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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NOREEN HULTEEN, ELEANORA COLLET, LINDA PORTER, ELIZABETH SNYDER, and all others similarly situated, and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Plaintiffs,

v.

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

Defendants.

Case No. C 01 1122 MJJ

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [CORRECTED]

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

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I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT UNDER TITLE VII AND DEFENDANTS' EFFORTS TO UNDERCUT CONTROLLING LAW BY MISCHARACTERIZING PLAINTIFFS' CLAIMS MUST BE REJECTED

A. *Pallas*, *Carter*, And *Bazemore* Are Current, Applicable, And Persuasive Precedent And *Lockheed v. Spink* Does Not Apply To Plaintiffs' Claims In This Case

1. Retroactivity Doctrine Is Inapplicable To Defendants' Post-PDA Conduct

Plaintiffs challenge Defendants' application of the NCS system to the individually named plaintiffs, all of whom retired, or will retire, after the effective date of the Pregnancy Discrimination Act ("PDA"). Because this is a challenge to the *current* application of the NCS system to determine retirement and related benefits, Plaintiffs are not attempting to apply the PDA retroactively. Defendants, however, mischaracterize Plaintiffs' challenge as attacking PT&T's pregnancy leave and service crediting policies that were in place *prior* to the PDA. Based on this mischaracterization, Defendants argue that "retroactive" application of a statute is required whenever pre-Act conduct constitutes discrimination, but has not yet been found illegal. (D.Opp. 4-6.)[1]

Defendants ignore the Supreme Court's holding in *Bazemore v. Friday*, 478 U.S. 385 (1986), that the then-current calculation of employees' pay violated Title VII where pay was determined, in part, by pre-Title VII events. Just as the plaintiffs in *Bazemore* were challenging post-Title VII conduct, the Plaintiffs here are challenging post-PDA conduct. In both cases, the challenged post-Act conduct involves the employer's ongoing use of discriminatory criteria, which, *arguendo*, were not illegal prior to the effective date of the Act. Defendants' use of a formula based in part on pre-Act events does not convert the challenge into a retroactive application of the Act. Thus, *Bazemore* did not hold that granting relief to the plaintiffs would be "retroactive" relief because each new paycheck incorporated a discriminatory variable that originated before Title VII. Similarly, "retroactivity" doctrines do not apply to this case. Indeed, acceptance of Defendants' position that *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), undermines or overrules *Pallas v.*

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[1]Prior pleadings in this case will be referred to as follows: Defendants' Motion for Summary Judgment as "D.Mem."; Defendants' Opposition to Plaintiffs' Motion for Summary Judgment as "D.Opp."; Plaintiffs' Motion for Summary Judgment as "P.Mem."; and, Plaintiffs' Opposition to Defendants' Motion for Summary Judgment as "P.Opp."

Pacific Bell, 940 F.2d 1324 (9th Cir. 1991), *cert. denied,* 502 U.S. 1050 (1992), would require a finding that *Spink*, and the retroactivity cases cited by Defendants (D.Opp. 4:17-6:4), also had the effect of overruling *Bazemore*, which was cited just last Term in *National Railroad Passenger Corp. v. Morgan*, __ U.S.__, 122 S.Ct. 2061, 2071 (2002).

It is evident that Defendants must re-characterize Plaintiffs' claims to avoid the binding precedent of *Pallas*, which held that use of a virtually identical NCS system was a *present* violation of the PDA. 940 F.2d at 1327. Accordingly, Defendants argue that *Spink*, which reversed *Spink v. Lockheed,* 60 F.3d 616 (9th Cir. 1995), implicitly overruled *Pallas*. However, as an analysis of *Spink* makes clear, that case differs from Plaintiffs' claims here and in *Pallas*.

Spink rejected application of a statutory amendment[2] to a decision made prior to the new act's effective date. This case, however, presents a different issue. Here, Plaintiffs seek relief for decisions made well *after* the effective date of the PDA—Defendants' application of the discriminatory NCS system to calculate Plaintiffs' retirement and other related benefits today. Thus, there is no basis to apply *Spink's* analysis of OBRA to the PDA, or to assume that *Pallas*, which was cited by neither the Supreme Court nor the Ninth Circuit in *Spink*, has been overruled *sub silentio.* Instead, *Spink's* failure to cite or discuss *Pallas* strongly argues that it remains the governing law in this Circuit. *See, e.g., United States v. Sharpe,* 470 U.S. 675, 694 n.6 (1985)(Marshall, J., concurring)("Legal reasoning hardly consists of finding isolated sentences in wholly different contexts and using them to overrule *sub silentio* prior holdings.").

Contrary to Defendants' assertion (D.Opp. 5), the Supreme Court's decision in *Spink* did not reject what Defendants call "the *Pallas/Spink* method of retroactive statutory construction." In *Spink*, the Court, based solely on the language of OBRA, found that the statute was not retroactive and, therefore, rejected the Ninth Circuit's opposite statutory construction. The Supreme Court opinion contains no analysis of—and consequently does not reject—the *Bazemore/Pallas* holding

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[2] *Spink* examined the 1986 amendments to ERISA and the Age Discrimination in Employment Act ("ADEA"), included in the Omnibus Budget Reconciliation Act of 1986 ("OBRA"), Pub.L. 99-509, 100 Stat. 1874, which prohibited age-discrimination in pension plans. The Court's holding that the statute's "temporal scope" precluded relief for pre-Act plan exclusion, *Spink,* 517 U.S. at 896-97 (*citing Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)), has no application here where Plaintiffs are not seeking retroactive relief.

that the post-Act use of discriminatory criteria to determine present benefits is a post-Act violation. Neither *Bazemore* nor *Pallas* is based on a finding of retroactivity.

Spink also differs from the case before this Court because ERISA explicitly *allowed* the exclusion of the plaintiff from the pension plan at the time. *See* ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2) (1982 & Supp. V 1988); ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) (1982 & Supp. V 1988). By contrast, prior to 1979, no federal statute made it *legal* to refuse to grant service credit to women disabled by pregnancy. In fact, in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139-42 (1977), the Supreme Court struck down a company policy depriving women of accumulated seniority after maternity leave. Under *Satty*, PT&T's pre-1979 policies denying NCS to women disabled by pregnancy would have been illegal.[3] Thus, contrary to Defendants' contentions, *Spink* does not overrule *Pallas* and is entirely inapplicable to Plaintiffs' claims here.

2. Vacatur In *Carter v. AT&T* Was Unrelated To The Decisions In *Lockheed v. Spink* And *Redding v. AT&T*

Defendants ask this Court to ignore the persuasive reasoning of *Carter v. AT&T*, 870 F. Supp. 1438 (S.D. Ohio 1994), because it was vacated as a condition of the parties' settlement agreement, while on appeal to the Sixth Circuit. *See* 1996 WL 656571 (S.D. Ohio Sept. 13, 1996). Defendants urge that vacatur, which the Circuit approved,[4] occurred because the district court questioned the continuing validity of its ruling in light of *Lockheed v. Spink* and *Redding v. AT&T Corp., et al.*, No. D.C. 96-WY-807-CB (D.Col. 1996), *aff'd*, 124 F.3d 217 (10th Cir. 1997). (D.Opp. 6-7.) Defendants' counsel provides copies of the District and Circuit Court remand and vacatur orders, but conspicuously omits the transcript of the parties' appearance before the district court on September 12, 1996 to discuss the requested motion to vacate.[5] As that transcript tellingly reveals,

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[3] Defendants argue that under *Gilbert v. General Electric Co*, 429 U.S. 125 (1976), PT&T's pre-PDA pregnancy leave policies were lawful (D.Opp. 9 n.5), ignoring *Satty*. *Gilbert*, however, dealt only with the loss of disability insurance benefits, not the loss of service credit. *Satty* made clear that lost seniority "burdened" women in a manner that violated Title VII. Accordingly, *Gilbert* does not end the analysis of the "legality" of the pre-PDA PT&T policies.

[4] Sixth Circuit procedure required the District Court to first enter an order indicating that it would grant the motion to vacate prior to any remand from the Circuit for that purpose. *First National Bank of Salem, Ohio v. Hirsh*, 535 F.2d 343, 346 (6th Cir. 1976).

[5] That transcript ("*Carter* Tr.") is Exhibit A to the Decl. of Mary Ann Ranz, filed herewith.

after initially rejecting the parties' joint motion to vacate, the court was asked by plaintiff's counsel to reconsider that ruling "so that [his] client can get paid." (*Carter* Tr. 3:4-13.) The Court expressed its view that "it's cruel on the part of AT&T to require that the decision be vacated in order for your client to be paid for reasons that probably have nothing to do with your client." *Id.* at 4:14-18. *See also id.* at 3:15-4:12;[6] 11:16-12:2.[7]

Contrary to Defendants' contention, the District Judge *rejected* AT&T's argument that "the rendering of certain decisions by the Supreme Court and by the District Court in Colorado put a different light on the issues and possibly a light that should be considered a bit more favorable to AT&T." *Id.* at 5:5-10. After asking counsel to explain how *Lockheed v. Spink* "affects what I've done," Judge Spiegel observed that because Ms. Carter was challenging actions taken "in 1989 long after the Pregnancy Discrimination Act, *the OBRA situation is not comparable* in that regard." *Id.* at 8:1-6 (emphasis added). *See generally id.* at 6:1-8:6. Moreover, no substantive discussion of the *Redding* decision occurred whatsoever. Far from questioning the validity of its prior ruling, the Judge continued to express dismay about the fairness of removing his decision from the public record. *Id.* at 12:3-12. Only after he was assured that his decision was already officially published and could continue to be cited for its reasoning, did the Judge agree to enter the vacatur order. *Id.* at 12:20-15:1; 16:5-22.

B. *Bazemore v. Friday* Controls This Case Because The NCS System Incorporates Facially Discriminatory Rules Which Are Applied By Defendants Today

Despite the express contrary holding in *Pallas*, Defendants argue (D.Opp. 8-14) that the NCS system is not facially discriminatory.[8] Defendants first assert that the *Pallas* court could not have found facial discrimination "absent its belief that the PDA is retroactive." *Id.* at 8:12-14. Defendants are wrong—the court's reasoning did not, as Defendants argue, *id.* at 8:13-14, rest on

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[6] The transcript leaves no doubt that AT&T was insisting on vacatur as a condition of fully settling Ms. Carter's claims. *See, e.g., Carter* Tr. 4:19-5:4; 13:25-14:13; 19:3-12.

[7] AT&T's counsel did not answer the court's specific question as to the number of other employees who would be affected by its decision, although defendant was certainly aware at the time of plaintiff Hulteen's EEOC charge filed in 1994. *Id.* at 11:8-13.

[8] Defendants do not dispute that a facially discriminatory system may be challenged at any time. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 (1989). Thus, if the Court finds facial discrimination here, Defendants agree that Plaintiffs' claims in this case are timely.

some implicit, but unstated, "belief" that "lawful pre-PDA conduct was transformed on the PDA's effective date into 'discriminatory' conduct." To the contrary, the court explicitly found that Pacific Bell's use of a benefit formula that incorporated the pre-PDA distinction between pregnancy leave and all other disability leaves was *post*-PDA *conduct* that, on its face, stated a claim under Title VII. *Pallas,* 940 F.2d at 1327. Thus, as explained in part I.A., *supra*, no retroactive application of the PDA is involved.

Defendants next argue that the NCS system is not facially discriminatory because it "makes no distinction whatsoever between males and females." (D.Opp. 8:17-18.) This is also wrong. It is undisputed that, prior to the PDA, the NCS system distinguished between female employees who took pregnancy leaves and employees who took leaves due to other temporary disabilities. JSF ¶ 66-68, 70-71, 73-74, 76-77, 81-82, 85-86. This facial distinction remains in place today even assuming, *arguendo*, that the distinction was not illegal sex discrimination under *Gilbert*. When AT&T amended the rules used in the NCS system to treat post-PDA pregnancy-related disabilities the same as other temporary disabilities, AT&T did not correct the NCS dates of women who were subjected to the pre-PDA disparate policy. JSF ¶ 69, 72, 75, 78, 84, 88. Thus, analysis of the NCS system both pre- and post-PDA reveals that: (1) the pre-PDA system distinguished between employees on the basis of pregnancy; (2) the post-PDA system did not adjust the NCS dates of affected women to correct for this disparate treatment; and, (3) as a consequence, AT&T calculates post-PDA benefits, including the benefits of Plaintiffs, in accordance with a criterion that treats women who took pre-PDA pregnancy leave differently than employees who took pre-PDA leave for other temporary disabilities. Thus, the terms of the NCS system *do* show, on their face, that the system distinguishes between similarly situated employees on the basis of pregnancy.

Since what is before the Court here is a post-PDA system that, as explained above, facially discriminates on the basis of pregnancy, the prior pre-PDA state of the law is irrelevant. Under the PDA, disparate treatment based on pregnancy is sex discrimination "on its face"—*i.e.,* disparate treatment between women and men. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983). This conclusion is not negated by the fact that the relevant NCS provisions do

not speak expressly in terms of males and females.[9]

Defendants also posit this same argument slightly differently by arguing that facial challenges may be made only to policies that "exist" at the time of the challenge, urging that AT&T's 1979 changes to the NCS system meant that the former policy no longer "exists." (D.Opp. 10:2-23.) This argument simply begs the central issue in the case: since Defendants continue to utilize a benefit calculation formula infected by pre-PDA discrimination, they have an "existing" policy that discriminates on the basis of pregnancy. As explained *infra*, under *Bazemore* and *Pallas*, this policy violates Title VII and the PDA *today*.

Contrary to Defendants' assertions (D.Opp. 10-11), both Defendants here and the defendant in *Bazemore* "changed" and "refused to change" their conduct in a parallel manner. In *Bazemore*, after the passage of Title VII, the employer merged two previously segregated work branches, but "refused" to correct all of the prior pay disparities by raising the pay of blacks to the levels earned by whites before the merger. Thus, employees hired before the merger received less post-merger salary due to the racially discriminatory wage differential, *Bazemore v. Friday,* 751 F.2d 662, 672 (4th Cir. 1984), *aff'd in part, vacated in part,* 478 U.S. 385 (1986), but blacks hired after that date were not harmed by the pre-Title VII salary differentials because the employer established facially neutral entry-level salaries in 1965, *id.* at 666. Here, AT&T ended disparate, pregnancy-based leave policies for women hired after the PDA, but "refused" to correct the disparities in credited service between women who took pregnancy leave and employees who took non-pregnancy disability leave before the PDA. As a consequence, women—including Plaintiffs—who took pre-PDA pregnancy leave receive or will receive less retirement benefits after AT&T's "change in conduct" than their otherwise similarly situated co-workers. Thus, here and in *Bazemore*, the employers' refusal to eliminate pre-Act disparities resulting from discriminatory systems (which were arguably legal before the Act) had the same prohibited effect—the receipt of reduced post-Act benefits (salary

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[9] Contrary to Defendants' assertion (D.Opp. 9:2), Plaintiffs (like the court in *Pallas*) do not use the term "facial discrimination" as a "mere label to avoid the statute of limitations," and Defendants' cited cases, *id.* at 9-10, are consequently inapposite.

benefits in *Bazemore*; retirement benefits in this case).[10] As *Pallas* recognized, implementation of a non-discriminatory system going forward did not insulate the employer in *Bazemore* from Title VII liability for the post-Act use of a salary structure which incorporated race-based, pre-Act salary disparities, nor did it insulate Pacific Bell from its continued use of the facially discriminatory NCS system. The same result should follow here.

Contrary to Defendants' contentions (D.Opp. 11-14), neither *United Airlines v. Evans*, 431 U.S. 553 (1977), nor *National Railroad Passenger Corp. v. Morgan*, 122 S.Ct. 2061 (2002), defeats Plaintiffs' claims here. *See* P.Opp. 6-7. In *Evans*, plaintiff failed to file a timely charge after her discriminatory termination, waiting to do so until she was rehired several years later and denied past seniority under an entirely different policy that applied equally to male and female flight attendants. 431 U.S. at 557-58. Unlike the seniority system in *Evans*, AT&T's NCS system *presently* disadvantages only women who took pre-PDA pregnancy leave. Thus, the analysis and outcome in *Evans* did not depend at all upon whether Ms. Evans' termination was or was not illegal when it occurred, and such a fact is neither relevant nor dispositive, as both *Bazemore* and *Pallas* clearly demonstrate. Similarly, Plaintiffs are not asserting a "continuing violation theory" like the one rejected in *Morgan*. *See* P.Opp. 6-7. Instead, their claims are based on a "discrete act" occurring within the appropriate time period—the application of the discriminatory NCS system to calculate their retirement benefits, leaving them with less than similarly situated male co-workers.

C. Because Defendants' NCS System Is Facially Discriminatory, It Is Ineligible For Protection Under §703(h) Of Title VII And Actionable Under The Civil Rights Act Of 1991

As set forth in part I.B., *supra*, Defendants' NCS system incorporates personnel rules that treat pregnant women less favorably than other employees of comparable tenure when they calculate

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[10] Defendants' bank account analogy (D.Opp. 11:13-16) fails. It is not the "inflow" of post-PDA service credits, but the "inflow" of post-PDA retirement benefits which is analogous to the post-Title VII salary "inflow" disparities in *Bazemore*. The fact that Plaintiffs would receive service credit if they took pregnancy leave *after* the PDA has no effect on the legal analysis, just as no legal consequence followed from the fact that the *Bazemore* plaintiffs presumably received the same non-merit-based pay increases *after* Title VII as their white co-workers.

retirement and termination benefits. *See also* P.Mem. 14-17; P.Opp. 9-11.[11] Both *Lorance*, 490 U.S. at 912, and *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 (1977), clearly hold that a system founded on such discriminatory underpinnings cannot be "bona fide."[12] Accordingly, Defendants cannot seek refuge under §703(h) for their continuing application of the NCS system to disadvantage formerly pregnant women.[13]

As discussed *supra*, Defendants' NCS system is facially discriminatory because it incorporates facially discriminatory pregnancy policies, just as the salary structure in *Bazemore*, which failed to "make all the adjustments necessary to remedy all disparities originating with the pre-Act discriminatory pay scales," was facially discriminatory. *Bazemore v. Friday*, 848 F.2d 476, 479 (4th Cir. 1988). Since evidence of discriminatory motive and/or continuing maintenance of a discriminatory system is sufficient to establish the prohibited discriminatory intent under Title VII, Defendants cannot claim that the NCS system, which incorporates the discriminatory pregnancy rules, is a "bona fide" seniority system protected by §703(h). *See, e.g., Hazelwood School Dist. v. United States*, 433 U.S. 299, 309-10, n. 15 (1977)(evidence that employer "engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, *particularly where relevant aspects of the decision-making process had undergone little change*")(emphasis added); *Pullman-Standard v. Swint*, 456 U.S. 273, 289(1982)(factual findings necessary to establish discriminatory intent include "actual intent to discriminate [on prohibited grounds] on the part of those who negotiated *or maintained the system*," as well as "discriminatory impact"). *See also Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002), *cert. denied*, _ S.Ct._, 2003 WL 95557 (U.S. Jan. 13, 2003); P.Mem. 16-17; P.Opp. 9-10.

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[11] Defendants concede that it is important to evaluate the validity of the NCS system by reference to "separate pregnancy leave policies," arguing that the system is non-discriminatory because post-1979 leave policies do not treat pregnancy differently from other temporary disability leave. (D.Opp. 14-15.) However, Defendants are still applying the pre-1979 rules to employees who took leaves at that time but are retiring today.

[12] In *Teamsters*, for example, the parties conceded that the seniority system at issue "did not have its genesis in racial discrimination and that it was negotiated *and has been maintained* free of any discriminatory purpose." *Id.* at 355-56 (emphasis added). There, unlike Defendants' NCS system, the seniority scheme applied equally to all employees.

[13] Plaintiffs contend that the PDA itself bars Defendants from asserting a §703(h) defense in this case. *See* P.Opp. 8-9.

Defendants' argument is also foreclosed by the 1991 Civil Rights Act, 42 U.S.C. §2000e-5(e)(2), which permits challenges to seniority systems adopted for a discriminatory purpose "*whether or not that discriminatory purpose is apparent on the face of the seniority provision*" whenever the application of the system causes an injury (emphasis added). Here, it is undisputed that Plaintiffs were injured at time they left (or will leave) AT&T's employment. JSF ¶ 69, 72, 75, 78, 84, 88. Because the Civil Rights Act specifically authorizes a person aggrieved by an intentionally discriminatory seniority system to bring suit when injured by the application of that system to her, Plaintiffs claims are timely. *See* P.Mem. 15-16.

II. PLAINTIFFS' ENTITLEMENT TO ERISA RELIEF IS MANDATED BY APPLICABLE LAW AND BY CLEAR AND UNAMBIGUOUS PLAN TERMS

A. Defendants Breached Their Fiduciary Duties By Not Acting Solely In The Interest Of Plan Participants And Beneficiaries

Even though ERISA does not expressly prohibit sex discrimination, this Circuit's unanimous ruling in *Pallas* (on the ERISA claim) held that plan fiduciaries may not discriminate among participants in administering the plan because to do so would breach ERISA's fiduciary requirement in § 404(a)(1) to operate the plan solely in the interest of participants and beneficiaries. *Pallas*, 940 F.2d at 1327. *See* P.Mem. 18-21; Restatement (Second) of Trusts, § 183 ("When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them"). In *Pallas*, the Court held that use of NCS to calculate service credit under the pension plan breached this obligation. 940 F.2d at 1327. This holding neither contravenes any Supreme Court or Ninth Circuit cases cited by Defendants (D.Mem.16-17; D.Opp. 16), nor is it diminished by other cited authorities.

Defendants' argument, *id.*, is premised on inapposite cases involving discrimination in the provision of employee benefits—*i.e.*, plan design—rather than cases involving discrimination in pension plan administration. *Shaw v. Delta Airlines,* 463 U.S. 85, 97 (1983), is a case about plan design—not plan administration. It addressed whether a state law that prohibited employers from *structuring* their plans in a discriminatory manner, not then prohibited by Title VII, was preempted by ERISA. *See* P.Opp. 14-15. By contrast, Plaintiffs contend that, once plan provisions are adopted or amended, plan fiduciaries cannot discriminate in their *administration* of the plan. Neither *Shaw* nor any other ERISA case, including those cited by Defendants, permits discrimination by

fiduciaries in the *administration* of pension plans.[14]

The question not presented or answered in *Shaw* was resolved in *Pallas* and *Carter*, holding that pregnancy discrimination in the current administration of pension plans and amendments is a breach of fiduciary duty. *Pallas*, 940 F.2d at 1327; *Carter*, 870 F.Supp. at 1448.[15] Thus, Defendants' bald assertion that Plaintiffs "challenge...the plan design that provides benefits to certain participants (*i.e.*, those who did not take pre-PDA pregnancy leaves) and not others (those who did)" (D.Opp. 18) is factually and legally wrong, as *Pallas* clearly demonstrates. 940 F.2d at 1327 ("[c]alculation of the service term for purposes of eligibility in the program is an act subject to review for breach of fiduciary duty"). Just as in *Pallas*, Defendants' calculation of TOE and denial of corresponding benefits are subject to review for breach of fiduciary duty under ERISA. As the Tenth Circuit acknowledged in *Redding,* a plaintiff may establish an ERISA violation if she demonstrates that, for example, the plan's fiduciaries have "imposed a standard not required by the plan's provisions." *See* P.Opp. 17. This litigation presents such a case.

The DOL Opinion Letter on which Plaintiffs rely (P.Mem. 19-20) continues to provide persuasive reasoning for Plaintiffs' case. While Defendants understate its scope (D.Opp. 17-18), the DOL Opinion deals with the issue presented here: whether an ERISA fiduciary can be held liable under ERISA for conduct that violates another applicable federal law. It sets forth specific examples in the context of the Medicare Secondary Payer ("MSP") statute:

> For example, if a fiduciary fails to acknowledge a plan's responsibility as primary payer under the MSP statute, where such fiduciary has no reasonable basis to believe that the plan should not be the primary payer, a violation of the prudence requirement of ERISA may

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[14] Even the Seventh Circuit in *Ameritech Benefit Plan Comm. v. CWA,* 220 F.3d 814, 825 (7th Cir. 2000), *cert. denied,* 531 U.S. 1127 (2001)—a case upon which Defendants rely (D.Opp. 16)—acknowledged that "the *Shaw* Court was not presented with and did not answer the question of whether discrimination against certain plan participants could ever reach the point of breaching fiduciary duties."

[15] The Colorado District Court's contrary 1996 opinion in *Redding,* No. D.C. 96-WY-807-CB, at 3, is neither controlling nor persuasive, as it mentions neither *Pallas* nor *Carter* and merely asserts that "ERISA does not provide a cause of action for civil rights violations," citing the same *dictum* in *Shaw* quoted *supra* and other cases that do not detract from *Pallas*. This *dictum* was not addressed by the Tenth Circuit. *Bucyrus-Erie Co. v. Dept. of Industry*, 599 F.2d 205, 206-207 (7th Cir. 1979), cited by the *Redding* district court and Defendants (D.Mem. 17), also involved plan design rather than plan administration when addressing ERISA preemption of a state fair employment law.

> arise. On the other hand, if a fiduciary unnecessarily causes a plan to act as primary payer, where the plan clearly should not be primary payer, such fiduciary would not be acting in a prudent manner and solely in the interests of the plan's participants and beneficiaries.

DOL Opinion Letter, 93-23A (1993 WL 349626 (ERISA)). Similarly, if this Court determines here that the Plan fiduciaries' failure to award additional service credit to Plaintiffs for their pre-PDA pregnancy leaves violates Title VII, such fiduciaries would not be acting solely in the interest of Plan participants and beneficiaries, and thus would violate ERISA's fiduciary provisions, ERISA § 404(a)(1). Since *Shaw* does not address this issue, the DOL Opinion is not in conflict with *Shaw*. Instead, the DOL Opinion's persuasive reasoning supports Plaintiffs' case and is entitled to respect. *See Morgan*, 122 S.Ct. at 2071.

The Plans' fiduciaries interpreted, administered, and applied the terms of the Plans when they excluded periods of absences due to pre-1979 pregnancy leaves in calculating TOE, which the Plans state is to be used for service credit and pension benefit calculations. This Court may review such acts under ERISA for beach of fiduciary duty. Defendants have cited no case holding otherwise.[16]

B. Defendants Breached Their Fiduciary Duties By Not Following The Plans' Terms

Defendants' refusal to award Plaintiffs additional service credit contravenes the terms of the applicable Plans and is a distinct breach of fiduciary duty under ERISA. No Plan provisions specifically require the exclusion of pre-1979 pregnancy leaves from service credit determinations. To the contrary, the Plans *mandate* that Defendants include Plaintiffs' pre-1979 pregnancy leaves in determining their TOE. *See* P.Mem. 21-23. Defendants have cited no Plan provision authorizing Defendants to interpret the Plans (and determine an employee's TOE) the way that Defendants have here. In fact, it is *Defendant*s, not Plaintiffs, who are blatantly misrepresenting the Plans' terms.

The parties agree that Plaintiffs' TOE[17] includes the period of time they were employed by

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[16] Defendants' cases distinguishing between fiduciary duties and settlor/plan sponsor functions such as plan design (D.Opp. 18) fail to provide any support for Defendants' erroneous placement of Plaintiffs' challenge in the category of plan design rather than the category of discriminatory plan administration.

[17] TOE is defined in PP § 2.35, in relevant part as follows: "Except as expressly limited or stated elsewhere in the Plan, including the provisions of Article 8, a period of continuous employment of an Employee in the service of one or more Participating Companies or Interchange Companies (...with respect to any person who was an employee of a Former Affiliate on December

PT&T before 1984. The parties disagree on whether certain provisions of Article 7—§§ 7.5 and 7.4—when read together, require Defendants to include Plaintiffs' time on pregnancy-related leaves of absence before 1984 while employed by PT&T when computing their TOE.

PP § 7.4 provides in relevant part: "Except to the extent provided in Article 8, the following rules in Section 7.4(a)-(e) shall apply to all Employees in all cases. (a)(i)...This Section 7.4(a) shall apply for determination of 'Term of Employment' in all cases under the Plan..." Section 7.4(a)(i) provides in relevant part that "any break in the continuity of or absence from the service shall be considered as a leave of absence upon completion by an Employee, who had previously completed 6 months of continuous service, of 5 years of continuous service after termination of the absence." Since under § 7.5 a "[l]eave of absence shall not constitute a break in the continuity of service," and since Plaintiffs had completed more than 5 years of continuous service after the end of the absence due to pregnancy, under the explicit terms of the Plans, the pregnancy leaves of Plaintiffs do not constitute a break in the continuity of service. As a result, TOE—*i.e.*, the "period of continuous employment" (§ 2.35)—of each Plaintiff must include all of the time that she was on leave due to pregnancy.

Defendants improperly accuse Plaintiffs of "conveniently omit[ting]" the remainder of §7.5. The remainder of § 7.5, by its very terms, does not apply to pre-1984 employment with a Former Affiliate[18] such as PT&T.[19] The balance of § 7.5 is drafted in the present tense and clearly applies to the present. It describes the current rules for obtaining a leave of absence from a "Participating Company" (*i.e.*, AT&T) or a "Company"[20] (*i.e.*, AT&T) and how absences today will or will not be

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31, 1983 and became an Employee under the Plan on January 1, 1984), or in the service of a Former Affiliate before 1984 provided employment with a Participating Company commenced after the completion of such service but before January 1, 1984." Plan documents (PP § 8.1) require that TOE "relating to periods of employment prior to January 1, 1984,.shall be recognized under the Plan in accordance with the provisions of this Article 8 and the provisions of Article 7."

[18] "Former Affiliate" is defined in PP § 2.13 as "[a]ny...of the following companies:...Pacific Telesis Group, Inc., any subsidiary of any such company (at any time both before and after January 1, 1984)."

[19] Sections 7.4(a)(i) and 7.5 of the PP (AT&T/HULT013542 and 013546)—included within JA, Tab 32—are also attached as Appendix 1 to this Memorandum for the Court's convenience.

[20] "Participating Company" is defined in PP § 2.24 as "AT&T or any AT&T subsidiary which shall have determined, with the concurrence of the Committee to participate in the Plan. No

credited. There is *no* reference in the remainder of § 7.5 as to the effect of a pre-1984 absence taken from a Former Affiliate (*i.e.*, PT&T) in computing TOE. Section 7.5 makes no reference to the discriminatory NCS system. The language in § 7.5 relied on by Defendants—"the rules and regulations of the Company" (*i.e.*, AT&T)—simply does not apply to Plaintiffs' claim for additional service credit relating to pre-1984 periods of employment with a Former Affiliate (*i.e.*, PT&T). Since the Plan so carefully differentiates among these entities, any reasonable interpretation of the Plan must similarly recognize these distinctions. Thus, while Defendants assert that the "rules and regulations of the Company" referenced in PP § 7.5 are those of PT&T (D.Opp. 23), a Former Affiliate, before 1979, they are simply wrong. Section 7.5 of the PP does *not* require that TOE be calculated using the discriminatory NCS system which excludes pre-1979 pregnancy-related disability absences.

Defendants' argument is likewise not supported by any language in Article 7 or Article 8. Nothing in these articles requires every sentence of every section to be applicable to every other sentence of every other section. Nor is this required by common sense. While Plan sections should generally be read in their entirety in conjunction with other related sections, the rules in one section cannot be made subject to the *inapplicable* portions of other sections. Defendants, however, seek exactly that result here by arguing that rules concerning breaks in service and TOE set forth in § 7.4(a)(i) should be made subject to a portion of § 7.5 that does not cover Plaintiffs' pre-1984 employment. In sum, *no* Plan terms require Defendants to exclude periods of absences due to pre-1979 pregnancy-related disability in determining Plaintiffs' TOE. Likewise, nothing in the POR or the Divestiture Interchange Agreement imposes such a requirement, and Defendants have cited no provision that requires such an exclusion. In addition, as Plaintiffs have demonstrated (P.Opp. 12-13), neither the MFJ nor DEFRA requires such an exclusion.

Neither § 9.1(b)(i) nor any other section of the PP provides any support for Defendants'

Former Affiliate...shall be considered a Participating Company hereunder. Appendix A contains a list of Participating Companies as of October 1, 1996." "Company" and "AT&T" are both defined in § 2.2 as "AT&T Corp. (formerly known as American Telephone and Telegraph Company), a New York Corporation, or its successors." As a result, PT&T (for whom Plaintiffs worked before 1984) is not a "Company" or a "Participating Company" as defined in the Plan; PT&T is, however, a "Former Affiliate."

claim (D.Opp. 22) that "when plaintiffs became employees of AT&T, by the Plan's terms their TOE while employed by a predecessor was automatically included after their immediate transfer to another Interchange Company." Section 9.1(b)(i) simply does not address the method by which TOE is to be calculated other than to indicate "as hereinbefore defined."[21] The parties agree that TOE includes Plaintiffs' employment both with a Participating Company (*i.e.*, AT&T) and an Interchange Company (*i.e.*, PT&T). Their dispute involves the calculation of TOE for the period of employment before 1984. Nothing in § 9.1(b)(i) affects that calculation.

Finally, PP § 9.5 does not support Defendants' claims. This section applies only to employees who are covered by the provisions of the Mandatory Portability Agreement, which, according to PP § 2.20, is that "agreement, *effective January 1, 1985*, between and among AT&T, Former Affiliates and certain other companies...in accordance with section 559 of the Tax Reform Act of 1984" (emphasis added). The Tax Reform Act of 1984 is a part of DEFRA. DEFRA § 559 covers the employees who change Bell System employment on or after January 1, 1985. (JA, Tab 26.) All of the individually named plaintiffs were hired by AT&T on or before January 1, 1984.

In addition, even if the Mandatory Portability Agreement and PP § 9.5 did apply here, § 9.5 makes clear that the provisions of § 7.4 also apply. As a result, the Plan provisions identified above—which required Defendants to include *all* of the time that the Plaintiffs were on leave due to pregnancy in calculating TOE—would still be applicable. Furthermore, § 9.5 merely requires that an employee's TOE include service with an Interchange Company. There is no dispute among the parties that TOE should include such service; the issue is the method by which such service is to be calculated. Section 9.5 is silent on that issue, stating simply that the "inclusion of such service in...[TOE]...under this Plan shall have no effect as to when such service is otherwise recognized in accordance with the provisions of Section 7.4, Article 8, or this Article 9."[22] Analysis of the Plans' terms thus demonstrates that Defendants have breached their fiduciary duty by not adhering to these

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[21] Section 9.1(b)(i) provides, in relevant part that "an Employee's Term of Employment, as hereinabove defined, shall include employment not only in Participating Companies, but also in any Interchange Company provided such Employee is transferred to or employed or reemployed by a Participating Company during an applicable interchange period."

[22] The MPP (JA, Tab 30) contains similar provisions to those described in the text for the PP (JA, Tab 32).

provisions.[23]

C. Defendants Did Not Provide Benefits and Service Credit Required By The Plans' Terms

As Plaintiffs have set forth in prior pleadings (P.Mem. 23; P.Opp. 20-21), § 502(a)(1)(B) of ERISA authorizes Plaintiffs to recover benefits due under the Plans' terms. As explained *supra*, the Plans do not authorize Defendants to interpret them the way they did in this case. Accordingly, this Court should order Defendants to interpret and apply the terms of the Plans to enforce and clarify the rights and to provide the additional service credit and benefits Plaintiffs seek.

CONCLUSION

Plaintiffs' Motion for Summary Judgment should be granted and Defendants' Cross-Motion for Summary Judgment should be denied.

Dated: January 24, 2003

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[23] Starting in 1989, collective bargaining agreements ("CBAs") between certain business units and divisions of AT&T and CWA contain the following definition of "Net Credited Service": "Net credited service shall mean 'term of employment' as set forth in the pension plan applicable to employees covered by this Agreement." *See* Parties' Supplemental Joint Appendix filed herewith. This definition of NCS within the CBA has no impact on the definition of TOE set forth in the PP or on the interpretation and application of TOE by Plan fiduciaries. While the CBA apparently borrows the definition of TOE from the PP, Plan documents do not reference either the CBAs or NCS when defining TOE. Under ERISA and the explicit terms of the PP, Plan fiduciaries have the responsibility to interpret and apply the PP, including all questions relating to TOE, based solely upon the terms of the PP regardless of any CBA definition. PP § 7.3; ERISA § 404(a)(1)(D).