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November 2, 2006

BY U.S. PRIORITY MAIL

Hon. Stanley R. Chesler, U.S.D.J.
United States District Court
for the District of New Jersey
50 Walnut Street
Newark, NJ 07101-0999

**Re: *Engers, et al. v. AT&T and AT&T Mgmt. Pension Plan, C.A. 98-3660*
(SRC/CCC)**

Dear Judge Chesler:

Plaintiffs file this Notice of Supplemental Authority to respectfully draw your Honor's attention to *EEOC v. Jefferson Co.*, 2006 WL 3069120 (6th Cir. October 31, 2006) (*en banc*), and *In re J.P. Morgan Chase Cash Balance Plan*, 2006 WL 3063424 (S.D.N.Y. October 30, 2006) (both of which are enclosed).

The *EEOC v. Jefferson Co.* decision relates to Plaintiffs' claim under ADEA §4(a) that AT&T designed a cash balance conversion under which older employees who were closer to early retirement age received little or no additional retirement benefits for as many as 13 years after the conversion. In *EEOC v. Jefferson Co.*, the Kentucky Retirement System ("KRS") offered "lower" disability retirement benefits to relatively older employees with "fewer" years remaining to retirement than relatively younger employees. 2006 WL 3069120 *3 and 13. Sitting *en banc*, the Sixth Circuit held that the ADEA is violated because the KRS "calculates disability-retirement benefits in such a way that an older employee who is eligible to receive disability benefits receives fewer benefits—in the form of lower monthly payments—than a younger disabled employee." *Id.* at *1. The ADEA is violated if "an employee's age ... 'actually play[s] a role in' and has 'a determinative influence on the outcome' of the amount a disabled employee's disability-retirement benefit is each month." *Id.* at *7 (quoting *Hazen Paper v. Biggins*, 507 U.S. 604, 610 (1993)).

The *J.P. Morgan Chase* decision by Judge Harold Baer, Jr., relates both to Judge Politan's June 6, 2001 ruling that the statutory term "any age" in ADEA §4(i) and ERISA §204(b)(1)(H) means "after age 65" and to the alternative defense which AT&T put forward in response to Plaintiffs' motion for reconsideration that, even if this ruling was wrong, the statutory phrase "rate of an employee's benefit accrual" might refer to the accrual of notional credits, as Judge Easterbrook held in *Cooper v. IBM*, 457 F.3d 636 (7th Cir. 2006), rather than the accrual of retirement income.

Initially, Judge Baer addressed the issue of whether the statutory term "any age" applies to participants younger than 65. 2006 WL 3063424 *5. He determined that "[t]he unambiguous meaning of the term "any" dictates the conclusion that the ERISA anti-age discrimination provision applies to individuals of all ages." *Id.* Judge Baer also found that "even those [courts] who eventually conclude that cash balance plans are not age discriminatory" have found that the term "any age" applies "before and after normal retirement age." *Id.* (citing *Hirt v. Equitable*, 441 F.Supp. 2d 516, 550 (S.D.N.Y. 2006); *Register v. PNC Financial Servs. Group*, 2005 WL 3120268, *7 n.5 (E.D.Pa. 2005)).

In relation to AT&T's fallback position, *In re J.P. Morgan Chase* holds that ERISA §204(b)(1)(H) is concerned with the accumulation of participants' "retirement benefits," and not notional "inputs" or credits. In analyzing ERISA §204(b)(1)(H), the district court identified the key issue as whether the phrase "rate of an employee's benefit accrual" "refers to the employer's contributions to the plan (inputs) or the employee's retirement benefit (outputs)." *Id.* at *5. Looking at the words "benefit" and "accrual," the court determined that "benefit" refers to the payments to be provided under a pension plan and "accrual" refers to the periodic accumulation or addition to those payments. *Id.* at *6. The court found that the "plain meaning" of this phrase is "supported by the purpose and structure of defined-benefit plans" because under ERISA the "inputs" that an employer credits to a cash balance account "must be converted to the age 65 annuity." *Id.* at *6-7.

Consistent with this "required conversion," the court found that "The [J.P. Morgan Chase] Plan itself states that participants do not receive the amounts in the notional account as their retirement benefits. Instead the plan dictates that the credit balance in the account must be converted into an accrued benefit before it is paid over to the employee." 2006 WL 3063424 *7. The court stated that "the age discrimination at issue here stems from the required conversion to an age 65 annuity (required because cash balance plans are defined benefit plans) combined with the

fact that under the JPMC Plan, JPMC allocates interest credits to the account through normal retirement age.” Id. at *8. The court concluded that under ERISA, participants in a defined benefit plan must be “promised a benefit upon retirement, not yearly credits in a notional account.” Id.

In this case as well, AT&T’s Plan document makes the “required conversion” to an age 65 annuity. AT&T’s Plan document provides that a “Participant’s Accrued Benefit under the Plan as of a given date is expressed in the form of a pension benefit, payable monthly, for the life of the Participant beginning as of the first day of the month after the month in which the Participant attains Normal Retirement Age” Ex. 5 at Section 2.01, in Pls. Appendix Vol. II, filed Oct. 7, 2004 (dkt. #214). Judge Baer finds that “as a matter of simple arithmetic,” the conversion of notional pay and interest credits into retirement benefits “results in a smaller retirement benefit for older workers because they have less years in which to earn interest.” 2006 WL 3063424 *8.

The *J.P. Morgan Chase* decision also addresses Judge Easterbrook’s determination in *Cooper v. IBM* that the separate age discrimination standards for defined-benefit and defined-contribution plans “appear to say the same thing.” See 457 F.3d at 638. Judge Baer compared the two age discrimination standards side-by-side and found that “The fact is accrual, using its dictionary meaning and in line with the structure of defined benefit plans, refers to what the employee accumulates (the outputs from the plan) whereas allocation, using its dictionary definition and in line with the structure of defined contribution plans, refers to what an employer puts into the account.” 2006 WL 3063424 *9. The court stated that “It is difficult to imagine that in this case, where Congress has set forth one standard applicable to defined-benefit plans and another standard applicable to defined-contribution plans, they meant both provisions to mean the same thing.” Id. “Congress was not prohibited from explicitly stating that age discrimination may be measured via the rate at which employer’s allocate funds to the employee’s account. They did not do so, and instead used two different words, in two separate provisions of the statute.” Id.

The court further observed that the district court decisions ruling that cash balance plans are not age discriminatory give “significant weight to policy arguments.” Id. *10. The court stated that these policy arguments “miss the point” since, quoting the Second Circuit’s decision in *Esden v. BankBoston*, 229 F.3d 154, 171 (2000), the “dispute i[s] not over what a ‘better’ regulatory regime, more

accommodating to the design objectives of cash balance plans might look like; the dispute is over how to apply the existing regulations to this Plan.” Id.¹

Respectfully submitted,



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¹ One such decision, *Register v. PNC Financial*, 2005 WL 3120268 (E.D. Pa. Nov. 21, 2005), is currently on appeal in the Third Circuit (CA 05-5445).