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PLANT CLOSINGS AND ERISA'S NONINTERFERENCE PROVISION†

DANA M. MUIR*

XYZ, Inc. has experienced a decrease in sales and a corresponding decrease in profits. In order to remain solvent, XYZ's board of directors decides to close one of its three manufacturing plants. Because the plants were opened at different times, the average ages and average seniority levels of employees vary significantly among the plants, resulting in differing levels of employee benefit costs, especially with respect to pension costs.¹

This scenario has been repeated numerous times in recent years as United States industry has struggled with recession and increased world-wide competition. Many companies continue to downsize even as the economic outlook improves.² At the same time, some employers

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* Assistant Professor of Business Law, University of Michigan. J.D., 1990, University of Michigan; M.B.A., 1980, University of Detroit; A.B., 1978, University of Michigan. The author gratefully acknowledges the research support of the University of Michigan School of Business Administration.

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¹ For an explanation of how pension costs increase with the age and years of service of the employee, see *infra* text accompanying notes 52-56. Special pension plans that award additional benefits on the attainment of some combination of age and service also increase pension costs for older and longer service employees. For example, USX Corporation's "Magic Number" plan and Clark Equipment Company's "30 and out" and "85 point" systems are discussed *infra* at notes 81 and 106 and accompanying text.

² Frank Swoboda, *U.S. Companies Speed Pace of Downsizing*, WASH. POST, Feb. 9, 1994, at C6; Eric Reguly, *Corporate Downsizing Continues Apace*, FIN. POST, July 14, 1993, § 1, at 5; *U.S. Companies Take Hatchet to Jobs Again*, L.A. TIMES, July 9, 1993, at D3.

are attempting to decrease the costs of their employee benefit plans, not infrequently resulting in lawsuits under the Employee Retirement Income Security Act of 1974 ("ERISA").³ For example, some employers have reduced or eliminated retiree health care coverage.⁴ Others have instituted dollar limitations on medical coverage for certain diseases such as Acquired Immune Deficiency Syndrome ("AIDS").⁵ And at least 50,000 small businesses terminated or froze their defined benefit pension plans⁶ between 1988 and 1993.⁷

An employer might wish to consider employee benefit costs when making a plant closing decision. However, ERISA section 510⁸ ("section 510") prohibits specified actions against employees⁹ and their beneficiaries¹⁰ in retaliation for exercising benefit rights or in order to prevent employees¹¹ from becoming entitled to benefits. Thus, section 510 must be considered at the intersection of the decision to close a plant and the increased attention focused on employee benefit costs.¹²

³ Employee Retirement Income Security Act ("ERISA") §§ 1-4402, 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992).

⁴ See, e.g., *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034, 1036 (3d Cir. 1994), *petition for cert. filed*, 62 U.S.L.W. 3844 (U.S. June 1, 1994) (No. 93-1935); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1478 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *infra* note 58 and accompanying text.

⁵ See, e.g., *McGann v. H & H Music Co.*, 946 F.2d 401, 403 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992). The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213 (Supp. IV 1992), may preclude these types of dollar caps. See *EEOC v. Mason Tenders' Dist. Council Welfare Fund*, No. 93-3865 (S.D.N.Y. filed June 9, 1993).

⁶ For a definition of the term "defined benefit pension plans," see *infra* text accompanying notes 38-41.

⁷ *Small Firms Lead Exit from Defined Benefit Pension Plans According to Enrolled Actuaries*, 5 Benefits Coordinator—Employee Benefits Alert (WGL) ¶ 9 (Mar. 31, 1993).

⁸ ERISA § 510 ("§ 510"), 29 U.S.C. § 1140 (1988).

⁹ Technically, the statutory reference is to "participants." See *infra* text accompanying note 92 for the exact language of § 510. ERISA defines "participant" to mean employees and certain other individuals who are eligible, or may become eligible in the future, for benefits from an employee benefit plan. ERISA § 3(7), 29 U.S.C. § 1002(7) (1988). Because of the context of plant closings, this Article generally refers to § 510's prohibitions as running against the employer; however, the statute actually applies to "any person." ERISA § 510, 29 U.S.C. § 1140 (1988); see, e.g., *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 421 (4th Cir. 1993).

¹⁰ A beneficiary is "a person designated by a participant, or by the terms of an employee benefit plan who is or may become entitled to a benefit thereunder." ERISA § 3(8), 29 U.S.C. § 1002(8) (1988).

¹¹ While the first clause of § 510, which protects the exercise of benefits, covers both participants and beneficiaries, the second clause, which protects against interference with the attainment of benefits, explicitly covers only participants. See *infra* text accompanying note 92 for the relevant language of § 510. The legislative history does not explain this difference in coverage, and it is unclear whether the asymmetry was intentional or the result of a drafting error.

¹² For examples of other employment-related statutory provisions that regulate plant closings, see, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992); Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1988).

This Article examines the implications of section 510 for an employer making a plant closing decision.¹³ Part I presents an overview of ERISA, explains relevant concepts of private employee benefit plans,¹⁴ and reviews *Unida v. Levi Strauss & Co.*¹⁵ and *Pickering v. USX Corp.*,¹⁶ two recent cases where plaintiffs alleged that plant closings violated section 510. Part II asks whether section 510 even applies to plant closing decisions or whether it applies only to individualized employment decisions. Part II concludes that section 510 does apply to plant closing decisions. Part III turns to an examination of the types of benefits protected by section 510, focusing on the controversy over whether section 510 protects more than an employee's initial right to become vested in benefits. Part IV reviews the prima facie case and allocation of the burdens of proof applicable to section 510 plant closing cases and ends with a brief discussion of the remedies available to plan participants after the Supreme Court's 1993 decision in *Mertens v. Hewitt Associates*.¹⁷

I. AN OVERVIEW OF ERISA AND FUNDAMENTALS

For purposes of this Article, it is unnecessary to undertake a detailed exploration of the intricacies of ERISA. However, the overview of ERISA and explanation of concepts provided below are indispensable to understanding the application of section 510 to plant closing decisions. This Part ends with a discussion of two recent plant closing cases.

A. An Overview of ERISA

Plant closings were not beyond the experience of ERISA's drafters. In fact, a plant closing may have been the final straw which convinced Congress of the necessity of pension reform. In 1963, Studebaker Corporation closed its automobile plant in South Bend, Indiana. As a result of that closing, thousands of employees lost their jobs. More importantly for future pension regulation, due to the underfunding of the Studebaker pension plan, 6,900 employees lost some or all of their promised pension benefits.¹⁸ The widespread deprivation of pension

¹³ Similar considerations apply to sourcing and other production decisions. See *infra* text accompanying notes 116-19 for a discussion of the tactics employed by Continental Can Co.

¹⁴ Public pension and welfare plans are exempt from Titles I and IV of ERISA. ERISA §§ 4(b)(1), 4021(b)(2), 29 U.S.C. §§ 1003(b)(1), 1321(b)(2) (1988).

¹⁵ 986 F.2d 970 (5th Cir. 1993).

¹⁶ 809 F. Supp. 1501 (D. Utah 1992).

¹⁷ 113 S. Ct. 2063 (1993).

¹⁸ *Private Pension Plans, 1966: Hearings Before the Subcomm. on Fiscal Policy of the Joint*

benefits inspired Congress to investigate the general lack of security for private pension plans.¹⁹

After more than ten years of legislative hearings and congressional debate, President Gerald R. Ford signed ERISA into law on Labor Day, 1974.²⁰ ERISA provides for comprehensive regulation of pension and welfare benefit plans.²¹ According to its declaration of policy, Congress enacted ERISA to protect employees' rights to collect benefits promised by existing benefit plans. Congress also hoped ERISA would encourage employers to expand the number and coverage of pension benefit plans.²²

Congress divided ERISA into four titles. Title I includes section 510.²³ In addition, Title I contains definitions and establishes requirements for: reporting and disclosure;²⁴ participation and vesting;²⁵ funding;²⁶ fiduciary responsibility;²⁷ administration and enforcement;²⁸ and continuation coverage under group health plans.²⁹ Title II sets forth amendments to the Internal Revenue Code ("IRC"), and many of its

Economic Comm., 89th Cong., 2d Sess. 104-28 (1966) (statement of Clifford M. MacMillan, Vice President, Studebaker Corp.); JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 53-57 (1990).

¹⁹ LANGBEIN & WOLK, *supra* note 18, at 54-55.

²⁰ ERISA: THE LAW AND THE CODE v (Dana J. Domone ed., 1994).

²¹ *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Paul Fassar, former Assistant Secretary of Labor for Labor-Management Relations, once noted that the employees "at the Labor Department, . . . charged with administering a good portion of [ERISA] can indeed substantiate the statement that ERISA is one of the most complex laws ever enacted by Congress." Paul Fassar, *The New Pension Law*, 28 PROC. N.Y.U. CONF. ON LAB. 59 (1975).

²² See ERISA § 2, 29 U.S.C. § 1001 (1988). A House report on ERISA establishes that Congress designed ERISA to:

- (1) establish equitable standards of plan administration;
- (2) mandate minimum standards of plan design with respect to the vesting of plan benefits;
- (3) require minimum standards of fiscal responsibility by requiring the amortization of unfunded liabilities;
- (4) insure the vested portion of unfunded liabilities against the risk of premature plan termination; and
- (5) promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits.

H.R. REP. NO. 533, 93d Cong., 1st Sess. 1-2 (1973), reprinted in 1974 U.S.C.A.N. 4639, 4640; see also Jay Conison, *Suits for Benefits Under ERISA*, 54 U. PITT. L. REV. 1, 3 (1992) ("ERISA's central purpose [is] safeguarding benefit expectations.").

²³ ERISA §§ 2-608, 29 U.S.C. §§ 1001-1168 (1988 & Supp. IV 1992).

²⁴ ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031 (1988 & Supp. IV 1992).

²⁵ ERISA §§ 201-211, 29 U.S.C. §§ 1051-1061 (1988 & Supp. IV 1992).

²⁶ ERISA §§ 301-308, 29 U.S.C. §§ 1081-1086 (1988 & Supp. IV 1992).

²⁷ ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (1988 & Supp. IV 1992).

²⁸ ERISA §§ 501-515, 29 U.S.C. §§ 1131-1145 (1988 & Supp. IV 1992).

²⁹ ERISA §§ 601-608, 29 U.S.C. §§ 1161-1168 (1988 & Supp. IV 1992).

provisions substantially parallel provisions of Title I.³⁰ Generally, an employer must comply with the requirements of Title II and the IRC for its pension and welfare benefit costs to receive tax-favored treatment.³¹ Title III³² designated agency authority at the time of ERISA's enactment.³³ Title IV governs the termination of pension plans, creates the Pension Benefit Guaranty Corporation ("PBGC"), and outlines the PBGC insurance program.³⁴

B. *Welfare Benefit Plans Compared to Pension Plans*

ERISA distinguishes between pension plans and welfare benefit plans. Employers establish pension plans to provide employees with income upon retirement or to otherwise permit the deferral of income at least until the termination of employment.³⁵ ERISA divides pension plans into two types: defined contribution pension plans and defined benefit pension plans. In a defined contribution pension plan, the employer makes contributions to accounts established on behalf of individual employees.³⁶ The retirement benefits of each employee depend entirely on the value of that employee's account.³⁷ Thus, the employee bears the investment risk because the value of the employee's final benefit equals the sum of the contributions as adjusted for investment returns.

A defined benefit pension plan includes any other type of pension plan.³⁸ Essentially, a defined benefit pension plan promises to pay a dollar amount at retirement, based upon a formula specified in the plan. Formula factors for salaried employees frequently include: age; years of service; and final average salary over a specified period of years. Hourly employees often receive a benefit determined primarily

³⁰ ERISA §§ 1001-2008, 88 Stat. 829, 898-994 (1974) (codified as amended in scattered sections of the I.R.C. (1988)).

³¹ See Nancy J. Altman, *Rethinking Retirement Income Policies: Nondiscrimination, Integration, and the Quest for Worker Security*, 42 Tax L. Rev. 433, 444-46 (1987).

³² ERISA §§ 3001-3043, 29 U.S.C. §§ 1201-1242 (1988 & Supp. IV 1992).

³³ The original designation of agency authority was revised by Reorg. No. 4 of 1978, 3 C.F.R. § 332 (1978), reprinted in 5 U.S.C. app. at 1163 (1982) and in 92 Stat. 3790 (1978).

³⁴ ERISA §§ 4001-4402, 29 U.S.C. §§ 1301-1461 (1988 & Supp. IV 1992).

³⁵ ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A) (1988).

³⁶ A comparatively small number of plans provide for after-tax employee contributions. Many contributions frequently thought of as employee contributions, such as discretionary contributions to § 401(k) plans, are defined by ERISA as employer contributions. I.R.C. § 401(k)(2)(A) (1988).

³⁷ ERISA § 3(34), 29 U.S.C. § 1002(34) (1988).

³⁸ ERISA § 3(35), 29 U.S.C. § 1002(35) (1988). For additional information regarding defined benefit and defined contributions plans, see Peter T. Scott, *A National Retirement Income Policy*, 44 Tax Notes 913, 919-20 (1989).

by their years of employment. Some plans provide enhanced early retirement benefits if the participant meets certain minimum age and service requirements.³⁹ A number of plans provide enhanced benefits only if the participant meets the age and service criteria and a permanent layoff or plant closing occurs.⁴⁰ In a defined benefit plan, the employer bears the investment risk because the employer must make sufficient contributions to the plan to pay the promised benefits regardless of the return earned by plan investments.⁴¹ This Article focuses primarily on employers with defined benefit pension plans.

In contrast to pension plans, welfare benefit plans include programs such as: health insurance; life insurance; and vacation payment plans.⁴² For example, the typical employer-provided health care plan is an ERISA welfare benefit plan. In addition, certain severance pay plans and cost-of-living retirement supplements may be treated as welfare plans instead of pension plans.⁴³

Many of ERISA's fiduciary, reporting, and disclosure obligations apply equally to pension plans and to welfare benefit plans.⁴⁴ Overall though, ERISA and the IRC currently regulate pension plans far more heavily than they regulate welfare benefit plans, especially with respect to levels of participation and funding.⁴⁵ And, as the next section explains, the concepts of accrual and statutory vesting apply only to pension plans.

C. Accrual Compared to Vesting

Accrual of benefits describes how an employee earns increased pension benefits over time.⁴⁶ The terms of a defined benefit pension

³⁹ See, e.g., the "30 and out" and "85 point" benefits under the plan at issue in *Nemeth v. Clark Equipment Co.*, 677 F. Supp. 899, 903 (W.D. Mich. 1987).

⁴⁰ See the discussion of USX's "Magic Number" benefits *infra* at note 81 and the discussion of Continental Can's Rule of 70/75 benefits *infra* at note 114.

⁴¹ Risks to participants in a defined benefit plan are further mitigated by the Pension Benefit Guaranty Corporation ("PBGC") insurance program, at least to the limited extent of PBGC benefit guarantees, and so long as the PBGC remains solvent. However, the PBGC's deficit was a record \$2.7 billion in 1992. *Lack of PBGC Reform May Force Well-Funded Plans to Pay*, *Pickle Says*, 20 Pens. Rep. (BNA) 583 (Mar. 15, 1993); see also R. IPPOLITO, *THE ECONOMICS OF PENSION INSURANCE* (1989).

⁴² ERISA § 3(1), 29 U.S.C. § 1002(1) (1988).

⁴³ ERISA § 3(2)(B), 29 U.S.C. § 1002(2)(B) (1988).

⁴⁴ See, e.g., ERISA §§ 101-111, 401-414, 29 U.S.C. §§ 1021-1031, 1101-1114 (1988 & Supp. IV 1992).

⁴⁵ See, e.g., I.R.C. §§ 401(a), (k), 415 (1988 & Supp. IV 1992) (amended 1992) (applying only to ERISA pension plans). This could change dramatically upon enactment of national health care legislation.

⁴⁶ I GARY BOREN, *QUALIFIED DEFERRED COMPENSATION PLANS* § 3:22 (Norman P. Stein & Carolyn E. Smith eds., 1994).

plan determine the amount of a participant's accrued benefit at any point in time.⁴⁷ Every pension plan must contain an accrual method.⁴⁸

In contrast to accrual, statutory vesting is the method by which an employee's accrued pension benefit becomes nonforfeitable. In plans with "cliff" vesting, the entire accrued benefit becomes nonforfeitable at a single point in time. Generally, ERISA requires this to occur by the date the employee completes five years of service.⁴⁹ Alternatively, plans may provide for "incremental" vesting where, at minimum, benefits vest at the rate of twenty percent per year, beginning when the employee completes three years of service.⁵⁰ In any case, an employer must vest all accrued benefits at the time of a complete or partial plan termination.⁵¹ However, if the employee's accrued benefit equals zero, the vested and nonforfeitable benefit also equals zero.

The following somewhat simplified example helps clarify the distinction between benefits accrual and vesting. A typical defined benefit plan might provide for five-year cliff vesting and offer an annual benefit at normal retirement age of two percent per year of credited service multiplied by the employee's average annual salary over the final five years of employment.⁵² The employee will be fully *vested* in the plan after five years. As a result, the employee has a right to receive his or her accrued benefit at normal retirement age, even if his or her employment terminates. However, with five years of credited service, the employee's annual accrued benefit (the amount receivable at normal retirement age) would equal only ten percent (two percent per year for five years) multiplied by the average annual salary over the five years of employment.

An employee who continues to work for the same employer continues to accrue additional benefits both because the percentage will increase as the years of credited service increase and because salary typically will increase. The nature of these accruals, combined with the effects of inflation, means that employees tend to accrue most of their defined benefit pension plan benefits in the final years of their em-

⁴⁷ See ERISA § 3(23), 29 U.S.C. § 1002(23) (1988 & Supp. IV 1992).

⁴⁸ ERISA § 204, 29 U.S.C. § 1054 (1988 & Supp. IV 1992).

⁴⁹ ERISA § 203(a)(2)(A), 29 U.S.C. § 1053(a)(2)(A) (1988). In comparison, multiemployer plans are permitted to delay vesting for up to 10 years. ERISA § 203(a)(2)(C), 29 U.S.C. § 1053(a)(2)(C) (1988).

⁵⁰ ERISA § 203(a)(2)(B), 29 U.S.C. § 1053(a)(2)(B) (1988).

⁵¹ I.R.C. § 411(d)(3) (1988), as amended by Unemployment Compensation Amendments of 1992, Pub. L. No. 102-318, § 521(b)(44), 106 Stat. 290, 311.

⁵² This is sometimes known as a unit benefit formula. The major alternative way of calculating benefits is known as a flat benefit formula. See 1 BOREN, *supra* note 46, at § 3:23; LANGBEIN & WOLK, *supra* note 18, at 42.

ployment.⁵³ And as employees grow close to retirement age, the accruals become even more costly to employers because of the reduced time for investment growth. Economic research confirms this phenomena by finding the existence of a spike in the rate of accruals at the point an employee reaches normal retirement age.⁵⁴

Similarly, it is by continuing to work until they meet the plan's minimum age and years of service criteria that employees typically become eligible for enhanced benefits.⁵⁵ Again, economic research shows a significant spike in the rate of accruals at the point an employee becomes entitled to an enhanced benefit.⁵⁶ Because the value of accruals in defined benefit plans continues to be weighted toward the end of an employee's career, denying an aging employee the opportunity to earn accruals can significantly limit a plan's benefit obligations and defeat employee expectations. Thus, protecting employees from actions meant to deprive them of the opportunity of earning additional accruals or meeting the minimum criteria for enhanced benefits comports with ERISA's goal of enforcing benefit promises but imposes significant costs on employers, especially as employees approach retirement age.

ERISA's statutory vesting requirements apply only to pension plans.⁵⁷ Because those plans promise future benefits, Congress perceived the need for vesting to ensure that the benefits would be available to employees at retirement. By comparison, welfare benefits typically are funded, or insurance purchased, on a "pay as you go" basis. Therefore, at the time of ERISA's enactment, there seemed little reason to require statutory vesting of welfare benefits and they were exempted.⁵⁸

⁵³ See Ippolito, *supra* note 41, at 16-21; R. IPPOLITO, PENSIONS, ECONOMICS AND PUBLIC POLICY, 36-51 (1986); see also LANGBEIN & WOLK, *supra* note 18, at 114. Primarily because of perceived abuses aimed at benefiting company insiders, the I.R.C. sets forth some rather complex minimum accrual formulas; the example in the text is somewhat simplified because of the intricacies of accrual requirements. See I.R.C. § 411(b) (1988); 1 BOREN, *supra* note 46, at §§ 3:22, 3:27. Also, the exact definition of "accrued benefits" sometimes becomes important and controversial when a pension plan is terminated. See, e.g., Dana M. Muir, Note, *Changing the Rules of the Game: Pension Plan Terminations and Early Retirement Plans*, 87 MICH. L. REV. 1034, 1038-51 (1989) (discussing whether early retirement benefits constituted accrued benefits prior to clarifying amendments in the Retirement Equity Act of 1984, § 301(a)(2), 98 Stat. 1451, codified at 29 U.S.C. § 1054(g) (1988)).

⁵⁴ Alan L. Gustman et al., *The Role of Pensions in the Labor Market: A Survey of the Literature*, 47 INDUS. & LAB. REL. REV. 417, 426-27 (1994).

⁵⁵ ERISA does not require an accrued benefit to include the value of early retirement subsidies. ERISA § 204(b)(1)(H)(v), 29 U.S.C. § 1054(b)(1)(H)(v) (1988).

⁵⁶ Gustman et al., *supra* note 54, at 426-27.

⁵⁷ ERISA § 203(a), 29 U.S.C. § 1053(a) (1988 & Supp. IV 1992).

⁵⁸ Congress has begun to question the wisdom of this exemption as employers have reduced health care coverage for their retirees. See, e.g., *Bill to Preserve Retiree Benefits During Litigation Introduced by Wofford*, PENS. & BENEF. DLY. (BNA) (July 21, 1993). Employer liabilities for unfunded

D. *Two Ends of the Spectrum*

This section reviews two recent cases where former employees alleged that their employers violated section 510 by considering employee benefit costs in making plant closing decisions.⁵⁹

In *Unida v. Levi Strauss & Co.*, the Fifth Circuit Court of Appeals found no evidence that the employer based its plant closing decision on employee benefit cost considerations.⁶⁰ Levi Strauss & Company ("Levi") closed its San Antonio plant after a decrease in demand for its Dockers pants.⁶¹ Former plant employees filed a class action alleging, among other claims, that Levi closed the plant to interfere with the plaintiffs' benefits.⁶² A magistrate recommended summary judgment for Levi on all of the plaintiffs' claims and the federal district court accepted that recommendation.⁶³

On appeal, the plaintiffs argued that section 510 did not require them to prove, as part of their prima facie case, that Levi had the specific intent of interfering with their benefits.⁶⁴ The circuit court disagreed.⁶⁵ Consistent with existing case law, the court held that the "for the purpose of interfering"⁶⁶ language in section 510 requires plaintiffs to prove the defendant acted with the specific intent to interfere with benefits.⁶⁷

retiree health care are estimated at \$412 billion, and a large number of employers report considering action to reduce the costs of their retiree health programs. GENERAL ACCOUNTING OFFICE, PUB. NO. 93-125, RETIREE HEALTH BENEFITS NOT SECURE (1993). Some employees have prevailed in suits disputing welfare benefit reductions on a theory of contractual vesting, especially where plan documents do not reserve the employer's right to amend or terminate the plan. See, e.g., *In re White Farm Equip. Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986); Steven J. Sacher & Evan Miller, *The Obligation to Provide Postretirement Welfare Benefits—The Evolving Case Law*, 4 LAB. LAW, 735 (1988). The Third Circuit further limited employer's rights in *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994) (employer prohibited from terminating retiree health insurance benefits because the plan documents did not contain the amendment procedure required by ERISA § 402(b)(3) even though the employer clearly had reserved the right to amend or terminate the plan), *petition for cert. filed*, 62 U.S.L.W. 3844 (U.S. June 1, 1994) (No. 93-1935). Again, national health care legislation could make dramatic changes to the law in this area.

⁵⁹ These two cases are analyzed in detail because they illustrate opposite findings of employer intent and opposite outcomes. See *infra* Part II.B. for a discussion of additional plant closing cases.

⁶⁰ 986 F.2d 970, 981 (5th Cir. 1993).

⁶¹ *Id.* at 973.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 979.

⁶⁵ *Unida*, 986 F.2d at 979.

⁶⁶ ERISA § 510, 29 U.S.C. § 1140 (1988). See *infra* text accompanying note 92 for the relevant portion of § 510.

⁶⁷ *Unida*, 986 F.2d at 979-80.

In the alternative, the plaintiffs argued that they had established specific intent by providing evidence that Levi closed the San Antonio plant: (1) to reduce costs; (2) at a time when Levi knew its corporate-wide benefit costs were increasing rapidly; (3) instead of a Caribbean plant where there were no benefit costs; and (4) with the result of preventing 369 employees from becoming fully vested in their benefits.⁶⁸ The court of appeals found the first two reasons too general to prove specific intent because the plaintiffs had not offered evidence showing increasing benefit costs at the San Antonio plant.⁶⁹ The court feared that permitting the claim to survive summary judgment based on corporation-wide cost data would result in similar claims from every plant closing.⁷⁰

With respect to the 369 unvested employees, the plaintiffs failed to show that the closing of the San Antonio plant prevented more employees from vesting than if Levi had closed another plant.⁷¹ The court noted that Levi maintained the Caribbean plant through the federal 807 Program which is intended to foster investment by United States companies in certain foreign countries.⁷² In the court's view, to admit participation in the 807 Program as evidence of specific intent to interfere with ERISA benefit rights would undermine the 807 Program.⁷³ Finally, the court decided that the plaintiffs had failed to controvert the Levi manager who testified: "[M]y decision to close the San Antonio plant was made without regard to costs associated with pension, workers' compensation, or other employee benefits."⁷⁴

At the other end of the spectrum is *Pickering v. USX Corp.*, where the district court in Utah found USX Corporation ("USX") idled its Geneva Works and Keigley Quarry facilities (collectively "Geneva") with the specific intent of interfering with the benefit rights of "active" and "management" employees in violation of section 510.⁷⁵ Evidence

⁶⁸ *Id.* at 980.

⁶⁹ *Id.* at 980-81.

⁷⁰ *Id.*

⁷¹ *Id.* at 980.

⁷² *Unida*, 986 F.2d at 981.

⁷³ *Id.* at 980-81.

⁷⁴ *Id.* at 980.

⁷⁵ 809 F. Supp. 1501, 1570 (D. Utah 1992). Other claims at issue under § 510 were: (1) USX failed to recall laid-off employees in order to avoid benefit costs; (2) USX sold the plant in violation of ERISA § 510; and (3) USX pressured employees to retire and inappropriately amended its plans in order to reduce benefits. *Id.* at 1531. The plaintiffs won on the first allegation but lost on the remaining two claims. *Id.* at 1540, 1545, 1550. The classifications of employees were defined for purposes of the case to distinguish among the various types of plaintiffs. *Id.* at 1511-12.

showed that, as of late 1985, USX intended to utilize the output from Geneva through late 1989 to supply a joint venture.⁷⁶ Thus, it appeared likely that Geneva would remain open through 1989.⁷⁷

However, a work stoppage occurred at Geneva on August 1, 1986, at which time USX idled the Geneva facilities.⁷⁸ The district court found that USX failed to conduct any reasonable cost studies of the Geneva operation between late 1985 and the idling of the Geneva plant, other than studies of the pension costs at the plant.⁷⁹ In fact, based on benefit studies done by USX, an expert for the plaintiffs estimated that pension costs would increase by more than \$50 million if USX waited until 1989 to close the plant instead of closing the plant in 1986.⁸⁰ This was true even though many employees already had vested benefits as of 1986, because by 1989 a significant number of employees would become eligible for much more lucrative "Magic Number" benefits.⁸¹

In addition to asserting a link between idling Geneva and an overall restructuring intended to increase the efficiency of the steel division, USX argued that section 510 did not apply to the idling for two statutory reasons. First, in the view of USX, Congress did not intend section 510 to "regulate 'every corporate business decision which [has] any possible collateral effect on pension benefits'"⁸² Second, USX believed that the plant closing could not be discriminatory because USX treated all of the employees at Geneva equally in the plant closing regardless of their entitlement to benefits.⁸³

The court dismissed as pretextual USX's stated efficiency basis for the idling because USX offered employee benefit cost studies as the only reasonable studies of the Geneva operations.⁸⁴ The court also

⁷⁶ *Id.* at 1546.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1550. Basic Manufacturing and Technology purchased Geneva on August 31, 1987. *Id.* at 1542.

⁷⁹ *Id.* at 1547.

⁸⁰ *Pickering*, 809 F. Supp. at 1546.

⁸¹ *Id.* at 1546-49. Participants would become entitled to Magic Number benefits under the USX plan when their plant closed or they were laid off and they had attained a minimum combination of years of service and age prior to the closing or lay off. *Id.* at 1516. The case cited the example of Tony Pickering who had a deferred vested pension of \$15,800 as of July 31, 1986 but who, by 1989, would become eligible for a Magic Number benefit of approximately \$217,000. *Id.* at 1549 n.27.

⁸² *Id.* at 1548 (quoting Memorandum in Support of USX's Tenth Motion for Partial Summary Judgment (Counts I, III, VI and VII) at 23 (quotation omitted)).

⁸³ *Pickering*, 809 F. Supp. at 1548.

⁸⁴ *Id.* at 1550-52. According to *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2759 (1993), in the context of Title VII, it is not necessarily sufficient for a plaintiff to prove that the employer's

dismissed USX's first statutory argument because the plaintiffs based their claims on USX's motive in closing the plant and not just on the collateral effect of the closing.⁸⁵ Finally, the court rejected the second statutory argument, finding irrelevant the number of employees terminated by the employer's action "if such action is taken for the determinative purpose to interfere with pension liability."⁸⁶

The court had bifurcated the trial, and thus deferred determination of the amount of damages to the second phase of the action.⁸⁷ Still, the court stated that damages would be individually calculated and would depend on "USX's actual treatment of each Geneva employee."⁸⁸ Also, the court determined that the plaintiffs were entitled to continued benefits as if USX had not illegally idled Geneva.⁸⁹

In sum, *Levi* illustrates that if an employer does not consider employee benefit costs as a factor when deciding which of its plants to close, that employer has not violated section 510. In contrast, the *USX* decision indicates that an employer violates section 510 when it makes a plant closing decision based exclusively on benefit costs. However, the threshold question raised by *USX* is whether section 510 applies to a plant closing decision.

II. APPLICATION TO PLANT CLOSING DECISIONS

Employers, such as USX, have argued that section 510 does not apply to plant closing decisions. This Part examines that issue beginning with the language and legislative history of section 510. This Part then reviews the applicable case law and analyzes the relevant economic, interpretative, and policy considerations. Finally, this Part concludes that section 510 does apply to plant closing decisions.

A. Statutory Language and Legislative History

To clarify the argument, employers reason that in a plant closing situation, where the decision to terminate employment affects all employees regardless of pension eligibility, the employers could not have discriminated on the basis of pension eligibility and thus could not

proffered reasons were pretextual; the plaintiff always maintains the ultimate burden of proving discrimination. See *infra* Part IV for a discussion of the allocation of burdens of production and persuasion.

⁸⁵ *Pickering*, 809 F. Supp. at 1548.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1513.

⁸⁸ *Id.* at 1552.

⁸⁹ *Id.*

have violated section 510. Employers also argue that section 510 does not apply to large-scale decision making such as a plant closing.⁹⁰ An evaluation of these arguments properly begins with the language of the statute.⁹¹ Section 510 states, in pertinent part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against *a participant or beneficiary* for exercising any right to which *he is entitled* under the provisions of an employee benefit plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which *such participant* may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act.⁹²

In parsing the words of the statute, one could focus on the references to the potential plaintiff(s). And in each instance, as highlighted above, the statutory references are in the singular. Arguably then, the conduct prohibited by the statute is conduct targeted directly at a single employee, or targeted on an employee-by-employee basis. Also, the floor debates on section 510 focused on the effectiveness of section 510 in protecting employees from individually targeted actions.⁹³ Thus, there are some indications that section 510 does not apply to across-the-board decisions such as plant closings.

Section 510's usage of the singular, however, is not dispositive in construing the statute. The very first section of the United States Code states that: "In determining the meaning of any act or resolution of Congress, unless the context otherwise indicates, words importing the singular include and apply to several persons, parties, or things"⁹⁴ Likewise, the nondiscrimination provision in Title VII of the Civil Rights Act of 1964⁹⁵ ("Title VII") is written in the singular. Often, in

⁹⁰ See, e.g., *id.* at 1548.

⁹¹ One commentator has observed that in recent employment and employee benefit decisions, the Supreme Court has both begun and concluded its analysis with the language of the applicable statute. Janice R. Bellace, *The Supreme Court's 1992-93 Term: A Review of Labor and Employment Law Cases*, 9 LAB. LAW. 603, 605 (1993).

⁹² ERISA § 510, 29 U.S.C. § 1140 (1988) (emphasis added).

⁹³ See *infra* Part III.B.2.c. for a thorough review of the legislative history of § 510.

⁹⁴ 1 U.S.C. § 1 (1982).

⁹⁵ 42 U.S.C. §§ 2000e-1-17 (1988 & Supp. IV 1992). Section 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of em-

enforcing section 510, the courts have looked to the case law under Title VII for precedent.⁹⁶ Title VII consistently has been interpreted as precluding employer actions taken against groups of employees as well as precluding individualized discriminatory acts.⁹⁷

In addition, one should look carefully at the actual actions prohibited by section 510. It is true that the relevant provision of section 510 forbids discrimination. To violate section 510, however, an employer need not discriminate among employees at a single plant. An employer also would discriminate against employees with respect to their benefits by comparing benefit costs among plants and closing the plant with the highest benefit costs to avoid those costs.

Furthermore, section 510 forbids not only discrimination, but also a variety of specific actions, including, but not limited to, discrimination undertaken for the purpose of interfering with benefits. One of the prohibited actions is "discharge." Thus, if an employer closes a specific plant and discharges the employees in order to interfere with benefit entitlements, the discharge of the affected employees constitutes an act prohibited by section 510 even if no discrimination occurs. In contrast, Title VII prohibits a variety of actions that constitute discrimination but its protections do not go beyond discriminatory actions.⁹⁸ The courts should recognize this difference in the plain meaning of the two statutes and should enforce the full range of prohibitions contained in section 510.

Indications in the legislative history lend limited support to the conclusion that section 510 applies to plant closings. Section 510 was viewed as one of the "fourteen basic rights"⁹⁹ protected under ERISA; the courts have, accordingly, construed its protections broadly.¹⁰⁰ Also, concern over plant closings helped spark Congress's interest in pension reform.¹⁰¹

The language of the statute leads to the logical conclusion that section 510 precludes an employment decision intended to affect groups

ployment, because of such individual's race, color, religion, sex, or national origin

....

Id. § 2000e-2(a).

⁹⁶ See *infra* Part IV for a discussion of allocation of burdens of proof.

⁹⁷ Disparate treatment class actions and disparate impact cases are examples of such recognized claims. See BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1230-34 (2D ED. 1983) & 170-71 (N. THOMPSON POWERS ED., 2D ED. SUPP. 1987-1989).

⁹⁸ See *supra* note 95 for the relevant language of Title VII.

⁹⁹ 120 CONG. REC. 29,935 (1974) (statement of Sen. Williams). See *infra* text accompanying notes 228-30 for a more detailed discussion of this portion of the legislative history.

¹⁰⁰ *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984).

¹⁰¹ See *supra* text accompanying notes 18-19.

of employees. The legislative history, though not dispositive, supports this conclusion. The next section considers the case law on this issue.

B. Case Law

To date, the case law generally has applied section 510 to plant closing decisions.¹⁰² In determining that section 510 applies to plant closing decisions, the USX court¹⁰³ relied on *Nemeth v. Clark Equipment Co.*¹⁰⁴ In *Nemeth*, eighteen former employees who had worked at Clark's Benton Harbor plant when the plant closed in 1983 sued Clark Equipment Company ("Clark").¹⁰⁵ All of the plaintiffs were vested in their basic pension benefits at the time of the closing; however, they claimed Clark closed their plant in order to prevent them from attaining more lucrative "30 and out" or "85 point" benefits.¹⁰⁶

Clark first argued that section 510 applies to neither plant closings nor other situations resulting from financial problems. The court dismissed this argument, stating that "the employer will violate ERISA if it makes an employment decision solely, or even substantially, for the purpose of avoiding pension liability."¹⁰⁷ Clark also argued that the termination of employees at Benton Harbor was an across-the-board, plant-wide decision. As such, Clark believed that section 510 could not apply to its closing of the Benton Harbor plant because the terminations did not depend on the individual pension entitlements of the employees. The court rejected this argument, stating that "ERISA does not distinguish between the termination of one employee and the termination of 100 employees. Either action is illegal if taken with the purpose of avoiding pension liability."¹⁰⁸ In the end though, Clark

¹⁰² See *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1129 (7th Cir. 1990) (denying employees the right to elect layoff when their plant closed violated § 510); *Anderson v. Torrington Co.*, 13 Employee Benefits Cas. (BNA) 1551, 1557-58 (N.D. Ind. 1991) (plaintiffs alleged the employer selected their plant for closure because it had the highest benefit costs). The only exception occurs in dicta in *Moehle v. NL Industries, Inc.*, where the court *sua sponte* addressed the application of § 510 without the benefit of briefs or arguments on the issue. 646 F. Supp. 769, 779 n.6 (E.D. Mo. 1986), *aff'd per curiam*, 845 F.2d 1027 (8th Cir. 1988). The *Moehle* court decided that § 510 does not apply to plant closing decisions because the section "only prohibits action aimed at individuals . . . so long as the plant closure had business justification." *Id.*

¹⁰³ 809 F. Supp. at 1548.

¹⁰⁴ 677 F. Supp. 899 (W.D. Mich. 1987).

¹⁰⁵ *Id.* at 902.

¹⁰⁶ *Id.* at 902-03. Under the standard plan, workers who began receiving benefits prior to age 65 received benefits that were actuarially reduced. *Id.* at 903. Under either "30 and out" or "85 point" retirements, the plaintiffs would have qualified both for benefits that were not actuarially reduced and for health insurance. *Id.*

¹⁰⁷ *Id.* at 905.

¹⁰⁸ *Id.* at 907.

prevailed in the suit because employee benefits constituted only twenty percent of the cost differential between the plants.¹⁰⁹ Clark convinced the court that it would have closed the Benton Harbor facility even if it had not considered employee benefit costs.¹¹⁰ The court considered this an adequate defense.¹¹¹

Similarly, the Continental Can Company faced lawsuits when it made employment and plant sourcing decisions based upon employee benefit costs.¹¹² In the late 1970s, Continental Can had developed excess manufacturing capacity.¹¹³ Continental Can also faced significant plant closing benefit liabilities, especially for employees eligible for Rule of 70/75 pensions.¹¹⁴ In order to minimize its plant closing costs, Continental Can implemented a secret computer system known as the "BELL" system. BELL was a reverse acronym for "Lowest Level of Employee Benefits" or "Let's Limit Employee Benefits."¹¹⁵

In essence, the BELL system identified, by plant, the number of employees already eligible for Rule of 70/75 benefits and fixed production at each plant at a level that would result in continued employment of those individuals.¹¹⁶ This permitted Continental Can to avoid the high benefit costs associated with the termination of individuals eligible for the enhanced benefits.¹¹⁷ Similarly, the BELL system identified employees who were close to becoming eligible for Rule of 70/75 benefits.¹¹⁸ Continental Can permanently laid off those employees to prevent them from obtaining eligibility for the costly enhanced benefits.¹¹⁹

¹⁰⁹ *Nemeth*, 677 F. Supp. at 909.

¹¹⁰ *Id.*

¹¹¹ *Id.*; see also *Deeming*, 905 F.2d at 1127 (no violation of § 510 where employer closed plant due to increased competition and decreased demand, and not primarily to avoid benefit costs).

¹¹² See, e.g., *McLendon v. Continental Can Co.*, 908 F.2d 1171, 1173-74 (3d Cir. 1990), *later proceeding sub nom.* *McLendon v. Continental Group, Inc.*, 802 F. Supp. 1216 (D.N.J. 1992).

¹¹³ See *id.* at 1175-76.

¹¹⁴ See *id.* at 1174. After being laid off for at least two years or after receiving a determination that the lay off was permanent, a worker could receive a Rule of 70 pension if the worker had accrued at least 15 years of service, was at least age 50 and the combination of age and years of service added to at least 70. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 838-39 (3d Cir.), *cert. denied*, 484 U.S. 949 (1987), *later proceeding sub nom.* *McLendon v. Continental Group, Inc.*, 802 F. Supp. 1216 (D.N.J. 1992). Eligibility requirements for the Rule of 75 pension were similar except that there was no minimum age threshold but the combination of age and years of service had to total at least 75. *Id.* at 839. Continental later agreed to a plan even more favorable to laid-off employees, the "Rule of 65" plan. *Id.*

¹¹⁵ *McLendon*, 908 F.2d at 1175 n.4.

¹¹⁶ See *id.* at 1175.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

The resulting lawsuits included *Gavalik v. Continental Can Co.*,¹²⁰ *Jakub v. Continental Can Co.*,¹²¹ and *McLendon v. Continental Can Co.*¹²² *Gavalik* and *Jakub* were later consolidated. The Third Circuit Court of Appeals determined in *Gavalik* that the BELL system, as utilized at Continental's Pittsburgh plant, did violate section 510.¹²³ However, the court allowed Continental Can to try to prove a "same loss" defense.¹²⁴ Continental Can had the burden of proving "same loss."¹²⁵ A district court in New Jersey decided in *McLendon* that the decision in *Gavalik* collaterally estopped Continental Can from retrying, for each plant, the question of whether the BELL system violated section 510.¹²⁶ The district court then conducted a test trial on the "same loss" defense, which Continental Can lost with respect to its largest plant.¹²⁷ The Third Circuit affirmed *McLendon* but determined that Continental Can could retry the "same loss" defense for each plant.¹²⁸ An issue remained as to whether Continental Can could obtain individual trials on damages for each of the more than 5,000 plaintiffs.¹²⁹ After approximately ten years of litigation costing millions of dollars, the *Gavalik* and *McLendon* cases settled in 1992 for \$415 million.¹³⁰

Some commentators have read the First Circuit's decision in *Aronson v. Servus Rubber Division of Chromalloy*¹³¹ to indicate that section 510 only applies to employment decisions aimed at individual participants and that it does not apply to decisions that affect a large number of plan participants.¹³² This reasoning might exempt plant closings from the scope of section 510. In *Aronson*, the employer partially

¹²⁰ 812 F.2d 834 (3d Cir. 1987). For a more detailed discussion of the *Gavalik* and *McLendon* cases, see GORDON L. CLARK, PENSIONS AND CORPORATE RESTRUCTURING IN AMERICAN INDUSTRY, 48-100 (1993).

¹²¹ No. 82-1995 (W.D. Pa. 1992).

¹²² 908 F.2d 1171 (3d Cir. 1990).

¹²³ 812 F.2d at 865.

¹²⁴ *Id.* at 866.

¹²⁵ *Id.* at 863.

¹²⁶ *McLendon*, 749 F. Supp. 382, 384 (D.N.J. 1989).

¹²⁷ *Id.* at 584.

¹²⁸ *McLendon*, 908 F.2d at 1171, 1181.

¹²⁹ See *McLendon*, 802 F. Supp. 1216, 1220-21 (D.N.J. 1992).

¹³⁰ *Id.* at 1217, 1221.

¹³¹ 730 F.2d 12 (1st Cir.), cert. denied, 469 U.S. 1017 (1984).

¹³² See William C. Martucci & John L. Utz, *Unlawful Interference with Protected Rights Under ERISA*, 2 LAB. LAW. 251, 258-60 (1986); see also Joan Vogel, *Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?*, 62 NOTRE DAME L. REV. 1024, 1060-61 (1987). Contra Terry Collingsworth, *ERISA Section 510—A Further Limitation on Arbitrary Discharges*, 10 INDUS. REL. L.J. 319, 340 (1988) (stating that mass layoffs violate § 510 if undertaken with the goal of avoiding pension expenses).

terminated its pension plan after closing one of its divisions.¹³³ The affected employees alleged that the partial pension plan termination discriminated against them in violation of section 510.¹³⁴ The First Circuit rejected this contention and decided that a partial plan termination, resulting from an independent criterion such as the closing of a division for business reasons, does not result from invidious intent or violate section 510.¹³⁵

Aronson can be distinguished from cases such as *Clark Equipment, Gavalik*, and *McLendon*. The *Aronson* case focused on an employer's decision to terminate all or part of an employee benefit plan with respect to a group of former employees. Barring contractual obligations, employers have the right under ERISA to terminate benefit plans due to financial or other business considerations, so long as they reserved the right to terminate in the plans. In such cases, employers exhibit no invidious intent, and the terminations comply with ERISA's requirements.¹³⁶ And, an employer always has the right under ERISA to close a facility or terminate a group of employees for reasons not associated with benefit costs. In contrast, when an employer terminates an individual's or a group's employment in order to prevent the attainment of benefit rights, the actions implicate both the language and the intent of section 510.

C. Economic, Interpretative, and Policy Considerations

From an economic perspective, it may initially appear intolerable that employers may not close plants during periods of fiscal hardship. However, section 510 does not prohibit plant closings. Instead, by its own terms, section 510 only forbids employers from closing plants "for the purpose of interfering with the attainment" of benefit rights or in retaliation for the exercise of benefit rights.¹³⁷ In accordance with this language, to establish a violation, plaintiffs must prove that their em-

¹³³ 730 F.2d at 14.

¹³⁴ See *id.* at 13.

¹³⁵ *Id.* at 14-16.

¹³⁶ *Id.* at 16; *Seaman v. Arvida Realty Sales*, 985 F.2d 543, 546 (11th Cir.) (distinguishing termination of employment from modification or termination of an ERISA welfare benefit plan), *cert. denied*, 114 S. Ct. 308 (1993); *Owens v. Storehouse, Inc.*, 984 F.2d 394, 398-99 (11th Cir. 1993) (modification of an ERISA welfare benefit plan); *McGann v. H & H Music Co.*, 946 F.2d 401, 405 (5th Cir. 1991) (similar analysis with respect to modification of an ERISA welfare benefit plan), *cert. denied*, 113 S. Ct. 482 (1992). See *infra* text accompanying notes 141-44 for a further discussion of plan terminations.

¹³⁷ ERISA § 510, 29 U.S.C. § 1140 (1988) (emphasis added).

ployer acted with the specific intent to interfere with benefits or to retaliate for the exercise of benefit rights. This requirement has served as a significant limitation on lawsuits, and defendant employers have been successful in obtaining summary judgment against such claims.¹³⁸ Thus, the statute balances the need to protect the employment relationship from employer actions taken to deny employees their expected benefit entitlements with the need to preserve the right of employers to operate in an efficient and profitable manner.

It would be incongruous to invalidate section 510's protections whenever an employer experiences financial difficulty. Any other interpretation would reward an employer that promised its employees more expensive benefits than it could afford. The employer could fire the employees at the very last moment to avoid paying the promised benefits. Such a result would contradict the legislative history which illustrates congressional concern about employers evading ERISA's protections by, for example, firing employees on the eve of becoming vested in their benefits.¹³⁹ Nor is it rational to interpret section 510 as protecting participants against individualized employer actions taken to evade ERISA while permitting the same actions taken for the same purpose when aimed at groups of participants.

As noted above,¹⁴⁰ ERISA generally permits employers to terminate benefit plans due to financial or other business considerations. From an economic perspective, it may appear at first glance that plant closings and other mass employment actions should not be treated differently from plan terminations and that employers also should be able to base plant closing decisions on benefit cost considerations during a period of downsizing. However, a decision to terminate a plan has different policy implications from a decision to close a plant in order to avoid benefit costs.

The right to terminate plans is an important corollary of the fact that the law does not require employers to sponsor private benefit plans. As a result, ERISA explicitly permits plan terminations.¹⁴¹ In plan amendments and terminations, a number of mechanisms protect against discrimination among employees. The IRC limits an employer's ability

¹³⁸ See, e.g., *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 981 (5th Cir. 1993) (granting summary judgment to the employer because the employees failed to prove a specific intent to interfere with benefits and recognizing that every plant closing decision should not become the subject of litigation).

¹³⁹ See *infra* text accompanying notes 222-25.

¹⁴⁰ See *supra* text following note 136.

¹⁴¹ See, e.g., ERISA § 4041, 29 U.S.C. § 1341 (1988 & Supp. IV 1992).

to allow some employees to participate in a pension plan while denying other employees the right to participate.¹⁴² A partial termination or plan amendment may possibly affect only some plan participants; however, ERISA and the IRC contain a number of provisions which ensure that minimum numbers of employees benefit from a qualified benefit plan and that the benefits of each plan participant are calculated fairly in comparison to other plan participants.¹⁴³ Finally, to protect plan participants, ERISA sets forth detailed requirements for the actual process of a plan termination.¹⁴⁴

On the other hand, the role played by the Studebaker plant closing in bringing legislative attention to abuses in the pension system and ERISA's legislative history indicate that section 510 is meant to ensure that benefit entitlements do not disrupt the employment relationship. Case law also recognizes that section 510 protects "*the employment relationship* against actions designed to interfere with, or discriminate against, the attainment of a pension right. . . ."¹⁴⁵ A plant closing clearly is one example of an employer action that affects the employment relationship. The fact that a plant closing affects the employment relationship of many employees instead of just a single employee does not exempt the decision process from the reach of section 510.

Furthermore, by closing a certain plant because of the high employee benefit costs at that plant, the employer essentially shifts the cost of the plant closing from the employer to the employees. This is especially true in cases like *Gavalik v. Continental Can, Co.*¹⁴⁶ and *McLendon v. Continental Can, Co.*,¹⁴⁷ where the employer makes sourcing or plant closing decisions to avoid paying costly plant closing benefits.¹⁴⁸ Continental Can's actions were particularly egregious because Continental Can agreed with the United Steel Workers of Amer-

¹⁴² See I.R.C. § 401(a) (1988 & Supp. IV 1992).

¹⁴³ *Id.*

¹⁴⁴ See, e.g., ERISA §§ 4041-4048, 29 U.S.C. §§ 1341-1348 (1988 & Supp. IV 1992).

¹⁴⁵ *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 668 (7th Cir. 1993) (quoting *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990) (emphasis added)). Providing protection to the employment relationship does not preclude protection against discrimination. See *infra* note 252 (noting the controversy over giving content to the discrimination provision of § 510).

¹⁴⁶ *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987), *later proceeding sub nom.* *McLendon v. Continental Group, Inc.*, 802 F. Supp. 1216 (D.N.J. 1992).

¹⁴⁷ *McLendon v. Continental Can Co.*, 908 F.2d 1171 (3d Cir. 1990), *later proceeding sub nom.* *McLendon v. Continental Group, Inc.*, 802 F. Supp. 1216 (D.N.J. 1992).

¹⁴⁸ *CLARK, supra* note 99, at 95. USX utilized a similar strategy when it closed Geneva early to prevent employees from becoming entitled to Magic Number benefits. *Pickering v. USX Corp.*, 809 F. Supp. 1501 (D. Utah 1992).

ica to plant closing benefits that were more favorable to Continental Can employees than past benefit plans. At the same time, Continental Can utilized the BELL system to limit the numbers of employees that could become entitled to plant closing benefits.¹⁴⁹

From an interpretative standpoint, applying section 510 to large scale employment decisions raises the concern of further "federalizing the law of employee discharge."¹⁵⁰ ERISA contains a pre-emption provision recognized as being "conspicuous for its breadth."¹⁵¹ Based upon that provision, the Supreme Court has decided that ERISA pre-empts a state wrongful termination claim by an employee who alleges discharge in order to prevent him or her from vesting in his or her pension plan benefits.¹⁵² Thus, ERISA already federalizes the traditional state law doctrine of employment-at-will to some extent. Applying the protections of section 510 to groups of employees would extend the scope of ERISA pre-emption. However, such pre-emption would apply only in cases where an intent to interfere with benefits or to retaliate for the exercise of benefits motivated an employer. The entire body of state law associated with individual employee terminations has not been federalized simply because a termination results in the loss of an opportunity to earn additional benefits. Instead, courts correctly have refused to apply section 510 where an employment discharge, undertaken for a legitimate purpose, simply prevents the attainment of benefits.¹⁵³ Continuing this distinction and refusing to apply ERISA pre-emption in such cases would leave untouched the bulk of state common law with respect to wrongful termination.

Some employers turn to a policy analysis and argue that plant closings actually increase the benefits of certain employees. This is true to a limited extent where plans provide for special, enhanced benefits in the instance of a plant closing. However, all employees do not qualify for such enhanced benefits. In addition, as illustrated by *Pickering v. USX Corp.*,¹⁵⁴ employers may close plants earlier than they otherwise would in order to prevent employees from becoming eligible for enhanced benefits. While it may seem that fully vested employees do not suffer any harm with respect to their benefits in a plant closing, even

¹⁴⁹ CLARK, *supra* note 120, at 86-87.

¹⁵⁰ LANGBEIN & WOLK, *supra* note 18, at 110-11.

¹⁵¹ FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990); ERISA § 514, 29 U.S.C. § 1144 (1988 & Supp. IV 1992).

¹⁵² Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990). See *infra* text accompanying notes 168-71, 341-45 for discussions of *Ingersoll-Rand*.

¹⁵³ See *infra* text accompanying notes 264-73.

¹⁵⁴ 809 F. Supp. 1501 (D. Utah 1992).

those employees typically would benefit from earning additional accruals (and correspondingly higher benefits) during subsequent years of employment.¹⁵⁵ Other employees may be unvested or may be within a few years of becoming eligible for programs like USX's "Magic Number" benefits.

D. Conclusion—Section 510 Should Apply to Certain Plant Closing Situations

This Part has examined whether section 510 applies to mass employment decisions such as plant closings. The language of the statute and the legislative history indicate that courts should limit the prohibitions of section 510 to individually targeted actions. On the other hand, the language of the statute and the legislative history also indicate that section 510 prohibits interference with benefits regardless of whether the interference occurs through discrimination or by one of the other means prohibited by the statute.

To date, the courts generally have applied section 510 protections in plant closing cases. Economic, interpretative, and policy analysis support the results in the case law. The specific intent requirement appropriately limits the prohibition on interference with benefits and ensures that every mass employment decision does not violate section 510 simply because participants lose the opportunity to earn additional benefits. As a result, employers properly maintain the right to close plants due to general financial considerations.

Unfortunately though, this is far from the end of the inquiry. Considerable controversy in the courts surrounds the types of benefit rights protected by section 510. To the extent section 510 does not protect certain benefit rights, that section would not prohibit an employer from considering the costs associated with the benefits when making a plant closing decision. However, to the extent section 510 protects a variety of benefit rights, such as the right to enhanced benefits or the right to earn additional accruals, section 510 will prohibit employers from closing plants in order to interfere with the attainment of those benefit rights. Thus, the next Part examines the types of benefit rights protected by section 510.

¹⁵⁵ See *infra* part III.B.2. for a discussion of the debate over whether § 510 protects a plan participant's right to such additional accruals. In relatively rare circumstances, an employee may have earned the maximum possible benefit under the applicable pension plan; such an employee would suffer no pension plan injury in a plant closing situation.

III. BENEFITS PROTECTED BY SECTION 510

Much of the case law under section 510 follows separate strands based on the language of the statute. As noted above, section 510 protects a participant from being "discharge[d], fine[d], suspend[ed], expel[led], discipline[d], or discriminate[d] against" (1) "for exercising any rights" (the "Exercise Clause"), or (2) "for the purpose of interfering with the attainment of any right to which such participant may become entitled" (the "Interference Clause")¹⁵⁶ under a benefit plan or under Title I of ERISA. This Part initially discusses the rights protected by the Exercise Clause. It then turns to the contours of the Interference Clause, paying special attention to the controversy surrounding whether section 510 protects only the initial vesting of benefits. The Part ends with a brief examination of the application of section 510 to benefits granted under welfare benefit plans.

A. Exercise Clause

The Exercise Clause prohibits certain types of retaliation against a participant who makes benefit claims or challenges benefit denials.¹⁵⁷ Also, an employer may not fire an employee in retaliation for a benefit claim filed by other plan beneficiaries such as the employee's spouse.¹⁵⁸ The Exercise Clause protects an employee if his or her employer constructively discharges him or her in retaliation for filing benefit claims.¹⁵⁹

In order to state a valid retaliation claim under the Exercise Clause, a claimant must prove the defendant had the specific intent to "discharge, fine, suspend, expel, discipline, or discriminate against"¹⁶⁰ the claimant for exercising ERISA rights.¹⁶¹ In determining the existence of specific intent, the courts generally utilize the concepts devel-

¹⁵⁶ ERISA § 510, 29 U.S.C. § 1140 (1988). See *supra* text accompanying note 94 for the language of the relevant portion of § 510. Section 510 also prohibits actions taken against anyone for testifying or giving information in ERISA proceedings. ERISA § 510, 29 U.S.C. § 1140 (1988).

¹⁵⁷ See *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 825 (7th Cir. 1984). See *infra* text accompanying note 166 for a discussion of *Bittner*.

¹⁵⁸ *Fitzgerald v. Codex Corp.*, 882 F.2d 586, 589 (1st Cir. 1989) (employee's suit is cognizable under § 510 if he was fired in retaliation for benefit claims filed by his former wife).

¹⁵⁹ *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805, 810 (10th Cir. 1984) (union secretary stated a claim under § 510 even though she quit because union officials made her working conditions unbearable).

¹⁶⁰ ERISA § 510, 29 U.S.C. § 1140 (1988).

¹⁶¹ See, e.g., *Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993) (employer did not violate the Exercise Clause by instituting a \$25,000 cap on AIDS-related health care claims unless employer instituted the cap to retaliate for previous claims).

oped under Title VII for shifting burdens of production and persuasion.¹⁶² The Exercise Clause does not protect an employee who is disproportionately affected by an employer's action if that action at least nominally extends to all employees.¹⁶³

For the Exercise Clause to apply, the benefits at issue must be protected by ERISA or provided under the employer's benefit plan. For example, one employer suggested that its employee file a "friendly lawsuit" to determine the legality of the employer's termination of specific medical benefits utilized by the employee's son.¹⁶⁴ The employer then fired the employee for joining a state law claim seeking compensatory and punitive damages for intentional infliction of emotional distress with his claim for benefits.¹⁶⁵ The Exercise Clause did not protect the employee from discharge because the discharge was based upon the state law claims, not the ERISA claims.¹⁶⁶

B. *Interference Clause*

1. General Application

Upon reading the prohibition against interference with a participant's attainment of any right under a benefits plan or under Title I of ERISA,¹⁶⁷ it may appear that the Interference Clause operates as a ban on any interference with the attainment of any benefit right. In a few situations the import of the clause appears to be just that clear. For example, the Supreme Court recognized in *Ingersoll-Rand Co. v. McClendon*, that a prototypical section 510 violation occurs when an employer terminates an employee shortly before the employee's pension benefits vest.¹⁶⁸ *Ingersoll-Rand* had fired McClendon after nine years and eight months of employment.¹⁶⁹ As permitted by the vesting rules in effect at the time, the *Ingersoll-Rand* plan contained a ten-year cliff vesting provision.¹⁷⁰ McClendon sued under Texas state common law alleging that *Ingersoll-Rand* terminated him to avoid pension costs.¹⁷¹

¹⁶² See *infra* part IV.

¹⁶³ *McCann v. H & H Music Co.*, 946 F.2d 401, 403-05 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992). For a discussion of *McCann*, see *infra* text accompanying notes 280-84.

¹⁶⁴ *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 825 (7th Cir. 1984).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 826.

¹⁶⁷ For an explanation of the contents of Title I of ERISA, see *supra* text accompanying notes 23-29.

¹⁶⁸ 498 U.S. 133, 143 (1990).

¹⁶⁹ *Id.* at 135.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 135-36. Actually, because of IRS regulations that apply to terminated employees,

In a similar case, an employee successfully stated a claim under the Interference Clause in *Biggins v. Hazen Paper Co.*¹⁷² when he was fired a few weeks before his pension benefit vested. And many courts agree that section 510 protects participants who are vested in basic benefits but who have not yet become eligible for enhanced benefits offered under their pension plan.¹⁷³ At the opposite end of the spectrum, a plaintiff cannot state a cause of action under the Interference Clause where the plaintiff has attained the maximum level of benefits offered under the employer's plan.¹⁷⁴

2. The Disagreement Over Protection for Vested Participants

While courts agree on the general parameters of the types of benefits protected by the Interference Clause, they have not consistently applied the Interference Clause to protect vested participants in the accrual of additional benefits. As discussed in Part I.C., interference with future accruals can significantly affect an employee's benefits, especially in a defined benefit pension plan.¹⁷⁵ This subsection addresses the disagreement over the extent of protection provided by section 510, beginning with the disagreement in the courts. Addressed next is the language of the statute, the legislative history, and an important early case, *West v. Butler*,¹⁷⁶ that has been misconstrued. The subsection concludes that section 510 does protect vested participants and ends with a review of the implications for employers and vested participants.

McClendon's pension benefits had vested and the issue before the Supreme Court simply was ERISA's pre-emption of state common law wrongful termination claims. *Id.* at 135.

¹⁷² 953 F.2d 1405, 1416 (1st Cir. 1992), *vacated on other grounds*, 113 S. Ct. 1701 (1993) (vacating ADEA counts); *see also* Olitsky v. Spencer Gifts, Inc., 964 F.2d 1471, 1473, 1479 (5th Cir. 1992) (employee fired a few months prior to vesting under a ten-year cliff vesting provision), *cert. denied*, 113 S. Ct. 1253 (1993); Ursic v. Bethlehem Mines, 719 F.2d 670, 672 (3d Cir. 1983) (employee terminated after twenty-nine and one-half years, would have qualified for a disability pension in another six months); McKay v. Capital Cities Communications, Inc., 605 F. Supp. 1489, 1490-91 (S.D.N.Y. 1985) (employee fired after nine years of service where employer's plan had a ten-year cliff vesting provision).

¹⁷³ *See, e.g.*, Dister v. Continental Group, Inc., 859 F.2d 1108, 1110-11 (2d Cir. 1988) (assuming that § 510 protected the plaintiff's right to his employer's enhanced "75/80" benefit plan even though he was vested fully in the basic pension plan); *cf.* Baker v. Kaiser Aluminum & Chem. Corp., 608 F. Supp. 1315, 1318-19 (C.D. Cal. 1984). Some read *Baker* as indicating that § 510 does not protect a vested participant's right to an early retirement benefit. However, *Baker* really just requires a plaintiff to make a strong showing of specific intent in order to avoid summary judgment. *See infra* text at notes 264-73.

¹⁷⁴ *See* Garry v. TRW, Inc., 603 F. Supp. 157, 162 (N.D. Ohio 1985) (discussing *Houck v. Lee Wilson Eng'g Co.*, No. C82-351 (N.D. Ohio July 23, 1984)).

¹⁷⁵ *See supra* notes 53-56 and accompanying text.

¹⁷⁶ 621 F.2d 240 (6th Cir. 1980).

a. *Disagreement in the Courts*

In *Donohue v. Custom Management Corp.*,¹⁷⁷ the employer eliminated the plaintiffs' jobs and fired them after the subsidiary they managed incurred substantial financial losses. The plaintiffs were vested in the employer's retirement plan but claimed interference with their right to earn additional accruals.¹⁷⁸ For authority, the court looked to the statement in *West v. Butler*¹⁷⁹ that section 510 was "aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining *vested pension rights*."¹⁸⁰ Focusing on the phrase "vested pension rights" and apparently ignoring both the importance of the "discharging or harassing" phrase and the term "primarily," the *Donohue* court decided that, because the plaintiffs were fully vested, their claims were beyond the scope of coverage of the Interference Clause.¹⁸¹

Another district court case denying a vested plaintiff the opportunity to state a claim of interference with benefits is *Malone v. Gilman Paper Co.*¹⁸² In *Malone*, the plaintiff alleged that his employer coerced him into retiring early at age 56 to prevent him from becoming entitled to larger benefits at age 62.¹⁸³ The *Malone* court based its decision on two factors. First, the court looked to a case that quoted the same language from *West* utilized by the *Donohue* court and discussed above.¹⁸⁴ Second, the *Malone* court recognized that nearly every termination of employment results in the loss of an opportunity to accrue additional benefits. Thus, the court decided the plaintiff had no cause of action under section 510 because he was fully vested in his pension plan.¹⁸⁵

¹⁷⁷ 634 F. Supp. 1190, 1192 (W.D. Pa. 1986).

¹⁷⁸ *Id.* at 1190.

¹⁷⁹ 621 F.2d 240 (6th Cir. 1980). For discussion of *West*, see *infra* part III.B.2.d.

¹⁸⁰ *Donohue*, 634 F. Supp. at 1197 (quoting *West*, 621 F.2d at 245) (emphasis added).

¹⁸¹ *Id.* The *Donohue* court also based its decision on the plaintiffs' failure to present evidence that the employer's specific intent in carrying out the terminations was to interfere with benefits. *Id.* See *infra* text accompanying notes 264-73 for a discussion of the specific intent requirement.

¹⁸² 737 F. Supp. 88 (S.D. Ga. 1990); see also *Sangeniti v. Mutual of Am.*, No. 90-3558, 1990 U.S. Dist. LEXIS 16809 (S.D.N.Y. Dec. 10, 1990); *Kelly v. Chase Manhattan Bank*, 717 F. Supp. 227, 232 (S.D.N.Y. 1989); *Johnson v. United Airlines, Inc.*, 680 F. Supp. 1425, 1432-33 (D. Haw. 1987); *Moehle v. NL Indus., Inc.*, 646 F. Supp. 769, 779 n.6 (E.D. Mo. 1986), *aff'd without opinion*, 845 F.2d 1027 (8th Cir. 1988); *Weir v. Litton Bionetics, Inc.*, 41 Fair Empl. Prac. Cas. (BNA) 1150, 1153 (D. Md. 1986) (it appears that *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236 (4th Cir. 1991), implicitly overruled the holding in *Weir*), *later opinion*, 43 Fair Empl. Prac. Cas. (BNA) 663 (D. Md. 1987); *Baker v. Kaiser Aluminum & Chem. Corp.*, 608 F. Supp. 1315, 1319 (N.D. Cal. 1984).

¹⁸³ *Malone*, 737 F. Supp. at 89.

¹⁸⁴ *Id.* at 88; see *supra* text accompanying note 180.

¹⁸⁵ 737 F. Supp. at 90.

In *Van Zant v. Todd Shipyards Corp.*, a district court in Texas recently stated an extremely narrow view of the scope of section 510's protections.¹⁸⁶ Todd Shipyards ("Todd") amended its retirement plan to offer an early retirement program ("ERP") to employees at its Seattle site in an attempt to decrease overstaffing in Seattle.¹⁸⁷ The plaintiffs were long-time employees at Todd's Galveston facility whom Todd had retained to perform caretaker functions from the time of the Galveston closing until Todd could sell the facility.¹⁸⁸ The plaintiffs alleged that Todd's failure to permit them to participate in the ERP constituted discrimination in violation of section 510.¹⁸⁹ The court held that section 510 does not preclude employers from amending plans even if the amendments have a disproportionate effect on one or more employees.¹⁹⁰ Second, the court determined that the plaintiffs had failed to put forth evidence that Todd's actions infringed on a right protected by section 510.¹⁹¹ This conclusion is correct because the plaintiffs alleged a right to a benefit that had never been part of their pension plan.

However, the *Van Zant* court's language sweeps far more broadly than necessary to decide this case. Specifically, the court stated that "[t]he right referred to in the second clause of section 510 is not simply any right to which an employee may conceivably become entitled, but rather any right to which an employee may become entitled pursuant to an *existing, enforceable obligation* assumed by the employer."¹⁹² Because, as recognized by the court, ERISA permits employers to prospectively modify or terminate their benefit plans, few promised benefits are enforceable prior to the point the benefits vest.¹⁹³ As a result, taken literally, the court's statement would eviscerate the protections of section 510.

On the other hand, in the context of a plant closing, the court in *Nemeth v. Clark Equipment Co.*¹⁹⁴ narrowly read the Sixth Circuit precedent in *West v. Butler* and decided, based on case law, legislative history, and policy considerations, that vested employees are entitled to pro-

¹⁸⁶ See 847 F. Supp. 69, 73 (S.D. Tex. 1994).

¹⁸⁷ *Id.* at 71.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 71-72.

¹⁹⁰ See *id.* at 73.

¹⁹¹ *Van Zant*, 847 F. Supp. at 73.

¹⁹² *Id.* (emphasis added).

¹⁹³ Although ERISA contains an "anti-cutback rule" prohibiting plan amendments that reduce accrued benefits, an employer can seek a waiver of even this requirement. ERISA § 204(g), 29 U.S.C. § 1054 (1988).

¹⁹⁴ 677 F. Supp. 899, 907-08 (W.D. Mich. 1987). See *supra* text accompanying notes 104-11 for a discussion of *Clark Equipment*.

tection under section 510. Like the *Clark Equipment* court, numerous courts have extended section 510 protection to the opportunity to qualify for enhanced early retirement benefits.¹⁹⁵ In addition, many of the recent appellate cases have extended the protections of the Interference Clause to the right of participants to earn future accruals regardless of the availability of an enhanced early retirement benefit.

Conkwright v. Westinghouse Electric Corp., for example, involved an employee, Conkwright, laid off at age 60.¹⁹⁶ He was fully vested in his pension benefits, having worked for Westinghouse for almost 20 years.¹⁹⁷ The Fourth Circuit Court of Appeals looked to the legislative history and decided that Congress's intent to provide "broad remedies" for interference with pension rights militated for the application of the Interference Clause in the case at hand.¹⁹⁸ However, the Fourth Circuit ultimately granted summary judgment to Westinghouse because Conkwright failed to prove Westinghouse had the specific intent to interfere with his pension benefits.¹⁹⁹

Similarly, in *Clark v. Coats & Clark, Inc.*, all five plaintiffs had been terminated as part of a reduction in force.²⁰⁰ Four of the plaintiffs were vested in their pension benefits, while the fifth was nine months away from vesting at the time of his termination.²⁰¹ The Eleventh Circuit followed the reasoning in *Conkwright* and determined that "Congress did not intend to leave employees unprotected once their rights were vested, . . ."²⁰² Thus, the court decided that the protections of section 510 extended to the vested plaintiffs as well as to the unvested plaintiff. However, this court, too, ultimately granted summary judgment to the employer because the former employees failed to show that the employer had the specific intent to interfere with ERISA rights.²⁰³

¹⁹⁵ See, e.g., *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1115 (2d Cir. 1988); *Pickering v. USX Corp.*, 809 F. Supp. 1501, 1549-50 (D. Utah 1992).

¹⁹⁶ 933 F.2d 231, 233 (4th Cir. 1991).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 237.

¹⁹⁹ *Id.* at 236-39.

²⁰⁰ 990 F.2d 1217, 1220 (11th Cir. 1993) (this decision appears to implicitly overrule the holding in *Malone v. Gilman Paper Co.*, 737 F. Supp. 88 (S.D. Ga. 1990)); see also *Garry v. TRW, Inc.*, 603 F. Supp. 157, 162 (N.D. Ohio 1985); *Citro v. TRW, Inc.*, 41 Fair Empl. Prac. Cas. (BNA) 391, 394 (N.D. Ohio 1984); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 359-60 (E.D. Mo. 1979); *Marcoz v. Summa Corp.*, 801 P.2d 1346, 1352-53 (Nev. 1990). While reserving judgment on the issue, in *Clark v. Resistoflex Co. Div. of Unidynamics, Corp.*, 854 F.2d 762, 770 (5th Cir. 1988), the Fifth Circuit said it perceived "room for a construction [of ERISA § 510] that extends section 510 protection to vested employees as well [as to unvested employees]."

²⁰¹ *Clark*, 990 F.2d at 1220-21.

²⁰² *Id.* at 1222.

²⁰³ *Id.* at 1226.

b. *The Statutory Language*

The language of the Interference Clause is broad enough to protect vested participants in the accrual of additional benefits because it prohibits interference "with the attainment of *any right* to which such participant *may become entitled* under the plan, [or under Title I of ERISA]"²⁰⁴ Taken literally, the term "any right" would include a participant's benefits based on additional accruals as well as a participant's right to become vested. In addition, it seems likely that Congress would have replaced the foregoing phrase with the simple language "with the attainment of a vested right under the plan, . . ." if Congress had intended such a limitation.²⁰⁵

On the other hand, those who believe section 510 protects only unvested employees point to the phrase "may become entitled." It is primarily through vesting that benefits become nonforfeitable. As a result, once a participant is vested, that participant does become "entitled" to whatever benefits the participant has accrued. Arguably, the use of the word "may" excludes post-vesting accruals from coverage because, once vested, a participant is entitled to accruals as they occur. Thus, the argument is that the language of section 510 protects the right to become vested, but nothing more.

However, such a narrow reading of the phrase "may become entitled" conflicts with the theory of accruals, with the other protections ERISA accords to accruals, and with the language of the statute. As noted above in Part I.C., it is largely through accruals that pension benefits increase in value. As accruals increase, the benefit to which a participant ultimately is "entitled" also increases. So, it is logical to extend the concept of entitlement to the right to accrue additional benefits. Furthermore, while ERISA Section 203²⁰⁶ extensively regulates vesting, ERISA Section 204²⁰⁷ sets forth comprehensive rules regarding accruals including intricate allocation formulas and a prohibition on reducing benefits once the benefits have accrued. Given the significant level of protection accorded accruals elsewhere in ERISA, it would be inconsistent to construe the word "entitled" in section 510 as assuring the right to vesting but not to accruals. Finally, vesting is not the only method by which participants become entitled to benefits. Many plans provide for early retirement benefits or supplements. Typically, participants become entitled to those enhanced benefits by meeting the

²⁰⁴ ERISA § 510, 29 U.S.C. § 1140 (1988) (emphasis added).

²⁰⁵ See *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 237 (4th Cir. 1991).

²⁰⁶ ERISA § 203, 29 U.S.C. § 1053 (1988 & Supp. IV 1992).

²⁰⁷ ERISA § 204, 29 U.S.C. § 1054 (1988 & Supp. IV 1992).

plan's age and service criteria.²⁰⁸ Although the enhanced benefits are not vested, the participant is entitled to the benefits under the terms of the plan. Section 510's language prohibiting actions taken "for the purpose of interfering with the attainment of any right to which such participant *may become entitled under the plan*, . . ." ²⁰⁹ appears directly to protect such participants even though the participants are vested in their basic benefits.

In addition, section 510 casts a broad umbrella of protection by protecting a plan "participant" from interference. ERISA defines the term "participant" as including "any employee or former employee . . . who *is or may become* eligible to receive a benefit of any type from an employee benefit plan . . ." ²¹⁰ Employees who are vested are entitled to receive a benefit. Therefore, they are participants, are covered by the language of section 510, and should be protected from interference in attaining additional accruals under their employers' benefit plans.

The word "plan" also indicates that accruals should receive protection. The use of the term "plan" in the Interference Clause most likely refers back to the use of the term "employee benefit plan" in the Exercise Clause. ERISA defines the term "employee benefit plan" as including both welfare benefit plans and pension benefit plans.²¹¹ Thus, the language implies protection against interference with becoming entitled to rights under either a welfare benefit plan or a pension benefit plan. As discussed in Part I.C., statutory vesting only applies to pension benefits.²¹² Therefore, one commentator has argued that section 510's protections must extend beyond the right to become vested in order to reach beyond pension plans.²¹³ However, an interpretation limiting section 510 protections to vesting would accord relief to participants whose welfare benefits vest other than through statutory vesting.²¹⁴ Still, the statutory language does not contain any indication that its scope is limited to vesting. Instead its reference to "any right" in conjunction with its use of the term "employee benefit plan" implies coverage for a wide variety of plan entitlements.

This examination of the language of section 510 indicates that participants are entitled to protection from interference with their right to earn additional benefit accruals as well as to protection in becoming vested in their benefits. However, the crux of the disagree-

²⁰⁸ See, e.g., *supra* note 81.

²⁰⁹ ERISA § 510, 29 U.S.C. § 1140 (1988) (emphasis added).

²¹⁰ ERISA § 3(7), 29 U.S.C. § 1002(7) (1988) (emphasis added).

²¹¹ ERISA § 3(3), 29 U.S.C. § 1002(3) (1988).

²¹² See *supra* text accompanying note 57.

²¹³ See Collingsworth, *supra* note 108, at 328-29.

²¹⁴ See *supra* note 58.

ment among the courts is the purpose of section 510 as found in the legislative history. The next section reviews the legislative history of section 510. Following that section is a discussion of *West v. Butler*,²¹⁵ an important early case interpreting the legislative history.

c. Legislative History

Section 510 has not been amended since it was enacted as part of the original version of ERISA in 1974.²¹⁶ Furthermore, Congress did not change the Interference Clause significantly during the legislative process.²¹⁷ The earliest discussion of section 510, from April, 1973, indicates that Congress's initial goal was to preclude employers from interfering with "pension rights or the expectations of those rights"²¹⁸ through the use of economic weapons. The legislative history provides no indication that the legislature's concern extended only to vesting of benefits. In fact, the report states that "safeguards are required . . . in order to *completely secure the rights and expectations* brought into being by this landmark reform legislation . . ."²¹⁹ The focus on complete protection indicates an intent that the Interference Clause help guarantee the general effectiveness of ERISA. Certainly accruals were among the rights protected by ERISA. Coverage by section 510 protects employees' specific rights to accruals as well as their general benefit expectations.

The same Senate report states: "The enforcement provisions have been designed specifically to provide . . . broad remedies for redressing or preventing violations of [ERISA] . . ."²²⁰ This statement adds weight to the argument that the Interference Clause provides broad protections. In fact, the *Conkright* court cited this language as indicating that Congress did not intend to limit the protections of the Interference Clause to vesting of benefits.²²¹

Floor discussions also addressed section 510. Twice, Senator Hartke raised concerns about employment terminations meant to prevent the

²¹⁵ 621 F.2d 240 (6th Cir. 1980).

²¹⁶ Compare ERISA, Pub. L. No. 93-406, § 510, 88 Stat. 829, 895 (1974) (codified at 29 U.S.C. § 1140 (Supp. IV 1974)) (the section as enacted) with ERISA § 510, 29 U.S.C. § 1140 (1988) (the current version). Congress has considered a number of proposed amendments. See, e.g., H.R. 975, 103d Cong., 1st Sess. § 2 (1993) (limiting decreases in health insurance coverage).

²¹⁷ Section 510 was originally numbered as ERISA § 610. Compare ERISA § 610 as set forth in S. REP. NO. 127, 93d Cong., 1st Sess. 48 (1973) (the proposed version) reprinted in 1974 U.S.C.C.A.N. 4838 with ERISA, Pub. L. No. 93-406, § 510, 88 Stat. 829, 895 (1974) (codified at 29 U.S.C. § 1140 (Supp. IV 1974)) (the section as enacted).

²¹⁸ S. REP. NO. 127, 93d Cong., 1st Sess. 36 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4872.

²¹⁹ *Id.* (emphasis added).

²²⁰ *Id.* at 4871.

²²¹ *Conkright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236-37 (4th Cir. 1991).

vesting of employees' pension benefits. First, he referred to the ERISA provision permitting an employer to preclude an employee from pension plan eligibility and vesting prior to age thirty.²²² Senator Hartke asked whether that limitation provided an employer with an incentive to fire each of its employees on the day before the employee's thirtieth birthday.²²³ Senator Javits replied that section 510 was meant to provide a remedy in "precisely the areas" of concern to Senator Hartke.²²⁴ The next day, Senator Hartke proposed the creation of administrative machinery to aid in the enforcement of section 510 and raised another vesting example.²²⁵

In contrast to the narrow context of the floor discussions, the 1974 conference report noted that both the House and Senate versions of section 510 provided: "[I]t is unlawful to interfere with the attainment of *any rights* to which a participant or beneficiary may become entitled"²²⁶ This reference to "any rights" parallels the statutory language and appears to contemplate protection of more benefits than just the unvested pension benefits referred to by Senator Hartke in the scenarios mentioned above. The *Conkright* court cited this reference to "any rights" in support of its conclusion that the Interference Clause protects the rights of participants to additional accruals.²²⁷

The final piece of legislative history that directly addresses section 510 contains remarks by Senator Williams, a co-sponsor of ERISA, when he introduced the conference report to the Senate. In discussing the administration and enforcement of ERISA, Senator Williams stated: "A further protection for employees is the prohibition against discharge, or other discriminatory conduct toward participants and beneficiaries which is designed to interfere with attainment of vested benefits *or other rights under the bill*"²²⁸ The inclusion of "other rights" in addition to the reference to "vested benefits" must mean that the protections of the Interference Clause extend beyond the vesting of

²²² The limitation enacted was age 25 and is now age 21. Compare ERISA, Pub. L. No. 93-406, §§ 202(a)(1)(A)(i), 1011, 410(a)(1)(A)(i), 88 Stat. 826, 853, 898 (codified as amended at 29 U.S.C. § 1052(a)(1)(A)(i) (Supp. IV 1974) and I.R.C. § 410(a)(1)(A)(i) (Supp. IV 1974), respectively) (original age limitation of 25) with ERISA § 202(a)(1)(A)(i), 29 U.S.C. § 1052(a)(1)(A)(i) (1988) and I.R.C. § 410(a)(1)(A)(i) (1988) (current age limitation of 21).

²²³ For an explanation of the costs associated with vested benefits, see IPPOLITO, *supra* note 41, at 36-42.

²²⁴ 119 CONG. REC. 30,043-44 (1973).

²²⁵ *Id.* at 30,374.

²²⁶ H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 330 (1974) (emphasis added), reprinted in 1974 U.S.C.C.A.N. 5038, 5110.

²²⁷ *Conkright*, 933 F.2d at 236.

²²⁸ 120 CONG. REC. S29,933 (1974) (statement of Sen. Williams) (emphasis added).

benefits. As discussed above,²²⁹ ERISA requires every plan to provide for accruals of benefits and comprehensively regulates accruals. Thus, it is reasonable to include the right to continued benefits accruals among the "other rights under the bill" protected from interference.

Senator Williams went on to discuss "fourteen basic rights" which lay "at the heart of pension reform and provide much-needed and long-denied protections."²³⁰ Vesting was one of the fourteen rights in this "Pension Bill of Rights," but others included fair eligibility standards for plan participation and standards to ensure that plans used reasonable criteria to calculate credit for time worked.²³¹ Both concepts are important in determining benefit accruals. The final basic right, "Protection of Pension Rights Against Employer or Union Interference," stated, in pertinent part:

Every employee is to have the right, enforceable by the Secretary of Labor, to be free from interference with his pension benefits. This means that he cannot be discharged, fined, suspended, expelled or otherwise interfered with in order to prevent him from receiving pension benefits or attaining eligibility for pension benefits.²³²

This language reflects the essence of the protections of section 510. The use of the term "eligibility" and the repeated reference to pension rights is subject to interpretation. Because an unvested participant is not eligible to receive retirement benefits, the statement might support the argument that section 510's protections extend only to the vesting of benefits. However, this reading is probably too narrow because the very first of the fourteen basic rights is entitled "Eligibility" and protects the rights of employees to join pension plans at the later of the time they reach age twenty-five or complete one year of service. Therefore, the term eligibility must cover more than just the right to initial vesting. And because earning additional accruals increases the pension benefits to which a participant is entitled, it is logical to interpret the phrase as extending to accruals. Also, while the legislature focused on pensions in 1974, that was generally true throughout ERISA and should not be determinative as to the interpretation of the breadth of section 510.

²²⁹ See *supra* text accompanying note 48.

²³⁰ 120 CONG. REC. S29,935 (1974) (statement of Sen. Williams).

²³¹ *Id.*

²³² *Id.*

To summarize the legislative history, the floor debates of ERISA contain indications of Congress's concern with protecting participants from interference with benefit vesting. However, the relevant language in the committee and conference reports, as well as a presentation made by a co-sponsor of ERISA near the end of the legislative process, indicate Congress intended the Interference Clause to protect more than just the right to benefit vesting. The next section looks in detail at an early case relying upon parts of the legislative history.

d. *Interpretation of West v. Butler*

The courts in *Donohue*²³³ and *Malone*²³⁴ both cited *West v. Butler*²³⁵ as authority for their conclusion that the Interference Clause protects a participant's right to vesting, but not accrual, of benefits. In *Clark Equipment*,²³⁶ however, a district court in the same circuit as *West* concluded that *West* was not inconsistent with an interpretation of section 510 that extends protections to accruals. To reach its decision that section 510 protects a participant's right to future accruals, the court in *Conkwright*²³⁷ distinguished language in *West*. Therefore, this section reviews the *West* decision in some detail.

In *West*, the defendants picketed a number of coal mines that had collective bargaining agreements ("CBAs") with the Southern Labor Union ("SLU"), causing some mines to cut production.²³⁸ The CBAs required employers to contribute to pension and welfare funds ("SLU Funds") created under the Taft-Hartley Act.²³⁹ The CBA tied the level of required contributions directly to the tons of coal produced. Therefore, the production cutbacks caused a drop in employer contributions to the SLU Funds.²⁴⁰

²³³ *Donohue v. Custom Management Corp.*, 634 F. Supp. 1190, 1197 (W.D. Pa. 1986); see *supra* text accompanying notes 177-81.

²³⁴ *Malone v. Gilman Paper Co.*, 737 F. Supp. 88, 90 (S.D. Ga. 1990) (citing *Corum v. Farm Credit Servs.*, 628 F. Supp. 707, 717 (D. Minn. 1986), which quoted *West*); see *supra* text accompanying notes 182-85.

²³⁵ 621 F.2d 240 (6th Cir. 1980).

²³⁶ *Nemeth v. Clark Equipment Co.*, 677 F. Supp. 899, 908 (W.D. Mich. 1987); see *supra* text accompanying note 194.

²³⁷ *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 237 (4th Cir. 1991); see *supra* text accompanying notes 196-99.

²³⁸ 621 F.2d at 241-42.

²³⁹ *Id.* at 241; 29 U.S.C. §§ 141-200 (1988 & Supp. IV 1992). These plans are also subject to special regulation under the Multiemployer Pension Plan Amendments Act of 1980 which is contained in Title IV of ERISA.

²⁴⁰ *West*, 621 F.2d at 242.

Trustees of the SLU Funds sued the picketers claiming their actions violated ERISA section 511 ("section 511")²⁴¹ "by engaging in violent secondary picketing for the purpose of interfering with SLU miners' ERISA-protected rights."²⁴² Section 511, a companion provision to section 510, prohibits coercive interference with, or coercive prevention of the exercise of, any right of a participant under a benefit plan or ERISA.²⁴³ Section 511 provides for criminal penalties whereas section 510 addresses less egregious methods of interference such as employment discharge and relies upon ERISA's standard civil enforcement sections.²⁴⁴ The court determined the trustees had no private right of action under section 511 and decided the case as though the claim were based upon section 510.²⁴⁵

The Sixth Circuit Court of Appeals began its analysis by looking to the earliest legislative history on the provision and concluded that "Congress had a specific type of problem in mind when it enacted sections 510 and 511"²⁴⁶ The court cited the floor debate, in which Senator Hartke expressed his concern that employers would discharge employees on the eve of vesting in order to minimize benefit costs.²⁴⁷ The only other piece of legislative history cited was Senator Javits's reliance on section 510's protections to allay Senator Hartke's concerns.²⁴⁸ To the court, this "legislative history reveal[ed] that the prohibitions were aimed *primarily* at preventing unscrupulous employers from *discharging or harassing* their employees in order to keep them from obtaining *vested pension rights*."²⁴⁹ The *Donohue* and *Malone* courts relied upon this statement to conclude that section 510 protects only vesting.

The *West* court relied on the same legislative history to support its statement that "Congress designed § 510 *primarily* to protect the employment relationship that gives rise to an individual's pension rights."²⁵⁰ The court proceeded to ignore its use of the word "primarily" and decided that the trustees had failed to state a cause of action under

²⁴¹ ERISA § 511, 29 U.S.C. § 1141 (1988).

²⁴² *West*, 621 F.2d at 242-43 (footnote omitted).

²⁴³ 29 U.S.C. § 1141.

²⁴⁴ *Id.*

²⁴⁵ *West*, 621 F.2d at 243-44.

²⁴⁶ *Id.* at 245.

²⁴⁷ *Id.*

²⁴⁸ *See id.*

²⁴⁹ *Id.* (emphasis added).

²⁵⁰ 621 F.2d at 245 (emphasis added, footnote omitted). This statement also supports the extension of § 510 protections to accruals because accruals are critical in determining pension entitlements.

this standard because the secondary pickets could not interfere directly with the employment relationship.²⁵¹

Therefore, the critical factor to the court was the extent to which the alleged action interfered with the employment relationship.²⁵² Read in this light, the court's reference to vested pension benefits can be harmonized with the holding by focusing on the portion of the sentence referring to "discharging or harassing" employees. The outcome indicates that the *West* court focused on the specific problem of discharging or harassing employees to avoid benefit costs. While the *West* court did refer to benefit vesting, arguably it did so because that provides the prototypical example of benefits interference. Certainly, Senators Hartke and Javits used vesting as an example of a situation where an employer may interfere with benefits. However, that does not mean that Congress meant to limit section 510's protections to that narrow context. In fact, if one wanted to take such a narrow reading to the extreme, one might note that, at the time of the floor debates, ERISA permitted employers to delay vesting until the employee attained age thirty. Congress ultimately adopted an age limitation of twenty-five, and later reduced it to age twenty-one. The examples in the legislative history, however, provide that section 510 prohibits terminations as a participant approaches age thirty. It would be absurd to infer from this legislative history that a participant is not entitled to protection under section 510 until almost age thirty. Yet the argument is not dissimilar to the argument that section 510 protects only vested benefits because the examples in the legislative history refer to vesting.

Also, the *West* court cited only a general statement regarding section 511 and those sections of the section 510 legislative history that focused on employee discharges.²⁵³ The court did not cite, let alone

²⁵¹ *Id.* at 245-46.

²⁵² This focus on the employment relationship likely resulted from the facts of the case. However, a number of cases have focused exclusively on whether a termination of employment has occurred in the same way that courts have focused on vesting. *See, e.g.,* *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1503 (3d Cir. 1994) (employer "actions [must] affect[] the employer-employee relationship"); *McGath v. Auto-Body N. Shore, Inc.*, 7 F.3d 665, 668 (7th Cir. 1993) (focus of § 510 protections is on the employment relationship). *But see* *Aronson v. Servus Rubber, Div. of Chromalloy*, 730 F.2d 12, 16 (1st Cir.) (under certain circumstances a plan termination could violate § 510), *cert. denied*, 469 U.S. 1017 (1984); *Newton v. Van Otterloo*, 756 F. Supp. 1121, 1136 (N.D. Ind. 1991) (retaliatory reduction in benefits might violate § 510). One student commentator has argued that the focus on the employment relationship constitutes an overly narrow interpretation of the statute. Carl A. Greci, Note, *Use It And Lose It: The Employer's Absolute Right Under ERISA Section 510 To Engage in Post-Claim Modifications of Employee Welfare Benefit Plans*, 68 IND. L.J. 177, 195-96 (1992). A focus that ignores the statute's use of the term "discrimination" does appear unreasonably narrow; however, a complete analysis of this issue is beyond the scope of this Article.

²⁵³ 621 F.2d at 243 (citing H.R. CONF. REP. NO. 93-1280, 93d Cong., 2d Sess. (1974)).

attempt to reconcile: (1) the conference report's assertion that section 510 protects against interference with a participant's ability to attain "any rights"; (2) the statements by Senator Williams in introducing the conference report to the Senate that ERISA prohibited interference with a participant's "attainment of vested benefits *or other rights* under the bill . . .";²⁵⁴ or (3) the implication in the discussion of the fourteen basic rights protected by ERISA that the coverage of section 510 extends beyond the vesting of benefits.²⁵⁵ Although these three portions of the legislative history merit significant weight, coming as they do at the end of the legislative process, the *West* court ignores them. This selective use of the legislative history only makes sense if the *West* opinion is addressing the need for either a discharge or harassment to occur, and not the issue of whether a vested plaintiff is protected.

In addition, the court viewed the reduction in employer *contributions* as the underlying concern of the SLU trustees.²⁵⁶ The level of contributions in no way affects whether benefits vest in the type of plan at issue; instead, contribution levels affect funding. If it seriously believed the protections of section 510 extend only to vesting of benefits, the *West* court could simply have held that the decrease in contributions did not affect benefit vesting and, thus, section 510 did not apply to the facts at hand. Instead, the court based its decision on a lack of interference with the employment relationship.²⁵⁷ Thus, the courts in cases such as *Donohue* and *Malone* misread *West* when they interpreted *West* as holding that only unvested participants are entitled to state a claim under section 510.²⁵⁸

e. *Implications for Employers and Vested Participants*

Reading section 510 to protect employees from interference with their right to earn benefit accruals comports with Congress's intent to afford significant protections under ERISA to employee benefit plan participants. Interpreting the Interference Clause as protecting participants' rights to earn additional accruals also protects against a possible avoidance scheme. For example, an employer could simply vest employees in their benefits shortly after hiring.²⁵⁹ If the right to earn

²⁵⁴ 120 CONG. REC. S29,933 (1974) (statement of Sen. Williams) (emphasis added).

²⁵⁵ *Id.* at S29,935 (statement of Sen. Williams).

²⁵⁶ *West*, 621 F.2d at 246.

²⁵⁷ *Id.*

²⁵⁸ See also *Nemeth v. Clark Equip. Co.*, 677 F. Supp. 899, 908 (W.D. Mich. 1987) (because additional accruals increase the value of vested pensions, *West*'s reference to "obtaining vested pension rights" means § 510 does protect accruals) (quoting *West v. Butler*, 621 F.2d at 245) (emphasis in *Clark Equipment*).

²⁵⁹ ERISA's vesting requirements are *minimum* requirements; an employer may adopt a

accruals were not protected, an employee fired to prevent receipt of a larger pension benefit would have no claim under section 510 because he was already vested.²⁶⁰

A number of courts have recognized the incongruity of according vested participants less protection than unvested participants.²⁶¹ In addition, protecting participants' rights to earn accruals comports with the general practice of protecting participants' rights to become eligible for enhanced levels of benefits such as *Continental Can's* Rule of 70/75 program.²⁶² As a technical matter, ERISA does not impose any special vesting requirements on those enhanced benefit programs. However, interpreting section 510 as protecting the right to earn additional accruals provides a sound analytical basis for protecting the right of participants to earn enhanced benefits.²⁶³

This does not mean, though, that section 510's protections are without limitation. Every termination of employment or plant closing does not violate section 510 just because the discharge effectively denies the former employee the right to earn additional benefit accruals. Section 510 only protects against specific acts taken for the purpose of interfering with a participant's attainment of a benefit right. As indicated above, to state a claim under section 510 a plaintiff must prove the employer acted with the specific intent to interfere with the plaintiff's benefits.²⁶⁴

Some courts have confused this "specific intent" requirement with the issue of whether section 510 protects vested employees. For example, in *Malone v. Gilman Paper Co.* the court *sua sponte* determined that "a long line of cases" concludes that section 510 does not protect vested participants.²⁶⁵ The *Malone* court then quoted the following passage:

Plaintiff does not dispute that his pension rights had vested, but rather asserts that defendant terminated him to prevent

schedule that provides for vesting more quickly than ERISA's requirements. See ERISA § 203, 29 U.S.C. § 1053 (1988 & Supp. IV 1992).

²⁶⁰ Collingsworth, *supra* note 132, at 327.

²⁶¹ *Clark v. Resistoflex Co., Div. of Unidynamics*, 854 F.2d 762, 770 (5th Cir. 1988); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1243 (7th Cir. 1983); *Marcoz v. Summa Corp.*, 801 P.2d 1346, 1352 (Nev. 1990).

²⁶² See *supra* text accompanying notes 114-30. But see *Sangeniti v. Mutual of Am.*, No. 90-3558, 1990 U.S. Dist. LEXIS 16809 (S.D.N.Y. Dec. 10, 1993) (distinguishing between enhanced early retirement benefits and "normal" accruals).

²⁶³ Because there is a clear line when the employee becomes eligible for an enhanced benefits program, just as there is when the employee becomes vested initially, a discharge just before becoming eligible for an enhanced benefits program should be evidence of prohibited employer intent just as it is evidence in the context of vesting. See *infra* text accompanying notes 270-73.

²⁶⁴ See *supra* text accompanying note 67.

²⁶⁵ 737 F. Supp. 88, 89 (S.D. Ga. 1990).

him from qualifying for [the larger benefits he would receive if he had retired at age sixty-five] *The only evidence offered* by plaintiff is that if he had not been terminated, he would have been able to accrue additional benefits. It is undisputed that no benefits previously earned would have been forfeited by reason of the discharge. Thus, regardless of whether the discharge was arbitrary and capricious, its impact on benefits was only incidental—the resulting loss was simply that which would result from any discharge, i.e. a loss of wages and other benefits earned on account of work to be performed in the future.²⁶⁶

Based in part on this quote, the *Malone* court decided that section 510 does not protect a vested plaintiff. This review of the sufficiency of the plaintiff's evidence bears directly on the determination of whether the plaintiff has stated a *prima facie* case. However, it has absolutely nothing to do with the issue of whether section 510 protects vested plaintiffs.

The basis for the confusion between the specific intent requirement and the application of section 510 to vested plaintiffs apparently arises from the statement that the termination of employment has only an incidental effect on benefits. To the extent that the court used the word "incidental" to indicate that the loss of future benefits was a result of the termination and not a motivating factor, that goes to the issue of intent. And to the extent that the court used the word "incidental" to reflect a belief that participants have little left to gain once their benefits have vested, the statement often proves incorrect because accruals in the final years of employment typically have a significant effect on benefits in a defined benefit plan.²⁶⁷ Moreover, even if the effect on benefits is only incidental, section 510 prohibits interference with "the attainment of any right,"²⁶⁸ not just with the attainment of substantial rights. Some courts have committed essentially the same error in determining that section 510 cannot apply to the termination of a vested participant because nearly every such employment termination prevents the participant from earning future accruals.²⁶⁹ Again, this is important in determining whether the employee has proven the

²⁶⁶ *Id.* at 90 (quoting *Baker v. Kaiser Aluminum & Chem. Corp.*, 608 F. Supp. 1315, 1318-19 (N.D. Cal. 1984)) (emphasis added).

²⁶⁷ See *supra* text accompanying notes 53-56; 2 BOREN, *supra* note 46, at § 16:13.

²⁶⁸ ERISA § 510, 29 U.S.C. § 1140 (1988).

²⁶⁹ See, e.g., *Kelly v. Chase Manhattan Bank*, 717 F. Supp. 227, 232 (S.D.N.Y. 1989); *Corum v. Farm Credit Servs.*, 628 F. Supp. 707, 717-18 (D. Minn. 1986).

necessary specific intent on the part of the employer but is irrelevant in determining the scope of protection of section 510.

Correctly understood, the specific intent requirement protects an employer from having to litigate every employment discharge. Where employees suffer discharge just prior to vesting, a prototypical section 510 situation,²⁷⁰ the proximity in time alone provides important evidence of prohibited intent on the part of the employer.²⁷¹ Similarly, a discharge just prior to attainment of eligibility for an enhanced benefit often evidences an intent to interfere with the attainment of a benefit right. Where vested employees claim interference with their right to earn additional accruals, however, the discharge alone does not help prove prohibited employer conduct.²⁷² Otherwise, almost every single employment termination could result in a trial under section 510 because working for a longer time almost always results in the accrual of greater benefits. Instead, the employee must present evidence other than the mere fact of the termination in order to avoid summary judgment.²⁷³

In sum, the protections of section 510 extend to the right to accrue benefits and the right to meet plan criteria for enhanced benefits as well as to the right to vest in benefits. In each case the employee must show specific intent. However, differences exist in the probative value of the employment termination to prove an employer's malevolent intent.

C. *Application of Section 510 to Welfare Benefits*

This Part began by explaining the general application of the Exercise Clause and the Interference Clause. Next, this Part examined the issue of whether the protections of section 510 extend beyond the right to become vested and concluded that they extend to the right to earn additional accruals and to meet the criteria for enhanced benefits. This section briefly analyzes the application of section 510 to welfare benefits in order to ensure consistency with the protections accorded to pension benefits.

²⁷⁰ See *supra* text accompanying notes 168–71.

²⁷¹ Technically this evidence becomes important to the employee's prima facie case. See *infra* text accompanying note 314 for a brief discussion of the current requirements of a prima facie case.

²⁷² See, e.g., *Titsch v. Reliance Group*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff'd without opinion*, 742 F.2d 1441 (2d Cir. 1983).

²⁷³ See, e.g., *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 347–48 (3d Cir. 1990); *Johnson v. United Airlines, Inc.*, 680 F. Supp. 1425, 1432–33 (D. Haw. 1987); *Baker v. Kaiser Aluminum & Chem. Corp.*, 608 F. Supp. 1315, 1319 (C.D. Cal. 1984).

The Seventh Circuit Court of Appeals faced the question of whether the Interference Clause protects a participant's right to continued welfare benefits in *Kross v. Western Electric Co.*²⁷⁴ Kross brought a class action lawsuit resulting from a substantial reduction in workforce at Western Electric's Hawthorne Works facility.²⁷⁵ Like the courts that believe the Interference Clause protects only the right to become vested, the district court decided that Kross's termination did not prevent him from attaining benefits under the welfare benefit plans, because he participated in those plans when discharged.²⁷⁶ The Seventh Circuit reversed, believing the language and the remedial nature of the statute requires that interference with continued participation in welfare benefit plans is covered by section 510.²⁷⁷ Likewise, at least one circuit has held that an employer may not fire an employee to prevent that employee from taking part in the employer's health care plan.²⁷⁸ Just as in pension plan cases, the plaintiff must prove that the employer took the employment action at issue with the specific intent of interfering with benefit entitlements.²⁷⁹

Recently, plaintiffs have attempted unsuccessfully to use both the Interference and the Exercise Clauses to challenge reductions in their medical insurance plans. For example, in *McGann v. H & H Music Co.*,²⁸⁰ the employer reduced the lifetime cap in its health insurance plan from \$1 million to \$5,000 for expenses related to AIDS shortly after learning that one of its employees had contracted AIDS. The Fifth Circuit Court of Appeals accepted the employer's claim that its motivation was to reduce the costs of its health care plan and that it was not impermissibly targeting McGann because the reduction applied to all employees who might file AIDS-related claims.²⁸¹ The court distin-

²⁷⁴ 701 F.2d 1238, 1243 (7th Cir. 1983).

²⁷⁵ *Id.* at 1239.

²⁷⁶ *Id.* at 1241. The Seventh Circuit upheld the dismissal of Kross's pension benefit claims because Kross failed to exhaust his administrative remedies prior to bringing suit under ERISA. *Id.* at 1245.

²⁷⁷ *Id.* at 1241-46. The Seventh Circuit also recognized that failure to extend the coverage of § 510 to participants in welfare benefit plans would result in less protection for vested employees than for probationary employees. *Id.* at 1243; see also *Massie v. Indiana Gas Co.*, 752 F. Supp. 261, 269 (S.D. Ind. 1990) (employee discharged in order to avoid costs under short term disability plan entitled to protection under § 510).

²⁷⁸ *Seaman v. Arvida Realty Sales*, 985 F.2d 543, 545 (11th Cir.) (the court relied upon the Exercise Clause), *cert. denied*, 114 S. Ct. 308 (1993).

²⁷⁹ *Phelps v. Field Real Estate Co.*, 991 F.2d 645, 649-50 (10th Cir. 1993).

²⁸⁰ 946 F.2d 401, 403 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

²⁸¹ *Id.* at 405-08; see also *Owens v. Storehouse, Inc.*, 984 F.2d 394, 398-99 (11th Cir. 1993). For additional commentary on employer's rights to modify health care plans in order to contain costs with respect to HIV/AIDS, see T.J. Dorsey, *Recent Developments*, *McGann v. H & H Music*

guished *Vogel v. Independence Federal Savings Bank*,²⁸² where the employer impermissibly excluded only Vogel from coverage under its health insurance plan.²⁸³ Finally, the Fifth Circuit recognized that ERISA does not require an employer to offer any health insurance and permits an employer to amend or eliminate the voluntary plans it has chosen to offer if the employer has reserved its right to amend or eliminate the plan.²⁸⁴

These applications of section 510 in the welfare benefit plan context are consistent with section 510's application, discussed above,²⁸⁵ to pension plan claims. The courts hold that section 510 prohibits an employer from firing an employee to interfere with the employee's welfare benefits. Furthermore, that protection extends to employment actions that affect groups of employees. In contrast, section 510 does not generally prevent an employer from terminating or amending a welfare benefit plan. Finally, since the concept of statutory vesting does not apply to welfare benefits, the application of section 510 in these cases supports the conclusion that the protections of section 510 extend beyond vesting.

IV. PROOF OF A SECTION 510 CLAIM

Part II of this Article concludes that the protections of section 510 should extend to plant closing situations. Part III of this Article argues that the types of benefits covered by section 510 include an employee's right to earn future benefit accruals and meet plan criteria for enhanced benefits as well as the employee's right to become vested in benefits. Thus, an employer cannot close a plant and fire employees to interfere with the rights of the employees to accrue benefits or to become entitled to enhanced benefits. However, a plant closing does not violate section 510 simply because it has the result of interfering with employee benefits or saving the employer money through reduced benefit costs. Instead, an employer violates section 510 only where it closes a plant with the specific intent to interfere with the attainment of employee benefits. This Part will address briefly the nature of a plaintiff's burden of proof in a section 510 case by explaining the standards for Title VII cases and examining the way courts

Co.: *The Limited Meaning of "Discrimination" Under Section 510 of ERISA*, 67 TUL. L. REV. 305 (1992); Greci, *supra* note 209; James M. Smith, *HIV/AIDS and Workplace Discrimination: Dickens Revisited—"It was the Best of Times, It was the Worst of Times,"* 22 U. WEST. L.A. L. REV. 19 (1991); James R. Bruner, Note, *AIDS and ERISA Preemption: The Double Threat*, 41 DUKE L.J. 1115 (1992).

²⁸² 728 F. Supp. 1210, 1225 (D. Md. 1990).

²⁸³ *McGann*, 946 F.2d at 405.

²⁸⁴ *Id.* at 405-08.

²⁸⁵ See *supra* parts III.A and III.B.

currently apply those standards in section 510 cases. This Part concludes by questioning the remedies available in a section 510 action after the 1993 Supreme Court decision in *Mertens v. Hewitt Associates*.²⁸⁶

A. Title VII Burdens and Their Application to Section 510 Cases

As recognized by the court in *Levi Strauss & Co.*,²⁸⁷ to state a valid section 510 claim, a plaintiff "must show the employer had the 'specific intent to violate ERISA.'" However, because plaintiffs can rarely obtain direct—or "smoking gun"—evidence to prove a section 510 claim, plaintiffs may use circumstantial evidence to prove a claim. Generally, in section 510 cases where the plaintiffs rely on circumstantial evidence, the courts purportedly apply the burden-shifting standards established by the Supreme Court in *Texas Department of Community Affairs v. Burdine*²⁸⁸ and *McDonnell Douglas Corp. v. Green*²⁸⁹ for Title VII disparate treatment cases.²⁹⁰

In *McDonnell Douglas*, the Supreme Court outlined the four elements of a plaintiff's prima facie case in a Title VII disparate treatment claim for discriminatory failure to hire.²⁹¹ First, the plaintiff must belong to a protected class.²⁹² Second, the plaintiff must have applied and been qualified for the job opening sought to be filled by the defendant.²⁹³ Third, the defendant must have rejected the plaintiff.²⁹⁴ Fourth, the defendant must have continued to solicit applications from individuals with similar qualifications for the same job for which the plaintiff applied.²⁹⁵ However, the *McDonnell Douglas* Court made it clear that the prima facie case may vary depending on the factual situation of the case at issue.²⁹⁶ In fact, a number of different elements have emerged depending on the nature of the Title VII case.²⁹⁷

²⁸⁶ 113 S. Ct. 2063 (1993).

²⁸⁷ *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 980-81 (5th Cir. 1993) (quoting *Clark v. Resistoflex Co.*, 854 F.2d 762, 770 (5th Cir. 1988)); see also *Kapetanovich v. Rockwell Int'l, Inc.*, 15 Employee Benefits Cas. (BNA) 2580, 2582 (3d Cir. 1992); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851-52 (3d Cir.), cert. denied, 484 U.S. 979 (1987), later proceeding sub nom. *McLendon v. Continental Group, Inc.*, 802 F. Supp. 1216 (D.N.J. 1992).

²⁸⁸ 450 U.S. 248, 252-56 (1981).

²⁸⁹ 411 U.S. 792, 802-03 (1973).

²⁹⁰ See, e.g., *Gavalik*, 812 F.2d at 851-52 (presence of circumstantial evidence calls for application of *McDonnell Douglas* test).

²⁹¹ 411 U.S. at 802.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ 411 U.S. at 802 n.13.

²⁹⁷ See, e.g., *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793, 796 (discrimination in promo-

The Supreme Court decided in *Burdine* that a plaintiff initially has the burden to prove a prima facie case by a preponderance of the evidence.²⁹⁸ Once the plaintiff successfully establishes a prima facie case, the plaintiff receives a presumption that the defendant discriminated against the plaintiff.²⁹⁹ The defendant then bears the burden of producing evidence of a "legitimate, nondiscriminatory reason"³⁰⁰ for the defendant's action. Production of such evidence by the defendant eliminates the presumption in favor of the plaintiff.³⁰¹ The plaintiff then has an opportunity to prove the defendant's asserted reason was not the actual motivation for the challenged employment decision. The plaintiff's burden of proof "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination."³⁰²

In *St. Mary's Honor Center v. Hicks*, the Supreme Court clarified the application of the *Burdine* standard to cases where the defendant produces evidence of a "legitimate, nondiscriminatory reason" for the defendant's actions but the trier of fact rejects that evidence as not being credible.³⁰³ One of the key phrases at issue was the "merger" language from *Burdine*, quoted above.³⁰⁴ According to the Supreme Court, even where the defendant's evidence is not credible, the plaintiff loses the benefit of the presumption of discrimination. On the other hand, the rejection of the defendant's stated reason for the employment action does "permit the trier of fact to infer the ultimate fact of intentional discrimination."³⁰⁵ This decision has spawned significant criticism³⁰⁶ and legislation has been introduced to counteract the holding.³⁰⁷

tion), *modified*, 850 F.2d 1549 (11th Cir. 1988); *Satterwhite v. Smith*, 744 F.2d 1380, 1383 (9th Cir. 1984) (prima facie case for discriminatory constructive discharge); *Cockrham v. South Cent. Bell Tel. Co.*, 695 F.2d 143, 144-45 (5th Cir. 1982) (discriminatory discharge due to unequal discipline).

²⁹⁸ 450 U.S. at 254.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 255.

³⁰² *Id.* at 255-56. The quoted language was at the center of the dispute in *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2752 (1993); see *infra* notes 303-07 and accompanying text.

³⁰³ 113 S. Ct. 2742, 2745-47 (1993). However, the Court split 5-4 on the outcome. *Hicks* involved the demotion and later discharge of an African-American correctional officer. *Id.* at 2746. Once the trier of fact decided that the defendants' stated reasons for the demotion and discharge were pretextual, the Eighth Circuit determined that the plaintiff was entitled to win as a matter of law. *Id.* at 2748. The Supreme Court reversed, holding that the ultimate burden of proof remains at all times with the plaintiff so the plaintiff may only win if the plaintiff proves intentional discrimination. *Id.* at 2749-54.

³⁰⁴ See *supra* text accompanying note 302.

³⁰⁵ 113 S. Ct. at 2749.

³⁰⁶ See, e.g., *The Supreme Court—Leading Cases*, 107 HARV. L. REV. 144, 342-52 (1993).

³⁰⁷ H.R. 2867, 103d Cong., 1st Sess. (1993); H.R. 2787, 103d Cong., 1st Sess. (1993).

Finally, a Title VII plaintiff may raise a so-called "mixed motive" claim.³⁰⁸ Mixed motive cases occur where the defendant had a legitimate as well as an illegal motive for the discriminatory employment action. A plurality of the Supreme Court decided in *Price Waterhouse v. Hopkins*³⁰⁹ that the *Burdine* standard of proof does not apply to mixed motive cases. Instead, the Supreme Court required the employer to prove, by the preponderance of the evidence, that the employer would have made the same employment decision in the absence of the illegal motive.³¹⁰ Thus, the burden of *persuasion*, instead of simply the burden of production, shifted to the defendant. The Civil Rights Act of 1991³¹¹ ("CRA") essentially reinstituted the standard of proof that existed in the case law prior to *Price Waterhouse*. Under the CRA, a plaintiff establishes violation of Title VII upon proof that a prohibited criteria was "a motivating factor."³¹²

As in the context of Title VII, plaintiffs alleging a violation of section 510 sometimes cannot produce direct, or "smoking gun," evidence of an intent to deprive the plaintiff of benefits. Therefore, where the evidence is circumstantial, numerous courts have applied the *McDonnell Douglas* framework. The nature of the prima facie case in a section 510 action, however, has been refined over recent years. Initially, intent appeared as an element of the prima facie case.³¹³ As a result, the framework did little or nothing to aid a plaintiff in proving the requisite intent. Generally, the prima facie case now consists of: (i) membership in a class protected by ERISA; (ii) qualification for the job; and (iii) discharge under circumstances that would tend to lead one to believe that a protected characteristic supplied the basis for the decision.³¹⁴

If the plaintiff proves the employer based its employment decision upon both a permissible and a prohibited reason, the analysis becomes more difficult. In *USX*,³¹⁵ the employer argued that even if a prohibited

³⁰⁸ In addition to mixed motive and disparate treatment cases, plaintiffs may bring claims under theories of disparate treatment class action or disparate impact class action. See SCHLEI & GROSSMAN, *supra* note 97, at 1230-34 & Supp. at 170-71.

³⁰⁹ 490 U.S. 228, 247 (1989).

³¹⁰ *Id.* at 253.

³¹¹ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

³¹² 42 U.S.C. § 2000e-2(m) (1988 & Supp. IV 1992). However, relief for violations of this section of Title VII is limited to declaratory relief, certain injunctive relief, and attorney's fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B) (1988 & Supp. IV 1992).

³¹³ Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir.), *cert. denied*, 484 U.S. 949 (1987), *later proceeding sub nom.* McLendon v. Continental Group, Inc., 802 F. Supp. 1216 (D.N.J. 1992).

³¹⁴ See, e.g., Kapetanovich v. Rockwell Int'l, Inc., 15 Employee Benefits Cas. (BNA) 2580, 2582-83 (1992).

³¹⁵ Pickering v. USX Corp., 809 F. Supp. 1501, 1533 n.18 (D. Utah 1992).

reason contributed to its decision to close Geneva, it had the right to defend on the ground that it would have closed the plant anyway. The court dismissed this argument as inconsistent with the *McDonnell Douglas* framework.³¹⁶

In contrast, the courts in *Gavalik*³¹⁷ and *McLendon*,³¹⁸ would have permitted the employer to defend by proving that the plaintiffs "would have suffered the *same loss* of work even in the absence of the illegal plan."³¹⁹ Essentially the courts in *Gavalik* and *McLendon* followed the evidentiary standards set forth by the plurality in *Price Waterhouse*. Although the CRA changed that standard for Title VII actions, it had no effect on ERISA actions. Thus, in section 510 cases where a plaintiff proves that employers acted for permissible and impermissible reasons, case law in at least some circuits permits the employer to defend by proving that it would have taken the same action even in the absence of the prohibited motive.³²⁰

When faced with section 510 claims, the courts traditionally have looked to the evidentiary standards developed under Title VII. This pattern is beginning to disintegrate as Congress has modified the standards under Title VII without making corresponding changes to ERISA. It is too early to tell whether this will result in diverging frameworks for burdens of proof under the two statutes. The complexity of burden of proof issues, combined with the general complexity of ERISA actions, makes it difficult to believe that litigation will achieve uniformity in the near future. However, additional statutory refinement of ERISA became far more likely after the 1993 Supreme Court decision in *Mertens v. Hewitt Associates*³²¹ discussed in the next section.

³¹⁶ *Id.*

³¹⁷ *Gavalik*, 812 F.2d at 834.

³¹⁸ *McLendon v. Continental Can Co.*, 908 F.2d 1171 (3d Cir. 1990), *later proceeding sub nom. McLendon v. Continental Group, Inc.*, 802 F. Supp. 1216 (D.N.J. 1992).

³¹⁹ *Id.* at 1178 (quoting *Gavalik*, 812 F.2d at 866) (emphasis added by the *McLendon* court); *see also* *Nemeth v. Clark Equip. Co.*, 677 F. Supp. 899, 909 (W.D. Mich. 1987) (no § 510 violation because consideration of the pension costs was not determinative in Clark's decision to close the Benton Harbor plant). *But see, e.g., Zimmerman v. Sloss Equip., Inc.*, 835 F. Supp. 1283, 1289 (D. Kan. 1993) (a § 510 plaintiff need not show that she would have received benefits "but for" the employer's action). A resolution of the standard of proof in mixed motive cases is beyond the scope of this Article.

³²⁰ Given the concerns that prompted Congress to "reverse" *Price Waterhouse* by enacting the CRA, the issue of what the appropriate standards are for § 510 mixed motive cases deserves more attention. When combined with the question of whether the cases under § 510 should even look to Title VII, these queries go beyond the scope of this Article.

³²¹ 113 S. Ct. 2063 (1993).

B. Remedies

In 1993 the Supreme Court limited the scope of relief available to remedy violations of ERISA.³²² This section reviews the relevant statutory provision and its historical application before turning to a discussion of the decision in *Mertens v. Hewitt Associates*.³²³ The section ends by addressing the post-*Mertens* outlook for remedies for section 510 claims.

While section 510 contains substantive prohibitions, it is not self-enforcing. Instead, enforcement must occur under ERISA section 502 ("section 502")³²⁴ which contains ERISA's general enforcement provisions. Section 502 provides a variety of remedies, depending on the nature of the claim being raised and the status of the party bringing the claim. A number of gaps exist in those enforcement provisions and Congress intended the development of a federal common law to supplement ERISA.³²⁵ Rather than fill the gaps, lower courts have routinely adopted the Supreme Court's statement in *Massachusetts Mutual Life Insurance Company v. Russell*,³²⁶ that Congress carefully drafted section 502 to provide a systematic remedial scheme. Relying upon that statement, courts frequently have refused to permit remedies not explicitly authorized by section 502.³²⁷

For purposes of a section 510 claim, the most relevant portions of section 502 are subsections (a)(1) and (a)(3). Section 502(a)(1) permits participants or beneficiaries to bring suit:

- (A) for the relief provided for in subsection (c) of this section [regarding information and disclosure violations], or
- (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .³²⁸

According to section 502(a)(3), a civil suit may be brought:

by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the

³²² See *id.*

³²³ *Id.*

³²⁴ ERISA § 502, 29 U.S.C. § 1132 (1988 & Supp. IV 1992) (amended 1993).

³²⁵ See Conison, *supra* note 22, at 6-8 (arguing that § 502 establishes an imprecise and unsystematic civil enforcement system).

³²⁶ 473 U.S. 134, 146-47 (1985).

³²⁷ See, e.g., Conison, *supra* note 22, at 7-8.

³²⁸ ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1) (1988 & Supp. IV 1992).

terms of the plan, or (B) *to obtain other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; . . .³²⁹

Because sections 510 and 502 are both part of Title I of ERISA, it is natural to rely upon section 502(a)(3)'s grant of a cause of action for a violation of "any provision of this title."³³⁰ Subsection (A) limits relief to injunctive relief. In contrast, subsection (B) offers a wider variety of remedies by permitting "other appropriate equitable relief."³³¹ Some early section 510 commentators relied upon the broad goals set forth in the legislative history to recommend that courts read this phrase as permitting all types of relief that might be available in equity, including monetary relief, and at least one commentator recommended punitive awards in appropriate cases.³³²

A few early cases cited ERISA's remedial purpose and Congress's intent to provide "the full range of legal and equitable remedies available in both state and federal courts"³³³ as authority permitting the award of a variety of remedies. For example, some courts indicated that a plaintiff who suffered termination in violation of section 510 could recover back pay,³³⁴ reinstatement,³³⁵ front pay,³³⁶ reinstatement of lost benefits,³³⁷ and pre-judgment interest.³³⁸ A few courts also stated that punitive damages would be available in appropriate cases.³³⁹ Other courts permitted plaintiffs to recover using estoppel theories.³⁴⁰

The Supreme Court added some support for a broad interpretation of section 502(a)(3) in *Ingersoll-Rand Co. v. McClendon*.³⁴¹ In a unanimous opinion written by Justice O'Connor, the Court deter-

³²⁹ ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988) (emphasis added).

³³⁰ *Id.*

³³¹ *Id.*

³³² Collingsworth, *supra* note 132, at 348; *see also* Martucci & Utz, *supra* note 132, at 262-64; Vogel, *supra* note 132, at 1047, 1053-54.

³³³ H.R. REP. NO. 533, 93d Cong., 2d Sess. 17 (1973), *reprinted in* 1974 U.S.S.C.A.N. 4639, 4655.

³³⁴ *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1016-17 (W.D. Mo. 1984); *Bittner v. Sadoff & Rudoy Indus.*, 490 F. Supp. 534, 536 (E.D. Wis. 1980).

³³⁵ *Folz*, 594 F. Supp. at 1018; *Bittner*, 490 F. Supp. at 536.

³³⁶ *Folz*, 594 F. Supp. at 1018; *Bittner*, 490 F. Supp. at 536.

³³⁷ *Folz*, 594 F. Supp. at 1019-20; *Bittner*, 490 F. Supp. at 536.

³³⁸ *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1217 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981); *Folz*, 594 F. Supp. at 1016-17.

³³⁹ *Bittner*, 490 F. Supp. at 536; *Baeten v. Van Ess*, 474 F. Supp. 1324, 1331 (E.D. Wis. 1979) (discussing damages available under § 502(a)(3) in the context of flagrant and malicious actions by the trustees). This position was discredited by all circuit courts that examined the issue. *See, e.g., Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2077 n.6 (White, J., dissenting).

³⁴⁰ *See, e.g., Black v. TIC Inv. Corp.*, 900 F.2d 112, 114-16 (7th Cir. 1990). *But see, e.g., Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 58-60 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1051 (1993).

³⁴¹ 498 U.S. 133 (1990).

mined that ERISA pre-empted a former employee's common law claim for unlawful discharge where the employer allegedly fired the employee in order to prevent him from vesting in the employer's pension plan.³⁴² The plaintiff sought "lost future wages, mental anguish and punitive damages as a result of the wrongful discharge."³⁴³ Justice O'Connor wrote that ERISA would pre-empt this cause of action even in the absence of its broad pre-emption clause because the state law claim directly conflicted with the federal prohibitions contained in section 510.³⁴⁴ In discussing the remedies available for a section 510 violation, Justice O'Connor then stated: "It is clear that the relief requested here is well within the power of federal courts to provide."³⁴⁵ Some courts have taken Justice O'Connor at her word and have concluded that section 502(a)(3) permits the award of "extra-contractual, even punitive, damages."³⁴⁶ Other courts have determined that Justice O'Connor's statement regarding the availability of remedies was unclear and constituted dicta. Accordingly, those courts have refused to permit punitive or extracontractual remedies.³⁴⁷

In its 1993 decision in *Mertens v. Hewitt Associates*,³⁴⁸ the Supreme Court limited the types of remedies available under section 502(a)(3). In *Mertens*, pension plan participants sued Hewitt Associates ("Hewitt") after their employer phased out its steel operations, leaving an underfunded pension plan that could not provide promised benefits.³⁴⁹ The participants believed that Hewitt, as actuary to the plan, breached a variety of ERISA duties by permitting the employer to select the actuarial assumptions for the plan and by failing to disclose either the funding deficiency or the employer's status as a client of Hewitt.³⁵⁰ As relief, the participants asked that Hewitt contribute the amount necessary to fully fund the plan so they could receive the promised benefits.³⁵¹ The Supreme Court granted certiorari on the narrow ques-

³⁴² *Id.* at 144.

³⁴³ *Id.* at 136 (quoting *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 71 n.3 (Tex. 1989)).

³⁴⁴ *Id.* at 142.

³⁴⁵ *Id.* at 145.

³⁴⁶ *Blue Cross & Blue Shield v. Lewis*, 753 F. Supp. 345, 347 (N.D. Ala. 1990) ("being willing to attribute literacy to the Supreme Court"), *supp. opinion*, 1991 U.S. Dist. LEXIS 56 (N.D. Ala. Jan. 3, 1991), *later proceeding*, 754 F. Supp. 849 (N.D. Ala. 1991).

³⁴⁷ See, e.g., *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 821 n.7 (11th Cir. 1991).

³⁴⁸ 113 S. Ct. 2063 (1993).

³⁴⁹ *Id.* at 2065. Because of insufficient plan assets, the PBGC used its authority under ERISA to terminate the plan. The PBGC benefit guarantees then applied to the plan participants. However, many of the plaintiffs had elected to take early retirement, and the benefits promised to them by the pension plan were substantially higher than the PBGC guarantees. *Id.* The participants also brought suit against plan fiduciaries. *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.* at 2067.

tion of whether money damages are available under section 502(a)(3) "against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty."³⁵²

In determining the availability of money damages under section 502(a)(3), the Court focused on the phrase "appropriate equitable relief."³⁵³ The participants contended that the losses to the plan constituted appropriate equitable relief because equity courts could provide such relief through the common law of trusts before ERISA. Writing for the five-to-four majority, Justice Scalia admitted that the phrase "equitable relief" could mean "whatever relief a court of equity is empowered to provide in the particular case at issue."³⁵⁴ However, the majority determined that because of the context of the provision, the term "equitable relief" in section 502(a)(3)(B) takes on the alternative meaning of "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."³⁵⁵ In coming to this conclusion, the majority compared other areas of ERISA where Congress distinguished between "equitable" and "remedial" relief or between "equitable" and "legal" relief.³⁵⁶ The majority also noted that reading section 502(a)(3) to preclude compensatory damages comports with its interpretation of similar language in Title VII.³⁵⁷ And because the Court viewed the participants' request for payment of plan losses as a request for compensatory damages, "the classic form of *legal* relief,"³⁵⁸ the Court upheld the decision of the court of appeals that ERISA did not permit such relief.³⁵⁹

Justice White wrote a strong dissent, joined by the Chief Justice and Justices Stevens and O'Connor. The dissent argued that Congress intended ERISA to incorporate the common law of trust and that trust law militated for a broad definition of "equitable relief" in section 502(a)(3).³⁶⁰ The dissent also believed it inappropriate to interpret ERISA in a way that would cause participants to receive less protection under ERISA than they enjoyed under the common law of trusts—an outcome that the dissent termed an "anomaly."³⁶¹ Finally, the dissent

³⁵² *Id.* at 2066.

³⁵³ *Mertens*, 113 S. Ct. at 2067.

³⁵⁴ *Id.* at 2068–69.

³⁵⁵ *Id.* at 2069 (emphasis in original). Attorney fees and costs are also available, usually at the court's discretion, for actions under ERISA. ERISA § 502(g), 29 U.S.C. § 1132(g) (1988).

³⁵⁶ *Mertens*, 113 S. Ct. at 2070–71.

³⁵⁷ *Id.* at 2068.

³⁵⁸ *Id.* (emphasis in original).

³⁵⁹ *Id.* at 2072.

³⁶⁰ *Id.* at 2073.

³⁶¹ *Mertens*, 113 S. Ct. at 2074.

argued that the context did not require such a narrow construction of the phrase "appropriate equitable relief" and that Congress did not always utilize great precision in its wording of remedial provisions.³⁶²

Many commentators and courts agree that section 502(a)(3), the provision at issue in *Mertens*, provides the basis for suits alleging a violation of section 510.³⁶³ In *Tolle v. Carroll Touch, Inc.*,³⁶⁴ for example, Tolle claimed, *inter alia*, that Carroll Touch, Inc. terminated her employment to deprive her of benefits in violation of section 510. In determining the appropriate statute of limitations, the Seventh Circuit Court of Appeals decided that section 502(a)(1)(B) essentially provides relief for the breach of contractual rights under a benefit plan.³⁶⁵ However, in order for such a breach to occur, a participant must have satisfied the plan's requirements for receipt of such benefits. In contrast, the court found that section 502(a)(3) provides an avenue for the redress of statutory violations.³⁶⁶ Thus, according to the Seventh Circuit, sections 510 and 502(a)(3) protect a participant from employer actions "which might cut off or interfere with a participant's ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan."³⁶⁷

To the extent the *Mertens* Court limited remedies available under section 502(a)(3), the decision has important implications for suits brought to challenge violations of section 510. Although *Mertens* was decided in the context of the duties of nonfiduciaries and not as a section 510 case, the Court's plain meaning approach appears to require application of *Mertens*' interpretation of section 502(a)(3) to all types of claims, including section 510 claims, brought under section 502(a)(3).³⁶⁸ In fact, as a fiduciary-type case, *Mertens* offered a stronger argument for relying upon concepts developed under the common law of trusts than would actions brought for violation of section 510 which have no analogue in the common law of trusts. Thus, after *Mertens*, it appears likely that section 502(a)(3) will limit participants alleging a

³⁶² *Id.* at 2075 n.4.

³⁶³ See, e.g., 2 BOREN, *supra* note 46, at § 16:13; Collingsworth, *supra* note 132, at 348; see also Martucci & Utz, *supra* note 108, at 262-64; Vogel, *supra* note 132, at 1047, 1053-54.

³⁶⁴ 977 F.2d 1129, 1132 (7th Cir. 1992), *summ. j. on other grounds*, 813 F. Supp. 1368 (C.D. Ill. 1993), *aff'd*, 23 F.3d 174 (7th Cir. 1994); see also Custer v. Pan American Life Ins. Co., 12 F.3d 410, 421 (4th Cir. 1993); Spinelli v. Gaughan, 12 F.3d 853, 856 (9th Cir. 1993); Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1203 (10th Cir. 1990); Bishop v. Osborn Transp., Inc., 838 F.2d 1173 (11th Cir.), *cert. denied*, 488 U.S. 832 (1988).

³⁶⁵ *Tolle*, 977 F.2d at 1133.

³⁶⁶ *Id.* at 1133-34, 1139; see also Richards v. General Motors Corp., 850 F. Supp. 1325, 1339-40 (E.D. Mich. 1994) (section 502(a)(3) provides the only remedy for a violation of § 510).

³⁶⁷ *Tolle*, 977 F.2d at 1134.

³⁶⁸ See *Armstrong v. Jefferson Smurfit Corp.*, No. 94-1060, 1994 U.S. App. LEXIS 18703, at *6-7 (1st Cir. July 22, 1994); 2 BOREN, *supra* note 46, at § 16:13.

violation of section 510 to traditional equitable remedies and will preclude the recovery of compensatory damages.

Grounding a claim for a section 510 violation in another subsection of section 502 provides one way of avoiding this limitation. section 502(a)(1)(B), however, which permits participants to recover, enforce, or clarify benefits due under a benefit plan, appears to be the only possible alternative. Some courts have stated that both sections 502(a)(1)(B) and 502(a)(3) are available to remedy section 510 violations and the application of section 502(a)(1)(B) remains far from settled.³⁶⁹

The gist of a typical section 510 complaint is that an employer took an action intended to prevent the plaintiff from becoming entitled to plan benefits.³⁷⁰ As the *Tolle* court recognized,³⁷¹ a plaintiff alleging that type of violation of the Interference Clause cannot state a section 502(a)(1)(B) claim "to recover benefits due to him under the terms of his plan"³⁷² because the plaintiff did not meet the requirements of the plan. Plaintiffs have advanced several theories to avoid this problem. One plaintiff, for example, argued that the ability under section 502(a)(1)(B) "to enforce . . . rights under the terms of the plan" permits a cause of action to enforce the right to be free from actions forbidden by section 510.³⁷³ However, such an interpretation fails to give meaning to the phrase "terms of the plan"; section 510 confers a statutory right not typically replicated in employee benefit plans.³⁷⁴ And, section 502(a)(1)(B) may authorize only the recovery of plan benefits.

In sum, plaintiffs seeking remedies for section 510 violations are likely left only with equitable remedies under section 502(a)(3). The provisions permitting injunctive relief and restitution should permit a

³⁶⁹ *Babich v. Unisys Corp.*, No. 92-1473-MLB, 1994 WL 167984, at *3 (D. Kan. Apr. 8, 1994); *Zimmerman v. Sloss Equip., Inc.*, 835 F. Supp. 1283, 1290 (D. Kan. 1993).

³⁷⁰ *But see* *Richards v. General Motors Corp.*, 850 F. Supp. 1325, 1327-28 (E.D. Mich. 1994) (plaintiffs alleged that G.M. reduced benefits which the plaintiffs had earned under the plan and relied on section 502(a)(1)(B)).

³⁷¹ *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1133-34 (7th Cir. 1992).

³⁷² ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B) (1988).

³⁷³ *See* *Cox v. Keystone Carbon Co.*, 894 F.2d 647, 649 (3d Cir. 1990).

³⁷⁴ *See id.* *But see* *Babich v. Unisys Corp.*, No. 92-1473-MLB, 1994 U.S. Dist. WESTLAW 167984 (D. Kan. Apr. 8, 1994). *Babich* addressed the nature of the § 502(a)(1)(B) in the context of the availability of a jury trial in § 510 actions and determined that a § 510 plaintiff could seek monetary damages under § 502(a)(1)(B) and termed the damages as "restitutionary in character and therefore equitable in nature." *Id.* at *7. The availability of a jury trial is yet another issue where the courts are split. *See id.* at *3-7. The *Mertens* determination that only traditional equitable relief is available under § 502(a)(3) appears to preclude the availability of a jury trial for actions predicated on that section.

plaintiff who prevails in a section 510 action to obtain reinstatement where practicable. A plaintiff might also obtain lost benefits under a theory of restitution if the plaintiff's termination unjustly enriched the employer.³⁷⁵ Unjust enrichment, for example, arguably occurs where the employer has established a pension plan with the expectation that a given percentage of participants will meet the criteria for enhanced benefits but the employer closes a plant to prevent the participants from achieving entitlement for enhanced benefits. The amounts the employer previously funded, or should have funded, to pay for enhanced benefits will reduce the employer's future plan funding liability. Arguably, the employer is unjustly enriched at least to the extent of this savings. However, it is difficult to predict how the courts will treat these types of claims because few past ERISA cases have dealt with traditional notions of unjust enrichment.³⁷⁶

Also, section 510 plaintiffs may be left without other components of a make-whole remedy because of questions regarding the availability of items such as back pay and front pay.³⁷⁷ One commentator has stated: "[B]ack pay seems on the surface to be an ordinary damages claim, almost an exemplar of a claim at law."³⁷⁸ In the absence of specific provisions under other employment statutes, some courts agree and have refused to classify back pay as equitable relief. For example, in *Waldrop v. Southern Co. Services, Inc.*,³⁷⁹ a former employee alleged violations of the Age Discrimination in Employment Act of 1967³⁸⁰ and the Rehabilitation Act of 1973 ("Rehabilitation Act").³⁸¹ The United States Court of Appeals for the Eleventh Circuit determined that the requested back pay failed to constitute restitution under the Rehabili-

³⁷⁵ See, e.g., *Howe v. Variety Corp.*, 36 F.2d 746, 756-57 (8th Cir. 1994) (permitting restitutionary awards of lost benefits over the objection of a strenuous dissent); *Zimmerman v. Sloss Equip., Inc.*, 835 F. Supp. 1283, 1289 (D. Kan. 1993) (referring to "restitution of forfeited benefits"); see 1 DAN B. DOBBS, LAW OF REMEDIES § 6.10(5) (1993) (extending this argument to cover back pay).

³⁷⁶ See, e.g., *Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts*, 954 F.2d 299, 303 (5th Cir. 1992) (employer inadvertently made overpayments to a multiemployer plan and sought to recover the excess contribution); *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 992 (4th Cir.) (an insurance company obtained a restitutionary recovery where a participant received double payment of benefits), *cert. denied*, 498 U.S. 982 (1990).

³⁷⁷ See *Armstrong v. Jefferson Smurfit Corp.*, No. 94-1060, 1994 U.S. App. LEXIS 18703, at *6 (1st Cir. July 22, 1994). But see *Zimmerman v. Sloss Equip., Inc.*, 835 F. Supp. 1283, 1289 (D. Kan. 1993). *Zimmerman* was decided after *Mertens* but states, without referring to the *Mertens* decision, that courts have the "equitable power" to award full relief in § 510 cases.

³⁷⁸ 2 DOBBS, *supra* note 375, at § 6:10(5).

³⁷⁹ 24 F.3d 152, 154 (11th Cir. 1994).

³⁸⁰ 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992).

³⁸¹ *Id.* §§ 701-796f-6 (1988 & Supp. IV 1992).

tation Act because no unjust enrichment existed, as would have occurred if the employer had failed to compensate plaintiff for time actually worked.³⁸²

Unlike ERISA, Title VII specifically permits back pay.³⁸³ In Title VII actions, courts generally categorized back pay as equitable relief for the purpose of questions of jury trial entitlement prior to the enactment of the Civil Rights Act of 1991. To reach that conclusion, courts have relied on a variety of arguments, including the wording of Title VII. Another theory is that back pay is available as incidental to the injunctive remedy of reinstatement.³⁸⁴ Commentators, however, have questioned the Title VII arguments as being inconsistent with the basic compensatory nature of back pay claims, and it is unclear whether the equitable categorization will be extended by analogy to ERISA.³⁸⁵ To the extent the courts treat ERISA claims for items such as back pay as compensatory damages, those types of relief would appear unavailable after *Mertens*. The lack of such remedies for a successful section 510 plaintiff "seems anomalous, stripping Section 510 of its intended effect."³⁸⁶

V. CONCLUSION

Employers faced with increasing competitive pressures and aging plants undoubtedly will find themselves considering plant closings. Given the significant costs associated with employee benefits, it is natural and appropriate that employers are paying more attention to the expenses associated with employee benefits. However, section 510 of ERISA contains important limitations on an employer's ability to avoid benefit obligations.

This Article began with background on ERISA and relevant benefit plan concepts. It then examined two of the recent plant closing decisions in detail. One issue is whether section 510 should even apply to large scale employment decisions such as plant closings. This Article concludes that Congress intended section 510 to preclude employer actions taken for the purpose of preventing plan participants from gaining entitlement to promised benefits. It would be anomalous to

³⁸² *Waldrop*, 24 F.3d at 159.

³⁸³ 42 U.S.C. § 2000e-5(g) (Supp. IV 1992). *But see* *Pegg v. General Motors Corp.*, 793 F. Supp. 284, 286 (D. Kan. 1992) (designating a § 510 claim as an equitable claim by analogizing it to a Title VII claim).

³⁸⁴ *See, e.g.*, *Teamsters v. Terry*, 494 U.S. 558, 571 (1989); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 929 (9th Cir.), *cert. denied*, 459 U.S. 971 (1982); 2 DOBBS, *supra* note 375, at § 6:10(5).

³⁸⁵ *See, e.g.*, 2 DOBBS, *supra* note 375, at § 6:10(5).

³⁸⁶ *See* 2 BOREN, *supra* note 46, at § 16:13.

protect participants from individually targeted actions while permitting equivalent actions so long as they affect large numbers of participants.

That conclusion, however, does not end the inquiry. The next question becomes, what type of benefits does section 510 protect? The benefits issue has caused considerable controversy in the courts. This Article concludes that the disagreement arises in large part from a misreading of early case law and a failure to distinguish between the scope of section 510 and the separate need to prove specific intent. This Article concludes that section 510 protects a vested participant's right to accrue additional benefits and earn entitlement to enhanced benefits as well as an unvested participant's right to become vested.

In proving intent, the courts traditionally have looked to frameworks for allocating the burden of proof that have developed under Title VII jurisprudence. Those analogies, whether or not they were correct, are beginning to break down as Congress has modified Title VII but has left section 510 untouched. At the same time the courts currently are struggling with the import of the Supreme Court's 1993 opinion in *Mertens v. Hewitt Associates*³⁸⁷ which limited relief to traditional equitable remedies. After *Mertens* the remedies of prevailing section 510 plaintiffs may be limited to job reinstatement and perhaps lost benefits. Although such an interpretation would eviscerate the protections of section 510, it appears questionable whether a prevailing plaintiff can recover all categories of relief necessary to obtain make-whole relief. Thus, although the protections of section 510 may technically prohibit a wide variety of employer actions, ERISA may not offer effective relief to wronged participants.

³⁸⁷ 113 S. Ct. 2063 (1993).