plaintiff asks for an equitable remedy, the equitable version of the rule should generally apply. And if a plaintiff asks for damages, the legal version should typically apply. In some cases, that inquiry will be easy. But the question is harder in release cases like McClellan's. When a plaintiff asks a court to rescind a release agreement so that she can sue under a federal statute, the plaintiff asks for *two* remedies: first, rescission, and second, whatever remedies she ultimately seeks under the statute. What remedy is the proper touchstone for the

tender-back rule? Here, McClellan seeks equitable remedies: rescission *and* reinstatement. *See* 2 Joseph Story, *Commentaries on Equity Jurisprudence* §§ 688–95 (listing rescission as an equitable remedy); *see also Fleming*, 27 F.3d at 261 (listing reinstatement as an equitable remedy). She also seeks damages, historically a legal remedy. *But see Chauffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 571 (1990) (stating a monetary award may be equitable if "incidental to or intertwined with injunctive relief"). On the one hand, the fact she seeks an equitable remedy—reinstatement—could be sufficient grounds to apply the equitable rule. Or it might be more appropriate to apply a remedy-by-remedy analysis, such that any legal remedies she seeks are subject to the legal version of the rule, while her equitable remedies require only reasonable timing. Or there is a third possibility. Since tender-back relates to rescission of McClellan's release itself, perhaps the equitable nature of rescission should require courts to always apply the equitable version of the rule. I would remand to the district court to analyze the remedies McClellan seeks and determine the applicable rule in the first instance.[2]

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[2] The majority opinion posits that the common law approach of asking district courts to do what they do everyday—analyze complaints—is unworkable. This unworkability evidently follows from the majority opinion's belief that Title VII allows judges to provide remedies that the parties themselves do not seek. The opinion's only citation for that wide-reaching proposition is part of a footnote in an out-of-circuit case. *Selgas v. Am. Airlines, Inc.*, 104 F.3d 9, 13 n.2 (1st Cir. 1997). But if one reads the *entire* footnote, it becomes clear that the *Selgas* court did not do what the majority opinion says. Instead, the court applied a remedy that

Timing of reasonableness. Assuming the equitable rule applies (at least in part), the district court should consider whether the timing of McClellan's tender back was reasonable. *See* 2 James Kent, *Commentaries on American Law* 194 ("In the case of voidable contracts [by infants], it will depend upon [the] circumstances . . . whether any overt act of assent or dissent on his part be requisite to determine the fact of his future responsibility."); *see also Oubre*, 522 U.S. at 440–41 (Thomas, J., dissenting) (stating "immediate tender is not always required"); *Stewart*, 33 Ky. at 481 (requiring tender back of a horse "in a reasonable time"); *Bieghler*, 174 N.E. at 776 (suggesting that it is sufficient in "nearly all jurisdictions" for a party to "sufficiently excuse himself" of the duty to tender back). In making that determination, the district court on remand might consider pleading rules as a reference. *See* Fed. R. Civ. P. 15(a)–(b); *see, e.g.*, *Girard v. St. Louis Car Wheel Co.*, 27 S.W. 648, 650–52 (Mo. 1894) (analyzing if and when tender back needed to occur when it was raised as an affirmative defense in the pleadings); *see also Talmer*, 651 F. App'x at 443–44 (discussing the interplay between Ohio's strict tender-back rule and Federal Rule of Civil Procedure 15); *Romero v. Allstate Ins.*

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the plaintiff herself sought *in her complaint. Id.* ("Additionally, [the plaintiff's] repeated requests for reinstatement in her original complaint and in subsequent motions bely a claim that she elected one form of recovery over the other."). *Selgas* then cannot support the majority opinion's proposition that courts can simply free-wheel Title VII remedies. And, moreover, *Selgas* goes to show that Title VII does not displace the ordinary rules of pleading—the same rules that the common law approach to tender-back embraces.

Co., 170 F. Supp. 3d 779, 790 n.9 (E.D. Pa. 2016) (assessing tender back considering plaintiff's three amended complaints). The fact that McClellan tendered back before her employer's first responsive pleading would lend in favor of finding the timing of her tender reasonable. On the other hand, had she tendered back later, meanwhile subjecting the employer to expensive discovery, her timing might deserve greater scrutiny. *See McQuiddy v. Ware*, 87 U.S. 14, 19 (1873) ("[H]e who seeks equity must do equity.").

* * *

Accordingly, I agree with the majority that we should remand the case. But rather than moving forward with the merits of McClellan's Title VII and Equal Pay Act claims, I would instruct the district court to reconsider the ratification and tender-back doctrines consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-1992

JENA MCCLELLAN,

Plaintiff-Appellant,

v.

MIDWEST MACHINING, INC.,

Defendant-Appellee.

Before COLE, Chief Judge;
CLAY and THAPAR, Circuit Judges.

JUDGMENT

(Filed Aug. 16, 2018)

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is REVERSED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENA MCCLELLAN, Plaintiff, -v- MIDWEST MACHINING, INC., Defendant.	No. 1:16-cv-1308 HONORABLE PAUL L. MALONEY

OPINION AND ORDER

This matter is before the Court on Defendant Midwest Machining, Inc.'s motion for summary judgment. (ECF No. 26.)[1] Defendant has submitted a severance agreement, signed by Plaintiff Jena McClellan, that purports to "satisf[y] any and all past, current and future claims by either party except those arising from a violation of this agreement." (ECF No. 27-1 at PageID.131.) Thus, Defendant argues that Plaintiff's suit, which arises under Title VII and the Equal Pay Act, is barred by the common-law doctrines of release and tender back.

I.

"Federal law controls the validity of a release of a federal cause of action." *Street v. J.C. Bradford & Co.*,

[1] The Court denied in part Defendant's prior motion for summary judgment, allowing the parties to conduct discovery into whether Plaintiff's release was knowing and voluntary. (*See* ECF No. 19 at PageID.103.)

886 F.2d 1472, 1481 (6th Cir. 1989); *accord Gascho v. Scheurer Hosp.*, 400 F. App'x 978, 981 (6th Cir. 2010). When evaluating a plaintiff's challenge to the validity of the release, courts must "remain[] alert to ensure that employers do not defeat the policies of . . . Title VII by taking advantage of their superior bargaining position or by overreaching." *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995).

"[A]n effort to rescind a settlement agreement presents a question of fact for a jury." *Gascho*, 400 F. App'x at 871. Thus, summary judgment here is appropriate only if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see, e.g.*, *Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Put simply, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in h[er] favor." *Id*. (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

The Court concludes genuine disputes in material fact preclude summary judgment on the issue of whether Plaintiff "knowingly" and "voluntarily" executed the severance agreement under these circumstances.

The parties' respective depositions of the events surrounding the execution of the release cannot be reconciled. (*Compare* ECF No. 31-3 *with* ECF No. 31-4.) Since the Court cannot make "credibility determinations" at this stage, however, it must accept Plaintiff's account as true and draw all inferences in her favor. *See Anderson*, 477 U.S. at 255.

One day after returning to work and with no prior notice, Plaintiff Jena McClellan was called into a menacing meeting with Defendant's owner, Philip Allor. Despite McClellan's many years of service for the company in its inside sales department and no record of discipline in over six years, Allor brusquely told her: "Today is your last day." (ECF No. 31-4 at PageID.202.) This announcement "blindsided" McClellan and the timing was concerning, to say the least McClellan had recently announced her pregnancy at work, and her supervisor had made negative comments for weeks in response to the announcement, including "commenting sardonically and jealously about her perfect life," and reacting negatively to McClellan's absences for prenatal appointments. (ECF No. 1 at PageID.3.)

After calling McClellan into his office, Allor immediately presented the severance agreement and forcefully declared: "[w]e need to read through it together, and you can sign it, and we'll be on our way." (ECF No. 31-4 at PageID.202.) However, Allor did not ensure McClellan's understanding as they went along at a rapid pace. (*Id*. at PageID.202.) By way of example, when McClellan challenged a paragraph early on, and stated, "I still should have had one week [of vacation]

left," Allor forcefully replied, "[you] do not," and moved on. (*Id*.)

McClellan felt she could not ask any further questions—she was "bullied" throughout the meeting—and Allor's tone was "raised" during the entire conversation; further, Allor shut the door, and McClellan did not feel free to leave. (*Id*. at PageID.203-04.) Allor "insist[ed]," many times, that McClellan sign the agreement. And Allor gave McClellan no time to think—"[i]f you want[ ] a[ny] severance, then you need to sign it *now*." (*Id*. at PageID.205 (emphasis added).) McClellan, feeling no other option, signed the release; she did not understand she had given up her right to sue for discrimination—though the parties, through counsel, now agree the waiver clearly bars all claims. (*See* ECF No. 27-1 at PageID.131.)

To be sure, a jury could not conclude any one or two of the salient facts in isolation sufficed to invalidate the release. *See, e.g.*, *Sako v. Ohio Dep't of Admin. Servs.*, 278 F. App'x 514, 518 (6th Cir. 2008) (affirming a non-native English speaker with high-school education was nevertheless able to read and understand the release). And, admittedly, the release was clear—though McClellan understood "claims" in the scope of the release to merely mean unpaid wages and benefits. (*See* ECF No. 31-4 at PageID.205.) Nonetheless, when viewing the totality of the circumstances, the Court cannot say the evidence is "so one-sided that [Midwest] must prevail as a matter of law," *Anderson*, 477 U.S. at

251-52, on the issue of whether McClellan "knowingly" and "voluntarily" executed the severance agreement.[2]

McClellan has a high-school education; she was "blindsided" by an unexpected meeting; she felt "bullied," did not feel free to leave the room, and did not feel like she could ask any questions after her first attempt; Allor insisted she sign the agreement and forcefully said if she wanted any money after her abrupt termination, she would need to sign the agreement; she had no time to consider whether to sign the release, and certainly no time to consult with a lawyer; she received a small sum of money to extinguish any claims if she truly suffered unlawful discrimination; she did not understand the broad scope of the agreement.

Again, these factors do not necessarily reflect "the truth of the matter," *Anderson*, 477 U.S. at 249, 255; rather, they are distilled from McClellan's testimony because the Court must accept all of her testimony as true and draw all inferences in her favor. *See id*.

Nevertheless, the Court's determination that genuine disputes surrounding the validity of the severance agreement preclude summary judgment on that issue does not resolve the case. Curiously, McClellan accepted the severance payment of $4,000.00, but did

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[2] The Court expresses no opinion on this issue as it relates to Plaintiff's ELCRA claims. *Compare Adams*, 67 F.3d at 583 (applying a "totality of the circumstances" test) *with Denton v. Utley*, 86 N.W.2d 537, 541 (Mich. 1957) (applying a "fairness" and "knowledge" test); *see, e.g.*, *Soltis v. J.C. Penney Corp., Inc.*, 635 F. App'x 245, 248 (6th Cir. 2015) (analyzing a release separately under Michigan and federal law as appropriate).

not "tender back" that amount prior to filing suit. This brings us to the next issue.

II.

Even assuming Plaintiff did not enter into the settlement agreement knowingly and voluntarily, the deficit made the release merely voidable, not void. *Cf. Oubre v. Entergy Ops., Inc.*, 522 U.S. 422, 431-32 (1998) (Breyer, J., concurring) (citing *id*. at 846 n.1 (Thomas, J., dissenting)) ("My point is that the statute's provisions are consistent with viewing an invalid release as voidable, rather than void. Apparently, five or more Justices take this view of the matter."). If a "contract that the employer and worker tried to create [is] voidable, like a contract made with an infant, or a contract created through fraud, mistake, or duress, . . . the worker may elect to avoid or to ratify." *Id*. at 431.

In other words, even if a party signs a release under duress,[3] she can still ratify the contract after the duress dissipates. *See* 1 E. Farnsworth, Contracts § 4.4, p. 381, § 4.19, p. 443 (1990); *see also Oubre*, 522 U.S. at 430 (Breyer, J., concurring) ("As a conceptual matter, a 'tender back' requirement would imply that the worker

[3] Plaintiff's theory for why she did not sign the release knowingly and voluntarily sounds in the common-law contractual defense of duress. *Cf. Shaheen v. B.F. Goodrich Co.*, 873 F.2d 105, 107 (6th Cir. 1989) ("Properly executed waivers of possible employment-related discrimination claims knowingly and voluntarily made between an employee and his employer will be enforced absent the typical exceptions for fraud, duress, lack of consideration or mutual mistake.").

had ratified her promise by keeping her employer's payment. For that reason, it would bar suit, including suit by a worker (without other assets) who had already spent the money he received for the promise."). Thus, even if a party signs a release under duress, she must, "as a condition precedent to suit, . . . return the consideration in exchange for a release." *Oubre*, 522 U.S. at 436 (Thomas, J., dissenting) (citing *Buffum v. Peter Barceloux Co.*, 289 U.S. 227, 234 (1933)); *see, e.g.*, *Stefanac v. Cranbrook Educ. Cmty.*, 458 N.W.2d 56, 66 (Mich. 1990) ("We hold as a matter of law that a plaintiff must, in all cases where a legal claim is raised in contravention of an agreement, tender the consideration recited in the agreement prior to or simultaneously with the filing of suit."). McClellan did not return any consideration prior to filing this lawsuit.

The Court recognizes that a few courts have refused to apply the tender-back rule in the Title VII context, relying on one passage in *Oubre*, 522 U.S. at 427,[4] another passage in *Hogue v. Southern Ry. Co.*, 390 U.S. 516, 518 (1968),[5] and public-policy grounds. *See, e.g.*,

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[4] "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."

[5] "[A] rule which requires a refund as a prerequisite to institution of [an FELA] suit would be wholly incongruous with the general policy of the Act to give railroad employees a right to

Gascho v. Scheurer Hosp., 589 F. Supp. 2d 884 (E.D. Mich. 2008) (rejecting a strict application of the tender-back rule in the Title VII context); *Atwell v. Tenn. State Emps. Ass'n*, 2015 WL 5697311 (M.D. Tenn. Sep. 28, 2015) (same); *Rangel v. El Paso Natural Gas Co.*, 996 F. Supp. 1093 (D.N.M. 1998) (rejecting any application of the tender-back rule in the Title VII context); *see also Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1541 (3d Cir. 1997) ("[W]e note that courts have regularly applied the analysis in *Hogue* to reject tender requirements in lawsuits brought under a variety of federal remedial statutes."). Nonetheless, the Court does not find this authority persuasive.

"Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). Common-law doctrines "'ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redevelopment and Housing Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35-36 (1983) (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812)).

In *Oubre*, 522 U.S. at 427, the Supreme Court held the Older Workers Protection Act, which contains a unique waiver provision, *see* 29 U.S.C. § 626(f)(1), supplanted common law chiefly because Congress created

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recover just compensation for injuries negligently inflicted by their employers."

a waiver provision "separate and apart from contract law." Moreover, like the OWPA (and ADEA) analyzed in *Oubre*, the FELA analyzed in *Hogue* contained a waiver provision that seemingly supplanted common law. *See Hogue*, 390 U.S. at 517-18 (citing *Duncan v. Thompson*, 315 U.S. 1 (1942)) ("We have held that an express agreement of an injured employee who obtained funds from a carrier to help defray living expenses first to return the sum paid as a prerequisite to the filing and maintenance of an action under the FELA was void under [42 U.S.C. § 55]."). The same cannot be said for Title VII (and the Equal Pay Act), which contains no similar provision. *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) ("[P]resumably, an employee may waive his cause of action under Title VII as part of a voluntary settlement. . . .").

Therefore, this Court joins what appears to be the majority of federal courts, including at least one court of appeals, to apply the tender-back rule in the Title VII context. *See, e.g.*, *Bittinger v. Tecumseh Prods. Co.*, 83 F. Supp. 2d (E.D. Mich. 1998) ("[T]he Court believes that the tender of consideration is a prerequisite to plaintiff's maintenance of a claim challenging the validity of a release in a non-ADEA context."); *Fleming v. U.S. Postal Serv. AMF O'Hare*, 27 F.3d 259, 269-62 (7th Cir. 1994) (enforcing the tender-back requirement under Title VII); *accord Lawson v. J.C. Penney Corp. Inc.*, 580 F. App'x 492, 494 (7th Cir. 2014) ("[N]o statute abrogates the tender-back requirement for release of claims under Title VII and the Equal Pay Act."); *see also Wittorf v. Shell Oil Co.*, 37 F.3d 1151, 1154 (5th Cir.

1994) (applying the tender back rule to bar federal- and state-law claims).[6]

In sum, even assuming Plaintiff did not enter into her release knowingly and voluntarily, any accompanying deficit rendered the contract merely voidable; her decision to file a lawsuit prior to tendering back (or attempting to tender back) the consideration she received affirmed she ratified the release. Thus, this Court must dismiss her federal claims.

The Court hereby **GRANTS** Defendants' motion for summary judgment as to the Title VII and Equal Pay Act claims. (ECF No. 26.)

However, the Court declines to exercise jurisdiction over Plaintiff's ELCRA claims under state law. *See* 28 U.S.C. § 1367(c). Whether Plaintiff signed the release knowingly and voluntarily to the satisfaction of Michigan law, and whether she can still tender back the consideration she received prior to filing a new

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[6] The Sixth Circuit, in an unpublished case, indicated its willingness to agree in principle that "[t]he tender back of consideration received for signing a release is an absolute prerequisite to avoidance of the release under Michigan and federal law." *Samms v. Quanex Corp.*, 1996 WL 599821, at *3 (6th Cir. Oct. 17, 1996). Hopefully, the Sixth Circuit will resolve, in a published opinion, whether a strict application of the tender-back rule in the Title VII context is appropriate given the split among district courts in the circuit. *Compare, e.g.*, *Gascho*, 589 F. Supp. 2d at 891; *Atwell*, 2015 WL 5697311, at *4; *with Bittinger*, 83 F. Supp. 2d at 871. Plaintiffs should not face varying barriers based upon what district judge they draw.

lawsuit raising her ELCRA claims in Michigan, are matters best reserved for the state courts to decide.

Judgment will enter separately.

IT IS SO ORDERED.

Date: August 3, 2017 /s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENA MCCLELLAN, Plaintiff, -v- MIDWEST MACHINING, INC., Defendant.	No. 1:16-cv-1308 HONORABLE PAUL L. MALONEY

JUDGMENT

In accordance with the opinion and order entered on this date (ECF No. 33), and pursuant to Fed. R. Civ. P. 58, **JUDGMENT** hereby enters.

IT IS SO ORDERED.

Date: August 3, 2017

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENA MCCLELLAN, Plaintiff, -v- MIDWEST MACHINING, INC. AND SELF LUBE, INC., Defendant.	)))))))	No. 1:16-cv-1308 HONORABLE PAUL L. MALONEY

ORDER GRANTING IN PART AND DENYING WITHOUT PREJUDICE IN PART MOTION FOR SUMMARY JUDGMENT

The Court is not fully satisfied that this round of briefing resolves the entire case.

To begin, the Court must grant Defendants' motion for summary judgment in part insofar as Defendant "Self Lube, Inc." is not a proper party to this action.

As Defendant demonstrates, there is no such entity relevant to this case, and "SelfLube," the name listed on the severance agreement, is a valid "assumed name" for Midwest Machining, Inc. (ECF No. 18-1 at PageID.98.) The "assumed name," "SelfLube," was properly registered by certificate with the Michigan Department of Licensing and Regulatory Affairs. (*See id*.)

Accordingly, "Self Lube, Inc." is not a proper party to this action.

In addition, Plaintiff's argument that even if "SelfLube" was bound by a severance agreement, Midwest Machining, Inc., was not, must be rejected.

So long as a corporation properly registers an "assumed name" under Michigan law, it may "transact its business under [that] assumed name," even though that name is one "other than its corporate name." Mich. Comp. Laws § 450.1217. Obviously, the phrase "transact business" encompasses entering into a contract.

In *Penton Pub., Inc. v. Markey*, Plaintiff had sued Robert A. Markey personally for payments owed to it for sales made to "Markey & Associates." Defendant responded that he was not personally liable to because Plaintiff's sales actually had been to Markey & Associates, Inc., a Michigan corporation doing business as Markey & Associates. 538 N.W.2d 104. The Michigan Court of Appeals held that because Markey & Associates, Inc., had followed state law by registering an assumed name, Markey & Associates, the principal had been disclosed to the public, and thus Plaintiff was on fair notice that it should have sued Markey & Associates, Inc. rather than Robery A. Markey. *Id*. at 626–27.

In other words, so long as compliance is satisfied under § 450.1217, "[a] corporation . . . has notified the public constructively regarding its assumed name," and "parties contracting with agents of the corporation operating under the assumed name cannot claim that they were without notice regarding the existence or identity of the corporation." *Markey*, 538 N.W.2d at

626; *cf. Duray Dev., LLC v. Perrin*, 792 N.W.2d 749, 756 (Mich. Ct. App. 2010) ("Where a body assumes to be a corporation and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence."). "A person conducting a business under a name subject to certification pursuant to the assumed name statute may be sued in such name in an action arising out of the conduct of such business," Mich. Comp. Laws § 600.2051(1); however, ultimately, "an assumed name" itself is "not a legal entity," *Murray v. Viking Fin. Servs.*, 2001 WL 1456862, at *1 n.1 (Mich. Ct. App. Nov. 16, 2001), and a "[corporation] doing business under an assumed name has no juridical status aside from the [corporation]." *Trustees of B.A.C. Local 32 Ins. Fund v. Caloia*, 261 F. Supp. 2d 814, 818 (E.D. Mich. 2003).

Because "Self Lube, Inc." does not exist, at least not in the context of this case, and "SelfLube" does not have any status aside from Midwest Machining, Inc., "Self Lube, Inc." must be dismissed from this lawsuit.

Thus, one of Defendants' threshold arguments must be sustained. Insofar as the release is valid, the contract validly bound both Plaintiff and Defendant Midwest.

However, at this stage and on this factual record, the Court cannot conclude the release was valid under federal law.

Despite Defendants' contention,[1] Plaintiff appears to argue that the release was not knowingly and voluntarily executed. (*See* ECF No. 17 at PageID.73–74 (citing the federal standard for a knowing and voluntary waiver, and suggesting Plaintiff's education, lack of consultation with counsel, the clarity of the waiver, and duress were factors for this Court to consider); *see also* ECF No. 17-3 at PageID.89 (asserting McClellan's boss gave her the severance agreement at the time of termination, and "[f]eeling pressured, [she] signed it.").) The Court is essentially left with one affidavit to determine whether a genuine issue of material fact exists as to whether the release was knowingly and voluntarily executed. (And it must make that determination viewing the facts in the light most favorable to the non-moving party.) Since the release appears to be in dispute on these grounds, the Court will decline to rule on the merits of this motion at this time to allow for additional discovery or clarification. *See* Fed. R. Civ. P. 56(e). The motion, of course, is denied in this part without prejudice.

Moreover, and in the same vein, Defendants cite a host of cases under Michigan law for the proposition

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[1] The Court recognizes that it appears Plaintiff did not inform Defendants that she intended to argue against the validity of the waiver. (ECF No. 16 at PageID.54.) However, the Court is not comfortable that apparent omission suffices to constitute waiver in the true legal sense. If the Court dismissed this action and Plaintiff then argued on appeal that she did not voluntarily and knowingly enter into the release, as she appears to have done here, this action would surely be remanded for further development of the factual record.

that McClellan's subjective interpretation of the Severance Agreement is irrelevant. That is true to an extent under Michigan law if contract terms contain no ambiguity. But *federal case law* governs whether a release has been *knowingly and voluntarily executed* as to *federal claims*. *See Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995) (Courts must "remain[] alert to ensure that employers do not defeat the policies of the ADEA and Title VII by taking advantage of their superior bargaining position or by overreaching.").[2] Indeed, the five relevant factors in the Sixth Circuit are more searching than the factors under Michigan law. *Compare id.* (applying a robust "totality of the circumstances" test) *with Denton v. Utley*, 86 N.W.2d 537, 541 (Mich. 1957) (applying a straightforward "fairness" and "knowledge" test); *see, e.g.*, *Soltis v. J.C. Penney Corp., Inc.*, 635 F. App'x 245, 248 (6th Cir. 2015) (analyzing a release separately under Michigan and federal law as appropriate).

In light of Plaintiff's affidavit, it appears the issue of whether she knowingly and voluntarily executed the agreement warrants discovery. The scant facts available to the Court at this time analyzed within the five relevant factors suggest[3] an easy answer may prove elusive: "(1) Plaintiff's experience, background, and

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[2] The Court recognizes that Plaintiff also alleged a corresponding claim under the ELCRA, but in the interest of judicial economy, the Court declines to rule on the ELCRA claim at this time.

[3] However, the Court must also consider whether the bare affidavit is self-serving and may omit relevant facts.

education" – McClellan has a high-school education level; "(2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer" – McClellan was presented the waiver at the moment of termination and was told she needed to sign "then" if she "wanted any severance," and she was "feeling pressured" and did not have the opportunity to consult with a lawyer; "(3) the clarity of the waiver" – the waiver appears clear; "(4) consideration for the waiver" – a fairly small, though not insignificant, sum of money was given to extinguish any claims if the plaintiff suffered unlawful employment discrimination; "(5) the totality of the circumstances" – the totality of the circumstances remains unclear. *Adams*, 67 F.3d at 583.

Finally, the Court is not satisfied with the parties' briefing with respect to the tender-back rule.[4]

"Federal law controls the validity of a release of a federal cause of action." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1481 (6th Cir. 1989); *accord. Gascho v. Scheurer Hosp.*, 589 F. Supp. 2d 884, 891 (E.D. Mich. 2008). Defendants' reliance on Michigan law is misplaced – and the question under federal law presents a closer call.[5] *See, e.g.*, *Gascho*, 589 F. Supp. 2d at 891 (rejecting a strict application of the tender-back rule in

[4] It appears that even if the agreement was made under duress, the tender back rule *may* still come into play as a possible bar because the contract would have merely been voidable as opposed to void. *See Oubre v. Entergy Ops., Inc.*, 522 U.S. 422, 431–32 (1998) (Breyer, J., concurring).

[5] *See supra* note 2.

the Title VII context), *Rangel v. El Paso Natural Gas Co.*, 996 F. Supp. 1093, 1096 (D.N.M. 1998) (rejecting any application of the tender-back rule in the Title VII context); *see also Hogue v. Southern Ry. Co.*, 390 U.S. 516, 518 (1968) ("[A] rule which requires a refund as a prerequisite to institution of [an FELA] suit would be wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers."); *cf. Oubre*, 522 U.S. at 427 (concluding that "[w]e ought not to open the door to an evasion of the [ADEA and OWBPA] statute[s] by this [tender-back] device"). *But see, e.g.*, *Fleming v. U.S. Postal Serv. AMF O'Hare*, 27 F.3d 259, 269–62 (7th Cir. 1994) (applying a "free-market" contract law analysis to enforce the tender-back requirement under Title VII).

Thus, the parties may once again brief this issue after a period of discovery on the issue of whether Plaintiff knowingly and voluntarily entered into the severance agreement or clarification that discovery is not needed.

If the Court misread Plaintiff's brief—and Plaintiff is not contesting a voluntary and knowing release—Plaintiff should promptly file a notice with the Court within seven days. If the notice is filed, Defendant Midwest may promptly move again for summary judgment on the remaining issues and include the relevant briefing the Court needs. If the notice is not filed, the parties will conduct discovery for a period of 28 days on the issue of whether the release was executed knowingly and voluntarily.

Accordingly, Defendants' motion for summary judgment is granted in part and denied without prejudice in part. Defendant "Self Lube, Inc." is terminated from this case. Plaintiff's claims survive for now, pending either discovery or clarification.

IT IS SO ORDERED.

Date: April 18, 2017

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

No. 17-1992

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JENA MCCLELLAN, Plaintiff-Appellant, v. MIDWEST MACHINING, INC., Defendant-Appellee.	ORDER (Filed Oct. 12, 2018)

BEFORE: COLE, Chief Judge; CLAY and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition then was circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk