IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

KENNETH WALTON GEORGE, *et al.*,	)	
	)	
Plaintiffs,	)	C/A No: 8:06-CV-373-RBH
	)	
vs.	)	
	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN, *et al.*,	)	
	)	
Defendants.	)	

MOTION FOR CERTIFICATION OF CLASS ACTION

Plaintiffs' hereby move for certification of the proposed class pursuant to Rules 23(a), 23(b)(1), (b)(2), and (b)(3) for the reasons stated in the Memorandum in Support of Motion for Certification of Class Action.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

Greenville, South Carolina

April 27, 2006

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KENNETH WALTON GEORGE, *et al.*,	)	
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Plaintiffs,	)	**C/A No: 8:06-CV-373-RBH**
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DUKE ENERGY RETIREMENT CASH BALANCE PLAN, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs, on behalf of themselves and all others similarly situated, move that this case be certified as a class action under Rule 23(b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure. Plaintiffs seek certification of a class to include all current and former participants in the Duke cash balance pension plan. Plaintiffs also seek certification of an ERISA age discrimination subclass consisting of participants over the age of 40 and certification of an opt-in class with respect to the ADEA claims, consisting of participants over the age of 40.

Plaintiffs are current and former employees of defendant Duke Energy Corporation ("Duke"), a North Carolina corporation. Defendant Duke Energy Retirement Cash Balance Plan is an entity created by Duke Energy Corporation. Plaintiffs allege that when Duke converted its pension plan to a "cash balance" plan on January 1, 1997, it violated ERISA and the ADEA in that:

1. Duke's Plan unlawfully factors age into the calculation of interest credits in violation of ERISA Section 204(b)(1)(H);

2. Duke violated the ADEA by knowingly and willfully adopting a plan that discriminates against employees over the age of 40, as a result of the Cash Balance Plan's "wear-away" effect;

3. Duke's Cash Balance Plan violated ERISA § 502(a)(1) by failing to follow the procedures specified in the plan documents for calculating lump sum distributions.

4. Duke's method of calculating lump sum distributions uses an inappropriate interest rate and a pre-mortality discount thereby reducing the amount of lump sum distributions participants will receive, violating the anti-cut back provision of ERISA §§ 203(a), 204(c), and 502(a)(1);

5. Duke's distribution of lump sum benefits to plaintiffs and other Class members violates ERISA § 204(c)(3) [29 U.S.C. § 1054(c)(3)], which requires that a lump sum distribution "shall be the actuarial equivalent" of an annuity commencing at normal retirement age;

6. Duke's distribution of lump sum benefits to plaintiff and other Class members violates the provisions of IRC § 417(e) [26 U.S.C. § 417(e)], which require that a lump sum distribution shall not be less than the present value of the annuity commencing at normal retirement age, calculated by using the actuarial assumptions set forth at IRC § 417;

7. Duke's Cash Balance Plan violated ERISA § 502(a)(1) during the 1997 and 1998 Plan years by failing to follow the procedure specified in the Plan document for calculating the appropriate interest rate credit;

8. Duke's Plan causes plan participants to face years where they accrue zero benefits followed by years where they accrue actual benefits, which violates the "anti-backloading" rule in ERISA § 204(b)(1)(B) requiring that the value of the benefit accrued in any given year not exceed the value of a benefit accrued in any previous year by more than 33 1/3%;

9. Duke breached its fiduciary duty to plan participants under ERISA § 404(a)(1) by misleading employees about the effects of the conversion to the Cash Balance Plan and the purpose behind certain amendments to the Plan concerning the calculation of

interest credits and by failing to correctly administer the Cash Balance Plan;

10. Duke's summary plan description (SPD) violated ERISA § 102 and 29 C.F.R. § 2520.102 by failing to explain the full import of the cash balance plan terms, including but not limited to, failing to completely explain the wear-away effect and failing to explicitly explain how benefit accruals under the plan are reduced by advancing age;

11. Duke failed to notify plan participants of a significant reduction in the rate of future benefit accruals 15 days prior to the January 1, 1997 effective date in violation of ERISA § 204(h), which prohibits such plan amendments without notice of the reduction.

Distilled to its essence, this case rests upon inescapable facts mandating class treatment. The facts alleged, if proven, demonstrate a clear violation of provisions of both ERISA and the ADEA.[1] The common issue which predominates in this litigation is whether Duke correctly and fairly converted its pension plan to a cash balance pension plan on January 1, 1997. The determination of this issue rests not upon facts specific to any individual employee, but rather upon a pattern of conduct, and upon the common facts relating to Duke's involvement, direction, control, participation, knowledge, authorization, and ratification of management personnel acts and, particularly, the decision to convert its pension plan, the manner of conversion, and the structure of the cash benefit plan.

Class treatment is superior to alternative methods available to resolve this litigation. Given that adjudication of the facts concerning Duke's conversion from a pension plan to a cash balance pension plan will dispose of all of the class's ERISA and ADEA claims, any approach other than a class action invites inconsistent and potentially inequitable results, and years of costly, duplicative proceedings. Accordingly, the plaintiffs seek certification of a plaintiff class

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[1] *Cooper v. IBM*, 2005 U.S. Dist. LEXIS 17071 (D. Ill. Aug. 16, 2005).

pursuant to Federal Rule of Civil Procedure 23 against defendants Duke Energy Retirement Cash Balance Plan and Duke Energy Corporation.

II. ARGUMENT

A. The Proposed Class

As set forth in the Complaint, the proposed class consists of any and all persons who are present and/or former employees of Duke Energy who participated in the Duke Energy Retirement Cash Balance Plan on or after January 1, 1997, including a subclass consisting of any and all persons who are present and/or former eligible employees of Duke Energy over the age of 40 who participated in the Duke Energy Retirement Cash Balance Plan on or after January 1, 1997.

The proposed class covers all participants in the Duke Pension Plan who have been harmed by the ERISA and ADEA breaches set forth above. On information and belief, the proposed class will include thousands of individuals.

B. Class Certification Requirements Under Rule 23

Rule 23(a) of the Federal Rules of Civil Procedure establishes four prerequisites for class certification: "[that] (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Class certification is not appropriate unless the named plaintiffs establish all four prerequisites. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982).

The putative class must also be a type of class maintainable under Rule 23(b). Here plaintiffs contend that certification is maintainable under Rule 23(b)(1), (b)(2), and (b)(3). Under

subsection (b)(1), plaintiffs must establish that the adjudication of individual claims "would establish incompatible standards of conduct" on Duke or "be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(A) and (B). Under subsection (b)(2), plaintiffs must establish that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Under subsection (b)(3), plaintiffs must establish that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

It is appropriate to bring a class action where the issues involved are common to the class as a whole; the questions of law are applicable in the same way to each class member; and the class action procedure allows for the efficient and economical litigation of a question potentially affecting every class member. *See General Tel. Co.*, 457 U.S. at 157.

The question to be answered for class certification is not whether the plaintiffs will prevail on the merits but, rather, whether the requirements of Rule 23 are met. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). However, the certification question often entails considerations that are "enmeshed in the factual and legal issues comprising the cause of action" and, where necessary, the court may look beyond the face of the pleadings in order to come to a proper conclusion on the certification question. *See General Tel. Co.*, 457 U.S. at 161; *Risher v. Crestar Mortgage Corporation*, 2001 U.S. Dist. LEXIS 14449 at *11 (D.S.C. Mar. 30, 2001).

The determination of the efficacy of a class action rests soundly within the discretion of this Court, and should reflect the intended flexibility of Rule 23. While each case must be viewed through the prism of its particular facts, the interpretation of Rule 23 should be "a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case 'best serve the ends of justice for the affected parties and . . . promote judicial efficiency.'" *In Re: A. H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir. 1989). Indeed, the decisions on the proper standard of construction of Rule 23 explain that, if an error is to be made, it must be "in favor of and not against the maintenance of the class action." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968). There is a presumption favoring class certification: "[T]he interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action." *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3rd Cir. 1985) (quoting *Kahan v. Rosenstiel*, 424 F.2d 161, 196 (3rd Cir. 1970), *cert. denied*, 398 U.S. 950 (1970) (citations omitted)).

In *Banyai v. Mazur*, 205 F.R.D. 160, 165 (D.N.Y. 2002), the court stated that "[c]lass actions are generally well-suited to litigation brought pursuant to ERISA." In two recent ERISA cases involving pension plan violations, courts have found that class certification of ERISA claims is appropriate because each class member's claim arose from the same course of events and that each made similar legal arguments to prove the defendants' liability. *See Cooper v. IBM*, 2005 U.S. Dist. LEXIS 17071 (D. Ill. Aug. 16, 2005); *Richards v. Fleetboston Financial Corp.*, 2006 WL 860674 (D. Conn. Mar. 31, 2006). In this case, the overriding goal of the putative class is to establish the existence of a pattern of conduct which resulted in violations of ERISA and the ADEA, matters clearly subject to common proof.

Any differences among the claims of each plaintiff and any individual issues which may exist in this regard are overwhelmed by the common issues. Thus, this case falls squarely within the parameters of *Cooper* and *Richards*, in that the proof necessary to resolve this litigation is common to all class members.

C. Each of the Four Prerequisites of Rule 23(a) Is Satisfied Here

The conjunctive provisions of Rule 23(a) are met in this case.

1. Numerosity

Plaintiffs seek relief under ERISA and the ADEA. The putative class in this case is estimated to consist of thousands of employees. In *Bates v. Tenco Services, Inc.*, the court found that "a lawsuit with potentially one hundred and eighty plaintiffs presents logistical problems that make the practicality of permissive joinder dubious." 132 F.R.D. 160, 163 (D.S.C. 1990). To satisfy the "numerosity" standard of Rule 23(a), plaintiffs need not show that joinder is impossible, only that it is impracticable. *Robidoux v. Celan*, 987 F.2d 931, 935 (2d Cir. 1993). The numerosity requirement is presumed satisfied where more than 40 members make up the class. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

Given the number of employees who would be affected by a decision regarding the applicability of ERISA and the ADEA in this case, it is clear that plaintiffs have met the Rule 23(a) numerosity requirements. Simply stated, the manageability of handling thousands of claims under ERISA and the ADEA would be greatly facilitated by the class action vehicle.

2. Commonality

The Rule 23(a)(2) requirement for common questions of law or fact for a class action is achieved with the existence of a single common question of either law or fact; not all questions of law or fact need be common. *Bates*, 132 F.R.D. at 163. The commonality test is met when

there is "at least one issue whose resolution will affect all or a significant number of the putative class members." *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982).

Each of the putative class plaintiffs herein seeks compensatory damages under ERISA and the ADEA. Certification of a class under Rule 23 is usually warranted in cases such as this, that is, where individual wrongs are alleged to have occurred pursuant to a common plan. Though individual recoveries for the putative class members herein may differ, each individual's recovery is dependent on the dispositive question of whether Duke's actions violated ERISA and the ADEA. *See, e.g., Finnan*, 726 F.Supp. 460. This common question of fact and law is particularly well suited to a class action suit and this single broad question is a common question sufficient to satisfy the requirement of Rule 23(a)(2). *See Bates*, 132 F.R.D. at 163. In this case, there is a common nucleus of operative fact and law: whether Duke's cash balance pension plan comports with the requirements of ERISA and the ADEA. *See In Re: A. H. Robins Co.*, 880 F.2d at 741-42. Thus, the common question of law and fact render this action appropriate for class action treatment.

3. Typicality

The typicality prerequisite of Rule 23(a) generally is satisfied if the plaintiffs assert a similar interest and similar injury. *General Telephone Co.*, 457 U.S. at 157. In the words of the Supreme Court, "[t]he typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiffs' claims." *General Telephone Co. of the N.W., Inc. v. Equal Employment Opportunity Commission*, 446 U.S. 319, 330 (1980). The typicality test of Rule 23(a) does not require that "the representatives have identical claims which other members of the class might present. The question of typicality focuses on the similarity of the legal and remedial theories of claims of the named and unnamed plaintiffs." *Bates*, 132 F.R.D. at 163.

A finding of typicality can be established by a strong similarity of legal theories and common facts, and is not precluded by allegations of, or presence of, some factual differences between the claims of the named plaintiffs and other class members. *In re Indus. Diamonds Antitrust Litigation*, 167 F.R.D. 374, 379 (S.D.N.Y. 1996). If "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations of the fact patterns underlying the individual claims." *Robidoux v. Celan*, 987 F.2d 931, 936-7 (2d Cir. 1993); *see, e.g., Kreuzfeld, A.G. v. Carnehammar*, 138 F.R.D. 594, 599 (S.D.Fla. 1991) (stating typicality inquiry is whether class representative is part of the class, possesses the same interest, and suffers the same injury as the class members). This alignment of similar interests and similar injuries assures that the class representatives have interests and incentives consistent with those of absent class members, such that the absentee members' interests are protected: "[A] plaintiff with typical claims will pursue his or her own self interest and in so doing will advance the interests of the class members, which are aligned with those of the representative." 1 *Newberg on Class Actions*, *supra* at § 3.13, p. 3-77.

The named plaintiffs herein are members of the class under the proposed class definition set forth in the Complaint. *See East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). They are all current and former employees of Duke who suffered losses as a result of Duke's conversion of its pension plan into a cash balance pension plan design on January 1, 1997 and/or Duke's failure to follow plan terms, to the detriment of its participants. Their suit is based on violations of ERISA and the ADEA. Aside from the issue of quantum which will vary among class members according to the individual's age, wage scale, etc., all

other issues are "typical" to the class – that is, whether the employees were covered by ERISA and the ADEA and whether the defendants failed to comply with ERISA and the ADEA.

4. Adequacy of Representation

The final hurdle of Rule 23 (a)(4) requires adequacy of representation. A class representative must "possess the same interest and suffer the same injury as the class members." *Amchem Products v. Windsor*, 521 U.S. 591, 625-26 (1997). The adequacy of representation requirement encompasses two factors: (1) whether plaintiff's interests are antagonistic to the interests of other members of the class; and (2) whether plaintiff's attorneys are qualified, experienced and able to conduct the litigation. *Bates*, 132 F.R.D. at 163.

In the present action, both prongs of this test are met. Unquestionably, the named plaintiffs well represent the class. The plaintiffs were affected alongside the other Duke employees when Duke converted its pension plan and they share the same incentive as absent class members to establish the elements of violations of both ERISA and the ADEA. Thus, no antagonism exists between the named plaintiffs and the class. *See Id.*

The named plaintiffs, as shown by their affidavits, have a clear understanding of the issues in this case and have been highly involved in the litigation. They have assisted in developing the facts, have reviewed all pleadings, have communicated regularly with their counsel and have and will continue to take a very active role in this litigation. They are intelligent, possess good character, and are highly motivated. *See, e.g.*, Affidavits of Kenneth Walton George, Henry Miller and Jim Matthews attached as Exhibits A, B, and C. (Affidavits of additional plaintiffs to be filed later).

The named plaintiffs are represented by counsel with substantial experience in the field of ERISA and the ADEA, and also in the prosecution and successful resolution of complex

litigation and class actions. *See* Affidavits of James R. Gilreath, Cheryl Perkins, and Mona Lisa Wallace in Support of Motion for Class Certification attached as Exhibits D, E, and F. Plaintiffs' counsel collectively have a wide range of experience, not only in ERISA and ADEA cases, but in class action cases, multi-district litigation and other forms of representative litigation. *Id.* Plaintiffs' counsel are dedicated to the vigorous prosecution of this action.

D. Certification under Rule 23(b)(1)

Plaintiffs seek certification of the proposed class under Rule 23(b)(1), which states that certification is appropriate where

> the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Fed. R. Civ. P. 23(b)(1)(A) and (B). In *Amchem*, 521 U.S. at 614, the Supreme Court stated that Rule 23(b)(1) covers cases like this one in which the defendants are "obligated by law to treat class members alike." The question presented in this case is whether Duke's cash balance pension plan violated ERISA and the ADEA. If each pension participant filed a separate lawsuit to challenge the Plan, inconsistent and varying adjudications of the legality of the cash balance plan are inevitable. Additionally, an adjudication with respect to individual members of the class would substantially impair or impede the ability of other members to protect their interests. Thus, the plaintiffs have met the requirements for class certification under Rule 23(b)(1).

E. Certification under Rule 23(b)(2)

Plaintiffs seek certification of the proposed class under Rule 23(b)(2), which states that certification is appropriate where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). In *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 59 (3rd Cir. 1994), the court stated that "what is important under Rule 23(b)(2) is that the relief sought by the named plaintiffs should benefit the entire class." Here, plaintiffs seek a declaration that Duke's cash balance pension plan violates ERISA and the ADEA and seek injunctive relief requiring Duke to amend the plan to make it legal. Duke's actions with respect to the plan are generally applicable to the class, and if plaintiffs succeed in their attempt to show that Duke's conduct with respect to the cash balance plan is illegal, then injunctive or declaratory will be appropriate. The relief sought by the plaintiffs will benefit the entire class. Thus, the plaintiffs have met the requirements for class certification under Rule 23(b)(2).

F. Certification under Rule 23(b)(3)

Plaintiffs seek certification of the proposed class under Rule 23(b)(3), which provides for class certification when (1) the four requirements of Rule 23(a) have been met;[2] (2) when common questions of law or fact predominate; and (3) where the class action device is found by the Court to be superior to other available methods for fairly and efficiently disposing of the case. *In re A.H. Robins Co.*, 880 F.2d at 727-28. Because this action satisfies each of these criteria, class certification should be granted:

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[2] Generally, courts are instructed to defer to the allegations of plaintiffs' Complaint in determining the propriety of class certification. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

1. Rule 23(a) Requirements

As demonstrated above, the requirements of Rule 23(a) have clearly been met in this case.

2. Predominance of Common Issues

The overwhelming predominance of common issues in this action satisfies the threshold requirement of Rule 23(b)(3). Here, the vast majority of factual and legal questions affect the class as a whole, and overshadow any individual issues which may pertain to individual employees. There is a common nucleus of operative fact which is common to the class: whether Duke's cash balance pension plan comports with the requirements of ERISA and the ADEA. This common question of law and fact clearly predominates and renders this action appropriate for class action treatment.

Indeed, the core factual question – whether Duke violated provisions of ERISA and the ADEA when it converted its pension plan to a cash balance plan – is common to the claims of each and every class member and this core issue alone should be sufficient to justify class treatment of this case. Determination of this issue turns on a single factual record, which does not vary from plaintiff to plaintiff, and should be litigated only once.

3. Superiority of Class Action Mechanism

This Court need not find that the class action device is the ideal solution to this litigation in order to certify a class under Rule 23(b)(3). Rather, this Court need find only that the class mechanism is superior to other available means. Fed.R.Civ.P. 23(b)(3); *Amchem Products v. Windsor*, 521 U.S. 591 (1997).

There are four primary factors to be considered in determining whether a class action is superior pursuant to Rule 23(b)(3): "(A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any

litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3).

Considering these criteria in the context of this case, it is clear that the class action is superior to any other method of adjudicating the type of claims involved. As discussed herein, the majority of factual and legal issues involved in this action are common to all of the Duke employees. Presentation of these common issues in the class context is clearly preferable to ensure consistent class-wide results. No other ERISA and ADEA cases with regard to the cash balance plan conversion are presently pending against these defendants to plaintiffs' knowledge.

For all of the reasons stated above it is desirable that the claims be adjudicated in one forum. Management of a class in the ERISA and ADEA context should present no overriding problems of management. There are no significant individualized issues other than calculating benefits upon a finding of liability, a determination that would have to be made in any ERISA or ADEA case. In any event, failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and "'should be the exception rather than the rule.'" *In re Visa Check/Master Money Antitrust Litigation v. Visa U.S.A., Inc.*, 280 F.3d 123,141 (2d Cir. 2001) (citing *In re S. Cent. States Bakery Prods. Antitrust Litig.*, 86 F.R.D. 407, 423 (M.D. La. 1980) (quoting Manual for Complex Litigation, § 1.43 n. 72 (1977))).

III. CREATION OF A SUBCLASS AND OPT-IN CLASS

A. Subclass

Plaintiffs seek certification of a class to include an ERISA age discrimination subclass consisting of participants over the age of 40. When appropriate, "a class may be divided into

subclasses and each subclass treated as a class." Fed. R. Civ. P. 23(c)(4)(B). As a result of being under the age of 40, some plaintiffs will not have claims involving age-based violations of ERISA, therefore, the creation of a subclass of plaintiffs who qualify for the age-based claims is appropriate.

B. Opt-in Class

Plaintiffs also seek certification of an opt-in class with respect to the ADEA claims, consisting of participants over the age of 40. "[T]he Age Discrimination in Employment Act (ADEA) allows class actions to borrow the 'opt-in class action mechanism of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (1994)." *Johnson v. United States*, 208 F.R.D. 148, 159 (D. Tex. 2001) (citing *Thiessen v. General Electric Capital Corp.*, 255 F.3d 1221, 2001 WL 748077, at *4 (10th Cir. 2001)). ADEA plaintiffs are authorized by 29 U.S.C. § 626(b) to bring class actions in accordance with section 216(b), which allows actions "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b) (1996). "Unlike class actions under Rule 23, 'no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.'" *Johnson*, 208 F.R.D. at 159; *see Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995) (ADEA incorporates section 16(b) of Fair Labor Standards Act; "difference between an ADEA representative action and a Fed. R. Civ. P. 23 class action is that the ADEA action follows an 'opt-in' rather than an 'opt-out' procedure")). Therefore, pursuant to the ADEA, the creation of an opt-in class is appropriate.

IV. CONCLUSION

The purpose of the class action mechanism is to "save . . . the resources of both the court and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion under Rule 23." *General Telephone Co.*, 457 U.S. at 156.

The class action device is the only equitable and sensible tool for managing litigation involving the overriding factual and legal issues which define this case. Plaintiffs and all class members share a common interest in proof of the ERISA and ADEA violations that must be met to warrant recovery and all share a common interest in the fair and consistent resolution of legal issues raised by the claims asserted against Duke. In addition to its obvious inefficiency and prohibitive cost, individualized litigation with respect to these claims would surely yield inequitable and inconsistent results.

Accordingly, the plaintiffs respectfully request that this Court issue an order:

1. Finding that the requirements of Rule 23(a) and Rule 23(b)(1), (b)(2) and (b)(3) have been satisfied;

2. Appointing the named plaintiffs as representatives of the class;

3. Appointing the undersigned counsel as class counsel; and

4. Directing that Class Notice be disseminated in an expeditious manner.

Respectfully submitted,

By: /s/ James R. Gilreath
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Greenville, South Carolina

April 27, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

KENNETH WALTON GEORGE, *et al.*,	)	
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Plaintiffs,	)	**C/A No: 8:06-CV-373-RBH**
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vs.	)	
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DUKE ENERGY RETIREMENT CASH BALANCE PLAN, *et al.*,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT OF KENNETH WALTON GEORGE IN SUPPORT OF MOTION FOR CERTIFICATION OF A CLASS

Personally appeared before me, Kenneth Walton George, who being fully sworn, deposes and says:

1. I am over the age of eighteen years and believe in the obligations of an oath.
2. I make this Affidavit from my personal knowledge.
3. I am a citizen and resident of Seneca, South Carolina and I reside within the Anderson Division of the District Court for the State of South Carolina.
4. I became employed with Duke Energy in 1970 at the Duke Energy Oconee nuclear facility. I took early retirement from Duke Energy in December 2003.
5. Prior to filing the lawsuit, I was advised of the responsibilities that I have to the potential class as a class representative. Despite what I understand will be an enormous commitment of time and effort, I have accepted this responsibility to serve as a class representative because I believe that each employee of Duke who has lost money as a result of the pension plan conversion has suffered similar losses to those suffered by me and I believe each class member's claim to be

applicable to the class as a whole. In other words, I believe my claim to be the same as everyone else involved in the Duke pension plan conversion.

6. I don't know of any interest I have in the lawsuit that is antagonistic or in conflict with the interest of any other proposed class members.

7. Prior to filing the complaint, I assisted my attorneys in developing the factual allegations for the complaint. I reviewed a draft of the complaint and discussed the factual allegations in the complaint with my attorneys. My attorneys have explained to me various aspects of ERISA and the ADEA, and I understand the claims that are being advanced in this action.

8. Since the filing of the complaint, I have continued to communicate with the plaintiffs' attorneys and have been kept informed of developments. As the case continues, I understand that I will review additional pleadings and documents and will continue to provide counsel information relevant to the lawsuit.

FURTHER DEPONENT SAYETH NOT.

Kenneth Walton George

SWORN to before me this
27th day of April, 2006
(L.S.) Notary Public for South Carolina
My commission expires: Feb. 11 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

KENNETH WALTON GEORGE, *et al.*,	)	
	)	
Plaintiffs,	)	**C/A No: 8:06-CV-373-RBH**
	)	
vs.	)	
	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN, *et al.*,	)	
	)	
Defendants.	)	

AFFIDAVIT OF HENRY MILLER IN SUPPORT OF MOTION FOR CERTIFICATION OF A CLASS

Personally appeared before me, Henry Miller, who being fully sworn, deposes and says:

1. I am over the age of eighteen years and believe in the obligations of an oath.

2. I have made this Affidavit from my personal knowledge.

3. I am a citizen and resident of North Carolina.

4. I became employed with Duke Energy in 1970 and I am still currently employed with Duke Energy.

5. Prior to filing the lawsuit, I was advised of the responsibilities that I have to the potential class as a class representative. Despite what I understand will be an enormous commitment of time and effort, I have accepted this responsibility to serve as a class representative because I believe that each employee of Duke who has lost money as a result of the pension plan conversion has suffered losses similar to the type suffered by me and I believe each class member's claim to be applicable to the class as a whole. In

other words, I believe my claims to be the same as those of other participants in the Duke pension plan and people involved in the Duke pension plan conversion.

6. I don't know of any interest I have in the lawsuit that is antagonistic or in conflict with the interest of any other proposed class members.

7. Prior to filing the complaint, I assisted my attorneys in developing the factual allegations for the complaint. I reviewed a draft of the complaint and discussed the factual allegations in the complaint with my attorneys. My attorneys have explained to me various aspects of ERISA and the ADEA, and I understand the claims that are being advanced in this action.

8. Prior to, and since, the filing of the complaint, I continued to communicate with the plaintiffs' attorneys and have been kept informed of developments. I continue to investigate certain factual matters for my attorneys and have provided them information relevant to the lawsuit.

FURTHER DEPONENT SAYETH NOT.

Henry F. Miller
Henry Miller

SWORN to before me this
26th day of April, 2006
Connie Y. Brown (L.S.)
Notary Public for North Carolina
My commission expires: 11/24/08

CONNIE Y. BROWN NOTARY PUBLIC ROWAN COUNTY, N.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

KENNETH WALTON GEORGE, *et al.*,	)	
	)	
Plaintiffs,	)	**C/A No: 8:06-CV-373-RBH**
	)	
vs.	)	
	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN, *et al.*,	)	
	)	
Defendants.	)	

AFFIDAVIT OF JIM MATTHEWS IN SUPPORT OF MOTION FOR CERTIFICATION OF A CLASS

Personally appeared before me, Jim Matthews, who being fully sworn, deposes and says:

1. I am over the age of eighteen years and believe in the obligations of an oath.

2. I have made this Affidavit from my personal knowledge.

3. I am a citizen and resident of North Carolina.

4. I became employed with Duke Energy in 1972. I am currently employed at Duke Energy's McGuire Nuclear Station.

5. Prior to filing the lawsuit, I was advised of the responsibilities that I have to the potential class as a class representative. Despite what I understand will be an enormous commitment of time and effort, I have accepted this responsibility to serve as a class representative because I believe that each employee of Duke who has lost money as a result of the pension plan conversion has suffered similar losses to those suffered by me and I believe each class member's claim to be applicable to the class as a whole. In other

words, I believe my claims to be the same as those of other participants in the Duke pension plan conversion.

6. I don't know of any interest I have in the lawsuit that is antagonistic or in conflict with the interest of any other proposed class members.

7. Prior to filing the complaint, I assisted my attorneys in developing the factual allegations for the complaint. I reviewed a draft of the complaint and discussed the factual allegations in the complaint with my attorneys. My attorneys have explained to me various aspects of ERISA and the ADEA, and I understand the claims that are being advanced in this action.

8. Since the filing of the complaint, I have reviewed pleadings and documents that have been filed by the plaintiffs' attorneys and that have been filed by the defendants. I have to advise them of my reaction to these filings.

9. Prior to, and since, the filing of the complaint, I have continued to communicate with the plaintiffs' attorneys and have been kept informed of developments. I continue to investigate certain factual matters for my attorneys and have provided them information relevant to the lawsuit.

FURTHER DEPONENT SAYETH NOT.

Jim Matthews

SWORN to before me this
27th day of April, 2006
(L.S.)
Notary Public for North Carolina
My commission expires: 2-27-06 New
2-26-07 4-27-06

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

KENNETH WALTON GEORGE, *et al.*,	)	
	)	
Plaintiffs,	)	**C/A No: 8:06-CV-373-RBH**
	)	
vs.	)	
	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN, *et al.*,	)	
	)	
Defendants.	)	

AFFIDAVIT OF JAMES R. GILREATH IN SUPPORT OF MOTION FOR CERTIFICATION OF A CLASS

PERSONALLY APPEARED before me, James R. Gilreath, who being duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiffs in *George v. Duke Energy Retirement Cash Balance Plan*. I have personal knowledge of the facts set forth herein and, if called as a witness could and would testify competently there. The affidavit is submitted in support of the Plaintiffs' Motion for Class Certification and, in particular, to summarize my experience, which qualifies me to represent the Plaintiffs.

2. I graduated from University of South Carolina in 1964 with a B.S. Degree in Accounting and in 1967 received a J.D. Degree from the University of South Carolina Law School. In 1968, I received a Master of Laws Degree in Taxation from the New York University School of Law, graduate division. I have authored articles in the South Carolina Law Review and in the national publication Taxation for Lawyers. In addition, I have been

on the panel and lectured at a number of continuing education programs for attorneys and accountants. I am admitted to practice in all state and federal courts in the State of South Carolina, all state courts in North Carolina, and the federal district courts for the eastern, middle and western districts of the State of North Carolina, the United States Tax Court, the United States Court of Appeals for the Fourth Circuit, the Fifth Circuit and the Eleventh Circuit, and the United States Supreme Court. I am also a permanent member of the Fourth Circuit Judicial Conference. I have either tried or argued motions in all these courts, including an argument before the United States Supreme Court in November of 2005 in the case of *Wachovia Bank, N.A. v. Schmidt*, C.A. No. 04-1186

3. Since June 1968, I have practiced law in Greenville, South Carolina. During that period, my practice has primarily been limited to handling tax, corporate and securities matters. During the course of my practice, I have participated as lead counsel or co-lead counsel in at least twenty civil cases involving complex corporate tax or securities matters. The majority of these cases were pursued in the Federal Courts in the States of South Carolina, North Carolina, Tennessee, Georgia, Colorado and Louisiana. Most of this litigation involved multiple defendants, multi-state discovery and all aspects of motion practice. In addition to this, I have served as lead counsel or co-counsel for Plaintiffs in the following complex cases: Multi Media securities litigation filed in the Court of Common Pleas for Greenville County (as a result of this action, the company elected a recapitalization plan which resulted in an increase of $7.00 per share over the initial freeze-out offer. Without considering the potential value of the opportunity for continued equity participation, it was

estimated that the benefit to the public shareholders was in excess of $40 million); *Moorman v. Crawford, et al.*, Case No. CC-86-0050-M, U.S. District Court, Western District of North Carolina (this was a stockholder's derivative action filed on behalf of the stockholders in a large closely held corporation. A settlement arrangement was entered into with the company wherein the company made an offer to all of its shareholders to purchase all or part of their stock at substantial amounts over previous stock purchases); *Kitchens v. U.S. Shelter*, 82-1951-1, U.S. District Court for the District of South Carolina (this was a class action securities matter involving a judgment of $6.2 million dollars); *Phillips v. Beeber*, C.A. #9-88-2051-3, U.S. District Court for the District of South Carolina (this was an ERISA class action involving termination of a pension plan of Trailways Bus Lines. This litigation resulted in terminating the pension plan and recovering a surplus for the benefit of the class which exceeded $30 million dollars); *Thomas v. Tru-Tech*, U.S. District Court for the District of South Carolina, U.S. Dist. LEXIS 15929 (this was an ERISA class action involving termination of a pension plan. Plaintiffs received a $217,000, non-jury verdict, Judge G. Ross Anderson; affirmed by the 4th Circuit, U.S. Court of Appeals); *Patriots Point Securities Litigation,* U.S. District Court for the District of South Carolina (this was a class action involving a defaulted bond issue. Plaintiffs received a $12.7 Million settlement in 1992); *Bonney v. Grainger*, 356 S.E.2d 137 (S.C. Ct. of Appeals) (this was trust litigation in which long standing trustee of some 40 years was removed for lack of authority to act as trustee); *The State of South Carolina, Ex relatione, T. Travis Medlock, Attorney General vs. National Council on Compensation Insurance, Inc., et al.* C.A. No. 94-CP-23-2428, Court of Common

Pleas, Greenville County, South Carolina (this was a representative action involving anti-trust issues on assigned risk premiums in the South Carolina worker's compensation market. Plaintiffs received a settlement of approximately $32 Million in 1998); class counsel in *Vogt v. Greenmarine Holding, LLC,* C.A. No. 02 Civ. 2059 (GEL), a WARN Act litigation in Southern District of New York arising from plant closing in 13 states. This matter was recently resolved in a mediated settlement for $8.5 Million.

4. I believe that my areas of practice and experience make me imminently qualified to represent the Plaintiffs and proposed Class Members in this action, and I will vigorously prosecute the claims on their behalf.

James R. Gilreath

SWORN and subscribed to before me
this 26th day of April, 2006

William M. Hogan

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 1/30/13

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

KENNETH WALTON GEORGE, *et al.*,	)	
	)	
Plaintiffs,	)	**C/A No: 8:06-CV-373-RBH**
	)	
vs.	)	
	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN, *et al.*,	)	
	)	
Defendants.	)	

AFFIDAVIT OF CHERYL F. PERKINS IN SUPPORT OF MOTION FOR CERTIFICATION OF A CLASS

PERSONALLY APPEARED before me, Cheryl F. Perkins, who being duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiffs in *George v. Duke Energy Retirement Cash Balance Plan*. This affidavit is submitted in support of the Plaintiffs' Motion for Class Certification and, in particular, to summarize the experience of members of my firm, which qualifies the firm to represent the proposed class.

2. I am a partner in the Columbia, South Carolina firm, Whetstone, Myers, Perkins & Young, L.L.C. It is recognized as one of the leading litigation firms in South Carolina and is regularly referred cases from other counsel seeking assistance in complex trial litigation.

3. My legal background is as follows: In 1980, I graduated from the University of South Carolina School of Law and for my entire twenty-five years of practice I have focused on complex civil litigation. My experience with class actions, and/or representative litigation, includes representation of the State of South Carolina in the "Tobacco Litigation"; representation of the State of South Carolina in representative litigation brought on behalf of employers in the State seeking restitution for excess workers compensation premiums based upon allegations of price fixing (resulting in a settlement on

behalf of the employers valued at $32 million); class counsel in WARN Act litigation in the Southern District of New York arising from plant closings in 13 states (resulting in $8.5 million settlement); representation of multiple direct action and opt-out dealerships in multi-district litigation against American Honda Motor Company, based on allegations of civil racketeering and other business torts.

4. Over the years of my practice, I have represented plaintiffs in dozens of cases involving unfair trade practices, employment law, consumer fraud, mass torts, civil racketeering, insurance coverage disputes, among other areas of complex litigation.

5. Charles W. Whetstone, a partner in Whetstone, Myers, Perkins & Young, L.L.C., is also counsel of record in this matter. Mr. Whetstone graduated from the University of South Carolina School of Law in 1975 and served as a South Carolina Circuit Court Judge from 1991 to 1998. Mr. Whetstone participated in the class action/representative litigation outlined above in paragraph 3.

6. Thad L. Myers, a partner in Whetstone, Myers, Perkins & Young, L.L.C., is also counsel of record in this matter. Lt. Col. Myers graduated from the University of South Carolina School of Law in 1988. He also presently serves as the Staff Judge Advocate for the 169th Fighter Wing at McEntire Air National Guard Station in Eastover, South Carolina. Lt. Col. Myers has participated in numerous complex cases including a putative class action against Purdue Pharma alleging deceptive marketing and failure to warn in the distribution of the pain medication, Oxycontin.

Cheryl F. Perkins

SWORN and subscribed to before me
this 25th day of April, 2006

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 3/21/2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

KENNETH WALTON GEORGE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	**C/A No.: 8:06-CV-373-RBH**
vs.	)	
	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN, *et al.*,	)	

Defendants.

AFFIDAVIT OF MONA LISA WALLACE, ESQ.

PERSONALLY APPEARED BEFORE ME, Mona Lisa Wallace, who being duly sworn, deposes and says: ss, after being duly sworn, states as follows:

1. I am co-counsel for the Plaintiffs in the above captioned action. I have personal knowledge of the facts stated herein and, if called as a witness could and would testify to same. This affidavit is submitted in support of Plaintiffs' Motion for Class Certification and, in particular, to summarize my experience, which qualifies me to represent the Plaintiffs.

2. I am an attorney and partner in the firm Wallace and Graham, P.A., and am licensed to practice law in the states of South Carolina, North Carolina and Texas, as well as numerous federal courts, including: the District of South Carolina and the Western, Eastern & Middle Districts of North Carolina; United States Supreme Court and the United States Court of Appeals for the Fourth Circuit, among others.

3. My legal background is as follows: I attended Wake Forest University School of Law and received a Juris Doctor Degree with Honors in 1979. Since 1979 I have been engaged in the private practice of law in Salisbury, North Carolina, concentrating in civil litigation.

4. I have been a lawyer representing plaintiffs and employee plaintiffs in numerous types of litigation for over 20 years. During that time, I, and my law firm have represented clients, including numerous Duke Energy employees, in the areas of civil litigation, workers compensation, general and premises liability, insurance coverage, consumer protection, personal injury, mass and toxic torts and products liability including asbestos, silica, radiation, chemical poisonings, prescription drugs, and other similar occupational and product related claims, as well as ERISA claims. The aforementioned claims and matters have often involved mass and/or class claims.

5. I have had a long and active involvement in Trial Lawyers for Public Justice ("TLPJ"). I am a member of the Executive Committee and the Board of Directors of this organization. TLPJ is a national public interest law firm with offices in Washington, D.C. and Oakland, California. A volunteer network of more than 3,000 of the best trial lawyers in the United States, this organization in which I am most actively involved, is dedicated to accepting and litigating cases that involve the public good. I have held various other positions including TLPJ Diversity Committee, Co-Chairman of the Program Development Committee, Case Development Committee, Co-Chairman of the Major Donor/Special Gifts Committee, and North Carolina State Coordinator.

6. My involvement in TLPJ has included actively working on issues with regard to class actions and class-wide litigation, including active participation in our class action abuse project which is dedicated to preventing the abuse of the class action mechanism by attorneys and parties seeking to enter improper and collusive settlements that do not adequately provide relief to victims and consumers.

7. I have been active with the North Carolina State Bar, including as Former Advisory Member of the Rules of Professional Conduct Review Committee, Former Member of the Public Service and Information Committee, Former Member of the Family Law Committee. My other Professional Appointments have included appointment to the Wake Forest School of Law Board of Visitors, to the Catawba College Board of Trustees, and to the Hood Theological Seminary Board of Trustees.

8. I am a member of the North Carolina Academy of Trial Lawyers ("NC ATLA"). My involvement with NC ATLA includes appointment to the Former Executive Committee for Workers' Compensation, to the Legislative Committee, and to the PAC (Political Action Committee) Trustee.

9. I am a member of the Association of Trial Lawyers of America and the North Carolina Association of Women Attorneys, and of the American Bar Association and the Association of Trial Lawyers of America (Patron). I am also a member of the ABA Task Force on Asbestos within the Tort Trial and Insurance Practice Section.

10. I have successfully brought, litigated, and/or settled numerous multiple-claimant and mass-tort claims, including asbestos claims on behalf of thousands of workers. My law

firm is experienced in and capable of administering and processing large groups of claims and ongoing lawsuits.

11. I believe that I and the other attorneys representing the plaintiffs in this action have the time, experience and knowledge necessary to represent the plaintiff class competently and vigorously.

FURTHER DEPONENT SAYETH NOT.

This the 27th day of April, 2006.

Mona Lisa Wallace

Mona Lisa Wallace

SWORN to before me this
27th day of April, 2006

Rita C. Davis (L.S.)
Notary Public for North Carolina
My commission expires: 8/19/2011

Rita C. Davis NOTARY PUBLIC Johnston County, NC