IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CAROLYN BURLISON, JAMES EADY, JERRY FLOYD, ROBERT GUNTER, and STEPHEN REINSCH, Plaintiffs, vs. MCDONALD'S CORPORATION, Defendant.	)	Civil No. 1:03-CV-2984-WSD

PROPOSED AMICUS U.S. CHAMBER OF COMMERCE'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO CERTIFY RULING FOR INTERLOCUTORY APPEAL

INTRODUCTION

The Chamber of Commerce of the United States of America (the "Chamber") respectfully requests that the Court permit it to submit this memorandum as amicus curiae in support of defendant McDonald's Corporation's motion to certify the summary judgment ruling for interlocutory appeal pursuant to 28 U.S.C. §1292(b). As the leading representative of large and small businesses nationwide, the Chamber has a substantial interest in the outcome of this matter – regardless of what that outcome may be.[1]

[1] Though more established in appellate courts, amicus status is not uncommon in district courts, often as an alternative to limited intervention. See,

The Chamber is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

BACKGROUND

Plaintiffs in this age discrimination action were laid off by McDonald's in November 2001. In exchange for certain separation benefits, each of the plaintiffs signed a release that waived any claims he or she might have against McDonald's, expressly including claims of age discrimination. Order of May 6, 2005 ("Mem.") at 2, 4. Before signing the releases, plaintiffs also received, among other things, information that McDonald's supplied in accordance with the requirements of the Older Workers Benefit Protection Act, 29 U.S.C. §626(f) ("OWBPA"). The information listed certain information about those in the Atlanta (and former Nashville and Greenville) regions who, like the plaintiffs, were laid off and asked for waivers of age discrimination claims, and those in the same region(s) who hold the same job title or classification as those who were laid off but who were not selected for layoff.

Plaintiffs now contend that their releases are invalid under the OWBPA because they were given information about employees only in their regions, and not about employees who were laid off, or not selected for layoff, nationally. In its

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e.g., Mumford Cove Assn. v. Town of Groton, 786 F.2d 530 (2d Cir. 1986); Tutein v. Daley, 43 F. Supp. 2d 113 (D. Mass. 1999).

May 6 Order, the Court held that McDonald's properly provided only regional information about those not selected for layoff, but held that the statute required McDonald's to provide the plaintiffs with list of all employees selected for layoff across the country. Mem. at 12-17. McDonald's now requests that the Court certify that ruling for interlocutory appeal pursuant to 28 U.S.C. §1292(b).

ARGUMENT

A. The Court's Decision Has Significant Consequences For Employers And Employees Nationwide.

The Chamber concurs with McDonald's position that the releases at issue were valid and complied with the requirements of the Older Workers Benefit Protection Act ("OWBPA"), but the Court need not reconsider its ruling to decide that certification is appropriate. For a variety of reasons, the Court should permit an interlocutory appeal regardless of whether the ruling itself is correct or not.

First, the Court's opinion addresses a legal issue that confronts thousands of employers every year and has created uncertainty for employers where up until now there was none. When enacting its OWBPA regulations in 1998, EEOC estimated that more than 13,000 employers annually would engage in layoff programs that are subject to the OWBPA information requirements. 63 Fed. Reg. 30627 (1998). That estimate seems to be quite low, as the Bureau of Labor Statistics reports 15,980 ***mass*** layoffs – those involving reductions of more than 50 employees at a time – in 2004, and 3,779 such layoffs from January to March 2005.[2] Those layoffs affected more than 1.6 million employees in 2004, and

[2] See Press Release, Bureau of Labor Statistics, Mass Layoffs In December 2004 And Annual Averages For 2004 (January 26, 2005); Press Release, Bureau of Labor Statistics, Mass Layoffs In March 2005 (April 26, 2005). Both press

almost 400,000 employees in the first quarter of 2005. See id. Because these statistics include only layoffs of more than 50 employees at a time, and the Age Discrimination in Employment Act ("ADEA") applies to employers with 20 or more employees, 29 U.S.C. §630, and thus OWBPA does as well, it is likely that the actual number of employers turning to the regulations for guidance in preparing waiver disclosures is far higher.

Second, as the Court recognizes in its summary judgment order (Mem. at 13), there is little case law interpreting the scope of disclosures required by OWBPA. Indeed, there are no decisions of which we are aware that directly address the meaning of 29 U.S.C. §626(f)(1)(H)(ii) or the implementing EEOC regulations. As a matter of first impression that potentially will affect decisionmaking by tens of thousands of employers nationwide, the Court's decision, right or wrong, ought to be certified for prompt review by the Eleventh Circuit.

Further, immediate review will be in the interest of all affected and potentially affected parties. The cost of delaying review is measured not merely by the resources that will be expended by the plaintiffs, by McDonald's, and by the Court in litigating and deciding the merits of this case, but by the costs and disruption that employers across the country will incur in an uncertain legal environment before this Court's novel decision can be reviewed. If the statistics above hold true, thousands of employers will be laying off tens of thousands of employees, at significant cost in terms of severance or other consideration paid for releases, between the time this Court's summary judgment ruling was issued and

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releases, and other mass layoff statistics, are available online at http://bls.gov/schedule/archives/mmls_nr.htm.

the time that the Eleventh Circuit may receive this case on appeal after a final judgment.

Whatever those employers do with respect to OWBPA compliance in the interim – whether they choose to follow the unusual, indeed unprecedented interpretation adopted by the Court or adhere to the heretofore universally-accepted approach used by McDonald's – they now face substantial uncertainty about the enforceability of their releases. Employers may now face litigation they thought they had bargained to prevent, and may pay valuable consideration for releases that turn out to be worthless. We acknowledge, of course, that even a decision by the Eleventh Circuit may not resolve the matter once and for all, but a Court of Appeals decision will bring greater certainty to an area of the law that affects employers every day.

B. The Court's Decision Directs A Significant Departure In The Preparation Of OWBPA Releases.

As explained in the preceding section, the issue presented by McDonald's summary judgment motion is important enough to warrant immediate appellate review regardless of the correctness of the Court's interpretation of the statute and regulations. But the Chamber also supports McDonald's petition because the Court's decision orders a substantial departure from the currently prevailing method of complying with the OWBPA, and thus jeopardizes releases already given, and to be given, by countless employees across the country.

The commonly accepted interpretation of 29 U.S.C. §626(f)(1)(H)(ii) is the one reflected in McDonald's approach here: the list of "individuals eligible or selected for the program" and of "individuals in the same job classification or organizational unit who are not eligible or selected for the program" are drawn

from the same population, limited to the "decisional unit," as that phrase is used in the regulations. While there is no case law that specifically so holds, a survey of cases, articles, and memoranda convincingly demonstrates that companies have uniformly limited OWBPA information to employees in the "decisional unit," and that lawyers have consistently advised their clients that that is what the law requires. This consistent approach by employers and their advisors is strongly supported by a fair reading of the EEOC's regulations implementing the OWBPA.

Case law. In Massachusetts v. Bull HN Info. Systems, 143 F. Supp. 2d 134, 149 (D. Mass. 2001), the district court approved OWBPA information that listed only employees in the "decisional unit" who were selected and not selected for layoff – the position that McDonald's takes here. Cf. also Earley v. Champion Int'l Corp, 907 F.2d 1077, 1084-85 (11th Cir. 1990) (rejecting ADEA plaintiffs' claim that they should have been permitted to conduct national discovery, even though the layoff "was initiated at the national level," because the decision to terminate the plaintiffs was made "at the local level" and information about other layoffs was accordingly irrelevant). The plaintiffs in Earley were not offered releases, so the decision does not interpret OWBPA, but the Court's determination that discovery related to the layoff in other locations was irrelevant is nonetheless instructive.

Authoritative Publications. Beyond court decisions, numerous publications that offer advice or commentary on OWBPA requirements reflect a widely held understanding that the "decisional unit" determines the scope of the demographic information to be supplied, both for employees selected for layoff and those not selected. That shared understanding emerged coincident with the issuance of the EEOC's regulations in 1998. See, e.g., David Rothfeld, "ADEA, Other Waivers

Not Always Enforceable," (Sept. 1998) ("the employer must provide . . . the job titles and ages of all employees in the decisional unit eligible for the program, and the ages of employees in the decisional unit not eligible for the program");[3] Womble, Carlyle, Sandridge & Rice PLLC, "New Regulation on Waiver of ADEA Rights Issued," 8 N.C. Employment Law Letter 5 (Sept. 1998) ("Any member of the decisional unit who is asked to sign a waiver must be given the required information."); Duff, Whyte, & Boykin, LLC, "EEOC Issues Regulations on Releases/Waivers of Age Discrimination Claims" (Sept. 1998) ("the required information must be given to each person in the 'decisional unit' who is asked to sign a waiver agreement");[4] Pepper Hamilton LLP, "Labor and Employment Update: EEOC Issues Final Regulations on Waivers of Age Discrimination Claims" (1998) ("[information] should be presented in a format that permits comparisons between eligible and ineligible employees within the same decisional unit").[5]

Since the regulations were issued in 1998, practitioners have continued to express the universally-shared understanding that the selected and non-selected employees to be included on the disclosure list are determined by the "decisional unit." See, e.g., Jeffrey S. Klein, et al., "Employer Planning for a Reduction-in-Force," 713 Practising Law Institute 61 (Oct.-Nov. 2004) ("To comply with this requirement, the list provided by employers (containing the job titles and ages of

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[3] Available online at http://www.kanekessler.com/recent_pr/KK_RecDev_PDF-06.pdf.

[4] Available online at http://library.findlaw.com/1998/Sep/1/126192.html.

[5] Available online at http://library.findlaw.com/1998/Sep/1/126534.html.

individuals eligible for the program) must be composed of individuals from the proper 'decisional unit.'"); see id. at n.27 ("While the OWBPA refers variously to 'groups,' 'classes,' 'units,' 'job classification,' and 'organizational units' to describe the categories of employees about which disclosures must be made, the regulations implementing the OWBPA adopted the concept of 'decisional unit' to cover them all.") (citing 29 C.F.R. §§1625.22(f)(1)(iii)(C), (f)(3)); Jonathan A. Segal, "Ensuring Legal Peace," HR Magazine (Jan. 2004) ("In the event of a group termination, the employer . . . must provide the employees with . . . information about the ages . . . and job titles of the employees in the 'decisional unit' who were let go and were not let go."); Personnel Policy Service, Inc., "EEOC Clarifies Age Waiver Requirements" (2004) ("The regulations indicate that information on the program must be given to each person in the 'decisional unit' who is asked to sign a waiver agreement.");[6] David J. McAllister & David Harvey, "Don't Forget About OWBPA," 5 Lawyers J. 6 (May 2003) ("Regardless of how the decisional unit is defined, the information to be provided in a compliant OWBPA disclosure includes a listing of all the job titles and ages of all individuals in the decisional unit who are eligible or selected for the program and the job titles and ages of all individuals in the decisional unit who are not eligible and were not selected for the program."); Jonathan B. Orleans, "Requirements For The Knowing And Voluntary Waiver/Release Of Claims Under The Age Discrimination In Employment Act" (2002) ("state the job titles and ages of all employees in the decisional unit selected

[6] Available online at http://www.instanthrpolicies.com/articles/age_waiver.htm.

and not selected for the program");[7] Ellen M. Martin, et al., "Severance Agreements: A to Z," 661 Practising Law Institute 277, 305 (Sept. 2001) ("OWBPA requires that employers provide the 'job titles' and 'ages' of all employees in the decisional unit who are and are not ultimately selected or eligible for the exit incentive or termination program"); Meckler Bulger & Tilson LLP, "Releases Of ADEA Claims And The New Regulations Under The Older Workers Benefit Protection Act" (2001) ("Information regarding ages should be broken down according to the age of each person within the decisional unit eligible or selected for the program and each person within the decisional unit not eligible or selected for the program");[8] Thomas J. Flygare, "Early Retirement Incentive Plans For Faculty: ADEA Issues" (June 2000) ("the employer must provide the . . . information to each person in the 'decisional unit' who is asked to sign a waiver agreement");[9] Michael J. Ossip & Judith E. Harris, "The Effective and Lawful Use of Releases and Waivers: Post-Oubre Implications," ABA 1999 Annual Meeting (Aug. 1999) at pp. 8-9 (employer must provide "written information about the 'decisional unit,'" including selected and non-selected individuals).[10]

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[7] Available online at http://www.znclaw.com/6%20Library%20Pages/6el1.html.

[8] Available online at http://www.mbtlaw.com/pubs/articles/owbpalam.html.

[9] Available online at http://www.nacua.org/outline/docs/xi_faculty/xi-00-06-7.doc.

[10] Available online at http://www.bna.com/bnabooks/ababna/annual/99/owbpa.pdf.

This approach of using the same population of employees for both components of the §626(f)(1)(H)(ii) analysis makes sense in light of the way layoffs are determined and the plaintiffs' ultimate burden of proof. The essence of statistical evidence is comparison. The absolute number of employees laid off who are 40 or older is irrelevant unless it can be compared to the number of older employees in a similar population. See, e.g., Carter v. Ball, 33 F.3d 450, 456-57 (4th Cir. 1994) (absence of any African-American employees does not establish a prima facie case; that datum must be compared with the number of African-Americans in the relevant labor pool); Hawkins v. Ceco Corp., 883 F.2d 977, 985 (11th Cir. 1989) (same), cert. denied, 495 U.S. 935 (1990).

According to the Court's opinion, McDonald's did not determine which employees would be laid off from some central, national office; rather, as is common, it performed assessments of individual employees through regional and divisional managers. Mem. at 3. In the plaintiffs' region the decisionmaker was William Lamar, assisted by his staff of senior managers. Mem. at 3-4. To the extent the plaintiffs allege disparate treatment, it only makes sense to compare Lamar's selections of employees to be laid off against those whom Lamar did not select: that is the only relevant statistic in assessing whether a disparate treatment claim might lie against McDonald's. The selections made by a decisionmaker in Missoula, or Boston, or Sacramento have no bearing on whether or not Lamar harbored a discriminatory animus when he selected the plaintiffs for layoff and chose not to select other employees. See, e.g., Radue v. Kimberly-Clark Co., 219 F.3d 612, 616 (7th Cir. 2000) (statistics concerning ages of employees laid off in another division irrelevant to plaintiff's case). The Court's interpretation thus requires employers to give employees information that they cannot use to assess

the merits of a disparate treatment claim, hiding the relevant data amid a welter of irrelevant national information.[11]

Indeed, the Court acknowledges as much in its opinion, see Mem. at 16 n.6, but suggests that nationwide data might be relevant to a disparate impact claim, now cognizable under the ADEA after Smith v. City Of Jackson, Miss., 125 S. Ct. 1536, 1540 (2005). But the Court's information requirement is no more useful to plaintiffs evaluating a disparate impact claim. Requiring nationwide coverage for those selected for an exit program, and regional information for those not selected, would not reveal a disparate impact for either the national or the regional population. Even if, hypothetically, a high percentage of the selectees nationally were 40 or older, that would not, standing alone, indicate disparate impact; such a determination could only be made by comparing the national selectees to the national group of employees who were not selected. The same is true at the regional level. No matter what percentage of selectees are 40 or older, the figure is meaningless as an indicator of disparate impact unless there is an apples-to-apples comparison of selectees and non-selectees in the same population.[12]

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[11] Because the statute does not require that the employer provide any geographical information, employees who receive the information in the form directed by the Court will not be able to identify the regional employees selected by the local decisionmaker.

[12] That problem might theoretically be solved by requiring nationwide data on both selectees and non-selectees, but the Court does not so hold, and correctly so: requiring nationwide data in all respects would be unsupportable under any reading of the OWBPA and would entirely discard any notion of a "decisional unit." As discussed above, such an approach also would make a disparate *treatment* claim impossible to assess, since the intent of the regional decisionmaker – the crucial issue in such a case – would not be discernable from the national data.

Indeed, courts considering disparate impact claims regularly reject proffered statistical evidence that does not compare similar populations. For example, in Smith v. Xerox Corp., 196 F.3d 358, 368-69 (2d Cir. 1999), a disparate-impact age discrimination case challenging a layoff, the court rejected plaintiffs' statistical evidence because it analyzed disparate impact by work group rather than by considering the population of layoffs as a whole.

More generally, if the facially neutral practice said to have the disparate impact is a practice implemented at the regional level, then only regional data would be relevant; if the challenged practice was implemented nationwide, then nationwide data would be relevant. Under no circumstances would it be relevant to compare selectees across the country with non-selectees in a single geographic region.

Whatever else might be said about the drafting of the statutory requirements and their regulatory interpretation, it is unlikely that Congress or the EEOC intended to direct the disclosure of information that would not yield a relevant statistical comparison. The Court's ruling accordingly directs a sea change in the way employers provide OWBPA data to laid off employees. That significant change merits immediate appellate review.

CONCLUSION

For all of the foregoing reasons, the U.S. Chamber of Commerce respectfully urges the Court to grant McDonald's motion to amend the Court's summary judgment order to certify the matter for interlocutory appeal pursuant to 28 U.S.C. §1292(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all counsel of record, either through the electronic filing process or by first-class mail, postage prepaid, this 14th day of June, 2005.

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Mark W. Batten