

ERISA COMPLIANCE & ENFORCEMENT STRATEGY GUIDE

Employee Benefits Litigation

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The Interaction of ERISA Litigation with Age Discrimination and Disability Claims

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Introduction

Litigation involving allegations of benefit discrimination often involves claims asserted under three separate federal statutes with distinct underlying purposes: the Employee Retirement Income Security Act; the Age Discrimination Enforcement Act; and the Americans With Disabilities Act.

ERISA, passed by Congress in 1974, was established for the purpose of protecting the interests of participants in employee benefit plans and their beneficiaries by providing for appropriate remedies, sanctions, and ready access to federal courts,¹ and to protect the financial integrity of pension and welfare plans.² Although the statutory scheme of ERISA does not mandate that employers provide any particular benefits and does not itself proscribe discrimination in the design of employee benefit plans,³ §510 of ERISA prohibits employers from discriminating against a participant or beneficiary for exercising his or her benefit rights, and interfering with the attainment of any such benefit rights.⁴

The ADEA, originally adopted in 1967, is designed to “promote employment of older persons based on their ability rather than age”⁵ and to “prohibit arbitrary age discrimination in employment.”⁶ The act declares it unlawful “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”⁷ Workers 40 and older are protected under the ADEA. The protection against age discrimination extends beyond hiring, firing, and compensation, and includes all employee benefits. In addition to the ADEA’s statutory provision prohibiting age discrimination, ERISA also contains its own provisions proscribing age discrimination.⁸

Finally, Title I of the ADA, enacted in 1990, protects qualified individuals with disabilities against employment discrimination in areas such as application procedures, hiring, promotions, compensation, training, and termination.⁹ Under Title I, if an individual is disabled but is nonetheless capable of performing the job so long as the employer provides reasonable accommodations, then the employer must do so. Title III of the ADA prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation....”¹⁰

This report examines recent court decisions involving the intersection of ERISA litigation with ADEA and ADA claims in the context of allegations of benefit discrimination.

The Mechanics: Direct Evidence and the Burden-Shifting Framework of McDonnell Douglas

Although benefit discrimination claims face different substantive requirements depending on the statute under which they are brought, a common element for all is the mechanics of establishing a claim. All claims must assert direct evidence or indirect (circumstantial) evidence to establish a valid discrimination claim.¹¹

Direct evidence, such as the text of a benefit plan, effectively establishes a valid discrimination claim but is often difficult to find.¹² Much more common, however, is the use of indirect or circumstantial evidence in connection with discrimination claims.

For claims asserted under §510 of ERISA, the ADEA, and the ADA, plaintiffs face a modified version of the burden-shifting framework first pronounced by the Supreme Court in the context of Title VII of the Civil Rights Act of 1964 in *McDonnell Douglas v. Green*.¹³ As an initial matter, the plaintiff must make out a prima facie case of discrimination under the particular statute.¹⁴

To prove a prima facie case under ERISA §510, for example, a plaintiff must show (1) that an employer took specific actions (2) for the purpose of interfering (3) with an employee's attainment of pension benefit rights.¹⁵

With respect to claims asserted under the ADEA, a plaintiff must establish that the employee (1) is a member of the protected class, which for age discrimination cases means he or she must be at least forty years old; (2) is qualified to do the job; (3) suffered an adverse employment action; and (4) was replaced by a sufficiently younger person.¹⁶

To establish a prima facie case under the ADA, plaintiff must demonstrate that (1) he or she is disabled within the meaning of the ADA;¹⁷ (2) is able to perform the essential functions of the job; and (3) the employer discriminated against him or her because of the disability.¹⁸

If a prima facie case is established, there is a "presumption that the employer unlawfully discriminated against the employee."¹⁹

The burden then shifts to the employer, who must assert a legitimate, non-discriminatory reason for the allegedly discriminatory act.²⁰ If the employer fails to do this, judgment is granted in favor of the plaintiff. But if the employer provides legitimate reasons for its action, the presumption of illegal discrimination is dropped and the burden shifts back to the plaintiff.

In the final step of the burden shifting analysis, the plaintiff is given the opportunity to show that the proffered reason is merely pretext for an actual discriminatory purpose.²¹ This requires the plaintiff to produce enough evidence to show that the proffered reason had no basis in fact or was otherwise insufficient to explain the motivation behind the act in question.²² This step ensures that the employer is not permitted to cover up its unlawful motive with a neutral excuse that is in fact not the impetus behind the decision.

Employee Benefits and Age Discrimination

ERISA §510

In *Millsap v. McDonnell Douglas*,²³ the plaintiffs in a class action prevailed against their former employer in an ERISA §510²⁴ claim arising from a plant closure of their plant. The court found that the layoffs constituted an intentional interference by McDonnell Douglas with the plaintiffs' employee benefits. The court also concluded

that McDonnell Douglas, despite its numerous public assurances that it intended to keep the plant open, in fact never intended to do so and that its business reasons for closing the plant were pretextual.²⁵

The §510 action was not accompanied by an ADEA claim, but the average age of the plaintiffs figured prominently in the decision. The average age of the Tulsa hourly employees was the highest among the seven plants McDonnell Douglas considered for shutdown, meaning that the company stood to save the most in pension and health care costs by eliminating that plant.²⁶ The overall savings in just reduced pension and health care costs totaled \$24.7 million, whereas the company would otherwise save \$19 million over four years by closing the Tulsa plant.²⁷ The court found incredible the testimony of some company officials they had not considered those savings.

McDonnell Douglas was also punished for engaging in a pattern of discovery abuse during the proceedings.²⁸ The court found that company officers deliberately withheld relevant information and witnesses committed perjury at either depositions or at trial and destroyed relevant documents, among other things. These egregious discovery abuses greatly contributed to the court's rejection of the business justifications McDonnell Douglas provided after the plaintiffs established a prima facie §510 claim.²⁹ The company also drew the ire of the court with its bad-faith negotiations with the federal and local government and its overall "history of mendacity."³⁰ Not only did the district court find against the company on the issue of §510 liability, it also imposed substantial sanctions on it for the multiple discovery abuses occurring before, during, and after the trial.³¹

As is often the case in ERISA litigation, the issue of remedies in *Millsap* proved to be less clear-cut than the court's assessment of liability. On appeal, the Tenth Circuit granted the company's motion to preclude an award of back pay, despite the plaintiffs' arguments that back pay was a form of equitable relief available under ERISA §502(a)(3).³² The court found unpersuasive the plaintiffs' arguments that back pay represented equitable relief. It rejected the notion that back pay was "incidental to or intertwined with injunctive relief."³³ It also disagreed with the plaintiffs' analogy of the relief provisions of ERISA with that of Title VII and the NLRA, which treat back pay as equitable.³⁴ Finally, the court rejected the plaintiffs' public policy arguments that refusing to award back pay thwarts ERISA's goal of deterring interference with employee benefits.³⁵ The court concluded that the back pay sought was simply a different form of compensatory relief, which is a legal, not an equitable, remedy.³⁶ Because ERISA allows only for equitable relief, the court denied plaintiffs' back pay request.

ERISA §510 and the ADEA

Notwithstanding that the ADEA³⁷ may appear to be an obvious avenue of relief for employees alleging age discrimination, as demonstrated by *Millsap*, some plaintiffs choose to pursue a claim solely under ERISA §510. Others, however, pursue claims under both ERISA and the ADEA.

Coomer v. Bethesda Hosp., Inc.,³⁸ for example, involved claims under both the ADEA and ERISA §510 arising from a pension dispute. The plaintiffs, whose pension rights were all vested, complained that they were not granted a lump sum distribution even though one former employee had been granted such a distribution at the discretion of the plan administrator.³⁹ The court granted summary judgment to the defendant on the ERISA count because the denial of the plaintiffs' request for a lump sum was not an "interference" with a §510 right, given that lump sum payments were not in the plan and the distribution to the former employee was simply a discretionary act.⁴⁰ The age discrimination charge was similarly dismissed because the different treatment was reasonable, not pretextual, because the former employee (who was younger than the plaintiffs) who received the lump sum payment was owed a significantly smaller distribution than that owed to the plaintiffs.⁴¹

ERISA §510, the ADEA, and the ADA

Finally, some plaintiffs take a "kitchen sink" approach and assert benefit discrimination claims under ERISA, the ADEA, and the ADA, in addition to asserting claims under state law. In *Szczesny v. General Elec. Co.*, for example, the plaintiff brought claims under the ADEA, ERISA §510, the ADA, and the Pennsylvania Human

Relations Act arising out of his termination.⁴² The plaintiff alleged that he was fired because of his age, but the employer won summary judgment because the court concluded that plaintiff was fired for his documented poor work performance. The plaintiff was unable to establish that this legitimate, non-discriminatory reason was a pretext when the burden shifted back to him. The ERISA §510 claim failed because the court found that the plaintiff's termination did not deprive him of his pension in light of the fact that his rights had already vested, and his termination ended only his right to contribute to the plan. The court determined that §510 does not protect for merely "incidental" losses such as those. With respect to the ADA claim, the court noted that an axiom of any ADA claim is that the employer be aware of the disability and the employer denied knowledge of any alleged disability at the time the plaintiff was terminated. The court concluded that the record was clear and unequivocal that the plaintiff was not discharged because of a disability.⁴³

ERISA and the Conversion of Defined Benefit Pension Plans to the Cash Balance Model

Over the past twenty years, corporate pension plans in the United States have undergone a dramatic facelift. Whereas once, most pension plans operated as traditional defined benefit plans, today companies have shifted to offering employees participation in defined contribution plans or hybrid plans such as cash balance plans.⁴⁴ In defined benefit plans, employers bear the risk of investment as they contribute to a general trust and guarantee a certain benefit to each employee for his or her retirement (hence "defined benefit"). In defined contribution plans, the investment risk lies with the employees, who contribute to their own individual retirement accounts and decide where the funds are to be invested. Defined contribution accounts are easier to transfer to a new employer, an important benefit given the mobility of the modern workforce, but they do not offer the security of a defined benefit plan because the employee bears the risk of loss. The cash balance plan serves as a hybrid of the two. Under a cash balance plan, employees are provided hypothetical accounts, which consist of pay credits and interest credits, typically based on the years of service and the employee's salary for a given period. The account is hypothetical because the employer does not actually set money aside in individual accounts, but rather pools the funds with those of the other participants. Cash balance plans have the benefit of portability while not being burdened with the risk of loss, which remains with the employer.

The conversion of pension plans from the traditional benefit formula to the cash balance model, some argue, has left older workers out in the cold. While young employees have time to plan their retirement savings under a cash balance model, workers who had been relying on the traditional defined benefit plan, which typically accelerates benefits as the worker approaches retirement, are argued to be age-discriminatory. Such cash balance plan conversions have led to a number of age discrimination claims brought under the ADEA and ERISA.⁴⁵

Most courts weigh in favor of finding that cash balance plans are not inherently age discriminatory. In *Eaton v. Onan Corp.*,⁴⁶ the court granted summary judgment for the defendant on two counts of age discrimination asserted under the ADEA and ERISA and withheld summary judgment on three other ERISA claims. The company had converted its traditional defined benefit pension plan to a cash balance system that provided plan beneficiaries either an annuity or a lump sum payment on retirement. The plaintiffs alleged that the new plan discriminated against older workers, arguing that the cash balance plan reduced the rate of participants' benefit accruals because of age and by providing alternative formulas for annuity without offering an equivalent lump sum payment as an optional form of benefit. The court disagreed, finding that cash balance plans are not inherently age discriminatory because the rate of benefit accrual in a cash balance plan does not solely depend on a participant's age. The court further held that, even if it did depend solely upon a participant's age, the age discrimination provisions were inapplicable because the plaintiffs had not reached normal retirement age.

Eaton is not alone in dismissing age discrimination claims brought against employers converting defined benefit plans to cash balance plans. The court in *Tootle v. ARINC, Inc.*⁴⁷ agreed that the conversion of a pension plan to a cash balance plan did not violate the ADEA's or ERISA's age discrimination provisions for the same reasons as those given in *Eaton*. The court directed that the rate of benefit accrual in an individual's account balance should be measured from year to year, not in terms of an age-65 annuity traditionally used for defined benefit plans.⁴⁸ The court in *Godínez v. CBS Corp.* similarly ruled against age discrimination claims under ERISA and the ADEA for the conversion of a pension plan to the cash balance model because the plaintiffs did not establish that their accrual rate declined or that they were treated unfairly relative to younger employees.⁴⁹ *Campbell v. BankBoston*

noted problems with the age discrimination claims, although those claims were independently barred on procedural grounds.⁵⁰

Until recently, one decision from the Southern District of Illinois stood in contrast to *Eaton* and its progeny and served as a cautionary tale for companies considering transitioning their traditional pension plans into cash balance plans. In *Cooper v. IBM Corp.*, the court had found a cash balance plan violated ERISA's age discrimination provisions because the value of the employer's contributions to an employee's cash balance account naturally declines in value as the employee ages since that contribution has less time to draw interest.⁵¹ Cash balance plans were therefore *per se* ERISA violations.⁵²

On appeal, however, the Seventh Circuit disagreed.⁵³ The court first noted that the terms of IBM's plan are "age-neutral" because each employee receives an identical pay and interest credit per year.⁵⁴ The Seventh Circuit then declared that the district court misinterpreted the phrase "benefit accrual," as it appears in IBM's defined benefit plan. According to the court, "benefit accrual" refers to IBM's contribution to the employee's account (the "input"), not the gross amount of credits the employee ultimately receives ("output"). The district court's focus on the output, the court found, improperly penalizes an employer for the time value of money, because a younger employee who receives the same number of credits as an older worker at a given point in time will ultimately receive more credits because those credits earn interest for a longer period of time. The Seventh Circuit declined to find that the mere "time value of money" could give rise to a valid age discrimination claim.⁵⁵

Even with the reversal of *Cooper*, judicial interpretation of cash balance plans in the ERISA context is still unsettled. Two months prior to the Seventh Circuit's *Cooper* decision, the Southern District of Illinois in *Donaldson v. Pharmacia Pension Plan* created perhaps another wrinkle by refusing to dismiss ERISA age discrimination claims against an employer for converting its defined benefit plan to a cash balance plan.⁵⁶ Pharmacia sought to dismiss the claims because the employees 1) failed to exhaust their administrative remedies, and 2) sought legal and not equitable relief in violation of ERISA in demanding compensatory damages. The court first found that the employees were not required to exhaust their administrative remedies, which it found would have been "futile."⁵⁷ In addition, the court held that plan participants sought equitable relief because their benefits were "within the possession and control of [Pharmacia]," satisfying the Supreme Court's "possession" standard set forth in *Sereboff v. Mid Atlantic Med. Svcs., Inc.*⁵⁸

The Third Circuit has joined the Seventh Circuit in finding cash balance plans lawful under ERISA's age discrimination provisions. In affirming *Register v. PNC Fin. Svcs. Group, Inc.*,⁵⁹ the Third Circuit declared that it was concerned with the employer's contributions into a cash balance account ("inputs"), not the amount eventually received by the employee ("outputs"). The court found that because PNC did not reduce contributions to older employees, the rate of benefit accrual did not depend on age and the employer's plan was not age discriminatory.

Other Circuits are also expected to address the lawfulness of cash balance plans. As of March 2007, appeals were pending before the Second and Ninth Circuits. The Second Circuit in particular has witnessed a number of district court decisions on the lawfulness of cash balance plans, with some courts finding the plans lawful and others holding that they violate the age discrimination provisions of ERISA.⁶⁰ The Second Circuit is expected to hear an appeal from a decision finding that a cash balance plan did not violate ERISA's age discrimination provisions.⁶¹

An appeal is also pending before the Ninth Circuit,⁶² from a decision of the Central District of California dismissing an age discrimination claim arising from the conversion of the employer's defined benefit plan to a cash balance plan, among other things.⁶³

Although *Cooper* and *Register* are not binding on these courts, their guidance is expected to influence the courts in deciding whether the cash balance plans in existence before the effective date of the Pension Protection Act of 2006 (see discussion below) should be found unlawful under ERISA's age discrimination provisions.

The Pension Protection Act of 2006: Congress Affirms the Legality of Cash Balance Plans

On a prospective basis, Congress answered the question of whether cash balance plans are inherently age discriminatory by enacting the Pension Protection Act of 2006, signed by President Bush on August 17, 2006.⁶⁴ The PPA ensures compliance with ERISA and the ADEA's age discrimination provisions if a participant's accrued benefit equals or exceeds that of a similarly situated younger participant.⁶⁵ The hypothetical "similarly situated" younger participant must be identical to the older participant in all respects, with the exception of age, including length of service, compensation, position, and date of hire. The accrued benefit may be measured under one of three yardsticks: (1) the balance of hypothetical account; (2) an annuity payable at normal retirement age; or (3) the current value of the accumulated percentage of the participant's final average compensation. The first measurement will be used for cash balance plans, which by definition are a hypothetical account until retirement.

The PPA also allows employers to index accrued benefits under a cash balance model so long as the accrued benefit is not reduced. Cash balance plans are also subject to other requirements imposed on defined benefit plans, including provisions related to interest, vesting, conversion, minimum present values, and termination. The interest provision requires cash balance plans to ensure that interest credits do not exceed a market rate of return (the IRS will likely promulgate rules governing the calculation of "market rate"). Additionally, the PPA ensures that a participant's account balance is not reduced because of a negative interest credit.

The PPA's effective date in applying the age discrimination provisions to cash balance and other hybrid plans is June 29, 2005. Thus, cash balance plans meeting the law's specifications will not be found age discriminatory going forward. For plans in effect before June 29, 2005, however, courts continue to wrestle with the issue of the plans' lawfulness.

No Age Discrimination for "Top Hat" Plans

Courts have found no age discrimination under ERISA arising from "top hat" plans, which companies offer to key management and other highly compensated officers and employees.⁶⁶ Unlike cash balance plans, top hat plans serve a small and well-compensated number of employees and officers that courts view as capable of bargaining at arms' length with employers.⁶⁷ Thus, courts find that top hat plans are exempt from the fiduciary duty provisions of ERISA.⁶⁸

In *Paneccasio v. Unisource Worldwide, Inc.*, the district court held that Paneccasio's EEOC filing claiming age discrimination relating to the termination of the top hat plan was untimely, and rejected plaintiff's argument for equitable tolling. The court held further that, even if his EEOC claim were timely, Paneccasio failed to meet his initial burden of establishing a prima facie case of age discrimination. Moreover, even if he could establish such a prima facie case, the top hat plan was terminated for legitimate nondiscriminatory reasons. Finally, the court determined that the legitimate nondiscriminatory reasons for terminating the top hat plan were not pretextual, and granted summary judgment in favor of defendants on Paneccasio's age claim. As to the ERISA claims, the court decided that there was no genuine issue of material fact that the company acted within its discretion to terminate the top hat plan and pay termination benefits accordingly. The early retirement program did not change the language of the top hat plan nor the amount of the termination benefit that would be paid to Paneccasio upon Plan termination.⁶⁹

The district court in *Callahan v. Unisource Worldwide, Inc.*⁷⁰ similarly granted summary judgment in favor of defendants on the basis that Callahan had knowingly and voluntarily waived his right to sue for age discrimination when he signed a release agreement upon his termination of employment. The court further noted that, because top hat plans are exempt from the fiduciary duty provisions of ERISA, defendants also were entitled to summary judgment in their favor on Callahan's breach of fiduciary duty claim. Finally, the court granted summary judgment on Callahan's estoppel claim because there were no extraordinary circumstances and no misrepresentations were made.

Retiree Health Plans

The Third Circuit Court of Appeals in *Erie County Retirees Ass'n v. County of Erie*⁷¹ changed the landscape of benefit plans by expanding the application of the ADEA to retiree benefits. The plaintiffs, Medicare-eligible retirees, claimed that Erie County's benefit plan was unlawfully discriminatory because it provided them with inferior health coverage relative to retirees under the age of 65 who, by virtue of their age, were not eligible for Medicare.⁷² The court reasoned that because Medicare eligibility was a proxy for age, treating Medicare-eligible retirees less favorably than younger retirees was a potential violation of §4(a)(1) of the ADEA.⁷³

The court acknowledged that an otherwise unlawful benefit plan such as Erie County's may be exempt from ADEA liability under the statutory safe harbor of §4(f)(2)(B), commonly referred to as the "equal cost equal benefit" provision.⁷⁴ In this analysis, the district court would first decide if the benefits received favored the younger retirees, and if that proved to be the case the court would determine whether the costs incurred by Erie County were equal.⁷⁵ Medicare provided benefits could be considered under the first stage of the analysis, but only "costs which the County itself incurs" could be considered under the "equal cost" stage.⁷⁶ On remand, the district court ruled that the plan failed to qualify for protection under the safe harbor because both the benefits provided to the plaintiffs and the costs incurred by the County on behalf of the plaintiffs were inferior.⁷⁷ Accordingly, the plan was unlawful under the ADEA and the plaintiffs were granted their motion for partial summary judgment.

Safe Harbor Under the ADEA

As discussed in *Erie County*, the ADEA offers two safe harbors for employee benefit plans that otherwise would be discriminatory. The safe harbors protect plans that either make equal payments or incur equal costs for the benefit package of an older and a younger worker or for bona fide voluntary early retirement incentive plans.⁷⁸ These provisions have come to be known as the "equal benefit or equal cost" and the "voluntary early retirement incentive" safe harbors, respectively.⁷⁹

In *Abrahamson v. Board of Educ.*,⁸⁰ the defendant school district unsuccessfully sought to protect its retirement plan under the "voluntary early retirement incentive" safe harbor. The early retirement plan offered qualified teachers approaching retirement either a lump sum bonus of \$20,000 in exchange for early retirement or a salary augmentation of \$7,000 a year for three years if they kept working.⁸¹ The court found that the plan did not qualify as a voluntary early retirement *incentive* plan because teachers who continued working were financially better off than those that retired, thus giving no incentive for teachers to opt for early retirement.⁸²

Although the school district lost the battle over the substantive law of the early retirement incentive safe harbor, it ultimately won the war because the court allowed it to remove the salary augmentation early retirement option – which was precisely the relief sought by the plaintiffs. This guaranteed that teachers who sought early retirement under the old plan, which did not contain the salary augmentation option, were given the same \$20,000 early retirement incentive as teachers under the current plan. The "losers" under this ruling were the teachers who would have qualified for early retirement under the plan because they lost the salary augmentation option, which had been promised to them.

Unlike the ADA, the ADEA's safe harbor for employee benefit plans does not include a "subterfuge" clause.⁸³ A voluntary early retirement incentive plan must be "consistent with the relevant purpose or purposes of [the ADEA]," but the safe harbor does not explicitly require a plan not to be "subterfuge" as is stated in the ADA.

ERISA and the ADA

The intersection of ERISA with ADA⁸⁴ claims is also prevalent in benefit discrimination litigation. Two specific areas of intersection involve the difference in benefits for mental health-related disabilities versus physical disabilities and the inherent contradiction in seeking long-term disability or Social Security disability insurance benefits and asserting an ADA claim against the same employer.

Different Benefits For Different Disabilities and the ADA's Safe Harbor For Self-Insured

Benefit Plans

Most courts have found that offering insurance for disability does not obligate an employer to offer the same benefits for all disabilities. Employees who have alleged ERISA and ADA violations because their company offered lesser benefits for disabilities arising from mental health disorders versus physical maladies have been unsuccessful, because courts have held that the ADA does not prohibit this type of distinction.⁸⁵ Similarly, courts have found no ADA violation where an insurance policy caps coverage for AIDS-related illnesses.⁸⁶ In short, courts have determined that there is no ADA violation so long as every employee is offered the same plan, even if the plan offers different coverage for different disabilities.⁸⁷

In addition, other courts have similarly found no ADA violation but base their decisions on a different rationale by invoking the ADA's safe harbor for both insured and self-funded benefit plans.⁸⁸ For example, the D.C. Court of Appeals has held twice that self-funded disability plans qualify for the ADA's "bona fide benefit plan" safe harbor and are therefore exempt from its coverage.⁸⁹ That provision exempts any "bona fide benefit plan that is not subject to State laws that regulate insurance" so long as the plan is not "subterfuge to evade the purposes of [the ADA]."⁹⁰ Those cases, *EEOC v. Aramark Corp.* and *Fitts v. Federal Nat'l Mortg. Ass'n*, involved plaintiffs who received disability benefits for their mental health disorders but subsequently complained that their coverage was inferior to coverage for physically disabled beneficiaries.⁹¹ The courts dismissed both claims because the plans qualified for the safe harbor. Each disability plan was "bona fide because it exists and pays benefits" and was not subject to state insurance laws because of ERISA's preemption provisions.⁹² The plans could not be "subterfuge" because they were implemented before the ADA was enacted and thus could not have been intended to contradict the goals of the ADA.⁹³

The broad language of the bona fide benefit plan safe harbor coupled with its current judicial interpretation gives considerable freedom for employers to construct benefit plans without incurring ADA liability. The standard for establishing a "bona fide" plan simply requires for a plan to "exist" and "pay benefits." In *Aramark* and *Fitts*, these points were both readily conceded by the plaintiffs. Therefore, so long as the benefit plan was not designed as a "subterfuge" to thwart the aim of the ADA, it enjoys the protection of the safe harbor.

Although few courts have addressed the merits of the issue of what constitutes a "subterfuge," some decisions have discussed what factors demonstrate the existence of subterfuge. Courts agree that the lack of actuarial justification for the terms of a plan does not establish that the plan was subterfuge to evade the policies of the statute.⁹⁴ In *Leonard F. v. Israel Discount Bank*, the court rejected the plaintiff's ADA claim arising from disparate benefits for mental health disorders versus physical disorders because the plan qualified for the ADA's safe harbor. The finding on subterfuge was remanded because it was unclear when the plan came into effect, but the court stated that even if the plan had been implemented after the ADA became effective, an employer would not need to actuarially justify how it constructed its benefit plan.⁹⁵ Other courts have agreed with this proposition.⁹⁶

Asserting ADA Discrimination After Seeking LTD or SSDI Benefits

Sometimes when employees assert a disability discrimination claim under the ADA, they are haunted by their earlier attempts to receive either long-term disability payments from a private insurer or Social Security Disability Insurance benefits. The apparent contradiction between an application for LTD or SSDI (which asserts that the employee is unable to work) and an ADA claim (which argues that the employee could work if the employer provided reasonable accommodations) was glaring enough for many courts to dismiss as a matter of law the later ADA claim. However, the Supreme Court has stated that claims for SSDI and the ADA are not inherently contradictory.⁹⁷

Many jurisdictions have dismissed ADA claims where the employee previously applied for disability benefits.⁹⁸ These cases recognized the inherent contradiction where an employee claims that she was previously unable to work (and thus sought LTD benefits) and subsequently asserts that she is able to work (and files an ADA claim because her employer will not allow her to work). However, not all cases held that the apparent discrepancy automatically estopped a former SSDI recipient from filing an ADA claim.⁹⁹

The Supreme Court addressed the split among the circuits in 1999. It ruled that seeking SSDI benefits does not automatically estop an employee from pursuing an ADA claim, but that a plaintiff must explain the inherent contradiction between seeking SSDI benefits for an inability to work and then filing an ADA claim, which asserts that she can work with a reasonable accommodation.¹⁰⁰ The Court discussed many factors that could explain the seeming contradiction between SSDI benefits and the ADA claim. For example, the Social Security Administration, which administers SSDI benefits, does not take into account the possibility of “reasonable accommodation” that the ADA does.¹⁰¹ Also, an individual’s condition could improve so that she is able to work after previously being unable to do so.¹⁰²

Procedural Variations Under the Applicable Statutes of Limitations

In addition to the substantive differences among ERISA, the ADEA, and the ADA, there are procedural variations as well.

Claims brought pursuant to the ADEA as well as the ADA must first be filed with the Equal Employment Opportunity Commission within 180 days of the of the alleged unlawful practice, or, if there exists an applicable state discrimination law and agency, the time period is extended to 300 days.¹⁰³

With actions brought under ERISA, however, plaintiffs are only required to exhaust of the administrative remedies set forth under the applicable benefit plan.¹⁰⁴ Because ERISA’s statutory provisions contain a specific statute of limitations period only for claims of breach of fiduciary duty,¹⁰⁵ courts have instructed that the most analogous state statute of limitations be applied to all other causes of action brought pursuant to ERISA.¹⁰⁶ In *Woods v. Halliburton*, for example, the court determined that plaintiff’s ERISA §510 claim was barred by Oklahoma’s two-year statute of limitations applicable to employment discrimination actions.¹⁰⁷

Given the varied statute of limitations periods applicable to claims brought pursuant to ERISA as compared to the ADEA and the ADA, it is possible that certain claims may be time-barred when others are not. This was exactly the case in *Campbell*.¹⁰⁸ As the *Campbell* court explained, ERISA has its own anti-age discrimination provision.¹⁰⁹ The court dismissed this claim on the basis that plaintiff had waived his ERISA age discrimination claim because it was raised for the first time on appeal. The basis for the dismissal of plaintiff’s ADEA claim, however, was that it was time-barred because the charge of age discrimination was filed beyond the applicable 300 day limitation period.¹¹⁰

Footnotes

¹ ERISA §2, 29 U.S.C §1001(b).

² *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 128 (7th Cir.1992).

³ *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 91 (1983).

⁴ ERISA §510, 29 U.S.C. §1140.

⁵ 29 U.S.C. §621(b).

⁶ 29 U.S.C. §621(a).

⁷ 29 U.S.C. §623(a)(1).

⁸ ERISA §204(b)(1)(H), 29 U.S.C. §1054(b)(1)(H). The Internal Revenue Code also contains a parallel age discrimination provision at 26 U.S.C. § 411(b)(1)(H).

⁹ 42 U.S.C. §12112(a).

¹⁰ 42 U.S.C. §12182(a).

¹¹ See, e.g., *Lessard v. Applied Risk Mgmt.*, 307 F.3d 1020 (9th Cir. 2002).

¹² E.g., *Lessard*, 307 F.3d at 1026 (where the text of the new benefit plan announced after a merger that removed health care benefits for workers on extended leave was direct evidence of a §510 claim).

¹³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹⁴ *McDonnell Douglas*, 411 U.S. at 802.

¹⁵ See, e.g., *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852, 8 EBC 1047 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987).

¹⁶ See, e.g., *Anderson v. CONRAIL*, 297 F.3d 242, 249 (3d Cir. 2002).

¹⁷ The ADA defines a “qualified individual with a disability” as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. §12111(8).

¹⁸ See, e.g., *Pack v. Kmart Corp.*, 166 F.3d 1300, 1302 (10th Cir. 1999).

¹⁹ *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

²⁰ *McDonnell Douglas*, 492 U.S. at 802; *Shores v. Lucent Techs., Inc.*, 23 EBC 2702 (4th Cir. 2000).

²¹ *McDonnell Douglas*, 492 U.S. at 804.

²² *Potts v. National Healthcare*, 961 F. Supp. 1136 (M.D. Tenn. 1996).

²³ 162 F. Supp. 2d 1262 (N.D. Okla. 2001), *aff’d*, 368 F.3d 1246, 32 EBC 2586 (10th Cir. 2004).

²⁴ 29 U.S.C. §1140.

²⁵ *Millsap v. McDonnell Douglas*, 162 F. Supp. 2d at 1300.

²⁶ *Id.* at 1270.

²⁷ *Id.* at 1271.

²⁸ *Id.* at 1302.

²⁹ *Id.* at 1303.

³⁰ *Id.* at 1301.

³¹ *Id.* at 1307.

³² 368 F.3d 1246.

³³ *Id.* at 1255.

³⁴ *Id.* at 1257-58.

³⁵ *Id.* at 1259.

³⁶ *Id.* at 1254.

³⁷ See 29 U.S.C. §621, *et. seq.*

³⁸ *Coomer v. Bethesda Hosp., Inc.*, 370 F.3d 499, 32 EBC 2578 (6th Cir. 2004).

³⁹ *Id.* at 503.

⁴⁰ *Id.* at 507.

⁴¹ *Id.* at 510.

⁴² *Szczesny v. General Elec. Co.*, 66 Fed. Appx. 388, 30 EBC 2923 (3d Cir. May 19, 2003).

⁴³ Fed. Appx. at 394.

⁴⁴ Mark Hansen, "Converting to a Cash Balance Plan Can Be Risky," FINDLAW.COM, available at <http://articles.corporate.findlaw.com/articles/file/00525/009172> (last visited Oct. 28, 2004); see also Douglas McCollam, "Dealing With The Pension Bomb," LAW.COM, available at <http://www.law.com/jsp/article.jsp?id=1095434485577> (Sept. 28, 2004).

⁴⁵ The age discrimination provisions relating to retirement benefits in ERISA and the ADEA are similar. ERISA states that a defined benefit pension plan unlawfully discriminates by age if "the rate of an employee's benefit accrual is reduced, because of the attainment of any age." ERISA §204 (b)(1)(H), 29 U.S.C. §1054(b)(1)(H). Under the ADEA, "the cessation ... or reduction of the rate of an employee's benefit accrual, because of age" in a defined benefit plan is unlawful. 29 U.S.C. §623(i).

⁴⁶ *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812 (S.D. Ind. 2000).

⁴⁷ *Tootle v. ARINC, Inc.*, 222 F.R.D. 88, 32 EBC 2665 (D. Md. 2004).

⁴⁸ *Id.* at 93-94.

⁴⁹ *Godinez v. CBS Corp.*, 31 EBC 2218 (C.D. Cal. 2002), *aff'd*, 31 EBC 2221 (9th Cir. 2003).

⁵⁰ *Campbell v. BankBoston, N.A.*, 327 F.3d 1 (1st Cir. 2003).

⁵¹ *Cooper v. IBM Corp.*, 274 F. Supp. 2d 1010 (S.D. Ill. 2003).

⁵² *Cooper* adjudicated only an ERISA age discrimination claim and not an ADEA claim. *Eaton*, *Tootle*, and *Campbell*, on the other hand, all involved claims under both ERISA and the ADEA.

⁵³ 457 F.3d 636, 38 EBC 1801 (7th Cir. 2006).

⁵⁴ *Id.* at 638.

⁵⁵ *Id.* at 638-39.

⁵⁶ 435 F. Supp. 2d 853, 38 EBC 1006 (S.D. Ill. 2006)

⁵⁷ *Id.* at 863.

⁵⁸ *Id.* at 868-69 (citing 126 S. Ct. 1869 (2006)). This decision had not been appealed to the Seventh Circuit as of March 2007.

⁵⁹ *Register v. PNC Fin. Svcs. Group, Inc.*, 39 EBC 2409 (3d Cir. Jan. 30, 2007) (affirming No 04-cv-6097, 36 EBC 1321 (E.D. Pa. 2005))

⁶⁰ Compare *Hirt v. Equitable Retirement Plan*, 441 F. Supp. 2d 516, 38 EBC 2279 (S.D.N.Y. 2006) (plan was not discriminatory); *Laurent v. PriceWaterhouseCoopers, LLP*, 448 F. Supp. 2d 537, 553-54, 39 EBC 1336 (S.D.N.Y. 2006) (finding the cash balance plan lawful because “[t]he effect of a younger employee’s pay credits being worth more than those paid to older workers is caused not by discrimination but by the time value of money.”) with *In re Citigroup Pension Plan ERISA Litig.*, 39 EBC 2025 (S.D.N.Y. Dec. 12, 2006) (in addition to holding that the cash balance plan was age discriminatory, the court found the plan impermissibly allowed “backloading” of benefits and failed minimum accrual tests); *In re J.P. Morgan Chase Cash Balance Litig.*, 39 EBC 1326, (S.D.N.Y. Oct. 30, 2006) (finding a cash balance plan unlawful because “as a matter of simple arithmetic, this conversion results in a smaller retirement benefit for older workers because they have less years in which to earn interest”); *Richards v. Fleet Boston*, 427 F. Supp. 2d 150, 37 EBC 1449 (D. Conn. 2006) (refusing to dismiss plaintiff’s claim that cash balance plan was age discriminatory).

⁶¹ See *In re Citigroup Pension Plan ERISA Litig.*, No. 05-civ-05296, Slip Op. at 22 n.66 (S.D.N.Y. Dec. 12, 2006) (noting that the *Hirt* plaintiffs filed a notice of appeal on Oct. 13, 2006).

⁶² *Hurlic v. So. Cal. Gas Co.*, No. 06-55599 (9th Cir., filed April 21, 2006).

⁶³ *Hurlic v. So. Cal. Gas Co.*, No. 2:05-cv-05027-R-MAN (C.D. Cal. March 23, 2006) (dismissed without opinion).

⁶⁴ H.R. 4, § 701 et seq. (109th Congress, 2d Session).

⁶⁵ *Id.* at §§ 701(a)(1), 701(b)(1) and 701(c)(1).

⁶⁶ *Panecasio v. Unisource Worldwide, Inc.*, 38 EBC 2564 (D. Conn. 2006), and *Callahan v. Unisource Worldwide, Inc.*, 39 EBC 1556 (D. Conn. 2006) (companies offer “top hat” plans only to key management or highly compensated employees).

⁶⁷ *Fields v. Thompson Printing Co.*, 363 F.3d 259, 32 EBC 1673 (3d Cir. 2004).

⁶⁸ *Id.* at 274; *Callahan, supra*.

⁶⁹ *Panecasio*, 38 EBC 2564 (D. Conn. 2006).

⁷⁰ 39 EBC 1556 (D. Conn. 2006).

⁷¹ 220 F.3d 193, 24 EBC 2390 (3d Cir. 2000).

⁷² *Id.* at 196.

⁷³ Defining the scope of the act, this section makes it unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” 29 U.S.C. §623(a)(1).

⁷⁴ Exempting plans “where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker ...” 29 U.S.C. §623(f)(2)(B)(i).

⁷⁵ 220 F.3d at 216.

⁷⁶ *Id.*

⁷⁷ *Erie County Retirees Ass’n v. County of Erie*, 140 F. Supp. 2d 466 (W.D. Pa. 2001).

⁷⁸ 29 U.S.C. §623(f).

⁷⁹ *Abrahamson v. Board of Educ. of the Wappingers Falls Central Sch. Dist.*, 374 F.3d 66, 73, 32 EBC 2985 (2d Cir. 2004) (citing 29 U.S.C. § 623(f)(2)(B)(i) & (ii)).

⁸⁰ 374 F.3d 66 (2d Cir. 2004).

⁸¹ *Id.* at 70.

⁸² *Id.* at 74.

⁸³ 29 U.S.C. §623(f). A “subterfuge” clause once existed in the safe harbor but it has been expunged. See *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 172, n. 4, 11 EBC 1049 (1989). Interestingly, a subsequent section in the ADEA dealing only with the employment of law enforcement officers and firefighters provides a safe harbor for bona fide hiring and retirement plans that are not “subterfuge to evade the purposes of this Act.” 29 U.S.C. §623(j)(2).

⁸⁴ 42 U.S.C. §12101 *et. seq.* The ADA was enacted to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” *Id.* at §12101(b)(1). Title I prohibits discrimination against any “qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *Id.* at § 12112(a).

⁸⁵ *Pelletier v. Fleet Financial Group, Inc.*, 25 EBC 1401 (D.N.H. 2000); *EEOC v. Staten Island Savings Bank*, 207 F.3d 144 (2d Cir. 2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608, 22 EBC 1866 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); *Lewis v. Mart Corp.*, 180 F.3d 166, 170, 21 EBC 1369 (4th Cir. 1999); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1084 (1998); *EEOC v. CNA Ins. Co.*, 96 F.3d 1039, 1044 (7th Cir. 1996).

⁸⁶ *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999) (finding no ADA Title III violation for an insurance policy’s AIDS cap); *McNeil v. Time Ins. Co.*, 205 F.3d 179, 185, 24 EBC 1267 (5th Cir. 2000) (stating that the plain language of the ADA demonstrates that a business is not required to modify the goods or services it offers to satisfy Title III).

⁸⁷ See, e.g., *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 23 EBC 2542 (10th Cir. 1999).

⁸⁸ 42 U.S.C. §12201(c).

⁸⁹ *EEOC v. Aramark Corp.*, 208 F.3d 266, 267, 24 EBC 1425 (D.C. Cir. 2000); *Fitts v. Federal Nat’l Mortg. Ass’n*, 236 F.3d 1, 25 EBC 2058 (D.C. Cir. 2001) (same).

⁹⁰ 42 U.S.C. §12201(c)(3).

⁹¹ Each plan capped coverage for mental and emotional disabilities at 24 months while granting a longer period of benefits for disabilities arising from physical problems. *Aramark*, 208 F.3d at 267; *Fitts*, 236 F.3d at 2.

⁹² *Aramark*, 208 F.3d at 269; *Fitts*, 236 F.3d at 4.

⁹³ *Aramark*, 208 F.3d at 269-70; *Fitts*, 236 F.3d at 4.

⁹⁴ See *Leonard F. v. Israel Discount Bank*, 199 F.3d 99, 103-04, 23 EBC 2611 (2d Cir. 1999). This case discusses at length the history of the meaning of “subterfuge” for both the ADEA and the ADA safe harbors in rejecting the plaintiff’s argument that the “subterfuge” clause requires employers to base their benefit plan decisions on “sound actuarial principles.” *Leonard F.* points out that the Supreme Court in *Betts* struck down an EEOC regulation requiring plans to be actuarially justified as contrary to the plan language of the ADEA. Because the ADA was enacted after *Betts*, Congress was keenly aware of the judicial interpretation of “subterfuge” that required a specific intent to evade the purposes of the act and not actuarial justification.

⁹⁵ 199 F.3d at 105 (discussing the plain text of the safe harbor in 42 U.S.C. 12201(c)).

⁹⁶ See, e.g., *Rogers v. Department of Health and Env’tl. Control*, 174 F.3d 431, 437 (4th Cir. 1999) (“We do not find anything in §501(c) of the ADA (or anywhere else in the Act) that requires a plan sponsor or administrator to justify a plan’s separate classification of mental disability with actuarial data.”)

⁹⁷ *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999). Although the Supreme Court did not specifically address this issue in the context of disability plans governed by ERISA, presumably the same analysis would apply.

⁹⁸ See *August v. Office Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1996); *Cline v. Western Horseman, Inc.*, 922 F. Supp. 442 (D. Colo. 1996); *Morton v. GTE North, Inc.*, 922 F. Supp. 1169 (N.D. Tex. 1996).

⁹⁹ *E.g.*, *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1332 (10th Cir. 1998) (seeking SSDI benefits is relevant to but does not estop plaintiff from bringing an ADA claim); *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382 (6th Cir. 1998) (same).

¹⁰⁰ *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999).

¹⁰¹ *Id.* at 803.

¹⁰² *Id.* at 804.

¹⁰³ *Campbell*, 327 F.3d at 10-11 (plaintiff's ADEA claim was barred because the charge was not filed within 300 days of the alleged discriminatory act); *Kendall v. Fisse*, No. 00 CV 5154SJ (E.D.N.Y. May 25, 2004) (a plaintiff's charge of ADA discrimination must be filed within 300 days of the discriminatory action).

¹⁰⁴ *Tootle*, 222 F.R.D. at 92-93.

¹⁰⁵ ERISA §413, 29 U.S.C. § 1103.

¹⁰⁶ See, *e.g.*, *Woods v. Halliburton Co.*, 29 EBC 1663 (10th Cir. 2002) (unpublished).

¹⁰⁷ *Id.*

¹⁰⁸ *Campbell*, 327 F.3d 1.

¹⁰⁹ ERISA §204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i).

¹¹⁰ *Campbell*, 327 F.3d at 10-11.