No. 06-1463

United States Court of Appeals
For the Third Circuit

JAMES H. RUEHL,
Plaintiff-Appellee,

v.

VIACOM, INC., SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Pennsylvania in Civil Action No. 04-0075
Donetta W. Ambrose, Chief United States District Judge

BRIEF FOR DEFENDANT-APPELLANT VIACOM INC.

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Filed on Behalf of Defendant-Appellant CBS Corporation, Formerly Known as Viacom Inc., Successor by Merger to CBS Corporation, Formerly Known as Westinghouse Electric Corporation

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TABLE OF ABBREVIATIONS AND GLOSSARY

ADEA	Age Discrimination in Employment Act
D.Ct.Op.___	Opinion of the District Court dated ___
EEOC	Equal Employment Opportunity Commission
ERISA	Employee Retirement Income Security Act
ESBU	The Energy Systems Business Unit of Westinghouse Electric Company
Edm.Decl.	Declaration of Donna M. Edmonds
FLSA	Fair Labor Standards Act
JA__	Joint Appendix at page __
OWBPA	Older Workers Benefits Protection Act
R.Aff.__	Affidavit of James Ruehl dated ___
R.Dep.	Deposition of James Ruehl
Ruehl	Plaintiff-Appellee James Ruehl
S.J.Mot.	Defendant's Summary Judgment Motion (8/12/04)
Viacom Inc.	The defendant in this case, now known as CBS Corporation, and formerly the successor by merger to CBS Corporation, formerly known as Westinghouse Electric Corporation.
W.Dep.	Deposition of Sharon Warren
WEC	Westinghouse Electric Corp.

All emphasis in this Brief is added, unless otherwise indicated.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. On November 18, 2004, the district court entered an order denying Viacom's motion for summary judgment. JA7. On March 9, 2005, the district court certified its November 18, 2004 order for interlocutory appeal. JA20. On March 23, 2005, Viacom filed a timely petition for interlocutory appeal of the certified order. JA28. On January 31, 2006, this Court granted Viacom's petition. JA65. This Court has appellate jurisdiction under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES

More than five years after his termination, Ruehl, who previously was an opt-in plaintiff in a decertified ADEA collective action, filed both an untimely EEOC charge and then a lawsuit. The district court agreed that, because the charge was untimely filed, WEC/Viacom would have been entitled to summary judgment on limitations grounds but for two potential saving doctrines: (1) the "single-filing" rule (also known as the "piggybacking" doctrine), and/or (2) equitable tolling based on Ruehl's allegedly unenforceable release of ADEA claims. This appeal presents the following questions of law:

1. Whether a plaintiff in an individual action properly can invoke the "single-filing" rule to rely upon the EEOC charge of a former collective action

plaintiff, even after decertification of the collective action. JA9-13(D.Ct.Op.11/18/04); JA467(S.J.Mot.).

2. Whether a plaintiff in an individual action properly can invoke the "single-filing" rule where that plaintiff's claims are not so similar to those raised by the charging party, such that there would still have been a benefit to the EEOC additionally investigating and attempting to conciliate the individual plaintiff's claims separately from the charging party's claims. JA11-13(D.Ct.Op.11/18/04); JA468(S.J.Mot.).

3. Whether, in the event that a plaintiff in an individual action properly can invoke the single-filing rule to rely upon the EEOC charge of a former collective action plaintiff, even after decertification of the collective action, the non-charge-filing plaintiff must file his judicial complaint within 90 days of the date that he is notified that the collective action has been decertified. JA14n.3(D.Ct.Op.11/18/04); JA469(S.J.Mot.).

4. Whether a plaintiff seeking to invoke equitable tolling to excuse the untimely filing of his EEOC charge must allege the facts giving rise to the requested tolling in his judicial complaint. JA470(S.J.Mot.).

5. Whether the alleged technical deficiency of a release, based upon an employer's failure to attach to the release itself the demographic information that is specified by the OWBPA for a release of ADEA claims to be enforceable, provides

a proper basis for equitable tolling of the time to file an EEOC charge and ADEA lawsuit. JA16(D.Ct.Op.11/18/04); JA471(S.J.Mot.).

6. Whether a plaintiff seeking to invoke equitable tolling is precluded from doing so when he failed to request the demographic information that is specified by the OWBPA for a release of ADEA claims to be enforceable after he was placed on inquiry notice of both his ADEA claims and his entitlement to such demographic information. JA17(D.Ct.Op.11/18/04); JA473(S.J.Mot.).

7. Whether making the specified demographic information available upon request satisfies the OWBPA. JA15(D.Ct.Op.11/18/04); JA471(S.J.Mot.).

STATEMENT OF THE CASE

On January 20, 2004, Ruehl brought suit under the ADEA against WEC, his former employer, alleging that he was terminated on the basis of age. Viacom sought summary judgment, alleging that Ruehl had failed to file a timely administrative charge of discrimination with the EEOC and had failed to file a timely judicial complaint. JA9. The district court agreed that Ruehl's charge and complaint were facially untimely, but held that two saving doctrines—the "single-filing" rule and the "equitable tolling" doctrine—could potentially excuse the untimeliness. JA10-11. On January 31, 2006, this Court granted Viacom's petition for interlocutory review of that order. JA65.

STATEMENT OF FACTS

Ruehl's Employment at WEC. Ruehl had been director of accounting in WEC's Energy Systems Business Unit before moving to a position in the tax department of WEC's Industries and Technology Group. JA293(R.Dep.); JA427(Edm.Decl.). While working in the ESBU, Ruehl had participated in annual performance reviews of managers and selected professional employees, and attended meetings with CFO Fred Reynolds for the purpose of conducting these reviews. JA186-88(R.Aff.4/4/02); JA292-93(R.Dep). During 1994 and 1995, Reynolds allegedly referred to certain older employees as "blockers." JA186-88(R.Aff.4/4/02); JA292, 296-98(R.Dep.). These alleged comments led Ruehl to believe that age discrimination was occurring at WEC as early as 1994 and 1995. *Id.* Ruehl believed that even he "possibly" had been subjected to age discrimination, because similar comments "were probably made about me the same way when I wasn't in the room." JA292(R.Dep.).

WEC's Notification to Ruehl that He Would Be Separated from Employment. In March 1997, Ruehl accepted an opportunity to work in the tax department of the Industries and Technology Group, stationed at company headquarters. JA293(R.Dep). In November 1997, WEC CEO Michael Jordan announced that headquarters employees, such as Ruehl, would be notified by

December 10, 1997 whether they would be "affected by layoff." JA122-23(Jordan Letter); JA428(Edm.Decl.).

Ruehl recalls that, in a meeting with his supervisors Jack Carpenter and Phil Adams in "late 1997 or early 1998," he was informed and understood "that I was part of the transition team and that my job would be eliminated on August 31st, 1998." JA291-92(R.Dep.) Ruehl testified that, as of that time, he understood "that my job was being eliminated." JA292(R.Dep).

Ruehl's recollection is confirmed by WEC documents. Those documents show that Ruehl was identified as a "Transition" employee, with a job separation date of "8/31/98," and that he was informed, on December 10, 1997 by his supervisors Jack Carpenter and Phil Adams, that he would be separated from employment, effective August 31, 1998. JA124-25; JA145; JA291-92; JA428-29.

By letter dated July 2, 1998, Ruehl received what he referred to as "[o]fficial notification" of his termination. JA301(R.Dep.). Ruehl testified that, on the date that he received this letter, he "unequivocally" knew that he was being terminated as of August 31, 1998. JA307(R.Dep.).

Ruehl's Belief that His Separation Was the Result of Age Discrimination. Ruehl testified that, as of the "[s]ummer of 1998," "around the time" that his termination was effective, he believed that his termination was the result of age discrimination. JA295(R.Dep.). Ruehl was aware that almost all of

the employees in the tax department, which was composed of about 20 people, were losing their jobs. JA305(R.Dep.). Ruehl stated that he was "probably the oldest person in the department that was let go" and that he was allegedly the only one not offered a permanent position by KPMG, an entity not affiliated with WEC or CBS to which the tax department's work was outsourced. JA295(R.Dep.); JA429(Edm.Decl.).

Ruehl's Separation Agreement. In conjunction with his separation, Ruehl signed a separation agreement, dated August 31, 1998. JA146-50. Ruehl carefully read each paragraph of the agreement before signing it. JA304(R.Dep.). In particular, before signing, Ruehl specifically read paragraph 11, *id.*, in which he acknowledged receipt of demographic information about the group of employees affected by the separation program:

> Employee acknowledges that, at the commencement of [the period to review the release], he/she was informed, in writing, by CBS Corporation as to (i) any class, unit or group of individuals covered by the Involuntary Separation Program, any eligibility factors for the Involuntary Separation Program, and any time limits applicable; and (ii) the job titles and ages of all individuals eligible or selected for the Involuntary Separation Program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

JA147-48.

While Ruehl signed the agreement without actually receiving this demographic data, the record is uncontroverted that, as a matter of practice, WEC

would provide the data upon request by any employee affected by the separation program. *See, e.g.*, JA175-85(W.Dep.) (employee received demographic information); JA362(Interrogatories). Ruehl did not ask the company to provide him with the demographic information. JA304-05(R.Dep.).

Ruehl testified that he signed the release, despite having not reviewed the demographic data, because he did not want "to run the risk of delaying or in any way affecting [his] pension." JA304-05(R.Dep.). Ruehl admitted that "no one from Westinghouse" ever told him that the release had anything to do with his pension. JA304-05(R.Dep.).

Ruehl's Participation in the *Mueller* Litigation. Ruehl later became an opt-in plaintiff in a collective age-discrimination action filed by Norman Mueller and Harry Bellas. Mueller had been employed by WEC in its Nuclear Energy Division. Bellas had been employed by WEC in its ESBU. On "March 1, 1997," Mueller was notified that he would be terminated, effective as of April 30, 1998. JA151(Mueller Charge); JA160(D.Ct.Op.2/7/00). Bellas was terminated on December 31, 1997. JA153(Bellas Charge). On December 21, 1998, Mueller and Bellas filed EEOC charges against WEC, contending that WEC had a "systematic, multi-layered plan to eliminate older workers" and that "as a part of the age discrimination scheme . . . [WEC] modified its pension plan/severance plan to deprive older workers of accrued benefits under the plan," all in violation of the

ADEA. JA151-54. Neither EEOC charge expressly claimed that it had been timely filed, and Bellas's charge in fact conceded that "Bellas has not presented this charge within 300 days of the notification of his layoff." JA151-54. On May 14, 1999, the EEOC notified Mueller and Bellas that each of their administrative charges had been dismissed and that, with respect to each, "[a]ny 90-day period applicable to this charge during which suit should be filed begins upon your receipt of this notification of dismissal." JA155-56. On August 12, 1999, Mueller, Bellas and others filed suit, relying upon Mueller's and Bellas's charges, in the Western District of Pennsylvania, alleging that they had been discriminated against and involuntarily separated from employment with WEC in violation of the ADEA and ERISA.

WEC moved to dismiss the suit, contending that both Mueller's and Bellas's EEOC charges had not been timely filed. The district court denied WEC's motion as to Mueller, holding that, although the charge was facially untimely, the court could not "conclude as a matter of law that Mueller was notified of his impending layoff as of March 1, 1997 such that [the] EEOC charge filed on December 21, 1998 was untimely," because the charge alleged a termination notification date of "March 1, 1997 *or later*." JA160. As to Bellas, the district court originally held his charge untimely filed. JA160-63. On March 28, 2000, however, the district court reconsidered that ruling, holding that Bellas might be entitled to equitable

tolling to excuse his untimely filing based upon Bellas's allegations in his amended complaint of deception and coercion underlying the signing of his release. JA170-71.

On March 14, 2001, the district court conditionally certified a collective action under the ADEA, and authorized plaintiffs to send notice of the collective action to prospective opt-in plaintiffs. JA191-92. Ruehl opted into the collective action on March 28, 2001. JA173. On December 9, 2002, however, the district court decertified the collective action, holding that the individual layoff decisions were decentralized, and that the facts underlying the class claims were "hopelessly disparate." JA189; JA247-48.

In mid-March of 2003, the district court instructed that opt-in plaintiffs such as Ruehl be sent a written notice informing them that the collective action had been decertified and that any tolling of administrative and judicial filing deadlines would cease as of March 20, 2003. JA270-73. This language represented a compromise between the defendant's position on tolling and that of the plaintiffs, who wanted the notice to state that the former opt-ins each had 90 days to file judicial suits after they received the notice, reasoning that the "decertification decision by th[e] Court" was "effectively" the "administrative agency dismissal" in the case. JA267; JA270-72. Ruehl affirmed that he received this notice on March 20, 2003. JA407(R.Aff.9/16/04).

Ruehl's EEOC Charge. On September 22, 2003, Ruehl filed a charge of age discrimination with the EEOC. JA275. This charge was filed more than five years after Ruehl was separated from employment with WEC and more than 90 days after the decertification of the *Mueller* collective action. The charge alleged that Ruehl was terminated in 1998 on the basis of his age. *Id.* The charge further alleged:

> I signed a release that violates the Older Workers' Benefits Protection Act, 29 U.S.C. § 626(f). At the time of the signing of this Release, I had no knowledge that this Release was invalid under the law. During my involvement in the case of Mueller, et al. v. CBS, Inc., Civil Action No. 99-1130 (W.D. Pa.), I became aware, subsequent to my opting-in that this Release is invalid. Accordingly, the time period for me to file this Charge was equitably tolled until March 20, 2003, the date of my dismissal from the Mueller lawsuit.

Id. The charge did not specify the basis for Ruehl's allegation that the release that he signed "violates" the OWBPA.

Ruehl's Judicial Complaint. On January 20, 2004, Ruehl filed the present action. Ruehl's complaint alleges that his October 14, 2003 EEOC charge was "timely." JA280. The complaint does not mention the release that he signed or allege that Ruehl is entitled to equitable tolling of any applicable deadline. JA280-81. Moreover, the complaint does not even mention the *Mueller* action, nor does it in any way refer to the EEOC charges filed by Mueller or Bellas. *Id.*

The District Court's Summary Judgment Order. After discovery limited to the timeliness of Ruehl's EEOC charge and judicial complaint, on August 12,

2004, WEC filed its First Motion for Summary Judgment, urging that Ruehl's judicial complaint should be dismissed because both Ruehl's supporting EEOC charge and his judicial complaint were untimely filed. On November 18, 2004, the district court held that, despite the facial untimeliness of Ruehl's EEOC charge, JA10, Ruehl could survive summary judgment by invoking either post-decertification "piggybacking" or "equitable tolling" based on the allegedly defective release. JA10-11.

With respect to the single-filing-rule/piggybacking issue, the district court noted both the "lack of consensus concerning the application [of the single-filing rule] in the context of a class which has been decertified," JA11, and this Court's rejection of the rule outside of the class action context, *id.* (citing *Communications Workers of Am. v. N.J. Dep't of Pers.*, 282 F.3d 213, 218 (3d Cir. 2002)). Nevertheless, the district court found that this Court had "not squarely addressed" the application of the single-filing rule after the denial of class certification or the decertification of a collective action, and decided to follow prior precedent from the Western District of Pennsylvania and other circuits that had permitted piggybacking in such circumstances. JA12.

The district court alternatively held that Ruehl could avoid the untimeliness of his EEOC charge by invoking the doctrine of "equitable tolling" based upon his allegation that the release that he signed was defective under the OWBPA. The

district court was not prepared to rule that Ruehl's release is "consistent with the dictates of the OWBPA," JA15, notwithstanding the court's recognition that the only other court to address this issue had held that making the specified demographic data available upon request satisfies the OWBPA. JA16n.4 (citing *Hartnett v. Chase Bank of Tex. Nat'l Ass'n*, 59 F. Supp. 2d 605 (N.D. Tex. 1999)). Assuming that Ruehl's release was defective under the OWBPA, the court observed that "[t]he question before me then is whether an invalid waiver serves as a basis for equitable tolling." JA16. The district court answered that question in the affirmative, holding that a technically deficient release of ADEA claims, standing alone, could provide a proper basis for tolling. JA16-17.

The District Court's Certification Order. On March 9, 2005, the district court certified its November 18, 2004 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), finding that there "is substantial ground for difference of opinion as to each of the controlling questions of law in [its] November 18, 2004 Opinion and Order," JA21, and that "[i]mmediate review . . . might materially advance the ultimate termination of litigation in this case because it could dispose of the case, eliminating the need for further discovery and trial," *id.*, and "would also materially advance several other similar cases," because resolution of the controlling questions here "may affect the claims of other individuals in three related cases involving 67 plaintiffs pending in this Court." JA23. On January 31,

2006, this Court granted Viacom's petition for interlocutory review of the district court's order. JA65.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are three related cases pending in the Western District Court of Pennsylvania before Chief Judge Ambrose:

Barrett v. Viacom, Inc., 04-CV-0608 (W.D. Pa., filed April 22, 2004)

Bailey v. Viacom, Inc., 04-CV-0607 (W.D. Pa., filed April 22, 2004)

Albright v. Viacom, Inc., 04-CV-0609 (W.D. Pa., filed April 22, 2004)

These cases would be directly affected by resolution of the issues presented in this appeal, because most of the 67 plaintiffs involved in those cases did not file timely charges with the EEOC and are likely to raise the same arguments raised by Ruehl below. The district court recognized that "the Third Circuit court's decision here would hold significant precedential value for those cases. Were the Third Circuit court to reverse the denial of summary judgment, presumably many of those related claims would resolve as well." JA23.

STANDARD OF REVIEW

This Court's review of the denial of summary judgment is plenary. *Creque v. Texaco Antilles Ltd.*, 409 F.3d 150, 152 (3d Cir. 2005). The Court should assess the record using the same summary judgment standard that guides the district court. *Rivas v. City of Passaic*, 365 F.3d 181, 193 (3d Cir. 2004). Under that

standard, summary judgment is appropriate "where, drawing all reasonable inferences in favor of the nonmoving party, 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Lexington Ins. Co. v. W. Pa. Hosp.*, 423 F.3d 318, 322 n.2 (3d Cir. 2005) (quoting Fed. R. Civ. P. 56(c)).

SUMMARY OF THE ARGUMENT

Ruehl filed an untimely administrative charge with the EEOC, as well as an untimely judicial complaint. The district court nonetheless concluded that Ruehl's facially untimely charge and complaint could perhaps be saved by either the "single-filing" rule or the "equitable tolling" doctrine. The district court's conclusions are erroneous.

1. Courts have applied the "single-filing" rule in the class-action context to excuse putative class members from their EEOC-charge-filing requirements on the theory that the class charges of the putative class representatives encompassed the claims of the non-filing class members for purposes of the class action. But this Court has also long held that the single-filing rule does not apply outside of the class-action context. *See, e.g.*, *Communications Workers*, 282 F.3d at 218; *Whalen v. W.R. Grace & Co.*, 56 F.3d 504, 506-07 (3d Cir. 1995). That settled precedent, which expressly rejected the case law from other circuits upon which the district court here relied, precludes application of the single-filing rule in an individual

action instituted after a conditionally-certified collective action has been decertified, because the non-filing plaintiff is, in such an individual case, no longer seeking to opt into a pending class action that presents a collective claim that the EEOC has already investigated and attempted to conciliate. Indeed, once a court denies class certification or decertifies a conditionally certified class, the non-charging party is pursuing only an individual claim, and the employer and the EEOC have never been put on notice of that individual claim. In such circumstances, a timely EEOC charge by the individual is required to preserve the claim, as it would have been beneficial for the EEOC to investigate and attempt to conciliate the distinctive individual claims of the former putative or opt-in plaintiffs separately from the claims of the charging party in the decertified action.

The contrary conclusion of the district court is erroneous. The district court mistakenly relied on *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1056 (2d Cir. 1990), which had applied the single-filing rule outside of the class action context. In *Whalen*, this Court expressly rejected both the holding and the reasoning of *Tolliver*. Furthermore, the court in *Tolliver* premised its ruling upon the applicability of the then-effective ADEA statute of limitations, which the *Tolliver* court reasoned would appropriately limit the time within which lawsuits piggybacking on another charge could be filed. However, the 1991 amendments to

the ADEA rendered inapplicable that prior statute of limitations, and thus removed an essential predicate for the *Tolliver* court's decision.

The district court also incorrectly asserted that the procedural protections provided in the *Mueller* action fairly allowed the single-filing rule to be applied here. The district court failed to appreciate that, in *Whalen* and *Communications Workers*, this Court made plain that the only context in which there are appropriate procedural safeguards that permit the application of the single-filing rule is where a class action is pending, because only in that context do the class charge and complaint encompass and regulate both the charging party's claim and the non-filing plaintiff's claim. Moreover, the district court failed to appreciate that, where a court has determined that class treatment is not appropriate, the procedural safeguards that support application of the single-filing rule in the class-action context are no longer applicable and thus can no longer justify application of the single-filing rule in subsequent individual actions: Once the class case is decertified, there is no longer a collective claim to link and unite the claims of the charging party and the non-charging parties. Rather, once the class action is decertified, only distinctive individual claims remain, such that there would be a benefit to the EEOC additionally investigating and attempting to conciliate the individual plaintiff's claims separately from the charging party's claims. And once the class case is decertified, there is no reason to continue assuming either that the

employer is on notice of the distinct claims of the non-charging parties or that no purpose would be served by requiring EEOC investigation and conciliation of those distinct individual claims.

In all events, even if the single-filing rule could apply outside of a pending class action, it would not save Ruehl's judicial complaint. The single-filing rule can apply only where the claims of the charge-filing plaintiff and the would-be piggybacking plaintiff are so similar that the original charge would have placed the employer on notice, and provided an opportunity for conciliation, of the claims of the non-filing plaintiff. Here, Ruehl's individual allegations are significantly different from those raised by the charges upon which Ruehl seeks to piggyback (*i.e.*, the charges filed by Mueller and Bellas): Ruehl was separated from employment from a different business unit in a different facility, by different managers, and at a different time than were Mueller and Bellas. It was precisely because of such dissimilarities that, in decertifying the *Mueller* subclasses, the district court held that Ruehl and others were not "similarly situated" to Mueller and Bellas. The "single-filing" rule cannot properly be applied in such circumstances.

Indeed, even if Ruehl could properly rely on the single-filing rule, his judicial complaint would still be untimely filed. The single-filing rule only permits an individual plaintiff to stand in the shoes of the plaintiff upon whose charge he

relies. Moreover, the law requires that an ADEA suit be filed within 90 days of the issuance of a right-to-sue letter on a charge; and case law is clear that, when a class or collective action is decertified, an individual who filed an EEOC charge has at most 90 additional days within which to file a judicial complaint. Therefore, as a piggybacking plaintiff who did not file a charge, Ruehl also had at most 90 days to file a judicial complaint. But Ruehl did not file his judicial complaint until January 20, 2004, much more than 90 days after the *Mueller* subclasses were decertified. Accordingly, Ruehl's judicial complaint was not saved by the single-filing rule.

2. Nor does equitable tolling save Ruehl's untimely filed complaint. Tolling is an exception to the normal limitations rules. It applies only in extraordinary circumstances. That is not the case here.

To begin with, under the case law, tolling and the circumstances supporting it must be alleged in the complaint. Ruehl did not do so. For that reason alone, tolling should be rejected.

Moreover, tolling is permitted only where an employer has actively misled an employee about the facts giving rise to his claim or where the employee has been prevented in some extraordinary way from asserting his rights or has timely asserted his rights in the wrong forum. A technically defective release for purposes of the OWBPA does not constitute an extraordinary circumstance that allows or warrants tolling. Such a technically defective release—*i.e.*, one that

merely fails to include specified demographic data that the OWBPA requires for a waiver of ADEA claims to be enforceable—does not actively mislead an employee about his rights or prevent an employee from asserting his claims. Indeed, the proposed release here itself put Ruehl on notice of a potential ADEA claim, gave Ruehl a choice between asserting the claim or taking a separation package, and encouraged Ruehl to consult with an attorney about his claim and the choices that he was offered. Ruehl nowhere alleges that WEC misled or deceived him about the facts underlying his ADEA claim or, for that matter, about the release itself. The alleged technical deficiency in the release has nothing to do with the factors that might allow equitable tolling.

In addition, Ruehl plainly failed to exercise the requisite diligence necessary to preserve his claim. Ruehl admitted that he consciously chose not to request the demographic data mentioned in the release that he signed. Having been placed on inquiry notice of his right to receive the data, Ruehl may not obtain equitable tolling based on his failure to receive it.

In any event, Ruehl's tolling argument proceeds from the incorrect premise that the release did not comply with the OWBPA, because WEC made the specified demographic data available upon request rather than attaching it to the release itself. Contrary to the district court's hypothesis, while the statute requires that the employer "inform[] the individual in writing" about the pertinent

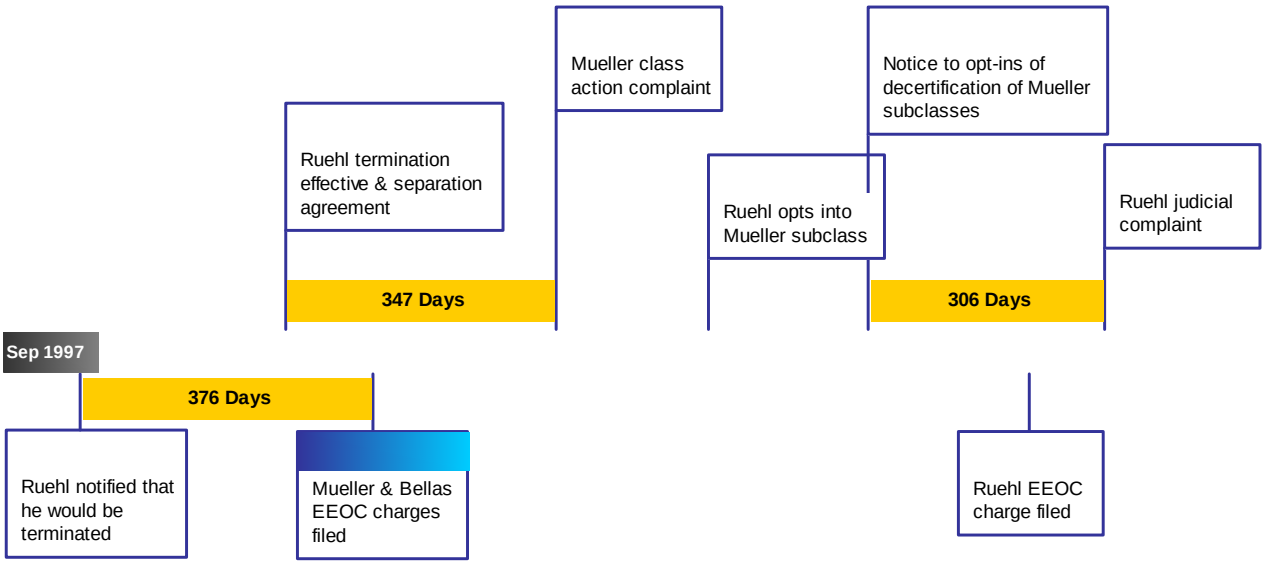
demographic information, the OWBPA does not require that the demographic information actually be attached to the proposed release itself. Rather, as the EEOC recognized in seeking public comment on the issue, the statutory text does not itself prohibit an employer from making that information available at a reasonable time and place or, as here, upon request. *See* 57 Fed. Reg. 10626-02, 10629 (March 27, 1992); 60 Fed. Reg. 45388-01, 45389 (Aug. 31, 1995). Indeed, as the legislative history of the OWBPA confirms, providing the information upon request is entirely consistent with the statute's purpose of encouraging employees affected by reductions in force to seek legal counsel so that any waiver of their ADEA claims is knowing and voluntary. For these reasons, the only other court to address this question has held that making the specified demographic information available upon request fully satisfies the OWBPA. *See Hartnett*, 59 F. Supp. 2d at 615.

ARGUMENT

Under the ADEA, a judicial complaint must be dismissed for failure to exhaust administrative remedies if a supporting EEOC charge was not filed within 300 days of notification to the employee of the adverse employment action. *See* 29 U.S.C. § 626(d)(2) (grievant claiming violation of the ADEA must exhaust his administrative remedies with the EEOC before filing a judicial action); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1392-93 (11th Cir. 1998) (en banc).

Moreover, as amended by the Civil Rights Act of 1991, the ADEA requires that a judicial complaint be filed within 90 days of either "receipt of a notice that 'a charge filed with the [EEOC] under [the ADEA] is dismissed or [that] the proceedings of the [EEOC] are terminated by the [EEOC],'" *Sperling v. Hoffman-La Roche, Inc.*, 24 F.3d 463, 464n.1 (3d Cir. 1994) (first, fourth, and fifth brackets in original), or, if a collective action has been filed, within no more than 90 days of the date that certification is denied or that any conditionally certified classes are decertified. *See Armstrong*, 138 F.3d at 1391-92.

As the following chart illustrates, Ruehl failed to satisfy both of these requirements.



Although Ruehl had notice that he would be separated from employment on August 31, 1998 by as early as December 10, 1997, he did not file an EEOC charge until October 14, 2003. Thus, Ruehl did not file his charge until more than

5 years after his employment was terminated, well after the 300-day charge filing period had expired. Indeed, given that Ruehl was notified as early as December 10, 1997 that he would be terminated, Ruehl's 300-day charge-filing period expired even before Mueller and Bellas filed their EEOC charges on December 21, 1998; and given his August 31, 1998 effective-termination date, Ruehl's 300-day charge-filing period had plainly run by no later than June 27, 1999—*i.e.*, well *before* Mueller and Bellas filed their putative collective action on August 13, 1999. Therefore, Ruehl's EEOC charge is plainly untimely.

Furthermore, Ruehl's judicial complaint is also untimely. The untimely EEOC charge makes the judicial complaint untimely as well. Moreover, Mueller and Bellas filed their collective action 90 days after the EEOC completed processing their own charges; and the notice date of the district court's decertification of the *Mueller* collective action was March 20, 2003. But Ruehl did not file his judicial complaint until January 20, 2004, more than 6 months later. That complaint was thus filed well beyond the 90-day deadline for any lawsuit based on the charges of Mueller and Bellas.

The district court ruled, however, that two saving doctrines could potentially excuse Ruehl's late filings: the "single-filing" rule and the "equitable tolling" doctrine. But neither properly applies here.

I. RUEHL'S UNTIMELY CHARGE AND COMPLAINT ARE NOT SAVED BY THE "SINGLE-FILING" RULE

By statute, the filing of a timely administrative charge by the complaining party is a prerequisite to suit under the ADEA. *See* 29 U.S.C. § 626(d)(2); 42 U.S.C. § 2000e-5(e). Under the so-called "single-filing" rule, however, the courts have created a limited exception to this statutory rule: The "single filing" of an original charging party will be taken to satisfy the filing obligation of a non-filing claimant as well where the non-filing plaintiff's claims are so similar to the claims of the charging party that no purpose would be served by requiring a separate EEOC investigation and conciliation of the non-filing plaintiff's claims. *See, e.g.*, *Whalen*, 56 F.3d at 506 (single-filing rule permits "aggrieved individuals who failed to file the required . . . EEOC charge to join a class action brought by a plaintiff who filed an EEOC charge alleging classwide discrimination"); *Tolliver*, 918 F.2d at 1056 (noting that the "single-filing" rule holds that "the timely filing of an administrative charge by a named plaintiff in a class action satisfies the charge filing obligation of all members of the class"). The single-filing rule's common nickname, the "piggybacking" rule, is derived from this effect. *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001). But, contrary to the district court's holding, the single-filing rule has no proper application here, where Ruehl's individual claims are necessarily distinct from the individual claims raised by Mueller and Bellas.

A. In This Circuit, the "Single-Filing" Rule Applies Only Where a Plaintiff Seeks to Piggyback Onto a Timely Filed Class Charge While a Class or Collective Action Is Pending

In this Circuit, the "single-filing" rule applies only where a non-filing plaintiff seeks to piggyback on a timely filed class charge in a pending class or collective action. Ruehl's effort to use the arguably untimely charges of Mueller and Bellas to support his own individual action is thus not permitted by the single-filing rule.

1. The "single-filing" rule has its origins in Title VII class action cases. *See Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968) (first articulating rule in Title VII class action); *Horton v. Jackson County Bd. of County Comm'rs*, 343 F.3d 897, 899 (7th Cir. 2003) (Posner, J.) (discussing origins of rule). As does the ADEA, Title VII requires that an aggrieved employee file a written charge with the EEOC describing the alleged discrimination. 42 U.S.C. § 2000e-5(b). The charge-filing requirement is intended to give "notice of the charge . . . [to the] employer" and to afford the EEOC the opportunity to informally settle employment disputes through "conference, conciliation, and persuasion." *Id.* If these efforts at conciliation are unsuccessful, and if the EEOC elects not to pursue the matter itself, it must notify the plaintiff in writing. *Id.* § 2000e-5(f). Upon receipt of this notice of dismissal, known as a "right-to-sue" letter, the plaintiff has 90 days to file a judicial complaint. *Id.*

In *Oatis*, the Fifth Circuit addressed the question whether putative class-action plaintiffs alleging race discrimination could join a class action even though they had not themselves previously filed EEOC charges. *See* 398 F.2d at 497-98. The court held that where the named plaintiff "raises a particular issue with the EEOC . . . he may bring an action for himself and the class of persons similarly situated." *Id.* at 498. The court found that "[i]t would be wasteful, if not vain, for numerous employees, all with the same grievance to have to process many identical complaints with the EEOC." *Id*. The court concluded that, "[i]f it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful[?]" *Id*.

Since *Oatis*, courts have generally followed the Fifth Circuit's lead and excused class members from having failed to file such "duplicative" charges not only in Title VII class cases but also in class cases under other statutes with charge-filing requirements (such as the ADEA). *See Horton*, 343 F.3d at 900 ("Requiring that every class member file a separate charge might drown agency and employer alike by touching off a multitude of fruitless negotiations."); *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1016 (7th Cir. 1988) (noting that the single-filing rule has been extended to ADEA cases, in light of the "strong parallelism between the charge-filing requirements of ADEA and Title VII"); *Whalen*, 56 F.3d at 506 (applying rule in ADEA case); *Lusardi v. Lechner*,

855 F.2d 1062, 1075-80 (3d Cir. 1988) (same); *Hipp*, 252 F.3d at 1217 (same); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (noting single-filing rule with approval and holding that relief was available "on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members").

2. Under this case law, however, there are three threshold requirements that must be met for the "single-filing" rule to apply. *First*, the EEOC charge on which the non-filing plaintiff wishes to rely must have been timely filed with respect to both the charging party's and the non-filing plaintiff's claims; this requirement means that, in a deferral state like Pennsylvania, the representative plaintiff's charge must have been filed within 300 days of when both the charging party and the *non-filing* plaintiff allegedly suffered adverse employment actions. *See, e.g.*, *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 246 (3d Cir. 1975); *Hipp*, 252 F.3d at 1220. *Second*, the representative charge must be sufficient to have put the EEOC and the employer on notice of the *non-filing* plaintiff's particular claims as well. *See, e.g., Horton*, 343 F.3d at 899 ("if the would-be intervenor's claim arises out of the same or similar discriminatory conduct, committed in the same period, as the claim in the suit in which he wants to intervene, his failure to file a timely charge will be disregarded"). And, *third*, as this Court has repeatedly held, the non-filing plaintiff must be seeking to participate in a pending class or collective

action where the allegedly timely filed class allegations are at issue; the single-filing rule has no proper application in separate individual actions. *See, e.g.*, *Whalen*, 56 F.3d at 507; *Communications Workers*, 282 F.3d at 218.

In *Whalen*, this Court addressed whether four plaintiffs who had not filed EEOC charges could join a previously-filed ADEA action that included five plaintiffs who had filed EEOC charges. *See* 56 F.3d at 504. The district court had permitted the non-filing plaintiffs to join the ADEA action, relying upon the Second Circuit's decision in *Tolliver*. *Id.* at 506. This Court reversed the district court's decision, describing the controlling legal issue as "whether the single filing rule is applicable to non-class action ADEA lawsuits." *Id.* This Court noted that, in its previous ruling in *Lusardi*, it had "clearly distinguished class actions from other situations where a plaintiff seeks to 'piggyback' onto a timely charge." *Id.* This Court also commented that, in its decision in *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989), "we noted our decision in *Lusardi* as holding 'that plaintiffs who had not filed charges with the EEOC could *opt into an ADEA class action suit* only if the original complainant's EEOC charge gave the employer notice of class-based age discrimination.'" *Whalen*, 56 F.3d at 506-07 (emphasis in original). And this Court found that, under its prior decisions, for the single-filing rule to apply, there must exist both "a charge with allegations broad enough to support a subsequent class action lawsuit" and "the class action itself,

with the attendant requirement of class certification." *Id.* at 507. This Court therefore concluded:

> . . . [O]ur analysis in *Lusardi* and *Lockhart* controls our decision here and provides plaintiffs the option of seeking class certification and prospective plaintiffs who failed to seek a timely administrative remedy for their alleged injury the opportunity to opt into the class. *When, however, plaintiffs choose to bring suit individually, they must first satisfy the prerequisite of filing a timely EEOC charge.*

Id.

This Court reaffirmed *Whalen*'s holding in *Communications Workers*. There, a local branch of a national union and four of its members, none of whom had filed an EEOC charge, sought to piggyback onto the timely-filed charge of a national union, which had filed an associational-standing complaint against a state agency. The district court had rejected this piggybacking attempt because, in the Third Circuit, "piggybacking has never been allowed when the subsequent action is not a class action." 282 F.3d at 217. This Court affirmed the district court's decision, holding that *Whalen* was "dispositive." *Id.* The Court noted that, in *Whalen*, "[w]e held that 'our case law requires that, outside the context of a representative or class action, . . . an individual plaintiff must file a timely administrative charge.'" *Id.* at 218 (quoting *Whalen*, 56 F.3d at 505, ellipses in original). The Court also noted that, in *Whalen*, "we stated that *Lusardi* did not hold that 'filing a charge with allegations broad enough to support a subsequent class action alleviates the burden of filing the class action itself, with the attendant

requirements of class certification," and "concluded that if 'plaintiffs choose to bring suit individually, they must satisfy the prerequisite of filing a timely EEOC charge.'" *Communications Workers*, 282 F.3d at 218 (quoting *Whalen*, 56 F.3d at 507). The Court then held that, because there was no class action pending, the local branch and its members could not piggyback onto the charge that had been filed by the national union. *Id*.

3. Therefore, contrary to the decision below, Ruehl has not satisfied the threshold requirements of the "single-filing" rule. While Ruehl seeks to piggyback on the charges filed by Mueller and Bellas, he ignores that the district court in *Mueller* held that those charges (filed on December 21, 1998) were arguably untimely filed as to the claims of Mueller and Bellas. JA159-63. Moreover, Ruehl ignores that those charges were filed more than 300 days after the accrual of Ruehl's own claim, as Ruehl was notified on December 10, 1997 that he would be terminated effective August 31, 1998. And, most significantly, Ruehl is pursuing here only an individual action, when *Whalen* and *Communications Workers* forbid piggybacking unless there is pending a "class action itself, with the attendant requirements of class certification." *Whalen*, 56 F.3d at 507; *Communications Workers*, 282 F.3d at 218. Ruehl cannot rely on the "single-filing" rule because, whenever "plaintiffs choose to bring suit individually, they must satisfy the prerequisite of filing a timely EEOC charge." *Whalen*, 56 F.3d at 507;

Communications Workers, 282 F.3d at 218; *see also Horton*, 343 F.3d at 900 (recognizing that "the Third Circuit confines the [single-filing] doctrine to class actions"); *Armstrong*, 138 F.3d at 1393 & n.45 ("[O]nce class certification has been denied to a piggybacking claimant, she must hie herself to the EEOC in order to seek further consideration of her claim.").

B. The District Court's Reasons for Holding the Single-Filing Rule Applicable Here Are Erroneous

Notwithstanding the clear and binding precedent from this Court, the district court nonetheless held that the single-filing rule could apply here to save Ruehl from summary judgment. JA11-14. In doing so, the district court wholly ignored Ruehl's failure to show either that the charges of Mueller and Bellas were timely filed or that they were filed within 300 days of the accrual of Ruehl's own cause of action. And the reasons that the district court gave for finding the single-filing rule applicable are themselves fundamentally flawed.

1. The District Court Should Not Have Relied on *Tolliver* and Its Progeny

To begin with, the district court erroneously relied upon *Tolliver* and district court decisions citing *Tolliver* as authority for "the application [of the single-filing rule] in the context of a class which has been decertified." JA11-13. In *Whalen*, this Court expressly rejected *Tolliver*, *see* 56 F.3d at 507, and the district court should therefore not have relied on *Tolliver* or its progeny at all.

Moreover, the district court ignored that, when the *Tolliver* court allowed a former putative class plaintiff to "piggyback" on the timely-filed charge of a class representative after decertification, 918 F.2d at 1054, the fact of decertification was not a distinction involved in the *Tolliver* court's analysis. *Id.* at 1056. Instead, the *Tolliver* court focused on whether "the 'single filing rule' is available to ADEA plaintiffs initiating individual suits instead of joining as plaintiffs in an existing suit." *Id.* at 1057. That is a proposition of law that this Court has rejected.

Furthermore, the district court ignored that, when the Second Circuit answered that legal question differently than has this Court, it did so on the understanding that employers would not risk facing stale claims, because the ADEA then contained an independent statute of limitations (2 years, or 3 years for willful violations) that ran from the time that the alleged injury occurred. *Id.* at 1059; *see also* 29 U.S.C. § 626(e)(1) (1988), *amended by* Pub. L. No. 102-166, Title I, § 115, 105 Stat. 1079 (1991). But that statute of limitations, borrowed from the FLSA, 29 U.S.C. § 255, no longer applies to the ADEA. *See Sperling*, 24 F.3d at 464 n.1 (noting that 1991 ADEA amendments render inapplicable FLSA statute of limitations). Indeed, as courts in the Second Circuit have recognized, as a result of these statutory changes, "there is no longer an absolute deadline for filing an [ADEA] action, [and] the fears of stale claims raised and allayed by the Second

Circuit [in *Tolliver*] are once again present." *Bowers v. Xerox Corp.*, No. 94-CV-6093T, 1995 WL 880773, at *4 (W.D.N.Y. May 5, 1995).

In short, *Tolliver* is contrary to the law of this Circuit, did not draw the distinction for which the district court cited it, and rests on a premise that was subsequently swept away by Congress. The district court here clearly should not have relied on *Tolliver*.

2. The District Court Also Erroneously Found That Application of the Single-Filing Rule Would Comport With the "Procedural Due Notice and Fairness Safeguards" That This Court Requires

The district court similarly erred in suggesting that post-decertification piggybacking in individual cases is permissible because "concerns for due notice and fairness safeguards were adequately addressed in the context of the *Mueller* litigation." JA13. That reasoning is also seriously flawed.

First, this Court made clear in *Whalen* and *Communications Workers* that the only circumstances in which the required notice and fairness safeguards necessary for application of the single-filing rule exist are in the context of a pending class action. *See, e.g.*, *Whalen*, 56 F.3d at 507 (explaining that the single-filing rule can only apply where there exists "the class action itself, with the attendant requirement of class certification" and that when "plaintiffs choose to bring suit individually, they must first satisfy the prerequisite of filing a timely EEOC charge"); *Communications Workers*, 282 F.3d at 218 (same). The district

court had no basis for suggesting that this Court did not mean what it has repeatedly said.

Second, contrary to the district court's assumption, once a court has determined that class treatment is inappropriate, the need for a separate charge and concomitant EEOC investigation and conciliation are readily apparent. The class action seeks to litigate a collective claim that, if proper, creates commonality, typicality, and representativeness between the charging party and the non-charging parties. Once a court determines that the non-filing plaintiff is not "similarly situated" to the charging party, however, the collective claim is no longer in issue and no longer unites the charging party and the non-charging parties; rather, at that point, only distinctive individual claims remain, and it is neither fair nor appropriate to deem the employer to have been on notice of the non-filing parties' distinct individual claims. Moreover, once a court determines that the non-filing party is not "similarly situated" to the charging party's claim, it is neither fair nor appropriate to allow the non-filing party to litigate the timeliness of the charging party's underlying charge. And, most importantly, once the court has decertified or denied the collective action and thereby determined that the non-filing party should have to pursue his or her own individual case based on its own unique facts and defenses, it is neither fair nor appropriate to assume that there was no benefit to be had from a separate EEOC investigation and effort at conciliation. In short,

contrary to the district court's reasoning, where a court has either denied or decertified an ADEA collective action, it has necessarily determined either that the plaintiffs are not sufficiently similarly situated to justify class treatment or that fairness and procedural considerations prevent class treatment. In either event, in those circumstances, it is neither fair to the employer nor procedurally proper to permit non-filing plaintiffs to piggyback onto the charges of other individuals with distinct individual claims. *Accord Horton*, 343 F.3d at 900-01.

C. In Any Event, Even If the Single-Filing Rule Could Apply Outside of a Pending Class Action, It Would Not Save Ruehl's Judicial Complaint

In any event, even if the single-filing rule could apply outside of a pending class action, it still would not save Ruehl's judicial complaint. The district court plainly erred in assuming and holding otherwise.

First, even in circuits that allow piggybacking outside of a class action, the single-filing rule applies only where there is sufficient degree of similarity between the claims of the charge-filing plaintiff and the would-be piggybacking plaintiff such that the original charge would have placed the employer on notice, and provided an opportunity for conciliation, of the claims of the non-filing plaintiff. *See, e.g.*, *Horton*, 343 F.3d at 900-01 (holding that the single-filing rule must "at the very least be limited to cases . . . in which the unexhausted claim arises from the *same* unlawful conduct," and explaining that otherwise the "failure of

conciliation" with respect to the charge-filing plaintiff "cannot be assumed to have doomed an attempt at conciliation with the" non-filing plaintiff) (emphasis in original); *Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1239 (11th Cir.) (holding that the single-filing rule can apply only where "the individual claims of the filing and non-filing plaintiff arise out of similar discriminatory treatment in the same time frame") (internal quotation marks omitted), *cert. denied*, 543 U.S. 1020 (2004); *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191, 1192 (10th Cir. 2004) (permitting piggybacking only because the claims of the charge-filing plaintiff and non-filing plaintiff "arose out of the same circumstances and occurred within the same general time frame as the exhausted claims"); *Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2d Cir. 1986) (single-filing rule "presupposes, of course, that the subsequent claims are sufficiently similar to the original complaint and the employer received adequate notice and an opportunity for conciliation."). But the claims of Mueller and Bellas are not sufficiently similar to the claims of Ruehl to allow these conclusions.

As courts allowing piggybacking outside of class cases have held, for the single-filing rule to be applicable, the claims of the charge-filing plaintiff and those of the non-filing plaintiff must be based on the actions of the same decisionmakers in the same location at about the same time. *See, e.g.*, *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214-15 (5th Cir. 1995) (ADEA plaintiffs were not similarly

situated where they were "scattered over 11 separate locations" and discharged by "different decision-making supervisors for a variety of reasons"); *Brooks v. BellSouth Telecomms., Inc.*, 164 F.R.D. 561, 569 (N.D. Ala. 1995) (ADEA plaintiffs were not "similarly situated" when they were "in separate departments" and had "separate supervisors"), *aff'd*, 114 F.3d 1202 (11th Cir. 1997). Ruehl, however, was selected for termination by different decisionmakers in a different business and at a different time than Mueller and Bellas: Mueller, notified of his termination in March 1997, was a manager in the Nuclear Energy Division of WEC and alleged that he was fired as a part of a "plan to eliminate older workers at Westinghouse's Nuclear Power Facility." JA151-52(Mueller Charge). Bellas, terminated in December 1997, was a project engineer in the ESBU and alleged that he was terminated as part of a "plan to eliminate older workers at Westinghouse's ESBU." JA153(Bellas Charge). Ruehl, by contrast, was neither a worker at the Nuclear Power Facility nor a member of WEC's ESBU at the time of his termination in late 1998. He was an accountant in the Tax Division and worked at corporate headquarters. JA405(R.Aff.9/16/04). Mueller's and Bellas's charges of age discrimination therefore simply do not establish a claim for Ruehl, who was an employee working in a different division, supervised by a different managerial team, and terminated at a different time.

Moreover, the lack of similarity between Ruehl's claims and those raised by Mueller and Bellas is confirmed by the district court's decertification of the *Mueller* action because of such dissimilarities. The district court held that the individual layoff decisions affecting members of the opt-in classes were decentralized and individualized, and that the facts underlying the individual plaintiffs' claims were "hopelessly disparate." JA189, JA247-48. In these circumstances, there is no basis for deeming that Mueller's and Bellas's EEOC charges put CBS on notice of Ruehl's distinct claim, nor is there a basis for deeming that the failure of CBS to reach conciliation with Mueller and Bellas would have doomed conciliation between CBS and Ruehl. And, while the district court held that possible issues of fact precluded dismissal of Mueller's and Bellas's claims on timeliness grounds, their charges were facially untimely and thus would not have property notified WEC of *any* other claims, since WEC could reasonably have presumed that those charges would be dismissed. *See, e.g., Wetzel*, 508 F.2d at 246; *Hipp*, 252 F.3d at 1220. Indeed, Ruehl was notified on December 10, 1997 that he had been selected for termination, effective August 31, 1998—which was more than 300 days before the charges of Mueller and Bellas were even filed. It was plain error to apply the single-filing rule in such circumstances.

Second, even if the single-filing rule could apply outside of a pending class action, Ruehl's judicial complaint was not timely filed. Ruehl filed his suit more

than 90 days after receiving notice of the decertification of the *Mueller* subclasses. That was too late.

Under the ADEA, once a timely administrative charge has been filed, a plaintiff has a limited window of time in which to bring suit—no less than 60 days after the charge is filed, but no more than 90 days after the EEOC sends a notice of dismissal. A plaintiff who invokes the single-filing rule, by definition, has not filed a timely EEOC charge, and thus will not receive his own notice of dismissal. Because the ADEA statute of limitations does not normally begin to run *until* such a notice is received, the piggybacking plaintiff would effectively face no limitations period at all. Such a result is untenable, because "[e]mployers would face the possibility of defending against piggybacked claims brought years after the litigation brought by persons who had followed the proper administrative procedure had resolved their claims." *Bowers*, 1995 WL 880773, at *4.

Accordingly, courts have thus held that "a plaintiff seeking to 'piggyback' onto the administrative charge of another [is] subject to the same statute of limitations as those persons similarly situated upon whose charge he relies" and that a piggybacking plaintiff's judicial complaint is untimely if it is filed more than 90 days after the representative plaintiff has received a notice of dismissal. *Id.* Courts have further held that, in a situation where the piggybacking plaintiff had attempted to join a class that was later decertified, the 90-day limitations period

would be tolled by the pendency of a putative class or collective action but would restart upon denial or decertification of the class action. *See, e.g.*, *Bost*, 372 F.3d at 1241-42 (holding that former unnamed class members had 90 days to sue from date that class complaint was dismissed with prejudice); *Basch v. Ground Round, Inc.*, 139 F.3d 6, 9 n.8, 11 (1st Cir. 1998) (assuming that *Tolliver* post-decertification piggybacking rule applied, but holding suit time barred because tolling would apply only until decertification date, leaving opt-ins with "at most 90 days" to file a judicial action; plaintiff's suit was filed more than 90 days after decertification); *Armstrong*, 138 F.3d at 1392 (holding judicial complaints filed more than 90 days after the effective decertification date untimely). Indeed, this is the very position articulated by Ruehl's lawyers in the *Mueller* litigation, who argued that because the "administrative agency dismissal in [a] case is effectively the decertification decision by [the] Court," "each plaintiff has ninety (90) days from receiving such Notice [of Decertification] to proceed to court." JA266-67.

Therefore, contrary to the ruling below, JA8n.3, Ruehl's judicial complaint was in all events untimely filed under the single-filing rule. On May 14, 1999, the EEOC notified both Mueller and Bellas that it was dismissing their respective charges. JA155-56. Mueller and Bellas filed their initial complaint on "August 13, 1999," exactly 90 days later. *Mueller v. CBS, Inc.*, 201 F.R.D. 425, 426 (W.D. Pa. 2001). Ruehl seeks to piggyback onto Mueller's and Bellas's charges, and thus

he must be treated as if he received a notice of dismissal on the same date as did Mueller and Bellas—*i.e.*, May 14, 1999. As of August 13, 1999, the 90-day limitation period may have been tolled by the filing of the collective action, but, upon decertification, the clock began to run again—and would have expired immediately. Moreover, even if Ruehl's 90-day time clock began anew upon the district court's issuance of its notice of decertification on March 20, 2003, Ruehl's judicial complaint was not filed until January 20, 2004—well over 90 days after class decertification. Accordingly, even if the single-filing rule were applied here, it would not save Ruehl's untimely judicial complaint.

II. RUEHL IS NOT ENTITLED TO EQUITABLE TOLLING

Nor is Ruehl entitled to any equitable tolling that could save his untimely EEOC charge or judicial complaint. The district court alternatively held that Ruehl could be entitled to equitable tolling of the 300-day EEOC-charge-filing period on the ground that the release that Ruehl signed allegedly failed to comply with the OWBPA because WEC did not include the demographic information specified in the statute as an attachment to the release that Ruehl signed, but instead made it available upon request. JA16 & n.4. The district court's ruling in this regard is erroneous for several reasons: It ignores the narrow circumstances in which tolling applies; it overlooks Ruehl's failure to plead facts giving rise to tolling in his

complaint; it ignores Ruehl's lack of diligence in pursuing his claims; and it is based on the flawed premise that Ruehl's release was actually defective.

A. Tolling Applies Only in Rare and Extraordinary Circumstances

Tolling is an exception to the normal limitations rules and, under established case law, applies only in rare and extraordinary circumstances. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (declining to toll the applicable statute of limitations because "[f]ederal courts have typically extended equitable relief only sparingly"). Tolling is appropriate only "'(1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff has in some extraordinary way been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.'" *Robinson v. Dalton*, 107 F.3d 1018, 1022 (3d Cir. 1997) (citation omitted). And equitable tolling is available only to a plaintiff who "'exercise[s] due diligence in preserving his legal rights.'" *Id.* at 1023 (quoting *Irwin*, 498 U.S. at 96).

A party who claims the benefit of equitable tolling must so allege in his judicial complaint. "[F]ederal courts have repeatedly held that plaintiffs seeking to toll the statute of limitations on various grounds must have included the allegation in their pleadings; this rule applies even where the tolling argument is raised in opposition to summary judgment." *Wasco Prods., Inc. v. Southwall Techs., Inc.*,

435 F.3d 989, 991 (9th Cir. 2006) (citing cases). Courts within this judicial circuit have followed this established rule. *See, e.g.*, *Loucks v. Jay*, No. Civ. A. 1:04-CV-0366, 2006 WL 266105, at *4 (M.D. Pa. Feb. 1, 2006) (dismissing claims as time-barred because "[t]he amended complaint is void of any allegations that would warrant equitable tolling of the limitations period"); *Cooper v. Wawa, Inc.*, No. Civ. A. 94-5920, 1995 WL 50061, at *2 (E.D. Pa. Feb. 2, 1995) (rejecting equitable tolling allegations missing from plaintiff's complaint). For instance, in *Compton v. National League of Professional Baseball Clubs*, 995 F. Supp. 554 (E.D. Pa.), *aff'd*, 172 F.3d 40 (3d Cir. 1998), a plaintiff who had filed an untimely EEOC charge sought equitable tolling to save his judicial complaint. The district court concluded that the plaintiff's complaint lacked "proper allegations" to support tolling, because "nowhere in his complaint [did plaintiff] allege that the defendants misled him into sleeping on his rights after the 1994 termination. Only in his opposition brief" opposing dismissal did plaintiff make tolling allegations. That was legally insufficient. 995 F. Supp. at 559-60.

Even where tolling is alleged in the complaint, however, this Court has made clear that it should be allowed only in rare and extraordinary circumstances. *See, e.g.*, *Robinson*, 107 F.3d at 1022. In *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir. 1994), for example, the Court found tolling warranted only because of the alleged extraordinary circumstance that "the

defendant actively misled the plaintiff respecting the reason for plaintiff's discharge." *Id*. at 1387. And this Court has elsewhere observed that tolling may be warranted "where a pro se litigant has been 'trapped' by harsh formalities," *Harris v. Vaughn*, 129 F. App'x 684, 687 n.9 (3d Cir. 2005), "where the [plaintiff's] delay was caused by judicial actions or omissions, government interference, mental incompetence, lack of notice, or actual innocence of [a habeas] petitioner," *id*., or "where a court has misled a party regarding the steps that the party needs to take to preserve a claim." *Brinson v. Vaughn*, 398 F.3d 225, 230 (3d Cir.), *cert. denied*, 126 S. Ct. 473 (2005). In contrast, the Court has found tolling unwarranted where a Title VII plaintiff claimed that he was "misled" by an EEOC counselor (but not by his former employer) into failing to file a formal complaint, but did not allege that he was independently unaware of the procedural requirements for pursuing a Title VII claim. *Robinson*, 107 F.3d at 1022-23.

While this Court has not itself addressed whether a technical deficiency in a release is an extraordinary circumstance that could give rise to tolling, not surprisingly, several courts (including two federal circuits) have held that a technically deficient release, without more, does not constitute an exceptional circumstance justifying tolling. *See, e.g.*, *LaCroix v. Detroit Edison Co.*, 964 F. Supp. 1144 (E.D. Mich. 1996); *Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 123-25 (1st Cir. 1998); *Moss v. Detroit Edison Co.*, 149 F.3d 1184, 1998 WL

322657 (6th Cir. 1988) (table, text in Westlaw). In *LaCroix*, for example, the Eastern District of Michigan determined that the plaintiff erred in commingling the defective waiver with her failure to file a timely EEOC charge, because "[a] defective waiver would only preclude Defendant from relying on the waiver. It does not excuse compliance with the statute of limitations." 964 F. Supp. at 1151. The circuits have held that this conclusion is particularly appropriate where the release itself provides the employee with specific notice of his rights under the ADEA. *See Am. Airlines*, 133 F.3d at 124 (equitable tolling unavailable where invalid release gave employee notice of his rights).

Indeed, in the *Mueller* case into which Ruehl originally opted, the district court originally agreed with the rationale of *LaCroix* with regard to Bellas's EEOC charge (although it later held that the untimeliness might be excused based on Bellas's later allegations of deception and coercion contained in his amended complaint). The court stated:

> I find that even assuming arguendo as Plaintiffs allege, that the Release entered into by Bellas and Westinghouse was ineffective, that Bellas did not learn of the invalidity of the Release until the fall of 1998 and then promptly filed the EEOC charge, that Westinghouse knew of the Release's invalidity from the outset, and intended that the defective Release tendered to Bellas would deter him from filing charges with the EEOC, said allegations do not give rise to an entitlement to equitable tolling of Bellas's requirement that he file a charge of discriminatory conduct with the EEOC within 300 days of the allegedly discriminatory act. *See LaCroix v. Detroit Edison Co.*, 964 F. Supp. 1144, 1151 (E.D. Mich. 1996) (holding that even assuming that the employer's waiver of ADEA claims was defective,

> plaintiff erred in commingling the defective waiver with her failure to comply with requirement of timely filing an EEOC charge because "[a] defective waiver would only preclude Defendant from relying on the waiver. It does not excuse compliance with the statute of limitations.").

JA163(D.Ct.Op.2/7/00).

B. Ruehl Cannot Satisfy the Requirements for Equitable Tolling

Under this case law, Ruehl cannot satisfy the requirements for equitable tolling. The district court's contrary conclusion is plainly wrong.

1. Ruehl Did Not Plead the Facts Supposedly Giving Rise to Tolling in His Judicial Complaint

To begin with, Ruehl did not plead any factual predicate for equitable tolling in his judicial complaint. His complaint does not mention the allegedly defective release, the OWBPA, or any other possible ground for tolling. Indeed, the complaint does not use the word "tolling," does not acknowledge that Ruehl's EEOC charge was facially untimely, and does not include any reference to the *Mueller* action. Ruehl's complaint plainly would not put any party on notice that he was asserting equitable tolling as a ground to excuse a facially untimely EEOC charge. For this reason alone, Ruehl may not rely on equitable tolling to excuse his untimely EEOC charge. *See, e.g.*, *Wasco*, 435 F.3d at 991; *Compton*, 995 F. Supp. at 559-60.

2. Ruehl Has Not Established Any Extraordinary Circumstance That Would Warrant Equitable Tolling

In any event, Ruehl has not established any extraordinary circumstance that would warrant equitable tolling. Ruehl has not alleged that WEC actively misled him concerning his cause of action; on the contrary, Ruehl has conceded that he suspected for years that WEC was discriminating against older workers (including himself) on the basis of age, that he was advised over eight months in advance that he had been selected for termination, that he believed then that he had been selected for termination based on his age, and that, upon termination, he was advised that he might have claims under the ADEA and that he should consult a lawyer before executing a release of those claims. JA291-92; JA299; JA304(R.Dep.). Nor has Ruehl alleged that he was prevented in some extraordinary way from asserting his rights; while he claims that he was induced to sign a release that he alleges was technically deficient under the OWBPA, he concedes that he was advised to consult a lawyer before signing the release, that he was aware that the specified demographic data was mentioned in but not attached to the release, and that he could have asked for the data but chose not to do so. And Ruehl does not, and could not, claim that he timely asserted his rights mistakenly in the wrong forum. Accordingly, under the case law, tolling is not legally warranted.

The district court held that Ruehl could be entitled to equitable tolling since his release, which is valid for all other purposes, allegedly is technically defective for purposes of waiving an ADEA claim, because the demographic information required under the OWBPA was only made available to Ruehl upon request, rather than by attaching it to the release itself. JA15-17. But, as noted above, that holding is contrary to the judgments of at least two federal courts of appeals and other district courts. *See, e.g., Am. Airlines*, 133 F.3d at 123-25; *Moss*, 1998 WL 322657, at *3; *LaCroix*, 964 F. Supp. at 1151. Put simply, the asserted technical deficiency in Ruehl's release in no way establishes that WEC "actively misled" Ruehl "regarding the reason for [his] discharge," *Oshiver*, 38 F.3d at 1392, nor does it establish that Ruehl was "prevented from asserting his . . . rights" "in some extraordinary way." *Robinson*, 107 F.3d at 1022. The technical deficiency is at most a reason for holding that the release does not itself bar Ruehl's ADEA claim; that technical deficiency does not render the release unenforceable as to any other released claim, and clearly does not provide the extraordinary circumstances that are required to equitably toll the statute of limitations on any claim.

Contrary to the ruling below, JA16-17, this Court's decision in *Oshiver* does not suggest otherwise. In *Oshiver*, this Court, accepting a plaintiff's factual allegations as true, permitted a plaintiff to survive a motion to dismiss on statute-of-limitations grounds where she had adequately pled facts charging the defendant

with actively misleading her as to the reasons for her termination. 38 F.3d at 1384. No such allegations of misrepresentation or deception and coercion appear in Ruehl's complaint; in particular, nowhere has Ruehl suggested that WEC misled him about the facts underlying his ADEA claim or, indeed, about the release itself. On the contrary, Ruehl claims that he long suspected that WEC was discriminating against him because of age and, though purportedly deficient, Ruehl understood from the release itself that he had the right to sue, the right to consult counsel, and the right to review specified demographic information. This case is nothing like *Oshiver*; rather, it is on all fours with the cases that have rejected tolling merely because a deficient release may have been involved. *See, e.g., Am. Airlines*, 133 F.3d at 124 (equitable tolling inapplicable where invalid release gave employee knowledge of his rights).

3. Ruehl's Lack of Diligence Precludes Tolling

In all events, Ruehl's lack of diligence precludes tolling as a matter of law. The cases are clear that a plaintiff cannot invoke equitable principles to excuse his own lack of diligence. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 1151 (1984). Tolling thus ceases once the grievant knows or, using reasonable diligence, should have known of his or her possible claim. *See Vernau v. Vic's Market, Inc.*, 896 F.2d 43, 46 (3d Cir. 1990); *see also Chakonas v. City of Chicago,*

42 F.3d 1132, 1135 (7th Cir. 1994) ("[T]olling should not be applied here because [plaintiff] should have been aware that he had a possible claim under the ADEA.").

This Court has explained that "'[t]here are very few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence.'" *Vernau*, 896 F.2d at 46 (quotation omitted). Accordingly, if there is a reason that a grievant should investigate into the facts of his possible claim (*i.e.*, if a grievant is put on inquiry notice of his claim), then he must so investigate; if he fails to do so, he has failed to exercise reasonable diligence. *See, e.g.*, *EBS Litig. LLC v. Barclays Global Investors, N.A.*, 304 F.3d 302, 305 (3d Cir. 2002) (inquiry notice is "when the plaintiff is *objectively* aware of the facts giving rise to the wrong") (emphasis in original, internal quotation marks omitted).

For these reasons, this Court and others routinely deny equitable tolling where a plaintiff has not diligently pursued his rights. *See, e.g.*, *Satterfield v. Johnson*, 434 F.3d 185, 195-96 (3d Cir. 2006) (rejecting equitable tolling of Antiterrorism and Effective Death Penalty Act statute of limitations in light of habeas petitioner's "lack of diligence in pursuing his petition" by waiting nearly a year to petition for post-conviction relief after he was aware of his claim for ineffective assistance of counsel); *Mahmood v. Gonzales*, 427 F.3d 248, 249, 252-53 (3d Cir. 2005) (holding equitable tolling inapplicable to alien's untimely motion

to reopen asylum claim, despite showing of ineffective assistance of counsel that would otherwise warrant tolling, in light of alien's failure "to exercise the requisite degree of diligence" in pursuit of his claims by failing to "inquire about the status" of his pending motion to reopen immigration case notwithstanding his knowledge that prior motion to reopen had been decided in "far less time" than current motion was pending); *Vistamar, Inc. v. Fagundo-Fagundo*, 430 F.3d 66, 71-73 (1st Cir. 2005) (affirming dismissal of civil rights claims as time-barred and rejecting application of equitable tolling in light of plaintiff's failure to exercise reasonable diligence in pursuing its claims when it had been "on notice" of facts giving rise to claims); *Ewer v. United States*, 63 Fed. Cl. 396, 401-02 (2005) (holding equitable tolling inapplicable to untimely claims under FLSA because plaintiffs did not actively pursue their claims and failed to explain how their claims were "inherently unknowable" prior to expiration of the limitations period).

In particular, in *Moss*, the Sixth Circuit rejected the argument that a release that technically failed to comply with the OWBPA's demographic information specifications would entitle the plaintiff to tolling where the plaintiff had "signed, and presumably read, the [release], which informed him of his right to receive the information on employee ages and job titles." 1998 WL 322657, at *5. The court held that even:

> constru[ing] the evidence in the light most favorable to [plaintiff], it is still apparent that he signed the form without having received the

> information. A diligent employee would have requested the information upon learning that he was entitled to it. [Plaintiff] did not. He cannot benefit from his own lack of diligence.

Id.

In this case, Ruehl has similarly failed to act with reasonable diligence. Here, Ruehl admitted that: (1) he long suspected that WEC was discriminating on the basis of age against its employees, including himself; (2) he believed his own termination was motivated by his age; (3) he knew that he had signed a release stating that he had received the specified demographic information; (4) he never asked for that information, (5) he made a conscious decision *not* to ask for that information based upon his unsupported assumption that it could somehow affect his pension benefits, and (6) he knew the demographics of his department and believed that he was the oldest employee terminated and that there were employees in his department under 40 years of age. JA291-305(R.Dep.). Thus, just like the plaintiff in *Moss*, Ruehl has not acted with reasonable diligence: Although he was on notice of both his potential ADEA claims and his right to receive specified demographic information, Ruehl chose not to request the information and instead knowingly signed a release waiving his ADEA claims. Like the plaintiff in *Moss*, Ruehl should not be permitted to claim tolling where he has shown such a lack of diligence:

> Moss claims that Detroit Edison committed an affirmative act of misrepresentation when it provided him with the VSO form that

> stated, falsely, that he had been given the required information …. The problem with this argument is that Detroit Edison gave Moss the VSO so that he could sign it, and thereby endorse the representations contained therein as true. And Moss did sign it. He signed a document that stated that he had received the necessary information, but he now claims that he never received it. Ironically, the only affirmative act of misrepresentation in this case is that of Moss averring that he had received the required information, when, in fact, he had not.

1998 WL 322657, at *4.

The district court erroneously suggested that "questions of fact as to [WEC's] conduct preclude the entry of summary judgment" on the inapplicability of tolling. JA17-18. In particular, the district court was concerned about the state of mind of WEC's decisionmakers when they adopted WEC's practice of making the required demographic information available upon request, rather than attaching it to each affected employee's release. JA17. The district court's concern was misplaced.

First, there is no evidence in the record, nor has Ruehl alleged, that WEC was engaged in any sort of conspiracy to deceive employees, like Ruehl, about the existence of potential ADEA claims or about the demographics of the employees selected for layoff. To the contrary, WEC advised employees of their rights under the ADEA, advised them of their rights to the demographic information, and provided the information upon request. There is no evidence of any intention to deceive. As this court has noted, "an inference based upon a speculation or

conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990).

Second, WEC's state of mind at the time it determined its practice of making the specified demographic information available upon request is entirely irrelevant to Ruehl's diligence in asserting his rights. The only facts relevant to the question whether Ruehl acted diligently are when Ruehl received notice of the availability of the demographic information and what, if anything, he did to act upon that notice. Here, Ruehl learned of the existence of the demographic information no later than August 31, 1998, the date of his release. And he made a conscious decision not to ask for the information. Those facts alone determine that Ruehl's own lack of diligence precludes the application of equitable tolling; WEC's intent in not attaching the information to the release is irrelevant to the analysis of Ruehl's lack of diligence.

4. Ruehl's Complaint Is Untimely Even With Tolling

Even apart from Ruehl's lack of diligence, equitable tolling would be particularly inappropriate on the record here. Ruehl was informed of his separation from employment with WEC on December 10, 1997, 264 days *before* he signed his release on August 31, 1998. JA125(Transition Form); JA145(Carpenter List); JA291-92(R.Dep.); JA429(Edm.Decl.). Thus, even if his 300-day clock were

tolled as of August 31, 1998, tolling would have ceased as of the effective decertification date in *Mueller*, since Ruehl testified that he "became aware" of the purported invalidity of his release "during [his] involvement in" *Mueller*. JA302(R.Dep.). Indeed, even if tolling ceased only on March 20, 2003 (the *Mueller* decertification notice date), Ruehl's 300-day clock would have run on April 26, 2003. But Ruehl did not file his EEOC charge until October 14, 2003, over 150 days *after* the 300-day limitations period would have expired. Therefore, regardless of tolling, Ruehl's EEOC charge was untimely, and his judicial complaint should be dismissed.

C. Ruehl's Release Was Not Defective Under the OWBPA

In any event, Ruehl's equitable tolling argument also proceeds from the false premise that Ruehl's release was defective under the OWBPA. It was not.

Contrary to Ruehl's argument and the district court's hypothesis, the OWBPA does not require that the specified demographic information be physically attached to the release. Section 626(f)(1)(H) of the OWBPA merely states that a waiver of rights relating to "an exit incentive or other employment termination program" will not be deemed "knowing and voluntary" unless the employer "informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate" as to "(ii) 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). While this provision clearly requires the employer to inform the employee in writing about such demographics, it simply does not specify the manner in which the information is to be conveyed. Nowhere does the OWBPA mandate that an employee be "provided" with the specified demographic information "at the time of" presenting, or "as an attachment to," his release, lest the release fail to be "knowing and voluntary." Rather, as the EEOC essentially acknowledged in seeking public comment on the issue, the statute can be read to allow the employer simply to make the information available at a reasonable time and place, or upon request. *See* 57 Fed. Reg. 10626-02, 10629 (March 27, 1992) (seeking comment on whether the ADEA and OWBPA "allow the employer to make the [demographic] information . . . available for examination in, for example, its personnel office"); *see also* 60 Fed. Reg. 45388-01, 45389 (Aug. 31, 1995) (seeking comment on whether the ADEA and OWBPA "permit an employer to satisfy the notification requirements" of 29 U.S.C. § 626(f)(1)(H) "by having the information available for any interested employee in a central location, such as the employer's personnel office, or is it necessary for an employer to provide all relevant information to every affected employee?").

Such a construction of the statute is in fact consistent with the OWBPA's purpose. As the legislative history reveals, the primary purpose of the OWBPA was to ensure that an employee considering a waiver of ADEA rights act knowingly and voluntarily. *See, e.g.*, S. Rep. 101-263, at I (April 5, 1990) (*reprinted in*, 1990 U.S.C.C.A.N. 1509, 1510) (stated purpose of Senate bill was "to ensure that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA"); H.R. Rep. 101-1014, at Section D (Jan. 3, 1991) (same). As the legislative history further reveals, the statute contemplates that the primary means of ensuring such knowing and voluntary waivers is through the advice of counsel. H.R. Rep. 101-664, at Section B, Part 2 ("An employee cannot be required to hire an attorney before signing a waiver, but it is vitally important that the employee understand the magnitude of what he or she is undertaking. Legal counsel is in the best position to help the individual reach that understanding."). Permitting an employer to furnish the demographic information to an employee upon request in no way detracts from these purposes: Counsel can advise the employee whether to request the information and whether to waive a claim (with or without reviewing the information). Indeed, failing to so construe the statute might frustrate the purposes of the statute, as it would otherwise require employers unnecessarily to provide employees and their counsel with thousands of pages of potentially unwanted and unhelpful materials.

As several of the public comments in response to the EEOC's proposed rulemaking show, construing the statute to require the employer always to attach the specified information to the release itself (in order for the release to be enforceable) could be wasteful, burdensome, and counterproductive. As the Equal Employment Advisory Council stated in its comments:

> Subparagraph (H) [of the OWBPA] requires the employer to "inform [eligible employees] in writing in a manner calculated to be understood by the average individual eligible to participate . . . ." It does not specify the manner in which the information is to be conveyed. Thus, a waiver will not be rendered invalid if the information was made available for examination instead of being distributed in full to each eligible employee.
>
> Depending upon the size of the "group," "class" or "unit," the information involved may be copious and costly to reproduce. Moreover, given the immense popularity of early retirement incentives, many participants will not even be interested in the statistical data, and at most will want the eligibility requirements and time limits. If the employer simply informs all eligible employees that the additional information is available for inspection in the personnel office or other convenient location, those interested will be able to access and examine it.

July 27, 1992 letter from Equal Employment Advisory Council to EEOC at 22, JA107. And as Senator Hatch and Congressman Goodling explained in their comments:

> The objective of the statute is *not* to discourage the use of waivers or to make them so burdensome and expensive that it is impractical for an employer to use them. Such a burden would include, for example, requiring the employer to send three inches of xeroxed paper to each employee.

Letter of August 17, 1992 to EEOC at 11, JA79 (emphasis in original). *See also, e.g.*, Undated letter from National Retail Federation to EEOC at 9-10, JA120-21 (noting that OWBPA must be interpreted to allow employers to make demographic information available for inspection upon request, "particularly if requirements such as 'job titles' and 'ages of all individuals' required by (H)(ii) are literally interpreted").

In keeping with the statute's text and legislative history, and the practical concerns expressed during the EEOC's rulemaking proceeding, the only court to have addressed this issue, other than the court below, held that making the demographic information available upon request fully satisfies the requirements of the OWBPA. In *Hartnett*, 59 F. Supp. 2d 605, the employee argued that the release that he signed was defective because the employer, by merely making the relevant demographic information available upon request, failed to provide him with such information as required under section 626(f)(1)(H). *See id*. The court rejected that argument and held that making the demographic information available upon request was sufficient for the release to comply with Section 626(f)(1)(H). *Id.* at 615 & n.17. In so holding, the court emphasized that the employee "[did] not claim that he asked for the information and was denied it." *Id.* at 615.

Ruehl's release, like the release at issue in *Hartnett*, meets the demographic information requirement of Section 626(f)(1)(H). It is undisputed that WEC made

the relevant demographic information available to employees; if an employee expressed a desire to see the demographic information, WEC provided the information to that employee. JA175-85(W.Dep.); JA362(Interrogatories). Ruehl has not claimed, nor could he claim, that he sought the information but was denied it. Indeed, Ruehl admits that he never asked the company to provide the demographic information. JA304-05(R.Dep.). To the contrary, Ruehl admits that he made a conscious decision *not* to ask for the demographic information, even though he understood that it was available. *Id.*

Because WEC's action in making available the demographic information complied with section 626(f)(1)(H), Ruehl's release is an effective waiver of his ADEA claim. It thus cannot provide a basis for tolling any statute of limitations.

CONCLUSION

For the foregoing reasons, the district court's order denying summary judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32A

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), counsel for Defendant-Appellant Viacom, Inc. certifies that Appellant's Brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B).

1. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(ii), Appellant's Brief contains 13,991 words.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Rule 46.1 of the Local Appellate Rules for the United States Court of Appeals for the Third Circuit, Lawrence D. Rosenberg, counsel for Viacom, Inc., certifies that he is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2006, one copy of the foregoing Brief for the Plaintiff-Appellant and incorporated Joint Appendix were served on the following counsel by overnight commercial carrier (Federal Express):

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I also certify that on April 19, 2006, ten bound copies of the foregoing BRIEF FOR DEFENDANT-APPELLANT VIACOM, INC. and incorporated Volume One of the Joint Appendix were served by mailing through a third-party commercial carrier (Federal Express) to the Office of the Clerk, United States Court of Appeals for the Third Circuit, and an electronic brief, in PDF format, was transmitted to the Office of the Clerk via electronic mail. I also certify that the text of the hard copies and the PDF file of the brief are identical.

I further certify that the PDF copy of the foregoing brief was scanned for viruses using the Word Metadata Assistant anti-virus program.

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