

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

WAYNE TOMLINSON,)
ALICE BALLESTEROS, and)
GARY MUCKELROY,)
individually and on)
behalf of all others similarly situated,)
)
Plaintiffs,)

v.)

CLASS ACTION COMPLAINT

EL PASO CORPORATION and)
EL PASO PENSION PLAN,)
)
Defendants.)

_____)

This is a class action under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C. § 1001 *et seq.*, and a representative action under the Age Discrimination in Employment Act of 1964, as amended (the “ADEA”), 29 U.S.C. § 621 *et seq.* Defendants have violated the ADEA and ERISA by amending a defined benefit retirement plan in a manner that freezes the benefits of older, longer-service employees and provides lower rates of benefit accrual based on age. Defendants have further violated ERISA by failing to disclose the reductions and other disadvantages of the amended plan to employees.

THE PARTIES

1. Plaintiffs are employees of the El Paso Corporation who are participants in the El Paso Corporation Pension Plan. Plaintiff Wayne Tomlinson was born in December 1951 and is currently age 53. He has worked for the El Paso Corporation since March

1978 and has a highest five-year salary average (the salary average used for pension purposes) in excess of \$100,000. Plaintiff Alice Ballesteros was born in 1951 and is currently age 53. She started work with the El Paso Corporation in 1978 and has a salary average below \$50,000. Plaintiff Gary Muckelroy was also born in 1951. He has worked for the El Paso Corporation since 1977 and has a salary average between \$50,000 and \$100,000. The other members of the proposed class reside throughout the United States and on information and belief number over 1,500.

2. On information and belief, Defendant El Paso Corporation (“El Paso”) is the largest pipeline company and the leading provider of natural gas interstate transportation services in North America. El Paso is incorporated under the laws of the State of Delaware. It is qualified to do business and conducts business in, among other states, Colorado. El Paso has its main office for the western pipelines in Colorado Springs, Colorado.

3. Defendant El Paso is an “employer” within the meaning of the Age Discrimination in Employment Act of 1967, as amended, and the Employee Retirement Income Security Act of 1974, as amended.

4. Defendant El Paso Pension Plan (the “Pension Plan”) is an employee benefit plan, as defined at § 3(3) of ERISA, 29 U.S.C. § 1002(3). More particularly, the Pension Plan is an “employee pension benefit plan”, as defined at ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), and a “defined benefit plan” within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35). The administrative offices of the Defendant Pension Plan are in Houston, Texas.

5. In addition to being the “plan sponsor” under § 3(16)(B) of ERISA, 29 U.S.C. § 1002(16)(B), Defendant El Paso functions as the “plan administrator” for the El Paso Pension Plan within the meaning of § 3(16)(A) of ERISA, 29 U.S.C. § 1002(16)(A) and as the “fiduciary” for the Pension Plan’s participants and beneficiaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) .

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to the Employee Retirement Income Security Act of 1974 as amended, 29 U.S.C. § 1132(e)(1), the Age Discrimination in Employment Act of 1967 as amended, 29 U.S.C. § 626(c)(1), and 28 U.S.C. § 1331.

7. Venue is proper in this Court under 29 U.S.C. § 1132(e) in that the Pension Plan may be found in this District because the Plaintiffs earned benefits in this District.

JURY TRIAL

8. Plaintiffs demand a trial by jury under the United States Constitution, Fed.R.Civ.P. 38(a) and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(c).

CLASS ACTION ALLEGATIONS

9. Plaintiffs bring this action as a class action in accordance with Federal Rule of Civil Procedure 23 to resolve disputes under the Employee Retirement Income Security Act of 1974 as amended and as a representative action under the Age Discrimination in Employment Act of 1967 as amended.

10. Plaintiffs bring this action on behalf of all other similarly-situated El Paso employees who have participated in the El Paso Pension Plan. The proposed class is defined as any and all persons who:

1. Are current or former El Paso employees,
2. Participated in the El Paso Pension Plan on or after the January 1, 2002 date on which the Pension Plan was fully converted to a cash balance design, and
3. Are over age 40, or will be over age 40 as of the date of the judgment.

11. On information and belief, the proposed class numbers over 1,500 making joinder impracticable.

12. Common questions of law and fact affect the rights of the members of the class. The claims of the named class representatives are typical of the claims of the members of the class. The named class representatives will fairly and adequately protect the interests of the class. Plaintiffs' counsel is experienced in class action litigation involving pension plans.

13. This action is best maintainable as a class action because Defendant has acted and/or refused to act on grounds generally applicable to the class the Plaintiffs represent, thereby making appropriate final injunctive and other equitable relief in favor of Plaintiffs and the class. In addition, the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudication that would establish incompatible standards of conduct for Defendants. Judicial economy dictates resolving all issues in a single action in accordance with Federal Rule of Civil

Procedure 23.

14. With respect to the class-wide claims under the Age Discrimination in Employment Act, the ADEA requires that members of the proposed class affirmatively opt into the suit after notice is given. 29 U.S.C. § 626(b) (incorporating by reference 29 U.S.C. § 216(b) of the Fair Labor Standards Act).

FACTUAL ALLEGATIONS

15. El Paso established the El Paso Pension Plan as a defined benefit plan for El Paso employees. Since its establishment, the El Paso Pension Plan has offered participants fixed annuities at retirement determined by a formula that multiplies years of credited service in the plan by a percentage of compensation in a specified pay base averaging period (the “old” formula).

16. More particularly, the Pension Plan’s benefit formula has been 1.1% of “Final Average Monthly Earnings” plus 0.5% of Final Average Monthly Earnings above a “Social Security Integration Level,” with the total of those amounts multiplied by years of credited service (up to a maximum of 30 years). “Final Average Monthly Earnings” are the highest average monthly earnings received during any 60 consecutive month period within the last 120 months before benefits stop accruing. The “Social Security Integration Level” is equal to the Social Security Taxable Wage Base in the year of termination divided by 36. For example, in 2001, the Social Security Taxable Wage Base was \$80,400. The Social Security Integration Level was therefore \$2,233.33 ($\$80,400 \div 36$).

17. In October 1996, El Paso distributed a brochure entitled “Program Highlights: Pension Benefits from El Paso Energy Corporation” to Plan participants about

a change in its benefit formula to a new formula known as a “cash balance” formula. The “new style” of pension plan was called “CBP Select.”

18. Under El Paso’s cash balance formula, initial Cash Balance Accounts were set up for participants. The Cash Balance Accounts are not actual accounts as in a savings account, a mutual fund, or even a 401(k) plan. Instead, they are hypothetical accounts to which notations are made. No funds are actually allocated to the participant’s account.

19. The initial Cash Balance Accounts for older, longer-service participants were set up at levels far below the value of their accumulated annuities under the “old” formula.

20. During a “transition period” between January 1, 1997 and December 31, 2001, Plan participants accrued benefits under both the old formula and the cash balance formula. After December 31, 2001, only the “cash balance” account benefits continue to accrue.

21. Transition provisions provide that upon termination of employment after December 31, 2001, participants will receive the higher of: (1) the amount computed under the new cash balance formula, or (2) the accumulated defined benefits to which the employees were already eligible, with no accruals after December 31, 2001.

22. Because El Paso set up the initial Cash Balance Accounts for older workers at a level well below the value of their previously accumulated benefits, a period was created during which the accumulated benefits to which participants are already entitled, even with no additional accruals after December 2001, are “higher” than their Cash Balance Accounts.

23. Under the cash balance amendments, El Paso credits each participant's hypothetical Cash Balance Account with two notations on a quarterly or annual basis. The first is a percentage of a participant's salary referred to as the "pay credit." El Paso's Cash Balance formula increases the pay credit at certain intervals, from a minimum of 4% of salary for participants whose age and years of credited service is less than 35, 5% for age and service between 35 and 49 points, 6% for age and service between 50 and 64 points, and a maximum of 7% of salary for participants whose age and years of credited service is 65 points or more. The pay credit does not increase thereafter.

24. The second annual notation to the participant's hypothetical account is a hypothetical interest credit. The annual hypothetical interest rate is the Five-Year U.S. Treasury Constant Maturity Yield for the month of October immediately preceding the beginning of a new Plan Year and cannot be lower than 4%.

25. El Paso's cash balance formula effects two changes that are not obvious on its face. First, the transition is structured in a manner that causes older, longer-service employees to earn no additional benefits for a number of years beyond the benefits to which they were already entitled under the old plan formula as of December 31, 2001. Second, the future rate of benefit accruals is significantly reduced even when employees begin to earn additional benefits.

26. The brochure introducing "CBP Select" that El Paso distributed in October 1996 did not disclose the freeze in benefits for older, longer-service employees, nor did it disclose that the "new" formula masks reductions in the rate of future benefit accruals.

CLAIM I

AGE DISCRIMINATION IN PENSION BENEFIT FREEZE

27. The statements of the previous counts are hereby included as if set forth at length.

28. The Plaintiffs and the members of the proposed Plaintiff class are in the protected class under the federal Age Discrimination in Employment Act of 1967 (“ADEA”), as amended.

29. The ADEA prohibits discrimination against any individual with respect to compensation, including compensation in the form of pension benefits, because of the individual’s age. The ADEA does not permit age-based pay differences: “a lower pension for an older worker is equivalent to a lower salary for the same work.” Quinones v. City of Evanston, 58 F.3d 275, 278 (7th Cir. 1995).

30. Age discrimination is tested on the basis of the individual’s current compensation. An employer cannot avoid age discrimination by contending that an older worker’s accumulated benefits are higher than those of a younger worker, even though the current year’s benefits for the older worker are less.

31. The ADEA’s “bona fide employee benefit plan” exception exempts certain bona fide employee benefit plans from scrutiny for age discrimination. However, the “bona fide employee benefit plan” exception only applies where the actual amount of payment or the actual cost incurred on behalf of an older worker is not less than that incurred on behalf of a younger person when the tests in 29 C.F.R. 1625.10 are applied.

32. In transitioning to the cash balance formula, Defendant El Paso used a

method that froze the retirement benefits that the named Plaintiffs and other class members will receive for many years at the previously accumulated levels as of December 31, 2001.

33. It takes many years after December 31, 2001 for the cash balance accounts of older, longer-service employees to move ahead of the benefits accumulated before the changes because El Paso set the initial Cash Balance Accounts for older, longer-service workers at low levels compared to the value of their accumulated pension benefits.

34. Because the new cash balance pay credits are only contingently payable under El Paso's "higher of" formulation, this means that older, longer-service employees actually receive no additional benefits for their years of employment with El Paso in 2002, 2003, 2004 and many subsequent years.

35. As a result of El Paso's transition method, older, longer-service employees experience a benefit freeze. Younger or recently hired employees do not experience a benefit freeze. They receive annual increases to their pensions.

36. During the years in which payment of the cash balance benefits is contingent under the "higher of" formulation, Defendant incurs no cost for Plaintiffs' pensions. At the same time, Defendant incurs costs for younger employees' pensions.

37. The actual costs incurred on behalf of older employees are less than those incurred on behalf of younger employees when the test in 29 C.F.R. 1625.10 is applied.

38. Defendant's actions discriminate against Plaintiffs because of age in violation of the ADEA, 29 U.S.C. § 623(a) and 29 U.S.C. § 626(b).

39. As required by 29 U.S.C. § 626(d), a representative of the class filed a

timely charge of age discrimination on July 16, 2004, on behalf of himself and other workers in the protected age group with the Equal Employment Opportunity Commission (“EEOC”) more than 60 days prior to commencement of this action. Defendants denied the charge and the EEOC was unable to resolve the controversy. Plaintiffs are filing this action on a timely basis under 29 U.S.C. § 626(d).

40. Plaintiffs have not otherwise attempted to exhaust administrative remedies because El Paso denied the EEOC charges filed on July 16, 2004 and Douglas Foshee, El Paso’s President and Chief Executive Officer, announced the company’s position on August 31, 2004 that no changes will be made to the previously-modified defined benefit plan. In addition, Plaintiffs’ claims involve statutory violations that do not allow the Plan sponsor or the Plan administrator discretion to modify what the law requires.

CLAIM II

CONDITIONING PAYMENT OF ADDITIONAL ANNUAL ACCRUALS VIOLATES ERISA SECTIONS 203(a) AND 204(b)(1)(B)

41. The statements of the previous counts are hereby included as if set forth at length.

42. To conform with Esden v. Bank of Boston, 229 F.3d 154, 169 (2d Cir. 2000), the El Paso Pension Plan must comply with the 133 $\frac{1}{3}$ % benefit accrual method in ERISA § 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B). The 133 $\frac{1}{3}$ % accrual method requires that defined benefit pension plans, including cash balance plans, offer “annual rates” of benefit accrual. The annual rates of benefit accruals in later years of participation can be no more than 133 $\frac{1}{3}$ % of the annual rates in earlier years. See, e.g., Esden, supra, 229 F.3d

at 169.

43. A right to benefit accruals must be unconditional to satisfy the nonforfeitability requirements of ERISA § 203(a), 29 U.S.C. § 1053(a). Pursuant to the regulations at 26 C.F.R. 1.411(a)-4: “[A] right which, at a particular time, is conditioned under the plan upon . . . subsequent forbearance which will cause loss of such right is a forfeitable right at that time.” IRS Notice 96-8, 1996-1 C.B. 359, explains:

“If benefits . . . have accrued [but] those benefits are disregarded when benefits commence before normal retirement age, the plan has effectively conditioned entitlement to the benefits . . . on the employee not taking a distribution prior to normal retirement age.”

In Esden v. Bank of Boston, supra, 229 F.3d at 157 and 168, the Second Circuit held that “because Plaintiff received less than she would have had she not elected to take her [cash balance] benefit in the form of a lump sum, part of her pension benefit was made conditional on the option chosen, in violation of the anti-forfeiture provisions of ERISA §203(a).”

44. The amended El Paso Pension Plan conditions entitlement to the accrued benefits derived from the participant’s Cash Balance Account on participants not retiring before the normal retirement age and receiving a distribution of his or her ERISA protected benefits. However, ERISA § 203(a), 29 U.S.C. § 1053(a), mandates that the right to the cash balance benefit accruals must be unconditional.

45. Alternatively, the amended Plan violates the 133⅓% rule in ERISA § 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B), because (1) the annual rates of cash balance accruals for 2002, 2003, 2004 and succeeding years are only nominal bookkeeping entries

that are not actually payable in many circumstances, (2) the annual rates of accrual in “later plan years” exceed 133 $\frac{1}{3}$ % of the accruals in the current and subsequent plan years, and (3) the annual rates of accrual for older, longer-service employees are only nominal whereas the rates of accrual for younger and newly-hired employees are always payable.

CLAIM III

REDUCED RATES OF BENEFIT ACCRUAL BASED ON AGE

46. The statements of the previous counts are hereby included as if set forth at length.

47. Accumulated interest credits under a cash balance pension plan are greater for younger participants due to the effect of compound interest until retirement. Unless the pay credits in a cash balance plan are commensurately age-weighted, the rate of benefit accrual will decrease with age. *Cooper v. IBM Personal Pension Plan*, 274 F.Supp.2d 1010, 1021 (S.D. Ill. 2003).

48. ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), prohibits reductions in the rate of accrual “because of the attainment of any age.” The same prohibition is contained in ADEA § 4(i)(1)(A), 29 U.S.C. § 623(i)(1)(A).

49. While El Paso’s initial weighting of the pay credits mitigates age discrimination in the rate of accrual, it does not eliminate it. Although the pay credits initially increase with age and years of credited service, they do not increase at all once the participant reaches a combined age and years of credited service of 65. Thus, participants whose age and years of pay credit service amount to 65 or more experience decreases in their rate of benefits accrual every year until they retire. Participants who are

hired at older ages will also experience decreases because of their proximity to retirement age.

50. The reductions in the rate of accrual because of age violate ERISA and the ADEA.

CLAIM IV

UNTIMELY, IMPROPER, AND INADEQUATE ERISA 204(h) NOTICE

51. The statements of the previous counts are hereby included as if set forth at length.

52. El Paso's cash balance amendments effected a reduction in the rate of future benefit accruals. Retirement benefits are now based on year-by-year compensation rather than average compensation in their highest 60 months of employment. The rate of accruals also decreases for participants with 65 age and service points and for participants who were hired at older ages.

53. El Paso has to date not notified Plan participants of any significant reductions in the rate of future accruals.

54. By implementing the reduction before adoption of the actual amendments and without providing notice of a significant reduction in the future rate of accruals at least 15 days before the amendments' effective date, El Paso violates ERISA § 204(h), 29 U.S.C. § 1054(h), which requires that adoption of the amendments precede notice and that notice of the reduction precede implementation by at least 15 days.

CLAIM V

INADEQUATE SUMMARY PLAN DESCRIPTIONS

55. The statements of the previous counts are hereby included as if set forth at length.

56. On information and belief, El Paso distributed a Summary Plan Description (“SPD”) of the Pension Plan, as amended by the “new” cash balance formula and transition provisions, in August 2002 to employees. The SPD, however, does not disclose that the “new” features:

- (a) cause older participants to earn no additional benefits beyond those already earned;
- (b) significantly reduce the rate of future benefit accruals; and
- (c) change the basis for benefits to year-by-year salary, whereas the “old” formula based all benefits on compensation in a highest pay base averaging period.

In addition, illustrative examples in the SPD omit comparisons of benefits under the “old” and the “new” formulas which would show the reductions and other disadvantages.

57. El Paso's SPD is not “written in a manner calculated to be understood by the average plan participant,” and is not “sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan,” in violation of § 102 of ERISA, 29 U.S.C. § 1022. El Paso’s failure to disclose the reductions and other disadvantages of the cash balance amendments also violates the fiduciary duty under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), to keep participants informed.

PRAYER FOR RELIEF

WHEREAS, the Plaintiffs pray that this Court:

A. Declare that the terms of the Defendant Pension Plan, as amended by the cash balance features, violate the ADEA § 4(a), 29 U.S.C. § 623(a), because they create periods of years in which older, longer-service participants earn no additional benefits, while younger, shorter-service workers are accruing additional benefits.

B. Declare that the terms of the Defendant Pension Plan, as amended by the cash balance features, violate the vesting and minimum accrual standards in ERISA §§ 203(a) and 204(b)(1)(B), 29 U.S.C. §§ 1053(a) and 1054(b)(1)(B), because they create periods of years in which older, longer-service participants have no annual rates of accrual that are actually payable.

C. Declare that the terms of the Defendant Pension Plan, as amended by the cash balance amendments, violate the accrual standards in ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), and ADEA § 4(i)(1)(A), 29 U.S.C. § 623(i)(1)(A), by decreasing the rates at which benefits accrue based on age.

D. Declare that El Paso's implementation of the cash balance amendments violates the 15-day advance notice rule in ERISA § 204(h), 29 U.S.C. § 1054(h); the Summary Plan Description rules in ERISA Sections 102 and 104(b)(1), 29 U.S.C. §§ 1022 and 1024(b)(1); and the fiduciary duties to keep beneficiaries informed in ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

E. Order El Paso to take all necessary steps to make the cash balance features fully compliant with the law, including eliminating the conditioning of receipt of the cash balance formula's annual pay credits and interest on the participant's age and years of credited service and age-based reductions in rates of benefit accruals.

F. Order that El Paso prepare a Section 204(h) notice and SPD that fully disclose all reductions and other disadvantages under the cash balance formula that are not required to be reformed by the Court's Order.

G. Order the Defendants to pay double damages for willful violations of the ADEA.

H. Order the Defendants to pay interest, attorneys' fees and expenses.

I. Award such other equitable and remedial relief as the Court deems appropriate to ensure receipt of all retirement benefits required to give effect to the Court's declarations.

DATED this _____ day of December, 2004.

Respectfully submitted,

Stephen R. Bruce
Suite 210
805 15th St., NW
Washington, D.C. 20005
202 / 371-8013

Barry D. Roseman
Roseman & Kazmierski, LLC
1120 Lincoln St., Suite 1607
Denver, CO 80203-2141
303 / 839-1771

Attorneys for Plaintiffs

Plaintiffs' Addresses:

Wayne Tomlinson

1350 Golden Hills Road
Colorado Springs, CO 80919

Alice Ballesteros
6764 Granite Peak Drive
Colorado Springs, CO 80918

Gary Muckelroy
14640 Latrobe Drive
Colorado Springs, CO 80921

**PLAINTIFFS DEMAND TRIAL BY JURY ON ALL ISSUES SO TRIABLE
RAISED HEREIN**