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United States District Court, N.D. Illinois.

AMERITECH BENEFIT PLAN COMMITTEE, et al., Plaintiffs,
v.
Annette FOSTER–HALL, et al., Defendants
and
Bernadette BERNABEI, Plaintiff,
v.
AMERITECH CORPORATION, Ameritech Management Pension Plan, and Ameritech Employees' Benefit Committee, Defendants.

No. 97 C 1441, 97 C 2209. | July 21, 1998.

Opinion

MEMORANDUM OPINION AND ORDER

CONLON, J.

***1** Ameritech Benefit Plan Committee, Ameritech Pension Plan, Ameritech Management Pension Plan and Ameritech Corporation and its subsidiaries (collectively "Ameritech") sue 36 present and former employees of Ameritech Corporation, as representatives of approximately 7,000 similarly-situated class members (collectively "the class defendants"); the Communications Workers of America, AFL–CIO ("CWA"); and the International Brotherhood of Electrical Workers, Local Nos. 165, 188, 336, 383, and 399 ("IBEW"). Ameritech seeks a declaratory judgment that its treatment of service credit for pregnancy or maternity-related leaves taken prior to the effective date of the Pregnancy Discrimination Act (April 29, 1979) does not violate ERISA, Title VII, the Equal Pay Act, or any other federal, state, or local law (Count I). Ameritech also seeks a declaratory judgment that its treatment of service credit does not violate the terms of collective bargaining agreements between Ameritech Corporation and the unions (Count II).

The CWA, the class defendants, and intervening defendant employees (collectively "the employees") filed counterclaims alleging that Ameritech's denial of additional service credit for pre–1979 pregnancy leaves in connection with pension plan enhancement programs offered in 1991 through 1995 violates ERISA and constitutes intentional discrimination based on gender and/or pregnancy in violation of Title VII, the Equal Pay Act and various states' discrimination laws. In a consolidated action (97 C 2209), Bernadette Bernabei sues Ameritech Corporation, Ameritech Management Pension Plan and Ameritech Employees' Benefit Committee for violations of ERISA, Title VII, the Equal Pay Act, and Ohio discrimination law.[1] The parties have filed cross-motions for summary judgment pursuant to Fed.R.Civ.P. 56.

BACKGROUND

The following facts are undisputed. Ameritech Benefit Plan Committee ("ABPC") is a named fiduciary and administrator of Ameritech Pension Plan ("APP") and Ameritech Management Pension Plan ("AMPP") (collectively "the pension plans"). Agreed Joint Stipulations of Fact ("Stip.") ¶¶ 1, 2. The pension plans were established and are maintained for the benefit of the participating employees of Ameritech Corporation, its direct and indirect subsidiaries, and Ameritech's predecessors. *Id.* ¶ 31. The benefits provided to eligible employees under the pension plans are determined in part by each employee's term of employment. *Id.* ¶ 34.

April 29, 1979 was the effective date of the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e-(k). Prior to April 29, 1979, Ameritech's predecessors typically granted their female employees a maximum of 30 days service credit for pregnancy

or maternity-related leaves of absence. *Id.* ¶ 36. In contrast, Ameritech's predecessors typically granted full service credit for the entire period of other disability-related leaves of absence. *Id.* ¶ 37. Net credited service dates are part of a record-keeping system used by Ameritech and its predecessors to track terms of employment. Rather than aggregate separate periods of service when service is interrupted, employees' hire dates are adjusted to "squeeze out" those periods of absence that are not credited as service. Since the PDA became effective, Ameritech and its predecessors have provided service credit for pregnancy and maternity-related leaves to the same extent as they provide service credit for periods of disability attributable to other conditions. *Id.* ¶ 39. However, Ameritech has not provided additional retroactive service credit for pregnancy or maternity-related leaves taken prior to April 29, 1979. Thus, the employees' net credited service dates continue to reflect the fact they received a maximum of 30 days service credit for pregnancy leaves taken before April 29, 1979.

***2** In 1991, Ameritech amended the AMPP to implement a program known as the 1991 Special Enhancement ("1991 Enhancement"). The 1991 Enhancement provided an additional three years of age and service under the AMPP for certain benefit purposes to eligible management employees who retired between July 31, 1991 and December 30, 1991. *Id.* ¶ 40. In 1992, Ameritech amended the AMPP to implement a program called the 1992–93 Workforce Resizing Program ("WRP"). The WRP provided enhanced pension benefits for eligible management employees who retired between July 31, 1992 and March 31, 1993. *Id* . ¶ 41.

On March 7, 1994, Ameritech's board of directors authorized an amendment to the APP known as the Ameritech Pension Plan Enhancement Program ("APPEP"). *Id.* ¶ 42. The APPEP provided that eligible non-management employees who retired between February 22, 1994 and September 30, 1995 would have three years added to their terms of employment and three years added to their actual ages for purposes of determining retirement eligibility and calculating the amount of their pension benefits. *Id.* In April 1994, Ameritech announced it would offer the Supplemental Income Protection Program ("SIPP") to certain non-management employees. Employees eligible for SIPP could receive additional payments upon leaving Ameritech, in addition to benefits provided by the APPEP. *Id.* ¶ 45. Payments under SIPP were calculated in part based upon an employee's term of employment. *Id.*

The APPEP, the WRP and the 1991 Enhancement did not change the requirements for retirement eligibility *or* the method of calculating an employee's term of employment. That is, the employees' terms of employment continue to reflect the fact they received a maximum of 30 days service credit for pregnancy leaves taken before April 29, 1979. As a result, even if employees elected to retire under the APPEP, the WRP or the 1991 Enhancement they would have remained ineligible for immediate retirement benefits—where they would have otherwise been immediately eligible for retirement benefits under these programs had they received full service credit for pregnancy leaves taken before April 29, 1979.

Beginning in 1992, employees filed administrative claims under the pension plans seeking additional service credit for pre–1979 pregnancy leaves. These claims were denied and the employees appealed to the Ameritech Benefit Plan Committee. The ABPC determined the claims were properly denied, noting that the pension plans did not contain provisions permitting additional service credit beyond the service credit to which employees were entitled under predecessor plan provisions and company leave policies in effect when the leaves were granted. In 1994, a number of employees filed charges with the Equal Employment Opportunity Commission ("EEOC"), alleging that Ameritech's treatment of service credit for pregnancy leaves taken prior to April 29, 1979 violated Title VII. In May 1997, the EEOC issued right-to-sue notices; this suit followed.

***3** On September 3, 1997, this court certified the following defendant class:

> All former and present female employees of Ameritech Corporation and the other parties identified in Paragraph 8 of Plaintiffs' Complaint ("Ameritech") with respect to whom the Ameritech Pension Plan or the Ameritech Management Pension Plan (collectively the "Plans") recognizes service with American Telephone & Telegraph Company, its pre-January 1, 1984 subsidiaries and the allied companies of The Southern New England Telephone Company and Cincinnati Bell Inc. (the "Bell System Companies"), and who took a pregnancy or maternity-related leave from a Bell System Company prior to April 29, 1979, and who were or are participants in a Plan or Plans.

Agreed Mot. for Class Cert. at 2; *See* Order, No. 97 C 1441 (N.D.Ill. Sept. 3, 1997).

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

A movant is entitled to summary judgment under Rule 56 when the moving papers and affidavits show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Unterreiner v. Volkswagen of America, Inc.,* 8 F.3d 1206, 1209 (7th Cir.1993). Once a moving party has met its burden, the non-moving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Becker v. Tenenbaum–Hill Assoc., Inc.,* 914 F.2d 107, 110 (7th Cir.1990). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *Fisher v. Transco Services–Milwaukee, Inc.,* 979 F.2d 1239, 1242 (7th Cir.1992). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Stewart v. McGinnis,* 5 F.3d 1031, 1033 (7th Cir.1993).

II. TITLE VII

Title VII prohibits discrimination "against any individual with respect to [her] compensation, terms and conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-(2)(a). In 1978 Congress enacted the Pregnancy Discrimination Act ("PDA"), which amended Title VII by clarifying that discrimination based on pregnancy constituted discrimination based on sex. The PDA provides as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected....

42 U.S.C. § 2000e-(k).

The parties do not dispute that because of the pre–1979 leave policies enforced by Ameritech's predecessors, women who took pregnancy leaves before April 29, 1979 currently have less credited service than otherwise similarly situated employees who took leaves of absence for other disabilities during that same period. Nor do the parties dispute that whenever Ameritech bases current employment decisions (for example, eligibility for retirement) on employees' net credited service dates, women who took pregnancy leaves before April 29, 1979 are disadvantaged when compared to employees who took leaves of absence for other disabilities. Ameritech characterizes the harm resulting from its reliance on net credited service dates as the *effect* of discrete acts taken before 1979: its predecessors' refusal to grant more than 30 days service credit for pregnancy and maternity leaves and the corresponding adjustments to employees' net credited service dates upon their return to work. The employees characterize the harm resulting from Ameritech's current reliance on net credited service dates as a fresh act of discrimination; in other words, each time Ameritech bases employment decisions on net credited service dates—without re-calculating net credited service to remedy the effects of its predecessors' pre–1979 leave policies—it makes a fresh decision to exclude pre–1979 pregnancy leave and affirmatively adopts a facially discriminatory policy. As a result of their different characterizations, the parties dispute whether the employees' Title VII counterclaims are timely.

***4** Title VII requires employees to file charges of discrimination "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e–5(e)(1). The employees argue their Title VII claims are timely based on three theories: (1) Ameritech's method of calculating net credited service is facially discriminatory and may be challenged at any time; (2) Ameritech's method of calculating net credited service may be challenged at any time because it was adopted for discriminatory purposes; and (3) Ameritech's reliance on net credited service constitutes a "continuing violation" of Title VII. These theories are discussed in turn.

A. Facial Discrimination

The employees argue Ameritech's method of calculating net credited service (*i.e.,* relying on net credited service dates without re-calculating pre–1979 net credited service based on post–1979 law) is facially discriminatory and may be challenged at any time. In the employees' view, the method of calculating net credited service employed by Ameritech's predecessors was a facially discriminatory *policy* that Ameritech *continues to apply* through its refusal to adjust net credited service dates, much like *Bazemore v. Friday,* 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), where a facially discriminatory salary structure was perpetuated after enactment of Title VII.

Bazemore warrants close attention. Prior to passage of Title VII, the employer (the North Carolina Agricultural Extension Service) maintained two separate branches of personnel: a "Negro branch" and a "White branch." *Id.* at 390. Although the employer merged the two branches in 1965 in compliance with Title VII, the employer did not eliminate the pre-merger salary disparities that existed between the two branches. *Id.* The Court of Appeals held the employer "was under no obligation to eliminate any salary disparity between blacks and whites that had its origin prior to 1972 when Title VII became applicable to public employers." *Id.* at 394. The Supreme Court rejected this conclusion, reasoning as follows:

> ... that the Extension Service discriminated with respect to salaries prior to the time it was covered by Title VII does not excuse perpetuating that discrimination after the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute.
>
> ...
>
> Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII. The Court of Appeals plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated.

***5** *Bazemore,* 478 U.S. at 395—96 (Brennan, J.). The employees argue net credited service dates that reflect pre-PDA pregnancy leave policies are analogous to the paychecks in *Bazemore* that were based on discriminatory salary policies established before Title VII.

Ameritech insists it makes decisions based on an employee's currently accrued service credit, regardless of gender. Ameritech points out its seniority system, on its face, credits all employees with whatever service credit they earned under prior plans and policies before Ameritech's pension plans came into existence in 1984; it does not "re-calculate" pre–1979 service credits, freshly excluding time spent on pregnancy leave each time it makes a decision. Ameritech concedes that its reliance on net credited service dates may perpetuate the *effects* of its predecessors' pre–1979 policies, but maintains that its current system is facially neutral. *See United Air Lines, Inc. v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

The court is persuaded that Ameritech's reliance on net credited service dates is not facially discriminatory, and that the employees' reliance on *Bazemore* is misplaced. In *Bazemore,* there was no facially neutral policy that explained why "each week's paycheck" delivered "less to a black than to a similarly situated white." *Bazemore,* 478 U.S. at 396. The original salary disparity in *Bazemore* was the result of a facially discriminatory salary structure adopted before Title VII was made applicable to public employers—a policy that explicitly paid black employees less salary *based on their race.* After Title VII became applicable, the salary disparity remained. Critically, the salary disparity remained not because of a facially neutral policy that gave effect to the prior facially discriminatory policy, *but because the facially discriminatory policy was still the proffered justification for "each week's paycheck."* The policy at issue in *Bazemore* was not facially discriminatory because it *resulted* in salary disparities along racial lines, or because salary disparities were allowed to *remain;* the policy was facially discriminatory because by its own terms it *dictated* salary disparities along racial lines. That is what it means for a policy to be "facially discriminatory." At bottom, *Bazemore* merely stands for the proposition that an employer does not have a license to continue enforcing a facially discriminatory policy merely because that policy was adopted before a change in the law made the policy illegal. Despite its broad language, *Bazemore* does not stand for the proposition that a facially neutral policy becomes facially discriminatory if the policy perpetuates discriminatory effects.

Here, Ameritech did not rely on a facially discriminatory policy to determine eligibility for retirement benefits. Ameritech determined eligibility for retirement benefits based (in part) on employees' net credited service dates, regardless of the employee's gender, and whether or not the employee had taken pregnancy leave. Ameritech concedes that its reliance on net credited service dates may disadvantage employees who took pre-PDA pregnancy or maternity-related leaves. But as Ameritech argues, the harm suffered by the employees does not result from Ameritech's current and facially neutral system for tracking years of service. The harm suffered by the employees is an *effect* of the pre-PDA policies enforced by Ameritech's predecessors. The fact Ameritech has not remedied the effects of those pre-PDA policies does not render their system for tracking years of service facially discriminatory. *Cf. International Bhd. of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). The court notes a different conclusion was reached by a divided panel of the 9 th Circuit in *Pallas v. Pacific Bell,* 940 F.2d 1324 (9 th Cir.1991) (relying on *Bazemore*). To the extent *Pallas* concludes that reliance on net credited service dates

without re-calculating pre–1979 net credited service based on post–1979 law is a facially discriminatory policy, this court finds *Pallas* unpersuasive and respectfully declines to follow it.

B. Discriminatory Purpose

***6** Title VII provides in pertinent part that:

> ... an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose ... (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted ... or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. § 2000e–5(e)(2). The employees argue their claims are timely because Ameritech's current system for tracking years of service was adopted with an *intent* to discriminate. The employees argue that when Ameritech came into existence in 1984 and decided to base employment decisions on net credited service dates, Ameritech made the concomitant decision to adopt its predecessors' policies with respect to pre–1979 pregnancy leaves, and Ameritech affirmatively re-adopts those policies each time it relies on net credited service dates to determine employees' eligibility for benefits.

As an initial matter, the court does not accept the employees' assertion that Ameritech "adopted" its predecessors pre–1979 pregnancy leave policies. To be sure, Ameritech adopted net credited service dates that *reflect the effects* of its predecessors' pre–1979 pregnancy leave policies. But that is not quite the same as adopting the pre–1979 pregnancy leave policies themselves. For the reasons discussed in the previous section, this distinction is a meaningful one.

The important question is whether there is any basis to conclude Ameritech adopted the net credited service dates for a discriminatory purpose. As evidence of discriminatory purpose, the employees point to Ameritech's "constructive knowledge" of the passage of the Pregnancy Discrimination Act and the decisions in *Pallas v. Pacific Bell,* 940 F.2d 1324 (9th Cir.1991) and *Carter v. AT & T,* 870 F.Supp. 1438 (S.D.Ohio 1994) (following *Pallas; vacated by* 1996 WL 656571 (S.D.Ohio Sept.13, 1996), per settlement agreement). The Pregnancy Discrimination Act does not speak to the specific issues presented in this lawsuit; consequently, knowledge of the PDA is not evidence that Ameritech chose to rely on net credited service dates for the purpose of discriminating against women who took pregnancy leaves before 1979. Nor are the issues presented by this lawsuit so straightforward that Ameritech was bound to accept *Pallas* (a 2–1 decision of the Ninth Circuit) or *Carter* (a vacated memorandum opinion) as the definitive statement on the legality of net credited service dates that reflect pre-PDA policies. The fact Ameritech continued to rely on net credited service dates after *Pallas* and *Carter* were decided is simply not evidence that Ameritech's decision was based on discriminatory animus. True, Ameritech has been made aware that its reliance on net credited service dates perpetuates the effects of its predecessors' pre-PDA policies, and based on legal advice Ameritech has declined to remedy those effects. But Ameritech's refusal to grant retroactive service credit does not constitute evidence that its motivation in relying on net credited service dates is discriminatory. Accordingly, there is no basis for finding the employees' claims timely under 42 U.S.C. § 2000e–5(e)(2).

C. Continuing Violation

***7** The employees argue their claims are timely because Ameritech's reliance on net credited service dates to determine eligibility for recent pension enhancements is a "continuing violation" of Title VII. "A continuing violation is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period." *Dasgupta v. University of Wisconsin Board of Regents,* 121 F.3d 1138, 1139 (7th Cir.1997).

In *Bazemore,* the plaintiffs alleged that during the limitations period they received a lower salary because of their race. As already discussed, *Bazemore* stands for the proposition that an employer does not have a license to commit acts of discrimination merely because those acts were planned or foretold outside the limitations period. In *Bazemore,* "[t]he fact that [plaintiffs' salaries] had been determined before the limitations period meant only that the violation of their rights was predictable ." *Dasgupta,* 121 F.3d 1138, 1140. The court is persuaded this is not a case like *Bazemore,* where the illegal act is repeated during the limitations period. Rather, Ameritech has merely refused to rectify the *effects* of its predecessors' pre–1979 policies.

In *United Air Lines, Inc. v. Evans,* the Supreme Court addressed the continuing violation doctrine in the context of a facially

neutral seniority system that perpetuated the effects of discriminatory actions taken outside the limitations period. 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571. Evans was a female flight attendant who was forced to resign in 1968 pursuant to United's "no marriage" policy for female flight attendants. *Id.* at 554. Evans did not challenge her forced resignation. In 1971, the Seventh Circuit found that United's policy violated Title VII. *See Sprogis v. United Air Lines, Inc.,* 444 F.2d 1194 (7 th Cir.1971). When Evans was rehired in 1972, she received no seniority credit for her prior employment, in accordance with United's policy regarding former employees who had long breaks in service. *Evans,* 431 U.S. at 555. Evans claimed that United's failure to grant seniority credit for her earlier period of employment violated Title VII because United's seniority policy perpetuated the consequences of its past discrimination. *Id* . at 557. The Court disagreed, stating as follows:

> [Evans] is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after [Evans] failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.

Id. at 558; *see also Delaware State College v. Ricks,* 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980).

***8** The Seventh Circuit recently addressed the distinction between actionable "continuing violations" and non-actionable effects of time-barred discrimination. *See Dasgupta v. University of Wisconsin Board of Regents,* 121 F.3d 1138 (7 th Cir.1997). Dasgupta claimed that as a result of national origin discrimination early in his career, his present salary was much lower than the salaries earned by his peers, even though they had all received similar raises in recent years. The court held that Dasgupta's claim was time-barred:

> There were no new violations during the limitations period, but merely a refusal to rectify the consequences of time-barred violations. It is not a violation of Title VII to tell an employee he won't get a raise to bring him up to the salary level he would have attained had he not been discriminated against at a time so far in the past as to be outside the period during which he could bring a suit seeking relief against that discrimination.

121 F.3d at 1140 (Posner, C.J.). Nor is it a violation of Title VII to refuse to grant an employee additional service credit to bring her up to the seniority level she would have attained had she been granted service credit for pregnancy leave(s) before 1979. Admittedly, this case presents close and difficult questions about the scope of the "continuing violation" doctrine in employment discrimination law. But the court is persuaded this case is more like *Evans, Teamsters, Ricks,* and *Dasgupta* than *Bazemore* and its progeny.

The employees argue that while they "may have had some hint that Ameritech might choose to continue using [net credited service dates] for assessing their retirement date when that day came," they were not *injured* until Ameritech denied their request for additional service credit in connection with the pension enhancements. Class Mem. at 20—21. The employees argue that denial of service credit is different from the forced resignation in *Evans,* the denial of tenure in *Ricks* and the lower pay in *Dasgupta* because these actions had an "immediate effect," whereas the harm associated with denial of service credit occurs "not so much at the moment of denial as in the future." *Pollis v. New School for Social Research,* 132 F.3d 115, 118 (2 nd Cir.1997). *Pollis* arose under the Equal Pay Act and involved an allegedly discriminatory pay scale. In the course of distinguishing another case, *Pollis* suggested in *dicta* that "[s]eniority rights are not of immediate value, but have determinate effect on the future terms of one's employment.... As a consequence, a discriminatory policy that results in a wrongful denial of seniority causes harm not so much at the moment of denial as in the future...." *Id.*

Pollis cites no authority for the proposition that seniority rights lack immediate value. To the extent *Pollis* suggests the denial of seniority rights does not become a legally cognizable injury until the seniority system is applied to determine eligibility for benefits, the *dicta* in *Pollis* unpersuasive. Seniority rights at Ameritech have immediate value similar to the immediate value associated with tenure in *Delaware State College v.. Ricks,* 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). Neither tenure nor seniority rights are valuable in the abstract; both are valuable because of the *rights* and *benefits* that are associated with either tenure or seniority. Yet in *Ricks,* the Supreme Court held the statute of limitations began to run when Ricks was denied tenure, not later when his employment contract ran out and—because he was denied tenure—was not renewed. "[W]hen Ricks lost [tenure] he lost something of value, and so was injured." *Webb v. Indiana National Bank,* 931 F.2d 434 (7 th Cir.1991).

***9** Here, it is undisputed that throughout their employment, management employees of Ameritech and its predecessors are

and were provided with disability and pension *benefit statements* that indicate the employees' net credited service dates.[2] Pl. 12(M) ¶ 45. It is further undisputed that throughout their employment, non-management employees of Ameritech and Ameritech's predecessors are and were provided with (or had access to) collective bargaining agreements. Stip. ¶ 59. These collective bargaining agreements state that net credited service dates are used to determine vacation benefits and selection, shift selection, promotion and transfer selection, layoff selection and recall rights, voluntary separation elections, the amount of separation payments, the amount and duration of sickness and accident disability benefit payments, and the date of periodic wage increases. *Id.* As for the non-management employees' pension benefits, any ambiguity concerning whether net credited service was effectively the same as "term of employment" as defined by the Ameritech Pension Plan ("pension plan") was resolved by the following language from the summary plan description for the pension plan, effective May 1989: "For example, to be eligible to retire with a service pension at age 65, you must have at least 10 years of *net credited service."* Defs. 12(M) ¶ 75 (emphasis added). Where an employee's net credited service determines the duration and amount of disability payments and all the other rights and entitlements listed above, it cannot be said that net credited service lacks immediate value to the employee. Here, the employees were plainly injured when Ameritech's predecessors refused to grant service credit for their pregnancy leaves. The fact that the *effects* of that injury become most severe as the employees near retirement does not afford the employees a fresh limitations period. It is undisputed that Ameritech and its predecessors provided employees with various notifications of their net credited service dates and any adjustments made to those dates. Stip. ¶¶ 53—58. Under these circumstances, the employees clearly discovered or should have discovered the injury.

Nor does there appear to be any basis to support equitable tolling of the statute of limitations. If, as the employees sometimes argue, the PDA merely clarified the scope of Title VII and was not a drastic shift in discrimination law, then perhaps the employees should have had sufficient information when their net credited service dates were adjusted to suspect that their rights under Title VII were possibly violated. *See Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 451 (7 th Cir.1990) ("The qualification 'possible' is important. If a plaintiff were entitled to have all the time he needed to be *certain* his rights had been violated, the statute of limitations would never run—for even after judgment, there is no certainty"). If, however, the PDA represented a drastic shift in discrimination law, then the change in law—together with the employees' knowledge of the relevance of net credited service dates and the fact employees would have been notified of any subsequent adjustments made to those dates—should have been enough to trigger a suspicion that their rights under Title VII may have been violated. The employees argue they reasonably waited to sue because Ameritech might have chosen to grant retroactive service credit as they neared retirement. The employees assert that Ameritech has "the power and ability" to grant retroactive service credit, as evidenced by the fact its predecessor once granted retroactive service credit in 1973 to workers who returned from strike. But the fact Ameritech has the *power* to grant retroactive service credit does not establish that the decision of Ameritech's predecessors to deny service credit for pregnancy leave is perpetually "not final." That decision became final when the employees returned to work and their net credited service dates were adjusted. Accordingly, there is no basis to toll the statute of limitations. The employees' Title VII claims are time-barred.

III. EQUAL PAY ACT

***10** Even assuming the employees could demonstrate a *prima facie* case under the Equal Pay Act, Ameritech has a complete defense because any disparity in pension benefits resulted from the nondiscriminatory application of Ameritech's seniority system (*i.e .,* Ameritech's reliance on net credited service dates). *See* 29 U.S.C. § 206(d). Ameritech has established a *bona fide* seniority system—one that is drafted and applied in a neutral manner. Accordingly, Ameritech is entitled to summary judgement as to this claim.

IV. ERISA

The employees argue Ameritech breached its fiduciary duty by discriminating against them based on pre–1979 pregnancy leaves. ERISA does not specifically prohibit gender discrimination. *Shaw v.. Delta Air Lines, Inc.,* 463 U.S. 85, 91, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). As an initial matter, there is some question whether the employees should be allowed to "bootstrap" an ERISA breach of fiduciary claim onto a gender discrimination claim. Some courts have refused to recognize a separate ERISA claim in these circumstances. *See, e.g, Biggs v. North Central United Tel. Co.,* 1997 WL 760669 (S.D.Ohio Oct.15, 1997). But even assuming the employees could state a separate ERISA claim, the court finds no support for the proposition that a plan administrator breaches its fiduciary duty to the plan participants by relying on a neutral seniority system that happens to give effect to the employer's pre-PDA leave policies. Accordingly, Ameritech is entitled to summary judgment as to any breach of fiduciary claims under ERISA.

V. STATE LAW CLAIMS

The state law claims mirror the employees' Title VII and Equal Pay Act claims. For the reasons previously discussed in parts II and III of this opinion, Ameritech is entitled to summary judgment as to the state law claims.

CONCLUSION

Defendants' motions for summary judgment are denied. Plaintiffs' motion for summary judgment is granted.

Footnotes

[1] Bernabei adopts the arguments set forth in the class defendants' memoranda.

[2] The employees seek to create a genuine issue by arguing that even though they received benefit statements and the benefit statements indicated their net credited service dates, they did not know the net credited service dates were relevant to the benefit calculations. *See, e.g.,* Defs. 12(N) ¶ 45. On this record, no jury could reasonably infer the employees did not know their net credited service dates were relevant to the benefits calculation, where the dates were communicated to the employees *in benefit statements.*