In the United States Court Of Appeals
for the Third Circuit

No. 14-2700

Equal Employment Opportunity Commission,
Plaintiff – Appellant,

v.

Allstate Insurance Company, et al.,
Defendants – Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania (No. 01-7042)
the Hon. Ronald L. Buckwalter, presiding

Brief of the Equal Employment Opportunity Commission as Appellant

P. David Lopez
General Counsel

Carolyn L. Wheeler
Acting Associate General Counsel

Jennifer S. Goldstein
Acting Assistant General Counsel

Paul D. Ramshaw
Attorney

Equal Employment
Opportunity Commission
Office of General Counsel
131 M St., NE, Room 5SW18K
Washington, DC 20507

(202) 663-4737
paul.ramshaw@eeoc.gov

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Statement of Jurisdiction

The Equal Employment Opportunity Commission alleges claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12111 et seq.; and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. The district court accordingly had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1343(4) (civil rights action), and 1345 (U.S. as plaintiff).

On March 13, 2014, the district court entered a decision, Joint Appendix Volume I at 6 ("JA-1-6"), *EEOC* docket ("ED") 137,[1] granting Allstate's motion for summary judgment, *Romero I* docket ("RD") 369, and denying the EEOC's motion for summary judgment as to liability, ED-124. The same day the court entered final judgment for Allstate and closed the case. JA-1-4, ED-138. Those orders disposed of all of the

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[1] In September 2012, the district court entered an order consolidating *EEOC v. Allstate Insurance Co.*, No. 01-7042, with *Romero v. Allstate Insurance Co.*, No. 01-3894 ("*Romero I*"), and *Romero v. Allstate Insurance Co.*, No. 01-6764 ("*Romero II*"), for administrative purposes. ED-111. Some of the documents relevant to the cross-motions for summary judgment filed by Allstate and the Commission in No. 01-7042 were filed by the clerk in the docket for No. 01-3894. "ED" refers to the docket in the EEOC's case, No. 01-7042, and "RD" refers to the docket in *Romero I*, No. 01-3894.

claims as to all the parties in this case. The Commission filed a timely notice of appeal on May 8, 2014. JA-1-1, ED-141. Fed. R. App. P. 4(a)(1)(B) (60 days). This court therefore has jurisdiction over this appeal. 28 U.S.C. § 1291; *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 131 (3d Cir. 2014).[2]

Statement of the Issues

1. Whether the district court erred in ruling that Allstate's policy requiring its employee agents to release all their claims in order to continue their careers was not retaliatory per se. This issue was raised in ED-124 at 17–20, objected to in ED-128 at 5–8, and ruled on at JA-1-15–23.

2. Whether the district court erred in ruling that on these facts the employee agents who refused to sign the release did not participate in

[2] The district court had consolidated the Commission's case with the two *Romero* cases, but for administrative purposes only. ED-111. The orders that the district court entered on March 13, 2014, ED-137 and ED-138, entered final judgment for Allstate and closed the Commission's case. The Commission's case can therefore be appealed even though the *Romero* cases are still pending. *See Bergman v. City of Atlantic City*, 860 F.2d 560, 564 (3d Cir. 1988) (important factors permitting appeal in one of two consolidated cases are that the plaintiffs in the two cases are represented by different attorneys and that the cases were not consolidated for trial).

protected opposition activity by doing so. This issue was raised in ED-124 at 20–24, objected to in ED-128 at 18–23, and ruled on at JA-1-24–29.

3. Whether the district court erred in ruling that Allstate's refusal to permit the non-signers to continue their careers selling Allstate products was not an adverse action. This issue was raised in ED-124 at 31–33, objected to in RD-369 at 17–18, and ruled on at JA-1-29–33.

Statement of Related Cases and Proceedings

This Court resolved an earlier appeal in these three related cases. *Romero v. Allstate Ins. Co.*, Nos. 07-4460, 07-4461, & 08-1122, 344 F. App'x 785 (3d Cir. 2009).

Statement of the Case

A. Course of Proceedings

This is an appeal from a final order of the District Court for the Eastern District of Pennsylvania (Buckwalter, J.) granting the defendants summary judgment on all the Commission's claims. JA-1-4–42. ED-137 & ED-138. The order was entered March 13, 2014.

The EEOC filed a complaint in December 2001, ED-1, and an amended complaint in February 2002, ED-2. The amended complaint

alleges that Allstate Insurance Company violated the anti-retaliation provisions of Title VII, the ADEA, and the ADA by requiring its employee agents to release all their claims under those statutes in order to continue selling insurance for the company. ED-2. In 2003, the Commission and Allstate filed cross-motions for summary judgment, and in March 2004, the district court granted the Commission's motion for summary judgment as to liability, ruling that the challenged program violated the anti-retaliation provisions. ED-30. In December 2005, relying on new case authority, Allstate filed a second motion for summary judgment, ED-42, and the district court granted that motion in June 2007. ED-63. The Commission and the *Romero* plaintiffs appealed, and this Court reversed in an unpublished order entered July 29, 2009. *Romero v. Allstate Ins. Co.*, 344 F. App'x 785 (3d Cir. 2009).

In April 2013, the EEOC and Allstate filed cross-motions for summary judgment. ED-124; RD-369. In March 2014, the district court denied the Commission's motion and granted Allstate's. JA-1-6–42, ED-137.[3]

[3] In the *Romero* cases, the district court in February 2014 denied Allstate's motion for summary judgment, ruling that material factual

B. Statement of Facts

For decades, Allstate sold its insurance using primarily "captive agents": i.e., agents who sold only Allstate insurance. These captive agents were Allstate employees, and they were entitled to generous employee benefits including pensions and medical and life insurance. JA-3-410–13, 419, 421 (1997 IRS pre-submission); Rozanski dep. (Ex. 60 to Meehan decl., RD-373) at 33, 35, 220–22, 228–29, 234–35, 237. In 1990, however, Allstate decided that, for financial reasons, it preferred its agents to work as independent contractors rather than as employees. JA-3-413 (1997 IRS pre-submission); 1999 expense reduction plan (Ex. 115 to Meehan decl., RD-373) at 15–16 (ARI 001085–86) (Allstate projected saving more than $174 million by eliminating employee benefits and costs). New agents came on board only in the independent-contractor track, and the company encouraged its employee agents to convert to independent-contractor status, but few employee agents wanted to do that. JA-3-473 (2003 Hutton dep. at 141), JA-3-414 (1997 IRS pre-submission); 1998 field communication package (Ex. 117 to

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disputes prevent summary disposition on whether the plaintiffs signed the release knowingly and voluntarily. JA-1-43–198, RD-454.

Meehan decl., RD-373) at 22–23 (ARI 187889–90) (listing advantages of exclusive agent program); JA-1-57 (February 2014 order denying summary judgment in *Romero I* ("*Romero I* order") at 11); 1997 SOOF compensation comparison (Ex. 120 to Meehan decl., RD-373) at 1 (ARI 061639) (only 2% of employee agents converted to exclusive agents annually).

During the 1990s, employee agents could apply to convert to exclusive agents (independent contractors). JA-1-56 (*Romero I* order at 10). The employee agent had to pay off any loans or advances from Allstate and meet certain production and performance-rating requirements, although the latter two requirements were eliminated in June 1998. *Id.*; 1998 field communication package (Ex. 117 to Meehan decl., RD-373) at 24 (ARI 187891). The agent received no conversion bonus, but acquired a transferable economic interest in his book of business after five years. JA-1-56–57 (*Romero I* order at 10–11). Allstate did not require employee agents converting to independent-

contractor status to sign a release of claims. JA-1-57 (*Romero I* order at 11); JA-2-185 (2012 Hutton dep. at 357).[4]

In 1993, two Allstate employee agents secured Tax Court rulings that they were independent contractors and could report their business deductions on Schedule C. The Eleventh Circuit affirmed these rulings in 1995. *Butts v. C.I.R.*, 49 F.3d 713 (11th Cir. 1995) (per curiam). These rulings threatened the tax-qualified status of the employee benefit plans that Allstate maintained for its employee agents. JA-1-57 (*Romero I* order at 11); 1998 field communication package (Ex. 117 to Meehan decl., RD-373) at 2 (ARI 187869); field communication Q&As (Ex. 121 to Meehan decl., RD-373) at 1 (ARI 096737). Allstate accordingly entered into negotiations with the Internal Revenue Service about whether its employee agents should be classified as employees or independent contractors. JA-1-57–58 (*Romero I* order at 11–12); field communication Q&As (Ex. 121 to Meehan decl., RD-373) at 1 (ARI

[4] Allstate in theory had discretion to reject these applications, but in practice it accepted them if the applicant satisfied the company's criteria. *See, e.g.*, Bright dep. (Ex. 116 to Meehan decl., RD-373) at 648–51 (knew of no conversion applications Allstate denied between June 1998 and November 1999); JA-1-165 (*Romero I* order at 119 n.34). As stated *supra*, the company wanted its employee agents to convert to independent-contractor status.

096737). When the IRS proposed that all of the employee agents be reclassified as independent contractors, Allstate rejected the proposal, pointing out in sworn testimony in June 1997 that the employee agents were long-term employees who "expected to be compensated as employees and receive the fringe benefits that Allstate has traditionally provided . . . , [including pensions] and retiree life and medical benefits." Requiring them to become independent contractors "at this juncture in their careers" would, Allstate concluded, subject them to "severe economic consequences." JA-3-421 (1997 IRS pre-submission at 15); JA-1-58 (*Romero I* order at 12).

In November 1999, Allstate announced its Preparing for the Future ("PFF") Group Reorganization Program ("Program"). JA-1-67 (*Romero I* order at 21). The Program called for terminating almost all of the company's 6,200 employee agents on June 30, 2000. JA-2-320–21 (program information booklet at 8–9); JA-1-67 (*Romero I* order at 21).[5] About 90% of these agents were 40 years old or older. Allstate answers to first interrogatories (Ex. 88 to Meehan decl., RD-373) at 12

[5] A small number of the employee agents were treated differently because of protections afforded by state laws. JA-1-76–77 (*Romero I* order at 30–31).

(interrogatory 11); JA-1-67 (*Romero I* order at 21). Allstate offered these employee agents four options. The first three options required the employee agents to sign a global release of all claims against the company, including any employment-discrimination claims arising out of their employment, their termination, or their conversion to independent-contractor status. JA-2-321 (program information booklet at 9); JA-1-67 (*Romero I* order at 21). An employee agent who signed the release could choose among: (1) converting to independent-contractor status and continuing his career selling Allstate financial products (the "conversion option"); (2) converting to independent-contractor status for a month and then selling his "book of business" or client list (the "sale option"); or (3) leaving Allstate and receiving enhanced severance benefits (the "enhanced-severance option"). JA-2-321 (program information booklet at 9); JA-1-67–68 (*Romero I* order at 21–22). The fourth option, which did not require a release, was leaving Allstate and receiving "base" severance benefits. JA-1-68–69 (*Romero I* order at 22–23).

Employee agents who selected the conversion option (option 1) automatically became "exclusive agents" and were deemed independent

contractors. JA-2-324 (program information booklet at 12); JA-1-67–68 (*Romero I* order at 21–22). Allstate forgave any outstanding loans or advances and provided a conversion bonus of at least $5,000. JA-2-337–38 (program information booklet at 25–26); JA-1-67–68 (*Romero I* order at 21–22). These exclusive agents were subject to production requirements and acquired an economic interest in their books of business after two years. JA-2-324, 328 (program information booklet at 12, 16).

The employee agents formed a significant portion of Allstate's sales force. Allstate responses to 30(b)(6) witness topics (Ex. 39 to Meehan decl., RD-373) at 4 (in November 1999, 41% of Allstate's U.S. agents were employee agents). They knew the company's products and customers. If they had all left the company in June 2000, their departure would have adversely affected the company's performance. JA-3-421 (IRS pre-submission at 15). Allstate therefore wanted many of the employee agents to continue selling the company's products (but as independent contractors rather than employees), and a large percentage of them did. JA-3-445 (PFF program presentation, Ex. 141 to Meehan decl., RD-373, at 12) (Allstate told its employee agents: "We want all of

you to come with us and be a part of that future."); Allstate responses to 30(b)(6) witness topics (Ex. 39 to Meehan decl., RD-373) at 4–5 (number of exclusive agents increased from 6,955 in November 1999 to 12,902 in December 2002).

Employee agents choosing the sale option (option 2) also received a conversion bonus and forgiveness of loans or advances. After working as an independent contractor for one month, they could sell their books of business, subject to Allstate's approval. JA-2-350–351(program information booklet at 38–39); JA-1-68 (*Romero I* order at 22). Employee agents selecting the enhanced-severance option (option 3) received a full year's pay, in addition to being forgiven loans or advances. JA-2-358–359 (program information booklet at 46–47); JA-1-68 (*Romero I* order at 22). Employee agents who refused to sign the release (option 4) received only a "base severance pay" of 13 weeks' worth of pay, with no forgiveness of loans or advances. *Id.*[6]

[6] Two days before announcing the Program, Allstate amended the severance plan that then applied to the employee agents to provide that employees terminated in a group reorganization would receive no benefits under that plan. JA-3-429–30 (amendment to Allstate Severance Pay Plan, Ex. 175 to Meehan decl., RD-373, at ARI 185441–42); JA-1-79–80 (*Romero I* order at 133–34 & n.47).

Thus the only way employee agents could continue their careers selling Allstate products was to sign the release and select the conversion option, becoming exclusive agents. Employee agents who did not sign the release could not, of course, continue to sell Allstate products, because Allstate terminated them. They also faced significant obstacles to any attempts to continue earning their living in insurance sales, or in sales of any kind. Allstate informed the employee agents who left the company that they were subject to covenants not to compete, and that their Allstate customer lists were confidential company property. The agents were accordingly prohibited, Allstate told them, from *ever* soliciting anyone on those lists for business, even business unrelated to Allstate's, and even if the persons were on the list because they were the agent's relatives, personal friends, or social acquaintances. JA-3-466 (PFF Q&As #8, Ex. 206 to Meehan decl., RD-373, at ARI 060225 (Q20); JA-3-469 (PFF Q&As #10, Ex. 207 to Meehan decl., RD-373, at ARI 060215 (Q1); JA-1-77–78 (*Romero I* order at 31–32).

The release was central to the Program. Indeed, Barry Hutton, a corporate designee, testified that without the release, Allstate would

not have implemented the Program. JA-2-185 (2012 Hutton dep. at 354). In the release, the employee was required to "release, waive and forever discharge Allstate Insurance Company . . . from any and all . . . charges, causes of action, . . . or claims for relief . . . arising out of, connected with, or related to, my employment and/or the termination of my employment . . . , or my transition to independent contractor status, . . . including any claim for . . . discrimination prohibited under the [ADEA, Title VII, or the ADA]." JA-2-379 (PFF election form and general release, Ex. 54 to Heinz decl., RD-372, at 1). Allstate did not allow the employee agents to change the wording of the release in any way. Allstate responses to third set of requests for admission (Ex. 62 to Meehan decl., RD-373) at 28 (request 61).

The Program imposed severe financial pressure on the employee agents to sign the release. When the district court recently denied Allstate summary judgment on the validity of the release in *Romero I*, it stated that the Program appeared to present "a true Hobson's choice":

"Plaintiffs essentially had two options: (1) execute the Release in order to either continue as Exclusive Agents, be able to sell their book of business, or receive enhanced severance; or (2) refuse to sign the

Release, give up an agency into which they had heavily invested time and money, face certain termination with no retirement or health benefits, receive inconsequential to no financial remuneration, face non-competition restrictions, and be forever barred from contacting anyone on a customer list, built over many years, for any commercial purpose whatsoever. . . . In other words, the choice presented by Allstate reasonably appeared to be either sign the Release or face likely financial ruin." JA-1-182 (*Romero I* order at 136). As a result of this financial pressure, only about 20 of the 6,200 employee agents refused to sign the release. Allstate response to EEOC's first requests for admissions (Ex. 1a to Miller decl., ED-124) at 8 (request 12).

C. District Court's Decision

The Commission had argued that the Program was retaliatory on its face, but the district court disagreed. The court ruled that the Program simply offered the terminated agents three different kinds of enhanced benefits (i.e., benefit packages to which the employee agents were not otherwise entitled) if they signed a release of claims, and offering terminated employees enhanced benefits if they release their claims is commonplace and perfectly lawful. JA-1-17–20.

The EEOC had relied on *EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir. 1992), in which the Commission had challenged a provision in a collective bargaining agreement. The provision allowed the employer to terminate an employee's grievance proceeding if the employee challenged the action being grieved in any other forum, including by filing a charge with the EEOC. The Seventh Circuit had declared the provision retaliatory per se. 957 F.2d at 427–31. The district court here rejected the Commission's reliance on *Board of Governors* on two grounds. First, it ruled that the Seventh Circuit had not held that a retaliatory policy, without more, is actionable. Second, the district court pointed out that in *Board of Governors* the employees had a contractual right to have their grievances processed, while here the employee agents did not, before Allstate adopted the Program, have a contractual right to convert to exclusive agents, but only the opportunity to submit an application, which Allstate had the discretion to reject. JA-1-20–23.

The Commission next argued that it could show retaliation using the normal proof scheme: the hold-outs participated in protected activity by refusing to sign the release, and because they refused to sign, Allstate refused to allow them to continue selling the company's products (the

adverse action). The district court rejected this argument on several grounds.

First, declining to sign a release does not, the court reasoned, constitute a threat to sue the employer, and more specifically does not constitute a threat to sue the employer alleging a violation of the anti-discrimination statutes. Second, even if refusing to sign the release was a protected activity, Allstate's withholding the conversion option was not an adverse action, because the employee agents were not otherwise entitled to a guaranteed conversion. Finally, the court pointed out that the EEOC had conceded that the sale and enhanced-benefits options were lawful, and it ruled that giving the terminated agents a third option cannot make the Program unlawful. JA-1-26–33.

The Commission also contended that the Program's release requirement constituted pre-emptive retaliation. The district court disagreed, ruling that the EEOC had failed to show that Allstate took an adverse action to prevent protected activity by an employee agent about to engage in it. JA-1-33–38. The district court also rejected the Commission's argument based on § 503(b) of the ADA, 42 U.S.C. § 12203(b), ruling that the EEOC had presented no evidence that any

employee agent was exercising his rights under the ADA or intended to. JA-1-39–41.

Summary of Argument

The Program provision requiring the employee agents to release their claims in order to continue working as Allstate agents was a retaliatory policy per se, and the district court erred in ruling the provision lawful. Employment policies can be facially retaliatory just as they can be facially discriminatory. The primary purpose of the anti-retaliation provisions is to maintain "unfettered access" to the anti-discrimination statutes' remedial mechanisms, and a decision allowing an employer to require its employees to release their claims in order to keep their jobs would authorize employers to eliminate that access.

In ruling that the Program's release requirement was lawful, the district court erroneously relied on the well-settled rule that employers may lawfully seek releases from terminated employees in exchange for enhanced severance benefits. That general rule does not authorize the conversion option's release requirement because with respect to the many employee agents who became exclusive agents, their relationship

with Allstate was not terminated and conversion was not a "severance" benefit.

In addition to challenging the conversion option's release requirement as retaliatory on its face, the Commission maintains that the holdouts participated in protected opposition activity when they refused to sign the release that Allstate required them to sign if they wanted to continue their careers as Allstate insurance agents. On these facts, the holdouts' refusal to sign the release communicated to Allstate that they were considering suing the company for discrimination.

Moreover, the Commission showed an adverse action and a causal connection. The adverse action was Allstate's refusal to permit the holdouts to continue their careers as Allstate agents, and the causal connection was the Program's provision requiring the release before allowing conversion.

Standard of Review

This Court reviews district court orders granting summary judgment *de novo*. *Lomando v. United States*, 667 F.3d 363, 371 (3d Cir. 2011) (review of orders granting summary judgment is plenary); *Meditz v. City of Newark*, 658 F.3d 364, 369 (3d Cir. 2011) (review of orders

granting summary judgment is *de novo*). The Commission contends that the district court made several legal errors in granting Allstate summary judgment, and this Court reviews such contentions *de novo*. *Lomando*, 667 F.3d at 371 (district court's legal conclusions are reviewed *de novo*).

Argument

I. The Program was retaliatory per se, because it required the employee agents to release all their claims in order to continue their careers with the company.

The Program required the employee agents to release their claims in order to continue working as Allstate agents. The Program was therefore a retaliatory policy and, like the policy challenged in *EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir. 1992), it violated the anti-retaliation provisions on its face.

The district court ruled that *Board of Governors* did not hold that a retaliatory policy is an actionable violation. But *Board of Governors* stated repeatedly that the challenged policy was retaliatory on its face and therefore an unlawful policy that could not stand. "[A] retaliatory policy," the court stated, "constitutes a *per se* violation of Section 4(d) [of the ADEA, 29 U.S.C. § 623(d)]." 957 F.2d at 429. *See also id.* at 431 ("In

sum, *Section 4(d) prohibits policies* that penalize employees who exercise their statutory rights under the ADEA. . . . [W]e fully agree with the conclusion . . . that *Article 17.2 violates Section 4(d)* with respect to ADEA claimants . . . *because it is [retaliatory] on its face*.") (emphasis added; citation omitted).

The policy in *Board of Governors* violated the ADEA's anti-retaliation provision, 29 U.S.C. § 623(d), because it authorized the employer to withhold a privilege of the employees' employment—the right to have their grievances processed—if they filed a charge with the EEOC. Here, the Program violated the anti-retaliation provisions because it authorized the employer to withhold a privilege of the employees' employment—the offer in the conversion option to continue their careers as Allstate agents—if they refused to release all their claims.

The Commission is not arguing that all releases violate the anti-retaliation provisions. Most do not. It is well settled, as discussed *infra*, that when an employer terminates some of its employees, it may lawfully offer them enhanced severance benefits if they release their claims. But it is quite a different matter for an employer to tell its

employees that they have to release all their claims in order to keep their jobs, as Allstate did here. If that were lawful, an employer could prevent its employees from ever effectively using the anti-discrimination statutes' remedial mechanisms, and that would thwart the primary purpose of the anti-retaliation provisions.

A. The district court erred by extending the rule allowing releases in exchange for enhanced severance benefits to the conversion option.

The district court erred because it applied a rule that does not govern here. The district court relied on the well-settled rule that when an employer terminates an employee, the employer may lawfully offer that employee enhanced severance benefits in exchange for a general release of claims. *See, e.g.*, *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 288–95 (3d Cir. 2003) (holding that release plaintiff signed was valid); *Isbell v. Allstate Insurance Co.*, 418 F.3d 788, 793 (7th Cir. 2005) (valid release requires consideration, and terminated employee not signing the release is not entitled to that consideration). Indeed, in the ADEA context, Congress specifically condoned agreements in which a terminated employee releases his age-discrimination claims, as long as the employee signs the agreement knowingly and voluntarily, and

the employer offers additional consideration—consideration beyond what the employee was already entitled to—in exchange for the release. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998) (ADEA waivers must comply with the Older Workers Benefit Protection Act ("OWBPA")); *Wastak*, 342 F.3d at 293–93 (release satisfied OWBPA's consideration requirement); *Miller v. Eby Realty Grp.*, 241 F. Supp. 2d 1247, 1256 (D. Kan. 2003) (discussing OWBPA's consideration requirement).

The general rule applies when the employees in question are really terminated: i.e., after the termination, the employees no longer have a business relationship with the company and no longer perform the same services for it that they performed before they were terminated. The rule governs the level of "*severance* benefits" the employer can offer, and the term "severance benefits" means benefits the employer provides to former employees after the employment relationship between them has been severed. *See Black's Law Dictionary* (9th ed. 2009) ("severance pay" is "[m]oney (apart from back wages or salary) paid by an employer to a dismissed employee").

The Commission is not challenging that general rule. Instead, the Commission's point is that the general rule does not apply to the Program's challenged provision because Allstate did not really terminate its relationship with many of its employee agents. Although Allstate terminated all its employee agents (qua employees), the company wanted many of them to continue selling and servicing its products, to continue performing the same services for the company that they had performed before they were terminated. To facilitate this result, Allstate offered the employee agents the conversion option, under which the employee agents would stop selling and servicing Allstate products as employees one day and the next day start selling and servicing Allstate products to and for the same clients, but now as independent contractors. Thus employee agents who became exclusive agents were not terminated in any normal sense, and the conversion option was not a "severance" benefit, but rather the opportunity to continue their Allstate careers.

Thus with respect to those employee agents who became exclusive agents—and any employee agents who wanted to continue their careers as Allstate insurance agents—the Program, instead of offering them

severance benefits, required them to release all their claims against the company in order to continue performing the same services for Allstate that they had been performing for decades. It is unlawful for an employer to require its employees to release all their claims against the company in order to continue working for the company, as Allstate did here.

B. It is unlawful for an employer to require its employees to release all their claims against the company in order to continue working for the company.

The Supreme Court has stated repeatedly that the anti-retaliation provisions should be interpreted in a way that serves their "'primary purpose'": ensuring that employees retain "'unfettered access to [the anti-discrimination statutes'] remedial mechanisms.'" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 346 (1997)) (brackets added). The district court's decision blatantly violates this imperative because it interprets the anti-retaliation provisions in a manner that allows an employer to *eliminate* its employees' access to those remedial mechanisms. Under the district court's reasoning, it would be lawful for an employer to terminate all its employees and then hire them back to do the same jobs

only if they sign a release of all their claims. Indeed, extending that logic, it would be lawful for an employer to do that every month or before issuing every paycheck. This interpretation of the anti-retaliation provisions would allow employers to immunize themselves from any liability for violating the anti-discrimination statutes. That cannot be correct. *See Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 106 (D. Mass. 1998) (allowing employers to "functionally insulate themselves from ADEA suits" would "offend[ ] the intent of Congress in enacting" the statute).

The district court pointed out that the Commission did not cite a single decision holding that it is unlawful for an employer to require its employees to release all their claims in order to continue working for the company. The district court is correct: the Commission knows of no such decision. But the district court failed to acknowledge that Allstate has not cited a single decision—except for *Isbell,* which Allstate and the district court misread—holding that it is *lawful* for an employer to require its employees to release all their claims in order to continue working for the company.

The *Isbell* court did not address a claim that the Program was a per se retaliatory policy because it required employee agents to release their claims in order to continue their careers with Allstate. Isbell did not claim that the policy was retaliatory per se, but rather raised a related individual claim: that Allstate retaliated against her by refusing to allow her to continue her career unless she signed the release.[7] In rejecting her retaliation claim, however, the court re-characterized her claim. The *Isbell* court rejected her retaliation claim because she offered no evidence that her *termination*—not Allstate's refusal to permit her to continue her career—was caused by her refusal to sign the release. The court's rationale for rejecting her retaliation claim was as follows:

> Isbell was not a victim of retaliation. *Her reason for termination* was the same for all employees at Allstate who were similarly situated. . . . *Isbell did not lose her job because* she refused to sign the Release. *She lost her job for the same reason* 6,400 other employee agents of Allstate lost theirs, including those who

[7] The *Isbell* court described her claim as follows:

> Isbell advances a novel theory of retaliation, claiming that Allstate retaliated against her when it refused her "the opportunity to work for Allstate albeit under a different contract unless she signed the release." Isbell thus argues that Allstate could not require her to sign the Release as a condition to becoming an independent contractor with the Company.

Isbell, 418 F.3d at 793.

> signed the Release—because Allstate had decided to eliminate all employee agent positions with the Company.

418 F.3d at 793 (emphasis altered). Thus the only adverse action the *Isbell* court considered in resolving her retaliation claim was her termination, not Allstate's refusal to allow her to continue selling the company's products. Not once in the two paragraphs rejecting Isbell's retaliation claim did the *Isbell* court even refer to Allstate's refusal to allow her to continue selling the company's insurance unless she signed a release. Since the Seventh Circuit resolved a different claim, its decision does not assist this Court in resolving the Commission's claim.

Nor did any of the other decisions that Allstate or the district court relied on hold that an employer may lawfully preclude any of its employees who refuse to sign a release of claims from continuing their careers. The question did not arise in *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995), because none of the employees whom the employer terminated there were offered the option of continuing to work for that employer. (The district court relied on *DiBiase*'s ruling that the policy challenged here did not violate the ADEA's prohibition on age discrimination on its face because the policy contained no reference to age. JA-1-16–17. That ruling does not assist Allstate here,

because the Commission is challenging the conversion option's release requirement, which is spelled out in the Program documents.) Nor did the issue arise in *EEOC v. SunDance Rehabilitation Corp.*, 466 F.3d 490 (6th Cir. 2006). There the defendant eliminated the charging party's position and offered her severance benefits she was not otherwise entitled to if she signed a release. The Commission did not allege that SunDance required its employees to sign releases in order to keep their jobs.[8] Indeed, the only case Allstate relied on in which the affected employees were free to maintain their employment was *EEOC v. Sears, Roebuck & Co.*, 857 F. Supp. 1233 (N.D. Ill. 1994), and in *Sears* the employees who chose to keep their jobs were *not* required to sign a release. *Id.* at 1238 n.2. (Allstate cited *Sears* for the proposition that declining to sign a release in a normal termination setting is not protected opposition activity. Allstate motion for summary judgment,

[8] *See also Bottge v. Suburban Propane*, 77 F. Supp. 2d 310 (N.D.N.Y. 1999) (alleged retaliatory act was withholding enhanced severance benefits when terminated employee refused to sign a release); and *Graves v. Fleetguard, Inc.*, No. 98-5893, 1999 WL 993963 (6th Cir. Oct. 21, 1999) (defendant offered terminated employee new position conditioned on his withdrawing an EEOC charge he had filed; court held this was legitimate settlement offer).

RD-369, at 6, 14. The Commission's point, however, is that the conversion option is hardly a normal termination setting.)

The district court also relied on *Local Union No.1992, Int'l Bhd. of Elec. Workers v. Okonite Co.*, 189 F.3d 339 (3d Cir.1999) (addressing contract interpretation under the WARN Act), *Corneveaux v. CUNA Mut. Ins. Grp.*, 76 F.3d 1498 (10th Cir.1996), *Griffin v. Kraft Gen. Foods*, 62 F.3d 368 (11th Cir.1995) (per curiam), *EEOC v. Nucletron Corp.*, 563 F.Supp.2d 592 (D.Md.2008), and *Prestileo v. Sears, Roebuck & Co.*, No. 99–2180, 2000 WL 190257 (E.D.Pa. Feb. 2, 2000). JA-1-15–19. Again, to the extent that these cases addressed the legality of a release, the release was offered in exchange for enhanced severance benefits in a normal termination setting. None of them addressed the lawfulness of requiring employees to release their claims in order to continue working for the employer.

In addition, Allstate relied on *EEOC & Yon v. UBS Brinson, Inc.*, Nos. 02-3745 & -33748, 2003 WL 133235 (S.D.N.Y. Jan. 15, 2003). That decision is also distinguishable. The plaintiffs there sued alleging that the employer had failed to satisfy all the requirements for a valid waiver imposed by OWBPA. The district court's principal holding was

that OWBPA does not create an independent cause of action; it merely renders nonconforming waivers invalid. *Id.* at *3–5. Second, the release included a provision requiring any former employee who signed the release and then sued the company to tender back his severance benefits and pay any fees and costs the employer incurred in securing dismissal of his claim. The plaintiffs contended that this provision violated the ADEA's anti-retaliation provision, 29 U.S.C. § 623(d), and the district court dismissed this claim because the employer had never implemented the challenged provision. *Id.* at *5.

Third, the individual plaintiff maintained that the employer violated 29 U.S.C. § 623(d) because when she asked to see the release before signing the employment agreement the employer proffered, which required her to sign the release later, the employer withdrew its offer of seven additional months of employment. The district court dismissed this claim as well, ruling that the plaintiff's request to see the release was not protected activity and that the employer's withdrawal of the employment offer was not an adverse action. *UBS Brinson*, 2003 WL 133235, at *7. This last ruling is the only ruling in the decision arguably relevant to the Commission's claims against Allstate. The

Commission believes that the withdrawal of an offer of employment is clearly an adverse action. In any event, the ruling is distinguishable because *UBS Brinson* held that the employer's withdrawal of the employment offer was not a cognizable adverse action *under the OWBPA*, which the court had already held does not create a cause of action. *Id.* That ruling is irrelevant here because the Commission is not basing its retaliation claim on an OWBPA violation.

Since the Program's provision requiring employee agents to release their claims in order to continue their careers with the company was retaliatory per se, the court should rule that the waivers signed by the employee agents who selected the conversion option were invalid. *Cf. Coventry v. U.S. Steel Corp.*, 856 F.3d 514, 524–25 (3d Cir. 1988) (invalidating waiver plaintiff signed where facts suggested plaintiff's signature "did not result from a volitional choice between real options").

II. The holdouts' refusal to sign the release was, on these facts, protected opposition activity, and Allstate retaliated against the holdouts by barring them from continuing their careers.

The anti-discrimination statutes make it unlawful for an employer "to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this [act]." 29

U.S.C. 623(d) (ADEA); *see also* 42 U.S.C. §§ 2000e-3(a) (Title VII) & 12203(a) (ADA). A retaliation plaintiff establishes a prima facie case by showing protected activity, a causal connection, and a materially adverse action. *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 320 (3d Cir. 2008).

The district court ruled that the holdouts' refusal to sign the release was not protected opposition activity. While a terminated employee's decision not to sign a proffered release is not always protected opposition activity, the holdouts' refusal to sign the release was, on these facts, protected opposition activity. The purpose of the release was presumably to avoid or minimize successful legal challenges to the Program. Allstate wanted to maximize the number of employee agents who signed the release, and the company pressured them to sign the release by imposing "severe economic consequences" on those who refused to sign it. The financial pressure was so severe that only 0.3% of them (20 out of 6,200) resisted it.

An employee agent who refused to sign the release received a maximum of 13 weeks of pay and no forgiveness of outstanding loans or advances, but if he signed the release he received 52 weeks of pay and

forgiveness of outstanding loans or advances. There were no other significant differences between these two options. On these facts, an employer would reasonably conclude that the only reason an individual would refuse to sign the release—thereby giving up 39 weeks of pay and other benefits—was the desire to preserve the right to challenge the Program. This is at least a reasonable inference to draw on summary judgment. *See Hampton v. Borough of Tinton Falls Police Dep't*, 98 F.3d 107, 112 (3d Cir. 1996) (in ruling on summary judgment, court "must give the non-moving party the benefit of all reasonable inferences").

The district court reasoned that even if a terminated employee's decision not to sign a release communicates to the employer that the employee is considering suing the employer, it does not necessarily communicate that the employee is considering suing the employer for employment discrimination. Here, however, since almost all of the 6,200 employee agents terminated by Allstate were 40 years old or older, the company knew that challenges to the Program would likely include claims of age discrimination. On these facts, the holdouts' refusal to sign the release communicated to Allstate that the holdouts believed

the Program was unlawful and that they wanted to preserve their right to challenge its legality under at least the ADEA.

Plaintiffs claiming retaliation based on opposition activity must show they reasonably and in good faith believed that the conduct or policy they opposed was unlawful. *See Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006). The holdouts believed the Program was unlawful, and that belief was reasonable, because, as argued *supra*, the Program was unlawful. In the alternative, even if this Court rules that the Program was not unlawful, the holdouts' belief was reasonable because a reasonable person could have believed that the Program was unlawful. *See, e.g.*, *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1076 (N.D. Tex. 2000) (employees reasonably believed employer's English-only policy was unlawful).

The district court noted that the Commission had conceded that the sales option and the enhanced-severance option were lawful, and it reasoned that adding a third option, giving the employee agents more choices, could not be unlawful. The Commission disagrees. The Commission did not challenge the sales and enhanced-severance options because they can both be deemed lawful under the rule allowing

employers to secure releases in exchange for enhanced severance benefits. As argued *supra*, however, the conversion option's release requirement cannot be deemed lawful under that rule, and it frustrates the primary purpose of the anti-discrimination statutes' anti-retaliation provisions.

When the holdouts refused to sign the release, Allstate retaliated against them by preventing them from continuing their careers as Allstate agents. Preventing them from continuing their careers was materially adverse, regardless of whether that action is understood as a termination or a refusal to rehire. *See, e.g.*, *Weiler v. R&T Mech., Inc.*, 255 F. App'x 665, 668 (3d Cir. 2007) (termination is a "materially adverse action" for purposes of retaliation claim); *McGowan v. City of Eufala*, 472 F.3d 736, 742 (10th Cir. 2006) (in retaliation claim, termination is "obviously an adverse action"); *Squibb v. Mem'l Med. Ctr.*, 497 F.3d 775, 788 (7th Cir. 2007) (failure to hire is materially adverse action for retaliation claim).[9] Moreover, the causal connection between their protected activity and the adverse action is dictated by

[9] The district court cited *Isbell* in ruling there was no adverse action, JA-1-29–31 & n.13, but as the Commission argued *supra*, the district court's reliance on *Isbell* was misplaced.

the Program itself: if an employee agent refused to sign the release, he could not become an exclusive agent and continue his career as an Allstate agent. *See, e.g.*, *EEOC v. Bd. of Governors*, 665 F. Supp. 630, 635 (N.D. Ill. 1987) (EEOC showed prima facie case of retaliation, with the causal connection established by the challenged provision in the collective bargaining agreement).

Conclusion

The fundamental purpose of the anti-retaliation provisions is to maintain "unfettered access" to the remedial mechanisms in the anti-discrimination statutes. *See Burlington N.*, 548 U.S. at 64. If employers were permitted to require their employees to release all their claims in order to keep their jobs, the employers would be able to prevent their employees from using those mechanisms effectively. This Court should therefore reverse the district court's summary judgment order and instruct the district court to enter summary judgment for the Commission with respect to Allstate's liability for imposing a policy that is retaliatory per se.

Respectfully submitted,

P. David Lopez
General Counsel

Carolyn L. Wheeler
Acting Associate General Counsel

Jennifer S. Goldstein
Acting Assistant General Counsel

s/ Paul D. Ramshaw
Attorney

Equal Employment
Opportunity Commission
Office of General Counsel
131 M St., NE, Room 5SW18K
Washington, D.C. 20507
(202) 663-4737

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Under Third Circuit LAR 28.3(d), I certify that I am a member of the bar of this Court.

August 12, 2014 s/ Paul D. Ramshaw

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I certify that I will mail ten printed and bound copies of this brief to the clerk of this Court tomorrow, August 13, 2014, and one copy to the following lawyer for the Allstate appellees:

Donald R. Livingston
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., NW, Suite 400
Washington, DC 20036

August 12, 2014 s/ Paul D. Ramshaw