No. 08-1806

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANIEL DOBROWSKI,

Plaintiff-Appellant,

v.

JAY DEE CONTRACTORS, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan, Southern Division

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT/APPELLEE AND IN SUPPORT OF AFFIRMANCE

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

Rae T. Vann
Counsel of Record
NORRIS TYSSE LAMPLEY
& LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600
rvann@ntll.com

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

December 3, 2008

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 08-1806 Case Name: *Dobrowski v. Jay Dee Contractors, Inc.*

Name of counsel: Rae T. Vann

Pursuant to 6th Cir. R. 26.1, Equal Employment Advisory Council and Chamber of Commerce of the United States of America make the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

CERTIFICATE OF SERVICE

I certify that on December 3, 2008 the foregoing document was electronically filed with the Clerk of the Court using the ECF system which will send notification to all parties in the appeal.

/s/ Rae T. Vann
Rae T. Vann
Counsel of Record
NORRIS, TYSSE, LAMPLEY
& LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
Telephone: (202) 629-5600
Facsimile: (202) 629-5601
E-mail: rvann@ntll.com
Attorney for *Amici Curiae*

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LEGISLATIVE HISTORY

The Equal Employment Advisory Council (EEAC) and Chamber of Commerce of the United States of America (the Chamber) respectfully submit this brief as *amici curiae* contingent upon the granting of the accompanying motion for leave to file. The brief urges this Court to affirm the decision below, and thus supports the position of Defendant-Appellee Jay Dee Contractors, Inc.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every

industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, as well as other labor and employment statutes and regulations. As employers, and as potential defendants in FMLA actions, EEAC and the Chambers' members have a direct and ongoing interest in the issue presented in this appeal regarding the circumstances under which an employee will be entitled to the benefits and protections of that Act.

Because of their interest in the application of the nation's fair employment laws, EEAC and/or the Chamber has filed numerous briefs as *amicus curiae* in cases before the Supreme Court, the United States Courts of Appeals, and various state supreme courts. As part of this activity, *amici* have filed briefs in cases before this Court involving the FMLA and other employment laws.[1] Thus, EEAC and the Chamber have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

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[1] *See Hoffman v. Professional Med. Team*, 394 F.3d 414 (6th Cir. 2005); *Cavin v. Honda Mfg., Inc.*, 346 F.3d 713 (6th Cir. 2003); *Thompson v. North American Stainless*, 520 F.3d 644, *vacated and reh'g en banc granted*, 2008 U.S. App. LEXIS 16075 (6th Cir. July 28, 2008); *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006); *Isabel v. City of Memphis*, 404 F.3d 404 (6th Cir. 2005).

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of their experience in these matters, EEAC and the Chamber are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

This is an action brought under the federal Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq*., by Plaintiff-Appellant Daniel Dobrowski against his former employer, Defendant-Appellee Jay Dee Contractors, Inc., challenging the termination of his employment at the conclusion of a medical leave of absence. Among the questions presented in this appeal are (1) whether the district court properly dismissed Dobrowski's claim based on the fact that he worked at a worksite with less than 50 employees within a 75-mile radius and thus was not eligible for FMLA leave, and (2) even assuming he was deemed eligible for FMLA leave as a result of an administrative error made by his former employer, whether the district court was correct in concluding that Dobrowski was not entitled to reinstatement because his position was eliminated for reasons unrelated to his leave.

Jay Dee Contractors, Inc. (Jay Dee) is a civil engineering construction company. *Dobrowski v. Jay Dee Contractors, Inc.*, 2008 U.S. Dist. LEXIS 43701, at *1-2 (E.D. Mich. June 8, 2008). In August 2003, the company hired Dobrowski as a mechanical engineer for a construction project at the Detroit Wastewater Treatment Plant (DWTP). *Id.* at *2. Although the job posting sought an individual with a civil engineering background, it was determined that Dobrowski's mechanical engineering background would be helpful in fulfilling the DWTP project requirements. *Id.* At that time, Jay Dee only employed 37 employees within a 75-mile radius of the DWTP. *Id.* at *8.

Dobrowski suffers from a partial seizure disorder. *Id.* at *3. In September 2004, he requested leave in order to undergo a surgical procedure for his seizure disorder condition. *Id.* at *4. Erroneously believing that the FMLA applied, Jay Dee granted the leave request, informing him in writing that "pursuant to the Family and Medical Leave Act, Jay Dee Contractors, Inc. will leave your position open for at least twelve (12) weeks from October 18, 2004." *Id.* During this same period, work on the DWTP project was coming to an end, and when Dobrowski returned from leave on December 13, 2004, he was laid off due to lack of work. *Id.* at *5.

On August 7, 2006, Dobrowski filed suit in state court claiming disability discrimination in violation of Michigan state law. Brief of Plaintiff-Appellant at 3.

He later amended his complaint to add an allegation that Jay Dee failed to restore him to the same or equivalent position upon his return from medical leave in violation of the FMLA, and Jay Dee subsequently removed the action to federal court. *Id.* at 4.

Jay Dee moved for summary judgment, arguing that because it did not employ at least 50 employees within a 75-mile radius of the DWTP, it is not a covered employer and Dobrowski is not an "eligible employee" entitled to leave under the FMLA. *Dobrowski*, 2008 U.S. Dist. LEXIS 43701, at *7. It argued that the mistaken designation of Dobrowski's leave as FMLA-qualifying is irrelevant, because eligibility for FMLA leave cannot be waived, even on estoppel grounds. *Id.*

Furthermore, Jay Dee claimed, even if Dobrowski was "deemed" eligible for FMLA leave, he had no right to job restoration, because his position was eliminated for legitimate business reasons unrelated to the leave, namely the completion of the DWTP project and lack of continued work. *Id.* The district court agreed, and granted summary judgment in favor of Jay Dee. This appeal ensued.

SUMMARY OF ARGUMENT

The FMLA was enacted, in part, "to balance the demands of the workplace with the needs of families … in a manner that accommodates the legitimate

interests of employers ….” 29 U.S.C. § 2601(b). It permits the “eligible employee” of a covered employer to take a maximum of 12 weeks of unpaid leave of absence in a 12-month period for, among other things, the employee’s own serious health condition. 29 U.S.C. § 2612(a)(1).

An “eligible employee” is defined in the Act as an employee who has been employed “for at least 12 months by the employer with respect to whom leave is requested … and for at least 1,250 hours of service with such employer during the previous 12-month period.” 29 U.S.C. § 2611(2)(A). Excluded from this definition is “any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.” 29 U.S.C. § 2611(2)(B)(ii).

The definition of “eligible employee” under the FMLA therefore plainly and unambiguously excludes employees who are assigned to worksites with fewer than 50 workers within a 75-mile radius. Since Jay Dee employed only 37 employees within a 75-mile radius, Plaintiff-Appellant was not an “eligible employee” entitled to the protections of the Act. Accordingly, the district court properly dismissed the action in its entirety.

The FMLA protects only employees who meet the statutory minimum eligibility requirements. Contrary to Plaintiff-Appellant’s contentions, eligibility

cannot be created artificially on the theory that Jay Dee's incorrect designation of his leave as FMLA leave somehow now "estops" the company from questioning his eligibility. To the extent that the current FMLA administrative regulations purport to confer eligibility by estoppel upon otherwise ineligible employees through one of the so-called "deeming" provisions, one of more of those provisions have been invalidated by the U.S. Supreme Court and several the federal courts of appeals, including this Court. Even the Secretary of Labor herself has acknowledged in newly revised FMLA regulations that the "deeming" provisions exceed the Department's authority under the Act and thus are unenforceable.

Nevertheless, even assuming Plaintiff-Appellant legitimately can be deemed eligible for FMLA leave, he did not have an unqualified right to job restoration in any event. Indeed, the statute and its implementing regulations – as well as decisions by this Court and others – make clear that reinstatement at the conclusion of FMLA leave may be denied for legitimate, non-leave related reasons. Because Plaintiff-Appellant failed to refute compelling evidence demonstrating that the elimination of his position was justified by legitimate business considerations unrelated to his purported exercise of FMLA rights, the district court correctly concluded that he was not entitled to job restoration at the conclusion of his medical leave.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT PLAINTIFF-APPELLANT WAS NOT ENTITLED TO JOB-PROTECTED LEAVE OF ABSENCE UNDER THE FAMILY AND MEDICAL LEAVE ACT

A. The Definition Of "Eligible Employee" Under The FMLA Unambiguously Excludes Individuals At Worksites Employing Fewer Than 50 Employees In A 75-Mile Radius

Plaintiff-Appellant did not work at a worksite that employed 50 or more employees in a 75-mile radius and thus was not an "eligible employee" entitled to the benefits and protections of the Family and Medical Leave Act (FMLA), as amended, 29 U.S.C. §§ 2601 *et seq.*

The FMLA was enacted, in part, "to balance the demands of the workplace with the needs of families … in a manner that accommodates the legitimate interests of employers …." 29 U.S.C. § 2601(b). It permits "eligible" employees of covered employers to take a maximum of 12 weeks of unpaid leave of absence in a 12-month period for the birth or adoption of a child, in order to care for the serious health condition of a spouse, child or parent, or due to the employee's own serious health condition. 29 U.S.C. § 2612(a)(1).

The FMLA defines "eligible employee" as one who has been employed "for at least 12 months by the employer with respect to whom leave is requested … and for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). "Like any key term in an important piece

of legislation, the 12-week figure was the result of compromise between groups with marked but divergent interests in the contested provision. Employers wanted fewer weeks; employees wanted more. . . . Congress resolved the conflict by choosing a middle ground, a period considered long enough to serve 'the needs of families' but not so long that it would upset 'the legitimate interests of employers.'" *Ragsdale v. World Wide Wolverine, Inc*., 535 U.S. 81, 93-94 (2002) (citations omitted).

Excluded from the FMLA's definition of "eligible employee" is "any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." 29 U.S.C. § 2611(2)(B). Early legislative versions of what came to be the FMLA did not include this so-called "small operations" exemption. That provision, as well as others, was incorporated into later versions of the bill as a compromise designed to accommodate specific employer concerns about their ability "to accommodate a leave standard and the cost of providing such leave." H.R. Rep. No. 101-28(I) (1989). "Most of the changes made in the bill as it has evolved in the past three Congresses respond to the problems that were raised by employers." *Id.*

In imposing a "geographic limitation of a 75-mile radius that applies to the aggregation of employees at different facilities," Congress sought both to

acknowledge and to minimize "the difficulties that an employer might have in reassigning workers to geographically separate facilities." H.R. Rep. No. 102-135, pt. 1, at 37 (1991). Thus, as the Labor Department explained in its 1993 interim FMLA regulations, "the purpose of the 75-mile radius limit is to afford employers the opportunity to utilize employees from proximate worksites when an employee goes on leave." 58 Fed. Reg. 31,794, 31,798 (June 4, 1993).

The bill in its final form contained a number of additional employer accommodations, including the "small employer" exemption, which excludes from coverage employers who employ fewer than 50 employees "for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A). As the U.S. House of Representatives Education and Labor Committee noted in its explanation of the bill:

> The exemption of employers with less than fifty employees means that 95% of all employers are excluded from the coverage of the bill and about 50% of all employees are covered. While concerned about the low coverage figures, the Committee, in recognition of the particular problems faced by small employers, approved this provision which exempts the small employer while providing coverage for workers employed by medium and large sized companies.

H.R. Rep. No. 102-135, pt. 1, at 37 (1991). Just as it had done with respect to the small operations exemption, Congress intentionally carved out as part of the text of the law a provision that would exclude small businesses from coverage so as to avoid imposing impracticable and unduly onerous leave obligations on employers

whose day-to-day operations rely on fewer than 50 employees. *See Pate v. Baker Tanks Gulf South, Inc.*, 34 F. Supp.2d 411, 418 (W.D. La. 1999) ("Indeed, the undue hardship on small companies imposed by extended absences is exemplified in the Family and Medical Leave Act") (citation omitted).

Losing an employee for 12 weeks is likely to work a significant hardship on any small operation, whether it is part of a large, multi-establishment corporation or a small, family-run grocery store. Where a large retail company maintains a small, remote storage facility at which only 10 employees work and one manager is assigned within a 75-mile radius, for instance, a request by the manager to take 12 weeks of FMLA leave could leave the employer without a viable option for covering the manager's duties at the site.

The employer in that case is left with either reassigning another supervisor from a distant location – which necessarily would require the company to provide temporary housing and/or transportation – or otherwise attempting to absorb the loss among its remaining 10 nonmanagement employees. Either alternative is likely to work a substantial burden on a facility's business operations. In response to that problem and others like it, Congress created both the "small operations" and a "small employer" exemption as a carve-out for those types of enterprises likely to be most impacted by the temporary loss of an employee to FMLA leave.

As the FMLA's plain text and legislative history makes clear, an employee who works for a worksite that employs less than 50 workers within a 75-mile radius simply is not eligible for the 12-week, job-protected FMLA leave entitlement. Because it is undisputed that Jay Dee did not employ 50 or more employees within a 75-mile radius of the DWTP worksite during the time he worked there, Dobrowski was not an eligible employee, and the district court properly dismissed his FMLA claim on that basis.

B. Since The FMLA Provides Coverage Only To Employees Who Meet The Minimum Eligibility Requirements, Eligibility Cannot Be Created By Estoppel

As one claiming interference with FMLA rights, Dobrowski bore the burden of demonstrating, by a preponderance of the evidence, both that he is an "eligible employee" under the Act and that he is entitled to the benefit sought, to wit, job restoration. *Edgar v. JAC Prods., Inc.*, 443 F.3d 501, 511 (6th Cir. 2006). "This inquiry is an objective one divorced from the employer's motives, with the central question being simply whether the employee was entitled to the FMLA benefits at issue." *Id.*; *see also Kohls v. Beverly Enters. Wis., Inc.*, 259 F.3d 799 (7th Cir. 2001).

Rather than disputing whether or not he satisfies the technical eligibility threshold established in the Act, Dobrowski instead rests his entire case on the proposition that he should be "deemed" eligible on estoppel grounds based on Jay

Dee's having erroneously classified his leave as FMLA-qualifying. Contrary to Dobrowski's argument, however, the FMLA does not permit an ineligible employee to become eligible for FMLA leave by virtue of an employer's technical notice violation. Indeed, not even the Secretary of Labor's own interpretation of the Act suggests such a possibility.

One of the Secretary of Labor's current FMLA regulations that attempts to create eligibility by estoppel in a somewhat different context already has been held by several courts of appeals, including this Court, to be invalid as a matter of law. Section 825.110(d) provides that once an employer has received notice from the employee of his or her request for FMLA leave, the employer must "either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met." 29 C.F.R. § 825.110(d). According to the regulation, if an employer fails to inform the employee of his or her eligibility prior to the commencement of the leave, "the employee will be deemed eligible." *Id.* Thus, Section 825.110(d) of the current regulations purports to allow an employee who may not otherwise be eligible for FMLA leave to be "deemed eligible" simply by virtue of the employer's failure to inform the employee of his or her eligibility under the Act prior to commencement of the leave. "Under a literal application of the regulation, an employee could work for one day, then inform her employer she

is sick and is leaving. If the employer fails to tell the employee she is ineligible for FMLA leave, the regulation … ostensibly would 'deem her eligible' …." *Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133, 1137 (E.D. Va. 1997).

On the issue of eligibility for FMLA leave, "Congress has directly spoken to the precise question," and the Secretary of Labor, therefore, "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (footnote omitted). Current Section 825.110(d), which purports to expand the definition of "eligible employee" beyond that which was contemplated by Congress when it enacted the FMLA, represents an impermissible extension of the statute and has been invalidated by several courts of appeals, including this Court. *Davis v. Mich. Bell. Tel. Co*., 543 F.3d 345, 354 (6th Cir. 2008) (citing *Knapp v. America West Airlines*, 207 Fed. Appx. 896, 900 (10th Cir. 2006)); *Woodford v. Community Action of Greene County, Inc.*, 268 F.3d 51, 55-56 (2d Cir. 2001); *Evanoff v. Minneapolis Pub. Schs.*, 11 Fed. Appx. 670, 671 (8th Cir. 2001) (unpublished); *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 796-97 (11th Cir. 2000); *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582 (7th Cir. 2000).

Other provisions of the current FMLA regulations have been struck down by the courts on similar grounds. Notably, in *Ragsdale v. Wolverine World Wide*, Inc., 535 U.S. 81, 84 (2002), the U.S. Supreme Court invalidated a regulation

providing that an employer may not count leave taken against an employee's 12-week FMLA entitlement until individual notice has been provided to the employee, concluding, "the regulation is contrary to the Act and beyond the Secretary of Labor's authority."

The Secretary of Labor recently acknowledged as much in revised FMLA regulations, which were published in the *Federal Register* on November 17, 2008 and will become effective on January 16, 2009. In the Preamble to the final rule, the Secretary noted, "[I]n light of the Supreme Court's decision in *Ragsdale*, the Department believes that it does not have regulatory authority to deem employees eligible for FMLA leave who do not meet the 12-month/1,250-hour requirements, even where the employer fails to provide the required eligibility notices to employees or provides incorrect information." 73 Fed. Reg. 67,933, 67,942 (Nov. 17, 2008).

Accordingly, while various sections of the existing FMLA regulations attempt to create "eligibility by estoppel" by virtue of an employer's failure to provide a certain type of notice, the U.S. Supreme Court, several federal courts of appeals, and most recently the Secretary of Labor herself all have recognized that such an invention is impermissible under the Act. So too should this Court reject, as did the district court, Dobrowski's attempt to manufacture the FMLA eligibility *he* lacked.

II. THE RIGHT TO JOB RESTORATION UNDER THE FMLA IS NOT ABSOLUTE AND MAY BE DENIED FOR LEGITIMATE, NON-LEAVE RELATED REASONS

Even assuming that Dobrowski was an eligible employee entitled to job-protected FMLA leave, his claim still must fail, as he cannot show that Jay Dee was under any legal obligation to return him to work at the conclusion of his leave. Accordingly, the district court properly dismissed his case.

Upon the expiration of an FMLA-qualifying leave of absence, an eligible employee who returns to work ordinarily is entitled to be restored to the position he or she held prior to the commencement of the leave or to an equivalent position. 29 U.S.C. § 2614(a)(1). This right is not unqualified, however, and is expressly limited by the Act itself. Specifically, section 104(a)(3)(B) of the Act provides, "[n]othing in this section shall be construed to entitle any restored employee to any right, benefit, or position of employment *other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave*." 29 U.S.C. § 2614(a)(3)(B) (emphasis added); *see also* 29 C.F.R. § 825.216(a).

As this Court has observed, "[a]n employee returning from FMLA leave is not entitled to restoration unless he would have continued to be employed if he had not taken FMLA leave. For instance, an employer need not restore an employee who would have lost his job or been laid off even if he had not taken FMLA

leave." *Hoge v. Honda Mfg., Inc.*, 384 F.3d 238, 245 (6th Cir. 2004); *see also O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1354 (11th Cir. 2000); *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1157 (7th Cir. 1997). Thus, an employee seeking to return to work from an FMLA-qualifying leave of absence will be limited in doing so to the extent that reinstatement represents a benefit to which the employee would not have been otherwise entitled. *Hoge*, 384 F.3d at 245.

In this case, the district court correctly held that Dobrowski was not entitled to job restoration, because his position was eliminated for legitimate business reasons unrelated to his leave of absence. Given the uncontroverted evidence before it, the district court properly dismissed Dobrowski's claim. In doing so, it provided welcome reassurance to employers faced with similar situations that their legitimate, non-FMLA related business decisions will not be used successfully by plaintiffs as a means of obtaining benefits to which they are not entitled.

CONCLUSION

For all of the foregoing reasons, as well as for those reasons set forth by the court below, dismissal of Dobrowski's action should be affirmed.

Respectfully submitted,

/s/ Rae T. Vann

Rae T. Vann
Counsel of Record
NORRIS TYSSE LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
Telephone: (202) 629-5600
Facsimile: (202) 629-5601
E-mail: rvann@ntll.com

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the United States of America

December 3, 2008

CERTIFICATE OF COMPLIANCE

I, Rae T. Vann, hereby certify that this Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce of the United States of America in Support of Defendant-Appellee and in Support of Affirmance complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i). This brief is written in Times New Roman fourteen-point typeface using MS Word 2003 word processing software and contains 3,985 words.

/s/ Rae T. Vann
Rae T. Vann
Counsel of Record
NORRIS, TYSSE, LAMPLEY
& LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
Telephone: (202) 629-5600
Facsimile: (202) 629-5601
E-mail: rvann@ntll.com
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December 2008, I electronically filed the Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce of the United States of America in Support of Defendant-Appellee and in Support of Affirmance with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Joseph F. Lucas (P29695)
Skupin & Lucas, P.C.
patorth@skupinlucas.com

Megan P. Norris (P39318)
Brian M. Schwartz (P69018)
Miller, Canfield, Paddock & Stone, P.L.C.
norris@millercanfield.com
schwartzb@millercanfield.com

/s/ Rae T. Vann
Rae T. Vann
Counsel of Record
NORRIS, TYSSE, LAMPLEY
& LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
Telephone: (202) 629-5600
Facsimile: (202) 629-5601
E-mail: rvann@ntll.com
Attorney for *Amici Curiae*