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,	)	
Plaintiffs,	)	**Case No.: 8:06-cv-00373-RBH**
v.	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN and DUKE ENERGY CORPORATION,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

This case centers upon Duke's conversion of its traditional defined benefit pension plan to a cash balance plan. Duke's cash balance plan is inherently age discriminatory under ERISA's age-based accrual rules because every dollar's worth of benefits credited to a 25-year-old is worth at least twice as much as the same benefit credit for a 50-year-old. This is a mathematical truth Duke does not deny.

Cash balance plans are a fairly new form of defined benefit pension plan. Congress adopted ERISA before the creation of cash balance plans. The first cash balance pension formula is generally credited to Bank of America in 1985. *See Lyons v. Georgia-Pacific Corp.*, 221 F.3d 1235, 1238, n.2 (11th Cir. 2000), *cert. denied*, 532 U.S. 967 (2001). Although it was not obvious to employees or the public at the outset, it is now established that cash balance formulas are a part of "corporate America's recent effort to curb costs by, *inter alia*, scaling back the benefits provided under pension plans." *Depenbrock v. CIGNA Corp.*, 389 F.3d 78, 79 (3rd Cir. 2004); *see also Hirt v. Equitable Ret. Plan*, 441 F. Supp. 2d 516, 536-37 (S.D.N.Y. 2006). Companies with older workforces, such as Duke, convert to cash balance plans as a way to reduce their future pension obligations, particularly to their older employees. *See* Edward A. Zelinsky, *The Cash Balance Controversy,* 19 Va. Tax Law Rev. 683, 713-14 (2000)(previously attached to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings).

The Plaintiff's ERISA age discrimination claim, stated in Count One of Plaintiffs' Complaint, turns on the meaning of the words "rate of benefit accrual," as used in ERISA § 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i). This is a purely legal issue. Accordingly, Plaintiffs seek a partial summary judgment ruling by this Court that "rate of employees' benefit accrual" refers

to the benefit promised by the plan (the output), rather than the hypothetical credits added to an employee's hypothetical account (the input). Or stated another way, the rate of an employee's benefit accrual refers to the employees' accrued benefit, the benefit expressed as an annuity at age 65, and not to the employer's contributions to the plan.

II. FACTUAL BACKGROUND OF THE DUKE PENSION PLAN.

Duke originally adopted a pension plan for employees in 1943. The plan was periodically amended in subsequent years. Prior to 1997, the plan was a traditional defined benefit plan. It provided for a retirement benefit after the participant had engaged in sufficient years of creditable service. Benefits were calculated using a formula based on factors including years of participation in the plan and the employee's annual pay. (Complaint ¶ 34).

Duke converted its traditional defined benefit plan to a cash balance[1] formula effective January 1, 1997. Under the new cash balance plan formula, each employee, as an ERISA plan participant, was assigned an initial cash balance account. This was a hypothetical account as opposed to an actual account that one would find in a true defined contribution plan such as a 401(k) or profit sharing plan. In a defined contribution plan, such as a 401(k) plan, money actually changes hands before the employee retires. The employer makes actual contributions in an account controlled, subject to the plan, by the employee. Under a traditional defined benefit plan, no individual account is set up for each employee, because until the employee retires, the amount of his benefit cannot be actually calculated, therefore, no money changes hands until the employee retires. The difference is: under a defined benefit plan, including cash balance plans, no benefit is paid to

[1]Cash balance plans are defined benefit plans that use a different formula from the traditional formula to calculate the value of a participant's retirement benefit.

the employee until retirement, and therefore, the benefit accruing to that employee each year has an actual value *only* when it results in a payment to him upon retirement. Before then, he has received nothing. It is because of this difference that the rules governing the two plans are different.

Under the new formula in Duke's cash balance plan, each plan participant receives a pay credit and a putative "interest credit." Plaintiffs contend the cash balance plan's manner of crediting the hypothetical account balance on an annual basis is improper and age discriminatory. The pay credit is based on the participant's salary. The hypothetical "interest credit" imitates interest accumulating on the hypothetical account balance. The "interest credits" continue until retirement age, even after the participant leaves employment. The "interest credits" subsequently cease, as set forth in the plan. As explained on pp. 27-28 of Plaintiffs' Reply to Duke's Motion for Judgment on the Pleadings, under Duke's plan, "interest credits" improperly cease by April of the year after the participant turns 70 ½ , which in and of itself renders the Duke plan in violation of ERISA's age discrimination requirements, since they cease on account of age.

As discussed in Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings, this manner of crediting the hypothetical account balance means that a participant's benefit accruals (expressed as an annuity at age 65) decrease as the participant ages. Accordingly, the cash balance formula reduces a participant's accrued benefit solely based on increases in age.

III . STANDARD GOVERNING MOTION FOR SUMMARY JUDGMENT

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Under Rule 56(c) of the Federal Rules of Civil Procedure, the court should grant summary judgment if the record shows there is no genuine issue as to any material fact,

and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). When considering the Plaintiffs' motion for summary judgment, the court must consider the evidence in the light most favorable to the defendants. *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007). In light of this standard, the facts set forth in this motion are either undisputed or represent the evidence of disputed facts in the light most favorable to the non-moving parties on the particular issue.

Under Rule 56(a), Fed.R.Civ.P., a party may "move with or without supporting affidavits for a summary judgment in the party's favor upon all [claims] or any part thereof." Thus, summary judgment may be granted as to any part of a claim. *Bell Microproducts, Inc. v. Global-Insync, Inc.*, 20 F.Supp.2d 938, 941 (E.D.Va. 1998). "Rule 56(d) operates in a case of partial summary judgment, where the court does not issue a summary judgment ruling on the entire case, but instead makes rulings which shape the litigation." *Id.* "Courts and commentators have stated that a partial summary judgment under Rule 56(d) is an appropriate procedure whereby a court can narrow the scope of trial." *Limehouse v. Resolution Trust Corp.*, 862 F.Supp. 97, 102 (D.S.C. 1994). Since such an order is generally not final, it is within the court's discretion to revise the order at a later point, giving proper notice to the parties so that no prejudice results. Rule 54(b) (any order not certified under Rule 54(b) that adjudicates fewer than all the claims of fewer than all parties is subject to revision at any time before entry of judgment).

IV. SUMMARY OF ARGUMENT

The narrow issue raised by this Motion is how must the "rate of an employees' benefit accrual" be determined for defined benefit plans for purposes of ERISA's age-based accrual standards, 29 U.S.C. § 1054(b)(1)(H)(i), in the context of a cash balance pension plan. This is a pure legal issue and there is a split of authority. There is no binding authority on this issue and the extant

authority is conflicting. One of the most recent opinions of the United States Court of Appeals of the Seventh Circuit in *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006), reversed a district court opinion that held cash balance plans to be *per se* illegal under ERISA. The Seventh Circuit's *Cooper* opinion held such plans to be proper under ERISA by undertaking a tortured, policy-based evaluation of the facially simple phrase, "rate of benefit accrual."

District Court decisions go both ways. Cases such as *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812 (S.D. Ind. 2000), declined to find the plans illegal. *Eaton* recognized that cash balance plans violate the plain language of ERISA, but chose to rewrite the statute and ignore its plain meaning. Other, better reasoned, district court opinions have held such plans to be *per se* illegal. The thorough and legally-sound district court opinion in *Cooper* was followed by a Connecticut District Court in *Richards v. FleetBoston Financial Corp.* 427 F. Supp. 2d 150 (D. Conn 2006). Since the decision in the *Richards* case, two more cases have been decided by District Courts in the Second Circuit, each holding cash balance plans to be *per se* illegal. *In re J.P. Morgan Chase Cash Balance Plan Litig.*, 460 F. Supp. 2d 479 (S.D.N.Y. 2006); *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323 (S.D.N.Y. 2006).

The *Citigroup* and *JP Morgan* opinions expressly rejected the holding and rationale of the *Cooper* Seventh Circuit opinion, and this Court should reject them as well. This Court should adopt the reasoning in the *Richards*, *Citigroup* and *JP Morgan* cases and hold, as a matter of law that the phrase "rate of an employee's benefit accrual" refers to the employee's accrued benefit, the benefit expressed as an annuity at age 65.

V. ARGUMENT

ERISA provides for two types of pension plans: (a) "defined contribution plans," and (b)

"defined benefit plans," and sets forth different legal requirements for each type of plan.

ERISA defines a defined-contribution plan as one where the employer periodically contributes a certain amount of money into the pension account for the employee. 29 U.S.C. § 1002(34). A defined contribution plan is "[a] pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses." *Id*. (emphasis added).

ERISA defines a defined-benefit plan as all plans that do not meet the definition of a defined contribution plan. 29 U.S.C. § 1002(35). A defined benefit plan is a pension plan other than an individual account plan. Thus, while ERISA defines a defined contribution plan very narrowly, it defines a defined benefit plan as a broad catch-all category for any plan that does not fit within the narrow definition of a defined contribution plan.

A cash balance plan purports to set up an "account" for each employee, which deceptively mocks the actual contribution in a defined benefit plan, such as 401(k) plan. In fact, there is no such account. Instead the employer makes a bookkeeping entry for each employee, crediting – on paper only – to that employee a percentage of his or her income for each year as a "contribution" to the cash balance plan. No actual contribution of money is made.[2] A second bookkeeping entry is

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[2] See Complaint, ¶ 48 "[Duke] 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." Duke's Answer "den[ied] that the Plan was not funded for the time period set forth in paragraph 48 of the complaint". Duke "denied" the remaining allegations of ¶ 48, which would include the Plaintiffs' allegation that "no contributions" were made to the plan. While the plan may have been actuarially "funded," Duke's denial that it made "no contributions" is at odds with its Annual Reports for the periods 1997-2002 (Exh. A) which clearly report to the public and Duke's shareholders that in each of these years "no contributions were necessary." Plaintiffs can only speculate as to the reason why Duke would file a misleading Answer, but believe one reason would be to steer the Court and Plaintiffs clear of the language in their Annual Reports which stated "Duke Energy's policy is to fund amounts, as necessary, on an actuarial basis to

periodically made to an employee's "account," crediting it with an investment return that is also only a bookkeeping entry and not actual money. The bookkeeping illusion is the fact that separates cash balance plans from defined contribution plans.

Because the individual accounts, employer contributions, and interest credits are all hypothetical, the benefits provided to the participant are not based solely on amounts actually contributed to a participant account. Nor are benefits based on the "income, expenses, gains and losses" from actual investment experience of account funds. Therefore cash balance plans are not defined contribution plans under 29 U.S.C. § 1002(34) but are defined benefit plans. See IRS Notice 96-8. See also *Esden v. Bank of Boston,* 229 F.3d 154, 158 (2nd Cir. 2000).

Under a cash balance plan, the employer guarantees an employee a ***benefit*** upon retirement (as a defined benefit plan), so the employer bears the risk that its investments meet the rate of return needed to produce the required benefit (and pockets the gains when such investments exceed the required return). In contrast, under defined contribution plans, the employer does not guarantee a retirement benefit to the employee. The employee bears the risk of (and reaps the reward of) any investment. Said another way, under a defined benefit plan, employees are promised an output: retirement benefits. Under a defined contribution plan, employees are only promised an input: employer contributions to an account.

The difference, then, is this: Under a defined benefit plan, including cash balance plans, no benefit is paid to the employee until retirement and, therefore, the benefit accruing to that employee

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provide assets sufficient to meet benefits to be paid to plan participants." The old adage if it walks like a duck and quacks like a duck, it must be a duck is very appropriate since Duke's policy on contributions (inputs) is based on actuarial assumptions which must be made to compute accrued benefits/benefit accruals. In short, this duck is a far cry from a defined contribution plan.

each year has an actual value only when it results in a payment to him on retirement. Before then, he has received nothing. "In truth, 'the employee has no actual account, the employer makes no contributions to an employee account, and so there is no account balance to which interest might be added.'" *Donaldson v. Pharmacia Pension Plan*, 435 F. Supp. 2d 853, 857 (S.D. Ill. 2006) (quoting *Berger v. Xerox*, 338 F.3d 755, 758 (7th Cir. 2003)). It is because of this difference that the rules governing defined benefit plans and defined contribution plans are different.[3] Key legislative differences between the two types of plans are summarized in the following chart:

	Defined Benefit Plan (i.e., pension plan)	**Defined Contribution Plan (i.e., 401(k) plan)**
Accrued Benefit	The individual's accrued benefit expressed in the form of an annual benefit commencing at normal retirement age (age 65). ERISA § 3(23)(A).	The balance of an individual's account. ERISA § 3(23)(B).
What the plan sponsor guarantees participants	Actuarial equivalent of age-65 annuity, or "outputs."	Contributions, or "inputs."
Age Discrimination Test	Unlawful if "***the rate of an employee's benefit accrual*** is reduced, because of the attainment of any age." ERISA § 204(b)(1)(H)(i).	Unlawful if "***the rate at which amounts are allocated*** to the employee's account [is] reduced, because of the attainment of any age." ERISA § 204(b)(2)(A).

[3] It is well-established that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, n.9 (2004) (citation omitted); *see also, Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.") (citation omitted).

The issue presented to the Court by Plaintiffs' Motion for Partial Summary Judgment is how to apply the ERISA age-based accrual standards for defined-benefit plans in the cash balance context. ERISA prohibits age discrimination in both defined benefit plans and defined contribution plans. However, because of the difference in form between the two plans, the age discrimination rules operate differently. Because ERISA considers the pension benefit to have been accrued upon the payment of each employer contribution in a defined contribution plan, such as a 401(k) plan, the age discrimination rule applicable to these plans prohibits cessation or reduction of allocations/contributions to the employee's account on account of age. ERISA § 204(b)(2)(A); 29 U.S.C. § 1054(b)(2)(A). Said another way, an employer may not discriminate against older employees by lowering their contribution rate. The rule governing defined benefit plans takes into account the fact that the pension benefit, that is the "pension entitlement," does not begin until retirement and, therefore, the pension entitlement provided by the plan is the "accrued benefit" at normal retirement age (which the plan selects but cannot be later than age 65). *Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755, 759 (7th Cir. 2003). The age discrimination rule applicable to defined benefit plans prohibits any cessation or reduction in the rate at which an employee accrues this benefit on account of age. ERISA § 204(b)(1)(H)(i); 29 U.S.C. § 1054(b)(1)(H)(i).

This leaves only the question of how the promise of a future benefit, which has no present value (unlike that of a 401(k) plan), is to be valued. ERISA requires that the accrued benefit be provided in the form of an annuity at normal retirement age. ERISA § 3(23)(A); 29 U.S.C. § 1002(23)(A). A plan may offer optional benefit forms, such as a lump sum, but they cannot be less than the actuarial equivalent of the annuity at normal retirement age. ERISA § 204(c)(3); 29 U.S.C.

§ 1054(c)(3); see also *Berger,* 338 F.3d at 759; *Esden v. Bank of Boston,* 229 F.3d 154, 162-64 (2nd Cir. 2000).

That is, every dollar "credited" to an employee's "account" under a defined benefit plan is really only the promise of the value of a one dollar annuity, bought today, and payable beginning on the employee's 65th birthday. Because age is always the sole determinant of the value of such an annuity, every dollar of benefit provided to an employee has a value that varies directly and absolutely with the age of the employee.

> By definition, under a defined-benefit plan, the employee never receives the credit balance in the Account. Instead, the inputs (contributions and interest credits) the employer makes into the Account must be converted to the age 65 annuity. *Esden*, 229 F.2d at 164 ("Because the Plan is a defined benefit plan, any distribution from the plan must be the actuarial equivalent of the accrued benefit expressed as an annual benefit payable at normal retirement age, that is – otherwise expressed – the normal retirement benefit.") You must know the individual's age to perform the actuarial calculation. As a result the cash balance plan is not age neutral.

J.P. Morgan, 460 F. Supp. 2d at 486.

Therefore, the Duke cash balance plan, *sub judice*, on it face, violates the requirements of ERISA. As noted above, there are two lines of authority concerning whether most cash balance plans, by their very nature, violate ERISA. The better rule and the rule this Court should adopt is that adopted by the *Richards, JP Morgan*, and *Citigroup* cases, that ERISA means what it says and the provisions of ERISA are clear and unambiguous.

The *Cooper* Seventh Circuit opinion essentially treats a cash balance plan as a defined contribution plan, when cash balance plans are unquestionably defined benefit plans.. J.P. Morgan, 460 F. Supp. 2d at 488. As the *J.P. Morgan* opinion clearly holds, this analysis is improper. A cash balance plan is a defined benefit plan and must be treated as such:

> Defendants argue that even if you accept the Plaintiffs' contention, the fact that older workers get less money as compared to younger workers is simply a result of older workers having less time to accrue interest on their account as compared to younger workers and that is not age discrimination but instead, a simple reflection and recognition of the time value of money. While this analysis is fair, it misses the point. The gravamen here is a question of statutory interpretation, specifically, the meaning of the phrase "rate of benefit accrual." Participants in a defined benefit plan are promised a benefit upon retirement, not yearly credits in a notional account. The Plan must know a participant's age to calculate that retirement benefit, which is an age 65 annuity. The Defendants avoid the consequences that result from the application of compound interest to amounts in the notional Account by their misguided focus on the employer's contributions to the plan as opposed to what the employee receives from the plan.

J.P. Morgan, 460 F. Supp. 2d at 487-488.

Even district court decisions upholding cash balance plans recognize that the typical plan violates the clear language of ERISA. For example, *Tootle v. Arinc, Inc.*, 222 F.R.D. 88 (D. Md. 2004), which ultimately failed to declare that cash balance plans violated ERISA, acknowledged that cash balance plans do not meet the requirements of ERISA:

> [E]mployers should not be forced to calculate accrued benefits under a cash balance plan in terms of an age-65 annuity, as ERISA requires for traditional defined benefit plans. *See Id.* at 829-834. Calculating accrued benefits in terms of an age-65 annuity is not the only option available under ERISA. For plans which involve individual accounts, such as traditional defined contribution plans, accrued benefits are calculated as "the balance of an individual's account." 29 U.S.C. § 1002(23)(B). ERISA's prohibition on age discrimination for defined contribution plans also differs slightly, stating that a plan satisfies the requirement as long as "allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age." 29 U.S.C. § 1054(b)(2)(A). These ERISA provisions provide a better measure for examining possible age discrimination in cash balance plans.

Tootle, 222 F.R.D. at 93-94.

In other words, the *Tootle* court ignores the sound principles of logical or syllogistic argument. The court agrees that cash balance plans are defined benefit plans and further agrees that defined benefit plans are required to measure the accrual of their benefits "in terms of an age-65

annuity," but concludes that a cash balance plan, nevertheless, may value the accrual of its benefits under the rules for defined contribution plans, which are statutorily inapplicable.

It does not seem to have occurred to any cash balance defendants, that if they desire their plans to be regulated as defined contribution plans, rather than defined benefit plans, all they have to do is *pay the money* to an account controlled by the employee.[4] Defendants, such as Duke, want to dance, but do not want to pay the piper. They want a pension plan regulated under the defined contribution rules of ERISA, but do not want to pay the price for such regulation: actually paying money into employees' accounts. They prefer to retain reserves against this liability, and to invest these reserves as *they* see fit, and for their benefit, "crediting" employees with small "interest" returns while they earn market rates. There is a reason why different rules apply to defined benefit plans and defined contribution plans: they are fundamentally different forms of retirement plans.

Tootle follows the rule stated in *Eaton*. The *Eaton* case also recognized that cash balance plans are defined benefit plans, but rejected the argument that cash balance plans necessarily violate ERISA giving these reasons:

> Plaintiffs' proposed interpretation would produce strange results totally at odds with the intended goal of the OBRA 1986 pension age discrimination provisions. There is no statutory or public policy reason that the rate of benefit accrual could not be measured, at least for these purposes, in terms of the rate of change in the balance of an employee's hypothetical account. In fact, that measure provides a precise, quantifiable, and clear measure that does not require any estimates or actuarial assumptions.

Eaton, 117 F. Supp. 2d at 826.

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[4]Another reason Duke obviously chose this route was to avoid the adverse tax penalties it would have incurred if it terminated its existing pension plan in 1997. (See discussion at p. 5 in Plaintiffs' Reply Brief to Duke's Motion for Judgment on the Pleadings.)

The conclusions of *Cooper*, *Eaton*, *Tootle*, and others, is contrary to Congress's "rigidly binary" regulatory regime for defined benefit and defined contribution plans. *Richards*, 427 F. Supp. 2d at 163. As noted by Judge Hall in *Richards*: "The statute is unambiguous in this respect, and the court need not inquire further into its meaning." *Id.* at 165. Judge Baer, in *JP Morgan Chase,* also held that the phrase "rate of benefit accrual" was unambiguous under the rigidly binary system found in *Esden*, whereby defined benefit plans promise an "output," while defined contribution plans promise only an "input." *In re JP Morgan Chase, supra,* 460 F. Supp. 2d at 485-88. Similarly, Judge Scheindlin, in the *Citigroup* case, held that, "[a]lthough other courts, including the Seventh Circuit, have treated cash balance plans as defined contribution plans for this purpose, doing so would ignore the plain language of the statute as well as the critical distinctions between the types of plans outlined by the Second Circuit in *Esden*." *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323, 342 (S.D.N.Y. 2006).

Eaton quite simply declares the statute ambiguous and undertakes to legislate on public policy under the guise of statutory interpretation, as did *Tootle.* It all comes down to the unwillingness of these courts to strike down a form of pension plan that covers thousands of workers, who would be entitled to substantial restitution should the plans be declared illegal under ERISA. The *Eaton* court almost openly says that Congress could not have meant what it plainly said in ERISA § 204(b)(l)(H)(i): that a defined benefit plan, which clearly includes cash balance plans, may not provide a rate of benefit accrual which discriminates based on the age of the employee.

Eaton and *Tootle* treat ERISA provisions as mere technicalities, to be ignored in the name of public policy, legislative history, and ambiguity. *Tootle* openly picks and chooses among the provisions of ERISA's rules for defined benefit plans and defined contribution plans, and puts

together a hybrid[5] not authorized by the statutes in any manner. *Eaton* declares it ambiguous and writes its own rule.

The provisions of ERISA should be enforced as written, and not in the cavalier--ignore the mandate of the statute--fashion that *Eaton, Tootle,* and *Cooper* and other cases have chosen.

Turning to the plain words of the statute, "rate of benefit accrual" may not be a defined phrase in any ERISA statute or regulation, but the word "benefit," the keystone of the phrase, refers us back to what the benefit is in a defined benefit plan, where an employee is promised a retirement benefit. Thus, the statutory language, "rate of benefit accrual," can only refer to the benefit that is relevant in the defined benefit plan context, the output from the plan.

> In light of the great similarity that "rate of benefit accrual" bears to the statutorily defined term "accrued benefit," [[6]] and the fact that ERISA requires accrued benefit to be measured as an annual benefit commencing at normal retirement age for defined benefit plans, but requires accrued benefit to be measured as the balance of an individual's account for defined contribution plans, in this court's opinion the term 'rate of benefit accrual,' as used in § 204(b)(1)(H)(i), refers to rate measured as a change in the annual benefit commencing at normal retirement age. The statute is unambiguous in this respect, and the court need not inquire further into its meaning.

Parsons v. AT&T Pension Benefit Plan, 2006 WL 3826694 (D. Conn. Dec. 22, 2006).

A dictionary definition for "benefit" is: "A ***payment*** or service provided for under an annuity, pension plan, or insurance policy." *J.P. Morgan Chase,* 460 F. Supp. 2d at 486 (quoting

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[5] ERISA does not sanction "hybrid" plans. In response to Xerox's argument that it had a " 'hybrid' cash balance plan," the court in *Berger v. Xerox* said "for 'hybrid' read 'unlawful.' " *Berger,* 338 F.3d at 762-763.

[6] Between the Conference Report, the Senate Report, and the House Report the term "benefit accrued" is used 24 times and the terms "accrued benefit" and "benefit accrued" appear in the same paragraph or the close proximity of these three reports at least 7 times. *See* H.R. Conf. Rep. No. 93-1280 (1974) *reprinted in* 1974 U.S.C.C.A.N. 5038; H.R. Rep. No. 93-807 (1974) *reprinted in* 1974 U.S.C.C.A.N 4670; S. Rep. No. 383 (1974) *reprinted in* 1974 U.S.C.C.A.N. 4889. (Exh.B).

Merriam-Webster's Collegiate Dictionary (1999)). A dictionary definition for "accrual" is: "the action or process of accruing." *Id.* "Accrual" is also defined as "something accrued; accretion" (Random House Unabridged Dictionary (2006)) and "something that has accrued during a specified period." (Merriam-Webster's Dictionary of Law (1996)). "Accruing" in turn is defined: "to ***accumulate*** or be added periodically." *Id.* Under the proper plain language analysis,

> substituting in the respective definitions, the phrase "rate of benefit accrual" is defined as the rate at which an employee accumulates retirement payments and cannot mean the contributions (credit balance) the employer makes to the employee's *hypothetical* account.
>
> The plain meaning of the phrase, "rate of benefit accrual," e.g. the employee's retirement payments from the account, is supported by the purpose and structure of defined-benefit plans.

J. P. Morgan, 460 F. Supp. 2d at 486 (citation omitted); *see also, In re Citigroup Pension Plan ERISA Litig*., 470 F. Supp. 2d 323, 343-44 (S.D.N.Y. 2006) ("Under a cash balance plan, employees never receive the amount in their hypothetical accounts as their retirement benefit. Instead, the cash balance in the account must be converted to the age 65 annuity. Because this actuarial conversion requires knowing an individual's age, cash balance plans are not age neutral."); *see, generally*, Edward A. Zelinsky, *The Cash Balance Controversy Revisited: Age Discrimination and Fidelity to Statutory Text,* 20 Va. Tax Rev. 557 (2001) (Exh. C).

When examining statutory language, the court generally gives words their "ordinary, contemporary, and common meaning." *Williams v. Taylor*, 529 U.S. 420, 431 (2000); *United States v. Maxwell*, 285 F.3d 336, 340-41 (4th Cir. 2002). The Supreme Court has explained that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *Maxwell*, 285 F.3d at 340-41. Where possible,

we must give effect to every provision and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous. *Freytag v. Comm'r Internal Revenue*, 501 U.S. 868, 877 (1991).

The phrase "rate of benefit accrual" is, quite simply, unambiguous and legislative history is, therefore, irrelevant. See *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 183 (2004) ("Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.") (internal citations omitted); *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter[.]").[7] "When interpreting a statute, the goal is always to ascertain and implement the intent of Congress." *Scott v. United States*, 328 F.3d 132, 138-139 (4th Cir. 2003); *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161-62 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000); *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1482 (4th Cir. 1996) (en banc). "The first step of this process is to determine whether the statutory language has a plain and unambiguous meaning." *Scott*, 328 F.3d at 138-139. "If the statute is unambiguous and if the statutory scheme is coherent and consistent, [the court's] inquiry ends there." *Id.*; *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002).

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[7] *See also, Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) (noting that "when the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms"); *Hillman v. I.R.S.*, 263 F.3d 338, 342 (4th Cir. 2001) (as a settled principle, "unless there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language," (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003) ("We must first determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute ... [and] our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (citations omitted).

The argument that the "rate of benefit accrual" is "ambiguous" because Section 204(b)(1)(H)(i) makes no reference to "accrued benefit," is reminiscent of a similar argument advanced by defendants in *Esden* and *Berger*. The defendants in those cases argued that "ERISA does not 'dictate a relationship between the amount payable as a lump sum and a participant's normal retirement benefit.'" *Esden*, 229 F.3d at 163; *Berger* 338 F.3d at 761. Because of the necessary relationship between accrued benefit and normal retirement benefits, Judge Posner referred to the argument as "semantic." *Berger*, 338 F.3d at 761. The same is true here because of the self-evident relationship between "accrued benefit" and "rate of benefit accrual": the latter ***determines*** the former.

"ERISA's statutory definition of 'accrued benefit' imparts a specific meaning to the word accrued, connoting a set periodic increase or accumulation. Section 3(23) states that an accrued benefit is an individual's benefit 'expressed in the form or an annual benefit commencing at normal retirement age.' " *Hoover v. Cumberland, Md. Area Teamsters Pension Fund,* 756 F.2d 977, 981 (3rd Cir. 1985). "An accrued benefit, thus, represents the interest in a retirement benefit that a participant earns each year, and a plan must state the method or formula for determining a participant's annual accrual rate." *Id.* at 981-82; *Board of Trustees Sheet Metal Workers v. CIR*, 117 T.C. 220, 228 (U.S. Tax Court, Dec. 4, 2001); *Ashenbaugh v. Crucible Inc.*, 854 F.2d 1516, 1524 (3rd Cir. 1988).

Additionally, ERISA Section 204(b)(1)(G) provides that "a defined benefit plan shall be treated as not satisfying the requirement of this paragraph if the participant's *accrued benefit* is reduced on account of any increase in his age or service." (Emphasis added). By using the statutorily defined term "accrued benefit," Congress indicated that the question of whether an employee's

pension benefits were reduced for purposes of the age-based accrual standards is to be answered with reference to an annual benefit commencing at normal retirement age pursuant to ERISA Section 3(23)(A). *See Richards,* 427 F. Supp. 2d at 165, n. 12.

Congress's use of the term "benefit accrual" is also manifest in ERISA §204(h), 29 U.S.C. §1054(h), which was enacted only six months before ERISA §204(b)(1)(H). This provision requires plan administrators to provide advance notice of a significant reduction in the rate of future benefit accrual. The Treasury Department, issuing regulations on this rule, concluded that "[t]he statutory phrase 'rate of future benefit accrual' implies, on its face, that §204(h) is limited to changes in the accrued benefits." 63 F.R. 68678, 68680 (Dec. 14, 1998).

ERISA also contains the term "benefit accrual" in ERISA § 4244A "Adjustment in Accrued Benefits" where the phrase is used six times.[8] In each instance the term "benefit accrual" is joined together with "accrued benefits" in the same phrase. For instance sub-paragraph (d)(1)(A) states:

> A plan which has been amended to reduce accrued benefits under this section may be amended to increase or restore accrued benefits, or the rate of the future benefit accruals, only if the plan is amended to restore levels of previously reduced accrued benefits of [specified participants] . . . to at least the same extent as any such increase in accrued benefits or in the rate of future benefit accruals.

29 U.S.C. § 1425(d)(l)(A); ERISA § 4244A(d)(l)(A) (emphasis added).

The terms "rate of future benefit accruals" is quite plainly used as the future tense of "accrued benefit" with both terms referring to the same matter - the benefit a participant receives. It is clear both terms are referring to the output from the plan - i.e., the participant's benefit - and not to employer allocations, or inputs.

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[8]See 29 U.S.C. §§ 1425(b)(l)(B)(ii), 1425(d)(l)(A), 1425(d)(l)(B)(i) & (ii), and 1425(d)(2).

The decisions holding that cash balance formulas comply with the prohibition against age discrimination and benefit accruals have accepted the argument that the "rate of employee's benefit accruals" does not have to be measured by the change in the "accrued benefit" because Congress did not specifically define the term "benefit accruals" in ERISA § 204(b)(l)(H)(i). *See, e.g,. Shea, Francese and Newman*, "Age Discrimination and Cash Balance Plans: Another View," 19 Va. Tax.Rev.763 (2000); *Register v. PNC,* 477 F.3d 56, 68-69 (3rd Cir. 2007); *Bryerton v. Verizon Communications, Inc.*, 2007 WL1120290 at *4 (S.D.N.Y., April 17, 2007); *Sunder v. U.S. Bank Pension Plan*, 2007 WL 541595, at *9 (E.D. Mo. 2007); *Finley v. Dunn & Bradstreet Corp.*, 471 F. Supp. 2d 485, 490 (D.N.J. 2007).

The proponents of this position do not generally contest that the general or primary meaning of the term "benefit accrual" is the change in the "accrued benefit." The view that a plan sponsor can nevertheless select a second meaning of this key statutory term originates in the *Eaton* opinion. There, Judge Hamilton concluded that, although the statutory phrase "rate of benefit accrual" generally means the change in the accrued benefit, it does not have "single, self evident meaning." 117 F. Supp. 2d at 830, 832-34. *Eaton* held a second meaning can be attached to the term "benefit accrual" in the cash balance context based on how the plan sponsor has "defined" the benefit. *Id.*

Five years later, Judge Davis' opinion in *Register v. PNC Financial*, 2005 WL 3120268, at *6-7 (E.D. Pa., Nov. 21, 2005), followed *Eaton.* Judge Easterbrook's opinion in *Cooper v. IBM*, 457 F. 3d 636 (7th Cir. 2006), also tracks *Eaton's* analysis without citing it. *Cooper* concludes that the phrase "rate of benefit accrual" can mean "the rate at which value is added (or imputed) to an account." 457 F.3d at 638-39. "What the true meaning of 'accrued benefit' may be is not controlling; 204(b)(1)(H)(i) does not use that phrase." *Id.* at 641. Six months later, *Register*

followed both *Cooper* and *Eaton* in holding that "the 'benefit' as used in the phrase 'benefit accrual' refers to the stated account balance as that is how the benefit is defined by cash balance plans." 477 F.3d at 68-70.

The view that the term "benefit accrual" in ERISA §204 (b)(1)(H(i) does not have a "single, self-evident meaning," and, therefore, that the court can attach a secondary meaning depending on how the plan sponsor defines the benefit, ignores the standard principal that "if a term is susceptible to two meanings "all but one...is ordinarily eliminated by context." *Deal v. United States,* 508 U.S. 129, 131-32 (1993). If a statutory term is susceptible to two different interpretations in isolation, courts examine the "placement and purpose" of the term in the statutory scheme, and other indicia of congressional content, including the use of the term and other sections of the statute. *Holloway v. United States*, 526 U.S. 1, 6-7 (1999); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 465-69 (2001) (rejecting "secondary meaning" that would insert economic cost factor into air quality standard).

There is, moreover, a "presumption that similar language in two labor law statutes has a similar meaning." *Metropolitan Life Insurance Company v. Taylor,* 481 U.S. 58, 65 (1987). The Supreme has emphasized:

> [W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is an enacted shortly after the other, it is appropriate to presume that Congress intended the text to have the same meaning in both statutes.

Smith v. City of Jackson, 544 U.S. 228, 233 (2005). [9]

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[9] *See also, Harris Trust & Sav. Bank v. Salomon Smith Barney*, 530 U.S. 238, 244-46 (2000) (Interpreting ERISA §502 (a)(3) consistently with §502)(a)(5)); and *Greenblatt v. Delta Plumbing & Heating*, 68 F.3d 561, 576 (2nd Cir. 1995) (argument that company was an "employer" for purposes of one section of ERISA but not another discarded because the "statute makes no distinction").

When the proposed secondary meaning entails the replacement of standard legal terminology with a neologism, these rules are even stronger. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994). Here it is indisputable that both *Cooper* and *Register* ultimately adopt a neologistic concept of imputed "inputs" which is analogous to, but not the same as, the defined contribution plan test for actual monetary allocations to an individual account.

In *Esden*, the court recognized that "the rules governing distributions from defined benefit plans are framed in terms of the normal retirement benefit – typically a single-life annuity payable at normal retirement age." 229 F.3d at 159. The court held that the plan is not free to "contract around the statute":

> The plan is correct that a pension benefit is defined according to the terms of the plans; but ERISA is quite explicit that these terms are circumscribed by statutory requirements and restrictions. The plan cannot contract around the statue.

Esden, 229 F 3d at 173. The idea that benefit accruals can be measured by imputed "inputs" depending on whether the plan sponsor wants to "contract around" the ERISA age-based accrual rules is simply inconsistent with *Esden*.

Because there is no ambiguity in §204(b)(1)(H)(i) and the "plain meaning" of the phase "rate of benefit accrual" is clear, resort to the legislative history is not needed to "divine Congress's intent." *In re: J. P. Morgan, supra,* 460 F. Supp. 2d at 485-86. (Judge Baer relying on *Bedroc Limited v. U.S.*, 541 U.S. 176, 183 (2004), held that §204(b)(1)(H)(i) "is not ambiguous"). Nevertheless, because a number of Courts appear bent on concluding that the "plain meaning" of the phrase is not so plain, certain elements of legislative history may be instructive.

The 1986 Conference Report for the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986") clearly indicates that Congress intended the words "benefit accrual" to refer to the change in

the "accrued benefit." Conference report for the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), H.R. Rep. 99-1012, at 378 (1986). The Conference Report states that "present law specifies certain requirements with respect to the rate at which benefits are accrued (i.e., earned) under a pension plan" and it describes those requirements as the "benefit accrual requirements." Conf. Rep. 99-1012 at 375, 1986 U.S.C.C.A.N. 3868 at 4020.

The Conference Report illustrates the application of ERISA §204(b)(1)(H)(i) by describing a defined benefit plan that "provides a benefit of $10 monthly per year of service." It concludes that the new rule will require older employees to earn the same "additional benefit of $10 per month." Conf. Rep. at 381, 1986 U.S.C.C.A.N. at 4026. The Conference Report also offers an example where a defined benefit plan provides a retirement benefit under a "fractional rule" formula based on highest average pay and years of participation. The Conference Report states that the new rule will not be violated where 45-year-old and 55-year-employees old "have different accrued benefits because of the different rate of benefit accrual for each year of service," but the older employee enjoys a higher rate of benefit accrual than the younger employee. Conf. Rep. at 379, 1986, USCCAN at 4024.[10] Again, the "accrued benefits" are unmistakably based on the "rate of benefit accrual."

Finally, ERISA §204(b)(1)(H)(i) and IRC §411(b)(1)(H)(i) were adopted by the Omnibus Budget Reconciliation Act of 1986 at the same time it adopted 29 U.S.C. § 623(1), an amendment of the Age Discrimination in Employment Act of 1967 ("ADEA"), which also prohibits age discrimination in the accrual of benefits. These three provisions were intended "to be interpreted

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[10] This is consistent with the Supreme Court's later opinion in *General Dynamic Land Sys. v. Kline*, 540 U.S. 581 (2004), that the ADEA does not prohibit reverse age discrimination.

in a consistent manner." H.R. Conf. Rep. No. 99-1012, at 378-79 (1986), reprinted in 1986 U.S.C.C.A.N. 3868, 4023-24. In pertinent part, 29 U.S.C. § 623(i)(l) provides:

> [It] shall be unlawful for an employer ... to establish or maintain an employee pension benefit plan which requires or permits (A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual because of age, or (B) in the case of a defined contribution plan, the cessation of allocations to an employee's account or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

The above language clearly and unmistakenly demonstrates that Congress intended different age accrual tests to apply to defined benefit and defined contribution plans.

As provided in Notice 96-8 and held in *Esden*, the application of Title I of ERISA to a cash balance plan requires that the "accrued benefit" include the value of interest credits to normal retirement owed:

> Under a cash balance plan, the retirement benefits payable at normal retirement age are determined by reference to the hypothetical account balance as of normal retirement age, including benefits attributable to interest credits to that age.

IRS Notice 96-8, Section III.

The requirement that the accrued benefit include the value of interest credits at normal retirement age, not just the current hypothetical account balance, is also required by ERISA "back loading" provisions, §204(b)(1)(A), (B) & (C), as explained in Notice 96-8 and applied in *Esden*:

> [B]enefits attributable to interest credits must be taken into account in determining whether the accrual of the retirement benefits under a cash balance plan satisfies one of the rules in §411(b)(1)(A)(B) or (C).

Notice 96-8, SCC2 III(A-1877); *Esden*, 229 F.3d at 167, n.18.

ERISA's back loading provisions come into play because if the future interest credits did not "accrue" in the current year, but only in future years, the account balance would grow

disproportionately in later years compared with the balance in the current year. The accruals would then be back loaded. Notice 96-8 refers to a cash balance plan that accrues only the present value of interest credits, i.e., the interest credit "allocations" as a "back loaded interest credit plan," and states that such plans "typically will not satisfy any of the accrual rules in §411(b)(1)(A)(B) or (C)." *Id.* at III(B). Therefore the "interest credits" must accrue at the same time the pay credits accrue. *Id.* at III(A-1877).

In footnote 18, the *Esden* Court noted IRS Notice 96-8's confirmation "that benefits attributable to interest credits are accrued benefits." 299 F.3d at 167, n.18. The Court then went on to state that "[a]s accrued benefits . . . they must be taken into account in determining whether a cash balance plan complies with the benefit accrual requirements under ERISA section 204(b)(1) and Code section 411(b)(1)." *Id.* Thus, as *Esden* clearly illustrates, there can be no real distinction between "accrued benefit" and "benefit accruals." To be sure, they are both outputs, contrary to what Duke will surely argue in this regard.

Under the Second Circuit's application of the law in *Esden*, it would be "texturally anomalous to calculate participant's distributions by projecting to normal retirement per the literal terms of the statute, but to test the age discrimination on different basis, e.g., by looking at immediate annuities." *See* Edward A. Zelinsky, *The Cash Balance Controversy Revisited: Age Discrimination in Fidelity to Statutory Text*, 20 Va. Tax. Rev. at 577 (2001).

In conclusion, as perceptively noted by Judge Baer in *J.P. Morgan*, courts holding cash balance plans are not age discriminatory gave "significant weight to policy arguments." *In re JP Morgan Chase*, 460 F. Supp. 2d at 489. Making policy is not the appropriate role for the courts. "As a Court, we observe that we have no authority to override Congress's policy preference so as to

substitute our own views, whatever they might be, for those of Congress." *Collier v. Burnhart*, 73 F.3d 444, 449 (2nd Cir. 2007). "Whatever temptations the statesmanship of policy-making might wisely suggest,' the judge's job is to construe the statute – not to make it better." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L.R. 527, 533 (1947). "The judge 'must not read in by way of creation,' but instead abide by the 'duty of restraint, th[e] humility as merely the transfer of another's command.' " *Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 921 (2007) (*quoting* Frankfurter).

"[A] court cannot resort to public policy considerations unless a determination has been made that the statutory language is ambiguous." *Knoepfler v. Guardian Life Ins. Co. of Am.*, 438 F.3d 287, 294 (3rd Cir. 2006). The basic tenets of statutory construction provide that when a statute or regulation is clear on its face, the judiciary is precluded from pursuing even salutary objectives at the expense of textual interpretation and must "apply the text, not [] improve upon it." *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989). "The court is not at liberty to reject the plain meaning of a statute merely because it believes the statute implements an unwise policy." *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 843 (Cal. 1999).

"Courts are not free to read into the language what is not there, but rather should apply the statute as written." *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994), cert. denied, 115 S.Ct. 954 (1995). It is for Congress to change or clarify a statute where a court cannot due to plain language of the law.

A recent decision is the perfect example of this policy-driven decision-making exemplified by Judge Hellerstein and the other courts upholding cash balance formulas:

> [A] cash balance plan account is defined in terms of a stated account balance. Contrary to appellant's assertions, we do not believe that a cash balance plan's technical classification

> as a defined benefit plan compels us to disregard this critical distinction and thereby unreasonably interfere with employers in the crafting of pension plans.

Register v. PNC Financial Services, 477 F.3d 56, 68 (3rd Cir 2007).

The *laissez faire* approach advocated by *Register* would turn the ERISA clock back more than thirty years, disregarding the fact that ERISA was enacted precisely to superimpose minimum statutory standards on the discretion afforded pension plan sponsors in the crafting of pension plans.

CONCLUSION

For the foregoing reasons, this court should grant partial summary judgment finding that the term "rate of employee's benefit accrual" in ERISA § 204(b)(1)(H) refers to an employee's benefit or output from the cash balance plan.

Respectfully submitted this the 12th day of July 2007 by:

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