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

Defendants.

Case No. C 01 1122 MJJ

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND/OR FOR JUDGMENT ON THE PLEADINGS

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

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FEDERAL STATUTES

Defendants AT&T Corp., AT&T Management Pension Plan, AT&T Pension Plan, and AT&T Employees' Benefit Committee ("AT&T"), by their attorneys and pursuant to Federal Rules of Civil Procedure 56 and 12(c) and Local Rule 7-3(c), submit this reply memorandum in support of their motion for summary judgment and/or for judgment on the pleadings.

INTRODUCTION

Plaintiffs' opposition to defendants' motion for summary judgment and/or judgment on the pleadings fails to refute defendants' arguments demonstrating that plaintiffs' claims fail as a matter of law. Thus, for the reasons set forth below and in AT&T's opening memorandum, the Court should enter judgment for AT&T on plaintiffs' Title VII and ERISA claims.

ARGUMENT

I. PLAINTIFFS FAIL TO REFUTE THE KEY CASES THAT ESTABLISH THAT THEIR TITLE VII CLAIMS RELY ON AN IMPERMISSIBLE RETROACTIVE APPLICATION OF THE PDA, AND ALSO FAIL TO REFUTE AT&T'S TIMELINESS AND BONA FIDE SENIORITY SYSTEM ARGUMENTS.

In their opposition brief, plaintiffs continue to cling to *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), as their only chance of success in this case. Rather than attack the reasoning of the subsequent cases that demonstrate that *Pallas* is no longer good law (which they cannot), plaintiffs try to distinguish some cases on their facts, while wholly ignoring others.

A. Plaintiffs Ignore AT&T's Retroactivity Analysis.

Plaintiffs contend that the relevant acts of alleged discrimination are AT&T's current application of the NCS system to determine plaintiffs' retirement benefits. Pl. 12/18/02 Opp. at 2, 4. Based on this faulty premise, they blithely state that AT&T's retroactivity analysis of the PDA is "irrelevant" and "inapplicable." *Id.* Plaintiffs are wrong as a matter of fact and as a matter of law.

First, as a factual matter, the only time plaintiffs have had service credit "deducted," or not counted towards their NCS date, was at the time they took their pre-PDA pregnancy leaves. JSF ¶¶ 28, 37, 39, 50, 59. That is, at the time they returned from their pregnancy leaves in the 1960's and 1970's, their NCS dates were adjusted to reflect that they did not receive full service

credit for their leaves. *Id.* That adjusted NCS date was then used for various employment transactions, such as allocating vacation time. *Id.* ¶ 19. Each time the adjusted NCS date was used, PT&T (and then later AT&T) did not start with the plaintiff's original hire date and decide to deduct all but 30 days of the period that the plaintiff was on leave. Rather, the adjustment was made once (at the time the leave occurred), and affected the NCS date for all transactions going forward. JSF ¶¶ 19, 28-29, 37, 39-40, 50-51, 59-60. After the PDA was enacted, AT&T changed its policy so that employees on pregnancy-related disability leaves received the same service credit as employees on other paid disability leaves. *Id.* ¶¶ 79-80.

Plaintiffs' argument that the relevant decision is AT&T's current use of NCS dates that incorporate the pre-PDA decision not to treat pregnancy leaves the same as disability leaves ignores that no such decision is being made today. Instead, plaintiffs act as if AT&T is currently adjusting employees' original hire dates by deducting service credit for all but 30 days of their pre-PDA pregnancy leaves. This is simply not what happens. The only decisions not to provide plaintiffs more service credit for their pre-PDA pregnancy leaves occurred in 1969 (Hulteen), 1975 and 1976 (Collet), 1968 (Porter), and 1974 (Snyder). JSF ¶¶ 28, 37, 39, 48-50, 59. Thus, the relevant question in this case is whether those decisions can be challenged today under the subsequently-enacted PDA. As explained below, they cannot.[1]

Second, as a matter of law, the retroactivity analyses of *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) and *Castro-Cortez v. Immigration and Naturalization Service*, 239 F.3d 1037

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[1] Plaintiffs take different positions in their brief regarding the legality of AT&T's pre-PDA policies. At one point, plaintiffs state that they "have not conceded the legality of Defendants' pre-PDA service crediting policies." Pl. 12/18/02 Opp. at 2, n.2 (citing *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) but failing to address *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)). Two pages later, plaintiffs state that they "do not argue, and *Pallas* does not hold, that pre-PDA actions violate the PDA." Pl. 12/18/02 Opp. at 4, n.6. Regardless of their inconsistency, either position dooms plaintiffs' claims. If AT&T's policies were unlawful at the time they were in effect in the pre-PDA era, then plaintiffs' claims based on those policies would be time-barred. Indeed, plaintiffs admit as much. *Id.* at 3, n. 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."). On the other hand, if AT&T's pre-PDA policies were lawful at the time, then the only way it could be held liable for those policies today is through a retroactive application of the PDA, which AT&T has demonstrated is prohibited. *See* AT&T 11/19/02 Br. at 7-10; AT&T 12/18/02 Br. at 4-6; *infra* at 4-5.

(9th Cir. 2001), apply directly to this case. Tellingly, plaintiffs nowhere address these courts' analysis of what constitutes retroactive application of a statute, nor how the Ninth Circuit's decision in *Pallas* can be squared with *Lockheed* and *Castro-Cortez*. Rather, they contend, erroneously, that *Lockheed* does not apply because it involved only whether certain statutory amendments covered the employer's service credit decisions before the amendments, and did not involve a current service credit calculation. Pl. 12/18/02 Opp. at 3. However, *Lockheed* did involve a question of current application of pre-statutory amendments to the plaintiff's service credit. The Court rejected the plaintiff's argument, identical to the one the plaintiffs made in *Pallas*, that the employer's incorporation of the pre-amendment service rules in its current calculation of the plaintiff's service credit was a current violation of the statute:

> To deny an employee credit for service years during which he was excluded from the plan based on age, even though that exclusion was lawful at the time, the Court of Appeals reasoned, is to reduce the rate of benefits accrual for that employee. . . When Congress includes a provision that specifically addresses the temporal effect of a statute, that provision trumps any general inferences that might be drawn from the substantive provisions of the statute. . . . Even if it were proper to disregard the express time limitations in § 9204 (a)(1) in favor of more general language, §§ 9201 and 9202(a) cannot bear the weight of the Court of Appeals' construction. *A reduction in total benefits due is not the same thing as a reduction in the rate of benefits accrual; the former is the final outcome of the calculation, whereas the latter is one of the factors in the equation.*

Lockheed, 517 U.S. at 897 (emphasis added) (citations omitted). In other words, although the balance in plaintiffs' "bank account" of service credit may not be as great as that of employees who took pre-1979 disability leaves, the rate of inflow of service credit since the PDA's enactment in 1979 has been exactly the same for pregnant and non-pregnant temporarily disabled employees. Thus, *Lockheed* demonstrates that plaintiffs seek an impermissible, retroactive application of the PDA, and their effort to distinguish it is unavailing.

Likewise, the Court should reject plaintiffs' effort to sidestep the fact that the *Pallas* analysis of service credit falls directly within the definition of "retroactivity" set forth in the Supreme Court cases cited by AT&T. For example, in *Landgraf v. USI Film Prods*, the Court cited the PDA as a prospective-only statute, and held that the key inquiry in determining

retroactivity is to ask "whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. 244, 278 (1994).[2]

Plaintiffs' insistence that they are challenging post-1979 actions is belied by the fact that their claims depend on challenging service credit allocations made in the pre-1979 era, when they spent time on maternity leave. At that time, not crediting pregnancy leaves to the same extent as disability leaves was lawful. *See General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). To now argue that it is illegal under the PDA would be to "attach[] new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 278. Plaintiffs do not address this test at all. Rather, they simply fall back on *Pallas* to argue that what is being challenged is the current calculation of pension benefits. Pl. 12/18/02 Opp. at 2-4.[3] However, as AT&T has demonstrated, subsequent case law has made clear that the *Pallas* court engaged in an impermissible retroactive application of the PDA. Plaintiffs' Title VII claims, which are all based on this now-rejected analysis, must be dismissed.

B. Plaintiffs' Concession That AT&T's Post-PDA Leave Of Absence Policies Are Lawful Distinguishes This Case From *Bazemore v. Friday* And Dooms Plaintiffs' Claims Under Title VII Timeliness Principles.

The Court's decision regarding the untimeliness of plaintiffs' claims depends on which of two lines of cases the Court believes applies to the service credit policies and practices at issue here. Plaintiffs urge the Court to hold that *Bazemore v. Friday*, 478 U.S. 385 (1986), governs the outcome; however, as demonstrated below, *Bazemore* is inapplicable, and the Court should

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[2] *See also INS v. St. Cyr.*, 533 U.S. 289, 321 (2001) ("'The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.'. . . A statute has retroactive effect when it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'") (quoting *Landgraf*, 511 U.S. at 269 and *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999)).

[3] Plaintiffs' circular "present violation" argument carves the statute of limitations out of the law. The "loss" of seniority credit in the distant past cannot be a present violation. *See Evans*, 431 U.S. at 558 ("a challenge to a neutral system *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.*") (emphasis added).

instead follow *United Airlines v. Evans*, 431 U.S. 553 (1977), and *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

In *Bazemore*, the employer made a "grandfather" argument, relying on the fact that its pay system was created before Title VII became applicable to it to defend a pay system that, if instituted in the post-Title VII era, unquestionably would have been unlawful. What the employer in *Bazemore* did not do is remedy the disparity on a prospective basis. That is, if the employer in *Bazemore* had, after it became subject to Title VII, begun paying black and white employees the same rate of pay going forward, it would not have violated the statute. Nor would the employer in that situation be obligated to go back and compensate the black employees for the pre-Act disparities; compliance with the law would demand only prospective changes to the pay system.

In *Evans*, the employer did what the employer in *Bazemore* did not: it ceased an unlawful practice of terminating flight attendants who got married. However, it was under no obligation to go back and make up for the pre-policy-change terminations by providing additional service credit to the flight attendants subject to the earlier unlawful policies. *Evans*, 431 U.S. at 558. That is exactly the situation here: when the PDA became effective, AT&T changed its policies to comply with the law. This is the key distinction between this case and *Bazemore*. The only way *Bazemore* could apply to this case would be if AT&T were to continue to give more service credit for disability leaves than for pregnancy leaves to employees who took such leaves after the PDA, and if AT&T were to defend such a practice by arguing that the system were legal today because it was adopted before the PDA, when it was legal. AT&T makes no such argument here; indeed, it is undisputed that AT&T's pregnancy leave policies have complied with the PDA since its enactment. JSF ¶¶ 79-80. Thus, *Evans*, not *Bazemore*, governs this case, and plaintiffs' claims challenge only the present effect of pre-PDA differential treatment, not current violations. Accordingly, even if the PDA could be applied retroactively, plaintiffs' claims have been time-barred for more than two decades.

C. Title VII's "Bona Fide Seniority System" Exception Applies To This Case And Mandates Dismissal Of Plaintiffs' Challenge To The NCS System.

1. Section 703(h) Applies To The PDA.

Plaintiffs argue that Section 703(h), which exempts "bona fide seniority systems" from Title VII, does not apply to the PDA. The PDA states in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) [703(h)] of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k).

No court, including *Pallas*, has relied on this provision to hold that the PDA can be applied retroactively to render unlawful an employer's conduct that the Court in *Gilbert* held *was* lawful under Title VII. The reference by the PDA to the phrase "nothing in section 703(h) of this title shall be interpreted to permit otherwise" is entirely unrelated to any issue about seniority. Rather, it prospectively eliminated certain Equal Pay Act defenses (the Bennett Amendment) on which the *Gilbert* Court had partially relied to conclude that it was lawful to treat pregnancy leave differently than disability leave. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 678 (1983); *Gilbert*, 429 U.S. at 143-145.

Although the Bennett Amendment is part of Section 703(h), it has nothing to do with seniority. Rather, the Bennett Amendment states:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

42 U.S.C. §2000e-2(h); *County of Washington v. Gunther*, 452 U.S. 161, 167 (1981).[4] By the Bennett Amendment, Congress intended to "incorporate only the affirmative defenses of the Equal Pay Act into Title VIII. The Amendment bars sex-based wage discrimination claims

[4] Section 206(d) of Title 29, the Equal Pay Act, authorizes differential payment of wages "where such payment is made pursuant to (i) a seniority system,; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d).

under Title VII where the pay differential is 'authorized' by the Equal Pay Act." *Gunther*, 452 U.S. at 168-69.

By the PDA, Congress meant to overturn *Gilbert,* and it included the "nothing in" phrase because *Gilbert* cited to and relied on the Bennett Amendment. *Gilbert*, 429 U.S. at 143-45. Rather than eradicate the bona fide seniority provisions of Title VII in the context of pregnancy, "the purpose of this disclaimer, as clearly indicated in the legislative history of the PDA, is to ensure that employers do not rely upon the Equal Pay Act to prevent the correction of pregnancy discrimination under Title VII." *Kansas Ass'n of Commerce & Indus. v. EEOC*, Civil Action No. 79-4145, 1983 U.S. Dist. LEXIS 14406 at *4 (D. Kan. Aug. 23, 1983).

Consistent with the "shall be treated the same" language of the PDA, the House Conference Report of March 13, 1978 explains that Congress meant the PDA to apply to "all aspects of employment," including "seniority and other conditions of employment currently covered by Title VII." H.R. Resp. 95-948 (1978), available at 1978 WL 8570, at *4 (Mar. 13, 1978). In the section of the Report entitled "Nonapplicability of Section 703(h)," the Report explains of the "nothing in section 2000e-2(h)" phrase:

> In addition to mandating equal treatment for pregnant workers, Section 1 of the bill expressly provides that "nothing in Section 703(h) shall be interpreted to permit otherwise." This disclaimer was necessitated by the Supreme Court's reliance in the *Gilbert* case on Section 703(h) of Title VII ("the Bennett Amendment") which in effect provides that certain practices authorized by the Equal Pay Act, 29 U.S.C. 206(d), do not violate Title VII. The court in *Gilbert* noted that a regulation issued under the Equal Pay Act provides that certain gender-based differentiations do not violate the Equal Pay Act. *See* 29 C.F.R. 800.116(d). While the *Gilbert* opinion is somewhat vague as to the pertinence of this regulation, it does appear that the Court regarded the Bennett Amendment and the Equal Pay Act regulation, taken together, as somehow insulating pregnancy-based classifications from the proscriptions of Title VII. Therefore, *the committee determined that it was necessary to expressly remove the Bennett Amendment from the pregnancy issue in order to assure the equal treatment of pregnant workers.*

Id., 1978 WL 8570, at *7 (emphasis added).

In short, the "nothing in section 703(h)" language of the PDA means only that pregnancy is like every other Title VII category in that the PDA entitles pregnant workers to equal treatment. As Justice Stevens stated in his concurrence in *Guerra*, by enacting the PDA,

"Congress did not intend to 'put pregnancy in a class by itself within Title VII.'" *California Fed. Sav. & Loan v. Guerra,* 479 U.S. 272, 292 (1987) (Stevens, J., concurring). Any reading of the PDA which would "carve out" the bona fide seniority system protection for pregnancy discrimination, would do just that. Thus, Section 703(h) applies to the PDA.

2. The NCS System Is A Bona Fide Seniority System That is Not Facially Discriminatory.

Plaintiffs concede that the NCS system is a seniority system, but argue that it is not "bona fide" within the meaning of Section 703(h) because it is "facially discriminatory." Pl. 12/18/02 Opp. at 9-11. However, plaintiffs never identify any document or aspect of the NCS system that, on its face, treats men and women differently. Rather, they simply point to the *Pallas* court's characterization of PT&T's similar NCS system as "facially discriminatory" and conclude that AT&T's NCS system therefore must also be discriminatory. The flaw in plaintiffs' argument, though, is that the NCS system does not contain any provisions that treat men and women differently. As AT&T explained in its opposition to plaintiffs' motion for summary judgment, it is undisputed that the NCS system has treated pregnancy and disability leaves the same since 1979, thereby eliminating any allegedly discriminatory practice that adversely affected females.[5]

The fact that the NCS system incorporates service credit policies in effect before 1979, when PT&T treated pregnancy leave less favorably than disability leave, does not mean that the system is itself discriminatory today. Rather, it means that it falls within the type of system the Supreme Court deemed acceptable in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). Although plaintiffs contend that AT&T "misreads" *Teamsters* by making this argument, it is clear from plaintiffs' discussion of the case that the parties agree on the holding of *Teamsters*, but not on its application to this case. The parties agree that *Teamsters* allows an employer to have a seniority system that perpetuates the effects of pre-Act discrimination, as long as the seniority system was not adopted with a discriminatory purpose. 481 U.S. at 324; Pl.

[5] In addition, plaintiffs' argument and *Pallas's* 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. See* AT&T 12/18/02 Opp. at 15.

12/18/02 Opp. at 10-11. Plaintiffs then argue, as they must to succeed, but without any factual support, that the NCS system is the "result of an intention to discriminate." Pl. 12/18/02 Opp. at 11. Plaintiffs' position is untenable. It is simply impossible for the NCS system to be the result of intentional discrimination. Through 1978, the difference in treatment that plaintiffs now challenge was determined to be lawful under Title VII in *Gilbert*, and only became unlawful when the definition of sex discrimination was changed by the PDA. When that occurred, AT&T eliminated the difference in treatment. JSF ¶¶ 79-80. Thus, there is no intentional discrimination in the NCS system, and it is a bona fide seniority system under *Teamsters*. Accordingly, under Section 703(h), it is exempt from plaintiffs' attack under Title VII.

D. Plaintiffs Do Not Dispute That Their "Force-Out" And "Guaranteed Reinstatement" Claims Were Actionable In The 1960's And 1970's, Which Means That Their Current Claims Based On Those Policies Are Untimely.

In its opening brief, AT&T argued that plaintiffs' "force-out" and "guaranteed reinstatement" claims were untimely because these alleged policies, if true, would have been unlawful in the era in which they applied, but plaintiffs failed to challenge them at that time. AT&T 11/19/02 Br. at 14-16. In response, plaintiffs do not dispute that the acts were unlawful before Title VII. Rather, they argue that the legality is irrelevant because they are challenging AT&T's current benefit calculations based on those policies. Pl. 12/18/02 Opp. at 11-12. However, AT&T is not making any current decisions to require employees to take pregnancy leave or failing to guarantee reinstatement to employees who return from leave. As applied to plaintiffs, those alleged decisions, if they occurred, were made by PT&T in the 1960's and 1970's, and are the relevant acts of alleged discrimination. Title VII requires a plaintiff to file an EEOC charge within 300 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e). It is undisputed that plaintiffs failed to do so with respect to the decisions on which their "force-out" and "guaranteed reinstatement" claims are based. Accordingly, those claims are time-barred.

E. DEFRA And The MFJ Are Evidence Of The Parties' And The Government's Settled Expectations With Respect To AT&T's Post-Divestiture Treatment Of Pre-Divestiture Service Credit.

Plaintiffs argue that DEFRA and the MFJ do not "immunize" AT&T's treatment of plaintiffs' service credit. Pl. 12/18/02 Opp. at 12-13. However, AT&T never argued that they did. Rather, AT&T argued that the "discrete act" of which plaintiffs are complaining is PT&T's failure to provide the same service credit for plaintiffs' pre-PDA pregnancy leaves as it did for other employees' disability leaves during the same period. AT&T 12/1/8/02 Opp. at 11-12. AT&T argued that it did not take any new action with respect to plaintiffs' service credit in the post-PDA era. *Id.* at 12. When the MFJ courts and Congress ordered AT&T not to make changes to the NCS system and to recognize service credit "in the same manner" as it was in 1984, that is exactly what AT&T did. As plaintiffs point out, AT&T did not add more service credit to plaintiffs' records, nor did it take any away (in contrast to the employer in *Satty*). In short, it did not take *any* action with respect to their service credit, which demonstrates why there is no current act of alleged discrimination for plaintiffs to challenge, why their Title VII claims are untimely, and why AT&T did not breach any ERISA fiduciary duty.[6]

II. PLAINTIFFS FAIL TO DEMONSTRATE WHY THE COURT SHOULD NOT DISMISS THEIR ERISA CLAIMS.

A. Plaintiffs Concede That ERISA, Unlike Title VII, Does Not Cover Sex Discrimination In Plan Design, Which Is What Plaintiffs Challenge.

In response to AT&T's dispositive argument that ERISA does not cover sex discrimination, plaintiffs concede that this legal proposition is true with respect to matters of plan design, but argue that it is not true with respect to matters of plan administration. They then

[6] Plaintiffs submitted the declaration of Patrick Scanlon, General Counsel of the CWA, in opposition to AT&T's points regarding the MFJ court's opinion and DEFRA. However, the Scanlon declaration consists almost entirely of legal conclusions, such as how to interpret the MFJ court's opinion and what Congress intended to accomplish in enacting DEFRA. Accordingly, the Court should not consider Scanlon's declaration in deciding AT&T's motion for summary judgment. *See National Union Fire Ins. Co. v. Siliconix, Inc.*, 726 F. Supp. 264, 269 (N.D. Cal. 1989) (declarant's statement was "inadmissible under Rule 56 as an expression of a legal conclusion which she is not competent to make. Therefore, the Court does not consider it in deciding whether to grant National Union's motion for summary judgment."); *McHugh v. United Service Auto Ass'n*, 164 F.3d 451, 454 (9th Cir. 1999) ("Although experts may disagree in their conclusions, their testimony cannot be used to provide legal meaning or interpret the policies as written.").

argue that what they are challenging is that the plan administrator "use[s] 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." Pl. 12/18/02 Opp. at 14.

There are at least two flaws in plaintiffs' argument. First, in the normal course of determining a participant's pension benefits, the plan administrator does not "grant" or "deny" service credit to the participant. Rather, the plan administrator, in accordance with the plan terms, determines benefits based on the NCS date the participant has under the company's employment policies and practices. JSF ¶¶ 21-22, 104.

Second, even if plaintiffs are simply arguing that the plan administrator errs by implicitly endorsing the policy that does not recognize service credit today for pre-PDA pregnancy leaves, but does recognize service credit for disability leaves, the plan administrator is not breaching any fiduciary duty by doing so. To the contrary, the plan administrator is *adhering* to its fiduciary duty by following the terms of the plan as written. Ironically, in light of the plain terms of the plan (which plaintiffs fail to cite or even acknowledge), plaintiffs defeat their own argument: "the core of Plaintiffs' argument is that once plan provisions are adopted or amended, plan fiduciaries cannot discriminate in their administration." Pl. 12/18/02 Opp. at 14.

Here, the written terms of the plan state that Term of Employment includes plaintiffs' pre-PDA PT&T service credit, *as defined by the "rules and regulations" of the company*. *See* JA Tab 32, PP §§ 7.4, 7.5, 8.19.1(b)(i), & 9.5.[7] As plaintiffs have stipulated in this case, AT&T employees' NCS dates have always been determined entirely by the personnel practices and procedures of AT&T and/or its former Bell System operating companies. JSF ¶ 21. Under the NCS system, *i.e.*, the "rules and regulations" of the company, employees who took a personal leave of absence, of which pregnancy was one type, received only 30 days of service credit. JSF

[7] In its opposition to plaintiffs' motion for summary judgment, AT&T set forth in detail the plan provisions that authorize the conduct plaintiffs' claim is contrary to the plan. *See* AT&T 12/18/02 Opp. at 19-23. In the interest of judicial economy, AT&T does not repeat the plan provisions here, but incorporates by reference its argument at pages 19-23 of its opposition brief.

¶¶ 19, 21-22, 67, 70. To the extent women who took pre-PDA pregnancy leaves are treated differently from men and women who took disability leaves during the same period, such treatment is based solely on these provisions, which are undisputedly administered according to their terms (indeed, plaintiffs' Title VII argument is based on the fact that these provisions are administered according to their terms). Thus, plaintiffs' only challenge is to the alleged sex discrimination in the plan's design, which is simply not a cognizable claim under ERISA. Accordingly, their ERISA count fails as a matter of law and should be dismissed.

B. Plaintiffs Have Not (And Cannot) Refute The Procedural Bars To Their ERISA Claims.

1. The Relevant "Act or Omission" Occurred Before ERISA's Effective Date.

Plaintiffs argue that the plan administrator engaged in a significant act of plan interpretation when it used plaintiffs' NCS dates (which did not include service credit for their pre-PDA pregnancy leaves) to calculate plaintiffs' benefits. This argument again reflects a fundamental misunderstanding of the plan provisions and personnel policies at issue. As explained above and in AT&T's opposition to plaintiffs' motion for summary judgment, the amount of plaintiffs' benefits in the 1990's was the inexorable consequence (*i.e.*, present effect) of the service credit they received in the 1960's and 1970's, which was governed by the PT&T policies in effect at that time. Thus, the plan administrator's calculation of benefits was not based on significant interpretation of any post-ERISA plan provision, and the relevant "act or omission" took place before ERISA's effective date.

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

Plaintiffs' only response to AT&T's argument that their ERISA claims are time-barred rests on the same omission of the relevant plan provisions that undermines their other arguments. Plaintiffs again contend that the NCS system is "an independent, discriminatory calculation method that [is] wholly separate from the Plans' terms." Pl. 12/18/02 Opp. at 18. Putting aside that there is nothing discriminatory about the NCS system, as explained above (*see* pp. 8-9, *supra*), the simple fact is that NCS is *not* separate from the plans' terms. To the contrary, as

explained above, the plans' definitions of TOE specifically refer to the "rules and regulations" of the company, of which the NCS system (incorporating PT&T's pre-PDA service credit decisions) is one. JSF ¶ 21 ("AT&T employees' NCS dates have always been determined entirely by the personnel practices and policies of AT&T and[/]or its former Bell System operating companies).

Moreover, it is disingenuous for plaintiffs to argue that NCS and TOE are two separate concepts when the collective bargaining agreements between plaintiff CWA and AT&T specifically define NCS as follows: "Net credited service shall mean "term of employment" as set forth in the pension plan applicable to employees covered by this Agreement." SJA at AT&T/HULT013736, 013945, 014243, 014449.[8] Plaintiffs have been on notice since the 1960's and 1970's that they did not receive service credit for the full period of their pregnancy disability leaves, and also have known since the 1980's that AT&T used the same adjusted NCS date that PT&T used for their employment benefits with AT&T, but failed to sue within three years of their knowledge (or within three years of ERISA's 1975 effective date, for leaves that occurred before that date). Accordingly, their breach of fiduciary duty claims are time-barred.

3. Plaintiffs Did Not Oppose AT&T's Argument That Their ERISA Claims Are Cognizable Under Only Section 502(a)(1)(B), Not Section 404.

In their opposition brief, plaintiffs did not make any argument contrary to AT&T's point that plaintiffs' ERISA § 404 claims must be dismissed because they are actually claims for benefits, which are properly brought only under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Accordingly, any breach of fiduciary duty claim or other claim by plaintiffs that seeks anything other than benefits under the terms of the plans must be dismissed.[9]

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[8] "SJA" refers to the parties' supplemental joint appendix of evidentiary materials for the Court to consider in deciding the parties' cross motions for summary judgment.

[9] Because the only section of ERISA that plaintiffs referred to in their Amended Complaint is Section 404, and they do not have any cognizable claim under Section 404, the Court has the discretion to dismiss plaintiffs' entire ERISA count on this basis. Nevertheless, even if the Court were to construe plaintiffs' ERISA count as a claim for benefits under Section 502(a)(1)(B), and were to allow plaintiffs to pursue those claims in this lawsuit, they would fail for the reasons set forth above and in AT&T's opening brief and opposition to plaintiffs' motion for summary judgment.

C. Plaintiffs' Breach Of Fiduciary Claims Fail On The Merits.

Even if cognizable, plaintiffs' breach of fiduciary duty claims fail because they rest on the same omission of the relevant plan terms as their other ERISA claims. For the reasons set forth in AT&T's opposition to plaintiffs' motion for summary judgment, it is clear that the plan administrator has at all times adhered to the terms of the plan as written and has not breached its fiduciary duty.

Further, when *all* the pertinent plan provisions are considered, it is clear that plaintiffs are seeking more favorable treatment than other plan participants. There is no plan provision that the plan administrator is applying to women one way and to men a different way. Rather, the plan administrator is applying the terms of the plan as written, as required by ERISA. *See* 29 U.S.C. § 1104(a)(1)(D). The fact that identical operation of a plan provision may result in fewer benefits for a woman who took a pre-PDA pregnancy leave than for a man or woman who took a pre-PDA disability leave is a reflection of the lawful policies in effect in the pre-PDA era, which determine an employee's NCS, which in turn is what the plan requires the plan administrator to use in calculating benefits -- nothing more, nothing less. Thus, AT&T has not breached its fiduciary duty.

D. AT&T's Benefit Claims Denials Complied With The Plans And Were Neither Arbitrary Nor Capricious.

Because AT&T's denials of plaintiffs' claims for additional benefits complied with the plan's terms (*see* AT&T 12/18/02 Opp. at 19-23), they were not arbitrary and capricious, and should be affirmed by the Court.

III. PLAINTIFFS' REQUEST FOR INAPPROPRIATE RETROACTIVE RELIEF IS A PROPER BASIS FOR THIS COURT TO DISMISS THEIR CLAIMS.

Plaintiffs contend that it is not appropriate at the liability stage of the proceedings for AT&T to argue that plaintiffs' claims should be dismissed because the relief they seek is barred. However, Federal Rule of Civil Procedure 12(c) allows the Court to dismiss the case on the pleadings if it is clear that the relief plaintiffs seek is barred as a matter of law. Fed. R. Civ. P. 12(c); *see also International Technologies Consultants v. Pilkington PLC*, 137 F.3d 1382, 1393

(9th Cir. 1997) (Rule 12(c) motion for judgment on the pleadings granted because relief was barred).

Here, the sweeping, retroactive relief plaintiffs seek is exactly the type the Supreme Court has prohibited in the pension plan context. Indeed, plaintiffs concede that such relief is barred (Pl. 12/18/02 Opp. at 22), but, incredibly, claim that "all that is involved here are relatively small NCS adjustments for some of AT&T's employees who were unlawfully denied service credit based on pregnancy discrimination." *Id.* at 22-23. Plaintiffs' modest description of their claims is belied by the allegations in the amended complaint, in which plaintiffs estimate that "the number of women in the class would be in excess of 15,000." Am. Cmplt. ¶ 16. Plaintiffs' 10-paragraph prayer for relief, which seeks recalculation of NCS dates for all class members, recalculation of pension benefits for all class members, and payments based on these recalculations, further underscores the financial and administrative burden they seek to impose on the pension plans. *See* Am. Cmplt. Prayer for Relief ¶¶ 1-10. Thus, plaintiffs' claims for relief that the Supreme Court prohibits them from recovering mandates dismissal of their claims.

CONCLUSION

For the reasons set forth above and in their opening memorandum, defendants AT&T Corp., AT&T Management Pension Plan, AT&T Pension Plan, and AT&T Employees' Benefit Committee respectfully request that the Court grant their motion for summary judgment, dismiss the amended complaint in its entirety with prejudice, and award defendants their costs and any other relief the Court deems equitable and just.

January 24, 2003

Respectfully submitted,

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