IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, et al.,	)	
	)	
Individually and on behalf of	)	
all others similarly situated,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	CASE NO. 07-cv-2602
v.	)	
	)	
EMBARQ CORPORATION et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR APPROVAL OF A COLLECTIVE ACTION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, AND AN ORDER REQUIRING DEFENDANTS TO PROVIDE CONTACT INFORMATION FOR THE POTENTIAL MEMBERS OF THE COLLECTIVE ACTION AND TO ASSIST IN PROVIDING THE NOTICE

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A. The Claim at Issue

Paragraph 30 of the Second Amended Complaint at pp. 27-28 sets forth the remaining[1] practices of defendants that plaintiffs challenge under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq.:

> 30. On or about July 26, 2007, Embarq informed Plaintiffs and the members of the Class that it was unilaterally terminating or reducing their company-paid . . . life insurance benefits and/or subsidies. The termination of life insurance benefits that were provided to the members of the VEBA Sub-Class, who were participants in Defendant Carolina Telephone & Telegraph Company Voluntary Employee Beneficiary Association, including Plaintiffs Fulghum, Daniel, Hollingsworth, Dorman, Joyner, Barnes, Games and Bullock, became effective on September 1, 2007. The . . . reduction of the amount of life insurance benefits provided to all other Plaintiffs and Class members, became effective on January 1, 2008.

The reduction or elimination of life insurance benefits did not differ by job category, municipality in which the employee worked, or date of retirement, but was relatively standard across the retirees. Exhibit A hereto is a copy of the July 26, 2007, Notice defendants sent to retirees who were not participants in Defendant Carolina Telephone & Telegraph Company's Voluntary Employee Beneficiary Association, or "VEBA." Exhibit B hereto is a copy of the July 26, 2007, Notice defendants sent to retirees who were participants in the VEBA.

B. The ADEA Defendants

All of the representative plaintiffs named Embarq Corporation, Carolina Telephone and Telegraph Company, Sprint Nextel, and Embarq Mid-Atlantic Management Services Company as the respondents in their original or amended EEOC charges.

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[1] The December 2, 2008 Memorandum and Order (Doc. #45), dismissed with prejudice Plaintiffs' ADEA claims as to the elimination of defendants' health insurance and drug benefits for Medicare-eligible retirees. Plaintiffs do not waive these claims, but intend to appeal this dismissal at an appropriate time.

C. Approval of the ADEA Collective Action

Plaintiffs seek approval of an opt-in collective action under the collective-action provision of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which has been incorporated into the Age Discrimination in Employment Act by 29 U.S.C. § 626(b). Sec. 216(b) provides in pertinent part:

> **(b) Damages; right of action; attorney's fees and costs; termination of right of action**
>
> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. . . .

29 U.S.C. § 216(b). Section 626(b) in turn provides:

> **(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion**
>
> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. . . . Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect

> voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

29 U.S.C. § 626(b).

As the Tenth Circuit stated in *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001), *cert. denied*, 536 U.S. 934 (2002):

> Class actions under the ADEA are authorized by 29 U.S.C. § 626(b), which expressly borrows the opt-in class action mechanism of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (1994). Section 216(b) provides for a class action where the complaining employees are "similarly situated." Unlike class actions under Rule 23, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.*

(footnote omitted.) The Court adopted the *ad hoc*, case-by-case approach to determining whether the proposed representative plaintiffs and opt-in plaintiffs were "similarly situated," instead of attempting to import the standards of Rule 23 into 29 U.S.C. § 216(b). *Id.* at 1105.

Like the plaintiffs in *Thiessen*, plaintiffs here are not challenging a series of individual decisions by the ADEA defendants, motivated by individual reasons, but a pattern and practice of discrimination by the ADEA defendants. The pattern and practice claim that remains in litigation arises from a policy that has an obvious disparate impact on older retirees: "reducing and limiting their life insurance benefits to a $10,000 death benefit and, in the case of VEBA participants, terminating the life insurance coverage, and therefore depriving them of the bulk of their life insurance benefits." Second Amended Complaint, ¶ 139(c) at pp. 59-60.

The Supreme Court has held that the ADEA prohibits practices that have disparate impact on older workers and are not justified by a reasonable factor other than age. *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005). While it is intuitively obvious that life insurance becomes more expensive, less affordable, and less available (or unavailable) as one ages, and thus that the challenged reductions in life insurance benefits have caused a disparate impact based on age,

plaintiffs will present expert evidence on these questions. This claim is identical for all members of the proposed collective action. The evidence will be the same for all members, and will not be different for retirees based on the jobs or locations in which they worked, the age at which they retired, or other individuating factors.

Upon proof of a prima facie case of disparate impact, the ADEA defendants will have the burdens of production and persuasion on whether the reduction, limitation, or termination of life insurance benefits was justified by a reasonable factor other than age. *Meacham v. Knolls Atomic Power Laboratory*, __ U.S. __, 128 S.Ct. 2395 (2008). Defendant's burden is uniform across all members of the proposed collective action. Defendant's evidence in support of their burden, if any, will be the same for all members, and will not be different for retirees based on the jobs or locations in which they worked, the age at which they retired, or other individuating factors.

Under the so-called "*ad hoc*" approach adopted by the Tenth Circuit, "a court typically makes an initial 'notice stage' determination of whether plaintiffs are 'similarly situated.' . . . In doing so, a court 'require[s] nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.'" *Thiessen*, 267 F.3d at 1102 (citation and some internal quotation marks omitted). A more detailed analysis may be made after discovery, in conjunction with a motion to decertify the class if the evidence shows that such a motion is warranted. *Id.* at 1102-03.

The standard for initial approval is "lenient." *Gieseke v. First Horizon Home Loan Corp.*, 408 F.Supp.2d 1164, 1166 (D. Kan. 2006); *Underwood v. NMC Mortg. Corp.*, 245 F.R.D. 720, 721 (D. Kan. 2007). There is a "low threshold." *Renfro v. Spartan Computer Services, Inc.*, 243 F.R.D. 431, 434 (D. Kan. 2007). Plaintiffs have attached the announcements of

changes in benefits,[2] demonstrating that the ADEA defendantsdid in fact reduce or terminate life insurance benefits as alleged.

Under this standard, this case is made to order for initial approval of a collective action. Nor is this the kind of a case ever likely to face a successful decertification motion under the more demanding post-discovery standard. *Cf. Thiessen*, 267 F.3d at 1105-08, emphasizing the importance of pattern-and-practice claims in deciding whether to decertify a previously-approved ADEA collective action, and reversing a decision to decertify the collective action.

D. Obtaining Contact Information from Defendants

It is well-accepted that defendant employers have a duty to assist in the task of providing adequate notice to class members. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 169-70 (1989), an ADEA collective-action case with an opt-in requirement, held that "district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) (1982 ed.), as incorporated by 29 U.S.C. § 626(b) (1982 ed.), in ADEA actions by facilitating notice to potential plaintiffs," and that the district court "was correct to permit discovery of the names and addresses of the discharged employees."

Such orders are common in the Tenth Circuit and this District. For example, *Underwood v. NMC Mortg. Corp.*, stated:

> Plaintiffs are entitled to specific discovery of the names, addresses and telephone numbers of the putative class members. . . . Accordingly, on or before October 22, 2007, defendants shall provide plaintiffs the names and last known addresses of each financial specialist employed by NMC at any time from August 8, 2004 to the present. Defendant shall also provide the telephone and cellular telephone numbers and e-mail addresses of each financial specialist employed by NMC at any time from August 8, 2004 to the present if defendant possesses such information.

245 F.R.D. at 724 (emphasis omitted). Similar orders were entered in *Sibley v. Sprint Nextel*

[2] See Exhibits A and B hereto.

Corp., No. 08-2063, 2008 WL 5046348 at *11 (D. Kan. Nov. 24, 2008) ("To that end, defendants are directed to provide to plaintiffs the names, addresses, and telephone numbers of all employees who are potential members of the class on or before December 22, 2008."); *Harlow v. Sprint Nextel Corp.*, __ F.R.D. __, 2008 WL 5173136 at *9 (D.Kan. Dec. 10, 2008) ("To that end, Sprint is directed to provide to Plaintiffs the names, addresses, and telephone numbers of all employees who are potential members of the class by January 12, 2009."); *Renfro v. Spartan Computer Services, Inc.*, 243 F.R.D. at 435 ("Accordingly, on or before July 20, 2007, defendants shall provide plaintiffs the names and last known addresses of all persons whom SCS employed as field technicians (including field technicians, field engineers, senior field engineers, parts supervisors and field supervisors) and installers (including installers, lead installers and senior installers) at any time from June 20, 2004 to the present.") (Emphasis omitted.); *Gieseke v. First Horizon Home Loan Corp.*, 408 F.Supp.2d at 1169 ("Defendants are ordered to provide plaintiffs with the names and current or last known addresses and telephone numbers for all current and former loan originators who have worked for First Horizon at any time since October 14, 2001, within fourteen (14) days of the date of this Memorandum and Order."). Nor is this a recent development. *See, e.g., Vaszlavik v. Storage Technology Corp.*, 175 F.R.D. 672, 682 (D. Colo. 1997) ("Defendant shall provide plaintiffs within twenty days a list of all persons discharged from Storage Tek between April 13, 1993, and December 31, 1996, as part of reductions-in-force. That list will be provided, if possible, in electronically usable form.")

Similarly, discussing the need for Title VII class members to file claim forms providing minimal information about their claims, a situation requiring no greater diligence than a notice informing class members of their rights in a class action, the former Fifth Circuit stated: "The

employer's records, as well as the employer's aid, would be made available to the plaintiffs for this purpose." *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (Former 5th Cir. 1974). *Accord, Meadows v. Ford Motor Co.*, 510 F.2d 939, 947 (6th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

Here, the necessary contact information should be in a readily-accessible form, because Defendants sent notices about the benefits to the members of the proposed collective action in 2007, and are making regular pension payments to them. To the extent that any retirees have dropped out of sight, plaintiffs need to have dates of birth, Social Security numbers, and other information that will help locate missing retirees, and check the Social Security death index to determine if they are deceased. To the extent that any retirees are deceased, plaintiffs need information on their designated beneficiaries and their contact information.

It is also appropriate to require a defendant to provide assistance in notifying potential members of the collective action. Inclusion of the Notice in any routine or regular mailings could reduce the expense of Notice substantially. Providing the Notice by e-mail would also reduce the expense of Notice substantially, but this requires that defendant provide plaintiffs with e-mail addresses of retirees, if known.

E. <u>The Text of the Notice</u>

Plaintiffs have proposed in effect that the parties meet and confer about the text of the Notice, with plaintiffs preparing an initial draft, the ADEA defendants proposing revisions, and the parties being required to discuss the matter in good faith, all within specified deadlines.

It is appropriate to prepare the proposed text of the Notice after the parties have had the benefit of the Court's rulings on the Motion for Approval of the Collective Action and the class certification motion.

F. Conclusion

Plaintiffs pray that their Motion be granted.

Respectfully submitted,

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