
**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

JOHN GARY SILVERNAIL,)	
)	
Plaintiff-Appellant,)	
)	Appeal from the
v.)	United States District Court
)	for the Central District of
)	Illinois
)	
AMERITECH PENSION PLAN AND)	
AMERITECH CORPORATION,)	No. 03-3291
)	
Defendants-Appellees.)	Hon. Richard Mills
)	

**BRIEF FOR DEFENDANTS-APPELLEES
AMERITECH PENSION PLAN AND AMERITECH CORPORATION**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 05-1535

Short Caption: Silvernail v. Ameritech Pension Plan and Ameritech Corp.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Ameritech Corporation n/k/a SBC Teleholdings, Inc.
Ameritech Pension Plan n/k/a SBC Pension Benefit Plan—Midwest Program

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown Rowe & Maw LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Ameritech Corporation n/k/a SBC Teleholdings, Inc. is a wholly owned subsidiary of SBC Communications Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

SBC Communications Inc. is a publicly held company

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Attorney's Signature: _____ Date: September 28, 2005

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STATEMENT OF JURISDICTION

Plaintiff-Appellant John Silvernail's statement of jurisdiction is not complete or correct. Silvernail's complaint alleged violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), which grants district courts jurisdiction over "civil actions under this subchapter brought * * * by a participant." 29 U.S.C. § 1132(e)(1). As explained in section I.C, *infra*, Silvernail is not a "participant" under ERISA because he is no longer employed by Ameritech and does not have a colorable claim to benefits. Consequently, he lacks standing to bring his action, and the district court lacked jurisdiction over the matter. On February 1, 2005, the district court granted the motion to dismiss of defendants-appellees Ameritech Corporation and Ameritech Pension Plan ("Ameritech" or the "Plan") pursuant to Fed. R. Civ. P. 12(b)(6) and entered final judgment. A13.¹ Silvernail filed his notice of appeal on March 2, 2005. A1. This Court has jurisdiction over Silvernail's appeal pursuant to 28 U.S.C. § 1291.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Circuit Rule 34(f), Ameritech respectfully submits that oral argument, which Silvernail has not requested, is unnecessary in this case. This appeal is frivolous because there is no reasonable interpretation of ERISA under

¹ "A_" refers to the Appendix attached to Silvernail's opening brief. "SA_" refers to the additional appendix submitted with Silvernail's opening brief. "Supp.App._" refers to the Supplemental Appendix submitted herewith.

which Silvernail can prevail. Oral argument will not significantly aid the Court because the briefs and the record adequately present the undisputed facts and pertinent legal arguments. Under Fed. R. App. P. 34(a)(2), the Court should affirm without argument. Should the Court wish to entertain argument, appellees will of course provide it.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Ameritech Plan violated ERISA by disregarding Silvernail's years of service before age 22 for purposes of determining his right to vested benefits where Congress expressly provided that such years of service could be disregarded.

2. Whether Silvernail's ERISA claim is barred by the statute of limitations where he knew of the allegedly unlawful Plan provisions at least 25 years prior to filing suit.

3. Whether the Plan Administrator violated ERISA's reporting provisions where Silvernail lacked standing to make such a request and the Plan Administrator nevertheless timely provided Silvernail with all requested information.

STATEMENT OF THE CASE

Silvernail asks this Court to reverse the district court's grant of Ameritech's motion to dismiss his First Amended Complaint ("Complaint"). His Complaint

sought relief under: 29 U.S.C. § 1132(a)(1)(B) (claiming benefits owed); 29 U.S.C. § 1132(a)(1)(A) (claiming failure by the Plan Administrator to provide requested information); and 29 U.S.C. § 1132(a)(3) (claiming equitable relief for violations of ERISA). A22 (Compl. at 9, Prayer for Relief). The district court granted Ameritech's motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). A4-A13. Silvernail's appeal followed.

STATEMENT OF FACTS

This appeal turns on section 4 of Ameritech's "Deferred Vested Pension" Plan, which disregarded an employee's years of service completed before age 22 in determining whether that employee earned a nonforfeitable right to benefits. SA 26-27 § 4. Silvernail worked at Ameritech (then known as the Illinois Bell Telephone Company) from 1967 to 1978. A16 ¶ 9. In 1999, more than 20 years after leaving Ameritech, Silvernail submitted a claim for vested benefits, which the Plan Administrator denied because Silvernail did not qualify. Supp.App. 83-85.

A. Ameritech's Plan Evolved During Silvernail's Employment.

Given Silvernail's challenge to the legality of section 4 of the Plan, that provision's history is significant. The Plan, which first went into effect in 1913, provided for several different types of pensions and benefits, including service pensions, disability pensions, and death benefits. SA1 ("1967 Plan"). The Plan was amended four times during Silvernail's employment, including shortly after he

began working for Ameritech in February 1967. SA1-SA6. The Plan was amended again in 1969. SA7-SA11 (“1969 Plan”). Following the enactment of ERISA in 1974, amendments designed to comply with the statute took effect in 1976, SA22-SA29 (“1976 Plan”), with further amendments taking effect in 1978. SA30-SA34 (“1978 Plan”).

The 1967 Plan did not offer any deferred vested benefits. Under section 4 of the Plan, four categories of employees qualified for a service pension upon their retirement: (1) employees 65 or older who had worked a minimum of 15 years; (2) employees 60 or older who had worked a minimum of 20 years; (3) employees 55 or older who had worked a minimum of 25 years and received administrative approval; and (4) regardless of age, employees who had worked a minimum of 30 years and received administrative approval. SA5-SA6 § 4(1)(a)-(b). Silvernail was born in September 1948 and started his employment in February 1967. A16 ¶ 8. Under the 1967 Plan, the earliest he could have received a service pension would have been in February 1997, assuming he had worked 30 years and received approval. SA5-SA6. Because Silvernail worked only 11 years (A16 ¶ 9), he qualified for no pension benefits under the 1967 Plan.

On June 1, 1969, amendments creating a deferred vested service pension took effect. SA7. The new section 4 stated that “any employee who has reached the age of forty years and whose term of employment has been fifteen or more

years and who, on or after June 1, 1969, leaves the service of the Company for any reason, shall be eligible to a deferred service pension commencing with the month in which he attains age sixty-five.” SA11 § 4(1)(c). Because, at a minimum, an employee would have to work 15 years after turning age 25 to reach age 40 with 15 years’ tenure, the 1969 Plan effectively disregarded years of service before age 25. *Id.* Under the 1969 Plan, Silvernail needed to work until his 40th birthday on September 5, 1988 for his deferred pension to vest. *Id.* Because he left the company a decade earlier, he obtained no vested right to benefits.

Congress’s enactment of ERISA in 1974 prompted another series of amendments, which are the focus of Silvernail’s appeal. Revised Plan section 4 covered “Deferred Vested Pension[s]”:

Except as specified in sub-paragraphs (i), (ii), and (iii) of this Paragraph 1(b), *any employee who has served ten or more calendar years after the age referred to in Section 203(b)(1)(A) of the Pension Act, namely age twenty-two*, and any participant who is in the service of the Company at age sixty-five, who on or after January 1, 1976, leaves the service of the Company for any reason, shall be eligible for a pension which shall commence upon his sixty-fifth birthday and shall be referred to in these Regulations as a deferred vested pension.

SA26 § 4(1)(b) (emphasis added). Subparagraph (iii) offered employees their choice of a vesting scheme: “Any employee is permitted to elect in lieu of using the rule of eligibility for a deferred vested pension stated above in this Paragraph

1(b), to use any rule of eligibility previously in effect during any part of his term of employment.” *Id.* § 4(1)(b)(iii).

The 1976 amendments made several important changes to the Plan. First, they adopted what is known as “cliff-vesting,” under which an employee’s right to accrued benefits becomes 100% vested upon the occurrence of a particular event as opposed to vesting gradually. See *Reklau v. Merchants Nat’l Corp.*, 808 F.2d 628, 629 n.2 (7th Cir. 1986). Second, the 1976 Plan reduced the required time for vesting. It required only 10 years of service (as opposed to 15 in the 1969 Plan) and counted years of service completed after age 22 (as opposed to only years of service completed after age 25 in the 1969 Plan). Compare SA26 § 4(1)(b) with SA11 § 4(1)(c). The 1976 Plan explicitly referenced ERISA as the source of the pre-age-22 exclusion. SA26 § 4(1)(b). It required Silvernail, hired in 1967 at the age of 18, to work for 10 years after he turned 22 in September 1970—or until September 1980—to qualify for a nonforfeitable right to pension benefits. Because he left the company in 1978, he did not qualify for pension benefits under the 1976 Plan.

Another round of amendments took effect on January 1, 1978, shortly before Silvernail terminated his employment. The 1978 Plan contained vesting rules identical to those in the 1976 Plan, including the provision excluding years of service before age 22. SA31 § 4(1)(b).

B. Silvernail's Employment With Ameritech Included Less Than Eight Years Of Service After Age 22.

It is not contested that Silvernail began working at Ameritech's predecessor, Illinois Bell, on February 6, 1967, or that Silvernail was born on September 5, 1948. Silvernail Br. 4. Accordingly, when Silvernail commenced his employment, he was approximately 18 years 5 months old. He turned 22 on September 5, 1970. *Ibid.*

Silvernail's employment was terminated on January 27, 1978. *Ibid.* Thus, although he worked at the company for nearly 11 years, he worked only 7 years and 5 months after age 22. That was 2 years and 7 months short of the 10 years needed to give Silvernail a nonforfeitable right to benefits. SA31 § 4(1)(b).

C. Ameritech Denied Silvernail's Claim For Benefits And Informed Him That He Had Zero Vested Benefits.

Silvernail's claim for benefits progressed through four stages: (1) Silvernail's pre-claim letters; (2) his formal claim; (3) his appeal from the denial of the claim; and (4) his communications following the denial of his appeal.

Silvernail wrote to Ameritech on November 19, 1998, claiming that he had "accrued 11 years of benefits, which cannot be reduced by retroactively applying the 'age 22 rule.'" Supp.App. 80 (emphasis added).² His letter did not request a

² Although these letters were not attached to Silvernail's Complaint, the Court may consider them because they are referenced in and are integral to Silvernail's
(cont'd)

statement of accrued benefits. *Ibid.* The Plan Administrator responded on February 22, 1999, informing Silvernail that he had no benefits because the Plan required 10 years of service after age 22 to qualify for a deferred vested pension, that ERISA permitted plans to disregard years of service before age 22, and that Silvernail had not completed the requisite years of service. Supp.App. 82.

Silvernail wrote to Ameritech again in March 1999, launching the formal claim process. Supp.App. 83. He repeated his earlier contention that his years of service before age 22 could not be disregarded, even as he cited the ERISA provision (§ 203(b)(1)(A)) that expressly permitted plans to disregard such years of service. Supp.App. 84. Additionally, Silvernail acknowledged that he became aware in 1978 that Ameritech deemed him ineligible for a deferred vested pension. He wrote: “After I separated service with Illinois Bell, I was informed verbally by a company supervisor that because of the age 22 rule, I did not qualify for deferred vested pension.” *Ibid.* His March 1999 letter, like his prior letter, did not request a statement of accrued benefits.

Ameritech denied Silvernail’s claim on September 13, 1999. Supp.App. 86-89. Ameritech explained that Silvernail’s claim was barred by the statute of

(... cont’d)

Complaint, and 10 of the 11 letters (all but the last) were appended to his district court brief filed in response to Ameritech’s motion to dismiss. See *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994).

limitations but proceeded to address the merits of Silvernail's claim as "a courtesy." *Ibid.* Quoting section 4(1)(b) of the 1978 Plan, Ameritech explained that it had appropriately disregarded Silvernail's years of service prior to reaching age 22 for vesting purposes and that he therefore was "not entitled to a deferred vested pension under the Plan." Supp.App. 87.

On October 13, 1999, Silvernail appealed this denial administratively, reasserting that the pre-age-22 years-of-service exclusion did not apply to him because he was "a Plan Participant beginning with my first day at work." Supp.App. 90. His appeal did not request a statement of benefits. The Plan's appeal committee reviewed and denied Silvernail's appeal. Supp.App. 95-99. It explained the Plan's exclusion of years of service before age 22, the unavailability of any other eligibility rule under which Silvernail could have earned a vested right to pension benefits, and the fact that mere participation did not entitle an employee to benefits if he did not meet the other eligibility criteria. *Ibid.*

During the years following the denial of his administrative appeal, Silvernail contacted various Plan officials, eventually requesting a statement of benefits despite having been told previously on multiple occasions that he had no vested benefits. He sent letters on July 3 and September 25, 2000, in which he did not request a statement of benefits. Supp.App. 100; Supp.App. 102. However, the September letter asked whether some of the questions posed in the July letter were

“the type of information a Plan Administrator is supposed to provide within the 30-day period.” Supp.App. 102. Ameritech responded to these letters on November 27, 2000, explaining that Silvernail had exhausted his administrative remedies. Supp.App. 104.

Silvernail continued to write to various Ameritech personnel. In a letter dated June 4, 2003, Silvernail for the first time requested a statement of his accrued benefits. Supp.App. 105. Ameritech responded on July 7, 2003, 30 days after receiving Silvernail’s request (taking into account the Fourth of July holiday). Supp.App. 106. In addition to explaining again why Silvernail’s appeal had been denied, the Plan stated that it could not give him “a statement of accrued benefits, whether or not vested, as you requested in your letter because there are no benefits to be put on a statement.” Supp.App. 107.

D. The District Court Dismissed Silvernail’s Complaint.

Silvernail filed his initial complaint in December 2003 and his amended Complaint in March 2004, alleging under 29 U.S.C. § 1132(a)(1)(B) that Ameritech improperly denied benefits owed to him, under section 1132(a)(1)(A) that the Plan Administrator failed to provide requested information, and under section 1132(a)(3) that the Plan violated ERISA. A21-A22.

The district court understood the Complaint to challenge the Plan’s denial of benefits and reviewed that denial under an arbitrary and capricious standard. A7-

A9. After reviewing various iterations of the Plan, including the 1976 Plan, the court ruled that the Administrator acted neither arbitrarily nor capriciously because Silvernail had no vested benefits. A9-A10. The court reached that conclusion based on ERISA’s unambiguous vesting provisions under which the Plan was “entitled to disregard the years of participation Mr. Silvernail accrued before he became 22 years old.” A12. Given the undisputed fact that Silvernail had not completed the 10 years of service after age 22 required to gain a nonforfeitable right to accrued benefits, the court concluded that he failed to state a claim upon which relief could be granted. A12-A13.

SUMMARY OF THE ARGUMENT

This appeal involves a straightforward application of the unambiguous text of ERISA’s vesting provisions. The 1976 Plan complied fully with ERISA § 203, which permitted employers adopting a “cliff vesting” schedule to disregard an employee’s years of service completed before age 22.³ Consequently, and in light

³ ERISA has been modified several times since its enactment in 1974. The text of the current codification of the statute differs from the text as it existed in 1976 and 1978. See Pub. L. No. 93-406, 88 Stat. 829 (1974). To avoid confusion, citations are to the original ERISA sections (*i.e.*, § 203, § 204, etc.) rather than to the current U.S. Code. Parallel citations to the U.S. Code are provided where the current version of ERISA is relevant. For the Court’s convenience, the original ERISA sections, implementing regulations, and relevant legislative history are appended to this brief at Supp.App. 1-78.

of the undisputed facts and unambiguous law, the district court correctly dismissed Silvernail's Complaint.

ERISA established minimum vesting requirements for employers offering pension plans. The statute afforded plans a choice of three vesting options. One option was 10-year "cliff-vesting," so called because a person was 0% vested before 10 years of service and 100% vested thereafter. ERISA unequivocally permitted cliff-vesting plans to exclude years of service completed before an employee turned age 22. The 1976 Plan followed these provisions precisely, even citing to the governing ERISA section, and accordingly disregarded any years of service completed before age 22. The Administrator was justified in denying Silvernail's claim for benefits because he had not completed 10 years of service after reaching age 22. The clarity of ERISA and the Plan is such that Silvernail does not have a colorable claim for benefits. Accordingly, Silvernail failed to state a claim on which relief can be granted. Silvernail also is not a "participant" and therefore lacks standing to bring this action.

Faced with a perfectly clear statute that refutes his argument, Silvernail embarks on a circuitous review of ERISA and its legislative history in hopes of showing ERISA to be ambiguous and the Plan to be illegal. This tactic fails not only because the statute is not ambiguous, but also because ERISA's other provisions, implementing regulations, and legislative history all confirm that

ERISA permitted employers to exclude years of service before age 22. Indeed, ERISA's legislative history shows that Congress explicitly adopted the pre-age-22 exclusion as part of a deliberate balance between the interests of employers and employees. Silvernail's additional arguments either discuss irrelevant ERISA provisions or reinforce the basic point that employers adopting a "cliff vesting" plan need not consider years of service before age 22.

Silvernail's claim also is barred by the applicable statute of limitations. Silvernail's claim accrued in 1978 when Silvernail learned, upon leaving his employment, that his pre-age-22 years of service would not count towards the Plan's vesting requirement. Yet, he did not bring his claim until 2003, at least 15 years after the limitations period had expired.

Finally, Silvernail's statutory penalty claim—that the Administrator failed to provide a statement of benefits—is baseless. Silvernail lacks even a colorable claim to benefits and consequently is not a "participant" within the meaning of ERISA's reporting provisions, a requirement for any right to request and receive information. Even if Silvernail were a "participant," the Administrator complied with ERISA's requirements. After informing Silvernail on several occasions that he had no benefits, the Administrator responded to Silvernail's formal request for a statement of benefits by informing him that he had no benefits that could be put on

a statement. Furthermore, Silvernail's statutory penalty claim is barred by the applicable statute of limitations.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of a motion to dismiss for failure to state a claim. *Small v. Chao*, 398 F.3d 894, 897 (7th Cir. 2005). Silvernail disputes the district court's employment of an arbitrary and capricious standard for review of the Plan Administrator's denial of benefits. See A7-A9. Insofar as the district court was construing the Administrator's interpretation of the Plan terms, it properly employed the arbitrary and capricious standard. However, because Silvernail contends that the central issue is whether the terms of the Plan violate ERISA, the proper standard of review is *de novo*. Silvernail Br. 22-23.

The standard of review is immaterial on this appeal. No matter whether the Administrator's decision is reviewed *de novo* or under the more deferential arbitrary and capricious standard, the result is the same. The district court's dismissal of Silvernail's claim must be affirmed because ERISA § 203 expressly authorized the Plan to disregard Silvernail's years of service completed before age 22. As this Court stated in *Vallone v. CNA Financial Corp.*, 375 F.3d 623, 632 (7th Cir. 2004), "it doesn't matter * * * which standard of review is applicable. For the ultimate issue is whether the benefits were vested. If the benefits were vested, the denial of benefits would be wrongful even under an arbitrary and capricious

standard; and if the benefits weren't vested, the denial of benefits would be lawful even under a de novo standard.”

ARGUMENT

I. Ameritech's 1976 Plan Complied With ERISA, Which Permits “Cliff Vesting” Plans To Exclude Years Of Service Before Age 22 For Vesting Purposes.

The plain and incontrovertible language of ERISA demonstrates that the district court properly dismissed Silvernail's claim. Section 203 expressly permits plans adopting “cliff vesting,” such as Ameritech's, to disregard an employee's years of service before age 22. “[I]f the plaintiff cannot present any set of facts that would entitle [him] to relief,” dismissal pursuant to Rule 12(b)(6) is proper. *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 978 (7th Cir. 1999).

The Plan's provisions and the duration of Silvernail's employment at the company are undisputed. The only question before the Court is whether the Plan complied with ERISA. “The basic rule in statutory interpretation is that plain statutory language governs.” *Nestle Holdings, Inc. v. Cent. States, S.E. & S.W. Areas Pension Fund*, 342 F.3d 801, 804 (7th Cir. 2003). The only exception is limited to “rare cases [where] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). The unequivocal language of section 203 shows that this is not one of those exceptional cases. The 1976 Plan adhered

to the unambiguous text of section 203, and the Administrator properly denied Silvernail's request for benefits because Silvernail did not complete 10 years of service after turning age 22. Given ERISA's plain text and the Plan's equally plain language, Silvernail's claim for benefits is not even colorable, depriving him of standing and requiring dismissal for failure to state a claim.

A. ERISA's Vesting Provisions Authorized Ameritech's Plan To Disregard An Employee's Pre-Age-22 Years Of Service.

The enactment of ERISA created a set of vesting provisions designed to cure various problems with the administration of pension plans. Congress recognized "that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits." ERISA § 2(a). Accordingly, Congress sought "to correct this condition by making 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." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980) (emphasis added). To this end, Congress created an array of statutory protections in Title I of ERISA, including standards for employee participation (§ 202), accrual (§ 204), and (of central importance here) "minimum vesting" (§ 203). See 1 Ronald J. Cooke, ERISA PRACTICE AND PROCEDURE § 4:1, at 4-4 (2d ed. 2005) ("participation rules determine when an individual is entitled to participate in a plan," "benefit accrual determines the

amount of benefit to be received,” and “vesting standards determine when that person’s right to benefits becomes nonforfeitable”).

“ERISA does not mandate that employers provide any particular benefits.” *Shaw v. Delta Air Lines*, 463 U.S. 85, 91 (1983). Instead, it mandates that employers with benefit plans afford their employees a nonforfeitable right to certain benefits once certain conditions are satisfied.⁴ Section 203(a) provided that “[e]ach pension plan shall provide that an employee’s right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.”⁵ Section 203(a)(2) established three different vesting schedules a plan could adopt, and section 203(b)(1) governed the periods of service considered in determining nonforfeitability under those three schedules. These unambiguous provisions demonstrate that the Ameritech Plan complied with ERISA.

⁴ “The term ‘nonforfeitable’ * * * means a claim obtained by a participant * * * to that part of an immediate or deferred benefit under a pension plan which arises from the participant’s service, which is unconditional, and which is legally enforceable against the plan.” ERISA § 3(19). The terms “‘vested’ and ‘nonforfeitable’ [are] used synonymously.” *Nachman*, 446 U.S. at 376.

⁵ Paragraph (1) of section 203(a) is not at issue. It required a Plan to give employees a nonforfeitable right to accrued benefits derived from *employee* contributions. Silvernail has not made any allegations regarding benefits derived from his own contributions.

1. Section 203(a)(2) authorized a plan to choose from three vesting schedules, including 10-year “cliff vesting.”

ERISA afforded employers three ways to satisfy section 203(a)’s requirement that all pension plans provide an employee with a nonforfeitable right to benefits. See ERISA § 203(a)(2) (“A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), *or* (C)”) (emphasis added).

First, a plan could choose “cliff vesting”: “A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.” § 203(a)(2)(A). Once an employee passes the 10-year threshold he becomes 100% vested, but before the 10-year mark he is 0% vested. Second, the statute permitted “5-15 vesting” pursuant to which “an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions.” § 203(a)(2)(B). The statute set out those percentages, which increased on a sliding scale, reaching 100% after 15 years of service. *Ibid.* Third, plans could opt for the “Rule of 45,” under which “a participant * * * who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from

employer contributions.” § 203(a)(2)(C). ERISA mandated a different, accelerated sliding scale for the “Rule of 45.” *Ibid.*

2. Section 203(b)(1) expressly permitted “cliff-vesting” plans to disregard years of service before age 22.

A separate subsection determined the percentage of accrued benefits to which an employee had a nonforfeitable right. ERISA § 203(b)(1) required generally that all of an employee’s service years be counted, but then listed five categories of service years that *could be excluded*. The first category covered years of service completed before age 22. It stated:

(b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2), all of an employee’s years of service with the employer or employers maintaining the plan shall be taken into account, *except that the following may be disregarded:*

(A) *years of service before age 22, except that in the case of a plan which does not satisfy subparagraph (A) or (B) of subsection (a)(2), the plan may not disregard any such year of service during which the employee was a participant.*

ERISA § 203(b)(1)(A) (emphasis added). On its face, this subsection permitted a plan to disregard years of service before age 22 if the plan satisfied either subparagraph (A) of section 203(a)(2) (cliff-vesting) or subparagraph B of section 203(a)(2) (5-15 vesting). The only exception to the pre-age-22 exclusion applied to plans adopting the “Rule of 45” described in section 203(a)(2)(C). “Rule of 45”

plans were required to count all years of service during which an employee was a participant, even if those years of service were completed before age 22.

Thus, a plan using the cliff-vesting scheme, such as Ameritech's, could exclude years of service before age 22 in computing the 10 years necessary to trigger a nonforfeitable right to the accrued benefits derived from employer contributions. The statutory authorization for that exclusion was express and unambiguous. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (citations omitted).

B. Ameritech's 1976 Plan Complied With ERISA's Vesting Standards.

Because it incorporated a cliff-vesting scheme, which satisfied the requirements of ERISA § 203(a), the 1976 Plan properly disregarded years of service completed before age 22 in accordance with ERISA § 203(b). The 1976 Plan (and the identical provisions in the 1978 Plan) provided that "any employee who has served ten or more calendar years after the age referred to in Section 203(b)(1)(A) of the Pension Act, namely age twenty-two * * * shall be eligible for a pension which shall commence upon his sixty-fifth birthday and shall be referred to in these Regulations as a deferred vested pension." SA26 § 4(1)(b). This

language is consistent with ERISA § 203; it both chooses “cliff-vesting” and excludes years of service before age 22.

The 1976 Plan was even more generous than required by ERISA: it permitted an employee “to elect in lieu of using the rule of eligibility for a deferred vested pension [described above], to use any rule of eligibility previously in effect during any part of his term of employment.” SA26 § 4(1)(b)(iii). Thus, Silvernail enjoyed the option of choosing a rule of eligibility offered by the 1967 or 1969 Plans instead of the rule of eligibility set forth in the 1976 Plan. He did not elect one of those alternatives because the 1976 Plan offered the shortest route to full vesting.⁶

The Administrator straightforwardly applied the terms of the 1976 Plan. Silvernail began working at Ameritech in February 1967 when he was 18 years and 5 months old. Silvernail turned age 22 on September 5, 1970. His employment ended in late January 1978, 7 years and 5 months after he turned age 22. Because he had not worked the requisite 10 years after reaching age 22, Silvernail had no vested right to any accrued benefits. Accordingly, he had zero benefits because

⁶ Under the 1976 Plan, Silvernail would not have vested until September 1980, 10 years after he turned age 22 (assuming he continued to work at Ameritech beyond 1978). Under the 1969 Plan, he would not have vested until September 1988, 15 years after he turned age 25. See SA11 § 4(1)(c). Under the 1967 Plan, he would not have vested until February 1997 and then only if he received committee approval. See SA5-SA6 § 4(1)(b).

any accrued benefits were lost when he left his employment, as the Administrator properly determined.

C. Silvernail Is Not A “Participant” Authorized To Bring Suit Under ERISA.

The clarity of both ERISA § 203 and the 1976 Plan leaves Silvernail without a colorable claim for benefits. As a result, Silvernail has failed to state a claim on which relief can be granted. He also is not a “participant” within the meaning of ERISA and therefore lacks standing to bring this action.

ERISA § 502(a), 29 U.S.C. § 1132(a), permits only “participants” to seek relief, and ERISA § 502(e), 29 U.S.C. § 1132(e), authorizes the federal courts to hear only claims brought by “participants.” The term “participant” includes former employees who “may become eligible to receive a benefit,” ERISA § 3(7), which the Supreme Court has interpreted to mean only those former employees with “a colorable claim to vested benefits.” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989). Accordingly, “subject-matter jurisdiction depends on an arguable claim.” *Kennedy v. Conn. Gen. Life Ins. Co.*, 924 F.2d 698, 700 (7th Cir. 1991); see also *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 497 (7th Cir. 1999) (applying *Firestone*’s standing principles to § 502(a)(3) claims).

Where, as here, “the language of the plan is so clear that any claim * * * must be frivolous,” jurisdiction is lacking. *Kennedy*, 924 F.2d at 700. Thus, in *Sallee v. Rextord Corp.*, 985 F.2d 927, 929 (7th Cir. 1993), this Court found that

the plain language of a plan so clearly deprived the appellants of a colorable claim that they lacked standing. The same is true here. Section 4 of the 1976 Plan expressly excluded years of service before age 22 in compliance with ERISA § 203, depriving Silvernail of anything more than a frivolous claim for benefits. Consequently, Silvernail has failed to state a claim and lacks standing to sue under ERISA. See *Gora v. Costa*, 971 F.2d 1325, 1328 (7th Cir. 1992) (“an argument that a party lacks standing can be raised at any stage of the proceedings.”).

II. The Plain Meaning Of ERISA § 203 Is Reinforced By Other ERISA Provisions, Their Implementing Regulations, And ERISA’s Legislative History.

This Court need not look beyond the unambiguous text of section 203 to resolve this appeal. Nevertheless, other provisions of ERISA, their implementing regulations, and ERISA’s legislative history all confirm that the Ameritech Plan complied with ERISA when it excluded pre-age-22 years of service from its vesting formula. Contrary to Silvernail’s argument, these supplemental materials create no statutory ambiguity. Silvernail Br. 14-15, 33-43. Instead, they confirm that the text meant precisely what it said.

A. ERISA’s Amendment Of The Internal Revenue Code Confirms That Plans Could Properly Disregard Years Of Service Before Age 22.

Title II of ERISA supports the plain-language reading of the pre-age-22 years-of-service exclusion. “Title II of ERISA amended the Internal

Revenue Code to condition the eligibility of pension plans for preferential tax treatment on compliance with many of the Title I requirements. The result was a ‘curious duplicate structure’ with nearly verbatim replication in the Internal Revenue Code of whole sections of text from Title I of ERISA.” *Cent. Laborers’ Pension Fund v. Heinz*, 541 U.S. 739, 746 (2004) (citation omitted). Section 1012(a) of ERISA added a new section 411 to the Internal Revenue Code (“IRC”) that set out the minimum vesting standards required for a plan to be considered a “qualified trust” and to enjoy pension-related tax benefits. If ERISA Title II created any haziness in ERISA § 203, as Silvernail contends, one would expect to see notable differences between ERISA § 203 and IRC § 411. Instead, IRC § 411 mirrored ERISA § 203. IRC § 411(a)(2)(A)-(C) permitted an employer to choose between the same three vesting schedules set forth in section 203, repeating verbatim section 203’s “cliff,” “5-15,” and “Rule-of-45” vesting provisions. Accordingly, a plan received favorable tax treatment “if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.” IRC § 411(a)(2)(A). In ascertaining the “[s]ervice included in determination of nonforfeitable percentage,” the new IRC section provided, almost identically to ERISA § 203, that years of service before age 22 could be disregarded by plans adopting a 10-year cliff-vesting regime:

In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under [IRC § 411(a)(2)], all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, *except that the following may be disregarded:*

(A) *years of service before age 22*, except that in the case of a plan which does not satisfy subparagraph (A) [cliff-vesting] or (B) [5-15 vesting] of paragraph (2), the plan may not disregard any such year of service during which the employee was a participant.

ERISA § 1012 (creating IRC § 411(a)(4)(A)) (emphasis added). Far from exposing some ambiguity in ERISA § 203, ERISA Title II confirms that years of service completed before age 22 need *not* be counted for purposes of determining nonforfeitable in a plan using 10-year cliff vesting. Rather, years of service before age 22 needed to be counted only for plans adopting “Rule of 45” vesting.

B. Treasury Regulations Implementing ERISA Further Confirm That Plans Could Properly Exclude Years Of Service Before Age 22.

The lone agency regulation governing the years of service that must be considered for cliff-vesting plans underscores the propriety of the 1976 Plan.⁷

⁷ Section 101 of President Carter's “Reorganization Plan No. 4 of 1978,” as enacted by Congress, gave the Treasury Secretary the authority to interpret the vesting provisions of both ERISA Title I and Title II. 92 Stat. 3790, 3790 (1978), reprinted in 1978 U.S.C.C.A.N. 9814, 9815. See generally *Heinz*, 541 U.S. at 746-47. Thus, IRS regulations interpreting IRC § 411 apply to ERISA § 203. 29 U.S.C. § 1202(c) (regulations prescribed under IRC § 411 “shall also apply to the minimum participation, vesting, and funding standards” of ERISA Title I); see

(cont'd)

Promulgated to implement section 411, the regulation reinforces the plain text of both ERISA § 203 and IRC § 411, stating:

(a) In general. Under section 411(a)(4), for purposes of determining the nonforfeitable percentage of an employee's right to his employer-derived accrued benefit under section 411(a)(2) * * *, all of an employee's years of service with an employer or employers maintaining the plan shall be taken into account *except that years of service described in paragraph (b) of this section may be disregarded.*

(b) Certain service. For purposes of paragraph (a) of this section, the following years of service may be disregarded:

(1) *Service before age 22.* (i) *In the case of a plan which satisfies the requirements of section 411(a)(2)(A) or (B) (relating to 10-year vesting and 5-15-year vesting, respectively), a year of service completed by an employee before he attains age 22.*

(ii) In the case of a plan which does not satisfy the requirements of section 411(a)(2)(A) or (B), a year of service completed by an employee before he attains age 22 if the employee is not a participant (for purposes of section 410) in the plan at any time during such year.

26 C.F.R. § 1.411(a)-5 (emphasis added). This regulation simply confirms what is plain from section 203's text: in determining the years of service that counted for purposes of obtaining a nonforfeitable right to employer contributions, a plan that

(... cont'd)

Heinz, 541 U.S. at 757, citing 53 Fed. Reg. 26050, 26053 (July 11, 1988) (“The regulations under section 411 are also applicable to provisions of Title I”).

adopted the 10-year vesting schedule authorized by IRC § 411 (and ERISA § 203) need not have counted years of service completed before age 22.

C. ERISA’s Legislative History Confirms That ERISA § 203 Meant Exactly What It Said.

The legislative history of the minimum vesting standards created by ERISA § 203 and IRC § 411 further confirms that plans could disregard years of service completed before age 22.⁸ Congress drafted section 203 to eliminate the harm caused to long-term employees by a loss of accrued benefits when their employment was terminated shortly before vesting. See H.R. REP. NO. 93-533 (1973), at 6, reprinted in 1974 U.S.C.C.A.N. 4639, 4644 (“the issue basically resolves itself into whether workers, after many years of labor, whose jobs terminate voluntarily or otherwise, should be denied benefits that have been placed for them in a fund for retirement purposes”).

⁸ Congress’s intentions are captured chiefly in the “Joint Explanatory Statement of the Committee of Conference.” H.R. CONF. REP. NO. 93-1280 (1974), reprinted in 1974 U.S.C.C.A.N. 5038. In both the House and the Senate, one committee considered the primary ERISA provisions (Title I) while another worked on the IRC amendments (Title II). These four committees each contributed reports: House Report No. 93-533 (1973) (Education and Labor), accompanying H.R. 2, the House version of ERISA Title I (1974 U.S.C.C.A.N. 4639); House Report No. 93-807 (1974) (Ways and Means), accompanying H.R. 12855, the House version of ERISA Title II (1974 U.S.C.C.A.N. 4670); Senate Report No. 93-127 (1973) (Labor and Public Welfare), accompanying S. 4, the Senate counterpart to H.R. 2 (1974 U.S.C.C.A.N. 4838); and Senate Report No. 93-383 (1973) (Finance), accompanying S. 1179, the Senate counterpart to H.R. 12855 (1974 U.S.C.C.A.N. 4890). Excerpts from these reports, along with statements of congressional leaders, are appended to the brief at Supp.App. 36-78.

Congress mandated minimum vesting standards that allowed for quicker vesting, but it recognized the necessity of striking a balance between employee needs and employer capabilities. Congress stressed that “it is especially important to balance the protection offered by the [vesting] provision against the additional cost involved in financing the plan.” S. REP. NO. 93-383 (1973), at 19, reprinted in 1974 U.S.C.C.A.N. 4890, 4905. See also H.R. REP. NO. 93-807 (1974), at 19, reprinted in 1974 U.S.C.C.A.N. 4670, 4686 (“it is generally recognized that a requirement for immediate and full vesting would not be feasible because it would involve such substantial additional costs that it would impede the adoption of new plans and the liberalization of existing ones”).

Allowing pension plans using cliff vesting to disregard years of service before age 22 was an integral part of the balance struck by Congress between protected employee benefits and plan affordability. The Joint Explanatory Statement of the Committee of Conference (“Joint Statement”) first explained the general rule:

Generally, * * * once an employee becomes eligible to participate in a pension plan, all his years of service with an employer (including preparticipation service, and service performed before the effective date of the Act) are to be taken into account for purposes of determining his place on the vesting schedule.

H.R. Conf. Rep. No. 93-1280 (1974), at 268, reprinted in 1974 U.S.C.C.A.N. 5038,

5050. The Joint Statement then carved out important exceptions, the most pertinent of which appeared directly after the paragraph quoted above and read:

Generally, the plan may also ignore service performed before age 22; however, if a plan elects to use the rule of 45, service before age 22 may be ignored only if the employee was not a participant in the plan during the years before age 22.

Id. (emphasis added). In explicating the structure of ERISA § 203(b)(1), the Joint Statement made clear that unlike “Rule of 45” plans, 10-year cliff-vesting plans did not need to consider years of service before age 22.

Contemporaneous statements of congressional leaders supporting the legislation described the synchronization between the text of section 203 and the intent of its drafters. In discussing ERISA’s vesting provisions, Senator Carl Curtis, a ranking member of the Senate Finance Committee, stated that “[e]mployment service prior to age 22 can be disregarded for the first two options of vesting [“cliff” and “5-15”], but this only can be disregarded under option No. 3 [“Rule of 45”] if he is not a participant in the plan.” 120 Cong. Rec. 29948 (1974). Senator Harrison A. Williams, Jr., the Chairman of the Senate Labor and Public Welfare Committee, echoed these comments, stating that “despite the *general rule in the bill that years of service before age 22 may be disregarded for vesting purposes*, an employer using the rule of 45 may not so disregard any years of

service during which the employee was a participant.” 120 Cong. Rec. 29929 (1974), reprinted in 1974 U.S.C.C.A.N. 5166, 5179 (emphasis added).

The selection of age 22 was the product of a bicameral compromise concerning the vesting schedules available to employers and the years of service required to be counted. The Senate preferred a bill with a more rapid vesting schedule and the inclusion of more years of service. Under the Senate versions of ERISA Title I (S. 4) and Title II (S. 1179), every plan had to follow a single vesting schedule—30% vested after 8 years, 100% vested after 15 years—and could ignore years of service prior to age 25 if the employer had not made contributions for an employee during those years (*i.e.*, the employee was not a participant). S. REP. NO. 93-127 (1973), at 39, reprinted in 1974 U.S.C.C.A.N. 4838, 4874-75; S. REP. NO. 93-383 (1973), at 46-47, reprinted in 1974 U.S.C.C.A.N. 4890, 4932.

By contrast, the House versions of ERISA Title I (H.R. 2) and Title II (H.R. 12855) afforded each plan a choice of three different vesting schedules and permitted an employer to exclude service prior to age 25 for vesting purposes, regardless of whether an employer made contributions on the employee’s behalf during that time. H.R. REP. NO. 93-533 (1973), at 23, reprinted in 1974 U.S.C.C.A.N. 4639, 4661. The justification for the pre-age-25 exclusion stemmed from the turnover of young employees: the Report accompanying H.R. 2 explained

that “until age 25 a large portion of the work force is still transient and accounting for such employees would impose unduly burdensome and costly record-keeping requirements on plan administrators.” *Id.* at 13, reprinted in 1974 U.S.C.C.A.N. at 4651. The House version of ERISA Title II echoed this reasoning: “To keep the operation of the minimum vesting requirement reasonable and to avoid imposing undue burdens on plans, certain periods of service are permitted to be excluded in determining the employee’s nonforfeitable rights.” H.R. REP. NO. 93-807 (1974), at 20, reprinted in 1974 U.S.C.C.A.N. 4670, 4687.

ERISA, as enacted, showed that the inter-chamber negotiations favored the House’s view of minimum vesting requirements, albeit in a form that accommodated some of the Senate’s reservations. The final version of ERISA § 203 and the new IRC § 411 (as added by ERISA § 1012) offered three vesting schedules from which plans could choose. For two of the three vesting schedules employers could exclude years of service completed before age 22, down from age 25. However, as a concession to the Senate conferees who “were extremely reluctant to accept the rule of 45 as an option because of [their] concern that it would unduly delay any vesting for employees starting at a very early age,” section 203 included the qualification “that despite the general rule in the bill that years of service before age 22 may be disregarded for vesting purposes, an employer using the rule of 45 may not so disregard any year of service during which the employee

was a participant.” 120 Cong. Rec. 29929 (1974) (statement of Sen. Williams), reprinted in 1974 U.S.C.C.A.N. 5177, 5179. The exception to the pre-age-22 service exclusion for “Rule of 45” plans reflected the language in the Senate bill that required plans to consider years of service before age 25 during which an employee was a participant. Thus, the text of ERISA § 203(b) incorporated the congressional compromise with the utmost clarity: plans could exclude all years of service prior to age 22 *regardless* of whether an employee was a participant in the plan during those years, except for “Rule of 45” plans, which could not disregard years during which an employee was a participant.

Far from revealing some ambiguity in ERISA § 203, ERISA’s other provisions and legislative history reinforce the plain meaning of its text. The unnecessary excursion into ERISA’s legislative history that Silvernail asks this Court to take undercuts his argument because it confirms that Congress intended to permit cliff-vesting plans to exclude pre-age-22 years of service.

III. Silvernail Offers No Valid Reason To Override ERISA’s Unambiguous Language.

Without a statutory foundation to support his argument that ERISA required the 1976 Plan to consider his years of service between February 1967 and September 1970 (the month he turned age 22), Silvernail peppers his brief with a battery of bewildering contentions that display only his misunderstanding of ERISA. Silvernail presents four arguments: (A) the 1976 Plan improperly applied

section 203 retroactively; (B) other ERISA provisions somehow demonstrate a latent ambiguity in section 203; (C) a different subsection of section 203, ERISA § 203(b)(2)(A), mandates that all years of service as a plan participant be counted for vesting purposes; and (D) the legislative history of ERISA shows that “all pre-ERISA years of service, regardless of age, must be counted for vesting purposes.” Silvernail Br. 33. As detailed below, these arguments are frivolous.

A. Adoption Of The 1976 Plan Had No Retroactive Effect.

Silvernail’s repeated contention that the 1976 Plan “retroactively” harmed him ignores the rudiments of vesting, as well as the history of the Plan, and reflects Silvernail’s misunderstanding of the distinction between vesting and accrual. Silvernail Br. 10-11, 14, 31-33.

Vesting refers to the point at which “employees gain a nonforfeitable right to the benefits they have accumulated.” *Central States, S.E. & S.W. Areas Pension Fund v. Nitehawk Express, Inc.*, 223 F.3d 483, 494 (7th Cir. 2000). Vesting is not the accumulation of benefits themselves, which is covered by the term “accrual.” As the Third Circuit has explained: “Vesting provisions do not affect the amount of the accrued benefit, but rather govern whether all or a portion of the accrued benefit is nonforfeitable.” *Hoover v. Cumberland, Md. Area Teamsters Pension Fund*, 756 F.2d 977, 983-84 (3d Cir. 1985). Silvernail’s citation to the Supreme Court’s *Heinz* decision for the proposition that the pre-age-22 exclusion “could not

be applied retroactively to affect pre-ERISA years of service” (Silvernail Br. 32-33) underscores this confusion of vesting and accrual. *Heinz* deals exclusively with ERISA’s prohibition on the reduction of accrued benefits, covered by ERISA § 204, and not the vesting of those accrued benefits. See *Heinz*, 541 U.S. at 744-46.

Silvernail’s retroactivity argument also disregards the history of the Ameritech Plan. Retroactivity is not an issue here because prior to the 1976 amendments Silvernail did not have *any* nonforfeitable right to benefits. The 1967 Plan did not provide for any vested pension benefits, although it made Silvernail eligible for a pension if he worked 30 years (until February 1997) and received approval, neither of which occurred. See SA5-SA6 § 4(1)(b). The 1969 amendments created a vested pension, but the vesting occurred only after an employee reached age 40 and had worked for 15 or more years, requirements not satisfied by Silvernail. See SA11 § 4(1)(c). The 1976 Plan’s exclusion of years of service before age 22 thus had no “retroactive effect” because there were no vested benefits to be retroactively reduced.

Accordingly, the 1976 amendments to the Plan did not harm Silvernail. To the contrary, the amendments increased the years of service that counted for vesting and reduced the time necessary to become vested. Under the 1969 Plan, Silvernail would not have become 100% vested until September 1988 when he

turned 40. Simple arithmetic demonstrates that the 1969 Plan did not count years of service completed before age 22. Under the 1976 Plan, however, Silvernail would have been vested in September 1980, 10 years after turning 22 and nearly 8 years earlier than under the 1969 Plan.

With respect to vesting, then, the post-ERISA amendment of section 4 of the Plan made it easier for Silvernail to obtain vested benefits. It shaved 5 years off the tenure needed for full vesting (from 15 to 10 years) and counted three more years of service (service after age 22 as opposed to after age 25). In addition, if Silvernail disliked the 1976 amendments, the 1976 Plan permitted him to elect any other rule of eligibility in place during his employment. See SA26 § 4(1)(b)(iii). Silvernail was not eligible for a vested pension under any of those rules.

B. The Other ERISA Provisions Cited By Silvernail Do Not Make Section 203 Latently Ambiguous.

Even if it were appropriate to search through an array of collateral statutory provisions in hopes of uncovering some supposed ambiguity in an otherwise perfectly clear statutory provision, the additional ERISA sections cited by Silvernail simply bolster the plain meaning of section 203(b)(1)(A).

First, Silvernail refers to section 206(a). Silvernail Br. 16-17, 43-45. This section established the three conditions that a participant had to meet before a plan was required to pay out benefits to which a participant had a vested right. Those conditions were (1) attainment of the “normal retirement age” (age 65 under the

Plan), (2) a minimum of 10 years' service, and (3) termination of employment. ERISA § 206(a). Silvernail posits a conflict between section 206(a) and section 203(b)(2)'s pre-age-22 exclusion simply because the former used the term "participant" and the latter used "employee." Silvernail Br. 16-17. No conflict exists because section 206(a) addressed the timing of benefit disbursement, not vesting. Additionally, it would make little sense for section 206(a) to have used the term "employee" given that one of the stated conditions for the receipt of benefits was that a participant no longer be employed. See ERISA § 206(a)(3).

Second, Silvernail seizes on the use of the word "participant" in the portion of section 203(b)(1)(A) requiring "Rule of 45" plans to count years of service during which an employee was a participant. Silvernail Br. 18. He contends that the phrase "the plan may not disregard any such year of service during which the employee was a participant," as used in describing "Rule of 45" plans, "is redundant or meaningless if meant to only apply to schedule (C)." *Ibid.* But that phrase was meaningful only with respect to "Rule of 45" plans. It reflected the House's response to the Senate's concern that "Rule of 45" plans would harm younger workers. Its language echoed the early Senate ERISA bills in which years of service before age 25 were excluded unless an employee was a participant during those years. The use of the word "participant," as opposed to "employee," suggested no ambiguity because under "cliff-vesting" and "5-15 vesting," years of

service before age 22 were excludable *regardless* of whether an employee was a participant. By contrast, under “Rule of 45” vesting, years of service were excludable only when an employee was not a participant.

Nor is there any inconsistency in the simultaneous use of both “employee” and “participant” in section 203(b)(1)(A). ERISA defined “employee” as “any individual employed by an employer” (§ 3(6)), and “participant” as “any employee or former employee * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan” (§ 3(7)). Where section 203(b)(1)(A) authorized the disregard of an employee’s years of service before age 22, it was referring to all employees, even participants. However, where section 203(b)(1)(A) barred exclusion from a “Rule of 45” plan of any years of service (before age 22 or otherwise) “during which the employee was a participant,” it was referring to a specific sub-category of employees. There is no conflict in the use of these two statutorily defined terms.

Third, *Silvernail* focuses on ERISA’s “look back” credit, which gave an employee three years of participation credit for service before age 25 if a plan limited participation to those over age 25. *Silvernail* Br. 15, 20, 41-42. In fact, the “look back” credit further confirms the propriety of the Plan’s disregard of years of service before age 22. The participation rules of ERISA § 202 generally required a pension plan to open participation to any employee who had turned age 25 and

completed one year of service. ERISA § 202(a)(1)(A). Together, the participation and vesting rules of section 203 formed a “look back” credit whereby “any employee who starts working for the firm at age 22 or younger and then meets the age requirement for participation by serving until the age of 25 will be given credit for the 3-year period from age 22 to 25 for purposes of determining the percentage of his benefits that are vested.” 120 Cong. Rec. 29199 (1974) (statement of Rep. Ullman), reprinted in 1974 U.S.C.C.A.N. 5166, 5167. The existence of this credit refutes Silvernail’s belief that his years of service between ages 18 and 22 should have been considered for vesting purposes: ERISA “looked back” only 3 years to age 22—not 7 years to age 18.

C. The ERISA Provision Defining “Year Of Service” Does Not Establish Which “Years Of Service” Count For Vesting Purposes.

Silvernail also places great weight on ERISA § 203(b)(2)(A). That provision merely explains what constitutes a single “year of service.” It does not “clearly require that each year of service as a participant of the plan must be counted for vesting purposes.” Silvernail Br. 23; see also *id.* at 23-28.

Silvernail confuses a provision defining how long an employee must have worked to obtain one year of service with a provision determining how many years of service were needed for vesting. Section 203(b)(2)(A) stated that “[f]or purposes of this section * * *, the term ‘year of service’ means a calendar year, plan year, or other 12-consecutive month period designated by the plan * * *

during which the participant has completed 1,000 hours of service.” While that section clearly determined when a year—or, more to the point, a partial year—counted as a “year of service,” it in no way mandated that “[f]or vesting purposes, you must count each year of service as a ‘Participant’ of the plan.” *Silvernail Br.* 24. The irrelevant cases cited by *Silvernail* (at 26-28) do not suggest otherwise. They merely interpret the 1,000 hours requirement discussed in section 203(b)(2)(A). Contrary to *Silvernail*’s assertions, section 203(b)(2)(A) was not in conflict with the pre-age-22 exclusion in section 203(b)(1)(A) because it merely set forth the meaning of “year of service.”

D. Silvernail’s Scattershot Quotations From ERISA’s Legislative History Are Either Irrelevant Or Contradict His Argument.

Silvernail cobbles together fragments of ERISA’s legislative history that alternate between irrelevancy and proof that Congress authorized cliff-vesting plans to disregard years of service before the age of 22.⁹ *Silvernail Br.* 33-39, 41-43. For example, selective quotations concerning Congress’s intent to afford plan participants retrospective vesting credits for service performed prior to ERISA’s

⁹ “[L]egislative history, especially isolated remarks of individual legislators, * * * could not be used to find ambiguity, or contrary intent, in statutory language that * * * is clear on its own terms without rendering nugatory the ‘plain meaning’ canon of construction.” *Alex v. City of Chicago*, 29 F.3d 1235, 1239 n.3 (7th Cir. 1994). Because the text of section 203(b)(1)(A) is clear, there is no need to consider the legislative history raised by *Silvernail*. In any event, *Silvernail* cites no legislative history that supports his contentions.

effective date do not bear on the exceptions to that general rule adopted by Congress, including the pre-age-22 exclusion. *Id.* at 33-36.

Silvernail also relies on snippets of legislative history taken out of context so as to alter the meaning of the cited material. He refers to Congress’s decision “to apply the minimum vesting requirements to the benefits accrued prior to the effective date of the provision” (Silvernail Br. 34, quoting H.R. REP. NO. 93-807 (1974), at 20, reprinted in 1974 U.S.C.C.A.N. 4670, 4687)), but neglects to quote the next paragraph where the House Committee expressed its intention to permit plans to exclude “service before age 25” in order “to avoid imposing undue burdens on plans.” H.R. REP. NO. 93-807, at 20. On two separate occasions, Silvernail performs the same trick on the Joint Statement: he quotes the general rule that all years of service must be taken into account for vesting purposes, but leaves out the critical following paragraph, which states that “[g]enerally, the plan may also ignore service performed before age 22.” See Silvernail Br. 36, 41 (quoting H.R. CONF. REP. NO. 93-1280 (1974), at 268, reprinted in 1974 U.S.C.C.A.N. 5038, 5050) (emphasis added).

Silvernail also cites to legislators’ floor statements concerning the “look back” provision discussed previously (*supra* pp. 37-38). Silvernail Br. 38, 41-43. Those references confirm that members of the House and Senate did not intend that plans be required to count years of service before age 22. The “look back” credit

applied *only* to years of service between ages 22 and 25, not to years of service between ages 18 and 22. Silvernail’s out-of-context quotations do not reveal any discrepancy between the plain language of section 203 and its drafters’ intent. Instead, they confirm that the 1976 Plan was justified in disregarding Silvernail’s years of service completed before age 22.

IV. The Statute Of Limitations Bars Silvernail’s Claim.

Silvernail’s failure to comply with the statute of limitations provides an alternative and independent ground for affirming the district court.¹⁰ “ERISA itself does not impose a statute of limitations for the bringing of civil actions,” so “the court applies the most analogous state statute of limitations.” *Daill v. Sheet Metal Workers’ Local 73 Pension Fund*, 100 F.3d 62, 65 (7th Cir. 1996). “Illinois does not have a specific statute of limitations for actions based on statutory violations,” and consequently “[t]he five-year statute of limitations for ‘all civil actions not otherwise provided for’ applies to these claims.” *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 1986 U.S. Dist. LEXIS 22083, at *4 (N.D. Ill. July 30, 1986), citing 735 ILCS 5/13-205 (“all civil actions not otherwise provided for[] shall be commenced within five years next after the cause of action accrued”).

¹⁰ Ameritech raised this statute of limitations issue below, but the district court did not reach it. See Ameritech Mot. to Dismiss 11-14; Ameritech Reply 12.

Hence, the statute of limitations for Silvernail's challenge to the Plan's compliance with ERISA is 5 years.

To the extent that Silvernail's claim is more properly viewed as a section 502(a)(1)(B) claim for wrongful denial of benefits, the limitations period is 10 years. See *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1137 (7th Cir. 1992) (Illinois's 10-year statute of limitations for written contracts, 735 ILCS 5/13-206, applies to actions challenging a denial of a claim for benefits). No matter whether the statute of limitations is 5 or 10 years, Silvernail's claim is time-barred because his claim accrued more than 25 years before he filed his complaint on December 31, 2003.

The date by which a claim must be filed depends on the date the claim accrued. This Court looks "to federal common law for purposes of determining the accrual date of a cause of action under a federal statute such as ERISA." *Daill*, 100 F.3d at 65. Federal courts apply the "discovery rule" under which "the accrual date is not determined when the injury occurs but when it is discovered or should have been discovered." *Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 688 (7th Cir. 2004). "Discovery" occurs "upon a clear and unequivocal repudiation of rights under the pension plan which [was] made known to the beneficiary." *Daill*, 100 F.3d at 66.

Silvernail’s claim accrued no later than 1978. The injury of which Silvernail complains is the Plan’s supposed failure to comply with ERISA. The terms of the 1976 and 1978 Plans clearly indicated that years of service completed prior to age 22 would not be counted for vesting purposes. SA26 § 4(1)(b); SA31 § 4(1)(b). Moreover, Silvernail admitted in his March 11, 1999 letter to Ameritech that he knew the age-22 rule would disqualify him from receiving vested benefits when his employment was terminated in 1978. Supp.App. 84 (“After I separated service with Illinois Bell, I was informed verbally by a company supervisor that *because of the age 22 rule*, I did not qualify for deferred vested pension”) (emphasis added).

Thus, Silvernail “discovered” his claimed injury—the Plan’s alleged violation of ERISA’s vesting provisions—by the time he left Ameritech in 1978. He may have learned of this alleged injury even earlier, as the Plan was amended nearly two years before to include the provision about which Silvernail complains. In Silvernail’s best-case scenario, his claim accrued in 1978. Regardless of whether the 5-year or 10-year statute of limitations applies, his December 2003 Complaint was filed at least 15 years too late to be actionable, providing an independent reason for this Court to affirm the district court’s order of dismissal.¹¹

¹¹ “Although the statute of limitations is ordinarily an affirmative defense,” a claim may be dismissed under Rule 12(b)(6) where “the face of [the] complaint” shows that it is “indisputably time-barred.” *Small v. Chao*, 398 F.3d 894, 898 (7th (cont’d)

V. Silvernail’s Claim That The Plan Did Not Provide Him With Requested Information Is Baseless.

Silvernail asserts that Ameritech violated ERISA by failing to provide him with a statement of benefits. Silvernail Br. 45-46. The district court did not discuss this issue, which Silvernail failed to set forth in a proper count of his Complaint. Nevertheless, any such claim was dismissed with the rest of Silvernail’s Complaint, and this Court “may affirm on any basis supported by the record.” *In re Scarlata*, 979 F.2d 521, 525 n.5 (7th Cir. 1992). Silvernail’s claim fails as a matter of law for three reasons: (1) Silvernail is not a “participant” and thus lacks standing; (2) Ameritech provided Silvernail with the requested information once he asked for it; and (3) Silvernail’s claim is barred by the statute of limitations.

A. ERISA Authorizes A Statutory Penalty For Failure To Provide Information Only In Limited Circumstances.

Silvernail’s claim springs from ERISA’s reporting requirements. ERISA § 105(a)(2), 29 U.S.C. § 1025(a)(2), requires an administrator to provide “to any *plan participant or beneficiary who so requests* in writing, a statement indicating, on the basis of the latest available information * * * *the nonforfeitable pension benefits, if any*, which have accrued” (emphasis added). ERISA’s civil

(... cont’d)

Cir. 2005). Here, all the information requiring dismissal based on the statute of limitations is set forth on the face of Silvernail’s Complaint.

enforcement provision, § 502, 29 U.S.C. § 1132, provides that if an administrator fails to comply with a “participant[’s]” request “within 30 days after such request” is made, the administrator “may in the court’s discretion be personally liable to such participant * * * in the amount of up to \$100 a day.” ERISA § 502(a)(1)(A), (c), 29 U.S.C. § 1132(a)(1)(A), (c). Thus, only a “participant” (or a beneficiary) can request information and bring a civil action for failure to provide that information.

B. Silvernail Was Not Entitled To Any Information Under ERISA § 105(a) Because He Was Not A “Participant.”

Because Silvernail does not have a colorable claim for benefits and is not a “participant” (see *supra* Part I.C), the Administrator owed him no duty to provide information, and he lacks standing to bring his statutory penalty claim. “Congress did not say that all ‘claimants’ could receive information about benefit plans.” *Firestone*, 489 U.S. at 117. Rather only “participants”—those “with a colorable claim to vested benefits”—have the right to request information and to bring an action if a plan administrator fails to satisfy that request. *Id.* at 118. Accordingly, “for jurisdictional purposes,” a party has standing to bring a section 105(a) claim “only if it can show that at the time it filed suit it had a colorable claim to vested benefits.” *Neuma, Inc. v. AMP, Inc.*, 259 F.3d 864, 878 (7th Cir. 2001).

Silvernail has no such colorable claim. Silvernail worked fewer than 10 years after reaching age 22, and thus could not possibly qualify for vested benefits

under the Plan. Silvernail has also known for some time that he had zero vested benefits. He learned that he was not vested in 1978 when he stopped working for Ameritech. Throughout the administrative claims process, he was told repeatedly that he had no vested benefits. The clarity of the Plan language, the text of section 203, and Silvernail's own knowledge confirm that Silvernail lacked any colorable claim for benefits. As a consequence, the Administrator owed him no duty to provide information when he finally requested it.

C. The Administrator Provided Silvernail With Benefit Information Despite Not Being Required To Do So.

Silvernail also fails to allege that the Plan Administrator violated the statute. “Although [Section 502(c)] provides that imposition of the statutory penalty lies within the discretion of the court, that discretion can only be exercised where the facts of a case establish an actual violation of [section 502(c)].” *Kleinhans v. Lisle Sav. Profit Sharing Trust*, 810 F.2d 618, 622 (7th Cir. 1987). Silvernail has pleaded no such violation. Between 1998 and 2003, the Plan informed Silvernail on multiple occasions that he had no vested benefits because he had not satisfied the 10-year cliff-vesting requirements of the 1976 Plan. Yet, Silvernail never requested a statement of his benefits in 1998 when he first contacted Ameritech, in 1999 when he filed a formal claim and appealed the denial of that claim, or in his myriad post-appeal letters sent between 2000 and early 2003.

Silvernail did not make a formal request for a statement until June 4, 2003. See Supp.App. 105 (“At this time I’m also making another formal request for a statement of my total accrued benefits, whether or not vested”). A Plan official responded on July 7, 2003, 30 days after Silvernail’s letter was sent (taking into account the July 4th holiday), informing Silvernail that he had no benefits. Contrary to Silvernail’s claim that he had previously asked for this information, his letters sent between 1998 and 2003 contain no such request. See Supp.App. 79-81, 83-85, 90-94, 100-03.

The actions of the Plan Administrator were perfectly consistent with ERISA’s disclosure provisions. Plan officials repeatedly told Silvernail that he had no vested benefits under the Plan because he had not completed 10 years of service after turning age 22. There was no more information to give Silvernail. The Administrator complied not only with the letter but the purpose of ERISA’s disclosure provisions—to ensure that “the individual participant knows exactly where he stands with respect to the plan.” *Firestone*, 489 U.S. at 118, quoting H.R. REP. NO. 93-533, at 11 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4649. When Silvernail finally asked for a statement, the Administrator provided a timely and accurate response, even though it was entirely superfluous in light of Silvernail’s awareness that he had zero benefits.

D. The Statute Of Limitations Bars Silvernail’s Section 502(c) Claim.

Even if Silvernail had requested benefits information in his letters sent between 1998 and 2000, which he did not, the statute of limitations would bar any claim under Section 502(c). Because that provision “authorizes the imposition of statutory penalties,” *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 162 (2d Cir. 2003); *Kamler v. H/N Telecommunication Servs., Inc.*, 305 F.3d 672, 683 (7th Cir. 2002); *Groves v. Modified Ret. Plan*, 803 F.2d 109, 117 (3d Cir. 1986), Illinois’s 2-year statute of limitations for statutory penalties applies. See 735 ILCS 5/13-202 (“Actions * * * for a statutory penalty * * * shall be commenced within 2 years next after the cause of action accrued”). Aside from the June 4, 2003 letter described above, to which the Administrator provided a timely response, the only other letters discussed by Silvernail predate December 2001. Even if Silvernail had asked for a statement of benefits in one of these letters and failed to receive any answer from the Plan, which did not occur, a claim springing from such a refusal was time-barred when Silvernail filed his complaint on December 31, 2003.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that the brief of defendants-appellees Ameritech Corporation and Ameritech Pension Plan complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(i) because it contains 11708 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

One of appellees' attorneys

CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned attorney, Jeffrey A. Berger, certifies that he has filed electronically, pursuant to Circuit Rule 31(e), a digital version of the foregoing brief in a non-scanned PDF format.

One of appellees' attorneys

CERTIFICATE OF SERVICE

The undersigned attorney, Jeffrey A. Berger, certifies that on September 28, 2005, he caused two copies and a digital version of the foregoing brief and supplemental appendix of defendants-appellees Ameritech Corporation and Ameritech Pension Plan to be served by first-class mail on September 28, 2005 upon the following:

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