IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:14-cv-01232-LTB-SKC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

COLLEGEAMERICA DENVER, INC., n/k/a CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC., d/b/a COLLEGEAMERICA,

Defendant.

MOTION FOR PRELIMINARY INJUNCTION

After this Court entered the parties' agreed-upon scheduling order and set a bench trial in this action for November 2019, CollegeAmerica has now sought and obtained a trial date in the related, long-dormant Larimer County action against charging party Debbi Potts, now set for May 13 and 14, 2019, *before* this Court can resolve the EEOC's pending claim, challenging the very basis and legality of the Larimer County action.

The Larimer County action, which CollegeAmerica filed only after Ms. Potts filed charges of unlawful employment practices with the EEOC, had been stayed since 2014, precisely because it is an action seeking to enforce the very same contract which the EEOC here alleges is unlawful under Section 7(f)(4) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(f)(4). That provision prohibits contractual waivers of certain rights protected by the ADEA, including the right to file a charge of discrimination and to freely communicate with the EEOC. Here, the Agreement contains three impermissibly restrictive terms. CollegeAmerica has admitted

the first is illegal because it prohibits Ms. Potts from filing charges of discrimination. Nevertheless, at different points in litigation, CollegeAmerica has asserted that Ms. Potts' communications with the EEOC were actionable breaches of all three of the contractual restrictions it placed on her. Given CollegeAmerica's mutable and over-reaching contract interpretations through the history of this case, the agreement should be held unenforceable in its entirety.

Beyond that, CollegeAmerica's efforts to try the Larimer County action before this Court's trial are a transparent strategy to undermine this Court's ability to later render meaningful adjudication and relief. CollegeAmerica's race to the courthouse should be rejected, particularly in this action, where CollegeAmerica once already induced this Court to dismiss EEOC's claim as moot, based on representations CollegeAmerica later abandoned, precipitating appeal, reversal, remand, and requiring an additional trial. CollegeAmerica should not be permitted to seek enforcement of a contract in the Larimer County action while its legality under the ADEA remains a pending question before this Court. Accordingly, the EEOC seeks a preliminary injunction to preserve the status quo and protect this Court's ability to render meaningful adjudication and relief.

Because the trial in the Larimer County court is set for May 13–14, 2019, the EEOC requests that this Court set briefing and, as needed, a hearing, sufficiently in advance to avert irreparable harm.

D.C.COLO.LCivR 7.1(a) Certification: Counsel for the EEOC conferred by telephone with counsel for Defendant before filing this Motion. Defendant opposes the relief sought herein.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Background Facts and the Agreement

Debbi Potts was employed by CollegeAmerica from 2009 until July 2012. *See* Trial Tr., ECF No. 150 at 48:22. When she resigned, she believed she was owed $7,000 in bonus payments. *See id.* 56:7–12. Ms. Potts and CollegeAmerica's CEO, Mr. Eric Juhlin, executed an Agreement on September 1, 2012, in which, *inter alia*, CollegeAmerica agreed to pay Ms. Potts $7,000, and Ms. Potts agreed, [1] "to refrain from . . . contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance . . . ;" [2] to "direct any complaints or issues against CollegeAmerica . . . . to CollegeAmerica's toll free compliant [*sic*] number"; and [3] "[t]o not intentionally with malicious intent . . . disparage the reputation of CollegeAmerica." (Ex. 1 (the "Agreement").)

B. Ms. Potts' Charges of Discrimination and CollegeAmerica's Lawsuit Against Her

On January 23, 2013, Ms. Potts filed the first of three charges with the Wyoming Fair Employment Program, and through it the EEOC, alleging CollegeAmerica had engaged in violations of the ADEA. (ECF No. 166-2.) On March 25, 2013, CollegeAmerica sued Ms. Potts in the Larimer County Court (the "Larimer County action" or "state court action"), alleging she had breached the Agreement and seeking $7,000 in damages. (ECF No. 112-6.) While Ms. Potts was defending herself *pro* se, CollegeAmerica took the position that she had violated the Agreement "through her filing of . . . multiple charges with the EEOC." (Ex. 2 at 3) Ms. Potts repeatedly objected that CollegeAmerica's position was illegal under the ADEA, even quoting EEOC guidance. (*See* Ex. 3 at 2 (August 16, 2013 brief filed by Ms. Potts in Larimer County action arguing "[CollegeAmerica] has no legal standing to demand that an employee . . . not file

an EEOC claim"); Ex. 4 (April 8, 2013 *pro se* Answer pleading "[t]he severance agreement is not in compliance with the [ADEA, as amended by the Older Workers Benefits' Protection Act, or "OWBPA"]). But CollegeAmerica persisted in its claim, also seeking discovery of Ms. Potts' communications with the EEOC. (Ex. 5 at 3 ¶10 & Interrogatories Nos. 3, 4, 6 & RFP No. 7; Ex. At 78.)

On December 20, 2013, the EEOC sent a Letter of Determination finding reasonable cause that CollegeAmerica had retaliated against Ms. Potts and also "sought to use an unlawful and invalid waiver to interfere with [Ms. Potts'] protected right to file a charge or participate in an investigation or proceeding . . . in violation of Section 7(f)(1) and (4) of the ADEA," and that the Agreement "contain[s] an unlawful and invalid waiver of rights." (ECF No. 6-5.) Shortly after receiving this letter, CollegeAmerica reversed its interpretation of the Agreement, sending Ms. Potts on January 7, 2014 a letter stating that CollegeAmerica "does not assert and will not assert at any time in the future that you violated the Agreement by filing a charge with the EEOC," (ECF No. 112-14), and then amending its Complaint to add a footnote contradicting its prior position by stating it "does not assert that the parties' agreement constitutes a waiver of discrimination claims, nor that Ms. Potts violated the contract by filing EEOC charges." (Ex. 7)

C. Previous History in this Action

The EEOC filed this action on April 30, 2014, bringing three claims. (ECF No. 1.) First, and at issue here, the EEOC alleges that the Agreement, and CollegeAmerica's use of the Agreement, interfered with the EEOC's and Ms. Potts protected rights in violation of Section 7(f)(4) of the ADEA, 29 U.S.C. § 626(f)(4). (*Id.* ¶¶ 38–39.) Second, the EEOC alleged violations of Section 7(f)(4) based on agreements used with other employees. (*Id.* ¶¶ 40–42.) Third, the

EEOC alleged unlawful retaliation, specifically, that CollegeAmerica sued Ms. Potts in retaliation for having filed charges of discrimination. (*Id*. ¶¶ 43–46.) After the EEOC filed this action, the Larimer County court quickly stayed CollegeAmerica's action against Ms. Potts. (Ex. 8.)

In June and August 2014, CollegeAmerica argued that its recent recantation of the view that Ms. Potts had violated the Agreement by filing EEOC charges mooted the EEOC's interference claim. (ECF No. 6.) In support, CollegeAmerica filed declarations representing that "it is not our position that the Agreement constitutes a waiver of Ms. Potts' rights under the [ADEA]," and that "we never asserted that she had waived her right to bring the charges," (ECF No. 6-10 ¶ 11), and that CollegeAmerica "does not and will ***never*** assert that the Agreement constitutes a waiver of Ms. Potts's ADEA claims or waives her otherwise unfettered right to file charges of discrimination and cooperate in any proceeding conducted by the EEOC . . . ." (ECF No. 11-1 ¶ 4 (emphasis in original).) Relying on CollegeAmerica's representations, this Court dismissed the EEOC's first claim as moot, reasoning that:

> Based on the affidavits of its general counsel and its most recent representation in the State Court Action . . . CollegeAmerica has met its burden of demonstrating that there is no reasonable expectation that it will use the Agreement to interfere with the ADEA rights of Potts or the EEOC. To the extent that CollegeAmerica previously used the Agreement in this manner, any resulting effects have been eradicated by CollegeAmerica's recent representations and assurances."

(ECF No. 16 at 5–8.) The Court also dismissed the EEOC's second claim. (*Id.* at 8–13.)

This case proceeded only on the EEOC's retaliation claim. (ECF No. 1 ¶¶ 43–46; ECF No. 16 at 14–15.) CollegeAmerica defended by arguing it had sued Ms. Potts not in retaliation, but because it sincerely believed she had breached the Agreement. (*See generally* ECF No. 87 at 6–13.) In the February 2016 pre-trial order, CollegeAmerica retreated from its previous assurance

that it would never claim Ms. Potts had violated the Agreement when she contacted the EEOC, newly asserting that she had in fact breached the Agreement "by not notifying the College of the issues she raised in her charge of discrimination." (*Id.* at 11.) At the retaliation trial, CollegeAmerica argued the contract provision requiring Ms. Potts to "direct any complaints or issues" from "students or staff" to its toll free complaint number required her to provide "prior notice" of her EEOC charges. *See* Trial Tr., ECF No. 150at 107:14–108:1; *id.* at 161:13–17; ECF No. 152 at 458:7–15. The jury returned a verdict for CollegeAmerica on the retaliation claim.

D. Appeal and Remand

The EEOC appealed only the dismissal of its Section 7(f)(4) claim. On appeal, CollegeAmerica maintained that the Agreement requires Ms. Potts "to notify [CollegeAmerica] of her complaints," and "that Potts' filing of complaints without first notifying [CollegeAmerica] was a violation of the . . . Agreement." (*See* Ex. 9 at 24) Given that contention, the Tenth Circuit reversed, holding that CollegeAmerica's ongoing plan to argue in the Larimer County action that Ms. Potts breached the Agreement by not giving it prior notice of her EEOC charges "create[s] the potential for CollegeAmerica to repeat its allegedly wrongful behavior." *EEOC v. CollegeAmerica Denver, Inc.*, 869 F.3d 1171, 1174 (10th Cir. 2017).

On remand, CollegeAmerica changed positions again. Despite its recent insistence before the Court of Appeals that a prior notice obligation would not "inhibit [Ms. Potts] from making [her] complaints," and left her rights "unfettered," (*see* Ex. 10 at 24), CollegeAmerica quickly offered on remand to give up exactly this same "prior notice" interpretation of the Agreement, *if* doing so would resolve the EEOC's remanded Section 7(f)(4) claim. (*See* ECF No. 176 at 2.) However, CollegeAmerica never entered such a stipulation. Absent a negotiated resolution and

with no relinquishment by CollegeAmerica of any pending contract claims or theories against Ms. Potts, the parties submitted, and the Court entered, a fully-agreed scheduling order governing the EEOC's remanded claim, and set it for trial in November 2019. (ECF Nos 92, 93.)

E. CollegeAmerica's Renewed Activity in the State Court Action

Notwithstanding this Court's pre-existing trial setting, in November 2018, CollegeAmerica sought and then obtained a trial date in the long-dormant Larimer County action, leapfrogging this Court's trial dates, and seeking to obtain a judgment against Ms. Potts *before* this Court can resolve the legality of either the Agreement or CollegeAmerica's pursuit of the Larimer County action under Section 7(f)(4). (*See* Exs. 10, 11, 12.) Ms. Potts, through counsel, then filed on January 23, 2019 a motion asking the Larimer County court to dismiss CollegeAmerica's claims (Ex. 13), which CollegeAmerica moved to strike. (Ex. 14)[1] On March 22, 2019, the Larimer County court struck the pending motions, struck all filings except the underlying pleadings, and indicated trial would proceed on May 13–14, 2019, with no further briefing or legal rulings. (Ex. 12.)

II. LEGAL STANDARD

A preliminary injunction serves to "preserv[e] the relative positions of the parties until a trial on the merits can be held." *DTC Energy Grp., Inc. v. Hirschfeld*, 912 F.3d 1263, 1269–70 (10th Cir. 2018). A party seeking relief under Rule 65 must show that it: (1) "is substantially likely to succeed on the merits;" (2) "will suffer irreparable injury if the injunction is denied;" (3) that "the movant's threatened injury outweighs the injury the opposing party will suffer under the injunction;" and (4) the injunction would not be adverse to the public interest." *Id.* at 1270.

[1] The Court can take judicial notice of filings from a related court case. *See, e.g. Porter v. Ford Motor Co.*, --- F.3d ---, 2019 WL 1121378, at *1 n.2 (10th Cir. Mar. 12, 2019).

III. ARGUMENT

A. The EEOC is Substantially Likely to Prevail.

1. Legal Background and Section 7(f)(4).

Section 7(f) of the ADEA was added by the Older Workers' Benefits Protection Act of 1990 ("OWBPA"). It addresses waivers of employees' rights under the ADEA. The first three sub-parts of Section 7(f) establish conditions under which employees may validly waive their right to bring an ADEA claim. *See* 29 U.S.C. § 626(f)(1)–(3). Section 7(f)(4), on the other hand, identifies impermissible terms which may ***not*** be included in any waiver of rights. As explained in *Wastak v. LeHigh Valley Health Network*, 342 F.3d 281 (3d Cir. 2003):

> The statute is divided into four subsections. . . . the first enumerates a list of mandatory prerequisites for a valid waiver. The second sets forth a narrow exception to those requirements. The third allocates the burden of proof with regard to disputes about the first two subsections, placing on the party asserting the waiver the burden to prove that it was made knowingly and voluntarily. Finally, § 626(f)(4) . . . . clarifies that ***even otherwise statutorily compliant waiver agreements cannot be used to interfere with the EEOC's exercise of its duties, or with an employee's right to complain to the agency***.

Id. at 290 (emphasis added). Section 7(f)(4) includes two distinct prohibitions:

> [1] No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. [2] No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 U.S.C. § 626(f)(4) (enumeration added). The kinds of interference prohibited are further explained by EEOC regulations, which interpret the statute and make clear that prohibitions against filing a charge or participating in EEOC proceedings are impermissible, as are provisions placing conditions or limitations upon employees' rights:

> (2) No waiver agreement may include any provision prohibiting any individual from:

> (i) Filing a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or
>
> (ii) Participating in any investigation or proceeding conducted by EEOC.
>
> (3) No waiver agreement may include any provision imposing any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to:
>
> (i) File a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or
>
> (ii) Participate in any investigation or proceeding conducted by EEOC.

29 C.F.R. § 1625.22(i)(2) & (3). Courts give great deference to EEOC Regulations, promulgated under Administrative Procedure Act notice and comment procedures and reasonably interpreting statutes entrusted to the EEOC. *See E.E.O.C. v. Seafarers Int'l Union*, 394 F.3d 197, 202 (4th Cir. 2005) (EEOC ADEA regulations given *Chevron* deference); *Wilkerson v. Shinseki*, 606 F.3d 1256, 1263 (10th Cir. 2010) (ADA regulations).

As used in the statute and regulations, the term "waiver agreement," is not expressly defined. But the term applies broadly to the waiver of "*any* right or claim under [the ADEA]." § 626(f)(1) (emphasis added). Generally, a "waiver" is the "voluntary relinquishment or abandonment . . . of a legal right or advantage." Black's Law Dictionary (10th ed. 2014); *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017) ("[W]aiver is the 'intentional relinquishment or abandonment of a known right." (internal quotation marks omitted)). The Agreement here purports to waive Ms. Potts' protected rights under the ADEA,

including to file a charge and to freely communicate with the EEOC.[2] Moreover, failure to file a charge with the EEOC generally bars an individual from bringing an ADEA suit, so any waiver that prohibits filing a charge also effectively bars pursuit of an ADEA claim[3]

2. **CollegeAmerica Has Used the Agreement to Interfere With Ms. Potts' Rights.**

a) The Charge-Filing Waiver is Illegal, and CollegeAmerica Has Used it to Interfere with Ms. Potts' Rights.

The first obligation the Agreement places on Ms. Potts prohibits her, with no exceptions, from presenting "*any* complaint or grievance," to "*any* governmental or regulatory agency," including the EEOC or any FEPA. (Ex. 2 (emphasis added)). On face, this prohibits Ms. Potts from filing a charge of discrimination. Such a charge-filing bar is illegal and unenforceable under Section 7(f)(4), because it "interfere[s] with the protected right of an employee to file a charge." § 626(f)(4); *accord Commonwealth of Massachusetts v. Bull HN Info. Sys., Inc.*, 143 F. Supp. 2d 134, 148 (D. Mass. 2001) ("*Bull*") ("This broadly-worded prohibition, which extends beyond judicial actions to encompass all 'claims,' flies in the face of the OWBPA's clear proscription of any interference with an employee's right to instigate or participate in 'an investigation or proceeding conducted by the Commission.'"); *Cosmair*, 821 F.2d at 1090 (holding, pre-OWBPA, that "[a] waiver of the right to file a charge is void as against public policy").

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[2] Even if Section 7(f)(4) did not expressly apply, the public policy it codifies has long prohibited any waiver of the right to file a charge. *See E.E.O.C. v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987); S. Rep. 101-263, at 35, 1990 U.S.C.C.A.N. 1509, 1541 (1990) (noting OWBPA codified this public policy bar, and favorably citing *Cosmair*).

[3] *See generally, e.g.*, *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1185 (10th Cir. 2018) (statute "places a mandatory duty on a plaintiff to file an EEOC charge" (as to Title VII)); *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1308 (10th Cir. 2005) (ADEA charge-filing obligations follow Title VII), *abrogated by Lincoln*, 900 F.3d 1166 (holding that charge-filing requirements arise as an affirmative defense, not a jurisdictional prerequisite).

Here, the Agreement includes just such a prohibited charge-filing bar. Indeed, in the previous trial in this action, CollegeAmerica belatedly conceded—as it must—that this provision is "impermissible," and "illegal." Trial Tr., ECF No. 150 at 105:22–24; ECF No. 151 at 39:18–24 (Juhlin Testimony).

Moreover, CollegeAmerica has impermissibly *used* the agreement to justify interfering with Ms. Potts' protected rights: *See* § 626(f)(4). By asserting in state court that she had breached the agreement by filing EEOC charges (*see* Ex. 2 at 3); by maintaining that position even after Ms. Potts objected it was unlawful under the ADEA (*see* Exs. 2, 3, 4); by attempting to compel her to turn over communications from a then-ongoing EEOC investigation, (Exs. 6, 7); and by continuing, to this day, to actively seek a trial and judgment against Ms. Potts on the basis of the concededly-illegal Agreement, CollegeAmerica has used the Agreement impermissibly to interfere with her protected rights.

b) CollegeAmerica's Demand for Prior Notice Violates Section 7(f)(4) and Interferes with Ms. Potts' Rights.

As described above, CollegeAmerica asserts that the Agreement required Ms. Potts to give prior notice to CollegeAmerica before filing a charge of discrimination. (*See* ECF No. 87 at 8; Trial Tr., ECF No. 150 at 92:6–17; Ex. 10 at 24.) This assertion—which CollegeAmerica is now free to press at the trial set in the Larimer County action—constitutes an ongoing violation of Section 7(f)(4). In particular, the prior notice requirement is a condition precedent that adversely affects Ms. Potts' right to file a charge and freely participate in EEOC proceedings, and is therefore expressly prohibited as a violation of Section 7(f)(4). 29 C.F.R. § 1625.22(i)(3).

If Ms. Potts was, in fact, required to notify CollegeAmerica when she filed a charge, and to communicate the nature of her charge to CollegeAmerica, then her right to communicate with the EEOC was not "unfettered," as CollegeAmerica has claimed. (*See* ECF No. 11-1, ¶ 4) To the contrary, imposing a prior notice obligation interferes with Ms. Potts' rights by deterring her willingness to communicate candidly with the EEOC. (Ex. 15, ¶¶ 20–21 (Burkholder Declaration).) By asserting this view of the Agreement's terms, CollegeAmerica continues to "us[e] [the Agreement] to justify interfering with" Ms. Potts' protected right to file a charge and communicate with the EEOC. § 626(f)(4); 29 C.F.R. § 1625.22(i).

c) CollegeAmerica's Assertion of the Anti-Disparagement Clause Violates Section 7(f)(4) by Censoring Ms. Potts' Communications.

CollegeAmerica has also asserted the Agreement's anti-disparagement clause broadly. Like the charge-filing waiver, the Agreement's anti-disparagement provision contains no exception for communications with the EEOC (or any other agency). Indeed, CollegeAmerica has claimed that it applies to communications with the EEOC, asserting in this action that: "In filing her claims with the EEOC, Ms. Potts continued to disparage the College on issues unrelated to issues of discrimination or retaliation," and that "disparaging statements within the charge that **that were not related** to age discrimination were statements Ms. Potts had agreed she would no longer make if the College paid her $7,000." (Ex. 16, at 11, ¶15 (emphasis in original).)

This view of the anti-disparagement clause places an impermissible content-based restriction on Ms. Potts' communications with the EEOC, illegally imposing a "condition precedent," and "other limitation" on her right to participate in EEOC proceedings, and threatening to impose a "penalty," namely a breach of contract claim, for communications with the EEOC.

See 29 C.F.R. § 1625.22(i)(3). By pressing its action against Ms. Potts, while holding open this broad interpretation of the anti-disparagement clause, CollegeAmerica is impermissibly using the agreement to interfere with her rights.

3. **CollegeAmerica's Later Representations Cannot Cure the Agreement's Illegality.**

CollegeAmerica may argue that it has already promised not to interpret the Agreement as waiving Ms. Potts' protected rights. CollegeAmerica's *post hoc* retreat from the Agreement's overbroad terms cannot cure its illegality, nor undo the fact that CollegeAmerica has repeatedly used the Agreement to interfere with her protected rights, and continues to do so. Any such argument should be rejected, for at least two reasons.

First, this Court has previously found the Agreement to be "plain and clear and unambiguous," and held that "parol evidence regarding its terms [is] inadmissible." Trial Tr., ECF No. 150 at 9:19–20; *id.* at 132:15–19; *see generally, e.g., Cheyenne Mountain Sch. Dist. No. 12 v. Thompson*, 861 P.2d 711, 715 (Colo. 1993). Neither contemporaneous nor after-the-fact qualifications by CollegeAmerica can cure the Agreement's facial illegality.

Second, CollegeAmerica's representations as to how it may or may not interpret the Agreement going forward should be rejected, given its own demonstrated willingness to change position to suit the tactical needs of each new moment. CollegeAmerica began its suit against Ms. Potts taking *exactly* the position that she had breached the Agreement by filing charges with the EEOC. (Ex. 3 at 3.) It maintained that position until the EEOC delivered a formal determination that CollegeAmerica's was violating the ADEA. (*See* ECF No. 6-5 (Dec. 20, 2013 Letter of Determination); ECF No. 112-14 (Jan. 7, 2014 letter disavowing claim).)

When CollegeAmerica sought to have EEOC's interference claim dismissed, its position further evolved. First CollegeAmerica declared that "[i]n responding to Ms. Potts' charges . . . we never asserted that [Ms. Potts] had waived her right to bring the charges." (ECF No. 6-10 ¶ 11.) But that careful representation as to positions that not taken in the investigation sidestepped the reality that even while the investigation was ongoing, CollegeAmerica was actively asserting its impermissible contract interpretation in the state court action. (See Ex. 2 at 3; *see also* Exs. 5&6.)

Next, CollegeAmerica expanded its representation by promising to "***never*** assert that the Agreement . . . waives [Ms. Potts'] otherwise unfettered right to file charges . . . and [to] cooperate in any proceeding conducted by the EEOC." (ECF No. 11-1, ¶ 4 (emphasis in original).) But, after this Court acted in reliance on that representation, CollegeAmerica again changed position, arguing that despite its lip service to Ms. Potts' "unfettered right[s]," CollegeAmerica would now interpret the Agreement to require that she give "prior notice" to CollegeAmerica before communicating with the EEOC. (ECF No. 87 at 11; Trial Tr. ECF No. 150 107:14–108:1.)

Then, after reversal on appeal, having already benefited from this "prior notice" theory of a breach, CollegeAmerica swiftly offered to abandon that same theory, *if* doing so would get rid of the EEOC's interference claim. (*See* ECF No. 176 at 2.) But, despite this offer, CollegeAmerica has never actually entered such a stipulation. Nor has CollegeAmerica withdrawn its view that the anti-disparagement clause restricts Ms. Potts' communications with the EEOC. (Ex. 16 at 11.) Indeed, CollegeAmerica has not taken any binding position as to what breach of contract theories it will assert now in the Larimer County action.

Given this history, the Court should discredit CollegeAmerica's representations as to how it may or may not interpret the Agreement. The record demonstrates that CollegeAmerica will

willingly take any position that serves its immediate tactical goals. Absent an injunction, CollegeAmerica remains free to assert virtually any interpretation of the Agreement's overbroad language. This is especially true given the Larimer County court's recent rulings, which provide no opportunity for further legal rulings limiting CollegeAmerica's assertions under the Agreement. (*See* Ex. 12.) Ms. Potts should not have to guess what theories CollegeAmerica will next assert. *Cf. Eastman v. Union Pac. R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007) (in order to "protect the integrity of the judicial process," the doctrine of judicial estoppel "prohibit[s] parties from deliberately changing positions according to the exigencies of the moment"). This Court should halt further evolution in CollegeAmerica's contract interpretation by enjoining it from asserting any breach of the Agreement until this action is resolved.

4. **The Agreement Adversely Affects and Interferes With the EEOC's Rights and Responsibilities**

In addition to having used the Agreement to justify interference with Ms. Potts' rights, the same three provisions of the Agreement impermissibly "affect[t] the Commission's rights and responsibilities." § 626(f)(4). First, by purporting to prohibit Ms. Potts from "contacting any governmental . . . agency" to "fil[e] any complaint or grievance . . . .," the Agreement facially bars her from filing a charge. The EEOC has a statutory responsibility to receive and investigate charges, a statutory a right to do so, and also *depends* on the receipt of charges from private parties to fulfill its responsibilities. (*See* Ex. 15 ¶¶ 15–18 (Burkholder Declaration).) As the Fifth Circuit has explained:

> Allowing the filing of charges to be obstructed . . . could impede EEOC enforcement of the civil rights laws. The EEOC depends on the filing of charges to notify it of possible discrimination. A charge not only informs the EEOC of discrimination against the employee who files the charge or on whose behalf it

> is filed, but also may identify other unlawful company actions. . . . When the EEOC acts on this information albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.

Cosmair, 821 F.2d at 1090 (citations and internal quotation marks omitted). Because the EEOC's rights and responsibilities go beyond the interests of any one charging party, a contract that seeks to prevent charges from being filed impermissibly "affect[s] the Commission's rights and responsibilities." 29 U.S.C. § 7(f)(4); *see also* Ex. 15 ¶ 19.

Second, CollegeAmerica's assertion of a "prior notice" requirement before Ms. Potts was permitted under the Agreement to file a charge also adversely and impermissibly affects the EEOC's rights and responsibilities. The EEOC depends on receiving candid and forthcoming communications from charging parties and other employees. (Ex. 15 ¶¶ 16–17.) Because employees are often unwilling or disinclined to raise the same allegations or complaints internally that they wish to bring to the Commission, enforcement of a "prior notice" obligation both deters the filing of charges and interferes with the candid communications from employees on which the EEOC depends. (*See id.* ¶¶ 20–21.) Any preconditions or limits on an employee communications, or a requirement to disclose allegations to the employer in the first instance, have a negative and chilling effect on the EEOC's receipt of information, and negatively affect its ability to exercise its rights and responsibilities. (*Id.*) *See also EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744--745 (1st Cir. 1996) (stressing the importance of "the free flow of information" between possible victims of discrimination and "the agency entrusted with righting the wrongs inflicted upon them").

Third, CollegeAmerica's claim that the anti-disparagement term restricts what Ms. Potts could say to the EEOC, or restricted the topics she could discuss, also impermissibly undermines

the Commission's rights and responsibilities. An employee who believes she is subject to an "anti-disparagement" limitation will likely be deterred from filing a charge and will be less candid and forthcoming. (*Id.* ¶¶ 22–23.) Self-censoring or withholding information that is arguably "disparaging" hinders the EEOC's ability to complete investigations, and adversely affects its rights and responsibilities. (*Id.* ¶ 22.) Likewise, asserting in a legal action that the employee may face liability based on the content of her communications with the EEOC tends to have a strong chilling effect on the EEOC's receipt of information. (*Id.* ¶¶ 23–24.) For these reasons, the Agreement's anti-disparagement clause, which CollegeAmerica has interpreted as applying to communications with the EEOC, impermissibly affects the EEOC's rights and responsibilities. 29 U.S.C. §626(f)(4); *see also* Ex. 16 at 11.

5. **The Whitehead Decision Does Not Preclude the EEOC's Section 7(f)(4) Claim.**

The EEOC has a statutory duty to enforce the ADEA, including Section 7(f)(4). *See generally Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008). Indeed, Congress has expressly authorized the Commission to bring suit to enforce the ADEA. Section 626(b) directs the EEOC to enforce the ADEA "in accordance with the powers, remedies, and procedures provided in sections . . . 216 (except for subsection (a) thereof) and 217" of the Fair Labor Standards Act ("FLSA"), and section 216(c) of the FLSA empowers the Secretary of Labor to bring "an action in any court of competent jurisdiction" to enforce the FLSA. 29 U.S.C. §§ 626(b), 216(c). Thus, the claim here is expressly authorized by statute. *Cf. FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 484(1985) (statute expressly authorized the FEC to bring its action); *see also Bull*, 143 F.Supp. 2d at 158.

CollegeAmerica may renew its argument that under the Tenth Circuit decision in *Whitehead v. Oklahoma Gas & Electric Co.*, 187 F.3d 1184, 1192–93 (10th Cir. 1999), Section 7(f)(4) does not provide a cause of action. That argument is incorrect. Indeed, on appeal of this case, the Tenth Circuit declined to adopt Defendant's view of *Whitehead*.

In reality, *Whitehead* has little, if any, application to a Section 7(f)(4) interference claim brought by the EEOC. *Whitehead* held that a private plaintiff cannot state a stand-alone claim for damages based on an employer's failure to satisfy the requirements for a valid waiver of ADEA rights under § 626(f)(1). 187 F.3d at 1191–92. In *Whitehead*, private plaintiffs claimed their employer had violated § 626(f)(1)(F)(ii) by failing to give them sufficient time to consider an early retirement offer that included an ADEA waiver. The Tenth Circuit concluded that the requirements for entering a valid ADEA waiver under § 626(f)(1) only determine whether the waiver was knowing and voluntary, and therefore enforceable, and are relevant only if the plaintiff brings an ADEA claim against which the employer seeks to enforce a waiver. *Id.* at 1191–92. *Whitehead* therefore held that if there is not an ADEA claim against which the employer asserts a waiver, the employee cannot bring a freestanding claim for damages based on alleged violations of Section 7(f)(1). *Whitehead* did not address Section 7(f)(4).

Moreover, it is significant that the EEOC, whose rights and responsibilities Section 7(f)(4) protects, was not a party in *Whitehead*. Rather than governing the procedural requirements and validity of permissible waivers, Section 7(f)(4) protects the EEOC's investigations and communications with charging parties and witnesses. *See Wastak*, 342 F.3d at 289–93 (3d Cir. 2003); *Thiessen v. Gen. Elec. Capital Corp.*, 232 F. Supp. 2d 1230, 1241–43 (D. Kan. 2002);

Romero v. Allstate Ins. Co., 1 F. Supp. 3d 319, 391–97 (E.D. Pa. 2014). If the EEOC cannot sue to redress violations of this provision, it is difficult to see how it can be enforced.

* * *

In sum, the Agreement on its face violates Section 7(f)(4). Undisputed facts show that CollegeAmerica has impermissibly used it to interfere with Ms. Potts' protected rights, and it also adversely affects the EEOC's rights and responsibilities. The Court should not rely on CollegeAmerica's promises not to assert prohibited interpretations of the Agreement. And the Tenth Circuit decision in *Whitehead* has no application to the EEOC's claim under Section 7(f)(4). The EEOC is therefore substantially likely to prevail on the merits of its Section 7(f)(4) claim.

B. CollegeAmerica's Efforts to Enforce Illegal Provisions of the Agreement in a State Court Trial Against Ms. Potts Will Cause Irreparable Harm

Absent relief from this Court, CollegeAmerica is free to assert any alleged breach of the Agreement in the approaching Larimer County trial. In particular, CollegeAmerica may seek a judgment on the theory that Ms. Potts was obligated to provide prior notice regarding her charges but did not do so, or that she impermissibly disparaged CollegeAmerica while communicating with EEOC investigators. As explained above, such assertions would impermissibly use the Agreement to justify interference with Ms. Potts' protected rights, would seek to penalize her based on illegal waivers, and would adversely affect the EEOC's rights.

If CollegeAmerica is permitted to go forward to trial in the Larimer County action, it will do irreparable harm to Ms. Potts. Ms. Potts is currently unemployed and seeking a job, and presently would be unable to pay $7,000 to CollegeAmerica if it obtained a judgment. (*See*. Ex. 17, ¶¶ 13, 15 (Potts Declaration).) Trial-related press coverage is likely to cost her job

opportunities, as is the threat of a judgment, with accompanying damage to her credit rating, and potential wage garnishment. (*See id.* ¶¶ 16–19.) A public record of a judgment is difficult to unwind, so even if the EEOC later prevails in showing that the Agreement violates the ADEA, court records reflecting a judgment will create a permanent public record likely to hamper her job search and professional opportunities indefinitely. Moreover, if an injunction or declaratory relief from this Court later this year requires the state court action to be tried a second time, the harms of wasted time, stress, and reputational harm will be exacerbated. (*Id.*¶ 19.)

In addition, a public court proceeding and potential judgment are likely to have a chilling effect on the willingness of other employees to file charges with the EEOC or FEPAs, or to otherwise report unlawful employment practices. Even if Ms. Potts and the EEOC both eventually prevail, the threat of litigation harms the EEOC's ability to receive candid reports of discrimination by chilling employees' willingness to communicate with the EEOC. (*See* Ex. 15 ¶ 26.)

C. The Threat of Injury Outweighs any Claimed Harm to CollegeAmerica

The amount in controversy in the Larimer County action is $7,000. This is not a meaningful sum to CollegeAmerica, which has represented that it is pursuing the action against Ms. Potts as a matter of principle. (Trial Tr. ECF No. 150 at 64:23–65:1.) The only threatened harm to CollegeAmerica would be a modest delay, but the Larimer County Action has already been stayed since May 2014. In these circumstances, there is no meaningful injury that will result from having the state court action tried a few months later. To the contrary, all parties will benefit from the certainty of having the federal dispute regarding the Agreement's validity resolved *before* any trial seeking to enforce the same Agreement.

In reality, the practical import for CollegeAmerica is precisely that it *wants* to leapfrog this Court's proceedings, and to press its claim against Ms. Potts before this Court adjudicates the legality of the Agreement and CollegeAmerica's state court action. Rather than indulge CollegeAmerica's tactical maneuvering, this Court should enter a preliminary injunction for the very reason such relief exists: to preserve the status quo and the long stable relative position between the parties. *See DTC Energy*, 912 F.3d at 1269–70.

D. Preliminary Injunctive Relief Would Serve the Relevant Public Interests

The relevant public interests are those recognized by Congress and protected by the ADEA. In particular, Section 7(f)(4) safeguards the EEOC's investigations and its communications with charging parties and witnesses. *See Wastak*, 342 F.3d at 289–93; *Thiessen*, 232 F. Supp. 2d at 1241–43. The Court should also weigh the risk that a public trial in which CollegeAmerica asserts a facially illegal waiver against a former employee will have a chilling effect on employees' willingness to communicate candidly with the EEOC. (*See* Ex. 15 ¶¶ 21–26.)

These are significant public interests with a wide impact. As recognized in the *Cosmair* case: "Allowing the filing of charges to be obstructed by enforcing a waiver of the right to file a charge could impede EEOC enforcement of the civil rights laws. The EEOC depends on the filing of charges to notify it of possible discrimination." *Cosmair*, 821 F.2d at 1090. Accordingly, "an employer and an employee cannot agree to deny the EEOC the information it needs to advance this public interest." *Id.* Even "a sprinkling of settlement agreements that contain stipulations prohibiting cooperation with the EEOC could effectively thwart an agency investigation." *Astra*, 94 F.3d at 744. "[A]ny agreement that materially interferes with communication between an

employee and the Commission sows the seeds of harm to the public interest." *Id.* (affirming grant of preliminary injunction preventing the enforcement of "non-assistance" contract terms).

These strong public interests weigh in favor of a preliminary injunction broad enough to halt CollegeAmerica's efforts to enforce the Agreement while its validity under Section 7(f)(4) remains in dispute. To the extent CollegeAmerica argues there is a public interest in vindicating its claimed contract rights, the only risk is a delay of a few additional months. That private interest is outweighed by the public interest in protecting the EEOC's enforcement capabilities. *Cf. Cosmair*, 821 F.2d at 1090 ("The public interest in private dispute settlement is outweighed by the public interest in EEOC enforcement of the ADEA.").

Similarly, while the EEOC respects the Larimer County court's need to manage its docket, considerations of judicial economy weigh in favor of this having this Court decide the legality of the Agreement *before* the Larimer County action proceeds to trial. After the federal claim is decided, any still-viable state claim(s) can advance with certainty and finality, avoiding the risk of having one trial in May enforce an Agreement that is invalidated by another trial in November.

E. A Preliminary Injunction Should Enter to Preserve the Status Quo.

1. **A Preliminary Injunction Should Enter to Preserve the Status Quo and Protect This Court's Ability to Render a Meaningful Decision on the Merits.**

A preliminary injunction serves to "preserv[e] the relative positions of the parties until a trial on the merits can be held." *DTC Energy*, 912 F.3d at 1269; *accord George Washington Home Owners Assoc., Inc. v. Widnall*, 863 F. Supp. 1423, 1425 (D. Colo. 1994) ("The primary function of a preliminary injunction is to preserve the status quo pending a final determination of the rights of the parties, in order to preserve the power to render a meaningful decision on the merits." (internal quotation marks omitted)).

Here, the status quo and relative positions of the parties had long been stable. For over four years, the Larimer County action had been stayed pending resolution of this litigation. Although the EEOC's Section 7(f)(4) claim challenging the legality of CollegeAmerica's state court action remained unresolved, CollegeAmerica was not actively seeking to enforce the Agreement, to obtain a judgment against Ms. Potts, nor to otherwise "us[e] the [Agreement] to justify interference with [her] protected rights." § 626(f)(4). In that posture, this Court was positioned for orderly adjudication of the Section 7(f)(4) claim. In particular, on September 18, 2018 this Court entered a Scheduling Order—fully-agreed by CollegeAmerica—which (as since amended), sets a schedule for litigation to proceed through late-May 2019, with trial set for November 19, 2019. (ECF Nos. 191–193, 201.)

Notwithstanding this existing schedule and stable status quo, in November 2018, without prior notification to Ms. Potts, the EEOC, or this Court, CollegeAmerica sought to leapfrog this Court's schedule by asking the Larimer County court for a trial set *before* this case will be resolved. Over the EEOC's objection, CollegeAmerica requested, and the Larimer County court set, a two-day trial for May 13–14, 2019. (*See* Exs. 10–12.)

On March 22, 2019, the Larimer County court struck Ms. Potts' pending motion to dismiss, and further struck *all* previous filings, other than CollegeAmerica's Amended Complaint and Ms. Potts' original *pro se* Answer, stating the court's firm intention to proceed to trial on May 13-14, 2019. (Ex. 12) Given those rulings, the last opportunity to avoid a premature trial in the Larimer County action without relief from this Court has past. Moreover, the state court's most recent rulings prohibit any further submissions that might elicit pre-trial legal rulings as to the legality of the Agreement, including under Section 7(f)(4). *See id*. Because there is no avenue for the Larimer

County court to adjudicate these issues, only this Court can rule on the federal law claim. Absent a ruling here, the path is wide open for CollegeAmerica to proceed against Ms. Potts on any theory of breach cognizable under its Amended Complaint. (Exs. 7, 12.)

Permitting CollegeAmerica to proceed would upend the status quo and defeat this Court's ability to render meaningful adjudication and relief. Indeed, it seems that CollegeAmerica's aim is *exactly* to escape this Court's adjudication of the Section 7(f)(4) claim, by pursuing a judgment against Ms. Potts before this Court rules, then, more than likely, renewing its argument that this case has become moot once CollegeAmerica has completed the very action that the EEOC's pending claim challenges as illegal and seeks to enjoin.

2. **The Court Should Preliminarily Enjoin CollegeAmerica From Asserting Any Breach of the Agreement Against Ms. Potts.**

Given CollegeAmerica's shifting positions, and because the terms that violate Section 7(f)(4) are not severable, the Court should enjoin CollegeAmerica from asserting any breach of the Agreement or otherwise using the Agreement against Ms. Potts in the Larimer County action.

a) A More Limited Preliminary Injunction Would Not Avoid the Threatened Harm.

CollegeAmerica has already demonstrated that it will alter its interpretation of the Agreement opportunistically to suits its shifting litigation objectives. *See supra*, Part IV.3. Absent an injunction, CollegeAmerica may assert virtually any breach of the Agreement under its Amended Complaint. That Complaint includes a limited caveat that it "does not assert that . . . Ms. Potts violated the contract by filing EEOC charges." (Ex. 7.) But without an injunction, nothing prevents CollegeAmerica from using the Agreement in any other way. It may assert, for example, that Ms. Potts owed CollegeAmerica prior notice of her charges, that her

communications with the EEOC impermissibly disparaged CollegeAmerica, or any other as-yet-undisclosed theory of liability. Neither any disclosure by CollegeAmerica nor any present or potential ruling from the Larimer County court will restrict CollegeAmerica's claims.

Moreover, the harms a preliminary injunction should prevent will follow from any premature trial in state court. And Section 7(f)(4) not only restricts terms a waiver agreement may not contain, it also restricts how agreements may be "used," prohibiting interference with an employee's rights. Here, CollegeAmerica's ongoing *use* of the Agreement should be enjoined. For all these reasons, the appropriate preliminary relief is not merely to enumerate claims that CollegeAmerica *cannot* pursue, but to enjoin it from alleging *any* breach of the concededly-illegal Agreement. *See United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496, (2001) (in fashioning injunctive relief courts should "mould each decree to the necessities of the particular case" (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944))).

b) The Illegal Portions of the Agreement are not Separable.

Second, the contract terms that are illegal, both on face and as interpreted by CollegeAmerica, are not severable from the remainder of the Agreement. Where one provision of a contract is void or unenforceable as contrary to public policy, "a court *may* nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange." Restatement (Second) of Contract § 184(1) ("*Restatement*") (emphasis added); *see also Meyer v. State Farm Mut. Auto. Ins. Co.*, 689 P.2d 585, 593 (Colo. 1984) (citing Restatement § 184) (recognizing the "well-established principle of contract law that where a provision in a contract is void because it is contrary to public policy, the remaining portions of the agreement are

enforceable to the extent the illegal provision can be separated from the valid promises"), *legislatively repealed on other grounds as stated in Schlessinger v. Schlessinger*, 796 P.2d 1385, 1389 (Colo. 1990).

Courts applying this principle under the ADEA have concluded that the presence of an unenforceable charge-filing waiver does not, by itself, necessarily void an entire contract. *See e.g.*, *Wastak*, 342 F.3d at 292; *McCall v. U.S. Postal Serv.*, 839 F.2d 664, 666 (Fed. Cir. 1988). But this analysis rests on application of *Restatement* principles to the facts of each case. Courts *may* enforce the remaining contract provisions, but only if (1) the provision that is void was not "an essential part of the agreed exchange," and (2) the party seeking enforcement "did not engage in serious misconduct." *Restatement* § 184.

Applying those principles here, the illegal provisions of the Agreement are not severable. Initially, the Agreement contains no severability clause. Beyond that, "[i]n determining whether a provision is severable, '[t]he primary objective is to ascertain the intent of the contracting parties, as such intent is manifested by not only the several terms and provisions of the contract itself, but also as such are viewed in the light of all the surrounding circumstances, including the conduct of the parties before any dispute has arisen'" *CapitalValue Advisors, LLC v. K2D, Inc.*, 321 P.3d 602, 606 (Colo. App. 2013) (quoting *John v. United Advert.*, Inc., 439 P.2d 53, 56 (Colo. 1968)). The Court should also consider "the singleness or apportionability of the consideration." *John*, 439 P.2d at 56.

Here, all three of the material terms purporting to place obligations on Ms. Potts violate Section 7(f)(4), either facially or as CollegeAmerica has asserted them against Ms. Potts. *See Supra*, Parts III.A.2–4. All three share a common scheme, in the nature of gag provisions to

prevent and place restrictions on Ms. Potts' communications about CollegeAmerica, particularly with any regulatory body. CollegeAmerica has, at different times, maintained that Ms. Potts' communications with the EEOC violated all three of these terms. CollegeAmerica has also expressly stated that all of the Agreement's exchanged terms formed part of a single exchange. (Ex. 17 at 5 (admitting that "the $7,000 . . . was consideration for all of the commitments made by Ms. Potts in the agreement.").) The $7,000 payment is unitary, and CollegeAmerica seeks to recover it entirely, with no apportionment for partial performance. Further, Mr. Juhlin has testified that the claimed obligation for Ms. Potts to provide prior notice of her complaints (including her EEOC charges) was a provision he "absolutely" wanted, showing that it is an "essential" term of the Agreement. (*See* Trial Tr. ECF No. 150 at 91:23–92:17.)

For all these reasons, the impermissible contract terms and interpretations which CollegeAmerica has asserted to interfere with Ms. Potts' rights, are "essential" to the Agreement, form part of its consideration, and cannot be severed. *Restatement* § 184(1). The Agreement is therefore rendered unenforceable as a whole. *See id.*, Comment a. ("If the performance as to which the agreement is unenforceable is an essential part of the agreed exchange, the inequality will be so great as to make the entire agreement unenforceable."); *cf. Jones v. Feiger, Collison & Killmer*, 903 P.2d 27, 35 (Colo. App. 1994), *as modified on denial of reh'g* (Feb. 2, 1995) (holding that in contingency fee legal services contract, an impermissible term restricting client from unreasonably refusing to settle was "inextricably intertwined" with terms providing for calculation of fees), *rev'd on other grounds*, 926 P.2d 1244 (Colo. 1996).

In addition, the Court's decision whether to enforce any part of the Agreement is discretionary and depends on the conduct of the party seeking enforcement. *Restatement* § 184(1).

"A court will not exercise this discretion in favor of a party unless it appears that he made the agreement in good faith and in accordance with reasonable standards of fair dealing." *Id.* Comment b. "For example, a court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable. *Id.* Likewise, a party that has engaged in "serious misconduct" may not seek to have the remainder of a partially-void contract enforced. *Restatement* § 184(1). Here, CollegeAmerica has actively pursued impermissible interpretations of the Agreement and overbroad waivers, has flip-flopped as to its interpretation of the as Agreement, has actively used it to seek protected EEOC communications from a *pro se* former employee, and is now willfully using the Agreement to seek a judgment against Ms. Potts while attempting to evade this Court's ability to render adjudication and relief. Given these facts, the Court should decline to allow any part of the Agreement to be enforced until it renders judgment on the merits of the EEOC's Section 7(f)(4) claim.

IV. CONCLUSION

As detailed above, all factors supporting a preliminary injunction are met. To preserve the status quo and protect its own ability to render effective adjudication and relief, the Court should preliminarily enjoin CollegeAmerica from asserting any breach of contract claim under the Agreement, or from otherwise using the Agreement in any way to pursue a claim or judgment against Ms. Potts, including in the pending Larimer County action. This relief should remain in place until this Court enters a final adjudication on the merits of the EEOC's claim under 29 U.S.C. § 626(f)(4).

Respectfully submitted this 26th day of March, 2019,

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CERTIFICATE OF SERVICE (CM/ECF)

I certify that on March 26, 2019, I electronically filed the foregoing using the CM/ECF system, which will electronically serve all attorneys of record. Under D.C.COLO.LCivR 5.1(d), "[t]he Notice of Electronic Filing (NEF) generated by CM/ECF constitutes a certificate of service."

s/Nathan D. Foster