NO. 04-7118

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TED KRUCHOWSKI; GERALD ADAMS; WILLIAM COOPER; TONY FENNELL; ALAN GEBERT; HAROLD GRIFFIN; STAN HARRIS; FORD HENDERSHOT; DARRELL KELLEY; ALAN LEWIS; JAMES LITTLE; JOE PRIVETTE; ED RISENHOOVER; SUSAN ROGERS; LINDA SLABAUGH; JOEL WHITE,

Plaintiffs-Appellants,

v.

THE WEYERHAEUSER COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Oklahoma

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Stephen A. Bokat
Robin S. Conrad
Robert J. Costagliola
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
The Chamber of Commerce
of the United States of America

Ann Elizabeth Reesman*
McGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth St., N.W., Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

*Counsel of Record

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rules 26.1 and 29(c), *Amici Curiae* Equal Employment Advisory Council and The Chamber of Commerce of the United States disclose the following:

1. The Equal Employment Advisory Council and The Chamber of Commerce of the United States have no parent corporations and no subsidiary corporations.

2. No publicly held company owns 10% or more stock in the Equal Employment Advisory Council or The Chamber of Commerce of the United States.

Respectfully submitted:

_____

Stephen A. Bokat
Robin S. Conrad
Robert J. Costagliola
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

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Ann Elizabeth Reesman*
McGUINESS NORRIS
& WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

*Counsel of Record

September 26, 2005

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The Equal Employment Advisory Council ("EEAC"), and the Chamber of Commerce of the United States of America ("the Chamber"), respectfully submit this brief as *amici curiae* in support of Defendant-Appellee The Weyerhaeuser Company's Petition for Panel Rehearing and Suggestion for Rehearing *En Banc*, contingent on the granting of the accompanying motion for leave. The brief urges this Court to grant the petition.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 320 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements.

The Chamber of Commerce of the United States of America ("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 advocates the interests of the

national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

All of EEAC's members, and many of the Chamber's members, are employers covered by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, as well as other labor and employment statutes and regulations. As employers and representatives of employers who are possible defendants in employment-related lawsuits, the *amici's* members are interested in preserving effective, voluntary means of resolving such claims — both actual and potential — without the costs, risks, and other burdens associated with litigation.

Thus, the issues presented in the Petition are extremely important to the nationwide constituency that EEAC and the Chamber represent. The panel ruled that Weyerhaeuser failed to meet the requirements of Title II of the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. § 626(f). The panel's reading of the OWBPA requirements is incorrect and will jeopardize many existing releases of claims for which employers have paid valuable consideration.

EEAC and the Chamber seek to assist the Court by highlighting the exceptional importance the decision in this case has beyond the immediate concerns of the parties.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The panel decision misinterpreted the "eligibility factors" disclosure requirement of the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. § 626(f), by holding that it requires an employer offering a release in connection with a reduction in force to provide the selection criteria utilized in selecting employees for termination. The panel also ruled incorrectly that a release is invalid under OWBPA merely because the company made a *de minimis* error in describing the relevant decisional unit, even though the data the company provided correctly represented the actual force reduction. The case raises questions of exceptional importance for U.S. employers.

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S INTERPRETATION OF THE OWBPA "ELIGIBLITY FACTORS" PROVISION CONFLICTS WITH THE PLAIN MEANING OF THE STATUTE, THE EEOC'S REGULATIONS, AND CURRENT PRACTICE AND PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE

A. The Panel Interpreted OWBPA's "Eligibility Factors" Language Incorrectly

The panel invalidated the Weyerhaeuser release based on an incorrect interpretation of the "eligibility factors" provision of Title II of the Older Workers Benefits Protection Act (OWBPA), 29 U.S.C. § 626(f). OWBPA requires employers offering a severance-and-release program to a group or class of employees to disclose, *inter alia*, "any eligibility factors for such program. . . ."

29 U.S.C. § 626(f)(1)(H)(i) (emphasis added). The panel concluded that Weyerhaeuser's notice was insufficient because it did not provide the factors Weyerhaeuser used in determining which employees would be selected for the reduction in force (RIF) and which would not.

The panel's interpretation contradicts both the language of OWBPA and its regulations. The dictionary definition of "eligible" connotes a *positive* effect. "(1) Qualified, as for an office or position. 2. Desirable and worthy of choice . . . ." *Webster's II New College Dictionary* (Houghton Mifflin 1999). Accordingly, Congress' choice of the words "eligibility factors" points toward those factors that enable the individual to receive a benefit, *e.g.*, severance pay, and not to those that led to the individual's termination from employment. Further, the use of the word "any" implies that there may be programs that do not have eligibility factors at all; otherwise Congress would have used the words "*the* eligibility factors" instead.

Moreover, the statute says that an employer must disclose the "eligibility factors for [the] *program*." 29 U.S.C. § 626(f)(1)(H)(i) (emphasis added). The regulations adopted by the Equal Employment Opportunity Commission (EEOC) interpreting OWBPA[1] further explain that the "program" is the severance-and-release package offered by the employer, not the RIF itself. "A 'program' exists

[1] EEAC participated on the Negotiated Rulemaking Committee that developed the Equal Employment Opportunity Commission (EEOC)'s regulations interpreting

when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees." 29 C.F.R § 1625.22(f)(1)(iii)(B). *See, e.g.*, *Grizzaffi v. DSC Logistics*, 2001 WL 929760, 2001 U.S. Dist. LEXIS 12494, at *9 (N.D. Ill. Aug. 15. 2001) (noting that "[t]he trademark of involuntary termination programs is a standardized formula or package of employee benefits that is available to more than one employee") (citation omitted).

There is no mention anywhere in OWBPA or the regulations of a requirement that an employer must notify employees of the criteria it intends to use in selecting employees for termination. Rather, the EEOC's regulations provide an example of a way in which an employer can provide the required information in a context almost identical to that of the Weyerhaeuser case. In the example, an employer has decided that it must terminate 10 percent of the employees in its Construction Division and is seeking releases from the terminated employees. The regulation states that the employer may provide the required information through a notice worded as follows:

> (A) The decisional unit is the Construction Division.
>
> (B) All persons in the Construction Division are eligible for the program. All persons who are being terminated in our November RIF are selected for the program. * * *

OWBPA. 63 Fed. Reg. 30,624, 30,625 (June 5, 1998) (publication of Final Rule, listing members of Committee).

29 C.F.R. § 1625.22(f)(4)(vii). This appears to be precisely the format Weyerhaeuser followed in its informational notices.

B. The Panel's Decision Jeopardizes Untold Numbers of Releases For Which Employers Have Paid Valuable Consideration, and Thus Creates a Question of Exceptional Importance

When implementing workforce reductions, many employers, including members of EEAC, offer additional benefits to departing employees who agree to release legal claims they might otherwise assert against the employer. Individuals who voluntarily accept this option by signing general releases receive severance benefits, *e.g.*, supplemental cash payments, over and beyond any benefits to which they otherwise would be entitled upon termination of their employment. In return, the employer avoids potentially costly and disruptive litigation and gains relief from the lingering uncertainties and potential liabilities it otherwise might face during the period in which a timely claim can be filed.

Because of the significant, mutual advantages they afford to both employees and employers, such voluntary severance-and-release programs have been used widely in implementing workforce reduction programs throughout the United States. Accordingly, employers throughout the country, relying on the language of the statute and the EEOC regulations, regularly disclose in their OWBPA notices the "eligibility factors for [the] program" in question. In the case of a voluntary

early retirement incentive, the "eligibility factors" may be, for example, that the employee be at least 55 years old and have 20 years of service. In the case of an involuntary termination, such as a RIF, the sole "eligibility factor" typically is that the employee is being terminated. Not surprisingly, the leading treatise on force reductions, which includes an entire chapter on releases, does not even envision the erroneous interpretation of "eligibility factors" adopted by the panel. *See generally* Lipsig, Ethan, *Downsizing* (BNA 1996 & Supp. 1999).

Accordingly, the panel decision potentially invalidates countless releases which employers have prepared in good faith reliance on the statutory language and interpreting regulations, and for which they have given millions of dollars in good and valuable consideration.

II. THE DISCLOSURE NOTICES SATISFIED THE OWBPA REQUIREMENTS NOTWITHSTANDING A *DE MINIMIS* ERROR IN DESCRIBING THE "DECISIONAL UNIT"

The panel also held the releases invalid because it found that the decisional unit the company used in compiling the lists of job titles and ages that it appended to its Group Termination Notice was not the same as the decisional unit the company had identified in the Notice itself. The panel does not appear to be saying that the informational lists the company provided were incomplete in relation to the decisional unit the company *actually used* in making its selections. Rather, the panel acknowledges that the actual decisional unit in this case was a

unit limited to salaried employees of the Valliant Mill who reported to the Mill manager—precisely the group that the company used in compiling the lists it appended to its informational notices.

Accordingly, the notices in this case satisfied the OWBPA requirement of disclosing "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). Since the data provided was correct, the fact that the decisional unit the company actually used did not coincide precisely with the decisional unit it described in the text of its Notice is at worst *de minimis* and does not support invalidation of the release on these purely hypertechnical grounds.

CONCLUSION

For the reasons set forth above, the *amici curiae* Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit that the Petition For Rehearing *En Banc* should be granted.

Respectfully submitted,

_____

Ann Elizabeth Reesman*
McGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth St., N.W., Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

*Counsel of Record

Stephen A. Bokat
Robin S. Conrad
Robert J. Costagliola
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
The Chamber of Commerce
of the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2005, I sent a copy of the Brief *Amici Curiae* of the Equal Employment Advisory Council and The Chamber of Commerce of the United States of America in Support of Defendant-Appellee's Petition for Panel Rehearing and Suggestion for Rehearing *En Banc* via Federal Express Priority Overnight courier delivery to the last known address of the counsel for the parties as follows:

J. Vince Hightower
320 South Boston Avenue
Suite 1030
Tulsa, OK 74103
(918) 592-8800

Kathy R. Neal
William S. Leach
Michael F. Smith
ELDRIDGE COOPER
STEICHEN & LEACH, PLLC
110 West 7th Street
Tulsa, OK 74119
(918) 388-5555

I further certify that an identical copy of the Brief in .pdf format has been transmitted by electronic mail to the Clerk of Court and to all other counsel.

_____
Ann Elizabeth Reesman

ADDENDUM

FRANK GRIZZAFFI, JR., Plaintiff, v. DSC LOGISTICS, Defendant.

No. 00 c 8023

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2001 U.S. Dist. LEXIS 12494

August 9, 2001, Decided
August 15, 2001, Docketed

DISPOSITION: [*1] DSC's motion for summary judgment granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, a 56 year-old former employee, sued defendant former employer pursuant to the Age Discrimination in Employment Act, *29 U.S.C.S. § 621* et seq. (ADEA), alleging one count of age discrimination and one count of retaliation based on his termination and failure to rehire. The employer moved for summary judgment.

OVERVIEW: The employee was terminated when his job was eliminated. He accepted a severance package which included a waiver of any ADEA claim. The issue was whether the employee was barred from bringing his claim based on the release. The employee argued that the waiver did not comply with the requirements of *29 U.S.C.S. § 626*(f)(1)(H) and was unenforceable. The court found that the employee was not terminated as part of a large scale reduction in force, rather he was terminated because of a specific business occurrence. Because there was no evidence that a group termination program existed, the employer was not required to abide by the additional requirements of § 626(f)(1)(H), it had complied with the requirements of § 626(f)(1)(A)-(G), thereby making the waiver knowing and voluntary. Thus, the waiver was enforceable and barred the employee's ADEA claim.

OUTCOME: The court granted the employer's motion for summary judgment.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN1] Summary judgment is proper only when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, we must evaluate the admissible evidence in the light most favorable to the nonmoving party. The party opposing the motion for summary judgment must affirmatively demonstrate that there is a genuine issue of material fact that requires trial. Fed. R. Civ. P. 56(e). A genuine issue for trial exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party. However, if the evidence is merely colorable, or is not sufficiently probative, the court may grant summary judgment.

Labor & Employment Law > Discrimination > Age Discrimination > Defenses & Exceptions

[HN2] An employee can waive a claim under the Age Discrimination in Employment Act, *29 U.S.C.S. § 621* et seq., where the waiver is knowing and voluntary. Such waivers are knowing and voluntary if they comply with the Older Workers Benefit Protection Act, *29 U.S.C.S. § 626* (f).

Labor & Employment Law > Discrimination > Age Discrimination > Defenses & Exceptions

[HN3] A waiver is enforceable under *29 U.S.C.S. § 626*(f) when seven factors are met, four of which are that: (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate; (B) the waiver specifically refers to rights or claims arising under this chapter; (C) the individual does not waive rights or claims that may arise after the date the waiver is executed; (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.

Labor & Employment Law > Discrimination > Age Discrimination > Defenses & Exceptions

[HN4] A waiver is enforceable under *29 U.S.C.S. § 626*(f) when seven factors are met, three of which are that: (E) the individual is advised in writing to consult an attorney prior to executing the agreement; and (F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 within which to consider the agreement; (G) the agreement provides that for a period of at least seven days following the execution of such agreement, the individual may revoke the agreement.

Labor & Employment Law > Discrimination > Age Discrimination > Defenses & Exceptions
[HN5] See *29 U.S.C.S. § 626*(f)(1)(H).

Labor & Employment Law > Discrimination > Age Discrimination > Defenses & Exceptions
[HN6] In any dispute over whether the requirements of *29 U.S.C.S. § 626*(f)(1)(A)-(H) 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. *29 U.S.C.S. § 626*(f)(3).

Labor & Employment Law > Discrimination > Age Discrimination > Defenses & Exceptions
[HN7] In the context of waivers under the Age Discrimination in Employment Act, *29 U.S.C.S. § 621* et seq., there is a fundamental distinction between individually tailored separation agreements and employer programs targeted at groups of employees. Individual separation agreements are the result of actual or expected adverse action against an individual employee. Courts have noted that adverse actions, in the form of job loss, are inevitable for some people in reduction in force situations, and that the corporation is taking the action for general efficiency reasons. The employee understands that the action is being taken against him, and he may engage in arms-length negotiation to resolve any differences with the employer.

Labor & Employment Law > Discrimination > Age Discrimination > Defenses & Exceptions
[HN8] "Program" under *29 U.S.C.S. § 626*(f)(1)(H) goes with "group or class." Congress having thought that recipients of the kind of standardized, often complex, take-it-or-leave-it severance offers tendered in connection with a reduction in force or other reorganization should have more time in which and information with which to decide whether to waive their rights under the Age Discrimination in Employe Act, *29 U.S.C.S. § 621* et seq., than in the case of individually negotiated separations. The trademark of involuntary termination programs is a standardized formula or package of employee benefits that is available to more than one employee.

COUNSEL: For FRANK GRIZZAFFI, JR, plaintiff: Denise M. Mercherson, Attorney at Law, Chicago, IL.

For DSC LOGISTICS, defendant: John W. Powers, Nicole H. Murphy, Seyfarth Shaw, Chicago, IL.

JUDGES: Marvin E. Aspen, District Court Judge.

OPINIONBY: Marvin E. Aspen

OPINION:

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, Chief Judge:

Plaintiff Frank Grizzaffi, brought a complaint against defendant DSC Logistics ("DSC") pursuant to the Age Discrimination in Employment Act, *29 U.S.C. § 621* et. seq. ("ADEA"). He alleges one count of age discrimination and one count of retaliation, based on his termination and the failure of DSC to rehire him months later. DSC moves pursuant to *Federal Rule of Civil Procedure 56* for summary judgment. As explained below, we grant the motion.

BACKGROUND

The following facts are undisputed. Plaintiff was an employee of DSC from September 25, 1984 until March 10, 2000, when he was terminated. Plaintiff was 56 years old when he was discharged. DSC is a third-party logistics provider and it's customers include long-term "public accounts." It's Melrose Park facility, where plaintiff was employed, [*2] consisted of five separate warehouse buildings, known as Buildings 1 through 5. At the time of his discharge, plaintiff was employed as a warehouse supervisor, working on two accounts, North American Logistics ("NALS") and Pillsbury. The NALS account occupied most of Buildings 1 and 2 (sometimes referred collectively to as Building 1) and utilized its own inventory control system called FSG (finished goods system). In the fall of 1999, DSC lost the NALS account and subsequently, Building 1 became almost empty. DSC kept three of the warehouse supervisors - plaintiff, Gerald Williams and Bruno Sowinski - to work on the remaining small public accounts.

In early 2000, DSC learned that it would be losing another large account - Pillsbury. DSC then decided it would not renew its lease on Building 1. DSC consolidated the public accounts of Building 1 and management determined that these accounts could be served on two, rather than three, shifts. DSC then made the decision to keep Bruno Sowinski and Gerald Williams as the two

shift supervisors, and to terminate plaintiff. On or about February 23, 2000, DSC human resources representatives met with plaintiff to advise him that his position [*3] was being eliminated and that he would be terminated effective March 10, 2000. They explained the need to move from three shifts to two due to the loss of business. Plaintiff was offered an individually tailored separation package, along with a release agreement and was advised to consult an attorney. Plaintiff signed the release, which provided that he would receive severance in the amount of $ 9,693.97, vacation pay for unused vacation, and any wages accrued prior to his termination date. It also provided that he was waiving any cause of action under the ADEA and that he had not been discriminated against on the basis of age.

DISCUSSION

[HN1] Summary judgment is proper only when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed.R.Civ.P. 56(c)*. When ruling on a motion for summary judgment, we must evaluate the admissible evidence in the light most favorable to the nonmoving party. *Popovits v. Circuit City Stores, Inc., 185 F.3d 726, 731 (7th Cir. 1999)*. The party opposing the motion for summary judgment must affirmatively demonstrate that there is a genuine issue of material [*4] fact that requires trial. *Fed. R. Civ. P. 56(e)*; *Waldridge v. American Hoechst Corp., 24 F.3d 918, 923 (1994)*. A genuine issue for trial exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. However, if the evidence is merely colorable, or is not sufficiently probative, the court may grant summary judgment. *Id., at 249-50*.

The threshold question presented in this suit is whether the plaintiff is barred from bringing a claim against his former employer, DSC, because of the release that he signed. DSC contends that the release entered into by plaintiff is a valid, binding and enforceable release agreement and that for that reason he waived any ADEA claim he has against DSC.

[HN2] An employee can waive an ADEA claim where the waiver is knowing and voluntary. See *Oubre v. Entergy Operations, Inc., 522 U.S. 422, 139 L. Ed. 2d 849, 118 S. Ct. 838 (1998)*. Such waivers are knowing and voluntary if they comply with the Older Workers Benefit Protection Act ("OWBPA"), *29 U.S.C. § 626* [*5] (f). [HN3] The law provides that a waiver is enforceable when:

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under this chapter;
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
> [HN4]
> (E) the individual is advised in writing to consult an attorney prior to executing the agreement; and
>
> (F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 within which to consider the agreement;
>
> (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the [*6] individual may revoke the agreement...;

The waiver here tracked, almost exactly, these requirements. The release agreement was a simple, three-page document, written in clear language, and specifically referred to claims under the ADEA. Plaintiff's termination claim arose before the agreement was executed. Plaintiff received over $ 9,000 in severance pay for signing the waiver, and acknowledged that this payment was in excess of any payments or benefits to which he was already entitled. Plaintiff was advised to consult with an attorney before executing the release, and did so. Finally, the release provided for a 21-day consideration period and a 7-day revocation period.

The question that we are now faced with is whether this waiver was requested in connection with some sort of exit incentive or other program offered to a group of employees. Section 626(f)(1)(H) states that:

> [HN5]
> if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer...informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to (i) any [*7] class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and (ii) the job titles and ages of all individuals eligible or selected for the program, and all the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

The plaintiff argues that the waiver he signed was requested in connection with an employee termination program, and that because the waiver did not comply with the requirements of section 626(f)(1)(H), the waiver is not enforceable. We must decide whether there is enough evidence of this to create a triable issue. [HN6] In any dispute over whether the requirements of section 626(f)(1)(A)-(H) 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...." *29 U.S.C. § 626*(f)(3).

[HN7] In the context of ADEA waivers, there is a fundamental distinction between individually tailored separation agreements and employer programs targeted at groups of employees. Individual separation agreements [*8] are the result of actual or expected adverse action against an individual employee. *Campbell v. Amana Co., L.P., 125 F. Supp. 2d 1129, 1133 (N.D.Iowa 2001)*. Courts have noted that adverse actions, in the form of job loss, are inevitable for some people in reduction in force situations, and that the corporation is taking the action for general efficiency reasons. *Adams v. Ameritech Services, Inc., 231 F.3d 414, 421 (7th Cir.2000)*. The employee understands that the action is being taken against him, and he may engage in arms-length negotiation to resolve any differences with the employer. *Campbell, 125 F. Supp. 2d at 1133*.

Group termination and reduction programs stand in stark contrast to the individual separation. The Seventh Circuit has said that "[HN8] program" goes with "group or class," "Congress having thought that recipients of the kind of standardized, often complex, take-it-or-leave-it severance offers tendered in connection with a reduction in force or other reorganization should have more time in which and information with which to decide whether to waive their ADEA rights than in the case of individually negotiated separations. [*9] " *Blackwell v. Cole Taylor Bank, 152 F.3d 666, 670 (7th Cir. 1998)*. The trademark of involuntary termination programs is a standardized formula or package of employee benefits that is available to more than one employee. *Campbell, 125 F. Supp. 2d at 1133*.

Here, we have the termination of one, or at the most, two employees. Plaintiff claims that Silvio Restrepo, another supervisor, was also offered a severance package following the loss of the NALS account. He argues that this constituted a "downsizing" program.

The statute does not specify the size of the group or class, although the fewer the people terminated, the less likely it is that the offer to the members is pursuant to a program. *Blackwell, 152 F.3d at 670*. Though no court has found a definition for "group termination program," many courts have determined their existence. *See, e.g., Blackwell, 152 F.3d at 671* (offer to leave was to an entire class of employees, the branch managers, not to individuals and the fact that there were only seven of them did not detract from the "programmatic" nature of the offer); *Oberg v. Allied Van Lines, Inc., 11 F.3d 679, 682 (7th Cir. 1993)* [*10] (finding that "sixty plus employees terminated at one time satisfies OWBPA's definition of a group termination"); *Suhy v. AlliedSignal, 44 F. Supp. 2d 432, 435 (D.Conn.1999)* (finding subsections '(F)(ii) and '(H) applicable to termination of forty employees in connection with reduction in force); *Butcher v. Gerber Prods. Co., 8 F. Supp. 2d 307, 315 (S.D.N.Y.1998)* (finding no dispute that mass discharge (over 300 employees) on one day "constitutes an 'employee termination program' under the OWBPA"); *Burch v. Fluor Corp., 867 F. Supp. 873 (E.D.Mo. 1994)* (finding term applicable to termination of four employees constituting twenty-five percent reduction in force).

Plaintiff was not terminated as part of a large scale reduction in force as occurred in many of the cases cited above. Rather, he was terminated because of a specific business occurrence - the loss of the NALS and Pillsbury accounts. The reduction in force - if it was one - was at the most a reduction of two employees. Even though we have found no cases finding a termination program existed when just two employees were fired, that does not mean that such a scenario is not possible. [*11] However, plaintiff has failed to present any facts to indicate that such a situation existed in the present case. DSC indicates that Restrepo's position was eliminated on December 1, 1999, immediately after the loss of the NALS account, and that plaintiff's job was not eliminated until March 10, 2000, after the loss of the Pillsbury account. Plaintiff does not dispute this fact. Individuals terminated at different times for different reasons can hardly be con-

sidered part of a group. More importantly, a group requires at least two people, and it is therefore impossible, by definition, for us to find that a group termination program existed when plaintiff was the only employee terminated at the time.

CONCLUSION

Because no group termination program existed, DSC was not required to abide by the additional requirements of section 626(f)(1)(H). DSC did comply with the requirements of sections 626(f)(1)(A)-(G), thereby making plaintiff's waiver knowing and voluntary. Because his waiver was knowing and voluntary, making his release agreement valid, he is barred from bringing a claim against DSC under the ADEA. We therefore grant DSC's motion for summary judgment. It is so ordered. [*12]

Marvin E. Aspen, District Court Judge

Dated: 8/9/01

JUDGMENT IN A CIVIL CASE - DOCKETED AUG 14 2001

IT IS HEREBY ORDERED AND ADJUDGED that because no group termination program existed, DSC was not required to abide by the additional requirements of section 626(h)(1)(H). DSC did comply with the requirements of sections 626(h)(1)(A)-(G), thereby making plaintiff's waiver knowing and voluntary. Because his waiver was knowing and voluntary, making his release agreement valid, he is barred from bringing a claim against DSC under the ADEA. We therefore grant DSC's motion for summary judgment.

Date: 8/9/2001