United States District Court,
N.D. California.
Noreen **HULTEEN** et. al., Plaintiffs,
v.
AT & T CORP., et. al, Defendants.
No. C-01-1122 MJJ.

Aug. 11, 2003.

Blythe Mickelson, Weinberg, Roger & Rosenfeld, Alameda, CA, Henry Sanford Hewitt, Erickson Beasley Hewitt & Wilson, Oakland, CA, Judith Edith Kurtz, Law Offices of Judith E. Kurtz, Noreen A. Farrell, Equal Rights Advocates, San Francisco, CA, Mary Katherine O'Melveny, Communications Workers of America, Washington, DC, for Plaintiffs.

Allegra R. Rich, Charles C. Jackson, Michael John Sears, Seyfarth Shaw, LLP, Chicago, IL, Joshua M. Henderson, Nixon Peabody, LLP, San Francisco, CA, for Defendants.

AMENDED ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

MARTIN J. JENKINS, District Judge.

INTRODUCTION[FN1]

FN1. This Amended Order is solely intended to correct typographical errors that were inadvertently included in the August 6, 2003 Order. The analysis and holding of that Order remain unchanged.

***1** Before the Court are dual motions for summary judgment. The claims at issue concern alleged violations of both Title VII of the Civil Rights Act and of ERISA, flowing from defendants' denial of service credit to plaintiffs for time spent on disability due to pregnancy. For the reasons outlined below, plaintiffs' motion for summary judgment is GRANTED IN PART and DENIED IN PART, and defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART.

FACTUAL BACKGROUND

1) Procedural History of the Case

The plaintiffs in this case are all women who were employed by Pacific Telephone and Telegraph (PT & T), a Bell System Operating Company and subsidiary of defendant AT & T. After the divestiture of the Bell Operating Companies through the 1984 Modification of Final Judgment, plaintiffs became employees of AT & T. While at PT & T, each of the women took temporary leaves of absence due to pregnancy prior to 1979. Pursuant to policies in place at the time, PT & T did not give “service credit” to women who took temporary disability leaves due to pregnancy during the time they were on leave, while it did offer such credit to employees who were on temporary leave due to other disabilities. As explained below, the amount of service credit indicates the amount of time an employee has been with the company, and the calculation of “Net Credited Service” (“NCS”) is critical in determining a host of benefits for which employees can qualify: the amount of pension payments; eligibility for early retirement; qualification for certain voluntary termination packages; job bidding; shift preference; seniority for layoffs, etc. The NCS for each plaintiff calculated by PT & T was carried over to AT & T when they became AT & T employees.

Plaintiffs allege that the failure to credit them with the time they were on disability leave due to pregnancy constitutes discrimination on the basis of sex, in violation of Title VII of the Civil Rights Act, and is a breach of the AT & T benefit plan's fiduciary duty to treat all plan members equally, in violation of the Employee Retirement Income Security Act (ERSIA).[FN2] Plaintiffs filed suit on their own behalf and on behalf of all others similarly situated on March 20, 2001. Soon after the case was filed, the parties agreed to divide the case into three phases.[FN3] Phase I comprises an initial determination of liability, based on a joint stipulation of relevant facts. The case is currently situated in Phase I, and the present summary judgment motions are the vehicle to determine initial liability. Phase II will concern secondary liability and class certification issues, should any of plaintiffs' claims

remain after summary judgment and subsequent appeals. Phase III will then address the issue of damages.

FN2. These laws are codified at 42.U.S.C. §§ 2000e *et. seq.* and 29 U.S.C. §§ 1001 *et. seq.*, respectively.

FN3. *See* Joint Case Management Statement and Proposed Order, filed on July 27, 2001.

2) Developments in the Law of Pregnancy Discrimination

When passed, Title VII of the Civil Rights Act of 1964 prohibited discrimination on the basis of sex, but did not specifically proscribe discrimination due to pregnancy. The Supreme Court examined whether Title VII included discrimination due to pregnancy in *General Electric Co. v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). In *Gilbert,* the Court found no violation of Title VII where an employee benefit plan failed to cover pregnancy disability. *Id.* at 145-46. The Court refined its position somewhat the following year in *Nashville Gas Co. v. Satty,* 434 U.S. 136, 98 S.Ct. 347, 54 L.Ed.2d 356 (1977). In *Satty,* the Court distinguished between a benefit plan that refuses to confer a benefit based upon a classification such as pregnancy, the issue in *Gilbert,* and a plan that affirmatively imposes a burden, such as the one in *Satty.* The Supreme Court held that an employer may not "burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Satty,* 434 U.S. at 142. In *Satty,* the plan at issue denied sick pay to women on pregnancy disability and eliminated all their job seniority upon return from leave. *Id.* at 137. In contrast to *Gilbert,* the Court in *Satty* held that such a plan violated Title VII.

***2** The tension between *Gilbert* and *Satty* was resolved with the passage of the Pregnancy Discrimination Act of 1979 ("PDA"). In response to the Supreme Court's opinion in *Gilbert,* Congress amended Title VII to include pregnancy under the umbrella of discrimination due to sex. In the wake of the PDA, employee benefit plans that fail to accord women on pregnancy leave the same rights as employees on temporary disability due to other factors are in violation of Title VII.

3) History of Defendants' Net Credited Service System

a. Pre-1977: The Original Plan

As early as 1914, AT & T, and its operating companies, used a service crediting system that determined pension benefits eligibility for other programs based upon the length of time an employee was with the company. The tenure of an employee's service in the company was referred to as her "Term Of Employment," or TOE, and was defined as a "period of continuous employment in the service of the Company." (Parties' Joint Stipulations of Fact ISO Their Respective Motions for Summary Judgment ("JSF") ¶ 17.) As part of this method of calculation, a foundational date for the calculation of "Net Credited Service," or NCS, was maintained for each employee. The NCS date represented the beginning of an employee's TOE.[FN4] (*Id.* ¶ 18.) An employee's NCS date, however, was not fixed; rather, it was adjusted to account for any interruptions in an employee's service. For instance, if an employee began working on September 1, 1970, and stayed with the company without interruption until September 1, 1971, she would be credited with 365 days of service, and her NCS date would remain September 1, 1970. However, if the employee went on a leave of absence for 25 days, she would be credited for only 340 days of service, and her NCS date would be adjusted accordingly. The new date would then become September 26, 1970. (*See id.*)

FN4. For the purpose of analysis here, TOE and NCS will be used interchangeably, both referring to the amount of time an employee is credited as serving.

Occasionally, an employee's period of service would be interrupted by periods of disability, personal leaves of absence, and other causes. AT & T and its predecessor companies had various policies for granting service credit for these disability related interruptions. The most important for purposes of the present action is PT & T's pre-1977 policy that treated a leave of absence for a pregnancy-related disability as a "personal leave," coupled with the policy that granted a maximum of 30 days service credit for any personal leave, regardless of duration. (*Id.* ¶ 67.) For instance, under this system, an employee who began work for PT & T on September 1, 1970, but who became pregnant and was disabled for 100 days during that year because of the pregnancy received service credit

for only 30 of those days, and her NCS date was pushed back 70 days, to November 10, 1970. In this way, the plan fully accounted for the days she was absent. At the same time, an employee who became temporarily disabled because of a condition unrelated to pregnancy, such as an injury, received full credit for the entire duration of his absence from work. (*Id.* ¶ 68.)

***3** Additionally, some women who became pregnant were forced to go on personal leave before they were rendered disabled by their condition, a policy referred to as "forced leave" (*Id.* ¶ 81.) At the same time, other employees who anticipated the onset of a disability were not forced to go on leave before they felt incapable of working. (*Id.* ¶ 82.)

b. 1977-1979: the Maternity Payment Plan

On August 7, 1977, PT & T adopted the Maternity Payment Plan, which granted service credit for up to six weeks of disability due to pregnancy and which eliminated the policy of forced leave. (*Id.* ¶ 70.) If the disability lasted longer than six weeks, it became personal leave, with the 30 day maximum credit. (*Id.*) No adjustment was made to the TOE or NCS dates of those women who became disabled due to pregnancy prior to the Maternity Payment Plan. These women were not credited with any service time beyond the 30 day maximum for personal leave, and their NCS dates were not re-adjusted to reflect the addition of any service time. (*Id.*)

c. 1979-Present: The Anticipated Disability Plan And Current Policy of AT & T

In 1979, as a response to the newly-enacted Pregnancy Discrimination Act, PT & T adopted the Anticipated Disability Plan, which provided service credit for leaves of absence due to pregnancy on the same terms as leaves of absence for other temporary disabilities. (*Id.* ¶ 79.) As with the adoption of the Maternity Payment Plan, no adjustments were made to the service credit or NCS dates of women who had taken leaves for pregnancy under either the prior Maternity Payment Plan or the pre-1977 system. (*Id.*) This plan is currently in effect at AT & T. (*Id.* ¶ 80.)

When the Modification of Final Judgment was adopted, AT & T divested itself of its Bell operating companies. With this breakup, employees of many former operating companies, such as PT & T, became employees of AT & T. (*Id.* ¶ 91.) The MFJ, and the Plan of Reorganization that followed it, required that all pre-divestiture service be carried with the employees regardless of where they were subsequently employed-with AT & T or with the regional companies that were formed in the wake of the MFJ. (*Id.* ¶ 92.)

After the MFJ, some plaintiffs became employees of AT & T, with the same NCS dates and accumulated service time with which they had been credited as employees of PT & T.[FN5] (*Id.* ¶¶ 29, 40.) While the company no longer treats leave for temporary disability due to pregnancy differently than disability leave occasioned by other factors, at no time did AT & T adjust the NCS dates or amount of service time plaintiffs were credited before they became AT & T employees. (*Id.* ¶¶ 30, 41, 52, 63.) [FN6] This failure to assign credit for pre-1979 maternity leave is the foundation for the current lawsuit.

FN5. Plaintiffs Linda Porter and Elizabeth Snyder became an AT & T employee prior to the MFJ, in 1980. (JSF ¶ 51, 60.)

FN6. In 2000, Snyder received a single 30 day adjustment in her NCS, as an earlier calculation had neglected to give her 30 days of service for the personal leave she took when she became pregnant in 1974. (JSF ¶ 63.) Apart from that correction, to conform to the policy in effect before 1977, Snyder has received no other adjustments to her NCS. (*Id.*)

LEGAL STANDARD

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law. *See* Fed. R. Civ. Proc. 56(c). The moving party bears the initial burden of establishing that there is no genuine issue of material fact. *See id.; Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party does not bear the burden of proof at trial, the initial burden of showing that no genuine issue of material fact remains may be discharged by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Id.* at 325. The moving party is not required to produce

evidence showing the absence of genuine issues of material fact. *See* *Lujan v. National Wildlife Federation,* 497 U.S. 871, 885, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). Nor must the moving party support his or her own motion with evidence negating the non-moving party's claim. *See id.*

ANALYSIS

***4** This case is particularly well suited for summary judgment, as the parties have stipulated to all the material facts. (*See* JSF *and* Parties' Joint Appendix of Evidentiary Materials ISO Their Respective Motions for Summary Judgment.) The only issue concerns what law to apply to those facts. Plaintiffs argue that the Court should follow the Ninth Circuit's decision in *Pallas v. Pacific Bell,* 940 F.2d 1324 (9th Cir.1991), while defendants maintain that the holding in *Pallas* has effectively been overruled, and that the Court should instead follow the decision of the Seventh Circuit in *Ameritech Benefit Plan Committee v. Foster-Hall,* 220 F.3d 814 (7th Cir.2000), *cert. denied sub nom., CWA v. Ameritech Benefit Plan Committee,* 531 U.S. 1127, 121 S.Ct. 883, 148 L.Ed.2d 791 (2001).

A. *PLAINTIFFS' TITLE VII CLAIM*

While defendants raise interesting and compelling arguments regarding the applicability of Title VII's anti-discrimination provisions, given the facts of the present case and their resonance with the holding of *Pallas,* the Court is bound by the precedential effect of that decision, and it is obligated to follow *Pallas.* Therefore, as more fully explained below, plaintiffs' motion for summary judgment is GRANTED with respect to the claim under Title VII, and defendants' motion for summary judgment is DENIED.

1) *Pallas v. Pacific Bell*

In the case of *Pallas v. Pacific Bell,* the Ninth Circuit confronted the dismissal of a complaint identical to the present one for failure to state a claim.[FN7]

> FN7. "The Pacific Bell system at issue in *Pallas* is identical to Defendants' current system challenged here." (Plaintiffs' Motion for Summary Judgment at 9.) Defendants do not dispute that the systems are identical.

> Lana Pallas filed this suit against her employer, Pacific Bell, and its predecessor companies ... claiming that the company has discriminated against her on the basis of gender and pregnancy. Pacific Bell denied her retirement benefits in 1987 based on a method of calculating employee service time that does not credit pregnancy leaves taken prior to 1979 but credits temporary disability leaves taken during the same period. Pallas brought this action under the Pregnancy Discrimination Act provision of Title VII, 42 U.S.C. §§ 2000e *et seq.;* ERISA, 29 U.S.C. §§ 1001 *et. seq.* and the California Fair Employment and Housing Act.
>
> 940 F.2d at 1325. Because she had taken maternity leave in 1972 and was not credited with service time during her disability, the plaintiff in *Pallas* was two or three days short of the necessary amount of service needed to qualify for an early retirement offer. *Id.* at 1326. The Ninth Circuit found that the seniority system by which her time was calculated was facially discriminatory because it did not include temporary disability due to pregnancy, yet included temporary disabilities occasioned by other causes. In so holding, the Court of Appeals reversed the district court's ruling that the Pacific Bell service program was a *bona fide* seniority system that qualified for safe harbor protection under § 703(h) [42 U.S.C. § 2000e-2(h)]. *Id.* at 1326-27. This latter provision states that for facially neutral seniority systems, "the discriminatory act occurs at the time of adoption and subsequent applications do not constitute continuing violations." *Id.*

***5** In support of its holding, the Ninth Circuit considered several Supreme Court cases upon which the district court had relied in denying Pallas' claim, specifically, *Lorance v. AT & T Technologies, Inc.,* 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989), and *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), and found they were inapposite. *Pallas,* 940 F.2d at 1326. Both *Lorance* and *Evans* held that disparate impacts arising from facially neutral seniority systems must be challenged within the statute of limitations provided by Title VII, a period that begins to run from the time the system is adopted: "with a facially neutral system, the discriminatory act occurs at the time of adoption and subsequent applications do not constitute continuing violations." *Pallas,* 940 F.2d at 1326 (citing *Lorance,* 490 U.S. at 911-13; *Evans,* 431 U.S. at 557-58). The *Pallas* court found these cases inapposite for two reasons: (1) the retirement program at issue in the case

was instituted in 1987 and could not be challenged earlier, so the case was not “a belated attempt to litigate the discriminatory impact of a pre-Pregnaney Discrimination Act program”; and (2) the program at issue was not facially neutral. *Id.* at 1327.

Pacific Bell's leave program neglected to add time for temporary leave for pregnant women but added time for workers temporarily disabled for other reasons. In characterizing this program as not facially neutral, the court held that “[t]he system distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities.” *Id.* Therefore, the application of this policy to benefit determinations, such as the 1987 assessment of who qualified for early retirement, was actionable. In reversing the district court decision, the *Pallas* court stated:

> In 1987, Pacific Bell instituted a program that adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act. While the act of discriminating against Pallas in 1972 is not, itself, actionable, Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy. Pallas's complaint states a valid claim under Title VII.

Id. As the system in *Pallas* is identical to the NCS system in this case, the denial of the early retirement offer to Pallas did not result in the calculation of a new NCS date. Instead, Pacific Bell merely applied the NCS date to the date that the plaintiff applied for the early retirement offer and determined that she was just a few days shy of qualifying. Thus, it was not a calculation of a new NCS date that constituted an actionable harm. Rather, the court in *Pallas* held that Pacific Bell's application of a previously calculated NCS date to a determination of benefit eligibility is a discrete act giving rise to a valid claim. This act is the same injury claimed by plaintiffs in the present case: a failure to go back and credit plaintiffs for time on pre-1979 pregnancy leave.

***6** In the view of the *Pallas* court, the adoption of an NCS date calculated through a system that discriminated against women is a perpetuation of that discrimination, regardless of the fact that the differential treatment of pregnant women in computing service credit was not illegal at the time. *Id.* Under *Pallas,* the application of the NCS date incorporates a present act of discrimination; it does not comprise merely the present effects of past discrimination. This distinction is central to defendants' argument.

The Ninth Circuit supported its assessment that application of the NCS constitutes a cause of action for present discrimination through citation to the Supreme Court's decision in *Bazemore v. Friday,* 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). In that case, an employer had created two racially segregated workforces, with black workers earning less than whites. After Title VII made such discrimination unlawful, these pay disparities still remained, and the Supreme Court imposed liability even though the discrimination was not illegal at the time the pay structure was established. “Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.” *Id.* at 395-96; *cited by Pallas,* 940 F.2d at 1327. In *Bazemore,* the fact that the discriminatory pay structure was not illegal when enacted was immaterial, for the structure was still employed to deny equal treatment to black and white workers. In the same vein, plaintiffs in this case assert that each calculation of benefits using the NCS is actionable. “Plaintiffs' injuries occur when Defendants calculate valuable economic benefits using the challenged NCS system, thereby causing female employees who took pre-PDA pregnancy leaves to receive lesser benefits when they retire than employees who took disability leaves for other reasons.” (Plaintiffs' Motion for Summary Judgment at 18.)

2) *Pallas* Incorrectly Applied *Bazemore* and *Evans*

In defendants' moving papers, they invite this Court to examine *Bazemore* closely, in light of the *Pallas* court's reliance on the opinion. Defendants argue that a critical fact in *Bazemore* differentiates it from the situation confronting the Ninth Circuit in *Pallas* and facing this Court in the current case. In *Bazemore,* the Supreme Court determined that the pay structure used by the defendants after Title VII was enacted was identical to the system in place before Title VII, but which had since become unlawful. As seen below, the Supreme Court specifically noted that it was the defendants' conduct in continuing to engage in behavior that had become illegal that constituted a violation of

Title VII.

> A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute. While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be attached.

***7** *Bazemore,* 478 U.S. at 395. The fact that the Court is discussing the present conduct, and not simply the effects of past acts, is illustrated in the note that follows the above passage:

> Our holding in no sense gives legal effect to the pre-1972 actions, but, consistent with *Evans* and *Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977)], focuses on the present salary structure, which is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure.

Id. at 396 n. 6.

In contrast, defendants in the present case argue that although it employs the same seniority system at issue in *Pallas,* AT & T is not committing a present violation of Title VII in calculating seniority. Defendants argue that AT & T's implementation of the Anticipated Disability Plan ("ADP") is consistent with the PDA, in that employees taking temporary disability leave as a result of pregnancy are credited with the same service time that employees on non-pregnancy disability leave receive. (JSF ¶ 79.) Therefore, defendants argue that this is not a case of continuing discrimination.

In essence, plaintiffs agree with defendants; they agree that the practice to which they were subjected-only receiving 30 days of service credit-is no longer in force. However, plaintiffs do not allege that the ADP is a "mere continuation" of the pre-PDA leave policy or that defendant is continuing to engage in the unlawfully discriminatory practice, for under AT & T's policy since 1979, pregnant and non-pregnant employees are treated equally. Rather, plaintiffs assert that even though defendants no longer engage in the practice of denying service credit for pregnancy disability, defendants continue to violate Title VII through their refusal to correct their NCS dates. In other words, plaintiffs assert that the discriminatory practice that had become unlawful was changed by the ADP, but defendants did not, and still do not, make this policy retroactive by applying service credit for pre-1979 maternity leaves. (*Id.* ¶ 84.) It is this failure to count pregnancy leave taken before the ADP, and the resulting award of fewer benefits, that constitutes the disparate treatment about which plaintiffs complain, and plaintiffs rely on *Pallas* for the holding that such a failure is actionable. (*See* Plaintiffs' Reply Memorandum ISO Motion for Summary Judgment ("P.Reply") at 5.)

Defendants respond to plaintiffs' argument by challenging the legal foundation of the *Pallas* decision. In their view, the *Pallas* court misapplied *Bazemore'* s current acts analysis to a claim that sought damages for the present effects of a past practice. Instead, defendants argue that the analysis set forth by the Supreme Court in *Evans* provides the appropriate framework for considering plaintiffs' claim. (*See* Defendants' Reply ISO Motion for Summary Judgment ("D.Reply") at 3-4.)

In *United Air Lines, Inc. v. Evans,* the Supreme Court confronted a policy analogous to the one at issue here. 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). Prior to 1968, United Airlines had a pohcy that refused to permit its female flight attendants to be married, and when the plaintiff Evans married in 1968, United forced her to resign. Although case law later determined that this policy was in violation of Title VII, Evans failed to challenge her termination within the applicable statute of limitations. United changed its policy in 1968, and eventually re-hired Evans in 1972. Upon her re-hiring, however, United considered Evans an entirely new employee and denied any service credit for the time she had been employed prior to termination. United made this decision pursuant to a policy that denied recapture of prior service by any former employee, regardless of sex or reason for termination. The plaintiff alleged, however, that denial of past credit, when coupled with the fact that she was forced to resign for a discriminatory reason, "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* at 557.

> ***8** Respondent is correct in pointing out that the seniority system gives present effect to a past act of

discrimination.

* * * *

United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation.

* * * *

[A] challenge to a neutral system may not be predicated on the mere fact that a past event which has no 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. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of § 703(h).
Id. at 558-60 (emphasis original) (citations omitted). By stating that Evans's forced termination "has no legal significance," the Supreme Court necessarily determined that because Evans failed to challenge her discharge in 1968, the statute of limitations ran on her claim and precluded raising her illegal termination at a later time. Thus, it makes no difference why Evans was terminated, as discharge for an unchallenged discriminatory reason is legally equivalent to termination for a nondiscriminatory reason. *Id.* at 557.

The application of the Supreme Court's holding in *Evans* to the case presently before the Court is obvious, according to defendants. Defendants argue that the pre-1979 policy not to credit plaintiffs with service time for disability due to pregnancy was legal under *Gilbert v. General Electric Co.,* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). Even if this policy were actionable, the time to raise a claim would be within 300 days of the decision not to credit service, a decision contemporaneous with the pregnancy leave. (*See* D. Reply at 1-2) (citing JSF ¶¶ 19, 28-29, 37, 39-40, 50-51, 59-60)); *see also* 42 U.S.C. § 2000e-5(e)(1). Alternately, the time to challenge would be after the 1979 adoption of the ADP, when it was clear that pre-1979 maternity leave would not be credited. Since no challenge to this policy was raised until June 1994 at the earliest, defendants argue that plaintiffs' claims are all time barred, and thus, without legal significance.[FN8] Moreover, since the current NCS system does not discriminate between people who take disability leave for pregnancy and those who take disability leave for other reasons, it can be classified as neutral under the PDA. According to § 703(h) of the Act, (42 U.S.C. § 2000e-2(h)), the fact that calculations under a system that is neutral in operation may serve to perpetuate discrimination does not constitute an unlawful practice, so long as it is not done with an intent to discriminate. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 353-54, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) ("[W]e hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination.").

FN8. *See* First Amended Complaint ¶¶ 44, 57, 68, 79, 82 (describing the dates on which the plaintiffs first filed administrative complaints regarding the computation of their benefits).

***9** In support of their contention that *Pallas* was wrongly decided, defendants cite to the Court the Seventh Circuit's holding in *Ameritech Benefit Plan Committee v. Foster-Hall.* As with *Pallas,* the facts of *Ameritech* are essentially the same as the those in the present case. [FN9] Prior to the PDA, Ameritech's NCS system counted only 30 days of a temporary leave due to pregnancy toward an employee's time of service, a calculation that affected pension benefits, early retirement, and similar programs. *Ameritech,* 220 F.3d at 816-17. At the same time, however, temporary disability leaves for other reasons were credited toward time of service. *Id.* at 817. When the PDA became effective, this policy was changed, and pregnancy disability was credited the same as other leave, but Ameritech did not retroactively credit employees with time for pregnancy leave that had been excluded before the Act was passed. *Id.*

FN9. *See* Defendants' Motion for Summary Judgment at 8, describing the factual background of *Ameritech* as "almost identical."

In *Ameritech,* the Seventh Circuit mirrored the Ninth

Circuit's identification of *Bazemore* and *Evans* as critical cases to analyze, but the former court reached a different result than the court in *Pallas.* While admitting that the distinction between the holdings of the two cases is rather fine, the Seventh Circuit held that the *Evans* line of cases was more persuasive.

> For a number of reasons, we think that Ameritech has the better of this dispute, although we acknowledge that the line between continuing violations that arise with each new use of the discriminatory act (*e.g.,* the *Bazemore* paychecks) and past violations with present effects (*e.g.,* the *Evans* seniority) is subtle at best. But it is a line the Supreme Court has drawn, and it is our obligation to apply it if at all possible.

Id. at 822-23. Ultimately, the *Ameritech* court did not determine the merits of plaintiffs' claim that the defendant's refusal to apply pre-1979 maternity leaves to net service credit was discriminatory. Instead, the court decided the case on statute of limitations grounds, ruling that the proper time for the plaintiffs to have sued was within the statute of limitations after Ameritech's 1979 modification of the NCS system to conform to the PDA.

> Here, the women knew the minute they took their pregnancy or maternity leaves that they were not getting full credit for their time off. No later than the time when Ameritech amended its plan in response to the PDA, they knew that their NCS had not been amended.... The time for bringing a complaint was therefore long ago, and the district court properly recognized that these employees had sued too late.

Id. at 823. Since the plaintiffs did not file within the statute of limitations provided by 42 U.S.C. Section 2000e-5(e), their action was ruled untimely and was dismissed.

The Seventh Circuit also addressed the question of whether the seniority system at issue in *Ameritech* was *bona fide.* Title VII does not define discriminatory effects that flow from *bona fide* seniority systems as unlawful, as long as those effects do not arise from an intent to discriminate. 42 U.S.C. § 2000e-2(h) (§ 703(h)).[FN10] Applying the test found in *California Brewer's Ass'n v. Bryant,* 444 U.S. 598, 606, 100 S.Ct. 814, 63 L.Ed.2d 55 (1980), the *Ameritech* court concluded that the NCS system met the requirements of a seniority system. 220 F.3d at 823. It also cited the holding of *International Brotherhood of Teamsters,* 431 U.S. at 352-53, which states that neutral application of a seniority system that perpetuates past discrimination does not connote intent to discriminate. *Id.* Distinguishing between discriminatory actions and their later effects, the Seventh Circuit held that the discriminatory effects of the NCS system do not support a cause of action. *Ameritech,* 220 F.3d at 823. The only act that could sustain a cause of action in the case was the 1979 decision not to credit pre-PDA pregnancy to time in service, and the statute of limitations for that had long passed. *Id.*

> FN10. “Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin[.]” 42 U.S.C. § 2000e-2(h) (§ 703(h)).

***10** The *Ameritech* court posited another reason that the decision to deny benefits based on a NCS calculation was not actionable or evidence of discriminatory intent: the PDA does not have retroactive application. “Moreover, the PDA has not been treated as a retroactive statute, and so Ameritech would have had no reason to think it had to reshuffle its NCS list after the Act had passed.” *Id.* (citations omitted). The cases cited in *Ameritech* support this finding. “While it is clear that Congress intended to change Title VII as it had been interpreted by *Gilbert* and *Satty,* there is nothing in the amendment or in its legislative history to warrant any inference that Congress intended the change to be retroactive.” *Condit v. United Air Lines, Inc.,* 631 F.2d 1136, 1140 (4th Cir.1980). “Since Congress provided that the [PDA] would take effect on the date of its enactment, there is no basis for applying the 1979 amendment to Schwabenbauer's experiences in 1968-72. The cases relied upon by Schwabenbauer in seeking retroactive application of the amendment to her case are inapposite.” *Schwabenbauer v. Board of Ed. of City Sch. Dist. of Olean,* 667 F.2d 305, 310, n. 7 (2d Cir.1981) (citations omitted). “Whitehead's pregnancy-related termination from OG & E occurred nine years before the PDA was enacted, and the PDA is not retroactive.” *Whitehead v.*

Oklahoma Gas & Elec. Co., 187 F.3d 1184, 1193 (10th Cir.1999).

Defendants supply additional authority to support the proposition that the PDA is not retroactive, including cases from the Ninth Circuit and the Supreme Court. (*See* Defendants' Motion for Summary Judgment at 7.)

> The Civil Rights Act was amended in 1978 to include pregnancy as a factor in the definition of "on the basis of sex." 42 U.S.C. § 2000e(k). Because the facts in this [action] took place before 1978, this case is not controlled by the amendment; accordingly, we do not consider it.

Wambheim v. J.C. Penny Company, Inc., 642 F.2d 362, 363, n. 1 (9th Cir.1981). The Supreme Court has stated that a clear statement of congressional intent is needed for a law to apply retroactively, for in the absence of such clear intent, the rule is that laws are to be applied prospectively only. *Landgraph v. USI Film Products,* 511 U.S. 244, 271-72, 280 (1994). In this latter case, the PDA is offered as an example of a statute that is not retroactive in application.

> [I]n amending Title VII to bar discrimination on the basis of pregnancy in 1978, Congress provided: "Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment." The only Court of Appeals to consider whether the 1978 amendments applied to pending cases concluded that they did not. If we assume that Congress was familiar with those decisions, its choice of language in § 402(a) would imply nonretroactivity.

Id. at 258, n. 10 (citations omitted).

Defendants argue that the Ninth Circuit employed *Landgraph,* together with its presumption of non-retroactivity and its use of the PDA as an example of such a presumption in action, to reject the retroactive application of statutory amendments to the Immigration and Naturalization Act. *See* *Castro-Cortez v. Immigration and Naturalization Service,* 239 F.3d 1037, 1050-51 (9th Cir.2001). In addition to emphasizing the persuasive force of *Ameritech,* defendants also argue that the reasoning that animates the decision in *Pallas* demonstrates a retroactive application of the PDA, an application that has been rejected by subsequent Supreme Court decisions. (*See* D. Reply at 2-4.)

***11** In making this argument, defendants chiefly rely upon the opinion in *Spink v. Lockheed Corporation,* 60 F.3d 616 (9th Cir.1995) (*"Spink I"*), which was subsequently overruled by *Lockheed v. Spink,* 517 U.S. 882, 896-97, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1997) (*"Spink II"*).[FN11] In reversing the Ninth Circuit, the Supreme Court found that the Ninth Circuit erroneously concluded that the Age Discrimination in Employment Act ("ADEA"), as extended to retirement plans in the 1986 Omnibus Budget Reconciliation Act ("OBRA"), could be retroactively applied. *Spink II,* 517 U.S. at 897. The Supreme Court held that OBRA was prospective in nature, and not retroactive, and therefore, there was no liability for denial of benefits based on a pre-OBRA seniority calculation. *Id.* at 896-97. Defendants also cite *Landgraph,* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229, which used the PDA as an example of a statute that is not retroactively applied. *Id.* at 258 n. 10. Applying these decisions to the present case, defendants argue that the Pregnancy Discrimination Act is prospective in nature, and that the court in *Pallas* applied the statute retroactively, an application since prohibited by *Lockheed v. Spink.* (*See* D.Reply at 2-4.)

> FN11. The Ninth Circuit's analysis of the ADEA and its application to the factual situation in *Spink* was similar to the analysis of the PDA and the facts present in *Pallas. Compare* *Spink I,* 60 F.3d 616 *with* *Pallas,* 940 F.2d 1324.

While defendants' arguments have great logical and legal force, in order to apply them to the present case, this Court must determine that in *Pallas,* the Ninth Circuit applied the PDA in a retroactive manner. There are two impediments to such a finding, however. The first is the fact that the *Pallas* decision is silent with respect to the issue of retroactivity. In contrast to its decision in *Spink I,* which explicitly held that OBRA was retroactive, the Ninth Circuit makes no mention of the issue of retroactivity in *Pallas. Compare* *Spink I,* 60 F.3d at 620 n. 1 ("To the extent that our interpretation requires employers to include pre-enactment service years in calculating accrued benefits, [OBRA] applies retroactively.") *with* *Pallas,* 940 F.2d 1324. The second is the fact that in *Pallas,* the Ninth Circuit found a present violation of the PDA. The court clearly stated that the 1987 adoption of a policy applying a benefits calculation made prior to

the enactment of the PDA gave rise to a cause of action in 1987. *Pallas,* 940 F.2d at 1327. Because the court in *Pallas* made no mention of retroactivity and found a present violation of Title VII on an essentially identical record, this Court cannot find that the Supreme Court's decision in *Spink II* permits a departure from the holding of *Pallas.*

3) The Effect of *Pallas* Upon this Court

As reflected in the discussion above, defendants invite the Court to depart from the holding of *Pallas.* Their argument has three bases. First, the present case, as was *Pallas,* is not a case of current acts of discrimination; it concerns the present effects of past discrimination. For this reason, *Bazemore* is inapplicable, and the Supreme Court's holding in *Evans* controls. Second, the decision of the Seventh Circuit in *Ameritech,* on similar facts, supports defendants' contention that *Pallas* was wrongly decided. Third, the *Pallas* opinion involves a retroactive application of the PDA, and subsequent decisions of the Ninth Circuit and the Supreme Court have held that this type of retroactivity is erroneous.

***12** Absent the *Pallas* court's discussion of *Bazemore* and *Evans,* the Court would be free to undertake its own assessment regarding which case is more applicable to the current set of facts. However, despite defendants' cogent analysis of these cases and citation to *Ameritech,* the fact remains that *Pallas* is a decision of the Ninth Circuit with binding effect upon this Court.

When faced with a conflict between the law of this circuit and the law of another, the Court must follow the law of this circuit. *Gardner Construction Co. v. Assurance Co., of America,* No. C 99-1810 MJJ, 2000 WL 1677959, *4 (N.D.Cal.2000) ("Given the choice between binding precedent and persuasive precedent from another circuit in open disagreement with this circuit's law, this Court must adhere to the former.") District courts are bound by the law of their own circuit; "[t]hey are not free to resolve splits between circuits no matter how egregiously in error they may feel their own circuit to be." *Hasbrouck v. Texaco,* 663 F.2d 930, 933 (9th Cir.1981). This Court may not overrule a decision of the Ninth Circuit in the absence of an intervening Supreme Court decision that undermines the existing precedent, and both cases are closely on point. *United States v. Gay,* 967 F.2d 322, 327 (9th Cir.1992); *United States v. Lancellotti,* 761 F.2d 1363, 1366-67 (9th Cir.1985).

Defendants would argue that the ruling of *Lockheed v. Spink,* when viewed in connection with the opinion in *Landgraf,* is an example of such a intervening Supreme Court decision, but the Court is not convinced that the former case is sufficiently on point to justify setting aside the clear holding of *Pallas,* especially in light of the fact that *Pallas* found a present violation of Title VII on essentially identical facts to the ones before the Court in the present action.

For this reason, *Pallas* remains binding upon this Court, and based on that decision, plaintiffs in the present case have adequately stated a claim under Title VII for discrimination due to pregnancy. Therefore, plaintiffs' motion for summary judgment is GRANTED, and defendants' motion for summary judgment is DENIED as to claim one, violation of Title VII.

B. *PLAINTIFFS' ERISA CLAIM*

In addition to a cause of action under Title VII, plaintiffs claim that the denial of service credit for pre-1979 pregnancy leave constitutes a violation of the Employee Retirement Income Security Act ("ERISA"). Specifically, plaintiffs allege that the decision not to credit pre-1979 pregnancy leave in the NCS system is a breach of defendants' fiduciary duties to plaintiffs, since defendants have failed "to act solely in the interests of the participants and beneficiaries of those plans with respect to those plans as required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)." (First Amended Complaint ¶ 97.) Plaintiffs allege that the denial of credit manifests an application of the terms of the NCS system in a discriminatory manner, or in a manner contrary to law, and that it represents a wrongful denial of benefits. (*Id.* ¶ 98.)

***13** For support, they again turn to the decision in *Pallas,* which states that a benefit plan's calculation of service time to determine eligibility for early retirement "is an act subject to review for breach of fiduciary duty." 940 F.2d at 1327. The entire discussion that the Ninth Circuit devoted to the issue of Pallas's ERISA claim is contained in the following section.

> Pallas has also stated a claim cognizable under ERISA. Pallas challenges the manner in which the

> Early Retirement Opportunity program was applied to her. Calculation of the service term for purposes of eligibility in the program is an act subject to review for breach of fiduciary duty. *Meinhorn v. Firestone Tire and Rubber Co.,* 738 F.2d 1496, 1502-03 (9th Cir.1984). Pallas urges that Pacific Bell breached its fiduciary duty by failing to act in the interests of plan participants. Discrimination constitutes a fiduciary breach for purposes of ERISA. *See, e.g., Eiser v. I.A.M. National Pension Fund,* 684 F.2d 648 (9th Cir.1982), *cert. denied,* 464 U.S. 813, 104 S.Ct. 67, 78 L.Ed.2d 82 (1983). The allegations in the complaint are sufficient to support an ERISA claim.

Pallas, 940 F.2d at 1327. Plaintiffs assert a similar claims of breach of fiduciary duty in the present case, and in support they rely on *Pallas* for its statement that such a claim can be founded upon ERISA.

Essentially, plaintiffs are alleging discrimination in determination of plan benefits, so the success of their breach of fiduciary duties claim rises or falls on the merits of their claim for discrimination, as plaintiffs themselves make clear. "[I]f this Court determines here that the Plan fiduciaries' failure to award additional service credit to Plaintiffs for their pre-PDA pregnancy leave violates Title VII, such fiduciaries would not be acting solely in the interest of Plan participants and beneficiaries, and thus would violate ERISA's fiduciary provisions." (P. Reply at 11.) *See also Ameritech,* 220 F.3d at 825 ("Ameritech's decision to use NCS to calculate time of employment cannot evidence an intent to discriminate if the NCS system itself has passed muster under the antidiscrimination laws."). In addition to their argument that NCS calculations do not support a claim for violation of Title VII, defendants advance additional procedural and substantive reasons that plaintiffs' ERISA claims fail as a matter of law.

Defendants content that the relevant act in question is not a payment of lower benefits (as in *Bazemore*), but the decision not to credit pregnancy leave in NCS. This decision was made at the time the leave was taken, and with each plaintiff, the decision is over 20 years old. Alternately, defendants maintain that the relevant act is the decision to adopt the Anticipated Disability Plan in 1979. In adopting this policy, defendants (and the predecessor companies) chose not to apply the PDA retroactively and not to give credit for maternity leaves taken before that time. In either case, the statute of limitations for plaintiffs' ERISA action had long since run by the time plaintiffs filed suit, so the action is time barred. *See* 29 U.S.C. § 1113(2) (providing a three-year statute of limitations for breach of fiduciary responsibility, commencing on the earliest date on which plaintiff had actual knowledge of a breach or violation).

***14** In response, plaintiffs assert that they did not have actual knowledge that NCS would be applied in a discriminatory manner until the 1990s. (Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 18.) This argument is unconvincing, given the following facts: (1) plaintiffs were aware how the NCS system functioned; (2) they knew that they would not be credited with service time when they went on pregnancy leave; (3) they were aware that their NCS dates had been adjusted to reflect the denial of service credit during their absence from work; and (4) they knew that their NCS date traveled with them from PT & T to AT & T. (*See, e.g.* JSF ¶¶ 3, 27-31, 37, 40, 42, 48, 51, 53, 60, 61.) [FN12]

> FN12. The latest date for any of these facts is 1984, when named plaintiffs Hulteen and Collet became employees of AT & T; the other two plaintiffs became AT & T employees in 1980. (JSF ¶¶ 29, 40, 51, 60.)

For this reason, plaintiffs' ERISA claim fails as a matter of law. The precedential effect of *Pallas* does not alter this result. While that decision stands for the proposition that a discriminatory calculation of a service term is sufficient to support a cause of action under ERISA, nowhere does it state that such a cause of action, once properly pled, is immune to the statute of limitations defense provided by ERISA itself. *See Pallas,* 940 F.2d at 1327; 29 U.S.C. § 1113(2).[FN13] What the case does establish, however, is that the date of the violation for an ERISA claim is the adoption of the policy that allegedly constitutes a breach of fiduciary duty.

> FN13. As the statute of limitations issue disposes of plaintiffs' ERISA claim, the Court need not address defendants' other arguments related it.

In 1987, Pacific Bell instituted a program that adopted, and thereby perpetuated, acts of discrimi-

> nation which occurred prior to enactment of the Pregnancy Discrimination Act. While the act of discriminating against Pallas in 1972 is not, itself, actionable [in the context of Title VII], Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy.
> *Id.* at 1327. Pallas filed her complaint on June 27, 1989, well within the three-year statute of limitations period provided by ERISA,[FN14] so although the Ninth Circuit found that she stated a cognizable claim under the statute, the court did not address whether such claims are immune from statute of limitations challenges.

FN14. The Court takes judicial notice of the docket report in *Pallas v. Pacific Bell, et. al.,* No. 89-2373, heard by Judge Jensen of this Court.

In the present case, as in *Pallas,* the relevant act for plaintiffs' ERISA claim is the adoption of the policy not to credit pre-1979 pregnancy leave to employees' NCS. The latest arguable date that this policy was adopted is 1979, in the wake of the PDA, when the decision was made not to credit women retroactively for pregnancy leave. Any complaints under ERISA needed to be filed within three years of the 1979 adoption of that policy. *See Ziegler v. Connecticut General Life Ins. Co.,* 916 F.2d 548 (9th Cir.1990). As demonstrated in the First Amended Complaint, the earliest claim was filed in 1994, long after the statute of limitations had run on any such claims. (*See* First Amended Complaint ¶¶ 44, 57, 68, 79, 82.) Since the statute of limitations bars these claims as a matter of law, defendants' motion for summary judgment is GRANTED and plaintiffs' motion for summary judgment is DENIED with respect to the ERISA cause of action.

CONCLUSION

***15** Due to the weight this Court must accord to the Ninth Circuit's opinion in *Pallas,* plaintiffs have established that they are entitled to judgment as a matter of law on their allegations of a violation of Title VII claims, and the case shall proceed to Stage II on that claim. On the other hand, defendants have successfully established as a matter of law that the statute of limitations eliminates plaintiffs' claim for breach of fiduciary duty under ERISA, and they are entitled to summary judgment as to that claim. For these reasons, plaintiffs' motion for summary judgment is GRANTED as to claim one, violation of Title VII, and DENIED as to claim two, breach of fiduciary duty under ERISA, and defendants' motion for summary judgment is DENIED as to claim one, and GRANTED as to claim two.

IT IS SO ORDERED.

N.D.Cal.,2003.
Hulteen v. AT & T Corp.
Not Reported in F.Supp.2d, 2003 WL 25777891 (N.D.Cal.)

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