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FILED
DEC 18 2002
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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

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1 Defendants AT&T Corp., AT&T Management Pension Plan, AT&T Pension Plan, and
2 AT&T Employees' Benefit Committee, pursuant to Fed. R. Civ. P. 56, hereby oppose plaintiffs'
3 motion for summary judgment. In opposition to plaintiffs' motion, defendants state as follows:

4 **INTRODUCTION**

5 Plaintiffs' motion for summary judgment should be denied because all of their claims fail
6 as a matter of law. Plaintiffs rely heavily on the 2-1 decision in *Pallas v. Pacific Bell*, 940 F.2d
7 1324 (9th Cir. 1991), and never acknowledge that the Ninth Circuit (based on intervening
8 Supreme Court authority) has since repudiated the *Pallas* premise that statutes like the
9 Pregnancy Discrimination Act ("PDA") apply retroactively. *See* AT&T 11/19/02 Br. at 7-10.
10 To the contrary, plaintiffs expressly argue that their case depends entirely on this Court holding
11 that the PDA *is* retroactive. Plaintiffs concede that, from 1979 forward, PT&T's and AT&T's
12 pregnancy leave and service credit policies were lawful. But they argue that PT&T and AT&T
13 violated the law because, upon the PDA's effective date in 1979, they applied the PDA
14 "prospectively only." Pl. 11/19/02 Br. at 9; *see also id.* at 1.

15 All of plaintiffs' PDA arguments depend on the Court applying this erroneous,
16 retroactive reading of the PDA and ignoring a controlling Supreme Court decision (which
17 plaintiffs fail to cite). *See Gilbert v. General Electric Co.*, 429 U.S. 125, 136 (1976) ("exclusion
18 of pregnancy from a disability benefits plan . . . providing general coverage is not a gender-
19 based discrimination at all"). Plaintiffs argue that the 1979 PDA can be applied backwards, so
20 that pre-effective date conduct and policies were transformed retroactively into unlawful policies
21 upon the PDA's enactment. In other words, even though AT&T's pregnancy leave and service
22 credit policies have been lawful at all times *before* 1979 (because of *Gilbert*) *and since* 1979
23 (because AT&T made them PDA-compliant), plaintiffs contend they can reach back and label
24 the pre-PDA policies "discriminatory" so that, 24 years later, a court in 2003 may grant plaintiffs
25 relief for pre-1979 conduct. And, in yet another leap, plaintiffs argue that the NCS system --
26 which on its face makes no distinction whatsoever between males and females -- is "facially
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discriminatory" for no other reason than that plaintiffs today feel the effects of lawful *Gilbert*-era, pre-PDA policies. Plaintiffs' ERISA fiduciary breach arguments, moreover, borrow their erroneous PDA reasoning in an effort to transform ERISA into an anti-sex discrimination law (which the Supreme Court has said they may not do), and go on, conspicuously omitting any reference to controlling passages that squarely refute their claims, to claim that AT&T is violating the service credit provisions of the governing pension plans.

Section I.A. of the Argument below sets forth the controlling Supreme Court and Ninth Circuit authority that, since *Pallas*, makes clear that the PDA is not a retroactive law, contrary to what plaintiffs and *Pallas* assert. *Castro-Cortez v. Immigration and Naturalization Service*, 239 F.3d 1037 (9th Cir. 2001), *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), and *Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244 (1994) (on which *Castro-Cortez* relied) demonstrate that the PDA is indeed a "prospective only" statute. Accordingly, a court is not permitted to reach backwards to overturn decades of service credit expectations of hundreds of thousands of plan participants that were negotiated as PDA-compliant by the CWA in 1979 and memorialized in national collective bargaining agreements ever since, and adopted in the 1982 divestiture Plan of Reorganization, in the 1983 judgment of the divestiture court, and by Congress (at the CWA's request) in the Deficit Reduction Act of 1984.

Section I.B. addresses plaintiffs' reliance on the district court decision of *Carter v. AT&T* and on the EEOC's Casehandling Manual (which in turn relies on *Pallas* and *Carter*). What plaintiffs fail to explain is that the Sixth Circuit and district court in *Carter* vacated the *Carter* decision, in part, "[i]n light of the United States Supreme Court's recent [anti-retroactivity ADEA service credit] decision in *Lockheed v. Spink*, 116 S. Ct. 1783 (1996) and the Colorado District Court's [ERISA timeliness] decision in *Redding v. AT&T, et. al.*, No. 96-WY-807-CB (D. Colo. July 25, 1996)." Both *Lockheed* and *Redding* squarely reject plaintiffs' position.

1 Section I.C. discusses plaintiffs' repeated, but conclusory, contentions that AT&T is
2 guilty of the "ongoing application of discriminatory service crediting policies," and that the NCS
3 system is "facially discriminatory." These circular contentions depend on retroactive application
4 of the PDA, additional faulty reasoning, misapplication of *Bazemore v. Friday*, 478 U.S. 385
5 (1986), and ignoring the Supreme Court's recent decision in *National Railroad Passenger Corp.*
6 *v. Morgan*, 122 S. Ct. 2061 (2002) and the long-settled law of *United Air Lines v. Evans*, 431
7 U.S. 553 (1977). Finally, Section I.D refutes plaintiffs' efforts to avoid the immunizing effect of
8 Section 703(h) of Title VII on seniority systems like the NCS system here.
9 Section II.A. of the Argument demonstrates that ERISA's fiduciary duty provisions
10 cannot be invoked as an additional remedy for plaintiffs' sex discrimination claims. Section
11 II.B. refutes plaintiffs' disingenuous argument that AT&T has not been following the terms of
12 the controlling plans when it uses the NCS system to calculate service. Contrary to plaintiffs'
13 argument, Net Credited Service and Term of Employment ("TOE"), as defined in the plans, are
14 calculated in the same manner. Plaintiffs fail to call to the Court's attention plan language
15 contained in the very paragraphs they cite that supports AT&T's practices and rejects plaintiffs'
16 argument. Finally, Section II.C. shows that plaintiffs have not been denied any benefits due
17 them under the plans.
18 For all of the reasons set forth below, and in AT&T's motion for summary judgment and
19 memorandum in support, the Court should deny plaintiffs' motion for summary judgment, grant
20 AT&T's motion for summary judgment, and dismiss this case in its entirety with prejudice.
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ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR TITLE VII CLAIMS BECAUSE THEIR ARGUMENT RESTS ON AN IMPERMISSIBLE, RETROACTIVE APPLICATION OF THE PDA AND MISAPPLICATIONS OF OTHER TITLE VII AUTHORITY.

A. The Ninth Circuit Has Now Rejected The *Pallas-Spink* Method Of Retroactive Application Of New Statutory Requirements.

Plaintiffs concede that, from 1979 forward, PT&T's and AT&T's pregnancy leave and service credit policies were lawful. Pl. 11/19/02 Br. at 5, 9. Nevertheless, they argue that PT&T and AT&T violated the law because, upon the PDA's effective date in 1979, they applied the PDA "prospectively only":

> After enactment of the PDA, however, [PT&T's and AT&T's] policies were changed to allow women with pregnancy- related disabilities to take disability leave rather than personal leave. *Pallas*, 940 F.2d at 1326; JSF ¶79; JA Tab 45, (¶ 2). Pacific Bell, like Defendants here, *implemented this change in policy prospectively only and continued to deny service credit to women who were disabled due to pregnancy prior to April 29, 1979. Id.*; JSF ¶ 66 and n.2, 69, 72, 75, 78, 84, 88 (emphasis added).

Pl. 11/19/02 Br. at 9; *see also id.* at 1. All of plaintiffs' arguments -- including their claim that AT&T's NCS system is "facially discriminatory" -- are based on the notion that the PDA applies retroactively.

Contrary to plaintiffs' argument and *Pallas*, in *Wambheim v. J.C. Penney Co., Inc.*, 642 F.2d 362, 363 n.1 (9th Cir. 1981), the Ninth Circuit held, like the other courts of appeals,[1] that the PDA is not a retroactive statute. See AT&T 11/19/02 Br. at 7-10. Indeed, in its post-*Pallas* decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 257 n.10 (1994), the Supreme Court used the effective date language of the PDA as an example of a *non-retroactive* statute.

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[1] See *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").

Although the facts of *Wambheim* did not involve service credit issues, as did *Pallas*, the availability of retroactive service credit relief was specifically addressed in another post-*Pallas* decision, *Spink v. Lockheed Corp.*, 60 F.3d 616 (9th Cir. 1995), *rev'd,* 517 U.S. 882 (1996). In that case, 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. The Ninth Circuit in *Spink* explicitly recognized that its holding of pre-enactment relief meant that it was applying ADEA amendments retroactively. 60 F.3d at 620, n.1 ("To the extent our interpretation requires employers to include pre-enactment service years in calculating benefits, it applies retroactively. Retroactivity depends on whether the new provision attaches new legal consequences to events completed before its enactment.") ("*Spink*").[2] 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*").

The Ninth Circuit's recent decision in *Castro-Cortez v. Immigration and Naturalization Service*, 239 F.3d 1037, 1040, 1050-54 (9th Cir. 2001), also explicitly establishes that *Pallas* has lost its authority. In that case, the Ninth Circuit applied the post-*Pallas* precedent of *Landgraf* to reject the retroactive application of statutory amendments to the Immigration and Nationality 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

[2] Similarly, the *Pallas* court explained 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.

legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place..." *Id.* (citations omitted). In this case, the "legal effect of [the] conduct" plaintiffs challenge must therefore be assessed under *Gilbert*, which is "the law that existed when the conduct took place." *Id.*

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. Plaintiffs' motion for summary judgment should be denied because the principal authority on which they rely, *Pallas*, is no longer the law in the Ninth Circuit, or anywhere else.

B. *Carter v. AT&T*, On Which Plaintiffs Rely, Was Vacated Partly Because Of The Intervening Decisions Of The Supreme Court In *Lockheed Corp. v. Spink* And The District Court In *Redding v. AT&T.*

Plaintiffs also contend that *Carter v. AT&T,* 870 F. Supp 1438 (S.D. Ohio 1994), *vacated* 1996 WL 656571 (S.D. Ohio Sept. 13, 1996), a case that followed *Pallas*, is "directly on point" and supports plaintiffs' position here. Pl. 11/19/02 Br. at 10-11. Plaintiffs recognize that *Carter* is not binding on AT&T, but argue that its "persuasiveness" is not diminished in this case because it is one "involving the same defendant and the same issue." *Id.* at 10, n.10.

Carter has "persuasiveness," but it persuades *against* plaintiffs' argument, not for it. While that case was on appeal in the Sixth Circuit, the *Carter* district court entered an order that it would vacate its original decision if the case came back to it. *See* Order of District Court, in *Carter v. AT&T*, No. C-1-92-424, Sept. 9, 1996 (Jackson Decl. Ex. A).[3] What plaintiffs omit from their brief is that the Sixth Circuit approved vacatur of the *Carter* decision, in part "[i]n

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[3] A copy of the Declaration of Charles C. Jackson in Opposition to Plaintiffs' Motion for Summary Judgment has been filed and served contemporaneously with this opposition brief.

1 light of the United States Supreme Court's recent [anti-retroactivity ADEA service credit]
2 decision in *Lockheed v. Spink*, 116 S. Ct. 1783 (1996) and the Colorado District Court's decision
3 [dismissing similar claims under ERISA] in *Redding v. AT&T, et. al.*, No. 96-WY-807-CB (D.
4 Colo. July 25, 1996)." Order of Sixth Circuit in *Carter v. AT&T Corp.*, No. 95-3213, Sept. 13,
5 1996 at 1 (Jackson Decl. Ex. B).

6 On remand, the district court:

7 "expressly [found] that the competing values of finality of judgment and he right to relitigation of unreviewed disputes (see *Lockheed Corp. v. Spink*, 116 S. Ct.
8 1783 (1996) and *Redding v. AT&T*, et al., No 96-WY-807-CB (D. Colo. July 25, 1996)), and additional reasons, favor vacatur of this Court's December 16, 1994
9 Order and the Judgment entered pursuant thereto (as amended on January 30, 1995)."

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See Order of District Court in *Carter v. AT&T Corp.*, No. C-1-92-424, Sept. 13, 1996 (Jackson
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Decl. Ex. C).
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Thus, if *Carter* has any persuasive value at all, it is to make the point that *Lockheed* and
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Redding undercut the rationale of *Pallas* (upon which the *Carter* district court originally relied).
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As set forth above, the Supreme Court in *Lockheed* reversed the Ninth Circuit on the identical
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service credit issue (albeit under the ADEA) here. *Carter* does not support the result the
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plaintiffs seek in this Court in any way, and because the EEOC Compliance Manual relies on
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Carter, it likewise has no authority either (*see* Pl. 11/19/02 Br. at 12).[4]
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[4] Plaintiffs' citation to *EEOC v. Bell Atlantic Corp.*, 80 FEP Cas. (BNA) 164, 1999 WL 386725,
23 at * 4 (S.D.N.Y. 1999) is unavailing for similar reasons. In denying Bell Atlantic's motion to dismiss, the court simply relied on *Pallas* and *Carter* and failed to discuss the controlling
24 Supreme Court authorities of *Lockheed* and *Landgraf*. In addition, in approving the settlement of that case in October 2002, the *Bell Atlantic* court specifically found that "[a]voiding the
25 uncertainty of litigation is especially important here as the complaints are based upon conduct that occurred many years ago, and that may be subject to timeliness defenses that have been
26 successful in other courts." *EEOC v. Bell Atlantic Corp.*, 90 FEP Cas. (BNA) 476

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C. Plaintiffs Rely On Cases Such As *Bazemore v. Friday* That Do Not Support Their Claims, And Fail To Deal With Others (Including *Morgan* and *Evans*) That Doom Their Claims.

1. "Facial Discrimination" Cases And *Bazemore.*

The foregoing makes clear that plaintiffs' theme -- that AT&T is engaged in the "ongoing application of discriminatory service crediting policies" (Pl. 11/19/02 Br. at 10) -- is contrary to law. Because the PDA is not retroactive, PT&T's and AT&T's pregnancy leave policies were lawful before 1979 (because of *Gilbert*) and have been ever since (because AT&T made them PDA-compliant, as plaintiffs concede). However, because plaintiffs failed to file discrimination charges within the time Title VII requires, they are forced to argue that the pre-PDA policies at issue are "facially discriminatory" and "subject to challenge at any time." Pl. 11/19/02 Br. at 8. To do so, they rely on *Pallas's* description of the policies as "facially discriminatory." *Id.; Pallas*, 940 F.2d at 1326. However, the *Pallas* majority could not have reached this conclusion absent its belief that the PDA is retroactive, and that lawful pre-PDA conduct was transformed on the PDA's enactment date into "discriminatory" conduct. As explained above, though, it is now well-established that the PDA is *not* retroactive.

Plaintiffs' "facially discriminatory" description makes no sense for another dispositive reason: *on its face, TOE (as used in the pension plans) and the NCS system make no distinction whatsoever between males and females,* and plaintiffs fail to point to any such distinction. Thus, plaintiffs' repeated references to the NCS system as "facially discriminatory" are factually and legally insupportable.

In addition to *Pallas,* the other cases plaintiffs cite completely undercut their "facial discrimination" argument.[5] Wholly apart from the dispositive difference that the pre-PDA

[5] Plaintiffs also rely on an EEOC guidance written in 1972 and the case of *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) for the proposition that PT&T's pre-1979 policies were illegal at the time. Pl. 11/19/02 Mem. at 11-12. However, the 1972 EEOC guidance was rejected in *Gilbert,* 429 U.S. at 145 ("The EEOC guideline of 1972, conflicting as it does with earlier pronouncements of that agency, and containing no suggestion that some new source of legislative history had been discovered in the intervening eight years, stands virtually alone").

policies plaintiffs challenge here were affirmatively determined by the Supreme Court to be lawful, so-called "facial discrimination" is not a mere label to avoid statutes of limitations, but is grounded on express, *proscribed* differences in treatment, as illustrated by the cases on which plaintiffs rely. *See UAW v. Johnson Controls,* 499 U.S. 187, 199-200 (1991) (company barred fertile women, but not fertile men, from jobs entailing high levels of lead exposure; "Johnson Controls' policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females"); *Arizona Governing Committee For Tax Deferred Annuity And Deferred Compensation Plans v. Norris,* 463 U.S. 1073 (1983) (retirement plan violates Title VII when it pays lower amounts to a woman than to a man when contributions are the same); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (company's post-PDA policy of providing pregnancy-related benefits to female employees but denying them to the wives of male employees is facially discriminatory); *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002) (state of Hawaii's exclusion of the blind and other disabled from its health insurance programs "involves *facial discrimination*, in the form of a categorical exclusion of disabled persons from a public program") (emphasis added); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854-55 (9th Cir. 2000) (court invalidated policy that "men could generally weigh as much as large-framed men

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Further, plaintiffs' explanation of *Satty* is extremely misleading. *Satty* does *not* stand for the proposition that "denying seniority to women on pregnancy leave violates Title VII." Rather, it stands for the proposition that imposing a burden, such as eliminating all accrued seniority due to pregnancy leave (as opposed to granting a benefit to pregnant employees) violates Title VII. *Satty*, 434 U.S. at 142 ("Here, by comparison [to the situation in *Gilbert*], petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer"). Indeed, lower courts construing the issues in this case in light of *Gilbert* and *Satty* stated that *Gilbert* controlled. *See In Re Southwestern Bell Maternity Litigation*, 602 F.2d 845, 848 (8th Cir. 1979) ("Here, the record shows that Bell, unlike the employer in *Satty*, does not divest employees on maternity leave of seniority accumulated prior to taking leave"). Plaintiffs here have never made a claim that that AT&T divests pregnant employees of accumulated service credit.

whether they were large-framed or not, while women could generally not weigh more than medium-framed women").[6]

What these cases illustrate is that truly "facially discriminatory" policies explicitly state that employees will be treated differently based on their age, gender, or some other statutorily protected characteristic. No such policy exists in this case. Before 1979, when the policies differentiated between pregnant employees and non-pregnant (male or female) employees, pregnancy was not a statutorily protected characteristic. *See Gilbert*, 429 U.S. at 136. When pregnancy became a statutorily protected characteristic, in 1979, AT&T and PT&T changed their policies to eliminate differences in treatment between pregnant and non-pregnant disabled employees. The cases plaintiffs cite involved challenges to policies *that existed at the time of the challenge* (*e.g.*, if the employee is 55 now, he is fired). In contrast, here, it is undisputed that the pregnancy leave policy that is being challenged *has not been in effect since 1979* (JSF ¶¶ 79-80).[7]

This distinction illustrates why plaintiffs' reliance on *Bazemore v. Friday*, 478 U.S. 385 (1986), is so misplaced. In *Bazemore*, the employer paid black employees lower wages than white employees for doing the same work. The Court rejected the employer's defense that,

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[6] See also *EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086, 1094 (6th Cir. 1996) ("KY. REV. STAT. ANN. § 16.505(15) mandatorily retires state troopers on the first day of the month following their fifty-fifth birthday. As such, it facially discriminates between troopers younger than fifty-five years of age and those older than fifty-five years of age"); *Probe v. State Teachers' Retirement System,* 27 FEP Cas. (BNA) 1306 (C.D. Ca. 1981), *aff'd in part and rev'd in part,* 780 F.2d 776 (9th Cir. 1986)(use of explicit, current sex-based payments in retirement plan illegal); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F2d 1054 (2d Cir. 1982), *vacated and remanded*, 463 U.S. 1223 (1983)(use of explicit, current sex-based mortality tables is facially discriminatory).

[7] Unlike the NCS system in this case, the cases plaintiffs cite on page 17 of their brief are also distinguishable in that they involved current, on-going explicit discrimination. *See EEOC v. Kentucky State Police Dep't,* 80 F.3d 1086, 1094 (6th Cir. 1996) (current, explicit age-based mandatory retirement system is illegal); *EEOC v. Westinghouse,* 725 F.2d 211, 218-19 (3rd Cir. 1983) (employee plan which excludes those over 55 from participating is timely); *Crosland v. Charlotte Eye, Ear, and Throat Clinic*, 686 F.2d 208, 212 (4th Cir. 1982) (Plan explicitly excluded those over the age of 56 and those hired after age 53 from participation); *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 163 (1989) (Plan that explicitly excluded those age 60 from eligibility can be attacked at time of retirement)

because its pay practices began before Title VII made them unlawful, the employer could lawfully continue to use the same practices after Title VII. Contrary to the employer's argument, once Title VII invalidated the pay practices at issue, the employer was obliged to change its conduct. It refused to do so, however. Accordingly, any charge of discrimination filed within 300 days of such post-Act discrimination was timely and actionable. 478 U.S. at 395-396.

Here, unlike the employer in *Bazemore*, AT&T changed its conduct when the law changed. AT&T did not rely on the fact that its pregnancy leave policies were lawful before the PDA as a basis for continuing the same practices after the PDA. Rather, AT&T conformed its policies and practices to the new law. Plaintiffs complain that the current effect of these pre-PDA policies is that plaintiffs have incrementally less service credit today than other disabled employees (male and female) who took disability leave before 1979 for reasons other than pregnancy. However, even under *Bazemore*, these effects are of no legal import, because AT&T's current service crediting policies are lawful. To analogize, although plaintiffs' "bank account" of service credit may not be as great as that of disabled non-pregnant employees, the rate of inflow of service credit since the PDA's enactment is exactly the same for pregnant and non-pregnant temporarily disabled employees. If AT&T currently did not provide the same service credit for pregnancy leaves as for non-pregnancy-related temporary disability leaves (and argued that such a policy could not be challenged today because it was adopted before the PDA), plaintiffs could invoke *Bazemore* and sue for relief. However, because service credit has been accruing to pregnant and other disabled employees at the same rate at all times since 1979, there is simply no "present" violation of the PDA over which plaintiffs can sue.[8]

2. *Evans* And *Morgan* Also Repudiate Plaintiffs' Claims.

Two on-point Supreme Court decisions directly reject plaintiffs' effort to sue over the "effects" of decades-old events. In *United Airlines v. Evans*, 431 U.S. 553 (1977), the Court

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[8] Tellingly, the *Bazemore* court did not order relief for pre-act conduct, which is what plaintiffs seek here.

rejected a "continuing violation" theory nearly identical to plaintiffs' here. Prior to 1968, United had a policy that flight attendants, like Evans, would be forced to resign when they got married. *Id.* at 554. Upon their resignation, flight attendants were forced to relinquish all accrued seniority. *Id.* at 555 n. 6. This policy violated Title VII. *See Sprogis v. United Airlines*, 444 F.2d 1194 (7th Cir. 1971). However, Evans did not file a charge within the specified time period. 431 U.S. at 556.

United stopped forcing flight attendants (nearly all of whom were women) to resign in 1968, and Evans was rehired in 1972. *Id.* However, she was given a new seniority date. *Id.* After informal attempts to obtain her original service date failed, Evans sued but the district court dismissed, stating that her claim was time-barred.

The Supreme Court agreed. The Court held that Evans' failure to timely challenge United's discriminatory forced resignation policy meant that United "was entitled to treat that past act as lawful." *Id.* at 558. While it is true that Evans had less seniority (in her "bank account") as a result of United's earlier discrimination and that that had a continuing effect on her employment, "the emphasis should not be placed on mere continuity; the critical question is whether any *present* violation exists." *Id.* (emphasis changed). The Court held that "*a challenge to a neutral system* [like AT&T's NCS system which does not distinguish between males and females] *may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer.*" *Id.* (emphasis added).

Here, AT&T's case is even stronger than United's was in *Evans*. In *Evans*, the plaintiff's failure to sue within 300 days of an act that was unlawful at the time it occurred barred her from suing after the employer changed its conduct to conform to the law. The *Evans* Court held that the plaintiff's failure to sue was "the *legal equivalent* of a discriminatory act which occurred *before the statute was passed*." *Id.* (emphasis added). On that basis, the Court ruled that any

differences in service credit were not present violations, but merely the present effect of past, time-barred violations. *Id.* Here, in contrast, the challenged conduct actually *did* occur before the applicable statute was passed. Plaintiffs' efforts to sue AT&T now, after it has conformed to the law for more than two decades, must fail because they challenge only the present effects of past *lawful* conduct, not even past discrimination, as in *Evans*.

Recently, in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002), another case plaintiffs do not cite, the Supreme Court reiterated the importance of filing a timely discrimination charge. In *Morgan*, 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 were "discrete acts" that occurred more than 25 years ago, before the PDA was even law. 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, because AT&T conformed its policies to the law when Congress enacted the PDA in 1979, plaintiffs' reliance on *Bazemore* is

unavailing; rather, *Evans* and *Morgan* control, and plaintiffs' motion for summary judgment on their PDA claims must be denied because they fail as a matter of law.

D. The Effects Of Pacific Telephone & Telegraph Co.'s Pre-PDA Pregnancy Leave Service Credit Policy Are Also Not Actionable Because The NCS System Is A Bona Fide Seniority System Within The Meaning Of Section 703(h) Of Title VII.

As AT&T established in its summary judgment papers, AT&T's NCS system is a seniority system within the meaning of Section 703(h) of Title VII. *See* AT&T 11/19/02 Br. at 12-14. Plaintiffs challenge the applicability of Section 703(h) to this case by citing to *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) and to the Civil Rights Act of 1991 ("CRA"). Pl. 11/19/02 Br. at 14. Plaintiffs recognize that, under *Lorance*, facially neutral seniority systems must be timely challenged when they are adopted, and that facially discriminatory policies may be challenged at any time. *Id.* at 14. The CRA modified Section 703(h) to provide that a facially neutral seniority system can be challenged whenever it is applied if there is evidence of an intentionally discriminatory purpose in its adoption. *Id.* at 14 & n.13, 16. Neither of these authorities advances plaintiffs' case in the slightest.

First, AT&T's current policies are not facially discriminatory, and cannot be challenged at any time. Although plaintiffs repeatedly characterize the policies as "facially discriminatory," they *never* point to a current provision in the pension plans or any policy showing that, on its face, pregnant women are treated less favorably than other disabled employees.[9] Indeed, it is undisputed that, although it does not appear on the face of AT&T's NCS or TOE policies, separate pregnancy leave policies have treated pregnancy leave exactly the same as other

[9] To the extent plaintiffs are arguing that the pre-PDA policies are "facially discriminatory," that argument fails as a matter of law. Plaintiffs' argument rests on the faulty assumption that any policies that differentiate between groups of employees are per se unlawful. However, facial differentiation is not automatically facial discrimination. Rather, the differences in treatment must unlawful for them to be discriminatory within the meaning of Title VII or the PDA. Of course, the pre-PDA policies at issue here were not unlawful. *See Gilbert*, 429 U.S. at 136.

disability leaves since 1979. JSF ¶¶ 79-80. There is literally zero factual support for plaintiffs' "facially discriminatory" characterization.

Further, plaintiffs' argument and *Pallas'* conclusory statement that the NCS system is a facially discriminatory system is also completely inconsistent with the Ninth Circuit's and the Supreme Court's decision in *Lockheed Corp. v. Spink*. If plaintiffs are correct that a system which incorporates the failure to credit service for pre-PDA pregnancy leaves is facially discriminatory, then Lockheed's system, which incorporated the failure to credit service for pre-OBRA work performed by someone over the age of 60, would have been judged facially discriminatory as well. However, the Ninth Circuit did not use such reasoning to find liability, but instead felt compelled to apply the OBRA amendment retroactively to rule for the plaintiff. *Spink v. Lockheed Corp.*, 60 F.3d 616, n.1 (9th Cir. 1995), *rev'd*, 517 U.S. 882 (1996).

Second, because the policy is facially neutral, it can be challenged at any time only if plaintiffs can show discriminatory intent in its adoption. Here, that would be impossible. At the time of the adoption of these policies (early 20th century), the differentiation between pregnant and non-pregnant disabled employees was lawful. Therefore, it could not have been adopted with an unlawful discriminatory motive. Without retroactive application of the PDA to these policies, it cannot be credibly contended that they have their origins in proscribed "discrimination." In sum, nothing in Section 703(h), the CRA of 1991 or in the cases interpreting these authorities provides any support for plaintiffs' claims.

II. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR ERISA CLAIMS MUST BE DENIED BECAUSE DEFENDANTS ADHERED TO THEIR FIDUCIARY DUTIES AND PROPERLY DENIED PLAINTIFFS' CLAIMS FOR ADDITIONAL, RETROACTIVE SERVICE CREDIT.

A. Defendants Acted Solely In The Interest Of The Plans' Participants And Beneficiaries And Did Not Breach Their ERISA Fiduciary Duty.

Plaintiffs contend that defendants breached their ERISA fiduciary duty by calculating plaintiffs' Term of Employment ("TOE") in a manner that was "not in the best interest of the

plaintiff participants." Pl. 11/19/02 Br. at 19 (emphasis added). Relying on *Pallas*, *Carter*, and a 1993 Department of Labor Opinion Letter, plaintiffs contend that defendants engaged in a "discriminatory" calculation of TOE, in violation of Title VII, and that such alleged sex discrimination is a violation of ERISA's fiduciary provisions. *Id.* at 19-20. Plaintiffs also argue in the alternative that, even if defendants' allegedly sex discriminatory calculations do not violate Title VII, and in turn ERISA, defendants breached their ERISA fiduciary duties by favoring other class members over plaintiffs. Neither of plaintiffs' arguments has the slightest basis in law or in fact.

First, plaintiffs ignore the Supreme Court and other authority that specifically rejects plaintiffs' argument that ERISA prohibits sex discrimination. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (ERISA "does not mandate that employers provide any particular benefits and does not itself proscribe discrimination in the provision of employee benefits.). *See also Ameritech Ben. 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); AT&T 11/19/02 Br. at 16-17 (collecting cases).

Instead, in addition to *Pallas*,[10] plaintiffs rely on *Carter v. AT&T* and a 1993 Department of Labor Opinion Letter, neither of which is controlling or even persuasive. *Carter*, as explained above, was vacated partly because of the Colorado district court's contrary opinion in *Redding v. AT&T*. In *Redding*, the district court began its analysis of Redding's breach of fiduciary duty claim (identical to plaintiffs' claims here) by stating that "Redding's first claim fails because ERISA does not provide a cause of action for civil rights violations. The proper vehicle for a cause of action based on gender discrimination is Title VII, and the proper vehicle for a cause of

[10] The *Pallas* court's ERISA holding consisted of one conclusory paragraph that failed to account in any way for the applicable Supreme Court and other authority that its holding contravened. *Pallas*, 940 F.2d at 1327. *See* AT&T 11/19/02 Br. at 17 (explaining why *Pallas's* ERISA holding fails).

action based on pregnancy discrimination is the PDA." AT&T 11/19/02 App. of Unpublished Cases, Tab 1 at p. 3. The district court in *Carter* "expressly [found] that the competing values of finality of judgment and right to relitigation of unreviewed disputes (see *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) and *Redding v. AT&T, et al.*, No. 96-WY-807-CB (D. Colo. July 25, 1996) and additional reasons, favor vacatur of this Court's December 16, 1994 Order and the Judgment entered pursuant thereto (as amended on January 30, 1995)." Jackson Decl. Ex. C at 2. Thus, *Carter* not only lacks precedential value under the normal rules of *stare decisis*, but also lacks persuasive value because part of the reason it was vacated is the *Redding* decision, which held exactly what AT&T argues here -- that ERISA does not remedy alleged sex discrimination.

Likewise, the Department of Labor Opinion Letter on which plaintiffs rely is equally unhelpful to their case. To the extent the Letter opines that plan fiduciaries must comply with both ERISA *and* other applicable federal laws, that holding is unremarkable and irrelevant to this case. The issue is not whether an ERISA fiduciary may violate Title VII, but rather whether an ERISA fiduciary who allegedly violates Title VII can be held liable under ERISA for doing so. The DOL Letter simply does not address that issue. *See* DOL Op. Ltr. 93-23A. Further, to the extent the DOL Letter states that ERISA fiduciaries have an obligation to "take appropriate steps to assure that the plan is amended to comply with all applicable legal requirements," that holding necessarily applies only to situations in which the fiduciary believes the plan does not already comply with the law. *Id.* In this case, for the reasons stated in Part I, *supra*, the plans complied with the law at all times, and there was nothing for the fiduciaries to suggest that the plan sponsor change. Finally, plaintiffs seem to rely on the DOL Letter for the proposition that a violation of Title VII automatically violates ERISA's fiduciary provisions. However, the Letter simply does not say that, and, if it did, would impermissibly contravene the Supreme Court's

opinion on the same subject, in any event. *See Shaw*, 463 U.S. at 91.[11] Thus, the DOL Opinion Letter also fails to advance plaintiffs' case.

Second, plaintiffs argue that, regardless of whether they have allegedly violated Title VII, the plan fiduciaries have violated ERISA by favoring one class of participants over another. However, it is evident from plaintiffs' argument that what they challenge is the plan design that provides benefits to certain participants (*i.e.*, those who did not take pre-PDA pregnancy leaves) and not others (those who did) -- a plan sponsor function that does not implicate ERISA's fiduciary standards. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999) (matters of plan design, such as amending a plan, are not fiduciary acts). It is well settled that, as a matter of plan design, a plan may provide benefits to some participants and beneficiaries and not others. *Shaw*, 463 U.S. at 91; *Hensley v. Northwest Permanente P.C. Retirement Plan & Trust*, 258 F.3d 986, 1001 (9th Cir. 2001) ("ERISA contemplates that there will be plans that do not cover all categories of employees . . ."); *Bronk v. Mountain States Tel. & Tel. Co.*, 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.").

In contrast to the Supreme Court's and Ninth Circuit's recent decisions reaffirming that matters of plan design do not implicate ERISA's fiduciary standards, the older cases on which plaintiffs rely appear to rest on the erroneous legal conclusion that ERISA's fiduciary standards can be used to challenge the validity of a plan amendment. *See Elser v. I.A.M. National Pension Fund*, 684 F.2d 648 (9th Cir. 1982) (analyzing validity of service credit forfeiture provisions

[11] Plaintiffs argue that the DOL Letter is "entitled to great deference." Pl. 11/19/02 Br. at 19, n.17 (citing *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). However, the Supreme Court has held that *Chevron* deference applies only to agency regulations, not to opinion letters, and has specifically rejected *Chevron* deference for a DOL opinion letter. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant *Chevron*-style deference.").

under ERISA's fiduciary provisions); *Winpisinger v. Aurora Corp. of Illinois*, 456 F. Supp. 559 (N.D. Ohio 1978) (same). Plaintiffs' reliance on these cases fails to advance their ERISA claims in light of later Supreme Court and Ninth Circuit authority holding to the contrary. Thus, plaintiffs' breach of fiduciary duty claims based on defendants' alleged "discriminatory" treatment of plaintiffs has no merit and should be rejected.

B. Defendants Have At All Times Followed The Terms Of The Plans.

Plaintiffs also contend that defendants' refusal to award them additional, retroactive service credit contravenes the terms of the applicable plans and thereby constitutes another breach of fiduciary duty. Pl. 11/19/02 Br. at 21-23. In constructing their argument, however, and in quoting various plan terms, plaintiffs *omit* the plan provision that specifically authorizes defendants to interpret the plans (and determine an employee's "Term of Employment") the way that they have in this case. The Court should reject such a blatant misrepresentation of the plans' terms. *See Abraham v. Exxon Corp.*, 85 F.3d 1126, 1131 (5th Cir. 1996) (rejecting ERISA plaintiff's arguments because they "rest on tortured constructions of the plan, defying rules of logic and grammar.").

Specifically, plaintiffs argue that no provisions in the plans *require* the exclusion of pre-1979 pregnancy leaves from service credit determinations, and that, to the contrary, the plans mandate that defendants include plaintiffs' pre-PDA pregnancy leaves in the determination of their TOE. To reach this conclusion, plaintiffs set forth certain (but not all) applicable plan provisions. Plaintiffs cite to the portion of Section 7.4(a)(1) that states that "any break in the continuity of or absence from the service shall be considered as a leave of absence upon completion by an Employee, who had previously completed 6 months of continuous service, of 5 years of continuous service after termination of the absence." JA, Tab 32, PP §7.4(a)(1); Pl. 11/19/02 Br. at 22. Then they pluck one sentence from the next section, Section 7.5: "Leave of

absence shall not constitute a break in the continuity of service," JA, Tab 32, PP § 7.5; Pl. 11/19/02 Br. at 22, and stop their reading of the plan at that point.

Relying on only these excerpts from the applicable provisions, plaintiffs reason that, since they fit the description in Section 7.4(a)(i) of a "leave of absence," and Section 7.5 states, in part, that leaves of absence do not constitute a break in service, their TOE should include their full pre-1979 pregnancy leaves. Plaintiffs' erroneous analysis not only omits crucial plan language, but also leads to absurd results. Plaintiffs essentially are arguing that *any* break in the continuity of service which fits within the scope of Section 7.4(a)(i) entitles an employee to full service credit for that time period. Under the plaintiffs' construction of the plans, an employee who completes six months of continuous service, takes a 20-year hiatus, and then returns for five years of continuous service after the hiatus, has under the terms of the plan just taken a 20-year "leave of absence." And since "leave of absence" does not constitute a break in the continuity of service, that employee would be entitled to service credit for all 20 years of the leave for purposes of pension calculation, regardless of any other applicable Company policies or procedures.

Not surprisingly, plaintiffs' nonsensical argument contravenes the plain terms of the plans. Although plaintiffs rely on the statement in Section 7.5 that "[l]eave of absence shall not constitute a break in the continuity of service," they conveniently omit the remainder of Section 7.5, which specifically authorizes defendants to interpret the plans in the way that plaintiffs challenge in this case:

> Leave of absence for any period in excess of one month shall not be effective unless approved in writing by the Committee or the Pension Plan Administrator, as applicable, and in any case in which such approval is given, the Committee or the Pension Plan Administrator, as applicable, *shall indicate, in accordance with applicable legal requirements and the rules and regulations of the Company* ***whether or not the period of absence is to be deducted in computing Term of Employment*** *and whether during the absence the Employee shall be eligible to benefits under this Plan.*

JA, Tab 32, PP §7.5 (emphasis added).

This language clearly contemplates that service credit for leaves of absence longer than 30 days will be deducted from an employees' original TOE, and directs the fiduciary to consult with "the rules and regulations of the Company" in deciding whether to make such a deduction. It is undisputed that the applicable "rules and regulations" governing the Plan administrator's decision with respect to plaintiffs' pregnancy leaves provided that periods in excess of 30 days would not be credited. JSF ¶¶ 19, 21-22, 67, 70. Plaintiffs' contention that the NCS system was "wholly separate from the Plans' terms" (Pl. 11/19/02 Br. at 22) contravenes the language of Section 7.5.

Further, there can be no dispute that Section 7.5 must be read (in its entirety) in conjunction with Section 7.4(a)(i). First, plaintiffs themselves rely on the first sentence of Section 7.5 as the heart of their argument. They cannot give meaning and effect to only one sentence of that Section. Second, plaintiffs omit the preamble to Section 7.4, which states, "Except to the extent provided in Article 8, the following rules in Section 7.4(a)-(e) shall apply to all Employees in all cases." JA, Tab 32, PP §7.4. Article 8, in turn, provides as follows:

> The Term of Employment and Years of Service relating to periods of employment prior to January 1, 1984, of all individuals who were participants in the Plan, a Predecessor Plan, or another Qualified Pension Plan at any time prior to January 1, 1984 shall be recognized under the Plan in accordance with the Provisions of this Article 8 and the provisions of Article 7 and Section 4.2(q) . . . .

JA, Tab 32, PP §8.1.[12] Thus, the rules concerning Breaks in Service, specifically Section 7.4(a)(i), are made subject to the rest of Section 7.

Plaintiffs also cite to Section 7.3(a) of the Pension Plan, implying that the use of the NCS system in calculating plaintiffs' service credit is not "in compliance with applicable law." JA Tab 32, PP §7.3(a); Pl. 11/19/02 Br. at 22-23. The fact that plaintiffs have retained their NCS dates, which reflected calculations made during their tenure at PT&T, is specifically

[12] Furthermore, the definition of "Term of Employment," found in Section 2.35 of the Plan, contains the following qualifier: "Except as expressly limited or stated elsewhere in the Plan, including the Provisions of Article 8...."

contemplated by both the pension plans and the Plan of Reorganization ("POR") to which AT&T consented in 1983. JSF ¶ 90, 92. The POR mandated the implementation of a system for the treatment of service credit among Bell System entities, known as Interchange Agreements. Furthermore, the Deficit Reduction Act of 1984 ("DEFRA") provided that "the recognition of service credit, and enforcement of such recognition, shall be governed in the same manner and to same extent as provided under the divestiture interchange agreement for a change in employment by a covered employee during calendar year 1984." JA, Tab 26. Defendants were thus *required* to recognize service credit as they do.

Article 9 of the Plan articulates specific rules for the treatment of service at a Company subject to an Interchange Agreement. Section 9.1(b)(i) of the Pension Plan, which deals with "Transfer of Service Credit" provides as follows:

> That an Employee's Term of Employment, as hereinbefore defined, shall include employment not only in Participating Companies, by also in any Interchange Company provided such Employee is transferred to or employed or reemployed by a Participating Company during an applicable interchange period...[.]

JA, Tab 32, PP §9.1(b)(i).

Therefore, when plaintiffs became employees of AT&T, by the Plan's terms their TOE while employed by a predecessor was automatically included after their immediate transfer to another Interchange Company. Plaintiffs emphasize the fact that defendants never "re-calculated" their NCS dates so as to award them full service credit for their pregnancy leaves. However, as Section 9.1(b)(i) demonstrates, plaintiffs' TOE "shall include" employment by an Interchange Company. This is mandatory -- the TOE they had at PT&T, under the Plan's explicit terms, automatically carried over upon their immediate employment with an Interchange Company.

Furthermore, Section 9.5 obligates the Plan to include in an Interchange Company employee's TOE "all service with such Interchange Company" subject the restrictions embodied in other Plan provisions. Specifically, that section states in part:

> For any Employee who has one or more periods of service with an Interchange Company that are includable in such Employee's Term of Employment . . . under this Plan in accordance with the provisions of the Mandatory Portability Agreement, the term[] "Term of Employment," as defined in Section 2.35 . . . shall include all service with such Interchange Company or any subsidiary or affiliate of such Interchange Company which is includable in such Employee's Pension Service Credit in accordance with the provisions of the Mandatory Portability Agreement and the Interchange Company....provided, however, that the inclusion of such service in the Employee's Term of Employment . . . under this Plan shall have no effect as to when such service is otherwise recognized in accordance with the provisions of Section 7.4, Article 8, or this Article 9, nor any other term, condition or other emolument of employment not provided under and in accordance with the provisions of this Plan unless specifically indicated to the contrary.

JA, Tab 32, PP §9.5.

As with Section 9.1, this section provides that plaintiffs' service credit, or TOE, earned while employed by PT&T, *shall be* included in subsequent calculations of the plaintiffs' TOE. Furthermore, as the section makes clear, "inclusion of such service in the Employee's Term of Employment...shall have no effect as to when such service is otherwise recognized in accordance with the provisions of Section 7.4, Article 8 or this Article 9." Article 8, as discussed earlier, cross-references Article 7 in its General Rule regarding pre-January 1, 1984 service credit calculations. JA, Tab 32, PP §8.1.

The result is that, in accordance with these plan provisions, plaintiffs' service credit calculations, or TOE, include calculations that were made during their employment with PT&T. In turn, plaintiffs' current TOE reflects the fact that periods of their leave beyond 30 days were not included in their TOE calculation pursuant to "the rules and regulations" of PT&T, as that term is contemplated in Section 7.5. Thus, defendants have at all times followed the terms of the plans and have not breached their fiduciary duty.

C. Defendants Did Not Wrongfully Deny Plaintiffs Any Benefits Due To Them Under The Terms Of The Plans.

Plaintiffs argue, in one paragraph at the end of their brief, that AT&T wrongfully denied them benefits due to them under the terms of the plans. Pl. 11/19/02 Br. at 23. As explained above, however, the plans specifically authorize defendants to interpret them the way they did in

1 this case; therefore, plaintiffs are not due any additional benefits under the plans and defendants
2 correctly refused to award plaintiffs the additional, retroactive service credit they seek. *See* 29
3 U.S.C. § 1132(a)(1)(B) (authorizing suits by participants "to recover benefits *due to [them]*
4 *under the terms of [their] plan[s]*") (emphasis added). *See also* AT&T 11/19/02 Br. at 22-23
5 (explaining why plaintiffs' ERISA § 502(a)(1)(B) claim for benefits should be dismissed as a
6 matter of law).

7 **CONCLUSION**

8 For the reasons set forth above, defendants AT&T Corp., AT&T Management Pension
9 Plan, AT&T Pension Plan, and AT&T Employees' Benefit Committee respectfully request that
10 the Court deny plaintiff's motion for summary judgment.

11

12 DATED: December 18, 2002 SEYFARTH SHAW

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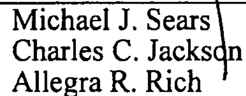

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