

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY (NEWARK)**

PHILLIP C. ENGERS, WARREN J. MCFALL,)	
DONALD G. NOERR and GERALD SMIT,)	
individually and on behalf of all others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 98-CV-3660 (SRC/CCC)
)	
AT&T and AT&T MANAGEMENT PENSION)	
PLAN,)	
)	
Defendants.)	

DECLARATION OF CLAUDE POULIN, F.S.A., M.A.A.A., E.A.

I, Claude Poulin, am over 21 years of age and based on personal knowledge, state as follows:

1. I have carefully reviewed and analyzed Lawrence Sher's and Dr. David Bloom's reports.

The Wear-Aways of Frozen Benefits

2. The practice about which the Plaintiffs complain is simple. For a number of years after the conversion of the AT&T Management Pension Plan to a cash balance design, the retirement benefits of many participants, principally older participants, did not increase. For example, Gerry Smit was eligible for a retirement benefit of \$1,985 per month as of August 1, 1997. Ex. K. When he retired nearly 8 years later, he was still entitled to the same monthly benefit. Id. None of the pay and interest credits theoretically assigned to Mr. Smit's cash balance account in those years were actually added to the retirement benefit that is being paid to him.

3. A 1998 article by AT&T's HR leader and Enrolled Actuary, Harold Burlingame

and Michael Gulotta and the 1997 Fact Sheet show that AT&T knew this was an issue: The Burlingame/Gulotta article says that “When 47-year-old mid-career employees projected the value of their annuities—if they were to retire at age 55—they found that they were coming up short. They hadn’t miscalculated—this was a feature of the cash balance plan.” Ex. AA. The article then says that the cash balance accruals were designed to “move ahead of the old plan” “beginning at about age 60” but that “for younger employees, the ‘crossover’ to the new plan was immediate.” The Fact Sheet says “In general, if you are within 7 years of retirement eligibility under the current plan, your special update will most likely provide a greater benefit than the cash balance feature.” Ex. BB.

4. Alan Sefcik, the in-house actuary who designed the cash balance formula for AT&T, prepared spreadsheets showing up to 8-year “crossovers” (AT&T’s term for “wear-away”) as a function of age and service. Ex. CC. As I indicated before, AT&T explored using different conversion factors at ages 44-54 to cap the crossovers at four years. Ex. O.

5. Mr. Sher’s Exhibit B (columns 10 and 11) illustrates the wear-away in the age 55 or over retirement benefit. It shows that the age 55 or over annuity with the Special Update is substantially higher than the age 55 or over annuity under the cash balance formula and that this condition continues to exist for a number of years: 8 years in the case of named Plaintiff Phillip Engers, almost 3 years for Warren McFall, 5 years for Donald Noerr and 9 years for Gerry Smit. See Sher Exhibits B-1a, B-2a, B-3a, and B-4a.

6. Mr. Sher does not dispute the preconditions for wear-away that I set out in Paragraph 26-28 of my September 22, 2008 report. And neither Mr. Sher nor Dr. Bloom disputes that wear-away is not a necessary or inherent part of a cash balance conversion. The Mellon

survey that Mr. Sher authored shows that the “greater of” design is not an inherent part of a cash balance conversion. Appendix D at 5 and 8-11. In a 1999 presentation to an actuarial group, Mr. Sher admitted that the “greater of” design is the option that allows early retirement benefits to be worn away the “fastest.” Ex. DD. And here he admits that the “A+B” approach “would guarantee avoidance of wearaways.” Rpt. at 17.

7. Paragraph 26 of my report identifies several groups of employees who were not subjected to wear-aways by AT&T, including the ASA employees who designed the cash balance conversion. In addition to those groups, AT&T’s Senior Executives also appear to have been subjected to more favorable rules. Neither Mr. Sher nor Dr. Bloom disputes the point in Dr. Bardwell’s report that for the Senior Executives the Special Update amounts and the opening account balances cannot be reconciled. Documents produced in discovery show that AT&T applied different rules to the Executives. See Ex. EE (referring to “special frozen Single Life Annuity for Executives, to be offered in addition to CBA distribution options” and to “final details from Executive HR”).

8. Mr. Sher also does not dispute the three reasons for wear-away that I set out in Paragraphs 28-38. First, Mr. Sher does not dispute that the value of early retirement benefits was not included in the opening account balances. Indeed, he agrees with this but contends that this exclusion is appropriate. Rpt. at 13-17. Second, Mr. Sher does not dispute that he computed the same underlying interest rates in the conversion factors that I found and that those rates discriminate on the basis of age. Rpt. at 17-18. Third, Mr. Sher does not dispute that the rates at which employees earn monthly benefits under the cash balance formula are reduced in comparison to the prior formula and that they are still lower for older employees. In fact, Mr.

Sher's Exhibit C (columns 7 and 8) shows how the rate of accrual under the cash balance formula decreases with age. In the *Amara v. CIGNA* trial, Sher also testified that he agreed with my analysis of the preconditions and reasons for wear-away--while testifying that he still thinks that it is legal. Ex. FF.

9. The counter-example that Mr. Sher provides in Table 11 on page 27 and in Exhibit B of his report about adding 5 years of age to each named Plaintiff (Mr. Sher calls these fictitious people "the older counterparts to the named plaintiffs") is a non-sequitur. One cannot disprove age discrimination in this way, as indicated by the fact that Dr. Bloom does not test Mr. Sher's theory. As shown by AT&T's Form 5500 Annual Return/Reports, less than 1.5% of the active participants in the Plan are over age 60 and less than 0.1% are age 65 or over. The Actuarial Valuation Reports further show that AT&T's experience was that hardly any employees work to age 65. As I understand it, the United States Supreme Court has ruled that an employer cannot avoid discrimination by proving that one segment of the protected group of employees is not discriminated against, or is not discriminated against as much.

10. Both of AT&T's experts try to reframe the wear-away issue in terms of the age-65 benefit. Bloom Rpt. at ¶¶57-59, 63, 68; Sher Rpt. at 7-9. But this is not the employment practice about which the employees have complained. And I did not say there was wear-away of the age-65 normal retirement benefit. In fact, in Paragraph 42, I said "the periods of wear-away nearly always end by ages 62 or 63." To avoid wear-away by deferring receipt of benefits to age 65, the employee would have to give up the superior value of the age 55 or benefit. In effect, AT&T would get the wear-away of the value of the early retirement benefits either way. One could also "avoid" wear-away or practically any other discriminatory employment practice, e.g.,

discrimination in pay based on sex or race, by quitting work but that does not make the practice at issue less discriminatory.

11. Dr. Bloom prepares an Exhibit 6a to 6c to illustrate that "other data patterns sometimes arise" in which there may be a slight wear-away based on the age-65 benefit because the age-65 cash balance benefit is initially lower than the age 65 Special Update (or Frozen Accrued Benefit). See also Paragraphs 47-49 of his Report. However, Exhibits 8 and 10 show that the "data pattern" illustrated by Exhibit 6 occurs for less than 450 people out of 49,000+, which is very infrequent, i.e., less than 1%. This is also evidently the basis for Dr. Bloom's damage calculations in Exhibit 12 (and on page 22 of his Report) of approximately \$17.5 million as opposed to the \$2.35 billion that Dr. Bardwell calculates, again less than 1%.

12. Mr. Sher's report repeatedly asserts that "Mr. Poulin's approach" would lead to "windfalls." Rpt. at 13-17. In doing so, he mischaracterizes my report. My report stated that a "greater of" plan design in conjunction with the method and interest rates with which AT&T established opening account balances and the rate at which employees earn additional benefits produces wear-aways for older employees. I said that the periods of wear-away could be avoided by an "A+B" approach in which the previously-earned benefits are protected in annuity form and the benefits earned under the cash balance formula are added to those benefits. This is the approach that Congress adopted in the 2006 Pension Protection Act. It does not lead to "windfalls" for older employees but provides them with the cash balance benefits in addition to the benefits they had already earned.

13. Nevertheless, Mr. Sher repeatedly says that "windfalls" would be produced if, rather than using the "A+B" approach to remedy wear-aways, AT&T was required to include the

value of early retirement benefits in the account balances to avoid wear-aways. Rpt. at 13-17. However, the Pension Protection Act also addresses this issue. It provides that the Plan can credit the cash balance account “with the amount of any early retirement benefit or retirement-type subsidy for the plan year in which the participant retires....” ERISA §204(b)(5)(B)(ii)-(iv), as added by Section 701(a)(1) of P.L. 109-280. Thus, both the A+B approach and this approach avoid wear-aways and the “windfalls” with which Mr. Sher is concerned.

14. It should be noted that AT&T has in other instances used the approach with which Mr. Sher professes concern to avoid wear-aways. As described in my report (¶¶26 and 36), AT&T used enhanced balances to avoid wear-aways for both the employees of the ASA subsidiary who designed and implemented the cash balance conversion and for AT&T’s occupational (union) workforce.

15. Dr. Bloom but not Mr. Sher says that my spreadsheets overstate the period of wear-away by counting 1997 as a year of wear-away when the Special Update was higher than the cash balance benefit at the end of that year. Rpt. at 13 and 22 n.11. But the cash balance amendments provided pay credits in 1997. Ex. GG. Those pay credits were subject to wear-away and were under wear-away in almost every case. Mr. Sher’s Exhibit B shows the same wear-away in 1997 as in my report.

16. Dr. Bloom criticizes the duration of wear-away calculations for essentially rounding up. Rpt. at 13 and 22 n.11. I believe that this is reasonable and that it does not affect the overall results or the comparisons between the wear-aways of older and younger workers. But to respond to this criticism without going in the opposite direction and understating the wear-away,

I have refined the wear-away duration calculation so it computes the period of wear-away down to one-tenth of a year. As revised, Exhibits I, J and V calculate the part of the year under wear-away by dividing the Special Update at the beginning of the year less the cash balance benefit at the beginning of the year by the cash balance benefit earned during the year. The year in which the pension effective date or the retirement date appears is also prorated based on tenths of a year.

17. Originally, AT&T provided that the interest crediting rates would be 7% from 1998-1999 and 4% thereafter. In 2000, AT&T changed the interest crediting rates to provide 7% for the year 2000. And in July 2001 the rate for 2001-2002 was increased to 5.5%. My report (at ¶14) presented the correct interest crediting rates, but there was an error in the interest crediting rates entered in the spreadsheets. That error has been corrected in the attached Exhibits I, J and R. The results are not significantly different. Note that the column for the “Cash Balance Projected to Age 65” in those Exhibits continues to use the schedule of interest crediting rates in effect in each year. For example, when the 1997 account balance is projected to age 65, the spreadsheet does not anticipate the 2000 or 2001 amendments related to interest crediting rates because those amendments were not retroactive.

The 6% Per Year Reduction for Commencement of Benefits Before Age 55

18. The losses from the 6% per year reduction for commencement before age 55 are based on age: Mr. Sher appears to agree that older employees in their 40's and early 50's lost a significant part of the value of their early retirement benefits by commencing benefits before age 55. On pages 27-30 of his report, he agrees with the actuarial analysis but disagrees with whether it is illegal (adding that he believes the opportunity to commence benefits before age 55 subject

to an excessive reduction reflects "AT&T's generosity"). Dr. Bardwell's report shows that the impact of the 6% reduction for commencement before age 55 was much greater on older employees than younger employees. Neither Mr. Sher nor Dr. Bloom contests this finding.

AT&T Has Not Incurred Actual Costs or Service Costs for Older Employees During the Periods of Wear-Away

19. Neither Mr. Sher nor Dr. Bloom provides any analysis or data about the actual cost, normal cost, or service cost incurred during the periods of wear-away by older and younger workers. AT&T has also not produced the individual valuation data that would further show the age-based wear-aways by the absence of normal costs and service costs. The only conclusion I can draw from these omissions is that AT&T is not asserting the "cost incurred" defense in Section 4(f)(2) of the ADEA.

20. There is also no response in either report to the point that the AT&T Management Pension Plan had a surplus of over \$6 billion and could easily have afforded the Special Update without the cost savings achieved from age-discriminatory wear-aways.

The Special Update Does Not Provide an Excuse for Age-Based Wear-Aways

21. In 1999 and 2000, AT&T told its employees that "Without this special update transition benefit, Cash Balance would immediately or very quickly surpass the prior accrued pension benefit, which would have been frozen." Ex. HH. My Exhibit V shows that this is not true. The reports of AT&T's actuarial expert and its statistical expert provide no analysis or data to support AT&T's assertion that without the Special Update there would be no wear-away.

22. Mr. Sher does indirectly respond to my Exhibit V on pages 20 and 23 of his report. Without any demonstration, he opines that the wear-away "would diminish significantly

or even disappear in many cases” if the traditional benefit without the Special Update is compared with a cash balance benefit with the Special Update. But it does not make sense to do this comparison: One cannot examine wear-aways “[w]ithout this special update transition benefit” with a model that still uses the Special Update, but on only one side of the comparison. Moreover, Mr. Sher’s assertions about the larger group under his model cannot be tested without accurate Frozen Accrued Benefit data. As described below, much of the Frozen Accrued Benefit data supplied by AT&T is unreliable.

23. Dr. Bloom has a paragraph on the same subject (Para. 62) that is incomprehensible to me because of the double negative (“My calculations show that there would have been no age disparity in wear-away even if there had been no SUB”). Exhibits 10a-10d show that Dr. Bloom is actually comparing the age-65 benefit under the cash balance formula with the Frozen Accrued Benefit. That comparison is simply not at issue.

24. No support is offered by either of AT&T’s experts for AT&T’s assertions that the Special Update provided, on average, a 25% increase in benefits compared with the Frozen Accrued Benefit, or that a "standard" update would have provided, on average, a 10-11% increase. See Ex. II. Neither Mr. Sher nor Dr. Bloom supports any of AT&T’s assertions about the percentage increases. See Sher Rpt. at 21-22; Bloom Rpt. at 7.

25. Even if AT&T’s assertions about the percentages are in the ballpark, the conclusions that AT&T tries to draw from them are simplistic because if a "standard" update had been provided in 1997, the employees still would have experienced wear-away and would have anticipated another update sooner. Based on the history of prior updates every 3 years or less, an update was due in mid-1997. Indeed, the pattern of updates in the career average pay formula

was so regular that it could constitute a “substantive amendment” under FAS-87 (§41). I would agree that this Special Update moved the pay window farther than a standard update, e.g., a standard update might have moved the pay window to an average of 1992-95 salary rather than 1994-96. But a standard update would have credited the employees’ service in all of 1997 and succeeding years and, based on the pattern of past updates, would have led employees to anticipate another update in the pay window in mid-2000.

Data Issues in the Data Files that AT&T Supplied

26. In most of his Exhibits, Dr. Bloom relies on the Frozen Accrued Benefit data that AT&T supplied. Although this is less critical than his effort to switch to the age-65 benefit, the Frozen Accrued Benefit data is fraught with errors. The data issues are illustrated by defense counsel's June 12, 2008 letter about the calculation of named Plaintiff Warren McFall's Frozen Accrued Benefit (Ex. JJ). Plaintiffs’ counsel complained that AT&T had supplied a vastly different amount for Mr. McFall in a Declaration filed with this Court on November 13, 2000 (\$1,469.58) compared with the \$713.79 in the database supplied in November 2007. The letter from defense counsel came up with a third amount (\$1,255.55) and suggested that many of the Frozen Accrued Benefit calculations were not final. A comparison of the Special Update data with the Frozen Accrued Benefit data shows implausible ratios in excess of 2 to 1 for close to 3,900 participants. Ex. KK.

27. Dr. Bloom further observes that there are “multiple” Special Update amounts in the database supplied by AT&T for over 6,700 individuals. Rpt. at 14. AT&T and Aon has evidently not provided him with the information to clear this up. I would need to see the archived calculations to see which Special Update amount is correct, but counsel for AT&T and Aon have

be tracking notes in the database to indicate which number is correct and what was the problem with the other one. In the absence of more data, I would continue to presume that the highest number is correct. Dr. Bloom appears to have done the same in his calculations.

Sher's Supplemental Opinion on the 133-1/3% Accrual Rule

28. Mr. Sher's report offers an additional expert opinion on the 133-1/3% accrual rule. Id. at 30-32. He says that this is in response to my October 3, 2003 Declaration and my "Second Supplemental Declaration dated April 10, 2006." Rpt. at 2 and 30. However, Magistrate Judge Hedges did not allow the Second Supplemental Declaration, Ex. MM, to be filed because discovery and expert reports had already concluded. Mr. Sher already responded to my October 3, 2003 Declaration on the 133-1/3% accrual rule. His expert report dated December 30, 2003 devotes four pages to that subject. Id. at 23-27 ("Analysis of Mr. Poulin's Claim That the 133-1/3% Rule Was Violated"). My September 22, 2008 report does not address the 133-1/3% accrual rule at all. My understanding is that these expert reports were to be about the ADEA issues in Claims One and Two of the Amended Complaint.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.

Signed: 
Claude Poulin

Date: December 3, 2008

Revised Exhibits

- Exhibit I Wear-away spreadsheet – potential damages
- Exhibit J Wear-away spreadsheet – actual damages
- Exhibit R Spreadsheet on benefit losses with 6% reduction for commencement before age 55
- Exhibit V Spreadsheet on wear-aways without the Special Update

Exhibits

- Exhibit AA Harold Burlingame and Michael Gulotta article in *Compensation & Benefits Review*, Nov./Dec. 1998
- Exhibit BB AT&T “Pension Changes Fact Sheet” dated April 1997
- Exhibit CC “Crossover” spreadsheets prepared by AT&T
- Exhibit DD 1999 presentation by Lawrence J. Sher at Glasser LegalWorks
- Exhibit EE Documents referring to “special frozen Single Life Annuity for Executives” and to “final details from Executive HR”
- Exhibit FF *Amara v. Cigna* trial testimony from Lawrence Sher on reasons for wear-away (Tr. 1344, line 2 - 1346, line 6.)
- Exhibit GG AT&T Board of Directors Resolutions and Management Pension Plan document on 1997 pay credits
- Exhibit HH AT&T statements that “Without this special update pension benefit, Cash Balance would immediately or very quickly surpass the prior accrued pension benefit”
- Exhibit II AT&T’s assertions that Special Update provided a 25% increase and that “standard” update was 10-11%
- Exhibit JJ June 12, 2008 letter from defense counsel about calculation of the discrepancies in the data concerning Warren McFall’s Frozen Accrued Benefit
- Exhibit KK Query on Special Update to Frozen Accrued Benefit ratios in excess of 2.0
- Exhibit LL Nov. 16, 2007 letter declining to provide archived data for Special Update and FAB or pay averages for 1987-92 or 1994-96
- Exhibit MM Second Supplemental Declaration of Claude Poulin dated April 10, 2006 on 133-1/3% rule