CASE NO. 13-3230

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM DOUGLAS FULGHUM, et al., individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

EMBARQ CORPORATION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Kansas
The Honorable Eric F. Melgren
(D.C. No. 2-07-CV-2602-EFM)

APPELLANTS' OPENING BRIEF

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ORAL ARGUMENT IS REQUESTED

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PRIOR OR RELATED APPEALS

Not applicable.

STATEMENT OF JURISDICTION

Jurisdiction was based on 28 U.S.C. §1331, 29 U.S.C. §626(b) (ADEA), 29 U.S.C. §1132(e)(1) (ERISA), and 28 U.S.C. §1367(a) (pendent claims).

Appellate jurisdiction is based on 28 U.S.C. §1291 and the final partial judgment pursuant to Fed.R.Civ.P. 54(b). Memorandum and Order, 7/16/2013 (19A9635, 9649 and Addendum A).[1] The time to file the Notice of Appeal was extended to September 16, 2013 pursuant to Fed.R.App.P. 4(a)(5). Order, 8/5/2013 (19A9655). The appeal was filed September 13, 2013. (19A9656).

[1] "A" refers to the 19-volume Appendix; the number prefix designates the volume. Attached "Addendum A" contains the relevant opinions and judgment. "Addendum B" contains relevant statutes and regulations.

STATEMENT OF ISSUES

1. Did the court err in dismissing ERISA benefit claims by failing to construe the summary plan descriptions ("SPDs") promising lifetime medical and prescription drug benefits ("health benefits") and life insurance from the viewpoint of a reasonable plan participant? Subsidiary issues include whether the court erred in:

   a. Excluding as "irrelevant" the expert testimony of plaintiffs' linguistics expert addressing how reasonable plan participants would understand the SPDs?

   b. Dismissing claims based on SPDs and collective bargaining agreements ("CBAs") containing language substantially the same as language precluding summary judgment as to two representative plaintiffs?

   c. Dismissing claims of class members despite defense admissions that the claims arose from SPDs and CBAs not addressed in the summary judgment motion?

2. Did the court err in ruling that ERISA's statute of limitations for cases of "fraud or concealment" required active concealment in addition to underlying fiduciary misrepresentations, and that claims were barred before they accrued and could be discovered?

3. Did the court err in granting Rule 12(b)(6) dismissal of federal and state-law age discrimination claims challenging elimination of health benefits by relying on an EEOC exemption that exceeded the agency's statutory authority, was unreasonable, arbitrary and capricious, and was given retroactive application?

4. Did the court err in granting summary judgment on federal and state-law age discrimination claims challenging elimination of life insurance benefits by ruling that: (a) there was no triable fact issue on retirees' *prima facie* case of disparate-impact; (b) defendants were not required to show a significant cost saving; and (c) there was no triable fact issue on the defense of a reasonable factor other than age?

STATEMENT OF THE CASE

A. The Parties

Plaintiffs-appellants ("retirees") are retired employees of defendants Sprint-Nextel Corporation ("Sprint") and Embarq Corporation ("Embarq") and their operating subsidiaries who participated in company plans providing post-retirement life and health benefits. The 17 plaintiffs-appellants represent a class of plan participants, spouses and other beneficiaries affected by the challenged benefit changes. More than 8,000 members of the collective action are also appellants. Notice of Appeal, 19A9656-57.

Defendants are: (a) Sprint and several former operating subsidiaries; (b) Embarq, Sprint's 2006 landline telephone spin-off which assumed its obligations to provide benefits; and (c) relevant plans and their various administrative bodies and fiduciaries.

B. The Claims

In November 2005 Sprint announced it was terminating prescription drug benefits for Medicare-eligible participants and replacing them with an annual $500 individual allowance beginning January 1, 2006. In July 2007 Embarq announced that: (1) effective January 1, 2008, it would terminate all health benefits including the drug allowance for Medicare-eligible participants; (2) effective September 1, 2007, it would terminate the "grandfathered" life insurance provided to certain

retirees of Carolina Telephone & Telegraph ("CT&T") who were "VEBA" participants; and (3) effective January 1, 2008, it would cap life insurance for all other retirees at $10,000. *See* Memorandum and Order, 2/14/2013 (hereinafter "Mem.") at 10 (19A9413 and Addendum A).

The retirees sued in December 2007 under ERISA, 29 U.S.C. §§1001 *et seq.*, ADEA, 29 U.S.C. §§621 *et seq.*, and age discrimination statutes of Ohio, Oregon, and Tennessee. This appeal concerns the following claims:

(1) class claims to restore benefits under ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), asserting that the plans provide lifetime benefits. The court certified an ERISA class of approximately 15,000 households. Memorandum and Order, 1/4/2011 (2A894);

(2) individual claims by the 17 representative plaintiffs for breach of fiduciary duty ("BOFD") under ERISA §§404(a) and 502(a)(3), 29 U.S.C. §§1104(a) and 1132(a)(3), asserting that defendants issued SPDs which misled the retirees into believing they had lifetime benefits and otherwise misrepresented they had lifetime benefits;

(3) ADEA claims for age discrimination, asserting that the benefit cutbacks disparately impacted retirees based on age. The ADEA and state-law age discrimination claims concerning life insurance proceeded through discovery to

summary judgment. The January 4, 2011 ruling certified this ADEA claim as a collective action and certified three state law subclasses.

C. Procedural History and Decisions Below

The court dismissed the ERISA claim for declaratory relief and the age claims as to health benefits under Rule 12(b)(6). Mem. 12/2/2008 at 23-29 (2A646-52). Extensive discovery ensued. In March 2012 defendants moved for summary judgment on all claims and to strike every expert. Retirees opposed all motions. (Docket Entries, 1A222-25).

The court granted defendants' summary judgment motions in substantial part. It dismissed the ERISA benefit claims of 15 representative plaintiffs and thousands of "selected class members" whose claims were based in part on SPDs defendants identified as containing the same or similar language. It ruled these SPDs could not be interpreted to provide lifetime benefits and that defendants could reduce or terminate benefits. Mem. 12-46. It granted defendants' motion to strike the expert report and testimony of Professor Gail Stygall, which evaluated how participants would reasonably understand the SPDs. Mem. 16. It also refused to consider any course-of-performance evidence confirming lifetime benefits. Mem. 15.

The court dismissed the BOFD claims of 15 representative plaintiffs as time-barred, ruling that ERISA's multi-part limitations provision, 29 U.S.C. §1113, had

run because (a) ERISA's discovery rule for cases of "fraud or concealment" required "active concealment", and (b) retirees had not sued within six years of the last action in the breach, because violations were complete at retirement. Mem. 52-58.

The court dismissed the age discrimination claims that elimination of life insurance benefits constituted a disparate-impact violation, ruling that retirees failed to present adequate statistical evidence of disparate impact and that defendants demonstrated their actions were based on a reasonable factor other than age. Mem. 58-70.

The Court denied all motions for reconsideration and denied defendants' renewed class decertification motion. 7/16/2013 Mem. 5-6, 11-13.

The court granted retirees' motion to enter partial final judgment. 7/16/2013 Mem. 6-11. It extended the appeal period by 30 days, to September 16, 2013, under Fed.R.App.P. 4(a)(5)(C). Order, 8/5/2013 (19A9655). Retirees filed their appeal on September 13, 2013. (19A9656).

STATEMENT OF FACTS

A. The SPDs and Professor Stygall's Analysis

On a page entitled "When Coverage Ends" SPDs 1-6, 18, 24-32 state that participants are entitled to receive retiree health benefits for life: "Your coverage under the Retiree Medical Plan ends . . . **when you die**." (emphasis added). 4A1618, 1671, 1727, 1761, 1774, 1829. This page does not cross-reference any reservation of the right to amend or terminate the plan ("ROR"). *See, e.g.*, 4A1618. The SPDs also assure participants that the plan provides financial and health security throughout retirement, s*ee, e.g.*, 4A1605, and link eligibility to pension eligibility, 4A1609, and company subsidies to age and years of service. 4A1605.

SPDs 5 and 6 also describe retiree life insurance and expressly state it is a lifetime benefit: "The basic life insurance coverage ends **on the date of your death**". 4A1806, 1835 (emphasis added).

Gail R. Stygall, Ph.D., is a professor of linguistics and an expert on issues of comprehensibility of pension-related and other complex documents. She analyzed the SPDs and concluded that they are reasonably understood by a participant to promise lifetime benefits. 16A8072-8159.

In these SPDs, any ROR language refers to a *general* right to amend or terminate in undefined circumstances for undefined persons, appears without any

heading or cross-reference, and is not listed in the Table of Contents (unlike the section with specific vesting language). *See, e.g.*, 4A1604. Other language refers only to possible "change" in "any part of the plan," "any or all parts of the plan," or suggests that certain specified covered procedures or services might change, but does not state that the plan itself may be terminated. *See, e.g.*, 4A1616, 1623, 1642. Some SPDs include a "Legal Information" section containing generic reservation language pertaining to multiple plans covering active employees, not retirees, with no specific reference to amendment or termination of plans providing benefits to current retirees. *See, e.g.*, 4A1649, 4A1652-53, 4A1655-58. Stygall found that the contrast between the specific benefits promises and vague, general disclaimers "produces ambiguity". 16A8096-97.

SPDs 7-15 and 19-23 are primarily directed to active employees, *see, e.g.*, 4A1839, 1861, 1892, 1999, 2003, 2045. Some of the SPDs do not contain *any* ROR at all. Others permit amendment or termination only "for reasons of business necessity or financial hardship". Provisions covering retirees state that life insurance coverage "will be" in the amount stated, subject only to a 50% reduction after five years of retirement, or that insurance will continue before and after age 65. The specified retiree coverage amount continues without durational limit and is linked to pensioner status. "Insurance Ends" sections refer only to a particular "Group Policy" and "insurance" thereunder, not the plan itself. Historically,

insurance policies did periodically change, but the plan benefits did not and existing retirees were grandfathered in their benefits. *See, e.g.*, 4A1842-44, 1854, 1881-84, 1888-89, 1910, 1923, 2038. Some SPDs refer to governing CBAs. *See, e.g.*, 4A2020, 2048. Based on her review of all SPD features, Stygall concluded that the SPDs are reasonably understood by a participant to promise lifetime benefits. 16A8098-102, 8111-114.

B. Course-of-Performance Evidence

Course-of-performance evidence establishes that the company understood these to be lifetime benefits. Company staff repeatedly and consistently informed retirees that their health or life insurance benefits were "lifetime" benefits. *See, e.g.*, 10A4788 (promising "lifetime" $114,000 life insurance); 15A7441-42 (describing 1989-91 retirees' lifetime medical benefits); 15A7444 (1990 letter); 15A7448-50 (2006 email from HR); 15A7583-84, 15A7595-7601 (company created retiree checklists listing lifetime coverage); 15A7463-64, 7477, 7641-43 (HR informed employees of lifetime benefits but did not disclose ROR); 7673-74 (HR told employees to retire before 2002 to secure lifetime health benefits); 16A7960 & 7962-8003 (1999-2000 company analysis showing thousands of retirees retired under SPDs with either *no* ROR or "indefinite" ROR limited to "business necessity or financial hardship"); 16A8013, 8027, 8042-43, 8053-54, 8059-60 (senior executives

stating company *cannot* terminate benefits); 8070 (post-termination Q&A anticipating retirees had documents confirming lifetime coverage).

Each representative plaintiff testified that he/she was promised lifetime retiree health and life insurance benefits. Those who were managers informed retiring employees they had lifetime benefits. *See, e.g.*, 8A4035; 9A4280, 4304, 4394-95, 4404-06, 4569, 4630, 4655; 10A4760, 4834, 4843-44, 4863-64, 5014, 5016-17, 5202-03, 5333-35, 5884-85, 5471-72, 5525-26, 5629, 5910, 6010, 6022-23; 15A7450; 16A7952-53.

D. Age Discrimination Claims

More than 8,000 retirees opted-into the collective action. Mem. 59. The court found that purchasing life insurance "is inherently more costly for older persons than younger persons because life expectancy is a function of age," and that none of the ADEA plaintiffs purchased replacement insurance. Mem. 62.

Retirees' statistical evidence of disparate impact was based on the actuarial report of Terry Long. (16A8248-72). He examined defendants' data for the entire class, and separately examined data for class members who timely opted in. (16A8250, ¶¶7-9). For each dataset, he considered each person's age and calculated the present commercial value of the death benefits lost, and compared it to values for identical class members ten years younger. For example, he

compared 65-year-olds to 55-year-olds, and so on for each age. (16A8258, ¶42) *See* 16A8256-60 (explaining methodology).

For class members and for timely opt-ins, Long found that older retirees lost much higher benefit values than younger counterparts, under each of a range of discount rates. The range of loss differentials for older retiree opt-ins, for example, was from 22.3% to 37.8% higher than the values lost by retirees ten years younger. (16A8251-53, 8272)

Long also found that some retirees could not obtain replacement insurance at any cost (16A8253-56). Finally, he found that even the conversion policies offered by defendants' carriers required premiums equal to multiple times the value of the coverage they would provide (16A8256-62).

Defendants' experts Barbara Niehus (16A8274-78) and Steve Browne (16A8280-82) objected to several of Long's conclusions, asserting that calculations should have been performed differently. Long's Rebuttal Report (16A8284-305) showed that defendants had not provided the data necessary to test some of their arguments, but explained why additional data would not alter the conclusions (16A8286 ¶¶8-11; 16A8289-302), and where defendants did provide data, he tested defense arguments and found they actually *increased* damage amounts. (16A8287-89 and 8305).

Plaintiffs' expert, David Crawford, Ph.D., compared the savings from life insurance reductions to other company expenditures to determine whether the savings were significant. (16A8308-14, 8364) He used as the benchmark the language of 29 C.F.R. §1625(a)(1), which excludes vacation and sick pay costs as not significant (Addendum B56). (16A8312 ¶23) Crawford found that the cost of paid vacations was 4.6% of wages, salaries and supplemental pay, and the cost of sick pay was approximately 1.5%. In contrast, the company's savings from the life insurance changes constituted only 0.9% to 1.0% of payroll. (16A8311 ¶19, 8312 ¶21, 8364).

SUMMARY OF ARGUMENT

I. Dismissal of the ERISA benefit claims contravenes the principles requiring that plans be interpreted from the perspective of a reasonable plan participant and that all ambiguities be resolved in participants' favor. The first group of SPDs contained specific promises that benefits end on death and these must control over general ROR clauses. The second group of SPDs had *no* RORs and the company thus lacked *any* power to amend/terminate benefits. The third and fourth groups of SPDs permitted amendment/termination *only* in cases of "business necessity or financial hardship", a tax law standard that was not satisfied. The court improperly drew all inferences and resolved all interpretive questions in favor of defendants. The court also erred in excluding retirees' course-of-performance evidence and expert testimony addressing the key factual dispute – Whether plan participants reasonably understood the SPDs to provide lifetime benefits?

II. The retirees' BOFD claims were timely. ERISA incorporates the longstanding rule that fiduciary misrepresentations constitute "fraud or concealment." The statute does not begin to run until the breach is discovered, here when benefits were eliminated. The court failed to acknowledge this statutory discovery rule and instead adopted an erroneous "active concealment" doctrine

from other circuits. The claims also were timely because actual injury is a required element. The claims could not accrue until benefits were terminated.

III. The court dismissed retirees' age discrimination claims challenging termination of health benefits for Medicare-eligible retirees in reliance on an EEOC regulation purporting to grant blanket immunity for such actions. The regulation is invalid because it conflicts with the language and purposes of the ADEA and OWBPA, and ignores the EEOC's own 1989 regulation codified in OWBPA with a mandate that it not be changed except by Congress. The court also erred in holding the 1989 regulation inapplicable because it refers to "employees," and in applying the exemption retroactively to destroy retirees' existing rights.

IV. The court erred in granting summary judgment on the retirees' age discrimination claims concerning life insurance benefits, by erroneously rejecting the retirees' statistical and other evidence of disparate-impact and failing to apply its own finding of disparate-impact. It erred in holding that a disparate-impact age discrimination case cannot be made as to any subgroup within the protected over-40 group; that defendants were not required to show significant cost savings; that defendants established a reasonable factor other than age; and that there was no genuine dispute of material fact about any of these issues.

STANDARD OF REVIEW

Rule 12(b)(6) dismissal is reviewed *de novo*. *Bixler v. Foster*, 596 F.3d 751, 75 n.2 (10th Cir. 2010).

Summary judgment is reviewed *de novo*. *DeBoard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1237 (10th Cir. 2000).

ARGUMENT

I. DISMISSAL OF THE BENEFIT CLAIMS CONTRAVENED THIS COURT'S ERISA DECISIONS.

A. The Standard of Review is *De Novo.*

See page 16 above. All issues were raised in the briefs and ruled upon in the court's decision.

B. This Court's Decisions Emphasize Strong Protections for Participants.

This Court applies general principles of contract construction to ERISA benefit plans. *DeBoard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1240 (10th Cir. 2000).

Courts must "giv[e] the language its common and ordinary meaning as a reasonable person in the position of the [plan] participant." *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir. 1996), *quoting Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

Ambiguity exists if plan language "is susceptible to the reading given it by plaintiffs," *Chiles*, 95 F.3d at 1517, or is "reasonably susceptible to more than one meaning, or where there is uncertainty as to the meaning of the term." *LaAsmar v. Phelps Dodge Corp. Life, Accid. Death & Dismemberment and Dependent Life Ins. Plan*, 605 F.3d 789, 804 (10th Cir. 2010); *see also Rasenack v. AIG Life Ins. Co.*, 585 F.3d 1311, 1318-20 (10th Cir. 2009).

In determining whether a plan can be interpreted multiple ways, "the proper inquiry is not what [the drafter] intended a term to signify." *Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1249 (10th Cir. 2007); *see also LaAsmar*, 605 F.3d at 801. The issue is whether there is more than one reasonable interpretation. *Miller*, 502 F.3d at 1252.

Kellogg v. Metropolitan Life Ins. Co., 549 F.3d 818, 830 (10th Cir. 2008), held that protective principles governing insurance contracts "apply equally to ERISA cases" and "focus[ ] upon the expectation and intentions of the insured." Thus, an employer "should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand." *Miller*, 502 F.3d at 1254. It cannot take advantage of its own ambiguous drafting. *Id*.

Ambiguity must be resolved in participants' favor. *Miller*, 502 F.3d at 1254. Consequences of unclear drafting must be imposed on the drafter, not individual participants. "Accuracy is not a lot to ask." *Chiles*, 95 F.3d at 1518.

Specific promises of lifetime benefits control over vague references to a general right to amend. *Chiles*, 95 F.3d at 1513, *quoting Restatement (Second) of Contracts* §203(c); *see also Mut. Life Ins. Co. v. Hill*, 193 U.S. 551, 558 (1904).

The lower court did not follow these mandatory standards, nor did it cite most of these decisions.

The decision also contravenes ERISA's paramount purpose of ensuring understandable disclosures so that a participant "on examining the plan documents, [can] determine exactly what his rights and obligations are under the plan." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995); *accord*: *Firestone*, 489 U.S. at 118. Interpreting SPDs to include limitations which do not appear "would thwart th[is] congressional purpose." *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1202 (10th Cir. 1992), *quoting Firestone*. *See also Charter Canyon Treatment Center v. Pool Co.*, 153 F.3d 1132, 1136 (10th Cir. 1998) ("important policy of protecting beneficiaries from misleading or false information" in SPD). SPDs therefore must be viewed in light of this "obligation to draft an SPD that is clear to participants." *Haymond v. Eighth Dist. Elec. Benefit Fund*, 36 F.App'x 369, 372-73 (10th Cir. 2002). The statute commands this. ERISA §102(a)-(b), 29 U.S.C. §1022(a)-(b) (Addendum B5-6); *see also Chiles*, 95 F.3d at 1518 (citing statute).

1977 Labor Department regulations require plan administrators to "tak[e] into account such factors as the level of comprehension and education" of participants and "the complexity of [plan] terms." 29 C.F.R. §2520.102-2(a) (B9). They prohibit misleading features of SPDs, including limitations that are "minimized, rendered obscure, or otherwise made to appear unimportant." 29 C.F.R. §2520.102-2(b) (B10). At a minimum, statements of benefits must cross-

reference any limitations and clearly identify any risks of benefit loss. 29 C.F.R. §2520.102-3(*l*) (B18). Nevertheless, the court ruled that it was sufficient for the company to place a general ROR *somewhere* in the SPD "even if there is only one" occurrence. Mem. 25.

Finally, the court failed to "view the evidence and draw reasonable inferences therefrom in the light most favorable to" retirees. *North Texas Production Credit Ass'n v. McCurtain County Nat'l Bank*, 222 F.3d 800, 806 (10th Cir. 2000).

C. When Read from the Perspective of a Reasonable Participant, the SPDs Promise Lifetime Benefits.

The court ignored SPD provisions specifically promising lifetime benefits and erroneously gave controlling weight to vague ROR language viewed in isolation.

Retirees showed "an *agreement or other demonstration of employer intent* to have company-paid [benefits] vest under the plan," *Chiles*, 95 F.3d at 1511 (emphasis added), and that "a promise to provide vested benefits '[was] incorporated, *in some fashion*, into the formal written ERISA plan.'" *Id.* (emphasis added). Unlike other circuits, this Court declined to adopt "a hard and fast rule finding a general [ROR] unambiguously controlling any promise located in another part of an ERISA document." *Id*. at 1512.

The court erred in ruling that specific promises of lifetime benefits are negated when vague ROR clauses are also present

1. SPDs 1-6, 18 and 24-32 State that Benefits End on Death

The court acknowledged that these SPDs[2] "contain the statement that the retirees' benefit coverage ends upon the retirees' death" and agreed that each SPD "purports to promise lifetime benefits." Mem. 17, 26. These SPDs also contain "at least one ROR stating the company reserves the right to amend or terminate." *Id*. The SPDs therefore present a facial conflict between the *specific* promise of lifetime benefits and a *general* ROR.

The court erred by resolving this patent ambiguity in favor of defendants. First, the court wrongly discounted the lifetime promises as insufficient. In *DeBoard* a promise to pay benefits "until the time of your death" was construed by this Court to "clearly indicate[] an intent on the part of [the employer] to provide plaintiffs with lifetime health insurance benefits." 208 F.3d at 1233, 1238. Here the SPDs promise that benefits end "when you die" or "on the date of your death." These are sufficient to promise vested benefits. *See also Noe v. Polyone Corp.*, 520 F.3d 548, 560 (6th Cir. 2008) ("promising to provide a benefit until a person dies undoubtedly means that the benefit lasts for the person's life"); *Aguilar v.*

[2] SPDs 1-6 were similar or substantially identical to SPDs 18 and 24-32 applicable to selected class members. Mem. 19-20. Descriptions and arguments for this and other SPD groups discussed below apply to all SPDs in each group.

Basin Resources, Inc., 47 F.App'x 872, 876 (10th Cir. 2002) (promises of retiree medical benefits "for life" or "until death" provide lifetime benefits).[3]

The court distinguished *DeBoard* because the letters at issue there did not include an ROR or other language indicating the employer could change the plan. Mem. 23. However, the first issue presented here is whether the SPDs' language promising benefits "until your death" is a lifetime promise. It is indistinguishable from the language held sufficient in *DeBoard*. Plan participants would reasonably understand this language to promise lifetime benefits.

At minimum, the conflicting language makes the SPDs ambiguous. *Aguilar* held a wage agreement was "ambiguous on its face" because promises of benefits "for life" and "until death" indicated intent to vest benefits, conflicting with clauses stating benefits were provided only for the agreement's term. 47 F.App'x at 875. The court ruled *Aguilar* was distinguishable because it involved a CBA, Mem. 24 n.56, but *Aguilar* does not suggest that ambiguity depends on the

[3] Other SPD portions reinforce the lifetime promises. Eligibility and "retiree medical dollars" are directly linked to pension eligibility, 15A7337-39, 7342-43 and cited exhibits, a recognized indicator of lifetime benefits. *Noe*, 520 F.3d at 558. The SPDs also assure that retirees "can feel secure that your family's health and well-being will be protected after you stop working". Mem. 18; *see also* 15A7337-38, 7343. The court belittled this as "simply explain[ing] that retirees can participate in the plan once they are retired." Mem. 26. This ignores the meaning participants would ascribe. *See LaAsmar*, 605 F.3d at 803 (statement that plan "provides additional security" part of "context of the policy as a whole" supporting understanding of coverage).

particular type of agreement. SPDs are interpreted "like any contract," *DeBoard*, 208 F.3d at 1240, so *Aguilar*'s conclusions apply fully.

The court's other distinction, that the *Aguilar* CBA contained numerous references to lifetime benefits but there was only one reference in these SPDs, imposes an indefinite numerical test and has no basis in *Aguilar* or in precedent or logic generally. A conflict need only appear once to create ambiguity. *See, e.g.*, *Haymond*, 36 F.App'x at 373 ("flat contradiction between the two provisions").

The lower court found a conflict: "[T]he same document that purports to promise lifetime benefits also contains an unambiguous reservation of rights clause." Mem. 26. This passage reveals the court's error. It recognized the lifetime promises and the conflicting language, but erroneously viewed the ROR in isolation and mischaracterized it as "unambiguous."

The patent conflict created ambiguity. *Haymond*; *Aguilar*; *Flores v. Monumental Life Ins. Co.*, 620 F.3d 1248, 1255 (10th Cir. 2010); *Dumais v. American Golf Corp.*, 299 F.3d 1216, 1218-19 (10th Cir. 2002); *Millensifer v. Ret. Plan for Salaried Employees of Cotter Corp.*, 968 F.2d 1005, 1009 (10th Cir. 1992). There is more than one reasonable interpretation, and any ambiguity must be resolved in the retirees' favor. *Miller*, 502 F.3d at 1252, 1254.

The lower court held that RORs must override conflicting provisions, stating it must not "render the inclusion of the [ROR] meaningless and leave it without

effect." Mem. 25. This was error. First, the patent conflict between specific lifetime promises and a general ROR cannot be reconciled by fiat. *Chiles* rejected that approach, as did Chief Judge Vratil in denying defendants' motion to dismiss. 12/2/08 Mem. at 15. Moreover, elevating a general ROR over specific lifetime promises nullifies the specific promises. A court "must read the SPDs as a whole" rather than focus on particular terms in isolation, and specific terms must control. *Chiles*, 95 F.3d at 1511, 1513. Second, it is not correct that enforcing the specific lifetime promise would nullify the ROR. An employer could still change or terminate benefits that were not subjects of contrary lifetime promises.

Chiles frequently cited *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), which held that a general ROR did not control contrary vesting language. The ROR here "does not specifically address alteration or termination of [the] benefits" for retirees. 95 F.3d at 1512.[4] The lower court did not discuss this portion of *Chiles*, but instead relied on other circuits' decisions that give controlling weight to RORs. Mem. 22 n.48, 24 & n.59. *Chiles* cited such decisions in a footnote but declined to follow them. 95 F.3d at 1512 n.2.

Participants are not expected to guess that a *specific* benefits promise until death (in the section "When Coverage Ends") is negated by another provision that

[4] The ROR in *Chiles* specifically applied to disabled participants receiving benefits, stating that their benefits would vest only on plan termination. It therefore was improper to infer vesting in other circumstances. *Id*. at 1513.

is not cross-referenced. In *Haymond*, there was "a flat contradiction between the two provisions" which "appear[ed] in different sections of the SPD without cross-referencing one another or providing any suggestion of how they might properly be read together." 36 F.App'x at 373*; cf. Spradley v. Owens-Illinois Hourly Employees Welfare Benefit Plan*, 686 F.3d 1135, 1138 (10th Cir. 2012) ("no cross-references to any other Plan provisions"). This Court rejected an "approach plac[ing] on the participant the burden of harmonizing apparently unrelated and conflicting provisions, thus contradicting ERISA's mandate that the SPD be clear to the layperson. *See* 29 U.S.C. §1022." 36 F.App'x at 373. "[A]n employee should not be required to adopt the skills of a lawyer." *Id.*, *quoting Chiles*, 95 F. 3d at 1517-18. Conflicting SPD provisions were "at best ambiguous" and had to be construed in the participant's favor. *Id.* at 374. The RORs here likewise were not cross-referenced.

At best for defendants, specific lifetime promises conflict with a general ROR. The SPDs were ambiguous and must be construed in the retirees' favor. The court also should have considered course-of-performance evidence and Professor Stygall's analysis. *See* Subsections D and E below.

2. SPDs 7-9 Have No ROR

SPDs 7-9 describe life insurance benefits for active and retired employees. SPD 7 governed the claims of plaintiff Britt and other unionized class members.

The court denied summary judgment as to Britt based on provisions of the related CBA. Mem. 33-34. It erred in dismissing claims of class members covered by the same SPD and CBA. *See* pages 39-40 below.

The dismissal for all retirees and class members under SPDs 7-9 also was erroneous because the SPDs have no RORs. Sprint's detailed review of SPD language in 2000 recognized that many SPDs, like these, lacked RORs. 15A7369-70 (all references to summary judgment statements of facts include the exhibits cited and summarized therein). As the court noted, SPDs 7-9 "do not contain an express reservation of rights provision." Mem. 26; *see also* 15A7347-48.

ERISA requires employers to expressly reserve a right to amend or terminate and "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. §1102(b)(3). *Halliburton Co. Benefits Committee v. Graves*, 463 F.3d 360, 371-72 (5th Cir. 2006), *citing Curtiss-Wright*, 514 U.S. at 80. "[F]or a plan *not* to have such a procedure would risk rendering the plan forever unamendable under standard trust law principles." 514 U.S. at 82, *citing Restatement (Second) of Trusts* §331(2).

This Court likewise held that employers can unilaterally amend or terminate welfare plans only **"assuming the plan provides for this right."** *DeBoard*, 208 F.3d at 1239-40 (emphasis added), *citing Curtiss-Wright*, 514 U.S. at 78; *see also*

Cirulis v. Unum Corp., 321 F.3d 1010, 1014 (10th Cir. 2003) (amendment allowed "**only when the face of the plan reserves this authority**").

The court held the absence of RORs did not matter because there was no statement of vested benefits. Mem. 29. This was error. If the employer did not reserve a right to amend/terminate, then it cannot take that action no matter how one characterizes the benefits language.

The court also erred in concluding that SPDs 7-9 did not contain vesting language. The SPDs link benefits to pension status, 15A7345-46, 7348, and contain specific, unqualified promises that retirees' life insurance "will be" the amount equal to their active employee coverage, subject only to a 50% reduction "on the fifth anniversary of retirement." 15A7346, 7348. This is sufficient for vesting. *See Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 84 (2d Cir. 2001) (terms that employees retiring after age 55 with 20 years of service "will be insured" "can be reasonably read as promising ... lifetime life insurance benefits upon performance"); *Cole v. ArvinMeritor. Inc.*, 549 F.3d 1064, 1070-71, 1075 (6th Cir. 2008) (statement that medical coverage at retirement "shall be continued" was unambiguous promise of lifetime benefits).

The court incorrectly distinguished *Devlin*. First, it mischaracterized *Devlin* as representing a "more lenient" Second Circuit standard which examines SPDs to determine if they are "capable of reasonably being interpreted" to promise vested

benefits. Mem. 30 & n.74. But this Court requires the same approach. *See* pages 17-18 above. Second, the court believed *Devlin* was distinguishable because it stated that employees who reached age 55 with 20 years service "will be insured," thus constituting acceptance by performance. Mem. 30. SPDs 7-9 have a similar requirement, *i.e.*, retirement under a pension plan with comparable age/service requirements. Third, the court inexplicably concluded that language in *Devlin* stating retirees "will be insured" is distinguishable from the language here promising life insurance "will be" provided in a stated amount. Mem. 30-31.

The court also failed to acknowledge other vesting provisions the retirees cited. For example, the SPDs contain no durational limits for insurance during retirement but do state limits for insurance during total disability. *See* 15A7346-48. Because the company thereby "demonstrated its ability to clearly limit benefits in companion provisions," if it had intended a limitation on *retirees'* benefits "it should have incorporated similar specific language." *McGee*, 953 F.2d at 1201. This "makes clear that the omission of that provision in the part of the plan governing [retiree benefits] was deliberate." *Novella v. Westchester County, New York*, 661 F.3d 128, 142 (2d Cir. 2011). Such differential treatment is evidence of vesting. *See Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 582 (6th Cir. 2006); *Zielinski v. Pabst Brewing Co.*, 463 F.3d 615, 617 (7th Cir. 2006). The court did not acknowledge these points. *See* Mem. 29-31.

Finally, the court cited references to possible termination of the "Group Policy" and concluded that "there does not appear to be a distinction between the policy and the plan." Mem. 31-33. This is simply incorrect. The SPDs are not the policies; they lack terms addressing premiums, renewal, etc. The SPDs also state that policies can be replaced but benefits will continue, even on a grandfathered basis, and specifically distinguish the "plan" from the particular "group policy" used to deliver its benefits. 15A7346-48. Moreover, the plan is a separate reporting entity under ERISA. *See, e.g.,* 4A1876, 1888.

Additionally, the right to change or terminate a particular insurance policy does not equate to the right to change or terminate the plan. *See DeBoard,* 208 F.3d at 1240-41 & n.6 (SPD stating plan "is intended to continue" but policy "can be changed or terminated" did not give right to terminate plan). *Accord*, *Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 308 (7th Cir. 1996). The lower court relied on a Fourth Circuit decision rather than these binding precedents. Mem. 32.

Any ambiguity must be resolved in retirees' favor. The court also should have considered the strong course-of-performance evidence and Professor Stygall's expert analysis. *See* Subsections D and E below.

3. SPDs 10-12 and 19 Limit Amendment/Termination to Cases of "Business Necessity or Financial Hardship"

SPDs 10-12 and 19 are primarily directed to active employee medical benefits. The court acknowledged the SPDs "indicate that benefits will continue

after retirement" but dismissed the claims based on an ROR allowing amendment or termination "for reasons of business necessity or financial hardship." Mem. 34-36.

These SPDs promise vested benefits. Specific provisions applicable to "employees who . . . are retired on pension" contain unqualified promises that the stated medical coverage "will continue" and that "you will be insured." Another provision addresses cessation of insurance, but only after "the date of your death." No durational limits are stated for retiree coverage, but limits apply to other benefit recipients. 15A7349-50. Specific provisions promising coverage that coordinates with Medicare upon attainment of age 65 also demonstrate vesting "because otherwise it would be illusory for many individuals." *Noe*, 520 F.3d at 561.

The dismissal based on these SPDs, Mem. 37-38, was erroneous.[5] The court considered phrases stating that benefits "will continue" or that participants "will be insured" in isolation and overlooked the other provisions indicating vested benefits.

The court also was mistaken in relying on *DeBoard*, which held that dental and life insurance benefits were not permanent because, in contrast to statements

[5] The court denied summary judgment on SPD 10 with respect to plaintiff Britt because his benefits were defined in the CBA which controlled SPD 7. Mem. 35 n.86. The court erred in granting summary judgment with respect to all other class members covered by SPD 10 and the CBA. *See* pages 25-26 above and 39-40 below.

promising health benefits "until the time of your death", the letters stated only that those benefits would continue. Unlike the retirees here, the *DeBoard* plaintiffs cited no other textual support. 208 F.3d at 1242.

As stated above, the court misconstrued *Devlin*, Mem. 38 n.95, and relied on *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 668 (6th Cir. 1998), even though it is contrary to later Sixth Circuit decisions including *Noe* and *Yolton* cited above. Finally, the court did not construe the SPDs as a reasonable participant would.

Most significantly, the court erred in ruling that the ROR was applicable despite the fact that it was expressly limited to "business necessity or financial hardship." This language derives from an IRS regulation, Treas. Reg. §1.401-1(b)(2), under which amendment or termination will disqualify the plan from favorable tax treatment if effected during its early years "for any reason other than business necessity." Rev. Ruling 69-25, 1969-1 C.B. 113 states that, "The term 'business necessity' has reference to adverse business conditions, not within the control of the employer, under which it is not possible to continue the plan." Rev. Ruling 69-24, 1969-1 C.B. 110 enumerated permissible conditions such as "bankruptcy, insolvency, ... and financial inability to continue meeting the cost of the plan."

The "business necessity" condition thus means (and is reasonably understood to mean) that amendment or termination could occur only if the

company is in bankruptcy or other severe financial position. 15A7376 and 16A8102-03 (Stygall); 17A8547 ¶18 (retiree Carpenter), 8549-50 ¶129 (retiree King). It is not remotely like an unqualified right to amend or terminate, and participants were never informed it was. *See, e.g.*, *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 93-94 (3d Cir 1992) (ROR ambiguous where conditioned on certain events or circumstances); *cf. Chiles*, 95 F.3d at 1513 (distinguishing *Alexander*). Indeed, in its comprehensive review of SPDs in 2000, Sprint *itself* recognized that RORs incorporating this "business necessity or financial hardship" limitation were "indefinite" and likely ineffective. 15A7369-70.

The court recognized that RORs based on "business necessity" appear "to impose a higher standard than the 'if necessary' standard in *Chiles*," Mem. 39, but concluded that "business necessity" was "only slightly more stringent" and functionally the same. Mem. 40. This construction is not only unreasonable on its face, but ignores the duty to construe language under this Court's protective rules.[6]

The record established that there was no "business necessity or financial hardship." In 2005 and 2007 the company was profitable and the benefits represented a minute portion of operating expenses. *See* 15A7357-59. At a

[6] The ruling also violates the canon "*noscitur a sociis.*" The meaning of an unclear phrase should "fit with the words with which it is closely associated." *Alioto v. Hoiles*, 341 F.App'x 433, 440 & n.12 (10th Cir. 2009) (unpublished).

minimum, the RORs were ambiguous and must be construed in the participants' favor.

Again, if there were any doubt that the conflict between the benefits provisions and the limited and inoperative ROR precluded summary judgment, the court should have considered other evidence including course-of-performance evidence and Professor Stygall's analysis. *See* Subsections D and E below.

4. SPDs 13-15 and 20-23 Limit Amendment/Termination to Cases of Business Necessity or Financial Hardship

SPDs 13-15 and 20-23 primarily describe employee life insurance benefits but specific provisions apply to retirees. 15A7352-53. The retiree-only provisions contain unqualified promises that insurance "will be," "will be paid," or "will be payable" in the amounts stated. The court considered only this language and ruled it was insufficient, for the same reasons stated for SPDs 10-12. Mem. 43-44.

But the SPDs must be read as a whole. The SPDs contain no durational limits for retirees, although limits are stated for other recipients. 15A7353. The SPDs link retiree benefits to pension eligibility. 15A7352-53. Both features indicate vesting. The court did not acknowledge these SPD features or the caselaw previously cited on these points. Mem. 44. *See* pages 27-28 above.

Moreover, these SPDs also contain RORs limited to cases of "business necessity or financial hardship." Mem. 42. As stated for SPD Group 3, that

condition was not satisfied and at a minimum, this type of ROR is ambiguous and must be construed in the participants' favor.

D. The Court Erred in Excluding Evidence.

The court also erred in believing it was barred from considering retirees' course-of-performance evidence. Mem. 15. Under *Chiles*, the retirees were entitled to show "an agreement *or other demonstration of employer intent*" to provide permanent benefits. 95 F.3d at 1511 (emphasis added). Conduct is "given substantial weight in determining the proper interpretation, particularly if the conduct manifesting their construction occurred prior to any controversy." *Boswell v. Chapel*, 298 F.2d 502, 506 (10th Cir. 1961).

Extrinsic evidence also can be used to determine *whether* a contract is ambiguous. *See Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1290 (10th Cir. 2000) (meaning and scope of employee waiver form ambiguous based on text *and* employer conduct). In addition, seemingly "clear" provisions may involve *latent* ambiguity where "some extrinsic factor or extraneous evidence creates a necessity for interpretation or a choice among two possible meanings." *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1542-43 (10th Cir. 1993). Extrinsic evidence also must be considered to determine whether there is latent ambiguity. *Id.* at 1543-44; *see also J. T. Majors & Son, Inc. v. Lippert Bros., Inc.*, 263 F.2d 650, 654 (10th Cir. 1958).

"When conflicting extrinsic evidence must be evaluated" summary judgment is improper. *Chiles*, 95 F.3d at 1515.

Extrinsic evidence may include "interpretive statements made by [the employer], past practices, customary usage in the trade, and other competent evidence bearing on the understanding of the parties." *Chiles*, 95 F.3d at 1519 n.12. This evidence includes:

Sprint and its predecessors had a longstanding practice of "grandfathering" benefits so that existing retirees were unaffected by changes for later retirees. The company preserved 170 legacy plans. 15A7370-72. Grandfathering is evidence of vested benefits. *DeBoard*, 208 F.3d at 1233, 1241; *see also Jensen*, 38 F.3d at 951.

In 2001 Sprint's management considered benefit changes but concluded that it "*probably can't take away benefits from current retirees*" and "*has an obligation to current retirees to maintain benefit levels*" and to honor "*existing commitments*." 15A7370-71, 16A8042-43 (emphasis added). Given these "obligations" and "commitments," the company made no changes in either medical or life insurance benefits for existing retirees. The company's own understanding was that it had promised lifetime benefits and that retirees had been told and understood this. 15A7359-70. It was error to exclude this evidence.

The same evidence shows the company waived or relinquished any right to change benefits. "Whether a power [to amend or terminate] has been relinquished

obviously *requires examination of extrinsic evidence*, which the district court properly undertook." *Jensen*, 38 F.3d at 950 (emphasis added), *citing* Bogert, *The Law of Trusts & Trustees* §993, at p. 232. Thus, even assuming the existence of a right to amend or terminate and satisfaction of all stated conditions, extrinsic evidence must be considered to determine whether the company relinquished any right. This question could not be resolved on summary judgment.

The evidence also includes repeated company communications promising "lifetime" benefits, both generally and in retirement counseling. 15A7359-69, 7372-74. This demonstrates intent to provide lifetime benefits and confirms that a reasonable participant would so understand the SPDs. Indeed, company conduct over many years was consistent with this understanding. *See DeBoard*; *Stewart*.

E. The Court Erred in Excluding the Evidence from Expert Stygall Finding That Participants Can Reasonably Understand the SPDs to Promise Lifetime Benefits.

The court excluded Professor Stygall's expert evidence as "irrelevant and unnecessary" because "the Court must determine whether the contractual language is ambiguous as a matter of law." Mem. 16. It also relied upon the absence of expert evidence in cases it cited.

The Court reviews *de novo* the question whether the district court used the proper legal test in excluding the Stygall evidence. A court must create a "sufficiently developed record" to explain its ruling. An "off-the-cuff" decision is

insufficient. Application of the correct standard is reviewed for abuse of discretion. *Goebel v. Denver & Rio Grande W. Railroad Co.*, 215 F.3d 1083, 1087, 1088 (10th Cir. 2000); *Dodge v. Cotter Corp*., 328 F.3d 1212, 1223 (10th Cir. 2003).

The court did not follow the required framework. Rule 401 establishes a "liberal standard;" evidence is relevant if has "*any* tendency to make *any* fact that is of consequence" more or less probable, and the degree of probative value required is "very low." *U.S. v. McVeigh*, 153 F.3d 1166, 1190 (10th Cir. 1998), *quoting* Fed.R.Evid. 401 (emphasis added), and *citing Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1983).

To assess relevance, a court "must look at the logical relationship between the evidence proffered and the material issue that evidence is supposed to support." *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1234 (10th Cir. 2004). The paramount principle guiding SPD interpretation and the material issue here is whether reasonable participants would understand the SPDs to promise lifetime benefits. *LaAsmar*, 605 F.3d at 803; *see also Miller*, 502 F.3d at 1249. Stygall addressed this precise issue. She analyzed words, structure and complexity to evaluate how participants would understand the benefit promises and reservations. *See* Stygall Report (16A8073-8159). Her analysis was relevant to "facts of consequence".

The court likewise applied incorrect legal principles in concluding that ambiguity was "a matter of law" which could not involve consideration of underlying fact issues. Expert testimony "is not objectionable just because it embraces an ultimate issue." Fed.R.Evid. 704(a); *see also Storts v. Hardee's Food Systems, Inc.*, 2000 U.S. App. LEXIS 6307, *37-39 (10th Cir. 2000) (unpublished) (expert testimony on "reasonableness and foreseeability"); *Specht v. Jensen,* 853 F.2d 805, 809 (10th Cir. 1998); Adv. Comm. Note Fed.R.Evid. 704 (1972) (legal question of capacity to make will involves subsidiary fact questions on which expert testimony permitted).

Expert testimony on how readers understand language is permitted. *See Vail Associates, Inc. v. Vend-Tel-Co., Ltd.*, 516 F.3d 853, 861-63 (10th Cir. 2008). The same principle favoring admissibility is found in ERISA decisions. *See Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 536 (9th Cir. 1990) (expert testimony on "plain and ordinary meaning" of plan term "mental illness"); *Blair v. Metropolitan Life Ins. Co.,* 974 F.2d 1219, 1222 (10th Cir. 1992) (expert testimony on meaning of plan coverage term). Expert analysis of readability is also received to assess compliance with statutory disclosure requirements. *See, e.g., Oster v. Lightbourne*, 2012 U.S. Dist. LEXIS 28126 *51-52 & n.8 (N.D. Cal. March 2, 2012).

Chiles cited a linguistic analysis by Stygall's professional colleague showing "how employees reading SPDs can be misled as to their contractual rights."

Chiles, 95 F.3d at 1519, *citing* Stratman, "Contract Disclaimers in ERISA Summary Plan Documents: A Deceptive Practice?," 10 *Indus. Rel. L. J.* 350 (1988). Given that this Court found linguistic analysis relevant in *Chiles*, the court's conclusory ruling here that Stygall's evidence is "irrelevant and unnecessary" was error.

F. The Court Erred in Dismissing the Claims of Class Members Defendants Identified as Having Claims Based on Either the Same SPD and CBA Language Which Was Sufficient to Preclude Summary Judgment or on SPDs and CBAs Defendants Did Not Address in Their Motion.

The court erred in dismissing claims of class members defendants identified as having claims based on either (a) the same SPD and CBA language which precluded summary judgment as to Britt, or (b) SPDs and CBAs defendants made no effort to address and on which they did not satisfy their Rule 56 burden. These errors were subjects of the retirees' motion for reconsideration which the court denied without comment. 7/16/2013 Mem. 6 (19A9640 and Addendum A).

1. The Ruling Denying Summary Judgment Against Plaintiff Britt Due to the Terms of SPDs 7 and 10 and the Related CBA Applied to Class Members Whose Claims Arose Under The Same SPDs and CBA.

The court denied summary judgment as to plaintiff Britt due to the applicability to him of both SPDs 7 and 10 and the related CBA. Mem. 33-35 & n.86. The same SPDs apply to hundreds of other class members. Mem. 26 n.63, 35 n.86; *see also* 6A2877, 2821. These class members are subject to the same

legal conclusions as Britt and their ERISA benefit claims should not have been dismissed.[7]

2. Defendants Admitted that Other SPDs and CBAs Applied to Numerous Class Members Whose Claims Were Dismissed, But Their Motion Made No Effort to Place These Documents in Issue and to Carry Their Rule 56 Burden. The Court Erred in Dismissing the Claims of these Class Members.

Fed.R.Civ.P. 56(a) contemplates summary judgment on a "part of each claim or defense" which is "identif[ied]" by the motion. Defendants could not obtain summary judgment on the meaning of documents they did not identify in their papers, describe in their fact statements, include in their exhibits, or address in their arguments. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (movant always bears initial responsibility of identifying portions of record which it believes demonstrate absence of genuine issue) (plurality opinion of Rehnquist, J.). The burden does not shift unless and until the moving party meets this "initial responsibility." *Murray v. City of Tahlequah*, 312 F.3d 1196, 1199 (10th Cir. 2002).

Defendants knew, for example, that some class members had rights based on documents not identified in their motion (such as a medical plan SPD for a class member who was only listed on a life insurance SPD roster or vice versa).

[7] The reconsideration motion confirmed that these class members were governed by the same CBA language. *See* Lempert Declaration and cited exhibits (19A9490-9535).

19A9598. Defendants' "Mapping"[8] specifically identified which SPDs and CBAs, not addressed in their motion, applied to each class member. But defendants did not give notice that they were challenging the sufficiency of any of those other documents or address those documents in their motion. The retirees' motion for reconsideration illustrated this shortcoming with examples. *See* Lempert Declaration at ¶¶ 7-13 (19A9493-95).

The court erred in dismissing all benefit claims of selected class members defendants mapped to other governing documents. The dismissal should have been limited to the "parts" of claims based on the documents defendants identified and addressed in their motion. These dismissals also were erroneous for the reasons stated in Subsections B-E above.

[8] The court ordered defendants to identify the SPDs and CBAs applicable to each class member. Order, 11/4/11 (2A909). This "Mapping" was produced on January 3, 2012. Retirees elected to meet their own obligations under a November 9, 2011 Order (2A919-22) by adopting the much more comprehensive Mapping. (2A1065). Although this adoption of the Mapping provided more information than was required, the Magistrate Judge entered a sanction that retirees could not challenge any of the Mapping, with certain exceptions. Order, 2/24/12 (2A1323). Motions for reconsideration and review were denied. Orders, 3/27/12 and 5/24/12 (12A6231, 18A9257). This is the sanction referred to at Mem. 14-15.

II. THE COURT ERRED IN RULING THAT FIDUCIARY MISREPRESENTATION CLAIMS WERE TIME-BARRED. THE RETIREES WERE NOT REQUIRED TO SHOW "ACTIVE CONCEALMENT" AND THE CLAIMS DID NOT ACCRUE UNTIL THE RETIREES SUFFERED ACTUAL HARM AND DISCOVERED ACTIONABLE MISREPRESENTATIONS.

The retirees claim in the alternative that defendants violated ERISA §§404(a) and 502(a)(3), 29 U.S.C. §§1104(a) and 1132(a)(3), by issuing SPDs which did not clearly disclose that benefits could be reduced/terminated during retirement and by otherwise misleading them into believing they had lifetime benefits. The court ruled these BOFD claims for 15 representative plaintiffs were time-barred. Mem. 52-58. Its interpretation of the statute and caselaw was erroneous.

A. The Standard of Review is *De Novo*

See page 16 above. All issues were raised in the briefs and ruled upon in the court's decision.

B. The Ruling Commits Fundamental Error in Applying the ERISA Provision for "Fraud or Concealment". The Supreme Court's Recent Decision in *Gabelli v. SEC* Confirms that ERISA Employs a Discovery Rule.

The statute of limitations governing BOFD claims, 29 U.S.C §1113 (Addendum B7), provides that "in the case of fraud or concealment" the statute does not run until "six years after the date of discovery of such breach or violation." The court ruled this provision was inapplicable because "there is no

evidence that Defendants actively concealed their alleged breach of fiduciary duty" and "no evidence of affirmative steps of fraud or concealment." Mem. 54. The court erred. The court noted that "the Tenth Circuit has not addressed this specific issue." It chose to follow the line of cases represented by *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1552 (3d Cir. 1996), requiring "affirmative steps to hide [the] breach." Mem. 53-54 & n.121.

This ruling ignored longstanding precedent that fiduciary misrepresentations constitute "fraud or concealment" and the statute does not begin to run until the plaintiff discovers (or reasonably should have discovered) the violation. No acts of concealment are required. Congress incorporated this law in the ERISA statute of limitations.

1. Under Trust Law, Fiduciary Misrepresentations or Failures to Disclose Information Constitute Fraud or Concealment.

ERISA looks to trust law for many provisions, *see, e.g., CIGNA Corp. v. Amara*, U.S. , 131 S.Ct. 1866, 1879-81 (2011), and must be construed to avoid results that would "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone*, 489 U.S. at 114.

Interpretation of the "fraud *or* concealment" provision begins with its expressly disjunctive language and "the ordinary meaning of the [term] at the time Congress enacted it." *Nat'l Credit Union Admin. Board v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1258 (10th Cir. 2013). Congress is presumed to know

existing law and when it makes use of terms with an established meaning it is presumed to adopt that meaning. *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 331 (1981).

It was well established at ERISA's enactment that when a fiduciary misrepresented or failed to disclose information, the conduct was deemed equivalent to fraud and the statute did not begin to run until discovery. This Court stated in *Amen v. Black*, 234 F.2d 12, 26 (10th Cir. 1956), "Surely no one would contend that the ... statute of limitations was intended to impose upon the defrauded party the burden of discovering a fraud perpetrated by one standing in a position of trust." *See also Sprint Communications Co. v. AT&T*, 76 F.3d 1221, 1226 (D.C. Cir. 1996) (fiduciary "nondisclosure of known facts, *without artifice or design to bar access to the information,* is 'fraudulent concealment'").

2. Under the Alternative Doctrine of "Equitable Tolling", the Statute Also Does Not Begin to Run Until Discovery of A Misrepresentation.

Congress also is presumed to have known of the doctrine of "equitable tolling" under which the statute will not begin to run until discovery, in the case of *either* underlying fraud *or* acts to conceal wrongdoing. This doctrine was so well established that the Supreme Court declared in 1874 that "the weight of judicial authority ... is in favor of the application of the rule to suits at law as well as in equity." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349 (1874).

This rule encompasses both "fraudulent concealment" *and* the doctrine of "inherent fraud." "[T]he statute does not begin to run until the fraud is discovered, *though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party*." *Bailey*, 88 U.S. at 348 (emphasis added). The rule follows from the principle that limitations statutes are meant to prevent frauds, not to aid their perpetration. *Id.* at 349. This rule "is read into every federal statute of limitations." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

"Equitable tolling" is synonymous with "fraud or concealment" and the cases refer to it as such. "*Holmberg* thus stands for the proposition that equity tolls the statute of limitations in cases of fraud or concealment." *TRW, Inc. v. Andrews*, 534 U.S. 19, 27 (2001).

The Second Circuit concluded that canons of statutory interpretation and drafting history confirm that ERISA incorporates this concept of fraud or concealment. *Caputo v. Pfizer*, 267 F.3d 181, 189-90 (2d Cir. 2001). *Caputo* noted that decisions of several circuits, including the Third Circuit decision followed here, Mem. 53-54, had erroneously concluded that "fraud or concealment" refers only to "fraudulent concealment" and requires affirmative acts to conceal. The Second Circuit traced these mistaken decisions to a "footnote in a district court opinion that cites no legal support for the proposition." 267 F.3d at

189 & n.2. Several circuits including the Third Circuit incorrectly equated "fraud or concealment" with "fraudulent concealment" due to erroneous direct or indirect reliance in the line of precedent on *Wood v. Carpenter*, 101 U.S. (11 Otto) 135 (1879). *Wood* was decided five years after *Bailey* and concerned an Indiana statute which allowed tolling only in cases of *concealment.* 101 U.S. at 138. The Court expressly distinguished *Wood* as referring only to Indiana law and cautioned that it could not "be held to overrule or modify" *Bailey*. *Rosenthal v. Walker*, 111 U.S. 185, 190-91 (1884).

Caputo also relied on the concurrence in *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, 242 F. 3d 497, 513-16 (3d Cir. 2001) (Mansmann, J., concurring), which reviewed the above-cited authorities and concluded that ERISA did not require affirmative acts of concealment. The Sixth Circuit recently expressed agreement with *Caputo*'s analysis. *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 550 (6th Cir. 2012) (*Caputo* "a persuasive contrary interpretation"), *cert. denied*, 133 S.Ct. 1239 (2013).

In *Gabelli v. S.E.C.*, U.S. , 133 S.Ct. 1216 (Feb. 27, 2013), the Court, citing *Holmberg* and *Bailey*, confirmed that the rule does not require active concealment. "[W]here a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.'" *Id*. at 1221. The

discovery rule "exists in part to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury" as is the case when "the injury is self-concealing." *Id*. at 1222. The Court noted the rule was distinct from tolling based on "fraudulent concealment" and other "doctrines that toll the running of an applicable limitations period when the defendant takes steps beyond the challenged conduct itself to conceal that conduct from the plaintiff." 133 S.Ct. at 1220 n.2.

Finally, statutory purpose should be considered. *Nat'l Credit Union Admin. Board*, 727 F.3d at 1262. Congress enacted ERISA to "establish[ ] standards of conduct, responsibility and obligation for fiduciaries" and "provide[ ] appropriate remedies." 29 U.S.C. §1001(b) (statement of purpose) (B3). "Given these objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals." *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996). The court's reading immunizes violations the retirees could not discover until defendants acted contrary to their representations.

3. Rule 9(b) Was Inapplicable Given Defendants' Failure to Raise this Issue and the Summary Judgment Posture of the Case in Which the Retirees Presented Extensive Evidence Establishing Fraud or Concealment.

The court also ruled that 15 representative plaintiffs had not pled "fraud or concealment" with the specificity required by Fed.R.Civ.P. 9(b). Mem. 54 n.124. However, defendants waived this objection. They did not raise it in their motion to

dismiss (which did not contest the BOFD claims) (1A385-415), or in their Answers (1A344-81, 2A654-97, 2A706-46, 2A849-93). *See, e.g., In re Docteroff*, 133 F.3d 210, 217 (3d Cir. 1997); *Davsko v. Golden Harvest Products, Inc.*, 965 F.Supp. 1467, 1474 (D. Kan. 1997).

Defendants also did not raise any objection in their opening memorandum for summary judgment (8A4016-20). Their first and only reference to Rule 9(b) was in a single footnote in their reply (18A9386). Accordingly, the issue was waived again and could not support dismissal. *See, e.g., Minshall v. McGraw Hill Broadcasting Co.*, 323 F.3d 1273, 1288 (10th Cir. 2003).

Plaintiffs have always alleged that defendants made affirmative misrepresentations, *see, e.g.*, Third Amended Complaint, 2A778-82, 800-01, and concealed the possibility of benefits termination during retirement, 2A795, 801-02. Rule 9(b) is a pleading rule intended to "ensure that a defendant is apprised of the fraud claim" to enable the "framing of an adequate responsive pleading." *United Nat'l Records, Inc. v. MCA, Inc.*, 609 F.Supp. 33, 38 (N.D. Ill. 1984). If defendants had timely invoked it, retirees could have cured any deficiency. But defendants instead conducted extensive discovery. At summary judgment, each retiree presented extensive evidence showing the details of fiduciary misrepresentations. *See* Mem. 49-51; 17A8487-551 and exhibits cited therein.

The same evidence was summarized in the Pretrial Order (2A943-44, 964). The claims accordingly were not subject to dismissal under Rule 9(b).

C. The Court Erred in Ruling that BOFD Claims Accrued and the Statute Began Running at Retirement. These Claims Require Proof of Harm and Did Not Accrue Until Defendants Reduced or Terminated Benefits.

Amara holds that "actual harm must be shown" as an element of a BOFD violation. 131 S.Ct. at 1882. In this case, no harm occurred and no claim arose until the company acted contrary to its representations and terminated the drug plan effective January 1, 2006. The "standard rule [is] that the limitations period commences when the plaintiff has a complete and present cause of action" and "can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) (construing ERISA multiemployer plan contribution provision). The court nevertheless ruled that only "a fiduciary's action" could constitute the last action forming part of the breach and necessarily occurred no later than retirement. Mem. 57. This contravenes both *Amara* and *Bay Area*. Under the court's ruling, lay participants would be required to file preemptive lawsuits before they could know that a violation had occurred and they had suffered harm.

Alternatively, the retirees' post-retirement reliance constituted "the last action." Each retiree identified action (or forbearance to act) during the six years preceding suit. *See* 17A8584. *Unisys* established that plaintiffs have viable claims

"if they relied to their detriment in making non-retirement-related decisions within the six-year limitations period" and that only retirees "who assert claims based *solely* on retirement decisions made more than six years before suit" were time-barred. 242 F.3d at 507. Acts of reliance thus can continue past retirement and form a basis for a claim. The court ruled to the contrary, Mem. 58 & n.143, relying upon a later panel decision in *Ranke v. Sanofi-Synthelabo, Inc.*, 436 F.3d 197, 201-03 (3d Cir. 2006), which could not overturn *Unisys.*

III. THE COURT ERRED IN DISMISSING THE AGE DISCRIMINATION CLAIMS. THE EEOC'S EXEMPTION FOR MEDICAL BENEFITS EXCEEDED STATUTORY AUTHORITY AND COULD NOT APPLY RETROACTIVELY.

A. The Standard of Review is *De Novo*

See page 16 above. All issues were raised in the briefs and ruled upon in the court's decision.

B. Age Discrimination Disparate-Impact Claims Are Cognizable

The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 *et seq.* ("ADEA") (excerpts in Addendum B29-B42) allows plaintiffs to challenge facially neutral practices that have a disparate impact on older employees and are not justified by a reasonable factor other than age ("RFOA"), *Smith v. City of Jackson*, 544 U.S. 228 (2005), or significant cost considerations. An RFOA is an

affirmative defense and the employer has the burdens of production and persuasion. *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008).

C. The Court Erred in Dismissing Disparate-Impact Age Discrimination Claims as to Medical and Prescription Drug Benefits.

The retirees alleged that defendants' cancellation of medical and prescription-drug benefits ("health benefits") for Medicare-eligible retirees violated the disparate-impact provisions of the ADEA (and the age discrimination statutes of Ohio, Oregon, and Tennessee). The lower court held this failed to state a claim. (2A646-52 and Addendum A). It relied on the EEOC's Final Rule adopting 29 C.F.R. §1625.32 (B98-99), 72 Fed. Reg. 72938-72945 (December 26, 2007) (B68-102), allowing employers and labor organizations to modify or eliminate health benefits for Medicare-eligible retirees. The lower court held this was a reasonable exemption permitted by ADEA §9, 29 U.S.C. §628 (B40-41).

1. The EEOC's Exemption Was Not Reasonable.

The EEOC's regulation cannot stand because it contradicts the ADEA's very purpose – protection of older workers from age discrimination. Although agency determinations are "entitled to considerable weight," there are "important limits": "A regulation cannot stand if it is "'arbitrary, capricious, or manifestly contrary to the statute.'" *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002). *Accord, United States v. O'Hagan*, 521 U.S. 642, 673 (1997); *Chevron, U.S.A.*,

Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). The statute must be viewed "as a 'symmetrical and coherent regulatory scheme.'" *Ragsdale, id.* Here, the regulation directly conflicts with the Older Workers Benefit Protection Act of 1990, Pub.L.101-433 ("OWBPA") (B43-51), and fails to meet the *Ragsdale* test.

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989), limited the ADEA's application to employee benefit plans. In response, Congress enacted the OWBPA. Sec. 101 states that the OWBPA was intended to "restore the original congressional intent" of the ADEA "to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." (B44).

Two other sections are relevant. OWBPA §102 inserted §11(*l*) into the ADEA, 29 U.S.C. §630(*l*), explicitly covering employee benefit plans. OWBPA §103 inserted §4(f)(2)(B)(i) into the ADEA, 29 U.S.C. §623(f)(2)(B)(i), allowing otherwise prohibited actions to observe the terms of a bona fide employee benefit plan "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, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)."[9] (B45).

[9] The 1989 version of 29 C.F.R. §1625.10 is reproduced at B56-67.

Section 1625.10(e) allows a coordination of benefits in which Medicare is the primary payer and the employer is only a secondary payer and does not need to pay anything reimbursed by Medicare. This type of "wrap-around" cost-saving approach was approved in *Int'l Union, UAW v. General Motors Corp.*, 497 F.3d 615, 633-34 (6th Cir. 2007). If defendants had this type of "wrap-around" coordination, plaintiffs would not have sued.

Instead, the EEOC allowed, and defendants did, what OWBPA prohibited by its codification of §1625.10(e): the elimination of *all* health-care benefits for Medicare-eligible retirees without meeting the detailed cost-justification provisions of §1625.10(d) (B58-62). When issuing its exemption, the EEOC did not even mention §1625.10(d), and attempted to justify its action by saying it would be difficult to calculate costs. (B77, B81, B92-93).

The first step in the *Chevron* inquiry is to determine whether Congress has directly spoken to the issue. If so, that ends the matter. *Hackworth v. Progressive Casualty Ins. Co.*, 468 F.3d 722, 727 (10th Cir. 2006). The lower court erroneously overlooked this requirement.

2. <u>The Court Misconstrued OWBPA.</u>

The court construed the reference to §1625.10 in 29 U.S.C. §623(f)(2)(B)(i) as merely setting forth a permissible cost analysis, and stated that the retirees had cited no authority that the entirety of §1625.10 had been codified into law.

(2A649). However, all of §1625.10 – including subsection (e) – has to do with payments, benefits, and costs; no separate part can be excluded from the statutory codification on this basis.

The court relied on *American Ass'n of Retired Persons v. E.E.O.C.*, 489 F.3d 558 (3d Cir. 2007) ("*AARP*"), in support, but *AARP* never addressed these points. *AARP* made only a passing reference to the OWBPA, quoted only part of §623(f)(2)(B)(i) but stopped before the mention of §1625.10, *id.* at 562 n.3, and never even mentioned §1625.10.

Congress codified §1625.10 "as in effect on June 22, 1989" to prevent any future regulatory changes from altering the ADEA rights of older workers to benefits. Construing the statute otherwise would eviscerate the Congressional decision to adopt and codify the regulation as it existed on a specific date. The court's ruling nullified this limitation and the OWBPA's Findings. Its construction of §628 is "manifestly contrary" to the statute.

The court held that §623(f)(2)(B)(i) could not be construed to limit the EEOC's power under ADEA §628 to establish reasonable exemptions, because that "would render Section 9 meaningless." (2A649). To the contrary, the EEOC would still have the power to establish reasonable exemptions in all matters involving hiring, BFOQs, compensation, assignments, training, promotions, firing, and non-§1625.10 benefits questions.

The OWBPA is a far more specific provision than §628. Under general rules of statutory construction, the general must yield to the specific. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1133 (10th Cir.). Moreover, earlier-enacted provisions must generally yield to inconsistent, later-enacted provisions. *Padilla-Caldera v. Gonzales***,** 453 F.3d 1237, 1242 (10th Cir. 2005). Under both canons of statutory construction, it is impermissible to construe §628, enacted in 1967, as overriding the 1990 OWBPA and its codification of the 1989 version of §1610.25.

3. The Court Erred in Distinguishing Retirees from Employees for Purposes of Statutory Protection.

The court erroneously stated that there was no contradiction in the regulations because §1625.10(e) applies only to current employees and not to the retirees affected by §1625.32. (2A649).

The ADEA and the regulations have never been construed to exclude retirees when the word "employees' is used. 1 LINDEMANN, GROSSMAN, & WEIRICH, EMPLOYMENT DISCRIMINATION LAW, 5TH ED., (BNA 2012), states at 12-10 to 12-11: "Retired employees may still be considered 'employees' under the ADEA as long as the alleged discrimination is related to, or arises out of, the employment relationship."

The court's reasoning would also preclude application of Title VII's anti-retaliation provision, § 704(a), 42 U.S.C. §2000e-(3)(a), to protect former

employees from retaliation because it refers to an "employee." However, that argument was rejected in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-46 (1997), holding that the word "employee" covers former employees.

4. The EEOC's Exemption is Neither Reasonable Nor Necessary.

The EEOC's stated justification for exempting changes to health benefits of Medicare-eligible retirees is that this would encourage employers to continue offering health benefits to retirees. (B68-69, 99-100). This is a social-welfare rationale unrelated to the ADEA's purposes. It encourages employers to favor *younger* retirees who have not reached Medicare age to the detriment of *older* retirees who have.

Even the principal case on which the court relied, *AARP*, stressed the Constitutional importance of the limits on the EEOC's §628 exemption power, and held that the power must be interpreted narrowly, "to avoid any potential delegation problem." 489 F.3d at 564-65, 564 n.6. It recognized that *Ind'l Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980), held constructions avoiding "'[an] open-ended grant [of legislative authority] should certainly be favored.'" *Id.* It interpreted §628 "to require narrow exemptions tailored to the overall purpose of the ADEA, an intelligible principle." *Id.* However, *AARP* never considered the problems noted above, and it did not construe the exemption narrowly.

This Circuit has agreed that the power of an executive agency to grant statutory exemptions must be constrained by the purposes of the statute. *Lee v. Gallup Auto Sales, Inc.*, 135 F.3d 1359, 1360-61 (10th Cir. 1998), applied *Chevron* analysis and held that the Secretary of Transportation's authority under 49 U.S.C. §32705(a)(5) to make exemptions from odometer information requirements did not authorize blanket exemptions.[10] Here, the EEOC exemption is a similarly flawed blanket exemption severely conflicting with the ADEA's purposes.

5. The Court Erred in Giving Retroactive Effect to the Exemption.

Defendants announced their elimination of health benefits for Medicare-eligible retirees on July 26, 2007, to take effect on January 1, 2008. (1A301-02). This announcement predated the EEOC's December 26, 2007 purported exemption by five months. The representative ADEA plaintiffs filed EEOC charges based on this announcement. (1A240).

The court rejected the retirees' argument that the EEOC could not exempt a pre-existing discriminatory practice, reasoning that any violation occurred when the benefit changes took effect after issuance of the regulation. (2A651). However, age discrimination occurred when Embarq approved and announced the change, not when it ultimately became effective. *Delaware State College v. Ricks*,

[10] The court rejected this precedent on the mistaken ground that the statute did not authorize any regulatory exemptions. (2A650).

449 U.S. 250, 258, 259 (1980); *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 628 (2007). *See also* 2 LINDEMANN, GROSSMAN, & WEIRICH, *supra*, at 27-25.

The court also relied on the appendix to the exemption, Addendum B101 (Question 6), stating the exemption applied to existing as well as newly-created plans. (2A651). However, this merely addressed actions taken after the date the rule came into effect; it does not legitimize any prior unlawful elimination of benefits.

In addition, nothing in the text of §628 authorizes the EEOC to grant *retroactive* exemptions. Plaintiffs' benefits were in force when Embarq announced the changes, and the court's retroactive application of the exemption destroyed pre-existing obligations to the retirees. Because §628 is silent as to retroactivity, the default rule is that there is no retroactivity where that would impair pre-existing rights. *Landgraf v. USI Film Products*, 511 U.S. 244, 250 (1994); *Vartelas v. Holder*, 132 S.Ct. 1479, 1486-87 (2012). The presumption against retroactive application of administrative regulations is even stronger. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208-09 (1988). The court cited *Bowen* in the later ruling on summary judgment that the EEOC's 2012 amendments to §1625.7 should not be applied to this case (Mem. 68 n.166). There is no principled reason

for the court below to hold in 2008 that one regulation should be retroactive and to hold in 2013 that the other should be prospective.

D. The Court Erred in Granting Summary Judgment on Plaintiffs' Age Discrimination Claims as to Defendants' Elimination or Reduction of Life Insurance Benefits.

The retirees' ADEA and state law claims[11] of disparate-impact age discrimination in life insurance benefits were not affected by the exemption. 2A645-46. The court later ruled on summary judgment that the retirees did not establish a *prima facie* case, Mem. 63-65, and held that defendants established an RFOA and that the requirement of "significant cost considerations" was inapplicable. Mem. 65-69.

1. The Retirees Established their *Prima Facie* Case.

Plaintiffs' evidence in support of their disparate-impact claim is detailed at pages 11-13 above, including the court's own finding. Mem. 62.

Plaintiffs used a ten-year age differential in their calculations because this is a conservative differential.[12] Nonetheless, the lower court held that plaintiffs

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[11] The court correctly ruled that the state law age discrimination claims were identical to the ADEA claims. Mem. 59. The discussion herein applies equally to the state-law claims.

[12] *See, e.g., E.E.O.C. v. Bd. of Regents of University of Wisconsin System*, 288 F.3d 296, 302 (7th Cir. 2002) (ten years); *Grosjean v. First Energy Corp.*, 349 F.3d 332, 336-40 (6th Cir. 2003) (six years); *Whittington v. Nordam Group Inc.*, 429 F.3d 986, 996 (10th Cir. 2005) (accepting five-year difference as substantial and declining to adopt bright-line rule).

produced no "relevant statistical evidence," Mem. 64, because Long's comparisons were to "younger versions of themselves," *id.*, and because the only relevant comparisons would have been to persons outside the protected group, *i.e.*, to persons younger than 40. Mem. 65.

This was error on several grounds. The retirees' actuarial proof of disparate impact was based on the aggregate of ten-year differences between 65-year-olds and 55-year-olds, 66-year-olds and 56-year-olds, 67-year-olds and 57-year-olds, and so on for every age reflected in the class. *Supra* at 11-12. The disparate impact would obviously be far greater if the younger age for comparison were always 39. Similarly, most 39-year-olds have no difficulty in obtaining life insurance. Using comparators under age 40 could not have resulted in a different conclusion of disparate impact.

The court also criticized the Long Report for not comparing an actual 70-year-old class member to an actual 60-year-old class member, Mem. 64 n.155, but this is a distinction without a difference. The life expectancy of an actual 60-year-old is identical to that of a 70-year-old hypothetically considered as 60. As with any actuarial study, Long's approach focused the results on the sole legally cognizable factor – the effect of defendants' changes. *City of Jackson*, 544 U.S. at 241; 29 C.F.R. § 1625.7 (2012).

The precedents hold that a wide range of evidence can be used to prove disparate impact. In *Dothard v. Rawlinson,* 433 U.S. 321, 330 (1977), the Court observed: "The plaintiffs in a case such as this are not required to exhaust every possible source of evidence...." *Id.* at 331. Defendants were "free to adduce countervailing evidence of [their] own," but did not. *Id.*

Unlike employee selection cases, there was no reasonable doubt here as to causation; defendants' practices, not chance, caused all the disparate impact upon older retirees and the court found that this disparate impact based on age was obvious.

The court also erred in ruling that disparate-impact claims could not be made for a subgroup of the protected class, relying on *Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364, 1373-74 (2d Cir. 1989), and *E.E.O.C. v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999). Mem. 65 n.156. Neither case logically supports the court's decision because neither case explains how the identical statutory language – "because of such individual's age" – can be construed differently in a disparate-impact case than in a disparate-treatment case. Indeed, *Lowe* was decided before the Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996), which held that the ADEA protects older employees even where the advantaged younger employees were part of the same over-40 protected group. While *McDonnell Douglas*

attempted to distinguish *Coin Caterers* as a disparate-treatment case, it did not explain why that factual difference must lead to a different interpretation of the identical language. *Karlo v. Pittsburgh Glass Works, LLC*, 880 F.Supp.2d 629, 638-39 (W.D.Pa. 2012), concluded that *Coin Caterers* cannot be so limited. *See also E.E.O.C. v. Borden's, Inc.*, 724 F.2d 1390, 1394-95 (9th Cir. 1984) (accepting without discussion ADEA disparate-impact showing as to employees 55 and older); Sperino, *The Sky Remains Intact: Why Allowing Subgroup Evidence Is Consistent With The Age Discrimination In Employment Act*, 90 Marq.L.Rev. 227 (2006); 1 LINDEMANN, GROSSMAN, & WEIRICH, *supra*, at 12-128 n.570 (courts have not yet confronted the effect of *Coin Caterers*).

An employer may not do what defendants did here, provide a benefit to younger members of a protected group and use that to justify excluding older members from that same group. Disparate impact against an older subgroup cannot be immunized by favoring a younger subgroup of the protected class. *Connecticut v. Teal*, 457 U.S. 440, 455 (1982).

2. Defendants Did Not Establish RFOA or Show Significant Cost Considerations.

The court held that, even if retirees established a *prima facie* case as to the life insurance changes, defendants established an RFOA. Mem. 65. Their asserted RFOA was the reduction of costs, and the alignment of their retiree benefits "more closely with those benefits provided by other companies." Mem. 66.

The RFOA defense to age-based reductions in a benefit plan is governed by §623(f)(2)(B)(i), which enacted §1625.10 into the statute "as in effect on June 22, 1989." (Addendum B31). Section 1625.10(a)(1) states that age-based reductions in employee benefit plans are permissible where "justified by significant cost considerations." (B56). The regulation continued, stating that the exemption must be "narrowly construed" (B57), and "does not apply ... to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations." (B56).

Defendants produced no evidence that their reduction/elimination of life insurance for class members was based on "significant cost considerations." What is "significant" for a small employer is not necessarily "significant" for very large employers like Embarq, just as the definition of a "reasonable" accommodation under the Americans with Disabilities Act, 42 U.S.C. §§11201 *et seq.*, depends in part on the size and resources of the employer. 42 U.S.C. §12111(10)(B)(ii), (iii). Simply reciting the mantra of "lower costs" is not sufficient under this regulation.

Nor is a mere assertion of "lower costs" sufficient under the statutory RFOA requirement. *Meacham* explained the difficulty employers may have in producing evidence of reasonableness and persuading the factfinder, 554 U.S. at 101, so a simple saving will not always be enough.

Retirees relied on expert evidence that, using §1625.10(a)(1) as a benchmark, defendants' savings from the life insurance changes were not "significant." *Supra* at 13.

The court disagreed, holding that defendants relied on the RFOA defense under §623(f)(1), and that §1625.10(a)(1) is inapplicable because it "relates to §623(f)(2)(B)." Mem. 66-67. This was error. While the regulation does refer at length to §623(f)(2) (B56), it also refers to §623(f)(1) in §1625.10(d)(i) (B60), and ends with the authority on which it is based, §621 (B67). Because §621 is the beginning section of the ADEA (B29), §1625.10 facially applies to the entire ADEA, including §623(f)(1).

The error of the court's ruling is apparent when it is logically extended to apply the §623(f)(1) RFOA defense to age-based reductions in benefits, because that would clearly conflict with OWBPA §101's findings (B44). The OWBPA and ADEA are best harmonized by regarding the codified §1625.10(a)(1) as a particularization of the kind of RFOA necessary to justify changes in facially age-neutral employee benefit plans having a disparate impact against older retirees.

The EEOC's 2012 adoption of §1625.7(e) (B53-54), makes clear that a simple assertion of cost reduction is not sufficient and that a number of other factors must be considered. If regulations are applied retroactively, this is controlling. If not, it has at least persuasive value.[13]

The lower court relied on several cases referring to cost considerations being an RFOA, Mem. 69 n.170, but they either involve highly distinguishable facts or are *dictum*, or both. In *Aldridge v. City of Memphis*, 404 Fed.App'x 29, 41 (6th Cir. 2010), the City was paying high-ranking officers more than lower-ranking officers to perform the same duties. *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 405 (6th Cir. 2008), involved "'[l]owering overall employee costs by increasing turnover and discouraging employees from using vacation and sick time," and the RIF disproportionately affected *younger* workers. *Allen v. Sears Roebuck and Co.*, 803 F.Supp.2d 690 (E.D. Mich. 2011), involved "decisions to eliminate paid time off and business expense reimbursement" and was *dictum*. *Doyle v. City of Medford*, 2011 WL 4894077 (D.Ore. Oct. 13, 2011) (No. 1:06-CV-03058-PA), *aff'd*, *Doyle v. City of Medford*, 512 Fed.App'x 680, 681 (9th Cir. 2013) (non-precedential), involved a highly dissimilar practice *and* a highly dissimilar situation: the City collectively bargained a change of carriers for a police-union-

[13] *Doyle v. City of Medford*, 512 F.App'x 680, 681 (9th Cir. 2013) (non-precedential), gave §1625.7(e)(1) a "*see*" citation. 1 LINDEMANN, GROSSMAN, & WEIRICH quotes it at 12-133-134.

sponsored health plan that excluded retirees. The plaintiffs had already won in state court on their state-law disparate-treatment and disparate-impact age claims and there was no evidence of disparate impact.. *Id.* at *1, 3-4. The Ninth Circuit described the cost savings as "significant," 512 F.App'x at 681. *See also Walker v. City of Cabot*, 2008 WL 4816617 (E.D.Ark. Nov. 4, 2008) (No. 408-CV-00139 BSM) (plaintiff agreed layoffs were reasonable to resolve budget problems); *Townsend v. Weyerhaeuser Co.*, 2005 WL 1389197 (W.D.Wis. June 13, 2005) (No. 04-C-563-C) (layoff in which plaintiff simply speculated that older workers were higher-paid and that layoff must have disparate impact).

Finally, the court held without analysis that defendants' desire to mimic some other companies' benefits structures was an RFOA. Mem. 69. This is a mere articulation of a nondiscriminatory reason under *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-58 (1981), and does not meet any definition of "reasonable."

The court thus erred in holding that defendants met their burdens of production and persuasion and in failing to find a genuine dispute of material fact.

CONCLUSION

The judgment should be reversed and the case remanded for further proceedings.

STATEMENT AS TO ORAL ARGUMENT

In view of the complexity of the issues and their importance to the retirees and to the development of the law in this Circuit, the retirees request oral argument.

Dated: December 11, 2013

Respectfully submitted,

s/ Alan M. Sandals

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On December 11, 2013, I caused two copies of the foregoing Opening Brief for Appellants to be served upon the following counsel by UPS Overnight Service and email:

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