IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

Gene R. Romero, et al.,
Plaintiffs – Appellants,

v. Nos. 07-4460 & -4461

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

Equal Employment Opportunity Commission,
Plaintiff – Appellant,

v. No. 08-1122

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

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

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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STATEMENT OF JURISDICTION

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

On June 20, 2007, the district court entered an order granting Allstate's December 2005 motion for summary judgment. Joint Appendix ("JA") 12-14 (EEOC Docket No. ("ED") 63, Romero 1 Docket No. ("R1D") 183). The court did not enter a separate judgment pursuant to Federal Rule of Civil Procedure 58(a) or 54(b), but the court apparently viewed its June order as a final order. Allstate had asked the court in its December 2005 motion to "enter judgment in Allstate's favor on all claims asserted in this action." JA 1143 (ED 42, R1D 148). The court's June order granted Allstate's summary judgment motion, granted two other motions, denied two motions, and dismissed "all other pending motions . . . AS MOOT." JA 13-14, ¶¶ 4-6. The court granted counsel 20 days to "submit . . . any issues that must be resolved before the case-files are closed." JA 14, ¶ 7. The EEOC and the Romero plaintiffs filed a response on July 10 asking the court to (1) state its rationale for some of its rulings and (2) enter final judgment under Rule

58(a) or judgment under Rule 54(b) as to all claims dismissed. JA 1255-59 (R1D 184). The district court did not respond to that filing. The district court's failure to state its rationale for some of its rulings did not deprive its decision of finality. See Caprio v. Bell Atlantic Sickness & Accident Plan, 374 F.3d 217, 220-21 (3d Cir. 2004) (assuming jurisdiction over unexplained summary judgment order); Vadino v. A. Valey Engineers, 903 F.2d 253, 267 (3d Cir. 1990) (deciding on merits appeal from unexplained summary judgment order).

Former Federal Rule of Civil Procedure 58(b)(2)(B) (current rule 58(c)(2)(B)) and Federal Rule of Appellate Procedure 4(a)(7)(A)(ii) provide that when a district court enters a final order but not a separate judgment, and a separate judgment is required, the separate judgment is entered 150 days after the final order was entered. Accordingly, final judgment was entered in these cases on November 19, 2007. Pursuant to Fed. R. App. Pro. 4(a)(1)(B), the Commission filed a timely notice of appeal on January 11, 2008.

STATEMENT OF THE ISSUE

Whether the district court erred in granting Allstate summary judgment with respect to the retaliation claims advanced by the EEOC and the Romero plaintiffs. Raised: ED 16, EEOC Motion for Partial Summary Judgment (May 2, 2003) at 6-18; R1D 93, Romero Motion for Partial Summary Judgment (May 23, 2003) at 13-29. Objected to: ED 18, Allstate Opposition to ED 16 (June 2, 2003) at 6-24;

R1D 100, Allstate Opposition to R1D 93 (June 20, 2003) at 3-30. Ruled on: JA 12-14 (ED 63, R1D 183, Order Granting Summary Judgment).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. It is related to Romero v. Allstate Insurance Co., No. 07-4461, with which it has been consolidated. In addition, the Commission joins in, and incorporates by reference, the "Statement of Related Cases" in the Romero I brief (at pp. 3-4).

STATEMENT OF THE CASE

A. Course of Proceedings

This is an appeal from a final order of the District Court for the Eastern District of Pennsylvania (Fullam, J.) granting defendants summary judgment on all claims as to all parties. The order was entered June 20, 2007, JA 12-14 (ED 63, R1D 143), and became a final judgment on November 19.

The EEOC filed a complaint in December 2001 alleging that Allstate Insurance Company violated the anti-retaliation provisions of Title VII, the ADEA, and the ADA by requiring its employee agents to release all their claims under those statutes in order to continue selling insurance for the company. JA 375-84 (ED 1). In February 2002, the district court consolidated (ED 3, R1D 145) the Commission's case with Romero v. Allstate Insurance Co., No. 01-3894, and denied Allstate's motions to dismiss both cases. JA 407-10 (ED 6, R1D 48).

During 2003, the parties filed cross motions for full or partial summary judgment. ED 11, 16; R1D 93, 113. In March 2004, the district court (1) denied Allstate's motion in most respects, (2) granted the motions by the EEOC and by the Romero I plaintiffs for partial summary judgment with respect to liability, and (3) declared voidable the releases that Allstate had required the employee agents to sign. JA 994-1008 (ED 30-31, R1D 134-35).

In December 2005, Allstate filed a second motion for summary judgment relying in part on intervening decisions. JA 1122-46 (ED 42, R1D 148). The district court entered an order on March 21, 2007, stating its intent to grant Allstate's motion. JA 1223-25 (ED 56, R1D 173). On June 20, 2007, the district court granted that motion. JA 12-14 (ED 63, R1D 183).

B. Statement of Facts

In late 1999 Allstate had about 15,100 insurance agents in the United States. JA 1979 (Allstate 30(b)(6) responses). These agents were permitted to sell only Allstate-approved insurance and financial-services products. JA 1810 (Hutton 1/03 dep., p. 76), JA 1888 (Hutton 3/02 affd., ¶ 2). It is undisputed that about 6,200 of these agents were employees of Allstate, having signed either an R830 or an R1500 employment contract. JA 1800 (Hutton 1/03 dep., p. 32), JA 1979 (Allstate 30(b)(6) responses). Allstate viewed the other 8,900 agents as

independent contractors (or as short-term employees training to become independent contractors). JA 1979 (Allstate 30(b)(6) responses).

In 1990 Allstate stopped hiring agents who would be long-term employees. JA 1818 (Hutton 1/03 dep., p. 141). Rather, all new agents entered the "Exclusive Agency" program, under which they worked as employees for 18 months (under the R3000 contract) and then became independent contractors (under the R3001 contract). JA 1880-90 (Hutton 3/02 affd., ¶ 11). Allstate also encouraged its employee agents to convert to independent-contractor status, with no requirement that they release all their claims. JA 1549 (Lawson dep. p. 264); JA 1617 (Moorehead dep. pp. 80-81). About 6,200 employee agents declined this offer.

In November 1999 Allstate announced a reorganization program called "Planning for the Future" ("PFF"). JA 1859-60 (Hutton 1/03 dep.) PFF called for the termination of almost all of the company's employee agents on June 30, 2000. JA 2293 (PFF Agent Information Booklet). The PFF Agent Information Booklet ("AIB") presented the employee agents with three numbered options, and all three options required each agent to sign a release of all claims. JA 2294 (AIB 9). An agent who signed a release could either (1) continue selling Allstate insurance, but as an independent contractor under the company's R3001S Exclusive Agency program and without his former employee benefits, JA 2310 (AIB 25); (2) convert to Exclusive Agency status for a short period solely for the purpose of acquiring

ownership of his book of business and selling it, and then leave the company, JA 2323-24 (AIB 38-39); or (3) leave the company by the end of June and receive a year of severance pay, plus other benefits, JA 2328 (AIB 43). The employee agents also had a fourth option: an agent who did not sign the release would be terminated and would receive a "base severance pay" lasting up to 13 weeks, depending on the agent's years of service. JA 2328 (AIB 43).

The release had to be signed by June 1, 2000. JA 2350 (AIB 65). The document required the agent to

> release, waive and forever discharge Allstate Insurance Company . . . from any and all . . . charges, causes of action, . . . or claims for relief . . . arising out of, connected with, or related to, my employment and/or the termination of my employment . . . , or my transition to independent contractor status, . . . including any claim for . . . discrimination prohibited under the [ADEA, Title VII, or the ADA].

JA 2352 (Release). Almost all of the employee agents signed the release. Only 19 did not. JA 2011 (Allstate RFA responses). Of the approximately 6200 agents who signed the release, somewhere between 3,800 (61%) and 4,200 (68%) continued their careers as Allstate insurance agents by converting to the Exclusive Agency program. JA 1966 (Allstate RFA responses).

More than 320 former employee agents filed charges with the EEOC alleging that the PFF program violated the prohibition against retaliation. ED 1 (EEOC Complaint, Ex. A); ED 2 (EEOC First Amended Complaint, Ex. B).

C. District Court's Decisions

The parties filed cross motions during 2003 for full or partial summary judgment. In March 2004, the district court granted partial summary judgment to the Commission and the Romero plaintiffs on their claims that Allstate's PFF program violated the anti-retaliation provisions of Title VII, the ADA, and the ADEA, and it ruled that the releases that the agents signed were therefore voidable at the option of the agents. JA 998-1000 (Order at 5-7). The court gave two reasons for this decision. First, the Older Workers Benefit Protection Act prohibits using a waiver "to justify interfering with the protected right of an employee to file a charge," 29 U.S.C. § 626(f)(4), and the release violated that provision because reasonable agents could interpret the release as preventing them from filing charges alleging violation of the anti-discrimination statutes. JA 999 (Order at 6). Second, the district court agreed with the EEOC that Allstate violated the anti-retaliation provisions because the PFF program threatened retaliation against the employee agents to prevent them from exercising and preserving their rights under the anti-discrimination statutes. JA 999 (Order at 6).

> Those employees who did not sign releases were in fact treated less favorably than those who did sign, and the signers had all been threatened with such an outcome if they exercised their right to refuse to sign the proposed release.

JA 999 (Order at 6).

In December 2005 Allstate filed a third motion for summary judgment, arguing that the district court should dismiss the plaintiffs' retaliation claims and relying in part on the then-recent decisions in Glanzman v. Metropolitan Management Corp., 391 F.3d 506 (3d Cir. 2004), and Isbell v. Allstate Insurance Co., 418 F.3d 788 (7th Cir. 2005). R1D 148 (Allstate summary judgment memo) at 11. The company maintained that: (1) refusing to sign a release is not a protected activity; (2) the termination of the agents who refused to sign was not causally connected to their refusal to sign, because all the employee agents were terminated, whether they signed or not; (3) whatever happened after the employee agents were terminated could not have been a retaliatory act because this Court held in Glanzman that there is no such thing as a post-termination adverse employment action; (4) it was lawful for Allstate to require its employees to sign a release before giving them benefits to which they were not otherwise entitled; and (5) the Seventh Circuit in Isbell rejected a retaliation claim identical to the ones the plaintiffs have raised here. R1D 148 at 10-15.

On June 20, 2007, the district court granted Allstate summary judgment on all plaintiffs' retaliation claims, relying on Isbell. The only explanation the court gave for this ruling was the following sentence (JA 13):

> The decision of the Seventh Circuit Court of Appeals in Isbell v. Allstate Insurance Co., 418 F.3d 788 (7th Cir. 2005), warrants the conclusion that plaintiffs' claims of ERISA violations, age discrimination, and retaliation must fail.

SUMMARY OF ARGUMENT

Allstate forced its employee agents to choose between holding on to their statutory rights and holding on to their careers at Allstate. In doing so, Allstate violated the prohibitions on retaliation in the ADEA, Title VII, and the ADA with respect to two groups of employee agents: those who refused to sign the release (the "holdouts") and those who signed the release in order to continue selling insurance for the company. By refusing to release their claims, the holdouts threatened to sue Allstate alleging discrimination or retaliation, and thus engaged in protected participation activity. Allstate retaliated against them by barring them from converting to exclusive-agent status, which in turn prevented them from continuing their careers as Allstate agents.

It is not lawful for an employer to require its employees to give up their substantive statutory rights under the anti-discrimination statutes in order to continue working for the company, and Allstate's PFF program violated this rule. The injury the holdouts suffered was that because they insisted on retaining their substantive statutory rights, Allstate deprived them of their opportunity to continue to sell Allstate insurance. The employee agents who signed the release in order to convert to exclusive agents were the other victims of Allstate's unlawful policy, but the injury they suffered was different. They were able to continue selling

Allstate insurance, but they were required to sign releases that they should not have been required to sign.

ARGUMENT

I. THE HOLDOUTS' REFUSAL TO SIGN THE RELEASE WAS PROTECTED ACTIVITY, AND ALLSTATE RETALIATED AGAINST THE HOLDOUTS BY BARRING THEM FROM BECOMING EXCLUSIVE AGENTS.

Section 4(d) of the ADEA makes it unlawful for an employer to discriminate against any of his employees "because such individual . . . has opposed any practice made unlawful by this section [the participation clause], or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA] [the opposition clause]." 29 U.S.C. 623(d). Title VII and the ADA contain similar provisions. 42 U.S.C. §§ 2000e-3(a) (Title VII), 12203(a) (ADA). Courts normally require retaliation plaintiffs to show that they engaged in protected activity, that the employer took an adverse action against them, and that there was a causal connection between the adverse action and the protected activity. Moore v. City of Philadelphia, 461 F.3d 331, 340-41 (3d Cir. 2006).

It is undisputed that Allstate required its employee agents to release all their statutory claims if they wanted to continue selling insurance for the company, and prohibited employee agents who refused to release their claims from continuing

their careers with the company. Prohibiting the holdouts from becoming exclusive agents was an adverse action regardless of whether an exclusive agent with Allstate is an employee or an independent contractor. Since all employee agents at Allstate were afforded the opportunity to become exclusive agents, the conversion option was a privilege of the employee agents' employment. In Hishon v. King & Spalding, 467 U.S. 69 (1984), the plaintiff alleged that the defendant law firm had rejected her for partnership because of her sex, and the Supreme Court held that this allegation stated a claim under Title VII regardless of the fact that, as a partner, the plaintiff would presumably no longer be a covered employee. "The benefit a plaintiff is denied," the Court stated, "need not be employment to fall within Title VII's protection; it need only be a term, condition, or privilege of employment." 467 U.S. at 77. Flannery v. Recording Industry Association of America, 354 F.3d 632 (7th Cir. 2004), reinforces the point. The defendant told Flannery in June 2001 that he would be terminated in October and promised him three severance benefits, including continuing half-time work as a consultant. After Flannery was terminated, he filed a charge with the EEOC, and the defendant never offered him any consulting work. Flannery alleged that the defendant's refusal to offer him consulting work was retaliatory, and the Seventh Circuit agreed. Acknowledging that a person who seeks a consulting position as an independent contractor cannot bring an ADEA claim, the court ruled that Flannery was "not suing as an

independent contractor, but as a former employee." Id. at 642. The court assumed that Flannery had to show an "adverse employment action," id. at 642 n.3,[1] but held that the promise of work as a consultant "unquestionabl[y] . . . grew out of his employment relationship," and that Flannery had therefore stated a claim for retaliation. Id. at 642. Just so here, Allstate's offer in the PFF program that employee agents could convert to exclusive-agent status grew out of their employment relationship.

Hishon also disposes of any argument Allstate might make that it was not an adverse action to deny conversion to exclusive-agent status because Allstate was under no obligation to offer that conversion. The defendant in Hishon made the same argument, and the Supreme Court rejected it, stating, "A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." Hishon, 467 U.S. at 75. Thus the option to convert to exclusive-agent status would have been a privilege of the employee agents' employment even if Allstate had offered it for the first time in November

[1] We now know that this standard was too narrow. See Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 126 S. Ct. 2405, 2411-14 (2006) (holding that an adverse action in a retaliation claim need not be an employment action).

1999. In fact, however, Allstate had offered this option to its employee agents since 1990.[2]

It clearly would have constituted unlawful retaliation if, after terminating all its employee agents, Allstate had prevented a former employee agent from converting to exclusive-agent status because she sued the company alleging discrimination, while allowing other former employee agents, who did not sue, to convert. See Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 568-69, 571-72 (3d Cir. 2002) (assuming that suing one's employer is protected activity under ADEA and ADA); Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3d Cir. 1994) (referring to "the protected act of filing a Title VII action"); Dawkins v. Nabisco, Inc., 549 F.2d 396, 397 (5th Cir. 1977) (§ 704(a) prohibits employer from retaliating against employee because employee filed Title VII lawsuit against employer). Allstate argued below, however, that because it did not wait for its employee agents to file suit, and instead prevented them from continuing as

[2] The Sixth Circuit held in EEOC v. SunDance Rehabilitation Corp., 466 F.3d 490 (2006), that where an employer offered severance benefits to RIF'd employees in exchange for signing a release, the employees who chose not to sign the release were not "deprived of anything" and "obviously d[id] not give up any rights." Id. at 501. The EEOC believes SunDance was wrongly decided, but even if it was correctly decided, it is not on point. In SunDance the RIF'd employees had no opportunity to continue their employment, and the issue was whether the release was retaliatory. Here the employee agents had an opportunity to continue their careers, and the issue is whether Allstate retaliated against them by barring them from doing so unless they released all their claims.

Allstate agents unless they released discrimination claims arising out of their employment, they acted lawfully. This Court should reject that argument.

It is well settled that the anti-retaliation provisions should be construed broadly in order to further their purpose, even if that means construing them to protect persons – and prohibit employment actions – not encompassed in the provisions' literal terms. See, e.g. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding that "employees" in § 704(a) of Title VII should be interpreted to include former employees); Fogleman, 283 F.3d at 572 (holding that employee who did not engage in protected activity was protected against retaliation where employer took adverse action because it erroneously believed plaintiff had engaged in protected activity); Charlton, 25 F.3d at 200 (holding that § 704(a) protects former employees); Brock v. Richardson, 812 F.2d 121, 123-25 (3d Cir. 1987) (holding that FLSA's anti-retaliation provision prohibits retaliation by employer where employer believed employee had engaged in protected activity, even though employee had not done so); EEOC v. Ohio Edison Co., 7 F.3d 541, 543 (6th Cir. 1993) (holding that § 704(a) protects plaintiff against retaliation even where plaintiff did not himself engage in protected activity, but his co-worker engaged in protected activity on his behalf).

Allstate may argue that there was no protected activity by the holdout employee agents here because there was no "activity": they did not "do" anything.

But they did in fact "do" something: they made a decision that Allstate forced them to make – not to sign the release – and that decision had a momentous impact on their careers. This Court and other courts have held that the anti-retaliation provisions sometimes protect employees who have done nothing at all. See, e.g., Fogleman, 283 F.3d at 572 (holding that employee who did nothing was protected against retaliation where employer took adverse action because it erroneously believed plaintiff had engaged in protected activity); Ohio Edison, 7 F.3d at 545 (holding that employee who did nothing was protected against retaliation where employer took adverse action against plaintiff right after a co-worker, acting on plaintiff's behalf, protested plaintiff's termination as discriminatory).

In addition, courts have held that the protection against retaliation extends to employees who have only threatened to file a charge or lawsuit. See, e.g., EEOC v. L.B. Foster Co., 123 F.3d 746, 754 (3d Cir. 1997) (plaintiff engaged in protected activity when she informed her supervisor that she intended to file charge); Gifford v. Atchison, Topeka & Santa Fe Ry Co., 685 F.2d 1149, 1156 n.3 (9th Cir. 1982) (writing letter to employer and union threatening to file EEOC charge is protected); see also Aviles v. Cornell Forge Co., 183 F.3d 598, 603 (7th Cir. 1999) (neither charge nor complaint need specify that relevant protected activity was plaintiff's threat to file charge, rather than actually filing it). Here the holdouts' refusal to sign the release could have reasonably been viewed by Allstate as a

threat to sue the company, since there was no other rational reason for the holdouts to refuse to sign.

Similarly, an employer may not force an employee to drop a charge or lawsuit alleging employment discrimination in order to keep her job. See Curl v. Reavis, 740 F.2d 1323, 1325 (4th Cir. 1984) (affirming district court judgment finding employer violated anti-retaliation provision when it conditioned promotion on plaintiff's dropping pending EEOC charge); cf. Johnson v. Palma, 931 F.2d 203, 208 (2d Cir. 1991) (finding retaliation when union conditioned willingness to proceed with union grievance on withdrawal of charge); Brock v. Casey Truck Sales, Inc., 839 F.2d 872, 879 (10th Cir. 1988) (FLSA retaliation provision prohibits firing employees for refusing to release claims for overtime pay); Marshall v. Parking Co. of America–Denver, 670 F.2d 141, 142-43 (10th Cir. 1982) (same, regarding refusal to release backpay claim).

In a case with facts similar to this case, the Eleventh Circuit recently held that the plaintiff engaged in protected activity when he refused to sign a mandatory arbitration agreement that would have applied to his pending EEOC charge. Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1277-79 (11th Cir. 2008). Goldsmith filed a charge with the EEOC alleging racial harassment and discrimination. Eight months later the employer required all its employees to sign a mandatory arbitration agreement as a condition of continued employment.

Goldsmith refused to sign it, and the employer fired him. Id. at 1271-72. The employer argued (1) that the Eleventh Circuit had already ruled – in Weeks v. Harden Manufacturing Corp., 291 F.3d 1307 (11th Cir. 2002) – that refusing to sign an arbitration agreement is not protected activity, and (2) that the defendant had therefore acted lawfully in firing Goldsmith for refusing to sign. The court of appeals rejected that argument and held that firing Goldsmith for refusing to sign the agreement constituted retaliation since both parties knew that the agreement would affect his pending charge. Id. at 1279 ("[Defendant] stated that its reason for Goldsmith's discharge was his refusal to sign the agreement, but that reason is retaliatory.").

Since there is no evidence here that any of the holdouts – or any of the employee agents who signed releases in order to continue working as Allstate agents – had pending charges, Allstate may argue that this Court should follow Weeks rather than Goldsmith. But Weeks supports the Commission's position and not Allstate's. In Weeks, the employer required all its employees to sign a mandatory arbitration agreement as a condition of continued employment, and it fired the plaintiffs because they refused to sign it. Weeks, 291 F.3d at 1310. The plaintiffs argued that their terminations were retaliatory, and the court of appeals disagreed, holding that their refusals to sign the arbitration agreement were not protected opposition activities. Id. at 1312. That holding was not grounded,

however, on the fact that the plaintiffs' refusals to sign the agreement did not constitute "activities." Rather, the court held that their refusals to sign were not "protected" activities because the plaintiffs' belief – that requiring the mandatory arbitration agreement was unlawful – was "not objectively reasonable." Weeks, 291 F.3d at 1312-14; see also EEOC v. Luce, Forward, Hamilton & Scripps, 303 F.3d 994, 1005-06 (9th Cir. 2002) (rejecting similar retaliation claim for the same reason).

In holding that the employees' beliefs were not objectively reasonable, Weeks and Luce, Forward relied on Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001), and the various appellate decisions holding that requiring employees to sign mandatory arbitration agreements as a condition of continued employment is lawful because employees signing such agreements are not "forgo[ing] the substantive rights afforded by the statute," and instead are only agreeing to resolve those substantive rights in "an arbitral rather than a judicial forum." Weeks, 291 F.3d at 1313 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)); Luce, Forward, 303 F.3d at 1006 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (in turn quoting Mitsubishi, 473 U.S. at 628)).

Accordingly, there are two reasons the result should be different here. First, the holdouts' refusal to sign the release was protected **participation** activity (because it could reasonably be viewed as a threat to sue the company), and there is no requirement that an employee engaging in protected participation activity have a reasonable belief in the unlawfulness of the employer's conduct. Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994) (per curiam) (while employee engaging in opposition activity must "have a reasonable belief that the practice the employee is opposing violates Title VII . . . , 'there is nothing in [the] wording [of the participation clause] requiring that the charges be valid, nor even an implied requirement that they be reasonable.'").

Second, even if the holdouts' refusal to sign were to be viewed only as **opposition** conduct, it was protected activity. Allstate was not requiring the employee agents merely to agree to a different forum for the resolution of their substantive rights; it required them to waive their substantive statutory rights to assert discrimination claims against the company in court or in arbitration. There are no cases holding that it is lawful for an employer to require its employees to release all their claims in order to continue working for the company. Consequently, the rationale that Weeks and Luce, Forward relied on in finding the employees' beliefs in those cases not objectively reasonable does not apply to the employee agents in this case. Since Allstate was requiring the employee agents to

release their substantive rights, their belief that the company's policy was unlawful was objectively reasonable.

Thus, consistent with the broad interpretation due the anti-retaliation provisions, this Court should hold that individuals who refuse to sign a waiver or release of all claims as a condition of continued employment are protected from reprisal, whether that refusal is viewed as participation or opposition activity. The law is settled that employees may not be penalized either for filing a charge or lawsuit alleging employment discrimination or for refusing to withdraw such a charge or suit. See, e.g., Casey Truck Sales, 839 F.2d at 879 (holding that where employer fired employees for refusing to repudiate their claim to overtime pay, employees' refusal to release their claims was protected activity under FLSA's anti-retaliation provision; stating that "[p]rotection against discrimination for instituting FLSA proceedings would be worthless if an employee could be fired for declining to give up the benefits he is due under the Act"); Parking Co., 670 F.2d at 142-43 (holding that where employer fired employee for refusing to release his back-pay claim, employee's "refusal to give up his claim" was protected activity under FLSA's anti-retaliation provision). It necessarily follows that it would make no sense to hold that such individuals may nonetheless be penalized for refusing to absolve the employer of liability for the alleged discriminatory conduct or to waive the right to benefit from any action the EEOC might bring challenging that same

discrimination. There can be no doubt that such a narrow interpretation of "protected activity" would chill employees' willingness to file charges and assert their statutory rights.

Allstate argued that its policy of conditioning an employee agent's opportunity to continue selling insurance for the company on his execution of a release should be deemed lawful because public policy encourages the settlement of employment discrimination claims. But Allstate was not settling existing claims; it was precluding the employee agents from enforcing the anti-discrimination statutes by litigating the lawfulness of the very program that the company was imposing on them. It does not serve the public interest to bar employees from enforcing the anti-discrimination statutes. Moreover, if employers were permitted on one occasion to require all their employees to release all their claims in order to continue working for the company, no obvious reason appears why they should not be permitted to do so every payday, thereby immunizing themselves from any liability under those statutes. See Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90, 106 (D. Mass. 1998) (allowing employers to "functionally insulate themselves from ADEA suits" would "offend[ ] the intent of Congress in enacting" the statute).

The district court's reliance on Isbell v. Allstate Ins. Co., 418 F.3d 788 (7th Cir. 2005), was misplaced. Isbell is not binding on the district court, either as a

matter of judicial hierarchy or on the basis of preclusion principles. More important, it is not persuasive authority for dismissing the plaintiffs' retaliation claims in this case, because it addressed a different claim. In affirming the dismissal of Isbell's retaliation claim, the Seventh Circuit characterized her claim as a challenge to her termination as an employee agent. The court stated:

> Isbell was not a victim of retaliation. Her reason for **termination** was the same for all employees at Allstate who were similarly situated. . . Isbell did not **lose her job**[ ] because she refused to sign the Release. She **lost her job** for the same reason 6,400 other employee agents of Allstate lost theirs, . . . because Allstate had decided to eliminate all employee agent positions with the Company.

418 F.3d at 793 (emphasis added). But the plaintiffs here are not alleging that Allstate retaliated against the holdouts by terminating them. Rather, we allege that Allstate retaliated against them by prohibiting them from continuing to work as Allstate agents. Allstate did not terminate the holdouts because they refused to sign the release, but it did bar them from continuing their careers as Allstate agents because they refused to sign it. Accordingly, the rationale that the Seventh Circuit used to reject Isbell's claim (i.e., lack of a causal connection between the protected activity and the adverse action) does not apply to the plaintiffs' claims in this case.[3] Since it is undisputed that Allstate refused to allow the holdouts to continue

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[3] It is true that the Seventh Circuit at one point described Isbell's claim as alleging "that Allstate retaliated against her when it refused her 'the opportunity to work for Allstate albeit under a different contract unless she signed the release.' Isbell thus argues," continued the court, "that Allstate could not require her to sign the

working as agents precisely because they would not sign a release, there was manifestly a causal connection between the protected activity and the adverse action in this case.

Allstate relied in the district court on decisions holding that it is not unlawful retaliation for an employer to condition receipt of enhanced severance benefits on execution of a release of discrimination claims. See, e.g., Bottge v. Suburban Propane, 77 F. Supp. 2d 310, 313 (N.D.N.Y. 1999) (refusal to sign release in order to obtain severance benefits, without accompanying opposition conduct, is not protected activity under Title VII); Snoke v. Staff Leasing, Inc., 43 F. Supp. 2d 1317, 1328 (M.D. Fla. 1998) (refusal to sign release in order to obtain severance benefits does not constitute protected opposition activity); EEOC v. Sears, Roebuck & Co., 857 F. Supp. 1233, 1239 (N.D. Ill. 1994) (same). In none of these cases, however, had the employer told its employees that it would not allow them to continue working for the company unless the employees released their claims. What was at stake in Bottge, Snoke and Sears was the amount of severance benefits the former employees would receive. Those cases therefore do not govern the plaintiffs' claims here. As the term implies, "severance benefits" are paid to

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Release as a condition to becoming an independent contractor with the Company." 418 F.3d at 793. That claim is like the one the plaintiffs raise here. But, as the quotation from Isbell in the text shows, that is not the claim that the Seventh Circuit resolved.

individuals who are severing their relationship with the company altogether, not those who, in Allstate's words, are simply "converting" from employee to independent contractor status. See Sly v. P.R. Mallory & Co., 712 F.2d 1209, 1211 (7th Cir. 1983) (severance benefits are "generally intended to tide an employee over while seeking a new job"). Indeed, Allstate's PFF materials used the term "severance" in this traditional sense, limiting the options of enhanced or base "severance pay" to employee agents who left the company permanently on or before June 30, 2000. The opportunity to continue working as an Allstate agent – which Allstate denied the holdouts because of their protected activity – is, in reality, the exact opposite of a severance benefit.[4]

In its December 2005 motion for summary judgment, the other "new" decision that Allstate relied on – besides Isbell – was Glanzman v. Metropolitan Management Corp., 391 F.3d 506 (3d Cir. 2004). There this Court gave two reasons for affirming dismissal of the plaintiff's retaliation claim: that the plaintiff suffered no actual injury, and that the alleged retaliatory acts occurred after Glanzman's discharge, and "[o]nce her employment was terminated it was not

[4] This Court's decision in Wastak v. Lehigh Valley Health Network, 342 F.3d 281 (2003), likewise addressed a release signed at termination, rather than one required as a condition for continuing the employee's career. In addition, the claim this Court addressed in Wastak – that the release the plaintiff had signed was void because it barred him from filing a charge – is quite different from the Commission's claims in this case.

possible for her to suffer adverse employment action." Id. at 516. Allstate urged the district court to rely on the quoted statement as good law, Motion at 12-13, but this Court should not do so. The Glanzman panel cited no authority for the quoted proposition, and it failed to acknowledge that in 2004, when it issued its decision, it was settled law both in the Supreme Court and in this Court that the anti-retaliation provisions protect former employees against retaliatory actions taken by their former employer after the plaintiff was no longer an employee. Robinson, 519 U.S. at 345-46 (holding that the plaintiff could sue for retaliation based on a negative reference that his former employer gave another employer after the plaintiff had been fired); Charlton, 25 F.3d at 200 (holding that the plaintiff could sue for retaliation based on an adverse action that her former employer took some time after she had been fired); see also Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 126 S. Ct. 2405, 2411-14 (2006) (rejecting Glanzman panel's assumption that retaliatory action must be an employment action).[5]

[5] Even if Allstate's policy is not unlawful under the anti-retaliation provisions of the ADEA, Title VII, and the ADA, it surely violates the anti-interference provision of the ADA. 42 U.S.C. § 12203(b). This Court has already acknowledged that the ADA's anti-interference provision "sweeps more broadly" than its anti-retaliation provision. Fogleman, 283 F.3d at 570-71. Allstate's requirement that the employee agents release all their claims in order to continue working for the company violated the anti-interference provision's injunction not to "interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this [act]." Brown v. City of Tucson, 336 F.3d 1181, 1192-93 (9th Cir. 2003) ("[I]t is clear that . . . the plain language of § 503(b) clearly

II. THE EMPLOYEE AGENTS WHO SIGNED RELEASES IN ORDER TO BECOME EXCLUSIVE AGENTS WERE ALSO VICTIMS OF ALLSTATE'S UNLAWFUL POLICY.

The holdouts were not the only victims of Allstate's unlawful policy. The other victims were the employee agents who signed releases in order to become exclusive agents. We have shown above that an employer violates the anti-retaliation provisions when it requires its employees to sign releases of all their claims in order to continue working for the company. The holdouts' retaliation claims follow the traditional paradigm: they engaged in protected participation activity by threatening to sue the company (or in protected opposition activity by refusing to go along with the company's unlawful policy), and Allstate retaliated against them by preventing them from converting to exclusive-agent status. The employee agents who became exclusive agents do not fit the traditional paradigm because the retaliatory action that Allstate took against them was pre-emptive.

A threat to take retaliatory action against employees who engage in protected activity can deter protected activity as effectively as – and perhaps even more effectively than – taking a retaliatory action can, and the EEOC should have the authority to sue to remove the threat. See Bull HN Info., 16 F. Supp. 2d at 108-09 ("If Bull's argument – that threats of retaliation are not actionable – is correct,

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prohibits [an employer] from threatening an individual with [an adverse employment action] unless the individual foregoes a statutorily protected [right].").

then a . . . government enforcement body would have to wait until an employer actually retaliates before invoking the protections of [29 U.S.C. §] 623(d). Where the threatened retaliation is clearly illegal, where it chills the redress of legal rights, however, such a conclusion can only be described as absurd.") Employees who learn that a co-worker was fired may not know about that person's protected activity or may not be sure that the termination was retaliatory. But if the employer makes an open threat – e.g., "If you file a charge against me or sue me, I will fire you" – the employer's retaliatory intent is clear. Allstate's policy is comparable to that threat. The company announced: "If you don't give up your right to sue us, you will not be permitted to continue selling our insurance." The Supreme Court has stated that "a primary purpose of [the] antiretaliation provisions [is m]aintaining unfettered access to statutory remedial mechanisms." Robinson, 519 U.S. at 346. Instead of maintaining unfettered access, Allstate required its agents to renounce that access. A company should not be permitted to require its employees to release their claims in order to keep working for the company, and the employee agents who became exclusive agents were injured by Allstate's violation of that rule.

While the legal rationale governing the holdouts' claims and the claims of the employee agents who converted is similar, the injuries the two groups suffered (and the types of relief due them) differ. The holdouts' injury was their inability to

continue their careers as Allstate agents. The new exclusive agents were able to continue their careers; their injury was being required to sign releases. The releases they signed should accordingly be declared void.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

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

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(1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,758 words, excluding the parts of the brief excepted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Counsel for Appellant EEOC certifies that the text of the electronically filed version of this brief is identical to the text of the hard copies of the brief filed with the Court.

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Counsel for Appellant EEOC certifies that a virus check using Symantec AntiVirus version 9.0.3.1000 was performed on the electronic version of this brief on June 2, 2008, prior to electronic filing with the Court.

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CERTIFICATE OF SERVICE

I, Paul D. Ramshaw, certify that on June 2, 2008, the same day that I transmitted to the court an electronic version of the brief for Appellant EEOC, I caused ten (10) printed and bound copies of the brief to be sent to the Clerk of the United States Court of Appeals for the Third Circuit, and electronic copies to the following counsel, who have agreed to accept electronic service:

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