IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	Case No. 05 cv 0208
v.	)	Judge James Zagel
SIDLEY AUSTIN BROWN & WOOD LLP,	)	Magistrate Judge Ashman
Defendant.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S RENEWED REQUEST FOR RECONSIDERATION OR CERTIFICATION FOR INTERLOCUTORY APPEAL

On June 9, 2005, this Court denied Sidley's attempt to preclude the EEOC from seeking victim-specific relief for a group of partners expelled from the partnership by Sidley in 1999 and for partners who were ousted pursuant to the firm's mandatory retirement policy. The Court explained that the Supreme Court's opinion in "*Waffle House* makes clear that EEOC's ability to seek monetary relief on behalf of individuals is derived from its own statutory rights to advance the public's interest and is unrelated to any individual's right." *EEOC v. Sidley Austin Brown & Wood, L.L.P*, Civ. No. 05 C 0208 (June 9, 2005) at 5, attached as Exhibit 1. The Court rejected Sidley's reliance on the Seventh Circuit's decision in *EEOC v. North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir. 2001), which predates *Waffle House*, saying "I find it clear enough from the holdings in both *Waffle House* and *BOR* that the privity arguments seen in *North Gibson* are no longer applicable and that *Waffle House* does in fact overrule that decision." *Id.*

Although this Court denied its initial request for reconsideration or certification for interlocutory appeal, Sidley now asks again that this Court reconsider its opinion or certify it for

interlocutory appeal. Defendant seems to think that ongoing discovery in the case has somehow provided a new reason for this Court to grant its request, suggesting that the fact that some former partners at this time may not want to participate in the lawsuit creates new support for their position. The law, however, is the opposite.

In *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1536 (2d Cir. 1996), the Second Circuit Court of Appeals decisively rejected the position that the EEOC's enforcement authority under the ADEA depends upon the willingness of the affected individuals to proceed with the litigation. "[W]here no [affected employee] has filed a charge with the EEOC, and, indeed, none supports the lawsuit . . . the EEOC may commence actions in the district court *to obtain both legal and equitable relief* . . . Section 16(c) of the FLSA . . . authorizes EEOC to bring actions on behalf of aggrieved employees and to seek relief *including back wages and liquidated damages*."(emphasis added). As the Seventh Circuit noted in *In re Bemis*, 279 F.3d 419, 421 (7th Cir. 2002), "the EEOC's primary role is that of a law enforcement agency and it is merely a detail that it pays over any monetary relief obtained to the victims of defendant's violation rather than pocketing the money itself and putting them to the bother of suing separately. Having to persuade the district court . . . [that it satisfied Rule 23] would interfere with the Commission's exercise of its prosecutorial discretion. It would be like a court's undertaking to decide whether the Justice Department, in bringing a suit attacking price fixing, was being adequately solicitous of the private interests of the victims of the defendant's conduct."

Nothing has changed since this Court issued its initial decisions denying Sidley's attempt to preclude the EEOC from seeking victim-specific relief and denying Sidley's request for reconsideration or certification or interlocutory appeal. There is no reason for this Court to change its position now.

I. The Legal Standards Governing A Request for Reconsideration and Certification for Interlocutory Appeal

Both motions for reconsideration and certification for interlocutory appeal are subject to strict standards and granted only rarely. "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. . . . Reconsideration is not an appropriate forum for rehashing previously rejected arguments." *Holden Metal v. Wismarq*, 2004 WL 1498152 (N.D. Ill. July 1, 2004 (quoting *Caisee National de Credit Agricaole v. CBI Indus., Inc*. 90 F.3d 1264, 1269 (7th Cir. 1996)).

The party seeking an interlocutory appeal has the burden of convincing the court that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment." *Fison Limited v. United States*, 458 F.2d 1241, 1248 (7th Cir. 1972), *cert. denied*, 405 U.S. 1041 (1972). To meet its burden, the party moving for certification must show that each of the following four statutory criteria is met: "There must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." *Ahrenholz v. Board of Trustees of the University of Illinois*, 219 F.3d 674, 675 (7th Cir. 2000)(emphasis in original).

Sidley makes essentially the same arguments in support of both its request for reconsideration and its request for certification for interlocutory appeal: that this Court's June 9, 2005 opinion was wrong on the merits; that this Court's opinion was wrong because this Court must follow circuit precedent (*North Gibson*); and that as a result of the June 9, 2005 opinion Sidley is being subjected to discovery that could be avoided if the EEOC were permitted to seek only injunctive relief. None of these arguments is correct nor do they satisfy the governing legal standards for either a motion for reconsideration or certification for interlocutory appeal.

II. Defendant's Belief That This Court's June 9, 2005 Opinion Is Wrong Provides No Justification for Reconsideration and Creates No Contestable Question of Law

This Court's conclusion that *Waffle House* overruled *North Gibson* is well-founded. The opinion rests on no errors of law or fact to justify reconsideration nor does the opinion result in a conflict among the district courts in the Northern District of Illinois or with other circuits to create a contestable question of law to justify certification for interlocutory appeal. Further, this Court acted correctly in following the governing Supreme Court precedent of *Waffle House* rather than the rejected logic of the Seventh Circuit's opinion in *North Gibson*.

A. The June 9, 2005 Opinion Contains No Manifest Error of Law or Fact

North Gibson barred the EEOC from seeking victim-specific relief for two affected employees who filed untimely charges and five employees who did not file charges in an ADEA case brought by the EEOC. The *North Gibson* court's reasoning rested on two bases: (1) the court relied on res judicata cases and (now overruled) cases regarding claims subject to mandatory arbitration to conclude that under the ADEA the EEOC steps into the shoes of the individual employee because there is privity between the EEOC and the individual employee; and (2) the court assessed the public interest in claims by the EEOC for victim-specific monetary relief and concluded that such claims serve only a "minimal public interest." 266 F.3d at 615-616. Accordingly, the *North Gibson* court held that though the EEOC could pursue a claim for injunctive relief, the EEOC was not permitted to bring a claim for monetary relief for the affected individuals because in the absence of a timely charge none of the affected individuals could themselves bring a claim.

Waffle House rejected these two bases on which *North Gibson* relies. In *Waffle House*, the Supreme Court granted certiorari to resolve a conflict among the circuit courts over the

EEOC's ability to bring a claim for victim-specific relief on behalf of an employee who could not bring such a claim because the employee was subject to a mandatory arbitration provision. *Waffle House* held that the EEOC is entitled to bring a judicial action for victim-specific relief even where the affected employee could not. Thus, the Supreme Court rejected the first basis of *North Gibson* -- that under the ADEA the EEOC steps into the shoes of the individual employee when the EEOC seeks victim-specific relief.[1] The Court also recognized that "it is the public agency's province – not that of the court – to determine whether public resources should be committed to the recovery of victim-specific relief." *Waffle House*, 534 U.S. at 291-92. The Court thus further rejected *North Gibson*'s remaining basis -- that victim-specific monetary relief involves a lesser public interest than injunctive relief. *Waffle House*, 534 U.S. at 295 (noting, for example, that "while punitive damages benefit the individual employee, they also serve an obvious public function in deterring future violations"). Thus, after *Waffle House*, this Court correctly concluded that nothing remains of *North Gibson* on this issue.

B. This Court's Opinion Creates No Circuit Split or Conflict of Law Within the Northern District of Illinois and There is No Likelihood of Reversal on Appeal

"A question of law is contestable if there are substantial conflicting decisions regarding the claimed controlling issue of law, or the question is not settled by controlling authority and there is a substantial likelihood that the district court ruling will be reversed on appeal." *United States v. Moglia*, No. 02 C 6131, 2004 WL 1254128 at *3 (N.D.Ill. June 7, 2004); *see also In re: Kmart Corp. v. Uniden America Corp.*, No. 04 C 4978, 2004 WL 2222265 at * 7 (N.D.Ill. Oct. 1, 2004)(same). There is no such conflict or likelihood of reversal on appeal here.

[1] Although *Waffle House* itself involved a Title VII claim, the conflicting circuit court opinions that the Court addressed included a case based on an ADEA claim. *See Waffle House*, 534 U.S. at 285 (noting that EEOC's petition for certiorari was granted to resolve a conflict among the circuit courts including *EEOC v. Kidder, Peabody & Co*, 156 F.3d 298 (2d Cir. 1998), an ADEA case precluding the EEOC from seeking victim-specific monetary relief). *Waffle House* made no distinction in the EEOC's ability to seek such relief based upon the federal anti-discrimination statute at issue despite its citation of the conflicting circuit court opinions involving different statutes.

1. There Is No Conflict Between This Court's Opinion and Res Judicata Cases From Other Circuits

Sidley suggests that this Court's opinion conflicts with decisions in other circuits which have recognized that the EEOC and the individuals for whom it seeks relief are in privity for res judicata purposes. Defendant's Motion for Limited Reconsideration or, in the Alternative, Certification for Interlocutory Review at 7-8 (hereinafter "Defendant's Motion for Reconsideration"). As the Court in *Waffle House* explained, "the fact that ordinary principles of res judicata . . . may apply to the EEOC does not . . . render the EEOC a proxy for the employee." The language from res judicata cases regarding any privity that exists between the EEOC and the individuals for whom it seeks relief must be understood to reflect the unique concerns of res judicata and does not create a contestable issue here where the question is whether EEOC can obtain victim-specific relief for a group of employees who have *never litigated* their claims of age discrimination.

In *Waffle House*, the Supreme Court indicated that "ordinary principles of res judicata, mootness, or mitigation may apply to EEOC claims." *Waffle House*, 534 U.S. at 298; *id* at 296 (citing decisions involving these doctrines, *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982); *EEOC v. Goodyear Aerospace Corp*., 813 F.2d 1539 (9th Cir. 1987); *EEOC v. U.S. Steel Corp*., 921 F.2d 489 (3rd Cir. 1990)). But the application of these doctrines to the EEOC does not limit the EEOC's authority to seek monetary relief. Res judicata, mootness and mitigation all reflect concern with the duplicative use of limited judicial resources, avoiding double recovery and conflicting resolutions. Here none of those concerns is implicated because none of the affected partners have filed suit, settled their claims or received unconditional offers of reinstatement.

2. There Is No Conflict Between This Court's Opinion and *Custom Companies*

Any reliance on Judge Leinenweber's opinion in *EEOC v. Custom Companies*, 2004 WL 765891, at *11 (N.D. Ill. April 7, 2004), to attempt to create a contestable question of law in this case is equally without merit. Defendant's Motion for Reconsideration at 8. Judge Leinenweber cited *North Gibson* in dicta in the course of answering the wholly *different* question of the *temporal scope* of the class for which the EEOC could seek relief in a Title VII case arising out of an individual charge of sex harassment. *EEOC v. Custom Companies*, 2004 WL 765891 (N.D. Ill. 2004), *11. Citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) and continuing violation case law, Judge Leinenweber concluded in a case based upon an individual charge of discrimination that EEOC could include as class members only those individuals who were employed within the 300-day charge filing period. Indeed, according to the logic of Judge Leinenweber's opinion, there should be no doubt that the EEOC is entitled to proceed with its claims for victim-specific relief at least for those individuals who were employed within 300-days of the EEOC's opening of its directed investigation on July 5, 2000 – a time period that would include all of the partners expelled from the partnership in October of 1999.[2]

3. This Court's Opinion Is Consistent With Both *General Telephone* and *U.S. Steel*

Sidley also cites both *General Telephone* and *U.S. Steel* to support its view that this Court overread *Waffle House*. Defendant's Motion for Reconsideration at 5-7. Defendant contends that even prior to *Waffle House*, there had always been some situations (like *General Telephone*)

[2] Defendant has asserted that the EEOC should be precluded from seeking any victim-specific relief because the ADEA contains no charge filing period or statute of limitations applicable to the EEOC and thus the EEOC (according to Defendant) could bring suit for a violation occurring far outside the 300-day charge filing period that applies to individuals in Illinois. Defendant's worst case scenario ignores the fact that where the EEOC subjects an employer to undue delay, the employer can invoke equitable doctrines including laches to prevent any unfairness. Here where EEOC opened its investigation into Defendant's compliance with the ADEA within 300 days of Defendant's 1999 expulsion of a group of partners and provided notice of the investigation to the Defendant, there has been no undue delay by the EEOC. Sidley's efforts to move discovery along, however, have been limited.

in which the EEOC was not subject to the same limitations as its claimants and other cases (like *U.S. Steel*) in which EEOC's relationship with its claimants limited the EEOC's authority to obtain relief. Thus, Defendant argues that because *North Gibson* referred to both General Telephone and U.S. Steel, North Gibson can and must be reconciled with the subsequently decided Waffle House by maintenance of the notion that EEOC is in "privity" with persons for whom it seeks victim-specific. It is a hopeless argument, urging a reconciliation that would be dependent upon repudiation of the central tenets of *Waffle House*.

Waffle House went beyond *General Telephone* to conclude that *EEOC can* seek victim-specific relief where the *affected employee could not* and that the public interest is served by EEOC's ability to seek such relief. These aspects of *Waffle House* cannot be reconciled with *North Gibson*, and Defendant's attempt to do so does not create a contestable question of law. Further, Defendant's suggestion that EEOC's ability to seek victim-specific relief for its claimants is merely coextensive with those claimants' entitlement to such relief ignores the Seventh Circuit's decision in *Board of Regents*, which permits the EEOC to seek monetary relief in an ADEA case even where the affected individuals would have no right to do so. 288 F.3d at 296. There is no basis for suggesting that both *General Telephone* and *U.S. Steel* create a contestable question of law.

In addition to the lack of conflict, it is highly unlikely that the Seventh Circuit would reverse this Court's opinion. *EEOC v. Board of Regents*, 288 F.3d 296 (7th Cir. 2002) confirmed that the job of line-drawing after *Waffle House* remains with the Supreme Court. The Seventh Circuit held that the EEOC could proceed with an ADEA suit even where the Eleventh Amendment would preclude affected employees from bringing a claim, saying "If ultimately

Waffle House is to be distinguished from a case such as this one, that distinction should be drawn not by us, but rather by the Supreme Court." *Id.* at 300.

III. By Following *Waffle House*, This Court Correctly Applied Governing Supreme Court Precedent

Other than challenging the legal basis for the Court's opinion and attempting to create a conflict among the courts where none exists, Defendant has suggested that reconsideration and interlocutory appeal are appropriate because even if this Court believes that *Waffle House* overruled *North Gibson*, this Court must continue to follow *North Gibson* until the Seventh Circuit itself declares *North Gibson* void. As this Court noted, Defendant's position flies in the face of the Seventh Circuit's own practice in *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004). *See EEOC v. Sidley Austin Brown & Wood, L.L.P*, Civ. 05 C 208, (Oct. 18, 2005 Transcript) at 7, attached as Exhibit 2.

Further, as this Court said and as has been recognized by other courts within this circuit, a district court and a court of appeals "are equally obligated to follow the most recent Supreme Court precedent." *See EEOC v. Sidley Austin Brown & Wood, L.L.P*, Civ. 05 C 208, (June 16, 2005 Transcript) at 2, attached as Exhibit 3 ("I actually think *Waffle House* did kill *North Gibson*. I recognize there is an argument that it didn't, but I think it did. I think the binding precedent rule actually tells me that I can't follow North Gibson."); *Wisconsin Bell, Inc., v. Public Service Commission of Wisconsin*, 57 F. Supp. 2d 710, 714-15 (W.D. Wis. 1999) ("In this circuit, district courts have stated that they are not bound by a court of appeals' decision that has been undermined by a subsequent decision of the Supreme Court."), *revd on other grounds*, 222 F.3d 323 (7th Cir. 2000), *on remand* 301 F. Supp.893, 897-98 (explaining that the Seventh

Circuit did not disagree with the premise "that when the Seventh Circuit and the Supreme Court conflict, it is the Supreme Court that district courts must follow.")[3]

The cases cited by Defendant are inapposite. Those cases make clear that a lower court must follow governing precedent from a superior court; they do not address the circumstance where the lower court believes that the superior court precedent has been itself been overruled by precedent from the Supreme Court. This court acted entirely correctly by following *Waffle House*.

IV. Ongoing Discovery In This Case Does Not Create a Basis for Reconsideration or Support the Position that Interlocutory Appeal Would Materially Advance Resolution of the Litigation.

Defendant seeks to avoid further disclosure of attorney personnel files and other confidential documents – despite the fact that this Court has entered a comprehensive Protective Order that prohibits public disclosure of confidential information, allows such information to be used only for purposes of this litigation, and must be agreed to by witnesses and class members who view the confidential information. Defendant claims "the most sensitive and intrusive disclosures arise from the fact that this is currently a case for individual relief" as result of this Court's June 9, 2005 decision. Defendant's Status Report Regarding Individual Objections and Renewed Request for Reconsideration at 3.

[3] Defendant has raised this issue because of language in the Court's opinion stating, "If there were no question concerning the ongoing validity of *North Gibson*, the individual relief sought by the EEOC in this case would certainly be barred." Exhibit 1 at 3. EEOC's position, however, is that even if *North Gibson* remains good law after *Waffle House*, *North Gibson* should not govern the scope of the EEOC's authority to obtain victim-specific relief in this case. Here (unlike *North Gibson*), EEOC's action rests on a directed investigation initiated by the Commission within 300-days after the discriminatory expulsions at issue. In such circumstances, the Second Circuit recognized EEOC's authority to sue for victim-specific relief in the absence of an individual Charge of Discrimination. *EEOC v. Johnson & Higgins*, 91 F.3d 1529 (2nd Cir. 1996). As the Second Circuit recognized in *Johnson & Higgins*, the ADEA, its implementing regulations, and the FLSA provisions explicitly incorporated into the ADEA make clear that victim-specific relief is available in such actions. *See* EEOC Memorandum of Law In Opposition to Defendant's Motion for Partial Summary Judgment at 13-20 (discussing Johnson & Higgins, the statutory language of the ADEA and FLSA and the EEOC regulations implementing the ADEA).

A. Substantially the Same Discovery Will Be Necessary Regardless of Whether This Is a Case for Victim-specific Relief or Only for Injunctive Relief.

Sidley's argument suggests that the discovery EEOC has sought in this case is all about money and other forms of victim-specific relief. In fact, before the question of any monetary or other victim-specific relief is even reached, EEOC must show first that the affected partners were covered employees and then that Defendant expelled them because of their age or pursuant to a mandatory retirement policy. Sidley's argument that the scope of discovery in this case could be substantially reduced if the EEOC were precluded from seeking victim-specific relief simply ignores the governing legal standards and the evidence that would be relevant to establish liability even if the EEOC were limited only to injunctive relief, the availability of which Sidley does not challenge.

The coverage inquiry under *Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, 450 (2003) (adopting EEOC's Compliance Manual standard) requires EEOC to present detailed evidence regarding the operations of Sidley.[4] In order to show that the partners selected for expulsion in the fall of 1999 were chosen because of their age -- and not because of their performance, as Sidley claims, EEOC may rely on evidence showing that similarly situated partners who were not as old were not terminated. *See Cerutii v. BASF Corp.*, 349 F.3d 1055, 1060-61 (7th Cir. 2003). In cases like this one, the performance of individuals who suffered an adverse action is frequently compared with the performance of younger workers who were retained in their jobs. *See, e.g, Vonckx v. Allstate Ins.*, 2004 WL 1427105 (N.D. Ill) (discussing use of comparators in ADEA disciplinary case).

[4] The *Clackamas* standard suggests six relevant factors for determining when individuals with the title partner are properly regarded as employees entitled to the protections of the federal anti-discrimination laws "1) whether organization can hire or fire individual or set rules for work; 2) extent of supervision organization exercises over individuals work; 3) whether individual reports to someone higher up in organization; 4) whether individual is able to influence organization; 5) whether parties intended that individual be an employee; 6) whether individual shares in profits, losses and liabilities of organization." *Id.*

Under these standards, even if EEOC were not seeking victim-specific relief, the mechanism by which partners are evaluated and compensated at the firm, the actual hours billed and worked by partners, the compensation received by each partner, and the personnel files of the demoted and mandatorily retired partners as well as their comparators would continue to be relevant to demonstrate liability for injunctive relief. Thus, Sidley's claim that the scope of discovery has been substantially increased by the Court's June 9, 2005 opinion is without merit.

The objection by some former partners to their participation in this litigation and their desire to limit discovery similarly provides no justification for reconsidering EEOC's authority to pursue a claim on behalf of those individuals or for certifying the June 9, 2005 opinion for interlocutory appeal. *See EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1536 (2d Cir. 1996).[5] Their objection does not limit the EEOC's ability to seek relief on their behalf or change the scope of relevant discovery material.

B. Certification for Interlocutory Appeal Is Premature

As this Court already noted in denying Defendant's initial request for reconsideration or interlocutory appeal, certification at this time is premature. There is no point in certifying this question to the Seventh Circuit when the questions of coverage and discrimination remain undecided. These questions must be resolved before we get to the question of awarding any

[5] The Second Circuit's opinion in *Johnson & Higgins* is entirely consistent with the numerous courts that have acknowledged EEOC's right to sue an employer under the ADEA regardless of whether any individual files a charge of age discrimination against the employer. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 28 (1991) (citing 29 C.F.R. 1626.4, 1626.13 (1990)); *EEOC v. Tire Kingdom, Inc*., 80 F.3d 449, 451 (11th Cir. 1996) (EEOC may investigate and bring suit under the ADEA whether or not employee has filed timely charge); *EEOC v. American & Efird Mills, Inc*., 964 F.2d 300, 303, 04 (4th Cir. 1992) (same). It is also consistent with cases brought under the FLSA, which is specifically incorporated in the ADEA. *See* 29 U.S.C. 626(b) (incorporating enforcement provisions of FLSA, 29 U.S.C. 211(b), 216 (except for subsection (a), 217)). *See Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985)("That the associates themselves vehemently protest coverage under the Act makes this case unusual, but the purposes of the Act require that it be applied even to those would decline its protections."); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 809 (D.D.Cir. 1983)("the Secretary may bring actions to enforce [the FLSA] even absent the consent of the underpaid employees).

relief – whether it is victim-specific relief or injunctive relief. Certifying the EEOC's ability to seek victim-specific relief thus is not an efficient use of judicial resources.[6]

V. If the June 9, 2005 Order Is Certified for Interlocutory Appeal, Discovery Should Continue

If this Court certifies its June 9, 2005 opinion for interlocutory appeal, discovery should continue without limitation. The vast majority of discovery in this case relates to liability, and holding up the discovery process while an interlocutory appeal is pending would slow litigation though any appellate decision on the issue would have little effect on the scope of discovery.

In addition, the EEOC respectfully requests that if this Court certifies the question whether *Waffle House* overrules *North Gibson*, the Court also certify the question whether *North Gibson* applies to a case brought by the EEOC based on a directed investigation initiated by the Commission within 300-days of the discriminatory decisions at issue. The language of the ADEA (and the FLSA on which the ADEA is based), the ADEA's implementing regulations, and established precedent make clear the EEOC is entitled to seek victim-specific relief in action based on a Commission-initiated investigation opened within 300 days of the discrimination at issue. *See* EEOC Memorandum of Law In Opposition to Defendant's Motion for Partial Summary Judgment at 13-20. The difference between this case, which rests on such a directed investigation, and *North Gibson*, which did not, provides a basis for distinguishing this case from

[6] The EEOC notes that if this Court were to reverse its opinion and hold that *North Gibson* bars EEOC's claims for victim-specific relief, certification under 1292(b) of the new opinion would be appropriate. First, any conclusion that EEOC could not pursue victim-specific relief would create a clear conflict with *Waffle House* and *Board of Regents* and thus would result in a contestable question of law. Second, if the issue were in such a posture, interlocutory appeal would speed the resolution of the case and avoid the risk of wasting judicial resources. It makes no sense to have a first trial on coverage, liability for discrimination, and injunctive relief only, and then, if the Court's (hypothetical) reliance on *North Gibson* opinion were ultimately reversed on appeal, impanel a jury to consider victim-specific relief – especially because that jury would necessarily have to hear much of the evidence presented in the first trial.

North Gibson and an alternative basis for affirming this Court's June 9, 2005 order permitting the EEOC to seek victim-specific relief.

Conclusion

For the foregoing reasons, the EEOC respectfully requests that this Court deny Defendant's motion for reconsideration or in the alternative for interlocutory review.

Respectfully Submitted,

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John C. Hendrickson, Regional Attorney
Gregory M. Gochanour, Supervisory Trial Attorney
Deborah L. Hamilton, Trial Attorney
Laurie S. Elkin, Trial Attorney
Equal Employment Opportunity Commission
500 West Madison St., Room 2800
Chicago, IL 60661
(312) 353-7726
Counsel for Plaintiff EEOC

CERTIFICATE OF SERVICE

Deborah Hamilton, an attorney, hereby certifies that she caused a copy of the foregoing PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S RENEWED REQUEST FOR RECONSIDERATION OR CERTIFICATION FOR INTERLOCUTORY APPEAL to be faxed and mailed, postage pre-paid, on November 7, 2005, to counsel of record at the following address:

To: Gary M. Elden
Lynn H. Murray
Gregory C. Jones
John E. Bucheit
Amanda McMurtrie
Grippo & Elden
111 S. Wacker Dr.
Chicago, IL 60606

Fax (312) 558-1195

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Deborah L. Hamilton