

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

<b>KATHI COOPER, BETH HARRINGTON,</b>	)	
<b>and MATTHEW HILLESHEIM,</b>	)	
<b>Individually and on Behalf of All Those</b>	)	
<b>Similarly Situated,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>vs.</b>	)	<b>CIVIL NO. 99-829-GPM</b>
	)	
<b>IBM PERSONAL PENSION PLAN and</b>	)	
<b>IBM CORPORATION,</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM AND ORDER**

**MURPHY, Chief District Judge:**

Before the Court is Plaintiffs’ motion to strike Defendants’ attempt to assert an affirmative defense out of time, or, in the alternative, to compel discovery and for extension of time.

The underlying issue, retroactive relief, is occasioned by IBM’s response to the remedy proposed by the class. IBM argues that under *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), retroactive relief to the class is not appropriate. The idea is that IBM, like the plaintiff in *Manhart*, was blind-sided by what it characterized as a drastic change in the law. Specifically, this Court’s declaration that IBM’s 1995 PCF and 1999 cash balance plans violate the age discrimination prohibitions of ERISA § 204(b)(1)(H) is a startling new development in pension law so that the Court should exercise its discretion and grant only prospective relief. The unfolding of this argument spawns other questions like: (1) is the “prospective only” argument an affirmative defense which must be pleaded and proved? (2) who has the burden of proof on

“prospective only”? (3) were the IBM pension managers and high-level executives actually surprised to learn that the cash balance plans fail as defined benefit plans under ERISA? and (4) how does the attorney-client privilege work in this circumstance?

The parties have briefed the narrow issue of whether *Manhart* is still good law or whether it has been overruled by *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), as argued by Plaintiffs. IBM's legal analysis is correct. *Manhart* addresses the Court's statutory authority to grant retroactive relief for a violation of Title VII, and it announces a rule that under certain limited circumstances retroactive relief is not appropriate. The *Manhart* court stated, “[t]here can be no doubt that the prohibition against sex-differentiated employee contributions represents a marked departure from past practice.” *Manhart*, 435 U.S. at 722.

But here, IBM is by no means in the sympathetic position of the employer in *Manhart*. Defined benefit plans are highly regulated and strictly scrutinized relative to defined contribution plans. The prohibition against age discrimination existed long before the appearance of cash balance plans. Indeed, the voluminous record in this case unequivocally shows that cash balance plans were a “response” to the long standing restrictive proscriptions that are the woof and weave of a defined benefit plan. If this Court is correct, then the class is entitled to retroactive relief. There has not been a change in the law. All that has changed is IBM's clever, but ineffectual, response to law that it finds too restrictive for its business model. Plaintiffs' motion to strike (Doc. 231) is **GRANTED**.

**This matter remains set for a hearing on all other pending motions on Monday, February 23, 2004, at 1:30 p.m.**

Finally, as counsel should be aware, this District Court has just transitioned to a system of electronic filing referred to as “CM/ECF.” CM/ECF requires *electronic* filing of pleadings (motions,

memoranda, orders, etc.) as of January 20, 2004. Participation in CM/ECF is mandatory.

Attorneys with questions about CM/ECF should consult the Court's web-site at [www.ilsd.uscourts.gov](http://www.ilsd.uscourts.gov), which includes the Electronic Case Filing User's Manual and the Electronic Filing Rules. Additionally, the web-site explains how attorneys can register as "users" of the CM/ECF system and provides information regarding training opportunities on CM/ECF. Depending upon the volume of requests at any given time, it may take up to three business days to obtain a password.

The Clerk's current procedure of sending paper copies of orders entered as a courtesy to those attorneys who have yet registered as a CM/ECF user will terminate on Monday, March 1, 2004.

**IT IS SO ORDERED.**

DATED this 12<sup>th</sup> day of February, 2004.

s/ G. Patrick Murphy  
G. PATRICK MURPHY  
Chief United States District Judge