

Releases and the Law of Retaliation: Theories and Recent Developments

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INTRODUCTION

The United States Equal Employment Opportunity Commission (“EEOC” or “Commission”) maintains that some release agreements violate the anti-retaliation protections of the federal anti-discrimination employment laws. EEOC has challenged releases by suing employers, and some courts have agreed with the EEOC’s position. Others have rejected it.

This article examines the law about retaliation and employment releases, the EEOC’s position about releases generally and, particularly, EEOC’s various theories about how releases can violate the anti-retaliation protections of EEOC-enforced laws. This article also describes and discusses the relevant statutory, regulatory, and sub-regulatory guidance that informs the EEOC’s release-related retaliation theories. And, this article discusses the relevant federal court decisions about when and whether certain releases are unlawful.

Generally, the courts are divided about whether conditioning settlement of a claim on the signing of a release can constitute retaliation, but the EEOC’s position is unambiguous. According to the EEOC, a release violates the laws enforced by the Commission if it prevents an individual from filing an EEOC charge of discrimination. The Commission also maintains that releases may not interfere with the Commission’s processes – investigations and litigation – and EEOC views any such release as both unenforceable and unlawful. EEOC has articulated other

theories about releases as well. For example, EEOC maintains that a release is unlawful if it would permit former employees to become independent contractors only if they released EEOC-related claims.

The law about releases and the retaliation protections of the federal anti-discrimination laws is still in flux. The courts are mixed; EEOC continues to sue employers over releases and to file *amicus curiae* briefs in release cases; and employers should be careful about how they draft releases.

CHALLENGES TO RELEASES AND THE EVOLVING CONCEPT OF RETALIATION

Cases that involve challenges to releases come in a variety of forms. For example, litigation has involved challenges to severance pay agreements that require an employee to waive all claims under various federal laws. Plaintiffs and the EEOC have challenged separation or release agreements that include a ban on filing charges. Some courts have agreed that such releases violate the anti-retaliation prohibitions of EEOC-enforced laws. Other courts have found that the releases are not retaliatory, but only that the offensive clause is itself unenforceable, or the entire agreement may be unenforceable, but not an affirmative violation of the anti-retaliation protections of the federal civil rights employment laws.

Challenges to releases tend to fall within a few categories. The most common challenge to a release involves the issue of enforceability. This refers to situations in which a current or former employee signed a release with the employer in exchange for money or other consideration, and subsequently files a lawsuit against the employer. The employer responds by citing the release and seeking dismissal of the case, and the employee counters by asserting that the release is not enforceable. If the employee prevails, the lawsuit proceeds to the merits.

Retaliation challenges are different. The EEOC asserts that the language of releases can violate the anti-retaliation provisions

of the EEOC-enforced laws. In these cases, the EEOC or, occasionally private litigants, attempt to demonstrate that the release itself was or is a form of coercion, interference, or “retaliation” against a person’s right to file a charge, or right to participate in EEOC proceedings, and that the release unlawfully “interferes” with or “coerces” a person in the exercise of rights protected by the federal anti-discrimination laws.

APPLICABLE STATUTORY AND REGULATORY AUTHORITY

Four laws frame EEOC’s ongoing challenges to releases: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981a, 2000e to 2000e-17 (“Title VII”), the Equal Pay Act, 29 U.S.C. § 206(d) (“EPA”), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 to 634 (“ADEA”), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 to 12213 (“ADA”). The EEOC typically cites and relies upon all four of these laws when it challenges releases.

Title VII Of The Civil Rights Act Of 1964

Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin. Section 704(a) of Title VII prohibits two forms of retaliation: so-called “participation” retaliation and “opposition” retaliation. The “participation” clause states:

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

Section 704(a) also contains Title VII’s “opposition” clause:

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

42 U.S.C. § 2000e-3(a).

Title VII's participation and opposition clauses say nothing about releases, nor does any other language of Title VII. EEOC's Title VII regulations likewise contain no reference to releases.

The Equal Pay Act

The Equal Pay Act was enacted in 1963 as an amendment to the Fair Labor Standards Act. The Act protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination. From 1963 until 1979, the United States Department of Labor enforced the Equal Pay Act. Enforcement authority of the Equal Pay Act transferred to the EEOC in 1979, and the EEOC has had enforcement authority over the Equal Pay Act from then until the present.

The EEOC typically cites the Equal Pay Act's "discrimination" provision when it challenges releases as retaliatory. That provision states:

(a) . . . it shall be unlawful for any person—

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding

FLSA § 15(a)(3), 29 U.S.C. § 215(a)(3).

Again, however, the Equal Pay Act contains no reference to releases, and EEOC's EPA regulations omit any reference to releases.

The Age Discrimination In Employment Act

Unlike Title VII and the Equal Pay Act, however, the ADEA seeks explicitly to regulate the language of releases.

The ADEA was enacted in 1967, and it prohibits employment discrimination because of age against persons age 40 and older. Like Title VII, the ADEA has two anti-retaliation prohibitions. Those prohibitions are virtually identical to those contained in Title VII. The ADEA's anti-retaliation participation clause states that:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA].

29 U.S.C. § 623(d).

Similarly, the ADEA's anti-retaliation opposition clause states that:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section.

29 U.S.C. § 623(d).

The Older Workers Benefits Protection Act

In 1990, Congress amended the ADEA when it enacted the Older Workers Benefits Protection Act Amendments. The Older Workers Benefits Protection Act ("OWBPA") specifically addresses releases. The OWBPA defines what must be included in a release for a release to be considered "knowing and voluntary."

If a release does not comply with OWBPA, the courts will find that it is not enforceable.

Under the OWBPA, an individual may not waive any ADEA right or claim unless the waiver is knowing and voluntary. With limited exceptions, a waiver may not be considered knowing and voluntary unless at a minimum:

- the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
- the waiver specifically refers to rights or claims arising under the OWBPA;
- the individual does not waive rights or claims that may arise after the date the waiver is executed;
- the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
- the individual is advised in writing to consult with an attorney prior to executing the agreement;
- (i) the individual is given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;
- the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired; and
- if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the 45 day consideration period) informs the individual in writing

in a manner calculated to be understood by the average individual eligible to participate, as to – (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

See 29 U.S.C. § 626(f)(1).

The OWBPA also states that these requirements must be met for any waiver in settlement of an EEOC age discrimination charge and, in addition, that “the individual is given a reasonable period of time within which to consider the settlement agreement.” 29 U.S.C. § 626(f)(2). This “reasonable period of time” requirement is instead of the 21, 45, and 7 day limits for other releases of age discrimination claims. *See* 29 U.S.C. § 626(f)(2).

EEOC OWBPA Regulations

Although the ADEA provides relatively precise guidance about waivers, the EEOC maintains that a waiver or release may comply with all of the OWBPA’s requirements, but still be unenforceable. According to the EEOC, “[o]ther facts and circumstances may bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver.” 29 C.F.R. § 1625.22(a)(3).

Wording of Waiver Agreements

Because waivers and releases must be “written in a manner calculated to be understood by. . . the average individual,” waiver agreements must be drafted in “plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate.” 29 C.F.R. § 1625.22(b)(3).

According to EEOC, employers should take into account such factors as the level of comprehension and education of typical participants. Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences. 29 C.F.R. § 1625.22(b)(3).

Informational Requirements

EEOC regulations also establish guidance about information that should be provided as part of exit incentive or other employment termination programs. 29 C.F.R. § 1625.22(f). Any employer that is considering seeking releases in exchange for severance pay as part of a reduction in force should consult the EEOC's regulations about the type and scope of information that should be included in any such reduction in force or other exit incentive or other termination program offered to a group or class of employees. Generally, the EEOC takes the position that the purpose of the informational requirements is to provide an employee with enough information about the program to allow the employee to make an informed choice about whether to sign a waiver agreement. 29 C.F.R. § 1625.22(f)(iv).

OWBPA and EEOC's Enforcement Powers

The Older Workers Benefits Protection Act contains a section that addresses releases and the right to file a charge. Section 7(f)(4) of the ADEA, which is codified at 29 U.S.C. § 626(f)(4), states:

No waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

According to the EEOC, this clause means that "[n]o waiver agreement may include any provision imposing any

condition precedent, any penalty, or any other limitation adversely affecting any individual's right to:

1. File a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or
2. Participate in any investigation or proceeding conducted by EEOC."

29 C.F.R. § 1625.22(i).

The Commission asserts that the OWBPA "reaffirmed the public policy against interference with EEOC enforcement efforts, including the right to file a charge." *See* Enforcement Guidance on Non-waivable employee rights, available at <http://www.eeoc.gov/policy/docs/waiver.html> (last visited October 4, 2007).

Further, the EEOC notes that courts have consistently recognized that individuals possess a non-waivable right to file charges with the EEOC. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (individual who signs an agreement to submit an employment discrimination claim to arbitration remains free to file a charge with EEOC); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987) (invalidating former employee's promise not to file a charge with EEOC because it "could impede EEOC enforcement of the civil rights laws" and is void as against public policy). *See also* Enforcement Guidance on Non-waivable employee rights (agreements that restrict the right to file an EEOC charge are null and void as a matter of public policy).

The EEOC additionally asserts that the OWBPA principles about releases "apply equally to all of the statutes enforced by the EEOC." *Id.* Of the statutes enforced by the EEOC, however, *only* the ADEA contains precise language about releases. But, when the EEOC sues about a release issue it typically cites and brings claims about releases pursuant to *all* statutes that it enforces.

The Americans With Disabilities Act

The Americans With Disabilities Act anti-retaliation provisions contain the same opposition and participation clauses as Title VII and one additional clause. This third provision prohibits interference and coercion with rights protected by the ADA, and provides:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. § 12203(b).

The clause is modeled on a similar prohibition contained in the Fair Housing Act. In its litigation program, the EEOC has asserted that the interference and coercion protections are broader than the participation and opposition clauses. While some courts have accepted EEOC's view, the scope and meaning of the ADA's interference provision remains unclear generally, and neither the courts nor the EEOC have clarified exactly what the ADA's interference provision means with respect to releases.

Other Regulatory Guidance About Releases

In addition to its ADEA regulations, the EEOC has issued other guidance about releases. On April 10, 1997, the EEOC issued its "Enforcement Guidance on Non-waivable employee rights under Equal Employment Opportunity Commission enforced statutes." In the Enforcement Guidance, the EEOC set forth its position that an employer may not interfere with the protected right of employees to file a charge or participate in any manner in an investigation, hearing, or proceeding under the laws enforced by the EEOC. According to the Commission, the right to file a charge

and to participate in EEOC proceedings are “non-waivable under the federal civil rights laws.” *Id.*

The Commission asserted two grounds for its position. First, the EEOC stated that “interference with these protected rights is contrary to public policy.” *Id.* Second, the EEOC asserted that “the anti-retaliation provisions of the civil rights statutes prohibit such conduct.” *Id.* The Commission explained:

Notwithstanding the format or context of the agreement in which such language might appear, promises not to file a charge or participate in an EEOC proceeding are null and void as a matter of public policy. Agreements extracting such promises from employees may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes.

Id.

The EEOC’s public policy rationale derives from its view that it is a law enforcement agency that has a responsibility to use its resources to eliminate unlawful discrimination. The EEOC views unlawful discrimination as a public wrong, not merely a private dispute between employers and individuals. Notably, the EEOC does not view itself merely as a proxy for private plaintiffs or private individuals. Rather, in the Commission’s view, it acts in the public interest. As a result, the EEOC’s position is that any agreement that restricts or limits a person’s right or ability to file a charge or otherwise participate in EEOC proceedings violates public policy because such an agreement may “deprive the Commission of important testimony and evidence needed to determine whether a violation has occurred.” *Id.* Moreover, such an agreement may also “make it more difficult for the Commission to prosecute past violations” and may create “an atmosphere . . . that tends to foster future violations of the law.” *Id.*

APPLICATION OF LEGAL AND REGULATORY GUIDANCE TO RELEASES

The EEOC's rationale about non-waivable employee rights with respect to releases is supported by a decision of the United States Court of Appeals for the First Circuit, *EEOC v. Astra USA, Inc.*, 94 F.3d, 738, 742 (1st Cir. 1996). In that case, the employer obtained settlement agreements and releases from employees that prohibited the employees from assisting the Commission in investigating any sexual harassment charges against the employer. The EEOC sued for injunctive relief, and the district court granted the Commission's request for a preliminary injunction. The injunction prohibited Astra from entering into or enforcing the provisions of the settlement agreements. *Astra USA, Inc.*, 94 F.3d at 742. Astra appealed, and the First Circuit affirmed the injunction. The court noted that the EEOC has a duty to vindicate the public interest in preventing unlawful employment discrimination and observed that "if victims of or witnesses to [employment discrimination] are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered" *Id.* The First Circuit concluded that any agreement that materially interferes with communication between an individual and the Commission "sows the seeds of harm to the public interest." *Id.* at 744.

Retaliation Theories & Guidance on Non-Waivable Rights

The EEOC's Guidance further provides that "[a]greements that attempt to bar individuals from filing a charge or assisting in a Commission investigation run afoul of the anti-retaliation provisions because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission." Enforcement Guidance on non-waivable employee rights at III.B. According to the EEOC, "such agreements have a chilling effect on the willingness and ability of individuals to come forward with information that may

be of critical import to the Commission as it seeks to advance the public interest in the elimination of unlawful employment discrimination.” *Id.*

Nonetheless, the Commission acknowledges in its Guidance that an individual who has signed a waiver agreement or otherwise settled a claim and subsequently files a charge with the Commission based on the same claim may not recover. In such circumstances, the Commission takes the position that the employer is shielded against any further recovery by the charging party, provided that the waiver agreement or settlement is valid under applicable law. This rationale applies whether the EEOC or the private individual brings a subsequent action. Thus, while a private agreement can eliminate an individual’s right to personal recovery, it cannot interfere with the EEOC’s right to enforce Title VII, the EPA, the ADA, or the ADEA by seeking relief that will benefit the public and any victims who have not validly waived their claims.

Consider, for example, the case of *EEOC v. Lockheed Martin Corp.*, 444 F. Supp. 2d 414 (D. Md. 2006). In *Lockheed*, Denise Isaac worked for a company called COMSAT Corporation for over twenty years when she was laid off as a result of COMSAT’s merger into a Lockheed Martin subsidiary. On October 16, 2000, Lockheed sent Ms. Isaac a letter that informed her that her position would be eliminated effective October 30, 2000. *Id.* The letter also informed Ms. Isaac that she would receive severance benefits under the COMSAT Corporation Salary Continuation Plan, but only “in exchange for” signing a Release of Claims form that was attached to the letter. The release provided, in relevant part, that “this Release prohibits my ability to pursue any Claims or charges against the Released Parties seeking monetary relief or other remedies for myself and/or as a representative on behalf of others. This agreement does not affect my ability to cooperate with any future ethics, legal or other

investigations, whether conducted by the Corporation or any governmental agencies.” *Id.* at 416.

Ms. Isaac declined to sign the release. Instead, she filed an EEOC charge. Correspondence ensued between her lawyer and Lockheed, and Lockheed asserted that “[i]f Ms. Isaac decides to sign the release as is and receive severance benefits, she will have to dismiss her EEOC charge against the company.” *Id.* Ms. Isaac never signed the release, lost her job, and did not receive any severance benefits. The EEOC sued Lockheed and sought relief for Ms. Isaac. EEOC alleged that Lockheed’s actions unlawfully interfered with Ms. Isaac’s protected activity in two respects. First, the EEOC argued that Lockheed’s conditioning of Isaac’s severance benefits on the withdrawal of her EEOC charge violated EEOC-enforced anti-retaliation protections. Second, the EEOC argued that the release itself prohibited the signor from filing an EEOC charge, and that it therefore violated the anti-retaliation protections. *Id.* at 417-18.

On August 8, 2006, the United States District Court for the District of Maryland agreed with the EEOC and issued a decision in the EEOC’s favor. First, the court said, Lockheed conditioned Ms. Isaac’s receipt of severance benefits on her withdrawal of her EEOC charge. According to the court, this violated the anti-retaliation provisions of EEOC-enforced statutes. *Id.* at 418. Second, the court determined that while Lockheed was not required to offer severance benefits to anyone, it could not offer such benefits *only* to persons who did not file charges. *Id.* at 419. The court pointed repeatedly to Lockheed’s letter to Ms. Isaac in which Lockheed stated that Ms. Isaac could receive severance benefits only if she withdrew her EEOC charge.

The court also found that Lockheed’s release on its face violated the anti-retaliation provisions. In that respect, the court explained: “the release does not bar only ‘Claims’ by employees; it ‘prohibits [employees’] ability to pursue any Claims *or charges* against the Released Parties seeking monetary relief or other

remedies for [them]sel[ves] and/or as a representative on behalf of others.” *Id.* at 421. According to the court, this meant that she could not file a charge if she signed the release. The court added that “this interpretation is supported by Lockheed’s own statements to Ms. Isaac that if she ‘decides to sign the release as is and receive severance benefits, she will have to dismiss her EEOC charge against the company.’” *Id.*

Similarly, in *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir 1987), the United States Court of Appeals for the Fifth Circuit concluded that a waiver of the right to file a *charge* with the EEOC is void as against public policy. *Cosmair, Inc.*, 821 F.2d at 1089-1090. On the other hand, the court held that waivers of *causes of action* under the ADEA are not void as against public policy. *Id.* at 1091. Rather, the court reasoned that, by filing a charge, the employee is simply bringing discriminatory matters to the attention of the EEOC. Thus, simply because a waiver of the right to file a charge is void does not mean that the rest of the waiver is void. *Id.* The court in *Cosmair* severed the provision about waiving the right to file a charge and enforced the rest of the agreement. *Id.*

In *EEOC v. Ventura Foods, LLC*, File No. 05-CV-00663 (D. Minn. 2005), the Commission brought suit on a retaliation theory with respect to the following release:

I have not filed or caused to be filed any ... charge with respect to any claim this Agreement purports to waive, and I promise never to file or prosecute a ... charge based on such Claims. I promise never to seek any damages, remedies or other relief for myself personally (any right to which I hereby waive) by filing or prosecuting a charge with any administrative agency with respect to any such claim. I promise to request any administrative agency or other body assuming jurisdiction of any ... charge to withdraw from the matter or dismiss with prejudice.

The *Ventura* case dealt with claims by a former employee for age discrimination who was asked to execute the above release in exchange for enhanced severance benefits. Despite the fact that the EEOC found no evidence of age discrimination, it sued Ventura Foods on the theory that the charge-filing ban provisions of the release were retaliatory. Ventura Foods entered into a consent decree with the EEOC. Among other things, Ventura Foods agreed as part of the settlement to: 1) refrain from requiring, as part of any agreement with employees or former employees, that they would not file charges with the EEOC, 2) send a notice to former employees who had signed such agreements since 2003 that the company had severed the charge-filing ban and that the employees had the right to file a charge with the EEOC without losing severance benefits, and 3) re-offer enhanced severance benefits to former employees who had refused to sign the agreement. See September 1, 2006 Consent Decree, *EEOC v. Ventura Foods, LLC* (D. Minn. Sept 1, 2006) (attached).

Recently, the U.S. Court of Appeals for the Sixth Circuit reached a similar conclusion about charge-filing bans. In *EEOC v. SunDance Rehabilitation Services*, 466 F. 3d 490 (6th Cir. 2006), SunDance notified Elizabeth Salsbury, a speech language pathologist employed by SunDance, that the company was compelled to reduce its workforce and that her job would be terminated. A notification letter informed Ms. Salsbury that she would receive 80 hours' worth of severance pay if she signed a separation agreement and general release. The release stated in relevant part that:

Releasor on behalf of herself and other releasors expressly agrees that she will not institute, commence, prosecute or otherwise pursue any proceeding, action, complaint, claim, charge, or grievance against Company or any other released parties in any administrative, judicial or other forum whatsoever with respect to any acts or events occurring

prior to the date hereof in the course of Releasor's dealings with Releasee.

Id. at 493.

Ms. Salsbury claimed she had been denied a promotion and was laid off by SunDance due to her sex, and she wanted to file a charge of sex discrimination with the EEOC. Ms. Salsbury decided not to sign the Separation Agreement, and she subsequently filed a charge with the Commission. In that charge, she alleged that she had been denied promotion and was laid off on the basis of her sex in violation of Title VII. She also stated that she had been "asked to sign a separation agreement, general release and covenant not to sue agreement in order to get a lump sum payment of 80 hours. I did not sign this release because I believe it violates the Laws administered by the EEOC." *Id.* at 494.

The EEOC filed suit against SunDance in the United States District Court for the Northern District of Ohio, and alleged violations of the anti-retaliation provisions of the ADEA, ADA, EPA, and Title VII. The EEOC sought an order that provided injunctive and affirmative relief, including: (1) reforming the relevant severance agreement to expressly permit employees to file charges with the EEOC and participate in EEOC investigations or proceedings without losing their severance pay; (2) severance pay for Elizabeth Salsbury and similarly situated individuals; and (3) instituting further measures to remove obstacles to participation in EEOC proceedings. The EEOC also sought an order that would require SunDance to deliver a corrective notice to former employees and toll all limitations periods for filing charges or claims. *Id.* at 496.

On July 26, 2004, the district court granted the EEOC's motion for summary judgment. SunDance then appealed, and the Sixth Circuit reversed the district court. *Id.* at 503. The Sixth Circuit held that conditioning severance pay on a ban on filing charges with the EEOC was not retaliation. Although the

provision in question was unenforceable, the court said, the agreement in its entirety did not violate the anti-retaliation laws. *Id.* at 501 (“the charge-filing ban may be unenforceable; but its inclusion in the Separation Agreement does not make SunDance's offering that Agreement in and of itself *retaliatory*”) (emphasis in original).

The EEOC filed a petition for rehearing and rehearing en banc, but the court denied EEOC's petition. *Id.* at 490.

Despite the Sixth Circuit's decision in *SunDance*, employers must remain cautious. The EEOC may continue to assert similar retaliation theories in other jurisdictions, and, given the evolving case law, employers should be particularly wary of conditioning severance or other benefits on an employee's agreement not file an EEOC charge.

Additional Retaliation Theories

Plaintiffs and the EEOC have asserted other retaliation theories against one major employer, Allstate Insurance Corporation, after Allstate transitioned certain employees to independent contractor status. In *Isbell v. Allstate Insurance Corporation*, 418 F.3d 788 (7th Cir. 2005), the United States Court of Appeals for the Seventh Circuit considered and rejected a novel retaliation theory about releases.

In November 1999, Allstate announced a company-wide plan to change the nature of its business relationship with a significant number of the people who sold insurance for the company. Essentially, Allstate determined that it would no longer sell insurance through employees, known as “employee agents,” but would do so instead through a network of exclusive independent contractors. To accomplish this conversion, the company decided to terminate, effective June 30, 2000, all of its approximately 6,400 employee agents-regardless of age, productivity, or performance. *Id.* at 790-91.

Allstate offered each of the 6,400 employee agents, including plaintiffs Isbell and Schneider, four options. The first two of these options allowed an employee to enter into an independent contractor relationship with Allstate. Both options would grant the new contractors the opportunity to have an economic interest in the book of business they wrote for the company as well as certain other benefits, including a \$5,000 bonus. The third option (“Option Three”) terminated the individual’s relationship with Allstate in exchange for the release and a year’s severance pay. The fourth option (“Option Four”) also included an immediate end to the parties’ business relationship and a simple severance pay-out for up to thirteen weeks’ salary. *Id.* at 791.

The first three options offered by Allstate required the terminated employee to sign a release (the “Release”) that purported to waive any claim that an employee might have against Allstate under the ADEA, Title VII, the ADA, and ERISA. If an employee did not sign a release, the employee received fewer severance benefits but retained the right to sue Allstate. *Id.*

James Schneider signed the release, and then filed an EEOC charge and lawsuit. Doris Isbell did not sign the release, and filed an EEOC charge and lawsuit. Both made claims of retaliation in violation of the ADEA, Title VII, the ADA, and other laws, and they also asserted age discrimination violations. The district court granted summary judgment for Allstate, and Ms. Isbell appealed. Mr. Schneider did not appeal. *Id.* at 792. Ms. Isbell advanced what the court described as a “a novel theory of retaliation.” She claimed 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 argued that Allstate could not require her to sign the Release as a condition to becoming an independent contractor with the Company. *Id.* at 793.

The Seventh Circuit disagreed and concluded that Ms. Isbell “was not a victim of retaliation.” *Id.* at 793. She lost her job, the court said, because Allstate eliminated all agent-employee positions. *Id.* The court also rejected her age discrimination claim because, the court said, “every employee in [the employee-agent] position lost his job, *regardless of age.*” *Id.* at 795.

Isbell is not, however, the end of the matter. The EEOC and private plaintiffs advanced a similar theory in *Romero v. Allstate*, No. Civ.A. 01-3894, Civ.A. 01-6764, Civ.A. 01-7042, 2004 WL 692231 (E.D. Pa. Mar. 30, 2004). In that case, the court considered the same restructuring program that was at issue in *Isbell*. In *Romero*, the EEOC contended that requiring the employee-agents to release all of their claims under the ADEA, the ADA and Title VII in order to continue working as sales agents constituted retaliation in violation of the ADEA, the ADA, and Title VII, and also constituted interference, coercion, and intimidation in violation of Section 503(b) of the ADA. *Romero*, 2004 WL 692231 at *3.

The district court observed that over 300 agents filed charges of discrimination, but stated that “we have no way of knowing how many other employee-agents failed to pursue charges before the EEOC simply because they accepted the release language at face value.” *Id.* The court added, “[t]hose 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.” *Id.* Thus, the court concluded that the releases are “voidable” but did not decide the retaliation issue asserted by the EEOC. Because the case is still pending, the retaliation issue remains unresolved.

CONCLUSION

Given the unsettled and evolving nature of the law about releases and retaliation, employers face difficult choices. The

benefits of a comprehensive release are relatively high for employers, but only when the release avoids spurring enforcement actions or litigation in its own right. That said, there are steps employers can take to protect themselves.

Other than the Older Workers Benefits Protection Act, no law enforced by the EEOC specifically addresses precise language that must be included in any release. Further, neither the Older Workers Benefits Protection Act nor any other law enforced by the EEOC requires employers to include release language that advises of the right to file a charge with the EEOC or other government entity.

Employers may, however, decide to include such language. For example, a release could include the following language:

Nothing in this Agreement shall interfere with [the undersigned's] right to file a charge, cooperate or participate in an investigation or proceeding conducted by the Equal Employment Opportunity Commission or other federal or state regulatory or law enforcement agency. However, the consideration provided to [the undersigned] in this Agreement shall be the sole relief provided for the claims that are released by [the undersigned] herein and [the undersigned] will not be entitled to recover and [the undersigned] agrees to waive any monetary benefits or recovery against Employer in connection with any such claim, charge or proceeding without regard to who has brought such complaint or charge.

Understandably, employers may be wary of indirectly encouraging outgoing employees to pursue administrative remedies through the EEOC or other government entity. Nonetheless, including such language in a release may ultimately serve to insulate employers from large-scale enforcement actions or subsequent litigation based on the language of a particular release.