IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLISON RAY Collegeville, PA 19426, Plaintiff, -against- AT&T MOBILITY SERVICES, INC. 1025 Lenox Park Blvd., NE Atlanta, GA 30319 Defendant.	No. 2:18-cv-03303-TR Magistrate Judge Timothy R. Rice

BRIEF AMICI CURIAE OF AARP AND AARP FOUNDATION IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and 1ST CIR. R. 29(a)(4)(A), amici curiae AARP and AARP Foundation submit the following corporate disclosure statement:

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

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STATEMENT OF INTEREST OF AMICI CURIAE

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. Among other things, AARP and AARP Foundation strive through legal and legislative advocacy to preserve the means to enforce older workers' rights.

AARP and the AARP Foundation's concern in this case is to ensure that the protections created by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990) remain secure. Approximately one-third of AARP members work, or are seeking work, and thus, are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, as amended by the OWBPA. AARP championed the passage of the OWBPA, a law crafted specifically to address the unequal bargaining positions of employers and employees in the midst of a layoff. In addition, AARP participated in the negotiated rulemaking process from December 1995 through July 1996 that culminated in the Equal Employment Opportunity Commission's (EEOC) regulations governing waivers of rights and claims under the ADEA. 29 C.F.R. § 1625.22. This rulemaking process involved representatives of employee rights organizations, employment plaintiffs' attorneys, management attorneys, and industry organizations.

Through AARP Foundation, AARP has filed numerous amicus curiae briefs in federal

courts regarding the proper interpretation and application of the OWBPA. Most significantly AARP participated as amicus curiae in *Oubre v. Entergy Ops, Inc.*, 522 U.S. 422 (1998), a decision that relied heavily on Congress's purpose in enacting the OWBPA in rejecting the argument that an employee could ratify a waiver that violated the Act by accepting and not returning the severance benefits received as consideration for the waiver. Other OWBPA cases AARP participated in as amicus curiae include *Shields v. Gen. Mills, Inc.*, No. 16-954, 2018 U.S. Dist. LEXIS 88 (D. Minn. Jan. 2, 2018); *McCleod v. Gen. Mills Inc.*, 856 F.3d 1160 (8th Cir. 2017); *Suhy v. AlliedSignal*, 44 F. Supp. 2d 432 (D. Conn. 1999); and *Ellison v. United Technologies Corp.*, No. 3:94CV01577, 1995 U.S. Dist. LEXIS 19325 (D. Conn. May 19, 1995).

SUMMARY OF THE ARGUMENT

Congress enacted the OWBPA to ensure that employees make informed and voluntary decisions when asked to release their ADEA rights and claims. Because Congress was particularly concerned about "additional issues" raised by group termination and reduction programs, Congress enacted "additional protection for individuals from whom a waiver is sought" in connection with group termination programs, S. Rep. No. 101-263, at 33 (1990), including the required disclosures at issue here.

Holding that OWBPA disclosures like AT&T's comply with the statute would allow employers to circumvent the OWBPA's "strict, unqualified statutory stricture," *Oubre*, 522 U.S. at 427, intended to protect older workers, by deceptively manipulating the information the statute commands it to provide. The OWBPA specifically requires that the employer provide information about individuals who were terminated, and individuals who were not, thereby enabling terminated employees to assess the strength of any potential age claim being waived. AT&T's disclosures substituted information on individuals who *might* be terminated for

information about individuals *actually* terminated. In doing so, AT&T deprived waiver recipients of the very statistical information Congress wanted them to have to assess the validity of a potential ADEA claim. Information about who merely is at risk of termination as opposed to who is definitively terminated is utterly meaningless to such an appraisal. If the Court holds that such misleading information can satisfy the OWBPA's stringent requirements, the integrity of the law's protections will be significantly compromised.

ARGUMENT

THE INFORMATION REQUIRED BY SECTION 626(f)(1)(H)(ii) IS INTENDED TO ALLOW COMPARISONS BETWEEN THE AGES OF *TERMINATED* AND *RETAINED* EMPLOYEES TO ENSURE THAT A WAIVER OF ADEA RIGHTS AND CLAIMS IS "KNOWING AND VOLUNTARY."

The OWBPA's legislative history forcefully and clearly shows that Congress enacted its protections for contexts precisely like this one. Specifically, Congress was concerned that employers were unfairly obtaining waivers from employees who were in no position to evaluate the strength of the claims they were being asked to relinquish. S. Rep. No. 101-79, at 10 (1989) incorporated by reference S. Rep. No. 101-263, at 15 (1990). Congress's research and hearings revealed that this problem was particularly serious when employees lost their jobs through downsizing.[1] To remedy this problem, "Congress imposed specific duties on employers who seek releases of [ADEA] claims . . . [and] delineated these duties with precision and without qualification. An employee 'may not waive' an ADEA claim unless the employer complies with the statute." *Oubre*, 522 U.S. at 427.

[1] "The problem is particularly acute in large-scale terminations and layoffs, where an individual employee would not reasonably be expected to know or suspect that age may have played a role in the employer's decision, or that the program may be designed to remove older workers from the labor force." S. Rep. No. 101-79, at 9; H. R. Rep. No. 101-664, at 22-23 (1990).

Significantly for this case, the OWBPA provides for enhanced protections when an employer seeks a waiver in connection with an "employment termination program offered to a group or class of employees." 29 U.S.C. § 626(f)(1)(H). In the context of a group termination program, employers must provide employees extra time to consider signing a waiver – 45 days instead of the 21 days in the case of an individual termination, 29 U.S.C. § 626(f)(1)(F)(ii) – and at the start of the 45-day period, the employer must provide each employee asked to sign a waiver with information as to any "class, unit, or group of individuals covered by such program," information about the eligibility factors for the program, and any time limits applicable to the program. 29 U.S.C. § 626(f)(1)(H)(i). Moreover, Congress commanded employers to provide the ages and job titles of all individuals who were included and excluded from the group termination program. 29 U.S.C. § 626 (f)(1)(H)(ii). AARP and AARP Foundation limit their analysis as amici curiae in this case to AT&T's failure to comply with this latter, critical provision in compiling the disclosures.[2]

A. A Waiver That Includes Employees Who *Might Be Terminated* Permits Employers to Materially Misrepresent the Number of Employees *Who Are Terminated* and Therefore Is Not Enforceable.

A waiver is not enforceable unless it is "knowing and voluntary," 29 U.S.C. § 626(f)(1), which requires "at a minimum," *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 380 (3d Cir. 2007), that the waiver meets each of the OWBPA's enumerated requirements. *See Butcher v. Gerber Prods. Co.*, 8 F. Supp. 2d at 314 ("Since the OWBPA establishes minimum threshold requirements, absolute technical compliance with its provisions is required."). In addition, however, "[o]ther

[2] Amici concur with the Plaintiff's argument that the Defendant's description of the decisional unit was not written in a manner calculated to be understood by the average individual eligible to participate in the plan. *See* ECF No. 19-1 at 13-14. The OWBPA commands absolute compliance. *See Butcher v. Gerber Prods.*, 8 F. Supp. 2d 307, 314 (S.D.N.Y. 1998) ("The absence of even one of the OWBPA's requirements invalidates a waiver.")

facts and circumstances may bear on the question of whether [a] waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee . . . ." 29 C.F.R. § 1625.22(a)(3). Moreover, "[t]he waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals." 29 C.F.R. § 1625.22(b)(4).

Congress mandated a straightforward requirement that employers provide waiver recipients with the ages and job titles of others being terminated from the same decisional unit as them, plus the same information about those who would not be terminated. It did so because it believed that:

> . . . collectively these informational requirements will permit older workers to make informed decisions in group termination and exit incentive programs. The principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the ADEA . . . The informational requirements set forth in the bill are designed to give all eligible employees a better picture of these factors.

S. Rep No. 101-263, at 34 (1990). The information is intended to help affected employees assess whether they are being treated differently from employees unaffected by the employer's decision. To make such comparisons, the terminated employees must have information concerning those who were and who were not terminated. Such comparisons are essential to determining whether a person is a victim of employment discrimination because discrimination, by definition, means that persons with a particular characteristic, here age, are treated less favorably than persons outside of the protected class.[3] Without accurate information on

[3] *See also Adams v. Ameritech Servs., Inc*., 231 F.3d 414, 431 (7th Cir. 2000) (affirming that "salary grade [instead of job titles] was too general to furnish the kind of information the statute contemplated," since "[a]s a form of worker protection legislation, the OWBPA demands information that allows people to ascertain whether they are being treated fairly vis-à-vis their peers."); *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1262-63 (6th Cir. 1997) ("At the conceptual level, Congress wanted to be sure that workers who signed a waiver had a clear idea of what they

comparators, an employee's decision to waive his or her ADEA rights is not "a knowing decision" under the statute. 29 U.S.C. § 626(f)(1). *See also* 29 C.F.R. § 1625.22(f)(1)(iv) ("The purpose of the informational requirements is to provide an employee with enough information regarding the program to allow the employee to make an informed choice whether or not to sign a waiver agreement.").

In this case, the Defendant "agree[d]," Def.'s Reply Br. in Support of its Cross-Motion for Summary Judgment, at 3 (ECF No. 22), that it "'**did not** provide to Plaintiff the job titles and ages of those in her Decisional Unit whose employment was [ultimately] terminated versus those who [ultimately] were retained.'" *Id*. (quoting Plaintiff's Mot. For Partial Summary Judgment and in Opposition to Def.'s Cross-Motion for Summary Judgment, at 1 (ECF No. 21)) (emphasis in original). Instead, AT&T gave information on employees who were *not* terminated (because they found other jobs with the Defendant), interspersed with the information on employees who were terminated. That fact invalidates the release because it is undisputed that the Defendant failed to provide the information required by 29 U.S.C. § 626(f)(1)(H)(ii).

The Defendant's disclosures did not give waiver recipients "the age and job-title information that would be relevant if the employees were to bring an age discrimination claim arising out of their termination." *Adams v. Moore Business Forms, Inc*., 224 F.3d 324, 329 (4th Cir. 2000). "The merits of an age discrimination case cannot be adequately evaluated on the basis of [who might be terminated]." *Suhy v. AlliedSignal*, 44 F. Supp. 2d 432, 437 (D. Conn. 1999) (holding that providing a range of ages instead of all ages did not provide sufficient information for an employee to assess the viability of a possible age claim). The ability of

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were giving up, particularly that they had the ability to assess the value of the right to sue for a possibly valid discrimination claim.").

employees to adequately assess whether they have a potentially valid ADEA claim from the disclosures mandated by the OWBPA is the touchstone for compliance with section 626(f)(1)(H)(ii) and the Defendant's disclosures failed to satisfy it.

The Defendant argues that Plaintiff failed to offer any proof that the information provided to her "was inaccurate and misleading," ECF 22, at 1, or "evidence to otherwise suggest that her execution of the waiver was not knowing or voluntary." *Id*. However, plaintiffs need not present any such evidence because the OWBPA "places the burden on the employer to ensure that waivers are knowing and voluntary." *Ruehl*, 500 F.3d at 381. *See also* 29 U.S.C. § 626(f)(3) ("In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth [in the OWBPA] have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary . . . . ."

Information about those at risk of termination, but not about those actually terminated, "simply does not provide sufficient information for an employee to make an informed decision as to whether age discrimination is afoot. To find otherwise is to force older employees to make decisions in the same void of information the OWBPA was enacted to prevent." *Suhy*, 44 F. Supp. 2d at 436.

B. The OWBPA Was Enacted to Prevent Manipulation; Defendant's Interpretation of the OWBPA Facilitates It.

The OWBPA's legislative history evinces Congress's concern that older workers caught up in a reduction-in-force are often especially vulnerable to "unfair and abusive waiver practices." S. Rep. No. 101-79, at 9 (1989). The Senate Committee on Labor and Human Resources pointed to specific abusive practices experienced by older workers offered severance pay in exchange for a waiver of their ADEA rights and claims (along with numerous other rights

and claims) when faced with termination. *Id*. at 9-12. The Committee described older workers' testimony that they "signed waivers without knowing or understanding the facts of any claim they might have." *Id*. at 10. These employees sought information from their superiors, who falsely advised them, without fear of contradiction, that reductions-in-force were "economically motivated" or part of a "general reduction-in-force," when they were actually focused on eliminating older workers. *Id*. at 10-11. These older workers confronted a Hobson's choice: whether to accept whatever severance was available in exchange for a waiver of their rights, or to keep their rights to pursue uncertain and expensive litigation while facing long-term unemployment with no severance and little savings. *See id*. at 11-12. Moreover, employers refused to allow such older workers adequate time to consider that choice. *Id*.

These are the harms Congress enacted the OWBPA to prevent. Yet, the potential for fraud and manipulation embedded in the Defendant's interpretation of section 626(f)(1)(H)(ii) is obvious. Defendant asks this Court to interpret a section specifically intended, and deliberately drafted, to make sure older workers can determine if they might have a viable ADEA claim before waiving it, and twist it to permit employers to include information on which employees "*might*" be terminated. If that interpretation is approved, employers would be free to make termination decisions without having to provide older workers with the accurate information that the OWBPA commands. One can readily understand how this approach could be used to mask age bias in its employment termination program. *See, e.g., Pagliolo v. Guidant Corp*., 483 F. Supp. 2d 847, 857 (D. Minn. 2007) (recognizing the material misrepresentation that resulted from not removing information concerning individuals who were redeployed from the list of terminated employees).

"Congressional intent behind the OWBPA was to protect older workers from age discrimination by employers . . . that goal cannot be achieved if employers do not give their employees meaningful, comparative information." *Behr v. AADG, Inc*., No. 14-CV-3075, 2016 U.S. Dist. LEXIS 99136, at *33 (N.D. Iowa, July 29, 2016). If permitted to include individuals considered for termination, but who were not ultimately terminated, in the list of job titles and ages of terminated employees, employers could easily disguise an age-based scheme to target older workers for termination as an apparent non-discriminatory reduction-in-force. Whether or not such misconduct took place in this case, the potential for such blatant fraud and manipulation is palpable. AT&T's interpretation "would frustrate the statute's practical operation as well as its formal command. . . . We ought not to open the door to an evasion of the statute by this device." *Oubre*, 522 U.S. at 427.

CONCLUSION

For the foregoing reasons, Amici Curiae AARP and AARP Foundation respectfully requests that the Court grant summary judgement in favor of Plaintiff and against Defendant AT&T Mobility Services, LLC on Count II of her Complaint.

Dated: December 20, 2018

/s/ Robert Davitch
Robert Davitch
The Law Office of Sidkoff, Pincus & Green
1101 Market Street
Suite 2700
Philadelphia, PA 19107
rad@SidkoffPincusGreen.com
215-574-0600

Local Counsel for Amici Curiae AARP and AARP Foundation

CERTIFICATE OF SERVICE

I, Robert Davitch, Esquire, hereby certify that a true and correct copy of AARP AND AARP FOUNDATION'S MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT was filed electronically and served via CM/ECF upon the below-listed counsel for Plaintiff and Defendant on December 20, 2018.

Daniel S. Orlow
Susan M. Saint-Antoine
Console Mattiacci Law, LLC
1525 Locust Street, 9th Floor
Philadelphia, PA 19102

Attorneys for Plaintiff

James Bucci, Esq.
Genova Burns LLC
1600 Market Street, Suite 3800
Phildelphia, PA 19103

Brian M. Hayes, Esq.
Paul Hastings LLP
200 Park Avenue, 30th Floor
New York, NY 10166
Admitted Pro Hac Vice

Alex J. Maturi
Paul Hastings, LLP
71 S. Wacker Drive
Chicago, IL 60606
Admitted Pro Hac Vice

Attorneys for Defendant

/s/ Robert Davitch
Robert Davitch
The Law Office of Sidkoff, Pincus & Green
1101 Market Street
Suite 2700
Philadelphia, PA 19107
rad@SidkoffPincusGreen.com
215-574-0600

Local Counsel for Amici Curiae AARP and AARP Foundation