No. 18-

IN THE

Supreme Court of the United States

JAMES P. TEUFEL,

Petitioner,

v.

THE NORTHERN TRUST COMPANY, *et al.,*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA) requires employers to honor their promises of accrued benefits – a requirement this Court has found to be "crucial" to ERISA's goal of protecting worker pensions. *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 744 (2004). In 2012, petitioner's employer changed its traditional defined benefit formula for workers who began their employment more than ten years earlier, *i.e.*, prior to June 1, 2001. For those employees, and only them, the company changed the highest average salary component of the existing formula, thereby reducing the value of benefits they had already earned by years of service provided before the amendment was adopted; the amendment also reduced the total compensation of those older workers who had served the company the longest. No similar reductions were imposed on the previously-accrued benefits or compensation of newer (and younger) employees. The Seventh Circuit held that such a plan amendment raised no cognizable claims under ERISA or the Age Discrimination in Employment Act (ADEA), and affirmed the dismissal of plaintiff's complaint under Fed. R. Civ. P. 12(b)(6).

The questions presented are:

Does an employer violate ERISA's anti-cutback rule by amending its defined benefit plan in a manner that freezes the promised growth of previously-accrued benefits, and thereby reduces the value of benefits attributable to service its employees have already provided?

Does the disparate impact theory of age discrimination liability, recognized by this Court in *Smith v. City of Jackson*, 544 U.S. 228 (2005), apply to pension plan changes that uniquely reduce the benefits and compensation of older workers?

LIST OF PARTIES TO THE PROCEEDING

Petitioner James P. Teufel, proceeding on his own behalf and seeking to represent a class and collective of similarly situated employees, was the plaintiff in the district court and the appellant before the court of appeals.

Respondents The Northern Trust Company, The Northern Trust Company Pension Plan, The Northern Trust Company Employee Benefit Administrative Committee and its members, Katie O'Neill, Kim Soppi, Bob Chapelle, Yuan Chen, Amyre Coleman, Heather Heston, Dawn Romei, Mark Sullivan, Mark Welch, Diane Hughes and Chandra Wilensky, were defendants in the district court and appellees before the court of appeals.

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STATUTES AND OTHER AUTHORITIES

James P. Teufel respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 887 F.3d 799, and reprinted at App. 1a-8a. The court of appeals' order denying rehearing is reprinted at App. 33a-34a.

The district court's memorandum opinion and order dismissing the second amended complaint (unpublished, available at 2017 WL 896562) is reprinted at App. 9a-20a.[1]

JURISDICTION

The court of appeals issued its opinion and judgment on April 11, 2018, and denied petitioner's petition for rehearing on May 10, 2018. App. 1a, 33a. The Court has jurisdiction to issue a writ of certiorari in this case under 28 U.S.C. § 1254(1) and Rule 13.3.

1. Before the district court, petitioner filed two actions that were subsequently consolidated. In dismissing petitioner's second amended complaint in the consolidated litigation, the district court entered identical memorandum opinions and orders in each case. For completeness, the memorandum opinion and order entered in the second-filed case (No. 15-cv-2822) is also included in the Appendix (21a-32a).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1054(g)(1) [ERISA § 204(g)(1)]:

> The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(d)(2) or 1441 of this title.

29 U.S.C. § 623(a) [ADEA § 4(a)]:

> **(a) Employer practices**
>
> It shall be unlawful for an employer --
>
> **(1)** to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> **(2)** to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> **(3)** to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(f)(2) [ADEA § 4(f)(2)]

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization--

* * *

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

* * *

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter….

29 U.S.C. § 623(i)(1)-(2) [ADEA § 4(i)(1)-(2)]:

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof 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.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

INTRODUCTION

For over 40 years, aging Americans have relied on ERISA as the primary protection for their pensions. They have also relied on federal law, as embodied in the ADEA, to stand as a bulwark against employment practices that uniquely burden older members of the workforce. Both of these important federal policies are at stake in this case. The Seventh Circuit held that a promise of accrued benefits cannot be enforced under federal law because the promise quantified benefits by reference to an employee's highest average salary, which the Seventh Circuit held was not certain to increase in the future. This holding directly contravenes this Court's holding in *Heinz*, and conflicts with holdings of other circuit courts of appeal. The Fourth and Ninth Circuits have held, as did this Court in *Heinz*, that ERISA's anti-cutback rule protects promises that base a participant's previously-accrued benefits on events that occur in the future, even where their occurrence is less than certain. *Heinz*, 541 U.S. 739 (post-retirement employment); *Savani v. URS Prof'l Solutions, LLC,* 592 F. App'x 166 (4th Cir. 2014) (continued service); *Shaw v. Int'l Ass'n of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985) (salary increases). The Seventh Circuit's holding in this case, that a plaintiff cannot state a claim for relief based on such a promise of accrued benefits, cannot be reconciled with this authority.

The Seventh Circuit's holding also eradicates the ADEA's disparate impact remedy in connection with pension plan changes, a result not grounded in the language of the statute and inconsistent with this Court's holding in *Smith v. City of Jackson*. On this record, the existence of the disparate impact on older employees was not disputed. Northern fixed increases to the highest average salary component for purposes of calculating earned benefits only for those workers who had served the company for a period longer than 10 years (since before June 1, 2001), without applying the reduction to younger, more recently hired employees. The result was that the benefits, and the compensation, of the company's older workers were devastated while those of younger workers were left largely undisturbed. Yet, even though the argument was not raised, the Seventh Circuit held that the ADEA – as the result of the adoption of section 623(i)(2) – affords no remedy for such a disparate impact on the pensions and compensation of older workers. Section 623(i)(2), however, does not create the broad "safe harbor" applied by the Seventh Circuit, and it does not warrant the court of appeals' deviation from this Court's holding in *Smith v. City of Jackson*.

This Court should issue a writ of certiorari in this case to resolve the conflict among the circuit courts created by the ruling below, reaffirm ERISA's protection of accrued benefits, and provide guidance to lower courts by clarifying that the ADEA's disparate impact analysis applies to pension plan amendments whose terms impose unique reductions in benefits and compensation of age-protected participants. The issues have broad importance as workers, confronting the continuing trend among private sector employers to transition away from defined benefit formulas in favor of less costly alternatives such as cash balance and defined contribution plans, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 & n.5 (2008), look to the law to protect the pensions they have already earned over years of prior service. The looming retirement security crisis[2] will be substantially worsened

2. "Meanwhile, a national retirement security crisis looms … For decades, the number of private pension plans has been in decline, likely replaced by 401(k) plans that have succeeded in transferring a variety of risks onto individual employees. The prospects are daunting. Boston College estimates that there is currently a deficit of $6.6 trillion between what workers would need today to sufficiently fund their retirement and what they actually have." *Pension Trends*, National Institute on Retirement Security (2017), available at https://www.nirsonline.org/wp-content/uploads/2017/07/pensiontrends.pdf (last visited Aug. 2, 2018).

if employers are allowed to abandon their promises and evade the reach of ERISA and the ADEA in the manner sanctioned by the lower court.

STATEMENT OF THE CASE

A. Statutory Background

1. ERISA's Anti-Cutback Rule

Congress enacted ERISA based on a set of findings, including that "the continued well-being and security of millions of employees and their dependents are directly affected by" employee benefit plans such as pensions, and that such plans "are affected with a national public interest." 29 U.S.C. § 1001(a). The statute incorporates express statements of federal policy, among them "to protect … the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service…." *Id.* § 1001(c).

As this Court has held,

> There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them.
>
> "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a

> plan. ERISA does, however, seek to ensure that employees will not be left emptyhanded once employers have guaranteed them certain benefits.... [W]hen Congress enacted ERISA, it 'wanted to ... mak[e] sure that if a worker has been promised a defined pension benefit upon retirement - and if he has fulfilled whatever conditions are required to obtain a vested benefit - he actually will receive it.' "

Heinz, 541 U.S. at 743 (ellipses and brackets by the Court) (quoting *Lockheed Corp. v. Spink,* 517 U.S. 882, 887 (1996) and *Nachman Corp. v. Pension Benefit Guaranty Corp.,* 446 U.S. 359, 375 (1980) (with citations omitted)).

"ERISA's anti-cutback rule is crucial to this object…." *Heinz*, 541 U.S. at 744. The rule provides, with exceptions not relevant herein, that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan …." 29 U.S.C. § 1054(g).

2. ADEA and Pension Plans

The ADEA embraces similarly important federal policy objectives: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). Under that Act, it is unlawful for an employer

> **(1)** to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation,

> terms, conditions, or privileges of employment, because of such individual's age; [or]
>
> **(2)** to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age….

29 U.S.C. § 623(a).

The ADEA contains an exception for "bona fide employee benefit plan[s] … where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)." 29 U.S.C. § 623(f)(2)(B)(i).[3] The referenced regulation stipulates that the exception for bona fide employee benefit plans does not apply to reductions in compensation outside the context of plan benefits: "neither section 4(f)(2) nor any other section of the [ADEA] excuses the payment of lower wages or salary to older employees on account of age." 29 C.F.R. § 1625.10(b).

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3. Congress amended this exception in response to this Court's ruling in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989). *See* Older Workers Benefit Protection Act of 1990, Pub. L. 101-433, 104 Stat. 978; *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 94 (2008).

In 1986 – four years before Congress enacted changes to the ADEA in response to the Court's decision in *Betts* – Congress enacted the Omnibus Budget Reconciliation Act of 1986, Pub. L. 99-509, 100 Stat. 1874, which added new subsection (i) to the ADEA. Paragraphs (1) and (2) of that new subsection, which were relied upon by the Seventh Circuit in rejecting petitioner's claims, provide:

> **(1)** Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof 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.
>
> **(2)** Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of

> participation which are taken into account for purposes of determining benefit accrual under the plan.

29 U.S.C. § 623(i); 100 Stat. 1874, 1973.

Finally, in 2006 Congress enacted the Pension Protection Act, Pub. L. 109-280, 120 Stat. 780, which among other things added to the ADEA protections for participants in connection with plan conversions, 29 U.S.C. § 623(i)(10)(B)(ii)-(iii); parallel provisions were also added to ERISA and the Internal Revenue Code. 29 U.S.C. § 1054(b)(1)(H)(5)(B)(ii)-(iii); 26 U.S.C. § 411(b)(5)(B)(ii)-(iii). With these provisions, Congress mandated that any plan conversion occurring after June 29, 2005 must protect "the participant's accrued benefit for years of service before the effective date of the amendment, determined under the terms of the plan as in effect before the amendment…." 29 U.S.C. § 623(i)(10)(B)(iii)(I).

B. The Challenged Plan Amendment

Prior to the adoption of the 2012 amendment challenged by petitioner, The Northern Trust Company provided its employees with pension benefits under two distinct defined benefit formulas: a traditional defined benefit formula for workers, like petitioner, whose employment predated June 1, 2001, and a "pension equity formula" for workers hired after May 31, 2001. Doc. 42 at 500-03.[4] Both formulas calculated benefits based on

4. "Doc." refers to the ECF document number in the district court, No. 1:14-cv-07214 (N.D. Ill.). All "Doc." page references are to the ECF header page.

employees' highest average salary[5] and length of service: under the traditional formula, participants were promised a retirement annuity equal to a percentage of their highest average salary multiplied by years of service; the pension equity formula, on the other hand, provided benefits in a lump sum (based on established "pension credits") that were a function of highest average salary and length of service. *Id.* at 500-03 & Doc. 42-2 at 633-34.

Northern maintained this two-formula pension plan alongside a policy that the company referred to as its "Total Compensation Policy." In accordance with that Total Compensation Policy, employees covered by the traditional defined benefit formula accepted smaller salaries in exchange for richer pension benefits, while newer employees received higher salaries in recognition of the smaller benefits provided under the pension equity formula. Doc. 42 at 522.

In 2012, Northern amended the plan. Northern converted all participants to a revised version of the pension equity formula, and fixed the annual rate at which the previously-earned benefits of participants under the traditional formula would grow. Doc. 42 at 504. For petitioner and others like him, the fixed rate (1.5%) was significantly lower than the rate at which their salaries historically had grown. *Id.* at 499, 504-05. Petitioner estimated that the change reduced his pension at retirement, with respect to the service he provided before the amendment was adopted, by more than 25%. *Id.* at 505.

5. Under the plan, employees' highest average salary is referred to as "Average Compensation." Doc. 42 at 500.

This change was applied only to participants whose benefits were defined by the traditional formula; no similar cap was placed on the growth of average salaries of younger pension equity formula participants. *Id.* at 504. Petitioner's expert opined, based on the plan's federal tax filings, that the majority of the traditional participants were over 40 years old (with an average age of 49), while the majority of the pension equity participants were under 40. Doc. 93-9 at 5828.

The 2012 plan amendment also fixed annual increases in the social security offset for traditional formula participants. Doc. 42 at 508-09. Referred to in the Northern plan as "Final Offset Compensation," this feature reduced benefits for participants like petitioner based on the 35-year average of the social security taxable wage base determined as of the date a participant reached social security retirement age. *Id.* Because the offset is a 35-year average, annual increases in the offset decrease over time as a participant continues to provide service to the sponsor and approaches retirement. By fixing the annual increase at 1.5%, Northern raised the offset for older workers (thus lowering their benefits), while lowering the offset for younger employees (thus increasing their benefits). *Id.*[6]

Petitioner alleged that the changes implemented by the 2012 amendment impermissibly reduced his accrued benefits under the plan and disparately impacted older,

6. The Seventh Circuit refused to address this aspect of the amendment, finding that it was a "wrinkle." 887 F.3d at 800 (App. 2a).

age-protected workers.[7] With respect to the accrued benefit claim, petitioner noted that the plan defined the promised "accrued benefit" as a percentage of an employees' highest average salary earned during "all periods of active employment with the Company." Doc. 42 at 500-01, 505-08. By providing for growth commensurate with salary increases, the plan promised workers that their pensions would (to that extent) maintain their value over time, thereby mitigating the erosion of the benefits' purchasing power between earning and payment. *Id.* at 507.

Petitioner also alleged that the change was age-discriminatory. In addition to capping the growth of already accrued benefits only for older, traditional formula participants, the amendment transitioned older participants to reduced benefits under the pension equity formula with no compensating adjustment in salaries; this reduced their overall compensation to a far greater degree than younger participants whose relatively higher salaries already took their lower benefits into account. The result was that the plan amendment saved the company money at the unique expense of older workers' overall compensation. Doc. 42 at 521-24. The Seventh Circuit also ignored this aspect of petitioner's claims. 887 F.3d 799 (App. 1a-8a).

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7. Petitioner asserted other claims under ERISA, but those claims are not at issue in this petition.

C. Proceedings Below

1. The District Court's dismissal, under Fed. R. Civ. P. 12(b)(6), of petitioner's Second Amended Complaint

Petitioner filed suit before the United States District Court for the Northern District of Illinois on September 16, 2014. Doc. 1. The suit, which originally sought relief under the ADEA, was thereafter consolidated with a separate suit that asserted claims under ERISA. Docs. 24, 26. Petitioner filed a second amended complaint on March 30, 2016. Doc. 42. The district court had jurisdiction under 29 U.S.C. § 1132(e), 29 U.S.C. § 626(c) and 28 U.S.C. § 1331.

Prior to answering petitioner's complaint, respondents moved to dismiss under Fed. R. Civ. P. 12(b)(6), and alternatively sought the entry of summary judgment. Docs. 66-74. Following briefing, the district court dismissed the second amended complaint in its entirety. Doc. 121 (App. 9a-20a). The district court ruled that petitioner could not state a cognizable claim for reduction of his accrued benefits both because the claim "was dependent on future employment and raises to become eligible for the potentially higher Accrued Benefit," and because the language of the plan did not support the claim. Doc 121 at 6127 (App. 17a). The district court also ruled that the plan amendment did not violate the ADEA because "any differences in pension benefits as a result of the 2012 Amendment are a result of differing years of service. Older workers are more likely to have worked longer and are more likely to have begun work when the Traditional Formula was in place. The 2012 Amendment removed the application of a formula that was more favorable toward older workers and replaced it with a formula that applies to all workers.[8] Thus, Defendants' Motion to Dismiss Counts VI and VII is granted." Doc. 121 at 6129-30 (App. 20a).

2. The Circuit Court's affirmance

The United States Court of Appeals for the Seventh Circuit affirmed the district court in all respects. 887 F.3d 799 (App. 1a-8a). The court rejected petitioner's accrued benefit claim because it was premised on future salary increases which were not guaranteed to occur: "What a participant hopes will happen tomorrow has not accrued in the past." 887 F.3d at 801 (App. 4a). The court stated that because the growth of the benefit was tied to future salaries, it could not be enforced as part of an already-accrued benefit. With respect to petitioner's future salary, the court held: "Teufel and others like him have a *hope* that it will [increase], maybe even an *expectation* that it will, but not an *entitlement* that it will – and for the purpose of identifying the 'accrued benefit' that's a vital difference. ERISA protects all entitlements that make up the 'accrued benefit' but does not protect anyone's hope that the future will improve on the past." 887 F.3d at 801-02 (App. 5a) (emphasis by the court).

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8. This statement by the district court was not correct. The limitation on previously-earned benefits was explicitly not "applied to all workers." To the contrary, defendants did not contest that the modified traditional benefit formula applied only to participants who commenced employment prior to June 1, 2001. *E.g.*, Doc. 68 at 1724.

The court also held that petitioner had not stated a cognizable claim for disparate impact age discrimination. The court first expressed skepticism that "curtailing a benefit correlated with age, and so coming closer to eliminating the role of age in pension calculations, can be understood as discrimination against the old." 887 F.3d at 802 (App. 7a). "At all events," the Seventh Circuit stated, "the Supreme Court has never held that the disparate impact of an age-neutral pension plan can violate the statute. To the contrary, *Kentucky Retirement Systems* [*v. EEOC*, 554 U.S. 135 (2008)] tells us that the relation between the ADEA and pension plans should be understood through the language of 29 U.S.C. §623(i), which directly addresses the topic." 887 F.3d at 802 (App. 7a).

The court then held that section 623(i) of the ADEA – specifically, section 623(i)(2)[9] – provided a "safe harbor" from claims of disparate impact age discrimination:

> Benefits depend on the number of years of credited service and the employee's salary, not on age. Because salary generally rises with age, and an extra year of credited service goes with an extra year of age, the plan's criteria are correlated with age – but both *Kentucky Retirement Systems* and *Hazen Paper* hold that these pension criteria differ from age discrimination. An employer would fall outside the §623(i) safe harbor if, for example, the

9. Respondents did not raise section 623(i)(2) as a basis for rejecting the disparate impact theory of liability, and the issue was not briefed to the Seventh Circuit.

> amount of pension credit per year were a function of age rather than the years of credited service, or if pension accruals stopped or were reduced at a firm's normal retirement age….. Because the plan complies with §623(i), it satisfies the ADEA.

887 F.3d at 803 (App. 8a) (citing *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135 (2008), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)).

The court of appeals did not address the aspects of the 2012 amendment that imposed unique reductions on the benefits of older participants: the cap on growth of highest average salary, and the change to the social security offset. The court also did not address petitioner's claim that the amendment reduced the overall compensation of older workers to a far greater extent than their younger counterparts.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's refusal to enforce a promise of accrued benefits solely because the promise depends, in part, on future events that are not guaranteed to occur conflicts with this Court's precedent and decisions of other courts of appeals. The ruling that the ADEA affords no disparate impact remedy in connection with pension plan changes similarly conflicts with this Court's precedent, and finds no support in the statute. The Court should correct these erroneous rulings for the following reasons.

I. The Seventh Circuit's ruling contravenes this Court's holding in *Heinz* and creates a circuit split.

In *Heinz*, this Court recognized that pension benefits that are affected by future events, which may or may not occur, are nonetheless protected by ERISA. *Heinz*, 541 U.S. at 745-46. Before Northern amended its pension plan in 2012, the plan provided that an employee's benefit would be measured by his or her highest average salary. The amendment reduced this benefit; it provided that, instead of receiving a percentage of highest average salary, workers would receive a percentage of their 2012 salary with a fixed and reduced annual adjustment. For employees like petitioner, this amendment reduced the promised benefit earned by service they performed before the amendment was adopted.

The Seventh Circuit held that the uncertainty of future salary increases made it impossible to classify the benefits as accrued. "Teufel and others like him have a *hope* [that their salary will increase], maybe even an *expectation* that it will, but not an *entitlement* that it will – and for the purpose of identifying the 'accrued benefit' that's a vital difference. ERISA protects all entitlements that make up the 'accrued benefit' but does not protect anyone's hope that the future will improve on the past." 887 F.3d at 801-02 (App. 5a) (emphasis by the court).

This Court has rejected this analysis. In *Heinz*, the employer amended its plan to suspend benefits for retired workers if they engaged in a broadened category of competitive employment. The Court acknowledged that the employees might never experience a suspension of their benefits – after all, disqualifying employment might never be available to them. They may have had a *hope* that they could obtain such employment, maybe even an *expectation* that they would do so, but did that mean that they had a benefit protectable by ERISA? This Court said that it did:

> In a given case, the new condition may or may not be invoked to justify an actual suspension of benefits, but at the moment the new condition is imposed, the accrued benefit becomes less valuable, irrespective of any actual suspension.

Heinz, 541 U.S. at 746.

Petitioner served Northern for 14 years before the 2012 amendment was adopted. The plan promised him in exchange a pension measured by his highest average salary multiplied by those 14 years of service. As in *Heinz*, Teufel had a right to rely on this promise:

> Heinz worked and accrued retirement benefits under a plan with terms allowing him to supplement retirement income by certain employment, and he was being reasonable if he relied on those terms in planning his retirement. The 1998 amendment undercut any such reliance, paying retirement income only if he accepted a substantial curtailment of his opportunity to do the kind of work he knew. We simply do not see how, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz's pension rights and reducing his promised benefits.

Id. at 744-45.

Petitioner, like Mr. Heinz, planned his retirement based on the promise of benefits contained in his pension plan; in Mr. Heinz's case, that planning included the hope that he would find other employment with which to supplement his pension; in petitioner's case, he planned on benefits, earned by service already provided, that have now been unilaterally reduced by plan amendment. This Court's holding – that the sponsor cannot impose new conditions, even where they are based on future events that are not certain to occur, without impermissibly reducing a previously accrued benefit – cannot be squared with the Seventh Circuit's holding that "[w]hat a participant hopes will happen tomorrow has not accrued in the past." 887 F.3d at 801 (App. 4a).

The Seventh Circuit misinterpreted the justified expectations that petitioner's lawsuit seeks to vindicate. Petitioner did not contend below, and does not contend before this Court, that he has a justified expectation in future salary increases. His salary may increase; it may decrease; his employment might be terminated. But Northern promised petitioner that, in exchange for his service, he would receive as his pension a percentage of the highest average salary he ultimately earned; his expectation that his earned benefit would grow in accordance with that formula – provided he lived up to his end of the bargain – was fully justified under the terms of the plan; and that promise ERISA does, and should, protect.

The sponsor is no more free to unilaterally change the formula to petitioner's detriment than the union was to expand the scope of disqualifying post-retirement employment in *Heinz*. The pensioners there had no justified expectation that such employment would be available, nor did they have any entitlement to such employment. The Court held nonetheless that the union's promise – that only certain categories of employment would result in a suspension of benefits – was fully enforceable under ERISA. This Court should issue a writ of certiorari because the Seventh Circuit's decision contravenes *Heinz* and undermines ERISA's goal of protecting workers' pensions.

The Seventh Circuit's decision also conflicts with holdings of other circuit courts of appeal. In *Shaw v. Int'l Ass'n of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985), the United States Court of Appeals for the Ninth Circuit enforced as an accrued benefit a "living pension" feature that tied benefits to "salary increases in the position the retiree held immediately prior to retirement." *Id.* at 1460 & 1464-65. The Seventh Circuit distinguished *Shaw* on the ground that the Northern Plan did not guarantee that "any worker's salary will increase in future years." 887 F.3d at 801 (App. 5a). But that is not a distinction at all. The plan at issue in *Shaw* did not guarantee that salaries would increase; rather, it provided that benefits earned would be adjusted by salary increases awarded to those holding the position previously held by the retiree, if those increases were awarded. *Shaw*, 750 F.2d at 1460. The panel opinion conflicts with *Shaw*.

In *Savani v. URS Prof'l Solutions, LLC*, 592 F. App'x 166 (4th Cir. 2014), the court of appeals held that a plan benefit based upon future service was accrued and protected from cutback under ERISA. The plan at issue in that case promised employees who met certain age and length of service requirements a supplemental benefit, and the court addressed an amendment that eliminated the benefit for those who did not, at the time of the amendment, meet the eligibility requirements. Such employees had no guarantee of future employment; nothing in the *Savani* decision suggests that they were other than employees at will. Nonetheless, the court held that, because the employees could meet the eligibility requirements with future service, the supplemental benefit could not be eliminated without violating ERISA's anti-cutback rule. *Id.* at 172.

The Seventh Circuit's decision, which did not address the *Savani* decision, thus conflicts with the holding of the Fourth Circuit as well. *See also Bellas v. CBS, Inc.*, 221 F.3d 517, 532 (3d Cir. 2000) (holding that plant shutdown benefits, provided upon the happening of an "unpredictable contingent event," were accrued benefits that "accrued upon their creation rather than upon the occurrence of the unpredictable contingent event").

The Seventh Circuit's decision herein also conflicts with prior precedent from that court. In *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992), the court held that a promise of future growth (a cost of living adjustment) was enforceable as an accrued benefit even though, as the court's discussion made clear, there was no guarantee that such an adjustment would occur.

> In 1973, defendants amended the Plan to add a COLA to all retirement benefits. The amendment provided that *if* the Consumer Price Index ("CPI") increased in any year

> following a participant's retirement, *then* the monthly benefit would be increased accordingly, thus preventing a reduction in the real value of the benefits.

Id. at 466-67 (emphasis added). Finding *Shaw* indistinguishable, *id.* at 467, the court in *Hickey* held that the COLA adjustment was "inseparably tied to the monthly retirement benefit as a means for maintaining the real value of that benefit." *Id.* at 468.

The Seventh Circuit's ruling in this case breaks with this authority and holds that a promise of accrued benefits is unenforceable under ERISA where it incorporates future events. This Court should grant review and reverse. Northern promised petitioner that, in exchange for the 14 years of service he provided before the plan was amended, his earned benefit would grow at the rate of his continuing salary increases. ERISA forbids, and should forbid, the sponsor from unilaterally reducing that growth, and the resulting benefit, after the employee has performed his end of the bargain.[10]

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10. Contrary to the Seventh Circuit's ruling, 887 F.3d at 801 (App. 4a), the existence of nuclear options, such as a plan termination or freeze of employee salaries, does not render the promise of accrued benefits beyond ERISA's protection. Like other plans, the Northern plan treats future growth following a plan *termination* differently than the growth promised while the plan remains in effect (and Northern, of course, has not terminated the plan). Additionally, the adverse consequences that attend such options – an across-the-board salary freeze, for example, would likely cause a mass exodus of employees – provide the necessary disincentive to render the promise of growth enforceable while the plan remains in place. Similar options were, in fact, available in *Shaw* and *Savani*. The Seventh Circuit cited no support for this aspect of its ruling.

II. The Seventh Circuit wrongly held that pension changes uniquely and adversely impacting older workers are not actionable under the ADEA.

The Seventh Circuit affirmed the dismissal of petitioner's claim of disparate impact age discrimination because it found the remedy unavailable under section 623(i)(2) of the ADEA. 887 F.3d at 802-03 (App. 7a-8a). The ruling conflicts with this Court's decision in *Smith v. City of Jackson*; its statutory analysis (which was neither raised nor briefed before the court of appeals) is flawed and unsupported; and it undermines one of the primary goals the ADEA was enacted to serve: to protect older workers from the consequences of discriminatory employment practices.

A. The Seventh Circuit's decision is contrary to *Smith v. City of Jackson*.

When this Court recognized the theory of disparate impact discrimination under the ADEA, it did so because the ADEA, like Title VII, addresses "the *consequences* of employment practices, not simply the motivation." *Smith v. City of Jackson*, 544 U.S. at 234 (emphasis by the Court) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)). Citing *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135 (2008), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) – both disparate treatment cases – the Seventh Circuit held that the disparate impact theory is not available under the ADEA unless the factor that distinguishes the affected group is expressly based on age, rather than just correlated with age. 887 F.3d at 802 (App. 7a). This Court has expressly rejected this analysis as applied to disparate impact claims:

> Our opinion in *Hazen Paper*, however, did not address or comment on the issue we decide today. In that case, we held that an employee's allegation that he was discharged shortly before his pension would have vested did not state a cause of action under a *disparate treatment* theory. The motivating factor was not, we held, the employee's age, but rather his years of service, a factor that the ADEA did not prohibit an employer from considering when terminating an employee. While we noted that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA," we were careful to explain that we were not deciding "whether a disparate impact theory of liability is available under the ADEA…."

Smith v. City of Jackson, 544 U.S. at 237-38 (citations and footnote omitted; emphasis by the Court) (quoting *Hazen Paper*, 507 U.S. at 610).

Far from holding, as the Seventh Circuit did, that disparate impact liability cannot lie where the distinguishing factor is not age itself, this Court has made clear that such a distinction, based on a factor other than age (in this case, length of service), "is the very definition of" disparate impact liability. *Smith v. City of Jackson*, 544 U.S. at 236 n.6. As the Court explained in *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008), "in *City of Jackson*, we made it clear that in the typical disparate-impact case, the employer's practice is 'without respect to age' and its adverse impact (though 'because of age') is 'attributable to a nonage factor'; so action based on a 'factor other than age' is the very premise for disparate-impact liability in the first place, not a negation of it or a defense to it."

The Seventh Circuit ignored this precedent in limiting the ADEA to distinctions that are facially based on age. The court of appeals also ignored the features of the Northern plan amendment that caused the disparate impacts of which petitioner complained: the cap on growth and reduction in Total Compensation applied to only longer-tenured employees, and the change in the plan's social security offset that lowered benefits for older employees but raised them for younger employees. Petitioner presented expert analysis demonstrating that these changes adversely impacted age-protected employees. He should be allowed to pursue the claims and obtain an explanation regarding why Northern applied such reductions uniquely to its older and longer-tenured employees. *Smith v. City of Jackson*, 544 U.S. at 239 (discussing the ADEA's defense based on reasonable factors other than age).

B. The Seventh Circuit's decision is not supported by ADEA Section 623(i)(2).

The Seventh Circuit held that Section 623(i)(2) of the ADEA provides a safe harbor that precludes disparate impact liability. 887 F.3d at 803 (App. 8a). The court's analysis, regarding an issue that was not raised by respondents or briefed by the parties, was flawed and incorrect.

First, the premise for the court's analysis was not correct. Observing that this Court has not previously applied the disparate impact theory to what the court of appeals termed an "age-neutral pension plan," the Seventh Circuit stated: "To the contrary, *Kentucky Retirement Systems* tells us that the relation between the ADEA and pension plans should be understood through the language of 29 U.S.C. §623(i), which directly addresses the topic." 887 F.3d at 802 (App. 7a). But *Kentucky Retirement Systems* was a disparate *treatment* case, not a disparate impact case. In fact, the Court was careful to note in *Kentucky Retirement Systems* that the disparate impact theory was not at issue in that case. 554 U.S. 135, 142 (citing *Smith v. City of Jackson* and noting that the disparate impact theory was not at issue in *Kentucky Retirement Systems*). Moreover, contrary to the Seventh Circuit's opinion, this Court did not address Section 623(i) in *Kentucky Retirement Systems* at all. 554 U.S. 135. Although the Court briefly discussed Section *623(l)*, there is nothing in *Kentucky Retirement Systems* that even addresses Section 623(i), let alone "tells us that the relation between the ADEA and pension plans should be understood through the language of 29 U.S.C. §623(i)." The Seventh Circuit thus erred in basing its holding – that disparate impact liability is not available in the context of pension plan amendments – on Section 623(i) and the *Kentucky Retirement Systems* decision.

Second, the limitations addressed by subsection (i)(2) are not even implicated in this case. Subsection (i)(2) authorizes employers to observe limitations "on the amount of benefits that the plan provides" or "the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan." The Northern plan contained such a limitation (35 years), but petitioner did not object to it. Instead, petitioner complained about the *changes* wrought by the 2012 plan amendment – the reduction in Total Compensation, the cap on growth of average compensation, the fixing of the social security offset – changes that uniquely (or disproportionately) affected older workers.

Third, the language of section 623(i)(2) does not support the safe harbor that the court of appeals applied. After declaring that "it shall be unlawful for an employer … to establish or maintain an employee pension benefit plan which requires or permits … 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," 29 U.S.C. § 623(i)(1)(A), subsection (i)(2) provides:

> Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

29 U.S.C. § 623(i)(2).

The Seventh Circuit interpreted this language to mean that, as long as the plan complies with the law before and after the amendment, the change effected cannot be age discriminatory. 887 F.3d at 803 (App. 8a). The court's reasoning focuses on the parties' relationship before and after the change, in isolation, and without considering the change itself. But it is the change – the reduction in benefits and compensation – that is objectionable here. An employer breaks no law by offering benefits based on years of service, and limiting benefits on that basis. Petitioner does not contend otherwise. But where, as here, the employer creates categories of employees based on a factor correlated with age (length of service), and then treats the older group less favorably by reducing their benefits and compensation (and only theirs), subsection (i)(2) affords no safe harbor.

The language on which the Seventh Circuit relied was added as part of the Omnibus Budget Reconciliation Act of 1986, Pub. L. 99-509, 100 Stat. 1874, the same year that Congress removed the upper age limit for protection under the ADEA. In *Hurlic v. S. Cal. Gas Co.*, 539 F.3d 1024 (9th Cir. 2008), the United States Court of Appeals for the Ninth Circuit discussed the legislative history surrounding the adoption of section 623(i) as part of the 1986 OBRA, specifically the prohibition of plan provisions that reduce benefit accruals "because of the attainment of any age." The court in *Hurlic* observed:

> The statute's legislative history makes clear that the word "attainment" is important. As originally enacted, ERISA did not require that a pension plan allow participants who worked beyond normal retirement age to continue earning benefits. *See* H.R.Rep. No. 99–1012, at 378 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 3868, 4023. In 1986,

> Congress enacted provisions to remedy that problem, explaining that "benefit accruals or continued allocations to an employee's account under either a defined benefit plan or a defined contribution plan may not be reduced or discontinued on account of the attainment of a *specified* age." *Id.* (emphasis added).
>
> This language clearly describes Congress's intent to prohibit pension plans from reducing or ceasing benefits when a participant reached age 65 or any other specified age. For example, the Plan would clearly be in violation of ERISA § 204(b)(1)(H)(i) if it provided that when participants reached age 50, they stopped receiving benefits or began accruing benefits at a reduced rate.

539 F.3d at 1031-32.

The Seventh Circuit has taken a limited exception to this statutory prohibition on reducing benefits because "participants reached age 65 or any other specified age," and turned it into wholesale immunity for pension plan amendments that are not facially age-discriminatory. Neither the language of the statute nor the legislative history surrounding the addition of section 623(i) supports that construction.

Fourth, section 623(i) by its terms is addressed to benefit accruals only, and not to already accrued benefits or other forms of compensation. *See* 29 U.S.C. § 623(i)(4) (emphasis added) ("Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section *relating to benefit accrual under such plan*."). To be sure, other circuit courts have held, based on this language, that changes to future accruals under cash balance plans, in and of themselves, do not violate the statute (a claim that petitioner has not made). *See Jensen v. Solvay Chems., Inc.*, 625 F.3d 641, 660 (10th Cir. 2010); *Hurlic*, 539 F.3d at 1032; *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 640-42 (7th Cir. 2006). But none of those cases involved, or applied a section 623(i) safe harbor to, the unique reductions Northern imposed on the existing benefits and Total Compensation of the older members of its workforce.

Petitioner herein is not complaining about the rate of benefit accrual under the amended plan, nor is he basing his claims on the nature of cash balance plans as compared to traditional defined benefit plans. Rather, with the 2012 amendment, Northern (a) reduced the benefits attributable to service petitioner provided before the amendment was adopted (a fact respondents have never disputed), and (b) reduced the Total Compensation of a class of older, age-protected workers who relied on the company's promise that the plan's benefits would make up for the lower salaries they were paid relative to their younger counterparts. Section 623(i)(2) does not offer a safe harbor for such reductions. *See, e.g.*, 29 C.F.R. § 1625.10(b) (noting that "neither section 4(f)(2) nor any other section of the [ADEA] excuses the payment of lower wages or salary to older employees on account of age").

The Seventh Circuit's decision is especially troubling in light of that court's failure to address the reduction in Total Compensation paid to Northern's older workers. That claim is a straight-up section 623(a)(2) claim of disparate impact liability; it is not meaningfully distinguishable from the facts that were before the Court in *Smith v. City of Jackson*. Unlike this case, however, the record in *Smith v. City of Jackson* was sufficiently developed to enable this Court to determine that "the City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a 'reasonable facto[r] other than age' that responded to the City's legitimate goal of retaining police officers." *Smith v. City of Jackson*, 544 U.S. at 242. Petitioner herein, on the other hand, has been entirely denied his day in court. The record is therefore silent regarding why Northern chose to burden its longer-tenured employees by reducing their pay in this manner. Allowing a company to reduce pay for older workers by reducing the benefits component of that compensation promises to thoroughly undermine the disparate impact theory of liability.

Finally, in finding that subsection (i)(2) created a "safe harbor" from disparate impact liability, the Seventh Circuit failed to consider other provisions of the ADEA which point to the continued existence of the disparate impact remedy. Section 623(f)(2), for example, which was amended four years after subsection (i)(2) was added, provides a limited benefit payment and cost-based exception from section (a) liability for "bona fide employee benefit plans," which include pension plans. 29 U.S.C. § 623(f)(2); 29 C.F.R. § 1625.10(b). The exception provides that it shall not be unlawful for an employer "to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section … to observe the terms of a bona fide employee benefit plan--

> where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989).

29 U.S.C. § 623(f)(2)(B)(i). The comparison to be drawn to justify the application of this exception (amount of payment, cost incurred) plainly focuses on the consequences of, rather than the motivation for, discriminatory practices. *See Smith v. City of Jackson*, 544 U.S. at 236 (emphasis by the Court; footnote omitted) (holding that disparate impact theory was available because "the text [of the ADEA] focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.").

Moreover, as part of the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780, Congress added a "Special rule for plan conversions," which provides:

> If, after June 29, 2005, an applicable plan amendment is adopted, the plan shall be treated as failing to meet the requirements of paragraph (1)(H)[11] unless the requirements of clause (iii) are met with respect to each individual who was a participant in the plan immediately before the adoption of the amendment.

29 U.S.C. § 623(i)(10)(B)(ii).

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11. The citation to paragraph (1)(H) appears to refer to parallel provisions of ERISA and the Internal Revenue Code. *See* 29 U.S.C. § 1054(b)(1)(H) and 26 U.S.C. § 411(b)(1)(H).

Clause (iii) provides that, in a plan conversion such as that involved here, participants must receive their "accrued benefit for years of service before the effective date of the amendment, determined under the terms of the plan as in effect before the amendment, plus … [their] accrued benefit for years of service after the effective date of the amendment, determined under the terms of the plan as in effect after the amendment." 29 U.S.C. § 623(i)(10)(B)(iii)(I) & (II).

Congress passed the Pension Protection Act on August 17, 2006, Pub. L. 109-280, 120 Stat. 780, after this Court decided *Smith v. City of Jackson*, yet Congress did not disavow the disparate impact remedy in connection with pension plan amendments. *See, e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."). To the contrary, under section 623(i)(10)(B), an employer can, without discriminatory motive, implement a non-compliant plan conversion; the subsection nonetheless provides – without reference to employer motives – that such a conversion "shall be treated as failing to meet the requirements of paragraph 1(H)." This provision is not consistent with the Seventh Circuit's determination that Congress eradicated the disparate impact remedy for pension plan amendments 20 years earlier; it further demonstrates Congress' continuing concern with the consequences of pension changes for older workers, and not just the employer's motivations in implementing those changes.

The Seventh Circuit failed to address these additional provisions of the ADEA. Instead, without briefing, the court of appeals determined that the ADEA no longer affords a disparate impact remedy for pension plan changes, based on an isolated reading of one subsection of the statute. Neither that subsection nor the statute read as a whole supports the court's holding, or warrants deviating from this Court's decision in *Smith v. City of Jackson*. To the contrary, the statute reflects Congress' continuing concern with the consequences for older, longer-tenured workers, of pension plan changes, conversions and amendments.

The Northern plan amendment and the Seventh Circuit ruling below provide a roadmap for employers to evade the reach of the ADEA. By tying reductions in benefits and compensation to tenure (and not explicitly age), employers will be free to reduce costs at the unique expense of older workers who have served the longest. This Court should correct the court of appeals' erroneous ruling that the disparate impact remedy is no longer available in connection with pension plan changes, and protect the rights of older workers to the pensions and compensation they have earned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED APRIL 11, 2018

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 17-1676 & 17-1677

JAMES P. TEUFEL,

Plaintiff-Appellant,

v.

THE NORTHERN TRUST COMPANY, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 14 C 7214 & 15 C 2822 —
Rubén Castillo, *Chief Judge.*

October 30, 2017, Argued
April 11, 2018, Decided

Before Wood, *Chief Judge,* and Bauer and Easterbrook, *Circuit Judges.*

Easterbrook, *Circuit Judge.* In 2012 Northern Trust changed its pension plan. Until then it had a defined-benefit plan under which retirement income depended on years worked, times an average of each employee's five highest-earning consecutive years, times a constant. Example: 30 years worked, times an average high-five salary of $50,000, times 0.018, produces a pension of $27,000. (We ignore several wrinkles, including an offset for Social Security benefits, a limit on the number of credited years, and a limit on the maximum credited earnings.) The parties call this the Traditional formula. As amended, however, the plan multiplies the years worked and the high average compensation not by a constant but by a formula that depends on the number of years worked after 2012. The parties call this arrangement the new PEP formula, and they agree that it reduces the pension-accrual rate. (There is also an old PEP formula, in place between 2002 and 2012, for employees hired after 2001; we ignore that wrinkle too.) Recognizing that shifting everyone to the new PEP formula would unsettle the expectations of workers who had relied on the Traditional formula, Northern Trust provided people hired before 2002 a transitional benefit, treating them as if they were still under the Traditional formula except that it would deem their salaries as increasing at 1.5% per year, without regard to the actual rate of change in their compensation.

James Teufel contends in this suit that the 2012 amendment, even with the transitional benefit, violates the anticutback rule in ERISA, the Employee Retirement Income Security Act. 29 U.S.C. §§ 1001-1461. He also contends that the change harms older workers relative to younger ones, violating the ADEA, the Age Discrimination in Employment Act. 29 U.S.C. §§ 621-34. The district court dismissed the suit on the pleadings, 2017 U.S. Dist. LEXIS 31674 (N.D. Ill. Mar. 6, 2017), and Teufel appeals.

The anti-cutback rule provides:

> The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(d)(2) or 1441 of this title.

29 U.S.C. §1054(g)(1). Neither §1082(d)(2) nor §1441 matters to this case; the anti-cutback rule has other provisos too, but none applies. So all that matters is the basic requirement: the "accrued benefit" of any participant may not be decreased. Teufel insists that the 2012 amendment reduced his "accrued benefit" because he expected his salary to continue increasing at more than 5% a year, as it had done since he was hired in 1998, while the 2012 amendment treats salaries as increasing at only 1.5% a year.

To analyze this contention we need to be precise about how pension benefits are calculated for employees, such as Teufel, hired before 2002 and still covered by the Traditional formula until 2012. The plan first calculates an employee's accrued benefit as of March 31, 2012. That process starts with the number of years of credited service, multiplies that by the consecutive-high-five average salary, and multiplies by 0.018. The plan adjusts that result in following years by treating the high-five average (before 2012) as if that figure had continued to increase by 1.5% a year for each year worked after 2012. Finally, the plan adds benefits calculated under the new PEP formula for service after March 31, 2012.

This statement of the new formula shows why Teufel cannot succeed. If, instead of amending the plan in March 2012, Northern Trust had *terminated* the plan, calculated Teufel's accrued benefit, and deposited that sum in a new plan with additions to come under the new PEP formula, then Teufel would not have had any complaint. (He concedes that this is so.) What actually happened is more favorable to him: he gets the vested benefit as of March 2012 *plus* an increase in the (imputed) average compensation of 1.5% a year (for pre-2012 work) for as long as he continues working.

Teufel wants us to treat the expectation of future salary increases as an "accrued benefit," but on March 31, 2012, when the transition occurred, the only benefit that had "accrued" was the sum due for work already performed. What a participant hopes will happen tomorrow has not accrued in the past.

Suppose the Traditional formula had remained unchanged but that in March 2012, as part of an austerity plan, Northern Trust had resolved that no employee's salary could increase at a rate of more than 1.5% a year. That would have had the same effect on the pre-2012 component of Teufel's pension as the actual amendment, but a reduction in the rate of salary increases could not violate ERISA, which does not require employers to increase anyone's salary. Curtailing the rate at which salaries change would not affect anyone's "accrued benefit." Since that is so, the actual amendment also must be valid.

Teufel relies on decisions such as *Hickey v. Chicago Truck Drivers Union*, 980 F.2d 465 (7th Cir. 1992); *Ruppert v. Alliant Energy Cash Balance Pension Plan*, 726 F.3d 936 (7th Cir. 2013); and *Shaw v. Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985). In these cases the language of the pension plan itself promised an increase in pension benefits—in one, a cost-of-living adjustment, in another a rate of interest added to the pension if the worker quit before retirement age, and in the third an adjustment in light of the salary earned by the current holder of the retiree's old job. The decisions all hold that these adjustments are part of the "accrued benefit" because they are among the pension plans' terms. See also *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 124 S. Ct. 2230, 159 L. Ed. 2d 46 (2004) (plan cannot attach new conditions to benefits already accrued). But nothing in the Northern Trust plan's Traditional formula guarantees that any worker's salary will increase in future years. Teufel and others like him have a *hope* that it will, maybe even an *expectation* that it will, but not an *entitlement* that it will—and for the purpose of identifying the "accrued benefit" that's a vital difference. ERISA protects all entitlements that make up the "accrued benefit" but does not protect anyone's hope that the future will improve on the past. See *Cinotto v. Delta Air Lines Inc.*, 674 F.3d 1285, 1296-97 (11th Cir. 2012).

One additional ERISA contention calls for brief mention. Teufel maintains that the plan's administrator violated 29 U.S.C. §1054(h)(2) because it did not furnish all participants with a writing that described the 2012 amendment "in a manner calculated to be understood by the average plan participant". To the extent Teufel faults the description for failing to tell participants that the amendment eliminated an accrued benefit, this contention fails for the reasons we have already given. To the extent that Teufel finds the language too complex—well, it seems clear to us, and it isn't apparent how it could have been made much simpler (all of these pension formulas have complexities). True, what seems clear to a federal judge may not be clear to "the average plan participant", but Northern Trust provided its staff with an online tool that showed each worker *exactly* what would happen to that worker's pension, under a number of different assumptions about future wages and retirement dates, and under both the pre-2012 approach and the amended plan. A precise participant-specific summation is hard to beat for clarity and complies with §1054(h)(2). Teufel makes a few other arguments based on ERISA, but they do not require discussion.

Teufel's argument under the ADEA fares no better. He acknowledges that the plan as a whole, and the 2012 amendment, is age-neutral, for pension eligibility is distinct from age. See *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135, 128 S. Ct. 2361, 171 L. Ed. 2d 322 (2008); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993). Still, he maintains, the correlation between pension eligibility and age—plus the fact that the high-five-average feature of the Traditional formula was most valuable to older workers approaching their highest-earning years—means that the 2012 amendment produces a disparate impact that violates the

ADEA. (*Smith v. Jackson*, 544 U.S. 228, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005), holds that a form of disparate-impact analysis applies under the ADEA.) The Traditional formula treats older workers better than younger ones (the high-five-average feature is more valuable the older one gets); and from this it follows that the elimination of the formula (or its reduction to a 1.5% annual increase) harms older workers relative to younger ones. So the argument goes.

We are skeptical about the proposition that curtailing a benefit correlated with age, and so coming closer to eliminating the role of age in pension calculations, can be understood as discrimination against the old. *Kentucky Retirement Systems* holds that a pension benefit for older workers does not violate the ADEA, but not that any such benefit, once extended, must be continued for life. At all events, the Supreme Court has never held that the disparate impact of an age-neutral pension plan can violate the statute. To the contrary, *Kentucky Retirement Systems* tells us that the relation between the ADEA and pension plans should be understood through the language of 29 U.S.C. §623(i), which directly addresses the topic.

Section 623 as a whole is the basic rule against age discrimination. Section 623(i)(2) provides that "[n]othing in this section" (that is, all of §623) prohibits an employer from "observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan." Just to avoid any doubt, §623(i)(4) adds: "Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan." In other words, a pension plan that complies with §623(i) does not violate the ADEA.

The Northern Trust pension plan, both before and after the 2012 amendment, complies with §623(i). Benefits depend on the number of years of credited service and the employee's salary, not on age. Because salary generally rises with age, and an extra year of credited service goes with an extra year of age, the plan's criteria are correlated with age—but both *Kentucky Retirement Systems* and *Hazen Paper* hold that these pension criteria differ from age discrimination. An employer would fall outside the §623(i) safe harbor if, for example, the amount of pension credit per year were a function of age rather than the years of credited service, or if pension accruals stopped or were reduced at a firm's normal retirement age. See 29 U.S.C. §623(i)(1). Stopping pension accruals at age 65 used to be a common feature of defined benefit plans. Under §623(i)(1)(A) that is no longer lawful. The Northern Trust plan, however, allows accruals past the normal retirement date, and accruals do not otherwise depend on age. Because the plan complies with §623(i), it satisfies the ADEA.

AFFIRMED

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED MARCH 6, 2017

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 14-cv-7214

JAMES P. TEUFEL, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

THE NORTHERN TRUST COMPANY, THE NORTHERN TRUST COMPANY PENSION PLAN, THE NORTHERN TRUST COMPANY EMPLOYEE BENEFIT ADMINISTRATIVE COMMITTEE, KATIE O'NEILL, KIM SOPPI, BOB CHAPELLE, YUAN CHEN, AMYRE COLEMAN, HEATHER HESTON, DAWN ROMEI, MARK SULLIVAN, MARK WELCH, DIANE HUGHES, AND CHANDRA WILENSKY,

Defendants.

JOHN W. DARRAH, United States District Judge.

March 6, 2017, Decided
March 6, 2017, Filed

MEMORANDUM OPINION AND ORDER

On March 20, 2016, Plaintiff James P. Teufel filed a Second Amended Complaint against Defendants The Northern Trust Company, The Northern Trust Company Pension Plan, The Northern Trust Company Employee Benefit Administrative Committee, Katie O'Neill, Kim Soppi, Bob Chapelle, Yuan Chen, Amyre Coleman, Heather Heston, Dawn Romei, Mark Sullivan, Mark Welch, Diane Hughes, and Chandra Wilensky, pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001, *et seq.*, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*, on behalf of himself and other participants in The Northern Trust Company Pension Plan. Defendants filed a Motion to Dismiss [66]. For the reasons set forth below, Defendants' Motion [66] is granted.

BACKGROUND

The following is taken from Plaintiff's Amended Complaint, which is assumed to be true for purposes of a motion to dismiss. *See Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 763 (7th Cir. 2010).

Plaintiff resides in Cook County, Illinois. Plaintiff is an employee of The Northern Trust Company and a participant in The Northern Trust Company Pension Plan (the "Plan"). (Compl. ¶ 1.) Defendant The Northern Trust Company ("Northern") is an Illinois banking corporation with its principal place of business located in Chicago, Illinois. Northern is the sponsor of the Plan within the meaning of ERISA Section 3(16)(B), 29 U.S.C. § 1002(16)(B), the trustee of the Pension Trust, and the fiduciary of the Plan. (Compl. ¶ 2.) The Plan is a defined benefit pension plan within the meaning of ERISA. Defendant The Northern Trust Company Employee Benefit Administrative Committee (the "Benefit Committee") is the named Plan Administrator and named Plan Fiduciary. Defendants Katie O'Neill, Kim Soppi, Bob Chapelle, Yuan Chen, Amyre Coleman, Heather Heston, Dawn Romei, Mark Sullivan, Mark Welch, Diane Hughes, and Chandra Wilensky ("Committee Members") are, or were, members of the Benefit Committee and Plan fiduciaries during the relevant period. Plaintiff asserts claims under ERISA and ADEA against Northern, the Plan, the Benefit Committee, and the Committee Members.

Plaintiff began his employment at Northern on or about March of 1998. Plaintiff became a participant in the Plan at that time. Over the course of Plaintiff's employment at Northern, his average annual compensation increases have exceeded 5.1 percent. Until 2002, the Plan provided defined pension benefits pursuant to a formula referred to as the "Traditional Benefit Formula."

In 2002, the Plan was amended to add a second formula, the Pension Equity Plan Benefit Formula (the "PEP Formula"), in addition to the Traditional Benefit Formula. Participants who already had an Accrued Benefit were permitted to choose which formula would apply to them going forward. Plaintiff chose the Traditional Benefit Formula. Effective April 1, 2012, Northern further amended the Plan by providing that no additional Credited Service would be recognized under the Traditional Formula ("2012 Amendment"). (Dkt. 42 ¶¶ 22-23.) Instead, a revised PEP Formula applied to all participants for all periods of service after March 31, 2012.

On January 26, 2012, Northern issued a notice of the upcoming Plan changes to the Plan's participants. The notice stated:

> If you are a Pension Plan participant who is currently under the Traditional Formula, your benefits earned after March 31, 2012 will be calculated under the Pension Equity Plan (PEP) Formula. This change will not impact benefits earned under the Traditional Formula through March 31, 2012.
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> - Credited service and eligible compensation under the Traditional Formula will be determined as of March 31, 2012.
>
> - This eligible compensation, determined as of March 31, 2012, will be increased at a rate of 1.5% per year for the time period you continue to earn benefits under the Pension Plan.

(Dkt. 42-4 at 1.)

LEGAL STANDARD

Rule 12(b)(6) permits a defendant to move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 555). However, plaintiffs are not required to "plead the elements of a cause of action along with facts supporting each element." *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 517 (7th Cir. 2015). Rather, the complaint must provide a defendant "with 'fair notice' of the claim and its basis." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008) (quoting Fed. R. Civ. P. 8(a)(2) and *Twombly*, 550 U.S. at 555). When evaluating a Rule 12(b)(6) motion, the court accepts the complaint's well-pleaded factual allegations as true and draws all reasonable inferences in the plaintiff's favor. *Twombly*, 550 U.S. at 555-56.

ANALYSIS

As a preliminary matter, Plaintiff filed a Motion [110] to strike and deem waived, "new arguments and assertions" made in Defendants' Reply in Support of their Motion to Dismiss [104]. It is well established that arguments raised for the first time in the reply brief are waived. *Mendez v. Perla Dental*, 646 F.3d 420, 424 (7th Cir. 2011). When the nonmovant raises new issues or arguments in response to a summary judgment motion, the movant is entitled to respond to those new issues in its reply brief. *See Central States, Southeast and Southwest Areas Pension Fund v. White*, 258 F.3d 636, 640 n. 2 (7th Cir. 2001). To the extent that Defendants' Reply in Support of their Motion to Dismiss contain arguments not previously raised and not in response to arguments raised by Plaintiff, these arguments will be deemed waived.

ERISA Claims

Plaintiff alleges that the 2012 Plan Amendment illegally decreased his accrued benefit in two ways: (1) locking the average compensation as of March 21, 2012, and increasing the average compensation by 1.5 percent per year instead of basing the average compensation on the highest annual average in any five-consecutive-year period; and (2) by freezing increases in Final Offset Compensation at 1.5 percent for the time period after the adoption of the 2012 Plan Amendment.

Under ERISA, the "accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(d)(2) or 1441 of this title." 29 U.S.C.A. § 1054(g)(1). Under the Traditional Benefit Formula, a participant's "Accrued Benefit" was calculated by: (1) multiplying 1.8 percent of a participant's "Average Compensation" by his number of years of "Credited Service" (up to thirty-five years); and then (2) subtracting (0.5 percent of the lesser of Final Offset Compensation or Covered Compensation) multiplied by his number of years of "Credited Service" (up to thirty-five years).

Accrued Benefit was defined as "the monthly benefit payable under the Plan in the form of a single life annuity upon the participant's attainment of 'Normal Retirement Age'." The Plan defined "Average Compensation" as "the highest annual average of the Compensation received by the participant during the full calendar months in any five-consecutive-year period that occurs in the participant's years of Credited Service." "Credited Service" was defined as the time the participant was employed by Northern and eligible to participate in the Plan. (Dkt. 42-1.) The 2012 Amendment stated that a participant's Accrued Benefit includes the "Accrued Benefit, if any, under the [Traditional Formula] as of March 31, 2012."

Defendants argue that any increases to the Accrued Benefit after 2012 were potential increases and had not actually accrued and were not protected by ERISA. Plaintiff cites to several cases that allegedly protect benefits based on future occurrences. In *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992), the Seventh Circuit held that a cost-of-living adjustment was an essential element of the retirement benefit that could not be eliminated without violating the anti-cutback rule. *Hickey*, 980 F.2d at 470. However, the cost-of-living adjustment in *Hickey* would have applied no matter what those workers did. It was not dependent on any future events. Similarly, in *Ruppert v.*

Alliant Energy Cash Balance Pension Plan, 726 F.3d 936 (7th Cir. 2013), the Seventh Circuit held that a benefit calculation was invalid because it had the effect of reducing future interest rates. Again, those future rates were not dependent on anything a plan participant did. That interest would have accrued regardless. In *Shaw v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985), a pension contained a "living pension" feature that matched increases in the retiree's pension benefits to salary increases in the position the retiree held immediately prior to retirement. *Shaw*, 750 F.2d at 1460. The Ninth Circuit held that the living-pension feature was not "conditional," because it was based on "an occurrence wholly outside the pensioner's control." *Id.* at 1464.

In this case, the Average Compensation, as defined by the Plan, was dependent on possible future wage increases and dependent on Plaintiff's continued employment with Northern. As the Supreme Court stated, "employers are perfectly free to modify the deal they are offering their employees, as long as the change goes to the terms of compensation for continued, future employment." *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 747, 124 S. Ct. 2230, 159 L. Ed. 2d 46 (2004). "Where the right to future benefit accruals are contingent on additional service, such future increases are not presently accrued benefits." *Cinotto v. Delta Air Lines Inc.*, 674 F.3d 1285, 1297 (11th Cir. 2012). In *Cinotto*, the Eleventh Circuit held that a more favorable social security offset had not accrued when an amendment changed the plan, because Plaintiff had not yet reached the age where the favorable offset applied. *Cinotto*, 674 F.3d at 1296-97. The right to a more favorable offset was "entirely dependent" on Plaintiff's providing future service until that age. *Id.* At most, Plaintiff had "an expectation of a future accrual." *Id.* at 1297. Under the Plan here, future benefit accruals, *i.e.*, a higher Accrued Benefit based on potential future raises, were contingent on additional service, and additional raises. Additional service and raises are not wholly outside Plaintiff's control, and an increased Accrued Benefit would not have necessarily occurred. At most, Plaintiff here had an expectation of future accrual of a higher Accrued Benefit.

Further, the terms of the Plan did not consider possible future service. Plaintiff cites to *Savani v. URS Prof'l Sols., LLC*, 592 F. App'x 166 (4th Cir. 2014), where the Fourth Circuit held that an early retirement pension supplement "explicitly incorporated future service into the calculation of an accrued benefit." *Savani*, 592 F. App'x at 172-73. Here, the Plan authorized Northern to amend the terms so long as it did not "decrease the Accrued Benefit of any Member (determined as of the time the amendment was adopted)." Dkt. 42-2, § 13.1. Further, Credited Service was calculated as the years "completed" and did not guarantee benefits based on future years' service or possible raises.

Plaintiff was dependent on future employment and raises to become eligible for the potentially higher Accrued Benefit. Additionally, the language of the Plan did not entitle Plaintiff to have his Accrued Benefit based on uncompleted years of service that may or may not have included raises. The 2012 Amendment did not violate ERISA's anti-cutback provision. Therefore, Defendants' Motion to Dismiss is granted as to Counts I-V.[1]

ADEA Claims

The ADEA makes it unlawful for an employer to discriminate against any employee "because of" that individual's age. 29 U.S.C. § 623(a). Section 4(i)(1) of the ADEA prohibits "the reduction of the rate of an employee's benefit accrual, because of age." 29 U.S.C. § 623(i)(1)(A). A plan complies with section 4(i)(1) if a participant's accrued benefit would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant. 29 U.S.C. § 623(i)(10)(A)(i). Defendants argue that Plaintiff's ADEA claims fail because the Plan complies with section 4(i)(1) and "[c]ompliance with the requirements of [section 4(i)] with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan." 29 U.S.C. § 623(i)(4).

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1. Plaintiff argues that even if his anti-cutback claim fails, his notice claim under ERISA still survives. ERISA requires written notice for any amendment to a plan that provides for a significant reduction in the rate of benefit accrual. 29 U.S.C. § 1054(h). Plaintiff argues that notice of the 2012 Amendment was deceptive and misleading because the 2012 Amendment improperly reduced accrued benefits, while the notice stated that accrued benefits would not be affected. As discussed, the 2012 Amendment did not improperly reduce accrued benefits, so the notice was not misleading.

Plaintiff argues that the 2012 Amendment does not qualify for the ADEA "safe harbor" provision because it applies to benefit accruals, and the alleged reductions for older workers constitute reductions in accrued benefits. Specifically, Plaintiff alleges that the 2012 Amendment disparately impacted older workers in the following ways: (1) it reduced funding costs and benefits for older Traditional Formula participants without a similar reduction for younger PEP Formula Participants; (2) it froze Final Offset Compensation in a manner that causes a greater reduction in benefits for workers closer to retiring and raises the benefits of many younger workers; and (3) created compensation structures that froze benefits and reduced compensation for older workers and did not freeze benefits or reduce compensation for younger workers. As discussed above, these alleged reductions do not affect accrued benefits, but the calculation of future Accrued Benefits, or the rate of benefit accrual.

Defendants contend that the 2012 Amendment subjects all participants to the exact same changes to future benefit accruals, regardless of age; thus, the Plan complies with the requirements of section 4(i). In cases such as these, "it is essential to separate age discrimination from other characteristics that may be correlated with age." *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006). While *Cooper* applies to age discrimination claims under ERISA, the same logic applies to age discrimination claims under the ADEA. Plaintiff attempts to distinguish *Cooper* by noting that the inquiry in that case focused on the pension plan's funding costs, and not the reduction of benefits. However, whether Plaintiff alleges that the Plan is discriminatory because of the changes in just funding costs or that the Plan is discriminatory because of changes in both funding costs and future benefits does not affect the overall inquiry as to whether the 2012 Amendment discriminates against older workers. Here, as in *Cooper*, any differences in pension benefits as a result of the 2012 Amendment are a result of differing years of service. Older workers are more likely to have worked longer and are more likely to have begun work when the Traditional Formula was in place. The 2012 Amendment removed the application of a formula that was more favorable toward older workers and replaced it with a formula that applies to all workers. Thus, Defendants' Motion to Dismiss Counts VI and VII is granted.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss [66] is granted. Plaintiff's Second Amended Complaint is dismissed without prejudice. Plaintiff is granted leave to file an amended complaint within thirty days of the entry of this Order, if he can do so in a manner consistent with this Opinion and Rule 11 of the Federal Rules of Civil Procedure.

Date: March 6, 2017

/s/ John W. Darrah
JOHN W. DARRAH
United States District Court Judge

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED MARCH 6, 2017

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 15-cv-2822

JAMES P. TEUFEL, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

THE NORTHERN TRUST COMPANY, THE NORTHERN TRUST COMPANY PENSION PLAN, THE NORTHERN TRUST COMPANY EMPLOYEE BENEFIT ADMINISTRATIVE COMMITTEE, KATIE O'NEILL, KIM SOPPI, BOB CHAPELLE, YUAN CHEN, AMYRE COLEMAN, HEATHER HESTON, DAWN ROMEI, MARK SULLIVAN, MARK WELCH, DIANE HUGHES, AND CHANDRA WILENSKY,

Defendants.

JOHN W. DARRAH, United States District Judge.

March 6, 2017, Decided
March 6, 2017, Filed

Appendix C

MEMORANDUM OPINION AND ORDER

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(Dkt. 42-4 at 1.)

LEGAL STANDARD

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Plaintiff was dependent on future employment and raises to become eligible for the potentially higher Accrued Benefit. Additionally, the language of the Plan did not entitle Plaintiff to have his Accrued Benefit based on uncompleted years of service that may or may not have included raises. The 2012 Amendment did not violate ERISA's anti-cutback provision. Therefore, Defendants' Motion to Dismiss is granted as to Counts I-V.[1]

ADEA Claims

The ADEA makes it unlawful for an employer to discriminate against any employee "because of" that individual's age. 29 U.S.C. § 623(a). Section 4(i)(1) of the ADEA prohibits "the reduction of the rate of an employee's benefit accrual, because of age." 29 U.S.C. § 623(i)(1)(A). A plan complies with section 4(i)(1) if a participant's accrued benefit would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant. 29 U.S.C. § 623(i)(10)(A)(i). Defendants argue that Plaintiff's ADEA claims fail because the Plan complies with section 4(i)(1) and "[c]ompliance with the requirements of [section 4(i)] with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan." 29 U.S.C. § 623(i)(4).

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1. Plaintiff argues that even if his anti-cutback claim fails, his notice claim under ERISA still survives. ERISA requires written notice for any amendment to a plan that provides for a significant reduction in the rate of benefit accrual. 29 U.S.C. § 1054(h). Plaintiff argues that notice of the 2012 Amendment was deceptive and misleading because the 2012 Amendment improperly reduced accrued benefits, while the notice stated that accrued benefits would not be affected. As discussed, the 2012 Amendment did not improperly reduce accrued benefits, so the notice was not misleading.

Plaintiff argues that the 2012 Amendment does not qualify for the ADEA "safe harbor" provision because it applies to benefit accruals, and the alleged reductions for older workers constitute reductions in accrued benefits. Specifically, Plaintiff alleges that the 2012 Amendment disparately impacted older workers in the following ways: (1) it reduced funding costs and benefits for older Traditional Formula participants without a similar reduction for younger PEP Formula Participants; (2) it froze Final Offset Compensation in a manner that causes a greater reduction in benefits for workers closer to retiring and raises the benefits of many younger workers; and (3) created compensation structures that froze benefits and reduced compensation for older workers and did not freeze benefits or reduce compensation for younger workers. As discussed above, these alleged reductions do not affect accrued benefits, but the calculation of future Accrued Benefits, or the rate of benefit accrual.

Defendants contend that the 2012 Amendment subjects all participants to the exact same changes to future benefit accruals, regardless of age; thus, the Plan complies with the requirements of section 4(i). In cases such as these, "it is essential to separate age discrimination from other characteristics that may be correlated with age." *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006). While *Cooper* applies to age discrimination claims under ERISA, the same logic applies to age discrimination claims under the ADEA. Plaintiff attempts to distinguish *Cooper* by noting that the inquiry in that case focused on the pension plan's funding costs, and not the reduction of benefits. However, whether Plaintiff alleges that the Plan is discriminatory because of the changes in just funding costs or that the Plan is discriminatory because of changes in both funding costs and future benefits does not affect the overall inquiry as to whether the 2012 Amendment discriminates against older workers. Here, as in *Cooper*, any differences in pension benefits as a result of the 2012 Amendment are a result of differing years of service. Older workers are more likely to have worked longer and are more likely to have begun work when the Traditional Formula was in place. The 2012 Amendment removed the application of a formula that was more favorable toward older workers and replaced it with a formula that applies to all workers. Thus, Defendants' Motion to Dismiss Counts VI and VII is granted.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss [66] is granted. Plaintiff's Second Amended Complaint is dismissed without prejudice. Plaintiff is granted leave to file an amended complaint within thirty days of the entry of this Order, if he can do so in a manner consistent with this Opinion and Rule 11 of the Federal Rules of Civil Procedure.

Date: March 6, 2017

/s/ John W. Darrah
JOHN W. DARRAH
United States District Court Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED MAY 10, 2018

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Nos. 17-1676 & 17-1677

JAMES P. TEUFEL,

Plaintiff-Appellant,

v.

THE NORTHERN TRUST COMPANY, *et al.*,

Defendants-Appellees.

May 10, 2018

Before
Diane P. Wood, *Chief Judge*
William J. Bauer, *Circuit Judge*
Frank H. Easterbrook, *Circuit Judge*

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division
Nos. 14 C 7214 & 15 C 2822
Rubén Castillo, *Chief Judge*

Appendix D

ORDER

Plaintiff-appellant filed a petition for rehearing and rehearing *en banc* on April 25, 2018. No judge in regular active service has requested a vote on the petition for rehearing *en banc*,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

* Judge Flaum did not participate in the consider of this petition.