No. _________

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CAROLYN BURLISON, JAMES EADY, JERRY FLOYD, ROBERT GUNTER, and STEPHEN REINSCH,

Plaintiffs-Appellees,

v.

McDONALD'S CORPORATION,

Defendant-Appellant.

On Interlocutory Appeal From an Order of the United States District Court for the Northern District of Georgia

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BRIEF OF AMICUS U.S. CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT'S REQUEST FOR PERMISSION TO TAKE INTERLOCUTORY APPEAL

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CORPORATE DISCLOSURE STATEMENT

1. The Chamber of Commerce of the United States has no parent corporation and no subsidiary corporations.

2. The Chamber of Commerce of the United States is a non-stock, non-profit corporation exempt from taxation under Internal Revenue Code §501(c)(6). As such, no publicly held company owns 10% or more stock in the Chamber.

CERTIFICATE OF INTERESTED PERSONS

In addition to the interested persons listed in McDonald's Certificate, the Chamber identifies the following persons:

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS and CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

STATEMENT OF THE ISSUES 1

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. The District Court's Decision Has Significant Consequences For Employers And Employees Nationwide. 3

B. The District Court's Decision Directs A Significant Departure In The Preparation Of OWBPA Releases. 5

CONCLUSION 12

6880/99999-502 BNLIB1/131691v2

TABLE OF CITATIONS

CASES

Carter v. Ball, 33 F.3d 450 (4th Cir. 1994) 10

Earley v. Champion Int'l Corp, 907 F.2d 1077 (11th Cir. 1990) 6

Hawkins v. Ceco Corp., 883 F.2d 977 (11th Cir. 1989), cert. denied, 495 U.S. 935 (1990) 10

Massachusetts v. Bull HN Info. Systems, 143 F. Supp. 2d 134 (D. Mass. 2001) .. 6

Radue v. Kimberly-Clark Co., 219 F.3d 612 (7th Cir. 2000) 10

Smith v. City Of Jackson, Miss., 125 S. Ct. 1536, 1540 (2005) 11

Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999) 12

STATUTES

29 U.S.C. §626 .... 4, 5

29 U.S.C. §630 4

OTHER CITATIONS

29 C.F.R. §1625.22 8

63 Fed. Reg. 30627 (1998) 3

Duff, Whyte, & Boykin, LLC, "EEOC Issues Regulations on Releases/Waivers of Age Discrimination Claims" (Sept. 1998) 7

Flygare, "Early Retirement Incentive Plans For Faculty: ADEA Issues" (June 2000) 9

Klein, et al., "Employer Planning for a Reduction-in-Force," 713 Practising Law Institute 61 (Oct.-Nov. 2004) 7

Martin, et al., "Severance Agreements: A to Z," 661 Practising Law Institute 277, 305 (Sept. 2001) 8

McAllister & Harvey, "Don't Forget About OWBPA," 5 Lawyers J. 6 (May 2003) 8

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Personnel Policy Service, Inc., "EEOC Clarifies Age Waiver Requirements" (2004) 8

Press Release, Bureau of Labor Statistics, Mass Layoffs In December 2004 And Annual Averages For 2004 (January 26, 2005) 3

Press Release, Bureau of Labor Statistics, Mass Layoffs In March 2005 (April 26, 2005) 3

Rothfeld, "ADEA, Other Waivers Not Always Enforceable," (Sept. 1998) 6

Segal, "Ensuring Legal Peace," HR Magazine (Jan. 2004) 8

Womble, Carlyle, Sandridge & Rice PLLC, "New Regulation on Waiver of ADEA Rights Issued," 8 N.C. Employment Law Letter 5 (Sept. 1998) 7

6880/99999-502 BNLIB1/131691v2

STATEMENT OF THE ISSUES

Whether McDonald's Corporation should be permitted to take an interlocutory appeal from a purely legal ruling of the district court interpreting the Older Workers Benefit Protection Act of 1990, where the district court's ruling directs a reversal of widespread longstanding practice in this area and also threatens the validity of thousands of release agreements entered into between employers and employees across the nation?

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, and the leading representative of large and small businesses nationwide. 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.

Because of the size and breadth of its membership, the Chamber has a substantial interest in the outcome of this matter, regardless of what that outcome may be. For although the Chamber supports McDonald's position on the merits of the legal questions presented, the Chamber has an independent interest in the Court accepting this proposed interlocutory appeal because of the turmoil that the district court's decision is likely to create. That decision orders a reversal of commonly accepted practice in obtaining releases of claims under the Age Discrimination in Employment Act. In doing so the ruling both threatens the validity of release agreements already signed and creates substantial uncertainty for employers about

the procedures they are required to follow to obtain valid releases of claims in future layoffs. The district court's ruling touches on a matter of significant concern to businesses large and small across the nation and should be reviewed not only because, respectfully, it is erroneous as a matter of law, but because whether correctly decided or not it introduces significant uncertainty for employers. The Chamber seeks leave to submit this brief to provide a broader perspective on the impact of the district court's decision than perhaps will be apparent from the briefs of the parties to the case.

SUMMARY OF ARGUMENT

This Court should grant interlocutory review of the district court's decision for two principal reasons. First, regardless of whether or not the district court decision correctly interprets the informational requirements of the Older Workers Benefit Protection Act ("OWBPA"), it should be promptly reviewed because it addresses a legal issue that faces thousands of employers across the country every year (pp. 3-4). The lack of controlling case law in any Circuit on the subject heightens the significance of the district court's decision and creates substantial uncertainty for affected employers, who now risk an invalid waiver of claims regardless of how they apply OWBPA requirements (pp. 4-5).

Second, the Court should grant review because the district court's decision upsets a uniform understanding of the statute that has been widely, even universally, held among courts and employment counsel at least since 1998, when the EEOC adopted regulations governing OWBPA (pp. 5-9). The decision actually deprives employees of relevant statistical information needed to evaluate the merits of a potential age discrimination claim, and thus serves the interests of

neither employers nor employees and undermines the very purpose of the statute (pp. 9-12).

ARGUMENT

A. The District 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 for a variety of reasons, the Court should permit an interlocutory appeal regardless of whether the ruling itself is correct or not.

First, the district 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.[1] Those layoffs affected more than 1.6 million employees in 2004, and 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

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

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 district court recognized 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 district court's decision, right or wrong, ought to be reviewed by this Court on an interlocutory basis.

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 district 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 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 the summary judgment ruling below was issued and the time that this Court may receive the 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 district 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 this Court 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 District 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 district court's interpretation of the statute and regulations. But the Chamber also supports McDonald's petition because the decision below 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");[2]

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[2] Available online at http://www.kanekessler.com/recent_pr/

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");[3] 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").[4]

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 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

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KK_RecDev_PDF-06.pdf.

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

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

6880/99999-502 BNLIB1/131691v2

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.");[5] 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 and not selected for the program");[6] 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

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

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

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");[7] 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");[8] 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).[9]

* * *

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

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

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

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

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 district 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 district 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.[10]

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[10] Because the statute does not require that the employer provide any geographical information, employees who receive the information in the form

Indeed, the court below 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 district 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.[11]

Indeed, courts considering disparate impact claims regularly reject proffered statistical evidence that does not compare similar populations. For example, in

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directed by the Court will not be able to identify the regional employees selected by the local decisionmaker.

[11] That problem might theoretically be solved by requiring nationwide data on both selectees and non-selectees, but the district 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.

6880/99999-502 BNLIB1/131691v2

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 district 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 permit an 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 ___ day of June, 2005.

____
Mark W. Batten