



R O B E R T B . S T E V E N S O N
N A N C Y K E P P E L M A N
N A N C Y J . S P E Z I A
T I M O T H Y J . M C G R A W
A N D R E W W . S T U M P F F

O F C O U N S E L

N A N C Y H . W E L B E R
A N T H O N Y S . H A R T I I I
R I C H A R D L . S A N D E R S O N , J R .

July 17, 2008

MORE GOOD NEWS FOR CASH BALANCE PLANS!

The U.S. 2nd Circuit Court of Appeals has held that cash balance plans are not inherently age discriminatory. It joins the 7th, 3rd and 6th Circuits in this finding. To date, all U.S. Circuit Courts of Appeal that have ruled on the age discrimination issue in cash balance plans have found that the plans are not inherently age discriminatory by reason of the plans' interest crediting method.

In 1988, the Equitable Life Assurance Society of America ("Equitable") converted its several defined benefit pension plans into one cash balance plan. In 2001, Equitable was sued by a putative class of plan participants, alleging (among other things) that the cash balance plan violated ERISA section 204(b)(1)(H)(i), which prohibits a DB plan from reducing the "rate of an employee's benefit accrual" by reason of attainment of any age. In 2006, a district court granted summary judgment to Equitable.

In 1996, Bell Atlantic converted a defined benefit plan to a cash balance plan. In 1998, NYNEX converted its defined benefit plan to a cash balance plan. These plans ultimately became the Verizon cash balance pension plan. A putative class of Verizon plan participants sued on the same age discrimination theory as above, interestingly for periods before June 29, 2005 (the effective date of Pension Protection Acts protective hybrid plan rules), and for periods after that date. In 2007, a district court granted a motion to dismiss in favor of Verizon. (Class certification was also denied.)

Both cases were appealed to the 2nd Circuit, and were argued together.

The 2nd Circuit found that cash balance plans are not inherently age discriminatory pursuant to ERISA section 204(b)(1)(H)(i). It utilized the same reasoning as the 7th Circuit (Cooper v IBM), the 3rd Circuit (Register v PNC Bank), and the 6th Circuit (Drutis v Rand McNally & Co; see discussion of that case below.) The 2nd Circuit found, as did the others, that the phrase "rate benefit accrual" applies to the incremental growth of a participant's account (analogous to "contributions"), and not to the ultimate benefit paid upon retirement. In essence, the term "rate of benefit accrual" is found to apply to the "inputs" (which are age neutral), and not to the benefit "outputs", which may be greater for an older employee than a younger employee. The "outputs" have been viewed as age neutral on the basis that any differences reflect "the time value of money."

A T T O R N E Y S A T L A W
4 4 4 S O U T H M A I N S T R E E T
A N N A R B O R , M I C H I G A N 4 8 1 0 4 - 2 3 0 4
7 3 4 7 4 7 - 7 0 5 0 7 3 4 7 4 7 - 8 0 1 0 F A X e m a i l : s k a @ s k a l a w . c o m

Notably, in reaching the “no age discrimination” result, the 2nd Circuit had to address its earlier decision in *Esden v Bank of Boston*, which the court admitted had caused “some uncertainty” among lower courts in the 2nd Circuit, regarding whether *Esden* mandated a finding that cash balance plans were age discriminatory. However, the 2nd Circuit adopted the view of its sister circuits and found that even before PPA’s 2006 changes, cash balance plans could be converted and meet the age discrimination rules of ERISA section 204(b)(1)(H)(i). The court also found that its result in *Esden* reflected the court’s deferral to an IRS interpretation of Code section 411(c)(3) and ERISA section 204(c)(3). However, plaintiffs in the *Hirt* and *Bryerton* cases could cite no such IRS position on the relevant age discrimination rule, ERISA section 204(b)(1)(H)(i), nor its tax counterpart, Internal Revenue Code section 411(b)(1)(H)(i).

Because our practice is centered in the 6th Circuit Court of Appeals, we include below our news item from August, 2007, relating to the 6th Circuit ruling in *Drutis*, finding cash balance plans not to be age discriminatory.

August, 2007: The 6th Circuit holds that cash balance plans are not inherently age discriminatory.

Below is a link to an opinion issued earlier this week by the US Court of Appeals for the 6th Circuit (*Drutis v Rand McNally & Co.*, ___ F.3d ___ (6th Cir. Aug. 27, 2007)) . It follows the 3rd Circuit in *Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56 (3rd Cir. 2007) and the 7th Circuit in *Cooper v. IBM Personal Protection Plan*, 457 F.3d 636 (7th Cir. 2006) by finding that benefit differences in cash balance plans at normal retirement age due to the interest crediting mechanism are the product of the time value of money, and not of age discrimination.

Frankly, we thought that the 6th Circuit had already decided this issue favorably, in a case called *West v AK Steel Corporation*, 484 F.3d 395 (6th Cir., April 20, 2007). However, the age issue was only part of the decision in the *West* case, although we thought it more than just “dicta”. (“Dicta”[strictly speaking “obiter dicta”] reflects legal discussion in a case which is not essential to the outcome.) We also thought the *Drutis* court could have reached the same result by deciding that the age discrimination amendments applied only to post-65 age discrimination; it declined to rule on this issue.

In any case, we’re pleased the 6th Circuit has interpreted the statute favorably to cash balance plans. This now lines the 6th Circuit up with the 3rd and 7th Circuits, the only other circuit courts which have faced this issue to date. “Three for three” so far.

And the Supreme Court, without comment, refused to hear the appeal of the 7th Circuit decision in *Cooper v IBM Personal Pension Plan*.

There are appeals pending in the 2nd and 9th Circuits, so we will keep you posted of additional developments. (2008 update: As noted above, in July 2008, the Second Circuit ruled, in *Hirt* [“Equitable”] and *Bryerton* [“Verizon”] that cash balance plans are not inherently age discriminatory.)

Here’s a link to the court’s opinion in *Drutis v Rand McNally & Co.*:

<http://www.ca6.uscourts.gov/opinions.pdf/07a0340p-06.pdf>.