Nos. 07-4460, 07-4461 & 08-1122

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GENE R. ROMERO, *et al.*,

Plaintiff-Appellants,

v.

ALLSTATE INSURANCE COMPANY, *et al.*,

Defendant-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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August 19, 2008

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, *Amici Curiae* Equal Employment Advisory Council and Chamber of Commerce of the United States of America make the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: None.

4) The instant appeal is not a bankruptcy appeal.

August 19, 2008

Rae T. Vann

Rae T. Vann

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The Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* with the consent of all parties. The brief urges the court to affirm the district court's ruling below and thus supports the position of Defendant-Appellee Allstate Insurance Company before this Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership is comprised of over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the

Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621 *et seq.*, and other equal employment opportunity statutes and regulations. Many of *amici's* members are large corporations that, by their sheer size, are regular respondents to administrative discrimination charges and civil complaints. In an effort to minimize the costs and disruptions associated with having to defend such actions, many of *amici's* members from time to time will offer individuals whose employment is being terminated special severance pay and/or other valuable consideration in exchange for a written promise not to sue for claims arising out of the employment relationship.

The practical value of such agreements to employers—and, hence, the amount of consideration they are likely to offer in exchange for them—is directly dependent on the comprehensiveness of the releases. A signed release is of little value to an employer seeking the certainty of an assured outcome (litigation avoidance) if its mere existence could give rise to potential liability for retaliation. *Amici* thus have a direct and ongoing interest in the issue presented in this appeal regarding whether the district court properly held that simply offering enhanced severance benefits in exchange for a waiver of the right to subsequently sue does

not constitute an act of unlawful retaliation under the ADEA, Title VII, or the ADA.

Because of their interest in these issues, EEAC and the Chamber have filed *amicus curiae* briefs in a number of cases involving the legality and enforceability of waivers and releases of workplace claims.[1] EEAC and the Chamber thus are well familiar with the issues and policy concerns presented to the Court in this case. Because of their experience in these matters, EEAC and the Chamber are well-suited to brief the Court on practical implications of the issues beyond the immediate concerns of the parties.

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[1] See *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006) (offer of unenforceable waiver and release of claims did not amount to unlawful "facial" retaliation under the ADEA); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307 (11th Cir. 2002) (requiring employees to sign mandatory arbitration agreement as condition of employment is not unlawful retaliation); *see also, e.g., Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007) (enforceability of unsupervised waivers under the FMLA), *cert. denied*, 128 S. Ct. 1109 (2008); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986) (*en banc*) (knowing, voluntary release of ADEA claims was not void because it had not been supervised by EEOC); *Gormin v. Brown-Forman Corp.*, 963 F.2d 323 (11th Cir. 1992) (same).

STATEMENT OF THE CASE

In November 1999, Allstate announced its business decision to reorganize its sales force in order to consolidate its agent force within the "Exclusive Agent" independent contractor program, the company's most productive program at the time. As part of the reorganization, Allstate terminated the employment of all of its employee-agents, giving them several post-termination options including moving to the independent contractor program or taking severance pay. *Romero v. Allstate Ins. Co.*, Nos. 01-3894, 01-6764 and 01-7042 (E.D. Pa. 2004) (Memorandum and Order of Mar. 30, 2004), at 3.

Specifically, Allstate gave each agent the option of (1) becoming an "Exclusive Agent" independent contractor, in which case he or she would be eligible for a bonus payment of at least $5,000 and would continue to work for Allstate, but under different terms as an independent contractor; (2) receiving enhanced severance pay in exchange for signing a release of claims; or (3) receiving base severance pay without having to sign a release. *Id.* Agents who elected to become Exclusive Agents also were required to sign a release under the program. *Id.*

A group of plaintiffs affected by Allstate's reorganization plan (the "*Romero*" plaintiffs) brought an action in the U.S. District Court for the Eastern District of Pennsylvania, alleging among other things that the company violated

the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.* *Id.* at 4. In a separate but related action, the U.S. Equal Employment Opportunity Commission (EEOC) claimed that Allstate's mere offer of a release in connection with the termination of the employee-agents' employment constituted unlawful "preemptive" retaliation in violation of the ADEA, as well as the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* *Id.* at 4-5. The district court consolidated the *Romero* and *EEOC* actions in February 2002.

On March 30, 2004, the district court ruled on several pending motions, including cross-motions for partial summary judgment, as well as the *Romero* plaintiffs' motion for class certification. *Id.* at 11-12. It held that the releases were voidable because they appeared to impermissibly prohibit the former employee-agents from filing EEOC discrimination charges, and certified a class comprised of any former Allstate employee-agent who signed the release, noting that any such person could rescind his or her assent by providing Allstate with 90 days advance notice and by tendering back any benefits received in exchange for having signed the release. *Id.* at 6.

The *Romero* plaintiffs and the EEOC sought reconsideration of the district court's tender back ruling. While that request was pending, Allstate moved for full

summary judgment, arguing among other things that the action is foreclosed by the Seventh Circuit's ruling in *Isbell v. Allstate Insurance Co.*, 418 F.3d 788 (7th Cir. 2005), *cert. denied*, 547 U.S. 1021 (2006), which affirmed summary judgment on virtually identical claims. On January 16, 2007, the district court denied Plaintiff-Appellants' motion for reconsideration, *Romero v. Allstate Ins. Co.*, Nos. 01-3894, 01-6764 and 01-7042 (E.D. Pa. 2007) (Order denying Plaintiff's Motion for Reconsideration), and on March 21, 2007, concluded, based on *Isbell*, that Plaintiff-Appellants' retaliation and ADEA discrimination claims warranted dismissal. *Romero v. Allstate Ins. Co.*, Nos. 01-3894, 01-6764 and 01-7042 (E.D. Pa. 2007) (Memorandum and Order of Mar. 21, 2007).

The district court further held that its preliminary determination that the signed releases were voidable was erroneous or, alternatively, now moot. *Romero v. Allstate Ins. Co.*, Nos. 01-3894, 01-6764 and 01-7042 (E.D. Pa. 2004) (Order of June 20, 2007), at 2. After memoranda were filed by the parties, the district court on June 20, 2007 issued an order adopting its March 21 findings and granting Allstate's motion for summary judgment. *Id.* at 2-3. Plaintiff-Appellants then filed the instant appeal.

SUMMARY OF ARGUMENT

This case represents another ambitious attempt by the EEOC to advance its novel theory of discrimination, which posits that requiring an employee to sign a

waiver and release of claims in exchange for valuable consideration to which he or she is not otherwise entitled constitutes an independent, *per se* act of retaliation under the federal employment nondiscrimination laws. The agency on other occasions has pursued this so-called "anticipatory retaliation" theory of discrimination, but with little success: of the two federal circuit courts that have considered the availability of an "anticipatory retaliation" theory of liability in the context of waivers and releases of claims, both have rejected it outright. *Isbell v. Allstate Ins. Co.,* 418 F.3d 788 (7th Cir. 2005), *cert. denied*, 547 U.S. 1021 (2006); *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006). Variations on the EEOC's anticipatory retaliation argument similarly have failed in other contexts. *See Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307 (11th Cir. 2002) (holding that discharge of employee for refusing to sign agreement to submit claims arising under Title VII, ADEA or ADA to binding arbitration did not constitute unlawful retaliation).

Contrary to the EEOC's contention, the mere existence of a release offered to individuals in exchange for benefits they would not otherwise be entitled to receive does not, without more, constitute unlawful retaliation. In order to make out a prima facie case of unlawful retaliation under federal employment nondiscrimination laws, a plaintiff must show that he or she: (1) engaged in "protected activity"; (2) suffered a materially adverse employment action; and (3)

can establish a sufficient causal connection between his or her protected activity and the subsequent adverse action. *Barber v. CSX Distrib. Svcs.*, 68 F.3d 694, 701-02 (3d Cir. 1995); *see also Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006).

Electing not to execute releases in exchange for *enhanced* separation benefits – as opposed to the *ordinary* severance package available to all terminated workers – does not constitute statutorily-protected activity, which requires a plaintiff either actively "oppose" conduct reasonably thought to constitute unlawful discrimination, or "participate" in a formal investigation, hearing or proceeding under Title VII, the ADA or the ADEA. Indeed, the term *anticipatory* retaliation itself illustrates the fatal flaw in the theory: a plaintiff cannot establish a retaliation cause of action based on an alleged adverse employment action that *has yet to, and may never, occur.*

Even assuming the employee-agents' refusal to sign the Allstate release were considered to rise to the level of legally protected conduct, the retaliation claim nevertheless fails, because they were not subjected to an adverse employment action as a result of their purported protected activity. Indeed, the decision to reorganize, and as a result eliminate all employee-agent positions, was made *before* the affected workers were ever presented with an opportunity to

consider signing the release. Accordingly, the district court properly dismissed the action in its entirety.

Allowing plaintiffs to challenge the validity of workplace waivers and releases under an anticipatory retaliation theory would significantly impede private resolution of workplace disputes, and would create hardship for employers and employees alike. Companies are unlikely to offer enhanced severance benefits unilaterally if they are unable, in return, to obtain releases that will accomplish their aim of closure and finality by ensuring that they will not be subject to future lawsuits by terminated employees who signed the releases and collected the severance benefits. These attacks risk substantial harm to the majority of people who have neither the intention nor the grounds to sue their employers, but seek only to move on, using severance pay to ease the transition.

ARGUMENT

I. MERELY INVITING AN EMPLOYEE TO SIGN A WAIVER AND RELEASE OF CLAIMS IN EXCHANGE FOR VALUABLE CONSIDERATION TO WHICH HE OR SHE IS NOT OTHERWISE ENTITLED DOES NOT CONSTITUTE UNLAWFUL WORKPLACE RETALIATION

A central issue presented in this appeal involves whether an employer that asks terminated employees to sign written releases upon electing to receive enhanced benefits and other valuable consideration not otherwise available to them is guilty of violating federal workplace anti-retaliation laws. The EEOC has taken

the position that by refusing to sign releases (and thus declining to receive enhanced benefits) in connection with the termination of their employment, nineteen (out of over 6,000) terminated Allstate employee-agents engaged in legally protected "participation activity," EEOC Br. at 9, and that Allstate engaged in unlawful retaliation by denying them "continued employment" based on their alleged protected conduct. *Id.* Creative as it may be, the EEOC's so-called "anticipatory retaliation" theory, both generally and specifically as applied to this case, is completely without legal foundation and thus was properly rejected by the district court.

A. "Protected Activity" Requires That A Plaintiff Either "Oppose" Conduct Believed To Be Discriminatory or "Participate" In An EEO Investigation, Hearing Or Proceeding

In challenging the legality of Allstate's use of releases in connection with its force reorganization, the EEOC invokes three federal employment nondiscrimination laws: Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-2000e-17, which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin; Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, which prohibits discrimination in employment on the basis of disability; and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, which prohibits discrimination in employment on the basis of age. In addition to barring discrimination based on

membership in a protected class, Title VII, the ADA and the ADEA all contain provisions strictly prohibiting employers from retaliating against those who have engaged in statutorily protected activity. Section 704(a) of Title VII provides, for instance:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . 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].

42 U.S.C. § 2000e-3(a). The ADA and the ADEA contain virtually identical anti-retaliation provisions. 42 U.S.C. § 12203(a); 29 U.S.C. § 623(d); *see also Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 135 n.4 (3d Cir. 2006) ("We have previously recognized that Title VII and the [ADEA] are comparable in many contexts"); *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 331 (3d Cir. 1993) ("The ADEA's substantive provisions were derived *in haec verba* from Title VII") (citation omitted).

A plaintiff claiming to be the victim of unlawful retaliation must show that he or she engaged in statutorily protected activity and subsequently suffered a materially adverse employment action as a consequence of the protected conduct. *Barber v. CSX Distrib. Svcs.*, 68 F.3d 694, 701-02 (3d Cir. 1995); *see also Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006). "Protected activity" under Section 704(a) can take the form of "opposing"

discriminatory employment practices, or "participating" in Title VII investigations, proceedings, or hearings. 42 U.S.C. § 2000e-3(a). Section 704(a)'s "participation" clause "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC." *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000); *see also Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998) ("Activities that constitute participation are outlined in the statute: (1) making a charge; (2) testifying; (3) assisting; or (4) participating in any manner in an investigation, proceeding, or hearing under Title VII"). Requiring that an EEOC charge be pending in order for conduct to be protected under the "participation" clause comports with an important underlying purpose of Title VII: to "protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989).

Accordingly, a threshold requirement for a retaliation claim under any of the federal nondiscrimination laws is that the plaintiff have engaged in protected activity, either "opposition" or "participation."

B. The Plaintiff-Appellants Did Not Engage In Statutorily-Protected "Opposition" Or "Participation" Conduct In Refusing To Sign The Allstate Release

It has not been alleged that any one of the terminated employee-agents who refused to sign Allstate's release in fact filed an administrative charge of discrimination, and thus engaged in protected "participation" conduct under the federal anti-retaliation laws, prior to being presented with the Allstate releases. Rather, the EEOC simply argues in its brief that "by refusing to release their claims, the [*Romero* plaintiffs] *threatened* to sue Allstate alleging discrimination or retaliation, and thus engaged in protected participation activity." EEOC br. at 9 (emphasis added).

Merely making, at best, an implied threat to sue for discrimination or retaliation does not rise to the level of "making a charge, testifying, assisting, participating" in a Title VII, ADA or ADEA proceeding. Several courts have found that even formal participation in an internal EEO investigation, absent a pending EEOC charge, does not constitute protected "participation" conduct. *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (the "clause protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC"); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000) (participation clause "irrelevant" where plaintiff failed to file EEOC charge until *after* the alleged retaliatory termination occurred);

Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990) ("Accusations made in the context of charges before the Commission are protected by statute; charges made outside of that context are made at the accuser's peril") (footnote omitted). Because the EEOC has failed to show that the terminated employee-agents who refused to sign Allstate's release engaged in statutorily protected "participation" conduct, it cannot establish a prima facie case of retaliation under Title VII, the ADA, or the ADEA.

Nor can it reasonably be said that any of the terminated employee-agents engaged in protected "opposition" conduct. Courts generally have extended protection under the opposition clause only to individuals who have actively or overtly opposed a specific practice that they reasonably believed to be discriminatory. *See Moore v. City of Philadelphia*, 461 F.3d 331, 343 (3d. Cir. 2006); *Barber v. CSX Distrib. Svcs.*, 68 F.3d 694, 701-02 (3d Cir. 1995). As this Court pointed out in *Curay-Cramer v. Ursuline Academy of Wilmington,* "opposition to an illegal employment practice must identify the employer and the practice - if not specifically, at least by context . . . . A general complaint of unfair treatment is insufficient to establish protected activity under Title VII." 450 F.3d at 135 (citing *Barber*, 68 F.3d at 702 and *Dupont-Lauren v. Schneider (USA), Inc.*, 994 F. Supp. 802, 823 (S.D. Tex. 1998) ("Vagueness as to the nature of the grievance . . . prevents a protest from qualifying as a protected activity")).

In order to be considered protected activity, opposition conduct therefore must involve some affirmative or overt act that sufficiently expresses the complaining individual's belief that a violation of the law has occurred. In the context of ADEA retaliation claims, an individual engages in protected opposition activity when "s/he 'has opposed any practice made unlawful by . . . section [623].' The practice made unlawful by § 623 is 'discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual's age.'" *Barber*, 68 F.3d at 702 (citation omitted). The Plaintiff-Appellants did not express such a belief in any way at the time they were presented with the release.

Even assuming for the sake of argument that they did engage in "participation" or "opposition" activity, the Plaintiff-Appellants' protestations still do not amount to *statutorily protected* conduct, because the conduct they allegedly protested – Allstate's offer of a waiver and release of claims in exchange for valuable consideration – was not a violation of Title VII, the ADA, or the ADEA. "Whether the employee opposes, or participates in a proceeding against, the employer's activity, the employee must hold an objectively reasonable belief, in good faith, that the activity they oppose is unlawful under Title VII." *Moore v. City of Philadelphia*, 461 F.3d at 341 (citations omitted). "To put it differently, if no reasonable person could have believed that the underlying incident complained

about constituted unlawful discrimination, then the complaint is not protected." *Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315, 322 (3d Cir. 2008).

In this case, it is undisputed that well over 6,000 of the employee-agents affected by Allstate's reorganization signed releases voluntarily waiving and releasing Allstate from liability from claims arising out of their employment. There is no suggestion whatsoever that this group – comprising an overwhelming majority of those impacted by the reorganization – believed the releases they signed were discriminatory or meant to serve as a "'preemptive strike against future protected activity.'" *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490, 497 (6th Cir. 2006).

It thus strains credulity to suggest, as the EEOC impliedly has done, that the actions of these thousands of similarly-situated employees in signing the releases – in the face of inaction by a mere nineteen – was objectively unreasonable. By insisting that the Romero plaintiffs had a reasonably objective belief that Allstate's offer of a release in exchange for valuable consideration constituted a violation of Title VII, the ADA, and the ADEA's nondiscrimination provisions, however, that is precisely what the EEOC would have this Court conclude.

C. The Plaintiff-Appellants Were Not Subjected To An Adverse Employment Action Because They Chose Not To Sign A Release

Even assuming one could plausibly believe that the employee-agents' refusal to sign the Allstate release constituted legally protected conduct, the EEOC nevertheless has failed to demonstrate that they were subjected to a materially adverse employment action as a result. The EEOC's action stems directly from Allstate's reorganization decision, which ultimately resulted in the elimination of every one of over 6,000 employee-agent positions. Thus, the adverse employment action being challenged really is the underlying termination, *not* the opportunity to continue employment as the EEOC alleges, because continued employment was not an option available to *any* of the affected persons. Furthermore, the termination decision was made before any employee-agents elected not to sign the release. "Evidence that the employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of the temporal proximity." *Hervey v. County of Koochiching*, 527 F.3d 711, 723 (8th Cir. 2008) (internal quotations and citation omitted). Because the EEOC cannot establish any causal connection between the employee-agents' refusal to sign Allstate's release and the termination of their employment, its retaliation claim was properly dismissed.

The employee-agents were not terminated because they refused to sign a release, nor were they threatened with any adverse employment action as a result.

Rather, their employment was terminated based on a legitimate business need to reorganize the workforce. In an effort to ease their transition, Allstate offered terminated employee-agents several options, *none* of which included the option of continuing their employment with the company. While one option, in exchange for signing a release, was for terminated employee-agents to become independent contractor agents, those who elected that option would still be terminated – they simply would have an opportunity to establish a different working relationship with the company under very different terms than existed while they were employees.

Simply put, Allstate did not discriminate. It offered the same terms to all employee-agents affected by the workplace reorganization. Some elected to sign a release in exchange for an independent contractor relationship or receipt of remuneration above that to which they otherwise would have received upon termination, and others did not. To attempt to apply the statutory ban against retaliation in such circumstances distorts its purpose.

The federal anti-retaliation laws are designed to protect the right of individuals to oppose discrimination, not to empower them to dictate the terms and conditions of their employment unilaterally. As the Eighth Circuit observed recently:

> We do not gainsay the importance of the prohibition on retaliation to the proper functioning of the discrimination laws. An employer may

> not dissuade employees from invoking the protections of the civil rights laws by retaliating against those who bring discrimination to light. But the cause of action also should not be extended beyond its proper role into an unwarranted regulation of the employer-employee relationship.

Hervey, 527 F.3d at 726.

II. PERMITTING PLAINTIFFS TO CHALLENGE THE VALIDITY OF RELEASES UNDER AN ANTICIPATORY RETALIATION THEORY WOULD SIGNIFICANTLY IMPEDE PRIVATE RESOLUTION OF ACTUAL AND POTENTIAL EMPLOYMENT DISPUTES AND WOULD IMPOSE A HARDSHIP ON BOTH EMPLOYERS AND EMPLOYEES

Many employers faced with the necessity of workforce reductions offer severance benefits to ease the impact of lost employment. Because these employers typically are offering benefits considerably greater than they are legally required to provide, they understandably ask that the employees accepting such benefits sign a general release of claims in return. A rule that would render any offer of a release in exchange for valuable consideration an act of "anticipatory" retaliation in violation of federal employment nondiscrimination laws would create a substantial disincentive for employers to offer separation benefits.

Employees who are dissatisfied with the amount of consideration offered in exchange for a release are free to reject the offer and seek a larger amount through negotiation or litigation, assuming there is a basis for suit. At the same time, however, the many who have no dispute with the employer or are satisfied that the

additional consideration is sufficient to resolve any pending issues may look forward to receiving the enhanced benefits without having to endure the delay and uncertainties of contested lawsuits.

The inability to obtain a full release will substantially reduce the amount employers are willing to pay. While reductions in force will still occur, employers likely will be less inclined than in the past to offer enhanced severance packages. As a consequence, the many employees who face layoffs will be deprived of a substantial benefit that might mean the difference between financial security and financial peril.

From the employer's perspective, the principal value of a general release is that it eliminates any possibility of post-termination litigation with the outgoing employee, therefore facilitating a full and peaceful end to the employment relationship. To have such value, however, the release must cover any and all existing or potential claims growing out of the employment relationship. For if the employee remains free to assert even one potential employment-related claim, meritorious or otherwise, the employer will remain subject to the potentially costly and disruptive prospect of having to defend against post-termination litigation by the employee.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit that the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1(e), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

Rae T. Vann

August 19, 2008 Rae T. Vann

CERTIFICATE OF COMPLIANCE

I, Rae T. Vann, hereby certify that this BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEES AND IN SUPPORT OF AFFIRMANCE complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B). This brief is written in Times New Roman 14-point typeface using MS Word 2003 and contains 4,465 words.

I further certify that the text of the electronic brief in .pdf format and the text of hard copies of this brief are identical and that a virus check was performed using the following virus software: Symantec Anti-Virus Corporate Edition 10.1.6 (updated August 19, 2008).

Rae T. Vann

August 19, 2008 Rae T. Vann

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August 2008, the undersigned filed one (1) electronic original and ten (10) true and correct copies of the foregoing brief via U.S. Priority Mail, postage prepaid, with the Clerk of the Court, and served two (2) true and correct copies of the foregoing brief via U.S. Priority Mail, postage prepaid, upon the following counsel addressed as follows:

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