UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEFANIE HIRT, BARBARA SEAY, ANN NUSSBAUM, SUSAN CHWAST, and LORETTA RONZCA, On Their Own Behalf And On Behalf Of All Others Similarly Situated,	)	
Plaintiffs,	)	01 Civ. 7920 (AKH)
v.	)	
THE EQUITABLE RETIREMENT PLAN FOR EMPLOYEES, MANAGERS AND AGENTS, and THE OFFICERS COMMITTEE ON BENEFIT PLANS, As Plan Administrator,	)	
Defendants.	)	

BRIEF OF *AMICUS CURIAE*
THE AMERICAN BENEFITS COUNCIL ADDRESSING
PLAINTIFFS' SECOND CLAIM FOR CLASS RELIEF

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Plaintiffs assert in their Second Claim for Class Relief that the cash balance formula in The Equitable Retirement Plan for Employees, Managers, and Agents (the "Plan") violates the age discrimination provision of ERISA section 204(b)(1)(H). Because this claim effectively challenges the legality of hundreds of similar pension plans adopted by employers across the country, including many of its members, *amicus* filed with this Court a Motion for Leave to File Brief *Amicus Curiae* on June 2, 2004. Pursuant to the Court's order granting its motion, *amicus* respectfully submits this brief addressing plaintiffs' age discrimination claim.

INTRODUCTION

Plaintiffs' claim rests on a wholly unconventional theory of age discrimination that would compel employers to massively subsidize the pensions of older workers at the expense of their younger colleagues. Not only is this interpretation of ERISA section 204(b)(1)(H) far-fetched, its potential consequences are sweeping. If plaintiffs' reading of this provision were accepted, the cash balance formula used in hundreds of pension plans covering millions of employees nationwide would be rendered illegal. *See Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 823 n.9 (S.D. Ind. 2000). If plaintiffs' proposed remedy were imposed retroactively, it could require employers to pay hundreds of billions of dollars in additional benefits, thus depleting the funds available for future benefit accruals and threatening our nation's voluntary private pension system.

Amicus urges the Court to deny plaintiffs' claim on the indisputable ground that no age discrimination can exist in a plan that provides benefit accruals of equal value to all employees based solely on their pay. Antidiscrimination laws require equal treatment—not preferential treatment—and section 204(b)(1)(H) is no exception. In The Equitable's cash balance plan, as in similar plans adopted by employers nationally, participants of all ages accrue Pay Credits and Interest Credits at the same rate. This entirely age-neutral feature fulfills employers' vital need

for retirement plans that distribute benefits more evenly and equitably than do traditional pension formulas, which no longer meet the needs of today's highly mobile workforce.

Section 204(b)(1)(H) prohibits age-based reductions in post-age 65 benefit accruals under defined benefit pension plans. As stated in the legislative history and in the heading of a parallel rule in the Internal Revenue Code, this provision does not apply to benefit accruals before age 65. Even if it did, no reasonable reading of Section 204(b)(1)(H) could conclude that a discriminatory reduction occurs in a plan under which all participants accrue benefits "in exactly the same way" regardless of age. *Lunn v. Montgomery Ward & Co.*, 166 F.3d 880, 883 (7th Cir. 1999).

Apart from its draconian consequences, plaintiffs' reading of section 204(b)(1)(H) cannot be correct because it relies upon the premise that the pension benefit of today's 65-year-old retiree must be compared to the projected benefit that a 25-year-old would need to wait forty years to receive. The nominal difference between these "accrued benefits" is due solely to the time value of money, not actual disparities in the value of benefits accrued under the Plan—which are credited equally without reference to age. Plaintiffs' claim contradicts both the text of ERISA and the Treasury Department's authoritative interpretation of section 204(b)(1)(H).

STATEMENT OF FACTS

In their Second Claim for Class Relief, plaintiffs challenge the legality of the cash balance formula under which benefit accruals have been calculated under the Plan since its amendment in 1988. Cash balance plans are defined benefit retirement plans that express benefits as a current lump sum value rather than a monthly retirement annuity. The benefit formula under such a plan operates in much the same manner as a savings account. Each month a participant's pension account under the Plan is credited with "Pay Credits" equal to 5% of eligible monthly compensation up to the Social Security wage base and 10% of any additional

monthly compensation. The participant's account is also credited each month with "Interest Credits" on the account balance at a market-based rate specified by the Plan. All participants, regardless of age, accrue Pay Credits and Interest Credits according to the same formula. There is no service cap limiting the number of years during which an employee may accrue benefits.

ARGUMENT

I. THE PLAN'S CASH BALANCE FORMULA COMPLIES WITH ERISA'S AGE DISCRIMINATION PROVISION.

Section 204(b)(1)(H) of ERISA states:

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

29 U.S.C. § 1054(b)(1)(H)(i). Substantially identical provisions appear in the Age Discrimination in Employment Act of 1967 ("ADEA") and the Internal Revenue Code (the "Code"). 26 U.S.C. § 411(b)(1)(H)(i); 29 U.S.C. § 623(i)(1). Congress enacted the three provisions as part of the Omnibus Reconciliation Act of 1986 ("OBRA") and intended that they be interpreted in a consistent manner. *See Eaton*, 117 F. Supp. 2d at 822-23; H.R. Conf. Rep. No. 99-1012, at 378-79 (1986). For the following reasons, *Amicus* contends that The Equitable's retirement plan complies with these provisions.

A. Section 204(b)(1)(H) Applies Only After Age 65

Plaintiffs are not eligible for class relief under the age discrimination provisions of OBRA because the provisions apply only to employees working "beyond normal retirement age." 26 U.S.C. § 411(b)(1)(H) (heading of parallel Code provision to ERISA section 204(b)(1)(H)). Prior to 1986, defined benefit plans typically ceased benefit accruals for workers who continued employment past the normal retirement age of 65. OBRA was enacted specifically to eliminate this practice, and thus, Congress only intended that this legislation affect

employees working beyond age 65. This intention was plainly stated in the OBRA Conference Committee Report:

> Under the conference agreement, the rules preventing the reduction or cessation of benefit accruals on account of the attainment of age are not intended to apply in cases in which a plan satisfies the normal benefit accrual requirements for employees who have not attained normal retirement age.

H.R. Conf. Rep. No. 99-1012, at 379 (1986).[1] At least three courts have therefore concluded that ERISA section 204(b)(1)(H) applies only to benefit accruals *after* age 65. *Eaton*, 117 F. Supp. 2d at 827-29; *Tootle v. ARINC, Inc.*, 2004 U.S. Dist. LEXIS 10629, at *15-16 (D. Md. June 10, 2004); *Engers v. AT&T Corp.*, No. 98-3660, letter op. at 8-11 (D.N.J. June 6, 2001) (attached as Exhibit A).

B. All Employees Receive Equal Treatment under the Cash Balance Formula, Regardless of Age

Even if the Court were to decide that section 204(b)(1)(H) applies also to employees who have not reached age 65, the Plan complies with these provisions for the reason that participants of all ages are treated exactly the same under the Plan's cash balance formula.

Section 204(b)(1)(H) prohibits reductions in an employee's rate of benefit accrual because of the attainment of any age. In *Lunn*, the court takes the position that section 204(b)(1)(H) is not violated if older participants accrue benefits in "exactly the same way" as younger ones. 166 F.3d at 883. Accordingly, if a plan's terms are age-neutral, it is unnecessary to engage in mathematical calculations to determine whether benefit accrual rates are reduced on account of age. Under the terms of the Plan, employees of The Equitable accrue benefits in the same manner throughout their careers. For every participant in the cash balance formula, Pay

[1] *See also Id.* at 376, 378 (explaining that the bill generally follows Senate amendment that applies "with respect to an employee's years of plan participation after normal retirement age"). Congress reaffirmed this interpretation when it passed the Older Workers Benefit Protection Act of 1990. *See* H.R. Rep. No. 101-664, at 35-36 (1990) (noting that that the mirror ADEA provision to ERISA § 204(b)(1)(H) applies to "all benefits accrued after the attainment of the normal retirement age specified in the plan"); S. Rep. No. 101-263, at 19-20 (1990) (same language in Senate report).

Credits equal 5% of monthly pay up to the Social Security wage base plus 10% for any additional compensation. In addition, monthly Interest Credits are credited to each participant's account at the same guaranteed rate specified by the Plan. A participant's age plays no role in determining Pay Credits or Interest Credits, and the same formula applies for every year of employment. Thus, because benefits accrue in "exactly the same way" for all employees, the cash balance formula fulfills the requirements of section 204(b)(1)(H).

The conclusion that this age-neutral formula does not discriminate by age is supported by the well-settled principle that discrimination laws require equal treatment, not preferential treatment. *Lunn*, 166 F.3d at 883 (it is "unlikely that ERISA would require a subsidy for older workers"); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("Title VII … does not demand that an employer give preferential treatment to minorities or women"); *Parcinski v. The Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982) ("The ADEA does not require an employer to accord special treatment to employees over forty years of age"). On its face, the Plan's cash balance formula confers equal treatment on participants of all ages. For each month of service, all employees with the same pay earn Pay Credits of the same amount, which accrue Interest Credits at the same guaranteed rate.

This age-neutral design reflects the primary objective motivating The Equitable and hundreds of other employers across the United States to adopt cash balance plans—the equal distribution of pension benefits across an increasingly mobile workforce. *See Eaton*, 117 F. Supp. 2d at 832 ("cash balance plans offer obvious benefits to employees in terms of having more 'portable' retirement benefits as job mobility increases"). Over the past 20 years, average job tenure has steadily fallen—particularly among older workers.[2] For this more mobile

[2] For instance, median tenures for workers age 45-54 has fallen from 9.5 years in 1983 to 7.6 years in 2002, representing a 20% decline over 20 years. U.S. Department of Labor, Bureau of Labor Statistics, Table 1: Median

workforce, traditional defined benefit pension plans, which skew benefits in favor of longer-serving employees, have lost much of their effectiveness in attracting and retaining talent.[3] America's more dynamic labor market has forced employers to seek pension designs that reward all employees equally based on their pay level—a requirement that cash balance plans fulfill perfectly.

C. The Growth in an Employee's Cash Balance Account is an Appropriate and Permissible Measurement of the Rate of Benefit Accrual

Should the Court find it necessary to measure benefit accruals under the Plan by some mathematical test, the test should measure the rate of growth in an employee's account balance. This method verifies the legality of the cash balance design. The *Eaton* court concluded that for purposes of section 204(b)(1)(H), "the rate of an employee's benefit accrual" under a cash balance plan "should be defined as the change in the employee's cash balance account from one year to the next." *Eaton*, 117 F. Supp. 2d at 832-33; *see also Tootle*, 2004 U.S. Dist. LEXIS 10629 at *16-18 (adopting a similar approach). Applied to the Plan, measurement of the account balance underscores the fact that age has no effect on the accrual of a participant's benefits. For every employee with the same salary and the same service, the sum of the Pay Credits and Interest Credits grows at the same rate, regardless of age.

Using an employee's account balance to measure benefit accruals is a logical approach that conforms with the antidiscrimination requirements of section 204(b)(1)(H) and its parallel provisions in ADEA and the Code. As the *Eaton* court noted in applying this method, the account balance is a "precise, quantifiable and clear measure that does not require any estimates

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Years of Tenure with Current Employer for Employed Wage and Salary Workers by Age and Sex, Selected Years, 1983-2002, *at* http://www.bls.gov/news.release/tenure.t01.htm.

[3] *See, e.g.*, General Accounting Office, Private Pensions: Implications of Conversions to Cash Balance Plans 23 (Sept. 2000) ("because cash balance plans spread benefit accruals more evenly over a worker's career than a traditional defined benefit plan with a final average pay formula does, workers can accrue higher benefits sooner. This is especially important for workers who change jobs frequently or move in and out of the workforce").

or actuarial assumptions." 117 F. Supp. 2d at 826. To satisfy a statute prohibiting age discrimination, pension plans must be able to use a measurement that "permits exact comparisons" between employees of different ages. *Id*. at 834. Because future Interest Credits under the Plan depend on a variable and unpredictable market rate, an "exact comparison" called for by the *Eaton* court is only possible by reference to the actual change in an individual's account balances from year to year.[4]

To justify its similar application of an account balance approach, the *Tootle* court invoked ERISA's age discrimination provision for defined contribution plans, which is satisfied if "the rate at which amounts are allocated to the employee's account is not reduced." 2004 U.S. Dist. LEXIS 10629 at *17 (citing ERISA § 204(b)(2)(A)). Cash balance plans accrue benefits in the same pattern as defined contribution plans. That is, under both, the benefit is expressed as an account balance equal to the sum of contributions made as a stated percentage of the participant's pay, plus interest earnings at a stated rate. For this reason, the *Tootle* court found it appropriate to measure cash balance accruals "by examining the rate at which amounts are allocated and the changes over time in an individual's account balance." *Id*. at *18. Indeed, an examination of the growth in account balances under the Plan reveals that no age discrimination can exist under a cash balance formula that awards identical Pay Credits as a percentage of salary.

D. The Account Balance Approach is Consistent With the Longstanding Principle of Measuring Age Discrimination on an Equal Cost Basis

The account balance approach of *Eaton* and *Tootle* is supported by the long-established rule that benefit accruals may be tested for age discrimination on a cost basis. The equal-cost

[4] By contrast, any measure of the rate of benefit accrual that incorporates future Interest Credits will necessarily be an estimate. The court in *Eaton* was justifiably skeptical that Congress intended the test should turn on future estimates. *Eaton*, 117 F. Supp. 2d at 833 ("It is hard to believe that, for purposes of determining whether a pension plan discriminates against participants on the basis of age, Congress would have intended to require the use of estimates . . . .").

rule is embedded in section 623(f)(2) of ADEA, which generally governs ADEA's requirements for workers in employee benefit plans.[5] Section 623(f)(2) provides that an employee benefit plan does not unlawfully discriminate on account of age if "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 provided under EEOC regulations. 29 U.S.C. § 623(f)(2)(B)(i). Section 623(f)(2) has been interpreted to mean that a defined benefit pension plan's compliance with ADEA section 623(f) can be measured in terms of the plan's current *cost* of providing the future benefit, rather than the future benefit amount when paid at retirement. *Quinones v. Evanston*, 58 F.3d 275, 278-79 (7th Cir. 1995); *New York 10-13 Assoc. v. New York*, 1999 WL 177442, at *6 (S.D.N.Y. March 3, 1999). On the basis of its equal cost analysis, the *Quinones* court reasoned that since a defined contribution plan does not violate ADEA if it credits an "identical percentage of salary" to each employee's account, "it would make no sense to say that an equivalent adjustment to a defined benefit plan violates the Act." 58 F.3d at 279 (7th Cir. 1995).

ADEA section 623(f) and its equal cost rule is the sole age-discrimination provision applying to benefits earned before age 65. This is because, as shown above, ERISA section 204(b)(1)(H) and its sister provision ADEA section 623(i) apply only to benefits earned *after* age 65. *Before* age 65, only section 623(f) applies. H.R. Rep. 101-664, at 36 (1990) (where ADEA section 623(i) not applicable, section 623(f) governs pension age discrimination); c*f. Eaton* 117 F. Supp. 2d at 829 (for participants under age 65, "[t]he more general terms of the ADEA continue to bar intentional age discrimination"). Before age 65, cash balance benefits satisfy ADEA section 623(f) if they meet it on the equal cost basis of *Quinones* and *New York 10-13*

[5] Age discrimination claims brought under ERISA section 204(b)(1)(H) are analyzed identically as those arising under the parallel provision in ADEA. *See Tootle*, 2004 U.S. Dist. LEXIS 10629, at *18 n.13 (noting that, if plaintiffs had supplemented their unsuccessful section 204(b)(1)(H) claim with a separate claim arising "under 29 U.S.C. § 623(i)(1)(A), it likewise would be subject to dismissal for failure to state a claim").

Association.

Even if the Court should decide that ERISA section 204(b)(1)(H) covers benefits earned before age 65, the conclusion would remain unchanged—benefits earned before age 65 may satisfy section 204(b)(1)(H) on an equal-cost basis. This result is demonstrated by the legislative history of ERISA section 204(b)(1)(H). Immediately before this provision's enactment, employee pensions were governed by ADEA section 623(f). Under regulations, section 623(f) could be satisfied on an equal-cost-or-equal-benefit basis. 29 C.F.R. § 860.120(f)(2)(ii) (1986). Legislative history shows that Congress believed that section 623(f) indisputably applied to benefits earned *before* age 65, but that disputes had arisen among the regulators as to whether section 623(f) extended to benefits earned *after* age 65. *See* H.R. Conf. Rep. No. 99-1012, at 378 (1986).[6] Congress enacted section 204(b)(1)(H) with the sole purpose of resolving the regulators' internal dispute about the application of age discrimination law to post-age 65 benefits. *Id.* at 378 (stating in "Reasons for change" that "disagreement exists" about application of ADEA to benefit accruals—where "disagreement" described as *solely* about ADEA's disputed application to post-age 65 accruals). Congress showed no intention to change the rules then indisputably applicable *before* age 65. Thus, even if it intended to replace ADEA section 623(f)

[6] The 1986 Conference Committee Report cites both 29 C.F.R. § 860.120(f)(2)(ii), initially issued by the Department of Labor, and a 1985 EEOC announcement revisiting this regulation. The initial regulation came under EEOC review because the EEOC had since acquired from the Labor Department all ADEA jurisdiction. The initial regulation and the 1985 EEOC announcement agreed in one key respect: Both allowed pension accruals to satisfy ADEA section 623(f)(2) on an equal-cost-or-equal-benefits basis. 29 C.F.R. § 860.120(f)(2)(ii) (1979); EEOC Proposed Partial Rescission, 12 BNA Pension Reporter 389 (March 11, 1985). But they differed in another key respect: In its initial regulation, the Labor Department held that section 623(f) did *not* compel post-age 65 accruals. In its 1985 announcement, the EEOC stated that this earlier interpretation of section 623(f) was incorrect, and announced its intention to rewrite the initial regulation to apply section 623(f) to benefits earned after age 65. The EEOC did not follow-up its 1985 announcement by publishing regulations or even proposed regulations. The law as applied to post-age 65 accruals thus remained in doubt. In its "reasons for change," the Conference Committee Report accurately describes this dispute and its history. This is the sole "disagreement" that the Conference Committee purports to resolve by enacting ERISA § 204(b)(1)(H) and its sister provisions of the Code and ADEA. *See also* H.R. Rep. No. 664, 101st Cong., 2d Sess. 34-35 (1990) (ADEA section 623(f) could always be satisfied on an equal-cost-or-equal-benefits basis).

with ERISA section 204(b)(1)(H) for benefits earned before age 65, Congress showed no intention to replace the equal-cost-or-equal benefit rule then applicable under ADEA section 623(f).

When looking at the equal cost principle long embedded in ADEA and specifically applied to pension benefits in *Quinones* and *New York 10-13 Association*, the account balance approach of *Eaton* and *Tootle* is supported and explained. In a cash balance plan, the employer's *cost* of providing the yearly addition to a participant's age 65-benefit is the annual pay credit.[7] In an individual account plan, such as a 401(k) plan, the employer's *cost* of providing each addition to a participant's benefit is the annual "allocation" to the account balance.[8] In such a plan, the same allocation will produce a smaller age-65 benefit for an older participant than for a younger one, because the account balance has less time to grow to reach its age 65-value. Similarly, in a cash balance plan, the identical pay credit yields a smaller increment to the age-65 benefit for the older participant than for the younger, but the employer's cost is the same—which is all that section 204(b)(1)(H) requires.

There can be no dispute that the Plan provides all employees before age 65 with benefit accruals of equal value when measured by the cost to the employer of providing it. Measured on a cost basis, to require greater accruals for older workers would produce a bonus on the basis of age, which is not the intended effect of section 204(b)(1)(H). *Lunn*, 166 F.3d at 833 ("reverse discrimination is not the theory of ERISA").

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[7] Interest credits, of course, are not part of the employer's cost, because they are "paid" for by the plan's investment earnings.

[8] The allocation is the employer's contribution to the account (plus forfeitures if any). The effect of forfeitures is age-neutral and does not affect the equal-cost-by-age analysis.

II. PLAINTIFFS' AGE DISCRIMINATION ATTACK ON THE CASH BALANCE FORMULA FAILS AS A MATTER OF LAW.

Plaintiffs' allegation that the Plan's cash balance formula violates section 204(b)(1)(H) on its face is based on the erroneous premise that Interest Credits are stated as an amount "projected to normal retirement age." Yet, as discussed above, the terms of the cash balance formula are completely age-neutral and an employee's account balance is stated as the sum of the Pay Credits and Interest Credits accumulated monthly. In effect, plaintiffs' claim appears to be founded upon the novel and unprecedented theory of age discrimination introduced in *Cooper v. IBM Personal Pension Plan*, 274 F. Supp. 2d 1010 (S.D. Ill. 2003). The *Cooper* court held that the "rate of an employee's benefit accrual" in section 204(b)(1)(H) must be measured by reference to the yearly accrual in the annuity that an employee could receive at age 65. *Id*. at 1021-22. By drawing an inapt comparison between younger and older workers who would be collecting their hypothetical age-65 annuities at different points in time, this approach creates the appearance of decreasing annual benefit accruals. In rendering its decision, the *Cooper* court made no attempted to address the well-reasoned opinion in *Eaton*, which reached the opposite conclusion on the same issue. For reasons stated below, the Court should reject plaintiffs' claim of age discrimination as well as the wrongly decided case upon which it presumably relies.

A. Plaintiffs' Interpretation of ERISA Ignores the Causation Requirement of Section 204(b)(1)(H) and Compels Preferential Treatment of Older Employees.

If the reading of Section 204(b)(1)(H) espoused by plaintiffs and the *Cooper* court were adopted here, the antidiscrimination function of this provision would be turned on its head. Section 204(b)(1)(H), along with its counterparts in ADEA and the Code, only prohibits reductions in rates of benefit accrual that occur "because of the attainment of any age." 29 U.S.C. § 1054(b)(1)(H)(i); *see also* 26 U.S.C. § 411(b)(1)(H)(i); 29 U.S.C. § 623(i). This

"causation" requirement embodies the fundamental purpose of ADEA's age discrimination provisions—preventing unequal treatment of older workers on the basis of "inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993). Consequently, reductions in benefit accrual rates that merely correlate with age, but that are not *caused* by age, do not reflect age bias and cannot violate section 204(b)(1)(H).[9]

Under plaintiffs' presumed methodology of projecting cash balance credits to age 65, the time value of money—not age—is the cause of the apparent reduction in benefit accrual rates. The sole reason that identical Pay Credits yield a smaller projected age-65 annuity for the older worker than for the younger one, is that the younger worker is compelled to wait a longer time before receiving the Pay Credit. For example, the age 60 employee waits only five years before collecting the Pay Credit at normal retirement age—the age 25 employee, 40 years. During this time, Interest Credits accrue on the account balance at a compounding rate. Interest Credits accumulate not on account of a participant's age, but rather, to compensate participants for changes in the time value of money and for the underlying investment returns earned by the Plan on allocations to their cash balance accounts. *See Eaton*, 117 F. Supp. 2d at 832 (interest credits help protect "the value of participants' benefits from being eroded by inflation"). It is the passage of time, not the attainment of any particular age, that accounts for the differences in size of projected age-65 annuities.

The projected value of future Interest Credits has no place in a proper comparison of benefit accrual rates because it bears no relation to the economic value of benefits credited to

[9] *See Biggins*, 507 U.S. at 612-13 (an employment decision premised upon an age-correlated but "analytically distinct" factor would not constitute age discrimination); *Eaton*, 117 F. Supp. 2d at 831-32 (section 204(b)(1)(H) does not prohibit reductions in benefits based on years of service "despite the one-to-one correlation of age and years of service"); *Campbell v. BankBoston, N.A.*, 206 F. Supp. 2d 70, 78 (D. Mass. 2002) (holding that an allegation that cash balance plan had a "disparate impact" on older workers "based on the fact that older workers will have a smaller amount of time for interest to accrue on their retirement accounts" failed to state a claim for relief); 29 U.S.C. 623(f)(1) (a differentiation "based on reasonable factors other than age" does not violate ADEA).

participants each year. Both the Supreme Court and the Second Circuit have repeatedly recognized the legal necessity of discounting future payments to present value in order to compensate for the time value of money.[10] When adjusted to present value, a participant's yearly accrual in an age-65 annuity in the Plan equals the annual amount credited to his or her cash balance account, since future Interest Credits are based on a prevailing market discount rate. As demonstrated above, annual account credits are allocated in an age-neutral fashion that provides equal treatment for employees of all ages. If the Plan were required to provide escalating Pay Credits to offset the effects of compounding interest, as plaintiffs suggest in their complaint, an age-based windfall for older workers would result. This skewed distribution of bonus benefits would contravene the intent of section 204(b)(1)(H) and its associated provisions by casting aside their basic tenet of equal treatment. Such reverse age discrimination has been explicitly rejected as the theory of section 204(b)(1)(H) and ADEA. *Lunn*, 166 F.3d at 833; *Parcinski*, 673 F.2d at 37.

Adoption of plaintiffs' theory of relief would also have staggering financial consequences that Congress could not possibly have intended. It would likely outlaw "hundreds of cash balance plans with millions of participants" nationwide and mandate inordinately large payments to older workers under these plans. *Eaton*, 117 F. Supp. 2d at 823. By creating a massive disincentive against the retaining of older workers, it would sharply undermine ADEA's stated purpose of "promot[ing] employment of older persons based on their ability rather than age." 29 U.S.C. 621(b). Similarly, adoption of plaintiffs' theory would also contradict the Supreme Court's command that ERISA should not be interpreted to impose burdens that "unduly

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[10] *See, e.g.*, *Atlantic Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 384 (1998) (noting that "a dollar today is worth more than a dollar tomorrow"); *Monessen S.W. Ry. Co. v. Morgan*, 486 U.S. 330, 339 (1988) (it is "self-evident" that "a given sum of money in hand is worth more than the like sum of money payable in the future"); *Ammar v. United States*, 342 F.3d 133, 149 (2d Cir. 2003) (holding that lower court "should have discounted" judgment award "to account for the time value of money"); *Competex, S.A. v. Labow*, 783 F.2d 333, 337 (2d Cir. 1986) ("post-judgment interest… compensates the judgment creditor for the time value of money").

discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Plaintiffs' interpretation of section 204(b)(1)(H) should therefore be rejected, as "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). Especially in the ERISA context, the Supreme Court has rejected statutory interpretations that would lead to "improbable results," such as the invalidation of procedures "that no one would think violate" ERISA. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 81 (1995).

B. Plaintiff's Age Discrimination Claim Conflicts with the Statutory Text and Legislative History.

Aside from the fact that plaintiffs' claim is fundamentally at odds with the purposes of section 204(b)(1)(H), it also lacks any plausible textual support. The *Cooper* court skirted these fatal defects in its legal theory by simply asserting that the "rate of benefit accrual" under section 204(b)(1)(H) must refer to the term "accrued benefit," which is defined elsewhere in ERISA as a participant's projected age-65 annuity. *Cooper*, 274 F. Supp. 2d at 1016; 29 U.S.C. § 1002(23)(A). This supposed textual link was the sole basis for the *Cooper* court's conclusion that age-65 annuities are the only valid measurement for rates of benefit accrual. Yet the court offers no rationale as to why age-65 annuities could not be discounted to present value for purposes of section 204(b)(1)(H), even if Congress had intended for the "accrued benefit" definition to apply.

In reality, neither ERISA nor ADEA provides a clear definition of the "rate of an employee's benefit accrual" for age discrimination purposes. *Eaton*, 117 F. Supp. 2d at 825. The meaning of technical terms in the complex regulatory universe of pension law is highly contextualized, and this is particularly the case with benefit accrual provisions. *See In re Gulf*

Pension Litig., 764 F. Supp. 1149, 1176-77 (S.D. Tex. 1991) (references in I.R.C. § 411(d)(3) to "benefits accrued" and in Treas. Reg. § 1.411(d)-2(b)(2) to "future benefit accruals" are not the same as the term "accrued benefit," and courts will not assume that differences in wording were "drafting oversights"); *Eaton*, 117 F. Supp. 2d at 830 n.8 (regulations under section 401(a)(4) of the Code sets forth "extraordinarily complex provisions and options for determining and comparing benefit accrual rates"). In the face of such textual ambiguity, courts are expected to look for guidance from a broad range of sources, including the statute's purposes and legislative history. *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of a statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy").

Upon closer inspection of the statutory language and history, plaintiffs' and the *Cooper* court's interpretation of section 204(b)(1)(H) fails because it would invalidate defined benefit plans explicitly permitted by ERISA.

Perhaps the most startling textual implication of their interpretation is that it would outlaw the sole example cited in Congress' 1986 OBRA Conference Report of a plan that *complies* with section 204(b)(1)(H). *Eaton*, 117 F. Supp. 2d at 830. Like most traditional defined benefit plans in the United States, the pension plan illustrated in the Conference Report provides a retirement annuity that increases at the "same" rate with each year of an employee's service before and after age 65. *See* H.R. Conf. Rep. 99-1012, at 381 (1986). According to plaintiffs' presumed methodology, any plan that shares this commonplace pattern of benefit accruals would violate section 204(b)(1)(H). Indeed, it is unclear how *any* defined benefit plan could satisfy this methodology with respect to post-age 65 benefit accruals. *Eaton*, 117 F. Supp. 2d at 830, 834. Calculations of projected age-65 annuities would be nonsensical for employees working past this age, who were the principal—if not exclusive—intended beneficiaries of the

OBRA legislation.

Plaintiffs' reading of section 204(b)(1)(H) would also render contributory defined benefit plans illegal simply because they provide interest credits that are mandated by ERISA. Defined benefit plans that accept contributions from employees, as permitted under ERISA section 204(c)(2)(B), must include statutorily determined interest credits as part of the "accrued benefit" on a participant's contributions. 29 U.S.C. § 1054(c)(2)(B)-(C). These credits accrue in precisely the same manner as Interest Credits under the Plan's cash balance formula. Measured as projected age-65 annuities under plaintiffs' presumed methodology, this pattern of benefit accruals produces the same apparent violation of section 204(b)(1)(H). This cannot be correct because it is solely the result of compliance with other provisions in the same section of ERISA. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must … interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole") (internal quotations and citations omitted).

C. Treasury Has Rejected the Legal Theory Underpinning Plaintiffs' Claim.

Plaintiffs' age discrimination theory also conflicts with authoritative guidance from the Treasury Department, which holds exclusive administrative jurisdiction over the interpretation of ERISA section 204(b)(1)(H) and its counterpart provision, Code section 411(b)(1)(H). *See* Reorganization Plan No. 4, 43 Fed. Reg. 47,713 (1978). In a 1991 preamble to final regulations under Code section 401(a)(4), Treasury stated:

> The fact that interest adjustments through normal retirement age are accrued in the year of the hypothetical allocation will not cause a cash balance plan fail to satisfy the requirements of section 411(b)(1)(H), relating to age based-reductions in the rate at which benefits are accrued under a plan.

56 Fed. Reg. 47,524 (1991).

This pronouncement expressly rejects plaintiffs' theory that guaranteed accruals of future

interest credits under cash balance plans result in age discrimination under ERISA and the Code. It is entitled to great deference as the Treasury Department's authoritative interpretation. *See Fidelity Fed. Savings & Loan Ass'n v. Cuesta*, 458 U.S. 141, 158 n.13 (1982) (preamble represents "the administrative construction of the regulation, to which deference is clearly in order") (internal quotations and citations omitted). Moreover, the regulations issued with this preamble contain an explicit safe harbor recognizing cash balance plans. Treas. Reg. § 1.401(a)(4)-8(c)(3). This safe harbor provision, which sets forth rules on how cash balance plans can comply with Code section 401(a)(4), further confirms that Treasury does not consider such plans to be age discriminatory. Other rules enabling cash balance plans to meet various tax-qualification requirements under the Code were published in IRS Notice 96-8. 1996-1 C.B. 359.

In addition, the Internal Revenue Service has granted numerous favorable determination letters with respect to cash balance plans, approving them as satisfying all requirements for tax qualification—including Code section 411(b)(1)(H). *See, e.g.*, Rev. Proc. 93-39, 1993-2 C.B. 513, 527 (referring to cash balance plan safe harbor in describing procedures for obtaining favorable determination letters).

CONCLUSION

For the foregoing reasons, Plaintiffs' Second Claim for Class Relief should be denied with respect to any motions filed by the parties to these proceedings.

Respectfully submitted,

THE AMERICAN BENEFITS COUNCIL

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June 30, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEFANIE HIRT, BARBARA SEAY, ANN NUSSBAUM, SUSAN CHWAST, and LORETTA RONZCA, On Their Own Behalf And On Behalf Of All Others Similarly Situated, Plaintiffs, v. THE EQUITABLE RETIREMENT PLAN FOR EMPLOYEES, MANAGERS AND AGENTS, and THE OFFICERS COMMITTEE ON BENEFIT PLANS, As Plan Administrator, Defendants.	)	01 Civ. 7920 (AKH)

CERTIFICATE OF SERVICE

VICTOR S. CHANG does hereby certify that, on June 30, 2004, he caused true and correct copies of Brief of *Amicus Curiae* the American Benefits Council Addressing Plaintiffs' Second Claim for Class Relief to be served upon the following:

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