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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NOREEN HULTEEN, ELEANORA COLLET, ARMA HORTON, ELIZABETH SNYDER, and all others similarly situated, and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Plaintiffs,

v.

AT&T CORPORATION, AT&T MANAGEMENT PENSION PLAN, AT&T PENSION PLAN, and AT&T EMPLOYEES' BENEFIT COMMITTEE

Defendants.

No. C 01 1122 MJJ

Date: February 25, 2003
Time: 9:30 a.m.
Courtroom: 11
Judge: Hon. Martin J. Jenkins

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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Firestone Tire and Rubber Co. v. Bruch
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Hasbrouck v. Texaco, Inc.
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Newport News Shipbuilding and Dry Dock Co. v. EEOC
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Probe v. State Teachers' Retirement System
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Public Employees Retirement System of Ohio v. Betts
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1 **NOTICE OF MOTION AND MOTION**

2 TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on Tuesday, February 25, 2003, at 9:30 a.m., or as soon 4 thereafter as the matter may be heard in Courtroom 11 of the United States District Court for 5 the Northern District of California, 19th Floor, 450 Golden Gate Avenue, San Francisco, CA, 6 Plaintiffs Noreen Hulteen ("Hulteen"), Eleanora Collet ("Collet"), Linda Porter ("Porter"), and 7 Elizabeth Snyder ("Snyder") ("individually named plaintiffs"), and the Communications 8 Workers of America, AFL-CIO ("CWA") will move pursuant to Federal Rules of Civil 9 Procedure 56 for summary judgment against AT&T Corp. ("AT&T"), AT&T Management 10 Pension Plan ("MPP"), AT&T Pension Plan ("PP"), and the AT&T Employees' Benefit 11 Committee ("EBC"), (collectively referred to as "Defendants"), claiming that Defendants have 12 discriminated against them or, in the case of CWA, its members, based on sex and pregnancy in 13 violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, 14 ("Title VII") and the Employee Retirement Income Security Act of 1974, as amended, 29 15 U.S.C. §1001 *et seq.* ("ERISA").

16 Plaintiffs challenge Defendants' method of calculating retirement and other related 17 benefits at the time an individual retires and receives those benefits which fails to credit 18 pregnancy-related disability leaves ("pregnancy leaves") taken prior to 1979, but does credit 19 temporary disability leaves taken for all other reasons during the same period. Pursuant to the 20 Joint Case Management Statement and Order and based on the pleadings, the Parties' Joint 21 Stipulations of Fact ("JSF ¶__"), and documents contained in the Parties' Joint Appendix, 22 ("JA, Tab __"), Plaintiffs move for summary judgment on the issue of Defendants' liability on 23 Plaintiffs' claims.[1]

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25 [1] This is a class action seeking relief on behalf of all AT&T employees affected by the 26 challenged system. *See* JSF ¶66 n.2. The August 7, 2001 Joint Case Management Statement and Order, pp. 7-8, provides for an initial liability determination in Phase 1 covering Plaintiffs' 27 claims and certain of Defendants' affirmative defenses related to timeliness, followed by Phase 2, in which secondary liability and class certification issues will be addressed, and Phase 3, in 28 which issues relating to damages will be determined.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. "Term of Employment" and "Net Credited Service Date."

During all relevant times, AT&T and its Bell System operating companies including PT&T, for whom the individually named plaintiffs previously worked,[2] have used a service crediting system that, for purposes of pension benefits, relies on an employee's "Term of Employment" ("TOE"). JSF ¶17. The Pension Plans define TOE as a period of continuous employment in the service of the company. *Id.* AT&T also maintains a Net Credited Service ("NCS") date[3] for all employees consisting of their original hire date and any "adjustments" made by AT&T or any Bell System operating company for periods during which no service credit has been accrued.[4] JSF ¶18. There is no requirement in the Plans that Defendants calculate TOE using NCS, but they have chosen to do so. JSF ¶22, 23.

Pursuant to the MPP and the PP for collectively-bargained employees (collectively referred to as "Pension Plans"), Defendants calculate the pension benefits affected by the alleged discrimination challenged in this case based, in part, on an employee's TOE. JSF ¶17. Other termination-related benefits are based on an employee's NCS. JSF ¶19, 46, 64. The greater an employee's NCS or TOE, the greater her pension and other termination-related

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[2] For Phase 1 purposes, the parties have agreed that the Court should consider AT&T's and PT&T's pre-April 29, 1979 service credit, disability, and personal leave policies and AT&T's current policies and practices used to determine service credit for pension and related benefits purposes. Individually named plaintiffs worked for PT&T prior to transferring to AT&T. JSF ¶2, 5. Plaintiffs do not waive their argument that this case includes all affected AT&T employees who previously worked for AT&T or any Bell System operating company, including PT&T. JSF ¶66, n.2.

[3] AT&T employees' NCS dates have always been determined by AT&T personnel practices and procedures. JSF ¶21.

[4] For example, an employee who started work on January 1, 1970 and who had no periods during which service credits did not accrue, would have an NCS date of January 1, 1970, and, as of December 31, 2000, a TOE of 31 years. However if the same employee had, during her entire employment, 90 days of pregnancy-related leave for which she did not receive service credit, her NCS date would be moved forward by 90 days, *i.e.*, to April 1, 1970, and Defendants would correspondingly reduce her NCS by 90 days, to 30 years and 275 days.

benefits. *See* JSF ¶34, 46, 55, 64, 65. Thus, any practice or policy that reduces an employee's NCS or TOE results in lower pension and other retirement benefits.

B. Treatment of Leaves for Pregnancy by AT&T and Its Bell System Operating Companies Prior to the Pregnancy Discrimination Act of 1978.

At all relevant times, AT&T and Bell System operating company employees disabled for reasons other than pregnancy have received full service credit for the entire period of their disability absences. JSF ¶68, 71; JA, Tab 45 (¶2). Therefore, such absences have not resulted in a forward adjustment of their NCS dates or a reduction in their TOE. As shown below, prior to the April 29, 1979 effective date of the Pregnancy Discrimination Act of 1978, 42 U.S.C. §2000e-(k) ("PDA"), pregnancy-related leaves taken by female employees of AT&T and its Bell System operating companies did not receive the same treatment.

1. Pregnancy leave treated as "Personal Leave."

Prior to August 7, 1977, AT&T and PT&T treated pregnancy leaves as "personal leaves," not as disability leaves. JSF ¶66 and n.2; JA, Tab 45 (¶2). Personal leaves received a maximum of 30 days service credit, even if they lasted longer than 30 days. *Id.*; JSF ¶67. Consequently, a woman who was on pregnancy leave for more than 30 days had her NCS date moved forward by the number of days her leave exceeded 30 days.

On August 7, 1977, PT&T adopted the Maternity Payment Plan ("MatPP"). JSF ¶70. Under this plan, pregnant employees became eligible for up to six weeks of service credit for the period following delivery, in addition to up to 30 days of service credit for pre-delivery leaves.[5] *Id.* However, regardless of the length of the period for which a pregnant employee was disabled by pregnancy, to the extent that her pre-delivery leave exceeded 30 days or her post-delivery leave exceeded six weeks, the leave was deemed personal leave and resulted in a change to her NCS date. *Id.*

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[5] Plaintiffs contend that the terms of the MatPP were not applied uniformly when in effect. JSF ¶70 n.3; ¶87. However, this dispute does not affect the appropriateness of summary judgment.

Starting April 29, 1979, the effective date of the PDA, AT&T and its Bell System operating companies implemented the Anticipated Disability Program ("ADP"), which superseded the MatPP. Under the ADP, which is still in effect today, service credit for pregnancy leaves is provided on the same basis as leaves taken for other temporary disabilities. JSF ¶79, 80.

2. Treatment of non-pregnancy-related disabilities occurring during pregnancy leave ("Double Disability").

Prior to the MatPP, employees of PT&T who took a personal leave of absence because of pregnancy and, while on that leave, became temporarily disabled for reasons unrelated to pregnancy ("double disability"), remained ineligible for sickness or disability benefits or for NCS credit in excess of 30 days. JSF ¶73. Similarly, while the MatPP was in effect, employees whose pregnancy-related disabilities lasted longer than six weeks and who then had a second disability received no NCS for the period of their second disability. JSF ¶76. In other words, because such "double disabilities" began during pregnancy leave, they were treated as personal leave. In contrast, PT&T employees on disability leave who became temporarily disabled for a different reason than their original disabilities were eligible for benefits and NCS credit for the entire period of both their original and their second disabilities. JSF ¶74, 77.

3. Required leaves prior to the onset of and/or following pregnancy-related leaves ("Forced Leaves").

Prior to the MatPP, some PT&T employees were forced by company practice or policy to take involuntary leaves of absence prior to the onset of their pregnancy-related disabilities. JSF ¶81. Other employees were involuntarily forced to stay out of work after their period of pregnancy-related disability because there was no guaranteed right to return to their previous positions. JSF ¶85. AT&T and PT&T classified these leaves as personal leave. JSF ¶85. Accordingly, these employees did not receive more than 30 days' service credit for their entire pregnancy leaves, including the time that they were placed on forced leave. *Id.* In contrast, during this period, employees on disability leaves unrelated to pregnancy were not required to start their leave before the onset of their disability or to remain off the payroll once medically

able to return to work. JSF ¶82, 86.

Between August 7, 1977 and April 29, 1979, the terms of the MatPP allowed pregnant employees to remain on their jobs until the date they and their physicians agreed leave should begin, and guaranteed them reinstatement at the expiration of their pregnancy leaves. JSF ¶83, 87. *But see* n.5, *supra*.

C. Defendants Calculate Retirement and Termination-Related Benefits Without Giving Full Service Credit for Pre-1979 Pregnancy-Related Disability Leaves.

The ADP's modification of leave policies in 1979 was designed and intended to bring AT&T and its Bell System operating companies into compliance with the PDA. JSF ¶80; JA, Tab 22 (HulteenCWA 0075). The new plan did not include service credit for leaves taken prior to April 29, 1979. JSF ¶69, 72, 75, 78, 79, 84, 88. At no time have Defendants included time deducted due to pregnancy, forced leave, or "double disability" leave when calculating the NCS date of female employees who took pregnancy-related leaves prior to April 29, 1979. *Id.*

D. Defendants Have Authority to Adjust NCS Dates and/or Calculate TOE to Credit Employees for Time Spent on Pregnancy Leave.

AT&T is, and has been, the plan administrator of the PP and MPP. JSF ¶11. AT&T has delegated to the EBC the discretion and authority to interpret and apply the PP and MPP for all purposes relevant to this case, including the determination of claims regarding whether employees are entitled to service credit or additional TOE under Plan language. JSF ¶13, 101. AT&T has delegated to the Benefit Claim and Appeal Committee ("BCAC") and/or the Pension Plan Administrator the initial discretion and authority to review and resolve all claims for benefits and/or service credit under the PP or MPP. JSF ¶15, 16, 102. The EBC serves as the final review committee under the PP and MPP for appeals by participants of decisions of the BCAC or the Pension Plan Administrator. JSF ¶13, 103.

Under the terms of the Pension Plans, Defendants may add service credit to an employee's TOE when an employee is reinstated to employment and receives back pay for the period of his/her absence from the payroll. JSF ¶100. Defendants also have the authority to change an employee's NCS date where it is determined that the date has been calculated

incorrectly by AT&T and/or any Bell System operating company, or where it is determined that the change is necessary to comply with legal requirements. JSF ¶104.

E. Individually Named Plaintiffs.[6]

Each individually named plaintiff took pregnancy leave prior to April 29, 1979. JSF ¶2. In accordance with the policies in effect prior to this date, each plaintiff's NCS date was moved forward by the number of days she was on pregnancy leave (less the 30 days of service credit allowed for personal leave) ("adjusted NCS date"), reducing her total NCS. JSF ¶28, 37, 39, 50, 59. Each individually named plaintiff left PT&T and became an employee of AT&T on or prior to January 1, 1984, the effective date of the court-ordered divestiture of AT&T. JSF ¶1, 29, 40, 51, 60. Each of their NCS dates traveled with them. *Id.* At no time after Plaintiffs became AT&T employees, did AT&T recalculate their NCS dates to include their previously uncredited pregnancy-related disability leave. JSF ¶30, 41, 52, 63. As a consequence, each individually named plaintiff either receives or will, upon retirement, receive lower pension and termination-related benefits than employees of comparable tenure who were absent due to other temporary disabilities. JSF ¶34, 46, 55, 64, 65.

AT&T involuntarily terminated plaintiff Hulteen due to a reduction in force in 1994. JSF ¶33. Defendants calculated Hulteen's pension using her "adjusted NCS date," and continue to pay her monthly pension checks based on this calculation. JSF ¶33, 34. Had Defendants credited Hulteen for all or some of the 210 uncredited days she was off work due to pregnancy leave and her "double disability," Hulteen's NCS date would have been earlier and, due to Defendants' reliance on NCS to calculate her TOE, her benefits under the MPP would have been greater. JSF ¶28, 34.

In 1998, AT&T notified plaintiff Collet that she could retire under the Voluntary Retirement Incentive Program ("VRIP"). JSF ¶44. The VRIP offered Collet the right to retire

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[6] Plaintiffs have exhausted their administrative remedies prior to filing this lawsuit as required by Title VII. JSF ¶97. The individually named plaintiffs have also exhausted administrative remedies to the extent required by ERISA. Answer and Defenses to First Amended Complaint, ¶46, 58, 69, 80, 87.

and receive enhanced pension benefits and other benefits. *Id.* Defendants calculated her pension benefits using her "adjusted NCS date," thereby reducing the value of her pension and other benefits. JSF ¶39, 46.

Plaintiff Porter is a current AT&T employee. When she retires, the calculation of the value of her pension and/or any other retirement offerings will be greater if Defendants credit her for the time she was forced to take a leave prior to her anticipated due date and the time she was off work due to pregnancy-related disability. JSF ¶50, 55.

On April 28, 2000, plaintiff Snyder voluntarily terminated her employment with AT&T pursuant to a Voluntary Termination Offer ("VTP"). Under the VTP, termination benefits were determined, in part, based on her "adjusted NCS date." JSF ¶64. In addition, Defendants calculated her pension using her "adjusted NCS date" to calculate her TOE. Because Defendants used the "adjusted NCS date," the value of her pension and related benefits was reduced. JSF ¶59, 65.

II. ARGUMENT

A. Summary Judgment Standard.

Under Federal Rule of Civil Procedure 56, summary judgment must be granted where the moving party demonstrates that no genuine issue exists as to any material fact and that judgment is appropriate as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). In this case, where the parties have filed cross-motions for summary judgment, and have agreed on numerous factual stipulations and documentary evidence, the Court must still evaluate each motion to determine whether summary judgment is appropriate. *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1135-36 (9th Cir. 2001). The stipulated facts together with settled law demonstrate that plaintiffs are entitled to summary judgment regarding liability as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

B. Defendants Are Liable Under Title VII.

As the undisputed facts show, when an employee retires or is terminated from AT&T,

Defendants, to determine the applicable retirement and termination-related benefits, apply service crediting policies that treat pregnancy-related leaves differently from non-pregnancy-related disability leaves taken before April 29, 1979. This Circuit has held that such policies are facially discriminatory and constitute a violation of Title VII and the PDA. *Pallas v. Pacific Bell*, 940 F.2d 1324, 1326 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992) ("*Pallas*"). Defendants will argue that Plaintiffs' claims are time-barred because, *inter alia*, they must have been raised when the discriminatory polices were adopted, not when they caused injury to the Plaintiffs. Defendants' position is wrong. Because Defendants' policies are facially discriminatory under Title VII, they are subject to challenge at any time, including when, as in this case, they are applied to reduce the retirement benefits the Plaintiffs would otherwise receive. *See, e.g., Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 n. 5 (1989). Moreover, precedents involving challenges to retirement and related benefits show that a challenge is timely if filed when the benefit is denied. *See, e.g., EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086, 1094 (6th Cir. 1996) (state troopers who knew of mandatory retirement age policy could challenge it at time of forced retirement). The reasoning of these cases is fully applicable here.

1. Defendants' application of facially discriminatory service crediting policies violates the Pregnancy Discrimination Act provisions of Title VII.

Title VII prohibits discrimination against any individual with respect to compensation, terms and conditions, or privileges of employment, because of such individual's sex. 42 U.S.C. §2000e-(2)(a).[7] In 1978, Congress amended Title VII by enacting the PDA, which makes clear that discrimination based upon pregnancy is sex discrimination prohibited by Title VII. The PDA provides in pertinent part:

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[7] Discrimination occurs whenever an employment policy or benefit "treats men and women differently on its face." *Frank v. United Airlines, Inc.*, 216 F.3d 845, 853-854 (9th Cir. 2000) (*citing Gerdom v. Continental Airlines*, 692 F.2d 602, 608 (9th Cir. 1982) (*en banc*)) (airline's "consistent" policy of establishing different weight standards for male and female flight attendants was facially discriminatory because it "applie[d] less favorably to one gender"), *cert. denied*, 532 U.S. 914 (2001).

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. (Emphasis added.)

42 U.S.C. § 2000e-(k).

In *Pallas*, the Ninth Circuit held that Pacific Bell's[8] system that denied service credit for pre-1979 pregnancy-related disability leaves facially violated the PDA provisions of Title VII. 940 F.2d at 1327. The Pacific Bell system at issue in *Pallas* is identical to Defendants' current system challenged here. Specifically, like Defendants, Pacific Bell measured an employee's length of service for purposes of determining retirement benefits by a "net credited service system." *Id.* at 1326; JSF ¶22. Under this system—the very same system applied to the individually named plaintiffs here—an employee was credited for absences due to temporary disability, but not for time spent on personal leave, *Pallas*, 940 F.2d at 1326; JSF ¶66-69; JA Tab 45, (¶2), and prior to the PDA, female employees disabled due to pregnancy were required to take personal leave, *Pallas*, 940 F.2d at 1326; JSF ¶66, 70. After enactment of the PDA, however, these policies were changed to allow women with pregnancy-related disabilities to take disability leave rather than personal leave.[9] *Pallas*, 940 F.2d at 1326; JSF ¶79; JA Tab 45, (¶2). Pacific Bell, like Defendants here, implemented this change in policy prospectively only, and continued to deny service credit to women who were disabled due to pregnancy prior to April 29, 1979. *Id.*; JSF ¶66 and n.2, 69, 72, 75, 78, 84, 88.

Lana Pallas contended that Pacific Bell's failure to give credit for pregnancy-related disability prior to 1979 was a current violation of the PDA. *Pallas*, 940 F.2d at 1325. In finding that Ms. Pallas' complaint stated a valid claim under Title VII, the court held, *inter*

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[8] PT&T was a Bell System operating company and a subsidiary of AT&T prior to 1984. JSF ¶5. In *Pallas*, the court described both pre- and post-divestiture employers as "Pacific Bell." *Pallas*, 940 F.2d at 1325.

[9] At this time, Bell System operating companies also stopped forcing women to leave work before they were disabled and/or denying them reinstatement at the end of their disability period. JSF ¶79, 80, 84, 86, 88.

1 *alia*, that Pacific Bell's net credited service system was "not facially neutral." Instead, the
2 court found that the system "facially discriminates against pregnant women" because it
3 "distinguishes between similarly situated employees: female employees who took leave prior
4 to 1979 due to pregnancy-related disability and employees who took leave prior to 1979 for
5 other temporary disabilities." *Id.*, at 1327.

6 Defendants' system for calculating service credit makes the same illegal distinction
7 between similarly situated employees. Because of Defendants' ongoing application of
8 discriminatory service crediting policies, women who took pre-PDA pregnancy-related leaves
9 receive less NCS than otherwise similarly situated male employees who took leaves of absence
10 for other temporary disabilities during that period. JSF ¶66-88. Defendants' use of these NCS
11 dates denies or reduces economic benefits to Plaintiffs and all similarly situated female
12 employees as compared to similarly situated male employees with the same length of service
13 but whose prior disability leaves were not pregnancy-related. *See* JSF ¶34, 46, 55, 64, 65.
14 Given this same disparate treatment, the holding in *Pallas* requires a finding that Defendants'
15 system is facially invalid under Title VII. *Pallas*, 940 F.2d at 1327.

16 Also directly on point is *Carter v. AT&T*, 870 F. Supp. 1438 (S.D. Ohio 1994), *vacated*
17 1996 WL 656571 (S.D. Ohio Sept. 13, 1996).[10] There, again, the court addressed the same
18 NCS system being challenged here. The court followed *Pallas*, holding that AT&T's system
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20 [10] The *Carter* decision was vacated upon plaintiff's motion to facilitate a settlement offered by AT&T. This does not, however, diminish its informational value or the
21 persuasiveness of the court's analysis in a case involving the same defendant and the same
22 issue. *See, e.g., U.S. v. Walgren*, 885 F.2d 1417, 1423 and n.8 (9th Cir. 1989) (considering but rejecting analysis in vacated decision). Indeed, courts are generally critical of a party's attempt
23 to vacate an unfavorable decision through the device of settlement or other voluntary actions that render the underlying dispute moot. *See, e.g., U.S. Bancorp Mortgage Co. v. Bonner Mall*
24 *Partnership*, 513 U.S. 18, 23-28 (1994) (refusing to vacate a Ninth Circuit decision after the parties' settlement rendered a grant of certiorari moot: "Judicial precedents are presumptively
25 correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be
26 served by a vacatur." *Id.*, at 26.). *See also Ringsby Truck Lines, Inc. v. Western Conference of*
27 *Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982) ("If the effect of post-judgment settlements were automatically to vacate the trial court's judgment, any litigant dissatisfied with a trial court's
28 findings would be able to have them wiped from the books.").

constituted a facial violation of Title VII and the PDA. Ms. Carter was denied pension-related benefits offered by AT&T in 1991 because she received only 30 days of service credit for a pregnancy-related leave in 1967, despite having been forced by company policy to stop working in her sixth month of pregnancy, before she became disabled. The court found that "[b]oth the enhancement system enacted by AT&T and AT&T's denial of credit for pregnancy leave violated Title VII." *Id.* at 1444.

> AT&T's system credits employees for temporary disability leave but not for temporary pregnancy leave. Title VII requires that men and women be treated alike, and when a company is allowed to enact a plan that distinguishes pregnancy from other temporary disabilities, it violates the principles underlying Title VII. Moreover, AT&T required women to leave after six months of pregnancy, but refused to give them more than one month of credit for this forced leave. Therefore, the company forced women to leave solely because they were pregnant, and refused to give them credit for the time they were gone. Since pregnancy is an immutable factor that is peculiar only to women, to treat it differently by applying a separate leave policy is sex discrimination. Thus, AT&T's enhancement plan incorporated disparate treatment based solely on gender, and such incorporation violates Title VII.

Id.

The holdings in *Pallas* and *Carter* that AT&T's system for determining service credit was facially invalid are fully consistent with Supreme Court and lower court decisions construing the PDA. *See, e.g., Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex"). *See also Int'l. Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197-199 (1990); *Harris v. Pan American Airways*, 649 F.2d 670, 678-679 (9th Cir. 1980). Likewise, Defendants' application of their discriminatory NCS system is facial discrimination based on pregnancy in violation of Title VII and the PDA.

Defendants' policies not only contravene the directly applicable holdings in *Pallas* and *Carter*, but they also have been consistently at odds with the EEOC's interpretation of Title VII. The EEOC's 1972 Sex Discrimination Guidelines, enacted long before the passage of the PDA, explicitly mandate that "[w]ritten and unwritten employment policies and practices governing matters such as...the accrual of seniority and other benefits and privileges...shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same

terms and conditions as they are applied to other temporary disabilities." 37 Fed. Reg., No. 66 (April 5, 1972) (later amended and codified at 29 C.F.R. §1604.10). As early as 1977, these Guidelines were upheld by the U.S. Supreme Court in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142, n.4 (1977) (denying seniority to women on pregnancy leaves violates Title VII).

The EEOC continues to interpret Title VII in the same manner today. 29 C.F.R. §1604.10; App. A to §1610.11. ("Title VII has always prohibited an employer from failing to accord a woman on pregnancy-related leave the same seniority . . . accrual accorded those on other disability leaves."). Moreover, the EEOC's Compliance Manual explicitly interprets Title VII to prohibit employers from using discriminatory pre-PDA pregnancy leave rules to determine current retirement and related benefits. EEOC Compliance Manual, No. 915.003 (Oct. 3, 2000), "Employee Benefits," §III.B (visited Nov. 10, 2002) <http://www.eeoc.gov/docs/benefits.html> (hereinafter "EEOC Compliance Manual") ("[E]mployers must treat pregnancy-related leaves the same as other medical leaves in calculating the years of service that will be credited in evaluating an employee's eligibility for a pension or for early retirement. These principles also apply to pregnancy-related leaves taken before the effective date of the PDA, where an employer uses years of service to establish eligibility for retirement benefits.").[11]

Defendants will likely cite to a ruling from the Seventh Circuit, *Ameritech Benefit Plan Committee v. Foster-Hall*, 220 F.3d 814 (7th Cir. 2000), *cert. denied sub nom., CWA v. Ameritech Benefit Plan Committee*, 531 U.S. 1127 (2001), which, contrary to *Pallas*, upheld Ameritech's use of a similar service crediting system to calculate eligibility for an early retirement offering. However, that decision is not entitled to any weight in this Circuit where

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[11] In fact, AT&T unsuccessfully sued the EEOC in an effort to have the agency's interpretation of the law declared invalid. JA, Tab 45; *AT&T v. EEOC*, 270 F.3d 973, 974 (D.C. Cir. 2001) (affirming dismissal of AT&T's lawsuit on grounds that no final agency action had occurred sufficient to trigger judicial review of EEOC's interpretation of the PDA). *Cf. Bell Atlantic Cash Balance Plan v. E.E.O.C.*, 976 F.Supp. 376, 382-83 (E.D. Va. 1997), *aff'd*, 182 F.3d 906 (4th Cir. 1999) (denying similar request for declaratory relief by another employer using pre-PDA Bell System operating company policies).

Pallas is the governing precedent.[12] In addition, the Seventh Circuit's ruling failed entirely to acknowledge or attempt to distinguish this Circuit's directly contrary holding in *Pallas* that the Bell System NCS policies used by Pacific Bell "facially discriminate[] against pregnant women." 940 F.2d at 1327. *See also EEOC v. Bell Atlantic Corp.*, 80 FEP Cas. (BNA) 164, 1999 WL 386725, at * 4 (S.D.N.Y. 1999) (finding that, when considering a service credit calculation system comparable to that at issue here, *Ameritech* was "wrongly decided"). Moreover, the EEOC has explicitly rejected the Ameritech holding as inconsistent with guarantees under Title VII, and, instead, adopted the reasoning of this Circuit in *Pallas* and of the district court in *Carter*. EEOC Compliance Manual, n. 96. *See also AT&T*, 270 F.3d at 974.

Defendants will also likely argue that since they did not make the initial discriminatory service crediting decisions or adjustments, but instead carried forward the NCS date that traveled with the employee from a previous Bell System operating company, they should be excused from liability for their continuing use of such dates. While it is true that Plaintiffs' service dates moved with them at divestiture from PT&T to AT&T, JSF ¶29, 40, 51, 60, Defendants have both the authority and the responsibility to correct an employee's NCS date where it is determined that the date has been calculated incorrectly by AT&T and/or any Bell System operating company, or where it is determined that the change is necessary to comply with legal requirements. JSF ¶104. *See Bazemore v. Friday*, 478 U.S. 385, 397 (1986) (defendant was "under an obligation to eradicate salary disparities based on race that began prior to the effective date of Title VII"). However, Defendants have chosen not to do so. JSF ¶30, 41, 52, 63. Since the PDA "requires an employer to give an employee who misses work

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[12] When there is a circuit court decision directly on point in a particular case, authority from other circuits is not entitled to any weight. *Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987); *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981), *cert. denied on other grounds*, 459 U.S. 828 (1982); *Gardner Construction Co. v. Assurance Co.*, 2000 WL 1677959, at *4 (N.D. Cal. Nov. 3, 2000) ("Given the choice between binding precedent and persuasive precedent from another circuit in open disagreement with this circuit's law, this Court must adhere to the former.").

due to pregnancy the same benefits it gives an employee who misses work for other reasons, such as disability," *AT&T*, 270 F.3d at 974, Defendants' service credit calculation policies are facially discriminatory in violation of the PDA and Title VII. *Pallas*, 940 F.2d at 1327.

C. Plaintiffs' Challenge to Defendants' Policies Is Timely.

1. Facially discriminatory policies can be challenged at any time, including when applied.

Because Defendants' service crediting policies are facially discriminatory, Plaintiffs may challenge them at any time. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 (1989). In *Lorance*, the Supreme Court differentiated two kinds of policies that could result in discrimination, and the time at which each policy must be challenged: facially neutral policies that must be challenged when adopted (even if adopted with a discriminatory motive); and facially discriminatory policies that, by definition, discriminate each time they are applied and can, therefore, be challenged at any time. 490 U.S. at 912. As explained by the majority, "[t]here is no doubt, of course, that a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time," *id.*, because such systems "by definition discriminate each time they are applied," *id.*, at 912, n. 5.[13] Here, Defendants apply and perpetuate facially discriminatory service crediting policies each time they calculate and pay retirement and termination-related benefits. Thus, each application of the discriminatory system triggers the limitations period anew. *Pallas*, 940 F.2d at 1327.

As recognized in *Pallas, id.*, this conclusion follows from the Supreme Court's analysis in *Bazemore v. Friday*, 478 U.S 385 (1986). In *Bazemore*, facially discriminatory pay policies were based on a racially segregated workforce that became unlawful once Title VII became

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[13] There was no disagreement in *Lorance* between the majority and Justice Marshall's dissent on the principle that a facially discriminatory policy may be challenged at any time. The point of disagreement was that Justice Marshall would have held that a facially neutral system adopted with the intention to discriminate, like that in *Lorance*, as well as a facially discriminatory system, like that in *Bazemore v. Friday*, 478 U.S. 385 (1986), could be challenged when applied. As explained *infra*, Justice Marshall's position was later codified by the 1991 Civil Rights Act. *See* 42 U.S.C. §2000e-5(e)(2).

applicable to the plaintiffs' employer in 1972. Although the employer abandoned the old segregated system to comply with Title VII's prohibition of discrimination, it continued to make compensation decisions using the pre-Title VII pay structure caused by the old segregated system. The plaintiffs sued to correct the pay discrepancies resulting from the pre-Title VII facially discriminatory practices that were not corrected after Title VII became applicable to the employer. A unanimous Court held that the action could be maintained. *Bazemore*, 478 U.S. at 394-397. In so holding, the Court left no doubt that perpetuating the pre-Title VII compensation policies was a separate, actionable violation of the Act. *Id.* at 395 ("[A] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute.").

The factors present in *Bazemore* are present here. In *Bazemore*, even after the race discrimination which had adversely affected pay levels became illegal, the defendant continued to use the prior salary system that was infected with discrimination. As a result, African-American employees continued to receive less pay than they would have absent the pre-Title VII discrimination. Similarly in this case, Defendants enforce an NCS system that facially discriminates against female employees on the basis of pre-PDA pregnancy leaves. Defendants' continued application of these NCS policies to Plaintiffs perpetuates the pre-PDA discrimination. As in *Bazemore*, the result is less economic benefits paid to the plaintiffs. Given these facts, Defendants have a present, ongoing duty—currently enforceable by Plaintiffs—to eliminate the differences in service credit caused by their pre-PDA discrimination. *Bazemore*, 478 U.S. at 396.

Moreover, to the extent that Defendants' service crediting policies can be arguably described as a "seniority system,"[14] Plaintiffs are specifically authorized by statute to bring their challenge when the facially discriminatory system is applied to them. Under the Civil Rights

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[14] Plaintiffs do not concede that these policies constitute a seniority system, either *bona fide* or not.

Act of 1991, Title VII was amended to include, *inter alia*, a provision specifying when a challenge to an intentionally discriminatory seniority system could be brought, as follows:

> For purposes of this section [on "time for filing charges"], an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. § 2000e-5(e)(2). The 1991 Act overruled the holding in *Lorance* that a facially neutral seniority system must be challenged when adopted, even if it was enacted with an intent to discriminate. Instead, the Act recognized and codified the reasoning of the dissent in *Lorance*, that would have held that both a facially discriminatory system, like that in *Bazemore*, and a facially neutral system adopted with the intention to discriminate, like that in *Lorance*, could be challenged when applied. The 1991 Act, however, did not overrule the Court's finding in *Lorance* that a facially discriminatory system could be challenged at any time. Rather, it underscored and codified the Court's finding that facially discriminatory systems, such as Defendants' system at issue here, can be challenged when applied.[15]

Defendants' facially discriminatory system is, by its very construct, intentional discrimination. *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002) ("by its very terms, facial discrimination is 'intentional'") (citation omitted). Accordingly, under Title VII as amended by the Civil Rights Act of 1991, Plaintiffs can challenge Defendants' service crediting calculation system—if it is deemed to be a seniority system—not only when adopted or enacted, but "when [the] person[s] aggrieved [are] injured by the application of the seniority

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[15] Nor did the 1991 Act overrule the Court's finding that a facially neutral system adopted without the intent to discriminate and applied neutrally must be challenged when adopted. This was the case in *United Airlines v. Evans*, 431 U.S. 553, 557-58 (1977) (holding that policy that both male and female employees who were terminated or resigned for any reason and then later rehired lost prior seniority credit was "neutral in its operation"). Here, however, the *Evans* holding is irrelevant because the system Plaintiffs challenge is facially discriminatory, not facially neutral. *See Pallas*, 940 F.2d at 1326-27.

system." 42 U.S.C. 2000e-5(e)(2).

2. Challenges to Retirement or Termination-Related Benefits Are Timely Made When the Benefit is Denied.

In addition to the governing Title VII decisions discussed above, courts have allowed challenges to retirement benefits and related policies as timely if filed when the benefit is denied. *See, e.g., Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1075, 1078 (1983) (allowing sex discrimination challenge to deferred compensation retirement plan arising from plaintiff's election to participate, rather than plan adoption); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1057, 1058 (2d Cir. 1982) (allowing sex discrimination challenge in 1974 to a pension plan adopted in 1952), *vacated and remanded*, 463 U.S. 1223 (1983);0 *Probe v. State Teachers' Retirement System*, 27 F.E.P. Cas (BNA) 1306, 1981 WL 352, at *1-2, *6 (C.D.Cal. 1981) (allowing sex discrimination challenge to retirement plan at plaintiffs' retirement), *aff'd in part and rev'd in part*, 780 F.2d 776 (9th Cir. 1986). Thus while Defendants will argue that Plaintiffs should have brought their complaint earlier, Plaintiffs properly brought their action at the time their injuries occurred—at retirement, when they were discriminatorily denied retirement and termination-related benefits.

Moreover, cases decided under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.*, ("ADEA") are directly analogous. In the context of the ADEA, courts routinely permit challenges to employee benefit plan provisions at the time such benefits are denied. *See, e.g., EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086, 1094 (6th Cir. 1996) (state troopers who knew of mandatory retirement age policy could challenge it at time of forced retirement); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211, 218-19 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984) (challenge to forced retirement policy under ADEA timely if made when benefits denied); *Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 212 (4th Cir. 1982) (excluding older employees from pension plan can be challenged at time of retirement). *See also Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 163, 169 (1989) (1976 modification of plan benefit payment formula challenged in 1985

when plaintiff retired and became subject to modified benefits).

The injury at issue here falls directly under the reasoning of these precedents. Plaintiffs' injuries occur when Defendants calculate valuable economic benefits using the challenged NCS system, thereby causing female employees who took pre-PDA pregnancy leaves to receive lesser benefits when they retire than employees who took disability leaves for other reasons. This injury does not occur until the service crediting system is applied, the calculation is made, and the less valuable benefit is determined. *Pallas*, 940 F.2d at 1327.

D. Defendants Are Liable Under ERISA.

Signed into law in 1974, ERISA establishes specific obligations owed to participants by plan fiduciaries, as follows:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; . . . and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

29 U.S.C. § 1104(a)(1). Defendants failed to meet these obligations and thus violated ERISA by discriminating against women who took pregnancy-related disability leave prior to April 29, 1979. In addition, Plaintiffs claim benefits due and seek to enforce and clarify rights under the terms of the applicable Plan as guaranteed by 29 U.S.C. §1132(a)(1)(B).

1. Defendants breached their fiduciary duty to plaintiffs.

a. Defendants failed to discharge their duties solely in the interest of plan participants and beneficiaries.

ERISA requires fiduciaries to discharge their duties solely in the interest of the participants and beneficiaries and "for the exclusive purpose of providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A)(i). A fiduciary's decisions "must be made with an eye single to the interests of the participants and beneficiaries."

Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982).[16]

In *Pallas*, the Ninth Circuit held that Ms. Pallas had stated a cognizable claim under ERISA, identifying the very nature of the fiduciary breach alleged by Plaintiffs here:

> Calculation of the service term for purposes of eligibility in the program is an act subject to review for breach of fiduciary duty. (Citation omitted.) Pallas alleges that Pacific Bell breached its fiduciary duty by failing to act in the interests of plan participants. Discrimination constitutes a fiduciary breach for purposes of ERISA.

Pallas, 940 F.2d at 1327 (*citing Elser v. I.A.M. National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983)). Here, as in *Pallas*, Defendants' administration of the Plans—*i.e.*, their failure to calculate TOE in a neutral manner—was not in the best interest of the plaintiff participants. As described in Part II.B., *supra*, Defendants here engaged in precisely the same type of discriminatory "service term" calculation with regard to Plaintiffs' retirement applications as occurred in *Pallas*. As in *Pallas*, such discrimination by Defendants here constitutes a breach of fiduciary duty under ERISA. 940 F.2d at 1327.

Both the *Carter* decision and an interpretive opinion from the Department of Labor ("DOL"), the agency charged with enforcing ERISA's fiduciary provisions, also support such a finding. In *Carter*, the court concluded that "the Committee's determination that Ms. Carter was not entitled to pension benefits because of her pregnancy leave violated [Title VII]." 870 F. Supp. at 1448. Therefore, it found "their decision [to be] 'erroneous as a matter of law' and constituted a breach of their fiduciary duties." *Id.* (*citing Pallas*, 940 F.2d at 1327). These rulings are consistent with the DOL's interpretation of ERISA. In a 1993 Opinion Letter, DOL advised that plan fiduciaries are obligated to comply with "other federal laws," as well as ERISA, in discharging their duties:[17]

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[16] AT&T, the EBC, the BCAC, and the Pension Plan Administrator are fiduciaries. JSF ¶6, 14, 15, 16.

[17] The DOL interpretation is entitled to great deference. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). *See also Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197, 1202 (8th Cir. 1992) (DOL interpretation of ERISA is entitled to deference).

> [P]lan fiduciaries are responsible for administering their plans to assure compliance with both ERISA and other applicable federal laws, in recognition of the fact that such other laws are not preempted by ERISA. *See* 29 U.S.C. § 1144(d). Similarly, where the terms of a plan are consistent with ERISA, but are not consistent with the requirements of other applicable federal laws or regulations, plan fiduciaries should take appropriate steps to assure that the plan is amended to comply with all applicable legal requirements . . . [Section] 514(d) of ERISA provides that nothing in Title I of ERISA shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States. Thus, . . . noncompliance [with another federal] statute and any regulations issued thereunder would not be excused on the basis that the plan is in compliance with ERISA.

DOL Opinion Letter, 93-23A (1993 WL 349626 (ERISA)). Thus, the EBC's failure to award additional service credit to Plaintiffs for their pre-PDA pregnancy leaves—a violation of Title VII—violates ERISA's fiduciary standards as well.

Even if the Court were to determine that Title VII was not violated, this discrimination would nevertheless violate ERISA. Courts have prohibited plan fiduciaries from discriminatorily favoring one class of participants over another. The Ninth Circuit's ruling in *Pallas* that discrimination constitutes a fiduciary breach for purposes of ERISA was not dependent on a determination that Title VII had been violated. In *Pallas*, the Ninth Circuit cited its earlier decision in *Elser*, where discrimination in benefit allocation by an ERISA pension plan was held to constitute a failure to discharge duties solely in the interests of plan participants and beneficiaries.

In *Elser*, the Ninth Circuit reviewed a pension fund's cancellation of past service credit for employees whose employer had withdrawn from the fund; the pension fund cancelled past service credit for all such employees except those who either (1) were receiving a pension, or (2) had left employment more than 24 months prior to or within 30 days after the employer's withdrawal from the fund. The Ninth Circuit found such disparate treatment to violate ERISA in that it was arbitrary and capricious and was a structural defect under 29 U.S.C. § 1104; the otherwise lawful cancellation of past service credit was applied in a discriminatory fashion by the plan administrator. *Elser*, 684 F.2d at 656-658. The discriminatory cancellation of past service credit at issue in *Elser* is comparable to Defendants' discriminatory exclusion of participants' pregnancy leaves in determining eligibility for pension benefits here. Both forms

of discriminatory treatment deny benefits to a select sub-class of plan participants.

Likewise, in *Winpisinger v. Aurora Corp. of Illinois, Precision Castings Division*, 456 F.Supp. 559, 573 (N.D. Ohio 1978), cited with approval by the Ninth Circuit in *Elser*, the court held that an otherwise permissible forfeiture violated 29 U.S.C. § 1104(a)(1) because it favored union participants over non-union participants, thereby failing to fall evenly upon all participants. Although ERISA does not expressly proscribe discrimination based upon union membership (or sex or pregnancy), the court held that treating non-union participants less favorably than union participants was a violation of the fiduciaries' duty to act "solely in the interest of the participants and beneficiaries." *Winpisinger*, 456 F.Supp. at 573. Similarly here, Defendants have failed to discharge their duties as required by ERISA by treating female employees disabled by pregnancy less favorably than all other participants.

b. Defendants failed to discharge their duties in accordance with the documents governing the plans.

Fiduciaries must discharge their duties in accordance with the documents governing the Plans insofar as the documents are consistent with the provisions of ERISA. 29 U.S.C. § 1104(a)(1)(D). The Plans' fiduciaries used Plaintiffs' NCS dates, which excluded credit for pre-1979 periods of absence due to pregnancy leave, when determining Plaintiffs' eligibility for pension benefits under the Plans. In so doing, Defendants failed to act in accordance with the Plan documents and thus violated ERISA. *See* 29 U.S.C. § 1104(a)(1)(D).

Even though it is undisputed that Defendants use NCS to determine Plan eligibility, nowhere in the Plans themselves are the terms "net credited service" or "net credited service date" defined or used, nor do the Plans establish "net credited service" explicitly as the basis for eligibility for pension benefits. Moreover, the Plans do not advise an employee-participant that her "term of employment," which the Plans state is used for pension benefit calculations, will exclude periods of absences due to pre-1979 pregnancy-related disability. Significantly, no Plan provision requires that pregnancy leaves be excluded from TOE calculations. No Plan provision requires that TOE be calculated using the discriminatory NCS system. JSF ¶ 23. Indeed, under the terms of the Plans, TOE should include the pregnancy-related leaves of

Plaintiffs.

"Term of Employment" ("TOE") is defined in the Plans as "a period of continuous employment." JSF ¶17; JA, Tab 32 (PP § 2.35, AT&T/HULT 013447). According to the plan documents, the TOE "relating to periods of employment prior to January 1, 1984, . . . shall be recognized under the Plan in accordance with the provisions of this Article 8 and the provisions of Article 7." PP § 8.1, AT&T/HULT 013555. Article 7 provides that "Section 7.4(a) shall apply for determination of 'Term of Employment' in all cases under the Plan." PP § 7.4(a), AT&T/HULT 013542. Section 7.4(a)(i) provides in relevant part:

> Any absence from the service without pay . . . shall be considered as a break in the continuity of service and if any person is reemployed after such a break in the continuity of his or her service, the individual's Term of Employment shall be reckoned from the date of such reemployment; provided, however, that . . . (2) any break in the continuity of or absence from the service shall be considered as a leave of absence upon completion by an Employee, who had previously completed 6 months of continuous service, of 5 years of continuous service after termination of the absence.

AT&T/HULT 013542. Section 7.5 provides in relevant part: "Leave of absence shall not constitute a break in the continuity of service." AT&T/HULT 013546.[18]

Each of the Plaintiffs has completed more than five years of continuous service after the end of the absence due to pregnancy. Thus, under the explicit terms of the Plans, the pregnancy leaves of Plaintiffs did not constitute a break in the continuity of service. As a result, the TOE—*i.e.*, the "period of continuous employment"—of each Plaintiff should include all of the time that she was on leave due to pregnancy.

Notwithstanding the language of the Plans, Defendants did not use each Plaintiff's TOE to determine her benefits, but relied instead upon her NCS date, which "adjusted" her TOE by excluding part of her pregnancy disability leave taken before 1979. By using NCS, Defendants picked an independent, discriminatory calculation method that was wholly separate from the Plans' terms. Moreover, the Plans themselves authorize and/or require the EBC to administer the Plans—including "all questions . . . relating to Term of Employment"—in compliance with

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[18] The MPP contains the same provisions. *See* JA, Tab 30.

1 applicable laws. *See, e.g.*, JA, Tab 32 (PP § 7.3(a), AT&T/HULT 013541); JA, Tab 30 (MPP § 7.3(a), AT&T/HULT 012134); JA, Tab 27 (MPP § 9, AT&T/HULT 001536). As discussed *supra*, such applicable laws include Title VII and ERISA. As a result, Defendants' decisions to use the discriminatory NCS to calculate TOE and to deny benefits to Plaintiffs violated ERISA's fiduciary standards. Defendants' construction of the Plan, by imposing a standard not "in accordance with" the plan documents themselves, violated 29 U.S.C. § 1104(a)(1)(D).

2. Plaintiffs Were Wrongfully Denied Rights Under the Terms of the Pension Plans.

ERISA, at Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), authorizes a plan participant to file a claim "to recover benefits due to [her] under the terms of [her] plan, to enforce [her] rights under the terms of the plan, or to clarify [her] rights to future benefits under the terms of the plan." *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989). Plaintiffs seek exactly this relief here. Accordingly, for all the reasons set forth in Part II.D.1., *supra*, Defendants should be ordered to interpret and apply the terms of the Plans to enforce and clarify the rights and to provide the benefits Plaintiffs seek.

III. CONCLUSION

As required by Rule 56, no genuine disputes of material fact exist, and, under settled

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law, Plaintiffs are entitled to summary judgment regarding liability as a matter of law. Accordingly, Plaintiffs' motion for summary judgment should be granted.

Dated: November 19, 2002

ERICKSON, BEASLEY, HEWITT & WILSON
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