

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)
Chief Judge John R. Tunheim

**APPELLEES' PETITION FOR REHEARING
BY PANEL**

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ATTORNEYS FOR APPELLEES

April 27, 2017

TO: Appellant above named and its counsel of record:

PLEASE TAKE NOTICE that the following petition for rehearing is submitted to the Court this date without request for oral argument.

PETITION

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, Appellees respectfully petition the Court to grant a rehearing and reconsideration of its decision issued on April 14, 2017.

ARGUMENT

Plaintiffs-Appellees respectfully request rehearing because this Court's recent ruling failed to follow on-point guidance from the U.S. Supreme Court about the mandatory standard for determining whether an ADEA claim is covered by a contractual release of claims and because the Court's analysis was based upon premises about the record in this case that are inaccurate. As is discussed further below, in the interest of justice, these material matters should lead to a different result.

1. The Decision Overlooked Supreme Court Precedent Which Directs that the Question of Whether an Employee's ADEA Claims are Covered by a Release is to be Determined Exclusively by Applying the OWBPA Standards.

In Part II(A) of its opinion, this Court decided an issue that had not yet been addressed by the district court: whether the Plaintiffs' ADEA claims that they were

discharged based on age (Counts II-V in the Amended Complaint) are within the scope of the arbitration provision in the Release Agreement.

As the Court noted, the arbitration provision reads as follows:

[I]n the event there is any dispute or claim arising out of or relating to the above release of claims, including, without limitation, any dispute about the validity or enforceability of the release or the assertion of any claim covered by the release, all such disputes or claims will be resolved exclusively through a final and binding arbitration on an individual basis and not in any form of class, collective, or representative proceeding. (Slip Op. at 3 (emphasis added).)

The release of claims provision in the Release Agreement, found on the same page as the arbitration provision, includes language that the release “specifically includes ... claims arising under the Age Discrimination in Employment Act”

Add.23.

After quoting the language of the arbitration provision, the Court determined that the claims in question were subject to arbitration because they were “covered by the release.” Slip Op. at 4.

Plaintiffs respectfully submit that the Court’s contract-law approach to resolving whether Plaintiffs’ ADEA claims are “covered by the release” is inconsistent with the holding in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), the seminal U.S. Supreme Court case addressing the OWBPA. The *Oubre* Court was clear that whether an ADEA claim is covered by a release of claims must be resolved exclusively by applying the OWBPA statutory standards. *Id.* at

427. The *Oubre* Court was emphatic that ordinary contract principles cannot trump the OWBPA standard: “the OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law,” *id.*, and “[t]he text of the OWBPA forecloses the employer’s defense, notwithstanding how general contract principles would apply to non-ADEA claims.” *Id.* The *Oubre* Court also stated, “The OWBPA governs the effect under federal law of waivers or releases on ADEA claims and incorporates no exceptions or qualifications,” *id.* at 427, and that “[a]n employee ‘may not waive’ an ADEA claim unless the waiver satisfies the OWBPA’s requirements.” *Id.* at 426-27 (citing 29 U.S.C. § 626(f)(1)).

Since an employee cannot waive an ADEA claim unless the waiver satisfies the OWBPA’s requirements, an ADEA claim is not “covered by” a contractual waiver of claims if that waiver does not satisfy the OWBPA requirements. This is the most natural and logical reading of the words “covered by” as used in the Release Agreement in the instant case. And if Plaintiffs’ ADEA claims are *not* covered by the release, then those ADEA claims are outside the scope of the arbitration provision.

Accordingly, under *Oubre*, it cannot be determined whether the Plaintiffs’ ADEA claims are “covered by the release” of claims provision in the Release Agreement until it is known whether General Mills can meet its burden to satisfy

the OWBPA requirements. That has not yet occurred in this case, and General Mills has as yet made no attempt to make that showing.

Since *Oubre* was decided, this Court and numerous others have held that contractual releases of claims which stated specifically that ADEA claims were waived were, as a matter of law, ineffective to waive or release ADEA claims solely because the agreements did not satisfy OWBPA standards. *See, e.g., Thomforde v. Int'l Bus. Mach. Corp.*, 406 F.3d 500, 505 (8th Cir. 2005) (“the Agreement is ineffective as a matter of law to waive Thomforde’s rights under the ADEA”); *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1095 (10th Cir. 2006) (“Because the information defendant provided did not meet the strict and unqualified requirement of the OWBPA, the Release is ineffective as a matter of law.”). ADEA claims cannot be “covered by” a contractual release of claims provision unless the agreement was “knowing and voluntary” under the OWBPA.

While it might be considered unconventional that, in this case, the question of whether the Plaintiffs’ claims are within the scope of the arbitration provision requires that a court first decide whether a valid ADEA waiver of claims was executed, that is the standard that General Mills created for itself by drafting an arbitration provision that defines arbitrable claims as those “covered by the release” of claims in the same document. It seems clear from the language that General Mills did not want to empower an arbitrator to rule on claims asserted by a

terminated employee unless such claims were “covered by the release.” In other words, General Mills drafted the arbitration clause as it did to permit arbitration only for claims that had been released. The arbitration clause serves only as a backstop to the release of claims in the agreement.

In this portion of its opinion, the Court relied on a statement about the record that is in fact untrue. The Court wrote that, “Plaintiffs assert, *for the first time on appeal*, that the agreements do not cover their ADEA claims.” Slip Op. at 4 (emphasis added). Plaintiffs respectfully state that that assertion is contradicted by the record. That the Plaintiffs’ claims were outside the scope of the narrow arbitration provision at issue was the *first* argument presented by Plaintiffs’ counsel at the hearing in the district court on General Mills’ motion to compel arbitration. (Doc. 66 (hearing transcript) at 19-20 (“If ADEA claims are not covered by the release because the release isn’t valid for a failure to comply with the specific provisions of the OWBPA, then there is no claim to be arbitrated.”).) General Mills misled the Court by misstating in its Reply Brief: “Plaintiffs never argued that the arbitration clauses did not cover the merits of their ADEA claims.” General Mills Reply Brief at 22. While this Court has said that, as a “general rule,” it does not consider arguments made by an appellant for the first time in a reply brief, *e.g.*, *Akeyo v. O’Hanlon*, 75 F.3d 370, 374 n.2 (8th Cir. 1996), in this instance the Court did not follow its maxim. Unfortunately, the Court’s opinion, as

it now reads, suggests incorrectly that Plaintiffs' counsel did not raise this issue in a timely manner.

2. The Court Misapprehended the Record by Finding that General Mills had Not Asserted that the Plaintiffs had Waived their ADEA Claims.

In Part II(B)(2) of the opinion, the Court, addressing an issue that had not previously been raised by any party, concluded that the district court lacked jurisdiction over the former employees' declaratory judgment claim because "General Mills has not asserted the validity of the substantive ADEA claim waivers." Slip Op. at 9. The Court said that "[i]n moving to compel arbitration of the former employees' ADEA claims, General Mills did not assert the validity of a waiver of 'the statutory right to be free from workplace age discrimination.'" *Id.* at 7.

The former employees respectfully submit that these statements about the record are not accurate. On March 5, 2015, on the first page of its original Memorandum in support of its Motion to Dismiss and to Compel Arbitration, General Mills said: "The Release Agreement included a release of all claims, including those under the Age Discrimination in Employment Act (ADEA)." (Doc. 7 at 1.)

On November 20, 2015, after the district court had denied its motion, General Mills asserted in its Answer that "each plaintiff voluntarily signed a valid

Release Agreement.” (Doc. 81 at 3.) It also asserted the affirmative defense of waiver in response to each Plaintiff’s ADEA claims. (*Id.* at 58, ¶ 287 (“Plaintiffs’ ADEA claims are barred because each Plaintiff accepted valuable consideration in exchange for his or her respective signed Release Agreement and valid waiver of his or her ADEA claims.”).)

In addition, in November 2015, shortly after the Answer was filed, and before proceedings in the district court were stayed, Plaintiffs filed with the district court a motion for partial summary judgment, which requested an order holding the purported waivers of ADEA claims invalid as a matter of law under the OWBPA. (Doc. 72.)

Since General Mills was clearly asserting from the outset of this case that the Plaintiffs had waived their ADEA claims, the district court was presented with an actual controversy on this issue, and it therefore had jurisdiction to rule, as it did, on the Plaintiffs’ declaratory judgment count.

CONCLUSION

“The purpose of a petition for rehearing ... is to direct the Court’s attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result.” *NLRB v. Brown & Root, Inc.*, 206 F.2d 73, 74 (8th Cir. 1953); *see Lors v. Dean*, 746 F.3d 857, 859-60 (8th Cir. 2014) (granting rehearing to consider

impact of Supreme Court decisions not previously considered); *Taylor v. Norris*, 401 F.3d 883, 884 (8th Cir. 2005) (granting rehearing because prior opinion misconstrued a point of law).

In Part II(A) of its opinion, the Court failed to follow the holding of *Oubre* that a “release can have no effect on [an] ADEA claim unless it complies with OWBPA requirements.” 522 U.S. at 427. In Part II(B)(2), the Court relied on a mistaken assumption that General Mills had not asserted that the ADEA claim waivers are valid.

Appellees respectfully request that a rehearing be granted, that this Court’s opinion dated April 14, 2017, be withdrawn, and that the Court enter a new opinion that:

- (i) directs that the issue of whether the Plaintiffs’ ADEA claims are within the scope of the arbitration provision is reserved until such time as it is determined whether General Mills can meet its burden to prove in court that the purported releases of ADEA claims were “knowing and voluntary” under the OWBPA standards, and
- (ii) affirms the judgment of the district court on the former employees’ declaratory judgment count that a “court of competent jurisdiction,” not an arbitrator, must determine the validity of

General Mills' waiver defense to the former employees' ADEA claims.

SNYDER & BRANDT, P.A.

Dated: April 27, 2017

s/ Craig A. Brandt

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CERTIFICATES OF COMPLIANCE AND SERVICE

As counsel for the Appellees, I hereby certify that this petition for rehearing is not frivolous and is presented in good faith and not for delay.

I also certify that this Petition for Rehearing by Panel has been scanned for viruses and is virus-free, and that:

(a) On April 27, 2017, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system; and

(b) All participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

s/ Craig A. Brandt

Craig A. Brandt
Counsel for Appellees