CASE NO. 05-4594

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AARP; JACK W. MACMILLAN; FRANK H. SMITH, JR.; FRANK A. WHEELER; FRED DOCHAT; GERALD FOWLER; M. ELAINE CLAY,

Plaintiffs-Appellants,

v.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF AMICI CURIAE LABOR ORGANIZATIONS IN SUPPORT OF DEFENDANT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FOR AFFIRMANCE OF THE DISTRICT COURT ORDER

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RULE 26.1 DISCLOSURE STATEMENT

The amici curiae National Education Association ("NEA"); the American Federation of Teachers ("AFT"); the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW"); the American Federation of State, County and Municipal Employees ("AFSCME"); the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union ("USW"); and the International Association of Fire Fighters ("IAFF") make the following disclosures pursuant to Rule 26.1 and Local Rule 26.1.1:

a) Amici are not affiliated with any publicly owned corporation.

b) There are no parent corporations of any of the amici.

c) There is no publicly held corporation that owns 10% or more of any stock of any amici.

/s/ Douglas Greenfield
Douglas Greenfield

March 1, 2006

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STATEMENT OF INTEREST OF AMICI CURIAE

The case before the Court presents a question of importance to employees, retirees, and labor organizations—whether the Equal Employment Opportunity Commission ("EEOC") properly exercised its exemption authority under §9 of the Age Discrimination in Employment Act ("ADEA") by promulgating an exemption from the ADEA's prohibitions that allows employers to establish and maintain health benefit plans coordinated with Medicare that provide more substantial benefits to pre-Medicare retirees than to Medicare-eligible retirees.

The amici curiae National Education Association ("NEA"); the American Federation of Teachers ("AFT"); the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW"); the American Federation of State, County and Municipal Employees ("AFSCME"); the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union ("USW"); and the International Association of Fire Fighters ("IAFF") file this brief to make a showing that the answer to this question is "yes." Both the Appellant and the Appellee have consented to the filing of this brief by the amici curiae.

The 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 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 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 Auto. Sys., Inc., 390 F.3d 417 (6th Cir. 2004); UAW v. Rockford Powertrain, Inc., 350 F.3d 698 (7th Cir. 2003); UAW v. BVR Liquidating, Inc., 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).

AFSCME represents more than 1.5 million public service workers in both the public and private sectors and has more than 3,000 affiliated councils and local unions. Through collective bargaining where possible, and through other means in jurisdictions that do not provide for collective bargaining for public employees, AFSCME and its affiliates represent members and other workers in matters concerning terms and conditions of employment, including the provision of retiree health benefits.

The USW represents approximately 850,000 working people in the United States and Canada, including a substantial number within the Third Circuit's geographic boundaries, within which the USW is headquartered. One of the USW's collective bargaining priorities is to secure retiree health benefits for employees it represents. There are also over 500,000 retirees in the United States who were previously represented by the USW during their careers, a large number of whom—particularly in the USW's core industries of steel, rubber and aluminum—are presently the beneficiaries of USW-negotiated retiree health insurance. Many of these retiree insurance agreements curtail recipients' benefits once they become Medicare-eligible. If the court adopts the AARP's position in this case, the impact on employees and retirees represented by the USW would be enormous.

The IAFF represents 272,000 fire fighters, paramedics, emergency medical technicians, and other first responders employed by state and local governments, the federal government, and private sector contractors. The IAFF has members and local affiliates in all states and the District of Columbia. Through collective bargaining where allowable, and through other means where collective bargaining is prohibited, the IAFF's local affiliates represent these employees in negotiating terms and conditions of employment. Those terms and conditions frequently include the provision

of retiree health benefits. Given the physically taxing nature of the occupation, retirement ages for fire fighters and other first responders are frequently substantially below the age of 65, and in some cases are as low as 40 years of age. They therefore rely on negotiated retiree health benefits as their primary source of health coverage prior to reaching the age of 65.

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 Appellant's challenge to the EEOC's § 9 exemption regulation at issue here. Drawing on their experience, amici curiae's argument focuses on the practical effects of that regulation, and seeks to demonstrate that the prompt implementation of the EEOC's § 9 exemption regulation is necessary and proper in the public interest and, in particular, the interests of retired employees.

SUMMARY OF ARGUMENT

The Court is here presented with the question of whether the EEOC acted within its proper authority in promulgating a § 9 exemption under the Age Discrimination in Employment Act (ADEA) allowing employers to establish and maintain retiree health benefit plans coordinated with Medicare that provide more substantial benefits to pre-Medicare retirees than to Medicare-eligible retirees. As shown in the EEOC's brief before this Court, and in this brief of amici curiae labor organizations, the answer to that question is "yes."

The EEOC concluded that the current ADEA rule, absent the § 9 exemption, would have the perverse effect of denying retirees who are members of the ADEA protected class some or all of their employer-provided health benefits—and that, in contrast, such an exemption would have no such untoward practical effect. This conclusion is firmly grounded in the realities affecting employers' decisions regarding the provision of retiree health benefits and is in no way arbitrary, capricious, or an abuse of discretion.

To begin, no federal law currently requires employers to provide retirees with health benefits, and most employers are free to modify or terminate such plans at any time. Further, a variety of economic and

practical factors discourage employers from providing retiree health benefits. As a result, most employers do not provide any health benefits to their retirees, and the percentage that do so has been declining precipitously over the years. Moreover, the practical disincentives to providing health care coverage to Medicare-eligible retirees are even greater than the disincentives to providing such coverage to pre-Medicare retirees. As a result, many of the employers that do offer some form of retiree health benefits concentrate on covering their pre-Medicare retirees, or, at most, provide only limited supplements to Medicare-eligible retirees.

Absent the exemption regulation, the current ADEA rule, as stated in Erie County Retirees Ass'n v. County of Erie, 220 F.3d 193 (3d Cir. 2000), essentially provides such employers with three options: raise benefits to Medicare-eligible retirees; reduce benefits to pre-Medicare retirees; or terminate the plans altogether. The logic of the situation facing employers compels the EEOC's conclusion that the vast majority will choose to reduce benefits to pre-Medicare retirees, or to terminate their retiree health benefit plans.

The amici curiae's extensive experience in negotiating and advocating for retiree health benefits confirms that the EEOC's conclusion in this regard is correct. In addition, the current ADEA rule, absent the § 9

exemption, unnecessarily ties the hands of labor organizations trying to negotiate the best possible deal for employees who lack any retiree health coverage by foreclosing what may oftentimes be the only result achievable—a bridge program to cover pre-Medicare retirees and perhaps a modest Medicare supplement for Medicare-eligible retirees.

In contrast, the exemption regulation is wholly unlikely to harm the interests of Medicare-eligible retirees. The minority of employers that have previously determined to provide full coverage to Medicare-eligible retirees have done so on the basis of union pressure and compensation policy incentives, and not because of any perceived ADEA requirement.

Finally, the EEOC correctly determined that the existing "equal cost, equal benefit" safe harbor for employer retiree health benefit plans is inadequate to the need with regard to Medicare coordination: (1) given the higher per-person cost of covering pre-Medicare retirees, the "equal cost" safe harbor is plainly inadequate; and (2) because the "equal benefit" safe harbor is too uncertain and difficult to apply to provide proper protection.

Given these realities, the EEOC's conclusion that the § 9 exemption regulation at issue here is necessary and proper in the public interest, and specifically in the interest of current and future retirees, is sound and proper, and in no way arbitrary, capricious, or an abuse of the EEOC's discretion.

ARGUMENT

THE EEOC PROPERLY DETERMINED THAT THE EXEMPTION REGULATION IS NECESSARY AND PROPER IN THE PUBLIC INTEREST AND IN THE INTEREST OF RETIREES

Section 9 of the Age Discrimination in Employment Act (ADEA) grants the Equal Employment Opportunity Commission (EEOC) the authority to "establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest." 29 U.S.C. § 628.

Acting pursuant to § 9, the EEOC has accorded employers an exemption from the ADEA's prohibitions that allows employers to establish and maintain health benefit plans coordinated with Medicare that provide more substantial benefits to pre-Medicare retirees than to Medicare-eligible retirees.

Significantly, in so doing, the EEOC did not take issue with the proposition that, as a substantive matter, §§ 4 and 11 of the ADEA (the ADEA provisions that regulate the establishment and maintenance of employer retiree health benefit plans), standing alone, are properly construed to make it an ADEA violation to establish and maintain plans that

provide more in the way of benefit to pre-Medicare retirees than to Medicare-eligible retirees.

Given what the EEOC did—and what the Commission did not do—this appeal presents the Court with two legal questions:

First, does § 9 of the ADEA grant the EEOC the authority to promulgate exemptions from the ADEA's prohibitions for a defined class of employer conduct, such as the exemption the EEOC promulgated here for Medicare-coordination in employer retiree health benefit plans? The answer to that question is "yes"—as the Brief for the EEOC demonstrates.

Second, does the EEOC's conclusion that the limited exemption for Medicare-coordination in employer retiree health benefit plans is a "reasonable exemption" that is "necessary and proper in the public interest" meet the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" test of § 10 of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A)? Again, the answer to that question is "yes"—as the Brief for the EEOC shows and as we show further in this argument.

The EEOC based its finding that the exemption promulgated here is necessary and proper in the public interest and, in particular, in the interests of retirees, on the following ground: if not negated by a § 9 exemption, the rule—articulated in Erie County Retirees Ass'n v. County of Erie, 220 F.3d

193 (3d Cir. 2000)—that it is unlawful under the ADEA for employer health plans to provide different health benefits to pre-Medicare retirees than to Medicare-eligible retirees, unless such benefits are equal in value or cost "may cause a class of people [protected by the ADEA] – 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." App. II at 504 (Notice of Proposed Rulemaking, 68 Fed. Reg. 41542, 41546 (July 14, 2003)).

The EEOC's conclusion that, absent a § 9 exemption, the ADEA's substantive provisions—which were enacted to benefit older workers—would have the perverse effect of denying retirees who are members of the ADEA protected class their employer-provided retiree health benefits—and that, in contrast, such an exemption would have no such untoward effect on retirees—is soundly based in the realities of the situation and provides an entirely proper and more than sufficient justification for promulgating the exemption.

1. a. The proper starting point is that there is no federal law that requires employers to establish retiree health benefit plans in the first place, to maintain such plans once they are established, or to improve, rather than decrease, plan 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 a retiree health benefit plan and, in this Circuit, promises to do so for a specified duration, is bound to continue the plan and to maintain benefit levels, rather than having free rein to terminate the plan or reduce benefits. 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—which includes state contract law and, in some cases, state or local statutes, ordinances and regulations—is more varied. However, as a general matter—as in the private sector—unless the employer has made a contractual commitment, retiree health benefits are not guaranteed.[1] Thus—

[1] Although some state courts have found retiree health benefits provided by a public sector employer to be "part of an employee's benefit package [that] is . . . an element of the consideration that the state contracts to tender in exchange for services rendered," Duncan v. Retired Pub. Employees of

like their private sector counterparts—public sector employees generally have no statutory guarantee of retiree health benefits.

b. The labor market itself provides little in the way of incentive for 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 he or she is going to provide, and the employer is no longer under the pressure that drives employers to compensate their employees—namely, the pressure to attract and retain employees. And, as current retirees are no longer part of the bargaining unit, at least under federal law, labor organizations cannot compel employers to bargain regarding their benefits. See Chemical Workers v. Pittsburgh Glass, 404 U.S. 157, 181-82 (1971).

Beyond that, the underlying economic and demographic trends actually work to create substantial disincentives to employers who are

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Alaska, Inc., 71 P.3d 882, 887 (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. Commw. Ct. 1992), aff'd, 634 A.2d 1113 (Pa. 1993).

considering whether to establish—or to maintain—a retiree health benefit plan. These factors include: i) the high and unpredictable rate of inflation for medical costs, which increased 10.3% in the year 2004[2]; (ii) the increasing cost of providing retiree health benefits as the baby boomers reach retirement and the concomitant concerns arising out of an open-ended commitment to providing retirees health benefits for the duration of their increasingly long life-span;[3] and (iii) changes in the accounting rules which require employers to front-load long-term benefit liabilities on their balance sheets.[4]

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[2] Kaiser Family Foundation & Hewitt, Prospects for Retiree Health Benefits as Medicare Prescription Drug Coverage Begins: Findings from the Kaiser Hewitt 2005 Survey on Retiree Health Benefits (Dec. 2005), available at http://www.kff.org/medicare/med120705pkg.cfm, at 15. In the same year, the average consumer price index inflation rate was 3.3%. See Bureau of Labor Statistics, Consumer Price Index (Feb. 22, 2006), available at ftp://ftp.bls. gov/pub/special.requests/cpi/cpiai.txt.

[3] It is estimated that, between now and 2030, the number of Medicare beneficiaries will more than double, so that by 2030, one in five Americans will be a Medicare beneficiary. See Fronstin, Paul & Jaffe, Jim, Controlling Health Costs and Improving Health Care Quality for Retirees, Employee Benefit Research Institute Issue Brief No. 278 at 7 (Feb. 2005).

[4] In the early 1990s, the Financial Accounting Standards Board revised its accounting standards to require that retiree health benefits liabilities be listed on companies' financial statements on an accrual basis, a change that radically affected calculations of current profits and liabilities. See Financial Accounting Standards Board, Financial Accounting Foundation, Statement No. 106: Employers' Accounting for Postretirement Benefits

Although it is fair enough to say, as the Appellant AARP does, that there are "innumerable factors" that influence employers' decisions as to whether to provide retiree health benefits, see AARP Br. at 44, that does nothing to obscure the conclusion that these factors weigh heavily against employers' establishing retiree health benefit plans in the first place, and against maintaining the plans that have been established.

c. Not surprisingly, then, the result is that the great majority of employers have not established any plan providing any health benefits to any of their retirees. See Kaiser Family Foundation & Hewitt, Prospects for Retiree Health Benefits as Medicare Prescription Drug Coverage Begins: Findings from the Kaiser Hewitt 2005 Survey on Retiree Health Benefits (Dec. 2005) (hereinafter "Kaiser Hewitt 2005 Retiree Health Benefits Survey"), available at http://www.kff.org/medicare/ med120705pkg.cfm , at v, vi n.4 (33% of employers with 200 or more employees offer some type of retiree health benefits; 18% of employers with 50-199 employees do so; and 6% of employers with fewer than 50 employees do so); see also Retiree

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Other Than Pensions (Dec. 1990). In 2004, the Government Accounting Standards Board adopted a similar accounting standard for government entities, which will officially take effect beginning in December 2006. See Government Accounting Standards Board, Financial Accounting Foundation, Statement No. 43: Financial Reporting for Postemployment Benefit Plans Other Than Pension Plans (Apr. 2004).

Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion, GAO-01-374 (hereinafter "GAO 01-374") (May 2001), available at http://www.gao.gov/new.items /d01374.pdf, at 6, 8.

Moreover, as one would expect given the factors at play, the number of private sector employers that maintain retiree health benefit plans has declined precipitously over the last decade. Between 1998 and 2005, the percentage of employers with 200 or more employees offering retiree health benefits declined from 66% to 33%. See Kaiser Hewitt 2005 Retiree Health Benefits Survey, at v. And, in the last year, 12% of those employers that did offer retiree health benefits eliminated those benefits for future retirees. Id. at 29. Surveys of local government employers with fewer than 5,000 employees show a similar trend. See Fronstin, Paul, The Impact of the Erosion of Retiree Health Benefits on Workers and Retirees, Employee Benefit Research Institute Issue Brief No. 279 (March 2005), available at http://www.ebri.org/publications/ib/ index.cfm, at 4 (hereinafter "EBRI Brief No. 279").

By the same token, many of the employers that continue to maintain retiree health benefit plans have taken steps to reduce their benefits and costs, by, e.g., limiting the class of eligible retirees, reducing plan benefits,

or increasing the share of the plan's costs that the retirees bear. See GAO 01-374 at 6, 9-12; EBRI Brief No. 279 at 6.

d. Against this background, the minority of employers that have determined to establish retiree health benefit plans—or that are moved by unions to do so through collective bargaining—have placed their emphasis on "bridge programs" that cover retirees until they reach Medicare eligibility through the same employer plan that provides health benefits to active employees. A GAO survey found that, of the large employers that provide some form of retiree health benefit plan, approximately 33% provide only a bridge for pre-Medicare retirees. See GAO 01-374 at 6 n.9 (stating that, of the large firms that provide some form of retiree health benefits, only 67% provide some form of coverage for Medicare-eligible retirees). The same holds true in the public sector. Among local government employers with between 250 and 999 employees, 55% offer health benefits to pre-Medicare retirees, while only 35% do so for Medicare-eligible retirees. See EBRI Brief No. 279 at 4.

Employers that do provide retiree health benefits, moreover, always treat Medicare-eligible retirees as a discrete group. And, for the most part, these employers have extended coverage to this group in the form of a

limited "supplement," such as reimbursement of Medicare Part B premiums, or a prescription drug benefit.

The upshot is that the employers that provide what is termed "wrap" or "carve out" coverage (under which Medicare-eligible retirees receive the same benefits as pre-Medicare retirees—albeit from two sources, rather than one) comprise a minority of a minority. See R. Ostuw, Retiree Health Care Benefits: New Rules, New Strategies, 17 Benefits Quarterly 54, 56 (Oct. 1, 2001) (concluding that "[m]any of today's retiree health plan designs are unlikely to satisfy ADEA based on the Erie County ruling and analysis.").[5]

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[5] It is very much to the point that prior to the Erie County decision, the prevailing understanding was that the ADEA permitted employers to establish bridge programs and bridge programs/Medicare supplement programs. 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 "the 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.") This understanding was thoroughly reasonable.

First, a Medicare-eligibility 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 correlated with age; retirees under age 65 are Medicare-eligible if they are receiving Social Security disability, 42 U.S.C. § 1395c, and retirees

e. The foregoing pattern is no happenstance; it is a product of the logic of the situation. A number of compelling considerations support an employer determination to only go so far as to provide a bridge program for pre-Medicare retirees. In the first place, bridge programs have the twin virtues of making it feasible for employees to take advantage of the employer's early retirement programs and of providing coverage for individuals who might otherwise lack any health benefit coverage at all. Secondly, bridge programs entail little, if any, administrative cost or complexity, as the pre-Medicare retirees and the active employees—all of whom receive their primary health insurance coverage through the employer—are typically placed in the same group plan. And, of great importance, bridge programs entail a limited ascertainable risk in that such

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over age 65 are not always Medicare-eligible. Second, the ADEA as it stood from its enactment through 1990 provided no basis whatsoever for a contrary conclusion. And, third, the Older Workers Benefit Protection Act of 1990 ("OWBPA") legislative history 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.")

programs cover individuals only for a limited ascertainable time period (until the individual is eligible for Medicare).

In contrast, a different—and more substantial—range of costs, competing considerations and complications influence the employer's determination as to whether to go further and provide health benefit coverage to Medicare-eligible retirees.

- 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, 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 have no health benefits.
- Third, a health benefit commitment to Medicare-eligible retirees entails a large open-ended financial risk.
- Fourth, in contrast to pre-Medicare retirees, Medicare-eligible retirees cannot simply be placed under the group plan 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 thus provides secondary coverage, and is

therefore 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 the plan).[6]

2. Under the Erie County rule and absent the EEOC's § 9 exemption regulation, the majority of those employers that do maintain employer retiree health benefit plans—those that provide bridge program retiree health benefits and those that provide bridge programs/Medicare supplement programs—must take one of three actions to bring themselves into compliance with the ADEA:

1) augment benefits provided to Medicare-eligible retirees by providing those retirees with wrap coverage equal in value or cost to the bridge program benefits being provided to pre-Medicare retirees;

[6] See discussion infra pp. 30-32.

2) reduce the benefits available to pre-Medicare retirees so that these benefits do not exceed the value or cost of those benefits provided to Medicare-eligible retirees; or

3) terminate 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.

The EEOC concluded that few, if any, employers would 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). And, for the reasons outlined in the preceding section of this brief,[7] it is as certain as such matters can be that the EEOC was correct in concluding that employers will not augment their plans but will instead: (1) restructure their plans in a way that reduces benefits to the pre-Medicare retirees (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)

[7] These reasons 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 that have manifested themselves in the trend towards terminating established plans, and the demonstrated disinclination of the majority of employers to institute retiree health benefit plans.

terminate their plans 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 this Court's remand to the district court. The parties settled for a one-time cash payment to the Medicare-eligible retirees, a reduction in the health benefits provided to pre-Medicare retirees, and no increase in the health benefits provided to the Medicare-eligible retirees. See John Colberg & John Muehl, Erie County Settlement Unsettling, 28 J. of Pension Planning & Compl. 48 (Jan. 1, 2003), 2003 WL 8730627. In short, Erie County chose to bring down the health benefits provided to pre-Medicare retirees, 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 the clear litigation victory in this Court and the necessity for district court approval of the settlement, it is wholly unlikely that 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.

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 § 9 exemption regulation, employee

organizations will have substantial difficulty in maintaining the employer-provided retiree health benefits previously achieved in collective bargaining.

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, school districts and hard-pressed employers in the manufacturing industries. 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 health benefit costs, 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 bridge programs/Medicare supplement programs are likely to insist on reducing those programs' benefits or on terminating the retiree health benefit plans.

The situation is even more stark with regard to collective bargaining negotiations with the majority of employers that do not have a retiree health

benefit plan. As the evidence indicates, given the costs and financial risks, such employers are strongly disinclined to establish and maintain even the most modest and limited retiree health benefit plan. Absent the EEOC's § 9 exemption regulation, the Erie County rule can only strengthen their adamant refusal to go forward.

Indeed, the amici curiae's experience in collective bargaining is that, more often than not, the most 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 bridge program/Medicare supplement program. But absent the EEOC's § 9 exemption regulation, even where the employer heretofore provided no retiree benefits at all, the parties to collective bargaining are foreclosed from arriving at this intermediate solution. In other words, absent the EEOC's exemption regulation, the "perfect" ideal of a wrap program is made the enemy of the possible—bridge programs/Medicare supplement programs that may be the only result achievable. [8]

[8] As such, the goal of the EEOC's exemption regulation is not to mold employers' health care policy choices, a goal that the AARP argues would be outside the authority and expertise of the EEOC, see AARP Br. at 43-46, but rather to remove an artificial restriction on employers' health care policy options, in order to further the interests of all older workers and retirees.

To be sure, against all this, the AARP argues that the implementation of the EEOC's § 9 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 "allow employers immediately to eliminate health care benefits to retirees age 65 and older, regardless of the employer's prior intentions." See AARP Br. at 51. Indeed, the very backbone of the AARP's argument that the exemption regulation is arbitrary or capricious is that the exemption regulation will allow employers to "arbitrarily cut benefits costs for . . . Medicare-eligible retirees," thus "robbing Peter [the Medicare-eligible retirees] to pay Paul [the pre-Medicare retirees]." AARP Br. at 41. The AARP's argument, however, rests on a false premise, and falls with that premise.

The long and short of the matter is that, as explained supra at pages 11-13, employers not bound by affirmative contractual commitments to maintain their retiree health benefits are free to reduce or eliminate those benefits at any time.[9] The EEOC's § 9 exemption regulation does not diminish any contractual obligation that an employer may have undertaken,

[9] The Plaintiffs acknowledge that, subsequent to Erie County and prior to the EEOC's publication of the § 9 exemption regulation, several of the Plaintiff retirees had their retiree medical benefits reduced. App. Vol. II at 58, Pl. Compl. at ¶¶ 11, 13.

or in any way grant the employer the right to (or increase the employer's right to) reduce or terminate such benefits. Nor will this Court's action with respect to the EEOC's exemption regulation have any such effect.

Indeed, the AARP has not even alleged, much less shown, that, in response to the EEOC's exemption regulation, any employer who has been providing wrap program health benefits to Medicare-eligible retirees has reduced or stated an intent to reduce those benefits.

That is not in any way surprising. Prior to Erie County, employers had been proceeding on the understanding that the ADEA allows for plans that provide more substantial health benefits to pre-Medicare retirees than to Medicare-eligible retirees. See supra p. 18, n.5. Thus, 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.

These pressures and incentives to provide benefits to Medicare-eligible retirees exist independent of any ADEA requirements, and will not be affected by the EEOC's § 9 exemption regulation, or this Court's action with respect to that regulation. There is, therefore, no basis to support

Appellant AARP's claim that the EEOC's § 9 exemption regulation will cause any employer providing Medicare-eligible retirees wrap coverage to reduce or eliminate those benefits in order to fund benefits for pre-Medicare retirees.[10]

As the foregoing demonstrates, the EEOC analysis of the likely effects of the Erie County rule, given the existing reality of the labor market, was perfectly sound, and the Commission therefore correctly determined that a limited § 9 exemption is necessary and proper in the public interest, in order to protect the well-being of current and future retirees.

[10] The AARP also argues, inter alia, that the exemption regulation is contrary to the goals of the ADEA because it will encourage the departure of older workers not eligible for Medicare from the workplace. AARP Br. at 40-41. Although the ADEA was clearly designed to promote employment of older Americans desiring such employment, it certainly was not designed to force such older Americans to stay in the workforce, or to lock them into a particular job so as to assure continued benefits. Early retirement packages are an important benefit to older Americans, and their elimination by tying employers' hands with respect to providing early retirees with health benefits, would be a result surely not intended by Congress—and one contrary to the public interest and the interests of older Americans. Indeed, research shows that poor health is one of the greatest factors influencing Americans' decisions about the timing of their retirement, see Older Workers: Labor Can Help Employers and Employees Plan Better for the Future, GAO 06-80, at pp. 19-20 (Dec. 2005), which indicates that many early retirees would be placed in an untenable position if forced to choose between staying in their job or losing health benefits.

3. While the preceding sections suffice to demonstrate that the EEOC action more than passes muster under the APA, we would be derelict if we did not close by rebutting the AARP's argument that the EEOC arbitrarily or capriciously failed to adequately assess the ability of employers to establish and maintain retiree health benefit programs that meet the Erie County rule through the statutory "equal cost/equal benefit" safe harbor.

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 "[a]fter extensive study" that the test simply is not workable in this context. See App. Vol. III at 504 (Notice of Proposed Rulemaking, 68 Fed. Reg. 41542, 41546 (July 14, 2003)); see also App. Vol. II at 163-64 (transcript of EEOC meeting discussing logistical difficulties in applying rule). The Commission's conclusion could not be more sound.

As the AARP correctly notes, per-person premiums for Medicare-eligible retirees will always be much lower than per-person premiums for pre-Medicare retirees, due to the fact that the government covers much of the cost for those eligible for Medicare (and, with the recent passage of the

limited Medicare Part D prescription drug benefit, costs for covering Medicare-eligible retirees may decline further).[11] Thus, bridge programs covering pre-Medicare retirees cannot survive under the "equal cost" safe harbor, and attention will inevitably focus on the more fact-intensive and subjective "equal benefit" standard.

In that regard, comparing the benefits provided by Medicare plus a Medicare supplement program to the benefits provided by a normal bridge program "is an onerous task at best, an impossible one at worst." John Colberg & John Muehl, Erie County Settlement Unsettling, 28 J. of Pension Planning & Compl. 48 (Jan. 1, 2003), 2003 WL 8730627.[12] Pre-Medicare retirees, like active retirees, are typically covered by a PPO (preferred provider) or HMO (health maintenance) plan. See Watson Wyatt Worldwide, Retiree Health Benefits: Time to Resuscitate? at 55-56 (2002)

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[11] The total cost of covering Medicare-eligible retirees, however, is likely to be greater than the total cost of covering pre-Medicare retirees, as the former group is typically much larger than the latter.

[12] The AARP's suggestion at page 50 of its brief that "[f]or more than twenty years, the EEOC's regulations have described how Medicare supplements and 'carve-out' plans satisfy an employer's obligation to provide non-discriminatory benefits," is misleading. The EEOC regulations have never provided specific guidance on how to apply the equal cost or benefit rule in the context of Medicare supplements and carve-outs, and most employers have long proceeded on the assumption that the regulations do not apply to Medicare coordination, see supra at p. 18, n.5.

(hereinafter "Watson Wyatt"). Medicare, however, is for the most part a traditional indemnity plan. Id.[13] And, since PPO/HMO plans differ in fundamental ways from Medicare, Medicare supplement plans must build off Medicare's distinctive indemnity model.

For instance, a common PPO plan for pre-Medicare retirees may impose a per-doctor co-payment rather than an annual deductible, and base co-insurance payments and out-of-pocket payments on whether the insured visits an in-network care provider, or an out-of-network care provider. Id. at 59. A Medicare supplement indemnity plan would instead have an annual deductible and flat co-insurance or out-of-pocket payments, regardless of what care provider is used. Id. The "benefit" to an individual insured would depend on factors such as how often he or she visits a doctor, and what value he or she individually places on being able to choose a care provider without being limited to a defined network of care providers. Moreover, comparing a Medicare supplement program to a bridge program will necessarily require a valuation of certain Medicare-unique benefits,

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[13] Medicare HMOs, such as were at issue in the Erie County case, have sharply declined in availability following changes to the Medicare reimbursement procedures that took effect in 1998. See Watson Wyatt at 56.

such as coverage for certain durable medical equipment not ordinarily covered by private insurance. These examples are only the beginning of the difficulty and uncertainty involved in comparing the benefits offered to Medicare-eligible retirees with those offered to pre-Medicare retirees.

Beyond that, as we have stressed throughout, it is important to remember that no federal statute requires employers to provide retiree health benefits, and that the practicalities cut against employers' doing so. If the equal benefit standard is difficult to apply and uncertain in its result—and it is surely that—it is unlikely that employers would choose the more expensive option that requires application of the equal benefit test, when simpler and less expensive options—reducing benefits for pre-Medicare retirees or terminating the retiree health plan altogether—are available.

CONCLUSION

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 affirm the District Court's order denying the Plaintiffs' Motion for Ex Parte and Temporary Restraining Order, Preliminary Injunction, and Stay of the Effective Date of Agency Regulations, and granting Summary Judgment to the Defendant EEOC.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to 3d Cir. LAR 46.1(e), I, Douglas L. Greenfield, hereby certify that Laurence Gold and I are members in good standing of the bar of this Court.

__/s/ Douglas Greenfield___
Douglas L. Greenfield

CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), I, Douglas L. Greenfield, hereby certify that the Brief of Amici Curiae Labor Organizations in Support of Defendant Equal Employment Opportunity Commission for Affirmance of the District Court Order complies with the type-volume limitation in that the type face is Times New Roman, 14-point font, and the brief contains 6,848 words, based upon the word count of the word processing system used to prepare the brief.

__/s/ Douglas Greenfield___
Douglas L. Greenfield

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on March 3, 2006, I sent the original and ten (10) hard copies of the Brief of Amici Curiae Labor Organizations in Support of Defendant Equal Employment Opportunity Commission for Affirmance of the District Court Order, via overnight mail, to the Clerk for the U.S. Court of Appeals for the Third Circuit at the following address:

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Also on March 3, 2006, I served two (2) copies of said brief via overnight mail on the following parties:

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CERTIFICATE OF ELECTRONIC FILING

I HEREBY CERTIFY that on March 3, 2006, I caused an identical copy of the Brief of Amici Curiae Labor Organizations in Support of Defendant Equal Employment Opportunity Commission for Affirmance of the District Court Order (with electronic signatures) to be filed via e-mail with the Clerk of the U.S. Court of Appeals for the Third Circuit. A virus check of this brief was performed using Symantec Corporate Edition, which was most recently updated on March 2, 2006.

__/s/ Douglas Greenfield___
Douglas L. Greenfield