2003 WL 133235
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
UBS BRINSON, INC. and UBS AG, Defendants.
Kinne S. YON, Plaintiff,
v.
UBS BRINSON, INC. and UBS AG, Defendants.

Nos. 02Civ.3748RMBTK, 02Civ.3745RMBTK. | Jan. 15, 2003.

Equal Employment Opportunity Commission (EEOC) and employee each filed complaints alleging that general release and severance agreements that employer required its employees to sign prior to termination of their employment and receipt of severance payments and/or so-called lock-in payments violated Age Discrimination in Employment Act (ADEA) and Older Workers Benefit Protection Act (OWBPA). On employer's motion to dismiss, the District Court, Berman, J., held that: (1) employer's failure to comply with OWBPA's waiver of rights provisions did not, by itself, violate ADEA; (2) release did not violate ADEA's anti-retaliation provision; and (3) employee's request to see release was not "protected activity."

Motion granted.

Opinion

DECISION & ORDER

BERMAN, J.

I. Introduction

***1** On or about May 16, 2002, Plaintiffs United States Equal Employment Opportunity Commission ("EEOC") and Kinne S. Yon ("Yon") (collectively, "Plaintiffs") each filed complaints against Defendants UBS Brinson, Inc. and UBS AG (collectively, "Defendants"), alleging that Defendants violated the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621 *et seq.,* and the Older Workers Benefit Protection Act of 1990 ("OWBPA"), codified as part of the ADEA at 29 U.S.C. § 626(f), because, among other things, (i) the General Release and Severance Agreements ("Release" or "Releases") that Defendants required its employees to sign prior to termination of their employment and receipt of severance payments and/or so-called "Lock–In Payments" were invalid under the OWBPA; and (ii) that Defendants "retaliated" against Yon in violation of the ADEA (following her request to examine a Release) by withdrawing the "Lock–In Offer" which had been made to her. *See* EEOC Complaint, filed May 16, 2002 ("EEOC Complaint"), at 1–2; Yon Complaint, filed May 16, 2002 ("Yon Complaint"), at 1.[1]

[1] The EEOC Complaint seeks injunctive and declaratory relief on behalf of Defendants' employees (and former employees) and also requests monetary relief (only) on behalf of Yon. *See* EEOC Complaint at 11–12. 02 Civ. 3748 and 02 Civ. 3745 are consolidated for the purposes of this motion.

On July 26, 2002, Defendants filed a joint motion to dismiss Plaintiffs' actions pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ.P.") 12(b)(6) ("Defendants' Motion"). On September 20, 2002, Plaintiffs filed a joint memorandum of law in opposition to Defendants' Motion ("Plaintiffs' Opp."). Defendants filed a reply on October 21, 2002 ("Defendants' Reply").[2] For the reasons set forth below, Defendants' Motion is granted.

[2] On January 14, 2003, counsel advised the Court that they were waiving oral argument.

II. Background

On July 29, 1998, Swiss Bank Corporation ("SBC") and Union Bank of Switzerland ("UBS") merged to become Defendant UBS AG. SBC Brinson, a division of SBC, became Defendant UBS Brinson, Inc. following the merger. EEOC Complaint, ¶¶ 9–14. In January of 1998, in anticipation of the merger, UBS and SBC each began a reduction-in-force by identifying (redundant) employees whose services would not be needed post-merger. *Id.* ¶¶ 15–16. Certain of the redundant employees deemed "critical for at least three (3) months" were asked to sign "Lock–In Agreements" obligating them to continue working for specified time periods in return for Lock–In Payments "consisting of a bonus and a discretionary payment, if they completed their employment in a satisfactory manner." *Id.* ¶ 17–18.[3] The Lock–In Agreements provided that affected employees would be required to sign a Separation Agreement and General Release.[4] EEOC Complaint, Attachment E. "Employees offered the Lock–In Agreement were forced to decide whether to remain employed through the lock-in date

without being provided a copy of the [R]elease that each would be required to sign by the end of the lock-in period in order to obtain lock-in payments." EEOC Complaint, ¶ 28. The Releases provided, in part, that:

> In consideration for UBS's payment of the severance pay and other benefits to which you are not otherwise entitled, you hereby agree to release UBS and any and all of UBS's subsidiaries, parents, branches, divisions ... of and from all causes of action, claims, damages, judgments or agreements of any kind including, but not limited to, all matters arising out of your employment with UBS and the cessation thereof. This release includes, but is not limited to, any and all alleged claims based on Title VII of the Civil Rights Act of 1964 ... [and] the Age Discrimination in Employment Act (including the Older Workers Benefit Protection Act).
>
> ***2** EEOC Complaint, Attachment G at 2 (emphasis added). Releases also stated that if "you breach this Agreement and Release by filing a claim against UBS or by disclosing confidential or proprietary information about UBS, you agree to repay all severance pay and other benefits" plus legal fees and costs that UBS might incur in obtaining dismissal of any such claim. *Id.* Employees were advised to consult "with anyone of your choosing, including an attorney" prior to executing the Releases. *Id.* at 3.

Plaintiff Yon, who worked as a managing director for both UBS AG and UBS Brinson, was to be terminated post-merger but was also regarded as a "critical" employee.[5] On April 20, 1998, Yon was offered a Lock–In Agreement ("Yon's Lock–In Offer") which provided that she would receive her salary and benefits through the end of 1998, plus a bonus equal to her 1997 bonus of $225,000, and a discretionary payment "which would have yielded a value of $92,219." Yon Complaint, ¶ 16; EEOC Complaint, ¶¶ 30–31. Before Yon would agree to the terms of the Lock–In Agreement, she asked to see a copy of the Release. Her request was denied. Yon Complaint, ¶ 18. Yon protested to Defendants' chief legal counsel, *id.* ¶ 19, and on May 1, 1998, Defendants withdrew Yon's Lock–In Offer in a letter which stated: "This letter confirms the termination of your employment with UBS Asset Management (New York) Inc .... effective ninety (90) days from today. This letter also supersedes all prior discussions and writings concerning your continued employment with the Firm." Leblang Aff., Ex. D. Yon received "only the standard severance package." Yon Complaint, ¶ 20.[6] Yon alleges that when she questioned the withdrawal of her Lock–In Offer, "she was told that the previous [Lock–In] terms were being denied to her because she had attempted to oppose the company policy that refused to allow her to examine" the Release and that she "had advised persons on her staff that they had a right to consult with legal counsel before signing the lock-in documents." *Id.* ¶ 21. She also alleges that she "had no choice but to accept the standard severance package offered ... which had a value approximately $448,000 less than the lock-in package." *Id.* ¶ 24.[7]

On February 22, 1999, Yon filed a charge with the EEOC. *Id.* ¶ 8. She alleged substantially the same facts as those alleged here, namely that Defendants' actions regarding the Release and withdrawal of Yon's Lock–In Offer "violate the ADEA and constitute retaliation under the ADEA." Leblang Aff., Ex. E at 2. On September 15, 1999, the EEOC issued a determination that there was "reasonable cause to believe that [Ms. Yon] and other similarly situated individuals have been discriminated against as alleged." Yon Complaint, ¶ 8.

III. Standard of Review

"In reviewing a Rule 12(b)(6) motion, this Court must accept the factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff." *Bernheim v. Litt,* 79 F.3d 318, 321 (2d Cir.1996). However, "legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." *L'Eureopeenne de Banque v. La Republica de Venezuela,* 700 F.Supp. 114, 122 (S.D.N.Y.1988). Dismissal of the complaint is proper when "it appears beyond doubt that plaintiff can prove no

3 Non-critical employees received separate termination benefits. *Id.* ¶ 19.

4 In fact, all terminated employees, whether offered Lock–In Agreements or not, were asked to execute Releases. *Id.* ¶ 20.

5 At the time of her termination from employment, Yon was 43 years old.

6 Yon's severance package included: (i) payment for 90 days at the rate of her then current salary ($215,000 per year); (ii) a lump sum amount equal to 72 weeks at her then current salary (nearly $300,000); and (iii) eight months of medical, dental and life insurance benefits. Leblang Aff., Ex D.

7 Yon ultimately signed the Release on August 6, 1998, which was witnessed by Yon's attorney Jeffrey C. Slade. Affidavit of Kevin B. Leblang ("Leblang Aff."), dated July 25, 2002, Ex. F.

set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). "The issue is not whether a plaintiff is likely to prevail ultimately, 'but whether the claimant is entitled to offer evidence to support the claims." ' *Gant v. Wallingford Bd. of Educ. .,* 69 F.3d 669 (2d Cir.1995) (quoting *Weisman v. LeLandais,* 532 F.2d 308, 311 (2d Cir.1976) (per curiam)). "Common sense requires that courts remember the purpose of a pleading—to state a claim and provide adequate notice of that claim." *Gabriel Capital, L.P. v. Natwest Finance, Inc.,* 122 F.Supp.2d 407, 411 (S.D.N.Y.2000). A complaint is deemed to "include ... documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." *Rothman v. Gregor,* 220 F.3d 81, 88 (2d Cir.2000).

IV. Analysis

A. The Complaints Do Not Allege Age Discrimination

***3** [1] Although (ostensibly) brought under the ADEA, 29 U.S.C. § 621 *et seq.,* neither complaint sets forth a cause of action for age discrimination under *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (complaint which alleged that plaintiff was terminated on the basis of national origin and age, provided relevant dates and detailed the events leading to his termination, and included the ages and nationalities of relevant persons involved in his termination sufficiently gave "respondent fair notice of what petitioner's claims are and the grounds upon which they rest."). Here, Plaintiffs do not allege (any) factors supporting a claim that Defendants discriminated against any employee, including Yon, on the basis of age. aggressive. *See Marks v. New York University,* 61 F.Supp.2d 81, 90 n. 7 (S.D.N.Y.1999). Rather, Plaintiffs' seek to hold Defendants liable under the ADEA on the ground that the Releases did not conform to OWBPA requirements. *See generally* EEOC Complaint, at 1–2, 11. Since Plaintiffs "have not asserted a separate ADEA claim ... [and] a violation of the OWBPA, by itself, [cannot] establish[ ] age discrimination," Plaintiffs complaints fail to state a claim for which relief may be granted. *Whitehead v. Oklahoma Gas & Elec. Co.,* 187 F.3d 1184, 1191–92 (10th Cir.1999).[8]

8 The Court is not here ruling upon the validity of the Releases under the ADEA or the OWBPA.

B. The OWBPA Does Not Create an Independent Cause of Action

Defendants persuasively contend that "[n]othing in the OWBPA's waiver provisions authorizes a civil action ... based solely on an allegedly defective ADEA waiver or defines a violation of the waiver provisions, standing alone, to be an unlawful employment practice." Defendants' Memorandum of Law in Support of Their Motion to Dismiss ("Defendants' Mem."). dated July 26, 2002, at 9. Plaintiffs maintain that "the ADEA clearly provides that the EEOC has standing to prevent violations of said statute regardless of whether the EEOC has identified victims of age discrimination in its investigation, complaint, or otherwise." Plaintiffs' Opp. at 5 (emphasis added).[9]

9 Plaintiffs also argue that the OWBPA amendments were not intended to "be merely cautionary ... Instead, Congress intended that the EEOC have the authority to enforce OWBPA's prohibitions." *Id.* at 9.

In 1990, Congress amended Section 626 of the ADEA by enacting the OWBPA which "is designed to protect the rights and benefits of older workers" and "governs the effect under federal law of waivers or releases on ADEA claims." *Oubre v. Entergy,* 522 U.S. 422, 427, 118 S.Ct. 838, 139 L.Ed.2d 849 (1998). "The OWBPA provides [that]: 'An individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary ..." ' *Id.* at 426–27 (quoting 29 U.S.C. § 626(f)(1)).[10]

10 Without deciding whether a violation of the OWBPA requirements is a substantive cause of action under the ADEA (as Plaintiffs contend here), the Supreme Court has made clear that a waiver or release which fails to comply with the statutory requirements of the OWBPA cannot bar an employee from pursuing his or her ADEA claim. *Id.* at 428; *see also Tung v. Texaco,* 150 F.3d 206, 209 (2d Cir.1998) ("an employee may not waive an ADEA claim unless the employer complies with the specific duties imposed upon it by the statute").

Virtually every court that has decided the issue of whether a violation of the OWBPA, by itself, establishes age discrimination has concluded that it does not. In *Marks v. New York University,* 61 F.Supp.2d 81 (S.D.N.Y.1999), Judge Robert P. Patterson, Jr. observed that "Oubre does not provide a basis for concluding that § 626(f) does anything more than prescribe the requirements for an effective waiver of ADEA claims." *Id.* at 90 n. 7; *see also Whitehead,* 187 F.3d at 1191–92 ("OWBPA simply determines whether the employee has, as a matter of law, waived the right to bring a separate and distinct ADEA claim. The OWBPA does not, by itself, determine in the first instance whether age discrimination has occurred"); *see also Welch v. Maritrans Inc.,* 2001 WL 73112, at *9 (E.D.Pa. Jan.25, 2001) (an alleged violation of the

OWBPA waiver provisions does "not give rise to a claim under the ADEA"); *Management Employees of AT & T v. AT & T,* 1999 WL 334751 (D.N.J. Apr.23, 1999) ("[p]laintiffs have cited no support—and this Court has found none—for the contention that such conduct, if proven, creates an independent cause of action"); *Lawrence v. National Westminster Bank,* 1995 WL 506043, at *8 (D.N.J. Aug.16, 1995), *rev'd in part on other grounds,* 98 F.3d 61 (3d Cir.1996) ("this Court does not believe that a violation of the OWBPA alone may serve as the basis for an age discrimination claim under the ADEA"); *Williams v. General Motors Corp.,* 901 F.Supp. 252, 255 (E.D.Mich.1995) (rejecting "plaintiffs' contention that a violation of the procedural requirements [of OWBPA] may be extrapolated into a holding that a substantive cause of action for age discrimination exists"); *EEOC v. Sara Lee Corp.,* 923 F.Supp. 994, 999 (W.D.Mich.1995) ("a failure to meet the requirements [of OWBPA] does not constitute a separate cause of action and is not a violation of the ADEA").

***4** Plaintiffs urge the Court to reject this persuasive line of cases and, instead, to follow the decision in *Commonwealth of Massachusettes v. Bull HN Info. Sys.,* 16 F.Supp.2d 90 (D.Mass.1998), a case which is factually quite different from the case at bar. *See* Plaintiffs' Opp. at 6, 9, 23–24. In *Commonwealth,* the court held that the defendant's alleged violation of the OWBPA supported an independent cause of action under the ADEA against the defendant employer. 16 F.Supp.2d at 107. The underlying cases were brought after former employees of Bull HN Information Systems, Inc. ("Bull HN") filed age discrimination complaints with the EEOC and the Massachusetts Commission Against Discrimination ("MCAD"). It was alleged, among other things, that the defendant Bull HN "was engaged in a pattern and practice of age discrimination, and that older employees had been disproportionately affected by [its] lay-offs between 1990 and 1994." *Commonwealth,* 16 F.Supp.2d at 94.[11] The actions in federal court specifically alleged, *inter alia,* that the defendant "discriminated against older workers by requiring that they waive ADEA rights in exchange for severance pay when younger workers, who are not covered by the ADEA, received the same severance without waiving these rights." *Id.* at 98. In concluding that "the civil action provision of the ADEA applies equally to suits brought under the waiver provisions," the *Commonwealth* court stated that "[i]f Congress sought to preclude independent enforcement of the waiver conditions ... it would have either said so explicitly or placed the OWBPA in a different part of the statute." *Id.* at 105. The court also stated that Congress' intent to provide an independent cause of action "can be supported by considering [ ] the purposes of the OWBPA in light of the circumstances of this case." *Id.* (emphasis added).

[11] In 1994, Bull HN implemented the use of waivers in conjunction with its severance plan for employees. *Id.* at 95.

The circumstances of *Commonwealth* are readily distinguishable from those at bar most notably because, in *Commonwealth,* age discrimination was at the core of the plaintiffs' complaints. *Id.* at 98, 101 (the defendant "discriminated against older workers by requiring that [only] they waive ADEA rights" and "the waivers themselves ... require[d] older workers to give up greater rights for the same consideration as younger workers."). Plaintiffs here do not allege that Defendants engaged in (a pattern of) discrimination on the basis of age or that the Releases were aimed only at older employees. *See Commonwealth,* 16 F.Supp.2d at 98. Indeed, Plaintiffs suggest that all terminated employees were required to execute Releases as a condition of receiving Lock–In Payments or severance benefits, EEOC Complaint, ¶¶ 20–21, and nowhere do they suggest that Defendants chose to terminate particular individuals on the basis of age. *Id.* ¶¶ 15–16 ("in anticipation of their merger, [Defendants] began a reduction-in-force," identifying "redundant employees whose services would not be needed post-merger, for the purpose of terminating said redundant employees.").

***5** Apart from these clear factual distinctions, there are other reasons that *Commonwealth* does not control. That is, it can be argued that the OWBPA waiver requirements were intended to be "a shield for plaintiffs in an ADEA action when an employer invokes the waiver as an affirmative defense," *Whitehead,* 187 F.3d at 1191, not a sword that provides an independent (age discrimination) claim. *See* H.R.Rep. No. 101, 664, Section IV(B)(2) ("[a] waiver of rights or a release of claims is generally available as an affirmative defense. The party relying on the defense has the burden of showing its scope and its applicability to the matter at hand"); 136 Cong. Rec. S13594–01, S13597 (daily ed. Sept.24, 1990) ("the party asserting the validity of the waiver shall have the burden of proving in a court of competent jurisdiction as an affirmative defense that the waiver process satisfied each of the factors in that paragraph"); *see also Oubre,* 522 U.S. at 427–28; *Hodge v. New York College of Podiatric Medicine,* 157 F.3d 164, 167 (2d Cir.1998) (invalidity of release precluded dismissal of ADEA claim even though plaintiff had accepted benefits of settlement agreement).[12]

[12] Also, the OWBPA's waiver provisions are not found in 29 U.S.C. § 623 which sets forth prohibited discriminatory acts by an employer. Rather, the waiver provisions are included in Section 626, titled "Recordkeeping, investigation, and enforcement". Section 623 prohibits, among other things, the failure or refusal "to hire or to discharge any individual or otherwise discriminate against any individual with

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"; and the limitation or classification of employees "which would deprive or tend to deprive any individual of employment opportunities ... because of such individual's age." 29 U.S.C. § 623(a)(1),(2); *see, e.g., EEOC v. Sears, Roebuck and Co.,* 883 F.Supp. 211, 215 (N.D.Ill.1995) ("[t]he fact that Congress could have created a separate cause of action, but chose not to, precludes this Court from reading one into the statute now. Accordingly, to the extent the EEOC is attempting to create a cause of action based solely on an OWBPA violation, 29 U.S.C. § 626(f), the Court concludes that such a claim must be dismissed as a matter of law"); *Williams,* 901 F.Supp. at 255.

1. No Retaliation

Plaintiffs allege that the Releases violate Section 4(d) of the ADEA, 29 U.S.C. § 623(d), which makes it "unlawful for an employer to discriminate against any of his employees ... because such individual, member or applicant for membership has opposed any practice made unlawful by this section, 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 chapter." Plaintiffs' argue that the "tenderback and legal fees clause" of the Release constitutes a "direct threat of retaliation [and] an interference with the EEOC's processes" in an effort to "dissuade UBS' employees from filing charges of discrimination with the EEOC."[13] Plaintiff's Opp. at 20. Defendants respond that the "restitution provision merely advised employees of UBS' right ... to enforce the waiver or seek recoupment ... Having sanctioned the use of ADEA waivers, Congress did not intend that employers who seek to enforce such waivers would be liable for retaliation." Defendants' Reply at 8. Defendants also argue that Plaintiffs do not "even allege that UBS has sought to enforce the provision or required that a single employee, including Ms. Yon, tender back her severance benefits or pay UBS' attorneys' fees. As a result, the EEOC cannot show that UBS has used the restitution provision to retaliate." Defendants' Reply at 8–9.

13 The Release provides: "If you breach this Agreement and Release by filing a claim against UBS or by divulging confidential or proprietary information about UBS, you agree to repay all severance pay and other benefits provided to you herein and to pay all legal fees and costs that UBS incurs to obtain the dismissal of any such claims." EEOC Complaint, Attachment G, at 2.

[2] The Court is not persuaded that the tenderback and attorney's fee clause in the Release, standing alone, gives rise to a retaliation cause of action under Section 4(d) of 29 U.S.C. § 623(d), i.e., absent allegations that the Releases were unlawfully (discriminatorily) employed.[14] *See Commonwealth,* 16 F.Supp.2d at 109–10 ("[i]nsofar as the waiver itself is valid under the stringent standards of the OWBPA, an employer is not retaliating by merely seeking to enforce it."). The Court in *Oubre* did not "expressly or implicitly" reject tenderback provisions, as Plaintiffs' appear to contend, Plaintiff's Opp. at 19; rather it acknowledged that "[i]n further proceedings in this or other cases, courts may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee." *Oubre,* 522 U.S. at 428. And, *Blistein v. St. John's College,* 860 F.Supp. 256 (D.Ma.1994), *aff'd,* 74 F.3d 1459 (4th Cir.1996), the district court held that an employer's counterclaim to recover severance benefits was not retaliation within the meaning of 29 U.S.C. § 623(d) because disallowing such a claim "would mean that defendant-employers in discrimination suits would be severely limited in protecting their rights under proper waiver agreements which comply with the OWBPA." *Id.* at 269 (emphasis omitted).

14 Section 623(d) prohibits discrimination against an employee for participating in investigations, proceedings or litigation under the ADEA. *See Commonwealth,* 16 F.Supp.2d at 108 n. 18 ("retaliation" is used "as a shorthand way to distinguish substantive age discrimination claims from claims of discrimination based on the exercise of legal rights granted by the ADEA") (citing *EEOC v. Board of Governors of State Colleges and Universities,* 957 F.2d 424, 427 (7th Cir.1992), *cert. denied.,* 506 U.S. 906, 113 S.Ct. 299, 121 L.Ed.2d 223 (1992)).

2. Fair Labor and Standards Act Claim

***6** Plaintiffs argue that, because the Release does not meet OWBPA requirements under Section 626(f), Defendants have violated the record keeping provision(s) of Section 7 of the ADEA, 29 U.S.C. § 626(a) and § 211(c), and also the Fair Labor Standards Act of 1938 ("FLSA"), as amended, 29 U.S.C. § 207 *et seq*. Plaintiff's Opp. at 21.[15] Plaintiffs contend, among other things, that because the Releases constitute "a record of its employees and the conditions and practices of UBS' severance program(s)," and because "UBS has not met the standard with regard to its Releases, the EEOC has stated a claim that UBS has violated the record keeping provisions of the ADEA." *Id.* (emphasis omitted). Defendants respond that the "FLSA claim fails to meet even the minimal standards of notice pleading and must be dismissed." Defendants' Reply at 9.

[15] 29 U.S.C. § 626(a) provides: "The Equal Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in section 209 and 211 of this title."
Section 211 provides: "The Administrator or his designated representatives may investigate and gather regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter ... [and] the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter."

Neither the EEOC nor the Yon complaint alleges facts supporting a violation and/or cause of action under the FLSA.[16] In fact, the complaints barely reference the FLSA except to say that "[t]his action is authorized and instituted pursuant to Section 7(b) of the ADEA, 29 U.S.C. § 626(b), which incorporates by reference ... the Fair Labor Standards Act." *See* EEOC Complaint, ¶ 1; Yon Complaint, ¶ 2. Plaintiffs do not satisfy pleading requirements which require notice to Defendants of the alleged FLSA violation.[17] *See, e.g., Kulkarni v. City University of New York,* 2003 WL 23319, at *2 (S.D.N.Y. Jan.3, 2003) (a "[p]laintiff must identify a specific employment practice to 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" ') (quoting *Swierkiewicz,* 122 S.Ct. at 998).

[16] Plaintiffs' FLSA claim is substantially the same as its claim that the Releases are invalid under OWBPA.

[17] *See, e.g., Commonwealth of Massachusetts v. Bull HN Info. Sys., Inc.,* 143 F.Supp.2d 134, 144 n. 23 (D.Mass.2001) (while finding that certain of the defendant's releases were invalid for failure to comply with the OWBPA, the court granted summary judgment on the FLSA claim).

C. Yon Has Failed To Allege A Cognizable Claim of Retaliation

Plaintiff Yon alleges that Defendants retaliated against her by the "withdrawal of the substantial lock-in benefits—because she sought to exercise her rights under the ADEA." Yon Complaint, ¶¶ 22–23. Plaintiffs argue that Ms. Yon's "Lock–In Offer was withdrawn for the explicit reason that she protested that she was being required to sign an OWBPA waiver without being notified of any of the protections required by law" and because "she had urged others to do the same with their lawyers." Plaintiffs' Opp. at 28. Defendants contend that Yon's retaliation claim must fail because Yon has not, among other things, demonstrated that she was engaged in a "protected activity". Defendants' Mem. at 27. Defendants also contend, persuasively in the Court's view, that no facts have been pled to suggest that Defendants "or a reasonable employer could have understood Ms. Yon to be opposing age discrimination." *Id.* at 28.[18]

[18] To state a claim for retaliation under the ADEA, a plaintiff must show that: (1) she "was engaged in a protected activity, (2) the employer was aware that plaintiff was engaging in the protected activity, (3) plaintiff was subject to an adverse employment action, and (4) a nexus between the protected activity and the adverse employment action." *McVay v. Johnson,* 1999 WL 294783, at *2 (E.D.N.Y. Mar.24, 1999).

As noted in Section IV(A) *supra,* there are no complaint allegations that Defendants discriminated against Yon on the basis of her age. It is not alleged, for example, that Yon (or any other former employee) was terminated on the basis of age; that Yon's Lock–In Offer was revoked on the basis of her age; or that Yon experienced any other adverse action as a result of her age. *See generally* EEOC Complaint; Yon Complaint.[19] Moreover, it is not alleged that complaints were made to or filed against the Defendants with the EEOC on the basis of unlawful age discrimination. *See, e.g., Holtz v. Rockefeller & Co., Inc.,* 258 F.3d 62, 83 (2d Cir.2001) ("a plaintiff typically may raise in a district court complaint only those claims that either were included in or are 'reasonably related to' the allegations contained in her EEOC charge"); *Chimarev v. TD Waterhouse Investor Services, Inc.,* 2002 WL 31729506, at *2 (S.D.N.Y. Dec.4, 2002) ("[a]s a prerequisite for bringing an action under the ADEA, a plaintiff must first exhaust administrative remedies with the [EEOC] and designated state or local agency. In accordance with 29 U.S.C. § 626(c), no person can bring a suit in federal or state court under the ADEA until he has first resorted to the appropriate administrative proceedings."). All of the claims presented, including Yon's retaliation claim, are premised upon alleged violations of OWBPA's waiver provisions which, as noted above, do not give rise to an independent claim under the ADEA.

[19] On the contrary, as noted, it appears that Defendants' practices with respect to the Releases applied equally to all terminated employees regardless of their age. *See* EEOC Complaint, ¶ 20.

***7** [3] Thus, Yon's retaliation claim fails. "The prohibition against retaliation is intended to protect employees who resist unlawful workplace discrimination." *Little v. National Broadcasting Co., Inc.,* 210 F.Supp.2d 330, 386 (S.D.N.Y.2002) (addressing protected activity in the

context of Title VII).[20] Because "[v]iolations of the OWBPA merely render any agreement entered into regarding an employee's waiver of liability invalid," Yon's request to see the Release and her subsequent protest to Defendants may not constitute "protected activity" for the purposes of establishing retaliation.[21] *Welch v. Maritrans Inc.,* 2001 WL 73112, at * 8–9 (dismissing retaliation claim since "Plaintiff's actions did not constitute 'protected conduct' under the ADEA" where plaintiff's counsel communicated his "rights" under OWBPA to defendant and plaintiff's severance offer was subsequently withdrawn).

20 *See, e.g.,* 29 U.S.C. § 623(d) ("[i]t shall be unlawful for an employer to discriminate against any of his employees ... because such individual has opposed any practice made unlawful by this section").

21 The Court is not deciding whether Plaintiffs could (ever) establish a cognizable claim for retaliation under the ADEA, but is concluding that the allegations presented here are insufficient to state such a cause of action.

Assuming *arguendo* that Yon's conduct were protected, the withdrawal of her Lock–In Offer may not on the facts plead here constitute an adverse employment action. *See, e.g., Marks,* 61 F.Supp.2d at 90 ("the OWBPA does not replace the common law right of an employer to revoke an offer prior to acceptance"); *Ellison v. Premier Salons Int'l, Inc.,* 164 F.3d 1111, 1115 (8th Cir.1999) ("[b]ecause the OWBPA is concerned only with the validity of agreed upon waiver agreements, it does not preempt contract formation principles such as rejection and revocation"). Yon's claim appears to be that she did not get as much money under the severance package (which she did accept) as she would have gotten under the Lock–In Agreement (which was withdrawn). While "the OWBPA protects employees from unknowingly or involuntarily releasing their potential ADEA claims ... it does not entitle employees to the best possible separation agreement in exchange for the waiver of their ADEA rights." *Ellison,* 164 F.3d at 1115.

V. Conclusion

For the reasons stated herein, Defendants' Motion to Dismiss [Dkt. No. 5 in 02 Civ. 3745] is granted.[22] If Plaintiffs determine that a basis exists for repleading, they are directed to file a motion and proposed amended complaint on or before February 4, 2003. If a motion is not filed as of February 4, 2003, the Clerk of Court is respectfully requested to close this case.

22 Given the dismissal of Plaintiffs' primary claims, the Court does not reach the parties' additional arguments relating, among other things, to whether: (i) the Releases satisfied the OWBPA waiver provisions; (ii) the Lock–In letters triggered OWBPA's waiver requirements; and (iii) the EEOC met its obligations to conciliate.