IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, *et al.*, Plaintiffs, v. EMBARQ CORPORATION, *et al.*, Defendants.	Civil Action No.: 07-CV-2602 (EFM/JPO)

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' FOURTH, FIFTH, SIXTH, AND SEVENTH CLAIMS FOR RELIEF (AGE DISCRIMINATION CLAIMS)

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I. INTRODUCTION

In their Fourth, Fifth, Sixth, and Seventh Claims for Relief (collectively, the "Age Discrimination Claims"), the named plaintiffs, "Individual Age Discrimination Plaintiffs," opt-in plaintiffs, and class members identified below (collectively, "Plaintiffs") allege that the 2007 decision by Defendant Embarq Corporation and two affiliated companies (collectively, "Embarq") to reduce or eliminate retiree life insurance benefits violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* ("ADEA"), as well as Ohio, Oregon, and Tennessee age discrimination laws. Specifically, Plaintiffs allege that by cutting those benefits, Embarq "disparately impacted retirees based on age because the premiums plaintiffs and the Class would have to pay to replace the reduced or terminated life insurance benefits are significantly greater than they are for those who are ten years younger." Pretrial Order (Doc. 295) at 15 & 21. Embarq is entitled to judgment as a matter of law on this disparate impact claim for four independent reasons.

First, Plaintiffs' disparate impact claim, which challenges Embarq's reduction of retiree benefits as a cost-cutting measure, is simply not cognizable under the ADEA and its state law analogs for a host of reasons:

- In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court stated that ADEA disparate impact claims may be asserted under Section 632(a)(2), but not Section 632(a)(1). Plaintiffs' disparate impact claim falls squarely under Section 632(a)(1), because it concerns alleged age discrimination "with respect to [Plaintiffs'] compensation . . . or privileges of employment." 29 U.S.C. § 632(a)(1). When Embarq reduced or eliminated retiree life insurance benefits, it did not "*limit, segregate, or classify [its] employees* in any way which would deprive or tend to deprive any individual *of employment opportunities* or otherwise

adversely affect his *status as an employee*." 29 U.S.C. § 632(a)(2) (emphasis added). That action is thus not cognizable under the sole ADEA section that recognizes disparate impact liability.

- In the leading case involving a disparate impact claim of the kind asserted here—that is, a claim alleging that a company's across-the-board benefit reductions implemented in response to business conditions impermissibly impacted older workers more than younger workers—the court held that plaintiffs' claim "makes no sense in disparate impact terms," and that the plaintiffs therefore failed to make out "even a prima facie case of disparate impact." *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1163 (7th Cir. 1992). *Finnegan* makes clear that where, as here, a company makes uniform benefit cuts in response to business conditions, no inference of age discrimination can be drawn from the alleged fact that the financial burden of those cuts falls more heavily on older retirees than younger retirees.

- Plaintiffs' assertion that Embarq's reduction of life insurance benefits had an unlawful disparate impact on older retirees is based entirely on the indisputable fact that life insurance premiums are higher for older persons than younger persons. If this fact sufficed to establish an ADEA violation, then any company's reduction of life insurance benefits—and for that matter, health or disability insurance benefits—provided to employees or retirees would constitute a *per se* violation of the ADEA, even if those benefits are unvested under ERISA, because premiums for all such insurance increase with age. There is something wrong with an interpretation of the ADEA that would turn any employer's exercise of its right under ERISA to cut unvested welfare benefits into an ADEA violation.

- An EEOC regulation, 29 C.F.R. § 1625.10(f)(1)(i), provides that "it is not unlawful for life insurance coverage to cease upon separation from service." The point of this regulatory provision is not that a company may terminate life insurance coverage only at the

moment an employee leaves the company, but instead that a company may terminate such coverage *following* separation from service—which is what Embarq did here. For all these reasons, Plaintiffs' disparate impact claim is not cognizable under the ADEA.

Second, even if Plaintiffs' disparate impact claim were cognizable under the ADEA, to meet their prima facie burden, Plaintiffs must demonstrate that Embarq's reduction of retiree life insurance benefits had a disparate impact on persons *within the protected group*, as compared to persons *outside* that group. To assist victims of age discrimination who seek to prove such an impact, the Supreme Court has approved the use of statistical data that compares the impact of the challenged employment practice on: (1) persons *within* the protected group (*i.e.*, age 40 or above); and (2) person *outside* the protected group (*i.e.*, under age 40). By contrast, the sole data presented by Plaintiffs here compares the impact of Embarq' reduction of retiree benefits on: (1) persons *within* the protected group (*i.e.*, age 40 or above); with (2) *hypothetical* persons *within that same group*—namely, hypothetical "younger" versions *of the same people*. This cannot possibly prove what ADEA plaintiffs must prove to prevail on a disparate impact claim—namely, that the challenged practice had a disparate impact on persons within the protected group *as compared to persons outside that group.* Not surprisingly, Plaintiffs cannot cite a single case in which a plaintiff has supported a disparate impact ADEA claim based on this kind of irrelevant statistical analysis.

Third, even if Plaintiffs could establish that Embarq's reduction of retiree life insurance benefits disparately impacted protected class members in violation of Section 632(a)(2), Embarq would *still* be entitled to summary judgment, because it indisputably took that action based on "reasonable factors other than age," which is a complete defense to Plaintiffs' ADEA Claim. *See* 29 U.S.C. § 623(f)(1). Embarq needed to manage its cost structure to remain competitive and

maintain profitability, in part because revenues from one of its core businesses, traditional "landline" telephone service, were steadily shrinking. Numerous courts have granted summary judgment to defendants based on the "reasonable factor other than age" defense where, as here, the defendant adopted the challenged policy to reduce costs and/or more closely align compensation or benefits with those offered by other companies. This Court should do the same.

Fourth, the ADEA's "equal cost/equal benefit" safe harbor (29 U.S.C. § 623(f)(2)(B)) applies to Embarq's decisions. Under this safe harbor, employers may cut benefits packages as long as "for each benefit or benefit package, the actual amount of the 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." *Id.* Where, as here, a plan makes no distinction between older and younger retirees with respect to either cost or benefit, the safe harbor applies as a matter of law.

For all these reasons, Embarq is entitled to judgment as a matter of law on Plaintiffs' Age Discrimination Claims.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Fed. R. Civ. P. 56 and D. Kan. Local Rule 56.1, Defendants provide the following Statement of Undisputed Material Facts ("UF") entitling them to summary judgment. Citations are to the pleadings, the discovery materials on file, and the exhibits attached hereto, including the Declarations of Randall T. Parker ("Ex. A") and Christopher J. Koenigs ("Ex. B") and the exhibits thereto (referred to as, *e.g.*, "Ex. A-1," *etc.*).

A. The Parties

1. The ADEA Claims are brought by the 17 named plaintiffs, as well as by the approximately 750 retirees referred to in Plaintiffs' Third Amended Complaint ("Complaint," Doc. 117) as the "Individual Age Discrimination Plaintiffs." More than 8,000 "opt-in" plaintiffs have also agreed to have their ADEA claims tried in this collective action. Complaint ¶¶ 9-26;

Plaintiffs' Corrected Memorandum in Opposition to Defendants' Motion to Certify Collective Action (Doc. 301) at 1.

2. A January 4, 2011 Order certified, *inter alia*, three sub-classes under Fed. R. Civ. P. 23(b)(1)(B) and (b)(2) with respect to Plaintiffs' Fifth Claim for Relief (for violation of Ohio's age discrimination statute), Sixth Claim for Relief (for violation of Oregon's age discrimination statute), and Seventh Claim for Relief (for violation of Tennessee's age discrimination statute) (collectively, the "State Age Discrimination Claims"). Doc. 199 at 4.

3. None of the more than 8,000 ADEA Plaintiffs was an employee of Embarq at the time it reduced or eliminated the retiree life insurance benefits. Instead, they had all ended their employment at Embarq or its affiliates or predecessors at least four years, and in some instances more than 40 years, before those benefits were reduced or eliminated. Ex. A ¶ 14.

4. The defendants with respect to Plaintiffs' ADEA Claim are Embarq Corporation, Carolina Telephone and Telegraph Company, LLC (together with its predecessors, "CT&T"), and Embarq Mid-Atlantic Management Service Company (collectively, "Embarq"). Complaint ¶ 129.

5. The sole defendant with respect to Plaintiffs' State Age Discrimination Claims is Embarq Corporation. *Id.* ¶¶ 149, 156 & 163.

B. <u>Retiree Life Insurance Benefits and the 2007 Changes to Those Benefits</u>

6. Employees who retired from Embarq prior to 2004 received Company-subsidized basic life insurance benefits. The amount of those benefits varied depending upon the time, and the company from which, an employee retired, and ranged from a maximum of two times a retiree's last annual pay rate to less than $5,000, with the most frequent amounts being between $10,000 and $25,000. Ex. A ¶ 3.

7. As of December 31, 1993, CT&T non-bargaining unit employees and bargaining unit employees represented by certain local unions participated in a Voluntary Employee Benefits Association ("VEBA") plan, which provided a retirement death benefit equal to one times the retiree's last annual pay. Retiree participants in the VEBA Plan received basic life insurance coverage in addition to the VEBA retirement death benefit. *Id.* ¶ 4.

8. The retiree life insurance benefits referred to above are welfare benefits under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"). Complaint ¶¶ 43, 47 & 48.

9. At a meeting on June 27, 2007, Embarq's Employee Benefits Committee ("EBC") voted to: (a) eliminate Company-sponsored basic life insurance for retirees who were participants in the CT&T VEBA plan effective September 1, 2007; and (b) reduce the maximum amount of basic life insurance coverage to $10,000 for non-VEBA participating retirees effective January 1, 2008. Embarq announced these changes on July 26, 2007. Ex. A ¶ 8; Pretrial Order at 3-4.

C. Reasons Retiree Life Insurance Benefits Were Reduced or Eliminated

10. The decision to reduce or eliminate retiree life insurance benefits in 2007 was made primarily to keep Embarq competitive within its industry by (a) reducing costs, and (b) aligning its retiree life insurance benefits more closely with similar benefits offered by other companies. Ex. A ¶ 10.

11. Embarq spun off from Sprint effective May 17, 2006. Embarq needed to manage its cost structure to remain competitive and maintain profitability, in part because revenues from its core business, traditional "landline" telephone service, were steadily shrinking. Embarq wished to reduce costs in ways that would not jeopardize customer service or the company's revenues. One way to do this was to reduce retiree life insurance benefits. *Id.* ¶ 5.

12. Embarq's post-retirement life insurance program was costly to maintain. As of June 2007, approximately 76% of retiree life insurance coverage was underwritten through a fully-insured contract, and the remaining 24% liability was funded by Embarq itself through a self-insured arrangement. Embarq's share of retiree life insurance costs was $9 million in cash annually, and resulted in an $11.3 million annual expense charge to its income statement and an accrued balance sheet liability of $169.5 million. *Id.* ¶ 6 & Ex. A-2 at EQ_FUL_157799.

13. Financial projections provided to the EBC at the June 27, 2007 meeting showed that: (a) eliminating VEBA retirees' basic life insurance benefits would result in annual cash savings of $1.6 million, annual expense reductions of $4 million, and a reduction in accrued balance sheet liabilities of $31 million; (b) capping non-VEBA retiree life insurance benefits at $10,000 would result in annual cash savings of $2.5 million, annual expense reductions of $5.4 million, and a reduction in accrued balance sheet liabilities of $41.4 million; and (c) taking both of these steps would result in annual cash savings of $4.1 million, annual expense reductions of $9.4 million, and a reduction in accrued balance sheet liabilities of $72.4 million. Ex. A ¶ 12 & Ex. A-2 at EQ_FUL_157799.

14. Embarq changed retiree life insurance benefits in 2007 in part to achieve these projected cost savings. Ex. A ¶ 10.

15. Additional data from a Watson Wyatt 2005/2006 Benefits Database of 1,150 companies, which was also provided to the EBC at the June 27, 2007 meeting, showed that: (a) 73% of all companies and 85% of non-manufacturing companies, like Embarq, provided no life insurance benefits to retirees; and (b) of the relatively few companies that provide such benefits, 45% of all such companies, and 31% of non-manufacturing companies, provided coverage of $10,000 or less. Ex. A ¶¶ 7 & 12 & Ex. A-2 at EQ_FUL_157804.

16. Embarq was aware in June 2007 that Qwest Corporation, a telecommunications company in the same business as Embarq, had reduced to $10,000 the amount of life insurance coverage it provided to retirees shortly before Embarq decided to implement its own reduction in retiree life insurance benefits. Ex. A ¶ 7.

17. Although Company-sponsored basic life insurance benefits for retirees who were participants in the CT&T VEBA were eliminated, those retirees still receive a company-provided death benefit substantially more generous than the life insurance benefit provided by most other companies and by Embarq to non-VEBA retirees—namely, an amount that equaled the retiree's final annual salary, or one year of wages. *Id.* ¶ 9.

18. Embarq's 2007 reduction of retiree life insurance benefits was intended in part to align those benefits more closely with similar benefits offered by other companies. *Id.* ¶ 10.

D. Plaintiffs' Age Discrimination Claims

19. The Fourth Claim for Relief in Plaintiffs' March 2008 Amended Complaint, September 2008 Second Amended Complaint, and November 2009 Third Amended Complaint (collectively, the "Complaints") asserted both disparate treatment and disparate impact theories of recovery for Embarq's alleged age discrimination. Doc. 14 ¶ 128; Doc. 42 ¶ 128; Doc. 117 ¶ 128.

20. The Complaint's Fifth Claim for Relief, brought by named plaintiffs Kenneth Carpenter and Betty Carpenter on behalf of a certified class, asserts that Embarq's 2007 decision to cut retiree life insurance benefits violated Ohio's age discrimination statute, Ohio Rev. Code § 4112.02(a). Doc. 117 ¶¶ 148-51.

21. The Complaint's Sixth Claim for Relief, brought by named plaintiff Carl Somdahl on behalf of a certified class, asserts that Embarq's 2007 decision to cut retiree life insurance

benefits violated Oregon's age discrimination statute, Or. Rev. Stat. § 659A.030(b). Doc. 117 ¶¶ 155-58.

22. The Complaint's Seventh Claim for Relief, brought by named plaintiff Wanda Shipley on behalf of a certified class, asserts that Embarq's 2007 decision to cut retiree life insurance benefits violated Tennessee's age discrimination statute, Tenn. Code Ann. 4-21-401(a)(2). Doc. 117 ¶¶ 162-65.

23. Plaintiffs' Age Discrimination Claims as set forth in the Pretrial Order assert only a disparate impact, and not a disparate treatment, theory of age discrimination. Pretrial Order at 24-28.

24. Plaintiffs assert the same theories of recovery in both their ADEA and their State Age Discrimination Claims—that "Embarq discriminated on the basis of age when it reduced or terminated retiree life insurance benefits . . . because that action had a discriminatory adverse impact based on age," and that the "reduction and termination of the retiree life insurance disparately impacted retirees based on age because the premiums plaintiffs and the Class would have to pay to replace the reduced or terminated life insurance benefits are significantly greater than they are for those who are ten years younger." *Id.* at 15 & 21.

25. Plaintiffs assert that they are entitled to prevail on their Age Discrimination Claims regardless of whether their retiree life insurance benefits are vested under ERISA. Doc. 301 at 2-3 & 8-9.

26. Life insurance is inherently more costly for older persons than younger persons, because life expectancy is a function of age. Doc. 21 at 25; Ex. B-1 at 157-58.

27. Neither Plaintiffs nor their expert, Terry Long ("Long"), has presented evidence that any of the more than 8,000 ADEA Plaintiffs has purchased insurance to replace the life insurance that Embarq reduced or eliminated.

28. Long's own actuarial firm, of which Long is an owner, reduced life insurance benefits that it had previously provided to its retirees. Ex. B-1 at 254-58.

29. Embarq has no control over (a) underwriting practices of life insurance companies, or (b) the manner in which life insurance companies price any replacement life insurance policies that Plaintiffs may elect to purchase. Ex. A ¶ 15.

III. ARGUMENT

Embarq is entitled to summary judgment on Plaintiffs' Age Discrimination Claims[1] if it demonstrates that "there is no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not "a disfavored procedural shortcut," but is instead "an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), *quoting* Fed. R. Civ. P. 1.

[1] Plaintiffs advance the same theory of recovery under both their ADEA and State Age Discrimination Claims, *see* UF ¶ 24, and courts evaluate those claims using the same standards. *See*, *e.g.*, *Miller v. Potash Corp. of Saskatchewan, Inc.*, No. 1-09-58, 2010 WL 3529248 *4 & 13-13 (Ohio Ct. App. Sept. 13, 2010) (explaining that "Ohio courts have consistently looked to federal cases interpreting federal civil rights and age discrimination legislation," and applying *City of Jackson* to state disparate impact age discrimination claim); *Lawrence v. Genuine Parts Co.*, No. 97-15975, 1998 WL 133253, at *1 (9th Cir. Mar. 19, 1998) ("The standard for establishing a prima facie case of age discrimination under Oregon law is identical to that used in federal law."); *Aldridge v. City of Memphis*, 404 F. App'x. 29, 40-41 & n.11 (6th Cir. 2010) (holding that the "same analysis" applies to disparate impact claims brought under the Tennessee statute and the ADEA, and applying *City of Jackson* to such claims). Embarq accordingly seeks summary judgment on Plaintiffs' State Age Discrimination Claims for the same reasons it seeks summary judgment on Plaintiffs' ADEA Claims.

Section 623(a) of the ADEA identifies the practices that constitute unlawful age discrimination. In relevant part, Section 623(a) makes it unlawful for an employer:

> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .

29 U.S.C. § 623(a).

In the Amended Complaint filed four years ago, Plaintiffs asserted both disparate treatment and disparate impact theories of recovery for Embarq's alleged age discrimination. UF ¶ 19. Plaintiffs continued to assert both disparate treatment and disparate impact theories of recovery in their Second and Third Amended Complaints, filed in September 2008 and November 2009, respectively. *Id.* In each of these complaints, Plaintiffs distinguished between their claim of *intentional* age discrimination, which Plaintiffs brought solely under Section 623(a)(1), and their claim of *disparate impact* age discrimination, which Plaintiffs brought solely under Section 623(a)(2):

> The actions of Defendants violate the prohibitions against *intentional age discrimination in* § 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), and violate the prohibitions against *disparate-impact age discrimination* in § 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2).

Doc 14 ¶ 128; Doc 42 ¶ 128; Doc 117 ¶ 128 (emphasis added).

"In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Thus, if an employee's age played a role in her employer's decision-making process and influenced the outcome, the proper claim is disparate treatment. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000); *Teamsters v. United States*, 431

U.S. 324, 335-36 (1977) (in disparate treatment cases, "[p]roof of discriminatory motive is critical"). By contrast, disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another." *Hazen Paper Co.*, 507 U.S. at 609 (internal quotation marks omitted). "Proof of discriminatory motive . . . is not required under a disparate-impact theory." *Id.*

After years of discovery that produced no evidence of intentional age discrimination, Plaintiffs abandoned their claim under Section 623(a)(1), and now pursue only a disparate impact age discrimination claim under Section 623(a)(2). *See* Pretrial Order at 24-28. Defendants are entitled to summary judgment on Plaintiffs' remaining disparate impact claim because: (1) that claim, which challenges Embarq's reduction of retiree benefits as a cost-cutting measure, is not cognizable under the ADEA; (2) Plaintiffs have failed to prove a prima facie case of disparate impact because they have presented no relevant statistical evidence and no evidence that the challenged policy had an actual disparate impact on any Plaintiff; (3) Embarq's decision to reduce the retiree benefits was indisputably based on reasonable factors other than age; and (4) Embarq's decision to reduce the retiree benefits qualifies for the equal cost/equal benefit safe harbor.

A. Plaintiffs' Disparate Impact Claim, Which Challenges Embarq's Reduction of Retiree Benefits as a Cost-Cutting Measure, Is Not Cognizable Under the ADEA.

1. Plaintiffs' Disparate Impact Claim Is Not Cognizable in Light of *Smith v. City of Jackson*.

City of Jackson holds, and Plaintiffs' Complaints acknowledge, that disparate impact claims may be asserted only under ADEA § 4(a)(2) (codified at 29 U.S.C. § 623(a)(2)), and not under ADEA § 4(a)(1) (codified at 29 U.S.C. § 623(a)(1)). *See City of Jackson*, 544 U.S. at 237 n. 6 ("§ 4(a)(l) . . . does not encompass disparate impact liability."); *see also Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 95-96 (2008) (discussing disparate impact claims solely under

§ 4 (a)(2)); *Aldridge v. City of Memphis*, 404 F. App'x 29, 39-40 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2932 (2011) (stating that § 4(a)(l) "has been interpreted as proscribing intentional disparate treatment on the basis of age" while § 4(a)(2) "has been interpreted as proscribing facially neutral employment practices with a disparate impact based on age") (*citing*, *inter alia*, *City of Jackson*).

In short, the Supreme Court has determined that *some*, but not *all*, types of employment practices are subject to disparate impact analysis under the ADEA. The employment practices that *are* subject to disparate impact analysis are those identified in § 4(a)(2), and the employment practices that *are not* subject to disparate impact analysis are those identified in § 4(a)(l). Acknowledging this fact, Plaintiffs' Complaint alleges that Embarq violated "the prohibitions against *intentional age discrimination* in § 4(a)(1)" and "the prohibitions against *disparate-impact age discrimination* in § 4(a)(2)." Doc 117 ¶ 128.

Although Plaintiffs are correct that disparate impact age discrimination claims can only be brought under ADEA § 4(a)(2), their own claims can only be brought under § 4(a)(1). Plaintiffs allege that "Embarq discriminated on the basis of age when it reduced or terminated retiree life insurance benefits of plaintiffs . . . because that action had a discriminatory adverse impact based on age." Pretrial Order at 21. The sole basis for Plaintiffs' age discrimination claim is thus that Embarq reduced or terminated the life insurance benefits of Plaintiffs, all of whom were former (not current) employees of Embarq or its predecessors when this policy was implemented. UF ¶¶ 3 & 24.

Section 623(a)(1)—under which Plaintiffs are no longer proceeding, and under which disparate impact claims are *not* allowed—makes it unlawful 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)(2) (emphasis added). Section 630(*l*) provides that "[t]he term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." Moreover, Plaintiffs themselves assert that the retiree life insurance benefits are a form of "compensation" and a "privilege[] of employment." *See* Doc. 128 at 27 n. 7 ("insurance premiums or benefits are . . . elements of back pay"). In sum, Plaintiffs' ADEA claim relating to retiree life insurance benefits is covered (if at all) by Section 623(a)(1), the provision that does not support disparate impact liability. *See*, *e.g.*, *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193, 210 (3rd Cir. 2000) (recognizing age discrimination claim alleging unlawful cuts to retiree benefits as a *disparate treatment* claim under *Section 623(a)(1)*).

Because Plaintiffs cannot prove intentional age discrimination as required by Section 623(a)(1), they attempt to shoehorn their age discrimination allegations into Section 623(a)(2). But the shoe does not fit. That section makes it unlawful for an employer "to *limit, segregate, or classify* his *employees* in any way which would deprive or tend to deprive any individual *of employment opportunities* or otherwise adversely affect *his status as an employee*, because of such individual's age." 29 U.S.C. § 623(a)(2) (emphasis added).

First, unlike Section 623(a)(1), which bars discrimination against "individuals," Section 623(a)(2) bars discrimination only against "employees"—a term that the ADEA defines to mean "an individual *employed by* any employer." 29 U.S.C. § 630(f) (emphasis added). As a result, to assert a claim under Section 623(a)(2), Plaintiffs must plead an adverse impact on their status as "employees." None of the more than 8,000 ADEA Plaintiffs in this case was an employee of Embarq when it reduced or eliminated retiree life insurance benefits. Instead, all Plaintiffs had ended their employment at Embarq (or its affiliates or predecessors) at least four years, and in

some instances more than four decades, before those benefits were reduced or eliminated. UF ¶ 3. Because Plaintiffs were not "employees" of Embarq when retiree life insurance benefits were reduced, their age discrimination claims cannot be brought under Section 623(a)(2).

Second, even if Plaintiffs, who were not employed by Embarq at the time the allegedly discriminatory policy was implemented, could be deemed its "employees" within the meaning of Section 623(a)(2), Plaintiffs still could not proceed under that section, because Embarq's reduction of retiree life insurance benefits does not constitute an action "to *limit*, *segregate* or *classify* employees," as required by Section 623(a)(2). Far from limiting, segregating, or classifying retirees, Embarq treated all retirees the same. *See* UF ¶ 9.

Finally, even if Embarq's reduction of retiree life insurance benefits could be characterized as an action to "limit, segregate or classify employees," Plaintiffs still could not proceed under Section 623(a)(2). As the Supreme Court has stated, that section does not "simply prohibit[] actions that 'limit, segregate, or classify' persons; rather the language prohibits such actions that 'deprive any individual *of employment opportunities* or otherwise adversely affect his status *as an employee*' because of such individual's . . . age." *City of Jackson*, 544 U.S. at 235, *quoting* 29 U.S.C. § 623(a)(2) (emphasis added). Reducing retiree life insurance benefits did not deprive Plaintiffs of any "employment opportunities," much less affect their "status as an employee." Indeed, because Plaintiffs are retired, they have no employment "status" to affect. For all these reasons, Plaintiffs' disparate impact claim is not cognizable under Section 623(a)(2) as a matter of law.

2. Plaintiffs' Disparate Impact Claim Is Not Cognizable in Light of *Finnegan v. Trans World Airlines, Inc.*

Although the disparate impact theory has no application outside Section 623(a)(2), the theory itself is a "judicial doctrine" (*Finnegan*, 967 F.2d at 1163), which means courts must

determine its parameters. This case falls far beyond any reasonable parameters for that doctrine, as *Finnegan* demonstrates.

In *Finnegan*, employees whose benefits were reduced in a cost-cutting program brought a disparate impact age discrimination claim against their employer, alleging that the program's burden fell more heavily on older than younger workers. The Seventh Circuit held that the case "makes no sense in disparate impact terms," and that the plaintiffs therefore failed to make out "even a prima facie case of disparate impact." *Id.* at 1163. The court stated:

> The thinking behind the concept of disparate impact is that if an employment practice bears disproportionately against the members of a protected group, the employer ought to be required to justify it. * * * *No one until this case had suggested pushing this principle to the point of deeming changes in compensation, made in response to business adversity, suspect merely because the impact of the changes might not be—almost certainly would not be—random with respect to age. A company that for legitimate business reasons decides . . . to cut out dental insurance . . . is not required to conduct a study to determine the impact of the measure on employees grouped by age and if it is nonrandom to prove that the same amount of money could not have been saved in some different fashion*.

Id. (emphasis added).

The benefits cut in *Finnegan* included paid vacations, whose curtailment plaintiffs challenged, and dental insurance, whose curtailment plaintiffs did not challenge. *Id.* at 1162 & 1164. The court noted that the brunt of cutting those benefits "inevitably fell mainly on workers within the class protected by the Age Discrimination in Employment Act." *Id.* at 1162 & 1164. With respect to the curtailment of paid vacation time, this was true because more senior workers were entitled to more paid vacation time. *Id.* at 1162. With respect to the elimination of dental insurance, this was true because "dental problems tend to increase with age." *Id.* at 1164.

The Seventh Circuit held that plaintiffs who challenge across-the-board benefit cuts necessitated by business conditions fail to establish a prima facie case of disparate impact:

> Across-the-board cuts in wages and fringe benefits necessitated by business downturns or setbacks are a far cry from the situations that brought the theory into being. These cuts are not a legacy of deliberate discrimination on grounds of age; they are not the product of inertia or insensitivity. They are an unavoidable response to adversity. Their adverse impact on older workers is unavoidable too, because it is impossible to reduce the costs of fringe benefits without making deeper cuts in the benefits of older workers, simply because, by virtue of being older, they have greater benefits. In this situation no inference of discrimination, whether deliberate or merely inadvertent (but avoidable), can be drawn from the greater impact of curtailing employees' benefits on older workers.

Id. at 1164.

Significantly, the court rejected an approach under which benefit reductions that disproportionately affected older workers would give rise to a prima facie ADEA violation, in response to which the company would need to show a reasonable justification for the reductions:

> We could accept the plaintiffs' approach to the extent of finding a disparate impact, and then rule that the employer's business justification was compelling. But that would not be a satisfactory approach. It would mean that every time an employer made an across-the-board cut in . . . benefits he was prima facie violating the age discrimination law. Practices so tenuously related to discrimination, so remote from the objectives of civil rights law, do not reach the prima facie threshold.

Id. at 1165. The Seventh Circuit accordingly affirmed the district court's entry of summary judgment for defendant on plaintiffs' disparate impact claim. *Id.*

In the two decades since *Finnegan* was decided, no court has pushed the disparate impact theory to the point that *Finnegan* itself rejected—namely, to the point of deeming across-the-board benefit cuts made for legitimate business reasons suspect merely because their impact allegedly falls more heavily on older individuals. Here as in *Finnegan*, Embarq cut benefits across the board for legitimate business (including cost-cutting) reasons. Here as in *Finnegan*, the impact of those cuts allegedly falls more heavily on individuals within the class protected by the ADEA. And here as in *Finnegan*, "[p]ractices so tenuously related to

discrimination, so remote from the objectives of civil rights law, do not reach the prima facie threshold." *Id.*

3. Plaintiffs' Disparate Impact Claim Is Not Cognizable Because It Would Turn Any Employer's Exercise of Its Right Under ERISA To Cut Unvested Welfare Benefits into an ADEA Violation.[2]

Plaintiffs allege that by cutting retiree life insurance benefits, Embarq "disparately impacted retirees based on age because the premiums plaintiffs and the Class would have to pay to replace the reduced or terminated life insurance benefits are significantly greater than they are for those who are ten years younger." Pretrial Order at 15 & 21. That life insurance premiums are higher for older persons than younger persons is indisputable. Because life expectancy is a function of age, no insurance company would insure the life of a 70-year-old for the same amount it would charge to insure the life of a 40-, 50-, or 60-year-old. *See* UF ¶ 26.

If the two propositions set forth above suffice to establish an ADEA violation, any company's reduction or elimination of retiree life insurance benefits, even if those benefits are unvested as a matter of law under ERISA, would constitute a *per se* violation of the ADEA, because life insurance is more costly for older persons than younger persons. But the potential impact of Plaintiffs' theory does not stop there. Plaintiffs previously asserted in this case, and promise to re-assert on appeal, that their theory applies to: (1) the reduction or elimination of *medical and prescription drug benefits* as well as life insurance benefits; and (2) the reduction or elimination of *employee* as well as retiree benefits:

> [T]he cancellation or limitation of *medical, prescription drug and life insurance benefits* imposes a heavier burden on *working and retired employees* as they age, forcing them to pay significant additional amounts to replace the insurance or to forego it altogether. Common sense also makes clear that it costs much more to obtain these benefits as one ages due to underwriting practices which tie cost to attained age.

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[2] This section of the brief duplicates a section of Defendants' Reply Brief in Support of Motion To Decertify Collective Action (*see* Doc. 308 at 3-7).

Doc. 21 at 25 (emphasis added); *see also* Complaint ¶¶ 131 & 140-43.[3] Plaintiffs' theory would also apply whenever a company reduced or eliminated disability insurance benefits for employees or retirees, because disability insurance is also more costly for older persons than younger persons. *See http://www.insuranceproviders.com/how-much-does-disability-insurance-cost* ("The older you are when you purchase disability insurance, the more you can expect to pay.").

It is worth pausing to consider the deleterious impact Plaintiffs' theory would have on employer-sponsored life insurance benefit plans in this country. In March 2010, 56 percent of all private industry employees (as distinguished from retirees) received life insurance benefits pursuant to such plans. *See* U.S. Bureau of Labor Statistics, Program Perspectives (Dec. 2010), at 1-2, *available at http://stats.bls.gov/opub/perspectives/program_perspectives_vol2_ issue7.pdf.* Under Plaintiffs' theory, any company that attempts to reduce or eliminate such benefits to employees or retirees over the age of 40 would thereby engage in a *per se* ADEA violation, because the cost such persons incur to purchase replacement life insurance exceeds the cost younger persons incur.

The upheaval caused by Plaintiffs' theory would be even greater with respect to health plans. More than 177 million Americans (approximately 60 percent) receive health insurance through an employer. *See* United States Census Bureau, "Income, Poverty, and Health Insurance Coverage in the United States: 2007," at 19-21, *available at http://www.census.gov/prod/2008pubs/p60-235.pdf*. In 2011, 99 percent of large firms (200 or more workers), and 59 percent of small firms (3-199 workers) offered health benefits. *See*

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[3] In December 2008, this Court granted Defendants' motion to dismiss Plaintiffs' ADEA Claim relating to health and prescription drug benefits on the ground that 29 C.F.R. § 1625.32(b) expressly permits reduction in such benefits for Medicare-eligible retirees. *See* Doc. 45 at 29. Plaintiffs have stated they will appeal that ruling. *See* Doc. 130 at 1 n 1.

Employer Health Benefits 2011 Annual Survey at 34-38, *available at http://ehbs.kff.org/?page=charts&id=2&sn=17&p=2*. Under Plaintiffs' theory, any company that reduced or eliminated health benefits provided to employees or retirees over the age of 40 would thereby violate the ADEA, because the cost such persons incur to purchase replacement health coverage exceeds the cost younger persons incur. When Congress passed the ADEA, it certainly didn't intend that plaintiffs' lawyers could successfully sue under the ADEA to freeze unvested health benefits whenever increasing health costs force companies to reduce such benefits.

Plaintiffs' theory of ADEA liability would wreak the havoc described above by improperly nullifying four judicially recognized, and Congressionally mandated, characteristics of welfare benefit plans under ERISA.

First, employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (citations omitted). But under Plaintiffs' theory, employers would no longer be free to modify or terminate unvested employee or retiree health, disability, or life insurance benefits, because any such modification or termination would constitute a *per se* violation of the ADEA. Even though this Court "must avoid any rule that would have the effect of undermining Congress' considered decision that welfare benefit plans not be subject to a vesting requirement" (*Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (6th Cir. 1990)), Plaintiffs urge this Court to impose such a rule here.

Second, as the Supreme Court has stated, "[t]he flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident; Congress recognized that 'requir[ing] the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of

plans.'" *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997), *quoting* S.Rep. No. 93-383, p. 51 (1973). By subjecting companies to ADEA disparate impact liability as to the health, disability, and life insurance benefits they provide to millions of employees and retirees over the age of 40, Plaintiffs' theory would, to put it mildly, "seriously complicate the administration and increase the cost of plans" (*id.*).

Third, as the Supreme Court has also stated, allowing employers to amend or terminate welfare plans "encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, they would err initially on the side of omission." *Inter-Modal*, 520 U.S. at 515 (citation and quotation marks omitted). The inevitable, and immediate, effect of the ruling sought by Plaintiffs would be to discourage employers from offering life insurance benefit plans in the first place. What company would offer allegedly "flexible" welfare benefits when any subsequent reduction or elimination of those benefits will invite an ADEA lawsuit? As the Sixth Circuit stated in *Adams*, "Congress chose not to impose vesting requirements on welfare benefit plans for fear that placing such a burden on employers would inhibit the establishment of such plans." 905 F.2d at 947. The ruling sought by Plaintiffs would thwart Congress' clear intent to encourage, not discourage, the establishment of welfare benefit plans.

Finally, the Supreme Court has held that "because ERISA is a comprehensive and reticulated statute, and is enormously complex and detailed, it should not be supplemented by extratextual remedies." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (citations and quotation marks omitted). ERISA itself provides the remedy (*i.e.*, by specifying the conditions for the vesting of welfare benefits) that Plaintiffs seek to impose under the ADEA, but *only* if plan documents state in "clear and express language" that such benefits are vested. *Chiles v.*

Ceridian Corp., 95 F.3d 1505, 1513 (10th Cir. 1996). Plaintiffs seek an extratextual remedy that includes no such requirement—*i.e.*, they seek a declaration that retirees' life insurance benefits are essentially vested (because the cost of replacing those benefits is higher for older than younger persons) even if the governing plan documents expressly state that such benefits are *not* vested. Even though courts "do not have the power to assume the legislature's role and welcome additional layers of obligation" (*Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993)), Plaintiffs would have this Court impose a layer of obligation with respect to unvested welfare benefits that Congress deliberately chose not to impose when it enacted ERISA.

As the Seventh Circuit stated in *Finnegan*, "[t]here is something wrong with an interpretation of the Age Discrimination in Employment Act that . . . would as a practical matter forbid all firms to reduce . . . benefits in periods of adversity." *Finnegan*, 967 F.2d at 1164. That is what Plaintiffs' interpretation of the ADEA would do—and not just in periods of adversity, but *always*. Because the disparate impact theory under the ADEA is a "judicial doctrine" (*id.* at 1163), this Court has the power, and indeed the obligation, to ensure that it is not applied in a way that would turn any employer's exercise of its right under ERISA to cut unvested welfare benefits into an ADEA violation. The Court should accordingly rule that Plaintiffs' disparate impact claim is not cognizable under the ADEA.

4. Plaintiffs' Disparate Impact Claim Is Not Cognizable in Light of 29 C.F.R. § 1625.10(f)(1)(i).

An EEOC regulation, 29 C.F.R. § 1625.10(f)(1)(i), provides that "it is not unlawful for life insurance coverage to cease upon separation from service." In light of this provision, Embarq indisputably would have acted lawfully had it terminated the life insurance benefits of employees at the time they retired.

Plaintiffs nevertheless argue that Embarq's decision to allow employees to continue those benefits notwithstanding their retirement renders Section 1625.10(f)(1)(i) irrelevant, and forever stripped Embarq of its right to reduce such benefits. But there is no principled basis for distinguishing at-separation from post-separation reduction of life insurance benefits. As the Third Circuit recognized when it fully supported the position taken by the EEOC in the analogous healthcare context, "employers are not required to provide any *retiree* health benefits, *or to maintain such plans once they have been established*." *AARP v. EEOC*, 489 F.3d 558, 564 (3d Cir. 2007) (emphasis added). *See also Doyle v. City of Medford*, No. 1:06-V-03058, 2011 WL 4894077, at *4 (D. Or. Oct. 13, 2011) (an employer "may distinguish between retired and current employees without violating the ADEA").

B. Plaintiffs Have Not Established a Prima Facie Case of Disparate Impact Because They Have Presented No Relevant Statistical Evidence and No Evidence that the Challenged Policy Had An Actual Disparate Impact on Any Plaintiff.

For all the reasons set forth above, Plaintiffs' disparate impact claim is not cognizable under the ADEA. However, even if that claim were cognizable, Plaintiffs have not presented evidence sufficient to establish a prima facie case of disparate impact. In particular, they have not presented: (1) any relevant statistical evidence whatever; or (2) any evidence that the policy they challenge had an actual disparate impact on retirees.

1. Plaintiffs Have Presented No Relevant Statistical Evidence Supporting Their Disparate Impact Claim.

As the Supreme Court has stated, disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact *fall more harshly on one group than another*." *Teamsters*, 431 U.S. at 335 n. 15 (emphasis added). There is no question about the makeup of the "one group" to which the Court refers: It is the group entitled to protection under the pertinent discrimination statute, which in the case of the ADEA consists

of individuals "who are at least 40 years of age." 29 U.S.C. § 631(a). Nor is there any doubt about the meaning of the "other" group to which the Court refers: at a minimum, it means a group *that is not the protected group.*

Thus, in the seminal case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court compared the percentage of (1) *African-American job applicants* who had completed high school and (2) *non minority job applicants* who had done so, in order to determine whether defendant's high school diploma requirement had a disproportionate impact on African-Americans seeking certain employment at that company. *Id.* at 430. In particular, the Court compared the ratio of those *within* the protected class who did and did not meet the challenged qualification to the ratio of those *outside* the protected class. Using this kind of statistical data makes sense, because it can show what must be shown to establish disparate impact liability—namely, that the challenged practice had a disparate impact on persons within the protected group *as compared to persons outside the protected group. See*, *e.g.*, *Powell v. Dallas Morning News L.P.*, 776 F. Supp. 2d 240, 257 (N.D. Tex. 2011) (plaintiff must show a "substantial statistical disparity *between protected and non-protected workers* with respect to the employment practices in question") (emphasis added).

Here, however, the sole statistical data presented by Plaintiffs compares the impact of Embarq's reduction in retiree life insurance benefits on: (1) persons *within* the protected group (*i.e.*, age 40 or above); with (2) *fictional* persons *within the same protected group*—namely, "younger" versions *of the same people.* Plaintiffs' actuarial expert, Terry Long, compares estimated life insurance premium costs for (1) a class consisting of all Plaintiffs, and (2) a *hypothetical* class consisting of all Plaintiffs *when they were ten years younger*. As Long stated in his deposition: "I calculated the value of the benefits for someone exactly ten years younger,

otherwise the same. So, yes, it's hypothetical in that . . . that group did not exist." *See id.* at 82. Ex. B-1 at 74-75, 76-78, 149, 150-53, 158-59 & 162.[4]

In *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1243 (10th Cir. 1991), the Tenth Circuit stated: "[A]ny statistical analysis must involve the appropriate comparables." The fictional "comparables" selected by Plaintiffs in this case, in what may be a first in the history of disparate impact discrimination cases, consists of younger versions of themselves. These comparables are irrelevant to the task at hand, which is to determine whether the policy challenged by Plaintiffs had a disparate impact on persons within the protected group *as compared to persons outside that group.* Because Plaintiffs have presented no evidence showing such an impact, their disparate impact claim fails. *See Carpenter v. Boeing Co.*, 456 F.3d 1183, 1196 (10th Cir. 2006) (to prove disparate impact through statistical data "[t]he statistics must . . . related to the proper population"); *Pippin v. Burlington Resources Oil & Gas Co.*, 440 F.3d 1186, 1201 (10th Cir. 2006) (affirming order granting summary judgment to employer in disparate impact case where plaintiffs' statistics did not identify appropriate "comparables" and hence had "little significance").

Notably, Long admits he did not try even to determine whether younger retirees *within* the protected class were treated more favorably than older retirees *within* that class:

> Q: Did you check to see whether any class member has a larger benefit reduction in the younger ages as compared to the older ages?
>
> A: No.

Ex. B-1 at 162. But even if Plaintiffs had presented such evidence, as a matter of law it would not support Plaintiffs' disparate impact claim. "Every court of appeals decision addressing this issue has concluded that it is improper to distinguish between subgroups of employees over the

[4] Defendants are contemporaneously moving to strike Long's testimony pursuant to Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

age of 40 and that a disparate impact analysis must compare employees aged 40 and over with those 39 and younger." *Rudwall v. Blackrock, Inc.*, No. C09-5176, 2011 U.S. Dist. LEXIS 19147, at *38 (N.D. Cal. Feb. 25, 2011). For example, in *Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364 (2d Cir. 1989), the Second Circuit held that plaintiffs failed to establish a prima facie case of disparate impact age discrimination because they did not produce "statistics from which it may be inferred that the School District's selection methods or employment criteria resulted in employment of a larger share of teachers under 40 years of age than of teachers over 40 years of age." *Id.* at 1371 (citation, brackets, ellipsis and quotations omitted). Similarly, in *Smith v. Tenn. Valley Auth.*, 924 F.2d 1059, 1991 WL 11271, at *4 (6th Cir. 1991), the Sixth Circuit stated: "[T]o meet his burden, Smith would have to produce statistics to show that a particular selection practice resulted in the hiring of a larger share of workers under the age of forty than over the age of forty."

Courts, including this one, routinely grant summary judgment to defendants in ADEA cases where the plaintiff presents statistical evidence that compares the impact of an employment practice on both an "over 40" group and another group, but the evidence does not establish a sufficiently disparate impact between the two groups. *See*, *e.g.*, *Apsley v. Boeing Co.*, 722 F. Supp. 2d 1218, 1246-47 (D. Kan. 2010). Summary judgment is even more appropriate where, as here, Plaintiffs present no evidence whatever showing that the challenged policy, while "facially neutral in their treatment of *different groups* . . . in fact fall more harshly on *one group than another*." *Teamsters*, 431 U.S. at 335 n. 15 (emphasis added).

2. Plaintiffs Have Presented No Evidence that Embarq's Decision Had an Actual Disparate Impact on Any Plaintiff.

To establish a prima facie case of disparate impact ADEA liability, Plaintiffs must also show that the identified disparity caused a *real*, not hypothetical, impact on *actual* retirees. As

the Supreme Court stated in *Meacham*: "The factual causation that § 623(a)(2) describes as practices that 'deprive or tend to deprive . . . or otherwise adversely affect [employees] . . . because of . . . age' is typically shown by looking to *data revealing the impact* of a given practice on *actual* employees." 554 U.S. at 96 n. 13 (emphasis added). "[P]laintiff's burden is heavy, not only to isolate and identify the specific employment practices, but to establish causation." *Powell*, 776 F. Supp. at 257.

Plaintiffs have failed to prove that the action about which they complain—Embarq's reduction of retiree life insurance benefits—caused any real, as opposed to hypothetical, impact on Plaintiffs. Neither Plaintiffs nor their expert have presented evidence that any of the more than 8,000 Plaintiffs purchased insurance to replace the life insurance that Embarq reduced or eliminated. UF ¶ 27. Absent such a purchase, the alleged disparate impact identified by Long—*i.e.*, the difference in the cost of life insurance premiums for Plaintiffs and the fictional "ten years younger" Plaintiffs—is purely hypothetical. Embarq's reduction of life insurance benefits will eventually impact Plaintiffs' beneficiaries, who will not receive the life insurance proceeds when Plaintiffs die that they would have received had the change not occurred. But the impact of this change is uniform, not disparate. The only alleged *disparate* impact identified by Plaintiffs' expert is one that will occur *only* if specific Plaintiffs purchase replacement life insurance, and insofar as Plaintiffs have shown, this has never happened.

Even if it happened, Embarq would not be the cause of the alleged disparate impact. It is undisputed that Embarq has no control over: (1) underwriting practices of life insurance companies; or (2) the manner in which life insurance companies price any replacement life insurance policies that Plaintiffs may elect to purchase. UF ¶ 29. Long concedes that the cost of insurance increases as persons age simply because death benefit payouts become more likely

(and more immediate) as persons age. *See* Ex. B-1 at 139. As Long stated: "The cost per thousand dollars of insurance *has nothing to do with the defendants*." *Id.* at 143 (emphasis added). Embarq cannot be held responsible for any increased insurance costs incurred by Plaintiffs when it controls neither Plaintiffs' purchasing decisions nor the increased insurance costs.

C. Embarq's Decision To Reduce Retiree Benefits Was Indisputably Based on Reasonable Factors Other than Age.

The ADEA provides that "it shall not be unlawful for an employer . . . to take action otherwise prohibited under subsection[] (a) . . . where the differentiation is based on reasonable factors other than age" ("RFOA"). 29 U.S.C. § 623(f)(1). "The focus of the defense is that the factor was a 'reasonable' one for the employer to be using." *Meacham*, 554 U.S. at 96. In determining whether the employer acted reasonably, a court need not consider "whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on the protected class." *City of Jackson*, 544 U.S. at 243.

Even if Plaintiffs could establish that Embarq's reduction of retiree life insurance benefits had a disparate impact on them as compared to some other group, Embarq would still be entitled to summary judgment on that claim, because its decision to cut retiree life insurance benefits was indisputably motivated by a desire to: (1) reduce costs; and (2) align its retiree benefits more closely with those provided by other companies.

1. Reducing Costs To Remain Competitive and Maintain Profitability Is Reasonable as a Matter of Law.

At the time Embarq cut retiree life insurance benefits, it needed to manage its cost structure to remain competitive and maintain profitability, in part because revenues from its core business, traditional "landline" telephone service, were steadily shrinking. Embarq wished to

reduce costs in ways that would not jeopardize customer service or the company's revenues. One way to do this was to reduce retiree life insurance benefits. UF ¶ 11.

As of June 2007, Embarq's share of retiree life insurance costs was $9 million in cash annually, and resulted in an $11.3 million annual expense charge to its income statement and an accrued balance sheet liability of $169.5 million. *Id.* ¶ 12. The planned reduction or elimination of retiree life insurance benefits was projected to result in annual cash savings of $4.1 million, annual expense reductions of $9.4 million, and a reduction in accrued balance sheet liabilities of $72.4 million. *Id.* ¶ 13.

Numerous courts have granted summary judgment to defendants in ADEA disparate impact cases based on the RFOA defense where, as here, the challenged policy was adopted in part to reduce costs.

- In *Aldridge*, *supra*, the Sixth Circuit upheld an order granting summary judgment to defendant based on the RFOA defense, stating that "demoting employees of a particular seniority status for cost-saving and operational considerations surely qualifies" as a reasonable factor other than age. 404 Fed. Appx. at 41. The court added: "Whether there were more logical or less disruptive ways for the Department to increase its operating efficiency is beside the point." *Id.*

- In *Allen v. Highlands Hospital Corp.*, 545 F.3d 387 (6th Cir. 2008), the Sixth Circuit upheld an order granting summary judgment to defendant based on the RFOA defense, stating: "The [district] court ultimately held that '[l]owering overall employee costs by increasing turnover and discouraging employees from using vacation and sick time might not be the wisest method of running a hospital, but it is a reasonable factor other than age in response to HHC's bulging employee costs.' We agree." *Id.* at 405.

- In *Allen v. Sears Roebuck & Co.*, 803 F. Supp. 2d 690 (E.D. Mich. 2011), the court granted summary judgment for the defendant based on the RFOA defense when "the business decisions at issue were aimed at decreasing costs," stating: "[T]he decisions to eliminate paid time off and business expense reimbursement were reasonable factors other than age" that supported defendant's goal "to reduce operating costs." *Id.* at 697-98.

- In *Townsend v. Weyerhaeuser Co.,* No. 04-C-563-C, 2005 WL 1389197 (W.D. Wis. June 13, 2005), the court granted summary judgment to the defendant based in part on the RFOA defense, stating: "[A]n employer that decides to terminate an employee to relieve itself of the burden of that employee's high salary or health care costs has based its decision on 'reasonable factors' other than the employee's age." *Id.* at *14.

- In *Doyle*, *supra*¸ the court granted summary judgment to the defendant based on the RFOA defense because the challenged practice, switching health insurance coverage, "saved hundreds of thousands of dollars and reduced the premiums paid by management employees." 2011 WL 4894077, at *4.

- In *Walker v. City of Cabot, Arkansas*, No. 4:08-CV-00139, 2008 WL 4816617, at *4 (E.D. Ark. Nov. 4, 2008), the court granted summary judgment to the defendant based on the RFOA defense, stating that even if the challenged employment action was not "financially necessary," it was nevertheless "reasonable to terminate Walker to eliminate redundant positions and reduce expenses."

Here too, Embarq's decision to remain competitive and maintain profitability by reducing the cost of providing retiree life insurance benefits was a "reasonable factor other than age" as a matter of law. Embarq is according entitled to summary judgment on Plaintiffs' ADEA Claim.

2. Aligning Retiree Benefits More Closely with Other Companies' Retiree Benefits Is Reasonable as a Matter of Law.

A second reason Embarq reduced retiree life insurance benefits was to align those benefits more closely with other companies' retiree benefits. When Embarq took that action, the available data showed that 73% of all companies, and 85% of non-manufacturing companies like Embarq, provided no retiree life insurance benefits. UF ¶ 15. The data also showed that of the small percentage of companies that provided such benefits, 45% provided coverage of $10,000 or less. *Id.* As a result, even after Embarq's 2007 cuts in life insurance benefits, which limited VEBA retirees to death benefits provided under the VEBA plan (in an amount equal to their final year's salary) and limited all other retirees' life insurance benefits to $10,000, Embarq still provided more life insurance to retirees than most companies did. UF ¶¶ 9 & 17. Moreover, a large, similarly situated telecommunications company reduced *its* retiree life insurance benefits to $10,000 shortly before Embarq took this action. UF ¶ 16; *see generally Kerber v. Qwest Group Life Ins. Co.*, 647 F.3d 950, 956-57 (10th Cir. 2011) (rejecting claim that Qwest's reduction of retiree life insurance benefits violated ERISA). One purpose of Embarq's action was thus to bring its benefits more in line with those offered by other companies. UF ¶¶ 15-18.

In *City of Jackson*, the Supreme Court held that an employer acted reasonably when it adjusted employee compensation to align it with compensation provided by similarly situated entities. In that case, the employer adopted a new compensation plan under which 66% of officers under 40 received raises of more than 10%, while only 45% of those over 40 did. 544 U.S. at 242. The employer adopted this plan "to raise the salaries of junior officers to make them competitive with comparable positions in the market." *Id.* The Court stated: "[W]e hold that the City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a 'reasonable

facto[r] other than age.'" *Id.* The Court further held that in considering the RFOA defense, a court need not consider "whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on the protected class," stating: "While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable." *Id.* at 243.

Here too, Embarq adjusted its retiree benefits to bring them more in line with common business practices, which is a reasonable factor other than age. *See* Definition of "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act, 75 Fed. Reg. 7271, 7128 (Feb. 18, 2010) (EEOC factors relevant to determining whether an employment practice is reasonable include whether it is a "common business practice[]").

The Tenth Circuit has stated: "Our role is to prevent unlawful hiring practices, not to act as a super personnel department that second guesses employers' business judgments." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1233 (10th Cir. 2000) (citation and quotation marks omitted). Embarq's reduction of retiree life insurance benefits was a matter of business judgment, and had nothing whatever to do with hiring practices, much less unlawful hiring practices. Because Embarq's business judgment was indisputably reasonable, Embarq is entitled to judgment on Plaintiffs' ADEA Claim as a matter of law.

D. Embarq's Decision To Reduce Retiree Benefits Qualifies for the Equal Cost/Equal Benefit Safe Harbor.

Finally, Embarq is entitled to summary judgment on Plaintiffs' ADEA Claim because its decision to reduce retiree life insurance benefits satisfies the ADEA's equal cost/equal benefit safe harbor. Under this safe harbor, employers may cut benefits packages as long as "for each benefit or benefit package, the actual amount of the 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). Embarq's 2007 decision falls within this safe harbor.

The proper comparison groups for evaluating compliance with the safe harbor are older and younger retirees, not retirees as compared to active employees. As the Third Circuit has explained, a comparison between older retirees and younger active employees is inappropriate because it would be based on individuals' employment status, not their ages. *Erie County*, 220 F.3d at 216 n. 14. Thus, where a plan makes no distinction between older and younger retirees with respect to either cost or benefit, the safe harbor applies as a matter of law. *See Lefevre v. Niagara Mohawk Power Corp.*, 610 F. Supp. 2d 212, 217 (N.D.N.Y. 2009) ("Where the benefit derived from the plan is the same for the Medicare-eligible retiree as it is for the younger, non-Medicare eligible retiree, the 'equal benefit' prong is met and the safe harbor provision applies."); *cf. Bozner v. Sweetwater County Sch. Dist.*, No. 96-8087, 1997 WL 165168, at * 3 (10th Cir. Apr. 9, 1997) (where the plan "provides the same level of benefits to older workers as to younger workers, there is no violation" of the ADEA).

Here, because all similarly-situated retirees were treated the same regardless of age, Embarq's decision to cut retiree life insurance benefits qualifies for the safe harbor. Embarq eliminated Company-sponsored life insurance for VEBA-participant retirees (leaving untouched VEBA's death benefit, one year's pay), without regard to the age of such persons. The VEBA participants all received exactly the same benefit from Embarq—the VEBA death benefit. To the extent they lost life insurance benefits, they all received exactly the same benefit at exactly the same cost to Embarq ($0). Embarq uniformly capped at $10,000 the basic life insurance coverage for all other retirees, regardless of their age. Simply put, because all retirees affected by

the benefit reductions received the same benefit, the safe harbor insulates Embarq from Plaintiffs' claims.

IV. CONCLUSION

For the reasons set forth above, Embarq respectfully requests that the Court grant summary judgment in its favor on Plaintiffs' Fourth, Fifth, Sixth, and Seventh Claims for Relief.

Respectfully submitted,

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I hereby certify that on the 2nd day of March, 2012, I electronically filed the foregoing document using the CM/ECF system, which will send notice of electronic filing to the following attorneys for Plaintiffs:

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