

Medicare and Retiree Benefits – The Impact of *AARP v. EEOC*

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With its denial of a writ of certiorari, the United States Supreme Court by default approved a new exemption to the Age Discrimination in Employment Act (ADEA) authorizing employers to reduce retiree health benefits for anyone 65 or older (i.e. the Medicare-eligible). With this decision – or lack thereof – age discrimination laws are the latest victim of the increasing costs of health insurance.

At issue in the case *AARP v. EEOC* was a proposed regulation by the Equal Employment Opportunity Commission (EEOC) allowing employers to reduce or eliminate health care benefits for retirees aged 65 or older while maintaining such coverage for younger retirees.¹ *AARP* argued that the rule was not consistent with the language of the ADEA or the Older Workers Benefit Protection Act (OWBPA), a statement that the EEOC did not challenge directly. Instead the EEOC said it had sufficient exemption-making authority to allow it to adopt the rule regardless of the statutory language.²

The case was heard in the Eastern District of Pennsylvania, where the court originally found in *AARP*'s favor. In *AARP I*, *AARP* argued that the EEOC's rule would in effect allow the very sort of age discrimination Congress was trying to prohibit through the ADEA and OWBPA.³ The EEOC stated that the rule was necessary to ensure that employers would continue giving benefits to those most in need – those without access to Medicare – given rising premium costs.⁴

The *AARP I* court granted *AARP*'s request for declaratory judgment and a permanent injunction against the rule based on its reading of a Third Circuit case, *Erie County Retirees Ass'n v. Court of Erie*, 220 F.3d 193 (3d Cir. 2000). As noted by the *AARP I* court, the Third Circuit reviewed the ADEA and OWBPA in *Erie County* to determine the exact question at issue in *AARP I* – whether retiree health benefits could be reduced once retirees became Medicare-eligible. The Third Circuit found that this was clearly prohibited by the ADEA.⁵ This ruling became the basis of an EEOC enforcement policy, which in turn showed the EEOC that requiring the same health benefits for all was causing many employers to eliminate benefits for all retirees. This motivated the EEOC to propose the rule being opposed by *AARP*.⁶ While the *AARP I* court was not completely unsympathetic to the EEOC's reasoning, it felt itself confined by the *Erie County* ruling.⁷ Interestingly, it does not appear that the EEOC ever argued that it was allowing different benefits based on something other than age. While the EEOC rule was linked to those age 65 or older, it was really focused on Medicare eligibility and not just age.

¹ *AARP v. EEOC*, petition for cert., 2007 WL 4142609 (US, Nov. 19, 2007) (No. 07-662), *2.

² *Id.* at *3.

³ *AARP v. EEOC*, 383 F.Supp.2d 705 (E.D.Pa., 2005), 706.

⁴ *Id.*

⁵ *Id.* at 707.

⁶ *Id.*

⁷ *Id.* at 709-711.

The EEOC filed a timely appeal of the *AARP I* decision, an appeal that was still pending when the Supreme Court made its *National Cable and Telecommunications Association v. Brand X Internet Services* decision⁸ (hereinafter “*Brand X*.”). Because of the impact *Brand X* had on the *AARP I* ruling, the district court gave leave to the EEOC to file a motion for relief from that opinion. The Third Circuit appeal was stayed, and the case was returned to the Eastern District of Pennsylvania court.⁹

After reviewing the procedural history of the case, the court turned to the *Brand X* decision, which stated that the only binding judicial precedent in agency interpretation cases are those that hold the statutory language was unambiguous and clearly foreclosed the agency’s interpretation. Decisions relying on a best reading of the statute should not, therefore, be considered binding precedent. *Brand X* made a similar change the first step in judicial analysis of agency interpretations – instead of looking to see if the statutory language addressed the precise issue courts now need to see if the statutory text allows for only one possible interpretation.¹⁰

Given the new analysis required, the district court needed to re-evaluate the impact of the *Erie County* decision on the case at hand. The court determined that the *Erie County* decision spoke to the best interpretation of the statute, not the only interpretation.¹¹ The *AARP II* court therefore needed to review again the EEOC’s proposed rule and the arguments for and against it. The *AARP II* court found that the EEOC was arguing that Congress delegated complete exemption authority to the EEOC in the ADEA, including the power to exempt actions specially addressed in the statute. The *AARP II* court found that this was too far-reaching – the EEOC could propose rules to fill in gaps in the statute but not to overrule statutory language.¹² Looking again at the analysis in the *Erie County* decision and its own review of the relevant ADEA and OWBPA, the *AARP II* court allowed for more than one interpretation and that the EEOC could therefore interpret the statute through rule. Following this analysis, the *AARP II* court ruled for the EEOC and vacated its *AARP I* decision.¹³

AARP unsuccessfully appealed the ruling to the Third Circuit. The Third Circuit agreed with the EEOC’s argument about the extent of authority delegated to the agency by Congress – i.e. the EEOC could exempt actions from enforcement under the ADEA even if doing so appeared to contradict the ADEA’s plain language.¹⁴ The Third Circuit found that Congress intended to allow EEOC to create any and all exemptions it saw fit so long as they were reasonable, necessary, and in the public interest.¹⁵

⁸ The decision is available at 545 U.S. 967, 125 S.Ct. 2688 (2005).

⁹ *AARP v. EEOC*, 390 F.Supp.2d 437 (E.D.Pa., 2005), 442.

¹⁰ *Id.* at 445-446.

¹¹ *Id.* at 447-450.

¹² *Id.* at 454.

¹³ *Id.* at 462-463.

¹⁴ *AARP*, petition, *supra* note 1, at *8.

¹⁵ Reesa Benkoff, *High Court Will Not Decide if Exemption Allowing Benefits Coordination Violates ADEA*, TEACHING HOSPITAL UPDATE, AMERICAN HEALTH LAWYERS ASSOCIATION, March 24-28, 2008 (copy on file with author).

After AARP's motion for a rehearing en banc was denied, it filed the petition for certiorari.¹⁶ AARP focused on the split between the circuits about the required analysis in agency interpretation cases and the unbridled power awarded to the EEOC under the Third Circuit's reasoning.¹⁷ The Supreme Court denied the petition and provided no further comment on the case.¹⁸

With that denial, the rule change was allowed to remain in effect. It has been estimated that the rule impacts millions of workers and the companies for whom they once worked.¹⁹ Company and labor union representatives supported the decision as a way to allow employers to provide retiree health benefits at a lower cost. An AARP survey from 2004 had found that 49 percent of retirees between the ages of 55 and 64 had health insurance through their former employers,²⁰ a figure that highlights the importance of retiree health benefits for non-Medicare eligible retirees.

The Third Circuit opinion reeks of the activist judges' hand so often lamented in the news media and by politicians. The court decided, in essence, that the EEOC's rule was good policy and so it could be enacted. To do so required finding that Congress intended to allow the EEOC to overrule statutory language if doing so was in the public interest. Even if such a level of delegation is not seen as problematic under the separation of powers doctrine, it is clearly suspect to suggest Congress put language in a bill to allow an administrative agency to change the scope of the statute whenever the agency felt that was advisable. Rulemaking authority is generally granted to allow interpretation of statutory language, not to erase such language.

The end result may be the best one for all involved – a greater likelihood of continued health benefits for retirees who are not yet eligible for Medicare. The rule acknowledges that those 65 and older have access to health coverage under Medicare and therefore do not have the same level of need for health coverage that retirees under 65 do. Giving employers the flexibility to cut off retiree health benefits at 65 allows them to reduce their costs substantially. This makes providing health coverage to those without a clear alternative – i.e. those who are not Medicare-eligible – more economically feasible. The benefit of the rule in the real world and its potential positive impact on access to health care for younger retirees makes the rule a good one; it does not make it a legal one, however.

The EEOC's argument about why it proposed and passed the rule is strong, but that does not mean it has the authority to adopt the rule. Any number of executive agencies at the

¹⁶ AARP, petition, *supra* note 1, at *10.

¹⁷ *Id.* at *11-28.

¹⁸ AARP v. EEOC, -- S.Ct. --, 2008 WL 754343 (US 2008).

¹⁹ Mark Anderson, *Justices Reject AARP Appeal*, THE WALL STREET JOURNAL, March 24, 2008, available at: http://online.wsj.com/article/SB120636180532359097.html?mod=googlenews_wsj (last accessed March 27, 2008).

²⁰ David Savage, *Supreme Court allows retiree benefit cuts*, LOS ANGELES TIMES, March 25, 2008, available at: <http://www.latimes.com/news/printedition/asection/la-na-scotus25mar25,1,5568623.story> (last accessed March 26, 2008).

federal and state levels undoubtedly have ideas of changes that could be made in the public interest if only they could ignore existing statutory language. Given that the agencies have more expertise implementing and administering the program created by legislatures, the agency rules would likely streamline many programs and benefit many Americans. If we let this happen, we are saying the ends always justify the means, no matter what the impact to our government and legal system may be. If the executive branch has the level of power the EEOC argued it did and the Third Circuit allowed it to have, than the legislative branch has little or no purpose and our checks and balances system is utterly worthless. It seems unlikely that such a system is what the founding fathers had in mind, no matter how onerous health care costs might be.

Health Law Perspectives (April 2008), available at <http://www.law.uh.edu/healthlaw/perspectives/homepage.asp>