SUPREME COURT OF THE UNITED STATES

No. 96–1291

DOLORES M. OUBRE, PETITIONER *v.*
ENTERGY OPERATIONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January 26, 1998]

JUSTICE THOMAS, with whom CHIEF JUSTICE REHNQUIST joins, dissenting.

The Older Workers Benefit Protection Act (OWBPA), 29 U. S. C. §626(f), imposes certain minimum requirements that waivers of claims under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq.*, must meet in order to be considered "knowing and voluntary." The Court of Appeals held that petitioner had ratified a release of ADEA claims that did not comply with the OWBPA by retaining the benefits she had received in exchange for the release, even after she had become aware of the defect and had decided to sue respondent. The majority does not suggest that the Court of Appeals was incorrect in concluding that petitioner's conduct was sufficient to constitute ratification of the release. Instead, without so much as acknowledging the long-established principle that a statute "must 'speak directly' to the question addressed by the common law" in order to abrogate it, *United States* v. *Texas*, 507 U. S. 529, 534 (1993) (quoting *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 625 (1978)), the Court holds that the OWBPA abrogates both the common-law doctrine of ratification and the doctrine that a party must "tender back" consideration received under a release of legal claims before bringing suit. Because the OWBPA

does not address either of these common-law doctrines at all, much less with the clarity necessary to abrogate them, I respectfully dissent.

It has long been established that "[s]tatutes 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.'" *United States* v. *Texas*, *supra*, at 534 (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 783 (1952)). Congress is understood to legislate against a background of common-law principles, *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991), and thus "does not write upon a clean slate," *United States* v. *Texas*, *supra*, at 534. As a result, common-law doctrines "'ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redevelopment and Housing Authority* v. *Chesapeake & Potomac Telephone Co. of Va.*, 464 U. S. 30, 35 (1983) (quoting *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch 603, 623 (1813)).

The only clear and explicit purpose of the OWBPA is to define "knowing and voluntary" in the context of ADEA waivers. Prior to the statute's enactment, the Courts of Appeals had disagreed about the proper standard for determining whether such waivers were knowing and voluntary. Several courts had adopted a "totality of the circumstances" test as a matter of federal waiver law, see, *e.g.*, *Cirillo* v. *Arco Chemical Co.*, 862 F. 2d 448, 451 (CA3 1988); *Bormann* v. *AT&T Communications, Inc.*, 875 F. 2d 399, 403 (CA2), cert. denied, 493 U. S. 924 (1989); *O'Hare* v. *Global Natural Resources, Inc.*, 898 F. 2d 1015, 1017 (CA5 1990), while others had relied solely on common-law contract principles, see *Runyan* v. *National Cash Register Corp.*, 787 F. 2d 1039, 1044, n. 10, 1045 (CA6) (en banc), cert. denied, 479 U. S. 850 (1986); *Lancaster* v. *Buerkle Buick Honda Co.*, 809 F. 2d 539, 541 (CA8), cert. denied,

482 U. S. 928 (1987). In enacting the OWBPA, Congress adopted neither approach, instead setting certain minimum requirements that every release of ADEA rights and claims must meet in order to be deemed knowing and voluntary. I therefore agree with the Court that the OWBPA abrogates the common-law definition of a "knowing and voluntary" waiver where ADEA claims are involved.

From this rather unremarkable proposition, however, the Court leaps to the conclusion that the OWBPA supplants the common-law doctrines of ratification and tender back. The doctrine of ratification (also known in contract law as affirmation) provides that a party, after discovering a defect in the original release, can make binding that otherwise voidable release either explicitly or by failing timely to return the consideration received. See Restatement (Second) of Contracts, §7, Comments *d*, *e* (1979); 1 E. Farnsworth, Farnsworth on Contracts §4.15 (1990); §4.19.[1] The tender back doctrine requires, as a condition precedent to suit, that a plaintiff return the consideration received in exchange for a release, on the theory that it is inconsistent to bring suit against the defendant while at the same time retaining the consideration received in exchange for a promise *not* to bring such a suit. See *Buffum* v. *Peter Barceloux*, 289 U. S. 227, 234 (1933) (citing state cases).

The OWBPA simply does not speak to ratification. It is certainly not the case– notwithstanding the Court's statement that the OWBPA "governs the effect under federal law of waivers or releases on ADEA claims," *ante*, at 5– that ratification can *never* apply in the context of ADEA releases. There is no reason to think that releases voidable on non-statutory grounds such as fraud, duress,

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[1] For the reasons noted by JUSTICE BREYER, see *ante*, at 2–3, I think it cannot be doubted that releases that fail to meet the OWBPA's requirements are merely voidable, rather than void.

or mistake cannot be ratified: The OWBPA merely imposes requirements for knowing and voluntary waivers and is silent regarding fraud, duress, and mistake. Further, the statute makes no mention of whether there can ever be a valid ratification in the more specific instance, presented by this case, of a release of ADEA claims that fails to satisfy the statute's requirements. Instead, the statute merely establishes prerequisites that must be met for a release to be considered knowing and voluntary; the imposition of these statutory requirements says absolutely nothing about whether a release that fails to meet these prerequisites can ever be ratified.

Not only does the text of the OWBPA make no mention of ratification, but it also cannot be said that the doctrine is inconsistent with the statute. The majority appears to reason that ratification cannot apply in the ADEA context because releases would be given legal effect where they should have none. As the Court explains, "the release can have no effect on [the employee's] ADEA claim unless it complies with the OWBPA." *Ante*, at 5. Or, put another way, because petitioner's release did not comply with the statute, "it is unenforceable against her insofar as it purports to waive or release her ADEA claim." *Ibid.*

The Court's concerns, however, appear directed at ratification itself, rather than at its application in the ADEA context. Ratification *necessarily* applies where a release is unenforceable against one party at its adoption because of some deficiency; the whole point of ratification is to give legal effect to an otherwise voidable release. By defining the requirements that must be met for a release of ADEA claims to be considered knowing and voluntary, the OWBPA merely establishes one of the ways in which a release may be unenforceable at its adoption. The OWBPA does not suggest any reason why a noncomplying release cannot be made binding, despite the original defect, in the same manner as any other voidable release.

Nor does ratification conflict with the purpose of the OWBPA. Ratification occurs only when the employee realizes that the release does not comply with the OWBPA and nevertheless assents to be bound. See 12 W. Jaeger, Williston on Contracts §1527 (3d ed. 1970) (ratification may occur only after defect is discovered); Restatement (Second) of Contracts, *supra*, §381 (same). This is surely consistent with the statutory purpose of ensuring that waivers of ADEA claims are knowing and voluntary.[2]

The question remains whether the OWBPA imposes requirements that a ratification must meet. Ratification of a voidable release, like the release itself, must be knowing and voluntary. Otherwise, it too is voidable by the innocent party. See *id*., §85, Comment b. Although the Court does not expressly address this question, it appears that the Court's holding requires, at minimum, that the statutory requirements apply in the ratification context.

The OWBPA does not, however, clearly displace the common-law definition of "knowing and voluntary" in the ratification context. The statute itself states that it applies to waivers and is absolutely silent regarding ratification or affirmation. Further, several of the statutory requirements cannot be translated easily into the ratification context. The requirements that an employee be given a period of at least 21 days to consider the agreement, §626(f)(1)(F)(i), and that he have a 7-day period in which to revoke the agreement, §626(f)(1)(G), naturally apply in the context of the original release, but seem superfluous when applied to ratification. For example,

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[2] Although the Court, relying on the statute's title, defines the OWBPA's purpose broadly as "protect[ing] the rights and benefits of older workers," *ante*, at 4, the statute itself suggests only the more specific purpose of preventing unknowing or involuntary waivers of ADEA rights and claims.

when an employee has implicitly ratified the original release by retaining the consideration for several months after discovering its defects, a 21-day waiting period to consider the agreement and a 7-day revocation period have no place. An employee thus may ratify a release that fails to comply with the OWBPA.

For many of the same reasons that the OWBPA does not abrogate the doctrine of ratification, it also does not abrogate the tender back requirement. Certainly the statute does not supplant the tender back requirement in its entirety. Where a release complies with the statute but is voidable on other grounds (such as fraud), the OWBPA does not relieve an employee of the obligation to return the consideration received before suing his employer; the OWBPA does not even arguably address such a situation. And in the more specific context of a release that fails to comply with the OWBPA, the statute simply says nothing about whether there can ever be an obligation to tender back the consideration before filing suit.

Nor is the tender back requirement inconsistent with the OWBPA. Although it does create an additional obligation that would not exist but for the noncomplying release, the doctrine merely puts the employee to a choice between avoiding the release and retaining the benefit of his bargain. After all, this doctrine does not preclude suit but merely acts as a condition precedent to it; the employee need only return the consideration before the statute of limitations period has run. And despite the Court's concern that "[i]n many instances a discharged employee likely will have spent the monies received and will lack the means to tender their return," *ante*, at 5; see also *ante*, at 1 (BREYER, J., concurring),[3] courts have interpreted the

[3] The statements of the majority in this regard, like much of the majority opinion generally, imply that noncomplying releases are void as against public policy, rather than voidable. That certainly is not the

tender back doctrine flexibly, such that immediate tender is not always required. See D. Dobbs, Law of Remedies §9.3(3), pp. 590–591 (1973); *Fleming* v. *United States Postal Service AMF O'Hare*, 27 F. 3d 259, 260 (CA7 1994). If anything, the Court's holding creates a windfall for an employee who may now retain the consideration received from his employer while at the same time filing suit.

Finally, it is clear that the statutory requirements have no application to the tender back requirement. The tender back doctrine operates not to make the voidable release binding, as does ratification, but rather precludes a party from simultaneously retaining the benefits of the release and suing to vindicate released claims. See *supra*, at 3. That is, the requirement to tender back is simply a condition precedent to suit; it has nothing to do with whether a waiver was knowing and voluntary. Nothing in the statute even arguably implies that the statutory requirements must be met before this obligation arises.

In sum, the OWBPA does not clearly and explicitly abrogate the doctrines of ratification and tender back. Congress, of course, is free to do so. But until it does, these common-law doctrines should apply to releases of ADEA claims, just as they do to other releases. Because the Court of Appeals determined that petitioner had indeed ratified her release, and there is no reason to think that this determination was in error, I would affirm. I therefore respectfully dissent.

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case. See n. 1, *supra*. And JUSTICE BREYER does not explain why his alternative– permitting the employer to seek restitution– survives the OWBPA while the tender back requirement does not. See *ante*, at 3–4.