

BREYER, J., concurring

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 BREYER, with whom JUSTICE O'CONNOR joins,
concurring.

This case focuses upon a worker who received a payment from her employer and in return promised not to bring an age-discrimination suit. Her promise failed the procedural tests of validity set forth in the OWBPA, 29 U. S. C. §626(f)(1). I agree with the majority that, because of this procedural failing, the worker is free to bring her age-discrimination suit without “tendering-back” her employer’s payment as a precondition. As a conceptual matter, a “tender-back” requirement would imply that the worker 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. Yet such an act of ratification could embody some of the same procedural failings that led Congress to find the promise not to sue itself invalid. For these reasons, as the majority points out, a tender-back precondition requirement would run contrary to Congress’ statutory command. See *ante*, at 4–5. Cf. 1 Restatement (Second) of Contracts §85, Comment *b* (1979) (a promise ratifying a voidable contract “may itself be voidable for the same reason as the original promise, or it may be voidable or unenforceable for some

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other reason”); D. Dobbs, *Law of Remedies* 982 (1973) (hereinafter Dobbs) (“[C]ourts must avoid allowing a recovery that has the effect of substantially enforcing the contract that has been declared unenforceable, since to do so would defeat the policy that led to the . . . rule in the first place”).

I write these additional words because I believe it important to specify that the statute need not, and does not, thereby make the worker’s procedurally invalid promise totally void, *i.e.*, without any legal effect, say, like a contract the terms of which themselves are contrary to public policy. See 1 Restatement (Second) of Contracts, §7, Comment *a*; 2 *id.*, §178. Rather, the statute makes the contract that the employer and worker tried to create voidable, like a contract made with an infant, or a contract created through fraud, mistake or duress, which contract the worker may elect either to avoid or to ratify. See 1 *id.*, §7 and Comment *b*.

To determine whether a contract is voidable or void, courts typically ask whether the contract has been made under conditions that would justify giving one of the parties a choice as to validity, making it voidable, *e.g.*, a contract with an infant; or whether enforcement of the contract would violate the law or public policy irrespective of the conditions in which the contract was formed, making it void, *e.g.*, a contract to commit murder. Compare 1 *id.*, §7, Comment *b* (voidable) with 2 *id.*, §178 and Comment *d* (void). The statute before us reflects concern about the conditions (of knowledge and free choice) surrounding the making of a contract to waive an age-discrimination claim. It does not reflect any relevant concern about enforcing the contract’s substantive terms. Nor does this statute, unlike the Federal Employers’ Liability Act, 35 Stat. 65, as amended, 45 U.S.C. §51 *et seq.*, say that a contract waiving suit and thereby avoiding liability is void. §55. Rather, as the majority’s opinion makes clear, see *ante*, at

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4–5, the OWBPA prohibits courts from finding ratification in certain circumstances, such as those presented here, namely, a worker’s retention of a employer’s payment for an invalid release. That fact may affect ratification, but it need not make the contract void, rather than voidable.

That the contract is voidable rather than void may prove important. For example, an absolutely void contract, it is said, “is void as to everybody whose rights would be affected by it if valid.” 17A Am. Jur. 2d, Contracts §7, p. 31 (1991). Were a former worker’s procedurally invalid promise not to sue absolutely void, might it not become legally possible for an employer to decide to cancel its own reciprocal obligation, say, to pay the worker, or to provide ongoing health benefits— whether or not the worker in question ever intended to bring a lawsuit? It seems most unlikely that Congress, enacting a statute meant to protect workers, would have wanted to create— as a result of an employer’s failure to follow the law— any such legal threat to all workers, whether or not they intend to bring suit. To find the contract voidable, rather than void, would offer legal protection against such threats.

At the same time, treating the contract as voidable could permit an employer to recover his own reciprocal payment (or to avoid his reciprocal promise) where doing so seems most fair, namely, where that recovery would *not* bar the worker from bringing suit. Once the worker (who has made the procedurally invalid promise not to sue) brings an age-discrimination suit, he has clearly rejected (avoided) his promise not to sue. As long as there is no “tender-back” precondition, his (invalid) promise will not have barred his suit in conflict with the statute. Once he has sued, however, nothing in the statute prevents his employer from asking for restitution of his reciprocal payment or relief from any ongoing reciprocal obligation. See Restatement of Restitution §47, Comment *b* (1936) (“A person who transfers something to another believing that

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the other thereby comes under a duty to perform the terms of a contract . . . is ordinarily entitled to restitution for what he has given if the obligation intended does not arise and if the other does not perform”); Dobbs, *supra*, at 994 (restitution is often allowed where benefits are conferred under voidable contract). A number of older state cases indicate, for example, that the amount of consideration paid for an invalid release can be deducted from a successful plaintiff’s damages award. See, e.g., *St. Louis-San Francisco R. Co. v. Cox*, 171 Ark. 103, 113–115, 283 S. W. 31, 35 (1926) (amount paid for invalid release may be taken into consideration in setting remedy); *Koshka v. Missouri Pac. R. Co.*, 114 Kan. 126, 129–130, 217 P. 293, 295 (1923) (the sum paid for an invalid release may be treated as an item of credit against damages); *Miller v. Spokane Int’l R. Co.*, 82 Wash. 170, 177–178, 143 P. 981, 984 (1914) (same); *Gilmore v. Western Elec. Co.*, 42 N. D. 206, 211–212, 172 N. W. 111, 113 (1919).

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. See *post*, at ___ n.1, ___. As I understand the majority’s opinion, it is also consistent with this view, and I consequently concur in its opinion.