UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal No.: 06-12515-AA
District Court No.: 02-23286 CV-AMS

PERCY BONILLA, ET AL.

Appellants,

v.

BAKER CONCRETE CONSTRUCTION, INC.

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR RECONSIDERATION OF JULY 28, 2006 ORDER DENYING LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLEE FOR AFFIRMANCE OF THE DISTRICT COURT DECISION

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District Court No.: 02-23286 CV-AMS

PERCY BONILLA, ET AL.

Appellants,

v.

BAKER CONCRETE CONSTRUCTION, INC.

Appellee.

CERTIFICATE OF INTERESTED PERSONS AND DISCLOSURE STATEMENT

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1. The Chamber of Commerce of the United States of America (*amicus curiae*).

2. Robin S. Conrad, Esq. (Counsel for the Chamber of Commerce of the United States of America and *amici curiae*).

3. Jones Day (Counsel to *amici curiae*).

4. Samuel Estreicher, Esq. (Counsel to *amici curiae*).

5. Theresia Moser, Esq. (Counsel to *amici curiae*).

6. Society for Human Resource Management (*amicus curiae*).

Pursuant to Eleventh Circuit Rule 26.1-1, this Certificate includes only persons and entities omitted from the Certificates contained in Appellants' Initial Brief, and Appellee's Answer Brief.

Society for Human Resource Management does not have a parent company and no publicly held corporation owns 10% or more of its stock.

The Chamber of Commerce of the United States of America does not have a parent company and no publicly held corporation owns 10% or more of its stock.

Dated: August __, 2006

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MOTION OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR RECONSIDERATION OF JULY 28, 2006 ORDER DENYING LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLEE FOR AFFIRMANCE OF THE DISTRICT COURT DECISION

Amici Curiae, the Society for Human Resource Management ("SHRM" or the "Society"), and the Chamber of Commerce of the United States of America ("the Chamber") (together, "*amici*"), respectfully petition this Court to reconsider its July 28, 2006 Order denying *amici's* Motion for Leave to file an *amici curiae* brief in the above captioned matter, filed with this Court on July 20, 2006.[1] *Amici* believe that their brief will be of considerable assistance to this Court in rendering a decision in this case. *Amici* have satisfied the requirements of Federal Rule of Appellate Procedure 29 ("FRAP 29"), providing this Court with a statement of *amici's* interest and explanation why the arguments expressed in this brief are relevant and will aid the Court's disposition of the case. Despite Appellants' contention, this brief is not duplicative of the parties' filings, providing a more detailed analysis of the legislative history and highlighting several public policy considerations that are not adequately presented in the parties' briefs (if presented

[1] Appellee has consented to the filing of the brief *amici curiae*. Appellants have withheld their consent to file the brief *amici curiae*, which necessitated filing a motion for leave.

at all). Moreover, *amici*, as major organizations involved in implementing and adjusting to employment regulations, offer a broader, national perspective extending beyond the immediate pecuniary interests of the parties.

Amici recognize that granting leave to file an *amicus curiae* brief is within the sound discretion of this Court. Voices for Choices v. Illinois Bell Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003). Under FRAP 29, where a party withholds its consent, a motion for leave to file an *amicus* brief must satisfy three elements: (a) an adequate interest; (b) desirability; and (c) relevance. See, Neonatology Assoc., P.A. v. Comm'r of Internal Revenue, 293 F.3d 128, 129, 131 (3d Cir. 2002) (per Alito, J.) (granting, despite one party's denial of consent, motion for leave to file *amicus* brief and noting generally the benefits of *amicus curiae* briefs). As some courts have noted, the basic question underlying these elements is "whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." Voices, 339 F.3d at 545. Here, *amici* satisfy the three requirements of FRAP 29 and present arguments and considerations – not found in the briefs of either party – that will be of aid to the Court in deciding this case. See, Neonatology Assoc., 293 F.3d at 133 ("[I]f a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.").

1. "An Adequate Interest"

First, *amici* have a more than adequate interest in the present case. *Amici* are leading organizations of employers and human resource professionals whose members are directly engaged in implementing the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (2002) ("FLSA"), its Portal-to-Portal Act amendments, 29 U.S.C. §§ 251 *et seq.* (2002) ("Portal Act" or "Act"), and are regularly adjusting their operations to conform with administrative and judicial interpretations of these statutes. The proper disposition of this case will have significant implication for *amici's* members across the country. *Amici* have already expended considerable resources in preparing its brief *amici curiae* in the present matter.

Amicus SHRM is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is both to serve human resource management professionals and to advance the profession to ensure that the human resource function within organizations is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries. SHRM has appeared as *amicus curiae* in several cases including American Assoc. of Retired Persons v. Equal Employment Opportunity Comm., No. 05-4594 (3d Cir.) (merits

decision pending), Taylor v. Progress Energy, 415 F.3d 364 (4th Cir. 2005), and Metropolitan Milwaukee Assoc. of Commerce v. Milwaukee County, 431 F.3d 277 (7th Cir. 2005). The Chamber and SHRM appeared together as *amici curiae* in the principal brief *amici curiae* for the employer community in IBP, Inc. v. Alvarez, 126 S.Ct. 514 (2005).

The Chamber is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber has more than 100 American Chambers of Commerce in 91 countries. The Chamber advocates the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses. For instance, the Chamber has filed *amicus curiae* briefs with this Court in Glover v. Philip Morris USA, No. 05-14219 (merits decision pending), Action Marine, Inc. v. Continental Carbon, Inc., Nos. 06-11311-DD, 06-11312-DD (merits decision pending), and Caley v. Gulfstream Aerospace, 428 F.3d 1359 (11th Cir. 2005). The Chamber respectfully asks this Court to grant the Chamber permission, as it has done before, to provide this Court with the benefit of its perspective and the experience of its members in dealing with wage-hour issues.

2. "Desirability"

Amici have also met the requirement of desirability under FRAP 29(b)(2), which "is open-ended, but a broad reading is prudent." Neonatology Assoc., 293 F.3d at 131. *Amici's* brief is desirable because it includes an analysis of the legislative history of the Portal Act and a variety of policy concerns implicated in this case that are not adequately presented in the briefs of either party. Despite Appellants' contention of duplicability, Appellee's brief devotes little time on both issues: two pages essentially give a timeline of the passage of the Act (Appellee Br., pp. 13-15); and barely over a page is devoted to policy considerations (id. at 20-21). Appellants' brief is, understandably, silent on these matters. By contrast, *amici* devote more than nine pages to the legislative history and intent of the Portal Act amendments (*Amici* Br. pp. 20-29). *Amici*'s brief also explores the relevant examples provided by the Department of Labor's regulations (id. at 10-12), which are barely touched upon in the parties' briefs.

Appellants' argument that this Court's unpublished decision in Burton v. Hillsborough County, Fla., No. 05-10247, 2006 WL 1374493 (11th Cir. May 18, 2006), moots any further consideration of the legislative history of Portal Act is misplaced. First, in Burton, this Court addressed the specific legislative history of the Employee Commuting Flexibility Act of 1996 amendments (which is not squarely at issue here), not the history of the Portal Act as a whole. Id. at *9-12.

Secondly, as *amici's* brief points out, the facts in Burton are readily distinguishable from those at hand, creating a need to assess the history of the Portal Act and the legislative intent as applied to the present facts.

Moreover, *amici* also highlight important policy considerations that inform a proper consideration of the travel time claim in this case. First, *amici* emphasize the likely detrimental impact of a ruling following the logic of Appellants' arguments would have on employer incentives to provide free transportation to the worksite for their employees, as well as the anomalies that will be created among similarly situated employees. (*Amici* Br., pp. 24-26). *Amici* identify national security and public safety concerns which may be undermined by the spectre of compensation claims for delays in getting to work due to government required safety measures. (id. at 27-28).

3. "Relevance"

On the requirement of relevance, *amici's* membership reflects the vast majority of major U.S. employers and human resource professionals who are directly affected by federal wage-hour regulations. They offer a special perspective on the issues in this case and believe that the arguments and policy considerations raised in their brief will aid this Court in its disposition of this case.

As stated by the Court in Neonatology Assoc., 293 F.3d at 133, "a restrictive practice regarding motions for leave to file seems to be an unpromising strategy for lightening a court's work load … [a] court would be well advised to grant motions for leave to file *amicus* briefs unless it is obvious that the proposed briefs do not meet [FRAP] 29's criteria as broadly interpreted." *Amici* desire a voice in this litigation, the outcome of which directly affects *amici* and its membership, and the working public at large. As this Court is aware, its decision could have far-reaching effects in the workplace, making it a case of considerable public interest. *Amici* have expended significant resources preparing its brief and identifying its interest in this matter. We urge this Court to grant us the opportunity to present a series of issues and concerns of *amici* and the public that are not adequately addressed in the parties' briefs.

Thus, *amici* respectfully petition this Court to reconsider its Order denying *amici* leave to file their brief *amici curiae*.

Respectfully submitted,

Dated: August ___, 2006

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of August, 2006, I filed the foregoing with the Clerk of the Court for the Eleventh Circuit and served by U.S. Mail on J. H. Zidell, Esquire, Attorney for Appellants, 300 71st Street, #605, Miami Beach, Florida 33141, and Andrew S. Hament, Gray Robinson, P.A., Attorneys for Appellee, 1800 W. Hibiscus Blvd., Suite 138, Melbourne, Florida 32901.

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