No. 14-2700

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE CO.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Hon. Ronald L. Buckwalter, Case No. 2:01-cv-07042

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STATEMENT OF THE ISSUES

In a group reorganization program, Allstate terminated the employee contracts of virtually all of its employee sales agents in order to move to a solely independent contractor agent force. The EEOC first claims that Allstate's group reorganization program was a "retaliatory policy" that "violated the anti-retaliation provisions on its face," because Allstate offered all of the terminated agents three enhanced post-termination options in exchange for a general release, one of which was the option to start a new business as an independent contractor for Allstate. EEOC Br. 19. But the EEOC limits that claim to "those employee agents who became [independent contractors]" or wanted to. EEOC Br. 23. The question presented with respect to the EEOC's first claim is:

1. Whether Allstate "per se" discriminated against those terminated agents who chose to become independent contractors, because of activity protected by the antidiscrimination statutes, when it offered all terminated agents three options that provided additional benefits to which they were otherwise unentitled in exchange for a general release, including the option to become an independent contractor.[1]

[1] This issue was raised in Allstate's Motion for Summary Judgment, RD-369-1, at pp. 5-12, and opposition to the EEOC's motion, ED-128, at pp. 5-17, objected to in the EEOC's Motion for Summary Judgment, ED-124, at pp. 14-20, and opposition to Allstate's motion, RD-401, pp. 5-13, and ruled on at JA-15-JA-23.

The EEOC also claims that the terminated agents' decisions not to sign the general release would have conveyed to Allstate their intent to challenge the Program as unlawful age discrimination, and Allstate therefore retaliated under the ADEA by declining to provide them the additional benefits available only to those who signed the release. EEOC Br. 33-36. The issue raised by the EEOC's second claim is:

2. Whether Allstate discriminated against the terminated employees who declined to sign a general release because of opposition to age discrimination when Allstate did not provide them the enhanced benefits, exceeding the base benefit package, that were available only to terminated employees who signed the release.[2]

STATEMENT OF RELATED CASES AND PROCEEDINGS

At the district court, this case was consolidated for administrative purposes with two other cases involving claims by former Allstate employees, *Romero v. Allstate Insurance Co.*, No. 01-3894 (*Romero I*) and *Romero v. Allstate Insurance Co.*, No. 01-6764 (*Romero II*). Those two cases remain pending in the district court. This Court resolved an earlier appeal in all three cases in *Romero v. Allstate*

[2] This issue was raised in Allstate's Motion for Summary Judgment, RD-369-1, at pp. 12-18, and opposition to the EEOC's motion, ED-128, at pp. 18-23, 24-27, objected to in the EEOC's Motion for Summary Judgment, ED-124, at pp. 20-24, and opposition to Allstate's motion, RD-401, pp. 15-21, and ruled on at JA-24-JA-33.

Ins. Co., Nos. 07-4460, 07-4661, and 08-1122, 344 F. App'x 785 (3d Cir. 2009), and an appeal involving an unrelated issue in *Romero II* in 2005, *Romero v. Allstate Corp.*, 404 F.3d 212 (3d Cir. 2005).

The issue of the enforceability of the release remains pending before the district court in *Romero*, and has been scheduled for trial beginning May 18, 2015.

STATEMENT OF THE CASE

As part of a major business reorganization, Allstate eliminated its employee agent programs and terminated the employment of all of its employee agents except where prohibited by state law. The terminated agents were not entitled to severance pay, to own or sell an economic interest in the books of business serviced as employee agents, or to take that book of business into a new contract with Allstate as an independent contractor. Through the group reorganization program, however, Allstate offered the terminated agents those benefits, among others. All agents were offered the same four options: base severance (which did not require a release), or enhanced severance in the form of either higher cash severance pay, the opportunity to sell an economic interest in the book of business, or the opportunity to start a new business with that book (all of which required a general release of claims). All agents were terminated, whether or not they signed the release. All agents who signed the release were provided their chosen enhanced benefit option, whether or not they made a charge or filed a lawsuit. And

all agents who did not sign the release were provided the base severance option they selected.

The question in this appeal is whether, by offering as one of its enhanced severance packages the opportunity for a former employee agent to become an independent contractor for Allstate, along with a cash bonus and forgiveness of certain debts to Allstate, Allstate engaged in unlawful discrimination against its employees because those employees opposed unlawful employment discrimination or participated in an antidiscrimination proceeding. As the Seventh Circuit has already concluded with respect to the same group reorganization program at issue here, the antidiscrimination statutes' plain terms give a clear answer: No. Offering all terminated employees a choice of incentives in exchange for a general release of claims is not discriminating against them on account of any employee's (or all employees') opposition to discrimination or participation in an antidiscrimination proceeding. *Isbell v. Allstate Ins. Co.*, 418 F.3d 788 (7th Cir. 2005).

A. Statutory Framework

The Age Discrimination in Employment Act ("ADEA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the Americans with Disabilities Act ("ADA") all make it unlawful for an employer to "discriminate" against any employee "because such individual … has opposed any practice made unlawful by" the relevant statute or "because such individual … has made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding, or litigation under" that statute. 29 U.S.C. § 623(d) (ADEA); *see also* 42 U.S.C. § 2000e-3(a) (Title VII) (substantially identical); 42 U.S.C. § 12203(a) (ADA) (substantially identical).

To make out a *prima facie* case of discrimination under these antiretaliation statutes, the EEOC must establish three elements. First, the EEOC must show that an employee or employees engaged in protected activity, meaning "opposition to employment discrimination, [or] the employee's submission of or support for a complaint that alleges employment discrimination." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013). Second, the EEOC must establish "the employer took a materially adverse action against" the employee or employees. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 231 (3d Cir. 2007). Third, the EEOC must establish that "there was a causal connection between the protected activity and the employer's action." *Id.* Causation "require[s] proof that the desire to retaliate was the but-for cause of the challenged employment action." *Nassar*, 133 S. Ct. at 2528.[3]

The antidiscrimination statutes permit employees to waive any discrimination claims they may have. 29 U.S.C. § 626(f)(1) (allowing waiver of

[3] "Because the anti-retaliation provisions of the ADA and ADEA are nearly identical, as is the anti-retaliation provision of Title VII," this Court has "held that precedent interpreting any one of these statutes is equally relevant to interpretation of the others." *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567 (3d Cir. 2002).

ADEA claims provided waiver meets certain requirements); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (waiver of Title VII claims permitted if waiver is "voluntary and knowing"). In order for a waiver to be valid, it must be supported by consideration. 29 U.S.C. § 626(f)(1)(D) (ADEA); *see Local Union No. 1992, Int'l Bhd. of Elec. Workers v. Okonite Co.*, 189 F.3d 339, 348-49 (3d Cir. 1999) ("The requirement that employees sign a release as a condition of receiving severance pay is a common provision in modern severance agreements," but "the employee must receive consideration in exchange for the waiver."). That is, an employer must provide the employee some value "in addition to anything of value to which the individual already is entitled." 29 U.S.C. § 626(f)(1)(D). Thus, employees who sign releases must necessarily be provided value that employees who do not sign the release do not receive.

B. Allstate's Agent Sales Force

Allstate is an Illinois insurance company that sells insurance and related products. JA-48 (District Court Opinion on the Validity of the Release ("Release Op.")). Over the years, Allstate has changed its agent programs to enable Allstate and its agents to effectively compete in the insurance industry. JA-393 (Decl. of Barry Hutton, Allstate Vice President of Distribution Support ("Hutton Decl.")). By 1999, Allstate had an agency force of approximately 15,200 agents, comprised

of both employee agents and independent contractor agents, working under several different contracts. JA-48 (Release Op.).

1. Allstate's Employee Agent Programs

Prior to 1984, Allstate sold its insurance products primarily through employee agents who worked under a contract known as the R830 Agreement. JA-49 (Release Op.). In 1984, Allstate introduced a new employee agent program known as the Neighborhood Office Agent Program. *Id*. Agents hired after introduction of the Neighborhood Office Agent Program were employed under a new contract known as the R1500 Agreement. *Id.* Existing R830 agents were given the option of joining the R1500 program. *Id.*

Allstate adopted the Neighborhood Office Agent Program in response to flat productivity and the aggressive use of local independent contractor sales agents by its competitors. JA-394 (Hutton Decl.). The new program was designed to provide employee agents more entrepreneurial discretion. JA-49 (Release Op.). For example, agents selected and leased their own office location, paid their own office expenses, and were able to hire their own support staff through a temporary agency. JA-50 (Release Op.). Qualifying office expenses were reimbursed by Allstate through an office expense allowance, but as originally designed, agents in the Neighborhood Office Agent Program could decide to incur expenses which exceeded that allowance in an effort to generate more sales and income. *Id.*

Employee agents could receive an advance from Allstate against their office expense allowance. *Id.* This advance had to be repaid if an employee was terminated. JA-51 (Release Op.).

Under both the R830 and R1500 employee agent agreements, the customer accounts sold and serviced by the agents belonged exclusively to Allstate. *Id*. Employee agents had no economic interest in those accounts that they could sell, exchange, or otherwise transfer. *Id.* Neither the R830 Agreement nor the R1500 Agreement provided severance pay in the event of termination. JA-53 (Release Op.). Allstate's severance pay benefit plans did not apply to employees "terminated under the terms of any group reorganization/restructuring benefit plan or program." *Id.* (quoting Allstate Severance Pay Plan).[4]

2. Allstate's Independent Contractor Agent Programs

In 1990, Allstate introduced an independent contractor agent program known as the Exclusive Agency ("EA") Program. JA-55 (Release Op.) The

[4] For years prior to the Preparing for the Future Group Reorganization Program, the severance pay plan excluded employees terminated under the terms of any form of group reorganization/restructuring benefit plan or program. 1998 Allstate Severance Pay Plan, Zolner Decl. ¶ 38, Ex. 38, RD-399, at A046690. The district court stated in *Romero* that Allstate amended its severance plan only two days prior to the announcement of the Program to preclude terminated employees from receiving severance pay if they were terminated under a group reorganization plan. JA-180 (Release Op.). The plan amendment referred to by the district court merely confirmed that the Program was a group reorganization program. *See* JA-430 (1999 Amendment to Allstate Severance Pay Plan).

contracts under the independent contractor program were designated R3000, an eighteen-month provisional employee contract for new agents, and R3001, the independent contractor contract. *Id.* All new agents after 1990 were in the independent contractor program. *Id.* It differed from Allstate's employee agent programs in several respects. The agents were independent contractors with more flexibility in their office operations, had a transferable economic interest in the books of business that they produced and serviced, and received commissions that were greater than the commissions payable to employee agents. JA-56 (Release Op.); JA-395 (Hutton Decl.).

Employee agents could apply to convert to the independent contractor program. JA-56 (Release Op.). Employee agents had no right to become independent contractor agents; Allstate had the sole discretion to approve or deny their applications. JA-22-JA-23 (District Court Opinion on the EEOC's Claim ("Op."). Agents who were permitted to convert to the independent contractor program did not accrue an immediately transferrable interest in the book of business serviced under their prior employee agent contracts; instead, that economic interest did not accrue until the agent had served as an independent contractor agent for five years. JA-57 (Release Op.). They also did not receive any bonus for converting. *Id.*

3. Allstate's Agreement with the IRS Regarding Employee Classification

In the mid-1990s, several employee agents under the Neighborhood Office Agent Program obtained tax court rulings that they should be classified as independent contractors rather than employees for federal income tax purposes. *Id*. To preserve the employee status of the Neighborhood Office Agent Program and the tax-qualified status of Allstate's employee benefit plans, Allstate engaged in extensive negotiations with the IRS over the next several years. JA-58 (Release Op.). As part of those negotiations, Allstate explained to the IRS that it could not simply reclassify its employees as independent contractors without immediately placing the tax-qualified status of the employee benefit plans in jeopardy and disrupting employee benefits, with concomitant serious consequences to the agents. JA-384-JA-385 (2012 Hutton Dep.). Allstate reached an agreement with the IRS in 1998 that allowed Allstate to continue that program as an employee program. JA-58 (Release Op.).

Under the agreement with the IRS, Allstate was required to make changes to the Neighborhood Office Agent Program to exert greater control over the agents and their office expenditures. JA-58-JA-59 (Release Op.). The agreement required Allstate to, *inter alia*, set mandatory office hours for the agents, maintain performance evaluation criteria that evaluated agents on the basis of adherence to

Allstate polices, and ensure that no employee agent incurred certain office expenses in excess of their expense allowance. *Id.*

C. The Preparing for the Future Group Reorganization Program

1. Allstate's Decision to Reorganize Its Agent Sales Force

The changes wrought by the agreement with the IRS ultimately impaired the flexibility and competitiveness of the Neighborhood Office Agent program for employee agents. JA-394-JA-395 (Hutton Decl.). Moreover, by January 1999, Allstate was managing and administering multiple agent programs and contracts, each of which had different compensation structures or commission schedules, different office expense allowance formulas (or none at all), different rules regarding the hiring and pay of support staff, and different performance and evaluation standards. JA-63 (Release Op.); JA-395 (Hutton Decl.); JA-475 (2003 Hutton Dep.). Thus, in June 1999, Allstate began to explore whether all of its agency programs should be consolidated, so that agents would operate under a single program. JA-63 (Release Op.); JA-396 (Hutton Decl.). Barry Hutton, then an Assistant Vice President in Allstate's Sales Department, was charged with spearheading this inquiry. JA-63-JA-64 (Release Op.). Mr. Hutton and his team concluded that moving to a single agent program was necessary to allow Allstate and its agents to effectively compete. JA-395-JA-396 (Hutton Decl.). As Mr. Hutton explained, administering multiple different agent programs:

> made it very difficult for the company to be nimble in product changes and pricing changes, the various things that we had to figure out how in the world to do it and if it's new products, how do we pay all these different kinds of agent groups. We couldn't be quick enough in the marketplace and efficient enough to support them, not to mention that managers had to one day talk as if they were talking to an independent contractor and another day talk as if they were an employee with this set of date commission rates and another date this set of commission rates. It just wasn't efficient.

JA-392 (2012 Hutton Dep.). The independent contractor program was the single program of choice, because it had become Allstate's most successful program. JA-JA-396 (Hutton Decl.); JA-471 (2003 Hutton Dep.) (noting that Allstate conducted a study comparing the productivity of the employee agent programs with the independent contractor agent program and concluded that the productivity of the employee agent programs was shrinking, whereas productivity was growing in the independent contractor program). Mr. Hutton's team did not consider the costs of providing benefits to employee agents in its analysis. JA-396 (Hutton Decl.).[5]

In late September 1999, the Hutton team recommended that Allstate discontinue its employee agent programs. JA-66 (Release Op.). In October 1999, Allstate made the decision to go forward with moving to a single-contract agent program, believing this move was necessary "to strengthen the ability of Allstate

[5] After Allstate had adopted the Hutton team's recommendation to move to a single-contract independent contractor agent program, it generated a document reflecting expense reductions and increases in light of the transition. That document indicated an expense reduction of $174 million after factoring in changes in compensation, payroll tax, Allstate agency program, office expense allowance and similar program elimination, and employee benefits. Ex. 115 to RD-373, at ARI 001085-86 (November 1999 expense reduction plan).

and its agents to build profitable agencies and effectively compete in the marketplace." JA-400 (Decl. of Edward Liddy, Allstate's CEO); *see also* JA-66 (Release Op.). In November 1999, Allstate announced the reorganization program, called the Preparing for the Future Group Reorganization Program. JA-67 (Release Op.).

2. Options for Terminated Employee Agents under the Program

With limited exceptions due to state law requirements, Allstate terminated the employment contracts of all 6,200 R830 and R1500 employee agents effective no later than June 30, 2000. JA-67 (Release Op.) Allstate offered every terminated agent the same four post-employment termination options. *Id.*

Base Severance Option: Although terminated agents were not otherwise entitled to severance pay, JA-53 (Release Op.), the Program provided each terminated agent base severance pay of up to 13 weeks' pay if they chose not to sign a general release of claims against Allstate (the "Release"). JA-8 (Op.). In addition, Allstate covered any lease payment obligations for terminated agents who selected this option. JA-87 (Release Op.). Among the *Romero* plaintiffs, one opted to receive base severance pay. JA-90 (Release Op.). In total, fewer than 25 terminated agents selected the base severance option. *Id.*

Three of the options provided extra benefits in exchange for signing the Release, as follows:

Exclusive Agency Option: The terminated agent could enter into an R3001 contract, known as the Exclusive Agency Program, as an independent contractor. JA-7 (Op.). As part of this option, the terminated agent would receive a conversion bonus of at least $5,000, forgiveness of any office expense allowance advance owed to Allstate, and a new, transferable economic interest in the book of business the agent had sold and serviced as an employee agent after two years as an independent contractor. *Id*. Among the *Romero* plaintiffs, seventeen selected this option. JA-88 (Release Op.). Thirteen of them subsequently sold the economic interest in the book of business for amounts ranging from $100,000 to $910,000. JA-88-89 (Release Op.).

Sale Option: The terminated agent could become an Exclusive Agent independent contractor for the purpose of acquiring and selling a new economic interest in the book of business written as an employee agent within 30 days of becoming an independent contractor. JA-8 (Op.). The terminated agent would also receive a conversion bonus of at least $5,000 and forgiveness of any office expense allowance advance owed to Allstate. *Id.* Among the *Romero* plaintiffs, twelve selected the sale option and sold the economic interest in the books of business that they acquired for amounts ranging from $75,000 to $435,000. JA-89 (Release Op.).

Enhanced Severance Option: The terminated agent could receive an enhanced amount of severance pay equal to one year's pay. JA-8 (Op.). Allstate would also forgive any office expense allowance advances owed, and relieve the agent of certain lease or advertising obligations the agent incurred as an employee agent. *Id.* Among the *Romero* plaintiffs, two selected enhanced severance pay. JA-89 (Release Op.).

Terminated agents who chose not to enter into an independent contractor relationship with Allstate, whether they signed the Release or not, were subject to certain limited non-compete and non-solicitation provisions under the original employment contracts that they had signed. JA-86 (Release Op.). Specifically, under the R830 Agreement, terminated agents agreed that for two years following termination, they would not solicit or sell insurance (i) within one mile from any Allstate location from which they solicited or sold Allstate insurance during the preceding year or (ii) to a customer to whom they had sold Allstate insurance. *Id.* Under the R1500 Agreement, terminated agents agreed that for one year following termination, they would not solicit the purchase of competing products or services (i) within one mile of an Allstate location or (ii) from a customer who was an Allstate customer at the time of termination and to whom the terminated agent sold Allstate insurance or whose identity the agent had learned through Allstate employment. *Id.* Allstate explained that if a customer initiated contact with his or

her prior agent or responded to general advertising, that was not prohibited solicitation. JA-78 (Release Op.). A terminated agent could not take a list of Allstate customers with him following termination, as the customer lists were confidential company information. *Id.*

The Release required for selecting one of the three enhanced severance options provided that the terminated employee waived all claims against Allstate related to the employee's employment, termination, or transition to independent contractor status:

> I hereby release, waive, and forever discharge Allstate Insurance Company…from any and all liability, actions, charges, causes of action, demands, damages, entitlements or claims for relief or remuneration of any kind whatsoever…arising out of, connected with, or related to, my employment and/or the termination of my employment and my R830 or R1500 Agent Agreement with Allstate, or my transition to independent contractor status, including, but not limited to, all matters in law, in equity, in contract, or in tort, or pursuant to statute, including any claim for age or other types of discrimination prohibited under the Age Discrimination in Employment Act of 1967, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Employee Retirement Income Security Act ("ERISA"), …or any other federal, state, or local law or ordinance or the common law.

JA-9 (Op.). The Release did not bar the terminated employees from filing charges with the EEOC, and Allstate specifically informed one of the *Romero* plaintiffs that he could file a charge. JA-91 (Release Op.). Many terminated employee agents did file charges with the EEOC. JA-9 (Op.). Allstate did not penalize any

agent for filing a charge, and still paid those agents the full benefits to which they were entitled under their chosen Program option. JA-92 (Release Op.).

D. Procedural History

1. Prior Proceedings

The plaintiffs in the *Romero* cases are a group of terminated employee agents who filed two separate cases in 2001 asserting claims related to the Preparing for the Future Program (*Romero I*) and unrelated amendments to Allstate's pension plan (*Romero II*). JA-92-JA-93 (Release Op.). The EEOC also filed its suit in 2001, alleging that offering terminated employees a continuing relationship with Allstate as independent contractors, along with a cash bonus and debt forgiveness, in exchange for a general release of claims constituted retaliation per se against all of the 6,200 employee agents Allstate had terminated as part of the Preparing for the Future Program. JA-15 (Op.). The district court consolidated all three cases for administrative purposes. JA-95 (Release Op.).

In 2007, the district court granted judgment to Allstate in all three cases. JA-94 (Release Op.). The *Romero* plaintiffs and the EEOC appealed, and in 2009 this Court vacated the district court's decision and remanded the case for additional discovery. *Romero*, 344 F. App'x at 793-94. This Court did not address the merits of the EEOC's claims. *Id.* at 790 n.9. On remand the case was assigned to a different district court judge, the parties engaged in extensive discovery, and filed a

new round of summary judgment motions related to the Release. JA-95-JA-96 (Release Op.). Allstate moved for summary judgment on the EEOC's complaint and, in *Romero*, on the validity of the Release. The EEOC and the *Romero* plaintiffs filed cross-motions on the same issues. JA-6 (Op.); JA-96 (Release Op.).

2. The District Court's Decision

The district court denied the motions for summary judgment on the validity of the Release filed by Allstate and the *Romero* plaintiffs, holding there was a genuine issue of material fact as to whether the Releases were knowingly and voluntarily signed. JA-43-JA-198. Further proceedings are therefore pending in the district court to determine the validity of the Release.[6]

The district court granted Allstate's motion for summary judgment on the EEOC's complaint, however, JA-6-JA-42. The district court first rejected the EEOC's argument that the Program was facially retaliatory because it "took away a right to continued employment and conditioned any further employment on the employee's release of rights to engage in protected conduct." JA-20. The district court reasoned that it was "well established that a release of claims used in connection with termination of employment is not, in and of itself, a per se

[6] The EEOC's extended factual recitation of how, in its view, the Program "imposed severe financial pressure on the employee agents" (EEOC Br. 13), is thus beside the point here. Whether in fact the decision to sign the Release was involuntary is a question being decided in the district court and has no bearing on the issues in this appeal, which turn on the complete lack of connection between the Program and protected activity.

retaliatory policy," JA-17, so long as "an employer offers something in addition to what the terminated employee is entitled" to receive without signing a release, JA-21. Because each of the Program's three options "provided some form of enhanced benefits," it was lawful under those well-established principles. JA-19.

The district court concluded that the EEOC's "entire argument is premised on the faulty assumption that the Program discriminatorily doled out an absolute right that was part and parcel of the employee agents'" employment, specifically "the right to convert to independent contractor status." JA-22. That premise was faulty because, the district court concluded, "[p]rior to the announcement of the Program, employee agents had the *opportunity* to apply to convert to independent contractor status," but not a *right* to convert. JA-22-JA-23. After the Program was announced and the agents were terminated, however, the district court found they were offered a "new right to convert" that was "a benefit to which the employees were not otherwise entitled." JA-23. In short, "the provision of such additional benefits in exchange for the signature of a release waiving a federal claim is not a per se retaliatory policy." *Id.*

The district court noted that the EEOC conceded that the sale and enhanced severance pay options "provided benefits to which employee agents were not otherwise entitled and, thus, the mere offer of such options would not constitute per se retaliation." JA-32. Therefore, "it makes little sense to find that by adding a

fourth option—conversion to an independent contractor status"—Allstate "suddenly engaged in actionable retaliation." JA-32-JA-33.

The district court likewise rejected the EEOC's contention that it had established the elements of a retaliation claim with respect to the small number of terminated employees who declined to sign the Release. As to protected activity, the district court "declin[ed] to make the tenuous inference that employee agents' mere refusal to sign constituted some sort of opposition to discrimination that Allstate should have understood to be protected activity" when the "mere refusal to sign a release … does not clearly signal that the individual intends to participate in *any* litigation, let alone litigation which challenges some form of discrimination or other protected activity under the federal anti-discrimination statutes." JA-27-JA-29. As to an adverse action, the district court reiterated that the "right to convert was never part and parcel of the original employment agreement," JA-31, and therefore the "consequent withholding of benefits to which the employee is not otherwise entitled" when a terminated employee declines to sign a release is not an adverse employment action. JA-29. The district court noted that the Seventh Circuit had rejected precisely the same claim that "Allstate retaliated against [a terminated employee] when it refused her the opportunity to work for Allstate albeit under a different contract unless she signed the release." JA-30 (quoting *Isbell*, 418 F.3d at 793) (internal quotation marks omitted).

Finally, the district court rejected the EEOC's claims that the terminated employees who *signed* the Release had engaged in protected activity and been retaliated against, JA-33-JA-38, and that Allstate had violated a provision of the ADA prohibiting interference with rights protected under that Act, JA-39-JA-41. The EEOC has not appealed the district court's grant of judgment to Allstate on these claims, and has therefore waived them. *Ethypharm S.A. France v. Abbott Labs.*, 707 F.3d 223, 231 n.13 (3d Cir. 2013) ("We have consistently held that '[a]n issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue ... will not suffice to bring that issue before this court.'") (citation omitted; alterations in original).

SUMMARY OF ARGUMENT

An employer only retaliates in violation of the antidiscrimination statutes if it takes an adverse action against an employee because that employee engaged in protected activity, *i.e.*, opposed discrimination or participated in an antidiscrimination proceeding. In its primary argument, the EEOC makes no attempt to show any of the required elements in this calculus: that all or any of Allstate's 6,200 terminated employee agents engaged in protected activity and that Allstate took an adverse action against them because of such activity. Instead, the EEOC invokes statutory purpose and contends that Allstate's offering of the opportunity to terminated agents to enter into a contractual relationship with

Allstate in exchange for a release of all claims against the company (discrimination-related or otherwise) constituted "retaliation per se" against those agents who selected the independent contractor option because it was contrary to the purpose animating the antiretaliation provisions (if not their text). Because this Court must apply the antidiscrimination statutes according to their plain terms, and the EEOC does not and cannot demonstrate how its per se retaliation theory satisfies the statutes' terms, its claim must fail.

Moreover, it is well-established that offering terminated employees additional benefits in exchange for signing a release of claims does not constitute retaliation. The EEOC acknowledges as much. And that is precisely what Allstate did. The EEOC agrees that it was entirely proper for Allstate to offer enhanced severance pay, the option to take an economic interest in the book of business serviced as an employee agent and quickly sell it, and much of the Exclusive Agency option package, including the cash bonus and forgiveness of office expense allowance debts. But it contends that including the option to enter into an independent contractor relationship through the Program rendered the Program facially retaliatory—at least as against the individuals who selected that option. Yet the EEOC does not dispute the district court's conclusion that the opportunity to enter into an independent contractor arrangement under the Program was a new benefit to which *terminated* employees were not otherwise entitled. That being the

case, it is no different than any of the other enhanced benefits the EEOC concedes were lawful to offer.

The EEOC rests its argument on the assertion that these employees were not "really" terminated. That is both wrong on the facts and irrelevant as a matter of law. Their employment was really terminated, and the opportunity to become an independent contractor through the Program was appropriate consideration regardless, because it was a new benefit that was not part and parcel of the employment relationship. The EEOC's parade of extreme hypotheticals is entirely divorced from the facts of this case.

The EEOC's attempt to satisfy the statutes' elements with respect to the terminated employees who declined to sign the Release fares no better. It suffers the fatal flaw that merely declining to sign a general release of claims does not convey any opposition to employment discrimination, much less opposition to age discrimination. The EEOC points to no evidence—only speculation—that Allstate would have been aware that individuals declining to sign were opposing age discrimination. And even if declining to sign the Release could constitute protected activity, the EEOC has failed to show that Allstate took any adverse employment action against those terminated employees. Failing to provide them the benefit of a bargain they declined to make is not an adverse employment

action, but the natural consequence of allowing employees to choose to enter into releases in exchange for consideration—or not—at their option.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's "grant of summary judgment de novo, applying the same standard as did the district court." *Slagle v. Cnty. of Clarion*, 435 F.3d 262, 263 (3d Cir. 2006).

II. ALLSTATE DID NOT VIOLATE THE ANTIDISCRIMINATION STATUTES BY OFFERING INCENTIVES TO TERMINATED EMPLOYEES IN EXCHANGE FOR A RELEASE OF CLAIMS.

The antidiscrimination statutes prohibit only what their terms encompass: discrimination because of two expressly delineated categories of protected activity—opposition to discrimination and participation in an antidiscrimination proceeding. They do not provide the EEOC a roving license to police employer policies with which it disagrees. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995) ("Title VII … is not a general regulation of the workplace but a law which prohibits discrimination. The statute does not constrain employers from exercising significant other prerogatives and discretion in the course of the hiring, promoting, and discharging of their employees."). The EEOC makes no attempt to connect its per se retaliation theory to the statutory requirements, but instead attempts to establish retaliation in the absence of any

protected activity or connection between that protected activity and Allstate's decisions regarding the Program. The mere offer of a release does not meet these statutory elements and therefore does not amount to facial retaliation.

The EEOC's "per se" theory founders, in any event, on the EEOC's concessions that it is entirely permissible for an employer to offer enhanced severance benefits in exchange for a release, that the enhanced severance pay and sale option that Allstate offered were lawful severance benefits, and that the employees who selected those options were, in the EEOC's terms, "really" terminated. Accordingly, the EEOC's purportedly "facial" theory is, in actuality, a claim of discrimination only as applied to those terminated employee agents who selected the option to become independent contractors (or the amorphous group of agents who wanted to but selected some other option), because those agents were not, in the EEOC's view, "really" terminated. By definition, this is not a facial claim at all, as it depends upon facts that do not appear on the face of the policy. And it fails on both the law and the facts. There is nothing legally unique about the "severance" context with respect to the lawfulness of offering enhanced benefits in exchange for a release—the critical test is whether some additional, different benefit was offered in exchange for the release, which was the case here. And on the facts, the agents' employment relationships with Allstate were completely terminated. That the terminated agents were also offered the

opportunity to become business owners and enter into a materially different relationship with Allstate did not alter the effectiveness of the end of their employment.

A. The Antidiscrimination Statutes Prohibit Only Discrimination Because of Protected Activity.

1. The Antidiscrimination Statutes Must Be Applied According to Their Terms.

As the Supreme Court has recently reiterated, statutory text matters with respect to retaliation claims: It is "incorrect to infer that Congress meant anything other than what the text does say on the subject of retaliation." *Nassar*, 133 S. Ct. at 2530 (interpreting Title VII). Here, the EEOC begins and ends its per se retaliation claim without invoking the terms of the discrimination statutes at all. Instead, the EEOC contends that it is enough to state a claim for retaliation if it identifies some action that, in the EEOC's view, transgresses the purpose of the antiretaliation provisions—maintaining "unfettered access to [the anti-discrimination statutes'] remedial mechanisms." EEOC Br. 24 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) ("*BNSF*")).

But invocation of statutory purpose is not enough. In the antidiscrimination context, as anywhere, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Financial*

Servs., Inc., 557 U.S. 167, 175 (2009) (internal quotation marks omitted) (interpreting the ADEA). Indeed, the requirement to hew to the statutes' plain text is of particular importance when addressing releases of discrimination claims, because "refusing to recognize a statutorily compliant and otherwise valid waiver would be equally contrary to statutory policy," notwithstanding arguments by the EEOC that enforcing a valid release "would hinder [its] efforts to enforce" the antidiscrimination statutes. *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 293 (3d Cir. 2003). The EEOC's "recourse … to policy arguments" cannot overcome the plain text of the statute. *Id.* Thus, this Court has been clear that even with an antiretaliation provision that "should be liberally construed in favor of protecting" employees, a court may not "ignore clear statutory language." *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010) (interpreting antiretaliation provision under ERISA).

The EEOC's only authority for its purpose-based argument, *BNSF*, does not stand for the proposition that the antiretaliation provisions prohibit any activity that the EEOC believes might hinder unfettered access to the antidiscrimination statutes' remedies. To the contrary, *BNSF* stands for the uncontroversial principle that purpose can illuminate the meaning of the text of particular elements. *See* 548 U.S. at 59-60 (interpreting the term "discriminate against"). It also reiterates that the statute prohibits discrimination because of protected activity that the employee

has engaged in—the very statutory element the EEOC ignores (because it is entirely absent in this case). *See id.* at 59 (noting Title VII's antiretaliation provision prohibits discrimination because an employee "has 'opposed' a practice that Title VII forbids or has 'made a charge, testified, assisted, or participated in' a Title VII" proceeding). In any event, the Program did not hinder access to remedial measures; it merely offered terminated employees the choice to decide "whether the value of any claims" they might have "was worth surrendering for the enhanced benefits," *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 729 (3d Cir. 1995)—a choice the antidiscrimination statutes preserve, *see* 29 U.S.C. § 626(f).

Because Congress used "special care in drawing so precise a statutory scheme," there is no basis for reading a broad prohibition of anything the EEOC believes might fetter access to remedial measures into a "statute as precise, complex, and exhaustive as Title VII." *Nassar*, 133 S. Ct. at 2530. In short, given the statutes' clear language, "it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope." *Id.* at 2528.

2. The EEOC Has Not Met the Statutory Requirement to Prove that Allstate Discriminated Because of Protected Activity.

There are two plain statutory requirements that the EEOC's per se retaliation theory blithely overlooks. The first is that there must be, at a bare minimum, some antecedent protected activity for the employer to be discriminating against. There

is no possibility of retaliation under the statutes' terms unless an employee "has opposed any practice made unlawful by" the relevant statute or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under" that statute. 29 U.S.C. § 623(d) (ADEA); *see also* 42 U.S.C. § 2000e-3(a) (Title VII); 42 U.S.C. § 12203(a) (ADA).

Thus, even where a release specifically targets discrimination charges, *i.e.*, filing a discrimination charge with the EEOC—which this Release does not, JA-22 n.7 (Op.)—courts have repeatedly rejected the EEOC's contention that merely offering such a release violates the antiretaliation provisions. *See EEOC v. SunDance Rehab. Corp*., 466 F.3d 490, 492, 500-01 (6th Cir. 2006) (addressing an agreement that "condition[ed] severance pay on a promise not to file a charge with the EEOC" and holding "we are not persuaded by the EEOC's argument that SunDance's mere offer of the Separation Agreement to all employees terminated in the reduction in force, without more, amounts to facial retaliation under the four statutes at issue here"); *EEOC v. Nucletron Corp*., 563 F. Supp. 2d 592, 594, 598 (D. Md. 2008) (addressing an agreement "conditioning the award of severance benefits upon the terminated employee's agreement not to file a discrimination charge" and holding that the "mere offer of the severance agreement is insufficient to constitute discrimination in the retaliation context"); *cf. Moran v. DaVita Inc*., 441 F. App'x 942, 945, 947 (3d Cir. 2011) (rejecting claim that offering

"additional consideration" if terminated employee signed a release was retaliation under analogous state law because the "contention that the offering of the Release was retaliation per se is unsupported and unpersuasive").

That the employer did not facially retaliate by offering a release with a charge-filing ban did not leave the employees in *SunDance* and *Nucletron* without other recourse. Rather, as the Sixth Circuit explained in *SunDance*, their recourse lies in the opportunity to "accept the agreement and argue later that parts of it may be unenforceable." *SunDance Rehab. Corp.*, 466 F.3d at 501; *see also Whitehead v. Okla. Gas & Elec. Co.*, 187 F.3d 1184, 1191-92 (10th Cir. 1999) (holding failure to meet the requirements for a valid waiver under the Older Workers Benefit Protection Act results in invalidity of waiver of ADEA claim but is not an independent cause of action). Indeed, that is what all but one of the *Romero* plaintiffs did, and the district court is continuing to hold proceedings on those plaintiffs' claims that the Release is unenforceable under the totality of the circumstances because it was not knowingly or voluntarily entered. But, as the district court held, that does not mean that any invalidity constitutes "a substantive violation of the anti-retaliation statutes." JA-39 (Op.). Offering a general release does not itself violate the antidiscrimination statutes for the simple reason that there cannot be discrimination on account of protected activity when there is no protected activity.

The EEOC relies on *EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir. 1992), as the sole support for its attempt to establish retaliation in the absence of a showing that any employee asserted any particular discrimination claim and suffered an adverse action because of that protected activity. *See* EEOC Br. 19-20. The policy at issue in *Board of Governors* dictated that the employer would withdraw a contract benefit upon an employee's exercise of his right to file an EEOC charge. 957 F.2d at 425. That is entirely different from offering employees the choice, through a release, to decide whether the value of any accrued claims was worth surrendering in exchange for consideration, which this Court has held does not even ask—much less require—an employee to forgo his rights under the antidiscrimination statutes. *DiBiase*, 48 F.3d at 729 (employer offering consideration in exchange for a release "did not ask its terminated employees to give up their statutorily or constitutionally created *rights* to be free prospectively of various forms of discrimination") (emphasis in original). Moreover, in *Board of Governors* the policy at issue had been invoked to penalize an employee who had actually engaged in protected activity (filing a charge), 957 F.2d at 426-27, so the court's references to a "*per se* violation," *id.* at 429, were pure *dicta*. *See SunDance Rehab. Corp.*, 466 F.3d at 498 (distinguishing *Board of Governors* because in that case the "employer actually took an adverse action against the employee because the employee had pursued the statutorily protected activity of

filing a charge with the EEOC"); *Nucletron Corp*., 563 F. Supp. 2d at 598 (distinguishing *Board of Governors* because in that case "the employer had enforced [a policy] against employees who had filed charges with the EEOC").

The factual setting of *Board of Governors* was important because it established that the employee—who had no individual choice with respect to whether to release claims in exchange for some benefit but was subject to a collectively bargained agreement penalizing his charge-filing rights—had in fact pursued an age discrimination charge. 957 F.2d at 426-27. It was because the employee filed a charge of age discrimination that the employee was barred from pursuing other dispute resolution opportunities that non-charge filers had by right of the collective bargaining agreement. *Id*.

The policy here, on the other hand, differentiated in treatment of terminated employees, if at all, on the basis of whether they signed a general release—which has no necessary connection to federally protected discrimination claims or opposition. *See* pp. 46-51, *infra*. Indeed, the EEOC cannot even establish that all of the terminated employees it claims were retaliated against because they decided to release all claims even had age discrimination, Title VII, or disability claims to release. That raises the other critical element that the EEOC's per se retaliation claim is missing: but-for causation. The Supreme Court has recently made clear that "a plaintiff making a retaliation claim … must establish that his or her

protected activity was a but-for cause of the alleged adverse action by the employer." *Nassar*, 133 S. Ct. at 2534. Under that standard, merely showing that "the motive to discriminate was one of the employer's motives" would be insufficient. *Id.* at 2523. Thus, even if the EEOC could establish that everyone offered the Release engaged in some protected activity by signing, or not signing it—which it has not attempted to do—the EEOC would still have to show that Allstate discriminated because of that protected activity connected to discrimination claims—as opposed to, for example, making decisions based on a wish to minimize litigation costs generally in connection with the Program. Again, the EEOC has not attempted and cannot make this showing.

B. Offering Additional Benefits in Exchange for Signing a General Release Is Not Discrimination Because of Protected Activity.

1. The Antidiscrimination Statutes Permit Releases If Supported by Additional Benefits to which the Terminated Employees Are Not Otherwise Entitled.

As the EEOC agrees, it is a "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." EEOC Br. 21. That principle is amply supported by cases from this Court and others. *See, e.g.*, *DiBiase*, 48 F.3d at 730 (holding that "condition[ing] the right to expanded benefits on an employee's blanket waiver of all accrued claims," including ADEA claims, does not violate the ADEA's discrimination provisions); *Isbell*, 418 F.3d at

793 (holding individual who declined to sign Release under the Preparing for the Future Group Reorganization Program "was not a victim of retaliation" because the Program offered "various incentives and benefits in exchange for the release"); *SunDance Rehab. Corp*., 466 F.3d at 501; EEOC Br. 29 (collecting cases).

The EEOC's attempt to draw artificial distinctions among the types of benefits that qualify as enhanced severance, however, must fail. *See* EEOC Br. 22, 27. The legal test does not turn on whether the new consideration offered could properly be described as a "severance" benefit, much less whether the severance benefit was only cash, or was also, in part, a new business relationship with the employer. Rather, the important question is whether the benefit offered in exchange for a release is truly consideration in the sense that it is a thing of value to which the employee was not already entitled. *See Graves v. Fleetguard, Inc.*, No. 98-5893, 1999 WL 993963, at *4-5 (6th Cir. Oct. 21, 1999) (rejecting retaliation claim where offered consideration was new position); *Quattrone v. Erie 2 Chautaqua-Cattaraugus Bd. of Coop. Educ. Servs.*, No. 08-CV-367, 2011 WL 4899991, at *10 (W.D.N.Y. Oct. 13, 2011) (rejecting employee's claim that an "offer of employment in [a school] program, conditioned upon signing the Settlement Agreement Release and Waiver, was retaliatory *per se*"), *aff'd*, 503 F. App'x 12 (2d Cir. 2012). Indeed, even the EEOC agrees that the sale option was a permissible enhanced severance benefit (EEOC Br. 34), although it does not fit the

EEOC's dictionary definition of "severance pay" (EEOC Br. 22) and resulted in a 30 to 60-day business relationship with Allstate.

The EEOC attempts to distinguish *Graves* as involving only a settlement of an existing claim. EEOC Br. 28 n.8. The EEOC does not explain why that would make a difference. Even before an employee files suit, a release is a settlement of a (potential) claim, so the EEOC raises a distinction without a difference. In any event, the Sixth Circuit's primary holding was that because the employer "was under no obligation to transfer or rehire" the terminated employee, "offering him a position, but with a condition attached [(a general release)], was not an adverse employment action." *Graves*, 1999 WL 993963, at *5. So long as the new business relationship is a benefit to which the terminated employee was not already entitled following termination—as is the case here—an employer's offering of that business relationship in exchange for a release is a valid transaction.

2. The Program Is Lawful Because It Offered Terminated Employees Additional Incentives to which the Terminated Employees Were Not Otherwise Entitled.

As the district court held, each of the Program's three options "provided some form of enhanced benefits" to the terminated employees. JA-19. With respect to the conversion option specifically, the terminated agents were offered a "new right to convert" that was distinct from the prior opportunity to convert and was "a benefit to which the employees were not otherwise entitled." JA-23 (Op.).

Accordingly, the Program satisfied the well-established rule permitting employers to offer enhanced severance benefits in exchange for a release of claims.

The Seventh Circuit agreed, upholding the Program against precisely the same retaliation claim as the EEOC brings here. *Isbell*, 418 F.3d at 793. That case involved an employee, Doris Isbell, whose employment agreement was terminated during the same Program at issue in this case. *Id*. at 793. She chose to accept base severance, and thus no Release was required or executed. She then sued Allstate, alleging unlawful retaliation under the ADEA. The Seventh Circuit rejected her claim. *Id.*

The EEOC attempts to negate the Seventh Circuit precedent by contending that Isbell's and the EEOC's retaliation allegations are different. EEOC Br. 26. However, the Seventh Circuit characterized Isbell's retaliation claim *precisely* as the EEOC characterizes its own claim here. *Compare* EEOC Br. 20 (claiming it was unlawful to "withhold … the offer in the conversion option to continue their careers as Allstate agents … if they refused to release all their claims"), *with Isbell*, 418 F.3d at 793 (characterizing Isbell's claim as alleging it was unlawful to "require her to sign the Release as a condition to becoming an independent contractor with the Company").

The EEOC insists that although the Seventh Circuit described Isbell's claim in this way, it actually only decided a *different* claim, which is whether Isbell's

termination was lawful—not, the EEOC says, the "refusal to permit her to continue her career." EEOC Br. 26. But under Isbell's and the EEOC's theory of the case—that in fact, the employee agents were not all terminated by the Program, but only effectively terminated if they declined to sign the Release (EEOC Br. 23)—termination and refusal to allow conversion are simply two different ways of describing the same act. *See* EEOC Br. 35 (contending that the terminated agents suffered a materially adverse action "regardless of whether that action is understood as a termination or a refusal to rehire"). Thus, it is not surprising that the Seventh Circuit referred to the claim in both ways. However described, the Court plainly rejected it: "An employee who refuses to sign a release will not be offered the same deal as a terminated employee who is willing to sign the release." 418 F.3d at 793. The same result pertains here.

The EEOC concedes that Allstate lawfully offered terminated employees additional benefits by offering them the sale option and the enhanced severance pay option, noting that those options are lawful "under the rule allowing employers to secure releases in exchange for enhanced severance benefits." EEOC Br. 34-35. Thus, if these were the only two choices offered the employee agents, the EEOC would agree this case falls squarely within the cases correctly holding that offering enhanced severance benefits in exchange for a release is not retaliatory.

The EEOC hinges its retaliation argument solely on the existence of the third option, the opportunity to run an independently-owned business launched by the transfer from Allstate of an economic interest in the agent's book of business. The EEOC asserts that by adding the third option, Allstate transformed a lawful severance plan into unlawful retaliation. However, by having three post-termination options instead of two, Allstate agents were better off, not worse. It is nonsensical to argue, as the EEOC does here, that the addition of a more desirable option converts a compliant release into a release that simultaneously discriminates against both those who entered into the Release and those who did not. The additional option only benefited the employees, and served the statutory goal of allowing employers and employees to reach a resolution of any claims, outside of the courts and administrative process, to the betterment of both parties. *Wastak*, 342 F.3d at 293 (holding that "refusing to recognize a statutorily compliant and otherwise valid waiver would be equally contrary to statutory policy").

But in any event, even examining the conversion option in isolation, Allstate lawfully offered the terminated agents that option as additional consideration in exchange for the Release, for two reasons: (1) the conversion option offered under the Program was a new benefit linked solely to the Program that was not part and parcel of the agents' employment relationship and (2) the agents' employment had been "really" terminated (EEOC Br. 23) under the Program.

(a) The opportunity to enter into a contractual relationship under the Program was a new benefit distinct to the Program and not part and parcel of the employment relationship.

The EEOC's argument depends upon the premise that the Program "authorized [Allstate] 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." EEOC Br. 20. As the district court correctly concluded, that premise is faulty. JA-22-JA-23.

The EEOC acknowledged below that the Exclusive Agency option provided agents "who signed the release … some benefits to which they were not otherwise entitled," including "an absolute guarantee to convert to the R3001 contract," the conversion bonus, and the forgiveness of any office expense allowance debt. EEOC Mot. for Summ. J., ED-124, at 14. Those acknowledged new benefits describe *every* element of the consideration package offered under the Exclusive Agency conversion option. JA-7-JA-8 (Op.). In addition, under the Program, the time for independent contractors to accrue a transferable economic interest in the book of business serviced as employee agents was shortened from five years to two (or one month, under the sale option). *See* JA-7 (Op.).

The EEOC splinters this one indivisible benefit into smaller fragments so that it can claim that one small fragment of that package—the opportunity to apply to convert to independent contractor status—was a withheld employment benefit.

See EEOC Br. 20. But this sort of splintering of one benefit into fragments does not pass muster. The old independent contractor conversion program was withdrawn from everyone, whether they entered into the Release or not. Allstate then offered a new, much richer conversion opportunity to a different relationship with the company that was special to the Program. This new independent contractor package was never offered to employees as a standard employment benefit, and therefore was not later withheld.

(b) The Release was offered as part of a severance package.

Moreover, as the EEOC does not dispute, in the context of a severance agreement, a relevant comparison for purposes of determining whether an employer has validly offered enhanced benefits in exchange for a release is to the benefits to which employees were entitled *after* termination—not to the benefits to which an employee would have been entitled if he were still employed. *See, e.g.*, *SunDance Rehab. Corp.*, 466 F.3d at 501 ("Those who choose to accept [the release] are better off, by receiving a benefit that was not part and parcel of the employment relationship.") (internal quotation marks omitted); *cf. Wastak*, 342 F.3d at 294 (upholding release as supported by consideration when the "thirty-six weeks of income protection was substantial and certainly 'in addition' to what [the employee] was entitled to upon his termination—nothing").

Under that comparison, the opportunity to enter into an independent contractor relationship with an economic interest in the book of business serviced as an employee agent was undoubtedly an additional or enhanced benefit. Indeed, the EEOC makes no claim that *terminated* employees were entitled, as an incidence of their former employment, to apply to convert to independent contractors and take their book of business with them.

The EEOC's only response is to contend that not all of the employee agents were "really" terminated in the "normal" sense, EEOC Br. 22-23, 29, so it was not a "severance benefit"—simply because some of them took the opportunity to begin new relationships with Allstate as independent contractors. The EEOC cites no authority (much less the antidiscrimination statutes) for its creation of a new rule that an employer may not offer consideration in exchange for a release if it also offers a terminated employee the opportunity to "have a business relationship with the company." EEOC Br. 22. The EEOC agrees, however, that some of the employees—those who selected the enhanced severance pay and sale options—were "really" terminated under the EEOC's newly-invented test, as it concedes these were lawful "severance" benefits. EEOC Br. 34-35. The EEOC's claim thus reduces to the fundamentally inconsistent contention that Allstate facially discriminated against all of its terminated employee agents—but only as applied to those who elected to become independent contractors under the conversion option,

or the group of terminated agents who wanted to become independent contractors but chose not to, whom the EEOC has made no effort to identify. EEOC Br. 23-24.

The EEOC's inability to justify its purportedly facial retaliation theory on a facial basis demonstrates how incompatible the EEOC's theory is with the requirements of the antiretaliation provisions. The EEOC's "per se" claim in fact requires individualized proof that individuals wanted to become independent contractors but did not. But when a claim "require[s] referencing a fact outside the policy," then the policy "cannot be said to be discriminatory on its face." *DiBiase*, 48 F.3d at 727. And the EEOC's supposedly "per se" claim in fact requires more facts outside the policy than the EEOC acknowledges, because it would also require a showing that the employees who were not (in the EEOC's view) "really" terminated had actually engaged in some opposition or participation conduct that the antidiscrimination statutes protect. *See Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 195 (3d Cir. 2009) ("[W]e do not believe plaintiffs can reach a determination of unlawfulness under the ADA by proving only the existence of a '100% healed' policy, without any inquiry into whether that policy has been used to discriminate against individuals protected by the ADA from such discrimination.").

Moreover, as the district court concluded, the EEOC's sham-terminations claim simply has no basis in the record. JA-31 n.14. Although Allstate may have hoped that many of the terminated employees would decide to take the conversion option, it took the business risk that not as many would choose to enter into an independent contractor arrangement with Allstate as the company hoped. Indeed, the *Romero* plaintiffs are about evenly divided between terminated agents who decided to convert to independent contractors (17) and those who elected to sell their economic interest in the book of business or take severance pay (15). *See* pp. 13-15, *supra*.

In addition, the termination of the agents "qua employees" (EEOC Br. 23) was a real termination with complete severance of the employer-employee relationship. It materially transformed the business relationship between Allstate and those individuals who decided to convert to independent contractors under the Program. *See* JA-392 (2012 Hutton Dep.) (describing differences between managing employee and independent contractor programs); JA-395 (Hutton Decl.) (describing greater flexibility for independent contractors). Independent contractors were able to operate their business with substantial "freedom and autonomy," offering an agent the option "to turn his one-man shop into a multi-agent, multi-office business." *Daskam v. Allstate Corp.*, No. C11-0131RSL, 2012 WL 4420069, at *2 (W.D. Wash. Sept. 24, 2012) (holding agent in the Exclusive

Agency program was an independent contractor). They also obtained "a transferrable interest in the business, a circumstance unheard of in a normal employee-employer relationship." *Id.* Furthermore, it is undisputed that termination of employment ended the terminated agents' rights to accrue additional employee benefits and compensation, as the EEOC elsewhere complains had severe consequences (EEOC Br. 8). Indeed, the claims of the *Romero* plaintiffs suggest that, in their view at least, the terminations were meaningful.

The Program reflected a major reorganization of Allstate, affecting thousands of individuals and engendering major change. The opportunity to convert to an independent contractor through the Program was a distinct opportunity, different from simply retaining the same job. The EEOC's strained hypotheticals—positing an employer that terminates all employees, every month or every pay period, only to hire them back to do the same jobs if they sign releases (EEOC Br. 24-25)—are therefore wholly counterfactual. But they also do not help the EEOC's claims. Instead, they merely suggest that the antidiscrimination statutes are competent to address that sort of gamesmanship, as there would be a variety of grounds on which that release would potentially be invalid. *See* Older Workers Benefit Protection Act, 29 U.S.C. § 626(f). The EEOC can make no such claim of gamesmanship here, and has made no attempt to demonstrate that the Program was driven by anything other than Allstate's sound business judgment.

III. ALLSTATE DID NOT RETALIATE AGAINST THE TERMINATED EMPLOYEES WHO DECLINED TO SIGN THE RELEASE.

Under Third Circuit precedent and the plain text of the relevant statutes, the EEOC must establish three statutorily-required elements of a retaliation claim: (1) the terminated employees who declined to sign the Release engaged in protected activity; (2) Allstate took a materially adverse action against them subsequent to such activity; and (3) there was a causal connection between the protected activity and the adverse action. *See, e.g.*, *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701 (3d Cir. 1995).

The EEOC makes no effort to satisfy these elements for the terminated employees who signed the Release and accordingly has abandoned any claim that those terminated employees were retaliated against within the meaning of the statutes' terms. For the terminated employees who declined to sign the Release, the EEOC contends only that their failure to sign the Release constituted opposition to federally-prohibited age discrimination, thereby waiving any claim of retaliation under the terms of Title VII and the ADA. The decision not to sign a general release does not, however, convey opposition to any unlawfully discriminatory employment practice—much less specify opposition to age discrimination—and Allstate's decision to withhold the additional benefits that the terminated employees did not bargain for was the application of a neutral policy,

not an adverse employment action. Therefore, the EEOC's claim fails to meet any one of the elements of a prima facie case of retaliation, let alone all three.

A. Declining to Sign a General Release Is Not Protected Opposition Activity.

The antidiscrimination statutes protect two types of activity: opposition to discrimination and participation in an antidiscrimination proceeding. *Nassar*, 133 S. Ct. at 2525. The EEOC makes no claim that the terminated employees who declined to sign the Release thereby filed a claim or otherwise participated in an antidiscrimination proceeding. Rather, the EEOC's argument hinges entirely on the idea that refusing to sign a general release constitutes opposition to discrimination. *See* EEOC Br. 32-35. Not so. This Court has recognized that "opposition to an illegal employment practice must identify … the practice …, at least by context." *Curay-Cramer v. Ursuline Academy of Wilmington, Del.*, 450 F.3d 130, 135 (3d Cir. 2006). A "general complaint of unfair treatment" is not enough; the employee must specify the discrimination he is opposing. *Barber*, 68 F.3d at 701-02 (holding general complaint was not protected opposition because it "does not translate into a charge of illegal *age* discrimination") (emphasis in original). "'Vagueness as to the nature of the grievance … prevents a protest from qualifying as a protected activity.'" *Curay-Cramer*, 450 F.3d at 135 (quoting *Dupont-Lauren v. Schneider (USA), Inc.*, 994 F. Supp. 802, 823 (S.D. Tex. 1998) (alteration in original); *cf. Kasten v. Saint-Gobain Performance Plastics Corp.*, 131

S. Ct. 1325, 1335 (2011) (interpreting the protected activity of filing a complaint under the Fair Labor Standards Act as requiring a complaint that is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection").

Declining to sign a general release is as vague as it gets and communicates at most an inchoate dissatisfaction with some aspect of the employment relationship or its termination, which is not protected activity under the federal antidiscrimination statutes. Indeed, several courts have held that the decision not to enter into a general release of claims is not protected activity precisely because it does not convey opposition to any particular employment practice. *Jackson v. Unisys, Inc.*, No. 08-3298, 2009 WL 1393736, at *5-6 (E.D. Pa. May 15, 2009) (holding that rescinding the release in a severance agreement was not protected activity because employee's notice that he intended to rescind release did not "communicate[] his belief that he was discriminated against because of his disability"); *Bottge v. Suburban Propane*, 77 F. Supp. 2d 310, 313 (N.D.N.Y. 1999) ("Declining to sign a waiver of rights does not represent such an objection to discrimination, and therefore is not protected activity within the meaning of Title VII."); *EEOC v. Sears, Roebuck & Co.*, 857 F. Supp. 1233, 1239 (N.D. Ill. 1994) ("To oppose means to offer resistance to. Refusing to sign a release that would

entitle one to benefits hardly constitutes offering resistance as that phrase is commonly understood.") (internal quotation marks and citation omitted). These authorities comport with the common sense idea that refusing to sign a general release does not indicate that an employee will necessarily assert any claims, much less that the employee has, and will assert, a claim under the antidiscrimination statutes.

The EEOC points to no authority to the contrary, and Allstate is aware of none. Indeed, the EEOC concedes (EEOC Br. 32) that declining to sign a general release is not "always" opposition to discrimination. The consistent authority holding that refusing to sign a general release alone does not constitute opposition activity makes sense because of the fundamental rule that an employer cannot retaliate unless it *knows* that an employee engaged in protected activity:

> An employee cannot establish retaliation without proving that the employer *knew* that the employee engaged in protected activity. Without knowledge, there can be no retaliatory intent, and thus there can be no causal connection. Knowledge alone, however, is insufficient to prove retaliation.

Barbara T. Lindemann, et al., 1 *Employment Discrimination Law* 15-50-15-51 (5th ed. 2012) (collecting cases). Thus, at a minimum, the EEOC would have to establish that every single terminated employee's decision to decline the Release was based on opposition to age discrimination, *and* that Allstate was aware that declining to sign the Release was an act of opposition to age discrimination.

The EEOC cannot make that showing. In the first instance, it has made no attempt to show that the terminated employees' decision not to sign the Release was, in fact, based on opposition to age discrimination. In fact, it has made no attempt to show that the terminated employees who declined to sign the Release were even eligible to make age discrimination claims—a necessary fact given that its theory equates opposition with retaining personal claims. And it offers nothing more than a chain of speculation as to why Allstate must have reached the conclusion that every non-signer was opposing age discrimination. *See* EEOC Br. 32-33. The EEOC starts with the premise that the purpose of the Release was "presumably to avoid or minimize successful legal challenges to the Program." EEOC Br. 32. Not quite.

The purpose of a release program is to minimize litigation costs from all claims—not to insulate the employer from "successful" claims. Thus, as this Court has noted, even invalid suits "impose[] costs upon the company, and … it cannot be said that the costs will be contained by an early dismissal." *DiBiase*, 48 F.3d at 727-28 nn.9-10 (concluding that where an employer offered enhanced severance pay in exchange for a release, there was "nothing in the record to indicate that [the employer], by offering the general release, intended to target older workers. In fact, its motive is quite obvious—it wanted to protect itself against all litigation arising out of the [reduction in force].").

The EEOC then makes the cognitive leap that because the enhanced severance benefits offered by Allstate were so generous, Allstate must have understood that every individual who declined to sign the Release intended to sue. *See* EEOC Br. 33. That is tenuous enough—and would mean an employer is more likely to commit retaliation, in the EEOC's view, if it offers particularly generous benefits—but it is not sufficient in any event. At the final step, the EEOC asserts (EEOC Br. 33) that Allstate must have known that "challenges to the Program would likely include claims of age discrimination" simply because most of the terminated employee agents were 40 years old or older. It is remarkable for the EEOC to suggest that simply because a large number of terminated employees in a group were over 40—where every single employee agent position was eliminated except where prohibited by state law, regardless of any individual agent's characteristics—that Allstate should have intuited that any terminated employee was opposing disparate treatment based on age when he or she declined to sign a general release. In fact, the EEOC has not claimed that Allstate actually discriminated on account of age. By the EEOC's logic, Allstate should have also assumed that anyone who shared a protected characteristic meant to oppose discrimination on that basis by declining to sign a release, yet even the EEOC concedes there was no protected opposition conduct under Title VII or the ADA.

In any event, the breadth of the *Romero* plaintiffs' claims belie that inference as the claims include, *inter alia*, breach of contract, breach of fiduciary duty, and violation of ERISA. The terminated employees who declined to enter into the Release may—or may not—have had in mind any number of potential grievances regarding the end of their employment with Allstate, but their decisions not to release their potential claims did not hint at an opposition to any particular unlawful discrimination practice.

Finally, even if the terminated employees had all declined to sign the Release because they opposed age discrimination, and they had conveyed that opposition to Allstate, the EEOC's retaliation theory would still fail. An evenhanded policy asking *all* terminated employees to release *all* claims in exchange for enhanced severance benefits is not discriminatory on the basis of protected opposition conduct—even when they have a pending discrimination suit. *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 884 (5th Cir. 2003) ("[W]hen Chevron refused to award [an employee] a severance package" because he declined to sign a release that would require dismissal of his pending Title VII suit, "it was simply applying [its] general policy to [the employee], not retaliating against him for bringing an action against the company.").

B. Allstate Did Not Take an Adverse Action Against Individuals Who Did Not Sign the Release by Withholding Consideration They Had Not Earned.

As explained above, the Program provided terminated employees the opportunity to obtain benefits that they were not otherwise entitled to receive, as indeed the EEOC concedes for every aspect of the Program except for the opportunity to convert to independent contractor status with an economic interest in the book of business serviced as an employee agent. *See* pp. 35-44, *supra*. Accordingly, the terminated employees who did not enter into the Release were not entitled to the benefit of a bargain they declined to make. *See Isbell*, 418 F.3d at 793; *SunDance Rehab. Corp.*, 466 F.3d at 502 (an employee who declined to sign release did not suffer an adverse action when she did not receive enhanced benefits paid only to those who signed releases). Thus, even if their decision not to sign the Release could be deemed protected opposition to discrimination, the EEOC flips logic on its head by claiming (EEOC Br. 35) that withholding those additional benefits constituted an adverse employment action. Just as withholding the enhanced severance pay is not an adverse action taken against the terminated employees' pay, withholding the opportunity to enter into an independent contract with Allstate through the Program is not an adverse "termination." In either case, denial of extra incentives is not "adverse" in the relevant sense.

* * * * *

The record is clear that, as part of a business reorganization, Allstate terminated all 6,200 of its employee agents because it eliminated its employee agent programs. Allstate bore the business risk that many of its agents would choose not to seek a new relationship with Allstate as independent contractors. The terminated agents were not entitled to severance pay, to own or sell an economic interest in their books of business, or to take that book of business into a new contract with Allstate as an independent contractor. Through the Program, Allstate offered the terminated agents three enhanced severance packages with those benefits, in exchange for the signing of the Release to mitigate Allstate's litigation risk with such a large group reorganization program. All agents were offered the same four options. All agents were terminated, whether or not they signed the Release. All agents who signed the Release were provided their chosen enhanced benefit option, whether or not they made a charge or filed a suit. And all agents who did not sign the Release were not provided the enhanced benefits available only to Release-signers. All of these facts represent commonplace features in employers' reorganization or reduction-in-force programs. What they do not represent is discrimination against any terminated employee because that employee opposed discrimination or participated in an antidiscrimination proceeding. For that reason, the EEOC's claim must fail.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

October 6, 2014

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 28.3(d), I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

s/Donald R. Livingston
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October 6, 2014

COMBINED CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME, TYPEFACE, AND TYPE STYLE REQUIREMENTS; IDENTICAL TEXT OF BRIEFS; AND VIRUS CHECK

The foregoing brief is in 14-point Times New Roman proportional font and contains 12,507 words, and thus complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font for the main text and the footnotes.

Pursuant to Local Appellate Rule 31.1(c), I certify that the text of the brief electronically filed with the Court is identical to the text of the brief in the paper copies. I further certify that Symantec Endpoint Protection version 12.1.41 has been run on the file containing the electronic version of the brief and no viruses have been detected.

s/Hyland Hunt
Hyland Hunt

October 6, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on October 6, 2014, I served the foregoing brief upon the following counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system, and that I will send seven paper copies of the brief to the Clerk's office and serve one paper copy on below counsel by commercial delivery service on October 7, 2014:

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ADDENDUM

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United States Code
Title 29. Labor
Chapter 14. Age Discrimination in Employment

§ 623. Prohibition of age discrimination

***

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

* * * * *

United States Code
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights
Subchapter VI. Equal Employment Opportunities

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * * * *

United States Code
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities
Subchapter IV. Miscellaneous Provisions

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

* * * * *