IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 04-cv-02686-WDM-CBS

WAYNE TOMLINSON,
ALICE BALLESTEROS,
GARY MUCKELROY,
individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

EL PASO CORPORATION, and EL PASO PENSION PLAN,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT ON ADEA CLAIM

Defendants El Paso Corporation and El Paso Corporation Pension Plan (improperly sued as El Paso Pension Plan) (collectively "El Paso" or "Defendants"), respectfully submit this Memorandum in support of its Renewed Motion For Summary Judgment On ADEA Claim.

I. INTRODUCTION

Plaintiffs Wayne Tomlinson's, Alice Ballesteros', and Gary Muckelroy's (collectively, "Plaintiffs") Age Discrimination in Employment Act ("ADEA") claim is based on the theory that they have experienced "wear-away" periods during which the increases in their cash balance accounts did not add anything to the benefits that would ultimately have been payable to them at normal retirement age (i.e., age 65) had they not retired sooner. According to Plaintiffs, this discriminatory wear-away period resulted from the fact that when El Paso converted the El Paso Corporation Pension Plan from a traditional final average pay plan to a cash balance plan in January 1997, it instituted a five-year transition period during which each Participant's benefits were calculated under both the final average pay formula that was being transitioned out and the cash balance formula that was being transitioned in. At the end of the five-year transition period, the value of each Participant's benefit payable at normal retirement age (commonly referred to as the "accrued benefit") under the final average pay formula was frozen.[1] When a Participant retires, the Participant is entitled to receive the greater of (1) the benefit produced by the cash balance formula that was transitioned in or (2) the benefit produced by the final average pay formula that was transitioned out.

For purposes of this Motion, it is undisputed that at the end of the transition period, the final average pay formula that was being transitioned out had produced a greater "accrued benefit" for the named Plaintiffs than the cash balance formula that was being transitioned in had produced. Thus, according to Plaintiffs, the value of their "accrued benefits" did not grow during the time period in which their cash balance accounts were catching up to their benefits under the final average pay formula. The time it takes a Participant's cash balance formula to catch up to his or her "accrued benefit" under the final average pay formula constitutes the so-called "wear-away" period of which Plaintiffs complain. According to Plaintiffs, El Paso's plan conversion discriminates against older workers on the basis of age because older workers tend

---

[1] It is important to distinguish between the "accrued benefit" (i.e., the benefit payable at normal retirement age) and the value of the benefit payable at any other given point in time. Although the "accrued benefit" was frozen, the benefit payable at any other point in time prior to normal retirement age was not.

have longer “wear-away” periods than younger workers.[2]

Assuming everything Plaintiffs assert is true, El Paso nevertheless is entitled to judgment on Plaintiffs’ ADEA claim for a host of reasons. First, the claim simply is not cognizable as a matter of law. Plaintiffs have pled their claim under section 4(a) of the ADEA, 29 U.S.C. § 623(a). However, several courts, led by the Ninth Circuit in *Hurlic v. Southern California Gas Co.,* 539 F.3d 1024 (9th Cir. 2008) have made clear that claims relating to a reduction in the rate of benefit accrual (such as a failure to accrue benefits during a wear-away period) can only be brought under section 4(i) of the ADEA, 29 U.S.C. § 623(i), not section 4(a). Therefore, Plaintiffs’ claim fails because it is not pled under section 4(i) of the ADEA.

Even if Plaintiffs were permitted to replead their claim under section 4(i) of the ADEA, their claim would still fail. Several courts, led by *Hurlic*, have ruled that section 4(i) of the ADEA, like its ERISA counterpart (section 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H)), concerns itself only with the rate of “inputs” to a pension plan (such as the pay credits provided under the cash balance formula) rather than a plan’s “outputs” (such as the “accrued benefit” payable at normal retirement age). Therefore, just as Plaintiffs’ third claim for relief failed under ERISA’s prohibition on age discrimination because it concerned itself with the accrued benefit, instead of the pay credit and interest credit inputs into the cash balance formula, so too must Plaintiffs’ wear-away claim fail because it also concerns itself only with changes in the value of the “accrued

[2] It is also undisputed that El Paso could have stopped the final average pay formula in its tracks and simply converted to a cash balance plan without providing a transition period. It is ironic, then, that older workers experience a longer wear-away period because they were awarded higher benefits under the old final average pay formula at the end of the transition period than younger workers.

benefit," instead of the inputs to the cash balance formula itself.

Beyond that, even if the ADEA claim was cognizable, Plaintiffs cannot prove that they individually, or the putative members of the collective action generally, actually experienced a period of time during which the value of their immediately payable retirement benefits stopped growing. Thus, while it may be true that the so-called "accrued benefit" under the final average pay formula stopped growing at the close of the transition period, there is no dispute among the experts that the immediate benefit payable to each of the Plaintiffs grew continuously from the close of the transition period until the time each of them actually retired. Indeed, as discussed below, the Minimum Benefit grew faster than the cash balance benefit.

Another wholly independent shortcoming of Plaintiffs' ADEA claim is that is undisputed that Plaintiffs cannot prove that any so-called wear-away period that they experienced occurred "because of age." Yet another incurable defect in Plaintiffs' claim is that they simply were not negatively affected by the transition period of which they complain.

Even if Plaintiffs could establish that the plan conversion was age discriminatory, which they cannot, El Paso can establish two separate affirmative defenses to the ADEA claim.[3] First, El Paso can prove that the value of older workers' benefits during the wear-away period was at least as great as the value of younger workers' benefits, which is a complete defense to Plaintiffs' claim. Second, Plaintiffs' claim is untimely.[4]

[3] El Paso can also establish the reasonable factor other than age defense. However, by agreement of the parties, no discovery has yet occurred on that issue. Therefore, El Paso does not brief that issue here.

[4] El Paso realizes that this Court has ruled that Plaintiffs' claim is timely under the Lilly Ledbetter Fair Pay Act. However, El Paso believes that there are only two operative dates under which pension claims

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Prior to January 1, 1997, El Paso maintained a defined benefit pension plan that utilized a final average pay formula to calculate retirement benefits. Benefits under the final average pay formula generally increased along with Participants' years of service and the average of their final years of pay. (January 21, 2009 Order, Docket No. 311, p. 2; Complaint, ¶¶ 15-16).

2. El Paso converted its pension plan effective January 1, 1997 to a cash balance plan ("Amended Plan"). (Exhibit A, Preamble, p. 1 & § 4.1; March 19, 2008 Order, Docket No. 213, p. 11).

3. Under the Amended Plan's cash balance formula, a retiree's monthly pension is based upon pay and interest credits accumulated over time. (January 21, 2009 Order, Docket No. 311, p. 2). Each Participant is given a hypothetical account, and each quarter the Participant earns "pay credits," based on a percentage of his or her salary, and "interest credits," based on the yield of a five-year U.S. Treasury Bond. (*Id.*).

4. Pay credits increase with age. Thus, the older an employee is, the higher the percentage of pay that is credited to his or her cash balance account each quarter. (Exhibit A, § 4.1(a)(ii)).

5. The Amended Plan provided for a five-year transition period for Participants who were active on the date of the conversion to a cash balance formula. (January 21, 2009 Order, Docket No. 311, p. 2).[5] At the start of the transition period

accrue under that ADEA: (1) the date the Plan is amended and (2) the date a particular Participant retires. Neither of these dates establish the timeliness of Plaintiffs' claim. Therefore, recognizing that the Court may disagree with El Paso, El Paso respectfully briefs this argument so that the record will be complete.

[5] Employees hired after January 1, 1997 accrued benefits only under the cash balance formula. (Exhibit A, § 4.1(b)(i)).

(January 1, 1997), these Participants were given a cash balance account with a balance equivalent to their benefit under the final average pay formula. (Exhibit A, § 4.1(a)).

6. During the transition period, eligible Participants accrued benefits under both the new cash balance formula and the old final average pay formula (January 21, 2009 Order, Doc. No. 311, p. 2; Exhibit A, § 4.1, Deposition of Robert Bardwell, Ph.D. ("Bardwell Dep."), p. 26:14-19, attached as Exhibit B).

7. Generally, the value of a Participant's pension benefits under the final average pay formula is referred to as his or her "Minimum Benefit." (Exhibit A, § 4.1(b); Exhibit B, Bardwell Dep., p. 39:3-10). Like all pension benefits, the value of a Participant's Minimum Benefit can be calculated as an "accrued benefit" (i.e., a benefit that a Participant would receive at "normal retirement age" or age 65) or as an immediately payable benefit that a Participant would receive if he or she retired at any given time prior to normal retirement age.[6]

8. At the end of the five-year transition period - December 31, 2001 - each Participant's "accrued benefit" under the final average pay formula was frozen and thus stopped increasing in value. (Exhibit A, §§ 3.1, 4.1(b)(i); Exhibit B, Bardwell Dep., p. 84:15-18; January 21, 2009 Order, Docket No. 311, p. 2; Complaint, ¶¶ 20-21; Declaration of Kevin R. Minor ("Minor Decl."), ¶ 6, attached as Exhibit C). As discussed below, however, this is not true of the benefit that a Participant actually receives under the final average pay formula if the Participant retires before reaching (1) age 65 or (2) age 60 plus 30 years of service. Moreover, after the end of the transition period, benefits under the cash balance formula continued to accumulate. (Exhibit C, Minor

[6] *See* Exhibit A, § 3.1.

Decl., ¶ 6).

9. When a Participant retires, the Participant is entitled to receive the greater of (1) the benefit calculated under the cash balance formula or (2) the Minimum Benefit. (Exhibit A, § 4.1).

10. On average, the higher a Participant's age at the end of the transition period, the higher his or her Minimum Benefit under the final average pay formula was at the end of the transition period. (Exhibit B, Bardwell Dep., pp. 63:3-5, 91:17-20, 97:6-17).[7] During the five-year transition period, older employees' Minimum Benefits under the final average pay formula grew much faster than their cash balance benefits did. (Exhibit B, Bardwell Dep., pp. 118:23-25, 119:1-3). Thus, for many older Participants, their Minimum Benefits payable at age 65 (i.e., their "accrued benefits") exceeded their cash balance benefits at the end of the five-year transition period. (Exhibit B, Bardwell Dep., p. 118:7-12; Exhibit C, Minor Decl., ¶ 8).

11. According to Plaintiffs, certain Participants, including themselves, experienced a wear-away period because their Minimum Benefits, payable at age 65, were greater than the value of the cash balance accounts at the end of the transition period. (Complaint, ¶¶ 32-35; Exhibit B, Bardwell Dep., pp. 49: 8-20, 73:14-18, 75:2-5, 14-17).[8] Plaintiffs allege that during this so-called wear-away period, the value of their

[7] Robert Bardwell, Ph.D., Plaintiffs' statistical expert, testified that he could not opine that any Participant's pension benefits decreased after the plan conversion. (Exhibit B, Bardwell Dep., p. 46:7-12). Moreover, Dr. Bardwell testified that if El Paso had terminated the plan rather than converting it to a cash balance formula, older workers would have lost more benefits than younger workers. (Exhibit B, Bardwell Dep., p. 70:12-22).

[8] Dr. Bardwell testified that various factors impact the length of the wear-away period, including a Participant's salary, a Participant's years of service, and interest rates. (Exhibit B, Bardwell Dep., pp. 49:23-25, 50:1-3, 51:8-12, 52:12-15, 87:5-12). Indeed, Dr. Bardwell testified that he had no basis to disagree with the proposition that there exists an interest rate that is high enough to negate the wear-

pension benefits did not increase even though their cash balance accounts did increase. (Complaint, ¶¶ 32-35).

12. Importantly, Plaintiffs' own expert concedes that Plaintiffs' wear-away theory relies only on the value of the Minimum Benefit payable at normal retirement age (i.e., age 65), or the so-called "accrued benefit." (Exhibit B, Bardwell Dep., 49:13-20 (conceding that wear-away as defined by Plaintiffs pertains only to the benefit payable at age 65), 84:15-22 (conceding that he does not know whether the benefit payable at any point in time other than at age 65 continues to grow or not), 118:1-6 (conceding that his calculations pertained only to the benefit payable at age 65)).

13. However, under the terms of the Amended Plan, the actual value of the Minimum Benefit to which a Participant is entitled at any given point in time grows, even during a so-called "wear-away" period, as the individual ages towards (1) "normal retirement age" (age 65) or (2) age 60 plus 30 years of service. (Exhibit A, §§ 4.1(b)(i) (defining the Minimum Benefit by applying the Plan's final average pay provisions through December 31, 2001); 4.3(b); 4.5(b)).

14. Specifically, in sections 4.3(b) and 4.5(b), the Plan sets forth reduction factors that are applied to the retirement benefits of employees who retire before age 65 or before age 60 plus 30 years of service. (Exhibit A, §§ 4.3(b) & 4.5(b)).[9]

15. Section 4.3(b) states that a Participant's Minimum Benefit will be reduced in the following situations:

---

away effect entirely. (Exhibit B, Bardwell Dep. 51:13-25, 52:1-4).

[9] Early Retirement occurs when a participant retires after reaching age 55 with 10 years of service but before reaching "normal retirement age" or age 65. (*Compare* Exhibit A, § 3.1 *with* Exhibit A, § 3.2(a)).

> (i) if upon termination of employment, the Participant has completed at least 30 years of Credited Service, his or her Minimum Benefit shall be reduced by 2% for each year by which the benefit commencement date precedes his or her 60th birthday, with pro rata reductions for fractional years; or
>
> (ii) if upon termination of employment the Participant has completed less than 30 years of Credited Service, his or her Minimum Benefit shall be reduced by 2% per year for the lesser of (A) each year by which the benefits commencement date precedes his or her 65th birthday, or (B) the excess of 30 over the number of years of Credited Service, with pro rata reductions for fractional years; provided, however, that if the Participant's age at benefit commencement is less than 60, the reduction shall not be less than 2% for each year by which the benefit commencement date precedes his or her 60th birthday, with pro rata reductions for fractional years.

(Exhibit A, § 4.3(b)).

16. Section 4.5(b) states that a Participant's Minimum Benefit will also be reduced if the Participant retires before the "Normal Retirement Date" or age 65 in the following ways:

> In the event the Participant will receive the Vested Termination Benefit described in Section 4.5(b), such Minimum Benefit shall be reduced by one one-hundred-eightieth (1/180) for each of the first sixty (60) months by which the Vested Termination Date precedes the Normal Retirement Date, and reduced by one three-hundred-sixtieth (1/360) for each of the next sixty (60) months by which the Vested Termination Date precedes the Normal Retirement Date, and reduced Actuarially thereafter.

(Exhibit A, § 4.5(b)).[10]

17. Thus, reduction factors decrease each year that a Participant gets closer

---

[10] A Vested Termination Benefit applies to individuals who retire before reaching age 65 and who do not qualify for an Early Retirement Benefit, either because they have not reached age 55 or because they do not have 10 years of service. (Exhibit A, § 3.4).

to either (1) age 65 or (2) age 60 plus 30 years of service. (Declaration of Michael Ward ("Ward Decl."), ¶ 13, attached as Exhibit D). Therefore, the reduction factors that applied on December 31, 2001 (the end of the transition period) are larger than the reduction factors that apply after the close of the transition period as the employee ages toward (1) age 65 or (2) age 60 plus 30 years of service. (*Id.*). As the reduction factors decrease over time, the actual value of the benefit payable on any given day increases. (*Id.*).

18. A Participant who is entitled to a Minimum Benefit and who elects Early Retirement is also eligible for a Supplemental Early Retirement Benefit. (Exhibit A, § 4.3(a) ("In addition, if the Participant's Early Retirement Benefit is based on his or her Minimum Benefit..., the Participant shall also receive the supplemental benefit described in section 4.3(c).")). Therefore, Participants whose Minimum Benefits exceed their cash balance benefits (including all three Plaintiffs) receive an additional benefit that other employees do not. Therefore, under the terms of the Plan, the value of the Minimum Benefit grows every year as a Participant ages up to age 65 or age 60 plus 30 years of service.[11]

19. Moreover, the Amended Plan itself recognizes that the value of the Minimum Benefit that is actually payable to a Participant changes over time, even after the end of the transition period. Specifically, the Amended Plan guarantees that a Participant's actual pension benefit will be the greater of their cash balance benefit "or the Minimum Benefit ***payable as of such date***." (Exhibit A, § 4.1 (emphasis added); *see*

[11] The reduction for Early Retirement Benefits also ceases as a participant attains 30 years of service. (*See* Exhibit A, § 4.3(b)(ii)).

also Complaint, ¶ 21).[12]

20. El Paso retained Michael Ward, Ph.D., to test statistically whether Participants' benefits actually do grow as the Amended Plan dictates they should. Dr. Ward's expert qualifications are contained in his contemporaneously filed Declaration. (Exhibit D, Ward Decl., Ex. 1).

21. Dr. Ward's calculations prove several unassailable facts, all of which are consistent with the terms of the plan document itself as described above.

a. First, for employees who are under 65 years old, the actual value of the Minimum Benefit that is payable at any given point in time grows as the employees age toward 65 years of age or 60 years of age plus 30 years of service.[13] (Exhibit D, Ward Decl., ¶ 10).

b. Second, over 99% of El Paso's employees retire before reaching age 65. (Exhibit D, Ward Decl., ¶ 16).

c. Third, older workers' (i.e., over 40) Minimum Benefits grew more than twice as much as younger workers' (i.e., under 40) benefits under the cash balance formula, even after the close of the transition period. (Exhibit D, Ward Decl., ¶ 20). Specifically, Dr. Ward calculated that the actual, immediately payable value of older workers' Minimum Benefits grew by $16,081, on average, per year of service following the end of the transition

[12] *See* also Exhibit A, §§ 4.3(a) and 4.5(a) (pertaining to retirement before reaching age 65 or "normal retirement date.")

[13] Whereas Dr. Ward based his analysis on the change in the actual value of pension benefits payable at any point in time, Dr. Bardwell based his analysis on the lack of change of the "accrued benefit," meaning the value of the hypothetical benefit that is payable only upon reaching "normal retirement age" or age 65. (Exhibit D, Ward Decl., ¶ 22; Deposition of Michael Ward ("Ward Dep."), p. 65:4-10, attached as Exhibit E). Dr. Ward performed the same calculations for both younger and older Participants. (Exhibit E, Ward Dep., p. 43:1-5).

period. By contrast, younger workers' benefits under the cash balance formula grew by only $6,681, on average, per year of service following the end of the transition period. (Exhibit D, Ward Decl., ¶¶ 18, 19).

22. Dr. Bardwell testified that he does not dispute the accuracy of Dr. Ward's calculations. (Exhibit B, Bardwell Dep., p. 85:4-12, 120:6-22, 128:11-23, 129:2-21).

23. All three named Plaintiffs retired before reaching age 65. (Exhibit C, Minor Decl., Ex. 3, 4, & 5).

24. Looking at the benefits actually received by all three named Plaintiffs (as opposed to their hypothetical "accrued benefits" payable at age 65), the actual, payable value of <u>both</u> their cash balance benefit and their Minimum Benefits continued to grow after the close of the transition period. (Exhibit C, Minor Decl., ¶ 9). In fact, for all three Plaintiffs, the immediate value of each Plaintiff's Minimum Benefit grew faster than the immediate value of his or her cash balance benefit from the time the transition period closed until the time he or she actually started to receive retirement benefits. (Exhibit C, Minor Decl., ¶ 9).[14]

[14] The date on which Plaintiffs started receiving their retirement benefits is referred to as the "pension starting date." (Exhibit C, Minor Decl., ¶ 11).

	Alice Ballesteros[15]	**Gary Muckelroy**[16]	**Wayne Tomlinson**[17]
Growth of Immediate Lump Sum Benefit Under Final Average Pay Formula From End of Transition Period to Pension Starting Date	$191,199.39	$295,792.31	$212,916.19
Growth of Cash Balance Account From End of Transition Period to Pension Starting Date	$52,225.19	$99,826.11	$78,952.80
Growth of Immediate Annuity Under Final Average Pay Formula From End of Transition Period to Pension Starting Date	$1,190.66	$1,823.56	$1,270.43
Growth of Cash Balance Annuity From End of Transition Period To Pension Starting Date	$390.28	$739.95	$551.82

(Exhibit C, Minor Decl., ¶¶ 14-22).

25. Plaintiff Tomlinson retired on April 30, 2007 and started receiving pension benefits on May 1, 2007. Plaintiff Ballesteros retired on August 17, 2008 and started receiving pension benefits on October 1, 2008. Plaintiff Muckelroy retired on July 31, 2008 and started receiving pension benefits on August 1, 2008. (Exhibit C, Minor Decl., Ex. 3, 4, & 5).

---

15 Ms. Ballesteros began receiving her retirement benefits when she was approximately 57 years old. (Exhibit C, Minor Decl., Ex 3).

16 Mr. Muckelroy began receiving his retirement benefits when he was approximately 57 years old. (Exhibit C, Minor Decl., Ex. 4).

17 Mr. Tomlinson began receiving his retirement benefits when he was approximately 55 years old. (Exhibit C, Minor Decl., Ex. 5).

26. Plaintiff Tomlinson is the only Plaintiff to have filed a charge of discrimination. (January 21, 2009 Order, Docket No. 311, p. 9). He filed his charge of discrimination on July 16, 2004, and he filed his intake questionnaire with the EEOC on June 16, 2004. (*Id.*).

III. STANDARD OF REVIEW

Fed. R. Civ. P. 56(c) provides that summary judgment shall be granted if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Halprin v. Equitable Life Assur. Soc. of U.S.*, 267 F. Supp. 2d 1030, 134 (D. Colo. 2003).

IV. ARGUMENT

A. Plaintiffs Cannot Sustain An ADEA Claim Under Section 4(a) Of The ADEA

Plaintiffs assert their ADEA claim under section 4(a) of the ADEA, 29 U.S.C. § 623(a), as well as 29 U.S.C. § 626(b).[18] *See* Complaint, ¶ 38. However, pursuant to section 4(i)(4) of the ADEA, 29 U.S.C. § 623(i)(4), age discrimination claims related to the cessation of benefit accruals, or related to a reduction in the rate of benefit accruals, can only be brought pursuant to section 4(i)(1)(A) of the ADEA, 29 U.S.C. § 623(i)(1)(A).[19]

Section 4(i)(4) of the ADEA provides that "[c]ompliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such

[18] 29 U.S.C. § 626(b) does not contain any independent prohibitions on age discrimination. Instead, it is merely the enforcement mechanism through which ADEA claims are brought.

[19] Section 4(i)(1)(A) of the ADEA prohibits "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age...." 29 U.S.C. § 623(i)(1)(A).

plan." 29 U.S.C. § 623(i)(4). The legislative history of section 4(i)(4) confirms that a benefit plan that satisfies section 4(i)(4) satisfies the ADEA's accrual requirements as a whole. *See* H.R. Rep. No. 99-1012, at 382 (1986), reprinted in 1986 U.S.C.C.A.N. 3868, 4027:

> It is the intention of the conferees, in adopting the amendments to the ADEA (new sec. 4(i)), that the requirements contained in section 4(i) related to an employee's right to benefit accruals with respect to an employee benefit plan ... shall constitute the entire extent to which ADEA affects such benefit accrual and contribution matters with respect to such plans . . . .

The Ninth Circuit was called upon to construe this provision in *Hurlic v. Southern California Gas Co.*, 539 F.3d 1024 (9th Cir. 2008). There, the plaintiffs alleged a wear-away claim identical to the claim asserted by Plaintiffs here. As the Ninth Circuit characterized the claim:

> Plaintiffs' wear-away claim protests the fact that under the "greater of" provision, actual benefits payable (as compared to the hypothetical account balance) do not increase until the amount payable under the cash balance formula exceeds that payable under the pre-conversion formula. This claim thus relates to benefit accrual because it challenges the fact that benefits do not increase for some period of time.

Id. at 1037.

Relying on the legislative history discussed above, the Ninth Circuit concluded that section 4(i) is the only section of the ADEA upon which a claim based on benefit accrual may be brought: "As such, it must be brought under ADEA § 4(i), not the generic anti-discrimination provision of ADEA § 4(a)." *Id.* at 1037.

Other courts to consider the issue have followed *Hurlic. See Northwest Airlines, Inc. v. Phillips*, 594 F. Supp. 2d 1075, 1088 (D. Minn. 2009) ("ADEA section 4(i)(4) dictates that .... compliance with ADEA § 4(i)(1)(B) constitutes compliance with ADEA § 4(a), (c).")[20]; *Jensen v. Solvay Chemicals, Inc.*, No. 2:06-cv-00273-ABJ, slip op. at 20 (D. Wyo. Aug. 3, 2009) ("[P]laintiffs' claim for wear away cannot be brought under ADEA § 4(a) because it relates to benefit accrual and is therefore precluded by ADEA § 4(i)(4)."), attached as Exhibit F. Thus, Plaintiffs may not bring their ADEA claim under section 4(a). Accordingly, El Paso is entitled to judgment on Plaintiffs' ADEA claim.

B. Plaintiffs Cannot Sustain An ADEA Claim Under Section 4(i) Of The ADEA

Even if Plaintiffs were to replead their claim under section 4(i) of the ADEA, it would still fail for the same reason that Plaintiffs' third claim for relief failed. *See* March 22, 2007 Order, Docket No. 108, pp. 5-7. Like section 204(b)(1)(H) of ERISA, 29 U.S.C. § 1054(b)(1)(H), section (4)(i)(1)(A) of the ADEA regulates the rate of benefit accrual (i.e., "inputs") but not the "accrued benefit" (i.e. the "outputs"). Because it is undisputed that the "inputs" into the cash balance formula do not discriminate on the basis of age, El Paso is entitled to judgment on the ADEA claim as a matter of law.

As a starting point, Plaintiffs have repeatedly conceded, through pleadings and through their experts, that the wear-away they complain of is the failure of the "accrued benefit" (i.e. the benefit payable at age 65) to increase, even though the cash balance account (i.e., the inputs) is increasing. *See* Statement of Facts, ¶ 11-12; Docket No. 330, p. 12 ("the 'wear-away' claim relates to the receipt of benefit accruals ... rather than the benefit accrual formula"). *See also* section 3(23)(A) of ERISA, 29 U.S.C. § 1002(23)(A) (defining "accrued benefit" as the benefit payable at normal retirement age);

[20] *Northwest Airlines* reached a parallel result to *Hurlic* in addressing section 4(i)(1)(B) of the ADEA, which applies to defined contribution plans (like 401(k) plans). Section 4(i)(1)(A) applies to defined benefit plans like final average pay plans or cash balance plans.

Cooper v. IBM Personal Pension Plan, 457 F.3d 636, 638 (7th Cir. 2006) (same); *Hirt v. Equitable Retirement Plan,* 533 F.3d 102, 107-108 (2d Cir. 2008) (noting that ERISA defines "accrued benefit" with reference to the "ultimate retirement age annuity."); *Hurlic,* 539 F.3d at 1030 (same). As discussed below, as long as the inputs, or the rates of benefit accrual, are not age discriminatory, the ADEA is satisfied.

Section 4(i)(1)(A) of the ADEA and section 204(b)(1)(H) of ERISA were both enacted as part of the 1986 Consolidated Omnibus Budget Reconciliation Act. The accompanying legislative history states that:

> The conferees intend that the provisions of the ADEA, ERISA, and the Code that are amended to prevent the reduction or cessation of benefit accruals on account of the attainment of age are to be interpreted in a consistent manner and do not intend any differences in language in the provisions to create an inference that a difference exists among such provisions.

H.R. Rep. No. 99-1012, at 378-79 (1986), reprinted in 1986 U.S.C.A.A.N. 3868, 4023-24.

Based on the similarity in the language of the two sections, as well as the legislative history quoted above, the two provisions are to be given the same meaning. *Hurlic*, 539 F.3d at 1036 ("Congress has made clear that the provisions should be interpreted to have an identical meaning"); *Rosenblatt v. United Way of Greater Houston*, 590 F. Supp. 2d 863, 872 (S.D. Tex. 2008);[21] *Jensen,* slip. op. at 24 (section

[21] After the *Rosenblatt* court found that the cash balance conversion case before it could not proceed under section 4(i)(1)(A) of the ADEA, it analyzed the viability of the claim under other sections of the ADEA, including section 4(a) of the ADEA. The Court found that the claim could not proceed under section 4(a) of the ADEA because there was nothing in the complaint before it "to suggest that United Way was actually motivated by discrimination in its decision to endorse the conversion." *Rosenblatt*, 590 F. Supp. 2d at 873. As discussed above, *Hurlic* and its progeny make clear that the claim is not cognizable under section 4(a) of the ADEA because section 4(i) of the ADEA is the only provision of the

204(b)(1)(H)(i) of ERISA and section 4(i) of the ADEA, are to "be interpreted in a consistent manner to have an identical meaning") (quoting *Rosenblatt* , 590 F. Supp. 2d at 872).

This Court has already ruled that section 204(b)(1)(H) of ERISA applies only to "inputs" and not the "accrued benefit." *See* March 22, 2007 Order, Docket No. 108, pp. 6-7. Under *Hurlic* and its progeny, the same must be true of section 4(i)(1)(A) of the ADEA. And it is undisputed that the inputs into the pension plan (i.e., the pay credits and interest credits in the cash balance formula) do not discriminate on the basis of age. In fact, this Court has already correctly found that the cash balance formula provides for continuous inputs that are favorable to older workers. *See* January 21, 2009 Order, Docket No. 311, p. 11.

The correctness of this Court's ruling that it is only the "inputs" and not the "outputs" or "accrued benefit" that are regulated by section 204(b)(1)(H) of ERISA (and therefore its counterpart ADEA section 4(i)(1)(A)) has been confirmed over time. Thus, the holdings of the Third Circuit and the Seventh Circuit that this Court relied on in its March 22, 2007 Order have now been confirmed by the Second, Sixth and Ninth Circuits. *See Hirt*, 533 F.3d at 107-110; *Drutis v. Rand McNally & Co.*, 499 F.3d 608 (6th Cir. 2007); *Hurlic*, 539 F.3d at 1029-1032. No federal Courts of Appeal have reached a different result.

Those courts that have analyzed the wear-away claim itself have ruled that it is deficient under the ADEA because the claim seeks to regulate the "accrued benefit,"

ADEA that a plan must satisfy with respect to the cessation or reduction of benefit accruals.

whereas the statute at issue regulates only the rate of benefit accrual. *Hurlic,* 539 F.3d at 1036-1037 ("...the wear-away claim is not cognizable under ADEA § 4(i)...."), *Rosenblatt*, 590 F. Supp. 2d at 872; *Jensen,* slip. op. at 24. Notably, Plaintiffs' lead counsel in this case also represents the Plaintiffs in *Jensen.* In response to the *Jensen* court's order dismissing the plaintiffs' wear-away claim*,* Plaintiffs' lead counsel attempted to distinguish *Hurlic* by arguing that the wear-away in *Hurlic* was unlike the wear-away in *Jensen.* Interestingly though, in making that argument, Plaintiffs' counsel conceded that the wear-away in *Hurlic* is identical to the wear-away here in the case before this Court. *See* Docket No. 357, Ex. 1, p. 13 (quoting *Hurlic*, 539 F.3d at 1027).

It is undisputed that Plaintiffs' wear-away claim is based on the theory that the Plaintiffs' "accrued benefit" does not increase, even though the cash balance formula itself increases. However, section 4(i)(1)(A) of the ADEA does not regulate the "accrued benefit," but instead regulates the rate of benefit accrual. Because it is undisputed that the rate of benefit accrual is not discriminatory on the basis of age, El Paso is entitled to judgment on Plaintiffs' ADEA claim.

C. Plaintiffs Have Not Presented Any Evidence That They Or The Putative Collective Action Suffered A Decrease In Immediately Payable Benefits

Plaintiffs' complaint about the so-called wear-away period is that while both older and younger employees worked side by side, younger employees saw increases to their "accrued benefit" while their cash balance accounts increased, but older employees did not see similar increases in their accrued benefits while their cash balance accounts similarly increased. According to Plaintiffs, older employees do not see increases in their "accrued benefits" because increases in their cash balance accounts do not add anything to the accrued benefit while the cash balance account catches up to their Minimum Benefits.

The problem with Plaintiffs' argument is that it ignores the undisputed fact that while they worked side by side with younger employees, the Minimum Benefits actually payable to them did increase. Not only did their Minimum Benefits increase, but they increased faster than their cash balance accounts increased. Thus, the Minimum Benefit that each Plaintiff was actually paid upon retiring was much higher than their respective Minimum Benefits payable on December 31, 2001, the close of the transition period. Not only that, the Minimum Benefits for each Plaintiff grew faster than his or her respective cash balance account. Therefore, while younger employees saw increases in their cash balance accounts, Plaintiffs saw even larger increases to their Minimum Benefits.

1. The Immediately Payable Value Of Plaintiffs' Minimum Benefits Increased More Than Their Cash Balance Accounts After The End Of The Transition Period.

It is undisputed that each Plaintiff's pension grew larger after the end of transition period. In fact, each Plaintiff's Minimum Benefit grew faster than the actual value of his or her cash balance benefit from the time the transition period closed until the time he or she actually started receiving retirement benefits, regardless of whether the pension benefits are expressed as lump sums or as annuities. *See* Statement of Facts, ¶ 24.

Mr. Tomlinson's lump sum Minimum Benefit grew by $212,916.19 from the end of the transition period until his pension starting date, whereas his cash balance account only grew by $78,952.80. *See* Statement of Facts, ¶ 24. Mr. Tomlinson's actual annuity under the Minimum Benefit formula grew by $1,270.43 per month from the end of the transition period until his pension starting date, whereas his cash balance annuity only grew by $551.82 per month. *Id.*

Ms. Ballesteros' lump sum Minimum Benefit grew by $191,199.39 from the end of the transition period until her pension starting date, whereas her cash balance account only grew by $52,225.19. *See* Statement of Facts, ¶ 24. Ms. Ballesteros' actual annuity under the Minimum Benefit formula grew by $1,190.66 per month from the end of the transition period until her pension starting date, whereas her cash balance annuity only grew by $390.28 per month. *Id.*

Mr. Muckelroy's lump sum Minimum Benefit grew by $295,792.31 from the end of the transition period until his pension starting date, whereas his cash balance account only grew by $99,826.11. *See* Statement of Facts, ¶ 24. Mr. Muckelroy's actual annuity under the Minimum Benefit formula grew by $1,823.56 per month from the end of the transition period until his pension starting date, whereas his cash balance annuity only grew by $739.95 per month. *Id.*

Because each Plaintiff's actual pension benefit rose after the transition period (and even rose faster than their respective cash balance accounts), no Plaintiff suffered any harm. Therefore, El Paso is entitled to judgment on Plaintiffs' ADEA claim.

2. The Undisputed Mathematical Evidence Is Supported By The Plain Terms Of The Plan.

As explained in section IV.C.1 above, it is simply a mathematical fact that Plaintiffs' retirement benefits did grow after the close of the transition period, all the way up to the date that each actually retired. It is also a mathematical fact that each named Plaintiff's immediately payable retirement benefits grew more than their cash balance accounts grew during the same period of time. *See* Statement of Facts, ¶ 24.

These simple mathematical truths flow directly from the design of the pension plan itself. Under the plain terms of the Amended Plan, the Minimum Benefit is larger the closer an employee is to either (1) age 65 or (2) age 60 plus 30 years of service. *See* Statement of Facts, ¶¶ 13-19. Specifically, the Amended Plan sets forth reduction factors that are applied to the retirement benefits of employees who retire before age 65 and/or before age 60 plus 30 years of service. *See id.*, ¶¶ 13-18. Thus, reduction factors decrease each year that an employee gets closer to either (1) age 65 or (2) age 60 plus 30 years of service. *See id.*, ¶ 17. As the reduction factors decrease over time, the benefit payable by El Paso increases over time.[22]

3. Plaintiffs' Experts Erroneously Rely On The Accrued Benefit In An Effort To Show A Wear-Away Period.

In responding to El Paso's argument in sections IV.C.1 and IV.C.2 above that the members of the putative collection action in general, and the named Plaintiffs in particular, did not experience a wear-away, Plaintiffs are expected to ask the Court to close its eyes to what actually happened and focus instead on the lack of change in the value of the hypothetical benefit that Plaintiffs would have received had they not retired when they did. However, the Court should be moved by what *actually* happened, not what might have happened. Plaintiffs did, in fact, retire before age 65, and they did, in fact, receive larger retirement benefits than they would have had they retired at the close of the transition period.

[22] Similarly, only those employees who are eligible for a Minimum Benefit are also eligible to receive a Supplemental Early Retirement Benefit. *See* Statement Of Facts, ¶ 18. The Supplemental Early Retirement Benefit provided an enhanced benefit upon reaching age 55. *Id.* Therefore, employees who turned 55 after the close of the transition period earned that benefit as well.

Dr. Robert Bardwell, Plaintiffs' statistical expert, has admitted that he did not even attempt to compute the rate of change of the Plaintiffs' retirement benefits at any point in time other than normal retirement age. *See* Statement of Facts, ¶ 12. Therefore, Plaintiffs cannot produce any evidence that they suffered an impermissible decrease in the rate of benefit accrual. Instead, they can only show a lack of increase in the meaningless "accrued benefit." Accordingly, El Paso is entitled to judgment on Plaintiffs' ADEA claim.

D. Plaintiffs' ADEA Claim Fails Because The Wear-Away Period Does Not Occur "Because Of" Age.

Even if this Court were to analyze Plaintiffs' claims under section 4(a) of the ADEA, and even if this Court were to agree with Plaintiffs' experts' analysis, Plaintiffs' ADEA claim would still fail. Thus, independent of any of the arguments set forth above, the wear-away discussed by Plaintiffs' experts, by their own admission, does not occur "because of . . . age" within the meaning of section 4(a) of the ADEA. Rather, the wear-away discussed by Plaintiffs' experts is a function of a Participant's substantial accrued benefits under the old final average pay formula, which is based on years of service and salary, not age. *See Northwest Airlines*, 594 F. Supp. 2d at 1085-87; *Vaughn v. Air Line Pilots Ass'n, Int'l*, No. 03-CV-4822, 2008 U.S. Dist. LEXIS 56741, at *44 n.14 (E.D.N.Y. July 24, 2008), attached as Exhibit G; *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 823 (S.D. Ind. 2000).

This Court has already found that "the wear away effect correlates not to age but to the size of the accrued benefits under the old plan, which is affected by both salary and years of service." January 21, 1009 Order, Doc. No. 311, p. 12 (citing *Custer v.*

Southern New England Tel. Co., No. 3:05cv1444, 2008 WL 222558, at *10 (D. Conn. Jan. 24, 2008) ("The 'wear-away' period is not necessarily longer for older workers; it is longer for workers that have greater frozen benefits. Under the old plan, the size of a worker's frozen benefits is a function of a worker's salary and years of service, not his age."), attached as Exhibit H.

Presumably, Plaintiffs will argue that the wear-away is "caused by age" because there is a positive correlation between age and salary as well as between age and years of service.[23] However, age discrimination does not occur where the wear-away is caused by factors that are "analytically distinct from, yet correlated with, age." *Northwest Airlines*, 594 F. Supp. 2d at 1086; *Walker v. Monsanto Co. Pension Plan,* 2009 U.S. Dist. LEXIS 48961, *26-*28 (S.D. Ill. June 11, 2009) (finding that pension status is correlated with, but analytically distinct from age, and therefore does not violate ERISA's counterpart age discrimination provision), attached as Exhibit I. Therefore, in this case, any correlations between years of service and age or between salary and age are not enough to establish a claim that the plan violates the ADEA. Simply put, factors like "years of service" and "salary" are "analytically distinct" from age.

"A variable may be analytically distinct from age even though it depends in part on age." *Northwest Airlines*, 594 F. Supp. 2d at 1086. For example, in *Kentucky Retirement Sys. v. EEOC*, 128 S. Ct. 2361, 2367 (2008), the Supreme Court recently stated that "age and pension status remain 'analytically distinct concepts.'" The Court

[23] Plaintiffs may also argue that their statistical expert, Dr. Bardwell, testified that age directly impacts the length of the wear-away period. However, Dr. Bardwell ultimately admitted that age is not a direct cause of the wear-away period, but rather impacts the length of the wear-away through its effects on other variables. (Exhibit B, Bardwell Dep., p. 65:8-14).

explained:

> [O]ne can easily conceive of decisions that are actually made "because of" pension status and not age, even where pension status is itself based on age. Suppose, for example, that an employer pays all retired workers a pension, retirement eligibility turns on age, say 65, and a 70-year-old worker retires. Nothing in language or in logic prevents one from concluding that the employer has begun to pay the worker a pension, not because the worker is over 65, but simply because the worker has retired.

Id. *See also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) (finding that the factor "years of service" is analytically distinct from age); *Bernhard v. Nexstar Broad. Group*, 146 Fed. Appx. 582, 585 (3d Cir. 2005) ("salary is analytically distinct from . . . age"); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 952 (8th Cir. 1999) ("employment decisions motivated by factors other than age (such as retirement eligibility, salary, or seniority), even when such factors correlate with age, do not constitute age discrimination").

Here, the wear-away discussed by Plaintiffs' experts does not occur because of age, it occurs because of the difference between a Participant's Minimum Benefit and the Participant's cash balance benefit. The size of the Minimum Benefit is not dependent upon age, but is instead dependent upon years of service, which is positively correlated with age.[24] Indeed, this Court found that "[a] younger employee with more years of service, and/or a higher salary, could be subject to a longer wear away period than an older employee with fewer years of service and/or a lower salary." January 21, 2009 Order, Docket No. 311, p. 12. Further, "[p]laintiffs offer no evidence to show that

[24] As this Court has already found, the size of a person's cash balance account is positively correlated with age, because the higher their age, the higher their pay credit. *See* January 21, 2009 Order, Docket No. 311, p. 11.

two employees, one younger and one older, with the same accrued frozen benefit under the old plan and the same salary, would suffer different wear away periods." *Id.* Plaintiffs' own expert, Dr. Bardwell, testified that there is no way to tell whether age would otherwise impact the wear-away period if it were not correlated with salary and years of service. (Exhibit B, Bardwell Dep., p. 53:7-16 ("The wear-away we are examining intrinsically involves these correlations. There is no way to imagine that it would not.")).

Because the wear-away period occurs due to factors that are analytically distinct from, although correlated with, age, it is undisputed that Plaintiffs cannot prove that the wear-away period occurs "because of age" and, therefore, they cannot establish a claim under the ADEA. *See Northwest Airlines*, 594 F. Supp. 2d at 1086-87 (holding that because projected final average earnings and age are analytically distinct, plan did not violate the ADEA).[25]

E. Plaintiffs Cannot Prove Disparate Impact As A Result Of The Alleged Wear-away Period.

Section 4(a)(2) of the ADEA makes it unlawful for an employer to "limit,

[25] This conclusion comports with the United States Supreme Court's recent instructive holding in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). In *Gross*, the plaintiff alleged that his employer violated the ADEA because age "played a part" in the decision to demote the plaintiff. The defendant countered that its decision was part of a corporate restructuring. The question presented to the Court was whether a "plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." *Id.* at 2348. As a threshold matter, the Court rejected the notion that Title VII burden-shifting even applied to the ADEA. Further, and more importantly, the Court held that a plaintiff pursuing an ADEA disparate treatment claim must prove by a preponderance of the evidence that his or her age was the "but-for" cause of the adverse employment action. By its express language, the ADEA does not authorize "mixed-motive" age discrimination claims; age must be "the reason" for the employment decision. *Id.* at 2350-51. Where a plaintiff cannot establish that the purported discriminatory act occurred "because of age," an ADEA claim must fail. While the case before this Court involves a disparate impact claim governed by *Smith v. City of Jackson*, 544 U.S. 228 (2004), not a mixed motive disparate treatment claim like *Gross*, it is instructive that the *Gross* court required "but-for" causation in ADEA cases. *Gross* establishes that the standard for proving age discrimination is high.

segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . ." 29 U.S.C. § 623(a)(2). In *Smith v. City of Jackson*, 544 U.S. 228, 243 (2004), the Supreme Court held that certain types of disparate impact claims are cognizable under the ADEA.[26] *See also Pippin v. Burlington Resources Oil and Gas Co.*, 440 F.3d 1186, 1198 (10th Cir. 2006). Of course, as El Paso has explained elsewhere, claims related to the cessation or reduction in the rate of benefit accruals cannot be brought under section 4(a) of the ADEA; they may only be brought pursuant to section 4(i)(1)(A) of the ADEA. However, even if Plaintiffs could proceed under section 4(a), their claim still fails because they were benefited, not hurt, by the establishment of the transition period and the Minimum Benefit. If it were not for the generosity of the transition period and its associated Minimum Benefit, the actual pension benefits paid to Plaintiffs would have been lower. This is true of anyone who experiences the so-called wear-away discussed by Plaintiffs' experts.

To establish a *prima facie* disparate impact claim under the ADEA, Plaintiffs must show that a specific identifiable employment practice or policy caused a significant disparate impact on a protected group. *Pippin*, 440 F.3d at 1200 ("Thus, an employee must point to both a significant disparate impact and to a *particular* policy or practice that caused the disparity.") (emphasis in original). Moreover, "it is not enough to simply

[26] Disparate impact claims are available under section 4(a)(2) of the ADEA, but not under section 4(a)(1). *Smith*, 544 U.S. at 236 n.6. Of course, El Paso continues to maintain that age claims related to the cessation or reduction in the rate of accrual can only be brought under section 4(i)(1)(A) of the ADEA.

allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities." *Smith*, 544 U.S. at 241 (emphasis in original; internal quotations omitted).

Here, Plaintiffs' disparate impact claim must fail because they cannot establish that they suffered any adverse impact as a result of the alleged wear-away. As Plaintiffs concede, a Participant experienced a wear-away period only if his or her Minimum Benefit was greater than the cash balance account at the end of the transition period. *See* Statement of Facts, ¶ 11. Moreover, Plaintiffs' own expert witness, Dr. Bardwell, acknowledged that if El Paso had immediately converted to a cash balance benefit only, rather than providing the transition period as it did, Plaintiffs' pension benefits would be lower than they are under the "greater of" formula that causes the so-called wear-away. *See id.*, ¶ 10 n. 7.

Consistent with Plaintiffs' admissions, this Court has also concluded that: "[i]ncluding a five year grandfathering period and permitting employees to keep the greater of the benefits accrued under either plan also provides a greater advantage to workers with larger accrued benefits under the old plan than does simply freezing benefits at the previous level." January 21, 2009 Order, Doc. No. 311, p. 11. Therefore, Participants who experienced a wear-away period are in a better position than they otherwise would have been had El Paso simply converted directly to a cash balance plan and not provided a transition period and a Minimum Benefit. Plaintiffs cannot establish that they were disparately impacted by virtue of having received a higher pension benefit than they would have if El Paso had not had a transition period and an associated Minimum Benefit.

Plaintiffs may rely on *George v. Duke Energy Retirement Cash Balance Plan*, 560 F. Supp. 2d 444, 464 (D.S.C. 2008) for the proposition that they can sustain an ADEA disparate impact claim based on the wear-away effect. However, the *George* court did not consider the fact that if Participants experience a wear-away period, that necessarily means that their Minimum Benefit is greater than their cash balance benefit and, therefore, they are receiving larger benefits than they otherwise would if the Company did not provide a transition period.[27] Moreover, the *George* court did not analyze the growth in actually payable pension benefits that older workers experienced relative to younger workers.

F. Even If Plaintiffs Could Establish A Violation Of The ADEA, El Paso Is Entitled To An Affirmative Defense Under Section 4(f)(2)(B)(i) of the ADEA.

Even if the Court determines that Plaintiffs' wear-away claim under the ADEA is cognizable under 4(i)(1)(A) and/or 4(a) of the ADEA, El Paso is entitled to an affirmative defense under the ADEA. Specifically, section 4(f)(2)(B)(i) of the ADEA provides an affirmative defense for otherwise discriminatory actions that ultimately provide at least as great a benefit to older workers as they do for younger workers, which is referred to

[27] Plaintiffs may also argue that *George* stands for the proposition that ADEA section 4(i) is not the sole ground for challenging allegedly discriminatory benefit accruals under the ADEA because the *George* plaintiffs were permitted to proceed with a disparate impact claim under ADEA section 4(a) after the district court dismissed their claim under section 4(i)(1)(A). *George*, 560 F. Supp. 2d at 462. However, as the *Northwest Airlines* court noted, the *George* court did not consider the language of section 4(i)(4) of the ADEA in its decision. *Northwest Airlines*, 594 F. Supp. 2d at 1089 (finding *George* unpersuasive on that basis). Moreover, in further support of El Paso's argument in Section IV.A. above, the *George* court dismissed the plaintiffs' ADEA section 4(i)(1)(A) claim on the ground that such a claim was identical to their claim under ERISA section 204(b)(1)(H), which the Court held was without merit. *George*, 560 F. Supp. 2d at 462.

as the "equal cost or equal benefits" principle. *See* 29 U.S.C. § 623(f)(2)(B)(i). Therefore, even if the wear-away period violates the ADEA, El Paso is entitled to summary judgment because, during the wear-away period, older workers receive benefits that are at least as great as those received by younger workers.[28]

Section 4(f)(2)(B) of the ADEA provides, in relevant part, that it shall not be unlawful for an employer to:

> [O]bserve the terms of a bona fide employee benefit plan –
>
> > (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989) . . .

29 U.S.C. § 623(f)(2)(B)(i).[29] *See also* 29 C.F.R. § 1625.10. Thus, "a benefit plan that provides either the same benefits to employees regardless of cost, or different levels of benefits at the same cost, satisfies the equal cost/equal benefits principle." *New York 10-3 Assoc. v. City of New York*, No. 98 CIV 1425 (JGK), 1999 WL 177442, at *6 (S.D.N.Y. March 30, 1999) (*citing* 29 C.F.R. § 1625.10), attached as Exhibit L. "Put more simply, a benefit plan is ADEA compliant if it either provides equal benefits to employees or is of equal cost to an employer." *Erie County Retirees Assoc. v. County of*

---

[28] El Paso maintains that the Amended Plan is non-discriminatory for the reasons set forth above. Thus, section 4(f)(2)(B)(i) should not have to come into play. *See Bozner v. Sweetwater County School Dist.*, No. 96-8087, 1997 WL 165168, at *3 (10th Cir. April 9, 1997) (stating that exception does not apply to a non-discriminatory plan), attached as Exhibit J. In this section, El Paso merely argues in the alternative that the affirmative defense should apply.

[29] A plan is considered "bona fide" if its terms . . . have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan." 29 C.F.R. § 1625.10(b). *See also Breitigan v. New Castle County*, No. 02-1333-GMS, 2005 U.S. Dist. LEXIS 35908, at *5 (D. Del. Dec. 27, 2005) (noting that Supreme Court precedent has established that a "retirement plan is 'bona fide' within the meaning of the ADEA if it exists and pays benefits."), attached as Exhibit K. Accordingly, the Amended Plan constitutes a "bona fide" plan for purposes of the affirmative defense provision.

Erie, 140 F. Supp. 2d 466, 468 (W.D. Pa. 2001).[30] Here, even assuming that the wear-away exists, El Paso is entitled to the "equal benefits" defense because older workers' pension benefits are at least as great as they would be if there were no wear-away.

By definition, Participants who experience a wear-away have higher pension benefits during the wear-away than those employees who do not experience a wear-away and who only have a cash balance benefit. *See* Statement of Facts, ¶ 10-11. Accordingly, even if there was a meaningful wear-away period during which older Participants' immediately payable benefits do not grow, the value of those Participants' pension benefits throughout that time period are higher than they would be if there had been no transition period at all. Therefore, even if a meaningful wear-away existed, El Paso is entitled to an affirmative defense under section 4(f)(2)(B) of the ADEA because those who experience a wear-away have higher benefits than they would have had if there had been no transition period.

G. Even If Plaintiffs Could Establish A Violation Of The ADEA, Plaintiffs Have Failed To Timely Exhaust Their Administrative Remedies.

The Lilly Ledbetter Fair Pay Act expressly provides that "[n]othing in this Act is intended to change current law treatment of when pension distributions are considered paid." P.L. 111-2, § 2(4). In discussing this provision, the Committee Notes to the 2007 Ledbetter House bill, which was nearly identical to the Ledbetter Act passed in 2009, state that under existing law and the Ledbetter Act, "pension distributions would be considered *paid* upon entering retirement and *not* upon the issuance of each annuity

[30] In arguing that the "bona fide employee benefit plan" exception does not apply here, Plaintiffs focus only on the "cost incurred" prong of the affirmative defense and ignore "equal benefits" prong. *See* Complaint, ¶¶ 31, 36-37.

check." H.R. Rep. No. 110-237, at *18 (emphasis added). Thus, as applied to pension cases, the statute of limitations is triggered not only by the amendment to the plan itself, but also by an employee entering into retirement.

Plaintiffs recognized this in their reply brief in support of their Rule 59(e) motion. *See* Docket No. 330, p. 5 (discussing the legislative history of the Ledbetter Act and the Eighth Circuit's decision in *Maki v. Allete, Inc.* 383 F.3d 740, 744 (8th Cir. 2004)). However, Plaintiffs went on to argue that Mr. Tomlinson's charge was timely because it was filed in June 2004, several years <u>before</u> Mr. Tomlinson retired in 2007. The problem with this is that EEOC charges that are filed before a claim is perfected do not satisfy the obligation to exhaust administrative remedies. *Martinez v. Potter,* 347 F.3d 1208, 1210-1211 (10th Cir. 2003) (holding that claims occurring after the filing of an EEOC charge are barred unless independently exhausted).

It is undisputed that the Plan was amended effective January 1, 1997, and that Mr. Tomlinson filed his charge of discrimination with the EEOC in 2004. *See* Statement of Facts, ¶ 25. It is also undisputed that Mr. Tomlinson retired in 2007. *Id.*, ¶ 25. Therefore, Mr. Tomlinson did not file a charge of discrimination within 300 days of either (1) the amendment of the Plan or (2) his retirement. Accordingly, he failed to timely exhaust administrative remedies.

It is also undisputed that neither of the other named Plaintiffs have filed a Charge with the EEOC at all. The other Plaintiffs retired more than 300 days ago. *See* Statement of Facts, ¶ 25. Therefore, none of the Plaintiffs have timely exhausted their administrative remedies, and El Paso is entitled to judgment on the ADEA claim.

V. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court grant their Renewed Motion for Summary Judgment On ADEA Claim.

Respectfully submitted this 17th day of September, 2009.

s/ Darren E. Nadel
Darren E. Nadel
Joshua B. Kirkpatrick
Melissa M. Randall
Littler Mendelson, P.C.
One Tabor Center
1200 17th Street, Suite 1000
Denver, Colorado 80202
Telephone: (303) 629-6200
Facsimile: (303) 629-0200
dnadel@littler.com

Christopher J. Rillo
Schiff Hardin LLP
One Market, Spear Street Tower
Thirty-Second Floor
San Francisco, CA 94105
Telephone: (415) 901-8700
Facsimile: (415) 901-8701
crillo@schiffhardin.com

Attorneys for Defendants El Paso Corporation and El Paso Corporation Pension Plan

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2009, I electronically filed the foregoing **DEFENDANTS' MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT ON ADEA CLAIM** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Stephen R. Bruce, Esq.
805 15th Street, NW, Suite 210
Washington, D.C. 20005

Stephen.bruce@prodigy.net

Barry D. Roseman, Esq.
McNamara, Roseman, Martinez & Kazmierski, LLP
1640 East 18th Avenue
Denver, Colorado 80218

bdr@18thavelaw.com

s/Pat Bissonnette
Pat Bissonnette

Firmwide:91861770.4 021648.1082