IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 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' RESPONSE TO PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

Defendants El Paso Corporation and the El Paso Corporation Pension Plan (improperly sued as El Paso Pension Plan) (collectively, "Defendants" or "El Paso"), by and through their attorneys, Darren E. Nadel of Littler Mendelson, P.C. and Christopher J. Rillo of Groom Law Group, Chartered, respectfully submit Defendants' Response to Plaintiffs' Motion to Alter or Amend Judgment. (Doc. No. 313).

I. INTRODUCTION

In its January 21, 2009 Order ("Order"), this Court granted summary judgment in favor of El Paso with respect to Plaintiffs' claim under the Age Discrimination in

Employment Act ("ADEA") (Doc. No, 311). In doing so, the Court relied on the portion of *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618 (2007) that held that *Bazemore v. Friday,* 478 U.S. 385 (1986) is limited to facially discriminatory policies. (Order, Doc. No. 311, pp. 10-13). For the reasons discussed below, *Bazemore* still does not apply to Plaintiffs' claims.

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 ("Ledbetter Act"), P.L. 111-2, into law. *See* Plaintiffs' Motion to Alter or Amend Judgment, pp. 9-12 (Doc. No. 313). Relying on the Ledbetter Act, Plaintiffs seek reconsideration of this Court's January 21, 2009 Order under Fed. R. Civ. P. 59(e). Plaintiffs' sole argument for reconsideration is their mistaken belief that the Ledbetter Act now requires this Court to apply *Bazemore's* continuing violation theory to El Paso's statute of limitations defense. However, specific language contained in both the Ledbetter Act itself and the Ledbetter Act's legislative history, which Plaintiffs ignored in their Rule 59(e) motion, makes clear that *Bazemore* and its continuing violation theory do not apply to pension cases, such as this case.

There are other flaws with Plaintiffs' argument. As an initial matter, Plaintiffs have not established the existence of a discriminatory act within the EEOC statute of limitations period, which they must do in order to rely on the Ledbetter Act. In fact, they cannot establish the existence of a discriminatory act during any time frame because, as a matter of law, and as numerous courts have held, the exact wear-away claim that Plaintiffs assert is not cognizable under the ADEA.

Next, examining the language of the Ledbetter Act itself, Congress chose not to overturn the Supreme Court's holding in *National Railroad Passenger Co. v. Morgan,* 536 U.S. 101, 114-115 (2002) that the continuing violation doctrine may not be applied to discrete acts. Rather than change that framework, Congress instead chose to add additional discrete acts to the ADEA and the other anti-discrimination statutes to which the Ledbetter Act applies. Therefore, even if *Bazemore* could be applied to pension cases, Plaintiffs must still provide admissible evidence that they suffered one of the discrete acts set forth in the Ledbetter Act within 300 days of filing a charge of discrimination. Having failed to provide that evidence, Plaintiffs have failed to carry their burden as required by Fed. R. Civ. P. 56(e).

Nor does Plaintiffs' claim have any connection to any of the discrete acts that the Ledbetter Act added to the ADEA. Plaintiffs' ADEA claim is based on the theory that they suffered a "wear-away" period during which their cash balance benefits caught up to their "Minimum Benefits." The Ledbetter Act simply does not include "wear-away" claims within the list of discrete acts of discrimination that it adds to the ADEA.

In addition to this Response, El Paso has contemporaneously filed an Amended Motion for Partial Summary Judgment on Plaintiffs' ADEA claim, in which it sets forth alternative reasons why Plaintiffs' age discrimination claim must fail.[1] However, because those arguments are stand-alone bases for summary judgment, the Court need

[1] El Paso had not made these arguments in its earlier pleadings because (1) it was asked by this Court to specifically limit its arguments to the statute of limitations defense and (2) much of the evidence was gathered during discovery that proceeded after the original summary judgment motion was fully briefed. *See* Doc. No. 213, pp 17, 20.

not consider the Amended Motion if the Court upholds its Order on the basis of any of the arguments set forth in this Response.

II. ARGUMENT

A. The Ledbetter Act Makes Clear That Pension Cases Are Still Treated Differently Than Paycheck Cases.

As will be developed in detail below, under the Ledbetter Act, pension cases are still treated differently than paycheck cases for purposes of applying the statute of limitations defense. Therefore, even if the Ledbetter Act sought to do away with *Ledbetter's* distinction between facially discriminatory policies and facially neutral policies,[2] paycheck cases like *Bazemore* still have no application to this case. Instead, the Supreme Court's holding in *Florida v. Long*, 487 U.S. 223, 239 (1988), which was not disturbed by the Ledbetter Act, mandates a finding that Mr. Tomlinson's EEOC charge remains untimely.

1. The Meaning Of Section 2(4) Of The Ledbetter Act.

Plaintiffs' motion fails to apprise this Court that the Ledbetter 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 legislative history of the Ledbetter Act recognizes that the receipt of paychecks and the receipt of pension benefits are treated qualitatively different under the law. The legislative history further makes clear that Congress did not seek to change that treatment by passing the Ledbetter Act. Specifically, the Committee Notes

[2] El Paso does not concede that the Ledbetter Act sought to do away with that distinction. If Congress sought to eliminate that distinction, it could have done so expressly. Instead, as discussed below, the Ledbetter Act merely adds new discrete acts of discrimination to the applicable anti-discrimination statutes, including the ADEA.

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 check." H.R. Rep. No. 110-237, at *18 (emphasis added).

Therefore, the import of section 2(4) of the Ledbetter Act is to specifically make clear that pension cases and paycheck cases remain qualitatively different for purposes of applying the statute of limitations defense. While each paycheck is now a discriminatory event under the Ledbetter Act, the same is not true in a pension case like the one before the Court.

Section 2(4) of the Ledbetter Act is also entirely consistent with the Supreme Court's holding in *Florida v. Long*, 487 U.S. 223, 239 (1988), which stands for the same proposition as the legislative history quoted above.[3] Moreover, as discussed in more detail below, section 2(4) of the Ledbetter Act is also directly at odds with any application of a paycheck case like *Bazemore* to a pension case like the one before the Court.

2. The Supreme Court's Holding In *Florida v. Long*.

In *Long*, the Supreme Court held that pension cases and paycheck cases are not alike for purposes of applying the statute of limitations. As the Supreme Court explained:

> It is not correct to consider payments of benefits based on a retirement that has already occurred as a sort of continuing

[3] Plaintiffs admit in their Complaint that El Paso's pension benefits are paid upon a participating employee's *retirement* and that under the cash balance formula, participants receive hypothetical accounts to which notations are made but no funds are actually allocated to the participants' accounts. (Complaint, ¶¶ 15, 18, 23-24).

> violation. Our decision in *Bazemore v. Friday,* 478 U.S. 385 (1986) is not to the contrary.... In a salary case ... each week's paycheck is compensation for work presently performed and completed by an employee. Further, the employer does not fund its payroll on an actuarial basis. By contrast, a pension plan, funded on an actuarial basis, provides benefits fixed under a contract between the employer and retiree based on a past assessment of an employee's expected years of service, date of retirement, average final salary, and years of projected benefits. In the pension fund context, a continuing violation principle in every case would render employers liable for all past conduct.... We cannot recognize a principle of equitable relief that ignores the essential assumptions of an actuarially funded pension plan.

Long, 497 U.S. at 239.

The Eighth Circuit Court of Appeals has also recognized the difference between paycheck cases and pension check cases. In *Maki v. Allete, Inc.*, 383 F.3d 740, 744 (8th Cir. 2004), the Eighth Circuit explained that "[p]aychecks are payments for a prior term of work. For example, an employee works for a week, then the salary structure is applied and the paycheck is issued. Pension checks, however, are based on a pension structure that is applied only once, when the employee retires, and the pension checks merely flow from that single application." Thus, because pension checks are based on a pension structure that is applied only once, pension check cases differ from paycheck cases.[4]

The legislative history quoted in section 1 above, *Long*, and *Maki* all stand for the same proposition. Each time a paycheck is paid a new violation occurs. This is not true for the payment of pension benefits. "[P]ension distributions would be considered *paid*

[4] Notably, the legislative history of the 2007 Ledbetter House bill cites *Long* and *Maki* with approval. *See* H.R. Rep. No. 110-237, at * 18 n. 79 & 80.

upon entering retirement and *not* upon the issuance of each annuity check." H.R. Rep. No. 110-237, at *18 (emphasis added). Paycheck cases are simply of no help in analyzing the timeliness of Mr. Tomlinson's charge of discrimination in this case. *See also Clissuras v. Teachers' Retirement System of New York*, Nos. 02 Civ. 8130 (SAS) and 02 Civ. 8138 (SAS), 2003 U.S. Dist. LEXIS 4905 at *16, n. 8 (S.D.N.Y. Mar. 28, 2003) (recognizing that under *Long, Bazemore* cannot apply to pension cases), attached as Exhibit A.

3. *Bazemore v. Friday* Still Does Not Apply To This Case.

In their Rule 59(e) motion, Plaintiffs do not explain how *Bazemore* supports their position. They did, however, touch on that point in their Response to El Paso's original Motion For Partial Summary Judgment on ADEA claim. According to Plaintiffs: "***Except that it involves pension accruals instead of pay***, this case is like *Bazemore.* Each quarter that El Paso causes the cash balance credits to fail to accrue for older employees while the same credits accrue for younger employees is a 'fresh act of discrimination'." (Docket No. 229, p. 7; emphasis added).

Of course, the language emphasized above is exactly the problem with Plaintiffs' argument. This is, in fact, a case that involves pension accruals and it is not, in fact, a case that involves wages. That is the distinction that makes the difference. Under both *Long, Maki*, and section 2(4) of the Ledbetter Act itself, pension accruals and pay checks are not the same, particularly for purposes of applying the statute of limitations defense.[5] Instead, nothing in the Ledbetter Act disturbed the holding of *Long* that *Bazemore* does not apply to pension cases.

B. <u>Plaintiffs Have Not Established That El Paso Engaged In Any Of The Discrete Acts Set Forth In The Ledbetter Act.</u>

The Ledbetter Act did not change the framework, confirmed in *Morgan,* that the continuing violation doctrine does not apply to discrete acts of discrimination. Instead, under *Morgan,* the statute of limitations still must be satisfied as to each discrete act of discrimination. The Ledbetter Act amended the ADEA to add a new discrete act each time "a person is affected by application of a discriminatory compensation practice." P.L. 111-2, § (4)(3). Plaintiffs have not provided any admissible evidence that they were "affected by application of a discriminatory practice" within 300 days of filing a charge of discrimination. Nor can they. Therefore, their Rule 59(e) motion should be denied.

1. **The Ledbetter Act Does Not Overturn *National Railroad Passenger Co. v. Morgan*.**

In its Order, this Court held that El Paso's conversion of the pension plan to a cash balance plan was a discrete act. (Order, Doc. 311, p. 11). Thus, this Court found that Plaintiffs' cause of action under the ADEA "was triggered by the adoption of the cash balance plan...." (*Id.*, p. 12). Because Plaintiff Wayne Tomlinson failed to file a charge of discrimination with the EEOC within 300 days of El Paso's adoption of the cash balance plan, this Court held that his ADEA claim was time-barred. (*Id.*, p. 12-13).

In *Morgan*, the Supreme Court held that each discrete incident of discriminatory treatment constitutes its own "unlawful employment practice" for which administrative

[5] The cases cited in footnotes 5-7 of Plaintiffs' brief are all distinguishable for the same reason. None of them involved pension accruals.

remedies must be exhausted. *Morgan,* 536 U.S. at 111-12. In so holding, the *Morgan* court abrogated the continuing violation doctrine as previously applied to discrete acts of discrimination. *Id.* As the Tenth Circuit has summarized: "In Morgan, the Supreme Court held that a continuing violation theory . . . is not permitted for claims against discrete acts . . . thus, a claimant must file a charge . . . within the appropriate limitations period as to each such discrete act . . . that occurred." *Davidson v. America Online, Inc.*, 337, F.3d 1179, 1184 (10th Cir. 2003). Therefore, the limitations period for filing a charge is triggered when a discrete unlawful practice occurs, and the charge "must be filed within the ... 300-day time period after the discrete discriminatory act occurred." *Morgan*, 536 U.S. at 113.

2. Plaintiffs Fail To Present Evidence That They Filed A Charge Of Discrimination Within 300 Days Of Suffering A Discrete Act Of Discrimination Under The Ledbetter Act.

Putting *Morgan* and the Ledbetter Act together, Plaintiffs must still prove, with admissible evidence, that they were affected by application of a discriminatory practice and that they filed a charge of discrimination within 300 days of being affected by application of a discriminatory practice. They have not done so.

A plaintiff "may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e). Thus, "a party opposing summary judgment cannot rest upon his pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which [he or she] carries the burden of proof." *Tinkle v. Oklahoma Gas & Elec. Co.*, 16 Fed.

Appx. 815, 817 (10th Cir. 2001) (internal quotations omitted). While Plaintiffs do not have to conclusively prove that they were discriminated against, at a minimum, they must show that there is a genuine issue for trial as to whether they were affected by a discriminatory compensation decision within 300 days of filing a charge.[6] Otherwise, there is no basis for setting aside an order that was entered under Fed. R. Civ. P. 56 as opposed to Fed. R. Civ. P. 12.

This Court has already determined that Mr. Tomlinson did not file his charge of discrimination within 300 days of El Paso's discrete act of amending the plan. (Order, Doc. 311, p. 11-13).[7] Because Plaintiffs have not even attempted to meet their burden of showing that there is a genuine issue for trial regarding how Mr. Tomlinson was affected by a discriminatory compensation practice within 300 days of filing a charge of discrimination, this Court should deny their Rule 59(e) motion.

3. The Ledbetter Act Does Not Apply To Plaintiffs' Wear-Away Claim.

As noted above, the Ledbetter Act defines "unlawful employment practice" to now include "*when an individual is affected by application of a discriminatory compensation decision or other practice*, including each time wages, benefits, or other compensation *is*

---

[6] In order to determine the timeliness of a plaintiff's claims, courts routinely analyze which alleged discrete acts fell within the limitations period and which did not. *See Davidson*, 337 F.3d at 1186 (excluding plaintiff's previous refusal to hire claim because it occurred outside the limitations period); *Rydzeski v. Curian Capital, LLC*, No. 06-cv-01298-WDM-BMB, 2008 U.S. Dist. LEXIS 11573, at *16-17 (D. Colo. Feb. 14, 2008) (determining that while two of the alleged discrete acts fell within the limitations period, "[a]ll other acts which Plaintiff complains about are time-barred as they occurred more than 300 days" prior to the date of the charge), attached as Exhibit B. Thus, Plaintiffs were obligated to prove that they suffered an alleged discrete unlawful act that occurred within 300 days of Mr. Tomlinson's charge.

[7] Of the three named Plaintiffs, only Mr. Tomlinson has filed a charge of discrimination with the EEOC. (Complaint, ¶ 39). The other putative collection action members may piggyback on Mr. Tomlinson's charge if they can establish that they could have filed timely charges of discrimination on the day that Mr. Tomlinson actually filed his charge. *See Thiessen v. Gen. Elec. Corp.*, 267 F.3d 1095, 1111 (10th Cir. 2001). Thus, this action rises and falls upon the timeliness of Mr. Tomlinson's EEOC charge.

paid, resulting in whole or in part from such a decision or other practice." P.L. 111-2, § 4(3) (emphasis added). As El Paso has established, in their Rule 59(e) motion, Plaintiffs have not identified the discriminatory compensation practice that they were affected by nor presented any evidence that they filed a charge of discrimination within 300 days of being affected by such a discriminatory compensation practice. Presumably, Plaintiffs would rely on the statutory language quoted above to argue that each day that the cash balance plan increased in value while their Minimum Benefit was frozen constitutes a separate discrete act that triggers a new limitations period. However, Plaintiffs fail to explain how the language of the statute actually applies to a wear-away claim.[8]

Plaintiffs cannot dispute that, before an individual retires, it is speculative whether the alleged wear-away will or will not ultimately impact an individual's retirement benefit. The actual impact, if any, will not be known until the individual elects to receive retirement benefits and it is finally determined whether the cash balance account or the Minimum Benefit was larger. Therefore, the alleged wear away cannot be said to "affect" an individual within the meaning of section 4(3) of the Ledbetter Act on a pay period by pay period basis. Instead, whether it will have an effect depends on future contingencies, such as whether the cash balance account does or does not catch up to the Minimum Benefit by the time pension benefits are actually paid.

This lack of certainty about whether a wear-away will actually affect an individual's actual pension benefit underscores the importance of both the *Long* case

[8] As discussed in El Paso's contemporaneously filed Memorandum in Support of Amended Motion for Partial Summary Judgment on ADEA Claim, it is also undisputed that Plaintiffs did not suffer a wear-away.

and section 2(4) of the Ledbetter Act. They make clear that pension cases are treated differently than paycheck cases. In paycheck cases, a check that is discriminatorily small has an obvious and known impact. In pension cases, the actual impact, if any, will not be known until the benefit is paid. *See* H.R. Rep. No. 110-237, at *18.

C. Plaintiffs' ADEA Claim Is Not Cognizable As A Matter Of Law.

It is noteworthy that no court has ever sustained a wear-away claim like Plaintiffs' under the ADEA. The reason is that such claims are simply not cognizable under the ADEA as a matter of law.

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).[9] (Complaint, ¶ 38). However, pursuant to section 4(i)(4) of the ADEA, 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.[10] Plaintiffs' particular claim is not cognizable under section 4(i)(1)(A) of the ADEA because that provision has the same scope and meaning as section 204(b)(1)(H) of ERISA. This Court already rejected Plaintiffs' claim under section 204(b)(1)(H) of ERISA when it dismissed Plaintiffs' Claim III.

1. Age Discrimination Claims Related To Benefit Accruals Can Only Be Brought Under 29 U.S.C. § 623 (i)(1)(A).

Section 4(i)(4) of the ADEA provides: "Compliance 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 plan." The

[9] 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.
[10] Section 4(i)(1)(A) of the ADEA, 29 U.S.C. § 623(i)(1)(A), prohibits "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age...."

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. *See also Northwest Airlines, Inc. v. Phillips*, No. 07-4803, 2009 U.S. Dist. LEXIS 5646, at *32 (D. Minn. Jan. 26, 2009) ("ADEA section 4(i)(4) dictates that .... compliance with ADEA § 4(i)(1)(B) constitutes compliance with ADEA § 4(a), (c).”), attached as Exhibit C.[11] Thus, Plaintiffs may not bring their ADEA claim under 29 U.S.C. § 623(a) or 29 U.S.C. § 626(b).

Plaintiffs will undoubtedly rely on *Engers v. AT&T*, No. 98-3660, 2007 U.S. Dist. LEXIS 23021 (D.N.J. March 29, 2007), attached as Exhibit D, for the proposition that wear-away claims are not limited to section 4(i)(1)(A) of the ADEA. However, the unpublished *Engers* case lacks the persuasive authority of the Ninth Circuit's published *Hurlic* decision. The *Engers* court's ruling was incorrect because it erroneously relied on legislative history pertaining to the amendment of a different section of the ADEA, four years after section 4(i)(4) was adopted. *Engers*, 2007 U.S. Dist. LEXIS 23021, at *8-*9. The Ninth Circuit, by contrast, correctly relied on the legislative history of section 4(i)(4) itself. *Hurlic*, 539 F.3d at 1037. The *Northwest Airlines* court correctly concluded that the language of the statute was unambiguous and then relied on the legislative history of section 4(i)(4) to support its conclusion. *Northwest Airlines*, 2009 U.S. Dist. LEXIS 5646, at *32.

Plaintiffs may also argue that *Hurlic's* holding is inconsistent with the Supreme Court's holdings in *Smith v. City of Jackson*, 544 U.S. 228 (2005) and *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008). However, neither of those cases involved cessations in the rate of benefit accruals or “wear-aways,” and neither discussed the impact of section 4(i)(4) of the ADEA on a Plaintiff's ability to state a claim under section 4(a) of the ADEA. Thus, this Court should reach the same result as the *Northwest Airlines* court and conclude that neither *Smith* nor *Kentucky Retirement*

---

[11] *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.

Systems suggests that Plaintiffs may assert a claim related to a cessation or reduction in benefit accruals under section 4(a) of the ADEA. *See Northwest Airlines*, 2009 U.S. Dist. LEXIS 5646, at *33-35 (citing *Hurlic*, 539 F.3d at 1035-37).

2. ADEA Section 4(i)(1)(A) And ERISA Section 204(b)(1)(H) Are Identical In Scope And Meaning.

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*, No. H-08-1970, 2008 U.S. Dist. LEXIS 105424, at *24 (same), attached as Exhibit E.[12]

[12] 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

This Court has already dismissed Plaintiffs' claim of age discrimination under ERISA section 204(b)(1)(H). (*See* March 22, 2007 Order, Doc. No. 108, pp. 5-7, dismissing Plaintiffs' Claim III). Notably, the correctness of this Court's ruling on that claim 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 joined by the Second, Sixth and Ninth Circuits. *See Hirt v. Equitable Retirement Plan*, 533 F.3d 102 (2d Cir. 2008); *Drutis v. Rand McNally & Co.*, 499 F.3d 608 (6th Cir. 2007); *Hurlic*, 539 F.3d at 1029-1032. No Circuits have reached a different result.

Because Plaintiffs cannot sustain an age discrimination claim under section 204(b)(1)(H) of ERISA, they cannot sustain a claim under section 4(i)(1)(A) of the ADEA either. Because section 4(i)(1)(A) is the only provision of the ADEA under which a claim relating to a cessation or reduction of benefit accruals may be brought, Plaintiffs cannot sustain their wear-away claim under any provision of the ADEA.

III. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiffs' Motion to Alter or Amend Judgment.

Way was actually motivated by discrimination in its decision to endorse the conversion." *Rosenblatt*, 2008 U.S. Dist. LEXIS 105424, at *25 (emphasis added). As discussed above, *Hurlic* and *Northwest Airlines* 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 ADEA that a plan must satisfy with respect to the cessation or reduction of benefit accruals.

Respectfully submitted this 26th day of February, 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
Groom Law Group, Chartered
1701 Pennsylvania Avenue NW
Washington, D.C. 20006-5893
Telephone: (202) 857-0620
Facsimile: (202) 659-4503
crillo@groom.com

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

CERTIFICATE OF SERVICE

I hereby certify that on February 26th, 2009, a true and correct copy of the foregoing **Defendants' Response To Plaintiffs' Motion to Alter or Amend Judgment** was electronically filed and served via the *CM/ECF* system which will send notification of such filing to the following. The duly signed original is on file at the office of Littler Mendelson, P.C.

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:88281348.8 021648.1075