MICHAEL J. SEARS (SBN 158197)
SEYFARTH SHAW
101 California Street, Suite 2900
San Francisco, California 94111-5858
Telephone: (415) 397-2823
Facsimile: (415) 397-8549

CHARLES C. JACKSON
ALLEGRA R. RICH
SEYFARTH SHAW
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603
Telephone: (312) 346-8000
Facsimile: (312) 269-8869

Attorneys for AT&T CORP., AT&T MANAGEMENT PENSION PLAN, AT&T PENSION PLAN, and AT&T EMPLOYEES' BENEFIT COMMITTEE

ORIGINAL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NOREEN HULTEEN, ELEANORA COLLET, LINDA PORTER, ELIZABETH SNYDER, and all others similarly situated, and COMMUNICATIONS WORKERS OF AMERICA,

Plaintiffs,

v.

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

Defendants.

Case No. C 01 1122 MJJ

DEFENDANTS' NOTICE OF MOTION, MOTION FOR SUMMARY JUDGMENT AND/OR JUDGMENT ON THE PLEADINGS, AND SUPPORTING MEMORANDUM OF LAW

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

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NOTICE OF MOTION

TO PLAINTIFFS NOREEN HULTEEN, ELEANORA COLLET, LINDA PORTER, ELIZABETH SNYDER, AND COMMUNICATIONS WORKERS OF AMERICA, AND THEIR COUNSEL:

Defendants AT&T Corp., AT&T Management Pension Plan, AT&T Pension Plan, and AT&T Employees' Benefit Committee hereby give notice that on February 25, 2003 at 9:30 a.m., or as soon thereafter as counsel may be heard, in Courtroom 11 of the above-captioned Court, located at 450 Golden Gate Avenue, San Francisco, California, defendants will and hereby do move the Court for an order under Rules 56 and 12(c) of the Federal Rules of Civil Procedure granting them summary judgment and/or judgment on the pleadings in this matter and dismissing the amended complaint with prejudice. The motion is brought on the grounds that there is no genuine issue of any material fact and all of plaintiffs' claims fail as a matter of law.

RELIEF SOUGHT

Defendants seek judgment in their favor on all claims against them, dismissal with prejudice of the amended complaint, and any other relief the Court deems equitable and just.

SUPPORTING MEMORANDUM OF LAW

The four individual plaintiffs and the Communications Workers of America ("CWA") seek relief for events that occurred in 1969, 1975, 1968, and 1974, when the individual plaintiffs worked for Pacific Telephone & Telegraph Co. ("PT&T"), a former AT&T subsidiary that, since 1984, has been a company entirely separate from AT&T. Plaintiffs' principal claim for additional service credit challenges conduct by PT&T that was lawful in the 1960's and 1970's, but would not be if the subsequently-enacted Pregnancy Discrimination Act ("PDA") applied retroactively. Plaintiffs' remaining service credit claims have been time-barred under Title VII for more than a quarter-century. Likewise, plaintiffs' ERISA claims are time-barred and otherwise fail as a matter of law on a variety of grounds. In sum, for the reasons set forth below, the Court should grant defendants' motion for summary judgment and/or judgment on the pleadings, and dismiss the amended complaint with prejudice.

STATEMENT OF FACTS

I. AT&T'S SERVICE CREDIT POLICIES AND PRACTICES.

The present-day AT&T inherited a service calculation system known as the Net Credited Service ("NCS") system, which was used by the pre-divestiture Bell System operating companies, such as Pacific Telephone & Telegraph Co. ("PT&T"). Under this system, an NCS date is maintained for each employee, from her initial date of hire until her retirement or termination of employment. An employee's NCS date begins with her original hire date and then is moved forward in time to reflect any periods of leave or other absence for which no service credit is counted (JSF ¶¶ 17, 18, 21).[1]

Through the decades, NCS has determined countless daily job transactions, such as competitive job bidding, shift preference, and layoff determinations, and vacation for hourly Bell System and AT&T employees, and eligibility for certain benefit programs, including pension eligibility, and benefit levels for hourly and management employees. For hourly employees, collective bargaining agreements between AT&T and plaintiff CWA provide that NCS determines benefits and the competitive allocation of job rights for thousands of AT&T employees on a daily basis (JSF ¶¶ 19-20).

II. PT&T'S PRE-PDA SERVICE CREDIT POLICIES AND PRACTICES FOR PREGNANCY-RELATED LEAVES OF ABSENCE.

Before August 7, 1977, PT&T's policies classified pregnancy leaves as personal leaves, not as disability leaves. Under PT&T's personal leave and disability leave policies, employees were subject to different employment practices for the different types of leaves, and received different amounts of service credit:

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[1] The parties have worked together to establish a joint statement of undisputed facts for purposes of summary judgment. Citations to "JSF ¶ ___" refer to the Joint Stipulations of Fact. Citations to "JA Tab ___" refer to the Joint Appendix of Evidentiary Materials the parties have assembled to support their factual assertions. Citations to "Byrnes Decl. ¶ ___" refer to the Declaration of Brian M. Byrnes in support of defendants' motion for summary judgment. Citations to "Jackson Decl. ¶ __" refer to the Declaration of Charles C. Jackson in support of defendants' motion for summary judgment. Copies of unpublished cases cited in this memorandum are contained in defendants' Appendix of Unpublished Cases. These materials have been filed with this motion.

	PERSONAL LEAVE	DISABILITY LEAVE
SERVICE CREDIT	Employees received service credit for first 30 days of leave only, regardless of length of pregnancy disability.	Employees received service credit for the entire period of their paid disability leave.
"DOUBLE" DISABILITY	Employees on personal leave were not eligible for sickness and accident disability benefits or additional service credit for any other disability they may have developed while on leave.	Employees on disability leave were eligible for sickness and accident disability benefits for any second disability they developed while on leave.
"FORCED LEAVE"	Some employees were required to begin their pregnancy-related personal leave before they were actually disabled due to pregnancy, and did not receive additional service credit for this period of required leave.	Employees were not required to begin their disability leaves prior to the onset of their actual disability.
"GUARANTEED REINSTATEMENT"	Some employees were not guaranteed reinstatement to their same jobs at the end of their pregnancy-related personal leave, and did not receive additional service credit for any period of leave when they could not return to their jobs.	Employees were guaranteed reinstatement to the same or a similar job.

(JSF ¶¶ 66, 68, 71-78, 81-83, 85-86.)

When an employee returned from leave, her NCS date was adjusted according to the type of leave she had taken and the service credit policy associated with that type of leave. As set forth above, employees on paid disability leave received service credit for the entire period of their disability, while those on personal leave (of which pregnancy leave was one type) received only 30 days of service credit (JSF ¶¶ 67-68). The Supreme Court upheld this method of crediting service for pregnancy leaves under Title VII in *Gilbert v. General Elec. Co.*, 429 U.S. 125, 136 (1976).

On August 7, 1977, PT&T adopted the Maternity Payment Plan. Under the Maternity Payment Plan, some of the leave policies described above were amended to provide additional service credit and job protections to employees who took a leave of absence due to pregnancy. However, pregnancy leave still was not treated the same as disability leave in all respects (JSF ¶ 70).

On April 29, 1979 (the effective date of the PDA), PT&T adopted the Anticipated Disability Plan ("ADP"), which provided service credit for pregnancy leaves on the same basis as leave taken for other temporary disabilities. The ADP did not require, and PT&T did not make, a retroactive adjustment to the service credit calculations of women who had been subject to the pre-PDA policies of PT&T that classified pregnancy leave as personal leave. AT&T also adopted the ADP, which continues in effect today, and similarly did not make a retroactive adjustment to the service credit calculations of women who transferred to AT&T from PT&T, where they had been subject to PT&T's pre-PDA policies treating pregnancy leave as personal leave (JSF ¶¶ 79-80).

On April 20, 1979, before the ADP's effective date, CWA and AT&T agreed to a Memorandum of Understanding regarding how the ADP would apply to the thousands of CWA-represented employees (JSF ¶ 80). That day, CWA International Union President Glenn Watts wrote to all CWA Executive Board members, National Directors, and all Bell System Local Presidents "to advise that we have concluded negotiations with the Bell System at the National level on the [ADP] which brings the provisions of the old Maternity Payment Plan into compliance with the requirements of the Pregnancy Disability Amendment [sic] to the Civil Rights Act of 1964" (JA Tab 22). In 1980, CWA conducted collective bargaining throughout the Bell System with the understanding that the ADP complied with the PDA (Beaumont Dep. 75, 99-101; JA Tabs 22-23).

III. AT&T'S DIVESTITURE OF THE BELL SYSTEM OPERATING COMPANIES AND ITS EFFECT ON SERVICE CREDIT.

In 1982, the United States District Court for the District of Columbia entered a consent decree and Modified Final Judgment ("MFJ") to resolve the government's antitrust suit against AT&T. The MFJ required AT&T to divest certain Bell System operating companies and affiliated entities. The MFJ also required the recognition of pre-divestiture service by the newly-created regional telephone holding companies and their subsidiaries (JSF ¶¶ 89-90).

The MFJ required the parties to produce a Plan of Reorganization ("POR"), which was approved by the United States District Court for the District of Columbia in 1983. *See United*

States v. Western Elec. Co., 569 F. Supp. 1057 (D.D.C. 1983), *aff'd sub nom.*, *California v. United States*, 464 U.S. 1013 (1983). The POR addressed numerous divestiture issues affecting employees of American Telephone & Telegraph Co. and the subsidiaries to be divested. Because service credit "affects eligibility for and computation of pension benefits . . . ; eligibility for post-retirement unfunded benefits . . .; and eligibility for future contingent post-retirement pension increases" and to ensure that there would be no loss of benefits due to the divestiture, the POR stated that, "[a]ll employees and retirees of any pre-divestiture Bell System entity will have the same pension benefit entitlements immediately after divestiture as they had immediately prior to divestiture under the existing [Bell System pension plans]." (JA Tab 25, pp. 282-83).

Prior to and effective January 1, 1984, when the MFJ effectuated the break-up of American Telephone & Telegraph Co. and its divestiture of the local Bell System operating companies, including PT&T, many employees of the former Bell System operating companies became employees of AT&T and some AT&T employees became employees of the newly-created regional operating exchange companies (JSF ¶ 91).

Following divestiture, the CWA sponsored an amendment to the Deficit Reduction Act of 1984 ("DEFRA") that provided for continuing portability of service credit between post-divestiture employers. Pub. L. 98-369, 98 Stat. 494 (July 18, 1984) (Beaumont Dep. p. 111-14). In pertinent part, DEFRA provided that "the recognition of service credit . . . shall be governed in the same manner and to the same extent as provided under the [November 1, 1983] divestiture interchange agreement" between the former Bell System employers for "benefit accrual, vesting, and eligibility" (JA Tab 26). Since 1984, AT&T has continued to use employees' NCS as the basis for computing benefits and also to determine competitive job rights for hundreds of thousands of employees (for job bids, shift preference, layoffs, etc.) in countless daily transactions (JSF ¶ 19).

IV. AT&T'S BENEFIT CALCULATIONS BASED ON SERVICE CREDIT, AND ITS CLAIM AND APPEAL PROCESS.

When calculating pension benefits for employees, like plaintiffs here, who transferred to AT&T from a Bell System operating company, AT&T uses the NCS date assigned to the

employee by the previous employing entity.[2] This NCS date reflects whatever adjustments the previous employing entity may have made that resulted in any changes to an employee's original hire date. AT&T does not adjust the NCS date, and, except in cases of a mistake, does not provide additional service credit for any periods of time not previously credited under the Bell System operating company's policies (JSF ¶¶ 30, 41, 52, 104).

ARGUMENT

I. COUNT I SHOULD BE DISMISSED BECAUSE PLAINTIFFS' TITLE VII CLAIMS SEEK AN IMPERMISSIBLE RETROACTIVE APPLICATION OF THE PDA AND FAIL AS A MATTER OF LAW ON SEVERAL OTHER GROUNDS.

A. PT&T's Pre-PDA Service Credit Policies Were Lawful At The Time.

Under Title VII of the Civil Rights Act of 1964, "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). On October 31, 1978, Congress amended Title VII to include pregnancy discrimination within the definition of sex discrimination. 42 U.S.C. § 2000e(k). The PDA became effective for fringe benefit plans on April 29, 1979. *See* Pub.L. 95-555 § 2(b) (fringe benefit plans were given 180 days from the enactment of the PDA to comply with its provisions). Congress passed the PDA because, prior to its enactment, the Supreme Court had ruled that pregnancy discrimination was not sex discrimination. *See Gilbert v. General Electric Co.*, 429 U.S. 125, 136 (1976) ("exclusion of pregnancy from a disability benefits plan . . . providing general coverage is not a gender-based discrimination at all").[3]

Here, it is undisputed that PT&T's pre-PDA policies, which did not provide employees on pregnancy leaves the same accumulation of service credit as employees (of either sex) on temporary disability leaves, were lawful under *Gilbert*. It is also undisputed that, since the

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[2] Although the pension plans, since 1914, have used the phrase "term of employment," rather than "net credited service," to describe an employee's adjusted length of service, it is undisputed that AT&T's practice has been to use and apply the two terms interchangeably (Byrnes Decl. ¶¶ 2-3).

[3] *See also Communications Workers of America v. American Telephone and Telegraph Co.*, 513 F.2d 1024 (2d Cir. 1975) (finding violation of Title VII), *vacated per curiam*, 429 U.S. 1033 (1977) (relying on *Gilbert*); *In re Southwestern Bell Telephone Co. Maternity Benefits Litigation*, 602 F.2d 845, (8th Cir. 1979) (applying *Gilbert* to reject claim that pre-1979 exclusion of pregnancy from Southwest Bell's temporary disability plan violated Title VII).

PDA's effective date, the present-day AT&T Corp. and its predecessor entities have provided service credit for pregnancy leaves on the same basis as paid leaves taken for other temporary disabilities (JSF ¶ 79-80). Thus, the leave of absence policies at issue have, at all times before and after the PDA, not only complied with the law, but also have been ratified by both the MFJ court and Congress. For these reasons, the NCS expectations of all interested parties -- AT&T, the former Bell System employers, the CWA, and hundreds of thousands of affected employees -- have been settled since at least 1984, if not since 1979, when the PDA was enacted.

B. The PDA Is Not A Retroactive Statute.

Because the policies at issue were lawful before the PDA, the only way AT&T could be held liable today for this pre-PDA conduct[4] is if the Court were to apply the PDA retroactively (*i.e.*, apply the PDA to events that occurred before its enactment). However, the PDA is not a retroactive statute. *See Wambheim v. J.C. Penney Co.,* Inc., 642 F.2d 362, 363 n.1 (9th Cir. 1981) ("The Civil Rights Act was amended in 1978 to include pregnancy as a factor in the definition of 'on the basis of sex.' 42 U.S.C. § 2000e(k). Because the facts in this section (sic) took place before 1978, this case is not controlled by the amendment; accordingly, we do not consider it."); *Whitehead v. Oklahoma Gas & Elec. Co.*, 187 F.3d 1184, 1193 (10th Cir. 1999); *Fields v. Bolger*, 723 F.2d 1216, 1219 n.4 (6th Cir. 1984) ("Note that this amendment was intended to be prospective only in application."); *Schwabenbauer v. Board of Ed. of City Sch. Dist. of City of Orleans*, 667 F.2d 305, 310 n.7 (2d Cir. 1981); *Condit v. United Air Lines Inc.*, 631 F.2d 1136, 1139-40 (4th Cir. 1980); *cf. Ameritech Benefit Plan Committee v. Communications Workers of America*, 220 F.3d 814, 823 (7th Cir. 2000) (noting, without specifically holding, that "the PDA has not been treated as a retroactive statute"). Indeed, the Supreme Court has used the effective date language of the PDA as an example of a *non-retroactive* statute. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 257 n.10 (1994).[5]

[4] This memorandum does not address the issue of whether, in the pre-divestiture, pre-PDA era, American Telephone & Telegraph Co. could have been liable for the acts of its subsidiary, PT&T. AT&T does not waive, and expressly preserves, that issue for a later phase of the case, if necessary.

[5] In *Landgraf*, the Court warned that, unless otherwise directed, courts should not give retroactive effect to statutes enacted by Congress. *See Landgraf,* 511 U.S. at 265 ("the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a

The principal case on which plaintiffs rely, *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), contravenes the Ninth Circuit's earlier Title VII/PDA decision in *Wambheim*, and its reasoning has been rejected by subsequent Supreme Court and Ninth Circuit decisions on statutory retroactivity. In *Pallas*, a divided panel of the Ninth Circuit held that Pacific Bell's pre-PDA policy of not treating pregnancy leaves the same as temporary disability leaves for purposes of calculating an employee's Net Credited Service was discriminatory in the post-PDA era. *Id.* Putting aside *Wambheim*, until recently it appeared that the Ninth Circuit's view conflicted with a case to which plaintiff CWA was a party (and is bound by collateral estoppel), *Ameritech Benefit Plan Committee v. Communications Workers of America*, 220 F.3d 814 (7th Cir. 2000), which held the opposite on almost identical facts.

Although AT&T maintains that the result and reasoning of *Ameritech* foreclose plaintiffs' Title VII/PDA claims here, and that *Pallas* was wrongly decided, this Court need not depart from the *Pallas* precedent on this basis. Since *Pallas*, both the Supreme Court and the Ninth Circuit have rejected the identical analysis as that relied upon in the *Pallas* decision because it required an impermissible retroactive application of a non-retroactive statute.

First, in a 1995 decision, *Spink v. Lockheed Corp.*, 60 F.3d 616 (9th Cir. 1995), *rev'd*, 517 U.S. 882 (1996) ("*Spink*"), the Ninth Circuit construed a claim for service credit under recently-enacted amendments to the Age Discrimination in Employment Act ("ADEA") in a manner identical to *Pallas's* analysis of service credit under the PDA. Although in *Pallas* the Ninth Circuit did not explicitly address the retroactivity issue,[6] in *Spink*, it explicitly recognized that it was applying ADEA amendments retroactively. 60 F.3d at 620, n.1 ("To the extent our

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legal doctrine centuries older than our Republic"). As the Court explained, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.*

[6] The *Pallas* court did acknowledge, however, that, prior to 1979, "the law did not require employers to treat pregnant women like temporarily disabled men." 940 F.2d at 1325. That the *Pallas* court was applying the PDA retroactively is also evident from its characterization of PT&T's pre-PDA service credit policies as "acts of discrimination." *Id.* at 1327. As *Gilbert* makes clear, this pre-PDA conduct was not "discrimination" at all. Unequal treatment of pregnancy only became discrimination, on a prospective basis, once the PDA became law. Tellingly, the CWA took the position that the PDA was retroactive only after *Pallas* was decided (Beaumont Dep. 84), and should be estopped from contending otherwise now.

interpretation requires employers to include pre-enactment service years in calculating benefits, it applies retroactively."). On appeal, the Supreme Court rejected the *Pallas-Spink* method of retroactive statutory construction. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 896 (1996) (holding that the ADEA amendments at issue were prospective, and therefore should not have been applied retroactively, as the Ninth Circuit had done) ("*Lockheed*").

Second, more recently, in *Castro-Cortez v. Immigration and Naturalization Service*, 239 F.3d 1037, 1040, 1050-54 (9th Cir. 2001), the Ninth Circuit applied the post-*Pallas* precedent of *Landgraf* to reject the retroactive application of statutory amendments to the Immigration and Naturalization Act. Relying on *Landgraf* (in which the Court used the PDA as an example of a statute that is *not* retroactive, 511 U.S. at 257, n.10), the Ninth Circuit held that a statute cannot be applied retroactively "absent a plain statement to the contrary [from Congress]" because "'elementary ... fairness' requires that citizens be able to conform their behavior to the law." *Id.* Therefore, "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place..." *Id.* (citations omitted). The *Castro-Cortez* court, consistent with *Landgraf* and *Lockheed*, explained that, to determine whether a statute operates retroactively, a court must determine "whether it 'takes away or impairs vested rights,' 'creates a new obligation,' 'imposes a new duty,' or 'attaches a new disability, in respect to transactions or considerations already past. If so, then absent a plain statement to the contrary, courts should presume that Congress does not intend that the statute be retroactively applied." *Id.* at 1051 (citations omitted).

Landgraf, Lockheed, and *Castro-Cortez* completely undermine the reasoning of *Pallas* because they demonstrate that the *Pallas* court's analysis relied on an impermissible retroactive application of the PDA. By applying the PDA to pre-PDA periods of leave under the NCS system, *Pallas* impaired Pacific Bell's right to rely on the NCS system and imposed new liabilities on Pacific Bell for conduct that the Supreme Court held lawful in *Gilbert*, and that the MFJ court and Congress, in DEFRA, had ratified. Therefore, for the PDA to apply retroactively, and for *Pallas* to remain operative, Congress must have made "a plain statement" that the PDA applied retroactively. *Castro-Cortez*, 239 F.3d at 1051. But, as discussed above, Congress did

the opposite. *See Landgraf*, 511 U.S. at 257, n.10; *Wambheim,* 642 F.2d at 363, n.1.

Accordingly, because plaintiffs' lawsuit here cannot succeed without the *Pallas-Spink* retroactive application of statutory amendments, and because the Ninth Circuit has now unambiguously rejected the *Pallas-Spink* retroactivity analysis in light of subsequently-decided Supreme Court precedent, plaintiffs' claims for additional service credit are barred, and AT&T is entitled to summary judgment as a matter of law.

C. Even If The PDA Could Be Applied Retroactively, Plaintiffs' Claims Would Be Time-Barred Under Settled Title VII Principles.

Even assuming the PDA could be applied retroactively, plaintiffs' claims should be dismissed because they have been time-barred for more than twenty years. Under Title VII, a sex discrimination plaintiff must file a charge of discrimination with a state agency or the Equal Employment Opportunity Commission within 300 days after the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e). Although PT&T's decision not to provide plaintiffs the same amount of service credit for their pregnancy leaves as for employees on disability leaves occurred in the 1960's and early 1970's, and despite knowing about this "injury" to their NCS dates and seniority rights,[7] plaintiffs filed their discrimination charges between 1994 and 2002 -- decades too late.

To avoid the obvious time-bar to their claims, plaintiffs claim that the "alleged unlawful employment practice" they seek to challenge is AT&T's current refusal to award plaintiffs additional retroactive service credit for their pre-PDA pregnancy leaves, again relying on *Pallas.* On this point, *Pallas*, in turn, relied on *Bazemore v. Friday*, 478 U.S. 385 (1986), to support its holding that PT&T's policy of not giving retroactive service credit to employees who had taken pre-PDA maternity leaves was a current violation of Title VII. *Bazemore*, however, addressed an entirely different situation. In *Bazemore*, the employer continued paying racially discriminatory wages well *after* the effective date of Title VII. As a result, blacks were paid less than whites, after Title VII's enactment, for doing the same work. *Id.* at 394-97. As Justice

[7] Seniority rights are among the most valuable a worker possesses. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986). Any perceived harm to those rights, whether or not the effect of the alleged harm has been felt by the worker, triggers the statute of limitations. *See Delaware State College v. Ricks*, 449 U.S. 250, 261-62 (1980).

Brennan stated, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." *Id.* at 395. Thus, in *Bazemore*, unlike the facts in *Pallas* or in this case, the employer was committing current, ongoing acts of discrimination.

Two Supreme Court cases further demonstrate that there is no current act of discrimination in this case, just as there was none in *Pallas*. First, in *United Airlines v. Evans*, 431 U.S. 553 (1977), the Court rejected a "continuing violation" theory nearly identical to plaintiffs' here. The Court distinguished between the current effects of past discrimination and current actions of discrimination:

> [Evans] is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after [Evans] failed to file a charge within [the applicable time period]. A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.

Id. at 558. Despite the fact that Evans continued to feel the effects of the time-barred discriminatory acts, United was entitled to judgment as a matter of law because the deadline for her to file a charge had expired. *Id.*

Second, the Supreme Court reiterated the importance of filing a charge of discrimination within 300 days of the alleged discriminatory act just last term. In *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002), the plaintiff claimed that, because there was an alleged continuing violation of his Title VII rights, events that occurred outside of the 300 day statute of limitations should be treated as timely. Relying on *Evans*, the Supreme Court rejected this reading of the statute, holding that "discrete discriminatory acts are not actionable if time barred." *Id.* at 2072. When such a discrete act occurs, a plaintiff must file a charge within 300 days of that charge or complaints against those acts are "no longer actionable." *Id.* at 2073. The Supreme Court also cautioned that "the emphasis . . . 'should not be placed on mere continuity,' but on 'whether any *present* violation exist[s].'" *Id.* at 2072 (citing *Evans,* 431 U.S. at 558) (emphasis changed).

Here, PT&T's failure to grant plaintiffs service credit for the full amount of their pre-PDA pregnancy disabilities was a "discrete act" that occurred more than 25 years ago. Moreover, it is undisputed that the policy at issue is not in effect today and has not been for 23

years (JSF ¶¶ 79-80). Throughout this period, plaintiffs knew that their NCS date was what it had been since their pregnancy leaves in the 1960's and 1970's. AT&T did not take any new action. Indeed, the MFJ courts and Congress, in DEFRA, ordered AT&T *not* to make any changes to its NCS system and to recognize service credit "in the same manner" as it was in 1984 (JSF ¶¶ 29-31, 40-42, 51-53, 59-61, 92). In sum, the discrete acts of alleged discrimination in this case occurred more than 25 years ago -- decades before plaintiffs filed their charges -- and therefore are time-barred.

D. Plaintiffs' Claims Also Fail For The Independently Dispositive Reason That AT&T's Net Credited Service System Is A Bona Fide Seniority System Within The Meaning Of Title VII § 703(h).

Section 703(h) of Title VII provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin . . .

42 U.S.C. § 2000e-2(h). *See International Bhd. of Teamsters v. United States,* 431 U.S. 324, 353-54 (1977) ("an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination."). Although the statute does not define "bona fide seniority system," the Supreme Court has described the essential elements of a seniority system:

> In the area of labor relations, 'seniority' is a term that connotes length of employment. A 'seniority system' is a scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever-improving employment rights and benefits as their relative lengths of pertinent employment increase. Unlike other methods of allocating employment benefits and opportunities, such as subjective evaluations or educational requirements, the principal feature of any and every 'seniority system' is that preferential treatment is dispensed on the basis of some measure of time served in employment.

California Brewers Ass'n v. Bryant, 444 U.S. 598, 605-06 (1980) (footnotes omitted); *see also Ameritech Ben. Plan Committee*, 220 F.3d at 823 (explaining that "the key to deciding whether a decisionmaking process is a seniority system is its reliance on relative lengths of employment," and holding that Ameritech's identical NCS system was a bona fide seniority system exempt from attack under Title VII).

According to the Supreme Court, a seniority system is "bona fide" even if it relies on or incorporates employment decisions that are not based solely on length of employment:

> For instance, every seniority system must include rules that delineate how and when the seniority timeclock begins ticking, as well as rules that specify how and when a particular person's seniority may be forfeited. *Every seniority system must also have rules that define which passages of time will 'count' towards the accrual of seniority and which will not.* Every seniority system must, moreover, contain rules that particularize the types of employment conditions that will be governed or influenced by seniority and those that will not. *Rules that serve these purposes do not fall outside § 703(h) simply because they do not, in and of themselves, operate on the basis of some factor involving the passage of time.*

California Brewers, 444 U.S. at 607-08 (emphasis added) (footnotes omitted).

Pallas did not consider the application of Section 703(h). However, in *Ameritech Ben. Plan Comm.*, the Seventh Circuit held that Ameritech's use of the NCS system (the same one at issue in this case) was a bona fide seniority system entitled to the protection of Section 703(h). The court held that the employees could not show intentional discrimination in Ameritech's use of NCS system, and the NCS system was therefore bona fide, because: (i) before the PDA, it was held lawful under *Gilbert*; (ii) the PDA is not retroactive, so Ameritech "would have had no reason to think it had to reshuffle its NCS list after the Act was passed;" (iii) under *Teamsters*, the fact that the NCS system may perpetuate pre-Act discrimination "does not preclude it from being bona fide;" and (iv) under *California Brewers*, the NCS system is bona fide because it relies on relative length of employment. 220 F.3d at 823. Based on this analysis, the court concluded that the NCS system "fits easily into the seniority system line of cases." *Id.*

Here, the NCS system is a bona fide seniority system for the identical reasons as those relied on by the *Ameritech* court. First, it is undisputed that the NCS system was adopted decades before Title VII, with no intent to discriminate. Indeed, as the *Ameritech* court pointed out, in 1976, the Supreme Court held that the service credit decisions at issue here were lawful. *Gilbert*, 429 U.S. 125. Second, as set forth in detail above, the PDA is not retroactive. *See* Part I.B., *supra.* Third, the *Teamsters* principle that a seniority system is bona fide even though it may perpetuate pre-Act discrimination would eliminate plaintiffs' claims even if PT&T's pre-PDA policy could be deemed "discriminatory." Fourth, the NCS system falls squarely within the definition of bona fide seniority system set forth in *California Brewers* because it relies on

relative length of employment. 444 U.S. at 607-08. Accordingly, based on the Supreme Court's articulation of what constitutes a bona fide seniority system, this Court should hold that the NCS system is a bona fide seniority system exempt from plaintiffs' challenge under Title VII and the PDA.

E. Counts I(b) And I(d), Plaintiffs' "Force-Out" and "Guaranteed Reinstatement" Claims, Should Be Dismissed Because They Are Untimely.

Before the enactment of the PDA, the Supreme Court held that the imposition of a burden on a pregnant employee constituted sex discrimination. *Nashville Gas Co. v. Satty,* 434 U.S. 136, 142-43 (1977). The Court distinguished *Gilbert* because *Gilbert* involved the failure to grant a benefit (additional service credit) to a pregnant woman, rather than an imposition of a burden. *Id. See also DeLaurier v. San Diego Unified School District*, 588 F.2d 674, 677 (9th Cir. 1978) (following *Satty*).

Under *Satty*, and before the PDA, mandatory maternity leave policies were found discriminatory because they were considered to be a burden upon women's employment opportunities. *See DeLaurier*, 588 F.2d at 677. Once an employee demonstrated such a burden, an employer could avoid liability only if it could establish a "business necessity" for the forced leave policy. *Satty*, 434 U.S. at 143. Establishing a business necessity depended on: (1) the point during a pregnancy at which the employer required pregnant employees to take a leave of absence, and (2) the type of job that was affected. *DeLaurier,* 588 F.2d at 681. Businesses frequently failed to establish a business necessity for forcing women to leave work prior to the onset of their actual pregnancy-related disability. *See, e.g., Singer v. Mahoning County Bd. of Mental Retardation*, 379 F. Supp. 986, 989 (N.D. Ohio 1974), *aff'd*, 519 F.2d 748 (6th Cir. 1975) (no business necessity to force out pregnant teacher at 5 months). Thus, to the extent plaintiffs challenge PT&T's alleged pre-PDA policy of forcing a woman to begin her pregnancy-related leave of absence before the onset of her actual disability, while not forcing similarly situated disabled employees to do the same, such a claim would have been actionable at the time the plaintiffs took their pregnancy leaves in the 1960's and 1970's -- and now is time-barred.[8]

[8] Although for purposes of summary judgment AT&T agrees that from time to time, before the Maternity Pay Plan, PT&T may have required some female employees to begin their pregnancy

Likewise, before the PDA, an employer's failure to guarantee reinstatement at the end of a pregnancy leave was found to violate Title VII because it imposed a burden for which there was no business necessity. *See Communications Workers of America v. South Central Bell Telephone and Telegraph Co.*, 515 F. Supp. 240 (E.D. La. 1981); *In re Southwestern Bell Telephone Co. Maternity Benefits Litigation*, 602 F.2d 845 (8th Cir. 1979). In both of these cases, an AT&T subsidiary's policy of failing to guarantee reinstatement after pregnancy leaves (but doing so for disability leaves) was found to be discriminatory. Moreover, "the denial of guaranteed reinstatement to female employees on pregnancy related personal leave [could] not be justified as necessary for the continued successful operation of the business." *South Central Bell*, 515 F. Supp. at 246. Thus, should the Court choose to decide this issue,[9] to the extent plaintiffs challenge any failure by PT&T to guarantee reinstatement to a woman on pregnancy-related leave, and failing to provide service credit for any periods when a woman could not return to work as a result of this policy, such a claim also would have been actionable at the time the plaintiffs took their pregnancy leaves in the 1960's and 1970's.

As discussed above, *Morgan* and *Evans* require a plaintiff to file a charge of discrimination within 300 days of a discrete discriminatory act. Here, it is undisputed that plaintiffs did not file charges of discrimination challenging the alleged force-out policy or the alleged no-guaranteed-reinstatement policies at the time they took their pregnancy-related leaves of absence in the 1960's and 1970's, despite the fact that they may have had actionable claims against PT&T then (JSF ¶ 98).[10] Twenty to thirty years after a discrete act is far too late to complain. *Morgan*, 122 S. Ct. at 2073. Accordingly, plaintiffs' "force-out" and "guaranteed reinstatement" claims are time-barred.

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leaves before they wanted to do so, AT&T notes that only one plaintiff, Linda Porter, alleges that she was actually forced to leave earlier than she wanted (Am. Cmplt. ¶ 60). The other plaintiffs do not allege that they were forced to begin their leaves before they wanted (Am. Cmplt. ¶¶ 37, 48-49, 71).

[9] Again, although for purposes of summary judgment AT&T agrees that in some cases PT&T did not "guarantee" reinstatement at the time plaintiffs took their pre-Maternity Payment Plan pregnancy-related leaves of absence, AT&T notes that *none* of the plaintiffs alleges that she was not allowed to return when she wanted (Am. Cmplt. ¶¶ 38, 48-49, 63, 71).

[10] There is no dispute that AT&T no longer has such policies (if it, as opposed to PT&T, ever had them) (JSF ¶¶ 79-85).

II. PLAINTIFFS' ERISA BREACH OF FIDUCIARY DUTY AND WRONGFUL DENIAL OF BENEFITS CLAIMS IN COUNT II BOTH FAIL AS A MATTER OF LAW AND SHOULD BE DISMISSED.

Plaintiffs' amended complaint contains one ERISA count that appears to allege several different violations of the statute (Am. Cmplt. ¶¶ 96-98). As set forth below, plaintiffs' allegations fail on a number of grounds that mandate dismissal of their entire ERISA count.

A. ERISA Does Not Provide A Remedy For Alleged Sex Discrimination.

As a threshold matter, all of plaintiffs' ERISA allegations fail to state a claim under ERISA because they seek relief for alleged sex discrimination, for which ERISA does not provide a remedy. As the Supreme Court has stated, ERISA "does not mandate that employers provide any particular benefits, and *does not itself proscribe discrimination in the provision of employee benefits.*" *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (emphasis added). In *Shaw,* the Supreme Court pointed out that, based on the legislative history, the reason ERISA's drafters did not offer a nondiscrimination amendment to ERISA was that Title VII *already* provided a full remedy for pension plan-related civil rights discrimination.[11] *Id.* at 104-05.

Based on *Shaw* and ERISA's legislative history, numerous federal courts have held that ERISA's provisions do not apply to Title VII-protected discrimination. *See, e.g., Ameritech Benefit Plan Committee*, 220 F.3d at 825 ("[t]here may be a problem with shoe-horning a discrimination claim into the ERISA notion of fiduciary duty, because ERISA 'does not itself proscribe discrimination in the provision of employee benefits.'") (*citing Shaw*, 463 U.S. at 91); *Bronk v. Mountain States Telephone and Telegraph*, 140 F.3d 1335, 1338 (10th Cir. 1998) ("It is well established that ERISA does not prohibit an employer from distinguishing between groups or categories of employees, providing benefits for some but not for others."); *Spirt v. Teachers Insurance & Annuity Association*, 691 F.2d 1054, 1065 (2d Cir. 1982) (explaining that, based on legislative history, "ERISA was not amended to prohibit discrimination [on the basis of sex and

[11] Given the comprehensive and complex nature of ERISA, courts have been reluctant to read into it provisions that are not explicitly authorized. *See Mertens v. Hewitt Associates*, 508 U.S. 248, 254 (1993) (Court "emphasized [its] unwillingness to infer causes of action in the ERISA context, since that statute's carefully drafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'").

race]"), *vacated on other grounds*, 463 U.S. 1223 (1983); *Bucyrus-Erie Co. v. Department of Industry, Labor & Human Relations of the State of Wisconsin*, 599 F.2d 205, 207 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) ("ERISA does not include any substantive provisions prohibiting an employer from maintaining discriminatory [on the basis of maternity leave] benefit plans."); *Dall v. The Chinet Co.*, 33 F. Supp.2d 26, 41 (D. Me. 1998), *aff'd*, 201 F.3d 426 (1st Cir. 1999) (ERISA § 404 claim based on "discrimination" fails because ERISA does not recognize such a claim); *Beavers v. American Cast Iron Pipe Co.*, 751 F. Supp. 956, 965 (N.D. Ala. 1990) ("plaintiff's claim that ... ERISA makes discrimination of any kind a violation under ERISA is directly contrary to the United States Supreme Court's statement in *Shaw* . . . Plaintiffs simply do not have an ERISA claim on the basis of sex or race."), *aff'd in part, vacated in part, rev'd in part on other grounds*, 975 F.2d 792 (11th Cir. 1992).[12]

To the extent plaintiffs attempt to support their ERISA claim by again relying on *Pallas*, that case does not support recognition of ERISA claims based on alleged sex discrimination. In *Pallas*, the Ninth Circuit stated, in a conclusory paragraph with no analysis or reasoning, that the calculation of service for purposes of eligibility in the pension plan was an act subject to review for breach of fiduciary duty, and "[d]iscrimination constitutes a fiduciary breach for purposes of ERISA." 940 F.2d at 1327. What is missing in *Pallas*, however, is any discussion or analysis of the Supreme Court's decision in *Shaw*, ERISA's legislative history, or the numerous pertinent decisions from other circuits, all of which conclusively establish that ERISA does not cover sex discrimination. Indeed, *Pallas* does not even mention these authorities or their reasoning. Thus, plaintiffs' ERISA claims fail as a matter of law because there is no cognizable claim for sex discrimination under ERISA.

[12] An interpretation of ERISA that excludes discrimination claims is wholly consistent with the Supreme Court's historical treatment of discrimination claims. The Court has consistently ruled that discrimination may be remedied only through the proper statute. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) ("It cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA."). *See also Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (Court did not even mention ERISA in discrimination claim based on amendment of pension plan).

B. Plaintiffs' Breach Of Fiduciary Duty Claim Is Procedurally Barred.

1. ERISA Does Not Apply To Plaintiffs' Breach Of Fiduciary Duty Claims Because They Arose Before ERISA's Effective Date.

ERISA § 514 provides that the statute "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1). The courts of appeals "have uniformly agreed that the two clauses of section 514(b)(1) should be read disjunctively." *Stevens v. Employer-Teamsters Jt. Council No. 84 Pension Fund*, 979 F.2d 444, 450 (6th Cir. 1992). Accordingly, ERISA does not apply either to any pre-1975 causes of action *or* to any pre-1975 acts or omissions. *See Menhorn v. Firestone Tire & Rubber, Inc.*, 738 F.2d 1496, 1500 (9th Cir. 1984) ("ERISA's drafters recognized that it would be unfair to judge pre-ERISA conduct retrospectively by ERISA's standards.").

Plaintiffs, therefore, cannot salvage their claims simply because they waited until after the effective date of ERISA to raise them. In *Menhorn*, the Ninth Circuit explained that, "in cases where a claimant is formally denied benefits after ERISA's effective date pursuant to an unambiguous and nondiscretionary plan provision adopted before the effective date, the denial is not reviewable under ERISA." 738 F.2d at 1501.[13] Applying these principles, a Colorado district court dismissed identical ERISA claims against AT&T seeking additional retroactive service credit for a pre-PDA pregnancy leave based on uncredited service with another pre-divestiture Bell System operating company (Mountain States Telephone & Telegraph Co.):

> The bottom line here is that the acts giving rise to Redding's alleged claims occurred during the 1950's and 1960's [when she took her pregnancy leaves]. The plan administrators in the 1990's had nothing to do with those decisions. They simply reported the effect of those decisions to Redding in 1995.

Redding v. AT&T Corp., Slip Op. at 4, Case No. D.C. 96-WY-807-CB (D. Col. 1996), *aff'd,* 124 F.3d 217 (10th Cir. 1997).

Here, it is undisputed that the PT&T personal leave policy in effect when plaintiffs took

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[13] *See also Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1189-90 (2d Cir. 1996) (holding that a 1993 denial of benefits was not cognizable under ERISA because it followed from the plan's 1973 adoption of a break-in-service policy); *Quinn v. Country Club Soda Co.*, 639 F.2d 838, 840-41 (1st Cir. 1981) (holding that a post-effective-date denial of benefits was not cognizable under ERISA because it was the "inexorable consequence" of pre-1975 decisions excluding the claimant from participation in the plan).

their pregnancy-related leaves of absence did not provide full service credit for the time plaintiffs claim they were disabled due to pregnancy (JSF ¶¶ 66-67). Thus, the acts or omissions at issue in this case occurred in the pre-ERISA era, when plaintiffs took their leaves.[14] AT&T's denials in the 1990's of plaintiffs' claims for benefits were the inexorable consequences of what had happened decades earlier, and defendants merely "reported" these consequences to plaintiffs. Accordingly, plaintiffs' claims are not cognizable under ERISA.

2. Plaintiffs' Breach Of Fiduciary Duty Claims Are Time-Barred.

Wholly apart from ERISA § 514(B)(1), the statute of limitations applicable to fiduciary claims also forecloses plaintiffs' claims. ERISA § 413(b)(2) bars claims "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation . . ." 29 U.S.C. § 1113(B)(2). A plaintiff has "actual knowledge" of the alleged fiduciary breach when she knows of the act the fiduciary has taken that will ultimately result in the benefit-related breach that the plaintiff challenges in the lawsuit. *See Spragg v. Pacific Telesis Grp., et al.*, No. 97-15541, 1999 U.S. App. Lexis 1304 at **8, 10 (9th Cir. 1997) (holding that "once an individual has actual knowledge of the act that constitutes the breach and knows the harmful effect of the act, a cause of action for breach of fiduciary duty accrues" and finding that the plaintiff's actual knowledge consisted of knowing the act AT&T took and the "detrimental effect AT&T's acts would *ultimately* have on his pension benefits.") (emphasis added). *See also Ziegler v. Connecticut Gen. Life Ins. Co.*, 916 F.2d 548, 552 (9th Cir. 1990) (rejecting plaintiff's 1988 ERISA § 404 claim as time-barred because the plaintiff had actual knowledge of the breach when he knew of the underlying decision at issue in July 1984 and "not[ing], however, that just because Westco could not accurately quantify its injury until March of 1985 does not mean that Westco lacked actual knowledge of the alleged breach until then.").

Here, plaintiffs knew at the time they took their pregnancy-related leaves of absence that they did not receive full service credit for the period of their pregnancy-related disabilities (*See e.g.*, JSF ¶¶ 28, 37, 50, 59). Equally important, they also knew *at the time they became AT&T*

[14] Only one of the plaintiffs, Eleanora Collet, took her pregnancy-related leaves of absence after the effective date of ERISA (JSF ¶ 38). Although her claim is not foreclosed under ERISA on this basis, it nonetheless fails for the other reasons set forth in this section.

employees in the early 1980's that their NCS dates traveled with them and would be used to calculate their pensions (JSF ¶¶ 29, 40, 51, 60). Thus, arguably, they should have filed suit within three years of the enactment of ERISA (*i.e.*, by 1977). At the latest, they should have filed suit within three years of the date they transferred to AT&T, which would be by 1983 for plaintiffs Porter and Snyder (who transferred in 1980), and by 1987 for plaintiffs Hulteen and Collet (who transferred in 1984). Because plaintiffs failed to sue within three years of the dates they became aware of the breach of fiduciary duty they now allege, their ERISA claims are time-barred.

3. Plaintiffs' Claims For Additional Service Credit And Benefits Is Cognizable Only Under ERISA § 502(a)(1)(B), Not § 404.

Plaintiffs' "breach of fiduciary duty" claim also fails as a matter of law because it is, at bottom, simply a claim for additional benefits. Specifically, plaintiffs allege that defendants breached their fiduciary duty by "failing to act solely in the interests of the participants and beneficiaries of those plans with respect to those plans as required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)" (Am. Cmplt. ¶ 97).[15] However, the problem with plaintiffs' allegation is that ERISA's breach of fiduciary duty provision generally does not authorize suits by participants for individual relief. *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (participants cannot recover individual benefits for breach of fiduciary duty claims when other forms of relief are available); *see also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142, 144 (1985) (same). In contrast, ERISA § 502(a)(1)(B) specifically provides a cause of action for a participant to sue "to recover benefits due to him under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). Because their lawsuit exclusively seeks additional service credit (and the corresponding additional benefits plaintiffs believe they would receive as a result), the only section under which they can sue is Section 502(a)(1)(B).

In similar situations, the Ninth Circuit and other courts have rejected suits under other

[15] Although the amended complaint does not say so, claims for breach of the fiduciary duties enumerated in ERISA § 404 are enforced through ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), ERISA's "catchall" remedial section, which authorizes suits "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

sections of ERISA that are, like plaintiffs' claim here, actually disguised claims for benefits. *See Forsyth v. Humana*, 114 F.3d 1467, 1475 (9th Cir. 1997) (rejecting plaintiffs' breach of fiduciary duty claims because "section 1132(a)(1) provides an adequate remedy in this case"), *aff'd on other grounds*, 525 U.S. 299 (1999).[16] Thus, assuming plaintiffs can bring any ERISA claim at all, the only section under which their claim may properly be construed is Section 502(a)(1)(B), and their breach of fiduciary duty claim under ERISA § 404 should be dismissed.

C. On The Merits, Plaintiffs' Breach Of Fiduciary Duty Claim Fails Because Defendants Have Applied The Terms Of The Plan As Written And, Contrary To Plaintiffs' Request, Cannot Favor Plaintiffs Over Other Participants.

Plaintiffs also assert that, by denying them additional retroactive service credit, AT&T "fail[ed] to act solely in the interests of the participants and beneficiaries of those plans with respect to those plans as required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)" (Am. Cmplt. ¶ 97). However, what plaintiffs are actually challenging are defendants' refusals to depart from the terms of the applicable plans and refusal to act in the best interest of a particular subset of participants and beneficiaries - namely, those female employees who lawfully did not receive full service credit for their pre-PDA pregnancy-related disabilities.

Under Section 404, a fiduciary's obligation to act with the "exclusive purpose" of providing benefits to plan participants applies to all participants equally. A fiduciary cannot favor one set of participants over another, but rather must deal impartially with all beneficiaries when distributing plan assets. *See Restatement (Second) of Trusts* § 183 (1959); *Jensen v. Sipco, Inc.*, 867 F. Supp. 1384, 1396 (N.D. Iowa 1996) ("In administering a plan, a fiduciary may not favor one group of plan participants over another."). Thus, Section 404's "exclusive purpose" rule forecloses plaintiffs' claim that AT&T must treat them more favorably than other plan

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[16] *See also Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 91 (6th Cir. 1997) ("plaintiff cannot get around the exhaustion requirement [of Section 502(a)(1)(B)] by simply disguising his claim as a breach of fiduciary duty."); *Wald v. Southwestern Bell Corp. Customcare Med. Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996) ("because Wald is provided adequate relief by her right to bring a claim for benefits under section 502(a)(1)(B) . . .as she did in Count I, and she seeks no different relief in Count II of her complaint . . . she does not have a cause of action under section 502(a)(3)" for breach of fiduciary duty); *Pengilly v. The Guardian Life Ins. Co.*, 81 F. Supp.2d 1010, 1026 (N.D. Cal. 2000) (Armstrong, J.) (rejecting plaintiff's breach of fiduciary duty claim because, "[i]n the instant case, (a)(1)(B) already provides plaintiff an adequate remedy if in fact Guardian has deprived him of benefits due him under his ERISA plan.").

participants by crediting them with additional service that PT&T lawfully did not recognize in the pre-PDA era, and that the plans currently do not recognize.

In addition, the requirement in Section 404 that defendants apply the terms of the plan as written also means that ERISA prohibits defendants from making an ad hoc "exception" to the plan provision that obliges AT&T to recognize pre-divestiture service credit. Section 4.3(b)(ii) of the MPP states that: "For purposes of determining eligibility for a service pension...a pre-divestiture employee's Term of Employment shall include...pre-divestiture service." (JA Tab 30 (1996 MPP, p. 30; *see also* JA Tab 32, 1996 PP, p. 48) The unambiguous language makes clear that defendants do not have the discretion to *disregard* the rules governing pre-divestiture service. It is simply not a breach of fiduciary duty under ERISA to adhere strictly to the terms of a lawful plan, so long as the plan does not require the fiduciary to perform a transaction specifically proscribed by ERISA. *See Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1080 (4th Cir. 1988) *cert denied*, 493 U.S. 919 (1989).[17]

For all of the reasons set forth in Sections II.A-C., *supra*, ERISA simply does not authorize the fiduciary claims that plaintiffs advance in this case.

D. Defendants' Denials Of Plaintiffs' Claims For Additional Benefits, Based On Pre-PDA Service That PT&T Did Not Credit, Complied With The Plans.

Plaintiffs' remaining ERISA claim alleges that defendants "interpreted and applied the terms of the PP and MPP in an arbitrary and/or discriminatory manner and/or in a manner contrary to law, and/or have otherwise wrongfully denied benefits and Net Credited Service" to the plaintiffs (Am. Cmplt. ¶ 98). This claim fails regardless of whether the Court treats it as a

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[17] Rather than raise true fiduciary issues, plaintiffs essentially challenge defendants' failure to amend the plans to provide them the additional service credit they seek. However, settlor functions, such as amending a plan, are not subject to ERISA's rules governing fiduciary duties. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("'[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans.'". . .*When employers undertake those actions, they do not act as fiduciaries. . . , but are analogous to the settlors of a trust.*") (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (emphasis added); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999) (same). *See also Averhart v. US West Management Pension Plan*, 46 F.3d 1480, 1488 (10th Cir. 1994) (company's failure to amend plan to include plaintiffs in enhanced pension benefit retirement incentives did not result in a breach of company's fiduciary duties; "[t]he fact that the [challenged] amendment may have 'discriminated' against plaintiffs by denying them benefits extended to [other] employees...is immaterial").

claim for benefits under ERISA § 502(a)(1)(B) or as some kind of Section 404 breach of fiduciary duty claim (plaintiffs fail to cite any statutory provision for this claim). Section 502(a)(1)(B) provides that "a civil action may be brought -- (1) by participant or beneficiary . . . (B) to recover benefits due to him *under the terms of his plan*, to enforce his rights *under the terms of the plan*, or to clarify his rights to future benefits *under the terms of the plan*." 29 U.S.C. § 1132(a)(1)(B) (emphasis added).[18]

Here, the very terms of the MPP and PP refute plaintiffs' claims. Section 4.3(b)(ii) of the MPP provides that: "[f]or purposes of determining eligibility for a service pension...a pre-divestiture employee's Term of Employment shall include...pre-divestiture service." (JA Tab 30 (1996 MPP, p. 30; *see also* JA Tab 32, 1996 PP, p. 48). Nothing in the plan document gives the plan administrator discretion to award an employee additional service when there has been no mistake in the arithmetic application of the pre-divestiture, pre-PDA leave of absence policies. *Id.* Nor have plaintiffs identified any plan provision that they claim defendants misapplied or misinterpreted. Thus, defendants' decisions not to award plaintiffs additional, retroactive service credit were correct under the plans, and plaintiffs' claim for benefits fails under ERISA § 502(a)(1)(B).

III. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE, IN THE PENSION PLAN CONTEXT, THE SUPREME COURT HAS REJECTED THE TYPE OF RETROACTIVE RELIEF PLAINTIFFS SEEK.

Another basis for dismissal of plaintiffs' claims is that the Supreme Court has rejected the type of retroactive relief plaintiffs seek, and the Court should dismiss their claims on this basis as well. Retroactive relief is not available against pension plans, even if the plaintiff establishes a violation of law, because of the "devastating results" such relief could have on pension plans.

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[18] Generally, courts require plaintiffs to exhaust their administrative remedies, using a plan's internal claims and appeal process, before filing suit. This requirement allows the plan administrators, who are the most familiar with the plan terms, to adjudicate, and possibly resolve, claims before they reach litigation. If such a claim has been adjudicated internally, and if the plan (like the MPP and PP here, *see* JA Tab 30, MPP at p. 12, JA Tab 32, PP at p. 12) gives the plan administrator discretion to interpret its terms, then courts generally use a deferential arbitrary and capricious standard of review. Here, there is some dispute as to whether all of the named plaintiffs exhausted their administrative remedies. However, this dispute is immaterial to the issues before the Court, because, even under a *de novo* standard of review, plaintiffs' claims fail under the plain terms of the applicable plan provisions.

See Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1092-94, 1105 n.10, 1106 (1983); *Florida v. Long*, 487 U.S. 223, 238-39 (1988) (relief consisting of adjusted future benefit payments was barred; although prospective in form, the relief was actually retroactive because it "direct[ed] a change in benefits [that were] based upon contributions made before the court's order.").[19] *See also City of Los Angeles, Department of Water and Power, et. al. v. Manhart*, 435 U.S. 702, 719-20 (1978); *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 782-83 (9th Cir. 1986), *cert. denied*, 476 U.S. 1170 (1986); *Retired Public Employees' Association of California v. State of California*, 799 F.2d 511, 515-16 (9th Cir. 1986).

In *Florida v. Long*, the Supreme Court also made explicit that it would "not adopt the premise that the appropriateness of a retroactive award turns on a particular pension fund's current financial status, so that financially successful pension funds must pay but financially insecure funds do not. To do so imposes a penalty for prudent management." *Id.* at 237. Instead, the Court adopted a blanket rule, stating that "the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result. *Id.* at 236.[20]

In sum, in addition to the Ninth Circuit's recent rejection of retroactive application of a law that does not explicitly contain a retroactivity provision, *see Castro Cortez, supra*, the cases cited above make equally clear that retroactive relief against the MPP and PP is similarly prohibited. As the district court in *Redding v. AT&T* stated when rejecting ERISA claims

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[19] Here, plaintiffs seek past and future retirement benefits based upon a recalculation of their eligibility after granting them additional service credit for their decades old pregnancy leaves (Prayer for Relief ¶¶ 3, 6-7). Plaintiffs seek this relief not only for themselves but for a class of women employed by AT&T at any time on or after January 1, 1984, who had a pre-PDA pregnancy leave for which the employee did not receive service credit. *Id.* Am. Cmplt. ¶ 15, and Prayer For Relief ¶¶ 3, 6-7. Thus, it is clear that plaintiffs, like the plaintiffs in *Florida v. Long*, seek to impose substantial retroactive liability.

[20] *See also Probe*, 780 F.2d at, 782-83 (pre-*Florida v. Long* Ninth Circuit case holding that under *Manhart* and *Norris* "retroactive relief will be denied [under Title VII] where an employer was not put on notice by prior judicial decisions that its pension program was unlawful"); *Retired Public Employees Association v. California,* 799 F.2d at 515 (Ninth Circuit recognized that the Supreme Court in *Norris* and *Manhart* "premised its [no] retroactivity holding on a concern about the fate of pension plans in general"); *EEOC v. First National Bank of Chicago*, 740 F. Supp. 1338, 1346 (N.D. Ill. 1990) ("*Long* concerns itself not simply with the narrow facts of the controversy before it, but rather with the formulation of broad rules to govern pension disputes").

identical to those raised here:

> This Court declines Redding's invitation to set the bad precedent of imposing current legal requirements on decades old plans that were legal at the time, but would not be considered legal today. Were this the rule, nearly every pension plan in the country would be vulnerable to class action attacks, and many of these plans -- forced to pay benefits that were not contemplated long ago -- might soon run out of funds altogether.

Redding, Slip Op. at 1-2. This reasoning similarly mandates dismissal of plaintiffs' claims here.

CONCLUSION

For the foregoing reasons, defendants AT&T Corp., AT&T Management Pension Plan, AT&T Pension Plan, and AT&T Employees' Benefit Committee request that the Court grant defendants' motion for summary judgment and/or for judgment on the pleadings, dismiss the amended complaint with prejudice, and award defendants any such other relief as the Court deems equitable and just.

November 19, 2002

Respectfully submitted,

SEYFARTH SHAW

By _____
Charles C. Jackson

One of the Attorneys
for Defendants