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United States District Court,
W.D. Pennsylvania.

Arthur C. RUPERT, Linda K. Austin, Larry L. Campbell, Kenneth J. Hunt and Wade C. Bittner, individually and on behalf of all others similarly situated, Plaintiffs,
v.
PPG INDUSTRIES, INC., Defendant.
Arthur C. Rupert, Linda K. Austin, Larry L. Campbell, Kenneth J. Hunt, Wade C. Bittner on behalf of themselves and all others similarly situated, Consolidated Plaintiffs,
v.
PPG Industries, Inc., Consolidated Defendants.

Nos. 07cv0705, 08cv0616. | Feb. 26, 2009.

Attorneys and Law Firms

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Opinion

ORDER OF COURT ADOPTING REPORTS AND RECOMMENDATIONS OF SPECIAL MASTER AT DOCUMENT NOS. 123, 124 AND 126

ARTHUR J. SCHWAB, District Judge.

***1** After careful consideration of the various motions for summary judgment and the briefs and supporting materials, the Special Master's Reports and Recommendations at documents nos. 123, 124 and 126, the objections thereto (doc. nos. 128 and 129), and the respective responses to objections (doc. nos. 130, and 131), the Court adopts said Special Master's Reports and Recommendations, and enters the following Order on the pending motions for summary judgment:

Defendant's Motions for Summary Judgment as to Plaintiffs Hunt and Bittner (doc. nos. 75 and 83) are GRANTED with prejudice as to Plaintiffs Hunt and Bittner's claims as class representatives on behalf of others similarly situated, and as to their individual claims to the extent such individual claims rely on the charges Plaintiffs Hunt and Bittner filed with the EEOC.

Defendant's Motions for Summary Judgment as to Plaintiffs Rupert, Campbell, and Austin (doc. nos. 77, 79 and 81) are DENIED with regard to issues not relating to the Separation Agreement and Releases executed by Plaintiffs Rupert and Campbell, which are the subject of the Report and Recommendation at doc. no. 124, and with regard to issues regarding the Separation Agreement and Releases executed by Plaintiffs Rupert and Campbell, which are the subject of the Report and Recommendation at doc. no. 126.

Plaintiffs' Motion for Summary Judgment with regard to the Separation Agreements and Releases (doc. no. 85) is DENIED in part as moot, insofar as it relates to Defendant's previously withdrawn Fourth Affirmative Defense, and otherwise is GRANTED; (ii) Defendant's Second Affirmative Defense is STRICKEN with prejudice; and (iii) judgment is entered in favor of Plaintiffs on Defendant's Counterclaim with prejudice to Defendant's right to bring a Counterclaim based on breach of contract, but without prejudice to Defendant's right to file an Amended Counterclaim for restitution or on theories other than breach of contract.

SO ORDERED.

REPORT AND RECOMMENDATION

KEVIN P. LUCAS, Special Master.

I. Recommendation

It is recommended that Defendant's Motions for Summary Judgment as to Plaintiffs Hunt and Bittner (Docket Nos. 75 and 83) be granted. It is recommended that the grant of summary judgment be with prejudice as to Plaintiffs Hunt and Bittner's claims as class representatives on behalf of others similarly situated and as to their individual claims to the extent such individual claims rely on the charges Plaintiffs Hunt and Bittner filed with the EEOC. Nothing in this Report and Recommendation is intended to constitute a ruling on any issue not yet presented as to whether or the extent to which Plaintiffs Hunt and Bittner would or might be entitled to status as class members if class certification were granted at a subsequent stage in this case.

II. Report

Plaintiffs Arthur C. Rupert, Linda K. Austin, Larry L. Campbell, Kenneth J. Hunt and Wade C. Bittner bring this action in which they allege that the termination of their employment by Defendant PPG Industries, Inc. ("Defendant") violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA"). Plaintiffs allege claims of both disparate treatment and disparate impact. Plaintiffs bring these claims both as individuals and as class representatives on behalf of others similarly situated.

***2** Presently before this Court for disposition are Defendant's Motions for Summary Judgment as to Plaintiffs Hunt and Bittner. Defendant has asserted as an affirmative defense that Plaintiffs Hunt and Bittner failed to exhaust their administrative remedies by filing timely charges with the EEOC. In the alternative, Defendant has asserted that even if Plaintiffs Hunt and Bittner filed timely charges, they failed to exhaust their administrative remedies in regards to both their disparate impact claims asserted in Count II of the First Amended Complaint and their class claims on behalf of others similarly situated. For the reasons that follow, it is recommended that Defendant's Motions for Summary Judgment as to Plaintiffs Hunt and Bittner be granted.

A. *The Limitations Period Was Not Equitably Tolled as to Plaintiffs Hunt and Bittner.*

It is undisputed that Plaintiffs Hunt and Bittner did not make any filings with the EEOC until after the 300 day limitations period for filing a charge had run. Plaintiffs Hunt and Bittner argue, however, that equitable tolling applies and that their EEOC filings were therefore timely.

As Plaintiffs conceded in their October 16, 2008 letter to the Special Master, the burden of proof is on Plaintiffs Hunt and Bittner as the parties asserting equitable tolling. *See Courtney v. LaSalle Univ.,* 124 F.3d 499, 505 (3d Cir.1997).

Equitable tolling applies where: (1) "the defendant actively misled the plaintiff respecting the reason for the plaintiff's discharge"; (2) "this deception **caused** the plaintiff's non-compliance with the limitations period"; and (3) the plaintiff "could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim." *Ruehl v. Viacom, Inc.,* 500 F.3d 375, 384 (3d Cir.2007).

> Federal courts have typically extended equitable relief only sparingly.... We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.
>
> .... [T]he principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect.

Irwin v. Department of Veterans Affairs, 498 U.S. 89, 457-58, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990); *accord Podobnik v. USPS,* 409 F.3d 584, 591 (3d Cir.2005) ("The doctrine of equitable tolling ... should be applied 'sparingly.' ").

As to the first element of equitable tolling, Plaintiffs Hunt and Bittner argue that Defendant misled them by stating that the reason for their termination was restructuring and downsizing and by not revealing the use of a ranking and rating system based upon performance and subjective "success factors." They also assert they were misled by the Defendant's informational disclosures under OWBPA, which allegedly were incomplete and misleading as to the scope of the RIF and its disproportionate impact on older workers.

Plaintiffs rely on *Meyer v. Riegel Prods. Co.,* 720 F.2d 303 (3d Cir.1983). The *Meyer* plaintiff had been discharged, and several weeks later wrote to the defendant's Director of Personnel seeking to ascertain the reason for his discharge. The Director of Personnel wrote back "that he had been dismissed 'when the Engineering Department was reorganized due to the acquisition of [the plaintiff's employer] by [another company].' " *See Meyer,* 720 F.2d at 305. The plaintiff later learned that a younger man had replaced him, and, based upon this information, filed a charge of discrimination more than 300 days after his termination. Responding to the complaint, the defendant alleged for the first time that the plaintiff had been dismissed due to incompetence.

***3** The United States Court of Appeals for the Third Circuit observed that equitable tolling is appropriate where "the defendant has actively misled the plaintiff respecting the cause of action," noting that "cases may arise where the employer's own acts or omissions have lulled the plaintiff in to foregoing prompt attempts to vindicate his rights." *Id.* (quoting *School Dist. v. Marshall,* 657 F.2d 16, 20 (3d Cir.1981), and *Bonham v. Dresser Indus.,* 569 F.2d 187, 193 (3d Cir.1977)). The court held that either the letter informing the plaintiff that he was dismissed when the department was reorganized or the surreptitious plan to replace the plaintiff with a younger employer, of which the plaintiff was not informed, could have caused the plaintiff to temporarily defer filing his charge of discrimination. *See id.* at 307.

The court rejected the argument that a defendant's misrepresentation as to the reasons for termination should not support equitable tolling where, despite the misrepresentations, the plaintiff was suspicious that the real reason was age discrimination. Significantly, in doing so, it distinguished *Hart v. J.T. Baker Chem. Co.,* 598 F.2d 829 (3d Cir.1979).

In *Hart,* the plaintiff had been given four reasons for her discharge. Although she was suspicious at the time of her discharge that discrimination may have played a role, she contended that she was entitled to equitable tolling until these suspicions were confirmed by the defendant's subsequent use of gender-associated language in a letter of recommendation. The *Hart* court found that the facts upon which her charge was predicated were known to the plaintiff on the date of her discharge. Noting that "in the absence of evidence that the defendant contributed to [the charge-filing] delay, it may be extremely unfair to the defendant to require its defense of this litigation," the court concluded that "her suspicions were sufficient to lead a reasonable person to inquire further into the reasons for her discharge." *Hart,* 598 F.2d at 834.

The *Meyer* court distinguished *Hart* as a case where "the facts upon which her charge were predicated were known to her on the date of the discharge," and the "plaintiff simply did not allege that defendant had anything to do with her untimeliness." *Meyer,* 720 F.2d at 308. *Meyer* stated that *Hart* had observed that "had plaintiff inquired into the reasons for her dismissal and then alleged that she had been deceived, an entirely issue would have been presented."[1] *Id.* In contrast, *Meyer* explained that the *Meyer* plaintiff "allege[d] precisely what the plaintiff in *Hart* failed to allege: that defendants deceived him into postponing the filing of a claim. Here, too, plaintiff did precisely what the *Hart* court suggests: he asked defendant for an explanation of his dismissal." *Meyer,* 720 F.2d at 308. Thus, *Meyer* held that the plaintiff's suspicions at the time of his discharge did not preclude the invocation of equitable tolling. *See id.*

1 While *Hart* did not make this exact observation, it did hold that a reasonable person would have inquired further about the reasons for her discharge. *Hart,* 598 F.2d at 834.

***4** The court of appeals revisited the issue in *Ruehl v. Viacom, Inc.,* 500 F.3d 375 (3d Cir.2007). In *Ruehl,* the plaintiff alleged that the defendant had misled him by failing to make the informational disclosures required by the OWBPA. The court rejected the defendant's argument that a failure to provide OWBPA disclosures, an omission, could not constitute "actively misleading" under the first prong of the equitable tolling analysis. The court found it unnecessary to determine whether the plaintiff had in fact been misled, however, because the plaintiff had failed to create an issue of fact as to the second and third prongs of the equitable tolling analysis.

The court emphasized a plaintiff must prove that the "deception **caused** the plaintiff's non-compliance with the limitations provision." *Ruehl,* 500 F.3d at 384. It further stated that in addition, "equitable tolling requires the plaintiff to demonstrate that he or she could not, by exercise of reasonable diligence, have discovered essential information bearing on his or her claim." *Ruehl,* 500 F.3d at 384 (quoting *In re Mushroom Transp. Co.,* 382 F.3d 325, 339 (3d Cir.2004)). In this regard, the court cited *Hart* as "denying equitable tolling although employee was given four reasons for her discharge, none related to her gender, [where] 'her suspicions [of gender discrimination] were sufficient to lead a reasonable person to inquire further into the reasons for her discharge.' " *Id.* (quoting *Hart,* 598 F.2d at 834).

Ruehl assumed for purposes of argument that the defendant "actively misled [the plaintiff] as 'part of an intentional plan to hide vital information from its employees,' " but explained that the plaintiff's "diligence is also in issue." *Id.* The court noted that plaintiff first thought that he had been subjected to age discrimination prior to signing a claims release, and had been suspicious of age discrimination at the defendant's workplace generally since before his termination based upon comments he had heard about other older workers. *See id.* at 385. The court held that "[t]hese facts, which would have supported [the plaintiff's] cause of action, were known to him by the time he was terminated.... He has failed to explain how [the defendant's] failure to disclose under the OWBPA, however misleading, caused his failure to pursue a claim based on information he already had." *Id.*

Thus, where an employee suspects or has reason to suspect that discrimination may be the reason for his or her termination, analysis begins with reconciling *Meyer,* where the plaintiff's suspicions did not preclude equitable tolling, with *Ruehl* and *Hart,* where they did. *Ruehl* did not distinguish *Meyer* on the issues of causation or diligence. *Meyer,* however, distinguished *Hart,* on which *Ruehl* relied, on two bases: (1) that the facts upon which her charge was based were known to the *Hart* plaintiff, who was thus not misled by her employer; and (2) that the *Meyer* plaintiff made an inquiry as to the reasons for his termination. In fact, in both *Ruehl* and *Hart,* the plaintiffs' suspicions were based upon their knowledge of facts that the court found would have supported a cause of action. In *Meyer,* the plaintiff's suspicions were based upon the fact that his supervisor in terminating him indicated to plaintiff that he had received a "real screwing" and on the "pervasive belief among employees that [the employer] traditionally exploited older workers." *Meyer,* 720 F.2d at 305. These facts by themselves would not support a cause of action. Reconciling these three decisions, it appears that equitable tolling is not available to excuse the timely filing of an employment termination discrimination charge where the plaintiff employee has information that would support a cause of action and fails to make further inquiry.

***5** This is consistent with the United States Court of Appeals for the Third Circuit's decision in *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380 (3d Cir.1994). Although *Oshiver* predates *Ruehl,* it does distinguish *Meyer* and *Hart* in endeavoring to sketch the contours of the equitable tolling doctrine. It emphasized that in *Hart,* the "plaintiff simply did not allege that defendant had anything to do with her untimeliness," noting that "all the facts upon which Hart's charge of discrimination was predicated were known to her on the date of her discharge." *Oshiver,* 38 F.3d at 1388. It concluded that:

> where a defendant actively misleads the plaintiff regarding the reason for the plaintiff's dismissal, the statute of limitation will not begin to run, that is, will be tolled, until the facts which would support the plaintiff's cause of action are apparent, or should be apparent to a person with a reasonably prudent regard for his or her rights.

Id. at 1389.

Plaintiff Hunt avers that he was specifically told by Defendant that his termination was due only to economic factors. (*See* Supplemental Affidavit of Kenneth J. Hunt, at 2.) He further asserts that he first learned of the scope of the RIF, its disproportionate impact on older workers and the use of the ranking and rating system in November 2006 when he was contacted by Plaintiff Rupert. *Id.* He avers that prior to his termination, he worked out of his home, rarely visited any of Defendant's offices, was not in close touch with large numbers of other employees of Defendant, and was terminated at a local motel away from other employees. (*Id.* at 3; Affidavit of Kenneth J. Hunt, at 2.)

Hunt, however, was provided with a Decisional Unit Information form ("DUI"). Even assuming for purposes of argument that the DUI was misleadingly incomplete and did not comply with the requirements of the OWBPA, it did indicate that out of 15 employees, the three who were terminated were all in their 50's.[2] It further indicated that the average age of those being terminated was 53.5, while the average age of those being retained was 48.25. The DUI revealed indirect evidence of possible age discrimination in that it indicated that younger workers in the same or similar positions were retained. Thus, Plaintiff Hunt could have supported a prima facie case of discrimination based upon the information in the DUI. *See Anderson v. Consolidated Rail Corp.,* 297 F.3d 242, 249 (3d Cir.2002) (to establish a prima facie case of age discrimination in the context of a reduction in force, the plaintiff must show that he was a member of the protected class, was qualified for the position at issue and suffered an adverse employment action, and that the employer retained someone similarly situated to him who was sufficiently younger).

2 Plaintiffs argue that the information disclosure forms were not understandable and that Plaintiffs were not

> clear whether an indication of ineligibility on the form meant that such person had not been terminated, or whether it meant that such person had been terminated but was ineligible for severance. In the context of equitable tolling, however, where diligence is an issue, a reasonably diligent older worker receiving an allegedly unclear form suggesting possible disparate treatment of older and younger workers in regards to their "eligibility" would at least inquire to what eligibility meant.

It is undisputed that Hunt did not make any further inquiry, despite his knowledge of facts suggested by the DUI supporting a prima facie case and the possible disproportionate impact on older workers. Moreover, Hunt knew or should have known that Defendant's articulated non-discriminatory reasons for the termination of his employment, i.e., economic conditions and organizational restructuring, on their face did not explain why Hunt in particular was selected as part of the economic downsizing for employment termination while others were not. Under these circumstances, a reasonably diligent person would, at a minimum, inquire as to the reason why he in particular was selected for employment termination as part of a corporate downsizing. Thus, even assuming that Defendant misled Hunt about the reasons for his termination and the scope of the RIF, reasonable minds could not differ as to whether these misrepresentations caused Hunt to defer filing and whether in the exercise of reasonable diligence he could not have discovered information essential to his possible claim.

***6** Plaintiff Bittner also avers that he was specifically told by Defendant that his termination was due only to economic factors. (*See* Supplemental Affidavit of Wade C. Bittner, at 2.) He further asserts that he first learned of the scope of the RIF, its disproportionate impact on older workers and the use of the ranking and rating system in early November 2006 when he was contacted by a Brad Frazier. *Id.* Plaintiff Bittner avers that prior to his termination, he worked out of his home, rarely visited any of Defendant's offices, was not in close touch with large numbers of other employees of Defendant, and was terminated at a local motel away from other employees. (*Id.* at 2; Affidavit of Wade C. Bittner, at 1-2.)

Plaintiff Bittner also testified,

> [O]ver the years you would see individuals that would leave the company and then just asking people, you know, why is he leaving, why are they leaving and you'd get an answer similar to it wasn't his choice. And that's sort of-might have been maybe the first inklings you had that the older employees were targeted to be let go.

(Transcript of the Deposition of Wade C. Bittner, at 70.) Significantly, he received the same informational disclosure as Plaintiff Hunt.

As with Hunt, in light of Bittner's suspicions, the additional information regarding historical terminations upon which his suspicions were based, and the possible disproportionate impact and prima facie case suggested by the DUI, reasonable minds cannot differ as to whether a reasonable person in Bittner's position would have inquired further.

Although Plaintiffs Hunt and Bittner argue that in light of the events that had occurred, neither trusted Defendant to give an honest answer to any inquiry, a plaintiff employee in these circumstances is not excused from exercising reasonable diligence merely because he or she distrusts the defendant employer. *See Podobnik v. United States Postal Serv.,* 409 F.3d 584, 587, 592 (3d Cir.2005) (holding that plaintiff terminated by the Postal Service did not exercise reasonable diligence where he took no further action after being told by the EEOC to pursue his claim through the Postal Services EEO, which plaintiff understood to mean with his postal service supervisors and which he deemed futile). Further, even a supposedly dishonest answer by an employer may have utility to a plaintiff employee seeking information on which to build a discrimination case.

Plaintiffs also argue that there is evidence that further inquiry as to the reasons for their terminations would in fact have been futile. It should be noted that the United States District Court for the Eastern District of Pennsylvania, applying the closely related doctrine of fraudulent concealment, has rejected the argument that a plaintiff who has not exercised diligence may nonetheless be entitled to tolling on the ground that diligence would have been futile. *See Farrell v. A.I. DuPont Hosp. for Children of the Nemours Foundation,* No. 04-3877, 2006 WL 2035146, at *7 (E.D.Pa. July 19, 2006) (unpublished opinion). The court held:

> ***7** If the Court were to adopt Plaintiff's argument, it would eviscerate the concept of reasonable diligence and the purpose underlying the statute of limitations. Claims would never expire if an expired claim remained viable because exercising reasonable diligence would have been futile since the negligence would not have been discovered even with reasonable diligence.

Id.

This nonbinding authority is, however, in tension to an extent with the language in *Ruehl* that requires a plaintiff to demonstrate that "he or she could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim." *Ruehl,* 500 F.3d at 384. *Ruehl* 's formulation of the analysis seems to focus on whether the information was discoverable, not whether the plaintiff actually exercised reasonable diligence.

Regardless, Plaintiffs Hunt and Bittner have not adduced evidence that further inquiry would have been futile. Plaintiffs point to the fact that Plaintiff Austin asked during her termination interview whether she was being terminated because she had been sick. In response, she was told, "no, it's because of what Phil [Jones] read to you." (Transcript of Linda Austin, at 58.) Another employee of Defendant who apparently participated in the terminations testified that his instructions were "just don't waiver from the script, and it is going to be difficult, and read it as it says, and we will move on."[3] (Transcript of Gregory Rickard, at 58.) The fact that Plaintiff Austin asked if illness was the reason for her termination and was told that it was not simply does not support the contention that inquiry generally or in a particular instance as to how individuals were selected for termination would have been futile. Similarly, the fact that employees of Defendant were generally instructed not to waiver from the script does mean that Defendant would have refused to answer questions as to matters not covered by the script, such as the identities and situations of the younger retained employees referred to in the DUI.

3 To similar effect, John Prazenica, Defendant's Director of Human Resources for the Industrial Coatings Business Unit, testified that none of the employees in whose termination he participated were told about the use of the ranking system. (Transcript of John Prazenica, at 156-157.) Rett Wyman, Defendant's Human Resources Manager for the Industrial Coatings Business Unit, testified that individual performance was not mentioned in the "universal script" that he had authored for managers to use in carrying out the terminations. (Transcript of Rett Wyman, at 61.)

In sum, reasonable minds cannot differ as to the fact that Plaintiffs Hunt and Bittner did not exercise reasonable diligence by their doing nothing despite their knowledge that they had been terminated in a RIF concerning which they had information suggesting a possible disproportionate impact on older workers, that younger workers were retained, and that they had not been told the reason they in particular were selected for employment termination as part of the corporate downsizing while other employees were retained. Therefore, as a matter of law, Plaintiffs Hunt and Bittner may not rely on equitable tolling and have failed to exhaust administrative remedies.

B. ***Hunt and Bittner Are Not Entitled to Equitable Tolling on the Basis of Noncompliance with the Statutory Notice-Posting Requirement.***

Plaintiffs Hunt and Bittner also argue that Defendant's failure to comply with the ADEA's statutory notice-posting requirement supports equitable tolling. Again, the burden of proof is on Plaintiffs Hunt and Bittner as the parties asserting equitable tolling. *See Courtney v. LaSalle Univ.,* 124 F.3d 499, 505 (3d Cir.1997).

***8** Under 29 U.S.C. § 627,

> [e]very employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

29 U.S.C. § 627. The implementing regulations provide that every employer:

> shall post and keep posted in conspicuous places upon its premises the notice pertaining to the applicability of the Act prescribed by the Commission or its authorized representative. Such notice must be posted in prominent and accessible places where it can readily be observed by employees, applicants for employment and union members.

29 C.F.R. § 1627.10.

A failure to comply with § 627 can provide the basis for equitable tolling of the limitations period. In *Bonham v. Dresser Indus., Inc.,* 569 F.2d 187 (3d Cir.1978), the court of appeals held that "failure to post the required notice will toll the running of the 180-day period, at least until such time as the aggrieved person seeks out an attorney or acquires actual knowledge of his rights under the [ADEA]." *Id.* at 193. Hunt asserts that from 1990 to 2001 he worked in a small satellite office, where he was responsible for the bulletin board. (Supplemental Affidavit of Kenneth J. Hunt, at 3.) He avers that he was never provided by Defendant with any ADEA posters to post. *Id.* He asserts that from 2001 until his 2006 termination, he worked from home and averaged no more than three to four days per year in Defendant's Pittsburgh offices. *Id.* Similarly, Bittner asserts that he worked out of his home for eighteen years prior to his termination and that during that entire time he spent no more than three days in Defendant's Pittsburgh offices. (Supplemental Affidavit of Wade C. Bittner, at 2.) Neither Bittner nor Wade recall seeing any ADEA notices posted, and both believe they never received written notice of their ADEA rights. *Id.* at 3; Supplemental Affidavit of Kenneth J. Hunt, at 3.)

Hunt asserts in the briefing that he first learned of his ADEA rights in November 2006, but his Affidavit states only that he first learned in November 2006 of the scope of the RIF, its disproportionate impact on older workers, the use of the ranking system and the fact that "certain affected individuals felt there was sufficient evidence to warrant legal action." (Supplemental Affidavit of Kenneth J. Hunt, at 2.) His Affidavit does not address when he learned of his general right to be free of age discrimination under the ADEA. Similarly, Bittner asserts in the briefing and his Affidavit that he first learned of the facts underlying his ADEA claim in early November 2006. (Supplemental Affidavit of Wade C. Bittner, at 2.) Neither the briefing nor his Affidavit directly addresses when he first learned of his general right to be free of age discrimination under the ADEA.

***9** Plaintiffs rely on *Charlier v. S.C. Johnson & Son,* 556 F.2d 761 (5th Cir.1977), and *Edgeworth v. Forth Paper Co.,* 673 F.Supp. 922 (N.D.Ill.1987), for the proposition that where an employee works from home, visits the office infrequently and is unaware of his or her ADEA rights, posting the required notice in the office is insufficient and equitable tolling applies.

More persuasive, however, is *English v. Pabst Brewing Co.,* 828 F.2d 1047 (4th Cir.1987), in which the United States Court of Appeals for the Fourth Circuit declined to adopt *Charlie* 's interpretation of § 627 as imposing "a broad obligation on employers to 'provide employees with a meaningful opportunity of becoming aware of their ADEA rights.' " *Id.* at 1050 (quoting Charlier, 556 F.2d at 764)). It explained:

> It might well be desirable to require employers to send ADEA notices to traveling sales representatives and others who work off the company's premises. Congress might adopt such a requirement in the future. The terms of the present statute and its implementing regulation, however, require only that the notice be posted "in conspicuous places upon [the employer's] premises."

Id. (quoting 29 U.S.C. § 627). The court held that the employer complied with the terms of the statute by posting notice "on the only facilities in the company that plaintiff ever visited, and which plaintiff did visit when he was informed of his termination," and that the plaintiff therefore could not invoke equitable tolling. *Id.*

This issue was also considered by the United States Court of Appeals for the Sixth Circuit in an unpublished opinion, which agreed with *English,* rejecting the position taken by *Charlier* and *Edgeworth.* In *Vana v. Mallinckrodt Med., Inc. .,* 70 F.3d 116, 1995 WL 675597 (6th Cir.1995) (unpublished opinion), the court expansively explained its reasons for doing so:

> First, [*Charlier*] admits that Congress and the EEOC "do not require that an employer actually inform employees of the ADEA and its applicability," yet the court proceeds to impose almost precisely that duty judicially. When so motivated, Congress can be remarkably specific in mandating notification requirements, and its failure to do so here seems to be a

> reasonable compromise between the interests of potential plaintiffs and defendants in discrimination suits.
>
> Second, the *Charlier* court noted the goal of ensuring that "older employees may know of their new rights." The ADEA and similar anti-discrimination legislation may have been a novelty eighteen years ago, but most workers today are aware of some form of legal protection against discrimination. This is not to say that notice is unnecessary, because Congress and the EEOC have decided that it is, but it does weaken the argument for creating an "equitable" exception to an explicit limitations period based on an employee's ignorance of the law....
>
> Third, the *Charlier* court cites the shortness of the filing period as justifying a broad interpretation of the notice provisions, but allowing the limitations period to be tolled by ignorance of a specific legal right is "inconsistent with and [would] undermine the underlying ADEA policy of encouraging speedy, non-judicial resolutions to age discrimination employment disputes." Finally, by promulgating specific procedures for employers, Congress and the EEOC simplify compliance by providing relatively clear-cut guidelines that can be easily followed; a fact-specific, employee-specific notice standard increases uncertainty and increases the likelihood of litigation over what is essentially a threshold procedural matter.

***10** *Vana,* 70 F.3d 116, 1995 WL 675597, at *3-4.

Turning to *Edgeworth,* the *Vana* court found unpersuasive its "parade of 'probablys' " as to what Congress contemplated or should have contemplated. *Id.* at *4.

> First, the [*Edgeworth*] court's accusation of a "congressional lack of foresight" is weakened by the realization that Congress has not only had the opportunity to amend the notice provisions, but has in fact amended the ADEA several times. Thus, that body's failure to "update" the ADEA's notice provisions is just as likely due to Congress's satisfaction with the existing rules. Second, the *Edgeworth* court fails to consider some advantages of posting notices besides durability: low cost and simplicity of compliance. Congress may be reluctant to adopt a more fact-specific standard because it would be more expensive and unfamiliar to employers, as well as stimulating litigation and rewarding procrastination; every changed rule has a reliance and implementation cost. Finally, the rationale in *Edgeworth* is equally applicable to employees who never read the EEOC notices, although exposed to them on a daily basis-the law simply requires actual posting, not actual notice, and no amount of rationalization should transform the former into the latter.

Id.

The court agreed with the Fourth Circuit in *English* that however desirable it might be to require employers to send notices to traveling sales representatives, the statute that Congress adopted only requires posting "in conspicuous places upon the employer's premises." *See id.* at 5. In light of this, the court explained that:

> those courts that have focused on second-guessing Congress have been distracted from the critical inquiry concerning equitable tolling: whether the defendant somehow lulled or misled plaintiffs into letting their rights lapse. As we see it, meeting the statutory and regulatory requirements of Congress and the EEOC can in no way be construed as "engaging in misconduct that prevents the plaintiff from filing his or her claim on time," or constituting a "wrong ... [that] bar[s] inequitable reliance on statute of limitations."

Id. Thus, the court held that "a plaintiff's failure to observe EEOC notices alone is not grounds for equitable tolling, where an employer has posted its EEOC notices at conspicuous and accessible locations." *Id.*

Neither party has identified any authority on this precise issue from a court within the Third Circuit. Plaintiffs, however, argue that the rationale of *Charlier* and *Edgeworth* is supported by *Miller v. State Chem. Mnf'g Co.,* 706 F.Supp. 1166 (W.D.Pa.1988) (Bloch, J.). In resisting summary judgment, the *Miller* plaintiff asserted that ADEA notice was not posted in the three locations that salesmen frequented and where the were likely to see them. The court with little discussion of the law or of the plaintiff's evidence, held that "[w]hether the employer posted any posters in 'conspicuous places' and when plaintiff acquired actual notice of his rights under the ADEA are questions of fact that would have to be determined by this Court at the time of trial." *Miller,* 706 F.Supp. at 1169-70.

***11** Also, in *Bomberger v. Consolidated Coal Co.,* 623 F.Supp. 89 (W.D.Pa.1985), the United States District Court for the Western District of Pennsylvania (Cohill, J.) declined to apply equitable tolling where the plaintiff worked in a trailer apart from other buildings, and, that when he was not in the trailer, he was in one of two libraries, and that in none of these places was notice posted. The court cited the language of Charlier, as quoted in *McClinton v. Alabama By-Products Corp.,* 574 F.Supp. 43 (N.D.Ala.1983), *aff'd* 743 F.2d 1483 (11th Cir.1984), to the effect that "[n]otice is sufficient if it is posted conspicuously so that employees have a 'meaningful opportunity of becoming aware of their ADEA rights.' " *Bomberger,* 623 F.Supp. at 92 (quoting *McClinton,* 574 F.Supp. at 47 (citing *Charlier,* 556 F.2d at 764)). Applying this standard, the court granted summary judgment for the defendant, holding that "§ 627 does not require posting in every room of each building" and that plaintiff's allegations that no notice was posted in his individual work area and that he did not recall seeing any notices were insufficient as a matter of law to satisfy his burden of proof on the issue of equitable tolling. *Id* . at 93.

Both *Miller* or *Bomberger* address the question as to where at a particular business location or premises notice should appear or be placed to provide a meaningful opportunity for an employee to become aware of his rights. Plaintiffs Hunt and Bittner, however, are remotely stationed employees and do not contend that the posting of notice at some other location or at any of Defendant's premises would have provided the required notice to them. However, as expressed in the well-reasoned albeit unpublished *Vana* decision, the plain language of § 627 only requires posting on the employers "premises." Moreover, the implementing regulation also expressly states that notice must be posted on the employers "premises." 29 C.F.R. § 1627.10. Although cases that have extended equitable tolling to plaintiffs working off-site focus on the second sentence of the implementing regulation requiring "such notice" to be posted in "prominent and accessible places where it can readily be observed by employees," under the plain language of the regulation, "such notice" is the notice posted "upon [the employer's] premises" referred to in the first sentence. *Id.* This language therefore provides no basis upon which to upset the balance struck by the ADEA's limited constructive notice provision.

Moreover, under Third Circuit law, equitable tolling is limited to cases where "(1) the defendant actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." *Kocian,* 707 F.2d at 753. As suggested in *Vana,* to the extent that equitable tolling in the Third Circuit is grounded in the defendant's wrongdoing or deception, whether by act or omission, it would not apply in the notice posting context where the employer has fully complied with the ADEA's statutory notice provision. Nor would an employer's failure to give more notice than is statutorily required constitute the kind of "extraordinary" circumstances that may justify equitable tolling even in the absence of employer deception. Thus, Plaintiffs Hunt and Bittner as a matter of law are not entitled to equitable tolling based upon insufficiency of posted notices.

***12** In the alternative, even if equitable tolling were available in certain circumstances to off-site employees where an employer posts ADEA notice only on its premises, Plaintiffs have failed to adduce any evidence as to when they first learned of their general rights under the ADEA. Even those cases extending equitable tolling to off-site employees have held that equitable tolling only applies until the plaintiff first consults counsel or acquires actual knowledge of his or her rights. *Charlier,* 556 F.2d at 765; *Edgeworth,* 673 F.Supp. at 926. The Affidavits filed by Plaintiffs Hunt and Bittner indicate that they did not receive notice of their ADEA rights from Defendant, and further aver that they did not learn of the facts underlying their ADEA claims until November 2006. They are silent as to when they first learned of their general rights under the ADEA. It is, however, undisputed that both Hunt and Bittner received at the time of their employment termination a Separation Agreement and Release that specifically mentioned the Age Discrimination in Employment Act.

Accordingly, on this record, Plaintiffs have failed to adduce evidence to create an issue of material fact as to equitable tolling, an issue upon which they bear the burden of proof.

C. *It Is Not Necessary to Decide Whether Hunt and Bittner's Untimely Charges Gave Notice of Disparate Impact and Class Claims.*

Given that Plaintiffs Hunt and Bittner did not exhaust their administrative remedies by filing timely charges with the EEOC, it is unnecessary to decide as to Plaintiffs Hunt and Bittner the other issues raised by Defendant's summary judgment motions including whether the untimely charges that they did file provided sufficient notice of their disparate impact and class claims. However, it is noted that, unlike Plaintiffs Rupert, Austin and Campbell, Plaintiffs Hunt and Bittner did not include allegations suggesting disparate impact or class issues in their perfected charges, but only in the Questionnaires they initially filed with the EEOC. This distinction raises significant legal questions that the parties addressed only summarily in their briefing and whose resolution as indicated above is not necessary under the circumstances. *Compare Branum v. United Parcel Serv.,* 232 F.R.D. 505 (W.D.Pa.2005) (Conti, J.) (in contrast to Title VII and ADA cases, ADEA class allegations must appear on the face of the charge in order to provide notice to the defendant); *Rogan v. Giant Eagle, Inc.,* 133 F.Supp.2d 777 (W.D.Pa.2000) (Cohill, J.) (claim of retaliation presented only in the Questionnaire was not within the scope of the charge, notwithstanding the fact that Questionnaire was deemed a charge for purposes of timely filing); *with Carter v. Philadelphia Stock Exchange,* No. CIV. A. 99-2455, 1999 WL 715205 (E.D.Pa. Aug.25, 1999) (unpublished opinion) (claim detailed in the plaintiff's Intake Questionnaire but not within the formal charge was within the scope of a reasonable investigation by the EEOC); *see also Canavan v. Beneficial Fin. Corp.,* 553 F.2d 860, 863 (3d Cir.1977) (the failure of the EEOC to notify the discriminating employer or to attempt conciliation is not a bar to suit by the aggrieved employee); *Yhelka v. Dairy Farmers,* No. 07cv1736, 2008 WL 698279 (W.D.Pa.2008) (Schwab, J.) (considering information submitted to the EEOC in a letter in determining that a charge of retaliation under Title VII was within the scope of the EEOC investigation that could reasonably be expected to grow out of the Plaintiff's charge).

III. Conclusion

***13** For the reasons stated above, it is recommended that the Defendant's Motions for Summary Judgment as to Plaintiffs Hunt and Bittner (Docket Nos. 75 and 83) be granted with prejudice as to Plaintiffs Hunt and Bittner's claims as class representatives on behalf of others similarly situated and as to their individual claims to the extent such individual claims rely on the charges of discrimination Plaintiffs Hunt and Bittner filed with the EEOC. Nothing in this Report and Recommendation is intended to constitute a ruling on any issue not yet presented as to whether or the extent to which Plaintiffs Hunt and Bittner would or might be entitled to status as class members if class certification were granted at a subsequent stage in this case.

In accordance with this Court's Order Referring Case to a Special Master dated September 27, 2007 and the stipulation of the parties, either party may file objections to-or a motion to adopt or modify-this report and recommendation no later than fourteen days from the date of the report and recommendation. Responses to objections are due within ten days of the initial filing of said objections or motion.

REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully recommended that Defendant's Motions for Summary Judgment as to Plaintiffs Rupert, Campbell, and Austin (Docket Nos. 77, 79 and 81) be denied insofar as they raise issues not relating to the Separation Agreement and Releases executed by Plaintiffs Rupert and Campbell, which issues will be addressed in a separate Report and Recommendation.

II. Report

Plaintiffs Arthur C. Rupert, Linda K. Austin, Larry L. Campbell, Kenneth J. Hunt and Wade C. Bittner bring this action in which they allege that the termination of their employment by Defendant PPG Industries, Inc. ("Defendant") violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA"). Plaintiffs allege claims of both disparate treatment and disparate impact. Plaintiffs bring these claims both as individuals and as class representatives on behalf of others similarly situated.

Presently pending for disposition are Defendant's Motions for Summary Judgment as to Plaintiffs Rupert, Austin, and Campbell. Insofar as the motions as to Rupert and Campbell raise issues related to the Separation

Agreement and Releases executed by these two Plaintiffs, these issues will be addressed in a separate Report and Recommendation. The remainder of the issues raised by Defendant's Motions as to Plaintiffs Rupert, Austin and Campbell are addressed herein collectively, with individual differences highlighted as appropriate.

Defendant has asserted as an affirmative defense that Plaintiffs Rupert, Austin and Campbell failed to exhaust their administrative remedies by filing timely charges with the EEOC. In the alternative, Defendant has asserted that even if Plaintiffs Rupert, Austin and Campbell filed timely charges, they failed to exhaust their administrative remedies in regards to the disparate impact claims asserted in Count II of the First Amended Complaint and, in the case of Plaintiffs Austin and Campbell, their class claims on behalf of others similarly situated.

***14** Failure to exhaust administrative remedies is an affirmative defense as to which Defendant bears the burden of proof. *See Williams v. Runyon,* 130 F.3d 568, 573 (3d Cir.1997) (applying Title VII); *Spangler v. Moderne Glass Co.,* No. 6-1394, 2008 WL 919693, at *3 (W.D.Pa. April 3, 2008) (Ambrose, CJ.) (applying ADEA); *see also Ray v. CO. Kertes,* 285 F.3d 287, 292 (3d Cir.2002) (stating in dicta that courts including the Third Circuit treat exhaustion requirement under Title VII and the ADEA as affirmative defenses).

For the reasons that follow, it is recommended that Defendant's Motions for Summary Judgment as to Plaintiffs Rupert, Austin and Campbell be denied insofar as they raise issues other than the issues related to the Separation Agreement and Releases to be addressed in a separate Report and Recommendation.

A. Plaintiffs Rupert, Austin and Campbell Filed Timely EEOC Charges.

1. *The Intake Questionnaires Constitute a Charge.*

None of the five Plaintiffs filed formal EEOC charges within the 300 day limitations period. However, Plaintiffs Rupert, Austin and Campbell did file EEOC Questionnaires within the 300 day limitations period. The first issue is thus whether the Questionnaires constitute a charge for purposes of timely filing.

Both parties rely on the recent decision in *Federal Express Corp. v. Holowecki,* --- U.S. ----, ----, 128 S.Ct. 1147, 1154, 170 L.Ed.2d 10 (2008). In that case, the issue was whether the plaintiff had filed her charge with the EEOC at least 60 days before filing suit as required by 29 U.S.C. § 626(d). More than 60 days prior to filing suit, the plaintiff had filed an EEOC Form 283, labeled "Intake Questionnaire," and had attached an affidavit thereto. The parties disputed whether this Questionnaire and Affidavit constituted a charge.

The EEOC filed an amicus brief in which it submitted that the proper test for whether a filing constitutes a "charge" is "whether the filing, taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights." *Id.* at 1155. As explained by the EEOC and agreed with by the Court, the term "charge" needs to be defined "in a way that allows the agency to fulfill its distinct statutory functions of enforcing antidiscrimination laws and disseminating information about those laws to the public." *Id.* at 1157.

The Court explained that "[t]he agency's duty to initiate informal dispute resolution processes upon receipt of a charge is mandatory in the ADEA context," "[y]et at the same time, Congress intended the agency to serve an 'educational' function." *Id.* The Court found that "many filings come from individuals who have questions about their rights and simply want information," and that "the agency [thus] requires some mechanism to separate information requests from enforcement requests." *Id.* The Court reasoned that if all the standard required were an allegation of discrimination and the identity of the defendant, people approaching the agency with questions could end up creating a charge and starting the mandatory dispute resolution process. *See id.* The Court reasoned that this could deter individuals from providing this minimal information or from consulting the agency contrary to Congress's intent that the EEOC act as an information provider and attempt to settle disputes informally. *See id.*

***15** The Court concluded that the agency's interpretation therefore provided a "reasonable alternative that is consistent with the statutory framework," and that "no clearer alternatives [we]re within [the Court's] authority or expertise to adopt," and so the Court deferred to the agency interpretation under *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).[1] *Id.* Accordingly, the Court held that "if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take some remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." *Id.* at 1158.

The Court explained that this is an objective standard: "the filing must be examined from the standpoint of an objective observer to determine whether, by a reasonable construction of its terms, the filer requests the agency to activate its machinery and remedial processes." *Id.*

1 In light of the Court's conclusion that the EEOC's construction would be accepted even under the less deferential standard of *Skidmore,* it found it unnecessary to resolve whether the heightened standard of deference set forth in *Auer v. Robbins,* 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), applied. *See Holowecki,* 128 S.Ct. at 1156.

The Court further explained:

> under this permissive standard a wide range of documents might be classified as charges. But this result is consistent with the design and purpose of the ADEA.... In the administrative context now before us it appears that *pro se* filings may be the rule, not the exception.... The system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes. It thus is consistent with the purposes of the Act that a charge can be a form, easy to complete, or an informal document, easy to draft.

Id.

The Court then turned to the question of whether the Questionnaire and affidavit at issue constituted a charge. The EEOC, although it had not acted upon the filing as a charge, contended that the filing was a charge and that it should have acted upon it as such. *See id.* at 1159. The Court found that the EEOC's determination "is a reasonable exercise of its authority to apply its own regulations and procedures in the course of the routine administration of the statute it enforces." *Id.*

In response to the employer's argument that the filing contained no request to act, the Court stated that, were the Intake Questionnaire the only document filed, it might agree "that its handwritten statements do not request action." *Id.* The Court further stated that:

> The design of the form in use in 2001, moreover, does not give rise to the inference that the employee requests action against the employer. Unlike EEOC Form 5, the Intake Questionnaire is not labeled a "Charge of Discrimination." In fact the wording of the questionnaire suggests the opposite: that the form's purpose is to facilitate "pre-charge filing counseling" and to enable the agency to determine whether it has jurisdiction over "potential charges." There might be instances where the indicated discrimination is so clear or pervasive that the agency could infer from the allegations themselves that action is requested and required, but the agency is not required to treat every completed Intake Questionnaire as a charge.

***16** *Id.*

The Court held, however, that the attached affidavit, which concluded with the statement, "[p]lease force [the defendant] to end their age discrimination plan" was properly construed as a request for agency action. *Id.* at 1159-60. Although the defendant pointed to language in the affidavit indicating the plaintiff's understanding that the affidavit would be kept confidential, the Court found that this did not prevent the filing from being a charge, where plaintiff did not request the agency not to contact her employer and in fact checked a box on the Questionnaire giving the agency permission to disclose her identity to her employer. *See id.* at 1160.

The Court rejected the assertion that ambiguities should be construed against the drafter, reasoning that such a rule would "undermine the remedial scheme Congress adopted" and would encourage employees "to avoid filing errors by retaining counsel, thereby increasing both the cost and the likelihood of litigation." *Id.* Instead, the Court held that documents filed by an employee "should be construed, to the extent consistent with permissible rules of interpretation, to protect the employee's rights and statutory remedies." *Id.*

The United States Court of Appeals for the Third Circuit had an opportunity to apply the *Holowecki* standard in *Holender v. Mutual Industries North Inc.,* 527 F.3d 352 (3d Cir. June 3, 2008). As in *Holowecki,* the EEOC in *Holender* had not treated the plaintiff's filings as a charge, but had filed an amicus brief in which it took the position that it should have. The court noted that *Holowecki* appeared to give some deference to the EEOC's belief that the filing in question was a charge, but the Third Circuit found it unnecessary to reach the issue of deference because *de novo* review led to the conclusion that the filing constituted a charge. *Holender,* 527 F.3d at 356 n. 2 (quoting *Holowecki,* 128 S.Ct. at 1159).

The court explained that the plaintiff used an EEOC Form 5, which is entitled "Charge of Discrimination," and that the form contains multiple references to itself as a "charge." *Id.* at 356. The court also noted that the plaintiff's accompanying affidavit referred to the "instant charge [filed] on behalf of all persons similarly situated," and reasoned that the latter portion of this statement made clear that the plaintiff sought legal relief. *Id.*

The court rejected an argument that the plaintiffs repeated use of the term "complaint" in the filed documents created an ambiguity that required a different result, although EEOC regulations define "complaint" as information that is not a charge but alleges discrimination. *See Id.* at 356 n. 3. The court also rejected the defendant's argument that a more stringent standard should apply where the plaintiff had counsel, holding that "[t]here is no need to require that counseled submissions to the EEOC contain some magic combination of words explicitly seeking agency action. A charge, submitted by counsel or not, may imply such a request." *See Id.* at 357.

***17** This Court has also had occasion to apply the *Holowecki standard in Fava-Crockett v. Boehringer Ingelheim Pharm., Inc.,* No. 08cv0196, 2008 U.S. Dist. LEXIS 34955 (W.D.Pa. Apr. 29, 2008) (Schwab, J.). The *Fava-Crockett* plaintiff, through counsel, filed a six-paragraph letter entitled "Charge of Discrimination," accompanied by an Intake Questionnaire. This Court quoted *Holoweckl* 's instruction that filings should be construed to protect the employees rights and statutory remedies and concluded that "the 'charge of discrimination,' which happens to be written in the letter format, along with supporting documentation, clearly satisfied the EEOC's minimum requirements for a charge." *Fava-Crockett,* 2008 U.S. Dist. LEXIS 34955, at *7-8.

Under this line of authority, the issue for decision is whether the documents filed by Plaintiffs can be "reasonably construed" under permissible rules of construction as an implied request for action. This presents a close question.

Plaintiffs all filed a General Information Questionnaire, a General Intake Questionnaire and a Discharge Intake Questionnaire. The General Information Questionnaire concludes with the statement, "All **charges** must state an issue which is what happened to you. You must state what protected class you fall under which is the basis for discrimination." (emphasis added). It then instructs the person completing the form to "[c]heck the appropriate space for issues and class." Each of the Plaintiffs checked "Discharge" in the space provided under "Issues" and checked "Age (40+)" in the space provided under "Protected Class(es)." Significantly, *Holender* did rely in part to references in the typewritten form that referred to the form as a "charge."

Plaintiff Campbell, moreover, indicated that he had already sought assistance from an attorney in this matter, resulting in an ongoing consultation. The ongoing involvement of counsel would suggest to an objective reader that the filer was seeking to activate the agency's remedial processes, rather than merely seeking information from the EEOC. Similarly, Plaintiff Austin also indicated that she had consulted counsel. Although she did not indicate that the consultation was ongoing, she did indicate that her attorney thought she "had a case for age ... discrimination," which also tends to support the conclusion to an objective reader that she was looking to activate the EEOC's processes rather than merely seeking information.

Significantly, unlike in *Holowecki* and *Holender,* where the EEOC did not treat the filed documents as a charge by activating its dispute resolution processes, in the instant case, the EEOC did construe the filed documents as charges and did activate its dispute resolution processes. Moreover, Joseph Hardiman, the Director of the Pittsburgh Area Office of the EEOC, has sworn an affidavit in which he states that the EEOC "regards a completed General Information Questionnaire, a completed General Intake Questionnaire or a completed Discharge Intake Questionnaire as independently satisfying the above enumerated charge requirements," that "[t]he receipt of one or all of the completed Questionnaires described above would indicate to EEOC that the Charging Party manifested a clear intent for the

EEOC to act on his or her behalf with respect to the complained of acts by the Respondent," and that "the EEOC deems its receipt of any of the completed questionnaires as the filing date of a charge when received at the EEOC Field Office." (Affidavit of Joseph M. Hardiman III, at 2.)

***18** Mr. Hardiman further states that the documents filed by the Plaintiffs in this case "contained all five categories of information necessary under the regulation to qualify as a charge." *Id.* He further states that upon receipt of the Plaintiffs' Questionnaires, the EEOC assigned a charge number docketing the Questionnaires and "began the process of working toward the completion of EEOC Form 5," which he describes as "a document prepared by EEOC, entitled Charge of Discrimination, which briefly summarizes in three to four paragraphs the contents of the Questionnaires into what is known at EEOC as a 'perfected charge.' " *Id.* at 2-3. Lastly, he asserts that for purposes of assessing the timeliness of charges, EEOC looks to the date the Questionnaires were received, not the date that the charging party signed the perfected charges. *See id.* at 3.

Ultimately, as in *Holowecki,* the EEOC's determinations as expressed in the Hardiman affidavit "is a reasonable exercise of its authority to apply its own regulations and procedures in the course of the routine administration of the statute it enforces." *Holowecki,* 128 S.Ct. at 1159.

The dicta in *Holowecki* suggesting that a different result might have been obtained viewing the Questionnaire at issue there in isolation does not compel a different result here. The forms are not the same. In *Holowecki,* the one-page Form 283 completed by the Plaintiff only referred to a "charge" in the context of asking whether the plaintiff had ever filed an EEOC charge in the past. Moreover, the *Holowecki* form had a Privacy Act Statement on the back that stated that the form's purpose was to determine facts relevant to the agency's jurisdiction over "potential charges" and to provide "pre-charge counseling as is appropriate."

In contrast, Plaintiffs' General Information Questionnaires provide that "[a]ll *charges* must state an issue which is what happened to you," and provides a space for an issue to be stated. By providing responsive information stating an issue, the Plaintiffs satisfied this requirement. Moreover, the *Holowecki* plaintiff was in a continuing employment relationship that could have been jeopardized by the initiation of EEOC proceedings, a fact that would make it more likely that the questionnaire at issue was merely a request for information. In contrast, Plaintiffs' Questionnaires all indicated that they had been discharged.

Because the Questionnaires filed by Plaintiffs Rupert, Austin and Campbell, permissively construed to protect the employee's rights and statutory remedies as instructed in *Holowecki,* are properly deemed charges and were filed within the 300 day period, timeliness does not provide a basis for granting Defendant's Motions for Summary Judgment as to these three Plaintiffs.

2. *Equitable Tolling Provides an Alternative Basis for Finding that Plaintiffs Rupert and Austin Filed Timely Charges with the EEOC.*

***19** Plaintiffs Rupert, Austin and Campbell argue in the alternative that even if the Questionnaires were not deemed charges, equitable tolling would apply during the period after the Questionnaires were filed during which the EEOC delayed preparing the perfected charges. The burden of proof falls on Plaintiffs as the party asserting equitable tolling. *See Courtney v. LaSalle Univ.,* 124 F.3d 499, 505 (3d Cir.1997).

Analysis properly begins with the binding decisions of the United States Court of Appeals for the Third Circuit. In *Kocian v. Getty Ref'g & Marketing Co.,* 707 F.2d 748 (3d Cir.1983), *overruled on other grounds, Colgan v. Fisher Sci. Co.,* 935 F.2d 1407, 1414 (3d Cir.1991) (en banc), the plaintiff twice visited the EEOC office before the expiration of the limitations period. On the second visit, she, her lawyer and an EEOC intake officer began drafting but did not complete a charge. The next day, the EEOC officer called plaintiff to read her the completed charge, indicating that he would mail it to her for signature, which he did on the 181st day, one day after the end of the filing period. His letter enclosing the perfected charge informed the plaintiff that she must return the signed charge promptly because "a charge must be filed within the time limitation imposed by law." *Kocian,* 707 F.2d at 753.

The plaintiff, however, did not immediately sign and return it, but spent "well over a week" making corrections to the proposed charge, sending a revised charge to the EEOC on the 194th day, asking that the EEOC either use that charge or draft another reflecting the corrections. *Id.* at 754. The EEOC did draft a revised charge, which it mailed on the 201st day, which plaintiff returned by mail on the 205th day and which the EEOC received on the

230th day.

Significantly, the plaintiff did not dispute that she initially knew that she must comply with the 180 day limitations period. She argued, however, that the EEOC's statement in its letter mailed on the 181st day led her to believe that it was applying a 300-day rather than a 180-day filing limitations period.

The court of appeals explained that equitable tolling "may be appropriate if (1) the defendant actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." *Kocian,* 707 F.2d at 753. It held, however, that the plaintiff had not demonstrated the kind of "extraordinary" circumstances that justify equitable tolling. *Id.* at 753.

Significantly, the court noted that the EEOC counselor had not mailed the charge to the plaintiff until the 181st day. *See id.* at 754. The court stated that had the plaintiff "simply signed and returned the charge to the EEOC without further delay, a different picture might have been presented." *Id.* In that case, the court explained, the plaintiff:

> ***20** could have argued that the fact that the charge was several days past the 180 day limit was more because of bureaucratic delay than because of her own neglect. Indeed, she would have essentially completed all of her responsibilities in filing the charge, except for formally signing it, within 180 days.

Id.; but see Liszewski v. Moyer Packing Co., No. 06-3558, 2007 WL 3133050, at *2 (3d Cir. Oct.29, 2007) (unpublished opinion) (non-precedential decision suggesting that EEOC delay in processing charges is not an extraordinary circumstance supporting equitable tolling in the absence of EEOC deception or misinformation).

Kocian thus found that "[t]he crux of the equitable tolling argument thus becomes whether the language of the letter of [the 181st day] misled [the plaintiff] to delay further the filing of her formal charge." *Id.* The court found that the letter, which stated, "Because a charge must be filed within the time limitation imposed by law, I urge you to [review, sign, and return the charge] as soon as possible," did not mislead the plaintiff where it contained no false statement, but "merely advised [the plaintiff] to proceed expeditiously. It did not give her any reason to believe that the EEOC considered the enclosed charge to be formally filed and that she was thus free to make corrections without endangering the timeliness of her charge." *Id.*

The court indicated that the plaintiff's arguments "would be more appealing if she had been an inexperienced litigant proceeding pro se." *Id.* at 755. The court noted cases holding that "equitable tolling is particularly appropriate in cases involving 'lay persons unfamiliar with the complexities of the administrative procedures,'" distinguishing them from cases such as the one before it involving litigants "who are represented by counsel." *Id.* The court concluded:

> In this case [the plaintiff] admitted that she knew of the 180-day limitations period because she had filed a charge against a previous employer. We presume that her lawyer knew of the statute of limitations as well. We see no misrepresentations on the part of the EEOC that could have cause Ms. Kocian's delay. We therefore see no justification for equitable tolling.

Id.; see also Podobnik v. U.S. Postal Serv., 409 F.3d 584 (3d Cir.2005) (explaining that "running throughout the equitable estoppel cases is the obligation of the plaintiff to exercise due diligence to preserve his or her claim" and holding that the plaintiff was not entitled to equitable tolling based upon having received allegedly erroneous advice from the EEOC where he took no steps to attempt to follow such advice).

In the wake of *Kocian,* several district courts within the Third Circuit have considered the appropriateness of equitable tolling in cases of the EEOC's bureaucratic delay. In *Curtis v. Tyco Retail Healthcare Group,* No. 06-4302, 2007 WL 1545613 (E.D.Pa. May 24, 2007), relied on by Plaintiffs herein, the plaintiff's attorney had first contacted the EEOC in September 2004 within the 300 day period, enclosing a completed Discipline Questionnaire and requesting the commencement of an investigation into plaintiff's discharge. The EEOC sent him a number of additional questionnaires to complete, including an Information Questionnaire that was completed and returned to the EEOC in December 2004, still within the 300 day period. The EEOC did not send him a formal charge for review and signature and did not schedule an interview until November 2005, fourteen months after the initial contact, eleven months after the completed Information Questionnaire was returned and well after the expiration of the 300 day period. At that interview, the inspector began drafting, but did not complete, a formal charge. When the inspector did not complete the charge, the plaintiff asked for and received a copy, although this was not the EEOC's typical practice. The plaintiff completed the copy and returned it signed within ten days of the meeting.

***21** The plaintiff asserted that under the EEOC's internal procedures, preparation and service of the charge were the responsibility of the EEOC, not the plaintiff. The plaintiff also asserted that he had periodically followed up with the EEOC regarding the status of his claim and had been assured by the EEOC that the September Questionnaire "stopped the clock" and that the defendant would not be able to raise an issue about timeliness.

The United States District Court for the Eastern District of Pennsylvania concluded that the Questionnaires submitted within the 300 day period "would lead a reasonable person to conclude that Plaintiff intended to activate the machinery of Title VII" under the pre-*Holowecki* authority of *Bihler v. Singer Co.,* 710 F.3d 96, 99 (3d Cir.1999). *See Curtis,* 2007 WL 1545613, at *5. The court found that this conclusion was "bolstered" by the EEOC's determination that a charge had been timely filed. *Id.*

Significantly for present purposes, however, the court held that even if it were to conclude that a charge had not been timely filed, the plaintiff would still be entitled to equitable tolling. *See id.* The court noted that timely filing with the EEOC is not a jurisdictional prerequisite to suit in federal court but rather is subject to " 'waiver, estoppel, and equitable tolling.' " *Id.* (quoting *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234(1982)).

The court noted that the EEOC told the plaintiff on several occasions that the defendant would not be able to raise a timeliness objection, and explained that "a plaintiff may justifiably rely on formal communications with the EEOC." *Id.* (quoting *Guzelin v. Drexel Univ.,* No. 98-3004, 1999 WL 153720, at *4 (E.D.Pa. Mar.19, 1999)). The court also cited *Jones v. Eagle Indus. Hygiene Assocs., Inc.,* No. 04-1184, 2004 WL 1576652, at *2-3 (E.D.Pa. July 14, 2004) for the proposition that equitable tolling applies where the EEOC fails to send a plaintiff the formal charge for review and signature within the limitations period. *See id.* Thus the court held:

> [E]quitable tolling may be applied where the EEOC led the grievant to believe that filing a charge would be proper even though the limitations period had passed or where any delay in filing the charge was due to the EEOC's own "bureaucratic delay." Plaintiff alleges that any delay in filing the final charge was due to the EEOC's delay in scheduling an intake appointment. Once he finally met with an EEOC representative, he promptly completed the charge form and submitted it to the EEOC. This set of facts, if proven, would entitle him to equitable tolling and, as such, defeats a Motion to Dismiss.

Id.

As suggested by the *Curtis* court, *Jones v. Eagle Indus. Hygiene Assocs., Inc.,* No. Civ. A. 04-1184, 2004 WL 1576652 (E.D.Pa.2004), had previously reached a similar conclusion.

Likewise, in *Gulezlan v. Drexel Univ.,* No. Civ. A. 98-3004, 1999 WL 153720 (E.D.Pa.1999), the court also found that the EEOC's bureaucratic delay was the kind of extraordinary circumstance supporting equitable tolling, notwithstanding the fact that the plaintiff was represented by counsel in the EEOC proceedings. The court noted that while the court of appeals had declined to apply equitable tolling in *Koclan,* the *Koclan* court had expressly stated that the result might be different if the plaintiff's late filing had been due to bureaucratic delay rather than her own neglect. *Id.* Ultimately, the *Gulezlan* court held:

> ***22** Plaintiff was diligent in his interaction with the EEOC. He was led to believe at each turn from February 2, 1995 that he was

> properly following EEOC procedures. He went to the EEOC on February 16, 1995 for the purpose of filing a charge. But for the bureaucratic delay in providing the initial requested appointment and in processing plaintiff's claim when he did appear, he clearly could have filed a timely charge. That he was prevented from doing so for reasons of bureaucratic delay beyond his control is a sufficiently extraordinary circumstance to warrant the application of equitable tolling from February 16, 1995 to the filing of the charge.

Id.

Although the court noted the distinction some courts have drawn between unrepresented plaintiffs and those represented by counsel, the court concluded that a review of the cases shows that filing in the last few days of the limitations period is not unusual and that calling twelve days before the end of the period to schedule an appointment three days before the end of the period is not *per se* dilatory. *See id.* at *4 n. 4.

To similar effect is *Altopedia v. Memorex Telex Corp.,* 834 F.Supp. 800 (E.D.Pa.1993) ("Unlike the plaintiff in *Kocian,* plaintiff here made a good faith effort to file the charge within the 180 day time period. In effect, everything except signing the charge had been completed within that time period. Thus, plaintiff successfully asserts that there were extraordinary circumstances that prevented him from filing on time. In this case it was the bureaucratic delay of the PHRC which requested plaintiff to sign the charge on the 181st day.").

Although Defendant has cited no authority on this issue, authority exists that would preclude equitable tolling in the context of employment discrimination charges where the plaintiff was represented by counsel. *See, e.g., Jones v. Baskin, Flaherty, Elliot & Mannino, P.C.,* 738 F.Supp. 937 (W.D.Pa.1989) (Mencer, J.); *but see Curtis,* 2007 WL 1545613; *Gulezian,* 1999 WL 153720. Indeed, *Kocian* itself collected cases supporting this proposition, noting that the plaintiffs arguments "would be more appealing if she had been an inexperienced litigant proceeding pro se." *See Kocian,* 707 F.2d at 755. Nonetheless, the *Kocian* court opined that a different result (i.e., a result allowing equitable tolling) might have been presented if the represented plaintiff had promptly returned the charge when received. *See id.* at 754. *Kocian* relied on the plaintiff's representation by counsel in the context of rejecting the plaintiff's argument on the issue of whether EEOC misrepresentation led her to delay filing the charge, and not in considering the issue of EEOC bureaucratic delay. This is a distinction that has some logical appeal in this particular context, as a represented party is not as likely as an unrepresented party to be misled by EEOC misrepresentations, but is not necessarily in a better position to avoid agency bureaucratic delay.

***23** Also, the court of appeals has rejected the notion that representation by counsel precludes equitable tolling based upon an employer's misrepresentations as to the facts of the employee's termination. *See Meyer v. Riegel Corp.,* 720 F.2d 303, 308-09 (3d Cir.1983). In doing so, the court distinguished cases supporting the proposition that equitable tolling may not be invoked where plaintiff had consulted a lawyer thus:

> [T]hey for the most part stand for the laudable notion that a plaintiff who has consulted with an attorney about a potential discrimination claim will not get away with complaining that he failed to understand the requirements and implications of the statute. Unlike plaintiffs in those cases, plaintiff here does not base his argument for equitable tolling on ignorance of law.

Id.; see also Miller v. Beneficial Management Corp., 977 F.2d 834, 845 n. 6 (3d Cir.1992).

To the extent that Plaintiffs here base their equitable tolling argument on the EEOC's bureaucratic delay, it is not based on ignorance of the law, and equitable tolling is therefore available regardless of whether they were represented by counsel.

Plaintiff Rupert has adduced evidence sufficient to create a dispute of fact as to whether the EEOC's bureaucratic delay prevented his timely filing of the perfected charge so as to support equitable tolling. Plaintiff Rupert executed his Questionnaires on October 25, 2006 (26 days before the expiration of the 300 day period), by letter dated November 8, 2006 the EEOC scheduled a telephone appointment to file a charge for November 30 (10 days after the expiration of the 300 day period), by letter dated November 30, 2006, the EEOC provided the Form 5 for his execution and asked him to return it along with additional information within thirty days, and he in fact executed the Form 5 five days later on December 5, 2006 (15 days after the expiration of the 300 day period). Joseph Hardiman, Director of the Pittsburgh Area Office of the EEOC, avers that the EEOC is responsible for preparing the Form 5. (Hardiman Affidavit, at 2-3.)

Applying the reasoning of *Kocian,* this evidence is sufficient to allow a reasonable factfinder to conclude that the delay between the filing of the Questionnaire and the filing of the perfected charge is attributable to the EEOC's "bureaucratic delay." Further, the fact that the Form 5 was executed by Plaintiff Rupert five days after it was mailed by the EEOC (or, if one assumes three days for mailing, within 48 hours of receipt) is sufficient to allow a reasonable factfinder to conclude that Plaintiff Rupert was sufficiently diligent to be entitled to equitable tolling. Accordingly, equitable tolling provides an alternate basis for denying Defendant's Motion for Summary Judgment as to Plaintiff Rupert on the issue of timeliness.

Plaintiff Austin executed her Questionnaires on November 2, 2006, 18 days before the expiration of the 300 day period. The EEOC did not send a letter scheduling her appointment to meet with an investigator to prepare the formal charge until December 6, 2006 (16 days after the 300 days expired), and the EEOC scheduled the appointment for January 9, 2007 (50 days after the period expired). By letter dated January 8, 2007 (49 days after the period expired), the EEOC sent EEOC Form 5 (which is titled Charge of Discrimination) to Ms. Austin for signature, requesting that she return it along with the answers to various questions within 30 days. Plaintiff Austin executed the Form 5 and prepared the answers to the EEOC's questions, returning them to the EEOC by letter dated January 29, 2007 (21 days after the date of the EEOC's letter enclosing the charges, nineteen days before the date that the EEOC indicated they must be returned by, 70 days after the expiration of the 300 day period, and 88 days after executing the Questionnaires).

***24** As with Plaintiff Rupert, the time period prior to Plaintiff Austin's receipt of the Form 5 is fairly attributed to the EEOC's bureaucratic delay. However, Austin's Form 5 was mailed by the EEOC by letter dated January 8, 2007 and not executed by Plaintiff Austin until January 29, 2007, 21 days later. Clearly, more time elapsed after the EEOC's mailing of the Form 5 than the thirteen day delay that *Kocian* suggested did not to reflect the kind of diligence required for equitable tolling. It follows that 21 days similarly is too long. Given that Plaintiffs bear the burden of proof as to equitable tolling, they have not adduced evidence sufficient to create an issue as to whether the 21 days after mailing of the Form 5 is attributable to the EEOC's bureaucratic delay.

This does not end the inquiry, however. Rather, as in *Kocian,* the crux of the equitable tolling argument in regards to Plaintiff Austin becomes "whether the language of the letter of [January 9, 2007] misled [Plaintiff Austin] to delay further the filing of her formal charge." *Kocian,* 707 F.2d at 754. On this issue, Plaintiff Austin would appear to have a stronger argument than the argument advanced by the unsuccessful *Kocian* plaintiff. The letter received by the *Kocian* plaintiff merely urged the plaintiff to return the charge as soon as possible because a charge must be filed within the time limitations imposed by law. In contrast, the letter sent to Plaintiff Austin stated, "PLEASE COMPLETE AND HAVE THE ABOVE-REQUESTED INFORMATION SUBMITTED TO OUR OFFICE WITHIN 30 DAYS OR YOUR DISCRIMINATION CHARGE MAY BE DISMISSED." Unlike the letter in *Kocian,* which the court found not to be misleading, this letter could lead a reasonable layperson to believe that a charge submitted within 30 days would be timely. Thus, were Plaintiff Austin unrepresented, she would be entitled to rely on this formal communication from the EEOC.

However, an argument that Austin was misled by the EEOC into believing that a formal charge filed within 30 days would be timely is clearly based upon her misunderstanding of the requirements of the ADEA and thus ignorance of the law. In such a case, *Meyer* and *Kocian* raise an issue as to whether equitable tolling is appropriate to the extent that Plaintiff Austin was represented by counsel.

However, Plaintiff Austin has adduced evidence sufficient to create a factual dispute as to the extent to which Plaintiff Austin was represented by counsel. Austin does not dispute that she consulted with legal counsel prior to signing on February 15, 2006 the Separation Agreement and Release provided by Defendant, and that this counsel advised her that she had a case for age discrimination. (Joint Concise Statement of Material Facts Accompanying Defendant's Motion for Summary Judgment as to Plaintiff Linda K. Austin, at 5.) It is also not disputed that Austin contacted Plaintiffs' counsel by November 2, 2006, and that, after filling out her EEOC Questionnaires on November 2, 2006, she left them with a secretary at the Obermeyer firm (*i.e.,* one of Plaintiffs' counsel of record in this case). *Id.,* at 6-7.

***25** Austin testified, however, that after that, she did not submit any additional materials, including the January 29, 2007 letter enclosing her Form 5, through counsel, but rather did everything at home, including preparing the January 29, 2007 cover letter and the answers to the EEOC's questions contained therein. (Transcript of Linda Austin, at 21-22.) Similarly, she testified that all EEOC communications were directed to her, not to her counsel. *Id.* She also states that while she was given the Questionnaires by counsel and completed them in counsel's conference room, she completed them entirely on her own without any assistance from counsel, who declined to advise her or consult with her regarding the content of the Questionnaires. Resolving this factual dispute in favor of Plaintiff Austin, the non-moving party, it appears that while she had consulted counsel prior to initiating the EEOC proceedings, she was not represented by counsel in the EEOC proceedings and was not assisted or advised by counsel as to the execution and return of the Form 5.

In *Holowecki,* the United States Supreme Court rejected an argument that ambiguities in a charge should be construed against the drafter, holding that such a rule would undermine the remedial scheme adopted by Congress by encouraging individuals to avoid filing errors by retaining counsel, thereby increasing both the cost and the likelihood of litigation. *Federal Express Corp. v. Holowecki,* --- U.S. ----, ----, 128 S.Ct. 1147, 1160, 170 L.Ed.2d 10 (2008). The same result sought to be avoided by *Holowecki* would flow from a rule holding that a plaintiff who consults an attorney prior to initiating EEOC proceedings, but is not represented or provided legal assistance by counsel in those proceedings, is nonetheless deemed represented by counsel when determining the reasonableness of plaintiff's reliance on the EEOC's misrepresentations for equitable tolling purposes.

In sum, Plaintiff Austin has adduced evidence sufficient to allow a reasonable factfinder to conclude that she was not represented by counsel at a time or in a manner or extent that would bar the application of equitable tolling during the 30 days within which the EEOC instructed her to return the Form 5. Equitable tolling therefore provides an alternate ground upon which to deny Defendant's Motion for Summary Judgment as to Plaintiff Austin on the issue of timeliness.

Plaintiff Campbell learned of his termination by at least February 27, 2006, and so the 300 day period ran on December 26, 2006. Plaintiff Campbell executed his Questionnaires on November 6, 2006 (fifty days before the expiration of the 300 day period). Plaintiff Campbell executed the Form 5 on March 12, 2007 (76 days after the expiration of the 300 day period). Plaintiff Campbell does not point to any record evidence that would indicate what happened in the 126 days between his filing of the Questionnaires and his execution of the Form 5. Significantly, Plaintiff Campbell does not cite to record evidence indicating when the Form 5 was mailed to him for execution. The 126 days between the execution of Campbell's Questionnaires and his execution of the Form 5 is considerably longer than the corresponding period for the other four Plaintiffs (88 days for Austin, 41 days for Rupert, 52 days for Hunt, and 66 days for Bittner).

***26** On this record, Plaintiff Campbell has failed to adduce evidence that would create a dispute of material fact as to whether the 126-day delay between his execution of the Questionnaires and his execution of the Form 5 is fairly attributable to bureaucratic delay on the part of the EEOC. Accordingly, equitable tolling does not provide an alternate ground for denying Defendant's Motion for Summary Judgment against Plaintiff Campbell on the issue of timeliness.

B. ***The Perfected Charges Filed by Rupert, Austin and Campbell Were Not Insufficient to as a Matter of Law to Exhaust Administrative Remedies on Their Disparate Impact Claims.***

Failure to exhaust administrative remedies is an affirmative defense as to which Defendant bears the burden of proof. *See Williams v. Runyon,* 130 F.3d 568, 573 (3d Cir.1997) (applying Title VII); *Spangler v. Moderne Glass Co.,* No. 6-1394, 2008 WL 919693, at *3 (W.D.Pa. April 3, 2008) (Ambrose, CJ.) (applying ADEA); *see also Ray v. C.O. Kertes,* 285 F.3d 287, 292 (3d Cir.2002) (stating in dicta that courts including the Third Circuit treat exhaustion requirement under Title VII and the ADEA as affirmative defenses).

The requirement that a plaintiff exhaust administrative remedies by filing a charge with the EEOC is an "essential part[ ] of the statutory plan, designed to correct discrimination through administrative conciliation and persuasion if possible, rather than by formal court action."

Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398 (3d Cir.1976). While "[t]he law is clear that civil litigation ... is not available to one who has entirely bypassed the EEOC thereby depriving it of an opportunity to investigate and conciliate, ... EEOC charges should be liberally construed because they are preferred by laymen and are usually prepared without legal assistance." *Canavan v. Beneficial Fin. Corp.,* 553 F.2d 860, 863-64 (3d Cir.1977). "Because failure to exhaust administrative remedies is an affirmative defense, the defendant bears the burden of pleading and proving that the plaintiff has failed to exhaust administrative remedies." *Williams v. Runyon,* 130 F.3d 568 (3d Cir.1997).

Balancing these considerations, courts have crafted the following test: "the parameters of the civil action in the district court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination, including new acts which occurred during the pendency of proceedings before the Commission." *Ostapowicz,* 541 F.2d at 398-99; *Hicks v. ABT Assocs.,* 572 F.2d 960, 966 (3d Cir.1978). Thus, the scope of a civil action is not limited to the EEOC's actual investigation. *Hicks,* 572 F.2d at 966. "If the EEOC's investigation is unreasonably narrow or improperly conducted, the plaintiff should not be barred from his statutory right to a civil action." *Hicks,* 572 F.2d at 966.

In *Canavan,* the plaintiff filed an EEOC charge alleging discrimination in assignment of seniority status. In her charge, the plaintiff named one entity as the discriminating employer, but also listed an additional entity as having discriminated against her. The United States Court of Appeals for the Third Circuit explained that it was at least arguable that a reasonable investigation would have uncovered the second defendant's involvement. *See Canavan,* 553 F.2d at 864. Significantly, in reaching this conclusion, the court looked to information submitted to the EEOC by the second defendant, in which the second defendant indicated that it was the entity that had calculated the plaintiff's seniority. *See id.*

***27** In *Hicks,* the plaintiff filed an EEOC charge that alleged race discrimination in "broad terms." *Hicks,* 572 F.2d at 965. The EEOC in fact investigated only race discrimination as a result of his charge. His civil action, however, also included sex discrimination. The United States Court of Appeals for the Third Circuit rejected the defendant's argument that it was appropriate to go beyond the scope of the charge only to allow consideration of new facts uncovered by the EEOC investigation and that the investigation thus set the outer limit to the scope of the civil complaint. *Id.* at 966. Noting that the defendant did not have a right to conciliation and had shown no prejudice from expanding the scope of the civil action beyond the EEOC investigation, the court concluded that the standard announced in *Ostapowicz* (i.e., a rule focused on "the investigation which can reasonably be expected to grow out of the charge" irrespective of the actual investigation) "is a fair compromise of the interests expressed in Title VII in informal settlement as a preferred method of conflict resolution and the employee's right to a judicial forum once the Commission has finished processing a charge." *Id.*

The court held that the record contained a genuine issue whether the EEOC investigation would have included examination of sex discrimination claims. *See id.* While the court noted that "courts should presume the regularity of the EEOC's investigation," the plaintiff had adduced evidence that he had never been contacted by the EEOC investigator in the course of the investigation, contrary to the EEOC's own regulations, and further that if he had been contacted, he would have told the investigator that sex discrimination was a cause of the disparate treatment alleged in his charge. *Id.*

The court explained that:

> A finding that the EEOC would have discovered a claim for sex discrimination in the course of a reasonable investigation does not itself meet the standard of *Ostapowicz.* This evidence merely rebuts the presumption that the scope of the actual investigation is "what can reasonably be expected to grow out of the charge of discrimination."

Id. at 967. Rather, the court cautioned that:

> The district court must further find that the sex discrimination claims which would have been uncovered were reasonably within the scope of the charge filed with the EEOC. Otherwise, the charging party could greatly expand an investigation simply by alleging new and different facts when he was contacted by the Commission following his charge.

Id.

On this issue, that court noted that "the charge in broad terms complained of 'disparate treatment.' " *Id.* It also noted that there was "a close nexus between the facts supporting the claims of race and sex discrimination," in that both his sex and his race discrimination claims arose from allegations that he was subjected to stricter conditions of employment and disparate salary levels, the "same acts." *Id.* at 965, 967. Where the record was devoid of evidence of the investigatory practices of the agency and thus of "evidence on which the court can conclude whether a reasonable inquiry would have reached [the plaintiff's] allegations [of sex discrimination]," the court of appeals held that the defendant had not met its burden of showing an absence factual issues regarding the plaintiff's failure to exhaust administrative remedies. *Id.*

***28** The United States Court of Appeals for the Third Circuit again focused on consequences of discrimination rather than legal theories in *Howze v. Jones & Laughlin Steel Corp.,* 750 F.2d 1208 (3d Cir.1984). The *Howze* plaintiff had filed a charge alleging discriminatory failure to promote. In her civil litigation, she sought to raise an additional theory in support of this claim, specifically that she was discriminated against in retaliation for activities on behalf of the Black Caucus. *See Howze,* 750 F.2d at 1212. The court held that the new retaliation claim "may fairly be considered [an] explanation[ ] of the original charge" and was within the scope of the reasonable investigation that would be expected to grown from the plaintiff's charge of discriminatory failure to promote. *Id.; see also Galvls v. HGO Servs.,* 49 F.Supp.2d 445, 449 (E.D.Pa.1999) ("legal analysis turns on whether there is a close nexus between the facts supporting each claim or whether additional charges made in the judicial complaint may fairly be considered explanations of the original charge or growing out of it"). The court explained that "[w]hether the actual EEOC investigation uncovered any evidence of retaliation is of no consequence." *Howze,* 750 F.2d at 1212.

In *Antol v. Perry,* 82 F.3d 1291 (3d Cir.1996), however, the court of appeals found that a claim of gender discrimination was not within the scope of the investigation reasonably expected to grow out of a charge alleging disability discrimination, despite the fact that investigation would have revealed that two women were promoted while a man was not. The court did not distinguish its prior decision in *Hicks.* The cases are distinguishable, however, in that there was evidence that the *Hicks* plaintiff would have so informed the EEOC about his sex discrimination claim if asked, while the Antol plaintiff did not adduce such evidence. *Antol,* 82 F.3d at 1295.

Antol did distinguish the prior decision in *Waiters v. Parsons,* 729 F.2d 233 (3d Cir.1984), which held that a plaintiff's suit based upon an act of retaliation occurring after the conclusion of the EEOC proceedings was not barred "because the core grievances in the suit filed and the earlier EEOC complaint were the same-retaliation." *Id.* The *Antol* court held:

> The specifics of his disability discrimination charge do not fairly encompass a claim for gender discrimination merely because investigation would reveal that [the plaintiff] is a man and the two employees who received the positions are women. The investigation focused, quite properly we think, on the gravamen of [the plaintiff's] complaint-disability discrimination.

Id. at 1296.

In *Robinson v. Dalton,* 107 F.3d 1018 (3d Cir.1997), the plaintiff had filed charges with the EEOC alleging both racial discrimination and retaliation in various decisions related to sick leave and promotion. In addition to the absences referred to in his EEOC charges, the plaintiff had an additional long absence that ultimately led the defendant to terminate his employment. The plaintiff brought his termination to the attention of the EEOC, but it refused to investigate the charge of retaliatory discharge because it concluded the complaint had not been timely filed.

***29** The United States Court of Appeals for the Third Circuit in *Robinson* noted the *Ostapowicz* "reasonably expected to grow" standard and its holding in *Hicks* that a plaintiff is not barred from raising in its lawsuit additional claims if the EEOC investigation is too narrow. *See id.* at 1025-26. The court of appeals remanded to the district court for evaluation of the reasonableness of the investigation. *See id.* at 1026. In doing so, it explained that its own review was hampered by the absence of the EEOC charges from the record. *See id.* It noted, however, that where the reasons given by the employer for the discharge included some of the same incidents referred to in the plaintiff's prior charges, the court was unable to understand why the EEOC declined to investigate the discharge. *See id.* The court provided the following guidance to the district court:

> Factors the district court may consider in making this determination include 1) whether the previous three complaints alleged the same retaliatory intent inherent in the retaliatory discharge claim, 2) whether the subject of these previous complaints were used as a basis for the Navy's decision to terminate Robinson; and 3) whether the EEOC should have been put on notice of Robinson's claim of retaliatory discharge and therefore investigated that claim. In light of our precedent, the court may also want to reexamine whether there is enough overlapping in Robinson's subsequent allegations with the earlier complaints that this discharge complaint fairly falls within the scope of the earlier complaints.

Id.

More recently, in *Yhelka v. Dairy Farmers,* No. 07cv1736, 2008 WL 598279 (W.D.Pa. Feb.29, 2008) (Schwab, J.), this Court held that a claim of retaliation could reasonably be expected to grow out of a charge wherein "the plaintiff stated that she believed she was fired because she was a female and because she fought for the position she held." *Id.* at *2.

Based on this authority, the determination whether a claim is within the scope of the investigation reasonably expected to grow out of a charge should give weight to the fact that the claim in the charge and the new claim are based upon the same incidents, *e.g.,* the same failure to promote or the same absences from work. *See Hicks,* 572 F.2d at 965; *Robinson,* 107 F.3d at 1026. However, identity of incidents by itself is not sufficient where the "core grievances" or "gravamen" of the claims are not the same, such as where the charge alleges disability discrimination and the new claim alleges gender discrimination, at least unless the plaintiff can adduce evidence indicating that the additional grievance would have been brought to the attention of the EEOC during a reasonable investigation. *Compare Antol,* 82 F.3d at 1296 *with Hicks,* 572 F.2d at 966. Core grievances, however, are to be distinguished for these purposes from additional "legal theories" supporting or explaining the original charge that a particular incident was the result of discrimination. *See Howze,* 750 F.2d at 1212.

***30** Such a rule that focuses the exhaustion inquiry on the alleged consequences of the discrimination, rather than the alleged theory of discrimination, is supported by the statutory text of the ADEA as interpreted by the Supreme Court in recognizing a disparate impact cause of action. As the Court explained, Congress "directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Smith v. City of Jackson,* 544 U.S. 228, 234, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005) (plurality opinion) (emphasis in original) (quoting *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)). The Supreme Court found that the same statutory language giving rise to both disparate treatment and disparate impact theories, i.e., language prohibiting actions that "deprive any individual of employment opportunities or *otherwise adversely* affect his status as an employee, because of such individual's" race or age," "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Id.* at 235-36 (emphasis in original).

Defendant argues that Plaintiffs' charges are devoid of reference to any facially neutral policy, a required element of a disparate impact claim, but instead clearly allege intentional discrimination. It is true that disparate treatment and disparate impact are distinct legal theories of discrimination, with different elements of proof. Defendant cites no authority, however, for the assertion that a plaintiff's charge must allege the elements of a prima facie case in order to exhaust administrative remedies. Such a rule could not be reconciled with the broader rule followed in this circuit that exhaustion is determined by the scope of the EEOC investigation that would reasonably be expected to grow out of the charge. Moreover, the court of appeals has recognized that a "pattern of employment discrimination" can fall within either framework, describing both theories as "systemic discrimination" and noting that plaintiffs need not choose between them until after completion of discovery. *Lusardi v. Lechner,* 855 F.2d 1062, 1064 n. 1 (3d Cir.1988).

Applying the authority discussed above, the core grievance set forth in Plaintiffs' charges was that their terminations resulted from age discrimination. In this case, Plaintiffs' disparate treatment and disparate impact claims arise from the same incidents: their terminations. Whether these terminations resulted from discriminatory intent or a facially neutral policy with disparate impact is not the gravamen of their charges; it is merely a different theory explaining the conclusion that these specific incidents were the result of age discrimination.

The perfected charges filed by Plaintiffs Rupert, Austin and Campbell that were provided to Defendant suggested that the RIF fell disproportionately on older workers.[2] It is undisputed that Plaintiffs Rupert and Austin were not told how or why they were selected for termination, and thus it is not surprising that their EEOC charges refer only to the generic reasons given to them by Defendant for the RIF, namely economic factors and downsizing. Such reasons for the conducting of the RIF, however, do not indicate or explain why or on what basis the employment of particular individuals was terminated while that of other individuals was not as part of the RIF. Faced with such circumstances and charges, it is reasonable to expect the EEOC to inquire or its investigation otherwise to address why and how particular individuals were selected for employment termination as part of the Defendant's downsizing.

2 Plaintiff Rupert stated: "I believe that I was discriminated against because of my age, 57, in violation of the [ADEA] in that I, along with several other associates in my age group, was discharged from employment on the same day. Over the past six to eight years, there has been a systematic downsizing of employees in the 40-60 age bracket, with most of these employees being in their 50's. While focusing on older employees, the respondent has terminated their employment regardless of their work performance."

Plaintiff Austin stated: "... I was released from employment during what the respondent called a 'downsizing,' which included many employees who were in my age group (50's). Although General Industrial did not have a good year, I believe that the respondent was trying to get rid of older employees who were making more money than younger employees."

Plaintiff Campbell stated: "The respondent has engaged in a pattern of forcing older employees out, while retaining younger employees with less experience and seniority. I have been told that there was a list of names of older employees to be let go, and my name was on it."

***31** In fact, in the course of the actual EEOC investigations, the EEOC did so inquire, requesting that Defendant provide "[c]opies of the applicable policies, practices, or procedures relating to the act alleged to be discriminatory." (Exhibit 14.) *See Canavan,* 553 F.2d at 864 (considering evidence submitted to the EEOC by the defendant in determining whether the plaintiff had failed to exhaust administrative remedies). In response to the charges of Plaintiffs Rupert and Austin, Defendant provided the EEOC with a copy of its Reduction in Force Guidelines for Terminations, which described the facially neutral ranking system based on the use of Success Factors.[3] (Exhibits 14, 79). Although it is not clear from the record that the EEOC was provided with the Success Factors themselves in the actual investigation, it is reasonable to expect that the EEOC would have sought to obtain them since the Reduction In Force Guidelines provided by Defendant specifically referred to them. The Success Factors were multiple in nature and included characteristics such as "Driving Change," "Openness and Flexibility" and acting "with a Long-Term Perspective." (Exhibit 91, at Defendant R-04072. 04074, 04078.) While there is nothing improper or inappropriate about any such factors or characteristics, it is reasonable to expect that in the course of a reasonable investigation the EEOC would have considered or addressed the possibility that Defendant's facially neutral policy resulted in a disparate impact on older workers as suggested in the charges filed by Plaintiffs Rupert, Austin and Campbell.

3 The Guidelines were also provided in the investigation of the charges of Plaintiffs Hunt and Bittner. (*See* Exhibits 77, 78.)

Moreover, as to Plaintiffs Austin, Hunt and Bittner, the EEOC resolved its investigations on the basis of their execution of Separation Agreements and Releases. (Exhibit B to Answer and Counterclaim.) Although the parties have not pointed to record evidence of the basis for the EEOC's decisions as to Plaintiffs Rupert and Campbell, they executed the same or essentially similar Separation Agreements and Releases. Thus, there is at least an issue of fact presented as to whether the EEOC investigation was too narrow and whether, in the absence of executed Separation Agreements and Releases, the scope of the EEOC investigation that could reasonably have been expected to grow out of the Rupert and Austin's charges would have considered or addressed any disparate impact of Defendant's facially neutral policy.

Moreover, Plaintiff Rupert, when asked by the EEOC to provide a copy of any written procedure or policy with respect to his discharge, stated: “I do not have a copy if, in fact, there is one. I suspect Defendant Corporate HR Department would be a source to locate one.” (Exhibit 14.) Similarly, when asked by the EEOC to provide information for an affidavit regarding “Respondent’s Explanation for the Alleged Harm and Its Policies and Practices,” Plaintiff Rupert did not rule out the possible existence of such a policy, stating only that “[t]he only explanation I received from the respondent was that I was being terminated due to company downsizing.” These statements by Plaintiff Rupert held open the possible existence of a neutral policy and also suggested to the EEOC that it should inquire of Defendant for such a policy, and thereby provide further record support that a claim of disparate impact arising from the application of such a policy was within the scope of a reasonable EEOC investigation of Plaintiff Rupert’s charge.

***32** As to Plaintiff Campbell, the parties have not cited to record evidence regarding the response filed by Defendant in his EEOC proceedings, or any evidence regarding the scope of the actual EEOC investigation of Campbell’s charge. However, Campbell’s charge alleged that Defendant “ha[d] engaged in a pattern of forcing older employees out, while retaining younger employees with less experience and seniority.” Moreover, Campbell also alleged that he was told that performance was the reason for this termination, and that “there was a list of names of older employees to be let go, and [his] name was on it.” Furthermore, the overall record suggests that the EEOC investigation may have been resolved on the basis of the EEOC’s conclusion that Campbell had waived his claims by executing a Separation Agreement and Release, which could explain why the EEOC’s actual investigation may have been narrow and may not have reached the issue of disparate impact.

Given that failure to exhaust administrative remedies is an affirmative defense as to which Defendant bears the burden of proof, in order to be entitled to summary judgment Defendant had the burden of adducing evidence that disparate impact was not within the scope of a reasonable investigation growing out of the charge. *See In re Bressman,* 327 F.3d 229 (3d Cir.2003) (to obtain summary judgment on an affirmative defense as to which the Defendant has the burden of proof, they had the burden of supporting their motions “with credible evidence ... that would entitle [them] to a directed verdict if not controverted at trial.”). In light of the circumstances presented including the absence of record evidence as to the scope of the actual EEOC investigation beyond Campbell’s Charge of Discrimination and his Questionnaires, the determination as to the scope of the reasonable investigation cannot be made as a matter of law. Thus, Defendant’s motion for summary judgment on the basis of Campbell’s alleged failure to exhaust administrative remedies on a disparate impact claim should be denied.

A finding that Defendant is not entitled to summary judgment on Plaintiff Rupert, Austin and Campbell’s disparate impact claims is supported by the decisions of the United States Court of Appeals for the Second Circuit. In *Brown v. Coach Stores, Inc.,* 163 F.3d 706 (2d Cir.1998), the plaintiff’s charge alleged disparate treatment in the form of failure to promote, stating that the employer had instead promoted dozens of non-minority employees and “scarcely any” minorities. *Id.* at 708. The court applied the “scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination” standard and found that the plaintiff’s disparate impact claim was “reasonably related to her failure to promote claims as we would expect that the EEOC, in investigating the complaint, would have assessed [the defendant’s] promotion policies and their effect on minority employees.” *Id.* at 712.

***33** Similarly, in *Gomes v. Avco,* 964 F.2d 1330 (2d Cir.1992), the plaintiff’s charge set forth a disparate treatment claim. His charge alleged that he was the only Portuguese employee in his job classification. It also alleged that the defendant had a rule requiring eight years of experience in order to qualify for promotion to skilled trades, but only in the context of arguing that the plaintiff in fact satisfied the eight-year rule. The court concluded that although the charge “most naturally supports a claim of intentional discrimination,”

> [n]onetheless, once the EEOC investigated the case and found that [the plaintiff] did not satisfy the eight year rule, it would have been perfectly natural for the EEOC to question the necessity of the eight year rule itself. [The plaintiff’s] allegation that people with less experience than he (and thus less than eight years) were promoted ahead of him should have raised suspicion that there was no business justification for the rule. Given that [the plaintiff] had also

> alleged that he was the only Portuguese in his job category, the EEOC could then have reasonably inquired as to whether this possibly unnecessary rule had a discriminatory impact on employees of Portuguese decent. Accordingly, we conclude that an investigation of [the plaintiff's] disparate impact claim would reasonably have flowed from an investigation of his disparate treatment claim.

Gomes, 964 F.2d at 1334-35. The court distinguished the case from one where there were factual differences between to the two acts of discrimination, emphasizing that the plaintiff in contrast had "asserted two different theories of relief to remedy the particular incidents of discrimination [i.e., failure to promote] identified in Gomes' EEOC complaint." *Id.* at 1335.

The contrary conclusions reached by the non-binding decisions in *Pacheco v. Mineta,* 448 F.3d 783 (5th Cir.2006), *Woodman v. WWOR-TV,* 293 F.Supp.2d 381 (S.D.N.Y.2003), and *Jackson v. Merck & Co.,* No. CIV. A. 99-CV-3069, 1999 WL 962522 (E.D.Pa.1999) (Kelly, J.) (unpublished opinion),[4] are not persuasive. All three of these cases holding that plaintiffs failed to exhaust administrative remedies with respect to disparate impact claims are factually distinguishable in that in none of these cases was the EEOC actually made aware of the existence of the facially neutral policy during the course of the investigation. Clearly, where the defendant brings to the EEOC's attention-as was done in the present case-the existence of the facially neutral policy in attempting to defend against a plaintiff's charge of intentional discrimination, it is more likely that a reasonable EEOC investigation would consider or address the potential discriminatory impact of the policy than where the EEOC is unaware of the policy.

4 *Jackson* is further distinguishable in that plaintiffs charge did not allege a pattern of discrimination, and, in fact, mentioned other workers only in a way that tended to refute a finding of disparate impact. Moreover, to the extent that *Jackson* suggests that the standards determining whether a complaint is sufficient to survive a motion to dismiss apply to the determination of whether a plaintiff has exhausted administrative remedies, there is no basis for such an argument, which is inconsistent with the "reasonable investigation" standard and also overlooks the fact that most charges, unlike most federal complaints, are drafted by unsophisticated laypeople.

Moreover, the statutory framework created for analysis of disparate treatment cases recognizes that, at the outset of litigation, the reasons for the plaintiff's discharge, which may include the application of neutral policies, are often unknown to the plaintiff. Thus, the plaintiff's articulation of a prima facie case shifts the burden to the defendant to articulate a legitimate, non-discriminatory reason for the decision. Where the defendant does so during the administrative proceedings by pointing to a facially neutral policy used to select workers for a reduction in force, and where the charge has at least suggested that older workers were disproportionately affected by that reduction in force, it seems clear that the disparate impact of that policy on older workers is within the scope of a reasonable EEOC investigation.

***34** Accordingly, it is respectfully recommended that Defendant's Motions for Summary Judgment on the disparate impact claims asserted by Plaintiffs Rupert, Austin and Campbell be denied.

C. ***The Perfected Charges Filed by Plaintiffs Austin and Campbell Exhausted Their Administrative Remedies with Respect to Class Claims.***

Defendant next argues for partial summary judgment on the ground that Plaintiffs Austin and Campbell failed to exhaust their administrative remedies on their ADEA class claims.[5] This issue was initially raised by the Defendant in a Motion to Dismiss, which this Court denied as premature and without prejudice to Defendant raising it in a motion for summary judgment at the appropriate time. (Docket No. 26). The September 26, 2007 Case Management Order (Docket No. 28) indicates that Phase I of this case will address, *inter alia,* administrative remedy exhaustion as to disparate impact claims but no mention is made therein to administrative remedy exhaustion as to class claims. Nevertheless, the parties by their Stipulated Discovery Order dated December 3, 2007 (Docket No. 54) agreed that "the issue of whether the named plaintiffs failed to exhaust administrative remedies with regard to notice of a class claim is included within" Phase I. Also, this Court's Order Referring Case to a Special Master (Docket No. 29) conferred on the Special Master power to rule by report and recommendation on motions for summary judgment and on class related issues. Moreover, no party has objected to my ruling by report and recommendation on this issue. Thus, I do so as set forth below.

5 Defendant does not raise this issue as to Plaintiff Rupert.

Failure to exhaust administrative remedies is an affirmative defense as to which Defendant bears the burden of proof. *See Williams v. Runyon,* 130 F.3d 568, 573 (3d Cir.1997) (applying Title VII); *Spangler v. Moderne Glass Co.,* No. 6-1394, 2008 WL 919693, at *3 (W.D.Pa. April 3, 2008) (Ambrose, CJ.) (applying ADEA); *see also Ray v. C.O. Kertes,* 285 F.3d 287, 292 (3d Cir.2002) (stating in dicta that courts including the Third Circuit treat exhaustion requirements under Title VII and the ADEA as affirmative defenses).

Under the single filing rule, an individual who has not filed an EEOC charge within the limitations period can join a class action without personally satisfying the exhaustion and filing requirements if the EEOC charge filed by the representative plaintiff who filed the class action alleged "class-based discrimination." *Communications Workers v. New Jersey Dep't of Personnel,* 282 F.3d 213, 217 (3d Cir.2002); *accord Ruehl v. Viacom,* 500 F.3d 375, 386 (3d Cir.2007) ("a single, representative complaint can achieve the notice and conciliation purpose of the EEOC filing, '[s]o long as class issues are alleged.' "); *Lockardt v. Westinghouse Credit Corp.,* 879 F.2d 43, 53 (3d Cir.1989), *overruled on other grounds as recognized by, Starceski v. Westinghouse Elec. Corp.,* 54 F.3d 1089, 1099 n. 10 (3d Cir.1995). Although the charge need not state specifically that it was being brought on behalf of others similarly situated, the charge must "notif[y] [the employer] that it allegedly discriminates against persons over forty years old as a class." *Lockardt,* 879 F.2d at 53. "[A] plaintiff is not required to file a 'class charge,' but needs only to allege class issues that may subsequently form the basis for a 'class action.' " *Whalen v. W.R. Grace & Co.,* 56 F.3d 504, 507 (3d Cir.1995). "So long as class issues are alleged, a timely charge may serve as the basis for a class action." *Lusardi v. Lechner,* 855 F.2d 1062, 1078 (3d Cir.1988).

***35** In *Lusardi,* the plaintiff's EEOC charge alleged:

> [The defendant] has engaged and is continuing to engage in employment practices related to hiring, training, promotion and termination of past, present and future employees which discriminate against persons such as myself over forty as a class particularly with respect to the implementation of a reduction in salaried work force.

Lusardi, 855 F.2d at 1078. The United States Court of Appeals for the Third Circuit held:

> Although the EEOC charge does not use the words "similarly situated" or allege specifically that a class action is going to be brought, we fail to see how [the defendant] could claim prejudice by the bringing of a class action. The charge clearly notifies [the defendant] that it allegedly discriminates against persons over forty years old as a class. Accordingly, the charge provides sufficient notice to the parties to encourage meaningful conciliation, the purpose of requiring it. So long as class issues are alleged, a timely charge may serve as the basis for a class action.

Id.

More recently, in *Ruehl,* the court of appeals, while not directly confronted with the issue of whether allegations in an EEOC charge provided sufficient notice of class claims, did characterize the allegation that the defendant had perpetrated a "pattern and scheme of systematic discrimination against older workers" as a "class-wide allegation" applicable to a plaintiff who had not filed a timely EEOC charge. *Ruehl,* 500 F.3d at 389.

In contrast, in *Lockardt,* the EEOC charge "merely stated that [the defendant] terminated his position of employment on the basis of his age." *Lockardt,* 879 F.2d at 53. Unsurprisingly, the United States Court of Appeals for the Third Circuit held that the "charge provided [the defendant] with neither explicit nor implicit notice of alleged of class-based discrimination," and thus could not provide the basis for the joinder of plaintiffs who had not exhausted their administrative remedies. *Id.*

A closer question was presented to the United States District Court for the Eastern District of Pennsylvania in *Kresefky v. Panasonic Communications & Sys. Co.,* 169 F.R.D. 54 (E.D.Pa.1996). One of the EEOC charges in *Kresefky alleged,* "Fourteen (14) employees were affected [by the RIF] in my division (Marketing). Ten were within the protected age group." *Kresefky,* 169 F.R.D. at 60. The court held:

> Clearly, these charges were not sufficient to put defendants on notice of class claims against them. [The plaintiff who filed the above-quoted charge] is the only named plaintiff who even referred to other terminated employees within a protected group, and his charge is otherwise directed solely toward his own claims. By contrast, the charge which the *Lusardi* Court found to have provided adequate notice of class claims alleged that the defendant had engaged and *was continuing to engage in* specified discriminatory practices against *past, present and future employees "such as"* the named plaintiff, and referred to this group as *class. Lusardi,* 855 F.2d at 1078. [The plaintiff's] allegation that ten of the fourteen employees terminated from the marketing department in which he worked were within the protected age group does not suffice to place defendants on notice of class claims in the face of his repeated references to his own performance, his own termination and the discrimination he personally suffered.

***36** *Id.*

To the extent that the court's reasoning suggests that anything less than the *Lusardi* charge is insufficient, or that the charge must allege a "class claim," it is overly broad and inconsistent with the guidance of the court of appeals indicating that the plaintiff need not file a "class charge" but need only allege "class-based discrimination," or "class issues," or "notif[y] [the employer] that it allegedly discriminates against persons over forty years old as a class." *Ruehl,* 500 F.3d at 386; *Communications Workers,* 282 F.3d at 217; *Whalen,* 56 F.3d 507; *Lockardt,* 879 F.2d at 53; *Lusardi,* 855 F.2d at 1078. It is likewise inconsistent with the court of appeals' suggestion that an allegation that the defendant had engaged in a "pattern and scheme of systematic discrimination" is a sufficient allegation of class issues. *Ruehl,* 500 F.3d at 389.

Moreover, *Kresefky* is distinguishable on its facts. It is at least arguable that the statement in the *Kresefky* plaintiffs charge that others in the protected class were also terminated would be insufficient to notify the defendant that those terminations are alleged to be wrongful or discriminatory. Here, the EEOC charges filed by Plaintiffs Austin and Campbell all contained language that at least suggested that Defendant's treatment of older workers as a group was wrongful and discriminatory. *Lockardt,* 879 F.2d at 53 (enquiring whether the charge provided "explicit or implicit" notice of class-based discrimination). Plaintiff Austin stated:

> ... I was released from employment during what the respondent called a 'downsizing,' which included many employees who were in my age group (50's). Although General Industrial did not have a good year, I believe that the respondent was trying to get rid of older employees who were making more money than younger employees.

Thus, Austin did not limit herself to stating that other older employees were downsized. Rather, she accused Defendant of "trying to get rid of older employees."

Similarly, Plaintiff Campbell stated: "The respondent has engaged in a pattern of forcing older employees out, while retaining younger employees with less experience and seniority. I have been told that there was a list of names of older employees to be let go, and my name was on it." These allegations suggesting that older employees were targeted for termination despite having performed better than younger employees who were retained also suggest that Defendant's conduct towards older workers as a group was discriminatory.

The charges of Plaintiffs Austin and Campbell properly are deemed to allege class issues, particularly in light of the fact that charges are intended to be prepared by layperson in most instances and are therefore to be liberally construed. *See Canavan v. Beneficial Fin. Corp.,* 553 F.2d 860, 863 (3d Cir.1977).

This conclusion is supported by the decisions of courts in other jurisdictions finding that charges with similar language gave sufficient notice of class-based discrimination. For example, in *Church v. Consolidated Freightways, Inc.,* 137 F.R.D. 294 (N.D.Cal.1991), the court found notice of class-discrimination to be sufficient where one plaintiff's charge alleged that his position was eliminated "as was the other Quality Assurance Auditor position and the Director of Quality Assurance position," that "the other persons whose Quality Assurance positions were eliminated were also over 40" and that other positions for which he applied "were given to younger candidates." *Id.* at 302. Another plaintiff's charge was also found to be sufficient where it alleged that "the company preferred younger managers," that "younger managers were transferred to other positions rather than discharged," that "[a]fter the merger, younger salespeople from CF took over the terminal manager positions," that "the older management people are being terminated (or waiting to see what will happen with ... them)" and that "I have become aware through conversations with John Church that he has filed a charge with EEOC's Charlotte District office making allegations similar to mine." *Id.*

***37** As an additional example, in *Levine v. Bryant,* 700 F.Supp. 949 (N.D.Ill.1988), the court found a charge to sufficiently allege class-based discrimination where it alleged: "[The defendant] has made statements that they want 'new blood' in management. Since the new management started many employees over 50 years old in managerial positions have been discharged throughout the Country. All have been replaced by younger employees in the age group 20's and 30's." *Id.* at 955.[6]

6 *See also Anderson v. Montgomery Ward & Co.,* 852 F.2d 1008 (7th Cir.1988) (noting that 23 charges included some of the following allegations: "I believe Respondent's efforts have been to eliminate older employees and replace them with younger employees; it is my belief that Respondent is attempting to remove its older employees and replace them with young employees; other older employees (over age 50) have been terminated; as far as I know, most of the older employees let go have been replaced by younger employees; I believe that Respondent has attempted to displace its older employees and replace them with younger employees; respondent consistently fails to promote, terminates or forces early retirement upon its employees age 40 and above; my former employer has engage in a discriminatory pattern of forcing employees over forty years old to voluntary [sic] resign their positions; and my circumstances were one in a series of actions in which respondent established a pattern of forcing older employees into early retirement and replacing them with younger individuals hired from outside the Company."); *Thiessen v. General Elec. Capital Corp.,* 996 F.Supp. 1071, 1076 (D.Kan.1998) (charge alleged: "Employment decisions at [the defendant] for persons similarly situated to me show a 'stark pattern' unexplainable on grounds other than age .... The Defendant has a well-established history of 'early-outing' or attempting to 'early-out' older white executives at or near my level. Further, the company has an express but covert policy of discriminating against older white employees. Older white employees who are performing at a level which meets or exceeds objective expectations are identified as "White blockers" or "blockers." They are called "Blockers" because their continued employment "blocks" the promotion of younger ... "high potential" employees. The company's policy is to force the older white employees into early retirement or to eliminate the employee's position through restructuring. [The defendant] has a pattern and practice of removing employees identified as 'Blockers' from their positions.")

III. Conclusion

For the reasons stated above, it is recommended that the Defendant's Motions for Summary Judgment Plaintiffs Rupert, Campbell, and Austin (Docket Nos. 77, 79 and 81) be denied insofar as they raise issues not relating to the Separation Agreement and Releases executed by Plaintiffs Rupert and Campbell, which issues will be addressed in a separate Report and Recommendation.

In accordance with this Court's Order Referring Case to a Special Master dated September 27, 2007 and the stipulation of the parties, either party may file objections to-or a motion to adopt or modify-this report and recommendation no later than fourteen days from the date of the report and recommendation. Responses to objections are due within ten days of the initial filing of said objections or motion.

REPORT AND RECOMMENDATION

I. ***Recommendation***

It is respectfully recommended that: (i) Plaintiffs' Motion for Summary Judgment (Docket No. 85) be denied in part as moot insofar as it relates to Defendant's previously withdrawn Fourth Affirmative Defense but otherwise be granted; (ii) Defendant's Second Affirmative Defense be stricken with prejudice; and (iii) judgment be entered in favor of Plaintiffs on Defendant's Counterclaim with prejudice as to Defendant's right to bring a Counterclaim based on breach of contract but without prejudice to Defendant's right to file an Amended Counterclaim for restitution or on theories other than breach of contract. It is further recommended that Defendant's Motions for Summary Judgment as to Plaintiffs Rupert and Campbell (Docket Nos. 77 and 79) be denied insofar as they raise issues relating to the Separation Agreement and Releases executed by these two Plaintiffs.[1] Defendant's Motions for Summary Judgment insofar as they raise other matters were addressed in prior separate Reports and Recommendations dated February 5, 2009 (Docket Nos. 123 and 124).

1 By Report and Recommendation dated February 5, 2009, it was recommended that Defendant's Motions for Summary Judgment as to Plaintiffs Hunt and Bittner (Docket Nos. 75 and 83) be granted for reasons unrelated to the issues addressed herein. For the reasons stated herein, however, the Separation Agreements and Releases executed by Plaintiffs Hunt and Bittner do not provide an alternative basis upon which to grant summary judgment against them. For unknown reasons, Defendant's Motion for Summary Judgment as to Plaintiff Austin (Docket No. 81) omits any reference to her Separation Agreement and Release and the Second Amended Defense. However, Plaintiffs' Motion for Summary Judgment does raise the issue of Plaintiff Austin's Separation Agreement and Release.

II. ***Report***

Plaintiffs Arthur C. Rupert, Linda K. Austin, Larry L. Campbell, Kenneth J. Hunt and Wade C. Bittner bring this action in which they allege that the termination of their employment by Defendant PPG Industries, Inc. ("Defendant") violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA"). Plaintiffs allege claims of both disparate treatment and disparate impact. Plaintiffs bring these claims both as individuals and as class representatives on behalf of others similarly situated.

Defendant has asserted as its Second Affirmative Defense that each of the five Plaintiffs executed a Separation Agreement and Release (collectively, the "Releases") in which they released all claims under the ADEA. Thus, Defendant asserts that Plaintiffs' ADEA claims are barred by the doctrines of waiver and release. Defendant has also asserted a breach of contract Counterclaim, in which Defendant seeks to recover damages for Plaintiffs' breach of the Releases, including the amounts paid in consideration for the Releases and Defendant's litigation costs, including attorneys' fees, incurred in this action.

***38** Presently pending for disposition is a motion for summary judgment filed by Plaintiffs seeking an Order invalidating the Releases, dismissing Defendant's Counterclaim and striking Defendant's Second and Fourth Affirmative Defenses as a matter of law and with prejudice.[2] It is recommended that Plaintiffs' Motion for Summary Judgment be denied in part as moot insofar as it relates to Defendant's Fourth Affirmative Defense, given that, as reflected in this Court's Memorandum Order dated October 23, 2007 (Docket No. 45), Defendant has voluntarily withdrawn its Fourth Affirmative Defense. For the reasons that follow, it is recommended that Plaintiffs' Motion for Summary Judgment otherwise be granted.

2 Defendant has opposed the Plaintiffs' motion for summary judgment as to all five plaintiffs. Defendant has further cross-moved for summary judgment against Plaintiffs Rupert, Hunt, Bittner and Campbell on multiple grounds including that their claims have been waived and barred by the Releases as asserted in Defendant's Second Affirmative Defense. This Report and Recommendation addresses the issue of the effectiveness of the Releases in the context of Plaintiffs' and Defendant's summary judgment motions.

A. ***The Releases Do Not Comply with the Statutory Requirements of OWBPA and Thus Are Ineffective as Waivers of Plaintiffs' ADEA Claims.***

Under the ADEA, as amended by the Older Workers Benefit Protection Act ("OWBPA"), a waiver of ADEA claims must be "knowing and voluntary." 29 U.S.C. 626(f)(1). To be given effect as a waiver of ADEA claims, a release must at a minimum satisfy eight statutory requirements set forth in 29 U.S.C. § 626(f)(1)(A)-(H). The Supreme Court has held that OWBPA's statutory stricture on waivers is "strict" and "unqualified." *Oubre v. Entergy Operations, Inc.,* 522 U.S. 422, 426-27, 118 S.Ct. 838, 139 L.Ed.2d 849 (1998). The OWBPA places the burden on the Defendant, as "the party asserting the validity of a waiver," to demonstrate that the Releases satisfy each of the eight statutory requirements. 29 U.S.C. § 626(f)(3). Two statutory requirements are in dispute in this case: the understandabihty requirement set forth in § 626(f)(1)(A) and the requirement for certain informational disclosures set forth in § 626(f)(1)(H).

1. ***The Releases Do Not Satisfy The Statutory Understandability Requirement.***

Section 626(f) (1)(A) requires that to be effective as an ADEA waiver, the agreement between the parties must be "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate." 29 U.S.C. § 626(f) (1)(A). Significantly, EEOC regulations interpreting this statutory requirement state that:

> The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations.

29 C.F.R. § 1625.22(b)(4). Defendant does not contest that this regulation is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Plaintiffs argue that various provisions in the Releases are written in a manner calculated to mislead the average eligible participant into believing that by executing the Releases he or she has covenanted or agreed not to sue PPG on any and all claims, including any claim challenging, or any claim in connection with which the participant seeks to challenge, the validity of the Release. As a result, Plaintiffs argue that the Releases are ineffective as waivers under OWBPA.

***39** a. Under OWBPA and Its Implementing Regulations, a Release Cannot Bar Participants from Challenging the Validity of the Release.

Pursuant to notice and comment rule-making, the EEOC promulgated 29 C.F.R. § 1625.23, which provides:

> (b) No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement. This prohibition includes but is not limited to provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit. This rule is not intended to preclude employers from recovering attorneys' fees or costs specifically authorized under federal law.

29 C.F.R. § 1625.23.

Section 1625.23 was promulgated in the wake of *Oubre v. Entergy Operation, Inc.,* 522 U.S. 422, 118 S.Ct. 838, 139 L.Ed.2d 849 (1998), which had held that the contract principles of ratification and tender back are not available defenses when an ADEA waiver is challenged. The Court held that the statutory command of OWBPA is clear: an employee "may not waive" an ADEA claim unless the Release satisfies OWBPA's requirements. *Oubre,* 522 U.S. at 426-27. Thus, "OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law." *Id.* at 427. The Court explained that OWBPA's statutory stricture on waivers is "strict, unqualified," and "incorporates no exceptions or qualifications." *Id.*

The Court further stated:

> The rule proposed by the employer would frustrate the statute's practical operation as well as its

> formal command. In many instances a discharged employee likely will have spent the moneys received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the moneys and relying on ratification. We ought not to open the door to an evasion of the statute by this device.

Id.; see also Jakimas v. Hoffmann-La Roche, Inc., 485 F.3d 770, 782-84 (3d Cir. May 31, 2007) (relying on these same practical concerns that employees may be deterred from bringing meritorious claims and employers may be tempted to risk noncompliance, it was concluded that ERISA claims are not subject to the defenses of tender back and ratification).

Oubre noted that courts in the future "may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee, and [that] these questions may be complex where a release is effective as to some claims but not as to ADEA claims." *Oubre,* 522 U.S. at 428. The Court, however, found it unnecessary to reach these issues in the case before it, explaining that "[i]t suffices to hold that the release cannot bar the ADEA claim because it does not conform to the statute." *Id.*

***40** Justices Breyer and O'Connor concurred and wrote separately to emphasize that a release that violates OWBPA is voidable rather than void. The concurrence explained that:

> treating the contract as voidable could permit an employer to recover his own reciprocal payment (or to avoid his reciprocal promise) where doing so seems most fair, namely, where that recovery would **not** bar the worker from bringing suit. Once the worker (who has made the procedurally invalid promise not to sue) brings an age-discrimination suit, he has clearly rejected (avoided) his promise not to sue. As long as there is no "tender back" precondition, his (invalid) promise will not have barred his suit in conflict with the statute. Once he has sued, however, nothing in the statute prevents his employer from asking for restitution of his reciprocal payment or relief from any ongoing reciprocal obligation. *See Restatement of Restitution* § 47, Comment b (1936) ("A person who transfers something to another believing that the other thereby comes under a duty to perform the terms of a contract ... is ordinarily entitled to restitution for what he has given if the obligation intended does not arise and if the other does not perform"); Dobbs, *supra,* at 994 (restitution is often allowed where benefits are conferred under voidable contract). A number of older state cases indicate, for example, that the amount of consideration paid for an invalid release can be deducted from a successful plaintiff's damages award. *See, e.g., St. Louis-San Francisco R. Co. v. Cox,* 171 Ark. 103, 113-115, 283 S.W. 31, 35 (1926) (amount paid for invalid release may be taken into consideration in setting remedy); *Koshka v. Missouri Pac. R. Co.,* 114 Kan. 126, 129-130, 217 P. 293, 295 (1923) (the sum paid for an invalid release may be treated as an item of credit against damages); *Miller v. Spokane Int'l R. Co.,* 82 Wash. 170, 177-178, 143 P. 981, 984 (1914) (same); *Gilmore v. Western Elec. Co.,* 42 N.D. 206, 211-212, 172 N.W. 111, 113 (1919).

Id. at 432-33 (Breyer, J., concurring) (emphasis in original).

Defendant argues correctly that section 1625.23(b) goes beyond the scope of *Oubre* by prohibiting not only tender back requirements but also covenants not to sue and other limitations adversely affecting an individual's right to challenge the validity of the release. Defendant further argues in a somewhat cursory fashion that the broader prohibition in section 1625.23(b) contradicts the position taken by the *Oubre* concurrence and constitutes an inappropriate exercise of rule-making authority and "may not be entitled to deference because it overreaches substantive legal principles." (Defendant's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, at 3 & n.2.)

However, to the extent that section 1625.23(b) prohibits a release from including limitations that **bar** employees from challenging the validity of the release, and which therefore could have the effect of giving life to a waiver that does not comply with the OWBPA, it is consistent with both the majority opinion and the concurrence in *Oubre.* Given that *Oubre* is binding on this Court,[3] it compels the conclusion that section 1625.23(b) is a valid exercise of agency rule-making entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), at least insofar as it prohibits release provisions that **bar** a plaintiff from bringing a suit to challenge the validity of the release.

3 Defendant states that "[w]here Congress has listed in the OWBPA the requirement for a valid ADEA release, and EEOC has in 29 C .F.R. § 1625.22 provided specific guidance on the same subject, no basis exists for a court to add to the existing requirements," and cites to cases limiting the scope of judicial rule-making. (Defendant's Brief in Opposition to Plaintiffs' Motion for Summary Judgment, at 3, n.2 (citing *Northwest Airlines, Inc. v. Transportation Workers Union,* 451 U.S. 77, 97, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981), and *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978).) Whatever the limitations on judicial rule-making, it suffices for present purposes to acknowledge that this Court is bound by the decision of the United States Supreme Court in *Oubre.*

b. The Releases Are Written in a Manner Which Reasonably Could Be Understood by the Average Eligible Participant as Barring a Suit Challenging the Effectiveness of the Release.

***41** Paragraph 6(a) of the Releases contains a broad claims release, as follows:

> ... Employee ... **unconditionally releases** [Defendant] from **any and all claims and demands of any kind,** known or unknown, which he/she may have against [Defendant] as of the date Employee signs this Agreement, and any claims relating to his/her employment as of his/her Separation Date. This release includes a waiver (a giving up) of **any legal rights or claims** Employee may have or may have had **based upon any federal, state** or local statutes or ordinances, **specifically including but not limited to ... the [ADEA],** all as amended, and any other claim or cause of action under federal, state or local statutory or common law .... All such claims (including claims for related attorneys' fees and any litigation and court costs) are forever barred by this Agreement.

Significantly, in addition to the broad claims release provision in paragraph 6(a), the Releases also contain in their next subparagraph a separate covenant not to sue. Paragraph 6(b) of the Releases states that "Employee agrees never to file a lawsuit or become a member of a class asserting any claims that are released by Employee in this Agreement."

Covenants not to sue, like a waiver or a claims release, provide an affirmative defense that operates as a bar to consideration of the merits of any claim within their scope. As a general matter, a party or parties may prefer to use a claims release, a waiver or a covenant not to sue to achieve the same basic bar to the consideration of the merits of a claim, and a covenant not to sue may be selected in a given set of circumstances for a number of reasons, including to support an affirmative contract breach claim for damages if suit later is brought on a claim within its scope. Neither the OWBPA nor its implementing regulations prohibit the use of covenants not to sue.[4] However, as explained by the EEOC:

4 Section 1625.23(b) arguably purports to prohibit an agreement providing for the recovery of attorneys fees or damages for breach of a covenant not to sue, which seemingly would render a covenant not to sue as the functional equivalent of a claims release. The grounds relied upon in this Report and Recommendation for the disposition of the parties' summary judgment motions in question, however, make it unnecessary to reach the issue whether this regulatory limitation on the availability of damages for breach of a covenant not to sue is entitled to deference.

> [a]lthough ADEA covenants not to sue (absent damages) operate as the functional equivalent of waivers, they carry a higher risk of violating the OWBPA by virtue of their wording. An employee could read "covenant not to sue" or "promise not to sue" as giving up not only the right to challenge a past employment consequence as an ADEA violation, but also the right to challenge in court the knowing and voluntary nature of his or her waiver agreement. **The chance of misunderstanding is heightened if the covenant not to sue is added to an agreement that already includes an ADEA waiver clause.** The covenant in such a case would have no legal effect separate from the waiver clause. Nonetheless, its

language would appear to bar an individual's access to court.

> **Employers therefore must take precautions in drafting covenants not to sue so that employees understand that the covenants do not affect their right to test the knowing and voluntary nature of the agreements in court under the OWBPA.**

65 Fed.Reg. 77438, 77443.[5]

5 The above quoted language was published in the Federal Register along with the final rule set forth in section 1625.23. Defendant argues that the EEOC's review of and response to comments submitted during the rule-making process are not the product of notice and comment rule-making, and thus this commentary is only entitled to a "measure of respect" under *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1994). Under *Skidmore,* agency interpretations,

> while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, 323 U.S. at 140.

Skidmore, however, applies only to an agency's statutory interpretations. In contrast, when an agency interprets its own regulations, a significantly more deferential standard applies; the agency's interpretation is "controlling unless 'plainly erroneous or inconsistent with the regulation.' " *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). Indeed, the United States Supreme Court recently applied *Auer* deference to EEOC statements submitted in briefing regarding the correct interpretation of another of its regulations. *See Federal Express Corp. v. Holowecki,* ---U.S. ----, ----, 128 S.Ct. 1147, 1155, 170 L.Ed.2d 10 (Feb. 27, 2008).

Given that the quoted commentary explains the agency's own regulation, the more deferential *Auer* standard applies. Defendant cites no authority for its proposition that deference is not appropriate merely because the EEOC comments appear in the portion of the final rule-making in which the EEOC discusses and responds to comments received in the rule-making process. As with the amicus briefing at issue in *Auer* and *Holowecki,* "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. Indeed, commentary accompanying final rule-making would seem to be less suspicious than post-litigation interpretations in briefing, which are more likely to constitute " 'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Id.*

In sum, the EEOC's reasoning regarding the special risk of misunderstanding that arises from the presence of a claims release or waiver in conjunction with a covenant not to sue is entitled to deference under *Auer.* However, even applying the less deferential *Skidmore* standard, the EEOC's reasoning and guidance in this regard is persuasive.

***42** Plaintiffs refer to their challenge that the Releases do not comply with the OWBPA as a "claim" that supposedly is precluded or reasonably would be understood as being precluded by the broad claims release language in paragraph 6(a). Plaintiffs' characterization, however, is neither helpful nor accurate. Their challenge is not a "claim". Instead, it is a response to the Second Affirmative Defense of "the doctrines of waiver and/or release" raised by Defendants.[6] The language of the claims release in paragraph 6(a) does not prohibit or limit such challenge and, considered alone or in isolation, could not reasonably have been understood to do so by the average eligible participant. The paragraph 6(a) claims release, however, did not exist alone but instead was part of paragraph 6 of the Releases which contained the next two subparagraphs, 6(b) and 6(c).

6 The conclusion that a challenge to the effectiveness of a release is a response to an affirmative defense and not a claim is reinforced by the course of proceedings in the instant case. Plaintiffs' First Amended Complaint alleged age discrimination claims and violations of OWBPA and included in the prayer for relief a request for a judgment declaring that the Releases are invalid and unenforceable under the OWBPA. It did so, however, in the context of the assertion of Plaintiffs' ADEA claims. When Plaintiffs subsequently sought leave to file a Second Amended Complaint that included a stand-alone "claim" and a new Count that the Releases were invalid as violating the OWBPA, the proposed Second Amended Complaint was in all essential respects as related to the Releases identical to the First Amended Complaint; the attempted conversion of the challenge into a supposed stand alone "claim" changed nothing of substance and added no additional material allegations. The Court denied the requested leave on other grounds as untimely (Docket No. 52).

Paragraph 6(b) contains a covenant not to sue. The risk of misunderstanding by the average eligible participant that the Release language operates to bar a challenge under the OWBPA to the legal effectiveness of the Release is heightened in the instant case, where the scope of the covenant not to sue in paragraph 6(b) extends to "any claims that are released by Employee in this Agreement", which necessarily requires reference to the broad claims release language in paragraph 6(a) that applies to "any and all claims and demands of any kind," including but not limited to "any legal rights or claims Employee may have or may have had based upon ... the [ADEA] ... as amended." The only practical avenue available to Plaintiffs to challenge their signed Releases as ineffective under OWBPA was-as was done in this case-to file against Defendant their lawsuit asserting age discrimination claims and in that context to assert their OWBPA compliance challenge in response or anticipatory response to Defendant's raising of the Releases as an affirmative defense to their age discrimination claims.[7] Thus, the challenging of the effectiveness under the OWBPA of the Releases and the bringing of an ADEA claim lawsuit are, or reasonably could have been understood under the circumstances by the average eligible participant as being, intertwined and interconnected as a practical matter and included within the scope of the paragraph 6(a) broad affirmative claims release, of the paragraph 6(b) covenant not to sue, and/or of both in their combination. Accordingly, reading in conjunction the paragraph 6(a) claims release and the paragraph 6(b) covenant not to sue, the average eligible participant reasonably could have understood that the Release barred a challenge to the effectiveness or enforceability under the OWBPA of his or her Release.

7 In light of the limitations periods applicable to ADEA claims, it would not have been feasible as a practical matter for Plaintiffs to have deferred filing their ADEA claims while pursuing separate declaratory judgment actions seeking a declaration that their Releases were ineffective. Moreover, requiring such a cumbersome and impractical procedure would be contrary to fundamental goals of the OWBPA protecting the rights of employees.

Such an understanding by the average eligible participant reasonably would be reinforced by the next following subparagraph, *i.e.,* paragraph 6(c), which expressly excepts from the scope of the Releases "any rights to enforce this Agreement," but is silent as to rights to challenge the enforceability of the Agreement. If this exception for rights to enforce the Release is to be given effect, there is at least a reasonable reading or understanding by the average eligible participant that, absent such exception, rights relating to enforceability of the Release would be within the scope of the claims release and/or covenant not to sue. By expressly excepting from the scope of the claims release only a subset of rights relating to the Releases, *e.g.,* rights to enforce the Release, the average eligible participant reasonably could understand that other rights relating to the Releases, i.e., rights to challenge effectiveness of the Releases, are within the scope of the claims release and/or the covenant not to sue and thereby are barred.

***43** Defendant, however, points to paragraph 6(c), which provides that "the releases and waivers in this paragraph do not include any ... claims based on acts or events occurring after the effective dates of this Agreement." Defendant argues that a challenge to the Releases would not be ripe until the Releases were effective, and that this language thus expressly preserves a claim in which an employee challenges the Releases. However, even assuming that a challenge to the Releases as violating OWBPA constituted a "claim" for these purposes, such a challenge would be (or reasonably could be understood by the average participant as being) "based on acts or events occurring" either prior to or contemporaneous with the effective date of the Agreement, and not "after" that date as required by the language of the exclusion. Moreover, this exception itself contains an exception for "claims associated with Employee's employment or the termination of his/her employment up to, and including, his/her Separation Date," which reasonably could reinforce the understanding of the average eligible participant that the Release bars an OWBPA challenge. *See* 29 C.F.R. § 1625.22(b) (3) (OWBPA's understandability requirement "usually will require the limitation or elimination of technical jargon and of long, complex sentences.").

Defendant also points to the language in paragraph 6(c) stating that "the releases and waivers in this paragraph do not include any ... claims that cannot be released or waived as a matter of law." Again, even assuming that an OWBPA enforceability challenge constituted a "claim" for these purposes, there simply is no basis to conclude that the average eligible participant reasonably would understand said language to permit an OWBPA challenge which reasonably could be understood by the participant as otherwise being barred by the Release.

The present issue is not whether the Releases by their language or under contract or other common law principles in fact barred Plaintiffs from challenging their compliance with the requirements of the OWBPA. Instead, the issue is whether the Releases are written in a manner calculated to be understood by the average eligible participant as barring such a challenge. Measured against this statutory standard, the Releases fail.[8]

8 In light of the conclusion that the Releases reasonably could be understood by the average eligible participant as an actual bar to suit, it is unnecessary to decide Plaintiffs' alternative argument that the attorney's fees provisions in the Releases also violate (or are calculated to be understood in a manner that would violate) section 1625.23(b) or the related issue of whether section 1625.23(b) is entitled to deference to the extent it goes beyond the scope of *Oubre* to prohibit limitations that adversely affect a person's right to challenge the validity of a release but that do not rise to the level of a bar.

Additionally, because OWBPA's understandability requirement is couched in objective terms (the agreement between the parties must be "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate," 29 U.S.C. § 626(f)(1)(A)), it is unnecessary to consider extrinsic evidence as to how the Releases allegedly were in fact understood. It is noted, however, that Plaintiffs have adduced evidence that four of the Plaintiffs, (*see* Austin Affidavit, at 5-6; Rupert Affidavit, at 3-5; Hunt Affidavit, at 3-5; Bittner Affidavit, at 2-4), and at least some of Defendant's representatives deposed in this case understood that the covenants not to sue barred any challenge to the validity of the Releases. For example, Rett Wyman, the Human Resources Manager for the Industrial Coatings Business Unit testified that it was his understanding based upon the language of the Releases that if an employee were to file a lawsuit against Defendant challenging the validity of the Releases, this would constitute a breach of the agreement and that the employee would therefore be responsible for Defendant's litigation expenses under paragraph 15 of the Release. (Wyman Transcript, 141-142.)

Lastly, evidence submitted by Plaintiffs that Defendant adopted a new form of Release with different language has not been considered because such evidence carries little or no weight for purposes of resolving the issues presented. Thus, it is not necessary to determine whether Federal Rule of Evidence 407 would preclude its consideration.

c. The ADEA Waivers in the Releases Are Ineffective Under OWBPA.

As the Supreme Court has emphatically indicated:

> The policy of the OWBPA is ... clear from its title: It is designed to protect the rights and benefits of older workers. The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word. Congress imposed specific duties on employers who seek releases of certain claims created by statute. Congress delineated these duties with precision and without qualification: An employee "may not waive" an ADEA claim unless the employer complies with the statute....
>
> ***44** ...
>
> The OWBPA governs the effect under federal law of waivers or releases on ADEA claims and incorporates no exceptions or qualifications.

Oubre, 522 U.S. at 838; *accord Ruehl v. Viacom, Inc.,* 500 F.3d 375, 381-82 (3d Cir.2007).

Because the Releases were written in a manner calculated to cause the average eligible participant reasonably to understand that the Releases barred any challenge to their validity under the OWBPA, and because it would be unlawful under OWBPA for the Releases in fact to do so, the Releases were written in a manner calculated to have "the effect of misleading, misinforming, or failing to inform participants and affected individuals." 29 C.F.R. § 1625.22(b)(4). The Releases thus do not satisfy OWBPA's understandability requirement as interpreted by the EEOC in section 1625.22(b)(4) and are ineffective as a waiver of ADEA claims.

Defendant does not contest that section 1625.22(b)(4) is entitled to *Chevron* deference. Defendant does assert that the United States Court of Appeals for the Third Circuit has construed the understandability requirement in a practical non-technical manner, citing *Wastak v. Lehigh Valley Health Network,* 342 F.3d 281 (3d Cir.2003) (*"Wastak II"*) for the proposition that misstatement of the plaintiff's rights does not render an agreement inherently incomprehensible and thus does not violate the statutory understandability requirement. *Wastak II* addressed an employee's challenge to a release that purported to release the plaintiff's right to file a charge with the EEOC in violation of OWBPA, 29 U.S.C. § 626(f)(4).

The court of appeals held that the offensive charge-filing ban "could be severed without disturbing the enforceability of the agreement." *Wastak II,* 342 F.3d at 292. The court of appeals rejected the EEOC's argument that by including the unenforceable charge-filing prohibition, the waiver misstated the plaintiff's legal rights and thus violated one of the enumerated prerequisites for a valid waiver, namely the understandability requirement in § 626(f)(1)(A). *See Id.*

Significantly, however, the release in *Wastak II* was executed prior to the effective date of 29 C.F.R. § 1625.22, which not only provided that "no waiver agreement may include any provision prohibiting any individual from ... filing a charge ... with [the] EEOC," but also provided that waiver agreements "must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals." 29 C.F.R. § 1625.22(b) (4), (i)(2). The court of appeals expressly noted that:

> [t]he presence of such a prohibition [against charge-filing] in a waiver agreement that is subject to this regulation could certainly lead a court to find, under proper circumstances, that the waiver 'had the effect of misleading, misinforming, or failing to inform' the plaintiff, 29 C.F.R. § 1625.22(b)(4), thus rendering the waiver not 'knowing and voluntary,' and therefore, invalid.

***45** *Wastak II,* 342 F.3d at 293 n. 6.

Subsequently, at least one court has held "the law is clear" that inclusion of a waiver of the employees' rights to file charges with the EEOC renders a release invalid. *See Peterson v. Seagate U.S. LLC,* Civ. No. 07-2502, 2007 WL 4179399, at * 3 (D.Minn. Nov.20, 2007) (unpublished opinion).

In the instant case, the Releases were executed after the effective dates of both section 1625.22(b)(4), which requires that waivers not mislead, misinform or fail to inform, and of section 1625.23(b), which provides that "[n]o ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement." Given the deference due to these intervening regulations, *Wastak II* does not control here, a possibility that *Wastak II* itself recognized. Moreover, unlike in *Wastak II,* there is nothing in the structure or regulatory history of these regulations that suggests that release provisions that violate section 1625.23(b) were not intended to invalidate the release.

Defendant argues that neither OWBPA nor its implementing regulations require employers to affirmatively inform the employee that the right to challenge the validity of a release is preserved. While this is true, the EEOC has cautioned that due to the special risk of misunderstanding posed by covenants not to sue, employers who choose to include them in their releases "must take precautions in drafting covenants not to sue so that employees understand that the covenants do not affect their right to test the knowing and voluntary nature of the agreements in court under the OWBPA." 65 Fed.Reg. 77438, 77443.

Defendant similarly argues that the inclusion of the covenant not to sue does not make the Releases incomprehensible or incapable of being understood. Again, while this may be true, it ignores that section 1625.22(b)(4) mandates that the "agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals" of their rights. 29 C.F.R. § 1625.22(b)(4).

Defendant also argues that even if the Releases contain misleading provisions, they are non-material terms and thus the appropriate remedy is to excise such provisions from the Releases and enforce the remainder of the Releases. General contract principles regarding striking of non-material terms, however, are of little significance in the context of OWBPA. As explained by the United States Supreme Court in rejecting the applicability of the contract principles of tender back and ratification:

> The OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law. The statute creates a series of prerequisites for knowing and voluntary waivers and imposes affirmative duties of disclosure and waiting periods. The OWBPA governs the effect under federal law of waivers or releases on ADEA claims and incorporates

> no exceptions or qualifications. The text of the OWBPA forecloses the employer's defense, notwithstanding how general contract principles would apply to non-ADEA claims.

***46** *Oubre,* 522 U.S. at 841-42.

The best argument in support of severability may be one based on the regulatory scheme construing OWBPA. Indeed, although Defendant does not highlight it, there is some support for such an argument in the regulations. Section 1625.22(b)(4) states in full that "the waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations." 29 C.F.R. § 1625(b)(4).

Here, Plaintiffs essentially argue that the language of the Releases as reasonably understood by the average eligible participant overstated, rather than minimized, the limitations on the participants' ability to challenge the Releases under OWBPA. Thus, Plaintiffs cannot and do not argue that they were misled into executing the Releases on the basis of, or that they would not have done so had they been correctly informed as to, the limitations on their ability to challenge the effectiveness of the Releases under OWBPA. Moreover, despite the provisions in the Releases which reasonably could have been understood to bar a challenge under OWBPA to their validity, Plaintiffs in fact have brought this action. Thus, the challenged Release language in fact seemingly has caused Plaintiffs no harm that they would not have suffered in the absence of the challenged Release language.

The issues then are: (1) whether the second sentence of section 1625.22(b)(4) limits the scope of the broader first sentence; and (2) if it does not, whether it conflicts with the purpose of OWBPA in such a way as to make deference under *Chevron* inappropriate.

Neither party has cited any cases on this issue. Plaintiffs cite to cases from other circuits in which courts invalidated releases that included a covenant not to sue that expressly excepted claims under the ADEA but that also included ADEA claims in the scope of the released claims. *Syverson v. IBM,* 472 F.3d 1072 (9th Cir.2007); *Thomforde v. IBM,* 406 F.3d 500 (8th Cir.2005). The courts of appeals held that this led to a confusing conflict between the covenant not to sue and the release provisions that could lead an employee to believe that the exception in the covenant not to sue negated the release of ADEA claims. *Syverson v. IBM,* 472 F.3d 1072 (9th Cir.2007); *see also Thomforde v. IBM,* 406 F.3d 500 (8th Cir.2005). Thus, the misleading statements in these cases had the effecting of minimizing, rather than maximizing or overstating, the limitations imposed by the releases. Thus, these cases are of limited use in resolving the issue presented here.

It is concluded that the second sentence of section 1625.22(b) (4) does not operate to limit the first. The regulatory language is most naturally read as stating two separate prohibitions: (1) a waiver must not mislead or fail to inform; and (2) a waiver must not exaggerate its benefits or minimize its limitations. Nothing about the language and structure of the regulation in question suggests that the second sentence is intended to limit the scope of the first. At most, the regulation is ambiguous as to whether the understandability requirement is satisfied where a release is calculated to mislead a plaintiff by maximizing the limitations of the release. Therefore, it is appropriate to consider the EEOC's own interpretation of its regulation.[9]

9 Defendant correctly asserts that no deference is afforded to agency interpretations of regulations that are unambiguous. However, it is concluded that 1625.22(b)(4) and section 1625.23(b) when read together do not unambiguously provide, as argued by Defendant, that a release containing an unlawful prohibition on challenges to the release's validity does not violate OWBPA's understandability requirement by misleading the employee as to his or her rights.

***47** The commentary published in the Federal Register along with the final version of section 1625.23 addresses the issue of whether inclusion of an unlawful limitation on the right to challenge the validity of the agreement renders the agreement unenforceable. The EEOC reported that in response to the EEOC's Notice of Proposed Rule-making, one commenter had maintained that the language of the proposed rule left open the question of whether inclusion of unlawful tender back provisions might invalidate the release. *See* 65 Fed.Reg. 77438, 77441. The commenter had maintained that inclusion of such provisions should not invalidate an otherwise knowing and voluntary waiver. *Id.*

The EEOC responded thus:

> The final regulation does not address the question of severability because the NPRM did not present the issue, and the record on it is very limited. The Commission believes, however, that contrary to the position advanced by the employer, there is a strong argument that inclusion of an invalid provision in an ADEA waiver agreement-such as a tender back clause or a damages provision-should invalidate the entire waiver. Under this point of view, inclusion of such provisions in a waiver would make the agreement misleading in a material sense and thus violate the OWBPA's requirement that waivers be calculated to be understandable by the individual or by the average individual eligible to participate.

Id.

Later, and in more definite language, responding to a similar comment but in the context of the inclusion of an unlawful covenant not to sue, the EEOC again addressed the issue of the effect of the unlawful provision on the waiver. It stated:

> Employers therefore must take precautions in drafting covenants not to sue so that employees understand that the covenants do not affect their right to test the knowing and voluntary nature of the agreements in court under the OWBPA. By investing "court[s] of competent jurisdiction" with the authority to resolve "any dispute that may arise over * * * the validity of a waiver," Congress manifested in the plain language of the statute its intention to permit an employee who signed an ADEA waiver, to sue his or her employer upon the belief that the waiver did not comply with the OWBPA. Thus, **any provision in a waiver agreement that would cause an employee to believe that he or she could not seek a judicial determination of the validity of the waiver misrepresents the rights and obligations of the parties to the agreement. Such a misrepresentation conflicts with the OWBPA requirement that a valid waiver agreement must be "written in a manner calculated to be understood" by the employee "or by the average individual eligible to participate." 29 U.S.C. 626(f)(1)(A).**

65 Fed.Reg. 77438, 77443-77444 (emphasis added).

Defendant asserts that *Skidmore* supplies the standard of deference for these statements. However, given that this commentary interprets the interaction of two of the EEOC's own regulations, namely sections 1625.22 and 1625.23, it is properly analyzed under the framework in *Auer* and is thus "controlling unless 'plainly erroneous or inconsistent with the regulation.' "[10] *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79; *see also supra* note 5. It could be argued that the EEOC's statements that "there is a strong argument" that inclusion of an unlawful tender back provision "should" invalidate the waiver and that "under this point of view" the provision violates the understandability requirement, 65 Fed.Reg. 77438, 77441, fall short of a "fair and considered judgment on the matter in question" and thus is not entitled to deference under *Auer*. *See Auer,* 519 U.S. 452, 462, 117 S.Ct. 905, 137 L.Ed.2d 79 (in affording deference, stating that "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."). This argument is strengthened by the EEOC's explaining that the matter was not addressed in the proposed rule "because the NPRM did not present the issue, and the record on it is very limited." 65 Fed.Reg. 77438, 77441.

10 Defendant also suggested at oral argument that this commentary is not entitled to deference to the extent that it interprets 1625.22(b)(4), given that it was published in connection with section 1625.23. Defendant cites no authority for this proposition. Moreover, there does not appear to be any persuasive basis for concluding that where an agency in promulgating a new regulation opines as to its interaction with existing regulations, its interpretation is less deserving of deference.

***48** Despite this qualifying language, however, the EEOC believed its conclusion to be sufficiently fair and considered to publish it in the Federal Register as part of its final rule-making. Moreover, there is nothing equivocal about the EEOC's statement that:

> any provision in a waiver agreement that would cause

> an employee to believe that he or she could not seek a judicial determination of the validity of the waiver misrepresents the rights and obligations of the parties to the agreement [and] ... conflicts with the OWBPA requirement that a valid waiver agreement must be "written in a manner calculated to be understood" by the employee "or by the average individual eligible to participate."

Furthermore, the EEOC has allowed these statements to stand for eight years since their publication without further qualification or guidance. This commentary accompanying final rule-making would appear to be at least as fair and considered a judgment as post-litigation interpretations in briefing, which are afforded deference notwithstanding the fact that they are considerably more likely to constitute " 'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Auer,* 519 U.S. at 462; *see also supra* note 5.

Moreover, it is not unreasonable or inconsistent with the broad remedial purposes of the ADEA to invalidate a waiver where the misleading language did not harm the individual plaintiff in order to deter employers generally from including such provisions limiting the right to challenge the validity of a release in their release agreements. Although in such a case the "understandability" of the release seemingly does not impact the whether the release was "voluntary" as required by OWBPA, it does bear on whether it was "knowing." Moreover, legislative history indicates that all of OWBPA's threshold requirements, which would include the understandability requirement, are necessarily independent of the 'knowing and voluntary considerations." S. Rep. 101-263, 1990 U.S.S.C.A.N. 1509, 1538.

A rule invalidating a release containing a covenant not to sue which reasonably could be misunderstood by the average eligible participant does not impose any requirements in addition to the eight statutory requirements set forth in OWBPA. An employer is not required to include in its release a covenant not to sue, or a covenant not to sue in addition to a waiver or claims release, or some other limitation that reasonably could be understood by the average eligible participant to bar a challenge to the validity of the release. If an employer does not do so, it is not required affirmatively to inform the employee of his or her right to challenge the validity of the release under the OWBPA. Moreover, OWBPA provides that a waiver cannot be considered knowing and voluntary unless "at a minimum" the eight statutory requirements are satisfied. The statutory language "at a minimum" does not preclude and would not necessarily be inconsistent with additional requirements. Furthermore, refusing to give effect to releases containing provisions that violate section 1625.23 even when the particular plaintiff was not harmed by their inclusion could be deemed an effective mechanism for enforcing section 1625.23, both as to those employees who in fact **are** harmed by the misleading inclusion of such a prohibition and as a result do not challenge the validity of the agreement or bring themselves before the court[11] and/or also as to those employers who might well be tempted to risk noncompliance.[12]

11 Some of those who are misled into believing that they are precluded from seeking judicial review of the validity of their release or waiver might take advantage of their right to file a charge with the EEOC, to the extent such a right is expressly preserved by the release or waiver, giving the EEOC the opportunity to pass on the validity of the release or waiver. The legislative history of OWBPA indicates, however, that one of the reasons the bill was amended to omit the requirement that ADEA waivers be supervised by the EEOC in the first instance was the EEOC's concern that it "lacked the resources or capability to supervise waivers." S.Rep. No. 101-263, 1990 U.S.C.C.A.N. 1509, 1537. As a result, as *Oubre* makes clear, OWBPA requires that employees be afforded the opportunity to seek judicial review of unsupervised waivers, which cannot be equated with EEOC review.

12 *Cf. Oubre,* 522 U.S. at 427 ("The [tender back] rule proposed by the employer would frustrate the statute's practical operation as well as its formal command. In many instances a discharged employee likely will have spent the moneys received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the moneys and relying on ratification. We ought not to open the door to an evasion of the statute by this device.").

***49** In sum, it is concluded that a release written in a manner that reasonably could be understood by the average eligible participant to bar a challenge to its validity fails to satisfy the understandability requirement of OWBPA and is therefore ineffective as a waiver of ADEA claims. This conclusion is compelled by OWBPA, which not only places the burden of proof squarely on

Defendant but also displaces contract principles, by the Supreme Court's guidance to the effect that the requirements of the OWBPA are to be strictly construed without qualification or exception, and, ultimately, by the deference due to the EEOC's interpretation of OWBPA and of its own regulations.[13]

13 Nevertheless, it is troubling that a different result would or might be required by application of contract or general common law principles. This is particularly true in the present circumstances where Plaintiffs did in fact pursue their ADEA claims and commence this action despite the challenged language of the Release and also despite their receipt of substantial cash payments in connection with their entering into of the Releases. To the extent that any inequities might be deemed to have resulted from application of the statutory scheme and requirements in these circumstances, the potential for amelioration on grounds other than breach of contract at least with respect to the consideration paid by Defendant in return for the Releases may exist under *Oubre,* but that it is not a matter addressed on the merits by this Report and Recommendation. *See* discussion, *supra,* at n. 4 and n. 8, and *infra,* at Part B.

Accordingly, it is recommended that this Court grant summary judgment in favor of Plaintiffs invalidating the Releases and striking Defendant's Second Affirmative Defense that Plaintiffs have waived and released their claims under the ADEA.

2. *There Are Issues of Fact as to Whether the Informational Disclosures Received by Plaintiffs Rupert, Hunt, Bittner and Austin Comply with the Requirements of § 626(f)(1)(H).*

Plaintiffs assert that deficiencies in the informational disclosures received by Plaintiffs Rupert, Hunt, Bittner and Austin provide an additional, alternative basis upon which to grant a summary judgment invalidating the Releases executed by these four Plaintiffs. Under OWBPA, 29 U.S.C. § 626(f)(1)(H), "if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees," the employer must inform the employee "in a manner calculated to be understood by the average individual eligible to participate" as to:

> (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
>
> (ii) the job titles and ages of all individuals eligible or selected for the program, and 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).

"The purpose of the informational requirements is to provide an employee with enough information regarding the program to allow the employee to make an informed choice whether or not to sign a waiver agreement." 29 C.F.R. § 1625.22(f)(1)(iv). Indeed, the legislative history of OWBPA indicates that Congress was concerned regarding the difficulty of assessing whether a program "gives rise to a valid claim under the ADEA" where employees have no information about "the scope of the program or its eligibility criteria." S.Rep. No. 101-263, 1990 U.S.S.C.A.N. 1509, 1539. This Congressional concern was particularly focused on group termination programs because:

> Employees affected by these programs have little or no basis to suspect that action is being taken based on their individual characteristics. Indeed, the employer generally advises them that the termination is not a function of their individual status. Under these circumstances, the need for adequate information and access to advice before waivers are signed is especially acute.

***50** *Id.* at 1538.

a. There Are Disputes of Material Fact as to the Scope of the Decisional Unit and Thus of the Required Disclosures.

Section 1625.22 explains that the terms "class," "unit," "group," job classification," and "organizational unit" refer to examples of categories or groupings of employees affected by a program within an employer's particular organizational structure, and that the scope of such terms is "determined by examining the 'decisional unit' at issue." 29 C.F.R. § 1625.22(f)(1)(iii)(C), (3)(i)(A). The regulation elaborates as follows:

> When identifying the scope of the "class, unit, or group," and "job classification or organizational unit," an employer should consider its organizational structure and decision-making process. A "decisional unit is **that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver** and those who would not be offered consideration for the signing of a waiver. **The term "decisional unit" has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program.**

Id. § 1625.22(f)(3)(i)(B) (emphasis added).

Section 1625.22 goes on to explain that:

> in appropriate cases some subgroup of a facility's work force may be the decisional unit. In other situations, it may be appropriate for the decisional unit to comprise several facilities. However, as the decisional unit is typically no broader than the facility, in general the disclosure need be no broader than the facility. "Facility" as it is used throughout this section generally refers to place or location. However, in some circumstances terms such as "school," "plant," or "complex,' may be more appropriate.

Id. § 1625.22(f)(3)(ii)(B).

> (C) Often, when utilizing a program an employer is attempting to reduce its workforce at a particular facility in an effort to eliminate what it deems to be excessive overhead, expenses, or costs from its organization at that facility. If the employer's goal is the reduction of its workforce at a particular facility and that employer undertakes a decision-making process by which certain employees of the facility are selected for a program, and others are not selected for a program, then that facility generally will be the decisional unit for purposes of section 7(f)(1)(H) of the ADEA.
>
> (D) However, if an employer seeks to terminate employees by exclusively considering a particular portion or subgroup of its operations at a specific facility, then that subgroup or portion of the workforce at that facility will be considered the decisional unit.
>
> (E) Likewise, if the employer analyzes its operations at several facilities, specifically considers and compares ages, seniority rosters, or similar factors at differing facilities, and determines to focus its workforce reduction at a particular facility, then by the nature of that employer's decision-making process the decisional unit would include all considered facilities and not just the facility selected for the reductions.

***51** *Id.* § 1625.22(f)(3)(ii) (emphasis added). Section 1625.22 gives several examples of cases where the decisional unit is other than the facility:

> (A) A number of small facilities with interrelated functions and employees in a specific geographic area may comprise a single decisional unit;
>
> (B) If a company utilizes personnel for a common function at more than one facility, the decisional unit for that function (i.e., accounting) may be broader than the one facility;
>
> (C) A large facility with several distinct functions may comprise a number of decisional units; for example, if a single facility has distinct internal functions with no employee overlap (i .e., manufacturing, accounting, human resources), and the program is confined to a distinct function, a smaller decisional unit may be appropriate.

Id. § 1625.22(f)(3)(v).

The EEOC explains that "higher-level review of termination decisions generally will not change the scope of the decisional unit unless the reviewing process alters its scope." *Id.* at 1625.22(f)(3)(vi)(A). However, it goes on to state that:

> if the regional manager in the course of review determines that persons in other facilities should also be considered for termination, the decisional unit becomes the population of all facilities considered. Further, if, for example, the regional manager and his three immediate subordinates jointly review the termination

> decisions, taking into account more than one facility, the decisional unit becomes the populations of all facilities considered.

Id. at 1625.22(f)(3)(vi)(B).

Finally, section 1625.22(f)(4)(v) provides:

> If the terminees are selected from a subset of a decisional unit, the employer must still disclose information for the entire population of the decisional unit. For example, if the employer decides that a 10% RIF in the Accounting Department will come from the accountants whose performance is in the bottom one-third of the Division, the employer still must disclose information for all employees in the Accounting Department, even those who are the highest rated.

Id. at 1625.22(f)(4)(v).

The regulations then provide examples of typical structures for RIFs, including "facility-wide," "division-wide," "department-wide," "reporting," and "job-category." 29 C.F.R. § 1625.22(f)(3)(iii).

Prior to promulgation of section 1625.22, the United States Court of Appeals for the Sixth Circuit pointed out the ambiguity of the statutory term "organizational unit," and noted that it will always be in the employee's interest to quibble with whatever definition the employer used. *See Raczak,* 103 F.3d at 1263. The court also recognized, however, that:

> it is certainly possible that an employer will want to fiddle with the definition to mask the possible evidence for age discrimination.... [U]sing very small sub-units could ... mask discrimination because it is much more difficult to show or perceive discrimination when only very small numbers are involved.

***52** *Id.*

Defendants point to no cases interpreting the appropriate scope of a decisional unit. Plaintiffs point to two, although neither is wholly supportive of their position.

In *Burlison v. McDonald's Corporation,* 455 F.3d 1242 (11th Cir.2006), Defendant McDonald's engaged in a nationwide restructuring and RIF. In the restructuring, it reduced its U.S. "regions" from 38 to 21, in part by merging the three regions in which the plaintiffs had formerly been employed into one new Atlanta region. The regional manager for the new Atlanta region then worked with a group of senior managers to determine which of the 208 employees in the new Atlanta region to terminate. The informational disclosures provided to terminated employees covered the 208 employees in new Atlanta region.

The court held that the Atlanta region was the appropriate decisional unit. The court emphasized that **"local** mangers played key roles in the decision," and explained that "because the local authorities controlled the decision, the localities accordingly constitute the appropriate scope for the informational requirements." *Id.* The Court then held:

> The facts as they are developed in this case indicate that the Appellees were chosen for termination from the 208 employees in the [new] Atlanta ... region [ ]. The facts further indicate that they were considered for employment only in the Atlanta region. Given that the relevant regulations define the appropriate decisional unit as those who were considered for jobs in the same process as the terminated employees, those 208 employees constitute the appropriate decisional unit, and our inquiry is complete.

Id. at 1249.

Plaintiffs also cite to *Wells v. XPEDX,* No. 8:05-CV-2193-T-EAJ, 2006 WL 3133984 (M.D.Fla.2006). There the employer implemented a RIF that eliminated over 3,000 positions. Defendant contended that because the employee was the only employee in his level of management, he was the only person in National Accounts-Retail, his decisional unit. *See Id.* at *9. The plaintiffs argued that he was part of a larger decisional unit, the National Accounts division. *See id.* Pointing to evidence that the plaintiffs termination was controlled by the Vice President of National Accounts in Ohio, that plaintiff's job was housed at the "National Accounts-Tampa, FL" facility, and that plaintiff's job description identified his location as Tampa, FL and his department as National Accounts, the court held that National Accounts-Retail could be viewed as a mere subset of a decisional unit. *See id.* at * 11. The court declined to grant defendant's motion for summary judgment finding that there were issues of fact as to whether the plaintiff, who was not terminated until several months after the larger RIF, was part of a group termination program. *See id.* at *8-9, 11.

As the EEOC has indicated, determining the scope of the decisional unit and thus of the required disclosures cannot be determined from the face of the release but requires an examination of the unique facts regarding the particular RIF or termination. In the instant case, there are disputed facts regarding the RIF that took place within Defendant's Industrial Coatings Strategic Business Unit ("Industrial Coatings") that preclude summary judgment in favor of either party on the present record.

***53** Defendant has submitted the Affidavits of John Prazenica, Director of Human Resources for Industrial Coatings, and of Rett Wyman, Human Resources Manager for Industrial Coatings, in which they state that "[i]n deciding how many and which Industrial Coatings employees would be terminated from employment in the workforce reductions, a RIF matrix system was used to group employees, based on what Industrial Coatings managers considered comparable job duties and skills." (Wyman Affidavit dated March 24, 2008 and filed in support of Defendant's motions for summary judgment as to Plaintiffs Hunt & Bittner ("Wyman Affidavit I") ¶ 6; Prazenica Affidavit ¶ 6.) They further state that "[t]he RIF matrices were developed using PPG's Oracle human resources database, which contained information on employees job titles, position titles and classifications." (Wyman Affidavit I ¶ 7; Prazenica Affidavit ¶ 7.) They state that these RIF matrices were the basis for the informational disclosures given to terminated employees including Plaintiffs. (Wyman Affidavit I ¶ 8; Prazenica Affidavit ¶ 8.)

Significantly, Rett Wyman further states that:

> 9. The RIF matrix groupings were generally developed before the employees within each grouping were reviewed, rated, and ranked for purposes of planning and implementing the involuntary workforce reductions. In other words, we did not use the RIF matrix process to review, rate, and rank the entirety of Industrial Coatings, or other large blocks of the workforce, and then afterwards break the workforce down into the groupings as represented on the Decisional Unit Information disclosures given to certain Industrial Coatings employees whose employment was terminated in the workforce reductions.
>
> ...
>
> 11. When planning and implementing the involuntary workforce reductions that were required in order to achieve the total required Industrial Coatings cost reduction, we did *not* use the RIF matrix process to review, rate, and rank the entirety of the Industrial Coatings workforce.
>
> 12. Rather, when planning and implementing involuntary workforce reductions related to the cost reduction initiative, only those Industrial Coatings employees within certain groups-the RIF matrix groupings-were reviewed, rated and ranked.

(Wyman Affidavit dated April 14, 2008 and filed in opposition to Plaintiffs' motion for summary judgment ("Wyman Affidavit III") ¶¶ 9, 11-12.)

Defendant has also submitted evidence that each of the Plaintiffs was selected for termination by comparison to other employees within their RIF matrix grouping, but without comparison to any other employees outside their RIF matrix grouping. (Prazenica Affidavit ¶¶ 10-11, 14 (as to Plaintiff Rupert); Deposition of Charla Serbent, at 40-41 (as to Hunt & Bittner); Wyman Affidavit III ¶¶ 13-15 (as to Plaintiffs Rupert, Hunt, Bittner & Austin)).

Standing alone, this evidence is sufficient to meet Defendant's burden of adducing evidence sufficient to allow a reasonable mind to rule in its favor on this issue as to which it has the burden of proof.

***54** However, Defendant's evidence focuses almost exclusively on its actions in comparing individual employees to one another in selecting employees for termination. Section 1625.22 does not define the decisional unit so narrowly, but rather speaks in terms of the entire "process by which an employer chose certain employees for a program and ruled out others," 29 C.F.R.

§ 1625.22(f)(3)(i) (B), and the employees and groups of employees "considered" during that process, *Id.* § 1625.22(f)(3)(ii), (vi)(B). Indeed, it is clear that in the example given by section 1625.22(f)(3)(ii) (E), the individual employees are not compared to (or ranked against) the individual employees at the facilities that were previously considered but where the employer decided not to conduct its RIF. Nonetheless, the regulations provide that in such a case, "the decisional unit would include all considered facilities and not just the facility selected for the reductions." *Id.* § 1625 .22(f)(3)(ii)(E).

Also, Defendant has not explained its conclusory assertion that the RIF Matrix system was used to determine "how many" employees would be terminated. (Wyman Affidavit I ¶ 6; Prazenica Affidavit ¶ 6.) It is far from clear how a process limited to comparing and ranking employees within each RIF Matrix grouping could yield a decision as to how many employees would be terminated from each grouping or as a whole under the RIF, yet the decision as to how many employees to terminate would seem to be an inherent part of the process by which Defendant selected some employees for termination while ruling out others.

Moreover, Plaintiffs have adduced evidence that the cost-out initiative in Industrial Coatings had a unified goal. *See* 29 C, .F.R. § 1625.22(f)(3)(ii)(C). For example, Matt Marek, the General Manager of Industrial Coatings (America), testified that he was responsible for cutting $25.6 million in costs to bring returns to a standard level of profitability. (*See* Deposition of Matt Marek, at 24, 28.) Moreover, Plaintiffs have adduced additional evidence suggesting that subgoals were set within Industrial Coatings for four out of five broad functions: sales, technical, corporate, and R & D (but not manufacturing). (*See* Plaintiffs' Exhibits 43 & 117.)

Also, Defendant's Senior Vice President James Trainham testified in another matter that there was a reduction in force in R & D in 2006 and that the R & D employees would have been considered for the reduction along with "everyone associated with industrial coating," because "that's where the downsizing occurred." (Deposition of James Trainham, at 44-45.) He confirmed that he was referring to the "whole business unit," "including R & D." *Id.* at 45.[14]

14 Defendant asserts that this testimony is consistent with its position that while the Industrial Coatings RIF had an effect on work in Coatings R & D and was thus one of the reasons for the Coatings R & D RIF, the RIF at Coatings R & D was separate from the Industrial Coatings RIF. Trainham's testimony, however, is at least sufficient to create a dispute of fact on this point.

Plaintiffs have further adduced evidence that during the grouping process, 508 Industrial Coatings employees were ultimately placed into thirty RIF Matrix groupings, far more than the five broad function groupings for which it appears that goals were set. (Plaintiffs' Exhibit 179.) The 79 terminations are distributed across all thirty of these RIF Matrix groupings.[15] *Id.* Plaintiffs have also adduced evidence that the RIF Matrix groupings were "created and named" by John Prazenica, Director of Human Resources for the Industrial Coatings Business Unit, and Rett Wyman, Human Resources Manager for the Industrial Coatings Business Unit and that the groupings did not conform to pre-established groupings or departments used within Defendant for any other purpose. (*See* Prazenica Deposition, at 301-302.) A combined effect of the large number of newly-created groupings and the dispersal of terminations across all groupings seemingly would make it more difficult for an adversely affected employee to discern discriminatory intent and particularly disparate impact.

15 The record is unclear as to whether these 30 grouping comprised all the groupings in Industrial Coatings or whether there were additional groupings created that did not involve terminations.

***55** Additionally, Plaintiffs have adduced evidence suggesting that the rating and ranking process was not in fact always determinative of the issue of whether a particular employee was selected for termination, but rather that adjustments were made in some cases across RIF Matrix groupings and after the rating and ranking process. In the record is an August 29, 2005 email authored by Wyman in which he states that the technical management team had concluded their "realignment discussions" and "identified a number of individuals who have been impacted in their current roles that we feel are worthy of consideration elsewhere in the organization." (Plaintiffs' Exhibit 31.) Seven such individuals are then listed by name. *Id.* Notes from what appears to be a subsequent September 19, 2005 meeting refer to "[t]ransitional personnel moves to consider," which included "[e]stablish[ing] Liquid Technical Development

Team at Springdale ... including Phil Brontz [one of the individuals listed in the August 29, 2005 email]. (Exhibit 55, at PPGR-04930.) Similarly, another document lists 22 individuals on a "RIF List" while also listing three individuals, including Bob Olson and Bernie Ackerman, two of the individuals identified in the August 29, 2005 email, under the heading "Move out of E-coat/PT."[16] (Plaintiffs' Exhibit 74.)

16 "E-coat/PT" is not identified as one of the thirty RIF Matrix groupings. (Plaintiffs' Exhibit 179.) These groupings do include a grouping identified as "ED-PT Sales" and another grouping identified as "ED-PT Tech Svc." *Id.* at 2.

Finally, Plaintiffs have adduced evidence that prior to implementing the RIF, Prazenica prepared a spreadsheet comparing the impact of the RIF on individuals in various protected classes including age. (Prazenicka Deposition, at 119-121; Wyman Deposition, at 83-85.) This spreadsheet was also given to counsel, Gary Armbrust, for review. *See* Prazenica Deposition, at 121; Armbrust Transcript, at 17. The spreadsheet compares, among other things, the rate at which people over forty were being terminated as compared to people under forty. (*See* Plaintiffs' Exhibit 179.) It makes this comparison considering all of the employees in Industrial Coatings in total, as well as considering each RIF Matrix grouping separately. *Id.*

Accordingly, Plaintiffs have adduced evidence from which a reasonable factfinder could conclude that the RIF Matrix groupings did not reflect the Defendant's decisional process, i.e., that Defendant did not exclusively "consider" employees within the RIF Matrix groupings but rather considered multiple groupings in making its termination decisions and/or considered employees across groupings. Thus, Defendant is not entitled to summary judgment on this issue as to which it bears the burden of proof. At the same time, Defendant's evidence and the reasonable inferences therefrom are sufficient to create a dispute of fact as to the correctness of the decisional units utilized in the DUD's so as to withstand Plaintiffs' motion for summary judgment.

In sum, the scope of the DUD's do not provide an alternative basis for granting summary judgment in favor of Plaintiffs.

b. OWBPA Does Not Require That The Reasons for Plaintiffs' Terminations Be Disclosed, and the Releases Are Not Ineffective on This Basis.

***56** Plaintiffs assert that there is yet a third basis upon which to grant summary judgment in their favor invalidating the Releases. In addition to identifying the decisional unit covered by the employment termination program, section 626(f)(1)(H)(iii) requires that the employer inform the employees of "any eligibility factors for such program." 29 U.S.C. § 626(f)(1)(H). An EEOC regulation explains that "[t]he term 'exit incentive or other employment termination program' includes both voluntary and involuntary programs." 29 C.F.R. § 1625.22(e)(3). It further provides that "[u]sually 'other employment termination program' refers to a group or class of employees who were involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver." *Id.* § 1625.22(f)(iii).

Significantly, the EEOC regulation gives an example demonstrating "one way" in the information required by § 626(f)(1)(H) could be presented. 29 C.F.R. § 1625.22(f)(4)(vii). In the example, the employer had determined that it must terminate 10% of the employees in its Construction Division, and decided to offer all terminees $20,000 in severance in exchange for a waiver. *Id.* The sample disclosure statement provides, "All persons in the Construction Division are eligible for the program. All persons who are being terminated in our November RIF are selected for the program." *Id* . § 1625.22(f)(4)(vii)(B). There is no other provision in the sample disclosure statement that arguably addresses "eligibility factors." Nowhere does the sample disclosure statement identify any of the factors used to determine which particular employees were selected for termination and which particular employees were selected for retention.

The implication of these regulations is that the statutorily required eligibility factors are the factors determining an employee's eligibility to receive a severance payment and not the factors determining whether or not an employee is selected for termination. This conclusion is reinforced by the statutory use of the term "eligibility," which does not readily stretch to encompass employment termination. It would be an odd use of language to speak in terms of being eligible to have your employment involuntarily terminated.

Because section 1625.22 was promulgated pursuant to notice and comment rule-making, *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104

S.Ct. 2778, 81 L.Ed.2d 694 (1984), provides the standard of deference. Under *Chevron,* where Congress has not "directly spoken to the precise question at issue," a court "must sustain the [agency's] approach so long as it is 'based on a permissible construction of the statute.' " *Auer,* 519 U.S. at 457. Plaintiffs do not assert that section 1625.22 is not entitled to deference.[17]

17 A potential argument might be made that the definition of "other employment program" contained in section 1625.22(f)(iii) is inconsistent with statutory language. Section 626(f)(1)(H) sets forth certain information that must be provided "if a waiver is requested in connection with an exit incentive or other employment termination program." Substituting the EEOC's definition of "other employment program" into this sentence, the EEOC's interpretation might be argued as rendering superfluous certain of the statutory language. However, Plaintiffs have not made this nor any other argument that section 1625.22(f)(iii) is not entitled to deference.

Plaintiffs, however, cite several cases from other jurisdictions holding that the "eligibility factors" required by § 626(f)(1) (H) are "the factors used to determine who is subject to a termination program, not the factors used to determine who is eligible for severance pay after termination." *Massachusetts v. Bull HN Info. Sys., Inc.,* 143 F.Supp.2d 134, 147 n. 29 (D.Mass.2001); *accord Kruchowski v. Weyerhaeuser Co.,* 423 F.3d 1139, 1143-44 (10th Cir.2005), *vacated and superseded on rehearing in part,* 446 F.3d 1090 (10th Cir.2006); *Merritt v. FirstEnergy Corp.,* No. 1:05-CV-00586, 2006 WL 4568793, at * 3 (N.D.Ohio 2006) (citing the subsequently vacated *Kruchowski* opinion) (unpublished opinion); *Faraji v. FirstEnergy Corp.,* No. 1:04 CV 1493, 2007 WL 756750, at * 5 (N.D.Ohio 2007) (quoting *Bull HN Info. Sys.*) (unpublished opinion); *Pagliolo v. Guidant Corp.,* 483 F.Supp.2d 847, 861 (D.Minn.2007).

***57** *Kruchowski,* the only decision in which this issue was considered by a court of appeals, was subsequently vacated with the superseding opinion silent on the issue of eligibility factors and relying instead on an expanded discussion of what had been an alternative ground in the prior opinion. *See Kruchowski,* 446 F.3d 1090. Moreover, *Merritt* relied solely on the subsequently vacated *Kruchowski* decision. *Merritt,* 2006 WL 4568793, at *3.

Most importantly, none of these decisions considered the significance of the absence of factors relevant to termination in the sample disclosure form provided by the EEOC in section 1625.22(f)(4)(vii)(B). Indeed, of these cases, only *Pagliolo* even acknowledged the regulatory definition of "program" in section 1625.22(f)(1)(iii)(B), and that court engaged in no analysis regarding the deference due to this regulation. In the absence of an articulated basis for concluding that these regulations are inconsistent with OWBPA, an adequate basis does not exist to ignore or disregard the judgment of the EEOC. Indeed, information regarding eligibility for severance could be useful to the employee.

In conclusion, the failure of the DUD's to provide the factors relevant to termination does not as a matter of law provide a basis for holding that the Releases are ineffective as ADEA waivers and thus does not provide an alternative basis for granting Plaintiffs' motion for summary judgment.

3. It is *Unnecessary to* Determine *Whether the Understandability of the DUDs Presents an Additional Ground for Granting Plaintiffs' Motion for Summary Judgment.*

In a footnote in Plaintiffs' brief in support of their motion for summary judgment, Plaintiffs assert that there are additional deficiencies in the DUD's that rendered them not understandable in violation of OWBPA. These deficiencies are not illuminated in Plaintiffs' brief, which instead incorporates the Joint Concise Statement of Material Facts. In light of the above conclusion that the Releases are unenforceable and the fact that Plaintiffs essentially seek to incorporate 44 pages from the Joint Concise Statement into a brief that was already at the thirty-five page limit set by this Court, it is unnecessary to address this issue.

B. *Because The Releases Are Ineffective as to Plaintiffs' ADEA Claims, Plaintiffs' Pursuit of Their ADEA Claims Did Not Breach the Releases.*

Defendant has asserted a Counterclaim sounding in contract for breach of the Releases. As discussed *supra,* the Releases do not satisfy the requirements of OWBPA and thus are ineffective to waive of Plaintiffs' ADEA claims. Because Plaintiffs have not released their ADEA claims, they did not, as a matter of law, breach their covenant not to sue by bringing them. Accordingly, it is recommended that this Court grant summary judgment in favor of Plaintiffs on Defendant's Counterclaim for breach of contract.

Defendant's Counterclaim as alleged is limited to breach of contract. It is recommended that summary judgment be entered in favor of Plaintiffs, with prejudice as to Defendant's right to file an amended Counterclaim for breach of contract, but without prejudice as to Defendant's right to file an amended Counterclaim for restitution or on theories other than breach of contract. Where the availability of restitution or other affirmative relief raises significant issues regarding the deference due to section 1625.23(b) and its apparent tension with *Oubre,* which issues have not been thoroughly briefed by the parties, it is recommended that this Court decline to issue at this time what essentially would be an advisory opinion as to the availability of restitution or other affirmative relief on theories other than breach of contract as alleged in the Counterclaim. These issues may be appropriately addressed, if necessary, upon full briefing at a later stage in these proceedings.

C. ***Conclusion***

***58** For the reasons stated above, it is recommended that: (i) Plaintiffs' Motion for Summary Judgment (Docket No. 85) be denied in part as moot insofar as it relates to Defendant's previously withdrawn Fourth Affirmative Defense but otherwise be granted; (ii) Defendant's Second Affirmative Defense be stricken with prejudice; (iii) judgment be entered in favor of Plaintiffs on Defendant's Counterclaim with prejudice as to Defendant's right to bring a Counterclaim for breach of contract but without prejudice to Defendant's right to file an Amended Counterclaim for restitution or on theories other than breach of contract; and (iv) Defendant's Motions for Summary Judgment as to Plaintiffs Rupert and Campbell (Docket Nos. 77 and 79) be denied insofar as they raise issues relating to the Separation Agreement and Releases executed by these two Plaintiffs.

In accordance with this Court's Order Referring Case to a Special Master dated September 27, 2007 and the stipulation of the parties, either party may file objections to-or a motion to adopt or modify-this report and recommendation no later than fourteen days from the date of the report and recommendation. Responses to objections are due within ten days of the initial filing of said objections or motion.