No. 06-1463

# *United States Court of Appeals*
## For the Third Circuit

**JAMES H. RUEHL,**
***Plaintiff-Appellee,***

v.

**VIACOM, INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION,**
***Defendant-Appellant.***

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**Appeal from the United States District Court**
**For the Western District of Pennsylvania in Civil Action No. 04-0075**
**Donetta W. Ambrose, Chief United States District Judge**

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**BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT VIACOM'S REQUEST FOR REVERSAL OF THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT**

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April 26, 2006

## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit LAR 26.1, *amicus curiae* the Chamber of Commerce of the United States of America makes the following disclosure:

1) The Chamber is a not-for-profit corporation that has neither a parent nor stockholders.

2) To the best of the Chamber's institutional knowledge, no publicly held corporation that is not a party to the proceeding before this Court has a financial interest in the outcome of the proceeding.

3) This is not a bankruptcy appeal.

/s/ Robin S. Conrad
Robin S. Conrad

Dated: April 26, 2006

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## MISCELLANEOUS

## TABLE OF ABBREVIATIONS AND GLOSSARY

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|---|---|
| ADEA | Age Discrimination in Employment Act |
| Chamber | The Chamber of Commerce of the United States of America |
| EEOC | Equal Employment Opportunity Commission |
| ERISA | Employee Retirement Income Security Act |
| FLSA | Fair Labor Standards Act |
| JA__ | Joint Appendix at page __ |
| OWBPA | Older Workers Benefits Protection Act |
| Ruehl | Plaintiff-Appellee James Ruehl |
| Viacom Inc. | The defendant in this case, now known as CBS Corporation, and formerly the successor by merger to CBS Corporation, formerly known as Westinghouse Electric Corporation. |
| WEC | Westinghouse Electric Corp. |

All emphasis in this Brief is added, unless otherwise indicated.

## INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest federation of businesses, representing an underlying membership of more than three million businesses and organizations, with direct members of every size in every industrial sector and geographic region of the country. Members of the Chamber transact business in all or nearly all of the United States, as well as in countries around the world. An important function of the Chamber is the representation of its members' interests before the courts, Congress, and the Executive Branch.

The questions raised by this case – whether the "single-filing" rule applies following class decertification, whether the OWBPA mandates the provision of specific demographic information as an attachment to a proposed release of ADEA rights, and whether a technically deficient release itself provides a basis, standing alone, for invoking the "equitable tolling" doctrine – are likely to have a significant effect on Chamber members. Because the decision of the district court in this case undermines the important notice and conciliation functions of the administrative charge-filing requirements that serve as prerequisites to judicial suit under civil rights statutes such as the ADEA, stands to impose significant and unnecessary burdens on employers contemplating the use of ADEA waivers in connection with group termination programs, and threatens to expose employers to vast, and

potentially open-ended, liabilities for stale ADEA claims, the Chamber joins Appellant Viacom in asking this Court to correct the erroneous judgment of the district court.

## STATEMENT OF THE ISSUES

1. Whether application of the "single-filing" rule following the denial of class certification or the decertification of a class or collective action would undermine the notice and conciliation functions of the administrative charge-filing requirements that serve as prerequisites to judicial suit under the ADEA.

2. Whether the OWBPA, 29 U.S.C. § 626, requires employers to provide the demographic information specified by the statute as an attachment to a release, or allows that information to be made available at a specified time and place or upon request.

3. Whether a rule that predicates equitable tolling on a technically deficient release of ADEA claims, standing alone, would unfairly expose employers to costly litigation of stale claims.

## STATEMENT OF THE CASE

Appellee James Ruehl served as an accountant in WEC's tax department. Ruehl's employment was terminated, effective August 31, 1998. *Ruehl v. Viacom, Inc.*, No. 04-75, slip op. at 2 (W.D. Pa. Nov. 18, 2004). Ruehl received approximately eight-months' notice of his termination and signed a separation

agreement releasing all claims against WEC, including any claims under the ADEA, in exchange for additional separation benefits. *Id.*

For a release of ADEA claims to be enforceable, an employer must, among other things, "inform[] the individual in writing" as to "the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program." 29 U.S.C. § 626(f)(1)(H)(ii). Although the separation agreement that Ruehl signed acknowledged that he had received this demographic information, it was WEC's practice to provide the demographic data upon request, rather than to attach the information to each employee's proposed release. *See, e.g.*, JA175-85 (Warren Dep.); JA362 (Viacom Interrog. Responses). Ruehl did not actually review any such information and never asked WEC to provide it. JA304-05 (Ruehl Dep.).

At the time of his termination, Ruehl neither filed a charge of age discrimination with the EEOC nor attempted to bring a civil complaint alleging age discrimination. However, on December 21, 1998, Norman Mueller and Harry Bellas, two other former WEC employees, filed charges with the EEOC, alleging that WEC had engaged in class-based age discrimination. *Ruehl*, slip op. at 2. After receiving "right-to-sue" letters, Mueller, Bellas and others filed a class-action

complaint on August 12, 1999, again alleging classwide age discrimination by WEC. *Id*.

On March 14, 2001, the district court conditionally certified two subclasses in the *Mueller* class action. *Mueller v. CBS, Inc.*, No. 99-1310, slip op. at 3 (W.D. Pa. Dec. 12, 2002). That same month, Ruehl asked to join the *Mueller* action as an opt-in plaintiff. *Ruehl*, slip op. at 2.

On December 9, 2002, the district court decertified the *Mueller* subclasses, concluding that the class members were not "similarly situated." *Mueller*, slip op. at 59-70. In March 2003, Ruehl was sent notice that the *Mueller* case had been decertified and that any tolling of administrative and judicial filing deadlines would cease as of March 20, 2003. *Ruehl*, slip op. at 2.

On September 22, 2003, more than five years after he was terminated, Ruehl filed an individual administrative charge of age discrimination. A few months later, he filed this action. *Id.* at 2-3. Viacom sought summary judgment, arguing that neither Ruehl's administrative charge nor his judicial complaint were timely filed. *Id.* at 1-3.

On November 18, 2004, the district court denied Viacom's motion, agreeing that Ruehl's administrative charge and complaint were facially untimely, but holding that the untimeliness could be excused by either the "single-filing" rule or the equitable tolling doctrine. *Id.* at 4-5. With respect to the single-filing rule, the

district court held that, even though the *Mueller* action had been decertified, Ruehl could "piggyback" onto Mueller's and Bellas's EEOC charges and thereby excuse his failure to timely file an individual administrative charge. *Id*. at 5-8. With respect to the doctrine of "equitable tolling," the district court accepted Ruehl's argument that the release that he had signed was invalid under the OWBPA, because WEC had not provided him with statutorily-specified demographic data as an attachment to his release. *Id.* at 9. Even though the only other court to address this question had held that making the demographic data available upon request satisfies the OWBPA, *id.* at 10 n.4 (citing *Hartnett v. Chase Bank of Tex. Nat'l Ass'n*, 59 F. Supp. 2d 605 (N.D. Tex. 1999)), the district court refused to hold that the release that Ruehl signed was consistent with the OWBPA. The court further held that the asserted technical deficiency in the release, standing alone, could permit Ruehl to benefit from equitable tolling. *Id.* at 10-11.

## SUMMARY OF ARGUMENT

The district court's ruling is legally erroneous, is unfair to employers, and should be reversed.

I. The district court's application of the "single-filing" rule to permit an individual plaintiff to "piggyback" onto the charge of a putative class representative, even after conditionally certified ADEA classes have been decertified, undermines the notice and conciliation functions of the EEOC charge-

filing requirements and is unfair to employers. The EEOC charge-filing requirements are designed both to place an employer on notice of claims of discrimination and to permit the EEOC to investigate and conciliate such claims without litigation. The "single-filing" rule excuses a putative class member's failure to comply with the charge-filing requirements, on the theory that a class claim unites various individual claims and therefore that there would be no benefit for the EEOC to investigate and conciliate the individual's claim separately from the class claim. But, after class decertification, that theory no longer applies, as the class claim no longer exists to unite the claims of the non-charging party to those of the charging party. An employer will not be on notice of an individual's claims that are, by definition, dissimilar from the claims asserted by the former class representatives; and, absent certification and/or after class decertification, it would be beneficial for the EEOC to conciliate the claims of individual plaintiffs separately from the claims of the former class representatives. Therefore, the rule adopted by the district court unfairly deprives employers such as Viacom of both proper notice of the individual claims of former opt-in plaintiffs and the opportunity for those claims to be conciliated without litigation.

II. The district court's ruling that the OWBPA requires the specified demographic information to physically accompany any covered release of ADEA claims, rather than to be provided upon request or made available at a central

location, is not mandated by statute, and unnecessarily and unfairly burdens employers. The OWPBA does not specify the manner in which employees are to be provided the specified demographic information, as has been recognized by the EEOC, the only court other than the court below to address the issue, and numerous commentators. Rather, it is entirely consistent with the statutory language for employers to make the information available upon request or at a central location; and employers across this country, including Chamber members, have long provided the statutorily-specified information in these alternative manners. The primary purpose of the OWBPA – to ensure that releases of ADEA rights are knowing and voluntary and made with the benefit of counsel – is fully served by providing the required demographic information upon request or in a central location, since counsel can recommend whether an employee need analyze such information and can review such information with the employee before advising the employee whether to sign a release of claims. Requiring employers to attach automatically the demographic information to each and every covered release could result in confusion for employees and unfair burdens for employers. Indeed, because many employers have long provided the information only on request, declaring such a practice unlawful would result in widespread retroactive liabilities for employers.

III. The district court's further ruling – that a technically defective release could itself give rise to equitable tolling – is both unfair to employers and would have significant harmful consequences. That ruling would foster a substantial amount of litigation, since it would permit potentially hundreds of thousands of laid-off employees to invoke tolling on the basis of technically deficient releases to assert stale claims of age discrimination that employers have had every reason to believe were forfeited for compensation years ago. That ruling would also undermine the incentives for employers to offer generous separation packages to employees in exchange for releases of claims, to the detriment of separated employees and possibly to employers as well.

## ARGUMENT

### I. APPLYING THE "SINGLE-FILING" RULE FOLLOWING THE DENIAL OF CLASS CERTIFICATION OR CLASS DECERTIFICATION UNDERMINES THE CRITICAL NOTICE AND CONCILIATION FUNCTIONS OF THE ADMINISTRATIVE CHARGE-FILING REQUIREMENTS

The district court's ruling in this case – that a former class member who failed to file a timely EEOC charge of discrimination could nevertheless file an individual lawsuit and continue, even after class decertification, to piggyback onto the former class representative's administrative charge, even when the charging party's claim was so dissimilar from the non-filing plaintiff's claim as to defeat class certification – would impose a manifestly unfair burden on employers and is

contrary to the purposes of the charge-filing requirements. A "representative" charge – one on which a piggybacking plaintiff seeks to rely to satisfy his own charge-filing obligations – should "meet[] the purpose of the EEOC filing, which is to provide notice to the employer and an opportunity for conciliation." *Lusardi v. Lechner*, 855 F.2d 1062, 1077 (3d Cir. 1988). Allowing a plaintiff to rely on the charge of a representative plaintiff even after decertification of the class in which the non-filing plaintiff sought to participate would defeat these statutory purposes.

### A. Permitting Piggybacking Outside of a Pending Class Action Fails to Afford Employers Due Notice of Alleged Discrimination and Subjects Them to Unforeseen Liabilities

The notice aspect of the EEOC charge-filing requirement has several facets. "First, it puts the employer on notice that a complaint has been lodged against him and gives him the opportunity to take remedial action." *Bihler v. Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983) (internal quotation marks omitted); *Lusardi*, 855 F.2d at 1077-78 (administrative filing puts employer on notice of "pattern of unlawful conduct transcending an isolated individual claim and that they should act accordingly") (internal quotation marks omitted). Notice "also prevents the employer from later complaining of prejudice, since it has known of the allegations from the very beginning." *Chacko v. Patuxent Inst.*, 429 F.3d 505, 510 (4th Cir. 2005); *see also Geldon v. S. Milwaukee Sch. Dist.*, 414 F.3d 817, 819 (7th Cir.

2005) (EEOC charge meant to give "employer fair notice of the conduct about which the employee is complaining").

Given the salutary purposes of the notice function, it follows that plaintiffs should not be excused from filing a charge unless the notice function is served through alternate means. Thus, under the case law, a putative member of a class action could be excused from filing an administrative charge if the named plaintiff's charge alleges class-wide discrimination, because such a charge gives the employer notice of the class allegations, and at least constructive notice that employees falling within the scope of the class-wide discrimination alleged in that charge may assert similar claims. *See Whalen v. W.R. Grace & Co.*, 56 F.3d 504, 506 (3d Cir. 1995) (holding that single-filing rule applies in class actions when the "representative plaintiff has filed a timely charge with the EEOC that gives the employer notice that class-wide discrimination is alleged"); *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1017 (7th Cir. 1988) (holding that such a charge will "inform and give notice to the employer that the consequences of an individual plaintiff's charge may transcend an isolated individual claim") (internal quotation marks and alterations omitted). In such circumstances, the employer is thus constructively notified of, and given an opportunity to cure, the alleged discriminatory acts that affected those individual plaintiffs encompassed within the class charge, even when they did not file individual charges.

In contrast, where the named plaintiff's putative class action is never certified, or is decertified because the plaintiff sought to aggregate uncommon and dissimilar claims, the administrative charge fails to provide notice to the employer of the claims of the dissimilar individual plaintiffs; in such circumstances, there are no class allegations to unite the claims of the charging party and the non-filing individual plaintiffs. *See, e.g., Whalen*, 56 F.3d at 507 (explaining that the single-filing rule can only apply where there exists "the class action itself, with the attendant requirement of class certification" and that when "plaintiffs choose to bring suit individually, they must first satisfy the prerequisite of filing a timely EEOC charge"); *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1059 (2d Cir. 1990) (implying that plaintiff could not rely on another's administrative charge following decertification for lack of commonality).

For instance, a typical ADEA class charge might allege that a company discriminated against a class of workers in a common and typical way, such as through an official company policy of alleged age-based discrimination. *See, e.g., Lusardi*, 855 F.2d at 1064 (noting that class alleged "nationwide policy and practice of using age as a determinate factor in carrying out salaried workforce reductions"). But such a class charge provides an employer with no real notice of distinct *individualized* grievances. *Cf. Kersting v. Wal-Mart Stores, Inc.*, 250 F.3d 1109, 1118 (7th Cir. 2001) (holding that, to be valid, "EEOC charge and the

complaint must, at minimum, describe the *same conduct* and implicate the *same individuals*") (emphasis in original; internal quotation marks omitted). A plaintiff bringing an individualized, non-class claim should not be able to rely on the putative class charge, but should instead be required to file his own specific individual charge. Otherwise, employers will be unfairly surprised by individual claims that were *never* specified at any point prior to litigation, based on nothing more than class allegations that a court has held do not sustain a class action.

This case illustrates the Chamber's concern. The administrative charges filed by the named plaintiffs in the *Mueller* class action alleged a pattern and practice of discrimination in two specific divisions/business units of Viacom. JA151-54. Thousands of workers from a variety of divisions/business units opted into the conditionally certified classes; those classes were later decertified precisely because the putative class members were *not* similarly situated. *Mueller*, slip op. at 59-60. Ruehl, who at the time of his termination did not work in the divisions/business units specified in the named plaintiffs' charges, sought to have his failure to comply with the EEOC charge-filing requirements excused because he opted into the (eventually decertified) collective action. Allowing Ruehl's suit to proceed on that basis, however, would be unfair to Viacom, since Viacom was never properly placed on notice of Ruehl's specific individual claims by the general class allegations in the Mueller and Bellas charges.

### B. Permitting Piggybacking Outside of a Pending Class Action Contravenes Congress's Preference for Informal Resolution of Employment-Discrimination Claims Without Litigation

Closely tied to the notice function is the conciliation function of the EEOC charge-filing requirements. Both the ADEA and Title VII "share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (citing *Oscar Mayer & Co v. Evans*, 441 U.S. 750, 756 (1979)). "Cooperation and voluntary compliance were selected as the preferred means for achieving this goal." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Once a charge of discrimination is filed, "[i]f the EEOC finds that there is reasonable cause it 'shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.'" *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (quoting 42 U.S.C. § 2000e-5(b)); *see also* 29 U.S.C. § 626(b) (requiring EEOC to "to effect voluntary compliance with the requirements of [the ADEA] through informal methods of conciliation, conference, and persuasion"). Informal administrative conciliation is particularly useful in the ADEA context, where the length of formal litigation "is particularly prejudicial to the rights of 'older citizens to whom, by definition, relatively few productive years are left.'" *Oscar Mayer*, 441 U.S. at 757 (citation omitted).

This conciliation function is a critical component of the statutory scheme for resolving employment discrimination claims, and particularly age discrimination claims. *See Chacko*, 429 F.3d at 510. The EEOC's informal mediation and conciliation functions are highly useful and effective means of resolving such claims without resort to federal litigation. For instance, in 2005, the EEOC received 16,585 ADEA charges, and resolved 14,076 of them. A full 11,403 of those claims – or 81% – were either closed for administrative reasons or found lacking in reasonable cause to believe that discrimination occurred. *See* http://www.eeoc.gov/stats/adea.html (last visited Apr. 25, 2006). Of the 2,673 remaining merits resolutions, however, 2,259 were either settled, voluntarily withdrawn after the employer granted the employee a benefit, or successfully conciliated by the EEOC. *Id.* Only 414 meritorious claims could not be conciliated. *Id.* The EEOC's Title VII track record was comparable: of 10,286 merits resolutions, 8,184 claims were settled, withdrawn with benefits, or successfully conciliated, with only 2,102 unsuccessful conciliations. *See* http://www.eeoc.gov/stats/vii.html (last visited Apr. 25, 2006).

This critical conciliation mechanism is bypassed altogether when a plaintiff does not file his own charge, but instead is allowed to rely on the administrative charge filed by another. In the class-action context, a non-filing plaintiff's failure to allow an opportunity for conciliation is excused on the theory that, if the

employer was unable to successfully conciliate with the representative plaintiff about the class claims, it would be unable to reconcile with similarly-situated plaintiffs about those class claims either. *See Lusardi*, 855 F.2d at 1078 (noting that a class action charge that alleges "discriminat[ion] against persons over forty years old as a class . . . provides sufficient notice to the parties to encourage meaningful conciliation"). But that theory has no continuing application once the class claims no longer are in issue.

The presumption that the failure of conciliation with a representative plaintiff almost certainly would render futile separate conciliation efforts with similarly situated plaintiffs does not apply when a judicial class action brought by that representative plaintiff is dismissed for lack of commonality or dissimilarity. The common subject matter – *i.e.*, the class claim – is no longer in issue and no longer unites the claims of the charging and non-charging parties. There may be little chance for an employer to reconcile with a class of hundreds or thousands of members alleging a firm-wide pattern and practice of discrimination that the employer strongly denies, but if the claims of class-based discrimination are dismissed and each individual claim is to be considered on its own facts, the parties and the EEOC would likely be able to conciliate a substantial number of individual cases. *Cf. Weiss v. Regal Collections*, 385 F.3d 337, 349 (3d Cir. 2004) (noting that named plaintiffs in class action "voluntarily entered into individual settlements

subsequent to class decertification"); *Lusardi v. Xerox Corp.*, 975 F.2d 964, 974 (3d Cir. 1992) (same).

Accordingly, after denial of certification or decertification, there is still a significant prospect that conciliation would be successful and, therefore, the single-filing rule should not apply in those circumstances. This Court's cases so hold. *See Communications Workers of Am. v. N.J. Dep't of Pers.*, 282 F.3d 213, 217 (3d Cir. 2002) (agreeing that class charge is "is of little use" where party "never filed a class action"); *Whalen*, 56 F.3d at 505 ("outside the context of a representative or class action . . . an individual plaintiff must file a timely administrative charge"); *see also Horton v. Jackson County Bd. of County Comm'rs*, 343 F.3d 897, 899-900 (7th Cir. 2003) ("The conciliation process thus is important in limiting the Title VII caseload of the federal courts, and there is a risk that the single-filing doctrine will impede it," particularly when "there is . . . no class action.").

## II. THE OWBPA DOES NOT MANDATE THAT THE DEMOGRAPHIC INFORMATION SPECIFIED IN THE STATUTE BE PROVIDED AS AN ATTACHMENT TO A RELEASE

The Court should also reject the district court's assumption that 29 U.S.C. § 626(f)(1)(h) requires employers to attach the specified demographic information to every release, rather than making that information available for review in a central location or upon request. Such a construction is not mandated by the statutory text, is inconsistent with the purposes and legislative history of the

OWBPA, and is wasteful and unfair. Indeed, such a construction would open a floodgate of potential ADEA cases, as employers across the country have long made the statutorily-specified demographic information available upon request or at a central location.

### A. The Statutory Text Does Not Require That the Specified Demographic Information Be Attached to a Release

Contrary to the district court's ruling, the OWBPA nowhere mandates that an employer provide the specified demographic information to each employee as a physical attachment to a release in order for the release to be valid and enforceable under the ADEA. Instead, Section 626(f)(1)(H) of the OWBPA states that a waiver of rights relating to "an exit incentive or other employment termination program" will not be deemed "knowing and voluntary" unless the employer "informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate" as to "(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program." 29 U.S.C. § 626(f)(1)(H). Nothing in that text requires an employer to "attach" the specified data to a proposed release.

The statutory language actually does not address how the specified demographic information is to be "provided," "furnished," or "given" to employees. Rather, it merely mandates that an employer "inform[]" affected

employees "in writing" as to the demographics of the group of employees eligible for the exit incentive or included within the reduction in force. The statutory text does not describe the form in which the information must be conveyed, apart from the requirement that it be in writing. On the contrary, it leaves employers free to provide that information in ways that practicably suit the specific circumstances, subject to the statutory requirement that the information be conveyed to employees in writing "in a manner calculated to be understood by the average individual eligible to participate." 29 U.S.C. § 626(f)(1)(H). Nothing in the statutory text or its legislative history suggests that the "average individual" employee would be unable to understand and make use of demographic information that is made available for review at a specified time and place, or that is provided to employees upon request.

Indeed, the agency charged with administration of the statute – the EEOC – itself has recognized that the statutory text does not necessarily require that the specified demographic information be physically attached to releases. The EEOC has thus twice sought comment on the issue. *See* 57 Fed. Reg. 10626-02, 10629 (March 27, 1992) (seeking public comment on the question whether the OWBPA "allow[s] the employer to make the [demographic] information . . . available for examination in, for example, its personnel office"); 60 Fed. Reg. 45388-01, 45389 (Aug. 31, 1995) (seeking comment on whether the OWBPA "permit[s] an

employer to satisfy the notification requirements" of the statute "by having the information available for any interested employee in a central location, such as the employer's personnel office, or is it necessary for an employer to provide all relevant information to every affected employee?") Although the EEOC has chosen not to promulgate regulations on the issue, both requests for comment acknowledge that the statutory text does not, by its own terms, require that the demographic information be provided to an employee as an attachment to a release.

The textual ambiguity on this OWBPA issue is not unique. As many courts and commentators have noted, the provisions of the OWBPA governing releases are generally not clear or well-drafted, and are thus quite difficult for employers to administer. *See, e.g.*, *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1259-60 (6th Cir. 1997) (holding that the terms "job title," "job classification," and "organizational unit" found in 29 U.S.C. § 626(f)(1)(H) of the OWBPA are ambiguous, and that "[h]olding an employer strictly accountable for what might be a technical violation of these imprecise terms, with no indication that this would facilitate the provision's purpose and might even hamper it, is untenable and would elevate form over substance"); Gary D. Friedman & Ilene D. Freier, *The Impact of "Oubre" on Employers and Employees*, 2/19/98 N.Y.L.J. 1 (explaining that "many of the other statutory prerequisites in the OWBPA are anything but models of clarity" and that,

because "the answers to these questions [of statutory interpretation] are unclear, even for experts in the field, it is hard to imagine how diligent and knowledgeable employers can assure themselves of total compliance with the OWBPA"); Practicing Law Institute, *Age Discrimination: Recent Decisions by Appellate Courts Under the Age Discrimination in Employment Act* 1105-06 (1997) (noting that "OWBPA left ambiguous many aspects of how to obtain an enforceable release of ADEA claims" and describing the OWBPA provisions governing releases "in group-type terminations" as "not the model of clarity"). The district court's holding that the statutory text must be construed to require that the specified demographic information be attached to the release itself is thus wholly unfounded; the holding rests on a supposed clarity of language that is plainly lacking in the statute.

### B. The Purposes of the OWBPA Are Fully Served by Allowing an Employer to Provide the Specified Demographic Information Upon Request

At the same time, contrary to the district court's holding, the purposes of the OWBPA are fully served by allowing an employer to provide the specified demographic data on request. The OWBPA's drafters sought to ensure that releases of ADEA rights are knowing and voluntary by encouraging any employee considering a waiver of his or her ADEA rights have the opportunity to seek the advice of legal counsel. That statutory purpose is fully served by notifying the

employee of his rights to counsel and the specified demographic information, and then making the demographic information available upon request.

Prior to the OWBPA, the federal courts had wrestled with two issues in interpreting the ADEA: the requirements for a knowing and voluntary waiver of ADEA rights, and whether unsupervised waivers were permissible. *See, e.g.*, P.L. 101-433, S. Rep. 101-263 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537. In 1985, in an attempt to address those unsettled questions, the EEOC issued a proposed rule that would have permitted unsupervised waivers of ADEA rights so long as the waiver was "knowing and voluntary"; the proposed rule enumerated several factors to be considered in determining whether a waiver was in fact knowing and voluntary, including "whether the employee was encouraged to consult with an attorney." H.R. Rep. 101-221, at II.C (Aug. 4, 1989).

Both Houses of Congress proposed bills intended to replace the EEOC's proposed unsupervised-waiver rule. The Senate bill declared as its purpose "to ensure that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA." *See, e.g.*, S. Rep. 101-79, at I (July 19, 1989). The House bill did likewise. H.R. Rep. 101-221, at I (same). *See also, e.g.*, S. Rep. 101-79, at V.B ("The unsupervised waiver must be knowing and voluntary. At a minimum, the waiving party must have genuinely intended to release his ADEA claims and must have understood that he was accomplishing this

goal"). The proposed bills uniformly envisioned the involvement of counsel as providing the most effective means of ensuring that ADEA waivers were indeed knowing and voluntary. As the Senate bill explained:

> [A]ny individual asked to execute a waiver without supervision must be advised in writing to consult with an attorney prior to entering into the settlement agreement. Given the complexity of issues involved and the inherently unequal bargaining position of the parties, the Committee expects the employer to encourage employees to consult with counsel to determine what legal rights they may have. An employee cannot be required to hire an attorney before signing a waiver, but it is vitally important that the employee understand the magnitude of what he or she is undertaking. Counsel is in the best position to provide that understanding.

S. Rep. 101-79, at V.B; H.R. Rep. 101-221, at III.2 (same). *See also* S. Rep. 101-79, at V.B (employee must be given sufficient time "to locate and consult with an attorney if the employee wants to determine what legal rights may exist").

The statutory purposes are thus fully served by furnishing the required demographic information upon request. Counsel can advise an employee whether to request the information at all, and if requested, counsel can review the information with the affected employee. With or without reviewing the demographic information, counsel can advise the employee whether to waive any claim that the employee may have. Any resulting waiver should be considered "knowing and voluntary" under the OWBPA. *See* S. Rep. 101-263, at 34 (noting that demographic information requirements were intended to "permit older workers

to make more informed decisions in group termination and exit incentive programs" and that "in connection with these informational requirements," the bill took "steps to ensure that employees who wish to consult with counsel in interpreting the program will not be unduly deterred from doing so by financial considerations"). Indeed, a contrary interpretation of the statutory language that would instead require the employer to provide the demographic information as a physical attachment to a proposed release could frustrate the purposes of the statute in several ways.

*First*, an interpretation of the OWBPA that requires the specified demographic information to be provided as an attachment to a release would burden employees and their counsel with potentially thousands of pages of unwanted and perhaps useless information. Requiring employers in every instance to provide every affected employee, regardless of interest, with a complete copy of the demographic data would be wasteful and counterproductive. Thus, in response to the EEOC's requests for comments, noted above in Part II.A, the Equal Employment Advisory Council ("EEAC") observed that,

> given the immense popularity of early retirement incentives, many participants will not even be interested in the statistical data, and at most will want the eligibility requirements and time limits. If the employer simply informs all eligible employees that the additional information is available for inspection in the personnel office or other convenient location, those interested will be able to access and examine it.

JA107 (July 27, 1992 Letter from EEAC to EEOC, at 22). As the EEAC recognized, many employees who elect to participate in an exit incentive program, or who are affected by a reduction in force, will have no interest in receiving what would often amount to voluminous data about other employees affected by the program. Their interests are far more likely to lie in the timing and eligibility requirements of the separation program. It plainly does not further the purposes of the OWBPA to overload affected employees with potentially thousands of pages of data that they neither want nor need.

*Second*, such an interpretation of the statutory text would impose significant and unnecessary burdens on employers considering group termination or exit incentive programs. Such a requirement would do nothing to further the purposes of the statute, but would make the use of ADEA waivers in connection with group termination or exit incentive programs particularly expensive – and hence possibly unappealing to employers. In responding to the EEOC's request for comments on this issue, Senator Hatch and Congressman Goodling noted that an interpretation of the statute that requires the provision of demographic information as an attachment to a release would burden employers unnecessarily by, "for example, requiring the employer to send three inches of xeroxed paper to each employee." JA79 (Aug. 17, 1992 Letter from Senator Hatch and Congressman Goodling to EEOC, at 11) (emphasis in original). The EEAC expressed the same concern:

"Depending upon the size of the "group," "class" or "unit," the information involved may be copious and costly to reproduce." JA107 (July 27, 1992 Letter from EEAC to EEOC, at 22). And the National Retail Federation ("NRF") agreed that the OWBPA should be interpreted to permit employers to make demographic information available to employees upon request, "particularly if requirements such as 'job titles' and 'ages of all individuals' required by (H)(ii) are literally interpreted." JA120-21 (Undated letter from NRF to EEOC, at 9-10). As the NRF comment recognizes, a literal reading of the "demographic information" provision would frequently result in requiring the employer to compile and distribute a significant volume of material, at great expense – and often to employees who have no interest in the information and who might get confused and intimidated by the avalanche of paper.

*Third*, the OWBPA was never intended to make ADEA waivers so unpalatable or impractical for employers considering group termination or exit incentive programs that they would seriously consider ceasing to offer separation packages contingent upon ADEA releases rather than attempt to comply with the statute. As Senator Hatch and Congressman Goodling emphasized: "The objective of the statute is *not* to discourage the use of waivers or to make them so burdensome and expensive that it is impractical for an employer to use them." JA79 (emphasis in original).

For these reasons, it is the settled practice of numerous employers nationwide to distribute the specified demographic data to affected employees upon request, or to make it available at a central location. Employers have followed that practice since the passage of the OWBPA. This widespread practice is prescribed by pragmatic considerations in implementing release programs in the context of large workforces, as outlined in the comments to the EEOC. Employers wish to make use of releases in connection with exit incentive programs without assuming the significant burdens and costs of providing voluminous demographic data to uninterested employees. The EEOC rulemaking process encouraged employers to continue making the demographic data available by means other than as an attachment to a release, as the EEOC did not seek to prohibit the practice by regulation. Declaring the practice unlawful now would have widespread retroactive implications for the numerous employers who have followed the practice for many years – without suggestion from the EEOC or the statutory language itself that the practice is unacceptable – and who would, as a consequence, face the risk of significant, uncertain liabilities for ADEA claims that were the subject of bargained-for releases.

Accordingly, this Court should reject the district court's interpretation of the Section 626(f)(1)(H) demographic-information provision.

## III. PREDICATING EQUITABLE TOLLING SOLELY ON A TECHNICALLY DEFICIENT RELEASE WOULD BE HIGHLY UNFAIR TO EMPLOYERS AND WOULD HAVE PERVERSE AND UNINTENDED CONSEQUENCES FOR BOTH EMPLOYERS AND EMPLOYEES

The district court compounded its error in interpreting the OWBPA demographic-information provision by further holding that the supposedly deficient release provided sufficient grounds, standing alone, to toll the limitations period applicable to Ruehl's age discrimination claim. That holding ignores well-established tolling law.

The equitable tolling doctrine provides an exception to the normal limitations rules that applies only in rare circumstances: "'(1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights, or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.'" *Robinson v. Dalton*, 107 F.3d 1018, 1022 (3d Cir. 1997) (internal quotation marks omitted). None of those circumstances is presented by a technically deficient proposed release that itself advises an employee of his ADEA rights, his right to counsel, and, indeed, his right to the demographic information that, by its mere physical omission, by hypothesis made the release technically deficient.

The district court's willingness to extend the "extraordinary" tolling remedy based on a technical defect in an ADEA release ignores the sound rationale that other courts have used in refusing to apply tolling based on a deficient release, without more. These courts have reasoned that a technically deficient release may preclude an employer from relying on the employee's waiver of claims but does itself not excuse the employee's failure to comply with an applicable statute of limitations. *See* Viacom Br. at 43-44 (*citing LaCroix v. Detroit Edison Co.*, 964 F. Supp. 1144 (E.D. Mich. 1996); *Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 123-25 (1st Cir. 1998); *Moss v. Detroit Edison Co.*, 149 F.3d 1184, 1998 WL 322657 (6th Cir. 1988) (table, text in Westlaw)).

A contrary understanding of tolling law would be quite burdensome to employers and courts. As the comments in the EEOC rulemaking illustrate, it is administratively burdensome and costly to physically attach the OWBPA demographics information to each affected employee's separation documents. Because the OWBPA does not by its terms foreclose the provision of the demographic information by other methods, many employers instead have regularly made the demographic information available for review at a specified time and place, or upon request by an employee. If this Court were to determine that such an approach is inconsistent with the statute, it would necessarily follow that every employer who has adopted this practice in connection with an exit

incentive or group termination program has entered into deficient ADEA releases with their former employees. And the Court's further ruling on the availability of equitable tolling would mean, potentially, that *every* affected employee could now bring an age discrimination claim, regardless of how long ago the termination occurred or how long ago the release was signed. The almost certain result would be voluminous and costly litigation, potentially affecting hundreds of thousands of employees and countless employers. Such an outcome runs directly contrary to normal rules governing statutes of limitations and repose and finds no support in the purpose or history of the OWBPA.

Moreover, beyond the demographic-information requirement at issue in this case, the district court's tolling ruling would have the further consequence of potentially resurrecting the stale claims of plaintiffs who had signed releases that suffer from *any* technical deficiency under the OWBPA. As noted in Part II.B above, the OWPBA contains many statutory ambiguities, such as what constitutes a "job title," "job classification," or "organizational unit." *Raczak*, 103 F.3d at 1259-60. Under the district court's ruling, employers could be subject to stale claims as a result of having provided technically-deficient demographic information, even if attached to a proposed release. For example, if the term "organizational unit" were interpreted by a court to mean an entire company or division/business unit, and the employer provided only demographic information

about the employee's specific department, then that employer could be subject to numerous stale ADEA claims for having provided technically-deficient releases. Conversely, if "organizational unit" were interpreted by a court to mean the employee's specific department, and the employer had provided demographic information about the entire division, a court could find that the release was invalid for this reason, and the employer could then be subject to numerous stale ADEA claims.

In light of the statutory ambiguities of the OWBPA, the district court's tolling ruling could ultimately present so many practical concerns to employers that some might decide entirely to forego offering generous separation packages contingent upon releases of all claims against the employer. Such a result would be harmful to employees and possibly to employers as well, and would be plainly contrary to the purposes of the OWBPA.

## CONCLUSION

For the foregoing reasons, the Chamber supports Viacom's request that the district court's order denying summary judgment be reversed.

Respectfully submitted,

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April 26, 2006

## CERTIFICATE OF COMPLIANCE WITH RULE 32A

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), counsel for *amicus curiae* the Chamber of Commerce of the United States of America certifies that Appellant's Brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B).

1. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(ii), Appellant's Brief contains 6,829 words.

2. Appellant's Brief was prepared using Microsoft XP in Times New Roman with a 14-point font.

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## CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Rule 46.1 of the Local Appellate Rules for the United States Court of Appeals for the Third Circuit, Robin S. Conrad, counsel for *amicus curiae* the Chamber of Commerce of the United States of America, certifies that she is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2006, two copies of the foregoing BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT VIACOM'S REQUEST FOR REVERSAL OF THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT were served on the following counsel by overnight commercial carrier (Federal Express):

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I also certify that on April 26, 2006, ten bound copies of the foregoing BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT VIACOM'S REQUEST FOR REVERSAL OF THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT were served by mailing through a third-party

commercial carrier (Federal Express) to the Office of the Clerk, United States Court of Appeals for the Third Circuit, and an electronic brief, in PDF format, was transmitted to the Office of the Clerk via electronic mail. I also certify that the text of the hard copies and the PDF file of the brief are identical.

I further certify that the PDF copy of the foregoing brief was scanned for viruses using the McAfee VirusScan Enterprise 8.0.0 anti-virus program.

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