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U.S. District Court

District of South Carolina

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Case Name: George et al v. Duke Energy Retirement Cash Balance Plan et al
Case Number: 8:06-cv-373
Filer: Henry Miller
Kenneth Walton George
Dennis Reed Bowen
Clyde Freeman
George Moyers
Jim Matthews
Document Number: 1

Docket Text:
COMPLAINT against Duke Energy Retirement Cash Balance Plan, Duke Energy Corporation (Filing fee $ 250 receipt number 448269.) Service due by 6/6/2006, filed by Clyde Freeman, George Moyers, Jim Matthews, Henry Miller, Kenneth Walton George, Dennis Reed Bowen.(gkra,)

The following document(s) are associated with this transaction:

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8:06-cv-373 Notice will be electronically mailed to:

James Robinson Gilreath jim@gilreathlaw.com,

William Mitchell Hogan bhogan@gilreathlaw.com,

Cheryl F Perkins cperkins@attorneyssc.com,

Mona Lisa Wallace jcrouch@wallacegraham.com; bousley@wallacegraham.com; rdavis@wallacegraham.com; thester@wallacegraham.com; tcowan@wallacegraham.com

Charles W Whetstone , Jr cwhetstone@attorneyssc.com, probinson@attorneyssc.com

8:06-cv-373 Notice will be delivered by other means to:

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

KENNETH WALTON GEORGE, DENNIS REED BOWEN, CLYDE FREEMAN, GEORGE MOYERS, JIM MATTHEWS, and HENRY MILLER, on their own behalf and on behalf of a class of persons similarly situated,	**Case No.____________**
Plaintiffs,	**CLASS ACTION COMPLAINT [JURY TRIAL DEMANDED]**
vs.	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN and DUKE ENERGY CORPORATION,	
Defendants.	

Plaintiffs, on behalf of themselves and all others similarly situated, file this Complaint against the defendants and respectfully allege as follows:

I. JURISDICTION AND VENUE

1. This is a class action to enforce and redress violation of the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§1001, *et seq.* ("ERISA") and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* ("ADEA"). This Court has subject matter jurisdiction pursuant to 29 U.S.C. § 1132(e) & (f), 29 U.S.C. § 626 and 28 U.S.C. §1331.

2. This Court has personal jurisdiction over the parties pursuant to 29 U.S.C. § 1132(e) & (f) [ERISA § 502(e) & (f)] and Fed. R. Civ. P. 4(k).

3. Venue is proper in this district pursuant to 29 U.S.C. § 1132(e)(2) [ERISA Section 502(e)(2)], because the Plan was administered in this District, some or all of the

breaches for which relief is sought occurred in this District, and/or in that one or more of the defendants resides in or can be found in this District.

4. Plaintiffs have standing to bring this action pursuant to 29 U.S.C. § 1132(a)(1)(B) [ERISA Section 502(a)(1)(B)] because plaintiffs bring this action to recover benefits due them under the terms of the Duke Energy Retirement Cash Balance Plan [the "Plan"], to enforce their rights under the terms of the Plan, and/or to clarify their rights to future benefits under the terms of the Plan.

5. Plaintiffs have standing to bring this action pursuant to 29 U.S.C. § 1132(a)(3)(A) & (B) [ERISA Section 502(a)(3)(A) & (B)] because plaintiffs bring this action to enjoin acts and practices which violate provisions of ERISA and/or the terms of the Plan, and/or to obtain other appropriate equitable relief to redress such violations or to enforce provisions of ERISA or of the Plan.

6. Plaintiffs have standing under 29 U.S.C. § 626 because they are aggrieved persons under the ADEA.

7. The proposed class, through plaintiffs Freeman and Bowen, have exhausted administrative remedies under the Plan prior to initiating this action, pursuant to written notification, dated June 7, 2005, from defendants of a final denial of plaintiffs' appeals.

8. The proposed class, through plaintiffs Matthews and George have exhausted their administrative remedies pursuant to the ADEA by obtaining 90-day right to sue letters, dated November 7, 2005, from the Equal Employment Opportunity Commission ("EEOC") pursuant to claims they filed with that agency, which letters were received by plaintiffs on November 8, 2005.

II. PARTIES

9. Plaintiff Kenneth Walton George ("George") is a citizen and resident of Seneca, South Carolina and resides within the Anderson Division of the District Court for the State of South Carolina. George became employed with Duke Energy in 1970. George was employed at the Duke Energy Oconee nuclear facility. George took early retirement from Duke Energy in December 2003.

10. Plaintiff Dennis Reed Bowen ("Bowen") is a citizen and resident of Clover, South Carolina. Bowen became employed with Duke Energy in 1972. Bowen was employed at the Duke Energy Catawba nuclear facility. Bowen took early retirement from Duke Energy in November 2003.

11. Plaintiff Clyde Freeman ("Freeman") is a citizen and resident of Woodleaf, North Carolina. Freeman became employed with Duke Energy Corporation in 1973. Freeman took early retirement from Duke Energy Corporation in November 2003.

12. Plaintiff George Moyers ("Moyers") is a citizen and resident of Morganton, North Carolina. Moyers became employed with Duke Energy Corporation in 1960, and took retirement in 1999.

13. Plaintiff Jim Matthews ("Matthews") is a citizen and resident of North Carolina. Matthews became employed with Duke Energy Corporation in 1972. Matthews is currently employed with Duke Energy Corporation as a field planner and part time electronics specialist at the Duke Energy McGuire Nuclear Station.

14. Plaintiff Henry Miller ("Miller") is a citizen and resident of North Carolina. Miller became employed with Duke Energy in 1970 and is still currently employed with Duke Energy.

15. Each Plaintiff is a current or former Duke Energy Corporation employee and a pension plan "participant" within the meaning of 29 U.S.C. § 1002(7).

16. Defendant Duke Energy Corporation ("Duke Energy") is a North Carolina corporation with its principal place of business located at 422 South Church Street, Mail Code PB05E, Charlotte NC 28202-1904, and may be properly served with process at its corporate office in Charlotte or through its Registered Agent, CT Corporation System, 225 Hillsborough Street, Raleigh NC 27603. Duke Energy is qualified to do business in South Carolina and does business in South Carolina.

17. Defendant, The Duke Energy Retirement Cash Balance Plan (the "Plan" or "Cash Balance Plan") is an entity which may be sued pursuant to 29 U.S.C. § 1132(d)(1) [ERISA Section 502(d)(1)]. The administrative offices of the Plan are in Charlotte, North Carolina. The Plan may be served with process through having process served upon Duke Energy as Plan trustee and/or Plan administrator pursuant to 29 U.S.C. § 1132(d)(1), [ERISA § 502(d)(1)].

18. The Plan is an "employee benefit plan," as defined by 29 U.S.C. § 1002(3), and an "employee pension benefit plan," as defined by 29 U.S.C. § 1002(2)(A).

19. Duke Energy is an "employer" pursuant to 29 U.S.C. § 1002(5), functions as "administrator" and "plan sponsor" for and of the Plan pursuant to 29 U.S.C. § 1002(16), and functions as a "fiduciary" for the Plan pursuant to 29 U.S.C. § 1002(21).

20. Service of process is authorized in any district where a defendant resides or may be found pursuant to 29 U.S.C. §1132(e)(2), [ERISA Section 502(e)(2)].

III. NATURE OF THE ACTION

21. Plaintiffs, on behalf of a class of present and former participants in The Duke Energy Retirement Cash Balance Plan, bring this action seeking damages and injunctive relief under a pair of federal statutory schemes, the Employment Retirement Income Security Act ("ERISA") and the Age Discrimination in Employment Act ("ADEA").

22. As described in detail below, the plaintiffs allege that Duke Energy converted its defined benefit plan to a cash balance defined benefit plan. The plaintiffs contend that the conversion violated ERISA and the ADEA. Specifically, the conversion violates ERISA and ADEA's prohibition against age discrimination. The manner of calculating interest credits is impermissibly based on age. The conversion also disproportionately affected employees in the protected age group. Furthermore, the conversion also resulted in an impermissible back loading of benefits in violation of ERISA's accrual provisions.

23. The plaintiffs further contend that Duke Energy implemented the conversion in a manner that violated its general fiduciary obligations under ERISA Section 404 and/or the terms of the Plan. As one of many examples, the calculation of interest credits during certain periods did not follow the terms of the Plan. The plaintiffs contend that the implementation of the conversion is so replete with errors that an independent auditor should be appointed to review the administration of the Plan.

IV. CLASS ACTION ALLEGATIONS

24. The plaintiffs bring this action on behalf of themselves and the following class of individuals:

> All present and/or former employees of Duke Energy who participated in the Duke Energy Retirement Cash Balance Plan on or after January 1, 1997.

25. Additionally, the plaintiffs bring this action on behalf of a subclass consisting of:

> All 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.

26. Both the proposed class and the proposed subclass are so numerous that joinder of all members is impracticable. Both the proposed class and proposed subclass have hundreds of Plan participants.

27. There are issues of fact or law that are common to all members of the class and subclass, including but not limited to the following:

(a) whether the allocation of interest credits violates ERISA Section 204 (b)(2)(A);

(b) whether the method of calculating lump sum distributions violates ERISA's anti-cut back provisions;

(c) whether the Plan and Duke Energy have misled employees about the effects of the cash balance conversion;

(d) whether the Plan incorrectly calculated interest credits during the 1997 and 1998 Plan years;

(e) whether the Plan and Duke Energy have misled employees about the interest credit calculations and the amendments to change such provisions;

(f) whether the "wear away" effect of the conversion disproportionately impacts participants over the age of 40;

(g) the method by which Duke Energy implemented the cash balance conversion;

(h) whether Duke Energy and other Plan fiduciaries have violated general fiduciary obligations owed to Plan participants in the handling and implementation of the cash balance conversion;

(i) whether the Plan violates ERISA's and/or the ADEA's prohibition against age discrimination;

(j) whether the Plan violates ERISA's benefit accrual requirements by excessively back loading accrual;

(k) whether the Plan's distribution of lump sum benefits to plaintiffs and other Class members violates the requirements of ERISA Section 204(c)(3) and 29 U.S.C. §1054(c)(3) that a lump sum distribution "shall be the actuarial equivalent" of an annuity commencing at normal retirement age;

(l) whether the Plan's distribution of lump sum benefits to plaintiffs and other Class members violates the requirements of the Plan documents themselves;

(m) whether the Plan's distribution of lump sum benefits to plaintiffs and other Class members violates the provisions of IRC § 417 (e), 26 U.S.C. § 417 (e), 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;

(n) whether defendants and the Plan violated the terms of the Plan by issuing distributions that were less than the participant's "accrued benefits."

28. The plaintiffs' claims are typical of the claims of class members. Plaintiffs are members of both the class and subclass. They are over the age of 40 and suffered wear away as a result of the conversion. Plaintiffs were also adversely affected by the improper calculation of lump sum amounts and the improper calculation of interest credits.

29. The plaintiffs are adequate representatives of the class. Plaintiffs do not have any interest adverse to the interests of class members. Plaintiffs have actively sought to redress problems through the administrative appeals process. Plaintiffs have

retained counsel who are experienced in ERISA and employment discrimination and have litigated class actions.

30. Pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, the class meets all requirements for class certification.

31. The class also meets the requirements of Rule 23(b)(1) of the Federal Rules of Civil Procedure because adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interest of the other members of the class not parties to the adjudications or would substantially impair or impede their ability to protect their interests. Specifically, this case is properly certified under Rule 23(b)(1) because a decision by the Court that the Plan implemented provisions that violated ERISA would require the defendants to take uniform action. Additionally, separate prosecution of the claims that the Plan violates ERISA's prohibition of age based accruals and/or the ADEA could result in inconsistent and varying adjudications as to the legality of the Cash Balance Plan. Such varying decisions risk establishing incompatible standards of conduct for the defendants.

32. The class is properly maintainable under Rule 23(b)(2) because the defendants have acted or refused to act on grounds generally applicable to the class. To name just a few examples, the Plan has refused to acknowledge that their method of calculating interest credits violates the Plan's own terms, ERISA and/or the ADEA. Additionally, the Plan has refused to correct problems associated with the calculation of interest during the 1997 and 1998 Plan years. Finally, the Plan has refused to acknowledge that the method of calculating lump sum benefits violates ERISA's anti-

cutback rule and/or the terms of the Plan itself. Accordingly, injunctive or declaratory relief with respect to the whole class would be appropriate.

33. In addition, the class meets the requirements of Rule 23(b)(3) of the Federal Rules of Civil Procedure because the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. Many of the common questions of law or fact involve structural features of the Plan. As such, these issues predominate over individualized issues. Additionally, a class action is superior to any other available methods to obtain a fair and efficient adjudication of the controversy. Plaintiffs are unaware of any other litigation commenced by class members that challenge the Cash Balance Plan and the defendants' implementation of the Plan. Given that all the class members are either current or former employees of Duke Energy, concentrating the litigation in this forum would not present undue burdens on absent members. Finally, plaintiffs do not foresee any difficulties in managing the case as a class action.

V. FACTUAL ALLEGATIONS

A. History of Duke Energy's Defined Benefit Plans

34. Duke Energy originally adopted a pension plan for its employees on or about January 1, 1943. Thereafter, the plan was periodically amended, including in 1992, 1994, 1995, 1997 and 1999. Prior to 1997, the plan was a traditional defined benefit plan. The plan provided for a retirement benefit after the participant had engaged in sufficient years of creditable service. Benefits were calculated under a formula based on factors including years of participation in the plan and the employee's annual pay (the "old formula").

35. Duke Energy reinforced the perception among its workers that they would receive a substantial pension benefit when they retired, throughout the years leading up to the cash balance conversion. For example, Duke Energy periodically provided to its employees statements purporting to show "your hidden paycheck" that workers understood to include their accumulated retirement benefits.

36. During the 1990s, however, the corporate culture at Duke Energy changed. Influenced by the example of competitors such as Enron, Duke Energy's new executive team sought to embark on a course of acquisitions and expansions and, upon information and belief, began making changes to the retirement pension plan in order to facilitate the funding of those new corporate plans.

37. In the mid-1990s, upon information and belief, Duke Energy contracted with an actuarial consulting firm that also participated in IBM's controversial cash balance conversion, to do the same for Duke. Upon information and belief, the cash balance formula and the transition features were designed for Duke Energy by Mercer Investment Consulting, Inc. ("Mercer"), and Mercer was also one of the firms involved with IBM in designing IBM's cash balance plan. IBM's plan has since been held to be unlawful and age-discriminatory by a Federal District Court.

38. Cash balance plans are defined benefit plans that combine attributes of a 401(k) plan and a traditional pension plan. The basic cash balance formula consists of a compensation credit and an interest credit. Compensation credits end after a participant terminates employment but the interest credits continue until the participant withdraws his benefit. Thus, the cash balance design mimics the salary contribution and investment

return of a 401(k) plan. Benefits that have accrued under the traditional plan are supposedly protected and cannot be reduced.

39. Many cash balance plans such as Duke Power's arise from "conversions," pursuant to which an employer converts a traditional benefit plan into a cash balance plan. Under IRS regulations, while an employer in theory would have the right to partially or wholly terminate a pension plan, as a practical matter employers are deterred from doing so because of high IRS tax penalties for plan termination. By characterizing what is in effect a partial plan termination as a plan "conversion," employers are able to evade the IRS tax penalty while nevertheless cutting benefits to workers.

40. In practice, employees have lost significant value from their pension when their company converts to a cash balance plan. Workers can lose up to 50% or more of the benefits they would have accrued under the old plan.

41. In preparing for the Cash Balance Plan conversion in 1996, Duke Energy made misleading statements and misrepresentations to workers to the effect that the new Plan would not impair employee expectations, would not greatly change the old plan, and that employees should not be concerned. Upon information and belief, Duke Energy also misled workers that it was required to convert to a cash balance plan because it was a prime target for a hostile takeover. Moreover, the new Cash Balance Plan was offered on a "take it or leave it" basis.

42. The language and provisions of the Plan documents themselves are not readily understandable to lay people. In descriptive materials provided to Duke Energy workers, Duke Energy sought to characterize the new Plan as benefiting workers. In "On Track" newsletters from 1996 in the time period leading up to and contemporaneous with

the conversion to the cash balance Plan, Duke Energy misinformed its employees as to the effect that the Plan conversion would have on them.

B. Disproportionate Effects of the Cash Balance Conversion

43. The Cash Balance Plan adopted effective on or about January 1, 1997 made drastic changes in how benefits were calculated, resulting in reduced balances for participants.

44. Pursuant to the cash balance formula, participants were assigned initial cash balance accounts. The cash balance accounts are hypothetical accounts, that is, separate individual accounts were not actually been set up for each participant as with a 401(k) or other defined contribution plan.

45. Transition provisions for the Cash Balance Plan provided that participants would receive the greater of the accumulated pension benefits to which they were already eligible under the old plan, or the amount hypothetically calculated for the new cash balance account. As a result of how the initial cash balance account was calculated and this transition provision, most employees earned no additional retirement benefits for a number of years beyond those to which they were already eligible under the defined benefit plan's retirement provisions. This meant that a "wearaway" period ensued in which employees' new cash balance amount, beginning much lower than their frozen benefit under the old plan, increased each year but did not reach the level of the benefit under the old plan. During this "wearaway" period, there was no growth to the amount of benefits employees had under the old plan as of December 31, 1996. Many employees retired before their "wearaway" period ended.

46. When Duke Energy decided to convert to the cash balance formula, it knew that most of its employees would be trapped in "wearaway" and that for years, their cash balance accounts would not move ahead of their frozen amount under old plan. However, Duke Energy did not fully and adequately notify its workers of this effect of the conversion.

47. Duke's undisclosed goal of using the pension plan conversion to enrich itself at the expense of its employees was successful. Duke Energy paid large annual amounts to fund the prior pension plan before conversion, contributing over $54 million each year in 1995 and in 1996, according to Duke Energy's SEC filings.

48. After conversion to the Duke Energy Cash Balance Plan, the company's annual Form 10-K filings with the SEC demonstrate that it made no contributions whatsoever to the Cash Balance Plan in any of the six operating years (1997-2002) that followed its January 1, 1997 effective date.

49. Under the traditional pension plan that Duke Energy had in place prior to the adoption of the 1997 Cash Balance Plan, a substantial amount of pension benefit accruals were to occur in the latter years of an employee's career with Duke Energy as he or she approached retirement age. Duke Energy promoted this feature of the old plan to its employees to encourage them to remain loyal to Duke Energy and not look for job opportunities with other employers.

50. As a result of the design of the traditional pension plan, Duke Energy employees had an expectation that if they put in a full career of loyal work for Duke Energy, they would be rewarded with a substantial pension benefit.

51. The traditional Duke Energy plan included an early retirement benefit. Senior workers in their 40s and 50s often planned to take early retirement before the normal retirement age of 65, based on Duke Energy's promises regarding the accrual of their pension plan benefit as they aged.

52. Duke's conversion to a Cash Balance Plan during the late 1990s, which was intended to and did cut benefits, prejudiced many of its older workers because these employees had put in years of working for the company based on Duke's promises that they were going to get a retirement pension at one amount, and suddenly the amount was greatly cut. Cash balance conversions left older workers stranded, too old to start their careers over again, and having to defer plans for early retirement, because their expected lump sum benefit had been slashed.

53. In a traditional pension plan, most of the benefit accrues during the latter part of an employee's career, favoring older and more senior employees. In a cash balance plan, however, benefits do not accrue in this way. Thus, the conversion from a traditional benefit plan to a cash balance plan leads to a loss in expected benefits for older workers.

54. Older workers with 20 years or so of employment suffer the greatest loss in value from their pension when their company converts to a cash balance plan. Workers can lose up to 50% of the benefits they would have accrued under the old traditional plan. When Duke Energy converted to its Cash Balance Plan in January 1997, older workers lost thousands of dollars in the value of their pensions, after putting in decades of work.

55. For example, plaintiff Henry Miller suffered a 50% reduction in the value of his pension, as the accrued benefit on his account under the former plan was $258,000 on December 31, 1996, but his opening account balance under the new Plan on the next day, January 1, 1997, was only $129,000.

56. When Duke Energy switched its employees over to the Cash Balance Plan, the older and most senior employees were started out with a cash balance amount that was much lower than their benefit as of December 31, 1996 under the old pension plan.

57. In "On Track" newsletters from 1996, in the time period leading up to and contemporaneous with the conversion to the Cash Balance Plan, Duke Energy misinformed older and senior workers as to the effect that the Plan conversion would have on them.

58. The wear away effect has negatively impacted all employees, but it has disproportionately impacted employees over the age of 40. Such disparate impact lacks any legitimate business justification.

C. Design of the Cash Balance Plan Impermissibly Ties Accrual of Benefits to Age

59. In addition to disparate impact on employees in the protected age class, the Plan also discriminates on account of age in the manner in which it credits the accounts on an annual basis.

60. Duke nominally credits the hypothetical cash balance account of each participant with two chief components on an annual basis. The first is a percentage of a participant's salary, referred to as the "contribution credit." The second component is interest on the participant's hypothetical account balance or an "interest credit." The interest credits are related to each pay credit and they are fully earned in the year that the

pay credit was made; the interest credits continue until retirement age, even if an employee leaves employment.

61. Under the Duke Energy Cash Balance Plan's scheme for crediting the hypothetical cash balance account of participants, a participant's benefit accruals (expressed as an age 65 annuity) decrease as the participant ages.

62. The cash balance formula used by the Duke Energy Cash Balance Plan for determining benefits reduces a participant's accrued benefit solely on increases in age or service.

63. The rate of an employee's benefit accrual under the Cash Balance Plan decreases on account of the employee's age.

D. Errors in Application of Plan Provisions

64. Plaintiff Kenneth George was a participant in the Plan during each of the eight quarters that comprise the years 1997 and 1998.

65. The Plan, as amended and restated effective January 1, 1997 (and executed on December 23, 1996), provides in pertinent part as follows:

> The interest factor for a particular month shall be the average yield on 30-year Treasury bonds published in the Federal Reserve Statistical Release H.15 for the end of the third full business week prior to the beginning of the calendar quarter preceding the first day of the calendar quarter in which the particular month occurs[.]

66. The Duke Energy Corporation Retirement Cash Balance Plan was subsequently amended and restated effective July 16, 1997 (and executed on July 16, 1997) to provide in pertinent part:

> The interest factor for a particular month shall be the average yield on 30-year Treasury bonds published in the Federal Reserve Statistical Release H.15 for the end of the third full business week prior to the beginning of the calendar quarter in which the particular month occurs[.]

67. The Duke Energy Corporation Retirement Cash Balance Plan was subsequently amended and restated effective January 1, 1999 (and executed on December 11, 1998) to provide in pertinent part:

> The Interest factor means, for a particular month, the average yield on 30-year United States treasury bonds, as published in the United States Federal Reserve Statistical Release H.15 for the end of the third full business week of the month prior to the beginning of the calendar quarter in which such month occurs[.]

68. The first amendment changed the reference date for the interest rate by three months, the second changed the reference date from the 3rd week prior to the start of the quarter to the 3rd week of the month prior to the start of the quarter (in essence, a change of one week's time from three weeks measured from the end of the month to three weeks measured from the beginning of the month). An application of these terms under this reading yields a higher benefit to Plan participants than is reflected and disclosed to them in the periodic statements that were issued by Duke Energy.

69. Duke Energy did not apply the plain language of the Plan documents, in violation of Plan terms and ERISA, with the result that the benefits of plaintiff George and the Class members were understated.

70. Calculation of the pertinent interest factors for plaintiff George based on the plain language of these Plan provisions yields a result greater than the actual figures calculated by Duke Energy and/or its agents and, upon information and belief, has resulted in a net loss to each member of the Class – a sizeable total loss to Plan participants and a commensurate benefit to Duke Energy.

71. Defendant Duke Energy, through its Benefits Committee, improperly miscalculated Plan benefits for Plan participants during each of the eight quarters

comprising the years 1997 and 1998 by implementing a methodology for computing benefits that was clearly at odds with the provisions of the pertinent Plan documents themselves during the pertinent times, in violation of 29 U.S.C. § 1132(a)(1)(B), which provides a contract-based cause of action to participants and beneficiaries to recover benefits, enforce rights, or clarify rights to future benefits under the terms of an employee benefit plan.

72. Based on the foregoing, and upon information and belief, defendants' Benefits Committee and the administrative personnel of Duke Energy's responsible Plan, over the years in question, were aware of the discrepancy between the language of the Plan documents, and the calculation and interest credit formula as-applied. Defendants, however, did nothing to redress the discrepancy and failed to act in the best interests of Plan participants and beneficiaries.

73. During the relevant period, defendants twice amended the Plan to revise the Plan language to allow it to calculate benefits in the non-compliant manner in which it had been operating. Even following completion of the amendment process, such that the Plan terms thereafter conformed to the Benefits Committee's pattern of interest rate calculation, defendants never corrected the 1997-1998 errors to account for the two year period in which it had calculated benefits improperly.

74. Based on the plain language of the Plan documents; the nature of the successive changes to the pertinent Plan language over time; and the sophistication of Duke Energy and its Plan administrators and actuarial agents, plaintiffs allege, on information and belief, that the above-referenced interest rate miscalculation was not inadvertent but instead constituted application of erroneous interest rates to the benefit of

Duke Energy and the detriment of Class members. Plaintiffs are further informed and believe that the belated attempts to "fix" the Plan's terms where not accomplished in the ordinary course in that Plan brochures and informational materials that were provided to participants during the course of Plan amendments did not - then or later -- disclose this issue.

75. By approving, implementing and perpetuating, without disclosure to Plan participants or beneficiaries the above-referenced methodology concerning interest rate calculations, in blatant disregard to the plain language of the pertinent Plan provisions, plaintiffs are informed and believe that Duke Energy violated its fiduciary duties to the plaintiffs and others similarly situated under 29 U.S.C. § 1109.

76. Upon information and belief, the Plan's calculation of the opening cash balances also contained numerous errors. For example, employees who were paid commissions did not have such amounts included in the compensation for the purposes of calculating their opening balance.

E. Calculation of lump sum distributions under the Cash Balance Plan results in a loss of accrued benefits.

77. In order to ensure that the plan does not reduce a participant's accrued benefit in violation of ERISA § 204(g), the plan must convert the cash balance account to an annuity, then compare it to the prior plan accrued benefit, then choose the greater of the two.

78. An accrued benefit must be defined in terms of an annuity according to ERISA's "definitely determinable" rule. Page 8 of the ninth amendment to the Plan defines the actuarial equivalence basis for converting the cash balance single life annuity

to a lump sum. Therefore, by reciprocity, it provides the basis for converting a notional lump sum, such as the cash balance account, to the cash balance single life annuity.

79. The actuarial equivalence basis is the 1994 group annuity mortality table and the applicable interest rate. The applicable interest rate is that set by the 30-year treasury yield for the month of November of the prior year, currently 4.89%, under IRC § 417.

80. Upon information and belief, Duke is calculating the single life annuity for Plan participants on the basis that the single life annuity is equal to the cash balance account of the participant divided by the life annuity factor using the 1994 table and 4.89%, and that it is also greater than the prior plan accrued benefit.

81. As an example, Duke calculated the single life annuity for plaintiff Kenneth George at his request when he elected to receive a lump sum payment. The figure Duke generated was consistent with using the above-described basis, i.e., the single life annuity is equal to the cash balance account divided by the life annuity factor using the 1994 table and 4.89%, and is also greater than the prior plan accrued benefit.

82. Plaintiffs are informed and believe that Plan Section 5.04(c) requires use of the lesser of 4% or the "applicable interest rate" to determine the lump sum amount of this accrued benefit. Using the mortality table and 4%, the lump sum exceeds the cash balance account. For plaintiff Kenneth George, the true lump sum so calculated is approximately $484,000 versus the lump sum actually paid of approximately $448,000, which represents an underpayment of $36,000 in that single instance.

83. Upon information and belief, defendants have improperly failed to follow the Plan's provisions in determining lump sum payments, and are doing so to the detriment and damage of Plan participants who elect to take such lump sum payments.

84. The Plan also uses a pre-mortality discount when it calculates lump sum benefits. The pre-mortality discount results in an improper reduction of accrued benefits and, ultimately, the amount received by the participants.

F. Conversion Resulted in Partial Termination

85. The conversion of the prior defined benefit plan to the Cash Balance Plan resulted in a partial termination of the prior plan.

86. A partial termination results in immediate vesting for all participants of the prior plan.

87. Upon information and belief, Duke Energy did not treat the conversion as a partial termination. As a result, participants in the prior plan, who left employment prior to vesting but after the conversion, had their accrued benefit forfeited.

FOR A FIRST CAUSE OF ACTION
(ERISA Section 502(a)(1)-Age Based Accruals)

88. The plaintiffs incorporate by reference the factual allegations in the preceding paragraphs.

89. The Duke Energy Retirement Cash Balance Plan factors age into the calculation of interest credits. As a result, older employees/participants receive less interest credits than younger employees/participants. Calculating interest credits on such a basis violates ERISA Section 204(b).

90. As a direct and proximate result of these violations of ERISA Section 204(b), plaintiffs and other similarly situated Plan participants were damaged because they received less interest on account of age.

91. Plaintiffs are informed and believe that they, and other similarly situated Plan participants are entitled to the declaration of this Court that the Duke Energy Retirement Cash Balance Plan violates ERISA Section 204(b) and thus cannot lawfully be maintained; that the defendants be required to restore all lost interest credits to participants plus any loss of benefits arising from the failure to properly award credits; that defendants be required to pay participants any lost benefits arising from the failure to properly pay interest credits; and that the defendants be required to pay the appropriate benefits based on a single life age 65 annuity

FOR A SECOND CAUSE OF ACTION
(ADEA Claim Against Defendant Duke Energy)

92. The plaintiffs incorporate by reference the factual allegations in the preceding paragraphs.

93. The implementation of the Duke Energy Retirement Cash Balance Plan resulted in "wear away" as described above. This, in turn, meant that long-term employees had benefit accruals frozen for several years. The "wear away" effect disparately impacted employees over the age of 40.

94. Additionally, the defendant Duke Energy knowingly and willfully adopted a cash balance plan that discriminated against employees over the age of 40. Duke Energy knew or recklessly disregarded the fact that employees over the age of 40 would disproportionately suffer as a result of the conversion. Duke Energy implemented the

conversion knowing that it would effectively freeze benefit accruals for most employees over the age of 40.

95. The plaintiffs are informed and believe that they, and other similarly situated Plan participants, are entitled to an award of lost benefit accruals resulting from the conversion as well as liquidated amounts based on such lost benefit accruals.

FOR A THIRD CAUSE OF ACTION
(ERISA Section 502(a)(1)- Lump Sum Distributions)

96. The plaintiffs incorporate by reference the factual allegations in the preceding paragraphs.

97. The defendants fail to properly calculate the lump sum distributions that participants are entitled to under the Cash Balance Plan. Rather than utilizing the appropriate interest rate to reduce the participants' retirement benefit to present value, the defendants have utilized an interest rate that deprives participants of the full benefit promised under the Plan.

98. Additionally, the defendants have utilized a pre-mortality discount. The pre-mortality discount reduces the amount of a lump sum distribution a participant receives.

99. As a result, the defendants' method of calculating lump sum distributions effectuates an unlawful reduction in accrued retirement benefits. Such reduction in accrued benefits violates ERISA's anti-cut back rule and the express terms of the Plan.

100. The plaintiffs are informed and believe that they, and other similarly situated Plan participants, are entitled to the order of this Court declaring that the defendants' method of calculating lump sum distributions violates ERISA's anti-cut back provisions and the express terms of the Plan, and that defendants be required to restore

any lost benefits resulting from the defendants' unlawful calculation of lump sum distributions.

FOR A FOURTH CAUSE OF ACTION
(ERISA Section 502(a)(1)-Miscalculation of Interest Credits)

101. The plaintiffs incorporate by reference the factual allegations in the preceding paragraphs.

102. Under the Cash Balance Plan, a participant receives (at specified intervals) a salary-based credit and an interest based credit. These credits are "deposited" in a hypothetical account. The Plan specifies the method for determining how to calculate the interest credit. During the 1997 and 1998 Plan years, the Plan failed to follow the procedure specified in the Plan document for calculating the appropriate interest rate credit.

103. As a result of this failure, participants who received lump sum distributions or monthly annuity payments did not receive the full amount they were entitled to under the Plan. Additionally, participants who have not yet retired will not receive the full amount of benefits they are entitled to unless the error in calculation is corrected and an appropriate amount credited to their hypothetical accounts.

104. The plaintiffs are informed and believe that they, and other similarly situated Plan participants, are entitled to the declaration of this Court that the defendants erroneously calculated interest credits during 1997 and 1998 and that such error resulted in the wrongful denial of benefits to retirees and further requiring that the defendants restore any lost benefits resulting from their erroneous calculation of interest credits.

FOR A FIFTH CAUSE OF ACTION
(Section 502(a)(1)-Back loading)

105. The plaintiffs incorporate by reference the factual allegations in the preceding paragraphs.

106. As noted above, Duke Energy implemented its Cash Balance Plan in a manner that effectively froze accrual rates for employees with long-term service. The wear away resulted because the Plan used an approximate 7 percent interest rate to calculate the present value of accrued benefits under the old plan. Because accruals under the Cash Balance Plan were based on a lower interest rate, the present value of accrued benefits under the prior plan were substantially greater than the accrued benefits under the cash balance formula.

107. Under the Duke Energy Retirement Cash Balance Plan participants do not accrue any additional benefits until the value of their hypothetical account exceeds the present value of accrued benefits under the prior plan. The result of this rule is that the plaintiffs did not accrue benefits for substantial periods of time.

108. Because there is a substantial period where there is no accrual of benefits, the Cash Balance Plan violates ERISA Section 204(b)(1)(B) which provides that the rate of accrual in a given Plan year may not be more than 133 1/3 percent of the prior year.

109. The plaintiffs were injured as a result of the impermissible back loading because (1) the lump sum distributions were less than they should have been had accrual rates complied with Section 204(b) and/or (2) the amount of the participant's accrued benefit did not increase during the wear away period, since the frozen benefit continued to exceed the hypothetical cash balance account.

110. The plaintiffs are informed and believe that they, and other similarly situated Plan participants, are entitled to the declaration of this Court that the defendants back loaded accruals in violation of Section 204(b)(1) and (2) and further that the defendants be ordered to restore any lost benefits resulting from the defendants' unlawful back loading of benefits and that the defendants be ordered to retroactively reform the Plan so that it complies with Section 204(b)(1).

FOR A SIXTH CAUSE OF ACTION
(ERISA Section 502(a)(3)-Breach of Fiduciary Duty)

111. The plaintiffs incorporate by reference the factual allegations in the preceding paragraphs.

112. The defendants have breached fiduciary duties owed under ERISA. The defendant Duke Energy is a fiduciary of the Cash Balance Plan. As a fiduciary, Duke Energy was required under 29 U.S.C. § 1104(a)(1)) [ERISA Section 404(a)(1)] to administer the Plan in the sole interest of participants and beneficiaries and for the exclusive purpose of providing benefits. Section 404 requires an ERISA fiduciary to speak honestly and forthrightly with participants and beneficiaries. Fiduciaries are required to provide accurate and truthful information to participants and beneficiaries.

113. Section 404(a)(1) also requires ERISA fiduciaries to discharge their duties with the care, skill, prudence and diligence that a prudent person acting in like capacity and familiar with the operation of a defined benefit would exercise. A fiduciary that negligently carries out his or her duties under the Plan violates Section 404's standard of reasonable care. The duty of reasonable care also assumes that the fiduciaries will

diligently act to correct problems that may jeopardize the interests of participants/beneficiaries.

114. The defendants breached their fiduciary duties 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.

115. Additionally, the defendants have breached standards of care in the manner that they have administered the Cash Balance Plan. For example, Duke Energy and/or its designee erroneous calculated interest credits and failed to follow the terms of the Plan. Upon information and belief, Duke Energy and/or its designee have committed numerous errors in the calculation of opening account balances and/or the calculation of interest credits.

116. Finally, the defendants breached Section 404(a)(1)'s duty of reasonable care when they allowed the Cash Balance Plan to operate in violation of ERISA. The defendants failed to correct, among other things, (a) the problems related to lump sum distributions (i.e. improper whipsaw calculation; premortality discount etc.); (b) problems related to back loading of benefits; and (c) violations of Section 204(b)'s prohibition against age based benefits accrual.

117. The plaintiffs are informed and believe that they, and other similarly situated Plan participants, are entitled to the declaration of this Court that the defendants be required to retroactively reform the Cash Balance Plan so that it is in compliance with law and to recalculate participants/beneficiaries' benefits under the revised and reformed Plan and pay restitution to the Plan participants. Plaintiffs are further informed and believe that they are entitled to the order of this Court appointing an independent auditor

(at defendants' cost) to review the Cash Benefit Plan and all cash balance accounts thereunder, including but not limited to, the method of calculating the value of the accounts, the history of contributions to the hypothetical accounts; the calculation of opening account balances, etc.

WHEREFORE, plaintiffs pray, on behalf of themselves and other similarly situated Plan participants, for judgment as follows:

A. That the Court certify the proposed Rule 23 class with respect to the ERISA claims, including an ERISA age discrimination sub-class consisting of participants over the age of 40; and (2) certify an ADEA opt-in class with respect to the subclass consisting of participants over the age of 40.

B. As to the First Cause of Action, that the Court:

1. Declare that the Cash Balance Plan violates Section 204(b) and, thus, cannot lawfully be maintained

2. Order the defendants to restore all lost interest credits to participants, plus the loss of benefits arising from the failure to properly award credits;

3. Order defendants to pay participants lost benefits arising from the failure to properly pay interest credits;

4. Order the defendants to pay the appropriate benefits based a single life age 65 annuity; and

5. Award reasonable attorney fees to plaintiffs' counsel.

C. As to the Second Cause of Action:

1. For judgment against defendants on behalf of members of the subclass of lost benefit accruals resulting from the conversion;

2. For judgment against defendants on behalf of members of the subclass of a liquidated amount based on such lost benefit accruals; and

3. Award reasonable attorney fees to plaintiffs' counsel.

D. As to the Third Cause of Action, that the Court:

1. Declare that the defendants' method of calculating lump sum distributions violates ERISA's anti-cut back provisions;

2. Order the defendants to restore lost benefits resulting from the defendants' unlawful calculation of lump sum distributions; and

3. Award reasonable attorneys fees to plaintiffs' counsel.

E. As to the Fourth Cause of Action, that the Court:

1. Declare that the defendants erroneously calculated interest credits during 1997 and 1998 and that such error resulted in the wrongful denial of benefits to retirees;

2. Order the defendants to restore lost benefits resulting from the defendants' erroneous calculation of interest credits; and

3. Award reasonable attorneys fees to plaintiffs' counsel.

F. As to the Fifth Cause of action, that the Court:

1. Declare that the defendants erroneously calculated interest credits during 1997 and 1998 and that such error resulted in the wrongful denial of benefits to Plan participants;

2. Order the defendants to restore lost benefits resulting from the defendants' erroneous calculation of interest credits; and

3. Award reasonable attorneys fees to plaintiffs' counsel.

G. As to the Sixth Cause of Action, that the Court:

1. Order the defendants to retroactively reform the Duke Energy Retirement Cash Balance Plan so that it is in compliance with law and recalculate participants/beneficiaries' benefits under the revised and reformed Plan;

2. Order the defendants to pay restitution to the Plan participants;

3. Appoint an independent auditor, at defendants' cost, to review the Cash Balance Plan and all cash balance accounts thereunder, including but not limited to, the method of calculating the value of the accounts, the history of contributions to the hypothetical accounts; the calculation of opening account balances, etc.; and

4. Award reasonable attorneys fees to plaintiffs counsel.

H. For pre-judgment interest as allowed by law.

I. For the reasonable costs and disbursements of this action.

J. Plaintiffs demand jury by jury on the ADEA claim and such other claims as the Court may determine to be triable by jury.

K. For such other and further relief as this Court may deem just and proper.

James R. Gilreath (Fed. I.D. No. 2101)
William M. Hogan (Fed. I.D. No. 6141)
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue (29601)
P.O. Box 2147
Greenville, SC 29602
(864) 242-4727 Telephone
(864) 232-4395 Facsimile
jim@gilreatlaw.com
bhogan@gilreathlaw.com

Charles W. Whetstone, Jr. (Fed. I.D. No. 4604)
Cheryl F. Perkins (Fed. I.D. No. 4969)
WHETSTONE MYERS PERKINS & YOUNG LLC
1303 Blanding Street (29201)
P.O. Box 8086
Columbia, South Carolina 29202
(803) 799-9400 Telephone
(803) 799-2017 Facsimile
cwhetstone@attorneyssc.com
cperkins@attorneyssc.com

Mona Lisa Wallace (Fed. I.D. No. 7216)
WALLACE & GRAHAM, P.A.
525 North Main Street
Salisbury, North Carolina 28144
(704) 633-5244 Telephone
(704) 633-9434 Facsimile

ATTORNEYS FOR PLAINTIFFS

Greenville, South Carolina
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