UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AARP, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	2:05-cv-00509-AB
	)	
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

INTRODUCTION

On March 30, 2005, this Court issued an Amended Memorandum and Order granting Plaintiffs' Motion for Summary Judgment in this action. The Court ruled for Plaintiffs on the ground that the Third Circuit's decision in Erie County Retirees Ass'n v. County of Erie, 220 F.3d 193 (3d Cir. 2000), precluded the Court from considering the question of whether the public interest would be served by the EEOC's exercise of its authority under Section 9 of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 628, to allow employers to coordinate retiree health benefits with Medicare eligibility. AARP v. EEOC, No. 2:05-cv-0509-AB, slip. op. at 7 (E.D. Pa., Mar. 30, 2005) ("Opinion"). This analysis reflects the "genuine confusion in the lower courts over the interaction between the Chevron doctrine and stare decisis principles," that since has been resolved by the Supreme Court. See National Cable & Telecomms. Ass'n v. Brand X Internet Servs., ___ U.S. ___, 125 S. Ct. 2688, 2702 (2005) ("Brand X"). Brand X clarified that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the

agency to fill, displaces a conflicting agency construction." Id. at 2700. This Court's Opinion treated Erie County as such a precedent. Erie County, however, did not address the question presented in the case at bar: whether Section 9 of the ADEA authorizes the EEOC to exempt from liability the coordination of retiree health benefits with Medicare eligibility. Accordingly, Erie County should not have displaced the Chevron analysis set forth in the EEOC's earlier filings. Thus, consistent with Brand X, the Court should vacate its Opinion and analyze the challenged exemption under that Chevron analysis. Under that analysis, the Court should uphold the EEOC's authority to issue the exemption, and go on to enter judgment in favor of the EEOC for the reasons set forth in its earlier filings.

BACKGROUND

Plaintiffs filed this action on February 4, 2005, seeking to enjoin the publication of a final rule that would exempt from the ADEA the practice of coordinating retiree health benefits with Medicare eligibility. See Age Discrimination in Employment Act Proposed Regulation for Retiree Health, 68 Fed. Reg. 41,542, 41,544 (July 14, 2003) ("NPRM"). Count I of the two-count Complaint alleges that the proposed exemption is arbitrary, capricious, and not in accordance with law and therefore in violation of the Administrative Procedure Act ("APA"). Compl. ¶ 53. Count II alleges that the EEOC violated the notice-and-comment requirements of the APA in promulgating the exemption. Compl. ¶ 54.

One of Plaintiffs' principal arguments in support of their motion for preliminary injunction, which was subsequently consolidated with a trial on the merits, was that the exemption constituted an impermissible attempt to overturn the Third Circuit's decision in Erie County. Relying on cases such as United States v. Neal, 516 U.S. 284 (1996), Plaintiffs argued

that "[o]nce the Third Circuit divines a statute's clear meaning, it must adhere to that determination under the doctrine of stare decisis, and judge an agency's later interpretation of the statute against the court's prior determination of the statute's meaning." (Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction, and Stay of the Effective Date of Agency Regulations ("Pls. Mem.") at 9.) Applying Neal to this case, Plaintiffs contended that Erie County's determination that "Congress intended section 623(f)(2)(B)(i) to apply when an employer reduces health care benefits based on Medicare eligibility" meant that "the EEOC has no statutory gap within which to regulate under the 'Chevron Step One' analysis." (Pls. Mem. at 12.)

Consistent with its position in Erie County as amicus curiae, the EEOC did not dispute that the ADEA prohibits the practice of coordinating retiree health benefits with Medicare eligibility. Rather, the EEOC rejected the premise that Erie County's interpretation of Section 4 of the ADEA, 29 U.S.C. § 623, foreclosed the EEOC's interpretation of Section 9 of the ADEA, 29 U.S.C. § 628. (Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction ("Def. Mem.") at 19-20.) As explained in the EEOC's earlier filings, the starting point for the Court's Chevron analysis was not the plain language of Section 4, but the plain language of Section 9, which specifically authorizes the EEOC to

> issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may 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. The EEOC demonstrated that both the plain language of Section 9 and its legislative history, which are not even mentioned in Erie County, plainly authorize the EEOC to

establish "reasonable exemptions" from the ADEA's generally applicable prohibition of age discrimination. (Def. Mem. at 20-23.) The EEOC maintained that because its statutory authority to issue exemptions was clear and unambiguous, the focus of the Court's analysis should be whether the EEOC properly determined that the proposed exemption is reasonable and in the public interest.

After oral argument regarding the proper application of Chevron to this case in light of Erie County, the Court concluded that it need "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." (Opinion at 7.) Despite its preliminary assessment that "[t]he EEOC argue[d] persuasively that without this exemption, employers will reduce or eliminate health benefits for all retirees, no matter what their age," id. at 2, the Court concluded that it was constrained by Erie County from ruling in the EEOC's favor. The Court reasoned that "[b]ecause the Third Circuit held in Erie County that Congress intended the ADEA to apply to the exact same behavior that the EEOC would exempt, the EEOC's challenged exemption is contrary to Congressional intent and the plain language of the ADEA. Bound by Third Circuit precedent, I will grant [Plaintiffs'] motion for summary judgment." Id. at 9.

The EEOC timely filed a notice of appeal on May 31, 2005. On June 27, 2005, the Supreme Court decided Brand X. The following day, the Court convened a conference call to invite the parties to address the impact of Brand X on the Court's decision. The EEOC moved for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) on June 30, 2005. On July 13, 2005, the Third Circuit remanded for this Court to consider the EEOC's motion for relief.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 60(b)(6) authorizes the Court to relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). "'In simple English, the language of the "other reason" clause . . . vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" United States v. Enigwe, 320 F. Supp. 2d 301, 307 (E.D. Pa. 2004) (quoting Klapport v. United States, 335 U.S. 601, 614-15 (1949)). Intervening changes in the law may constitute sufficient grounds for relief under this rule. See id. Vacatur accordingly is warranted here to permit the Court to reach the merits of the case.

ARGUMENT

Brand X clarified that a court applying Chevron is bound by a prior judicial interpretation of a statute only if the prior judicial decision holds that the "statute unambiguously forecloses the agency's interpretation." Brand X, 125 S. Ct. at 2700. Erie County, on which this Court's Opinion was based, however, is not such a judicial decision. Although Erie County ruled that coordination of retiree health benefits with Medicare eligibility constitutes age discrimination under Section 4(a)(1) unless the employer can satisfy Section 4(f)(2)'s equal benefit or equal cost safe harbor, Erie County did not consider whether Section 9 authorizes the EEOC to exempt that practice. Thus, Erie County presents no impediment to the Court's review of the EEOC's interpretation of Section 9 under Chevron. Accordingly, the Court should vacate its Opinion and consider whether Section 9 authorizes the EEOC to exempt the practice of coordinating retiree health benefits with Medicare eligibility from the ADEA.

I. BRAND X MAKES CLEAR THAT ERIE COUNTY DOES NOT FORECLOSE THE EEOC'S INTERPRETATION OF SECTION 9

A. A Judicial Precedent Trumps an Agency Interpretation Only if the Judicial Precedent Unambiguously Forecloses the Agency Interpretation

Brand X confronted the question of whether cable companies selling broadband Internet services are providing telecommunications services within the meaning of the Communications Act of 1934. Brand X, 125 S. Ct. at 2695. Notwithstanding a prior Ninth Circuit decision holding that cable modem service was a telecommunication service, the FCC answered that question in the negative and thereby effectively exempted cable companies from the Communications Act's mandatory common-carrier regulation. Id. In the appeal of that decision, "[r]ather than analyzing the permissibility of [the FCC's] construction under the deferential framework of Chevron, . . . the Court of Appeals grounded its holding in the stare decisis effect of [its prior decision]." Id. at 2698-99. Reasoning that its prior decision overrode the FCC's subsequent contrary interpretation of the same statutory provision, the Ninth Circuit vacated the relevant portion of the FCC's decision. Id.

The Supreme Court reversed, specifically rejecting the Ninth Circuit's treatment of its prior decision:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . . . The better rule is to hold judicial interpretations contained in precedents to the same demanding Chevron step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

Id. at 2700. The Supreme Court emphasized that this holding is consistent with Neal, on which

Plaintiffs here relied for their argument, insofar as "Neal established only that a precedent holding a statute to be unambiguous forecloses a contrary agency construction." Id. at 2701. "Against this backdrop," the Supreme Court explained, "the Court of Appeals erred in refusing to apply Chevron to the Commission's interpretation of the definition of 'telecommunications service' . . . Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." Id. Brand X accordingly teaches that proper application of Chevron here requires the Court to determine whether Erie County unambiguously forecloses the EEOC's interpretation of Section 9.

B. Erie County Does Not Foreclose the EEOC's Interpretation of Section 9

Although this case and Erie County both concern treatment under the ADEA of the practice of coordinating retiree health benefits with Medicare eligibility, the statutory questions presented by the two cases are completely different. Erie County "called upon [the Court of Appeals] to address the applicability of the ADEA when an employer offers its Medicare-eligible retirees health insurance coverage allegedly inferior to the coverage offered to retired employees not eligible for Medicare." Erie County, 220 F.3d at 196. To answer this question, the Court of Appeals analyzed whether Section 4(a)(1)'s coverage of "individuals" extends to retirees, id. at 208; whether Section 11(*l*)'s use of the term "all employee benefits" includes health benefits, id. at 209; and whether Section 4(a)(1)'s prohibition of disparate treatment "because of . . . age" prohibits distinctions based on Medicare eligibility, id. at 211-13. Answering those questions affirmatively, the Court of Appeals held that Medicare-eligible retirees whose health insurance coverage is different from that provided to younger retirees can make out a violation of Section

4(a)(1) unless the employer can satisfy Section 4(f)'s equal benefit equal cost standard. Id. at 217.

Here, in contrast, the statutory question presented is whether Section 9 of the ADEA authorizes the EEOC to exempt that practice. Under Brand X, the Court should not have answered that question by reference to Erie County. Section 9 not only authorizes the EEOC to "issue such rules and regulations as it may consider necessary or appropriate for carrying out [the ADEA]," but it also authorizes the EEOC to "establish such reasonable exemptions to and from any or all provisions of [the ADEA] as it may find necessary and proper in the public interest." 628 U.S.C. § 628. Because the EEOC's exemption authority was not at issue in Erie County, and it consequently contains no analysis of Section 9, that decision has no relevance to the Court's consideration of whether the EEOC was authorized to issue the challenged exemption.

Further, although Erie County did not rely on Chevron, the Third Circuit by no means limited its analysis to the plain language of the provisions of the ADEA at issue. Rather, the Third Circuit clearly recognized that there were divergent arguments that could be made based on the legislative history of the statute, as well as competing policy considerations, which resulted in "a rather difficult task of statutory interpretation." Erie County, 220 F.3d at 208; see also id. at 216 (noting that "it makes good sense and furthers Congress' intent to apply the equal benefit or equal cost principle in this case"). Erie County thus does not "unambiguously foreclose" the EEOC's interpretation of Section 9. See Brand X, 125 S. Ct. at 2700.

II. THE COURT SHOULD UPHOLD THE EEOC'S EXERCISE OF ITS SECTION 9 EXEMPTION AUTHORITY

In the absence of a conclusive judicial interpretation of Section 9, the Court should engage in the familiar two-step Chevron analysis, asking first "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Natural Res. Def. Counsel, Inc., 467 U.S. 837, 842-43 (1984). Only if the Court determines that Section 9 is ambiguous should the Court reach the second step of the Chevron analysis, which asks whether the "agency's answer is based on a permissible construction of the statute." Id. at 843. Thus, the question for the Court is whether Section 9 authorizes the EEOC to issue exemptions, and, if so, whether the EEOC properly determined here that exempting the practice of coordinating retiree health benefits with Medicare eligibility is "necessary and proper in the public interest." See 29 U.S.C. § 628. For the reasons explained in the EEOC's earlier filings, both questions should be answered affirmatively. (See Def. Mem. at 27-40.)

Brand X also counsels in favor of that result in recognizing the importance of administrative flexibility. See id. at 2699. Brand X teaches that administrative agencies are given broad authority under Chevron to revise prior statutory interpretations and administrative policies in light of experience gained over time. An agency thus "'must consider varying interpretations and the wisdom of its policy on a continuing basis'" in light of new factual circumstances or regulatory issues that may arise as the agency discharges its duty to implement an Act. See Brand X, 125 S. Ct. at 2700. Such concepts are embodied in Section 9 of the

ADEA, and particularly in that provision's exemption authority. Where the ADEA's implementation creates undesirable outcomes, Congress vested the EEOC with authority to create reasonable "exemptions" from the Act's substantive provisions that are "necessary and proper in the public interest." 29 U.S.C. § 628. This authority allows the EEOC to reevaluate the impact of the Act's other substantive provisions over time and craft exemptions from their operation when appropriate to advance the public interest. That is exactly what happened here.

After the EEOC began receiving information from various sources suggesting that its adoption of the Erie County holding as a national enforcement policy was having serious, unintended consequences on the provision of employer-sponsored retiree health benefits, the EEOC rescinded its policy to allow further study and evaluation of the relationship between the ADEA and retiree health benefits. NPRM, 68 Fed. Reg. at 41,542. Based on the results of its study of that dynamic, the EEOC determined that it was necessary and proper in the public interest to craft a narrow exemption from the Act that would remove a disincentive to employers who wanted to continue providing health benefits to their retirees. Because that is precisely the kind of evolving agency interpretation that Brand X shields from contrary judicial decisionmaking, the Court can and should uphold the challenged exemption.

CONCLUSION

Because Erie County does not "unambiguously foreclose" the EEOC's interpretation of Section 9, the Court should vacate its Opinion and enter judgment in favor of the EEOC for the reasons set forth in its earlier filings.

Dated: July 14, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

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/s/ Gillian Flory
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Defendant.	)	

ORDER

Upon consideration of Defendant's Motion for Relief from Judgment and the entire record in this case, the Court hereby vacates its Amended Memorandum and Order of March 30, 2005, and enters judgment in favor of Defendant.

IT IS SO ORDERED, this _____ day of _____ of 2005.

_____
ANITA B. BRODY
United States District Judge