
NOTE

WAIVING GOODBYE TO YOUR RIGHTS: RETALIATION AND INVALIDITY IN THE CONTEXT OF WAIVERS UNDER TITLE VII, THE ADA, AND THE ADEA

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INTRODUCTION

In *EEOC v. Allstate Insurance Co.*,¹ the Court of Appeals for the Third Circuit recently held that an insurance company did not illegally retaliate against its former employees when the company made the ability to continue working as independent contractors contingent on former employees signing waivers of their right to recover under antidiscrimination statutes.² The Third Circuit held that the former employees’ refusal to sign these waivers was not a protected

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¹ 778 F.3d 444 (3d Cir.), *as amended on reh’g in part* (3d Cir. Mar. 26, 2015).

² *Id.* at 453 (“We therefore hold that Allstate did not violate the federal antiretaliation laws by requiring that employee agents sign [a waiver of their right to recover under antidiscrimination statutes] in order to avail themselves of [the opportunity to remain employed as independent contractors].”).

opposition activity.³ The Third Circuit also held that denying independent contractor status to those who refused to sign the waivers was not an adverse action.⁴ Some might view this decision with little skepticism. Employers have a strong interest in being able to minimize liability after large-scale reorganizations of their workforce.⁵ Congress even gave a nod of approval toward employers obtaining waivers when it set out the precise criteria governing the validity of waivers in the Older Workers Benefit Protection Act of 1990 (the “OWBPA”).⁶ For many, the *Allstate* decision simply falls into line with congressional endorsement of any waivers obtained according to certain standards of validity.⁷ At the same time, the decision in *Allstate* might be cause for alarm because the employer conditioned more than a purely economic reward on employees signing the waivers.⁸ The Equal Employment Opportunity Commission (the “EEOC”) at least thought so when it argued in its appellate brief that “[u]nder the district court’s reasoning, it would be lawful for an employer to terminate all its employees and then hire them back to do the same jobs only if they sign a release of all their claims . . . [and,] extending that logic, it would be lawful for an employer to do that every month or before issuing

³ *Id.* at 452 (“[T]he EEOC alleges that the ‘protected employee activity’ in question was the refusal to sign the [waiver.] . . . [but] the EEOC has [not] established . . . protected activity” (footnote omitted) (citation omitted)).

⁴ *Id.* (“[T]he EEOC alleges that . . . the associated ‘adverse action by the employer’ was Allstate’s withdrawal of the [the opportunity to remain employed as independent contractors.] . . . [but] the EEOC has [not] established . . . adverse action.” (footnote omitted) (citation omitted)).

⁵ See Alfred W. Blumrosen et al., *Downsizing and Employee Rights*, 50 RUTGERS L. REV. 943, 947-953 (1998) (explaining the importance of waivers releasing past discrimination claims in exchange for increased severance benefits to the widespread practice of “downsizing plans”); Amy Wax, Note, *Waiver of Rights Under the Age Discrimination in Employment Act of 1967*, 86 COLUM. L. REV. 1067, 1067 (1986) (“[W]aivers should be recognized as a desirable, nonadversarial, and speedy legal device for disposing of age discrimination disputes.”).

⁶ See Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended at 29 U.S.C. § 626(f) (2012)) (outlining the requirements for a valid waiver under the Age Discrimination in Employment Act); *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426 (1998) (acknowledging that Congress specifically endorsed the validity of waivers obtained according to certain statutorily defined requirements).

⁷ See *Romero v. Allstate Ins. Co.*, 3 F. Supp. 3d 313, 326 (E.D. Pa. 2014) (“To now hold that such a [waiver] was, by its very nature, retaliatory would contravene a well-settled congressional policy to permit the use of such [waivers] so long as they comply with certain requirements.”), *aff’d sub nom.* *EEOC v. Allstate Ins. Co.*, 778 F.3d 444 (3d Cir. 2015).

⁸ See Brief of the Equal Employment Opportunity Commission as Appellant at 24, *Allstate* (No. 14-2700) (“The district court’s decision blatantly violates [the policy concern for providing employees with ‘unfettered access to . . . remedial mechanisms’] because it interprets the anti-retaliation provisions in a manner that allows an employer to *eliminate* its employees’ access to those remedial mechanisms.” (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006))).

every paycheck.”⁹ Given the severe absence of authority directly on point,¹⁰ the EEOC’s fear might not have been entirely exaggerated.

The *Allstate* decision presented the occasion for drawing a workable standard. But the decision ultimately did not even hint at what sort of employer conduct in response to an employee’s refusal to sign a waiver might qualify as illegal retaliation.¹¹ The Third Circuit decided *Allstate* on the assumption that refusing to sign a waiver simply disentitles an employee to anything that the employer offers as consideration for signing the waiver.¹² In this way, the Third Circuit’s reasoning effectively extended an employer’s ability to make something contingent on an employee signing a waiver without setting a workable limit. The gaps in the Third Circuit’s reasoning invite the occasion to critically examine the circumstances under which an employer’s response to an employee’s refusal to sign a waiver creates an actionable claim for retaliation. This, in turn, invites the occasion for also examining the implications of this retaliation analysis on the validity of the waivers actually signed under such circumstances. As such, this Note proposes that coercively withdrawing certain aspects of the preexisting employment relationship due to an employee’s refusal to sign a waiver is a form of retaliation. Where an employer withdraws an aspect of the preexisting employment relationship, the employer engages in an adverse action.¹³ And, where employees refuse to sign waivers when their continued employment may be contingent on doing so, the refusal to sign the waiver is a protected opposition activity.¹⁴ It necessarily follows that, where other employees capitulate to the employer’s threats and sign the waivers, such waivers are invalid because they were involuntarily obtained under a threat of disruption to the employees’ careers.¹⁵

⁹ *Id.* at 24-25.

¹⁰ *See id.* at 25 (“The district court pointed out that the Commission did not cite a single decision holding that it is unlawful for an employer to require its employees to release all their claims in order to continue working for the company. The district court is correct: the Commission knows of no such decision.”).

¹¹ *See Allstate*, 778 F.3d at 453 (“Allstate followed the well-established rule that employers can require terminated employees to waive existing legal claims in order to receive unearned post-termination benefits.”).

¹² *Id.* at 452 (“[T]he Commission has cited no legal authority for the proposition that an employer commits an adverse action by denying an employee an unearned benefit on the basis of the employee’s refusal to sign a release.”).

¹³ *See infra* Part III.A (discussing this proposed standard).

¹⁴ *See infra* Part II.B (discussing the inclusion of a refusal to sign a waiver as a protected activity).

¹⁵ *See infra* Part IV (discussing how a threat of retaliation undermines the voluntariness and thus the validity of waivers obtained under such circumstances).

I. PURPOSES

The number of retaliation charges filed every year with the EEOC is growing rapidly.¹⁶ It is safe to assume that employees believe that they are increasingly under fire from employers.¹⁷ Naturally, this greater fear of retaliation may eventually suppress employees from exercising their rights. And ambiguities in the laws of employment retaliation do not help employees feel more secure in making the decision necessary to preserve their rights. Aggressive waiver offers—even if eventually ruled to be retaliatory and invalid—can still have prophylactic effects in suppressing employee challenges to employer discrimination.¹⁸ Many employees offered such waivers do not have easy access to legal resources that might inform them of the possibility of challenging their employer's demands.¹⁹ Ambiguities in the law weigh most heavily upon workers lacking in-depth legal knowledge of their rights.²⁰ Clear legal standards are necessary to prevent employers from using overreaching waiver offers as a method of creating an environment hostile to employees asserting their rights.²¹ As such, early intervention in defining a workable standard is necessary to stop employers from capitalizing on their employees' lack of information about their rights and on the current ambiguities in the law of waiver offers.²²

¹⁶ See *Charge Statistics FY 1997 Through FY 2016*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [https://perma.cc/994U-4HHK] (last visited Feb. 27, 2017) (describing an increase in retaliation charges under all statutes from 18,198 in 1997 to 42,018 in 2016).

¹⁷ At the same time, some commentators have speculated that the increasingly loose standards for retaliation claims have opened the figurative floodgates to lawsuits, which have led to the uptick in claims alleging retaliation. Gina Oderda, Note, *Opposition at the Water Cooler: The Treatment of Non-Purposive Conduct Under Title VII's Anti-Retaliation Clause*, 17 DUKE J. GENDER L. & POL'Y 241, 245-46 (referencing Justice Alito's concurrence in *Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271, 280 (2009) (Alito, J., concurring), as an example of judicial concern that an overly broad interpretation of antiretaliation provisions could lead to an undue increase in retaliation lawsuits).

¹⁸ See Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1091-92 (2014) (discussing the effects that threats of retaliation can have on employees exercising their rights).

¹⁹ See *id.* at 1093 (providing statistics to illustrate that fifty-nine percent of workers misunderstood their minimum wage and overtime rights).

²⁰ See *id.* at 1098-99 (concluding that workers least likely to have accurate substantive and procedural legal knowledge are workers least likely to make claims and the most likely to experience retaliation).

²¹ See *infra* notes 29-30 and accompanying text (discussing how employers quickly adapt to using waivers to minimize or avoid future claims against them).

²² See Alexander & Prasad, *supra* note 18, at 1098-99 (discussing how employees' fear of retaliation—due to both overly strict standards for satisfying discrimination claims and employees' unawareness of their rights under antidiscrimination statutes—prevents the most vulnerable employees from adequately accessing remedial mechanisms).

As changes in the modern economy shift the manner by which employers structure and manage their workforces, employers may begin to experiment with increasingly aggressive methods of avoiding liability, such as new types of waiver offers.²³ Specifically, as the labor market shifts toward increasingly casual, seasonal, or short-term labor,²⁴ more employers might follow the lead of the employer in *Allstate* by conditioning re-employment of employees or renewal of their contracts on employees signing waivers. As employees increasingly shift to independent contractor status or begin to work for labor subcontractors,²⁵ employers might take advantage of the new gaps in the labor structure—gaps that were often not part of the traditional long-term employment relationship—in order to extract insulation from liability. The same workers that are more likely to lack in-depth knowledge of their legal rights are those most likely to be in these labor sectors.²⁶ Thus, precisely defining the governing

²³ See Karen Aframe & Terry Shumaker, *Employee Releases - Layoffs & Severance Packages: When Is a Release Not a Release?*, 50 N.H.B.J. 42, 42 (2009) (“[T]he ‘severance in exchange for release’ has become a fixture in the downsizing process.”); Blumrosen et al., *supra* note 5, at 952-53 (“The technique of minimizing legal obligations by planning to seek waivers of claims which have not arisen may become common. It is possible to envision Christmas bonuses conditioned on the signing of waivers covering the preceding year, thus circumscribing future claims.”); cf. Sidney Charlotte Reynolds, Comment, *Closing a Discrimination Loophole: Using Title VII’s Anti-Retaliation Provision to Prevent Employers from Requiring Unlawful Arbitration Agreements as Conditions of Continued Employment*, 76 WASH. L. REV. 957, 973 (2001) (“Considering the extensive remedies available under Title VII, employers may desire to create arbitration schemes in employment contracts that limit the employer’s liability for future discrimination.”).

²⁴ See Dave Broad, *The Illusion of Choice: Economic Restructuring, Flexibility, and Security: Employment Standards for Part-Time Workers*, 67 SASK. L. REV. 545, 545-50 (2004) (describing the economic changes taking place in Canada and the United States that have led to the increasing number of casual and part-time employment arrangements). Other academics have noted the necessity of antidiscrimination law responding to changes in the organization of the modern workforce. See Deborah Maranville, *Changing Economy, Changing Lives: Unemployment Insurance and the Contingent Workforce*, 4 B.U. PUB. INT. L.J. 291, 294, 297 (1995) (describing the effects that changes in the economy have on enforcement of employment rights); Kimberly Hayes, Comment, *On the Clock Versus on the Books: The Appropriate Method for Counting Employees Under Title VII, the ADEA and Other Labor Laws*, 44 BUFF. L. REV. 963, 963-65 (1996) (describing one of the many difficulties of applying traditional antidiscrimination statutes to non-traditional forms of employment).

²⁵ See Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 638, 647-51 (2012) (discussing the structuring of workforces by joint employment contractors and professional employer organizations giving rise to “quasi-employment” relationships); Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 172 (2006) (discussing the increasing shift to independent contractor status).

²⁶ See Alexander & Prasad, *supra* note 18, at 1098 (contending that low-wage, front-line

standard in these situations is critical to properly protecting the antidiscrimination rights for an important segment of the U.S. workforce.²⁷ Employers might currently hesitate to experiment with offering waivers in new contexts given the relative ambiguity of the law surrounding such practices.²⁸ But, if courts address new types of waiver offers in the near future and decide to allow employers more flexibility, employers are likely to grow bolder in their experimentation.²⁹ So, it is important to define the appropriate standards for evaluating waiver offers—even if such cases have not yet started rapidly filling court dockets.³⁰ In the context of waiver offers, conduct that crosses the line into retaliation is not legally obvious due to complications in the *prima facie* case. Yet, without an adequately clear framework under retaliation law, it is even more difficult to understand how waivers could be invalidated in such contexts. Therefore, by proposing a clear standard, this Note begins the important process of resolving ambiguities in the current law surrounding waiver offers.

workers often lack the legal knowledge needed to protect their own rights).

²⁷ Academics frequently draw attention to the distributional effects of established standards in antidiscrimination law on certain marginalized groups. *See, e.g.*, Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 789 (2013) (discussing how the currently limited scope of the standards for finding illegal retaliation fails to protect low-income immigrant workers); Alexander & Prasad, *supra* note 18, at 1072 (“Our analysis reveals gaps in workers’ legal knowledge and powerful incentives to stay silent in the face of workplace problems.”).

²⁸ *See* Aframe & Shumaker, *supra* note 23, at 46 (highlighting the ambiguity of the law surrounding the standard for finding retaliatory waivers and thus warning employers of potential liability for retaliation if they fail to properly structure their waiver offerings).

²⁹ *See* Blumrosen et al., *supra* note 5, at 952 n.17 (describing how “[e]mployers [have] adapt[ed] quickly to new opportunities” in the context of waivers and observing a rapid increase in employers using mandatory arbitration clauses in employment contracts as a response to legal opportunities); Reynolds, *supra* note 23, at 957, 961-62 (describing both the increase in the use of mandatory arbitration agreements and the increase in judicial approval of mandatory arbitration agreements in a variety of contexts).

³⁰ Blumrosen et al., *supra* note 5, at 952 (“The technique of minimizing legal obligations by planning to seek waivers of claims which have not arisen may become common.”); *see also* Aframe & Shumaker, *supra* note 23, at 42 (acknowledging the utility of waivers in exchange for releasing liabilities when reorganizing a workforce to fit the changing needs of the modern economy); Blumrosen et al., *supra* note 5, at 947, 950 (acknowledging the increased importance of waivers in employee downsizing plans specifically and also suggesting the more general utility of waivers to an employer’s avoidance of liability for potentially discriminatory conduct).

II. BACKGROUND

A. *The Prima Facie Case in Retaliation and the Standards Governing the Validity of Waivers*

Employees who refuse to sign waivers may bring employment discrimination suits, claiming that their employer retaliated against them for their refusal to sign the waivers. Decisions such as *Allstate* examine the retaliatory nature of waiver offers simultaneously under the three major antidiscrimination statutes: the Age Discrimination in Employment Act of 1967 (the “ADEA”), the Americans with Disabilities Act of 1990 (the “ADA”), and Title VII of the Civil Rights Act of 1964 (“Title VII”).³¹ Analysis of retaliation claims arising under the three antidiscrimination statutes is generally uniform because the antiretaliation provisions of these three statutes are worded near-identically.³² The prima facie case for establishing retaliation under all three statutes requires a showing that: (1) the employee engaged in a protected activity; (2) the employee experienced an adverse action from their employer; and (3) a causal connection exists between the employee engaging in the protected activity and the employer’s adverse action.³³ More specifically, in satisfying the protected activity requirement, employees can show that they either directly participated in an

³¹ See *EEOC v. Allstate Ins. Co.*, 778 F.3d 444, 448-449 (3d Cir. 2015) (analyzing the retaliation claim under the ADEA, the ADA, and Title VII simultaneously).

³² See *id.* at 449 (“The antiretaliation provisions ‘are nearly identical,’ and ‘precedent interpreting any one of these statutes is equally relevant to interpretation of the others.’” (quoting *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567 (3d Cir. 2002))). The antiretaliation provision of Title VII provides:

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 [Act].

42 U.S.C. § 2000e-3(a) (2012). The antiretaliation provision of the ADEA provides:

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

29 U.S.C. § 623(d) (2012). And the relevant antiretaliation provision of the ADA provides:

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

42 U.S.C. § 12203(a).

³³ See *Allstate*, 778 F.3d at 449 (quoting *Fogleman*, 283 F.3d at 567-68).

activity, such as filing a charge with the EEOC, or otherwise engaged in an activity that expressed opposition to an employer's discriminatory conduct.³⁴

In addition to being able to establish the prima facie case for retaliation, an employee who actually signs a waiver can challenge its underlying validity.³⁵ In particular, the OWBPA amendments to the ADEA impose certain baseline requirements for the validity of waivers purporting to waive rights under the ADEA.³⁶ These statutory requirements for waivers under the ADEA include that the waiver was knowingly and voluntarily obtained.³⁷ While Title VII and the ADA do not explicitly enumerate minimum requirements for the validity of waivers, all such waivers under Title VII and the ADA are still subject to the

³⁴ See *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 274 (2009).

³⁵ See *Allstate*, 778 F.3d at 449-51.

³⁶ The specific requirements of waiving a claim under the ADEA are:

(1) An individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary. . . . [A] waiver may not be considered knowing and voluntary unless at a minimum—

(A) 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;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual is already entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)

(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;

(G) 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;

(H) 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 period specified in subparagraph (F)) 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.

29 U.S.C. § 626(f)(1).

³⁷ *Id.* (“An individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary.”).

same general requirements of being knowingly and voluntarily obtained.³⁸ Because the knowledge and voluntariness requirements of waivers under these three statutes are unlikely to be interpreted with much variation, the same standards for showing knowledge and voluntariness under the ADEA are likely to be applied to waivers under Title VII and the ADA.³⁹

B. *The Third Circuit's Reasoning in Allstate*

Although the Third Circuit's decision in *Allstate* is not the sole decision to address the issue of potentially retaliatory and invalid waiver offerings, the facts and reasoning of this case provide the most recent example of the legal standards applied in cases involving waiver offers.⁴⁰ Consider the basic facts of the case:

³⁸ See *Blackwell v. Cole Taylor Bank*, 152 F.3d 666, 673 (7th Cir. 1998) (applying the knowing and voluntary standard in a case challenging a waiver under Title VII); *Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist.*, 133 F.3d 816, 819 (11th Cir. 1998) (applying the knowing and voluntary standard in a case challenging a waiver under the ADA). At the same time, courts might still be conflicted as to the precise manner of formulating the “knowingness and voluntariness” inquiry. See Daniel P. O’Gorman, *A State of Disarray: The “Knowing and Voluntary” Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 75 (2005) (discussing the application of a “knowing and voluntary” standard by “a majority of the federal circuits . . . based on the totality of the circumstances . . . that focuses on the releasing person’s state of mind more than would an application of ordinary contract principles”).

³⁹ While the “knowing and voluntary” standard under each antidiscrimination statute is still unsettled, it is safe to assume that the general analysis of knowledge and voluntariness applies to waivers under all three statutes because this same standard is both formally included in the ADEA and applied by most courts addressing waivers under Title VII and the ADA. See Blumrosen et al., *supra* note 5, at 1011 (discussing the lack of clarity regarding the “knowing and voluntary” requirement of waivers under the ADEA); Jan W. Henkel, *Waiver of Claims Under the Age Discrimination in Employment Act After Oubre v. Entergy Operations, Inc.*, 35 WAKE FOREST L. REV. 395, 395-96 (2000) (addressing the standards governing the validity of waivers under ADEA after *Oubre v. Entergy Operations, Inc.* and the implications of such standards on the validity of waivers under other antidiscrimination statutes); O’Gorman, *supra* note 38, at 79 (contemplating a new standard for resolving the ambiguities in the current “knowing and voluntary” standard for waivers under Title VII).

⁴⁰ Other than the Third Circuit in *Allstate*, only two other circuits have even briefly touched upon this issue. See *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490, 501 (6th Cir. 2006) (deciding a claim alleging retaliation for denial of severance benefits to employees who refused to sign waivers); *Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 793 (7th Cir. 2005) (deciding a claim alleging retaliation for denial of severance benefits and an opportunity for continued employment as independent contractors to employees who refused to sign waivers). There is also a potentially relevant decision by the Court of Appeals for the Fifth Circuit. See *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1087 (5th Cir. 1987) (addressing a claim arising out of an employer’s refusal to continue paying severance benefits—awarded after the employee signed a waiver—because the employee filed a charge with the EEOC). While a few district courts have decided the issue, most of these decisions involve waivers offered in the context of severance packages, and the legal standards applied vary greatly between decisions. See

Allstate terminated all of its insurance agents in a reduction-in-force intended to usher in a new employment system whereby all of its insurance agents would work as independent contractors rather than as employees.⁴¹ This reduction-in-force applied to all insurance agents who were not already independent contractors.⁴² Ninety percent of these employees were over forty years old.⁴³ Allstate offered four severance package options to the terminated employees—only one of which did not require terminated employees to sign waivers.⁴⁴ The three other options included some combination of benefits such as “increased renewal commissions, a conversion bonus, earlier transferability in the agent’s book of business, debt forgiveness, and reimbursement for moving expenses if necessary.”⁴⁵ Most importantly, these three options also gave terminated employees the ability to continue working as independent contractors, thereby permitting them to continue their careers with the company.⁴⁶ Allstate maintained that the terminated employees had no legal entitlements to any form of severance benefit or to the ability to convert to independent contractor status following termination.⁴⁷

EEOC v. Cognis Corp., No. 10-CV-2182, 2011 WL 6149819, at *8 (C.D. Ill. Dec. 12, 2011) (“[T]he language of the [agreement containing a waiver offered as an alternative to termination] did not merely threaten retaliation, it promised retaliation, in the form of termination if [plaintiff], or the other employees, exercised their statutorily protected rights.”); Quattrone v. Erie 2 Chautauqua-Cattaraugus Bd. of Coop. Educ. Servs., No. 08-CV-367-JTC, 2011 WL 4899991, at *10 (W.D.N.Y. Oct. 13, 2011) (rejecting employee’s claim that an “offer of employment in [a school] program, conditioned upon signing the Settlement Agreement Release and Waiver, was retaliatory per se”), *aff’d*, 503 F. App’x 12 (2d Cir. 2012); Prelich v. Med. Res., Inc., 813 F. Supp. 2d 654, 668 (D. Md. 2011) (“[T]he mere offer of the severance package . . . does not fit the definition of retaliation under Title VII . . . [unless the employer takes a] ‘sufficiently adverse employment action.’”); Bottge v. Suburban Propane, 77 F. Supp. 2d 310, 313 (N.D.N.Y. 1999) (“Refusal to sign a waiver of rights can only constitute protected activity if that refusal represents an intent to complain about discriminatory employment practices.”). Needless to say, the Supreme Court has yet to directly rule on the issue.

⁴¹ EEOC v. Allstate Ins. Co., 778 F.3d 444, 446-47 (3d Cir. 2015).

⁴² *Id.* (stating that Allstate decided to completely abandon other agency programs and shift to the independent contractor model).

⁴³ Romero v. Allstate Ins. Co., 3 F. Supp. 3d 313, 317 (E.D. Pa. 2014), *aff’d sub nom. Allstate*, 778 F.3d 444.

⁴⁴ *Allstate*, 778 F.3d at 447.

⁴⁵ *Allstate*, 3 F. Supp. 3d at 317.

⁴⁶ *Id.* (describing how all three of these options allow the agents to enter into a new agreement thus converting them into independent contractors in exchange for some benefits).

⁴⁷ *Allstate*, 778 F.3d at 446 (“Allstate agents were at-will employees and were not entitled to any severance pay in the event that they were ‘terminated under the terms of any group reorganization/restructuring benefit plan or program’” (quoting Romero v. Allstate Ins. Co., 1 F. Supp. 3d 319, 336, 397-98 (E.D. Pa. 2014))).

The Third Circuit first decided that waivers obtained through this process were valid on their face.⁴⁸ The court reasoned that the option to convert to independent contractor status was sufficient consideration for the waiver because the terminated employees were not otherwise entitled to convert.⁴⁹ The court did not, however, directly address whether the waivers were voluntarily obtained.⁵⁰ The Third Circuit then decided that, although Allstate denied those terminated employees who refused to sign the waiver the ability to convert to independent contractor status, Allstate nevertheless did not engage in illegal retaliation because a terminated employee's refusal to sign the waiver did not qualify as a protected oppositional activity,⁵¹ and Allstate's denial was not an adverse action.⁵² The court first reasoned that an employee's motivation when refusing to sign a waiver was too ambiguous to sufficiently rise to the level of a protected opposition activity.⁵³ The court further reasoned that the terminated employees were not otherwise entitled to the ability to convert and, thus, denial of this additional consideration could not be an adverse action.⁵⁴ The court supported this conclusion by reasoning generally that an employer cannot commit an adverse action where the employer simply denies the proffered consideration to those who refuse to sign the waiver.⁵⁵

⁴⁸ See *id.* at 449-50 (holding that the EEOC must concede the legality of such releases).

⁴⁹ *Id.* at 449-51.

⁵⁰ See *id.* at 450 n.4 (stating that the issue of whether the waivers were knowingly and voluntarily signed remained pending in the lower court's case). The lower court had determined that a "trial was needed to determine whether the [waiver] was signed knowingly and voluntarily and whether it was unconscionable." *Id.* at 448 (citing *Allstate*, 1 F. Supp. 3d at 419).

⁵¹ *Id.* at 452.

⁵² *Id.*

⁵³ The Third Circuit attempted to bolster its decision not to include a refusal to sign a waiver as an oppositional activity by citing to the skepticism of the Court of Appeals for the Sixth Circuit, *id.* (citing *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490, 501 (6th Cir. 2006), and a vague rule by the Third Circuit that "[a] general complaint of unfair treatment" cannot qualify as oppositional activity, *id.* (quoting *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 702 (3d Cir. 1995)) Then, without further analysis, the court concluded that terminated employees could have "refused to sign . . . for any number of reasons unrelated to discrimination." *Id.*

⁵⁴ *Id.* (citing *SunDance*, 466 F.3d at 502) ("[T]he Commission has cited no legal authority for the proposition that an employer commits an adverse action by denying an employee an unearned benefit on the basis of the employee's refusal to sign a release.").

⁵⁵ In this manner, the Third Circuit continued to blend contract law analysis with employment law analysis instead of analyzing the sufficiency of the consideration separately from whether the employer engaged in an adverse action. See *id.* at 451 (deciding that denying the proffered consideration cannot be retaliatory because "the EEOC fails to explain why this financial pressure is more offensive to the antiretaliation statutes than the pressure one is bound to feel when required to sign a release in exchange for severance pay").

III. DEFINING RETALIATION IN THE CONTEXT OF WAIVER OFFERS

A. *Drawing the Appropriate Standard for Finding an Adverse Action*

In a waiver offer, the employer conditions something solely on the employees signing a waiver and denies it to those who do not sign.⁵⁶ If this “something” was a preexisting part of the employment relationship, the employer effectively punishes employees for their refusal to sign by placing them in a worse position than they were in before they refused to sign the waiver. This effectively disrupts the employees’ careers and punishes the employees for choosing to maintain their rights. As such, an employer engages in adverse action when it withdraws a preexisting aspect of the employment relationship due to an employee’s refusal to sign a waiver.

Even a casual observer might readily acknowledge that there is a difference between offering waivers in exchange for additional monetary benefits and offering waivers in exchange for continued employment.⁵⁷ There is a different type of harm to employees when a valuable, established relationship is disrupted or taken from them, than when a disconnected, potential future gain is not granted to them. Additional monetary benefits, for example, are often above and beyond that which is offered in the course of the specific employee’s ongoing employment relationship. These benefits are attainable only insofar as they are the proffered consideration in exchange for a waiver.⁵⁸ When the employer

⁵⁶ See, e.g., *id.* at 452.

⁵⁷ In fact, even the Third Circuit’s decision in *Allstate* might have noted that the court understood that its reasoning may not extend to cases involving different types of offers. See *id.* at 451 n.6 (“The Commission also fails to show that its nightmare scenario—employers using a cycle of layoffs, releases, and rehiring to immunize themselves from suit—is a valid concern.”). But, ultimately, the Third Circuit failed to make this distinction explicit, despite the EEOC’s concern that the court’s reasoning lacked a reasonably express limit. See Brief of the Equal Employment Opportunity Commission as Appellant at 24, *Allstate* (No. 14-2700) (“Under the district court’s reasoning, it would be lawful for an employer to terminate all its employees and then hire them back to do the same jobs only if they sign a release of all their claims[,] . . . [and,] extending that logic, it would be lawful for an employer to do that every month or before issuing every paycheck.”).

⁵⁸ Some courts have hinted at the possibility of viable employee retaliation claims according to a somewhat similar standard in order to draw the line between retaliatory and non-retaliatory waiver offers. See, e.g., *DeCecco v. UPMC*, 3 F. Supp. 3d 337, 393 (W.D. Pa. 2014) (“[The plaintiff] was not denied anything that she was owed pursuant to the employee benefits plan by defendants. This case would be different if plaintiff . . . refused to sign the [waiver] and defendants refused to pay her the severance benefit.”); *EEOC v. Nucletron Corp.*, 563 F. Supp. 2d 592, 600 (D. Md. 2008) (“[A]n employer may offer an additional severance payment in exchange for a release of any claims under the retaliation statutes and a promise not [sic] file suit against the employer. An employer may not, however, withhold standard employee benefits because an employee has refused to waive his rights under the antidiscrimination statutes.” (citation omitted)). However, the standard hinted at by these decisions still fails to draw the proper line. These decisions rely on a standard that draws a line by determining whether the employee was or was not already *entitled* to the thing offered

denies these benefits to those employees who do not sign waivers, the refusing employees are left in the same position as they were in before the waiver offer. In contrast, continued employment is presumed in an employee's already-existing employment relationship. Continued employment is not an aspect that the employer introduces simply to entice employees to sign waivers. When an employer denies continued employment to those who do not sign waivers, the refusing employees are left in a worse position than they were before the waiver offer. In this way, denying continued employment to those employees who do not sign waivers qualifies as an adverse action, whereas, denying additional monetary benefits to those same employees does not.

To determine whether an employer engages in an adverse action in more nuanced scenarios, courts must first ascertain the evolving status quo of the employment relationship and then evaluate the proffered consideration in context. Only after appraising the evolving status quo of the employment relationship can a court actually determine whether the employer's denial of the proffered consideration to those who did not sign the waiver was adverse.⁵⁹ The ultimate question then becomes: Was the proffered consideration already a part of the evolving status quo of the employment relationship such that its denial to those who do not sign the waiver actually disrupts the employment relationship?

Much of the Third Circuit's analysis in *Allstate* takes into account an employer's interest in validly offering waivers, but it fails to draw the line where an employer punishes employees for refusing to sign the waiver.⁶⁰ The court questioned whether simply denying something that an employer made contingent on the signing of the waiver could rise to the level of an adverse action.⁶¹ The court relied on the idea that the nature of an offer is that the promised consideration is denied to those who do not accept it.⁶² But, by neglecting the practical differences between offering a benefit above and beyond

by the employer in exchange for signing the waiver. In this way, the standard hinted at in these decisions adheres too closely to the contract law standard for finding adequate consideration. *See, e.g., Allstate*, 778 F.3d at 449 (defining adequate consideration in employment contracts roughly as benefits to which the employee is not otherwise entitled). But any standard mirroring the contract law standard for consideration is not effective in drawing the necessary line.

⁵⁹ Evaluating this sort of "dynamic status quo" in order to determine employer liability is equally relevant in other areas of the law. *See, e.g.,* MICHAEL HARPER ET AL., LABOR LAW: CASES, MATERIALS, AND PROBLEMS 305 (8th ed. 2015) (suggesting that, in the context of the National Labor Relations Act (the "NLRA"), forbidding employers from offering new benefits in order to sway employees prior to union certification elections and evaluating whether the newly offered benefit was already part of the existing "dynamic status quo" or whether the benefit was a new enticement outside of the "dynamic status quo" might be the proper standard defining the line at which the benefit violates the NLRA).

⁶⁰ *Allstate*, 778 F.3d at 452 (stating that the EEOC failed to establish that refusing to sign the waiver was a protected activity).

⁶¹ *Id.*

⁶² *Id.*

the existing employment relationship and threatening to disrupt the status quo of the employment relationship, the Third Circuit failed to recognize that taking certain things away from those who do not sign a waiver could constitute an adverse action.

Denying the ability to continue working as independent contractors to those employees who do not sign waivers—i.e., the factual scenario of *Allstate*—presents a situation near the cusp of the proposed standard. But, ultimately, Allstate's conduct was an adverse action. Resolution of this case should have depended on whether Allstate's reduction-in-force program was a standard mass layoff or actually a large-scale conversion program. In the former case, denying the opportunity to convert to independent contractor status to those who refuse to sign the waiver would leave them in the same position that they would have been in otherwise—unemployed. In the latter case, denying the opportunity to convert to independent contractor status to those who refuse to sign the waiver would truncate their careers solely due to their refusal to sign. Allstate laid off all of its remaining full-time insurance salespeople to implement its policy of only utilizing independent contractors as insurance salespeople.⁶³ Allstate's reduction-in-force was thus closer to the latter case.⁶⁴ The inclusion of a waiver as a prerequisite to conversion was simply a way for the employer to reap the benefit of obtaining insulation from liability by capitalizing upon this point of transition. But for the employer's desire to extract waivers from its salespeople at this point of transition, all salespeople would have presumably been able to continue their careers as independent contractors. Therefore, because the salespeople experienced a disruption to their established employment relationship, Allstate's denial of the opportunity to convert was an adverse action.

The only Supreme Court guidance for finding an adverse employment action comes from *Burlington Northern & Santa Fe Railway Co. v. White*.⁶⁵ In *Burlington Northern*, the Court promulgated a standard based on evaluating whether the employer's conduct would deter a reasonable employee from engaging in a protected activity.⁶⁶ The Court focused its inquiry on whether “the

⁶³ See *supra* note 41 and accompanying text.

⁶⁴ The actual facts of the *Allstate* case taken as a whole are strongly supportive of this inference. See *supra* notes 41-47 and accompanying text.

⁶⁵ 548 U.S. 53, 62 (2006) (finding that Title VII's antiretaliation provision is not limited to “actions that affect employment or alter the conditions of the workplace”); see also Lisa M. Durham Taylor, *Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern & Santa Fe Railway Co. v. White*, 9 U. PA. J. LAB. & EMP. L. 533, 533-43 (2007) (acknowledging the broad scope of the adverse action standard in *Burlington Northern* while simultaneously arguing against its efficacy); Jessica L. Beeler, Comment, *Turning Title VII's Protection Against Retaliation into a Never-Fulfilled Promise*, 39 GOLDEN GATE U. L. REV. 141, 143 (2008) (arguing that the Court intended a very broad scope for the adverse action standard in *Burlington Northern*).

⁶⁶ See *Burlington N.*, 548 U.S. at 77 (stating that one of the purposes of Title VII is to protect employees participating in protected conduct).

employer's actions [are] . . . harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."⁶⁷ This standard for determining an adverse action is a function of a materiality requirement. This requirement obligates the employee to show that the employer's conduct caused some sort of harm or injury beyond that which is merely insignificant.⁶⁸ The Court also stressed the importance of context.⁶⁹ In the context of waiver offers, such a materiality requirement invites the distinction between those waiver offers that leave refusing employees in the same position as they were in before the offer versus those that leave refusing employees in a worse position than they were in before the offer.

Employers might fear that too broad of an adverse action standard might entirely eliminate their ability to legally offer waivers. Some courts have agreed.⁷⁰ But these courts cannot simply decide that employers have an unqualified right to deny any type of proffered consideration to those who do not sign waivers.⁷¹ Instead, these courts must acknowledge that such an unqualified right effectively allows employers to punish employees for affirmatively maintaining their rights by refusing waivers. For this reason, it is critical for courts to examine the nature of the proffered consideration in the context of the ongoing employment relationship before deciding that an

⁶⁷ *Id.* at 57.

⁶⁸ *Id.* at 67-68 ("The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.").

⁶⁹ *Id.* at 69 ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998))).

⁷⁰ Most cases that involve strictly conditioning additional severance benefits on employees signing waivers might not present the occasion for judges to fashion a broad standard. However, the factual scenario in *Allstate* likely treads a fine line by conditioning the ability to continue working as an independent contractor on an employee signing a waiver. *See supra* Section II.B. Such a situation presented the occasion for pronouncing a workable standard to distinguish adverse actions from nonadverse actions in the context of waiver offers. And, instead of fashioning such a standard, the court threw up its hands and relied on the shibboleth that employers can always legally condition severance benefits on employees signing a waiver—even when such severance benefits include the opportunity for continued employment. *See EEOC v. Allstate Ins. Co.*, 778 F.3d 444, 451 (3d Cir. 2015) ("Having determined that [the employer's] conduct conformed with the settled rule that employers can exchange consideration [in the form of additional severance benefits] for releases of claims, it is unsurprising that the Commission's theories of retaliation are invalid.").

⁷¹ While judges often do not state the concern for employer's interests expressly in these cases, such a motivation can be inferred from the reasoning behind the lines drawn—or the lack thereof. *See, e.g., Allstate*, 778 F.3d at 451 (emphasizing employers' rights to offer waivers to employees); *Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 793 (7th Cir. 2005) (citing 29 U.S.C. § 626(f)(1)(D)(2000)) (finding no retaliation in the denial of consideration to refusing employees because "[a]n 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").

employer did not engage in an adverse action by denying the proffered consideration to those who refused to sign the waiver.⁷²

B. *Including the Refusal to Sign a Waiver as a Protected Activity Under the Opposition Clause*

When an employee refuses to sign a waiver in the face of a threat to disrupt the status quo of their employment relationship, the refusal to sign the waiver is an activity opposing the employer's attempt to extort insulation from liability. An affirmative rejection embodies resistance to an employer's threat to engage in an adverse action if the employee does not comply. This opposition should be protected as such under the opposition clause of antiretaliation provisions.⁷³

The most recent Supreme Court case directly addressing the scope of protections under the opposition clause is *Crawford v. Metropolitan Government of Nashville & Davidson County*.⁷⁴ This case rejected the narrow requirement that an employee's conduct be actively and consistently oppositional.⁷⁵ Instead, the Court decided that oppositional conduct must

⁷² See *infra* Part IV.

⁷³ The opposition clause is the most fitting avenue for protecting an employee's refusal to sign a waiver, see *supra* note 34 and accompanying text, regardless of the fact that the affirmative rejection of a waiver might imply some ready desire to participate in a lawsuit or EEOC charge. See Kiren Dosanjh Zucker, *Retrieving What Was Luce: Why Courts Should Recognize Employees' Refusal of an Employer's Mandatory Arbitration Agreement as "Protected Activity" Under Title VII's Antiretaliation Provision*, 22 LAB. LAW. 233, 250 (2006) (arguing that an employee's refusal to sign a mandatory arbitration agreement might communicate an intent to participate in an action against the employer, thereby protecting the refusal under the participation clause). Compare *EEOC v. Luce, Forward, Hamilton & Scripps LLP*, 303 F.3d 994, 1007 (9th Cir. 2002), *rev'd in part* 345 F.3d 742 (9th Cir. 2003) (reasoning that an employee's refusal to sign an arbitration agreement could not be seen as communicating intent to participate in a protected activity because "reserv[ing] [the] right to bring a civil action in a judicial forum" is not the same as reserving a substantive right, such as the right to sue), with *Gifford v. Atchison, Topeka & Santa Fe Ry. Co.*, 685 F.2d 1149, 1155-56 (9th Cir. 1982) (deciding that an employee's letter indicating a desire to bring an EEOC charge constituted a protected participation activity even before the employee filed such a charge).

⁷⁴ 555 U.S. 271, 273 (2009) (deciding that the opposition clause protects "an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation").

⁷⁵ See *id.* at 276 (analyzing whether the employee's conduct was oppositional according to whether the conduct could have communicated antagonism and resistance to the employer). In *Crawford*, the Court began its general trend toward a more flexible approach to evaluating retaliation claims by focusing more on the employer's perception of antagonism and resistance rather than adhering to a rigid inventory of oppositional activities. *Id.* at 279 (extending Title VII protections against retaliation to employees who respond to employer questions, not just those who report discrimination on their own initiative); see also *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174 (2011) (extending the scope of adverse actions beyond the traditional categories to likely include all employer conduct that would

reasonably communicate resistance or antagonism in some manner.⁷⁶ The Court even approvingly cited a Court of Appeals for the Seventh Circuit case finding sufficient communication of resistance when a manager refused to stop another employee from filing an EEOC charge.⁷⁷ In the context of waiver offers, such a broad standard allows for protecting an employee's affirmative refusal to sign a waiver in the face of threatened adverse action. An employee's refusal to sign a waiver communicates resistance by its very nature. Such a refusal communicates that the employees wish to affirmatively maintain their rights in the face of an employer's threatened adverse action. When employees decide to forgo the proffered consideration, and thus subject themselves to an employer's threatened action, this certainly indicates that the employees intend to explore the possibility of exercising their rights under antidiscrimination statutes.⁷⁸ In context, an employee's rejection of the value attached to signing a waiver in order to maintain the right to sue strongly indicates that the employee is antagonistic to the employer's attempt to insulate itself from liability.

In order to obtain protection under the opposition clause, employees must also show that their opposition stemmed from a reasonable belief that their employer engaged in some conduct in violation of an antidiscrimination statute.⁷⁹

have "dissuaded a reasonable worker from making or supporting a charge of discrimination" (quoting *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 68 (2006)).

⁷⁶ *Crawford*, 555 U.S. at 276 (deciding that the plaintiff's "description of the louche goings-on [of her workplace] would certainly qualify in the minds of reasonable jurors as 'resist[ant]' or 'antagoni[stic]' to [her employer's] treatment").

⁷⁷ *Id.* at 277 (citing *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996)) (finding protection under the opposition clause when an employee "refus[ed] to follow a supervisor's order to fire a junior worker for discriminatory reasons").

⁷⁸ Such a strong indication to the employer that the employee might file a lawsuit—even if the employee does not expressly state intent to sue—is precisely the sort of oppositional conduct *Crawford* sought to protect. The Court in *Crawford* stated that "[t]here is . . . no reason to doubt that a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion." *Id.* In the same way, there is no reason to doubt that an employee is protected when the employee refuses to sign a waiver and thus maintains the right to sue just as surely as when an employee indicates directly that they might wish to sue their employer. As such, antidiscrimination statutes likely do not embody "a freakish rule protecting an employee who" exercises the right to sue an employer but not an employee who affirmatively refuses an employer's attempt to prophylactically stifle the employee's ability to sue. *Id.* at 277-78 (stating that the statute does not require protection only for employees who report discrimination on their own).

⁷⁹ See generally Matthew W. Green Jr., *What's So Reasonable About Reasonableness? Rejecting a Case Law-Centered Approach to Title VII's Reasonable Belief Doctrine*, 62 KAN. L. REV. 759 (2014) (suggesting an alternative standard to the case-law-based standard for determining reasonableness); Lawrence D. Rosenthal, *To Report or Not To Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127 (2007) (arguing for the elimination of the objectively reasonable requirement in cases analyzing an employee's oppositional conduct).

Although the Court's analysis in *Crawford* involved no discussion of an employee's reasonable belief,⁸⁰ the Court acquiesced to this requirement in *Clark County School District v. Breeden*.⁸¹ As a result, almost every circuit now requires some evaluation of the reasonableness of the employee's belief.⁸² In the context of waiver offers, all refusing employees satisfy this requirement not only by resisting an employer's threat to engage in an illegal adverse action but also by holding a reasonable belief in some underlying violation of antidiscrimination laws that motivated their desire to maintain their rights.⁸³

Courts have traditionally taken—and continue to take—responsibility for responding flexibly to protect employees under antiretaliation provisions.⁸⁴

⁸⁰ *Crawford*, 555 U.S. at 276 (“When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication’ virtually always ‘constitutes the employee’s *opposition* to the activity.’” (alterations in original) (quoting 2 EEOC Compliance Manual §§ 8-II-B(1), (2), p 614:0003 (Mar. 2003))).

⁸¹ 532 U.S. 268, 270 (2001) (refusing to adopt a standard for the employee's belief in the underlying legality of the employer's conduct). Circuit courts still rely on this text from *Breeden* as if it were binding. *See, e.g.*, *Crumpacker v. Kan. Dep't of Human Res.*, 338 F.3d 1163, 1171 (10th Cir. 2003).

⁸² *Cf. Breeden*, 532 U.S. at 270 (declining to endorse a specific standard for evaluating the reasonableness of an employee's belief in the unlawfulness of underlying conduct). There were competing standards for evaluating the reasonableness of an employee's belief in the unlawfulness of the underlying conduct prior to *Breeden*. While the standard remains unsettled, nearly all courts now require some standard higher than merely a good faith belief. *See Green, supra* note 79, at 786-87 (“After *Breeden*, courts universally adopted reasonableness as the standard for determining when a belief about unlawful employment discrimination is protected.”); Lawrence D. Rosenthal, *Reading Too Much into What the Court Doesn't Write: How Some Federal Courts Have Limited Title VII's Participation Clause's Protections After Clark County School District v. Breeden*, 83 WASH. L. REV. 345, 365 (2008) (“[A]ll courts since *Breeden* have come to read *Breeden* as imposing this requirement [that the plaintiff have a reasonable belief in the underlying unlawfulness of the employer's conduct].”). Yet, even courts applying the reasonable belief standard diverge somewhat in the stringency of the standard, i.e., they diverge in the necessity of the closeness between the employee's belief and an objective violation of the law. *Compare Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 340-41 (4th Cir. 2006) (applying a case-law-based test of reasonableness after *Breeden* and thereby rejecting the employee's claim that complaint's about a coworker's extremely disparaging racial comments could qualify as a protected oppositional activity), *with Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 268-69 (4th Cir. 2015) (overruling *Jordan* to the extent that *Jordan* endorsed a case-law-based test for assessing whether an employee has a reasonable belief in underlying unlawful conduct).

⁸³ For example, the plaintiffs in *Allstate* could have held some reasonable belief that the employer's reduction in force violated the ADEA given that facts indicating that almost all of the terminated employees were in the ADEA's protected class. *See supra* note 43 and accompanying text.

⁸⁴ *See* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 378-80 (2010) (arguing that an antiretaliation principle underlies the Court's recent decisions allowing the Court to “protect[] employees from retaliation [in order to]

Recent cases involving antiretaliation provisions show a trend toward the Supreme Court's recognition of these provisions as embodying a flexible principle that is not strictly bound by its precise wording.⁸⁵ In setting new standards, the Court generally furthers the goals of antiretaliation provisions by expanding the scope of the protected activity requirement to contexts not immediately apparent within the plain language of the statute. Given that expanding the scope of the opposition clause to include a refusal to sign a waiver is necessary to prevent employers from unduly stifling employee access to the remedial mechanisms of antidiscrimination statutes, such refusal ultimately deserves protection.

IV. THE IMPLICATIONS OF THE RETALIATION STANDARD ON THE VALIDITY OF WAIVERS

While some employees will refuse to sign waivers and will experience the threatened disruption to their careers, other employees will simply capitulate to the employer's threats and sign the waivers. When obtained under such circumstances, these waivers are necessarily invalid and unenforceable. These waivers were involuntarily obtained by threatening disruption to the employees' careers if they did not sign the waiver. And involuntary waivers are invalid. A threat of retaliation almost certainly undermines the voluntariness of a waiver.⁸⁶ Valid waivers cannot be obtained in the context of threatened retaliation.⁸⁷ It

enhance the enforcement of the nation's laws" and predicting that the Court will respond flexibly in future cases to "broaden antiretaliation protections under these statutes, despite arguments that the statutory language at issue in each case seemingly excludes the employees' claims").

⁸⁵ See *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 173 (2011) (expanding the types of employer conduct potentially included within the adverse action prong of retaliation claims by reasoning that "Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct"); *Crawford*, 555 U.S. at 279 (rejecting the Sixth Circuit's limits on the scope of the opposition clause given policy concerns for protecting employees from employer intimidation that would prevent responding honestly when questioned about potentially harassing behavior from superiors (citing *Deborah L. Brake, Retaliation*, 90 MINN. L. REV. 18, 20 (2005))); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63-64 (2006) ("[T]he antiretaliation provision's 'primary purpose[]' [is] . . . '[m]aintaining unfettered access to statutory remedial mechanisms.'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997))).

⁸⁶ See Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act*, 79 VA. L. REV. 1271, 1282 (1993) (describing the coercive nature of early retirement plans arising from the implied threat of illegal conduct, i.e., discharge in violation of an antidiscrimination statute and arguing that incentives to retire are more valuable than a legal right of action).

⁸⁷ See *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 524-25 (3d Cir. 1988) (deciding that analysis of the voluntariness of the challenged waiver was "particularly salient . . . in light of the fact that the [waiver] that [the plaintiff] signed was determined to be *per se* violative of the ADEA in a separate proceeding").

cannot be said that an employee faces a purely “voluntary” choice of taking or leaving a waiver when a preexisting aspect of their employment relationship is made conditional on their signing a waiver. An offer cannot be voluntary where it carries an implied threat of disruption to the employees’ careers.⁸⁸ Surely, such an offer an employee can’t refuse, which threatens to punish the employee for refusing to comply, cannot be entirely voluntary.⁸⁹ There is no voluntariness where employees face a Hobson’s choice between disrupting their careers or signing away their rights.⁹⁰ For this reason, waivers obtained under such a threat of an adverse action—and ultimately a threat of retaliation—are involuntary and thus invalid.

If courts adopted a standard for voluntariness identical to that for finding an adverse action, it would provide sufficient consistency and uniformly protect both employees who sign a waiver and those who refuse. By first recognizing the retaliatory threat within the waiver offer, courts can more readily recognize that the waiver was obtained in a context calling for invalidation.⁹¹ The threatened employer conduct creates the conditions for an involuntary waiver in the same way that, once undertaken, such conduct constitutes an adverse action.⁹² The potential for inconsistency in application is eliminated when the standard for voluntariness is interpreted in tandem with the standard for finding an adverse action. In this way, under this Note’s proposed standard, there is never an actionable claim for retaliation where there is not also an invalid waiver and vice versa.

Not only do courts impose a general knowledge and voluntariness requirement for all waivers under Title VII and the ADA, but the ADEA also explicitly states that a “waiver may not be considered knowing and voluntary unless at a minimum . . . the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual is already entitled.”⁹³ This requirement from the ADEA must be understood as a

⁸⁸ See generally Harper, *supra* note 86, at 1280-83 (discussing coercion and conditional waivers offers in the context of the ADEA).

⁸⁹ See Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (“[A] primary purpose of antiretaliation provisions [is] [m]aintaining unfettered access to statutory remedial mechanisms.”).

⁹⁰ See Romero v. Allstate Ins. Co., 1 F. Supp. 3d 319, 410-11 (E.D. Pa. 2014) (acknowledging the potential “Hobson’s choice” faced by terminated employees offered an option to convert to independent contractor status contingent on signing a waiver).

⁹¹ See Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 513-14 (2001) (arguing that the “baseline for considering the coerciveness of offers in the employment context” should be no employment).

⁹² See *id.* at 519-20 (arguing that even beneficial offers can be coercive because they can lead to a choice between two unimaginable situations).

⁹³ 29 U.S.C. § 626(f)(1) (2012). While Title VII and the ADA do not have this express requirement codified in their text, their general “knowing and voluntary” standard for waiver validity almost certainly includes the same requirement that the proffered consideration must

function of the requirement that a waiver be knowingly and voluntarily obtained—rather than as a mere codification of the contract law requirement of consideration.⁹⁴ Once understood as such, this requirement embodies a congressional acknowledgement that a waiver cannot be voluntarily obtained where the proffered consideration is already part of the existing employment relationship. An employee does not voluntarily sign a waiver under circumstances in which the employer threatens to disrupt the preexisting employment relationship if the employee refuses to sign.⁹⁵ In the same way that such employer conduct rises to the level of an adverse action when an employer punishes an employee for refusing to sign a waiver,⁹⁶ the threat of this punishment makes any waiver obtained under such circumstances involuntary.

There has been confusion among courts regarding the proper standard for evaluating the validity of waivers challenged in the context of an alleged threat of retaliation. The Third Circuit, for example, has upheld waivers potentially obtained under a threat of retaliation by deciding simply that the conditioned aspect of the employment relationship was sufficient consideration for the waiver.⁹⁷ By focusing too narrowly on the sufficiency of consideration, courts fail to genuinely interrogate whether waivers can still be involuntary nonetheless.⁹⁸ Simply because nearly any aspect of the at-will employment relationship can serve as valid consideration,⁹⁹ it does not mean that conditioning aspects of the preexisting employment relationship cannot undermine the voluntariness of a waiver.¹⁰⁰

be above and beyond that which is part of the status quo of the existing employment relationship. *See supra* notes 35-39 and accompanying text.

⁹⁴ *See EEOC v. Allstate Ins. Co.*, 778 F.3d 444, 451 (3d Cir. 2015) (analyzing the validity of the waiver according to the sufficiency of the promised benefit as consideration for the waiver rather than analyzing whether the individual was already entitled to such a benefit as a function of the knowing and voluntary requirement).

⁹⁵ *See Silverstein, supra* note 91, at 519-22 (arguing that “consent induced by economic necessity” is not voluntary).

⁹⁶ *See supra* Section III.A.

⁹⁷ *See supra* Section II.B.

⁹⁸ *Allstate*, 778 F.3d at 451 (acknowledging “the Commission’s concerns about the prospects of employers trading releases for new business opportunities and terminated employees ‘facing financial’ pressure when offered such a deal,” but ultimately deciding that the concerns were misplaced).

⁹⁹ *Id.* at 449 (citing MARK A. ROTHSTEIN ET AL., 2 EMPLOYMENT LAW § 9.22 (5th ed. 2014)) (“It is hornbook law that employers can require terminated employees to release claims in exchange for benefits to which they would not otherwise be entitled.”). *See generally* *Circuit City Stores v. Adams*, 532 U.S. 105, 122-23 (2001) (upholding the validity of mandatory arbitration agreements and implying that an employment opportunity could serve as sufficient consideration for an arbitration agreement).

¹⁰⁰ *See Torrez v. Pub. Serv. Co. of N.M.*, 908 F.2d 687, 689-90 (10th Cir. 1990) (holding that courts should consider the totality of the circumstances when determining if a release was voluntarily signed). Even the district court’s original opinion in *Allstate* case acknowledged

CONCLUSION

The current law addressing employee retaliation claims arising from an employee's refusal to sign a waiver is at best muddled. At worst, the current standards may undermine the ability of many employees to resist undue employer attempts to restrict access to rights under antidiscrimination statutes. The main difficulty experienced by courts in the few cases actually addressing this issue has been formulating an appropriate standard that allows employers to offer valid waivers in certain contexts, while still protecting employees from loss of their rights in others. It is necessary to first define the line at which employers engage in an adverse action when they deny something to employees who refuse to sign a waiver. The line is naturally drawn at the point at which the employer does not simply deny a benefit above and beyond the preexisting employment relationship but instead disrupts the status quo of the employment relationship. This provides a workable standard that—in combination with protecting an employee's refusal to sign a waiver as an oppositional activity—prevents employers from punishing employees for their refusal. Then, once the context of certain waiver offers is understood as containing a threat of retaliation, it is only natural to decide that any waiver actually obtained in such a context is inherently involuntary and thus invalid.

This Note proposes a workable standard that courts can apply consistently in order to separate waivers obtained under threat of retaliation from those obtained under legal circumstances. Drawing the appropriate line to identify an underlying threat of retaliation is necessary to protect both those employees who were actually subject to the employer's threatened conduct and those who submitted to such threats by signing the waivers. The standard for finding an adverse action necessarily informs the standard for finding involuntariness to the waiver itself. And once such waivers are understood as invalid due to their involuntariness, it becomes more obvious that punishing employees for refusing to sign such waivers was retaliatory. Only by forbidding employers from coercively conditioning continuance of the status quo on employees signing waivers can courts effectively protect employees. Only in this way can courts further the fundamental goal of anti-retaliation statutes by allowing employees to "[m]aintain[] unfettered access to [statutory] remedial mechanisms."¹⁰¹

the potential validity of the plaintiffs' challenge to the voluntariness of the waivers and left the issue to the jury. *See* *Romero v. Allstate Ins. Co.*, 1 F. Supp. 3d 319, 410-11 (E.D. Pa. 2014).

¹⁰¹ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).