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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, AFL-CIO,

Plaintiffs,

v.

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

Defendants.

Case No. C 01 1122 MJJ

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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

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INTRODUCTION

As a matter of law, under this Circuit's governing decision in *Pallas v. Pacific Bell,* 940 F.2d 1324 (9th Cir. 1991), *cert. denied,* 502 U.S. 1050 (1992), Defendants' motion for summary judgment must be denied.[1] First, retroactivity doctrine has no application to Plaintiffs' claims here which are based on a current violation of law occurring when Defendants used their discrimination-infected NCS calculation system to grant Plaintiffs lower benefits than similarly tenured employees absent for disabilities unrelated to pregnancy. Second, because Plaintiffs' claims address Defendants' current denial of retirement-related benefits, they are timely. Third, the "bona fide seniority system" defense set forth in §703(h) of Title VII does not apply to claims brought under the PDA. Even if this defense were available, Defendants' NCS system is neither "bona fide" nor "neutral." Defendants' ongoing use of the NCS system to the detriment of Plaintiffs and the putative class was never "ordered" by any act of Congress or any court, at divestiture or otherwise, nor is it mandated by the terms of Defendants' pension plans. Because application of the NCS system harms only formerly pregnant women, it violates ERISA, which requires plan fiduciaries to act in the interests of *all* participants and beneficiaries. Finally, Plaintiffs' claims for relief are not barred by Title VII retroactivity cases addressing basic pension plan funding assumptions; instead, they are governed by traditional Title VII "make whole" relief provisions designed to remedy facially discriminatory conduct.

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT UNDER TITLE VII

A. THE RETROACTIVITY OF THE PREGNANCY DISCRIMINATION ACT HAS NO BEARING ON THE HOLDING IN *PALLAS.*

Defendants recognize that the holding in *Pallas* is squarely on point and, if still good law,

[1] Defendants' moving Memorandum ("D.Mem.") contains various alleged "facts" that are not supported by competent record evidence, including the parties' Joint Stipulations, and/or are otherwise not properly before the Court in Phase I. These misstatements are detailed in the accompanying Declaration of Judith Kurtz in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Kurtz Dec."), to which reference will be made in this opposition memorandum.

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requires a finding in Plaintiffs' favor on the cross-motions for summary judgment. Because Ninth Circuit precedent is binding on this Court, Defendants can only prevail on their motion if they demonstrates that there has been intervening precedent that undermines the holding in *Pallas*. Defendants' argument fails because *Pallas* is still good law. None of Defendants' arguments demonstrate otherwise.

Whether the Pregnancy Discrimination Act, 42 U.S.C. §2000e-(k) ("PDA") is retroactive is irrelevant to *Pallas* and here because in both *Pallas* and this case the acts being challenged occurred after the 1979 effective date of the PDA.[2] The *Pallas* court did not ignore retroactivity rules. Rather, it rejected the district court's holding that the discrimination being challenged occurred before 1979. *Id.* at 1325. *Pallas* held that it was Pacific Bell's 1987 application of its facially discriminatory NCS system to calculate plaintiffs' pension which was the relevant act. *Id.* at 1327. Accordingly, the court did not rely on the retrospective application of the PDA. Given that the *Pallas* holding was not dependent on a finding that the PDA may be applied retrospectively, the holding is not undermined by decisions finding that the PDA is not retroactive.[3]

Defendants' retroactivity argument depends on a finding that the Ninth Circuit was wrong when it held that Pallas was challenging Pacific Bell's 1987 conduct. They argue that it is only Defendants' pre-PDA decision to deny full service credit for pregnancy-related leaves that can be

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[2] Defendants assert that it is "undisputed" that PT&T's pre-PDA service credit policies were lawful before 1979. (D.Mem. 6.) They urge that because the policies were legal before the effective date of the PDA, they can only be held liable in this lawsuit if the PDA is found to be retroactive. Defendants are wrong on both counts. Plaintiffs have not conceded the legality of Defendants' pre-PDA service crediting policies. In *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), the Supreme Court struck down the company's policy of depriving women of accumulated seniority when returning from maternity leave because it imposed a burden on the women. *Id.* at 139-142. Like plaintiffs in *Satty*, the plaintiffs here are burdened by a loss of service credit. Furthermore, as Plaintiffs demonstrate *infra*, Section I.A, retroactivity does not apply to this case.

[3] Defendants cite the 1979 Anticipated Disability Plan ("ADP") negotiated between AT&T and CWA as not "requir[ing]" any "retroactive adjustment" to the service credit of women who transferred to PT&T from AT&T, and to other documents as implying CWA's belief in 1979 that "the ADP complied with the PDA." (D. Mem. 4.) However, these documents add nothing to the stipulated facts already before the Court, *i.e.*, that AT&T and its Bell System operating companies would comply with the PDA "going forward." *See, e.g.*, Beaumont deposition 99:15-100:8; *compare* JSF ¶79-80.

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scrutinized.[4] The cases cited by Defendants (D.Mem. 7-10) do not require or support this conclusion since they each involve a situation in which the only challenged behavior occurred prior to the PDA's enactment.[5] As such, they are consistent with the commonly accepted notion that the issue of retroactivity arises where a party seeks to apply a new law to acts that occurred before the effective date of the new law. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 248 (1994) (plaintiff sought benefit of 1991 amendment to Title VII allowing compensatory and punitive damages based on alleged discrimination which took place in 1984-1986) and *Castro-Cortez v. Immigration and Naturalization Service*, 239 F.3d 1037 (9th Cir. 2001) (aliens who re-entered the United States prior to Immigration and Nationality Act amendments permitting the INS to reinstate orders of removal).

Defendants place special reliance on *Spink v. Lockheed Corp.*, 60 F.3d 616, 618-619 (9th Cir. 1995), *rev'd*, 517 U.S. 882 (1996). (D.Mem. 8-9.) In *Spink*, the Ninth Circuit and the Supreme Court examined amendments to the ADEA and ERISA that changed the law to forbid pension plans from excluding from a plan individuals hired when they were over age 60. The question before the Ninth Circuit was whether the ADEA and ERISA amendments applied to such an exclusion when the exclusion occurred before the effective date of the amendment. This one-time occurrence took place in 1979, long before passage of the new law. Importantly, unlike *Pallas*, the employer in *Spink* did not utilize its pre-Act decision in determining the plaintiff's right to benefits after the amendments were enacted. Instead, the question was purely one of retroactivity: did the amendments cover an action (the exclusion of Spink from the plan) that occurred before the amendments' effective dates? Under classic retroactivity analysis as set forth in *Landgraf*, the Supreme Court reversed the Ninth Circuit's holding that the amendments to the

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[4] If, as a matter of law, the only relevant conduct was Defendants' pre-PDA decision not to credit pregnancy leave, then Plaintiffs' claims would be time-barred for failing to file a timely claim with the EEOC. An analysis based on retroactivity would become completely superfluous.

[5] *Wambheim v. J.C. Penney Co., Inc.*, 642 F.2d 362 (9th Cir. 1981) (head of household rule applied prior to 1978 and maternity plan excluded married women prior to its revision in 1977); *Whitehead v. Oklahoma Gas & Elec. Co.*, 187 F.3d 1184, 1993 (10th Cir. 1999) (firing on account of pregnancy in 1969); *Fields v. Bolger*, 723 F.2d 1216 (6th Cir. 1984)(denial of light duty request in 1978); *Schwabenbauer v. Board of Ed. of City School Dist. of City of Orleans*, 667 F.2d 305, 307 (2d Cir. 1981)(probationary teacher terminated for 1970 pregnancy); and *Condit v. United Air Lines, Inc.* 631 F.2d 1136 (4th Cir. 1980)(loss of sick leave and disability benefits in 1972).

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Acts were retroactive.[6] This holding, however, is inapplicable to *Pallas* and the case here where the challenged behavior (calculation of retirement and other related benefits) occurred long after the PDA was enacted.

B. PLAINTIFFS' CLAIMS ARE NOT TIME-BARRED.

Defendants contend that Plaintiffs' Title VII claims are time-barred because administrative charges were not filed with EEOC at the time of the original pre-PDA decision to deny them service credit for their pregnancy-related leaves. (D.Mem. 10-12.) According to Defendants, only this decision can be the "discrete act" that triggers the running of the 300-day period for filing an EEOC charge. This theory is wrong, as *Pallas* and *Bazemore v. Friday*, 478 U.S. 385 (1986), demonstrate. (*See* P.Mem. 14-15.) Although Plaintiffs were subject to disparate treatment because of pregnancy prior to the PDA, under the policies of AT&T and its Bell System operating companies, the NCS system applies those pre-PDA policies and is a new, current discriminatory act.[7] Accordingly, Plaintiffs timely filed their EEOC charges within 300 days of Defendants' use of the tainted NCS system to determine their pension and termination-related benefits.

Defendants acknowledge that *Pallas* relied on *Bazemore* for "its holding that PT&T's policy of not giving retroactive service credit to employees who had taken pre-PDA maternity leave was a current violation of Title VII." (D.Mem. 10:21-23.) Nonetheless, Defendants ask this court to reject *Pallas's* holding that *Bazemore* is controlling because, according to Defendants, *Bazemore* "addressed an entirely different situation" than the situation presented here and in *Pallas*. *Id.* Defendants' strained effort to distinguish *Bazemore* only underscores why it provides the correct analysis of the timeliness of claims based on the application of a tainted service crediting system like the one at issue in this case.

Defendants assert that the employer in *Bazemore* "was committing current, ongoing acts of

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[6] Because retroactivity law is irrelevant to this case, *Landgraf* and *Castro-Cortez* add nothing to Defendants' analysis. Like *Spink*, these cases involve questions of whether amendments to statutes should be applied retroactively to cover actions occurring before the effective dates of the amendments. These cases are irrelevant because Plaintiffs do not argue, and *Pallas* does not hold, that pre-PDA actions violate the PDA.

[7] Plaintiffs and Defendants disagree about whether the pre-PDA policies were legal prior to April 29, 1979. *See supra*, fn. 2. This disagreement, however, is not relevant to the timeliness issue.

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discrimination" because, it "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 was enacted, for doing the same work.." (D.Mem. 10:22-11:3 (emphasis in original).) This is exactly the problem with Defendants' continued use of their NCS system. The *Bazemore* employer, before Title VII applied, paid black workers less than white workers who were performing the same work. 478 U.S. at 395. Similarly, here, before the PDA applied, Defendants' predecessor companies discriminated against women by giving them less service credit service credit for pregnancy-related leaves than employees on leaves for other temporary disabilities. Thus, here, as in *Bazemore*, plaintiffs' employer engaged in facially discriminatory practices, which were not explicitly proscribed by law.

Once Title VII became effective, the employer in *Bazemore,* "while it made some adjustments to try to get rid of the salary discrepancies resulting on account of pre-Act discrimination, [did not make] all the adjustments necessary to get rid of all such disparities." *Id.* at 395 (internal quotation marks omitted). After the effective date of Title VII, race-based discrepancies continued to be a component of the employer's system for calculating salaries. The result, as explained by the Court, was that a black worker received less pay in each paycheck than a similarly situated white employee. *Id.* Thus, it was the employer's *current* use of a salary system infected by pre-Act discrimination that led the Court to conclude that a timely violation of Title VII was occurring because black employees were continuing to be paid discriminatory wages. *Id.* at 395-396.[8]

The case before this Court is directly analogous. After passage of the PDA, Defendants did not adjust their formula for calculating retirement and other benefits to get rid of the NCS discrepancies resulting from pre-PDA facial discrimination. JSF ¶79. It is undisputed that these

[8] The Court rejected the lower court's conclusion that the law did not require the "affirmative eliminat[ion]" of the "pre-Act discriminatory difference in salaries" as an "error" that was "too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* [it] became covered by Title VII. *Id.* at 395. This demonstrates the error of Defendants' reliance on Plaintiffs' alleged "knowledge" that their service dates were adjusted at the time and AT&T's failure to "take any new action." (D.Mem. 12:1-2.)

discrepancies are reflected in the retirement benefits which Defendants pay or will pay to Plaintiffs and putative class members. JSF ¶ 34, 46, 55, 65. Thus, due to Defendants' failure to eliminate the discrimination built into the NCS system, defendants *now* pay Plaintiffs lower pension and termination-related benefits than similarly situated men.[9] In sum, Defendants' continued use of its NCS formula is infected by discrimination outlawed by the PDA and results in the unlawful payment of discriminatory benefits, just as the employer's wage payment formula in *Bazemore* resulted in racially discriminatory paychecks barred by Title VII. Defendants' practice is simply *Bazemore* in slow motion.

Defendants' reliance on *United Airlines v. Evans*, 431 U.S. 553 (1977) and *National Railroad Passenger Corp. v. Morgan*, ___ U.S. ___, 122 S.Ct. 2061 (2002) is misplaced. (D.Mem. 11:4-25.) First, these cases involved a "continuing violation" theory that Plaintiffs do not advance here. Second, they involved "discrete" acts of discrimination which occurred outside the statutory charge-filing period, rather than current violations occurring within that period. Accordingly, these cases do not undermine *Bazemore* or *Pallas* since Plaintiffs are challenging the *current* use of a discriminatory service credit calculation system.

In *Evans,* a female flight attendant was forced to resign in 1968 due to United Airlines' "no marriage" policy. At that time, she did not file a charge or a lawsuit over her forced resignation. In 1972, when rehired, she was subject to a different policy that barred restoration of seniority to anyone who had previously resigned from the airline. Although her 1968 forced resignation claim was time-barred, Evans argued that the airline was guilty of a present, continuing violation of Title VII by not restoring her prior seniority, thus giving "present effect to the past, illegal forced retirement and perpetuating the consequences of forbidden discrimination." *Evans*, 431 U.S. at 557. The Court rejected this argument because there was no present violation of Title VII -- United Airlines dealt in the same manner with every employee who had been fired and later rehired; all of them lost accrued seniority. *Id.* at 557-559. As the unanimous *Bazemore* Court reiterated, in distinguishing *Evans* from its holding, Ms. Evans:

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[9] For example, Plaintiff Hulteen receives monthly retirement checks that are lower than the amount paid to a man with an identical employment history, but whose NCS date was not moved forward to subtract pre-1979 leave periods due to temporary disability. *See* JSF ¶ 34.

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> made no allegation that the seniority system itself was intentionally designed to discriminate. Because a lawsuit on the forced resignation was time barred, however, it was to be treated as an act occurring before the statute was passed, and therefore it had "no present legal consequences...even though "[i]t may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." The "critical question, . . . is whether any *present violation* exists."

478 U.S. at 396, n. 6 (emphasis added, citations omitted).

Here the opposite is true. Defendants do not treat all employees absent from work because of disability in the same manner. It is this present disparate treatment that Plaintiffs here challenge -- Defendants' application of the discrimination-infected NCS system to determine valuable financial benefits, resulting in the payment of lesser amounts to Plaintiffs and other female employees absent for pregnancy disability than to employees absent for non-pregnancy related temporary disabilities.

Morgan simply reiterated the holding in *Evans* that Title VII precludes recovery for "discrete" acts of discrimination which occur outside of the EEOC charge-filing period. *Morgan, supra*, 122 S.Ct. at 2068, 2070-2073. The Court held that such acts outside the statutory period cannot be deemed timely through the application of a "continuing violation" doctrine. *Id.* at 2071. Here, however, Plaintiffs' position is completely consistent with *Morgan*. It is the discrete act of determining their benefits using the facially discriminatory NCS system that Plaintiffs challenge in this lawsuit. Accordingly, neither *Morgan* nor *Evans* undermine Plaintiffs' claims.[10]

C. AT&T'S SERVICE CREDIT COMPUTATION SYSTEM IS NOT PROTECTED BY §703(h).

AT&T urges the Court to find that its service credit calculation system is exempt from Title VII liability because it is a "bona fide seniority system" under section 703(h), 42 U.S.C. §2000e-2(h).[11] (D.Mem. 12-14.) This argument fails for two reasons. First, the PDA explicitly rejects the

[10] In *Morgan,* the Court explicitly referred to the *Bazemore* paychecks as actionable components of a discriminatory pay structure even though the initial salary discrimination began prior to Title VII. *Id.* at 2071.

[11] Section 703(h) is an "exception" to Title VII's prohibition of practices "that operate to 'freeze' the status quo of prior discriminatory employment practices." *California Brewers Ass'n v. Bryant,* 444 U.S. 598, 600 (1980)(citation omitted).

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"bona fide seniority system" defense when discrimination is based on pregnancy. Second, even if the PDA does not reject this defense, §703(h) is not applicable because AT&T's system is not "otherwise neutral" and therefore is not "bona fide." This is true because AT&T's system facially discriminates between similarly situated employees on the basis of sex and pregnancy in awarding pension and retirement-related benefits.

1. §703(h) is Not a Defense to a Claim under the PDA.

The PDA requires employers to treat women affected by "pregnancy, childbirth and related medical conditions . . . the same for all employment-related purposes, including the receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and *nothing in Section 2000e-2(h) of this title shall be interpreted to permit otherwise*." 42 U.S.C. §2000e-(k)(emphasis added). The Act's explicit exclusion of the "bona fide" seniority defense means that defendants cannot argue that their conduct here is immunized by §703(h).[12]

While "§703(h) on its face does not distinguish between the perpetuation of pre- and post-Act discrimination," *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 348, n.30 (1977), its intended purpose was to immunize existing *neutrally operated* seniority rights from challenge even if the result of the exercise of those rights was to disadvantage a protected class of workers. *See Teamsters,* 431 U.S. at 348-355 (analyzing legislative history of §703(h)). The clear holding in *Teamsters* placed "an otherwise neutral, legitimate seniority system" under the umbrella of §703(h) even if it "perpetuate[d]" pre-Act discrimination. *Id.* at 353-54.

In enacting the PDA, however, Congress elected to eliminate this employer defense. As noted in the House Report accompanying the proposed legislation, "[b]y making clear that

[12] *See* H.R. REP. NO. 95-948, at *7 (1978) (Tab 1 to Appendix of Congressional Materials in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Appendix")) (explaining that the exclusion of §703(h) was required by the Supreme Court's reliance in *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 and n. 21 (1976), on the Equal Pay Act defenses (including a bona fide seniority system defense), 29 U.S.C. §206(d), and the "special attention" paid to that provision by Congress in enacting §703(h)). *See also* remarks of Rep. LaFalce: "Women should be encouraged to remain in the work force and should not face potentially catastrophic consequences from loss of a job or seniority owing to pregnancy." 124 CONG. REC. H21440 (daily ed. July 18, 1978) (Tab 2 to Appendix.).

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distinctions based on pregnancy are per se violations of Title VII, the bill would eliminate the need in most instances to rely on the impact approach." H.R. REP. NO. 95-948, at *3 (1978). Thus, even if the Court were to be sympathetic to Defendants' claim that its NCS calculation system is a "bona fide" seniority system, it is explicitly not protected under the PDA's plain language.[13]

2. AT&T's NCS System Is Not a "Bona Fide" Seniority System.

Even if application of §703(h) is not precluded by the PDA, the NCS system does not qualify as a bona fide seniority system.[14] Defendants' argument that the NCS system is bona fide fails because it is totally at odds with the holding in *Pallas* that such a system is facially discriminatory.[15] Instead of explaining how their position can be squared with this holding in *Pallas* (which it cannot be), Defendants rely exclusively on *Ameritech Benefit Plan Committee v. CWA,* 220 F.3d 814 (7th Cir. 2000), *cert. denied sub nom., CWA v. Ameritech Benefit Plan Committee,* 531 U.S. 1127 (2001). (D.Mem. 13-14.) However, *Ameritech* not only does not control this case (*see* P.Mem. 12-13), but, as explained below, it is incorrectly reasoned.

Defendants first argue that no intent to discriminate can be established because the NCS system was adopted before Title VII and was held to be lawful in 1976 by the Supreme Court in *Gilbert.* (D.Mem. 13-14, 21-24.)[16] *Teamsters*, however, expressly held that a seniority system is

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[13] The PDA must, like other statutes, be interpreted according to its plain and unambiguous meaning. *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997); *Microsoft Corp. v. C.I.R.*, _F.3d__, 2002 WL 31687644, *5 (9th Cir. September 11, 2002). Accordingly, "there is a strong presumption that the plain language of [a] statute expresses congressional intent." *Middle Mountain Land & Produce, Inc.,* 307 F.3d 1220, 1223 (9th Cir. 2002); *Botosan v. Paul McNally Realty,* 216 F.3d 827, 831 (9th Cir. 2000)(statutory interpretation begins with the "plain meaning of the statute's language").

[14] Relying on *California Brewers Ass'n v. Bryant,* 444 U.S. 598, 605-06 (1980), Defendants first assert that AT&T's NCS system is a "seniority system," as that term is used in Section 703(h). (D.Mem. 12:16-13:8.) For purposes of this motion, Plaintiffs do not dispute this assertion.

[15] While it is true, as Defendants point out (D.Mem. 13), that *Pallas* did not consider the application of §703(h), this does not mean, as Defendants suggest, that *Pallas* is irrelevant to the §703(h) issue. To the contrary, *Pallas*' holding that the NCS system discriminates on its face and is therefore intentionally discriminatory is determinative on the §703(h) issue—the defense is inapplicable in such a case.

[16] *Gilbert* considered only issues relating to disability benefit payment coverage, *not* seniority accrual issues. 429 U.S. at 127. *Satty* subsequently held that denying seniority to women on pregnancy leaves violated Title VII. 434 U.S. at 139-40.

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not afforded the protection of §703(h) if, *prior* to enactment of Title VII, the system was adopted for the purpose of discriminating on the basis of race or sex, even though federal law did not forbid such discrimination at the time. 431 U.S. at 324 (pre-Act system would be unlawful if it "[h]ad its genesis in racial discrimination"). *Also see American Tobacco Co. v. Patterson*, 456 U.S. 63, (1982) (standard for determining legality of pre-Act seniority same as standard for post-Act system); *Pullman-Standard v. Swift*, 456 U.S. 273, 278-279 (1982)(seniority system adopted in 1954 unlawful if structured for a discriminatory purpose).

The holding in *Pallas* that the NCS system facially discriminates against pregnant women establishes that it was adopted with an intent to discriminate. *See International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199-200 (1991)(fetal-protection policy that excluded only pregnant women or women capable of bearing children from jobs involving lead exposure was facially discriminatory and therefore intentional discrimination); *Leslie Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000) ("where a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender . . . a plaintiff need not otherwise establish the presence of discriminatory intent")(internal quotation marks omitted, citation omitted); *Gerdom v. Continental Airlines*, 692 F.2d 602, 608 (9th Cir. 1982 (*en banc*)).

Next, Defendants argue that the NCS system is bona fide because the PDA is not retroactive. (D.Mem. 13, 24). The irrelevance of this argument is explained in Section II.A, *supra.*

Third, Defendants urge that *Teamsters* immunizes the NCS system because it only perpetuates pre-Act discrimination. Defendants misread *Teamsters*. (D.Mem. 13:16-17, 25-27.) In *Teamsters*, the challenged departmental seniority system favored employees who had worked as line drivers over those with longer plant-wide tenure. Because the line driver department was segregated prior to Title VII, plaintiffs argued that the system unlawfully perpetuated the effects of past discrimination. However, unlike the system challenged here, the *Teamsters* system "applie[d] equally to all races and ethnic groups. To the extent it 'locks' employees into non-line driver jobs, it does so for all. [Those] who are discouraged from transferring to line driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white."

Id. at 355-56. The Court clearly held that where an intention to discriminate exists in connection with the establishment or continuation of a seniority system, the system is not bona fide. *Id.* 353.[17] Stated otherwise, a showing that a neutral seniority system has a disparate impact is not sufficient. *Id.* at 353-54; *American Tobacco*, 456 U.S. at 75; *Trans World Airlines v. Hardison*, 432 U.S. 63, 81-82 (1977). Here, contrary to Defendants' claims, Plaintiffs do not attack discriminatory effects of an otherwise neutral rule. Instead, following the dictates of *Pallas*, they challenge Defendants' application of a standard used to compute benefits for women who took pregnancy-related leave prior to the PDA that is the "result of an intention to discriminate because of . . . sex." Accordingly, §703(h) does not excuse this conduct. *See Teamsters*, 431 U.S. at 353.

Finally, relying on *California Brewers*, Defendants argue that the NCS system is bona fide because it relies on relative length of service. (D.Mem. 13-14.) *California Brewers*, however, dealt only with the definition of a neutral seniority system under section 703(h); it did not involve the issue of what constitutes a bona fide seniority system. In fact, the case was remanded so plaintiffs could show that the seniority system was "not 'bona fide.'" 444 U.S. at 610-11. The fact that Defendants' NSC system may qualify as a "seniority system" has nothing to do with whether it is "bona fide." The two are distinct questions. Here, the NCS system is not "neutral," but instead treats women who were pregnant less favorably than otherwise comparable employees. Thus, §703(h) does not prevent this Court from imposing liability under Title VII.

D. PLAINTIFFS' "FORCE-OUT" AND "GUARANTEED REINSTATEMENT" CLAIMS ARE TIMELY.

Defendants argue that because Plaintiffs' "force out" and "guaranteed return" claims were illegal before the effective date of the PDA, they are currently untimely, (D.Mem. 15.) For support, Defendants cite only *Morgan* and *Evans*, which do not address this issue at all.[18] While

[17] Plaintiffs in *Teamsters* "conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose." *Id.* at 356.

[18] While *Evans* involved an earlier illegal act, it is unclear if the behavior in *Morgan* which occurred prior to the EEOC filing period would, by itself, have been sufficient to establish a *prima facie* race discrimination case. In fact, in *Morgan*, the Court consistently refers to the pre-filing period acts as discriminatory, not illegal. 122 S. Ct. 2061.

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both cases involved untimely challenges to policies that had been illegal when applied, in neither case did the Court discuss or rely on the distinction between a policy or act that was illegal or legal in the past in the context of evaluating a current violation. As shown above, the challenge in this case is to Defendants' current method of calculating retirement and related benefits, an act that did not occur in the 1960s or 1970s, but in the 1990s. Its legality prior to the PDA is, therefore, irrelevant.

E. NEITHER THE MFJ NOR THE DEFRA IMMUNIZE DEFENDANTS' ACTIONS.

Defendants suggest throughout their brief that continued application of the discriminatory NCS system is "sanctioned" or "required" because proceedings relating to the AT&T divestiture and/or passage of the Deficit Reduction Act ("DEFRA") in 1984 conferred "approval" of such use. (*E.g.*, D.Mem. 4-6, 12). Defendants contend that the Modified Final Judgment ("MFJ"), *United States v. Amer. Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. U.S.*, 460 U.S. 1001 (1983), and 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." (D.Mem. 12, emphasis in original). In support, Defendants cite various documents and sections of the JSF, none of which support Defendants' contention. *See* Kurtz Dec. at ¶6.

The merits of the NCS system were never considered in the MFJ or DEFRA. The various court-ordered divestiture documents were designed to require the newly formed regional companies to accept the credited service of employees who had been working for AT&T and its Bell System operating companies—a requirement intended solely to protect those employees so their service credit would not be lost or reduced. *See* Declaration of Patrick M. Scanlon In Support of Plaintiffs' Motion for Summary Judgment and In Opposition to Defendants' Motion ¶5 ("Scanlon Dec."). As Defendants' admit, the Plan of Reorganization ("POR") focused on protecting employees' pension benefit entitlements—"to ensure that there would be no loss of benefits due to the divestiture." (D.Mem. 5.) The divestiture rulings prohibited AT&T from *taking away* NCS from employees moving from PT&T to AT&T. They did not, however, prohibit AT&T from correcting its discriminatory NCS policies by *adding to* Plaintiffs NCS, either at

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divestiture or thereafter. *Id.* Indeed, in response to CWA's concern that employees may be injured by the effect of the breakup on pension plans, the MFJ court stated: "*At a minimum*, the decree requires that the pension assets of employees follow them to their new assignments." *United States v. Western Electric,* 569 F. Supp. 1059, 1094 (D.D.C. 1983) (emphasis added).

The Court noted that it "need not and should not involve itself in the specific terms of the post-divestiture pension plans beyond their structure." *Id.* at 1094. Beyond the "threshold issues of the pension plans' division and the elimination of unlimited portability," the court left open other "nonstructural aspects of the pension plan," including "for example, the treatment by the post-divestiture plans of former employees who are rehired, or what rules ought to determine when an employee's pension rights become vested." *Id.* at 1094 and n. 160. In fact, "[t]he Court's approval of the plan of reorganization is therefore not to be regarded as an endorsement of whatever AT&T may be planning with respect to post-divestiture pension benefits." *Id.*

Similarly, DEFRA was enacted to protect the rights of employees previously covered by the AT&T Bell System Pension Plan by placing an ongoing obligation on AT&T to transfer Plan assets to the new regional companies to cover transferring employees. In no way did it approve the lawfulness of the NCS system or crediting policies. Scanlon Dec. at ¶6-7. Thus, nothing in DEFRA or any other divestiture mandates prevented AT&T or any of the newly formed companies from increasing an employee's service to correct an erroneous or unlawful denial by the prior employer. *Id.* at ¶5,7.

II. PLAINTIFFS' ERISA BREACH OF FIDUCIARY DUTY AND WRONGFUL DENIAL OF BENEFITS CLAIMS DO NOT FAIL AS A MATTER OF LAW AND SHOULD NOT BE DISMISSED

Plaintiffs' amended complaint alleges several different violations of ERISA. As set forth below, Defendants' arguments lack merit; Plaintiffs' ERISA claims must prevail.

A. ERISA PROHIBITS DISCRIMINATORY ADMINISTRATION OF PENSION PLANS.

ERISA's strict fiduciary standards require plan fiduciaries to discharge their duties "solely in the interest of the participants" and "for the exclusive purpose" of providing benefits to participants and beneficiaries. 29 U.S.C. §1104(a)(1)(A)(i). As set forth in P.Mem. 18-21,

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Plaintiffs' argument that AT&T and the EBC breached their fiduciary duties by interpreting the plans to require use of facially discriminatory service credit rules is supported by the case law. Defendants cannot seriously contend that it is in the best interest of the individually named plaintiffs, and the class they seek to represent, as required under §1104(a)(1)(A)(i), to use facially discriminatory calculation methods which deny service credit, and thus pension benefits, to women who spent time on pregnancy leaves prior to 1979, while granting service credit to men who were absent on disability leaves during the same period.

Defendants argue that ERISA does not prohibit discrimination, relying on *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). Defendants imply that, since ERISA does not specifically prohibit discrimination, no claim for fiduciary breach exists for discriminatory pension plan administration. Defendants misread *Shaw's* holding, which dealt only with employer discrimination in plan *design*, not discrimination in plan *administration*. Thus, *Shaw's* observation, in *dictum*, that ERISA did not "proscribe discrimination in the *provision* of employee benefits" (*id.* at 91 (emphasis added)) is not controlling here, especially since *Shaw* was addressing only employer actions in adopting or amending employee welfare plans (as opposed to pension plans). *Id. Shaw* does not hold that discrimination by fiduciaries in the *administration* of pension plans is permitted by ERISA. (P.Mem. 18-21.) Both *Pallas* and *Carter* rejected the identical argument that ERISA does not prohibit discrimination, concluding that pregnancy discrimination in the current administration of pension plans and amendments is a breach of fiduciary duty. *Pallas*, 940 F.2d at 1327; *Carter v. AT&T, Co.*, 870 F.Supp. 1438, 1448 (1994). The core of Plaintiffs' argument is that once plan provisions are adopted or amended, plan fiduciaries cannot discriminate in their administration.

ERISA was enacted to protect and promote the interests of employees, beneficiaries and participants in employee benefits plans. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989). The fact that ERISA contains no specific provision prohibiting discrimination in plan administration does not mean that Congress intended to prohibit discrimination-based challenges to the actions of plan fiduciaries. To the contrary, Congress intended for federal courts to fill gaps in

the enforcement and relief provisions of ERISA.[19] As a result, *Bruch* directed lower courts to develop law to supplement ERISA's protections. 489 U.S. at 110. Following the command of *Bruch*, this Circuit has examined when a fiduciary is "acting in the best interest of the participants and beneficiaries" as required by section 1104,[20] and concluded that pregnancy discrimination in the current administration of pension plans and amendments is a breach of fiduciary duty. *Pallas*, 940 F.2d at 1237. *See also*, *Carter*, 870 F. Supp. at 1448.

The Ninth Circuit's *Pallas* decision is controlling here, and none of Defendants' cited cases from other Circuits (D.Mem. 16-17) provides a basis for disregarding it. For example, in *Ameritech*, 220 F.3d at 825, the Seventh Circuit acknowledged:

> [T]he *Shaw* Court was not presented with and did not answer the question of whether discrimination against certain plan participants could ever reach the point of breaching fiduciary duties. We have no need to decide whether such a claim might be stated in some future case; we conclude only that this is not such a case.

In reaching this conclusion, the Seventh Circuit failed to even mention *Pallas* or any other pertinent decision or the reasoning of these authorities.[21]

B. PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIMS ARE NOT PROCEDURALLY BARRED.

1. Plaintiffs' Breach of Fiduciary Duty Claims Arose After ERISA's Effective Date and ERISA Applies to Them.

Defendants mistakenly rely on *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496

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[19] *Bruch*, 489 U.S. at 110-111 ("[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans" (quoting 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits))).

[20] As set forth in Plaintiffs' moving papers, the DOL concurs in this view. Fiduciary obligations require plan administrators to administer plans not only in accordance with ERISA, but also in accordance with other federal laws. Non-compliance with other federal laws is not excused simply because a plan may technically comply with ERISA. (P.Mem. 19-20 and n. 17.)

[21] The Supreme Court cases cited by Defendants (D.Mem. 17 n. 12) do not detract from *Pallas*. *Mertens v. Hewitt Associates*, 508 U.S. 248, 258 (1993), recognized the authority of courts to develop a "federal common law" under ERISA. Unlike *Mertens*, Plaintiffs do not seek remedies not expressly incorporated in ERISA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 613 (1993), acknowledged, in the context of an alleged violation of ERISA §510, 29 U.S.C. §1140, "the possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status." *Newport News Shipbuilding v. EEOC*, 462 U.S. 669 (1983), did not mention ERISA because no ERISA cause of action was alleged, just Title VII as amended by the PDA.

(9th Cir. 1984). (D.Mem. 18.) In *Pallas*, the court cited *Menhorn* in concluding that "[c]alculation of the service term for purposes of eligibility in the program is an act subject to review for breach of fiduciary duty." *Pallas*, 940 F.2d at 1327. Just as in *Pallas*, the calculation of the service term and denial of corresponding benefits challenged here are subject to review under ERISA, occurring as they did in the 1990's and thereafter, well after ERISA's effective date. *Menhorn*, 738 F.2d at 1501; *Bolton v. Construction Laborers' Pension Trust*, 56 F.3d 1055, 1058 (9th Cir. 1995); *Carter*, 870 F.Supp. at 1446.

The issue posited by Defendants is whether the "act or omission" (29 U.S.C. §1144(b)(1)) upon which each claim is based occurred prior to the effective date of ERISA, citing *Menhorn's* statement 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. (D.Mem. 18.) However, Defendants have failed to identify any "unambiguous and nondiscretionary" provision of the PP and/or MPP adopted before January 1, 1975 (ERISA's effective date) which required Defendants to deny Plaintiffs' claims for additional service credit and benefits in the 1990's and thereafter. The *only* provision of the MPP and PP cited in Defendants' moving papers—Section 4.3—is *not* such a provision (D.Mem. 22). *See* discussion *infra* II C. Nor do various documents sent to the individually named plaintiffs periodically throughout their PT&T employment containing their NCS dates (JSF ¶¶ 31, 42, 53, 61) "reflect an affirmative denial of credits pursuant to 'an unambiguous and nondiscretionary plan provision.' At most, these statements were pre-ERISA communications of a non-decision." *Smith v. Retirement Fund Trust*, 857 F.2d 587, 590 (9th Cir. 1988). As a result, the instant case is *not* the type of claim described in *Menhorn* as excluded from ERISA review.

Indeed, this case presents the type of claim described in *Menhorn* as being subject to review under ERISA: "[c]ases . . . in which benefits have been denied as the result of a significant act of discretion under or interpretation of the plan which took place after ERISA's effective date." *Id.* at 1502. As the Ninth Circuit explained:

> A plan provision requiring discretion or interpretation does not work to deny an individual benefits until specifically applied to [her]. A denial of benefits

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> pursuant to such a provision thus operates simultaneously as *both* the event triggering accrual of a cause of action *and* the substantial act resulting in denial of benefits.

Id. at 1503-1504 (emphasis in original). Thus, "in cases where benefits are denied 'as the result of a significant act of discretion under or interpretation of the plan which took place after ERISA's effective date,' the date of the 'act or omission' is the date on which the plan provision at issue is applied to the individual." *Bolton*, 56 F.3d at 1058 (quoting *Menhorn* and citing *Smith*). Here, the Plans' fiduciaries engaged in a "significant act of . . . interpretation of the plan" when they excluded periods of absences due to pre-1979 pregnancy-related disability in calculating TOE, which the Plans state is to be used for pension benefit calculations. By resolving service crediting issues against the individually named plaintiffs in the 1990's, rejecting claims for additional service credit and benefits, the fiduciaries engaged in an "act or omission" which this Court has jurisdiction to review under ERISA.

Redding v. AT&T, Case No. D.C. 96-WY-807-CB (D.Colo. 1996), *aff'd*, 124 F.3d 217 (10th Cir. 1997), is not to the contrary. There the court was ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Because Ms. Redding's complaint failed to properly allege that plan fiduciaries had engaged in "a significant act of discretion" as required by §1144(b), the court's dismissal was affirmed on appeal. 124 F.3d 217, 1997 U.S. App. LEXIS 23037* 13-14. *Redding* recognized, however, that in cases where plaintiffs could show that particular plan provisions "vested AT&T officials with the discretion to award such benefits" or "imposed a standard not required by the plan's provisions," then such post-ERISA conduct would be actionable. *Id.* This litigation presents such a case.[22]

2. Plaintiffs' Breach of Fiduciary Duty Claims Are Not Time-Barred.

Defendants' cited cases (D.Mem. 19-20) demonstrate that Plaintiffs' breach of fiduciary duty claims are not time-barred. The Ninth Circuit has repeatedly stated that, to apply the limitations period, the court "must first isolate and define the underlying violation upon which . . . [the] claim is founded." *Meagher v. International Association of Machinists*, 856 F.2d 1418, 1422

[22] The Ninth Circuit decisions cited above in the text are controlling here, and none of Defendants' cited cases from other Circuits (D.Mem. 18, n. 13) provides a basis for disregarding them.

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(9th Cir. 1988); *Ziegler v. Connecticut General Life Insurance Co.*, 916 F.2d 548, 550-551 (9th Cir. 1990) (quoting *Meagher*).[23] Here, the underlying violation upon which Plaintiffs' claims are founded is the failure of the Plans' fiduciaries to calculate TOE in a neutral manner with regard to Plaintiffs' retirement applications. By using NCS, the Plans' fiduciaries picked an independent, discriminatory calculation method that was wholly separate from the Plans' terms. As a result, Plaintiffs had no "actual knowledge" of the alleged fiduciary breach until the 1990's and thereafter when the Plans' fiduciaries applied the discriminatory NCS system to calculate TOE and deny service credit and benefits to Plaintiffs. Defendants incorrectly assert, with no basis in the record before the Court, that Plaintiffs knew "in the early 1980's that their NCS dates . . . would be used to calculate their pensions." (D.Mem. 20.) *See* Kurtz Dec. ¶10. While Plaintiffs knew that their NCS dates traveled with them, their knowledge of the existence of NCS—an independent, discriminatory calculation method that was wholly separate from the Plans' terms—does not immunize Defendants' conduct because Plaintiffs did not have "actual knowledge" that the Plans' designated TOE system would not be used. *See, e.g., Waller v. Blue Cross*, 32 F.3d 1337, 1341 (9th Cir. 1994) ("We decline to equate knowledge of the purchase of annuities in this case with actual knowledge of the alleged breach of fiduciary duty."). As a result, Plaintiffs' ERISA claims are not time-barred.

3. Plaintiffs' Claims for Additional Service Credit and Benefits are Cognizable Under Both ERISA Section 502(a)(1)(B) and Section 404.

Plaintiffs have detailed the specific obligations owed to them by the Plans' fiduciaries under section 404(a)(1) of ERISA, 29 U.S.C. §1104(a)(1). (P.Mem. 18-21.) In *Varity Corp. v. Howe*, 516 U.S. 489, 492 (1996), the Supreme Court held that ERISA §502(a)(3) authorizes ERISA plan participants to seek relief for individual participants harmed by breach of fiduciary obligations by the plans' fiduciaries. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997). One aspect of the ERISA §502(a)(3), 29 U.S.C. § 1132(a)(3), relief sought by Plaintiffs is

[23] Defendants improperly cite an unpublished decision of the Ninth Circuit, *Spragg v. Pacific Telesis Group*, 1999 U.S. App. LEXIS 1304 (9th Cir. 1999). U.S. Court of Appeals for the Ninth Circuit, Circuit Rule 36-3 (2000). Even if Defendants could properly rely on *Spragg*, *Spragg* cites the Ninth Circuit cases referenced in the text and offers no analysis inconsistent with those cases.

to permanently enjoin Defendants from engaging in the challenged discriminatory practices. The determination of whether other equitable relief is "appropriate" should be deferred until Phase III of these proceedings.[24] As a result, Plaintiffs' breach of fiduciary duty claims under ERISA §§502(a)(3) and 404 should not be dismissed.

C. PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIMS DO NOT FAIL ON THE MERITS BECAUSE DEFENDANTS HAVE NOT APPLIED THE TERMS OF THE PLANS AS WRITTEN AND PLAINTIFFS ARE NOT REQUESTING THAT DEFENDANTS FAVOR THEM OVER OTHER PARTICIPANTS.

Defendants argue that ERISA requires fiduciaries to discharge their duties in the interest of all participants, not just the individually named plaintiffs (D.Mem. 21-22), but cannot show that granting relief to Plaintiffs would adversely affect other participants. The parties agree that Plan fiduciaries have a clear duty of impartiality to all plan participants and beneficiaries. *Varity*, 516 U.S. at 1078-1079 (citing Restatement (Second) of Trusts § 183). Plaintiffs are *not* asking AT&T to treat them more favorably than other plan participants by crediting them with additional service. Instead, they want Defendants to stop applying facially discriminatory service credit rules that favor a subset of participants (males who took temporary disability leaves) over women who were temporarily disabled as a result of pregnancy.

Similarly, Plaintiffs are not asking Defendants to make an "ad hoc exception" to Section 4.3(b)(ii) of the MPP which states: "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). (D.Mem. 22.) This section does not apply to any of the individually named plaintiffs because it is limited to employees who were hired by a Participating Company [i.e., AT&T] (1996 MPP, Section 2.27 and App. A) on or

[24] ERISA §502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), by itself cannot adequately remedy all the injuries asserted by Plaintiffs. The cause of action provided by ERISA §502(a)(1)(B) is specifically limited to "the terms of the plan." While Plaintiffs assert that they are entitled to relief under the terms of the Plans, Defendants' failure 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" as required by ERISA §404(a)(1)(A)(i) is not necessarily premised on the Plans' terms. In other words, even if Plaintiffs had no "benefits due to [them] under the terms of [the] plan" (ERISA §502(a)(1)(B)), they can still properly rely on ERISA §502(a)(3) "to enjoin any act or practice which violates" ERISA §404(a)(1)(A)(i) and "to obtain other appropriate equitable relief."

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after January 1, 1985. (1996 MPP, Section 4.3(b)(i)(B), p. 29.) All of the individually named plaintiffs were hired by AT&T on or before January 1, 1984. In addition, even if this section were applicable, the MPP makes clear that the "rules in this Section 4.3 are in addition to other rules contained in the Plan for crediting service and determining benefits under Plan." (1996 MPP, p. 28.) As a result, the plan provisions identified in Plaintiffs' moving papers, which required Defendants to include all of the time that the Plaintiffs were on leave due to pregnancy in calculating TOE, would still be applicable. Furthermore, even if Section 4.3 were applicable, that section merely requires that an employee's TOE include pre-divestiture service. There is no dispute among the parties that TOE should include pre-divestiture service; the issue is the method by which such service is to be calculated. Section 4.3 is silent on that issue. As a result, the language of Section 4.3 provides no support for Defendants' position.[25]

D. DEFENDANTS' DENIALS OF PLAINTIFFS' CLAIMS FOR ADDITIONAL SERVICE CREDIT AND BENEFITS DID NOT COMPLY WITH THE TERMS OF THE PLANS.

Defendants also cite Section 4.3(b)(ii) of the MPP and a similar section in the PP to argue that Plaintiffs' claims were properly denied. (D.Mem. 22-23.) As discussed *supra*, these sections not only do not apply to the individually named plaintiffs, but they also do not support Defendants' position. Defendants failed to act in accordance with the Plan documents by using a discriminatory calculation method that was wholly separate from the Plans' terms to determine Plaintiffs' TOE and benefits.

In addition, the summary plan descriptions ("SPDs") referenced in the Declaration of Brian M. Byrnes, filed with Defendants' moving papers, do not support Defendants' position.[26] The PP SPD itself makes clear that: "More detailed information is provided in the official Pension Plan documents. If there is a conflict between statements in this booklet and the terms of the Pension

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[25] Since Plaintiffs are challenging the Defendants' discriminatory administration of the Plans and not Defendants' failure to amend the Plans, the cases cited by Defendants in footnote 17 (D.Mem. 22) regarding the distinction between fiduciary duties and settlor functions are not relevant.

[26] While only limited portions of these SPDs were attached to Byrnes' Declaration, complete copies can be found at JA, Tabs 37 (MPP SPD), 38 (PP SPD). Plaintiffs have also filed objections to the admissibility of portions of Byrnes' Declaration. *See* Objections to Evidence, filed herewith.

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Plan documents, the Pension Plan documents will control and govern the operation of the Pension Plan." (PP SPD at AT&T/HULT 012216.) *See Bergt v. Retirement Plan for Pilots*, 293 F.3d 1139 (9th Cir. 2002). According to the PP SPD, NCS "[g]enerally . . . includes the continuous number of years, months and days you have worked for a Participating Company – beginning with your most recent date of hire and ending when you terminate employment" (p. 23). Since "Participating Company" includes AT&T, but not the pre-divestiture PT&T (PP SPD p. 61), this general definition of NCS does not address how to calculate Bell System service before divestiture on January 1, 1984. In that regard, the PP SPD states: "If you had Bell System service before divestiture on January 1, 1984, special rules may apply. Contact the Pension Service Center (PSC) for information on how divestiture affects your service." (p. 29) Thus, the PP SPD provides no support for Defendants' position. Even if it did, to the extent it conflicted with Plan provisions referenced in Plaintiffs' moving papers, those Plan terms would govern.[27]

III. PLAINTIFFS SEEK VALID PROSPECTIVE RELIEF UNDER TITLE VII WHICH PERMITS RESTORATION OF PENSION BENEFITS WHEN DISCRIMINATION IS PROVEN

Defendants argue that Plaintiffs' claims should be dismissed because "[r]etroactive relief is not available against pension plans, even if the plaintiff establishes a violation of the law." (D.Mem. 23). This argument should be rejected both on the merits and because, as a matter dealing with relief, it is improperly raised at this phase of the case.

Defendants' cited cases relate to the type of *relief* a court may order for a plaintiff whose discrimination case includes a claim for loss of pension benefits. (D.Mem. 23-24.) Defendants, however, provide no precedent holding that pension plans, or employers who make contributions using discriminatory standards, are immunized from *liability* because the likely relief might involve a pension plan. Because the present cross-motions seek summary judgment with respect to liability only and do not address relief, these authorities are not germane to this issue.[28]

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[27] The MPP SPD (JA, Tab 37) contains similar provisions to those described in the text for the PP SPD.

[28] The August 7, 2001 Joint Case Management Statement and Order delays any rulings on

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The distinction between liability and relief in this context is exemplified by a case cited by Defendants, *City of Los Angeles, Dept. Water and Power. v. Manhart*, 435 U.S. 702 (1978), in which the Court first held that requiring female employees to make larger contributions to a pension fund than male employees violated Title VII. *Id.* at 713-718. Having found liability, the Court then addressed the issue of remedies. Without qualifying its prior holding in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), that Title VII creates a strong "presumption" in favor of relief which makes the prevailing plaintiff whole (*Manhart*, 435 U.S. at 719; *see also Albermarle*, 422 U.S. at 418-420), the Court determined that such relief was not appropriate in *Manhart* because of the grave consequences posed to the viability of plan funds by invalidating the plan's entire funding methodology. *Manhart*, 435 U.S. at 719-723.

Even if the Court were to address Defendants' relief argument at the liability stage, Defendants' authorities involve an entirely different type of harm to the pension plan than that presented here. The decisions in *Manhart, Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), and *Florida v. Long*, 487 U.S. 223 (1988), provide only a limited exception to Title VII's presumption of make-whole relief. *See Albermarle*, 422 U.S. at 419 ("The 'make whole' purpose of Title VII is made evident by the legislative history."). This exception occurs only when relief would undo crucial pension plan funding decisions made over many years, causing complete plan restructuring and posing a likely threat to a plan's long-term ability to pay expected benefits. *See Manhart*, 435 U.S. at 718-20, 722-23; *Norris*, 463 U.S. at 1091-1095; *Long*, 487 U.S. at 235-238, 740.[29] Granting relief in this case poses no such threat to Defendants' Plan funding or the actuarial assumptions underlying them. Instead, all that is involved here are relatively small NCS

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remedies until Phase III of the case, after liability has been determined and the class defined.

[29] This analysis also applies to *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 782-83 (9th cir. 1986), and *Retired Public Employees' Association v. California*, 779 F.2d 511, 516 (9th Cir. 1986).

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adjustments for some of AT&T's employees who were unlawfully denied service credit based on pregnancy discrimination.

Unlike the cases relied upon by Defendants, providing relief to Plaintiffs' claims will not threaten the Plans' viability, and there is no evidence in the record to the contrary. Indeed, in cases like this one, where the *Manhart-Norris-Long* exception does not apply, courts routinely include lost pension benefits in calculating back pay owed to prevailing plaintiffs, in conformity with Title VII's scheme of restorative relief. *See, e.g., Landgraf v. USI Film Prod.*, 511 U.S. 244, 253-54 (1994)(explaining that the 1991 amendments to Title VII expanded available monetary relief, which had already included pension benefits, to include future pecuniary and nonpecuniary losses); *United States v. Burke*, 504 U.S. 229, 234 (1992) (stating that a victim of gender based discrimination may recover lost wages "along with lost fringe benefits such as vacation pay and pension benefits"); *Ortiz v. Bank of America Nat'l Trust & Sav. Asso.*, 852 F.2d 383, 386 (9th Cir. 1987) (affirming award of compensation for lost pension benefits to prevailing Title VII plaintiff).

Finally, even if the *Manhart-Norris-Long* cases arguably applied here, their retroactivity analysis does not. Gender and pregnancy discrimination have been prohibited long before Defendants began paying Plaintiffs discriminatorily reduced pension benefits. Throughout the period that AT&T has been making reduced Plan contributions based on gender and pregnancy, Defendants have been on notice that such discrimination is unlawful. *See* P.Mem. 11-12;29 C.F.R. §1604.10; App. A to §1610.11. They cannot now argue that an order directing them to correct their discriminatory payment of pension benefits today is somehow impermissibly "retroactive" because it would require them to replace funds knowingly withheld in the past. *See also Carter*, 870 F. Supp. at 1444 n.2 (rejecting the same AT&T retroactivity argument under *Manhart*, *Norris*, and *Long* "because the PDA [was] not being applied retroactively" there: "AT&T was on notice at all times that discrimination against wom[e]n in the workplace violated Title VII, and this included

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discriminating against wom[e]n on the basis of their pregnancy. Thus, the concerns of the Manhart-Long line of cases are not present in this case." *Id.*)

CONCLUSION

For all of the reasons set forth above, and in Plaintiffs' moving papers and memorandum of points and authorities, Defendants' motion for summary judgment should be denied, and Plaintiffs' motion for summary judgment should be granted.

Dated: December 18, 2002

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