For Dockets See 09-3637

United States Court of Appeals, Seventh Circuit.
Grant M. **WALKER**, individually and on behalf of all other similarly situated, et al., Plaintiffs - Appellants,
v.
MONSANTO COMPANY PENSION PLAN, et al., Defendants - Appellees.
Glynn Davis, individually and on behalf of all other similarly situated, et al., Plaintiffs - Appellants,
v.
Solutia Incorporated Employees Pension Plan, Defendant - Appellee.
Fred Donaldson, individually and on behalf of all other similarly situated, et al., Plaintiffs - Appellants,
v.
Pharmacia Cash Balance Pension Plan, et al., Defendants - Appellees.
No. 09-3637.
January 12, 2010.

Appeal from the United States District Court For the Southern District of Illinois, Case No. 3:04-cv00436-JPG-PMF, The Honorable Judge J. Phil Gilbert

Brief and Required Short Appendix of Plaintiffs - Appellants

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

1. The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Grant M. Walker, Edward Zeringue and Richard W. Drake, individually and on behalf of the Monsanto Age 55 Cut-Off Class.

Glynn Davis, Eugene Forneris and Juanita Hammond, individually and on behalf of the Solutia Age 55 Cut-Off Class.

Fred Donaldson, Albert Walter III, Mary Clawson, Sandra Bellon, Audrey Sokolski and Carol Thomas, individually and on behalf of the Pharmacia Age 55 Cut-Off Class.

2. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Stueve Siegel Hanson LLP; Schlichter Bogard & Denton LLP; Schoen, Walton, Telken & Foster; Rex Carr Law Firm; Girard Gibbs LLP; Marker Armstrong LLP; Stueve Siegel Hanson Woody LLP

3. If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction under 28 U.S.C. § 1331 because Plaintiffs alleged in their Complaint that Defendants violated the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"), which provides for jurisdiction in the district court under 29 U.S.C. § 1132(e).

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as this is an appeal from a final decision of a district court. The United States District Court for the Southern District of Illinois, the Honorable J. Phil Gilbert, entered final judgment disposing of all of the claims with respect to all parties on September 29, 2009 (Doc. 341 (A17)).[FN1] Plaintiffs timely filed their Notice of Appeal on October 27, 2009, and are appealing that portion of the Court's final judgment in favor of Defendants on Counts I, II and III, pursuant to the Memorandum and Order (Doc. 326 (A1)) granting Defendants' motion for summary judgment on Counts I, II and III and denying in part Plaintiffs' motion for summary judgment to the extent it seeks judgment on Counts I, II and III. (Doc. 345).

FN1. Citations beginning with "A" refer to documents contained in the required short appendix bound with this brief. Citations beginning with "JA" refer to documents contained in the separately bound joint appendix.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

ERISA prohibits a defined benefit plan from ceasing or reducing an employee's benefit accrual because of the attainment of any age. 29 U.S.C. § 1054(b)(1)(H)(i) (stating that a defined benefit plan does not meet the requirements of ERISA if “an employee's benefit accrual is ceased, or the rate of any employee's benefit accrual is reduced, because of the attainment of any age”).

Defendants' cash-balance defined benefit plan (“the Plan”) includes a Prior Plan Account whose Initial Balance increases monthly in the form of Pay Credits and Interest Credits. Under the Plan's express terms, Interest Credits contributed to a participant's Prior Plan Account cease because “the Participant attains age 55.” (Plan § 6.2(d) (JA34)).

ERISA also prohibits the forfeiture of benefits and requires that “in determining the accrued benefit of a participant under a cash balance plan at any time prior to normal retirement age, the balance in the cash balance plan must be projected with interest credits to normal retirement age.” Rev. Rule. 2008-7, 2008-7 I.R.B. 419, 2008 WL 274325.

In determining a participant's accrued benefit, the Plan projects PPA Interest Credits only through age 55, as opposed to the Plan's normal retirement age of 65. (Plan § 3.2 (JA13)).

The issue presented for review is whether the Plan violates ERISA's prohibition against ceasing or reducing an employee's benefit accrual because of the attainment of any age and results in an impermissive forfeiture.

STATEMENT OF THE CASE

The origin of the underlying consolidated class action lawsuit is Plaintiffs' Complaint filed on June 23, 2004 in the United States District Court for the Southern District of Illinois, *Walker v. Monsanto Company Pension Plan*, Case No. 04-436. (Doc. 1). On September 1, 2006, the district court entered an Order consolidating the *Walker* action with the following three related actions: *Hammond v. Solutia, Inc. Employees' Pension Plan*, Case No. 06-139 (S.D. Ill. filed 2/15/2006); *Davis v. Solutia, Inc. Employees' Pension Plan*, Case No. 05-736 (S.D. Ill. filed 10/12/2005); and *Donaldson v. Pharmacia Pension Plan*, Case No. 06-3 (S.D. Ill. filed 1/3/2006). (Doc. 138). Plaintiffs filed their Consolidated Class Action Complaint on September 1, 2006. (Doc. 139). The Consolidated Class Action Complaint alleges (among other things) that Defendants' substantively identical cash-balance defined benefit plans violate ERISA's prohibition against ceasing or reducing an employee's benefit accrual because of the attainment of any age and results in an impermissive forfeiture. (Doc. 139, Counts I, II and III; Doc. 326 at 5 (A5)).

On May 22, 2008, the district court certified the three identical “Age 55 Cut-Off claims” (Counts I, II and III of the Consolidated Class Action Complaint) against the Monsanto, Solutia and Pharmacia Defendants (Doc. 276), consistent with the parties' Stipulation on class certification filed with the district court on June 11, 2007 (Doc. 211).

On June 11, 2009, the district court granted Defendants' motion for summary judgment on Plaintiffs' Age 55 Cut-Off claims (Counts I, II and III of the Consolidated Class Action Complaint) and denied Plaintiffs' cross-motion for summary judgment on those same claims. (Doc. 326 (A1)). The district court held that there were no factual disputes before the court in relation to Counts I, II and III, and that Defendants' Plan did not, as a matter of law, violate ERISA. (Doc. 326 (A1)). After additional proceedings necessary to resolve another claim (Count X) on which the district court granted Plaintiffs' cross-motion for summary judgment on the issue of liability against the Monsanto Defendants (Doc. 327), the district court entered final judgment disposing of all of the claims with respect to all parties on September 29, 2009 (Doc. 341 (A17)). Plaintiffs timely filed their joint notice of appeal on October 27, 2009. (Doc. 345).

STATEMENT OF FACTS

Effective January 1, 1997, Monsanto Company ("Old Monsanto") converted its traditional defined benefit plan to another form of defined benefit pension plan known as a cash balance plan. After the conversion, there were a number of corporate spin-offs and restructurings that resulted in Old Monsanto becoming three separate corporations -- namely, Pharmacia Corporation ("Old Monsanto" or "Pharmacia"), Solutia Inc. ("Solutia"), and a newly-created Monsanto Company ("New Monsanto"). As a result, there are three substantially identical cash balance pension plans: (1) the Pharmacia Cash Balance Pension Plan (the "Pharmacia Plan"), sponsored by Pharmacia, (2) the Solutia Inc. Employees' Pension Plan (the "Solutia Plan"), sponsored by Solutia, and (3) the Monsanto Company Pension Plan (the "Monsanto Plan"), sponsored by New Monsanto. (Doc. 287 at 7, ¶¶ 1-2; Doc. 296 at 3 n.2; (A2-3).[FN2]

FN2. Defendants did not dispute any portion of Plaintiffs' Statement of Undisputed and Material Facts (Doc. 287 at 7-11). *See* Doc. 296 at 3 n.2.

This case involves identical provisions in the Pharmacia, Solutia and Monsanto Plans. Because the relevant provisions are identical, the parties have referred to all of these plans collectively simply as "the Plan." (Doc. 287 at 7, ¶ 1; Doc. 296 at 3 n.2; Doc. 326 at 2-3 (A2-3)).

The Plan is structured around the formation and maintenance of two Accounts for each Participant: a Cash Balance Account and a Prior Plan Account (sometimes referred to herein as the "PPA"). (Plan § 3.1 (JA13)). Plaintiffs are not challenging any aspect of the Plan's Cash Balance Account. (Doc. 326 at 4 (A4)).

The initial account balance for a Participant's PPA was established pursuant to a conversion formula set forth in the Plan whereby a Participant's PPA is "credited with an amount equal to the Actuarial Equivalent lump sum value of the Participant's Predecessor Plan Accrued Benefit (as defined in [Paragraph 6.2(b)]), discounted using an interest rate of eight and one-half percent per annum for each month, if any, by which the Participant's age as of January 1, 1997 precedes age 55." (Plan § 6.2(b) (JA32)).

Once established, the PPA's initial account balance increases monthly in the form of Pay Credits and Interest Credits. As long as a Participant is an Eligible Employee or Qualified Disabled Terminated Employee, the Participant's PPA is credited monthly with Pay Credits equal to the balance of the Prior Plan Account on the first day of the month multiplied by 0.003274 (the monthly equivalent of 4% per annum). The PPA is also credited each month with Interest Credits equal to the sum of (i) the balance of the Prior Plan Account on the first day of such month, and (ii) the Participant's Pay Credits for that month, if any, multiplied by 0.006822 (the monthly equivalent of 8.5% per annum). (Plan §§ 6.2(c) (Pay Credits), 6.2(d) (Interest Credits) (JA34)).

The Plan, however, explicitly conditions a Participant's right to receive these Interest Credits to his Prior Plan Account on the Participant being under age 55. Under the Plan's express terms, Interest Credits contributed to a participant's Prior Plan Account cease because "the Participant attains age 55." (Plan § 6.2(d) (JA34); Doc. 287 at 9-10, ¶ 12; Doc. 296 at 3 n.2).

To further illustrate the operation of the Plan's PPA Interest Credits and Pay Credits, consider, for example, that an age 54 (or younger) participant that is a current employee will have both monthly Pay Credits and Interest Credits contributed to his PPA. These monthly Interest Credits for a participant age 54 (or younger) will apply to the participant's entire PPA balance, including increases to that account attributable to the monthly Pay Credits. However, if that participant remains employed after attaining age 55, he will continue to receive monthly Pay Credits to his PPA; but solely because he attained the age of 55, he will no longer receive any Interest Credits to the PPA, including the increase to the PPA attributable to monthly Pay Credits contributed after he attained age 55. Thus, under the Plan, post-age 55 Pay Credits do not have any Interest Credits added to them, while pre-age 55 Pay Credits do have Interest Credits added to them, but only to age 55. (Plan §§ 6.2(c), 6.2(d) (JA34)). (*See also* Doc. 315).

The Plan's provision explicitly ceasing the monthly PPA Interest Credits because “the Participant attains age 55” is also reflected in the Plan's calculation of a Participant's Accrued Benefit. Under the Plan's terms, “A participant's monthly Accrued Benefit is a single life annuity commencing at Normal Retirement Age equal to the quotient of (a) the Participant's current Accounts plus interest credits added to the Prior Plan Account through age 55 pursuant to Section 6.2(d) and interest credits added to the Cash Balance Account through Normal Retirement Age pursuant to Section 6.3(d) divided by (b) 125.” (Plan § 3.2 (JA13)). The Plan defines Normal Retirement Age as age 65. (Plan § 3.36 (JA23)).

The Plan does not contain an early retirement benefit formula, as confirmed by the absence of any such term in the Plan itself (JA1-181) and Defendants' own admission in the form of a sworn statement to the IRS, (see Application for Determination for Employee Benefit Plan, IRS Form 5300 (“Benefit formula at early retirement age is NO EARLY RETIREMENT BENEFIT FORMULA.”) (JA217)).

Defendants' own proffered ERISA expert has never seen or even heard of a cash balance plan that terminates any type of interest credit in the same manner as this Plan. (*See* Doc. 294-3 at 1-12 (excerpts from deposition of Francis X. Reagan)).

Plaintiffs, individually and on behalf of the certified Age 55 Cut-Off Classes, allege that by ceasing the monthly Interest Credits to a Participant's Prior Plan Account because “the Participant attains age 55,” the Plan violates ERISA's prohibition against ceasing or reducing an employee's benefit accrual because of the attainment of any age. Plaintiffs also allege that an impermissive forfeiture occurs because the Plan calculates a Participant's Accrued Benefit by reference to the continuation of PPA Interest Credits only “through age 55 pursuant to Section 6.2(d),” as opposed to the Plan's Normal Retirement Age (*i.e.*, age 65).

SUMMARY OF ARGUMENT

Defendants chose to discontinue their prior traditional defined benefit plan in favor of a new defined benefit cash balance plan. In doing so, Defendants created a Plan that includes two separate accounts. One of those accounts, the Prior Plan Account, had an initial account balance determined pursuant to the Plan's conversion formula. Once this initial account balance was established, the Plan is structured to increase a participant's Prior Plan Account through employer contributions in the form of Pay Credits and Interest Credits. These Pay Credits and Interest Credits increase a participant's stated account balance, and like other benefits, rights or features under a plan, are benefit accruals within the meaning of section 1054(b)(1)(H)(i) and cannot be stopped or reduced because of the attainment of any age.

While ERISA makes certain aspects of pension plans variable and allows employers to act in their own interest in making decisions with respect to those variable aspects, ERISA also declares certain aspects of Plan design to be immutable. Plan participants are entitled to the benefit of those immutable terms. In this case, participants are entitled to the benefit of ERISA's immutable requirement that a plan not cease or reduce a benefit accrual because of the attainment of any age.

Plaintiffs are challenging a Plan provision that on its face ceases a benefit accrual solely because a participant attains the age of 55. The district agreed: "[U]nder § 6.2(d)'s plain terms, the participant's accrual of interest credits ceases because the participant attains the age of 55 ...." (Doc. 326 at 7 (A7)). The language in the Plan itself is dispositive, and as the illustration provided in Plaintiffs' Statement of Facts further demonstrates, the Plan facially discriminates on the basis of age. Because the Plan on its face defines a participant's eligibility for PPA Interest Credits in terms of his age, the discrimination is facial and Defendants' reasons for adopting the challenged Plan provision are irrelevant to the Plan's legality.

The challenged Plan provision at issue in this case is the only one of its kind. Defendants' own proffered ERISA expert has never seen or even heard of a cash balance plan that terminates any type of interest credit in the same manner as this Plan. Of course, the reason that plan designers do not structure plans with provisions terminating interest credits (or other rights, benefits or features) based on the attainment of a specified age is that such a provision on its face violates ERISA's clear prohibition against ceasing or reducing any benefit accrual because of the attainment of any age and results in an impermissive forfeiture.

The district court erred as a matter of law in determining that the Plan complied with ERISA. The plain language of the statute itself, the statute's regulatory guidance, and the relevant case law all make clear that Defendants' Plan on its face violates ERISA's prohibition against ceasing or reducing a benefit accrual because of the attainment of any age and results in an impermissive forfeiture. Plaintiffs, therefore, are entitled to entry of judgment in their favor on the issue of liability against Defendants on their Age 55 Cut-Off Claims (Counts I, II and III).

ARGUMENT

I. Standard of Review.

This Court reviews a district court's decision on cross-motions for summary judgment *de novo. Wetzler v. Illinois CPA Society & Foundation Retirement Income Plan,* 586 F.3d 1053, 1057 (7th Cir. 2009). The issue of whether a certain term in a benefit plan violates ERISA is a question of law and as such, is also reviewed *de novo. Id*. Under a *de novo* standard of review, this Court reviews "without deference for the view of the district judge and hence almost as if the motion had been made to [this Court] directly." *Grun v. Pneumo Abex Corp.,* 163 F.3d 411, 419 (7th Cir. 1998).

II. Defendants' Plan Violates ERISA as a Matter of Law.

ERISA is a highly technical, paternalistic regulation that restricts the freedom of contract with respect to the scope and terms of employee benefit plans through specific and express statutory limitations. *See, e.g., Fry v. Exelon Corp. Cash Balance Pension Plan,* 571 F.3d 644, 646 (7th Cir. 2009) ("Employers are entitled to vary by contract those aspects of pension plans ERISA makes variable, and they may act in their own interest when doing so, just as participants are entitled to the benefit of terms ... that the law makes immutable."); *Williams v. Rohm & Haas Pension Plan,* 497 F.3d 710, 714 (7th Cir. 2007) ("Employers are not required to provide pension benefits, but when they do, their plans must comply with ERISA .... The Plan cannot avoid that which is dictated by the terms of ERISA. While ERISA generally allows each plan to select the monetary amount of benefits provided, it remains a paternalistic statute designed to restrict the freedom of contract."); *May Dep't Stores Co. v. Federal Insurance Co.,* 305 F.3d 597, 601 (7th Cir. 2002) ("ERISA is ... a regulation of private pension plans. It is a paternalistic regulation, intruding on the freedom of the contracting parties, the plan and its participants, every step of the way ....").

Consequently, this Court has emphasized that "courts should take care to interpret ERISA strictly according to its plain language." *Silvernail v. Ameritech Pension Plan,* 439 F.3d 355, 358 (7th Cir. 2006); *Johnson v. Georgia-Pacific Corp.,* 19 F.3d 1184, 1190 (7th Cir. 1994) ("[B]ecause ERISA is a highly technical statute our part is to apply it as precisely as we can, rather than to make adjustments according to a sense of equities in a particular case.").

A. The Plan Violates ERISA's Prohibition Against Ceasing an Employee's Benefit Accrual Because of the Attainment of Any Age Because the Plan on Its Face Ceases PPA Interest Credits Because a Participant Attains Age 55.

At issue in this case is ERISA's prohibition against ceasing or reducing an employee's benefit accrual because of the attainment of any age:

[A] defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of any employee's benefit accrual is reduced, because of the attainment of any age.

29 U.S.C. § 1054(b)(1)(H)(i).

A two-step analysis confirms that Defendants' Plan violates this provision of ERISA. First, the PPA Interest Credits are part of a participant's benefit accrual because they reflect an input credited by the employer to the participant's stated account balance, and are a right, benefit or feature of the Plan. Second, the PPA Interest Credits cease under the Plan's express terms because of a participant's attainment of a specified age (*i.e.*, when "the Participant attains age 55") in direct contravention of ERISA's clear and unambiguous statutory prohibition.

Accordingly, Plaintiffs are entitled to judgment as a matter of law on the issue of liability against Defendants. The district court erred in concluding otherwise.

1. The PPA Interest Credits Are Part of a Participant's Benefit Accrual.

Although ERISA itself does not define the phrase "benefit accrual," this Court and every other Circuit to have interpreted the phrase has done so in a way that confirms that the PPA Interest Credits at issue in this case are part of a participant's benefit accrual.

In *Cooper v. IBM Personal Pension Plan*, this Court stated that "benefit accrual" is "a phrase dealing with inputs (either in absolute terms or as a rate of change)" and should be read "as a reference to what the employer puts in" or "imputes to the account." 457 F.3d 636, 638-39 (7th Cir. 2006). This Court also explained in *Cooper* that its interpretation of "benefit accrual" as a reference to the employer's contribution to a participant's account has the support of regulations proposed by the Treasury Department, which define the phrase "benefit accrual" as " 'the additions to the participant's hypothetical account for the plan year.' " *Id*. at 649 (quoting 67 Fed. Reg. 76123, 76125-26 (Dec. 11, 2002)).

All other Circuits to have considered the issue have adopted this Court's interpretation of the statutory phrase "benefit accrual." For example, in *Register v. PNC Financial Services Group, Inc.*, the Third Circuit stated:

[C]ash balance plans define the benefit in terms of a stated account balance .... Thus, the "benefit" as used in the phrase "benefit accrual" refers to the stated account balance as that is how the benefit is defined by cash balance plans. Once this proposition is grasped, it becomes clear that the "accrual" of "benefit" in section 1054(b)(1)(H)(i) refers to the credits deposited into the participant's cash balance accounts, *i.e.*, the inputs.

477 F.3d 56, 68-69 (3d Cir. 2007). *Accord Drutis v. Rand McNally & Co.*, 499 F.3d 608, 612-15 (6th Cir. 2007) ("[T]he term 'benefit accrual' as used in § 1054(b)(1)(H)(i) refers to the employer's contribution to the defined benefit plan."); *Hurlic v. Southern California Gas Co.*, 539 F.3d 1024, 1037 (9th Cir. 2008) ("The term 'accrue' means 'to increase.' ... 'Benefit accrual' thus refers to the process by which benefits increase.... Under the cash balance plan, benefits increase as the employer credits the account with earnings and interest credits.").

Similarly, the Treasury Department in 1988 published proposed regulations to implement the Internal Revenue Code's parallel provisions to those of ERISA at issue here. *Compare* 29 U.S.C. § 1054(b)(1)(H) and 29 U.S.C. § 1054(b)(2), *with* 26 U.S.C. § 411(b)(1)(H) and 26 U.S.C. § 411(b)(2). As the Treasury Department explained:
The proposed regulations provide that the rate of an employee's benefit accrual under a defined benefit plan or the rate of allocations to an employee's account under a defined contribution plan will be considered to be reduced on account of the attainment of a specified age if optional forms of benefits, ancillary benefits or other benefits, rights or features under a plan that are provided with respect to benefits or allocations prior to such age are not provided (on terms that are at least as favorable to employees) with respect to benefits or allocations after such age.

53 Fed. Reg. 11,876, 11,877 (Apr. 11, 1988). Thus, the Treasury Department has interpreted the statutory phrase "benefit accrual" quite broadly, *i.e.*, to encompass any optional form of benefit, ancillary benefit or other benefit, right or feature under a plan, and confirmed that any termination or reduction of any such benefit, right or feature on account of the attainment of any age is prohibited. *See id.*

Once this established framework for interpreting the statutory phrase "benefit accrual" is grasped, it becomes clear that the PPA Interest Credits at issue in this case are part of a participant's benefit accrual and cannot be stopped or reduced because of the attainment of any age. The Prior Plan Account is one of the Accounts that forms the cash balance plan at issue in this case and has a stated account balance that increases monthly through employer contributions in the form of certain credits (*i.e.*, Pay Credits and Interest Credits). These credits are not dependent on the investment return of plan assets but rather represent a guaranteed increase provided by the employer.

Thus, in this case, the "benefit" as used in the statutory phrase "benefit accrual" includes the PPA's stated account balance as that is how the benefit is defined by cash balance plans. *See Register*, 477 F.3d at 68-69. The "accrual" of "benefit" in section 1054(b)(1)(H)(i) refers to the credits deposited into the participant's Prior Plan Account, *i.e.*, the inputs - in this case, the Pay Credits and Interest Credits. *See id*. Accordingly, ERISA prohibits the Plan from stopping or reducing either the PPA Pay Credits or Interest Credits (both benefit accruals within the meaning of section 1054(b)(1)(H)(i)) because of the attainment of any age.

Defendants, however, claimed that the PPA Interest Credits are not a "benefit accrual" by arguing, based on extrinsic evidence (as opposed to the unambiguous language in the Plan itself), that the PPA Interest Credit merely "represents the reversal of the discount taken from the total lump sum value of a participant's accrued benefit at the time of the plan conversion." (Doc. 326 at 8 (A8)). As such, according to Defendants, the PPA Interest Credits are not a benefit accrual because they do not increase the value of the accrued benefit to which participants were entitled under the prior traditional defined benefit plan. (Doc. 326 at 5 (A5)). Defendants' argument (and the district court's acceptance of that argument) misses the mark for several reasons.

As an initial matter, it was improper for the district court to rely upon Defendants' proffered extrinsic evidence in determining whether the PPA Interest Credits were a benefit accrual because that evidence revealed absolutely no ambiguity in the Plan that required interpretation. *See PMC, Inc. v Sherwin-Williams Co.,* 151 F.3d 610, 615 (7th Cir. 1998). Rather, Defendants' extrinsic evidence merely revealed that Defendants had a particular Plan design objective and were, at least according to Defendants, not actually motivated by any discriminatory age-based animus when it adopted the Plan language requiring the cessation of PPA Interest Credits when a participant attains age 55. This evidence is not relevant to the determination of whether the PPA Interest Credits, which are unambiguously defined in the Plan, are a benefit accrual within the meaning of section 1054(b)(1)(H)(i). Defendants' extrinsic evidence, therefore, should have been disregarded. *See Dugan v. R.J. Corman R.R. Co.,* 344 F.3d 662, 665 (7th Cir. 2003) (stating the general rule that if the language in an ERISA plan is unambiguous, the court should not consider extrinsic evidence); *Grun,* 163 F.3d at 420 (same); *Williams v. Rohm & Haas Pension Plan,* 2009 WL 382628, at *5 (S.D. Ind. Feb. 11, 2009) ("[A] discussion of the intent underlying this [Plan] provision is unwarranted because we find that provision to be unambiguous.... Defendant can not prevail here by asserting that its own words in the Plan were not intended to mean what they say.") (citing *Grun,* 163 F.3d at 420-21)).

The district court also erred in accepting Defendants' characterization of the PPA Interest Credits as simply "the reversal of an early retirement discount" and, as such, not reflecting any change to a participant's accrued benefit. (Doc. 326 at 13 (A13)). First, there is no early retirement discount feature in the Plan, as confirmed by the absence of any such term in the Plan itself and Defendants' own admission in the form of a sworn statement to the IRS. (JA1-181, 217).

Second, it is inaccurate for Defendants to claim that the PPA Interest Credits do nothing more than simply reverse the 8.5% discount taken for each year a participant was under age 55 as part of the formula the Plan used to establish the PPA's opening account balance. Although mathematically convenient, neither the Plan's PPA Interest Credit provision (section 6.2(d)) nor the Plan's provision setting forth the formula for determining a Participant's initial PPA account balance (section 6.2(b)) refer to the other or otherwise disclose the existence of Defendants' claimed "reversal."

And, third, as stated in the Plan itself, the monthly PPA Interest Credits apply not just to the participant's PPA opening account balance, but also to the monthly PPA Pay Credits that Defendants contribute to the Prior Plan Accounts of participants who are current employees or qualified disabled employees during the month.

Thus, as a matter of undisputed fact, and even considering Defendants' extrinsic evidence, the PPA Interest Credits *do* function in manner beyond simply "reversing" a non-existent early retirement or other discount and *do* increase the accrued benefit of participants. Therefore, even utilizing Defendants' and the district court's evaluative framework, these Interest Credits are benefit accruals within the meaning of section 1054(b)(1)(H)(i).

In any event, Defendants' focus on the alleged absence of any change to a participant's accrued benefit under the prior traditional defined benefit plan is legally unwarranted. This Court and all of the other Circuit's to have considered the issue have explained that a "benefit accrual" under section 1054(b)(1)(H)(i) refers to any employer contribution that changes a participant's stated account balance, as that is how the benefit is defined by cash balance plans. And, as the proposed Treasury Department regulations make clear, the prohibition on ceasing a benefit accrual because of the attainment of any change applies to any optional form of benefit, ancillary benefit or other benefit, right or feature under a plan.

It is undisputed that the stated account balances of participants' Prior Plan Accounts are subject to increase as Defendants contribute Interest Credits and Pay Credits to participants' Prior Plan Accounts on a monthly basis. These Interest Credits and Pay Credits are clearly a form of benefit, right or feature under the Plan. Thus, these Interest Credits and Pay Credits are benefit accruals within the meaning of section 1054(b)(1)(H)(i) as a matter of law, and cannot be discontinued or reduced because of the attainment of any age. Ultimately, there is nothing in the Plan itself or anything revealed by Defendants' improperly proffered extrinsic evidence that can change this inescapable legal conclusion.

Because the Plan permits the continuation of the Pay Credits to the Prior Plan Account as long as the Participant is an Eligible Employee or Qualified Disabled Terminated Employee during the month, it is undisputed that the Pay Credits do not cease and are not reduced because of the attainment of any age. The Plan, however, explicitly conditions a participant's right to receive Interest Credits to the PPA on the participant being under age 55. Under the Plan's express terms, Interest Credits on a participant's Prior Plan Account cease because “the Participant attains age 55” and are projected only until age 55 when calculating the participant's Accrued Benefit. Thus, the focus of Plaintiffs' claims is the express discontinuation of PPA Interest Credits because “the Participant attains age 55.”[FN3]

> FN3. In stark contrast (and as an illustration of how it should be done to comply with ERISA), under the Plan's express terms, Interest Credits on a participant's Cash Balance Account continue for each month prior to a Participant's Annuity Starting Date and are projected through Normal Retirement Age (*i.e.*, age 65) when calculating a participant's Accrued Benefit. (*See* Plan §§ 6.3(d) (JA37), 3.2 (JA13)).

Because it is established that the PPA Interest Credits are a benefit accrual under section 1054(b)(1)(H)(i), the only remaining question is whether those Interest Credits cease “because of the attainment of any age,” as prohibited by ERISA.

2. The PPA Interest Credits Cease under the Plan's Express Terms Because of the Attainment of a Specified Age.

Section 1054(b)(1)(H)(i) prohibits a Plan from ceasing or reducing a participant's benefit accrual “because of the attainment of any age.” 29 U.S.C. § 1054(b)(1)(H)(i). Although ERISA itself does not define the phrase “attainment of any age,” and this Court has not specifically addressed the question, the Ninth Circuit recently interpreted this phrase and explained its interpretation in a manner that readily establishes that the PPA Interest Credits at issue in this case cease under the Plan's express terms because of the attainment of a specified age in violation of ERISA.

In *Hurlic v. Southern California Gas Co.*, the Ninth Circuit considered both the precise statutory language employed by Congress as well as the statute's legislative history in concluding that “[t]he phrase ‘attainment of any age’ means the act of reaching a certain age . . . .” 539 F.3d 1024, 1031-32 (9th Cir. 2008). The Ninth Circuit explained:

The statute's legislative history makes clear that the word “attainment” is important. As originally enacted, ERISA did not require that a pension plan allow participants who worked beyond normal retirement age to continue earning benefits. *See* H.R. Rep. No. 99-1012, at 378 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 3868, 4023. In 1986, Congress enacted provisions to remedy that problem, explaining that “benefit accruals or continued allocations to an employee's account under either a defined benefit plan or a defined contribution plan may not be reduced or discontinued on account of the attainment of a *specified* age.” *Id.* (emphasis added).

This language clearly describes Congress's intent to prohibit pension plans from reducing or ceasing benefits when a participant reached age 65 or any other specified age. *For example, the Plan would clearly be in violation of ERISA § 204(b)(1)(H)(i) if it provided that when participants reached age 50, they stopped receiving benefits or began accruing benefits at a reduced rate.*

Id. at 1031-32 (emphasis in second paragraph added).

The Plan in this case expressly provides that the Interest Credits to the Prior Plan Account stop because "the Participant attains age 55." Thus, the Plan's plain terms violate ERISA's specific statutory prohibition against ceasing a benefit when a participant reaches a specified age, as the nearly identical example used by the Ninth Circuit in *Hurlic* aptly demonstrates.

Even though the Plan's terms require that the PPA Interest Credits cease because of the attainment of a specified age (*i.e.*, when "the Participant attains age 55") in direct contravention of ERISA's clear statutory prohibition, the district court found that these Interest Credits did not cease "because of the attainment of any age" based on Defendants' proffered extrinsic evidence that they had a non-age-based motive for adopting the challenged Plan provision. According to the district court, this extrinsic evidence demonstrated that, notwithstanding the Plan's plain terms, "the Plan's decision to stop awarding 'interest credits' was 'actually motivated' by the fact that the early retirement discount became fully reversed at the fully subsidized early retirement age, that is, the participant's pension status." (Doc. 326 at 15 (A15)). Hence, under the district court's logic, the cessation of the PPA Interest Credits because "the Participant attains age 55" was not a cessation "because of the attainment of any age."

The district court's conclusion with respect to the question of whether the PPA Interest Credits cease "because of the attainment of any age" is fundamentally flawed because the district court failed to apply ERISA strictly according to its plain language and disregarded the dispositive facial nature of the Plan's clear violation of ERISA's unambiguous statutory prohibition.

The statutory language appearing in section 1054(b)(1)(H)(i) mandates examination of whether, "under the plan," the PPA Interest Credits cease "because of the attainment of any age." 29 U.S.C. § 1054(b)(1)(H)(i). The district court failed to apply this statutory language in the precise manner mandated by this Court. *See Johnson,* 19 F.3d at 1190 ("[B]ecause ERISA is a highly technical statute our part is to apply it as precisely as we can, rather than to make adjustments according to a sense of equities in a particular case.").

For instance, the district erred in relying upon Defendants' proffered extrinsic evidence of a non-age-based motive for adopting the challenged Plan provision. Such evidence is irrelevant for two equally dispositive reasons. First, the statute requires examination of the actual language appearing in the Plan itself, not extrinsic evidence, in making a determination of whether the Plan complies with section 1054(b)(1)(H)(i). *See* 29 U.S.C. § 1054(b)(1)(H)(i) (stating that statutory prohibition should focus on whether "under the plan" a benefit accrual is ceased or reduced "because of the attainment of any age").

Second, Defendants' proffered extrinsic evidence of a non-age-based motive for adopting the challenged Plan provision is completely irrelevant where, as here, the challenged Plan provision expressly provides on its face that the PPA Interest Credits cease because the participant attains the age of 55, which section 1054(b)(1)(H)(i) plainly prohibits. *See Hurlic,* 539 F.3d at 1032 ("For example, the Plan would clearly be in violation of ERISA § 204(b)(1)(H)(i) if it provided that when participants reached age 50, they stopped receiving benefits or began accruing benefits at a reduced rate.").

This traditional rule is well-established and declares unlawful any policy or provision that on its face discriminates on the basis of age (or other protected trait) and finds the employer's reasons for adopting the challenged policy or provision to be irrelevant to its legality. *See, e.g., Kentucky Retirement Systems v. EEOC,* 128 S. Ct. 2361, 2369 (2008) (reaffirming the traditional rule "that a statute or policy that facially discriminates based on age suffices to show disparate treatment under the ADEA"); *International Union, UAW v. Johnson Controls, Inc.,* 499 U.S. 187, 199 (1991) ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."; "[T]he motives underlying the employers' express exclusion of women did not alter the intentionally discriminatory character of the policy."); *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121-22 (1985) (holding that TWA's policy of allowing pilots displaced for other reasons to remain employed by bumping a less senior flight engineer, but barring pilots displaced because of age from doing so, was "discriminatory on its face"); *Solon v. Gary Community School Corp.,* 180 F.3d 844, 855 (7th Cir. 1999) (holding that early retirement incentive program that expressly varied benefits in terms of the retiree's age was discriminatory on its face, stating: where "[t]he terms of the [plan] ... explicitly establish an employee's eligibility ... in terms of his age," the discrimination is facial, "and independent proof of an illicit motive is unnecessary"); *EEOC v. Bd. of Governors of State Colleges & Universities,* 957 F.2d 424, 429-31 (7th Cir. 1992) (holding that where a policy is facially discriminatory "the employer's reasons for adopting the challenged policy are irrelevant to the policy's legality").[FN4]

FN4. *See also Mona Shores Board of Education v. Mona Shores Teachers Education Ass'n,* 2008 WL 3009890, at *4-5 (Mich. App. Aug. 5, 2008) (holding that a plan provision expressly providing for supplemental benefits to retirees "based solely on the age of the teacher at the time of retirement" was "facially invalid" and unlawful, citing *Kentucky Retirement and Solon*).

Had the district court properly rejected Defendants' extrinsic evidence of a non-age-based motive for adopting the facially discriminatory Plan provision, the Plan's clear violation of ERISA's statutory prohibition is conclusively established, as the district court itself acknowledged, *see* Doc. 326 at 7 (A7) ("Thus, under § 6.2(d)'s plain terms, the participant's accrual of interest credits ceases because the participant attains the age of 55, and § 6.2(d) violates ERISA's anti-discrimination provisions unless there is an ambiguity in the Plan.").

Finally, the district court erred in finding that the Supreme's Court's decision in *Kentucky Retirement and* the Eighth Circuit's decision in *Atkins* compelled a conclusion in this case that participants' accrual of Interest Credits did not cease "because of the attainment of any age."

The Supreme Court's decision in *Kentucky Retirement is* readily distinguishable from this case and, contrary to the district court's conclusion, actually supports Plaintiffs' contention that the Plan's explicit termination of PPA Interest Credits because a participant attains age 55 is a violation on its face of ERISA.[FN5]

FN5. The claim in *Kentucky Retirement* did not arise under ERISA; rather, the claim arose under the ADEA's prohibition of age discrimination in employee pension benefit plans, which employs statutory language that differs from that of ERISA. For instance, the ADEA prohibits the establishment or maintenance of a defined benefit plan that requires or permits the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, *because of age*." 29 U.S.C. § 623(i)(1)(A) (emphasis added). ERISA, in contrast, prohibits a plan from ceasing or reducing an employee's benefit accrual "*because of the attainment of any age*." 29 U.S.C. § 1054(b)(1)(H)(i). While Plaintiffs recognize that there is legislative history stating that any differences in language between the provisions of ADEA and ERISA (as well as the Code) that were amended as part of the Omnibus Budget Reconciliation Act of 1986 were not intended to create an inference that a difference exists among such provisions, *see* H.R. Rep. No. 99-1012, at 378-79 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 3868, 4023-24, the Supreme Court recently emphasized the importance of textual differences in statutory provisions and the need to carefully consider those differences before concluding that decisions under one statutory scheme should control construction under another statutory scheme. *See Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009) (emphasizing the textual differences between Title VII and the ADEA). And, as previously discussed, the Ninth Circuit has concluded that the word "attainment" appearing in section 1054(b)(1)(H)(i) of ERISA "is important." *See Hurlic*, 539 F.3d at 1031-32. *See also In the Matter of Chi, Milwaukee, St. Paul & Pac. R.R. Co.*, 658 F.2d 1149, 1160 (7th Cir. 1981) (stating "well-known principle of statutory construction that all provisions within a statute are to be interpreted as meaningful and are not to be considered as mere surplusage").

Kentucky Retirement addressed disparate treatment based on pension status, *see* 128 S. Ct. at 2369-70, while Plaintiffs in this case challenge disparate treatment based explicitly and directly on the attainment of a specified age. To the extent the Supreme Court's decision in *Kentucky Retirement is* relevant to Plaintiffs' claims here, its relevance relates not to the Supreme Court's specific resolution of the self-described "quite special case" before it, but to its emphatic statement that its "opinion in no way unsettles the rule that a statute or policy that facially discriminates based on age suffices to show disparate treatment under the ADEA," *id*. at 2369, which the dissenting justices seized upon and similarly emphasized: "The rule ... is that once the plaintiff establishes that a policy discriminates on its face, no additional proof of a less-than-benign motive ... is required. For if the plan discriminates on its face, it is obvious that decisions made pursuant to the plan are 'actually motivated' by age," *id*. at 2374-75.

Thus, *Kentucky Retirement itself* makes clear that cases like this one, where the challenged termination of a benefit accrual is based expressly on the attainment of a specified age, are governed by the traditional rule -- that such a provision is a violation on its face -- and not by the *Kentucky Retirement* exception. Because the Plan at issue here on its face includes language terminating the accrual of the PPA Interest Credits because "the Participant attains age 55," which ERISA specifically prohibits, the district court erred in disregarding the traditional rule applicable to facially discriminatory policies or plans.

Like the Supreme Court in *Kentucky Retirement*, many courts have emphasized the importance of carefully considering whether a challenged plan is one that is facially discriminatory because of the traditional rule declaring such plans unlawful without regard to the employer's stated benign reasons for its adoption (as such reasons are irrelevant to the plan's legality). For instance, several recent Circuit Court of Appeals opinions demonstrate that had those courts been presented with the facts of this case, the result would have been a determination that the Plan on its face violates ERISA. *See Cooper*, 457 F.3d at 638, 640 (rejecting plaintiffs' challenge to the plan, but emphasizing that "[n]either the contribution rate nor the interest rate *changes with age*," and that all of the terms of the plan were "*age-neutral*"); *Register*, 477 F.3d at 68 (rejecting plaintiffs' challenge to the plan, but emphasizing that the plan did not reduce contributions in the form of "interest credits" to older employees and that these "interest credits" were properly "credited into the participants' accounts *regardless of their age*"); *Drutis*, 499 F.3d at 615 (rejecting plaintiffs' challenge to the plan, but emphasizing that the interest rate for the plan's "interest credit" *did not "change with age*.").[FN6]

FN6. *See also Northwest Airlines, Inc. v. Phillips*, 594 F. Supp. 2d 1075, 1084-86 (D. Minn. 2009)

("The [Plaintiffs] do not allege that the [Plan], on its face, discontinues or reduces allocations [based on age.]"; "The [Plaintiffs] must show that the allocations are ceased or reduced 'because of age. On its face, the [Plan] does not use age when calculating allocations. The Court therefore turns to whether the [Plan's] use of projected final average earnings, which incorporates a [plaintiff's] age, equates to cessation or reduction of allocations "because of age.").

The district court also erred in its reliance on the Eighth Circuit's decision in *Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197 (8th Cir. 1992). The issue before the Eighth Circuit in *Atkins* was whether the difference in accrual of pension payments caused by a traditional defined benefit plan's twenty-five year service cap and early retirement provision violated the ADEA and ERISA. The Eighth Circuit stated that the twenty-five year service cap was age-neutral and noted that federal law does not forbid that type of service cap. *Id*. at 1200-01 (citing 29 U.S.C. § 1054(b)(1)(H)(ii) (ERISA); 29 U.S.C. § 623(i)(2) (ADEA); 26 U.S.C. § 411(b)(1)(H)(ii) (IRC)). With respect to the plan's early retirement benefit provision, which permitted a participant to retire at age 55 with a 3% reduction for each year the participant was under the normal retirement age of 60, the Eighth Circuit observed that federal law does not forbid that type of early retirement discount. *Id*. (citing 29 U.S.C. § 1054(b)(1)(H)(v) (ERISA); 29 U.S.C. § 623(0(6) (ADEA); 26 U.S.C. § 411(b)(1)(H)(v) (IRC)). Accordingly, the Eighth Circuit summarily determined that the plan's terms did not cause any prohibited age-related reductions in an accrued benefit (or benefit accrual). *Id*.

The analysis employed by the Eighth Circuit in *Atkins* is irrelevant to Plaintiffs' claims here because Plaintiffs are challenging a plan that contains neither a service cap nor any early retirement benefit feature. Additionally, Plaintiffs' claims arise in connection with a cash balance plan - which, as explained above, is structured differently than a traditional defined benefit plan, such as the one at issue in *Atkins*. Also, unlike in *Atkins*, the Plan provision challenged by Plaintiffs here presents a straightforward claim involving a Plan that on its face includes language terminating a benefit accrual because a participant attains a specified age, which ERISA plainly prohibits. Thus, the Eighth Circuit's decision in *Atkins* provides no support for the district court's approval of the Plan's explicit termination of the interest credit benefit accrual because a participant attains the age of 55.

In summary, the PPA Interest Credits are a benefit accrual because they reflect an input credited by the employer to the participant's stated account balance and clearly constitute a form of benefit, right or feature under the Plan. As such, ERISA prohibits the Plan from ceasing or reducing the PPA Interest Credits "because of the attainment of any age." Where, as here, the Plan on its face ceases the PPA Interest Credits because a participant attains the age of 55, the Plan violates ERISA as a matter of law, and it does not matter whether Defendants had a non-age-based motive for adopting the challenged Plan provision. Accordingly, Plaintiffs are entitled to judgment in their favor as a matter of law on the issue of Defendants' liability on Plaintiffs' Age-55 Cut Off Claims (Counts I, II and III).

B. By Projecting the PPA Interest Credits Only Until Age 55 as Opposed to the Plan's Normal Retirement Age of 65, the Plan Also Violates ERISA's Requirement that an Employee's Accrued Benefit Be Calculated with Interest Credits Projected to Normal Retirement Age.

The Plan's unlawful termination of the PPA Interest Credits at age 55 also results in an impermissive forfeiture under ERISA because the Plan calculates a participant's accrued benefit with PPA Interest Credits projected only through age 55, as opposed to the Plan's Normal Retirement Age of 65. *See, e.g.*, Rev. Rule. 2008-7, 2008-7 I.R.B. 419, 2008 WL 274325 ("[I]n determining the accrued benefit of a participant under a cash balance plan at any time prior to normal retirement age, the balance in the cash balance plan must be projected with interest credits to normal retirement age."); Notice 96-8, 1996-6 I.R.B. 23, 1996-1 C.B. 359, 1996 WL 17901 ("Under a cash balance plan, the retirement benefits payable at normal retirement age are determined by reference to the hypothetical account balance as of normal retirement age, including benefits attributable to interest credits to that age."); *Berger v. Xerox Corp.*, 338 F.3d 755, 762-63 (7th Cir. 2003) (stating that IRS Notice 96-8 is "an authoritative interpretation of the applicable statutes and regulations" and confirming that to derive the actuarially equivalent of a pension at normal retirement age, a plan must add all interest that would accrue through age 65 before discounting the resulting sum to its present value); 29 U.S.C. § 1054(c)(3).

Accordingly, the district court also erred in failing to find that the Plan's calculation of a participant's accrued benefit results in an impermissive forfeiture.

CONCLUSION

Plaintiffs respectfully urge this Court to rule that the district court erred in granting summary judgment to Defendants and in denying summary judgment to Plaintiffs. Accordingly, the district court's judgment in favor of Defendants on Plaintiffs' Age 55 Cut-Off claims (Counts I, II and III of the Consolidated Class Action Complaint) should be reversed, and judgment entered in favor of Plaintiffs on those claims.

Appendix not available.

Grant M. WALKER, individually and on behalf of all other similarly situated, et al., Plaintiffs - Appellants, v. MONSANTO COMPANY PENSION PLAN, et al., Defendants - Appellees. Glynn Davis, individually and on behalf of all other similarly situated, et al., Plaintiffs - Appellants, v. Solutia Incorporated Employees Pension Plan, Defendant - Appellee. Fred Donaldson, individually and on behalf of all other similarly situated, et al., Plaintiffs - Appellants,
2010 WL 300586 (C.A.7) (Appellate Brief)

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