IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-cv-02686-WDM-CBS

WAYNE TOMLINSON,
ALICE BALLESTEROS,
GARY MUCKELROY,
individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

EL PASO CORPORATION, and
EL PASO PENSION PLAN,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON ADEA CLAIM FOR FAILURE TO FILE A TIMELY CHARGE OF DISCRIMINATION

Pursuant to Federal Rule of Civil Procedure 56(b) and D.C.COLO.L.Civ.R 56.1, Defendants El Paso Corporation and El Paso Corporation Pension Plan (collectively "El Paso") respectfully submit this Memorandum.

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Prior to January 1, 1997, El Paso maintained a defined benefit pension plan that utilized a final average pay formula to calculate retirement benefits. Benefits under the final average pay formula generally increased along with Participants' years of service and the average of their final years of pay. (Complaint, ¶¶ 15-16.)

2. El Paso converted its pension plan effective January 1, 1997 to a cash balance plan ("Amended Plan"). (Exhibit 1, Preamble, p. 1; § 4.1). El Paso described

the changes to the pension plan in several communications to employees between 1996 and 2001. (Exhibits 2, 3, 4, and 5). Mr. Tomlinson had notice of all facts upon which he rests his ADEA claim at the time he received those communications. (*Id.*)

3. The Amended Plan provided for a five-year transition period for participants who were active on the date the Plan converted to a cash balance formula. At the start of the transition period (January 1, 1997), these Participants were given a cash balance account with a balance equivalent to their benefit under the final average pay formula. (Exhibit 1, § 4.1) During the transition period, these employees accrued benefits under both the new cash balance formula and the old final average pay formula. (*Id.*)

4. Each of these participants was guaranteed that his or her final pension benefit would never be less than the value of the old final average pay formula as of the conclusion of the five year transition period (December 31, 2001). (*Id.*) This is known as the Plan's "Minimum Benefit." (*Id.*)

5. At the end of the five-year transition period, Participants' benefits under the final average pay formula were frozen. Future benefit accruals could then be earned only under the cash balance formula. (*Id.*) In contrast, employees hired after January 1, 1997 accrued benefits only under the cash balance formula.

6. The last act El Paso engaged in that Mr. Tomlinson relies on in support of his ADEA claim was El Paso's amendment of the pension plan to provide for the Minimum Benefit. That amendment occurred on December 12, 1996, with an effective date of January 1, 1997. (Exhibit 1, p. 72; preamble). Mr. Tomlinson admits that El Paso did not do anything or provide him with any new information that would have allowed him to understand the nature of his claims against El Paso after the close of the transition

period on December 31, 2001. (Exhibit 6, 162:8-163:10).[1]

7. On July 16, 2004, Mr. Tomlinson filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC"). (Exhibit 8). He had an appointment with the EEOC to provide an intake questionnaire on June 16, 2004. (Exhibit 9) His intake questionnaire was dated June 16, 2004.[2] (Exhibit 10). Three hundred days before June 16, 2004 is August 20, 2003.

8. No other Plaintiff or putative collective action member has filed a charge of discrimination with the EEOC. (Complaint, ¶ 39).

II. STANDARD OF REVIEW

Fed.R.Civ.P. 56(b) provides that summary judgment shall be granted if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See also Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Halprin v. Equitable Life Assur. Soc. of U.S.*, 267 F.Supp.2d 1030, 1034 (D. Colo. 2003).

III. ARGUMENT

A. The Nature Of Plaintiff's ADEA Claim

Plaintiffs benefited from the existence of the Minimum Benefit by earning bigger pension benefits than they would have earned had El Paso not provided a Minimum Benefit. (Exhibit 6, 88:17-89:15; Exhibit 7, 46:6-11). Nevertheless, Plaintiffs claim that the fact that they received the Minimum Benefit discriminated against them in violation of the ADEA.

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[1] Relevant excerpts of Volumes I and II of the deposition of Plaintiff Wayne Tomlinson are filed as Exhibit 6. Relevant Excerpts of the deposition of Plaintiff Gary Muckelroy are filed as Exhibit 7.

[2] While El Paso believes the date Mr. Tomlinson filed his charge of discrimination to be the operative date for purposes of the statute of limitations analysis (*see* Complaint, ¶ 39), the earliest date upon which Mr. Tomlinson could be said to have filed appropriate documents with the EEOC is the date he filed his intake questionnaire, or June 16, 2004.

Specifically, because Plaintiffs earned the Minimum Benefit, there is a period of time during which Plaintiffs observe no net increase in pension benefits while their cash balance accounts catch up to their Minimum Benefit. This is commonly referred to as a "wear-away" period. Younger employees who did not receive a Minimum Benefit, by contrast, continue to observe annual increases in their overall pension benefits because their cash balance accounts do not have a Minimum Benefit to catch up to. Plaintiffs claim that the fact that older workers who earned a Minimum Benefit do not observe increases in their overall pension benefits during a wear-away period, while younger workers who did not earn a Minimum Benefit have no wear-away period, constitutes a violation of the ADEA.

B. All Three Plaintiffs Must Rely On Mr. Tomlinson's EEOC Charge

Under the ADEA, an aggrieved employee must file a charge with the EEOC within 300 days of the alleged unlawful discriminatory practice. 29 U.S.C. § 626(d)(2). *See also EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 110 (1988); *Duncan v. Manager, Dep't of Safety, City and County of Denver,* 397 F.3d 1300, 1310 (10th Cir. 2005). Failure to comply with this prerequisite bars a plaintiff's claim. *See Dartt v. Shell Oil Co.,* 539 F.2d 1256, 1260-61 (10th Cir. 1976).

Generally speaking, each and every plaintiff must exhaust his or her administrative remedies by filing a timely EEOC charge prior to filing a claim under the ADEA. However, under the "piggybacking" doctrine, a putative collective action member can piggyback on a named plaintiff's EEOC charge if (and only if) the putative collective action member could have filed a timely charge of discrimination on the day that the representative plaintiff actually filed his or her charge. *Thiessen v. General Elec. Corp.,* 267 F.3d 1095, 1111 (10th Cir. 2001); *Britton v. Car Toys, Inc.,* No. 05-cv-726-WYD-

PAC, 2006 WL 3487686, *4 (D. Colo. Nov. 30, 2006).

C. Mr. Tomlinson's EEOC Charge Was Untimely

The statute of limitations begins to run on the date an employee is notified of an adverse employment decision, not the date upon which the adverse consequences of the decision are carried out. *Gray v. Phillips Petroleum Co.,* 858 F.2d 610, 613 (10th Cir. 1988) (citing *Delaware State College v. Ricks,* 449 U.S. 250, 256-59 (1980)). Thus, an employee is generally notified of an adverse employment decision when a particular event or decision is announced by the employer, even if the consequences of the adverse decision are delayed. *Id.* at 614; *Callan v. Pepsi-Cola Bottling Co. of Topeka, Inc.*, 801 F. Supp. 448, 453 (D. Kan. 1992) (holding that the 300 day time period began to run when the plaintiff was informed that his position was being eliminated, not when the employer subsequently stopped paying the plaintiff his regular salary and benefits); *Stark v. Dynascan Corp.*, 902 F.2d 549, 552 (7th Cir. 1990) (the limitations period began to run the day the plaintiff was notified of his termination, not his last day of employment); *Watson v. Eastman Kodak Co.,* 235 F.3d 851, 852-53 (3d Cir. 2000).

As the employee communications distributed by El Paso between 1996 and 2001 make clear, El Paso gave sufficient notice to trigger the running of the statute of limitations far more than 300 days before Mr. Tomlinson filed his charge with the EEOC. *See* Exhibit 2, p. 3 ("After December 31, 2001, the current pension plan benefit for all participants will be frozen and employees will not earn any further benefits under the current plan of benefits. An employee who retires in the future will be entitled to the **greater** of their benefit figured under the current pension plan formula and the value of their cash balance in **CBP Select**" (bold in original)); Exhibit 3, p. 2 ("the current pension formula will remain in effect ... until December 31, 2001. After that date, the current

pension formula will be frozen for those participants and they will not earn any additional benefits under the current plan of benefits"); Exhibit 4 (describing the plan in detail and giving several examples of employees of different ages); Exhibit 5, ¶ 2 ("After December 31, 2001, for a participant whose minimum benefit is greater than the cash account benefit, accruals under the Plan may effectively cease until the participant's cash account benefit exceeds the minimum benefit earned as of December 31, 2001." (Emphasis added)).

In addition to receiving the employee communications contained in Exhibits 2, 3, 4, and 5, Mr. Tomlinson unambiguously conceded in his deposition that he was on notice of the facts upon which his claim is based no later than 1999. Specifically, Mr. Tomlinson acknowledged that he received a Compensation Statement with information about his individual pension account in September 1999. (Exhibit 11; Exhibit 6, 174:17-175:16). He further admitted that in the September 1999 timeframe he understood that after December 31, 2001 his Minimum Benefit would cease to grow. (Exhibit 6, 177:3 - 8). Indeed, page 9 of Mr. Tomlinson's Compensation Statement contains a large bar graph depicting the projected values of Mr. Tomlinson's cash balance account and his Minimum Benefit at his then current age and at ages 55, 60, 62, and 65. (Exhibit 11, p. 9 of 11). This graph unmistakably notified Mr. Tomlinson that his cash balance account would trail his Minimum Benefit from his then current age (in 1999) until age 65. (*Id.*)

When asked about the bar chart, Mr. Tomlinson conceded that he understood from the chart that it would take a number of years for his cash balance benefit to catch up to the Minimum Benefit. He even went to far as to explain that if he used different assumptions that he thought to be more plausible than the assumptions behind the bar chart, his cash balance benefit would never catch up to the Minimum Benefit. (Exhibit 6,

179:23-180:25).

Moreover, Mr. Tomlinson himself agrees that El Paso did not provide him with any new information related to his claims after December 2001. After December 2001, he simply spent time speaking with lawyers and doing calculations to understand the precise nature of his claims. (Exhibit 6, 162:8-163:10). Given that the issue is when El Paso put Mr. Tomlinson on notice of its actions, the 300 day limitations period began to run no later than December 2001.

Beyond that, there is no doubt that Mr. Tomlinson did form the actual belief that he had been discriminated against on the basis of his age outside of the limitations period. Thus, by August 7, 2003, Mr. Tomlinson had contacted a lawyer to become a named Plaintiff in this very action. (Exhibit 12; Exhibit 6, 248:21-249:24). Mr. Tomlinson stated in an email to his former divorce lawyer:

> Karen did you hear about IBM losing the class action suit dealing with the age discrimination of their pension plan (cash balance plan).... [D]id you know that El Paso Natural Gas did the same thing in 1997 converting the defined benefit plan to a cash balance plan. With my calculations I will never be able to equal a new employee accumulating cash until they retire.

(Exhibit 12).[3] Mr. Tomlinson also admitted that he had been researching the *Cooper v. IBM* decision to determine whether he could bring an age discrimination claim against El Paso for a "handful of months" before sending Exhibit 12. (Exhibit 6, 185:19-187:25).

Finally, Mr. Tomlinson also admitted during his deposition that (1) he probably first learned of the wear away period in 1996 but definitely before 2001 (Exhibit 6, 68:13

[3] Plaintiff will assert that this exhibit is inadmissible because it is privileged. However, Mr. Tomlinson sent this document over El Paso's network knowing that he had no expectation of privacy concerning any document he sent over El Paso's network. Accordingly, the document is not privileged. For a complete discussion, please see El Paso's Motion To Compel, Docket No. 208, pp. 7-10, 17-18, which El Paso incorporates by reference pursuant to Fed.R.Civ.P. 10(c).

-69:4); (2) he contacted an El Paso benefits employee in 1997 to understand how his benefits were calculated (Exhibit 13; Exhibit 6; 172:4 - 173:15); (3) he received a benefit statement showing that the Minimum Benefit would be larger than his cash balance benefit in December 1997 (Exhibit 14, p. EPTO0015128); (4) he has known since at least 2001 that it would take awhile for the cash balance formula to catch up to his Minimum Benefit (Exhibit 6, 65:15-19); and (5) he created an Excel spreadsheet with a creation date in 2000 which he shared with Plaintiff Muckelroy that both used for the purpose of calculating their benefits under the pension plan (Exhibit 15, Exhibit 6, 225:17 - 25; 286:12 - 288:1).

Based on the undisputed evidence cited above, there is no question that Mr. Tomlinson had actual knowledge of the facts forming the basis for his claim no later than September 1999, and that he sought a lawyer to represent him no later than August 7, 2003. Because he filed his EEOC charge more than 300 days later, his charge is untimely and the ADEA claim should be dismissed.

D. Plaintiffs Cannot Rely On The Continuing Violation Doctrine

El Paso's amendment of the pension plan was a discrete act that took effect on January 1, 1997. Plaintiffs cannot identify any discriminatory act that occurred within 300 days of Plaintiff's submission of his intake questionnaire or afterwards. Instead, the discriminatory act (if there was one) was the amendment of the pension plan itself. Anything that happened after that was simply the result of the January 1, 1997 amendment.

Nevertheless, Plaintiffs are expected to argue that the fact that employees who earned a Minimum Benefit continue to observe no net growth in their pension benefits while their cash balance accounts catch up constitutes a continuing violation for which

the statute of limitations restarts every day. This argument, however, is foreclosed by the U.S. Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114-115 (2002). Specifically, "[i]n *Morgan,* the Supreme Court held that a continuing violation theory is not permitted for claims against discrete acts ... thus, a claimant must file a charge ... within the appropriate limitations period as to each such discrete act." *Martinez v. Potter,* 347 F.3d 1208, 1211 (10th Cir. 2003) (quoting *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1184 (10th Cir. 2003)). *See also Haynes v. Level 3 Communications, LLC,* 456 F.3d 1215, 1222 (10th Cir. 2006).

Morgan's prohibition on the application of the continuing violation doctrine to discrete acts was discussed in a way that relates directly to this case in *Ledbetter v. Goodyear Tire and Rubber Company*, 127 S. Ct. 2162 (2007). In *Ledbetter*, an employee alleged that discriminatory performance reviews that she had been given years prior to her charge of discrimination caused her to suffer lower pay during the charge filing period, because pay increases were based in part on performance reviews. Following *Morgan,* the Supreme Court rejected her claim, and made clear that "current effects alone cannot breath life into prior, uncharged discrimination" and that "such effects in themselves have 'no present legal consequences.'" *Id.* at 2169 (*quoting United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)).

Here, the amendment of the pension plan was a discrete act, just like the giving of a performance review in *Ledbetter* was a discrete act. To the extent Plaintiffs claim that they continue to suffer by virtue of an ongoing wear away period, the wear away period is simply the effect of the creation of the Minimum Benefit. Because Tomlinson received notice of that creation of the Minimum Benefit, as well as the existence of the wear away period far more than 300 days before Tomlinson filed his EEOC charge, his

claim is untimely.

Lastly, El Paso anticipates that Plaintiffs might rely on *Bazemore v. Friday,* 478 U.S. 375 (1986) in support of their continuing violation theory. However, any such reliance has already been rejected by the Supreme Court in *Florida v. Long,* 487 U.S. 223, 289 (1988), which refused to apply the reasoning of *Bazemore* to pension plans.

IV. CONCLUSION

Defendants respectfully request that the Court enter partial summary judgment on Plaintiffs' ADEA claim in their favor, because Plaintiffs did not file an EEOC charge within 300 days of receiving notice of the facts upon which the ADEA claim is based.

Respectfully submitted this 14th day of April, 2008.

s/ Darren E. Nadel

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2008, a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON ADEA CLAIM FOR FAILURE TO FILE A TIMELY CHARGE OF DISCRIMINATION** was electronically filed and served via the CM/ECF system which will send notification of such filing to the following. The duly signed original is on file at the office of Littler Mendelson, P.C.

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