UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AARP, et al. *Plaintiffs* v. Equal Employment Opportunity Commission *Defendant*	Case No.2:05-cv-00509-AB **Brief Amici Curiae in Support of Defendant**

BRIEF OF AMICI CURIAE LABOR ORGANIZATIONS IN SUPPORT OF DEFENDANT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The National Education Association, the American Federation of Teachers, and the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America respectfully submit this amici curiae brief in support of the Defendant Equal Employment Opportunity Commission.

STATEMENT OF INTEREST OF AMICI CURIAE

The case before the Court presents a question of importance to retirees, labor organizations that act as collective bargaining representatives, and employees – whether the Equal Employment Opportunity Commission ("EEOC") properly exercised its authority under the Age Discrimination in Employment Act ("ADEA") by promulgating a regulation that exempts from the ADEA's prohibitions the practice of coordinating employer-provided retiree health benefits with Medicare in a manner that results in different health benefits for Medicare-eligible retirees and retirees not eligible for

Medicare. The amici curiae National Education Association, the American Federation of Teachers, and the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America file this brief to make a showing that the answer to this question is "yes."

The National Education Association ("NEA") is a nationwide employee organization with over 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities throughout the United States. The NEA operates through a network of affiliated organizations, including some 13,000 local affiliates. Through collective bargaining where allowable, and through other means of bilateral decision-making in jurisdictions that do not allow collective bargaining for public sector employees, these local affiliates represent NEA members and other education employees in dealing with their employers regarding terms and conditions of employment, including the provision of retiree health benefits.

The American Federation of Teachers ("AFT") represents more than 1.3 million workers in both the private and public sectors with approximately 45 affiliated state federations and 3,000 affiliated local unions. Although the majority of AFT members are K-12 teachers, the AFT also represents higher education staff, early childhood educators, school support staff, state and local government employees, and nurses and other healthcare professionals. AFT-affiliated locals bargain over 800 new collective bargaining agreements each year and in so doing aim to provide these members secure retiree health benefits that contribute to a dignified retirement.

The International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") represents more than 1.3 million active and

retired members. The UAW was among the first industrial unions to negotiate for pension benefits and medical benefits for its retired membership. The UAW has continued to work vigorously to enhance and protect the medical benefits for its retired membership, both at the bargaining table with such employers as the domestic automobile manufacturers, and by litigating to enforce employer promises related to retiree medical benefits, see, e.g., McCoy v. Meridian Automotive Sys., Inc., 390 F.3d 417 (6th Cir. 2004); UAW v. Rockford Powertrain, 350 F.3d 698 (7th Cir. 2003); UAW v. BVR Liquidating, 190 F.3d 768 (6th Cir. 1999); Golden v. Kelsey-Hayes Co., 73 F.3d 648 (6th Cir. 1996); Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir. 1993); UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983).

Because of amici curiae's extensive experience in negotiating and otherwise advocating for retiree health benefits, they are able to provide a useful perspective to the Court in considering the Plaintiffs' Motion for Ex Parte and Temporary Restraining Order, Preliminary Injunction, and Stay of the Effective Date of Agency Regulations (hereinafter "Plaintiffs' Motion"). Many of amici curiae's members are eligible to retire with pension benefits prior to becoming eligible for Medicare. Most members would not be able to retire when first eligible, however, absent employer-provided retiree health benefits to cover them until they become eligible for Medicare. As a result, amici curiae have long negotiated for employer-provided health benefits for retired members who are not eligible for Medicare, as well as for Medicare-eligible retirees. Drawing on their experience, amici curiae's argument focuses on the practical effects of the EEOC's exemption regulation at issue in Plaintiffs' Motion, and attempts to demonstrate that the

prompt implementation of the EEOC's exemption regulation is necessary to protect the public interest and, in particular, the interests of retired employees.

ARGUMENT

THE EEOC'S EXEMPTION REGULATION IS IN THE PUBLIC INTEREST AND NECESSARY TO PROTECT THE INTERESTS OF RETIREES

The regulation at issue here – promulgated by the EEOC in the exercise of its exemption authority under Section 9 of the ADEA – states that an employer does not violate the ADEA by providing different health benefits to retirees who are not Medicare-eligible than are provided to Medicare-eligible retirees.

The EEOC concluded that this exemption is necessary in the public interest and, in particular, in the interests of retirees. The EEOC based that conclusion on its determination that, if left in place, the rule of Erie County Retirees Association v. County of Erie, 220 F.3d 193 (3d Cir. 2000) – that an employer violates the ADEA by providing different health benefits to retirees who are not Medicare-eligible than are provided to retirees who are Medicare-eligible, unless such benefits are equal in value or cost – "may cause a class of people – retirees [over 40 but] not yet 65 – to be left without any health insurance," and "may contribute to the loss of valuable employer-sponsored coverage that supplements Medicare for retirees age 65 and over." Notice of Proposed Rulemaking, 68 Fed. Reg. 41542, 41546 (July 14, 2003). As we show in this brief amici curiae, the EEOC's practical judgment that this exemption is necessary in the public interest and to protect the interests of retirees is entirely sound.

A. The EEOC's determination that an exemption is necessary to protect the interests of retirees is firmly rooted in the legal, economic, and practical factors that influence employers' decisions regarding the provision of health benefits to their retirees.

The threshold point is that there is no federal law that requires employers to provide retirees with health benefits. In the private sector, employers "are generally free under ERISA [the Employee Retirement Security Act of 1974, 29 U.S.C. § 1001 et. seq], for any reason at any time, to adopt, modify, or terminate welfare plans" such as retiree health benefit plans. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995). And, as ERISA does not provide for "vesting" of retiree health benefits, only a private sector employer that both affirmatively promises to provide retiree health benefits and, in this Circuit, promises do so for a specified duration is bound to continue the benefits, rather than having free rein to terminate or reduce them. UAW v. Skinner Engine Co., 188 F.3d 130, 139 (3d Cir. 1999).

Because ERISA does not apply to public sector employers, the law governing retiree health benefit commitments made by public sector employers is more varied, including state contract law and, in some cases, state or local statutes, ordinances and regulations. As in the private sector, unless the employer has made a contractual commitment, retiree health benefits are generally not guaranteed. Although some state courts have found retiree health benefits to be "part of an employee's benefit package and . . . an element of the consideration that the state contracts to tender in exchange for services rendered," Duncan v. Retired Public Employees, 71 P.3d 882 (Alaska 2003), other courts, including a Pennsylvania court, have looked to the specific language of the statutes and employee handbooks in order to determine whether the language evinces an

intent on behalf of the employer to make a contractual commitment to provide a particular level or type of health benefits, Bernstein v. Commonwealth, 617 A.2d 55, 59-60 (Pa. Cmwlth. 1992). Therefore, although the legal regime governing the retiree health commitments of public sector employers is not as clear as that governing the commitments made by private sector employers, many public sector employees – like their private sector counterparts – have no statutory guarantee of retiree health benefits.

Nor can it be said that practical pressures routinely fill that legal void and require employers – other than those who have made a pre-retirement contractual commitment to active employees regarding retiree health benefits – to provide retirees with such benefits. A retiree has provided the employer with all of the services that she is going to provide, and the employer is no longer under the pressure that drives employers to compensate their employees – viz., the pressure to provide a compensation package to the recipient that she will regard as a proper quid pro quo for providing her future services to the employer. Consequently, only a minority of employers have determined to bear the cost of providing any health benefits to any of their retirees. See Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion, GAO-01-374, at 6, 8 (May 2001) (citing studies indicating that "just over one-third of large employers, and [approximately 9 percent] of small employers, offered health coverage to some of their retirees in 2000").

Of equal moment, the number of employers providing retiree health benefits has declined sharply over the last decade. See id. at 6-7, 9-10. And, among those employers that continue to provide retiree health benefits, many have taken such cost reduction steps as: limiting the class of eligible retirees; reducing benefits to retirees; or increasing the

share of costs that the retirees bear. Id. As the foregoing demonstrates, a large and growing number of employers are re-evaluating the viability of continuing to maintain retiree health benefit plans as a component of their employee compensation packages. That employer judgment is a reaction to such factors as the high and unpredictable rate of inflation for medical costs; the increasing cost of providing retiree benefits as the baby boomers reach retirement and the increasing concomitant management concern with long-term benefit commitments; and changes in the accounting rules which require employers to front-load long-term benefit liabilities on their balance sheets.[1]

Against this background, the basic element of the retiree health benefit plans offered by the minority of employers that determine to provide such benefits – or that are moved by unions to do so through collective bargaining – is a "bridge" program that covers retirees until they reach Medicare eligibility. Indeed, the aforementioned survey, supra at page 6, indicated that, of the large employers that provide some form of retiree health coverage, approximately 25% provide only a bridge for retirees who are not Medicare-eligible. See id. (stating that 92% of such employers provide benefits for retirees who are not Medicare-eligible, but only 67% provide some form of coverage for Medicare-eligible retirees).

There are numerous reasons why an employer may only go so far as to provide a bridge program for retirees who are not Medicare-eligible: bridge programs make it feasible for employees to take advantage of the employer's early retirement programs;

[1] See Financial Accounting Standards Board, Financial Accounting Foundation, Statement of Financial Accounting Standards No. 106: Employers Accounting for Postretirement Benefits Other Than Pensions (Dec. 1990); Government Accounting

cover individuals for an ascertainable, limited time period (only until they are eligible for Medicare); provide coverage for individuals who might otherwise lack any health benefit coverage at all; and entail little, if any, administrative cost or complexity, as the retirees who are not Medicare-eligible typically may be placed in the same group plan as the active employees, given that both groups receive their primary insurance coverage through the employer.

In contrast, from the employer's perspective, going further and providing health benefits to Medicare-eligible retirees entails a different – and more substantial – range of costs and complications:

- First, at this juncture, there is no longer any need to provide health benefits to make it feasible for retirees who are pension-eligible, but not Medicare-eligible, to retire.
- Second, a health benefit commitment to Medicare-eligible retirees is open-ended (as opposed to the time-limited commitment of a bridge program for the retirees who are not Medicare-eligible), rendering this class of retirees much more numerous.
- Third, the fact that Medicare-eligible retirees already receive health benefit coverage through a government-sponsored program undercuts the concern that, absent employer action, the retirees would be left without coverage.
- Fourth and finally, in contrast to retirees who are not eligible for Medicare, Medicare-eligible retirees cannot simply be placed under the group plan

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Standards Board, Financial Accounting Foundation, Statement No. 43: Financial Reporting for Postemployment Benefit Plans Other Than Pension Plans (Apr. 2004).

> covering active employees with little or nothing in the way of administrative cost or difficulties. When retirees become Medicare-eligible, Medicare becomes their primary insurer; the employer, if it provides any coverage at all, provides only secondary coverage, and an employer providing secondary coverage is confronted with an entirely different set of questions regarding plan design than when the employer is providing primary coverage. Secondary coverage provided to Medicare-eligible retirees must be coordinated with Medicare coverage, requiring changes in the design of the health benefits plan itself (and the insurance policy that may underwrite it). And, because Medicare itself contains very distinctive benefits and requirements which differ substantially from most primary insurance policies on the market today, a secondary plan that is designed to supplement Medicare is apt to differ in form and substance from a primary plan covering active employees and retirees who are not eligible for Medicare.

As a result, employers that provide retiree health benefits always treat Medicare-eligible retirees as a discrete group. And employers that have been willing on their own, or as a result of collective bargaining, to extend coverage to this group, have often gone only so far as to provide a limited "supplement," such as reimbursement of Medicare Part B premiums, or a prescription drug benefit.[2] Only a small number of employers provide

[2] The amici curiae do not concede that the practice of providing different benefits to Medicare-eligible retirees than to those retirees who are not Medicare-eligible constitutes a violation of the ADEA, but recognize that such is the law of this Circuit by virtue of the Erie County decision. It is worthy of note, however, that it has long been the general practice of employers in this Circuit and elsewhere to proceed on the pre-Erie County

what is termed "wrap" coverage, under which Medicare-eligible retirees receive the same benefits as retirees who are not Medicare-eligible – albeit from two sources, rather than one.

B. Absent the EEOC's exemption regulation, the employers that provide bridge program retiree health benefits and those that provide Medicare supplement programs – the greatest number of the minority of employers providing retiree health benefits – would, under the Erie County rule, have the following compliance options:

1) augmenting the employer's retiree health benefit plan by providing Medicare-eligible retirees wrap coverage equal in value or cost to the bridge program benefits being provided to retirees who are not Medicare-eligible;

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understanding that distinguishing between retirees based on their eligibility for Medicare is permissible under the ADEA.

First, such a differentiation is not based on the recipient's age, but rather on the receipt of a government benefit. Cf. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) ("[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."). Indeed, Medicare eligibility is not always even correlated with age; retirees under age 65 are Medicare-eligible if they are receiving Social Security disability or have end-stage renal disease. 42 U.S.C. § 1395c.

Second, the legislative history of the Older Workers Benefit Protection Act of 1990 ("OWBPA"), amending the ADEA, clearly states that the ADEA as amended by OWBPA is not meant to prohibit such differentiation. See Final Substitute: Statement of Managers, 136 Cong. Rec. S25353 (Sept. 24, 1990), 136 Cong. Rec. H27062 (Oct. 2, 1990) ("In many of these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retiree's Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare eligibility. These practices are not prohibited by the substitute.")

2) reducing the benefits available to retirees not eligible for Medicare so that these benefits do not exceed the value or cost of those benefits provided to Medicare-eligible retirees;[3] or

3) terminating the plan so as not to incur the inevitable and substantial administrative cost of restructuring the plan, and the inevitable increase in cost resulting from an open-ended obligation to Medicare-eligible retirees.

As the EEOC has recognized – for the reasons explored in the preceding section of this brief, which include the absence of any affirmative federal statutory requirement to provide retiree health benefits, the financial and practical pressures on employers that militate against providing such benefits, and the demonstrated disinclination of employers to provide such benefits – employers would not choose to comply with the Erie County rule by augmenting their retiree health benefit plans (thereby increasing the employer's costs and open-ended obligations). They would rather: (1) restructure their plans in a way that reduces benefits to the retirees who are not Medicare-eligible (who have no alternative source of benefits) and that provides little if anything in benefits over and above Medicare for Medicare eligible retirees; or (2) terminate the plan altogether to the detriment of both groups of employees.

The best evidence in this regard is the result "won" by the Erie County plaintiffs following the Third Circuit's remand to the district court. The parties there settled for a

[3] This can be accomplished either by restructuring the plan to provide Medicare-eligible retirees wrap coverage equal in value or cost to reduced bridge program benefits that will henceforth be provided to retirees who are not Medicare-eligible, or, for those employers providing only a bridge program, by eliminating the bridge program altogether.

one-time cash payment to the Medicare-eligible retirees, a reduction in the health benefits provided to retirees not eligible for Medicare, and no increase in the health benefits provided to the Medicare-eligible retirees. See J. Colberg & J. Muehl, Erie County Settlement Unsettling, J. of Pension Planning & Compl. (Jan. 1, 2003), 2003 WL 8730627. In short, Erie County made the choice to bring down the health benefits provided to retirees who are not Medicare-eligible, rather than to bring up the health benefits provided to the Medicare-eligible retirees. If this is the best settlement that the plaintiff class could obtain from Erie County, despite its "complete victory" in the Third Circuit and the necessity for federal court approval of the settlement, it is wholly unlikely that the employers that face no legal constraint on their ability to reduce or to terminate retiree health benefits will take the higher cost option of augmenting their plans.

Thus, it is the amici curiae's considered judgment based on their extensive experience in negotiating and otherwise advocating for retiree health benefits that, absent the EEOC's exemption regulation, employee organizations will have substantial difficulty in maintaining the employer-provided retiree health benefits that they previously have achieved, and even greater difficulty in securing retiree health benefits from employers that do not presently provide such benefits. Amici curiae, like other labor organizations, seek to achieve the maximum in health benefits coverage for all retirees. But in the real world that goal has not proved to be consistently obtainable given the severe constraints on the finances of many of the employers with whom the amici curiae negotiate, including local governments and school districts. Indeed, health care coverage has become one of the most, if not the most, contentious issues in collective bargaining.

Most employers are strongly committed to reducing their costs in this area, and are unwilling to take any steps that would increase these costs.

In this context, in order to bring themselves into compliance with the Erie County rule, the employers that have agreed in bargaining to provide bridge programs or Medicare supplement programs are likely to insist on reducing those program benefits or on terminating the retiree health benefit plans. Even the employers that have agreed to provide comparable benefits for retirees who are not Medicare-eligible and for Medicare-eligible retirees, but that use different plan designs for the two groups, will press to scale down or eliminate benefits, rather than face the prospect of litigating complex factual issues regarding plan comparability if the equality of the benefits is subject to challenge.

Equally important, where the employer is one of the majority of employers that has not yet instituted a retiree health benefit plan, often the best that a collective bargaining representative can achieve, even through the most determined effort, is a bridge program to ensure that no retiree is left completely uninsured, or a supplement program for Medicare-eligible retirees. Unless and until the EEOC's exemption is implemented, the Erie County rule will deprive parties to collective bargaining of this option of agreeing to provide a limited health benefit plan where heretofore there was none. In other words, absent the EEOC's exemption regulation, the "perfect" ideal of a wrap program benefit design is made the enemy of the possible – bridge and supplements that that may be the only benefit designs achievable.

C. Against all this, Plaintiffs argue that the implementation of the EEOC's exemption regulation will be detrimental to the interests of the Plaintiff retirees and similarly situated Medicare-eligible retirees who are covered by wrap programs because it

will put them at increased risk of having their health benefits reduced or eliminated. See Pl. Memorandum of Points and Authorities in Support of Pl. Motion, at 29, 33. Plaintiffs' argument – which rests on a false premise as to the legal status quo prior to the Erie County ruling – is without merit.

To begin with, as explained supra at pages 5-6, employers that have not made affirmative contractual commitments to maintain their retiree health benefits are free to reduce or eliminate those benefits at any time.[4] The EEOC's exemption regulation does not diminish an employer's contractual obligation in that regard or grant to or increase an employer's right to reduce or terminate such benefits. And, the Court's action with respect to the EEOC's exemption regulation will not do so either.

Moreover, Plaintiffs have not alleged that, as a compliance response to Erie County, any employer has improved the health benefits provided to them or to any other Medicare-eligible retirees and in response to the EEOC's exemption regulation likely will reduce those benefits to their prior level.

Given those two points, what Plaintiffs are saying is that the employers that have provided Medicare-eligible retirees with a wrap program have done so because the employers believed that the ADEA so required, and that those employers are poised to eliminate these benefits should the EEOC's exemption regulation be implemented.

But, as we have noted supra at pages 7-10, prior to Erie County, employers had been operating on the understanding that the ADEA allows them to provide different health benefits to retirees who are not eligible for Medicare than to those that are eligible

[4] Indeed, the Plaintiffs acknowledge that several of the Plaintiff retirees already have had their retiree medical benefits reduced. Pl. Compl. at ¶¶ 8, 11, 13.

for Medicare. See, e.g., Hearing on Retirement Security for the American Worker: Opportunities and Challenges Before the House Comm. on Educ. & the Workforce Subcommittee on Employer-Employee Relations (Nov. 1, 2001) (testimony of Charles K. Kerby, III, William M. Mercer, Inc.) (testifying that "decision came as a surprise to many employers who assumed, based on ADEA's legislative history, it was permissible to offer different benefits to Medicare-eligible retirees [and] caused great consternation among retiree health plan sponsors.")

Thus, Plaintiffs' suggestion that employers will reduce or eliminate benefits to Medicare-eligible retirees if the EEOC's exemption regulation is implemented is without any basis in fact or in reason. The employers that have made a unilateral determination to provide wrap programs to cover Medicare-eligible retirees did so on compensation policy grounds, not on ADEA compliance grounds. And, the employers that agreed in collective bargaining to provide wrap coverage did so under the pressure of collective bargaining, not under the pressure of the ADEA.

There is nothing to support Plaintiffs' claim that the EEOC's exemption regulation will cause any employer providing Medicare-eligible retirees wrap coverage to reduce or eliminate those benefits.

D. While the foregoing is dispositive, we would be derelict if we did not close by rebutting Plaintiffs' characterization of EEOC's exemption regulation as arbitrary and capricious for failing to comprehend that it is a simple matter for employers to survive scrutiny under the Erie County rule by demonstrating that the Medicare-eligible retirees and the retirees who are not Medicare-eligible receive an "equal benefit"

from the employer, or, alternatively, that the employer expends an "equal cost" on members of the two groups.

Contrary to Plaintiffs' assertion, however, the EEOC correctly determined that this test is not workable in practice. While the Plaintiffs' Motion focuses on criticizing the EEOC's findings with respect to the "equal cost" prong, the "equal benefit" prong, which the Plaintiffs assert is the proper focus of the test, see Pls. Mem. at 31, is equally impractical. Plan design considerations are very different for primary coverage plans covering retirees who are not Medicare-eligible and secondary coverage plans covering Medicare-eligible retirees. That being so, the EEOC, which "closely examined whether it would be possible to apply the equal benefit/equal cost test" to compare benefits offered to retirees who are not Medicare-eligible with those offered to Medicare-eligible retirees, concluded "after extensive study" that the test simply was not workable in this context. See Notice of Proposed Rulemaking, 68 Fed. Reg. 41542, 41546 (July 14, 2003); see also Pls.' Exh. C at 4, 13-14; J. Colberg & J. Muehl, Erie County Settlement Unsettling, J. of Pension Planning & Compl. (Jan. 1, 2003), 2003 WL 8730627 (attempting to give guidance in applying test and concluding that comparing benefits provided under different policies "is an onerous task at best, an impossible one at worst.").

Beyond that, as we have stressed throughout, in considering the utility of the equal benefit/equal cost test for complying with the Erie County rule, it is important to remember that no federal statute requires employers to provide retiree health benefits. If the test is merely expensive to apply, or poses a not-insignificant risk that a retiree would bring suit challenging the calculations, it is unlikely that employers would choose that expense and risk, when much simpler and cost efficient options – reducing benefits for

retirees who are not Medicare-eligible or terminating the retiree health plan altogether – are available.

* * *

For the foregoing reasons, amici curiae submit that the EEOC's exemption regulation is necessary in the public interest and to protect the interests of retired employees, and accordingly urge the Court to rule that the regulation is legal and proper and to deny the Plaintiffs' Motion for Ex Parte and Temporary Restraining Order, Preliminary Injunction, and Stay of the Effective Date of Agency Regulations.

Respectfully submitted,

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