UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AARP, JACK W. MACMILLAN, FRANK H. SMITH, JR., FRANK A. WHEELER, FRED DOCHAT, GERALD FOWLER, M. ELAINE CLAY,	
Plaintiffs,	
v.	**Case No. 05-CV-509**
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	
Defendant.	

PLAINTIFFS' OPPOSITION TO
EEOC'S MOTION FOR RELIEF FROM JUDGMENT

Plaintiffs AARP, Jack W. Macmillan, Frank H. Smith, Jr., Frank A. Wheeler, Fred Dochat, Gerald Fowler, and M. Elaine Clay, by their counsel, hereby oppose the Motion For Relief from Judgment filed by the defendant Equal Employment Opportunity Commission ("EEOC") pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

The U.S. Supreme Court's recent decision in *National Cable and Telecommunications Assoc. v. Brand X Internet Servs*., Nos. 04-277, 04-281, 2005 WL 1498860 (U.S. June 27, 2005) does not undermine in any way the analysis or the result reached by the Court in its March 30, 2005, memorandum opinion. On the contrary, the reasoning of *National Cable* provides resounding affirmation of the bedrock of this Court's opinion – it's focus on the so-called Step One analysis under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in which the Court must first determine whether Congress has expressed a clear intent through the legislation under which the rulemaking has occurred. Since the decision in *National Cable* explicitly embraced the rationale behind *Chevron's* Step One analysis, it provides an

independent grounds for reaffirming this Court's ruling. Accordingly, the EEOC's motion should be denied.

The issue before the Supreme Court in *National Cable* was whether the Federal Communications Commission's conclusion "that cable companies that sell broadband Internet service do not provide 'telecommunications servic[e]' as the Communications Act defines that term . . . [wa]s a lawful construction of the Communications Act under *Chevron* . . . and the Administrative Procedure Act, 5 U.S.C. § 555 *et seq*." 2005 WL 1498860 at *7. The Court of Appeals for the Ninth Circuit had refused to apply the *Chevron* framework "because it thought the Commission's interpretation of the Communications Act [was] foreclosed by the conflicting construction of the Act [that the Ninth Circuit] had adopted in [*AT&T Corp. v.*] *Portland*, [216 F.3d 871 (9th Cir. 2000)]." *Id*. at *12. In its decision in *Portland*, the Ninth Circuit had concluded, contrary to the challenged rule, that cable modem service was a "telecommunications service." *Id.* at 13. What the Supreme Court found determinative, however, was the manner in which the Ninth Circuit had reached its result. "Its prior decision in *Portland* held only that the *best* reading of §153(46) was that cable modem service was a 'telecommunications service,' not that it was the *only permissible* reading of the statute." *Id.* (emphasis in original). The Ninth Circuit's concession that the statute was subject to multiple interpretations was fatal since, as the Supreme Court held, "[b]efore a judicial construction of a statute…may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." *Id.*

In reversing and remanding the Ninth Circuit's ruling, the Supreme Court stated, ". . . if [a] prior court decision holds that its construction follows from the unambiguous terms of the statute," there is "no room for agency discretion." *Id*. at 12. The premise of *Chevron* is that agencies have the important task of resolving statutory ambiguities and filling statutory gaps.

467 U.S. at 843-44. However, "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation . . . contains no gap for the agency to fill." *National Cable*, 2005 WL 1498860 at *12.[1]

Contrary to the approach of the Ninth Circuit in *National Cable*, this Court followed *Chevron* to the letter. And in so doing, this Court correctly relied on precisely what was missing in *National Cable* – Circuit precedent holding that Congressional intent was clear. Consequently, this Court properly concluded its *Chevron* analysis at Step One: "In this case I will not reach the second step of *Chevron* because the Third Circuit has already determined that Congress expressed a clear and unambiguous intent with regard to the precise question at issue." *AARP v. EEOC*, No. 05-CV-509, 2005 WL 723991 at *3 (March 31, E.D. Pa. 2005). This Court's conclusion, of course, was based on *Erie County Retiree Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), in which the Third Circuit held "that it was clear from the face of the [ADEA] that Congress intended for the ADEA's prohibitions against age discrimination to apply to the practice of reducing retiree health benefits when retirees become eligible for Medicare." *Id.* at *1; *see also* Def.'s Opp. Pls.' Mot. Prelim. Inj. at 6.[2] Precisely because the Circuit precedent found the statute clear, the EEOC's contrary interpretation is foreclosed under both *Chevron* and *National Cable*. *See Neal v. United States*, 516 U.S. 284, 290-95 (1996). *National Cable* confirms that this Court's initial analysis was correct.

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[1] *See also Public Employees Ret. Syst. of Ohio v. Betts*, 492 U.S. , 158, 171 (1989) ("no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.").

[2] The EEOC concedes that the plain language of the ADEA prohibits the practice of reducing or terminating retiree health benefits in accordance with Medicare eligibility. Def.'s Opp. to Pls.' Mot. Prelim. Inj. at 21 (characterizing as "obvious" the fact that "the proposed regulation exempts conduct that is prohibited by the ADEA."). Indeed, the EEOC advocated the very same position to the Third Circuit in its *amicus curiae* brief. *Erie County*, 220 F.3d at 210.

CONCLUSION

This Court has recognized that "[t]he EEOC does not dispute the holding of *Erie County*, that the plain language of the ADEA prohibits the practice of coordinating retiree health benefits with Medicare eligibility." 2005 WL 723991 at *5. As confirmed by the Supreme Court's recent decision in *National Cable*, the Third Circuit's ruling that "Congress did not allow for ambiguity with regard to the applicability of the ADEA to retiree health benefits," *id*. at *6, precludes the EEOC from interpreting the ADEA otherwise. This Court's initial decision should be reaffirmed and the EEOC's Motion for Relief from Judgment should be denied.

Dated: July 14, 2005

Respectfully submitted,

/s/ Michael J. Schrier

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CERTIFICATE OF SERVICE

I, Michael J. Schrier, hereby certify that on this 14th day of July, 2005, I caused copies of the foregoing Plaintiffs' Memorandum In Opposition To Defendant's Motion For Relief From Judgment to be filed electronically and such documents are available for viewing and downloading from the ECF system.

/s/ Michael J. Schrier
Michael J. Schrier