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United States District Court, D. New Jersey.

Phillip C. ENGERS, Warren J. McFall, Donald G. Noerr, and Gerald Smit, individually and on behalf of all others similarly situated, Plaintiffs,
v.
AT & T and AT & T Management Pension Plan, Defendants.

No. 98–CV–3660 (WGB).
|
Oct. 17, 2002.

Attorneys and Law Firms

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OPINION

BASSLER, J.

***1** The certified class action presently before the Court challenges the terms of AT & T's management pension plan. Plaintiffs commenced this action on August 5, 1998. Now before the Court is Defendants' third motion for partial dismissal pursuant to Fed.R.Civ.P. 12(b)(6). Before turning to the merits of the pending motion, mindful that this action is now in its fifth year and is before its second District Court Judge, the Court will endeavor to briefly recount how much (or, depending on one's point of view, how little) has already occurred in the dispute.

In February, 1999, Defendants AT & T and the AT & T Management Pension Plan (collectively "AT & T" or "Defendants") filed their first motion for partial dismissal. In April, 1999, Judge Nicholas Politan granted Defendants' motion. A number of Counts were dismissed with prejudice, and the remainder of the Complaint was dismissed without prejudice, so that Plaintiffs could re-file an appropriate Amended class action Complaint. Plaintiffs filed their First Amended Complaint on June 7, 1999.

In October, 1999, Defendants filed their second motion for partial dismissal, seeking to dismiss portions of the First Amended Complaint. Before the Court issued its ruling on the second motion for partial dismissal, Plaintiffs moved for leave to file a Second Amended Complaint. The Court took both motions under advisement in December, 1999.

On June 29, 2000, Judge Politan granted Plaintiffs leave to file their Second Amended Complaint. Judge Politan also granted in part and denied in part Defendants' second motion for partial dismissal, and dismissed the First, Second, and Eighth Counts of Plaintiffs' Second Amended Complaint with prejudice. On July 28, 2000, Plaintiffs moved for reargument of the Court's dismissal of Counts One and Two. The Court denied Plaintiffs' motion for reargument on October 4, 2000.

On October 20, 2000, Plaintiffs moved for class certification. Before ruling on the motion, the Court ordered Plaintiffs to submit additional materials in support of their application for class certification. On June 7, 2001, Judge Politan granted Plaintiffs' motion for class certification with regard to the remaining claims in the Second Amended Complaint, dismissed the Ninth claim for relief, and directed plaintiffs to submit additional evidence in relation to the class's claims.

On June 25, 2001, Defendants moved for reconsideration of the Court's June 7, 2001 decision. On July 6, 2001, Plaintiffs moved for leave to file a Third Amended Complaint.[1] On November 20, 2001, in his last action in this case before retiring from the bench, Judge Politan granted Plaintiffs' motion to file a Third Amended Complaint, denied Defendants' motion for reconsideration, and clarified his June 7, 2001 class certification ruling. Plaintiffs filed their Third Amended Complaint on November 29, 2001. On January 11, 2002, the case was reassigned from Judge Politan to this Judge.

As previously mentioned, now before the Court is

Defendants' third motion for partial dismissal, which is directed to Plaintiffs' Third Amended Complaint. Pursuant to Fed.R.Civ.P. 12(b)(6) Defendants seek to dismiss Counts Ten, Eleven, and Twelve from the Third Amended Complaint. Defendants also seek to strike Counts One, Two, Eight, and Nine from the Third Amended Complaint, on the grounds that these Counts were previously dismissed from the Second Amended Complaint by Judge Politan.

***2** Having reviewed the extensive submissions of the parties, and having reviewed Judge Politan's earlier decisions, for the following reasons, Defendants' motion to dismiss counts One, Two, Eight, Nine, Ten, Eleven, and Twelve is granted.

I. *STANDARD*

Under Fed.R.Civ.P. 12(b)(6), a complaint will be dismissed on the pleadings if it appears beyond doubt that a plaintiff can prove no set of facts consistent with the allegations of the claim that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 48 (1957); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.,* 171 F.3d 912, 919 (3d Cir.1999). In deciding a motion to dismiss for failure to state a claim, all allegations in the pleadings must be accepted as true and the plaintiff must be given the benefit of every favorable inference that can be drawn from those allegations. *Id.; See also Conley,* 355 U.S. at 48; *Oran v. Stafford,* 226 F.3d 275, 279 (3d Cir.2000); *Jama v. U.S.I.N.S,* 22 F.Supp.2d 353, 361 (D.N.J.1988). The complaint should not be dismissed unless it appears that "the facts alleged in the complaint, even if true fail to support the claim." *Ransom v. Marrazzo,* 848 F.2d 398, 401 (3d Cir.1988).

When evaluating a motion to dismiss brought pursuant to Fed.R.Civ.P. 12(b)(6), "[a]lthough a district court may not consider matters extraneous to the pleadings, 'a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment." ' *U.S. Express Lines Ltd. v. Higgins,* 281 F.3d 383, 388 (3d Cir.2002), *quoting See Burlington Coat Factory Sec. Lit.,* 114 F.3d 1410, 1426 (3d Cir.1997) (additional citations omitted). Accordingly, in ruling on Defendants' motion, the Court can and will consider the terms of the Plan document itself, as well as the terms of other documents referenced by Plaintiffs in their Complaint.

II. *DISCUSSION*

Pursuant to Fed.R.Civ.P. 12(b)(6) Defendants seek to dismiss Counts Ten, Eleven, and Twelve from the Third Amended Complaint. These three claims for relief, which were not present in either the First or Second Amended Complaint, were brought by Plaintiffs as a result of a purported October 16, 2000 amendment to the AT & T Management Pension Plan.[2]

Plaintiffs claim that the amendment to the Plan violates the rights of Plan members as protected by the Employee Retirement Income Security Act of 1974 (ERISA). While Plaintiffs challenge only one provision of the amended Plan (§ 4.06(a)(ii)), they claim it violates three separate ERISA sections. Plaintiffs allege in Count Ten of the Third Amended Complaint that § 4.06(a)(ii) impermissibly conditions payment of vested accrued benefits, which results in a forfeiture of benefits in violation of ERISA § 203(a), 29 U.S.C. § 1053(a). Relatedly, Plaintiffs claim in Count Eleven that by conditioning receipt of benefits, § 4.06(a)(ii) deprives Plaintiffs of the actuarial value of their vested benefits, in violation of ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3). Finally, count Twelve claims that § 4.06(a)(ii) impermissibly reduces previously protected benefits in violation of ERISA § 204(g), 29 U.S.C. § 1054(g).

***3** By way of general background, The AT & T Management Pension Plan was established in October 1980 as a defined benefit plan for AT & T employees. Initially, the Plan offered participants annuities at retirement determined by a formula which was based on years of participation in the Plan and on average pay over defined periods (the "old formula").

In 1997, AT & T took steps to convert the Plan from the old formula to a "Cash Balance" formula.[3] Contemporaneous with the conversion to a Cash Balance Plan, AT & T increased and froze retirement benefits that had already accrued through December 31, 1996. These benefits were calculated and then fixed via a mechanism referred to by the parties as the "Special Update Formula."

The Special Update Formula was used to compute a fixed benefit amount for each employee (the "Special Update Benefit"). Each employee's Special Update Benefit amount represented the entire retirement benefit accrued by the employee between the start of their employment and December 31, 1996. The Special Update Benefit amount provided each employee with a projection of the fixed annuity value of their retirement benefit as of normal retirement age (65), or as of an earlier time in the event they became eligible for early retirement.[4]

The Special Update Benefit amount was also used as a benchmark to calculate the starting value of each Employee's Cash Balance Account. (For this formula, *See* Appendix in Support of Defendants' Motion For Partial Dismissal of the Third Amended Complaint, ("Da"), at 180–81.) Although pre–1997 accrued benefits were fixed via the Special Update Benefit, employees continued to receive increases in their retirement benefits via contributions to their new Cash Balance Accounts. These new contributions were comprised of a nominal percentage of the employee's annual salary and some quantity of interest for each preceding year.[5]

Plaintiffs do not dispute the manner in which the Special Update Formula was used to compute and fix pre–1997 accrued benefits, or the manner in which annual credits were subsequently made to the individual Cash Balance Accounts. Plaintiffs instead claim that if they retire before age 65, in general they will receive only the value of the fixed Special Update Benefit, and will not receive any of the amounts subsequently credited to their Cash Balance Accounts in 1997, 1998, 1999, 2000, etc.

Plaintiffs claim that § 4.06(a)(ii) has created this impermissible curtailment of their retirement benefits. The disputed provision states in relevant part that:

> (A) For a Pension Commencement Date before the Normal Retirement Age of a Participant who is eligible for the Special Update Formula ... the Participant's pension benefit, payable monthly, for his or her life, equals the greater of:
>
> (1) the Accrued Benefit derived from his or her Cash Balance Account under Section 4.04, multiplied by the early commencement factor set forth [elsewhere] or
>
> ***4** (2) the Accrued Benefit determined under the [Special Update Formula] reduced by one-half percent for each calendar month or part thereof by which the Participant's age at the Pension Commencement Date is less than fifty-five years, except that each Participant with a Term of Employment of thirty or more years shall receive a monthly pension benefit reduced by one fourth percent for each calendar month or part thereof by which such Participant's age at the Pension Commencement Date is less than fifty-five years.

Amended Plan § 4.06(a)(ii) (Da 40.)

Translated into English, § 4.06(a)(ii) sets forth the manner in which retirement benefits are to be computed for those AT & T management employees (hired before 1997) who elect to retire before age 65. The section provides that such an employee who retires early will receive the greater of either 1) the actuarial value (at the time of retirement) of their Cash Balance Account, or 2) the value[6] of their Special Update Benefit.

Plaintiffs have attempted to demonstrate the operation of § 4.06(a)(ii) by using representative Plaintiff Donald Noerr as an example. (*See* Third Amended Complaint, ¶¶ 84–86; Noerr Benefits Table, attached to Defendants' Support Brief, Ex. G.) Plaintiff Donald Noerr's fixed Special Update Benefit amount was computed to be an annuity with an annual value at normal retirement age of $18,276. (Defendants' Support Brief, Ex. G.) In 1998, the year in which Noerr turned 55, the contents of his Cash Balance Account had an accrued annual value at normal retirement of $20,082.[7] In 1999, annual pay and interest credits raised the retirement annuity value of Noerr's Cash Balance Account to $21,300. In 2000, it increased to $22,380. At all times, the Special Update Benefit amount remained fixed at $18,276.

Because Noerr had been employed by AT & T for at least five years, his rights under the plan had vested. This meant that under the amended Plan, he could retire at any time and collect the present actuarial value of the contents of his Cash Falance Account. Additionally, because Noerr turned 55 in 1998, under the amended Plan he became eligible to collect the entire fixed amount of the Special Update Benefit without discount or penalty, pursuant to § 4.06(a)(ii)(A)(2). Although the amended Plan provided for both methods of calculating early retirement benefits, had Noerr elected to retire early in 1998, § 4.06(a)(ii) would have required him to collect the greater value of *either* the fixed Special Update Benefit, *or* the 1998 actuarial value of his Cash Balance Account's age 65 annuity value.

Although the accrued value of the annuity in Noerr's Cash Balance Account had increased to a projected $20,082 at retirement age (65), if he had collected it ten years early (at age 55) the actuarial value would have been $11,293. Because the Special Update Benefit amount ($ 18,276) available to Noerr was greater than the actuarial value of the Cash Balance Account annuity, pursuant to § 4.06(a)(ii) Noerr would receive the Special Update Benefit amount.

***5** The same result would have been repeated had Noerr elected to take early retirement in 1999 (when the updated Cash Balance Account actuarial value would have been $12,988), in 2000 (actuarial value of $14,814), or in 2001 (actuarial value of $16,374). Not until 2003, when the actuarial value of Noerr's Cash Balance Account was predicted to reach $19,834, would Noerr have collected the actuarial value of his Cash Balance Account instead of the Special Update Benefit amount.

The crux of Plaintiffs' claims in Counts Ten and Eleven stem from the preceding facts. Plaintiffs contend that, because benefits continued to accrue annually in Noerr's Cash Balance Account, Noerr's early retirement benefit impermissibly remained fixed at $18,276 each year from 1998 until 2002. Plaintiffs claim that in practice, the amended AT & T Plan requires many older participants to either accept the Special Update Benefit and forfeit any retirement benefits accrued after the Special Update was set (as pled in Count Eleven—violation of ERISA § 204(c)(3)), or impermissibly conditions employees' receipt of accrued benefits by forcing them to delay receiving their pensions until the actuarial value of the Cash Balance Account surpasses the fixed Special Update Benefit amount (as pled in Count Ten—violation of ERISA § 203(a)).

In response to Plaintiffs' claims, Defendants have moved to dismiss Counts Ten, Eleven, and Twelve. Defendants assert that Plaintiffs have fundamentally misread the terms of the amended Plan, and have mis-applied the cited ERISA provisions. According to AT & T, there is nothing improper about the manner in which § 4.06(a)(ii) calculates early retirement benefits. In fact, AT & T's contends that the amended Plan has actually enhanced pension benefits, expanded distribution rights, and implemented a new guaranteed minimum benefit for older employees.

A. *Plaintiffs' "law of the case" Argument*

Before considering the substance of Defendants' motion, the Court must address a threshold argument raised by Plaintiffs, namely that an earlier decision of Judge Politan renders the merits of Defendants' third motion for partial dismissal barred by the "law of the case" doctrine. Given Judge Politan's prior ruling, Plaintiffs theorize that the Court should now decline to reach the merits of Defendants' motion to dismiss.

As initially noted, On July 6, 2001, Plaintiffs moved before Judge Politan for leave to file a Third Amended Complaint. Defendants opposed Plaintiffs' motion, and argued that allowing another amendment of the complaint would be futile. Defendants claimed that Plaintiffs' proposed Counts Ten, Eleven, and Twelve were destined to fail as a matter of law, and attempted to convince Judge Politan that the complaint should not be amended to include the three new counts.

In his November 19, 2001 Letter Opinion, Judge Politan granted Plaintiffs leave to file their Third Amended Complaint. Judge Politan gave only a passing mention to Defendants' argument, and stated that "in opposition, the Defendants merely attempt to argue the merits of the new allegations, which is inappropriate for purposes of deciding a motion to amend." (Nov. 19, 2001 Letter Op. at 4.)

***6** Based on Judge Politan's foregoing conclusion, Plaintiffs now assert that Defendants should be barred from raising the same arguments they previously raised before Judge Politan. Plaintiffs point out that Defendants have merely attempted to recycle their failed arguments, and therefore ask the Court to ignore the arguments that Judge Politan already considered and "rejected."

Having reviewed Judge Politan's November 19, 2001 decision, the Court finds that Plaintiffs' request lacks merit. Judge Politan did not rule on whether Plaintiffs' claims could succeed as a matter of law. Quite to the contrary, Judge Politan expressly noted that Defendants' attempt to argue the merits of the new allegation was "inappropriate for purposes of deciding a motion to amend."

Judge Politan declined to consider Defendants' arguments because they were raised at the wrong time. Because Defendants' allegations are properly raised in their Rule 12(b)(6) motion to dismiss, however, the Court will turn its attention to the alleged deficiencies in Plaintiffs' Third Amended Complaint.

B. *Defendants' Motion to Dismiss Counts Ten and Eleven of the Third Amended Complaint*

When considering the merits of Defendants' motion to dismiss, it bears repeating that "[n]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan. ERISA does, however, seek to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits ... [W]hen Congress enacted ERISA it 'wanted to ... make sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." ' *Lockheed Corp. V. Spink,* 517 U.S. 882, 887 (1996) (internal citations omitted).

As one appellate court has noted, " 'The central problem to which ERISA is addressed is the loss of benefits previously promised.' ERISA does not concern itself with the amount of benefits promised ... but whatever the size, once those benefits have 'vested,' ERISA does not allow the benefits to be 'forfeited." ' *Huppeler v. Oscar Mayer Foods Corp.,* 32 F.3d 245, 246 (7th Cir.1994) (internal citations omitted.)

In keeping with the preceding, ERISA Section 203(a), 29 U.S.C. § 1053(a) (ERISA's nonforfeitability requirement), guides that:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is *nonforfeitable upon the attainment of normal retirement age* ... A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(emphasis added.) Although § 203(a) directs that a vested employee must be provided with 100% of their accrued retirement benefit upon attainment of normal retirement age, it says nothing of employer reductions of retirement benefits paid before normal retirement age. Such reductions are contemplated by ERISA Section 204(c)(3), 29 U.S.C. § 1054(c)(3), which directs in relevant part that:

> ***7** if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age ... the employee's accrued benefit ... shall be the actuarial equivalent of such benefit.

Plaintiffs claim that § 4.06(a)(ii) of AT & T's amended Plan runs afoul of both provisions. In Count Ten, Plaintiffs allege that "the Amended Plan document conditions entitlement to the accrued benefits derived from the participant's Cash Balance Account on the participant not retiring before the normal retirement age and receiving a distribution of his or her ERISA protected benefits.[8] Under the amended Plan documents, the right to the cash balance benefit accruals is not unconditional as required by ERISA Section 203(a), 29 U.S.C. § 1053(a)." (Third Amended Complaint. ¶ 88.)[9]

Relatedly, Count Eleven of Plaintiffs' Third Amended Complaint alleges that "[s]ection 4.06(a)(ii) provides that participants who retire before normal retirement age and receive ERISA-protected benefits[10] will *not* receive the actuarial value of the annual retirement benefits that they accrued in their Cash Balance Accounts in 1998, 1999, 2000, etc. Section 4.06(a)(ii) violates ERISA section 204(c)(3) because it deprives participants who retire before the normal retirement age of the actuarial value of their cash balance benefit accruals in 1998, 1999, 2000, and succeeding years." (Third Amended Complaint, ¶ 91.)

At first glace, Plaintiffs' allegations appear to state valid claims under both ERISA § 203(a) and § 204(c)(3). As alleged in Count Ten, it appears that employees (such as Plaintiff Noerr) who wish to receive their Cash Balance Account accruals after 1997 must agree to wait to retire and thereby give up receipt of their Special Update Benefit. Conditioning receipt of the one benefit (post–1997 Cash Balance accruals) on giving up receipt of the other benefit (the non-actuarially adjusted Special Update amount), would certainly appear to violate §

203(a)'s requirement that a vested employee be provided 100% of their accrued benefit, without forcing them to first give up one benefit in exchange for receiving another.

The alleged violation pled in Count Eleven initially appears even clearer. In order to obtain the value of the Special Update Benefit, which reflects all work performed before 1997, an employee must agree to collect a flat amount, regardless of what benefits are credited in 1997, 1998, 1999, etc. If the Special Benefit Amount is fixed in 1997 and remains constant, the actuarial value received by the employee for work performed in the ensuring years seemingly must be zero.

Although Plaintiffs' claims initially appear viable, closer inspection reveals that they are fatally flawed. For both Counts Ten and Eleven, an insurmountable obstacle in Plaintiffs' path is their assumption that the Special Update Benefit amount represents an accrued benefit that is payable without actuarial reduction before normal retirement age. If that were the case, both Counts Ten and Eleven would state a claim upon which relief can be granted. Unfortunately for Plaintiffs, upon careful examination of the terms of the amended Plan, the Court must conclude that the actuarially unreduced Special Update Benefit amount as paid by § 4.06(a)(ii)(A)(2) is not an accrued retirement benefit, but is instead a type of early retirement subsidy.

***8** Other courts, and even ERISA itself, have noted that "an accrued benefit is not the amount of pension payment a recipient receives by retiring early, it is the amount of pension payment a recipient achieves at normal retirement age." *Atkins v. Northwest Airlines, Inc.,* 967 F.2d 1197, 1201 (8th Cir.1992), *citing* 29 U.S.C. § 1002(23)(A) (defining the term "accrued benefit"). "Section 1053(a) prohibits forfeiture *after* 'the attainment of normal retirement age.' It grants no right to early retirement benefits before reaching that age." *Hansen v. Western Greyhound Retirement Plan,* 859 F.3d 779, 782 (9th Cir.1988) (citation omitted).

An employer is under no obligation to allow an employee to collect early retirement benefits. In fact, if an employer elects to provide early retirement benefits, federal law does not forbid the employer from discounting the early retirement benefits provided to an employee. While an employer's right to discount benefits is limited by ERISA § 204(c)(3), the provision was enacted only to ensure that employers who provide discounted early retirement benefits provide at least the present actuarial value of the employee's future normal retirement age benefits.

Stated another way, when an employee elects to retire early and is offered an early retirement benefit, ERISA § 204(c)(3) is satisfied (and the employee receives their total nonforfeitable benefit pursuant to ERISA § 203(a)) so long as the employee receives *at least* the actuarial value of their normal retirement age benefit. Any positive difference between what the employee is offered and the present actuarial value of the employee's accrued normal retirement benefit is properly considered a subsidy. The Third Circuit has looked to the Internal Revenue Code for a definition of a "benefit subsidy," and has commented that a "benefit subsidy is there defined as the excess in value of a benefit over the actuarial equivalent of the normal retirement benefit." *Ashenbaugh, et al. v. Crucible, Inc.,* 854 F.2d 1516, 1521 n. 6 (3d Cir.1988).

In *Ashenbaugh,* a plan required a considerable actuarial reduction for early receipt of normal retirement benefits. For employees with thirty years service, however, the actuarial reduction was waived. Based on the previously quoted definition, the Third Circuit found that "the value in excess of the amount that would be available to a retiring employee under the comparable actuarially-reduced normal retirement provisions" was properly considered a subsidy. *Id* It is the distinction between nonforfeitable retirement benefits and optional early retirement subsidies upon which Counts Ten and Eleven turn, and upon which they must ultimately fail.

When claiming amended Plan § 4.06(a)(ii) violates ERISA, Plaintiffs correctly cite the principle that "a right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause loss of such right is a forfeitable right at that time." 26 C .F.R. 1.411(a)–4. Further, Plaintiffs have correctly reminded the Court that "if benefits ... have *accrued* [but] those benefits are disregarded when benefits commence before normal retirement age, the plan has effectively conditioned entitlement to the benefits ... on the employee not taking a distribution prior to retirement age." IRS Notice 96–8, 1996–1 C.B. 359 (emphasis added).

***9** The accuracy of the preceding provisions aside, Plaintiffs' reliance upon them is misplaced. Although the preceding provisions address the impermissible conditioning of accrued rights (i.e., nonforfeitable benefits payable at normal retirement), they neither address nor prevent the implementation of limited early retirement subsidies that decrease from one year to the next. Therefore, because the actuarially unreduced Special Update Benefit is tantamount to an early retirement subsidy, Plaintiffs' attempt to apply the preceding provisions to § 4.06(a)(ii) is unavailing.

While the Special Update Benefit may be a "benefit" in layman's terms, and while vested employees have a "nonforfeitable accrued right" to collect the total sum of the Special Update Benefit upon reaching normal retirement age, the right to collect the entire amount early and without actuarial reduction is not a benefit of the type contemplated by 26 C.F.R. 1.411(a)–4 and IRS Notice 96–8. Therefore, even though Plaintiffs rightly argue that "payment of benefits earned after a Plan amendment [cannot] be made conditional on whether a participant forgoes early retirement benefits earned before 1997." (Opposition Brief, p. 7.), the Court finds that AT & T's amended Plan does not have the effect of conditioning accrued rights in the manner Plaintiffs allege. Although AT & T's amended Plan places limits and conditions on receipt of an early retirement subsidy, it never places limits or conditions on the receipt of at least the full actuarial value of an employee's nonforfeitable accrued benefits.

The distinction between the limited early retirement subsidy and the protected nonforfeitable benefits can be seen by looking to the effect of the amended AT & T Plan on Plaintiff Noerr. Noerr, who turned 55 in 1997, had an accrued Special Update Benefit amount of $18,276. As the Special Update Benefit amount equates to the value of all benefits accrued before 1997, it must follow that as of 1997, the full value of Noerr's normal retirement benefit at age 65 was guaranteed to be $18,276.

Pursuant to ERISA § 203(a), Noerr was unconditionally entitled to receive $18,276 upon reaching normal retirement. Had Noerr retired in 1997, his benefit could not have been less than the actuarial equivalent of $18,276, pursuant to ERISA § 204(c)(3). Nothing in the prior plan gave Noerr the right to collect the entire Special Update Benefit amount without actuarial reduction upon reaching age 55.[11]

As an incentive to promote early retirement, AT & T amended its Plan to include § 4.06(a)(ii). For the first time, although ERISA did not require it to do so, AT & T allowed Noerr to collect the entire $18,276 Special Update Benefit amount at age 55, without the otherwise required actuarial reduction. Although ERISA only obligated AT & T to provide Noerr with the 1997 actuarial value of the $18,276 (which would have been something less than $11,000), AT & T elected to provide a subsidy and increase the early retirement annuity immediately available to Noerr from the nonforfeitable actuarial value (less than $11,000) to the full value at normal retirement age ($18,276).

***10** It is the subsequent reduction of this initial annual subsidy of approximately $7,200 (i.e., the difference in value between Noerr's nonforfeitable actuarially reduced benefit (less than $11,000) and the non-reduced Special Update Benefit amount ($18,276)) that is ultimately at issue here.

In 1998, at age 56, Noerr's nonforfeitable accrued benefit at normal retirement age increased to $20,082 (as demonstrated by the new balance of his Cash Balance Account). Although the value of the accrued benefit that Noerr would realize at normal retirement had increased in 1998, pursuant to § 4.06(a)(ii), Plaintiff did not have the option to collect any additional increase over the amount available to him in 1997. Instead, AT & T continued to offer him an annual annuity equal to the actuarially unreduced Special Update Benefit amount ($18,276).

Contrary to Plaintiffs' assertions, even though § 4.06(a)(ii) only provided Noerr the same fixed $18,276 annuity that had been available to him in 1997, AT & T neither decreased Noerr's compensation for his previously accrued benefits nor failed to provide him credit for additional normal retirement benefits accrued in 1998. Instead, the fixed $18,276 annuity offered to Noerr in 1998 can conceptually be thought of as the combination of two sums: 1) an actuarial value component increased to reflect the 1998 credit to Noerr's Cash Balance Account (i.e., to reflect the actuarial value of the $1,806 normal retirement benefit added to Noerr's account in 1998), and 2) a decreased subsidy amount, having less value than the $7,200 subsidy previously offered in 1997.

A similar increase in accrued actuarial value and decrease in subsidy amount would occur in 1999, 2000, and 2001. Eventually, at some notional point in 2002 or 2003, the annual increases to the Cash Balance Account's normal retirement benefit would cause the present actuarial value of the benefit to surpass the fixed subsidized early retirement benefit. From that point forward, Noerr would be entitled to recover the actuarial value of his accrued benefit at normal retirement, but would not be entitled to a subsidy. Noerr's benefit amount would continue to increase each year, as annual credits continued to be made to his Cash Balance Account. At age 65, the actuarial value of Noerr's normal retirement benefit ultimately would equal the unadjusted value of his Cash Balance Account.

By setting the Cash Balance Account's initial annuity value at normal retirement equal to the fixed annuity value of the Special Update Benefit at normal retirement, AT & T was able to retain and carry forward the actuarial value of each employee's pre–1997 accrued benefits. The amended Plan neither forfeits subsequent increases in these accrued benefits' actuarial value or conditions their receipt. The only thing eligible employees incrementally lose is their access to AT & T's gratuitous subsidy; a subsidy which allows them to collect *more than* the actuarial value of their guaranteed normal retirement benefits for a defined period of time. The implementation of such a subsidy with a built in gradual reduction does not run contrary to either ERISA §§ 203(a) or 204(c)(3).

***11** The operation of AT & T's amended Plan, as demonstrated in the preceding example, is readily distinguishable from the plan in the primary case cited by Plaintiffs, *Esden v. Bank of Boston,* 229 F .3d 154 (2d Cir.2000). In *Esden,* a Plan's lump-sum early pay-out option was found to violate ERISA § 203(a). When setting an employee's normal retirement benefit, the Plan provided for annual contributions to a Cash Balance Account, and included a minimum annual credit for interest. In computing the lump sum payout amounts, the Plan projected current cash balances forward at a fixed rate of interest, and then discounted them back to present value at a different statutory rate.

Plaintiff Esden sued because the interest rate used in projecting the current cash balance forward was less than the minimum interest rate guaranteed to actually accrue under the terms of the Cash Balance Plan. Esden theorized that this process resulted in a lump sum payout amount that was less than the actuarial value of the minimum amount she was guaranteed to have received had she deferred collection until normal retirement.

The Second Circuit agreed with Esden. The court noted that "the rules governing distributions from defined benefit plans are framed in terms of the normal retirement benefit—typically a single-life annuity payable at retirement age. Any distribution in optional form (such as a lump sum) must be no less than the actuarial equivalent of such a benefit." The Second Circuit thus found that "because Plaintiff received less than she would have had she not elected to take her benefit in the form of a lump sum, part of her pension benefit was made conditional on the distribution option chosen, in violation of the anti-forfeiture provisions of ERISA § 203(a); I.R.C. § 411(a)(2) and Treas. Reg. § 1.411(a)–4." *Esden,* 229 F.3d at 157–58.

The case at hand is distinguishable from *Esden* because under AT & T's amended Plan, employees can never opt to take their retirement benefit at a time or in a form that is less than the actuarial value of the amount they are entitled to receive at normal retirement. As Defendants rightly note, the amended Plan provides that the early retirement benefit is never less than the normal retirement benefit, reduced to reflect the fact that the participant is receiving the benefit before normal retirement age. Because Plaintiffs are always guaranteed to receive at least as much as the present value of the annuity promised to them at normal retirement age, Counts Ten and Eleven fail to state valid claims under ERISA.

Although the alleged reduction of benefits complained of by Plaintiffs fails to support the claims in either Count Ten or Eleven, it seems to the Court that the same alleged benefits reduction could potentially amount to a violation of ERISA § 204(g), 29 U.S.C. § 1054(g).[12] It is conceivable that by offering employees a decreasing early retirement subsidy each year, instead of a fixed subsidy and increasing actuarial contributions, § 4.06(a)(ii) could violate § 1054(g)'s "anti-cutback" provision.

***12** Under the terms of AT & T's pre-amendment Plan, employees who met specific age and service requirements became eligible at age 55 to receive their entire normal retirement benefit without reduction. For eligible employees who happened to turn 55 in 1997, that unreduced pension amount would coincidentally have been identical to the pension amount calculated by the Special Update Formula. These individuals would thus theoretically have been able to collect their entire unreduced pension benefit upon reaching age 55, under either the old or the new Plan.

Under the amended Plan, however, the previously promised benefit (the right to collect the entire unreduced pension amount upon reaching 55) would slowly be eroded, because each year § 4.06(a)(ii) would effectively replace a portion of the previously unreduced amount with the actuarial value of newly accruing benefits. The eligible employees would thus no longer be able to collect both the entire benefit previously promised them and collect the guaranteed actuarial value of new benefits as they accrue. Mindful that under ERISA § 204(g), a plan amendment may not serve to reduce or eliminate a pre-existing accrued early retirement benefit, forcing these employees to collect new benefits in lieu of some portion of what had previously been promised them would necessarily seem to violate ERISA.

Based on the preceding possibility, the Court would theoretically be inclined to find that the amendment could violate ERISA. The Court will not do so, however, because Congress has clearly directed that amendments of the type implemented by AT & T are permissible.

When enacting ERISA, Congress considered the operation of a plan amendment virtually identical to § 4.06(a)(ii), and expressly directed that previously promised unreduced benefits may be converted into equal or larger actuarially reduced benefits without running afoul of ERISA. A Senate Report accompanying the Retirement Equity Act of 1984 ("REA")[13] described the relevant plan amendment, and concluded that it would not violate the ERISA § 204(g):

> consider a plan that provides an annual benefit of 1 percent of average pay per year of service at normal retirement age under the plan (age 65). The plan provides an early retirement benefit to a participant who has attained age 55. This early retirement benefit is reduced to 50 percent of the benefit payable to the participant at age 65. In the case of the participant who attains age 55 and who has completed 30 years of service, the amount of the annual benefit payable beginning at age 55 is not actuarially reduced under the plan.
>
> Under the bill, if the plan is amended on January 1, 1985 (effective on that date), to require a full actuarial reduction of early retirement benefits in all cases, then the full actuarial reduction could be made for any participant who severs employment before attaining age 55 and completing 30 years of service. Under the bill, however, if a participant met the age and service requirements for the unreduced early retirement benefit on January 1, 1985, then the plan amendment could not reduce that benefit below the level to which the participant would have been entitled if retirement had occurred immediately before the plan amendment was effective.
>
> ***13** Under this plan, if a participant did not meet the plan's requirements for unreduced early retirement benefits on January 1, 1985, but the participant later satisfied those requirements, then *the participant's accrued benefit under the plan would be the greater of (1) the accrued benefit as of the date of the plan amendment, without taking the actuarial reduction into account, or (2) the accrued benefit provided by the plan when the benefit becomes payable, after the full actuarial reduction. Accordingly, the participant's accrued benefit will not be reduced by the plan amendment, but it will not be increased by subsequent service or pay raises until the subsequent increase brings the participant's accrued benefit to a level in excess of the accrued benefit as of January 1, 1985.*

S.Rep. No. 98–575, at 29 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574–75 (emphasis added), *partially quoted in Corcoran,* 1997 WL 602859, *4.

As clarified in *Corcoran,*

> under the terms of the Senate Report, therefore, § 204(g) guarantees that the plan participant will be entitled to the greater of (I) the benefit that had accrued as of the date of the amendment, taking account of any pre-amendment subsidies that the participant was eligible to receive based on his or her age and service as of the date of separation (under the terms of the pre-amendment plan), or (ii) the benefit under the post-amendment benefit formula which is in place when the employee stops working ... [the report] does not, however, assure that post-amendment years of service will be included in calculating benefits under the pre-amendment plan.

1997 WL 602859, *4. Nor does the report prevent an employer from fixing an employee's benefits under the old plan until such time as their benefits as calculated by the new plan surpass the previously guaranteed benefit level. Thus, while Plaintiffs' allegations as described in Counts Ten and Eleven may at first glance appear to make out an additional claim under ERISA § 204(g), Congress has expressly directed that they do not. Accordingly, Counts Ten and Eleven of the Third Amended Complaint will be dismissed with prejudice.

C. *Plaintiffs' Twelfth Claim for Relief*

Plaintiffs' Twelfth Claim for relief alleges that Section 4.06(a)(ii) of the Amended Plan violates ERISA section 204(g) on slightly different factual grounds. In general terms, Plaintiffs claim that by reducing benefits by "one half percent" per month (6% per year) for commencement before age 55, or by "one quarter percent" per month (3% per year) for participants with over 30 years of service, § 4.06(a)(ii) causes participants to impermissibly lose or forfeit their ERISA-protected annuities.

ERISA § 204(g), codified at 29 U.S.C. § 1054(g), reads in relevant part:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan ...
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of -
>
>> ***14** (A) eliminating or reducing an early retirement benefit ..., or
>>
>> (B) eliminating an optional form of benefit,
>
> with respect to *benefits attributable to service before the amendment* shall be treated as reducing accrued benefits.

(emphasis added.) Thus, in order for the Plan amendment embodied in § 4.06(a)(ii) to violate ERISA § 204(g), it must either eliminate or reduce a previously available pre-amendment benefit.

As Defendants rightly claim, § 4.06(a)(ii) does not have such an effect. Under the terms of the pre-amendment Plan, those eligible to collect a "service pension"[14] had the option to retire early, but had to contend with the same "Early Retirement Discount" that now appears in § 4.06(a)(ii). (*See* Pre–Amendment Plan, § 4.1(a) (Eligibility), Da p. 350; § 4.2(1) (Early Retirement Discount), Da p. 363.)

Under the terms of the pre-amendment Early Retirement Discount, eligible employees could opt to collect their service pensions early, albeit at a reduced amount. According to Pre–Amendment Plan § 4.2(1), eligible employees' monthly pension allowance:

> shall be reduced by .5% for each calendar month or part thereof by which the Employee's age at time of retirement is less than 55 years, except that each Employee retired with a term of Employment of 30 or more years shall receive a monthly pension allowance reduced by 0.25% for each calendar month or part thereof by which such Employee's age at the time of retirement is less than 55 years.

Pursuant to Pre–Amendment Plan § 4.1(a), an employee eligible for a service pension was anyone 65 years of age with at least 10 years service, 55 years of age with 20 years service, 50 years of age with 25 years service, or any age with 30 years service. Employees who did not fall into one of the preceding age and service categories were not eligible to collect early retirement benefits.

Through the Plan amendment embodied in § 4.06(a)(ii), the .5% and .25% monthly Early Retirement Discounts were retained. Notably absent, however, were the age and service restrictions contained in the Pre–Amendment Plan. Under § 4.06(a)(ii), any employee who qualified for the Special Update Formula became eligible to receive an early retirement benefit, regardless of age.

By way of example, under the old plan an employee who was 48 years of age with 28 years service would not have been immediately eligible for early retirement benefits, falling 2 years shy of the age requirement for those with at least 25 years of service, and 2 years shy of the service requirement for those under 50 years of age. Therefore, the employee would have had no alternative but to wait until age 50 to collect benefits discounted 6% annually, or age 55 to collect full benefits.

Under § 4.06(a)(ii) of the Amended Plan, the same employee would be immediately eligible for benefits, albeit at the .5% per month (6% per year) discounted rate. The employee could also wait until age 55 to collect full benefits. Therefore, the result of the amendment is to allow a greater number of employees to obtain early retirement benefits, albeit at a rate less than what they would have received when they ultimately became eligible under the pre-amendment plan.

***15** The crux of Plaintiffs' argument is that:

> AT & T's restated Plan document modified the Plan to apply the 6% per year reduction factor to retirements at any age without regard to whether participants could have grown into eligibility under the prior plan rules. This means that a 6% reduction is now applied to retirements before age 50 and is applied to circumstances in which the participant could otherwise have grown into eligibility for unreduced benefits or benefits subject to the 3% reduction factor.

(Plaintiffs' Opposition Brief, p. 13.) Based on the modification extending the early retirement option to retirees younger than 50, Plaintiffs theorize that:

> A 6% per year reduction for retirements before the age of 50 is illegal in the absence of full disclosure to employees because it excessively reduces the benefit amounts [that would be] available [without discount] at age 55. A 6% factor is also illegal for retirements before and after age 50 when participants could have grown into eligibility for the 3% reduction.

(*Id.*)

In plain language, Plaintiffs' argument is that the Plan Amendment, without adequate notice, provides employees with the option to take substantially reduced benefits at an earlier age than what they previously could have opted for only at a later age. Contrary to Plaintiffs' assertions, nothing in § 4.06(a)(ii) of the Amended Plan prevents employees from "growing into" the benefits that were once available to them; it merely presents them with the option to receive less money per year at an earlier age, thus providing them with retirement benefits over a greater number of years.

Given the fact that § 4.06(a)(ii) of the Amended Plan only increases the number of employees eligible for early retirement benefits, and maintains the same Early Retirement Discount Rate previously provided for in the Plan, it escapes the Court how the Plan Amendment could violate ERISA § 204(g) in the manner Plaintiffs allege. Mindful that ERISA § 204(g) prohibits plan amendments that serve to reduce or eliminate *previously available* benefits, Plaintiffs can not make out a violation of ERISA § 204(g) as a matter of law. Defendants motion to dismiss Count 12 of the Third Amended Complaint is accordingly granted.[15]

D. *Defendants' Motion to Dismiss Counts One, Two, Eight, and Nine*

Counts One, Two, Eight, and Nine of the Third Amended Complaint are identical to counts previously dismissed by Judge Politan.[16] Defendants argue that these Counts should not be included in the Third Amended Complaint, as Plaintiffs have failed to articulate any unusual circumstances that would justify revisiting issues previously considered and dismissed by the Court on their merits. Therefore, Pursuant to the law of the case doctrine, Defendants seek to have Counts One, Two, Eight, and Nine dismissed from the Third Amended Complaint.

Plaintiffs have provided only limited opposition to Defendants' motion. Plaintiffs claim (without legal support) that it was appropriate for them to re-plead the Counts in the Third Amended Complaint because the dismissals of the claims are subject to appeal. Plaintiffs also contend that Judge Politan considered and rejected Defendants' arguments when he ruled on Plaintiffs' motion for leave to file the Third Amended Complaint.

***16** Having reviewed Judge Politan's November 2001 ruling, there is no evidence he rejected, or even considered, Defendants' request to again dismiss Counts One, Two, Eight, and Nine. Absent such evidence, the Court is free to examine Defendants' allegations that the Counts should again be dismissed. Having reviewed the relevant case law, the Court is convinced that they should be.

The Third Circuit has stated that "under the 'merger rule,' prior interlocutory orders merge with the final judgment in a case, and the interlocutory orders (to the extent that they affect the final judgment) may be reviewed on appeal from the final order." *In re Westinghouse Securities Lit.,* 90 F.3d 696, 706 (3d Cir.1996). In *Westinghouse,* a district court's two prior partial dismissal orders merged with a final order dismissing all remaining claims with prejudice, and thus were subject to review by the Third Circuit on appeal.

Based on *Westinghouse,* Plaintiffs should rest assured that they need not (and in the interests of efficiency, should not) re-plead dismissed claims in an amended complaint solely to preserve those claims for appeal. Instead, they should focus on the claims that have survived, and should attempt to make the remaining components of their action as clear and concise as possible. When the remainder of the action is finally addressed on the merits, Plaintiffs will be free to then appeal all of the Court's prior dismissals of their claims. Until that time, however, Counts One, Two, Eight, and Nine should not be included in the Complaint. Accordingly, they are dismissed.

III. *CONCLUSION*

For the foregoing reasons, Defendants' motion for partial dismissal of Counts One, Two, Eight, Nine, Ten, Eleven, and Twelve of the Third Amended Complaint is granted.

An appropriate Order follows.

ORDER

This matter having come before the Court on Defendants' third motion for partial dismissal pursuant to Fed.R.Civ.P. 12(b)(6); and

The Court having considered the submissions of the parties; and

The Court having considered the prior decisions of Judge Politan issued in this matter; and

The Court having decided this matter without oral argument pursuant to Fed.R.Civ.P. 78; and

For the reasons set forth in the Court's Opinion issued this day; and

For good cause shown;

It is on this *17* day of October, 2002 ORDERED that Defendants' motion is granted; Counts One, Two, Eight, Nine, Ten, Eleven, and Twelve of the Third Amended Complaint are hereby dismissed.

All Citations

Not Reported in F.Supp.2d, 2002 WL 32159586

Footnotes

1 While these motions were pending, the first of several discovery disputes began. These disputes first saw motions for reconsideration filed with Magistrate Judge Hedges, and then saw appeals of Judge Hedges' rulings filed with this Court.

2 The parties dispute various facts surrounding the amendment of the Plan. None of those facts are relevant to the motion to dismiss. For purposes of this Motion only, the Court will take as true the allegations of the Third Amended Complaint.

3 Cash Balance Plans have become increasingly popular. They provide each employee with a notional benefits "account" that allows the employee to track the accrual of retirement benefits on a yearly basis over the term of their employment. Typically, the balance of the account at a given moment in time represents the value of the benefit the employee will receive upon reaching normal retirement age. For an in-depth analysis of the history and operation of Cash Balance Plans, *see Eaton v. Onan Corp.,* 117 F.Supp.2d 812, 816–18 (S.D.Ind.2000.)

4 By way of simplified example, if a hypothetical 45–year–old employee's Special Update Benefit value was set at $10,000, that employee would be guaranteed to receive $10,000 a year beginning at age 65. If the employee had sufficient years of service, under the terms of the Plan they could elect to retire early and receive their full pension at age 55 without penalty or reduction. That full pension amount at early retirement would be the same $10,000.

5 In the case of the hypothetical 45–year–old employee, the Cash Balance Account's value would be computed as follows. The employee's "account" would be "opened" with an amount sufficient for that employee to collect an annuity at retirement equal to their Special Update Benefit amount (i.e., $10,000). At the conclusion of 1997, the employee's account would be credited with an amount equal to a defined percentage of the participant's pay for 1997, and credited with a set amount of interest on the participant's account balance. Each year thereafter, the employee would receive similar credits, and the account balance would steadily increase. Therefore, at any moment in time, the employee's Cash Balance Account value reflects the minimum future value at retirement age of their retirement annuity.

6 Reduced value if they are younger than 55, full value if they are 55 or older. As will be discussed, this reduction forms the alleged basis of Count Twelve. The reduction formula has no significant bearing on Counts Ten or Eleven.

7 This annuity value represented the value of the Special Update Benefit (comprising all benefits earned before 1997), and annual pay and interest credits for 1997 and 1998.

8 The Court presumes that this reference to "ERISA protected benefits" is to a potential distribution of the Special Update Benefit amount pursuant to § 4.06(a)(ii)(A)(2). (Footnote added.)

9 In their brief in opposition to Defendants' motion to dismiss, Plaintiffs imply for the first time that the Plan amendment also violates ERISA § 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B) (133% annual accrual method). Although the 133% method is mentioned in Plaintiffs' Third Amended Complaint (¶ 83), Plaintiffs do not claim in their Complaint that AT & T's amended Plan violates the 133% accrual method. The Court will not consider allegations which are not pled in the Complaint, and which are raised for the first time in opposition to a motion to dismiss.

10 Again, the Court presumes that this is a reference to receipt of the Special Update Benefit amount. (Footnote added.)

11 The pre-amendment Plan did allow for collection of full un-reduced benefits at Age 55 with sufficient years of service. The relevance of that early retirement provision will be discussed later in this section, and in the Court's discussion of Count Twelve.

12 While Plaintiffs allege in Count Twelve that § 4.06(a)(ii) violates ERISA § 204(g), Plaintiffs' claim is distinct from the one discussed here by the Court *sua sponte.* Plaintiffs' separate § 204(g) claim as contained in Count Twelve is discussed in the next section of this Opinion.

13 The REA amended ERISA § 204(g) to protect early retirement benefits and retirement-type subsidies. *See Corcoran v. Bell Atlantic Corp.,* 1997 WL 602859, *4 n. 6 (E.D.Pa. Sept. 23, 1997).

14 To the best of the Court's understanding, a "service pension" operated in a similar fashion to the Plan's present early retirement benefits, by allowing eligible employees to retire before normal retirement age.

15 Plaintiffs' tangential allegations surrounding the excessive nature of the .5% per month (6% per year) reduction of benefits do not fit within the framework of an ERISA § 204(g) violation, absent evidence that the Plan had previously calculated the Early Retirement Discount in a more favorable manner. To the extent that identical reduction rates

were contained in the pre-amendment Plan. Plaintiffs should have challenged them directly.

Similarly, Plaintiffs' claim that Defendants failed to provide adequate notice of the substantial impact of the amendment, and thereby induced employees to take an earlier pension for a lesser amount of money than they otherwise would have absent the amendment, does not constitute an ERISA § 204(g) violation. As Defendants note, such an allegation is more in keeping with the notice and fiduciary duty claims contained elsewhere in the viable portions of Plaintiffs' Third Amended Complaint.

16 Counts One, Two, and Eight were dismissed with prejudice on 12(b)(6) grounds. Count Nine was dismissed on subject matter jurisdiction grounds, after Judge Politan found that Plaintiffs lacked standing to pursue the claim. While Plaintiffs could ultimately attempt to show that they have gained standing to pursue Count Nine and ask for its reinstatement, as of yet Plaintiffs have not made such a showing or request.