

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SANDRA REGISTER; GRACE B. MERCHANT; SUSAN L. WILSON;
KRISTINA BECKMAN; JOHN J. DAGGETT; RICHARD RHOADES,
on behalf of themselves and all others similarly situated,

Appellants,

v.

PNC FINANCIAL SERVICES GROUP, INC., PNC BANK NA, PENSION
COMMITTEE OF PNC FINANCIAL SERVICES GROUP, INC. PENSION
PLAN, PNC FINANCIAL SERVICES GROUP INC. PENSION PLAN,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

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

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April 7, 2006

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**CORPORATE DISCLOSURE STATEMENT and
STATEMENT OF FINANCIAL INTEREST**

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, *Amici Curiae* the Equal
Employment Advisory Council and the Chamber of Commerce of the United
States of America make the following disclosures:

1) For non-governmental corporate parties please list all parent
corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: None.

4) The instant appeal is not a bankruptcy appeal.

April 7, 2006

/s/ Ann Elizabeth Reesman
Ann Elizabeth Reesman

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The Equal Employment Advisory Council (EEAC) and The Chamber of Commerce of the United States of America (the Chamber) respectfully submit this brief as *amici curiae* in support of Appellees PNC Financial Services Group, Inc., *et al.*, contingent on the granting of the accompanying motion for leave. The brief urges this Court to affirm the decision below.

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 320 major U.S. corporations. 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 and many of the Chamber's members are employers subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and other employment-related statutes and regulations. As employers, virtually all of EEAC's and many of the Chamber's members maintain pension plans designed to provide income continuation for employees after retirement. These plans have been adopted either at the employer's sole option or as a product of collective bargaining with employee representatives. Some of EEAC's and the Chamber's members offer plans of the "cash balance" design at issue in this case, while others may consider doing so in the future.

As potential defendants to ERISA lawsuits challenging conversions to cash balance plans, and as employers concerned about the continued viability of the nation's private pension system, EEAC's and the Chamber's member companies are extremely interested in the issues presented in this case. The district court below ruled correctly that the conversion by Defendant-Appellee PNC Financial Services, Inc. (PNC) of its traditional defined benefit pension plan to a plan of the cash balance design was lawful under ERISA. The district court's decision is firmly grounded in the law and strongly supported by public policy considerations.

Affirmance of the decision below is important to thousands of employers, many of whom do business in the Third Circuit, who have exercised, or may in the future exercise, the flexibility permissible under the law to convert to cash balance pension plans. Likewise, affirmance is important to the many employees in this country whose retirement security depends at least in part on the continued viability of an employer-sponsored pension plan.

Because of their interest in the application of the nation's employment laws, EEAC and the Chamber have filed briefs as *amici curiae* in cases before this Court, the Supreme Court of the United States, and other federal circuit courts of appeals. As part of this *amici* activity, EEAC and the Chamber have participated in several cases involving ERISA, and numerous cases involving allegations of age discrimination. In addition, both EEAC and the Chamber have briefed a number of other employment issues in this Court.

Thus, EEAC and the Chamber have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their significant experience in these matters, EEAC and the Chamber are uniquely situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case, particularly the practical effect that the decision will have on employers and beneficiaries of employer-sponsored pension plans.

STATEMENT OF THE CASE

Before 1999, PNC Financial Services Group, Inc. (PNC) provided a traditional “defined benefit” pension plan for its employees. *Register v. PNC Fin. Servs. Group, Inc.*, No. 04-6097, at 3 (E.D. Pa. Nov. 21, 2005). As of January 1, 1999, PNC switched to a “cash balance” pension plan. *Id.* The new plan took benefits that had accrued under the traditional plan and restated them as opening hypothetical cash balance accounts. *Id.* The plan credits each account annually with an earnings credit based on a percentage of pay. *Id.* at 4. The percentage ranges from 3%, for a newer and/or younger employee whose age plus total years of service equal less than 40, to 8%, for an older and/or long service employee whose age plus years of service equal 70 or more. *Id.* The plan also credits interest on a quarterly basis at the 30-year Treasury rate. *Id.* When each participant reaches normal retirement age, his or her account is converted actuarially into an annual annuity. *Id.*

Late in 2004, a group of current and former PNC employees and pension plan beneficiaries sued PNC, its pension plan, its pension plan committee, and a subsidiary, PNC Bank, claiming violations of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.* *Id.* at 1. First, they allege that because some participants will receive no additional benefit accruals for several years as their cash balance plan benefit catches up with their frozen prior

plan benefit, the plan violates the “anti-backloading” provision of ERISA § 204(b)(1)(B). *Id.* at 4-5. Second, they contend that an employee’s benefit accrual decreases on account of age in violation of ERISA § 204(b)(1)(H). *Id.* at 5. They further allege ERISA procedural and fiduciary duty violations. *Id.*

The district court granted PNC’s motion to dismiss the complaint on all counts for failure to state a claim. *Id.* at 1. First, the court rejected the claim that the new plan violates ERISA’s anti-backloading provision, holding that the provision in question specifically provides for plan amendments. *Id.* at 7. The court also ruled that the conversion did not violate the age discrimination prohibitions, concluding that the rate of benefit accrual must be determined by the change in the account balance, not the change in the employee’s annuity at normal retirement age as the plaintiffs argued. *Id.* at 15. The plaintiffs have appealed to this court.

SUMMARY OF ARGUMENT

The district court ruled correctly that PNC’s conversion of its defined benefit pension plan from the traditional “final average pay” variety to a “cash balance” format was lawful under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* In addition to sound legal reasoning, strong public policy considerations support affirmance of the district court’s decision, confirming that employers may continue to exercise needed flexibility to make such conversions.

Employers have converted their traditional “final average salary” defined benefit pension plans to the cash balance type for a variety of legitimate reasons. Whatever the reason, conversion to a cash balance plan is far superior, from the perspective of both older and younger employees, than other equally legitimate options such as terminating the plan entirely, freezing benefit accruals, or converting to a defined contribution plan. Affirmance of the decision below is critical to preserve employers’ flexibility to convert to cash balance pension plans.

ARGUMENT

I. THE DISTRICT COURT BELOW RULED CORRECTLY THAT CASH BALANCE PENSION PLANS ARE LAWFUL UNDER ERISA

Historically, employers provided defined benefit pension plans have formed the bulk of private sector retirement systems in the United States. Employee Benefits Research Institute, *Fundamentals of Employee Benefit Programs*, “*Defined Benefit and Defined Contribution Plans: Understanding the Differences*,” 1 (1997).¹ A “defined benefit” plan typically provides for a pension benefit in the form of an annuity for life. Steven J. Sacher, *et al.*, *Employee Benefits Law* 30 (American Bar Association 2d ed. 2000). The traditional, “final average salary” – type “defined benefit” plan provides an annuity that is calculated

¹ Available at <http://www.ebri.org/pdf/publications/books/fundamentals/fund05.pdf>.

using all or part of the individual's years of service and a final average pay calculation, generally a numerical average of the individual's last few years of employment. The employer contributions needed to fund the plan are ascertained using actuarial projections. *Id.*

In contrast, a "defined contribution" plan maintains a separate individual account for each participant, in which contributions and earnings accumulate. *Id.* at 29. The employer contributes a "defined" amount to the fund, but there are no guarantees as to the amount the participant will receive upon retirement. *Id.* at 175.

A "cash balance" plan contains some elements of each. In a "cash balance" plan, the benefit is defined as the actuarial equivalent of the life annuity that can be bought with the lump sum cash balance in a hypothetical individual account. It is considered a "defined benefit" plan because each participant's benefit is still stated in the form of an annual annuity upon retirement. It shares with defined contribution plans the feature of the individual account, albeit a hypothetical one. *Id.* at 29. Because cash balance plans exhibit characteristics of both defined benefit and defined contribution plans, they are often referred to as "hybrid" plans, although ERISA treats them as defined benefit plans. *Id.* at 30.

EEAC supports the sound legal analysis offered by PNC and its other supporting *amici* in this case demonstrating that PNC's conversion from a

traditional final average salary defined benefit plan to a cash balance plan is lawful under ERISA. We write separately to inform the Court of the substantial public policy reasons supporting affirmance of the district court's decision.

II. STRONG PUBLIC POLICY CONSIDERATIONS SUPPORT THE LAWFUL CONTINUATION OF EMPLOYER FLEXIBILITY TO CONVERT TO CASH BALANCE PENSION PLANS

A. Employers Have Converted To Cash Balance Pension Plans For Valid, Nondiscriminatory Reasons

According to the U.S. Government Accountability Office (GAO), “[i]n the late 1990’s, many private sector pension plan sponsors converted their traditional final average pay plans to [cash balance] plans.” U.S. Government Accountability Office, Report No. 06-42, *Private Pensions: Information on Cash Balance Pension Plans 2* (Oct. 2005) (hereinafter “GAO 06-42”). The GAO estimated that 19% of the Fortune 1000 had cash balance plans as of July 2000. U.S. General Accounting Office, Report No. GAO/HEHS-00-185, *Private Pensions: Implications of Conversions to Cash Balance Plans 42* (Sept. 2000) (hereinafter “GAO 00-185”). The GAO also reports that there were 843 hybrid plans with 100 or more participants as of 2001. GAO 06-42 at 4. Moreover, according to the Pension Benefit Guaranty Corporation (PBGC), the federal corporation that insures pension plans, 1,514 of the 30,611 single-employer plans it insured in 2004 were

“hybrid” plans, a total of 4.9%, up from 3.7% in 2001. Pension Benefit Guaranty Corp., *Pension Insurance Data Book 2004* 59 (2004) (Table S-34).²

Employers who have converted their traditional defined benefit pension plans to the “cash balance” type have done so for a variety of legitimate reasons. Based on interviews it conducted with a number of firms, the GAO reported that their decisions to convert were “based on a combination of factors.” GAO 00-185 at 12.

One such factor was “the desire to become more competitive within their specific industry” *Id.* Competitiveness in this context involves two fronts – competition for business and competition for talent.

Pension cost comparisons between U.S. companies and their foreign competitors reveal a stark contrast. In 2004, *Business Week* magazine reported that General Motors’ pension and health care expense for its retirees cost about \$1,784

² Available at <http://www.pbgc.gov/docs/2004databook.pdf>.

per vehicle, compared to Toyota's U.S. plan which costs about \$200 per vehicle.³

The Benefits Trap, Business Week, July 19, 2004.⁴

On the talent side, pension benefits offer employees more portability than traditional plans. GAO 00-185 at 13. An eligible employee who decides to leave the company before retirement age can pack up the lump sum benefit from a cash balance plan and take it along on his or her career move. This feature is especially important in an increasingly mobile society, in which workers are more and more likely to change employers several times, and perhaps more, before they retire. See Economic News Release, Bureau of Labor Statistics, *Employee Tenure in 2004* (Sept. 21, 2004), at Table 1 (illustrating changes in median employee tenure between January 1983 and January 2004). Given that mobility, pension portability becomes a significant factor in recruitment. GAO 00-185 at 14.

Yet another reason companies gave for converting to cash balance plans was the view that the benefits, which are expressed as a lump sum value, are easier for employees to understand than the actuarially calculated annuities used to describe

³ General Motors announced in November 2005 that it would be reducing its manufacturing workforce by 30,000 employees between 2005 and 2008. Press Release, General Motors Corp., GM North America to Undergo Major Capacity Reduction (Nov. 21, 2005), available at <http://media.gm.com/servlet/GatewayServlet?target=http://image.emerald.gm.com/gmnews/viewmonthlyreleasedetail.do?domain=74&docid=20772>

⁴ Available at http://www.businessweek.com/magazine/content/04_29/b3892001_mz001.htm.

traditional defined benefit plans. *Id.* Indeed, according to the American Benefits Council (ABC), “employee appreciation of the plan, facilitating communication with employees, and the ability to show the benefit amount in a lump sum format” were the “dominant motives” for cash balance conversions. *A Pension Double Header: Reforming Hybrid and Multi-Employer Pension Plans, Hearing Before the Senate Comm. on Health, Education, Labor and Pensions, Subcomm. on Retirement Security and Aging, 109th Cong. 3 (June 7, 2005) (Statement of James M. Delaplane, Jr., Partner, David & Harman LLP on behalf of the American Benefits Council).*⁵

B. Conversion To A Cash Balance Pension Plan Provides More Advantageous Benefits To Employees Than Other Equally Lawful Options Such As Freezing Or Terminating A Traditional Defined Benefit Plan, Or Converting To A Defined Contribution Plan

Critics of cash balance conversions contend that cost reduction primarily motivated employers to convert. Indeed, according to GAO, some companies did choose to convert to cash balance plans because they anticipated reducing the overall cost of their defined benefit pension plans, *e.g.*, by eliminating early retirement subsidies on future pension accruals. GAO 00-185 at 12. The American Benefits Council reports, however, that while some companies did

⁵ Available at http://www.americanbenefitscouncil.org/documents/0605help_written_ce.pdf.

convert to cash balance plans to cut costs, “for most employers it is neither the rationale for the conversion nor the reality that results.” *Delaplane Testimony* at 3-4.

In any event, bearing in mind that offering a pension plan is voluntary, not mandatory, under U.S. law, it is simply wrong to criticize employers for seeking to reduce pension costs by converting to a cash balance plan. After all, freezing or even terminating the plan entirely would have been another lawful option. GAO 00-185 at 8 (“The law prohibits firms from amending a plan’s benefit formula to reduce benefits that have already accrued. Firms can, however, change a pension plan’s benefit formula to prospectively reduce or eliminate future benefit accruals”); GAO 05-185 at 13 (“Converting to cash balance plans is also an alternative to terminating a pension plan”).

Nor is plan termination merely an idle threat. According to the PBGC, 101,000 single-employer plans, covering about 7.5 million participants, were terminated between 1986 and 2004. Pension Benefit Guaranty Corp., *An Analysis of Frozen Defined Benefit Plans* 1 (Dec. 21, 2005).⁶

Similarly, the PBGC reports that as of 2003, 9.4% of the single employer plans it insured were “hard-frozen,” *i.e.*, not accruing any additional benefits for any participants. *Id.* Indeed, “many more [defined benefit] plans have been

⁶ Available at http://www.pbgc.gov/docs/frozen_plans_1205.pdf.

terminated or frozen than converted to a hybrid form.” Olivia S. Mitchell and Janemarie Mulvey, *Potential Implications of Mandating Choice in Corporate Defined Benefit Plans*, *Journal of Pension Economics and Finance* 350 (Cambridge Univ. Press, 2004). Opponents of cash balance plans seem to have lost sight of this fact.

For older and younger employees alike, the benefits of an employer’s conversion to a cash balance plan rather than freezing or terminating the pension plan are obvious and tangible. They continue to accrue benefits. Older workers in particular are affected by frozen benefit accruals, even when the employer continues providing a pension benefit in the form of a defined contribution plan. According to the Employee Benefits Research Institute, “Older, longer-tenure workers tend to be affected by a pension freeze more than younger workers because they do not have as much time left in their working careers in a 401(k) plan to offset the accrual loss from a pension freeze.” Jack VanDerhei, EBRI Issue Brief No. 291, “*Defined Benefit Plan Freezes: Who’s Affected, How Much, and Replacing Lost Accruals* 16 (Employee Benefit Research Institute, Mar. 2006).⁷

Cash balance conversions also have other benefits to employees over and above converting to a defined contribution plan. With a cash balance plan, the employer continues to bear the investment risk, while the employee bears the risk

⁷ Available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_03-20063.pdf

of investment loss with a defined contribution plan. Patrick Purcell, *Pension Sponsorship and Participation: Summary of Recent Trends* 3 (Congressional Research Service, Sept. 8, 2005).⁸ Moreover, converting to a cash balance plan maintains the plan's PBGC insurance coverage, since defined benefit plans are insured by the PBGC while defined contribution plans are not. Employee Benefits Research Institute, *Facts from EBRI: Basics of the Pension Benefit Guaranty Corporation (PBGC)* 1 (July 2005).⁹

Traditional "final average pay" defined benefit plans are extremely beneficial to long-tenure, older employees. Because of the way such plans are structured, a significant portion of the benefit accrues in the last years of a person's career. GAO 00-185 at 16. In comparison, participants in cash balance plans accrue a greater proportion of their total benefit early on. *Id.*

This essential difference has been widely mischaracterized by critics as a form of age discrimination. When a company converts from a traditional plan to the cash balance variety, it is true that the expectations of some older workers who had anticipated a large increase in the value of their pensions will not be realized. *Id.* The same result would have occurred, however, had the employer frozen its pension plan or terminated it entirely. The lost expectations are a function of the

⁸ Available at http://digitalcommons.ilr.cornell.edu/key_workplace/261/

⁹ Available at <http://www.ebri.org/pdf/0705fact.pdf>

fact that the employer changed the pension plan, an act that is quite lawful. *Cf. Campbell v. BankBoston, N.A.*, 327 F.3d 1, 9 (1st Cir. 2003) (noting that reduction in anticipated pension benefits did not violate ERISA’s “anti-cutback” provision because it “was an elimination of an expected, not accrued, benefit”).

Had the company terminated the plan entirely, rather than converting to cash balance, these older workers would have lost far more. *See* GAO 06-42 at 7 (noting that “in comparing a conversion to a typical [cash balance] plan with a terminated [final average pay plan], all vested workers would do better under the [cash balance] plan).

Moreover, many employers converting to cash balance plans have made special benefit accrual adjustments for older workers, as PNC did here. Most cash balance plans provide larger pay credits based on age or service. GAO 00-185 at 15. PNC’s plan does both.

C. Serious Problems Already Threaten The Nation’s Defined Benefit Pension System, And Affirmance Of The Decision Below Is Necessary To Preserve Employers’ Flexibility To Convert To Cash Balance Pension Plans

The nation’s defined benefit pension system is in considerable peril. Employers are dropping their defined benefit plans – or those plans are going under – at an alarming rate, sometimes leaving employees and other plan beneficiaries with little to rely upon.

According to the PBGC, the total number of single employer defined benefit plans insured by PBGC dropped from 112,208 in 1985 to just 29,651 in 2004.

Pension Insurance Data Book 2004 at 56 (Table S-31). Although large employers are more likely than small ones to sponsor a retirement plan, only 77.4% of workers at companies with more than 100 employees worked at businesses with retirement plans in 2004, compared to 80.4% in 1995. Purcell at 8.

The PBGC itself is in trouble as well, going from a \$9.7 billion surplus to a \$23.3 billion deficit as of September 2004, which includes a \$12.1 billion loss in fiscal year 2004. U.S. Government Accountability Office, Report No. 05-294, *Private Pensions: Recent Experience of Large Defined Benefit Plans Illustrate Weaknesses in Funding Rules* 1 (May 2005) (hereinafter “GAO 05-294”). The PGBC traces its rapid decline to “several very large losses (primarily from steel and airline industry plans), lower interest rates that raised the value of PBGC’s liabilities and declining stock prices.” *Pension Insurance Data Book 2004* at 4. Just during the two-year tenure of PBGC Executive Director Bradley D. Belt, who recently resigned his post,¹⁰ “the PBGC experienced a record level of pension plan terminations, a dramatic increase in risk exposure, and a near doubling of its

¹⁰ Letter from Belt to President Bush of Mar. 23, 2006, *available at* http://www.pbgc.gov/docs/belt_resignation_letter.pdf

customer base.”¹¹ The precipitous drop in the financial viability of PBCG’s single employer program caused the GAO to place that program on its “high risk list” in 2003. GAO 05-294 at 9.

Indeed, the serious problems facing the nation’s defined benefit pension system has spurred the Administration to propose and Congress to consider legislation designed to shore up its sagging pillars. In 2005, House and Senate Committees held numerous hearings to gather information.¹² As a result, both the

¹¹ Press Release, Pension Benefits Guaranty Corp., PBGC Executive Director Bradley D. Belt Announces Departure (Mar. 23, 2006), *available at* <http://www.pbgc.gov/media/news-archive/2006/pr06-32.html>

¹² *See, e.g.,* Hearing on “Strengthening Pension Security for All Americans: Are Workers Prepared for a Safe and Secure Retirement?” Before the House Comm. on Education and the Workforce (Feb. 25, 2004); Hearing on “Financial Status of PBGC and the Administration’s Defined Benefit Plan Funding Proposal” Before the Senate Comm. on Finance (Mar. 1, 2005); Hearing on “Protecting Pensions and Ensuring the Solvency of PBGC” Before the House Comm. on Government Reform, Subcomm. on Government Management, Finance, and Accountability (Mar. 2, 2005); Hearing on “The Retirement Security Crisis: The Administration’s Proposal for Pension Reform and its Implications for Workers and Taxpayers” Before the House Comm. on Education and the Workforce (Mar. 2, 2005); Hearing on the President’s Proposal for Single-Employer Pension Funding Reform Before the House Comm. on Ways and Means, Subcomm. on Select Revenue Measures (Mar. 8, 2005); Hearing on “Private-Sector Retirement Savings Plans: What Does the Future Hold?” Before the Senate Comm. on Health, Education, Labor & Pensions (Mar. 15, 2005); Hearing on “The Role of Employer-Sponsored Retirement Plans in Increasing National Savings” Before the Senate Special Comm. on Aging (Apr. 12, 2005); Hearing on “PBCG Reform: Mending the Pension Safety Net” Before the Senate Comm. on Health, Education, Labor & Pensions, Subcomm. on Retirement Security and Aging (Apr. 26, 2005); Hearing on “Preventing the Next Pension Collapse: Lessons from the United Airlines Case” Before the Senate Comm. on Finance (June 7, 2005).

House and the Senate have passed pension reform legislation which is currently under study by a conference Committee.¹³

Allowing employers who have converted to “cash balance” defined benefit plans to continue to maintain them, and allowing other employers the flexibility to convert to such plans in the future, is a critical element in the future survival of the employer-sponsored defined benefit pension system. Indeed, the American Benefits Council identifies legal attacks on hybrid defined benefit plans as a primary threat to the nation’s defined benefit system. American Benefits Council, *Pensions at the Precipice: The Multiple Threats Facing Our Nation’s Defined Benefit Pension System* 7 (May 2004).¹⁴ Affirmance of the decision below will go a long way towards eliminating the lingering uncertainty surrounding cash balance plans.

¹³ H.R. 2830 was passed by the House on December 15, 2005, 151 Cong. Rec. H11,797-98 (Dec. 15, 2005) (Roll No. 635), and by the Senate on Mar. 3, 2006, 152 Cong. Rec. S1755 (Mar. 3, 2006) with an amendment in the nature of a substitute, being S. 1783, which was passed by the Senate on November 16, 2005. 151 Cong. Rec. S12,921 (Nov. 17, 2005).

¹⁴ Available at

http://www.americanbenefitscouncil.org/documents/definedbenefits_paper.pdf.

CONCLUSION

For the reasons set forth above, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be affirmed.

Respectfully submitted,

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April 7, 2006

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1(e), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

April 7, 2006

/s/ Ann Elizabeth Reesman
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CERTIFICATE OF COMPLIANCE

I, Ann Elizabeth Reesman, hereby certify that this BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES 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). This brief is written in Times New Roman 14-point typeface using MS Word 2002 and contains 4,004 words.

I further certify that the text of the electronic brief in .pdf format and the text of hard copies of this brief are identical and that a virus check was performed using the following virus software: Symantec Anti-Virus Corporate Edition 10.0 (updated April 7, 2006).

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