IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-cv-2686 (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.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ADEA CLAIM

Stephen R. Bruce
Allison C. Caalim
805 15th St., NW, Suite 210
Washington, D.C. 20005

Barry D. Roseman
McNamara, Roseman, Martinez &
Kazmierski, LLP
1640 East 18th Avenue
Denver, CO 80218-1202

Attorneys for Plaintiffs

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Plaintiffs' Response to Defendants' Statement of Undisputed Material Issues [1]

1. Undisputed.

2. Plaintiffs dispute that Mr. Tomlinson had notice of "all facts upon which he rested his ADEA claim at the time he received [El Paso's] communications." The expert reports of Robert Bardwell, Ph.D. (Ex. A), and Claude Poulin, F.S.A. (Ex.B), show that the cash balance conversion often resulted in age-related periods of "wear-away" lasting as many as 14 years and in older employees' future benefits being reduced by as much as 100%. Those reports were based on data that was unavailable to Mr. Tomlinson or other employees (*see* Ex. A at 15-16; Ex. B at 2). Plaintiffs also dispute that the written communications to employees between 1996 and 2001 adequately or understandably describe the age-related reductions resulting from "the changes to the pension plan." The expert report of Prof. James Stratman (Ex. C) shows that El Paso's communications failed to disclose the reductions or other disadvantages of the cash balance conversion.

3. Mr. Poulin's report shows that participants were not given cash balance accounts equivalent to the full value of their benefits. Instead, they were given accounts that fell short in three respects and fell farther short as the 5-year transition period progressed. Ex. B at 13-17. El Paso omits that the transition periods applicable to former Sonat and Coastal employees ran to December 31, 2004 and March 31, 2006. *Id.* at 4.

4. El Paso again omits the transition periods until December 31, 2004 and

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[1] In its brief, El Paso improperly asserts additional statements of fact beyond its eight numbered statements in violation of Local Rule 56.1. See Defs. Br. at 4, 5-8, and 9.

March 31, 2006 that applied to former Sonat and Coastal employees under the Plan.

5. The January 1, 1997 date again overlooks the dates for Sonat and Coastal.

6. El Paso provided data in response to discovery requests which enabled the Plaintiffs' experts to show the discrimination in which El Paso has engaged. Ex. A at 15-16, Ex. B at 2. Without disclosures or the data on the effects of the wear-aways on older and younger employees, Mr. Tomlinson did not know that the periods of wear-away were based on age. Mr. Tomlinson prepared Excel spreadsheets on September 15, 2003 to begin to figure out the effect of the amendments. But he did not know that the wear-aways were based on age until he consulted with his current counsel in early 2004. Ex. D at 23, line 19 - 24, line 8; 83, line 15 - 84, line 16; 98, line 11 - 99, line 22; 279, lines 14-21. Mr. Tomlinson did not retire until May 1, 2007. Ex. F.

7. Undisputed.

8. Disputed. The EEOC accepted Mr. Tomlinson's charge as a classwide charge and categorized it as a "continuing violation." Ex. E. Plaintiffs have been unable to determine whether any other member of the proposed collective action filed a charge because El Paso refuses to produce documents after the July 16, 2004 date on which Mr. Tomlinson formally filed his charge.

I. The Standard of Review

Pursuant to Federal Rule 56(c), summary judgment may only be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994). The moving party has the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets that burden, the other party must demonstrate a "genuine issue for trial on a material matter." *Concrete Works*, 36 F.3d at 1518. The factual record is viewed in the light most favorable to the nonmovant. *Byers v. City of Albuquerque*, 150 F.3d 1271,1274 (10th Cir. 1998).

II. The ADEA Charge Is Timely Because the Pension Structure that Produces Wear-Away Is a Discriminatory "Pattern or Practice" that Continued to Be Applied Into and Beyond the Filing Period.

El Paso has engaged in a "pattern or practice" of age discrimination which continued into and beyond the 300-day period before the charge was filed. To establish a "pattern or practice," a plaintiff must show that the "discrimination was the company's standard operating procedure–the regular rather than the unusual practice." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 337 (1977). A pattern or practice is "more than the mere occurrence of isolated or accidental or sporadic discriminatory acts." *Id.* In a pattern or practice claim, "the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984). A pattern or practice from the application of a pension provision is not uncommon. In *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716 (1978), pension provisions that indirectly required women to contribute more to a plan than men constituted a pattern or practice of discrimination. In such cases, the discrimination occurs "each time [the employer] applies the policy in a benefit calculation," *Hulteen v. AT&T Corp.*, 498 F.3d 1001, 1007 (9th Cir. 2007) (*en banc*), or forces employees "to give up accrual of ... pension benefits" by "repeated application" of the policy. *Connolly v. McCall*, 254 F.3d 36, 41 (2d Cir. 2001). Other cases involving pension provisions hold that a limitations period does not begin until "each individual plaintiff retired" and "the alleged discriminatory provision of the pension plan was applied ... and the defendant could no longer amend the bridging provision to cure such discrimination." *Maki v. Allete, Inc.*, 383 F.3d 740, 745 (8th Cir. 2004). Accord *EEOC v. North Gibson School Corp.*, 266 F.3d 607, 618 (7th Cir. 2001).[2] Here, Mr. Tomlinson did not retire until May 1, 2007. Ex. F.

The Tenth Circuit holds that "a claim of age discrimination ... may be based on a continuing policy and practice of discrimination that began before the statutory filing period, as long as the employer continues to apply the discriminatory policy and practice to a point within the relevant filing period, and plaintiff is not merely complaining of the continuing effects of a discriminatory practice that existed only before the relevant filing

[2] The same rule applies under ERISA. See, e.g., *Held v. Manufacturers Hanover,* 912 F.2d 1197, 1205 (10th Cir. 1990) (cause of action accrues when an "application for benefits is denied").

period." *Furr v. AT&T Technologies*, 824 F.2d 1537, 1543-44 (10th Cir. 1987) (policy or practice of failing to promote older employees to supervisory positions). Accord, *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 614-15 (10th Cir. 1988) ("Where plaintiffs challenge not just one incident or isolated incidents of conduct violative of the ADEA, but an unlawful practice involving several incidents, a charge filed with the EEOC is timely when it is filed within 180 days [or 300 days] of the termination of the policy and practice adversely affecting the plaintiffs"). In *Thiessen v. GE Capital Corp.,* 267 F.3d 1095, 1105 (10th Cir. 2001), cert. denied, 536 U.S. 934 (2002), a district court's decision to decertify a collective action was reversed because the court failed to recognize that "plaintiffs were asserting a pattern or practice claim." The plaintiffs "alleged it was defendants' standard operating procedure, implemented through the [Management Development Program] and the blocker policy to discriminate against employees ... on the basis of age." 267 F.3d at 1105. Mr. Thiessen was denied several promotions and downgraded in performance reviews between 1993 and 1995. Mr. Thiessen filed his charge well over 300 days after GE Capital began implementing the blocker policy but while the policy was still being applied.

Here, the reports of Plaintiffs' experts establish that El Paso's age-discriminatory wear-aways were not "isolated or accidental or sporadic" but the standard procedure under the plan after the 5-year transition periods. The expert reports show that the wear-away design can prevent older, longer-service employees from earning additional benefits for periods of over 14 years. Ex. A (Bardwell) at 5-9; Ex. B (Poulin) at 13-17.

Defendants argue that because Plaintiffs' claim stems from an amendment to a pension plan, a discrete act is involved and the continuing violation theory cannot be applicable under *AMTRAK v. Morgan*, 536 U.S. 101, 114 (2002). See Defs. Br. at 9. *Morgan* places limits on the continuing violation theory of discrimination for Title VII claims based on "discrete acts" of discrimination, such as termination, failure to promote, or refusal to hire, which the Court held "occur[]" on the day that they "happened." *Id.* at 110. El Paso neglects to mention that *Morgan* expressly distinguishes "pattern or practice claims." Id. at 115 n.9. Here, the wear-aways of cash balance accruals for older employees are not the result of a "discrete act" but the product of the repeated application of the "greater-of" design (instead of an "A plus B" benefit accrual structure), combined with a number of age-related factors. Ex. B at 13-17; accord *Amara v. CIGNA*, 534 F.Supp.2d 288, 347 (D. Conn. 2008). The wear-away is produced by the repeated application of that design to each quarter of pay credits under the cash balance formula.

In *Bazemore v. Friday*, 478 U.S. 375 (1986), the Supreme Court reversed a dismissal of a disparate pay claim on timeliness grounds, holding that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 396. *Morgan*, the primary case on which El Paso relies, cites *Bazemore* with approval as a pattern or practice case where "each week's paycheck" under a "discriminatory salary structure" was an actionable wrong." 536 U.S. at 111-12. 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." See *Reese v. Ice Cream Specialties*, 347 F.3d 1007, 1012 (7th Cir. 2003) ("If an employer tells his employee, 'I am going to infringe your rights under Title VII at least once every year you work for me,' this does not start the statute of limitations running on the future violations, violations that have not yet been committed").

Defendants also analogize this case to *Ledbetter v. Goodyear Tire and Rubber Co.*, 127 S. Ct. 2162 (2007). Defs. Br. at 9. *Ledbetter* holds that the reduced paychecks that an employee receives as a result of earlier discriminatory performance evaluations do not trigger new charging periods. *Id.* at 2169. The Supreme Court distinguished *Bazemore* as standing "for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure." *Id.* at 2174. Here, as Mr. Poulin's report shows, El Paso is applying a "discriminatory [pension] structure." Ex. B at 6-8, 13-17. In addition, El Paso has adopted additional amendments which have extended this policy or practice to new groups of employees effective in 2005 and 2006. See Ex. B at 3-4. Each time El Paso applies the policy to require employees "to give up accrual of ... pension benefits" is a "repeated application" of the discriminatory policy. *Connolly*, supra, 254 F.3d at 41.

Finally, Defendants inaccurately contend that *Florida v. Long*, 487 U.S. 223, 239 (1988), holds that *Bazemore* is inapplicable to "pension plans." Defs. Br. at 10. *Long* simply holds that it "is not correct to consider payments of benefits *based on a retirement that has already occurred* as a sort of continuing violation." *Id.* (emph. added).

III. El Paso Did Not Make the Age-Related Basis of the Wear-Away Periods Known to Employees; Mr. Tomlinson Did Not Know About This Until He Consulted Counsel Less Than 300 Days Before Filing His Charge.

Even if the Court did not recognize Mr. Tomlinson's EEOC charge as involving the repeated application of a discriminatory policy, El Paso is not entitled to summary judgment. Defendants assert that Mr. Tomlinson had, or should have had, notice of the discrimination through written communications distributed by El Paso between 1996 and 2001. Defs. Br. at 5-6. But Defendants' communications did not disclose that the wear-aways discriminated on the basis of age. Mr. Tomlinson testified that he did not know that the wear-away periods discriminated based on age until he consulted counsel in early 2004. Pls. Resp. to Defs. Facts ¶6.[3]

The expert reports of Dr. Bardwell and Mr. Poulin show that calculating the duration of the wear-away periods is a complex process. As their reports show, the age of the employees is an integral part of the calculation of wear-aways, but the impact of the wear-aways based on age is not obvious *a priori*. Ex. A at 9-12 and B at 13-17. The

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[3] To contest this, Defendants quote an August 7, 2003 email. Defs. Br. at 7. But it is clear from the e-mail that Mr. Tomlinson is not talking about wear-aways.

written communications that El Paso provided employees disclose none of this. Professor Stratman's expert report shows that El Paso's communications never disclose the length of the wear-aways or their age-related basis. Ex. C at 7-12, 12, 14-15.

In *Delaware College v. Ricks*, 449 U.S. 250, 258 (1980), the Supreme Court held that the limitations period begins to run when the employer "established its official position and made that position apparent" to the plaintiff. See also *Courtney v. LaSalle University*, 124 F.3d 499, 504 (3d Cir. 1997) (period begins when the employer made its "position apparent to the employee by explicit notice"); *Grayson v. Kmart Corp.*, 79 F.3d 1086, 1100 n.19 (11th Cir. 1996) ("time for filing an EEOC charge begins to run when the employee receives unequivocal notice of the adverse employment decision"). Even an "ambiguity" in "the employer's notice to the employee ... may be sufficient to delay the accrual of the discrimination claim, and therefore the commencement of the charge-filing period." Eglit, *Age Discrimination* (2d ed. 1997), vol. 1, §6.11. Here, to defend against this charge, El Paso will have to establish that its practice falls within the "bona fide plan" exception in Section 4(f)(2) of the ADEA. The EEOC's regulations on that Section provide that "the lower benefits to older employees on account of age" must be provided by the "express terms of the plan" so "older employees have some opportunity to know of the policy and to plan (or protest) accordingly." 29 C.F.R. 1625.10(c).

In this instance, El Paso's written communications never disclosed that there were longer wear-aways or lower benefits for older employees on account of age. Because El

Paso did not disclose that information, Mr. Tomlinson eventually had to prepare Excel spreadsheets to try to figure out the effect of the amendments. But even then he did not learn that the periods of wear-away discriminated on the basis of age until he contacted counsel in the spring of 2004. Pls. Resp. to Defs. Facts ¶6. "Fair warning" is not provided by a communication that requires the person to do "research beyond the document itself." *Hirt v. Equitable*, 441 F. Supp. 2d 516, 538 (S.D.N.Y. 2006). Because El Paso failed to provide notice of "the lower benefits to older employees on account of age," it cannot bar Mr. Tomlinson's charge of discrimination as untimely. [4]

Conclusion

For the foregoing reasons, Plaintiffs respectfully submit that El Paso has not shown that summary judgment should be granted in its favor on the ADEA claim.

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Respectfully submitted,

s/ Stephen R. Bruce
Stephen R. Bruce
Allison C. Caalim
805 15th St., NW, Suite 210
Washington, D.C. 20005
202 / 371-8013
stephen.bruce@prodigy.net

s/ Barry D. Roseman
Barry D. Roseman
McNamara, Roseman, Martinez &

[4] Alternatively, El Paso's failure to disclose in accordance with the regulations equitably tolls the filing period. See *Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

Kazmierski, LLP
1640 East 18th Avenue
Denver, CO 80218-1202
303 / 333-8700
bdr@18thavelaw.com

Attorneys for Plaintiffs

Plaintiffs' Exhibits

Ex. A - Expert statistical report of Robert A. Bardwell, Ph.D.
Ex. B - Expert actuarial report of Claude Poulin, F.S.A.
Ex. C - Expert communications report of Professor James F. Stratman.
Ex. D - Excerpts from Jan. 29-30 deposition of William Tomlinson.
Ex. E - William Tomlinson's EEOC charge and Investigation Information Sheet.
Ex. F - William Tomlinson's May 1, 2007 retirement election form and June 2007 True-Up calculation from Mercer's Benecalc system.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 28th day of April 2008, a true and correct copy of Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment on the ADEA Claim, with Exhibits A through F, and this Certificate of Service was served through the CM/ECF electronic filing system on the following attorneys for the Defendants:

Darren E. Nadel
Littler Mendelson, P.C.
One Tabor Center
1200 17th Street, Suite 1000
Denver, CO 80202

Raymond W. Martin
Wheeler Trigg Kennedy, LLP
1801 California Street, Suite 3600
Denver, Colorado 80202

Christopher J. Rillo, Esq.
Groom Law Group
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006-5893

s/ Stephen R. Bruce