No. 14-2700

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY,
Defendant-Appellee.

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-APPELLEE AND IN SUPPORT OF AFFIRMANCE

Kathryn Comerford Todd
Steven P. Lehotsky
Warren Postman
U.S. CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

Rae T. Vann
Counsel of Record
NORRIS TYSSE LAMPLEY
& LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

October 14, 2014

No. 14-2700

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY,
Defendant-Appellee.

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-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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.

s/ Rae T. Vann
October 14, 2014 Rae T. Vann

RULE 29(c)(5) STATEMENT

No counsel for a party authored this brief in whole or in part.

No counsel or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, their members, or their counsel, contributed money that intended to fund the preparation or submission of this brief.

Respectfully submitted,

s/ Rae T. Vann

Kathryn Comerford Todd
Steven P. Lehotsky
Warren Postman
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae* Chamber of Commerce of the United States of America

Rae T. Vann
Counsel of Record
NORRIS TYSSE LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

October 14, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS

FEDERAL CASES

FEDERAL STATUTES

REGULATIONS

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 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 250 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 (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every

region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

All of EEAC's, and many of the Chamber's, members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq*., the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq*., the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*., and other employment laws and regulations. Collectively, they make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations and other employment actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all their employment actions comply with applicable legal requirements.

Despite these efforts, businesses cannot entirely eliminate the chance that an employment transaction could become the subject of a discrimination charge or lawsuit (whether warranted or unwarranted). Many of *amici's* members are large corporations and thus are likely targets of such charges and suits, particularly when they find it necessary to terminate employment relationships. In an effort to minimize the costs and disruptions associated defending such actions, they

sometimes offer individuals whose employment is being terminated special severance pay in exchange for their agreement to waive potential claims arising out of their employment. *Amici* thus have a direct and ongoing interest in whether the mere offer of enhanced severance benefits in exchange for a waiver of potential employment claims is facially unlawful.

Because of their interest in these issues, EEAC and the Chamber over the years 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 are therefore familiar with the issues and policy concerns presented to the Court in this case. Because of their experience in these matters, they are well-suited to brief the Court on the practical implications of the issues beyond the immediate concerns of the parties.

[1] *See, e.g., Romero v. Allstate Ins. Co.*, 344 Fed. Appx. 785 (3d Cir. 2009); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995); *see also Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998); *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007); *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307 (11th Cir. 2002); *Gormin v. Brown-Forman Corp.*, 963 F.2d 323 (11th Cir. 1992); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986) (*en banc*). EEAC also participated on the Negotiated Rulemaking Committee that developed the regulations on waivers of rights and claims under the ADEA, which the EEOC adopted in July 1998 pursuant to the Older Workers Benefit Protection Act (OWBPA), 29 C.F.R. § 1625.22.

STATEMENT OF THE CASE

In November 1999, Allstate announced its business decision to consolidate its agent force within the "Exclusive Agent" independent contractor program, the company's most productive program at the time. *Romero v. Allstate Ins. Co.*, 3 F. Supp. 3d 313, C.A. No. 2:01-cv-07042-RB Doc. 137 (E.D. Pa. Mar. 13, 2014), at 2. 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. *Id.*

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 either sell his or her interest in a book of business or 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.* at 2-3. Agents who elected to become Exclusive Agents also were required to sign a release under the program. *Id.* at 2.

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 and in 2007, ruled in Allstate's favor, concluding among other things that the action was foreclosed by the Seventh Circuit's ruling in *Isbell v. Allstate Insurance Co.*, 418 F.3d 788 (7th Cir. 2005) (affirming summary judgment on virtually identical claims). *Id.*

The *Romero* plaintiffs and the EEOC appealed. Without addressing the EEOC's substantive claims, this Court vacated the district court's ruling and remanded for further proceedings. At the close of discovery, Allstate moved for summary judgment as to the EEOC's claim that the offer of a release, and the company's treatment of those who refused to sign it, was *per se* retaliatory. *Id.*

In granting Allstate's motion, the district court found among other things that the mere use of a release does not constitute a facially retaliatory employment practice just because it "may include the release of federal discrimination claims."

Id. at 13. It also rejected the EEOC's claim that the release is unlawful under traditional retaliation principles, concluding that the mere refusal to sign a release does not amount to protected conduct under federal anti-discrimination laws for retaliation purposes. *Id.* at 36-37. This appeal ensued.

SUMMARY OF ARGUMENT

Applying a straightforward analysis of well-established legal principles, the district court below correctly held that Allstate's use of a written waiver and release in a severance program affecting thousands of former employee-agents did not amount to a facial violation of federal anti-retaliation laws. Rejecting every one of the EEOC's novel arguments, including its contention that the release is *per se* retaliatory because it purportedly deters individuals from engaging in "future" protected conduct, the court pointed out that to so hold "would contravene a well-settled congressional policy to permit the use of such releases so long as they comply with certain requirements." *Romero v. Allstate Ins. Co.*, 3 F. Supp. 3d 313, C.A. No. 2:01-cv-07042-RB Doc. 137, at 18 (E.D. Pa. Mar. 13, 2014) (footnote omitted). In fact, neither Title VII, nor the ADEA or the ADA, prohibits the use of releases generally and, contrary to the EEOC's contention, the mere offer of a release in exchange for enhanced benefits to which the offerees would not otherwise be entitled does not constitute unlawful retaliation, even under traditional legal principles.

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 conduct"; (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 Ry. 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. Even assuming the employee-agents' refusal to sign the Allstate release were considered to rise to the level of legally protected conduct, the EEOC's retaliation claim nevertheless fails, because the non-signatories were not subjected to an adverse employment action as a result of their purported protected activity.

Furthermore, the EEOC's novel "facial" retaliation theory of liability has no basis in any of the statutes the agency invokes, and in fact has yet to be embraced by any court of appeals. Notably, of the two federal circuit courts that have considered the availability of such a 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); *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006). Variations on the EEOC's facial retaliation argument similarly have failed in other contexts. *See, e.g., 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).

Allowing the EEOC to challenge the validity of workplace waivers and releases under a facial retaliation theory would significantly impede private resolution of workplace disputes, and would create hardships for employers and employees alike. Companies are unlikely to offer enhanced severance benefits if they are precluded from conditioning receipt of those benefits on the execution of a valid release. By requiring releases in exchange for enhanced severance benefits, employers seek to ensure that they will not be subject to future lawsuits by terminated employees, thus enabling all involved to move on with their business and personal lives without the threat of disruptive and lengthy litigation. For their part, employees signing releases can look forward to receiving generous payments above and beyond standard benefits they would expect to receive—payments which may well help to ease some of the financial and other stress associated with the loss of employment. As a practical matter, employers seeking the certainty of

an assured outcome may have little if any incentive to offer enhanced severance benefits if, as the EEOC argues, the mere offer of an otherwise valid, conventional release could give rise to automatic liability for unlawful retaliation.

ARGUMENT

I. A RULE PROHIBITING AS "FACIALLY" RETALIATORY THE OFFER OF ENHANCED SEVERANCE IN EXCHANGE FOR A SIGNED RELEASE IS IRRECONCILABLE WITH THE PLAIN TEXT, PURPOSES, AND AIMS OF FEDERAL ANTI-RETALIATION LAWS

The district court below properly ruled that the EEOC could not proceed under its novel theory that employers commit a *per se* act of unlawful retaliation under federal law by offering departing employees additional severance pay or other valuable consideration to which they otherwise would not be entitled in exchange for a waiver and release of their employment-related claims (whether asserted or not). The EEOC's theory contravenes the plain text of federal workplace anti-retaliation and nondiscrimination laws, would undermine the statutes' preference for voluntary resolution of disputes over formal litigation, and should be rejected by this Court.

A. A Violation Of Federal Anti-Retaliation Laws Cannot Exist Without An Adverse Employment Action Being Taken Because Of Opposition To An Underlying Legal Violation

In challenging the legality of Allstate's use of releases in connection with its workforce reorganization and severance program, the EEOC invokes three federal

employment nondiscrimination laws—Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*; the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*—all of which contain provisions prohibiting employers from taking adverse employment action against any person because he or she has 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., 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).

Thus, in order to make out a prima facie case, a plaintiff claiming unlawful workplace retaliation must demonstrate that, at a minimum, (1) he or she engaged in statutorily protected activity and subsequently suffered (2) a materially adverse

employment action (3) because of the protected conduct. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *see also Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701-02 (3d Cir. 1995). Of course, for an adverse employment action to be "because of" protected conduct, the alleged victim must have engaged in some form of statutorily-protected activity, either by "opposing" conduct believed to be discriminatory, or by "participating" in an equal-employment opportunity (EEO) enforcement proceeding, *prior* to having suffered the alleged adverse employment action in question. Although the Supreme Court has construed employment antiretaliation laws expansively,[2] the cases do not apply to where there has been no opposition at all.

Finally, "[w]hether 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 331, 341 (3d Cir. 2006) (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).

[2] *See, e.g., Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Crawford v. Metropolitan Government*, 555 U.S. 271 (2009).

Under these well-established principles, it is elementary that an employer's mere offer 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. Nothing in *BNSF* or *Crawford* is to the contrary. *See, e.g.*, *Crawford*, 555 U.S. at 283-84 (Alito, J, concurring).

1. Merely refusing to sign a release does not constitute protected "opposition" to conduct reasonably believed to violate Title VII, the ADEA, or the ADA

The EEOC does not, and cannot, claim that all of Allstate's former employees reasonably believed they had engaged in any protected conduct prior to Allstate's offer of severance pay. Allstate's agents did not, *en masse*, file discrimination claims, or report discrimination, or participate in an EEOC investigation. And, of course, the mere act of working for Allstate was not an activity protected by the ADEA, Title VII, or the ADA.

Faced with this fundamental hole in its suit, the EEOC argues that the Allstate employee-agents, who refused to sign the release, engaged in "protected opposition activity by doing so." EEOC Brief at 3. Yet the EEOC still cannot connect the dots between the failure to sign a general release of employment claims and any protected opposition. As noted above, the EEOC does not and cannot suggest that these employees, as a class, had suggested that they would bring or support a claim under Title VII, the ADA, or the ADEA, or otherwise

oppose federally-prohibited discrimination. The conduct these employees "opposed" was simply Allstate's offer of a waiver and release of claims in exchange for valuable consideration. But that offer, of course, was not proscribed discrimination under Title VII, the ADA, or the ADEA. In short, the EEOC has identified no underlying opposition and is attempting to lift this case by its own bootstraps: under the EEOC's theory, Allstate's "requiring" employees to sign a general release is unlawful because employees who refuse are "opposing" the unlawful practice of requiring employees to sign a general release. No federal court has construed the anti-retaliation protections contained in Title VII, the ADEA, or the ADA so expansively, and for good reason. Such an interpretation is at odds with the plain text of the law and would find discrimination where there simply is none.

2. Withholding enhanced benefits provided as consideration for signing a release does not amount to an "adverse employment action"

The EEOC contends that Allstate retaliated against those who did not sign releases by treating them less favorably than those who did sign. In the EEOC's view, providing additional consideration to individuals signing a release, but not to those who declined to do so, constitutes a materially adverse employment action for retaliation purposes. Yet the EEOC cannot point to a single legal authority, nor does any exist, that so holds. *See EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490

(6th Cir. 2007); *Isbell v. Allstate Ins. Co.*, 418 F.3d 788 (7th Cir. 2005). To the contrary, the enhanced severance withheld from those who did not sign a release "was not a benefit given or owed to all employees, that was then withdrawn because of some protected activity." *DiBiase*, 466 F.3d at 502. Rather, the employee-agents who accepted the offer were made "better off" by obtaining a benefit to which they were not otherwise entitled, while those who rejected it forfeited nothing to which they were not already entitled. Simply put, "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." *Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 793 (7th Cir. 2005).

The EEOC also argues that Allstate's refusal "to permit the non-signors to continue their careers selling Allstate products was [ ] an adverse action." EEOC Brief at 10. As the Seventh Circuit held in *Isbell*, however, the nonsignors were not "denied" a career with Allstate because they refused to sign the release. Rather, they lost their jobs "for the same reason 6,400 other employee agents of Allstate lost theirs, *including those who signed the release*—because Allstate had decided to eliminate all employee agent positions within the company." *Isbell*, 418 F.3d at 793.

B. The EEOC's "Facial" Retaliation Theory of Liability Has No Basis In Title VII, The ADEA, Or The ADA, And Has Been Rejected By Every Federal Appeals Court To Have Considered It

This Court has observed that "when a policy facially discriminates on the basis of [a] protected trait, in certain circumstances, it may constitute *per se* or explicit [] discrimination." *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 726 (3d Cir. 1995). The EEOC purports to extend that concept to the retaliation context, claiming that "[e]mployment policies can be facially retaliatory just as they can be facially discriminatory." EEOC Brief at 17.

Acknowledging the "well-settled rule that employers may lawfully seek releases from terminated employees in exchange for enhanced severance benefits," *id.*, the EEOC nevertheless argues that the rule does not apply here, because the employment of employee-agents in question was not "really terminated." *Id.* at 22. In other words, the EEOC claims that Allstate made signing the release a condition of continued employment and in doing so retaliated as a matter of law—under not one, but three separate EEO statutes. The EEOC's position is contrary to the facts, since all Allstate employees lost their jobs as previously constituted, even those who signed the release. Moreover, a number of courts have rejected the EEOC's theory that conditioning employment on a general waiver is unlawful, as well as the similar contention that requiring an employee to waive his or her rights to a judicial forum as a condition of employment is facially retaliatory or otherwise

discriminatory. In particular, of the two federal circuit courts that have considered the availability of a "facial 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); *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006). Variations on the EEOC's facial retaliation argument similarly have failed. *See, e.g.*, *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).

In *Weeks,* for instance, the Eleventh Circuit ruled that requiring employees to sign an arbitration agreement as a condition of employment does not constitute unlawful retaliation under Title VII, the ADA, or the ADEA—rejecting a facial retaliation theory essentially the same as that advanced by the EEOC in this case. Among other things, it found that the plaintiffs' refusal to sign the arbitration agreement in question did not amount to protected "opposition" conduct because they could not have reasonably believed that requiring arbitration of potential discrimination claims constituted illegal activity under any of the statutes. It observed that Title VII defines "unlawful employment practices" to include such things as "making hiring or other job classification decisions based upon an individual's race, color, religion, sex or national origin." 291 F.3d at 1317.

The court explained, "[t]o attempt to extrapolate from these lists the premise that the action of an employer requiring employees to arbitrate employment disputes is an 'unlawful' employment practice would require an intellectual dishonesty in which this court will not engage." *Id*. So, too is the case here. The employee-agents cannot have reasonably believed that Allstate's mere offer of a release was itself unlawful under Title VII, the ADEA, or the ADA.

Furthermore, there are many "legal and factual distinctions between status-based and retaliation claims," *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, __ U.S. __, 133 S. Ct. 2517, 2532 (2013), that make the EEOC's purported extension of the facial discrimination concept to the retaliation context especially inappropriate. For instance, "an employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act." *Id.* at 2522-23. In contrast, "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." *Id.* at 2528. The very different standards of proof applicable to protected status-based discrimination claims and conduct-based retaliation claims reflect that the two theories are logically and fundamentally distinct, and cannot be treated in the interchangeable manner suggested by the EEOC.

Although an employment policy that explicitly restricts women to office jobs could easily be found to facially discriminate on the basis of sex, for instance, it is difficult to conceive of a circumstance in which a "facial retaliation" claim would arise in practice. Retlaiation inherently occurs in response to specific acts of "opposition"; yet, the EEOC's facial theory would find retaliation in every case involving a release, even where opposition is obviously lacking. To take an extreme example, the EEOC's theory would find liability where a 35 year old employee refused to sign a release after receiving *better* treatment on the basis of a protected trait (age), and never spoke about, let alone opposed, the preferential treatment. In such a case, on the EEOC's theory, the failure to hire such an employee would be "facial" retaliation for his or her supposed "opposition" to federally prohibited discrimination, even though no plausible discrimination against the employee, or opposition to such discrimination, can be identified.

The EEOC's premise is like saying that a kitchen knife categorically constitutes a deadly weapon because someone could use it to commit murder. Or as this Court has observed, "[t]o take the principle where it logically leads, it is like saying every person has accrued a potential due process claim simply because he or she has been a person and hence has been protected by the Fifth and Fourteenth Amendments." *DiBiase*, 48 F.3d at 728.

Adopting a *per se* retaliation rule in the severance and release context would encourage increasingly abusive conduct by the EEOC in the name of "systemic" discrimination enforcement. The risk of being targeted by the EEOC in this manner is not a hypothetical one. In fact, the EEOC earlier this year filed a highly publicized lawsuit accusing CVS Pharmacy of engaging in a pattern or practice of "resistance to the full enjoyment of rights secured by Title VII" of the Civil Rights Act of 1964 by conditioning certain employees' severance pay on the signing of" a separation agreement containing a waiver and release of claims. Complaint at 2, *EEOC v. CVS Pharmacy, Inc.*, No. 1:14-cv-00863 (N.D. Ill. Feb. 7, 2014).[3]

Like the theory it advances here, the EEOC in the *CVS* case had argued that the release itself is facially retaliatory, because even though the agreement disclaims interference with or restriction of an employee's right to participate in or cooperate with a charge investigation, in the EEOC's view its very existence nevertheless "deters the filing of charges and interferes with the employees' ability to communicate voluntarily with the EEOC and Fair Employment Practices Agencies." Memorandum Opinion and Order at 4, *EEOC v. CVS Pharmacy, Inc.*, No. 1:14-cv-00863 (N.D. Ill. Oct. 7, 2014) (footnote omitted). Taken to its logical end, such reasoning would effectively prohibit the use of all releases in the

[3] The EEOC's action has since been dismissed. Memorandum Opinion and Order, *EEOC v. CVS Pharmacy, Inc.*, No. 1:14-cv-00863 (N.D. Ill. Oct. 7, 2014).

employment context—a result at odds with the long line of case law recognizing the general validity of releases of employment claims.

C. The EEOC's Policy-Based Arguments Are Unavailing

1. Providing enhanced severance pay in exchange for a release does not interfere with workers' right to freely use federal anti-discrimination remedies

The EEOC contends that allowing employers to offer releases in connection with enhanced severance programs interferes with employees' "unfettered access" to EEO "remedial mechanisms," EEOC Brief at 17, even where, as here, the challenged release only prevents signatories from suing in court and recovering damages for waived claims. As the EEOC well knows, however, in reality, such releases seldom are designed to preclude the filing of administrative charges of discrimination with the EEOC or an equivalent state enforcement agency, or interfere with an administrative enforcement action. Moreover, this Court has observed:

> [A] privately executed waiver agreement cannot alter or obstruct the EEOC's ability to exercise its rights and responsibilities, and that an employer may not invoke a waiver in an attempt to impede an employee's participation in EEOC procedures. Both requirements appear to contemplate the validity of an underlying waiver of a legal action and deal only with the administrative process—namely, the right of the EEOC to do its job and the right of the employee to file a claim with the agency.

Wastak v. Lehigh Valley Health Network, 342 F.3d 281, 289 (3d Cir. 2003).

Even where an individual has filed a charge but is precluded from recovering damages in court—either because he is subject to a valid release or he agreed to forgo judicial proceedings in favor of binding arbitration—the EEOC retains the right to proceed in court under both Title VII and the ADA, as well. Indeed, in *EEOC v. Waffle House, Inc.*, the Supreme Court held that a mandatory arbitration agreement between an employer and its employee does not bar the Commission (which is not a party to that agreement) from bringing its own action in federal court to enforce federal antidiscrimination law. 534 U.S. 279 (2002). Moreover, the EEOC has long taken the position that the right to file an administrative charge of discrimination, or to participate in an EEOC investigation, can never be waived under any circumstances. *See* EEOC Notice 915.002, Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes (April 10, 1997).[4] Nevertheless, although the law in this Circuit is "clear that any attempt by an employer to *enforce* a contractual provision prohibiting an employee from filing a charge or participating in an EEOC investigation would be ineffectual, [] there is no indication that the mere presence of that contractual language would void an otherwise knowing or voluntary waiver." *Wastak*, 342 F.3d at 290.

[4] *Available at* http://www.eeoc.gov/policy/docs/waiver.html

2. Any real or imagined "financial pressure" felt by those presented with a release has no bearing on whether the release is facially retaliatory

In further support of its facial retaliation claim, the EEOC asserts that Allstate's program "imposed severe financial pressure on the employee-agents to sign the release." EEOC Brief at 13. Yet, the fact that acceptance of enhanced severance in exchange for signing a release may have eased some of their financial worries has no bearing on whether merely offering the release amounted to *per se* retaliation. Withholding enhanced benefits that are above and beyond those to which the individual would otherwise be entitled to receive does not amount to a materially adverse employment action for retaliation purposes. If anything, it merely preserves the status quo, leaving the employee free to collect whatever compensation and other benefits await her at the end of her employment. To attempt to apply the statutory ban against retaliation in such circumstances distorts its purpose.

II. ADOPTING THE EEOC'S ARGUMENTS WOULD EFFECTIVELY PRECLUDE EMPLOYERS FROM OBTAINING COMPREHENSIVE RELEASE AGREEMENTS, AND WOULD SIGNIFICANTLY DIMINISH THEIR VALUE TO EMPLOYERS AND EMPLOYEES ALIKE

If accepted, the EEOC's "facial retaliation" theory would have a devastating impact on countless employers and employees within the Third Circuit and elsewhere. Among other things, it would undermine the preclusionary effect of

any general release of employment claims in any context, reducing its value to employers and in turn reducing what they are willing to pay for it, to the ultimate detriment of the employees who are the recipients of the consideration given for the release.

Typically, 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 closure of the employment relationship. To have such value, however, the release must cover any and all existing or potential claims—even unforeseen claims—growing out of the employment relationship. 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.

Making the mere offer of a release a facial violation of federal anti-retaliation laws creates a substantial disincentive for employers to offer separation benefits. The inability to obtain a full release, including a release of federal EEO claims, likely will reduce the amount employers are willing to pay. As a result, layoffs and terminations will still occur, but with lesser, if any, additional benefits than offered in the past. Declaring such releases to be facially retaliatory likewise would affect early retirement incentives and other voluntary separation programs

in a similar way, reducing the incentives of employees to take them—and, thus, potentially contributing to further layoffs and reductions in force.

In addition to its likely impact on voluntary and involuntary separation programs, a rule barring general releases of unasserted claims also could jeopardize voluntary settlements of pending claims involving employment-related issues. Whenever an employer settles an employment dispute under any of the myriad federal or state statutes governing the employment relationship, as well as common law claims, the employer typically will ask for a general release from the employee, covering any and all claims the employee may have, including claims not yet raised. If the employer is precluded from even offering a full release as part of a global settlement of the employee's claims—common law, state, and federal alike—it likely will be disinclined to pay as much, if anything, for a partial one.

Accordingly, the facial retaliation theory advanced by the EEOC, if accepted by this Court, would devalue general releases in every employment-related context. Moreover, the practical impact of such a rule is multiplied exponentially by the fact that innumerable separation agreements containing general releases of employment-related claims, including those arising under Title VII, the ADEA and the ADA, already have been executed nationwide. For employers subject to such agreements, opening the door to potential liability under a facial retaliation theory

would substantially undermine the finality and certainty of releases for which they paid significant consideration and which they reasonably believed at the time were lawful.

As noted above, if the mere offer of a release amounted to retaliation as a matter of law, employers would be considerably less inclined to offer generous severance benefits and separation incentives, or even to consider settling employment-related cases—especially those involving unsupported claims unlikely to survive pre-trial dismissal. Although employers would be required to expend precious time and resources litigating the claims, they nevertheless would avoid the even more undesirable position of having to defend against claims that were subject to a now-illegal release, in exchange for which they paid considerable sums. Such an outcome also would profoundly affect those employees who would have had the opportunity to gain substantial financial benefits because of their voluntary or involuntary termination. The vast majority of these individuals have no quarrel with their terminations—and perhaps voluntarily chose to participate—and would willingly sign a release as consideration for the extra benefits.

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,

s/ Rae T. Vann

Kathryn Comerford Todd
Steven P. Lehotsky
Warren Postman
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae* Chamber of Commerce of the United States of America

Rae T. Vann
Counsel of Record
NORRIS TYSSE LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

October 14, 2014

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.

s/ Rae T. Vann

October 14, 2014 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 5,144 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: VIPRE Business 6.0.0 (updated October 14, 2014).

s/ Rae T. Vann
Rae T. Vann

October 14, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2014, the undersigned filed one (1) electronic original and seven (7) true and correct copies of the foregoing brief via U.S. Mail, postage prepaid, with the Clerk of the Court, and served an electronic copy via the Court's CM-ECF system upon the following counsel:

John V. Gorman, Esq.
Email: jgorman@morganlewis.com

Coleen M. Meehan, Esq.
Email: cmeehan@morganlewis.com

C. Felix Miller, Esq.
Email: felix.miller@eeoc.gov

Paul D. Ramshaw, Esq.
Email: Paul.Ramshaw@eeoc.gov

Iris A. Santiago-Flores, Esq.
Email: iris.santiago-flores@eeoc.gov

Richard C. Godfrey, Esq.
Email: rgodfrey@kirkland.com

Jordan M. Heinz, Esq.
Email: jheinz@kirkland.com

Katherine M. Katchen, Esq.
Email: kkatchen@akingump.com

Donald R. Livingston, Esq.
Email: dlivingston@akingump.com

Sallie G. Smylie, Esq.
Email: ssmylie@kirkland.com

Erica Zolner, Esq.
Email: erica.zolner@kirkland.com

s/ Rae T. Vann
Rae T. Vann

October 14, 2014