

No. 15-3540

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ELIZABETH MCLEOD, *et al.*,

Plaintiffs-Appellees,

v.

GENERAL MILLS, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Minnesota
Civ. No. 15-cv-494 (JRT/HB), Hon. John R. Tunheim

BRIEF OF AMICUS CURIAE AARP
IN SUPPORT OF PLAINTIFFS-APPELLEES

DANIEL B. KOHRMAN*
LAURIE A. MCCANN
DARA S. SMITH
WILLIAM ALVARADO RIVERA
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
(202) 434-2064 (p)
(202) 434-6424 (f)
dkohrman@aarp.org
Attorneys for Amicus Curiae AARP

**Counsel of Record*

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) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and AARP Insurance Plan, also known as the AARP Health Trust.

AARP has no parent corporation, nor has it issued shares or securities.

Dated: February 16, 2016

/s/ Daniel B. Kohrman
Daniel B. Kohrman*
AARP Foundation Litigation
**Counsel of Record*

Attorneys for Amicus Curiae AARP

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT..... i

TABLE OF AUTHORITIES..... iv

STATEMENT OF INTEREST OF AMICUS CURIAE AARP 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT..... 7

I. The District Court Correctly Concluded that the OWBPA Requires an Employer to Prove in a “Court of Competent Jurisdiction,” Not at Arbitration, that a Release of ADEA Rights or Claims was Knowing and Voluntary 7

 A. Section 626(f)(3)’s Plain Language Contains a Mandatory Congressional Command that a Defendant “Shall” Prove an ADEA Waiver’s Validity in Court 7

 B. Reading § 626(f)(3) to Mean What it Says is Not Inconsistent with Case Law Favoring Arbitration and Finding ADEA Claims Arbitrable 10

 C. The OWBPA’s Legislative History Underscores Congress’ Intent to Ensure Court Supervision of ADEA Waivers 14

II. The OWBPA Applies to Post-Dispute Waivers of ADEA-Guaranteed Rights to a Jury Trial and to Bring Collective Actions 16

 A. Supreme Court Precedent Does Not Foreclose the Conclusion that Defendants Must Prove in Court that Post-Dispute Waivers of So-Called “Procedural” ADEA Rights are Knowing and Voluntary 17

B.	If the OWBPA Does Not Apply in This Context, Employers Do Not Need to Ensure that Individual Employment Agreements Signed During a Layoff are Knowing and Voluntary	21
III.	Congress Enacted the OWBPA Specifically to Protect Vulnerable Older Workers from Being Pressured into Waiving ADEA Rights and Claims in Exchange for Severance Pay, Particularly in the Context of Large-Scale Reductions in Force.....	22
	CONCLUSION.....	27
	CERTIFICATE OF COMPLIANCE	28
	CERTIFICATE OF SERVICE AND FILING	29

TABLE OF AUTHORITIES

CASES

<i>14 Penn Plaza LLC v. Pyett</i> , 556 U.S. 247 (2009).....	<i>passim</i>
<i>CompuCredit Corp. v. Greenwood</i> , 132 S. Ct. 665 (2012).....	7, 8, 10, 11
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991).....	10, 11, 12
<i>Hilde v. City of Eveleth</i> , 777 F.3d 998 (2015).....	2
<i>Hoffman-La Roche, Inc. v. Sperling</i> , 493 U.S. 165 (1989).....	16
<i>King v. Ahrens</i> , 16 F.3d 265 (8th Cir. 1994).....	8
<i>Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach</i> , 523 U.S. 26 (1998).....	11
<i>Lopez v. Davis</i> , 531 U.S. 230 (2001).....	11
<i>Lorillard, Div. of Loew's Theatres, Inc. v. Pons</i> , 434 U.S. 575 (1978).....	16
<i>McLeod v. Gen. Mills, Inc.</i> , Civ. No. 15-494 (JRT/HB), 2015 U.S. Dist. LEXIS 144396, (D. Minn. Oct. 23, 2015).....	<i>passim</i>
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985).....	11, 12

<i>Oubre v. Entergy Operations, Inc.</i> , 522 U.S. 422 (1998).....	<i>passim</i>
<i>Owen v. Bristol Care, Inc.</i> , 702 F.3d 1050 (8th Cir. 2013)	4
<i>Osthus v. Whitesell Corp.</i> , 639 F.3d 841 (8th Cir. 2011)	9
<i>Padash v. INS</i> , 358 F.3d 1161 (9th Cir. 2004)	9
<i>Robinson v Shell Oil Co.</i> , 519 U.S. 337 (1997).....	7
<i>Russello v. United States</i> , 464 U.S. 16 (1983).....	9
<i>Townsend v. Bayer Corp.</i> , 774 F.3d 446 (8th Cir. 2014)	11
<i>Tramp v. Associated Underwriters, Inc.</i> , 768 F.3d 793 (2014).....	2
<i>United States v. Jones</i> , 811 F.2d 444 (8th Cir. 1987)	7

STATUTES AND REGULATIONS

Age Discrimination in Employment Act of 1967 (ADEA), Age, Pub. L. No. 90-202, § 2(a)(3), 81 Stat. 602	1, 23
29 U.S.C. §§ 621-634 (2012).....	1
29 U.S.C. § 623(B)(i)-(ii) (2012)	8
29 U.S.C. § 623(f)(2)	8, 9
29 U.S.C. § 623(f)(2)(A) (2012).....	8
29 U.S.C. § 623(f)(3) (2012).....	4, 9

29 U.S.C. § 626(b)	16
29 U.S.C. § 626(c)(1)	10
29 U.S.C. § 626(c)(2)	16
29 U.S.C. § 626(f)(1) (2012)	<i>passim</i>
29 U.S.C. § 626(f)(1)(c)	3, 18
29 U.S.C. § 626(f)(3)	<i>passim</i>
29 C.F.R. § 1625.22 (2012)	2
Fair Labor Standards Act (FLSA)	
29 U.S.C. § 216(b) (2012)	16
Federal Arbitration Act (FAA)	5, 19
9 U.S.C. § 1, et seq.,	
Fed. R. App. P. 29(c)(5)	1
Older Workers Benefit Protection Act (OWBPA),	
Pub. L. No. 101-433, 104 Stat. 978 (1990)	1, 3, 5, 18
Section 501(c)(4) (1993) of the Internal Revenue Code	
Title II of the OWBPA, Waiver Protection Act of 1989	14
Title 29 of Chapter 6 of the District of Columbia Code 1951	

OTHER AUTHORITIES

113 Cong. Rec. 34742 (daily ed. Dec. 4, 1967)	24
113 Cong. Rec. 7076 (daily ed. May 16, 1967)	24
S. Rep. No. 101-79 (1990)	<i>passim</i>
S. Rep. No. 101-263 (1989)	14, 24

MISCELLANEOUS

Alfred W. Blumrosen, et al., <i>Downsizing and Employee Rights</i> ,	
50 Rutgers L. Rev. 943 (1998)	25

STATEMENT OF INTEREST OF AMICUS CURIAE AARP¹

By the consent of both parties, AARP submits this *amicus curiae* brief in support of Plaintiffs-Appellees' position that the Court should affirm the district court's decision denying the motion to compel.

AARP is a nonpartisan, nonprofit membership organization dedicated to addressing the needs and interests of people age 50 and older. Among other things, AARP strives through legal and legislative advocacy to preserve the means to enforce older workers' rights.

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 (2012), as amended by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990). 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 EEOC's regulations governing waivers of rights and

¹ In accordance with Fed. R. App. P. 29(c)(5), AARP hereby states that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or any person or entity other than AARP, its charitable Foundation, members, and counsel, contributed money intended to fund preparing or submitting this brief.

claims under the ADEA. 29 C.F.R. § 1625.22 (2012). This rulemaking process involved representatives of employee rights organizations, employment plaintiffs' attorneys, management attorneys, and industry organizations.

Through its charitable affiliate AARP Foundation, AARP has filed numerous amicus curiae briefs in federal courts regarding the OWBPA's proper interpretation and application. For example, AARP participated as amicus curiae in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), a decision that rejected the premise that an employee could ratify a waiver that violated the OWBPA by accepting and not returning the severance benefits received as consideration for the waiver. The Eighth Circuit Court of Appeals has recently considered AARP's amicus curiae briefs in two significant age discrimination cases. *Hilde v. City of Eveleth*, 777 F.3d 998 (2015); *Tramp v. Associated Underwriters, Inc.*, 768 F.3d 793 (2014). AARP submitted an amicus brief and participated in oral argument before the district court in this case. *McLeod v. Gen. Mills, Inc.*, Civ. No. 15-494 (JRT/HB), 2015 U.S. Dist. LEXIS 144396, at *9, *18 n.3 (D. Minn. Oct. 23, 2015).

AARP is participating in this case because it will impact the OWBPA's continuing vitality by deciding whether an employer can evade the OWBPA's "strict, unqualified statutory stricture on waivers," *Oubre*, 522 U.S. at 427, by inserting a mandatory arbitration provision into a severance agreement. AARP seeks to ensure

that employers cannot ... shall prove ... in court that [] waiver of rights or claims was knowing and voluntary.

§ 626(f)(1),(3).

SUMMARY OF THE ARGUMENT

As the district court properly recognized, ... made it harder for companies to cajole employees, upon termination, to give up their ADEA rights ... especially in the context of a large-scale group layoff, in which individual employees have little-to-no leverage" [McLeod v. Gen. Mills, Inc., Civ. No. 15-494 (JRT/HB), 2015 U.S. Dist. LEXIS 144396, at *11 (D. Minn. Oct. 23, 2015). Congress accomplished this goal by commanding ... or claim under [the ADEA] unless ... § 626(f)(1) (2012). It set out strict requirements a defendant ... enforceable. 29 U.S.C. § 626(f)(3) (2012). The Supreme Court later reaffirmed the need to construe the statute strictly and literally, ... because the OWBPA ... Entergy Operations, Inc., 522 U.S. 422, 427 (1998).

