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ALSO ADMITTED IN:

UNITED STATES SUPREME COURT
STATE OF ARIZONA
STATE OF OKLAHOMA
STATE OF TEXAS
WASHINGTON, D.C.

December 5, 2007

Please Redistribute

Kerber v. Qwest Pension Plan (Pension Death Benefits) Named Plaintiffs:
nelsonphelps@comcast.net (Nelson Phelps),
EJKMAK@aol.com (Edward J. Kerber),
bikenbabe@qwest.net (Joanne West),
dnmeister@comcast.net (Nancy A. Meister),
tingemann@comcast.net (Thomas Ingemann);

Mimi Hull, AUSWR President;
Nelson Phelps, AUSWR Executive Director;
AUSWR Board members and General members

On December 3, 2007, the last legal brief - a "reply brief" - was filed by defense counsel for Qwest Defendants concerning their October 31, 2007 renewed effort for a summary judgment and complete dismissal of the pending *Kerber v. Qwest Pension Plan* (Pension Death Benefits) case. All legal briefs are posted at the AUSWR website on the Legal Developments page: http://www.uswestretiree.org/legal2.htm#death

This litigation is now in its 5th year, having started right after Qwest threatened on September 1, 2003 to end the PDB for all retirees, same as Lucent had done earlier that year. Thanks to immediate efforts by your AUSWR leadership and the thousands of retirees who sent Qwest protest letters, Qwest leadership backed down for a while. Nevertheless, effective for persons retiring on or after January 1, 2004, the PDB payment was ended because of Plan Amendment 2003-5. That was a major 'no-no,' a blunder reflective of CEO Dick Notebaert's insensitivity to retirees and obstinate refusal to look at how U S WEST historically treated the PDB. Mr. Notebaert is infamously known for proclaiming, "I don't look back in the rear view mirror." Well, he should have. Hopefully, this ***twelve*** point update will simplify and explain everything, as we await a ruling by Judge Boland.

1. All along, Qwest has taken a simple approach to this case. The defense argues the Pension Death Benefit (PDB) should be declared as a matter of law to be a "welfare" benefit, subject to the company's reservation of rights to make changes to Plan benefits. Defense counsel wanted the Judge only to look at the language in the latest Plan document, a paper created by Qwest in December 2002. But, we vehemently disagreed, and we contend the Judge should look at the whole history of the PDB, especially the manner in which U S WEST caused the PDB to become a protected benefit. During the course of this case, we marshaled together all the past Plan documents, the sworn reports filed with the government agencies, letters and official brochures sent out by Plan administrators, deposition testimony from current Qwest personnel involved with PDB administration, statements from past Chief HR Officers/EBC members, and an extensive expert opinion report. All of that information was packaged and summarized for Judge Boland. Cumulatively, it overwhelms defense counsel's jaundiced view of the PDB;

2. Defense counsel argue that the outcome of the *Foss v. Lucent* and *Chastain v. AT&T* cases is determinative. Hence, they contend "Game over." Not so fast. **We have gone to great lengths to explain there are significant differences between our case and both the *Foss* and *Chastain* cases, namely**: a) U S WEST and Qwest always characterized the PDB as a defined pension benefit, not a welfare benefit; b) the PDB was always reported in sworn government filings to be a vested Plan liability; c) unlike the parties in both the *Foss* and *Chastain* cases, we do not concede the PDB was ever subject to the company's reservation of rights (ROR); d) we contend the ROR language did not give the company any right to make changes to benefits, especially those benefits promised to retirees; e) we have shown the Court clear and concise language reflecting the PDB was an entitlement to the retirees; and f) ***most importantly***, unlike in the *Foss* and *Chastain* cases, the PDB was made a protected benefit because it became a necessary component of the special single-sum early retirement optional form of benefit payment, an option never provided by either Lucent (*Foss*) or AT&T *(Chastain*);

3. We pointed out in our legal brief numerous key facts which directly refute Qwest's position. Not surprisingly, in their latest legal brief, Qwest's team of defense lawyers did not even try to rebut what we tell the Court. Indeed, in the last legal brief, they simply say that they disagree but are unwilling to dispute the facts set forth by Plaintiffs-Retirees. Defense counsel devoted a mere two paragraphs discussing the facts and they cite to nothing in the record to refute what we tell the Court. In short, they didn't submit any opposing evidence or witness statement. That's very telling;

4. Qwest contends the Court should reject out of hand our expert opinion report given by former Department of Labor Regional Director Leonard Garofolo on the grounds that his opinion is merely a legal conclusion. Likewise, Qwest contends the Court should reject the sworn statements by former U S WEST EBC members Barbara Doherty and Richard Remington (both were former Chief HR Officers) on the grounds that they have an interest in this litigation. But, defense counsel did not file any rebuttal witness statements, no rebuttal expert report;

5. Qwest contends the fact the SPDs and the formal filings with the government agencies always characterized or classified the PDB not to be a welfare benefit should be ignored by the Court. We contend that showed a pattern and practice for almost 16 years that the PDB was deemed to be and represented to be a protected benefit, not a 'takeaway' benefit;

6. Qwest completely fails to address our key argument that during the 1990 "5 + 5" special retirement offering and for 7 years after January 1997, the PDB was made an integral component of an early retirement optional form of benefit, a fact that truly distinguishes our case from both the *Foss* and *Chastain* cases. Indeed, defense counsel completely avoided addressing our contention that the "DLS Equivalent of the PDB," not the actual PDB, was made part of the lump sum optional form of benefit which ERISA clearly says ***cannot*** be cutback or eliminated. We win this argument. When the DLS Equivalent of the PDB was made a mandatory component increasing the value of the lump sum payment, the company effectively gave it protected status as a 'retirement-type subsidy' which cannot be taken away. Amendment 2003-5 eliminated the DLS Equivalent of the PDB, thereby, directly violating ERISA's prohibitions. Amendment 2003-5 also violates ERISA's prohibition against cutting back on an early retirement optional form of benefit payment, unless permission is given by the DOL. No such permission was ever sought by Qwest or granted by the DOL;

7. Qwest fails to address all of the clear and express language we quoted in our brief which made the PDB an entitlement. We quote numerous passages saying the PDB "shall be paid," the PDB "will be paid", the retiree will "always be entitled" to the PDB, etc. Again, all of that quoted plan language distinguishes our case from the evidence used in both the *Foss* and *Chastain* cases;

8. We especially point out that U S WEST assigned the PDB a priority over certain deferred pension payments, another fact that shows the company intended the PDB to be a protected benefit, not a 'takeaway' benefit. Also, we quoted the founding Plan document which stated all the plan assets had to be use for payment of pension and PDB purposes only, a fact that proves the PDB was at the core purposes of the pension plan. Qwest simply asks the Court to ignore those facts;

9. I am especially outraged that Qwest's defense counsel falsely state in their latest brief that "Plaintiffs recognize that a valid reservation of rights clause empowers Qwest to modify or eliminate the Pensioner Death Benefit as a welfare benefit." That's just blatantly false. To the contrary, we steadfastly maintain that the ROR never gave the Company any right to make changes to ***benefits***. Judge Boland will not be fooled by defense counsel's false representations;

10. Qwest's defense counsel argue that each retiree, upon retirement, had a responsibility to read the complicated Plan document then in effect - a document between 150-200 pages in length. That is such baloney. The law is crystal clear. We correctly contend that it is the summary plan description, the only document sent to retirees, that governs, not the undisclosed Plan document sitting on the shelf in some in-house lawyer's office, which document

was never mailed or delivered to any employee or retiree;

11. We contend that the PDB payment should be based on the person's last annual salary at the time of retirement, not some frozen amount based on the salary as of March 1, 1993. We make that contention because we can prove that the pension plan was never properly amended by a writing executed by ***two*** EBC members. Qwest counters by simply stating -- without submitting any legal proof -- that the EBC "timely endorsed the change." Again, they lose, because they cannot show there ever was a proper plan amendment. As I accurately predicted in our legal brief, all that Qwest can show the Court is unfinished business. Qwest can only present a mere "resolution" reflected in the minutes of a meeting. But, that paper does not rise to the legal level of a bona fide Plan amendment executed by at least two EBC members. Qwest picked this fight and we asked top leadership several years ago to agree to our most reasonable settlement demands. Now, not only must Qwest lose this case, the company will have to make increased PDB payments to thousands of retirees, because the PDB was never properly limited or 'frozen' to the annual wage amount as of March 1, 2003. Thousands of Plaintiffs-Retirees are entitled to Judge Boland's declaration that the PDB payment must be calculated based on the annual wage rate paid immediately the day before retirement on a service pension commenced; and

12. Qwest's defense counsel sheepishly urge the Court not to grant Plaintiffs-Retirees a summary judgment. In our legal brief, we pointed out that since the law is clearly on our side insofar as the fact that Amendment 2003-5 is illegal since it violates ERISA prohibition against cutting back on an early retirement optional form of benefit, Judge Boland can on his own grant a summary judgment in favor of Plaintiffs-Retirees. That's called a summary judgment *sua sponte*, meaning the Court does it on his own motion, so as to expedite a final resolution of this litigation. It will be completely discretionary for Judge Boland to make that extra effort, after denying Qwest Defendants' pending motion for summary judgment dismissal.

Again, if you will read the three legal briefs posted at the AUSWR website on the Legal Developments page, you will have a better understanding why there are major distinctions between our case and both the *Foss* and *Chastain* cases, and I believe you will maintain confidence in the eventual outcome of the *Kerber* case. While we have asked Judge Boland to schedule an oral argument hearing, should he need further explanation, that is completely up to him. We should expect a ruling within the next 3 to 6 months, if not sooner. **The outcome of this case will effect the rights of thousands of U S WEST/Qwest retirees, both Management and Nonmanagement.**

Sincerely,

Curtis L. Kennedy

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