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PLANT CLOSINGS AND ERISA'S NONINTERFERENCE PROVISION

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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 age and average seniority levels of employees vary significantly among the plants - - resulting in differing levels of employee benefits 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 United States economy begins to make a modest recovery.[2] At the same time, some employers 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 plans[6] between 1988 and 1993.[7]

Given the increased attention focused on employee benefit costs, an employer might wish to consider employee benefit costs when making a plant closing decision. However, ERISA Section 510[8] ("Section 510") prohibits specified actions against employees[9] and their beneficiaries[10] in retaliation for exercising benefit rights or in order to prevent employees[11] 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]

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 and*

Co.[15] and *Pickering v. USX Corp.*,[16] two recent cases applying Section 510 to plant closing decisions. Part II addresses the issue of whether Section 510 even applies to plant closing decisions or whether its application is limited to individualized employment decisions, and 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 considerable controversy over whether Section 510 protects an employee's right to accrue additional benefits as well as the 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 discussion of the remedies available to plan participants after the Supreme Court's 1993 decision in *Mertens v. Hewitt Associates*.[17] The Article concludes with closing remarks in Part V.

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 that pension reform was necessary. 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 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. Section 510 is part of Title I.[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[30] sets forth amendments to the Internal Revenue Code ("I.R.C.") and many of its provisions substantially parallel provisions of Title I. Generally, an employer must comply with the requirements of Title II and the I.R.C. for its pension and welfare benefit costs to receive tax-favored treatment.[31] Title III[32] designated agency authority at the time of ERISA's enactment.[33] Title IV[34] governs the termination of pension plans, creates the Pension Benefit Guaranty Corporation ("PBGC"), and outlines the PBGC insurance program.

B. *Welfare Benefit Plans Compared to Pension Plans*

ERISA distinguishes between pension plans and welfare benefit plans. Pension plans are plans established to provide employees with income upon retirement or to otherwise permit the deferral of income at least until the termination of employment.[35] Two types of pension plans exist: defined contribution pension plans and defined benefit

pension plans. In a defined contribution pension plan, the employer makes contributions[36] to accounts established on behalf of individual employees. The retirement benefits of each employee are entirely dependent 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 is equal to the sum of the contributions as adjusted for investment return.

A defined benefit pension plan means 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 by their years of employment. A number of plans provide enhanced benefits in the case of a permanent layoff or plant closing if the employee meets certain minimum age and service requirements.[39] In each case, the investment risk is on the employer because the employer must make sufficient contributions to the plan to pay the promised benefits regardless of the return earned by plan investments.[40] 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.[41] 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.[42]

Many of ERISA's fiduciary, reporting, and disclosure obligations apply equally to pension plans and to welfare benefit plans.[43] Overall though, ERISA and the I.R.C. currently regulate pension plans far more heavily than they regulate welfare benefit plans, especially with respect to levels of participation and funding.[44] And, as the next section explains, the concepts of accrual and vesting apply only to pension plans.

C. *Accrual Compared to Vesting*

Accrual of benefits describes how an employee earns increased pension benefits over time.[45] For example, in a defined benefit pension plan, an employee may "accrue" 20 years of service for purposes of the plan's benefit formula. Every pension plan must contain an accrual method.[46]

In contrast to accrual, 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.[47] Alternatively, plans may provide for "incremental" vesting where, at minimum, benefits vest at the rate of 20 percent per year, beginning when the employee completes three years of service.[48] In any case, an employer must vest all accrued benefits at the time of a complete or partial plan termination.[49] However, if the employee's accrued benefit is equal to zero, the vested and nonforfeitable benefit also is equal to 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, with a maximum of 50 percent, times the employee's average annual salary over the final five years of employment.[50] The employee will be fully *vested* in the plan after five years. As a result, the employee has a right to receive the full accrued benefit at normal retirement age, even if the employment terminates. However, with five years of credited service, the employee's annual accrued benefit (the amount receivable at normal retirement age) would be equal only to ten percent (two percent per year for five years) times the average of 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 employment.[51] And as employees grow close to retirement age, the accruals become even more costly to employers because of the reduced time for investment growth. Similarly, it is by accruing the minimum age and service credits that employees typically become eligible for enhanced layoff and plant closing benefits. Therefore, protection of the right to continued accruals is important to employees but may be costly to employers especially as employees approach retirement age.

ERISA's vesting requirements apply only to pension plans.[52] 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 ERISA was enacted, there seemed to be little reason to require vesting of welfare benefits and they were exempted.[53]

D. *Two Ends of the Spectrum*

Employers may be tempted to base plant closing decisions on differences in employee benefit costs among plants. 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.[54]

In *Unida v. Levi Strauss & Co.*,[55] the Fifth Circuit Court of Appeals found no evidence that the employer based its plant closing decision on employee benefit cost considerations. Levi Strauss & Company ("Levi") closed its San Antonio plant after a decrease in demand for its Dockers pants. Former plant employees filed a class action alleging, among other claims, that Levi closed the plant to interfere with the plaintiffs'

benefits. A magistrate recommended summary judgment for Levi on all of the plaintiffs' claims and the federal district court accepted that recommendation.[56]

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. The court disagreed. Consistent with existing case law, the court held that the "for the purpose of interfering"[57] language in Section 510 requires plaintiffs to prove the defendant acted with the specific intent to interfere with benefits.[58]

In the alternative, the plaintiffs argued 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 benefits costs were increasing rapidly; (3) instead of a Caribbean plant where there were no benefit costs; and (4) resulting in 369 employees being unable to become fully vested in their benefits. The Court of Appeals held the first two reasons were too general to prove specific intent because the plaintiffs had not offered evidence showing increasing benefit costs at the San Antonio plant. 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.[59]

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. 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. Finally, with respect to the 369 unvested employees, the plaintiffs failed to show that more employees were prevented from vesting because of the closing of the San Antonio plant than if Levi had chosen to close another plant. Thus, 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.'"[60]

At the other end of the spectrum is *Pickering v. USX Corp.*,[61] 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[62] in violation of Section 510. Evidence showed that, as of late 1985, USX intended to utilize the output from Geneva through late 1989 to supply a joint venture. Thus, it appeared likely that Geneva would remain open through 1989.[63]

However, a work stoppage occurred at Geneva on August 1, 1986 and USX idled the Geneva facilities at that time.[64] Between late 1985 and the idling of the Geneva plant, the district court found that USX failed to conduct any reasonable cost studies of the Geneva operation other than studies of the pension costs at the plant. In fact, benefit studies done by USX indicated that pension costs would be more than $50 million higher if USX waited until 1989 to close the plant instead of closing the plant in 1986. 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.[65]

In addition to asserting that idling Geneva was part of 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 . . . .'"[66] 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 (apparently, because they all lost their jobs) regardless of their entitlement to benefits.[67]

The court dismissed as pretextual USX's stated efficiency basis for the idling because the only reasonable studies of the Geneva operations were employee benefit cost studies.[68] The court also dismissed USX's first statutory argument because the plaintiffs'

claims were based on USX's motive in closing the plant and not just on the collateral effect of the closing. 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."[69]

The court had bifurcated the trial so the amount of damages was deferred to the second phase of the action. Still, the court stated that damages would be individually calculated and would depend on "USX's actual treatment of each Geneva employee."[70] Also, the court indicated that the plaintiffs would be entitled to continued benefits as if USX had not illegally idled Geneva.[71]

In sum, *Levi* illustrates that if an employer does not consider employee benefits 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. The 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 is not made on the basis of pension eligibility, the employers could not have discriminated on the basis of pension eligibility and thus could not have violated Section 510. Employers also argue that Section 510 does not apply to large-scale decision making such as a plant closing.[72] An evaluation of these arguments properly begins with the language of the statute.[73] 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.[74]

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.[75] Thus, there are some indications that Section 510 does not apply to across-the-board decisions such as plant closings.

However, Section 510's usage of the singular is not dispositive in determining statutory construction. 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; . . . "[76] Likewise, the nondiscrimination provision in Title VII of the Civil Rights Act of 1964[77] ("Title VII") also is written in the singular. Often, in enforcing Section 510, the courts have looked to the case law under Title VII for precedent.[78] Title VII consistently has been interpreted as precluding employer actions taken against groups of employees as well as precluding individualized discriminatory acts.[79]

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. However, to violate Section 510, an employer need not discriminate among employees at a single plant. An employer also would discriminate against employees with respect to their benefits, and thus violate Section 510, 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 that results in interference with benefits. One of the prohibited actions is "discharge." Thus, if an employer closes a specific plant 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 actions that constitute discrimination but its protections do not go beyond discriminatory actions.[80] The courts should recognize this difference in the plain meaning of the two statutes and should enforce the broader range of employer actions prohibited by Section 510.

Indications in the legislative history lend limited support to the conclusion that Section 510 applies to plant closings. First, in introducing the conference report to the Senate, Senator Harrison Williams, a co-sponsor and "one of the principal architects of ERISA,"[81] referred to Section 510's protections as extending to "participants and beneficiaries."[82] Second, Section 510 was viewed as one of the "fourteen basic rights"[83] protected under ERISA; the courts have considered that, as such, its protections should be

broadly construed.[84] Also, concern over plant closings was part of the reason Congress became interested in pension reform.[85]

Based on the language of the statute, it would be logical to conclude that Section 510 precludes an employment decision intended to affect groups 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.[86] In determining that Section 510 is applicable to plant closing decisions, the *USX* court[87] relied on *Nemeth v. Clark Equipment Co.*[88] In *Nemeth*, Clark Equipment Company ("Clark") was sued by eighteen former employees who had worked at Clark's Benton Harbor plant when the plant closed in 1983. 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.[89]

Clark first argued that Section 510 does not apply to plant closings and 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."[90] It would be incongruous to invalidate Section 510's protections whenever an employer experiences financial difficulty. Any other finding would reward an employer that promised its employees more expensive benefits than the employer could afford by permitting that employer to fire the employees at the very last moment to avoid paying the benefits. Such a result would be inconsistent with the Congressional goal of ensuring through ERISA that employees receive promised benefits and that benefit entitlements do not disrupt the employment relationship.

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."[91] Clark still prevailed in the suit because employee benefits constituted only 20% of the cost differential between the plants so Clark would have closed the Benton Harbor facility even if it did not consider employee benefit costs. The court considered this an adequate defense.[92]

Similarly, Continental Can faced lawsuits when it made employment and plant sourcing decisions based upon employee benefit costs. In the late 1970s, Continental Can had developed excess manufacturing capacity. Continental Can also faced significant plant closing benefit liabilities, especially for employees who were eligible for Rule of 70/75 pensions.[93] 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 "Lets Limit Employee Benefits."[94]

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 so Continental Can would not incur the plant closing benefit costs associated with their termination. Similarly, the BELL system identified employees who were close to becoming eligible for Rule of 70/75 benefits. Those employees were permanently laid off to prevent them from obtaining eligibility for the costly plant closing benefits.[95]

The resulting lawsuits included *Gavalik v. Continental Can Co.*,[96] *Jakub v. Continental Can Co.*,[97] and *McLendon v. Continental Can Co.*[98] *Gavalik* and *Jakub*

were later consolidated. After approximately ten years of litigation costing millions of dollars, *Gavalik* and *McLendon* settled in 1992 for $415 million.[99]

Prior to settlement, the Third Circuit Court of Appeals had determined in *Gavalik* that the BELL system, as utilized at Continental's Pittsburgh plant, did violate Section 510. However, the court found that Continental Can was entitled to try to prove a "same loss" defense. Continental Can had the burden of proving "same loss."[100] 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. The district court then conducted a test trial on the "same loss" defense which Continental Can lost with respect to its largest plant.[101] The Third Circuit affirmed *McLendon* but determined that Continental Can could retry the "same loss" defense for each plant.[102] An issue remained as to whether Continental Can could obtain individual trials on damages for each of the more than 5,000 plaintiffs.[103]

Some commentators have read the First Circuit's decision in *Aronson v. Servus Rubber Division of Chromalloy*[104] 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.[105] In *Aronson*, the employer partially terminated its pension plan in conjunction with the closing of a division. The affected employees alleged that the partial termination discriminated against them in violation of Section 510. The First Circuit rejected this contention and decided that when a plan is partially terminated based on an independent criteria such as the closing of a division for business reasons, there is no invidious intent and no violation of Section 510.[106]

Thus, both the commentators and the *Aronson* court focused on this question in the context of an employer's decision to terminate all or part of an employee benefit plan with respect to a group of employees. The courts consistently have held that, 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, there is no invidious intent, and the terminations comply with ERISA's requirements.[107]

C. *Economic, Interpretative, and Policy Considerations*

From an economic perspective, it may initially appear intolerable that employers not be permitted to 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"[108] of benefit rights. In accordance with this language, to establish a violation, plaintiffs must prove that their employer acted with the specific intent to interfere with benefits. This requirement has served as a significant limitation on lawsuits and defendant employers have been successful in obtaining summary judgment against such claims.[109] 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.

As noted above,[110] 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 should not be treated differently 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 employers are not required by law to sponsor private benefit plans. As a result, ERISA explicitly permits plan terminations.[111] In plan amendments and terminations, a number of mechanisms

protect against discrimination among employees. The I.R.C. limits an employer's ability to allow some employees to participate in a pension plan while denying other employees the right to participate.[112] In a partial termination or plan amendment, it is possible that only some plan participants will be affected; however, again ERISA and the I.R.C. 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.[113] Finally, to ensure that participants are treated fairly, ERISA sets forth detailed requirements for the actual process of a plan termination.[114]

On the other hand, the Studebaker plant closing 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. . . .'"[115] A plant closing simply 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 should not exempt the decision process from the reach of Section 510.

Furthermore, when an employer closes a certain plant because of the high employee benefit costs at that plant, in essence the employer is shifting the cost of the plant closing from the employer to the employees. This is especially true in cases like *Gavalik v. Continental Can, Co.*,[116] and *McLendon v. Continental Can, Co.*,[117] where the employer makes sourcing or plant closing decisions to avoid paying costly plant closing benefits.[118] Continental Can's actions were particularly egregious because Continental Can agreed with the United Steel Workers of America to plant closing benefits that were more favorable to Continental Can employees than past benefit plans. At the same time, Continental Can was utilizing the BELL system to limit the numbers of employees that could become entitled to plant closing benefits.

From an interpretative standpoint, there is some concern that applying Section 510 to limit the criteria that may be considered in a plant closing situation would represent a significant step in "federalizing the law of employee discharge."[119] ERISA contains a pre-emption provision that is recognized as being "conspicuous for its breadth."[120] Furthermore, the Supreme Court has decided that ERISA pre-empts a state wrongful termination claim when an employee alleges he is discharged in order to prevent him from vesting in his pension plan benefits.[121] However, such pre-emption only would apply in cases where the employer was motivated by an intent to interfere with benefits or to retaliate for the exercise of benefits. This leaves 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 enhance the benefits of certain employees. This is true because a number of plans provide for special, increased benefits in the instance of a plant closing. However, all employees do not qualify for such enhanced benefits. And as illustrated by *Pickering v. USX*,[122] employers may close plants earlier than they otherwise would in order to prevent employees from becoming eligible for enhanced benefits.[123] Also, while it may seem that fully vested employees do not suffer any harm with respect to their benefits in a plant closing, even those employees typically would benefit from earning additional accruals (and correspondingly higher benefits) during subsequent years of employment.[124] 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 looked at whether Section 510 applies to plant closing situations. The language of the statute is drafted in the singular, possibly indicating that the prohibitions of Section 510 should be limited to individually targeted actions. Similarly, the floor debates reflect a special Congressional concern with employment decisions directed at an individual employee in order to deny benefits to that employee.

On the other hand, the U.S. Code provides that the singular includes the plural unless the statute indicates otherwise, and similar discrimination provisions in Title VII have been interpreted as protecting groups of employees. 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. Furthermore, the Studebaker plant closing situation and the legislative history provide some indications that Congress intended Section 510 to protect against invidious decision making targeted against groups of employees.

Also, to date, the courts generally have applied Section 510 protections in plant closing cases. Economic, interpretative, and policy analysis supports the results in the case law. The specific intent requirement appropriately balances the prohibition on interference with 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 certain benefit rights are not protected by Section 510, that section would not prohibit an employer from considering the costs associated with the benefits when making a plant closing decision. For example, many times a plant closing automatically

will cause at least a partial plan termination under ERISA. Under ERISA, all pension plan participants become fully vested in their benefits when a plan termination occurs. As a result, plant closings often result in increased, not decreased, vesting costs. Given this outcome, employers are not closing plants in order to deny vested benefits. However, to the extent Section 510 protects other benefit rights, such as the right to enhanced benefits or the right to earn additional accruals, then 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.

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"), and (2) "for the purpose of interfering with the attainment of any right to which such participant may become entitled" (the "Interference Clause")[125] 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 vesting of benefits or whether its protections also extend to the accrual of benefits in pension plans. 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.[126] 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.[127] The Exercise Clause protects an employee if her employer constructively discharges her in retaliation for filing benefit claims.[128]

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"[129] the claimant for exercising ERISA rights.[130] In determining the existence of specific intent, the courts generally utilize the concepts developed under Title VII for shifting burdens of production and persuasion.[131] 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.[132]

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. 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. The Exercise Clause did not protect the employee from discharge because the discharge was based upon the state law claims, not the ERISA claims.[133]

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,[134] 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*,[135] that a prototypical Section 510 violation occurs when an employer terminates an employee shortly before the employee's pension benefits vest. Ingersoll-Rand had fired McClendon after nine years and eight months of employment. This was at a time when cliff vesting could be delayed until an employee completed ten years of service. McClendon sued under Texas state common law alleging that Ingersoll-Rand had terminated him to avoid pension costs.[136]

In a similar case, the employee in *Biggins v. Hazen Paper Co.*[137] successfully stated a claim under the Interference Clause when he was fired a few weeks before his pension benefit vested. And most 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.[138] 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.[139]

Thus, courts agree on the general parameters of the types of benefits protected by the Interference Clause. In contrast, the courts are divided on whether the Interference Clause protects 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.[140] The next subsection addresses the disagreement over protection for additional accruals.

2. *The Disagreement Over Protection for Vested Participants*

This subsection analyzes the controversy over whether Section 510's protections extend to a vested participant's right to earn additional benefit accruals, 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*,[141] 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.

a. *Disagreement in the Courts*

In *Donohue v. Custom Management Corp.*,[142] 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. For authority, the court looked to the statement in *West v. Butler*[143] 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*.'"[144] 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.[145]

Another case denying a vested plaintiff the opportunity to state a claim of interference with benefits is *Malone v. Gilman Paper Co.*[146] In *Malone*, the plaintiff alleged that his employer coerced him into retiring early at age 56. The employer's alleged purpose was to prevent the plaintiff from becoming entitled to larger benefits at age 62. 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.[147] 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.[148]

On the other hand, in the context of a plant closing, the court in *Nemeth v. Clark Equipment Co.*,[149] 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 protection under Section 510. In addition, many of the recent cases have extended the protections of the Interference Clause to the right of participants to earn future accruals. For example, in *Conkwright v. Westinghouse Elec. Corp.*,[150] Conkwright was laid off at age 60. He was fully vested in his pension benefits, having worked for Westinghouse for almost 20 years. 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. 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.[151]

Similarly, in *Clark v. Coats & Clark, Inc.*,[152] all five plaintiffs had been terminated as part of a reduction in force. 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. The Eleventh Circuit followed the reasoning in *Conkwright* and determined that "Congress

did not intend to leave employees unprotected once their rights were vested, . . ."[153] 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.[154]

Thus, the courts disagree on whether Section 510's Interference Clause protects the right to earn future accruals as well as the right to become vested in pension benefits. To begin the analysis of the arguments on both sides of this issue, the next section considers the statutory language of the Interference Clause.

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] . . . ."[155] 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.

On the other hand, those that believe Section 510 protects only unvested employees can point to the phrase "may become entitled." It is through vesting that benefits become nonforfeitable. As a result, once a participant is vested, that participant does become "entitled" to benefits. And 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 Section 510 protects the right to become vested, but nothing more.

However, such a narrow reading of the phrase "may become entitled" is inconsistent both with the theory of accruals and with the other protections ERISA

accords to accruals. 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 203[156] extensively regulates vesting, ERISA Section 204[157] sets forth equally comprehensive rules regarding accruals including intricate allocation formulas and a prohibition on reducing benefits once the benefits have accrued. Given the equivalent 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.

Furthermore, Section 510 protects 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 . . ."[158] Employees who are vested are entitled to receive a benefit. Therefore, they are participants for purposes 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.[159] 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., vesting only applies to pension benefits. Therefore, in order for rights under welfare benefit plans to receive any protection, the protections of Section 510 must extend to rights in addition to vesting. And once the protections extend beyond vesting it is logical to cover accruals.[160]

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 disagreement among the courts on protecting participants in accrual of benefits after becoming vested 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*,[161] 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.[162] Furthermore, the Interference Clause was not changed significantly during the legislative process.[163] 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"[164] through the use of economic weapons. There is no indication the legislature's concern was limited 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 . . . ."[165] The focus on complete protection indicates an intent that the Interference Clause help guarantee the general effectiveness of ERISA.

The same Senate report states: "The enforcement provisions have been designed specifically to provide . . . broad remedies for redressing or preventing violations of [ERISA] . . . ."[166] This statement adds weight to the argument that the Interference Clause provides broad protections. The *Conkwright* court believed this language indicates that Congress did not intend to limit the protections of the Interference Clause to vesting of benefits.[167]

Floor discussions also interpreted the scope of Section 510. Twice, Senator Hartke raised concerns about employment terminations meant to prevent the vesting of an employee's pension benefit. First, he referred to the ERISA provision permitting an employer to preclude an employee from pension plan eligibility and vesting prior to age 30.[168] 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 30th birthday.[169] Senator Javits replied that Section 510 was meant to provide a remedy in "precisely the areas" of concern to Senator Hartke.[170] The next day, Senator Hartke proposed the creation of administrative machinery to aid in the enforcement of Section 510 and raised another vesting example.[171]

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 . . . ."[172] 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 *Conkwright* court cited this reference to "any rights" in support of its conclusion that the Interference Clause protects the rights of participants to additional accruals.[173]

The final piece of legislative history that directly addresses Section 510 are 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* . . . ."[174] 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 benefits. As discussed above,[175] every plan must provide for accruals of benefits and ERISA

comprehensively regulates accruals. Thus, it is reasonable to include the right to continued benefits accruals among the rights protected from interference.

Senator Williams went on to discuss "fourteen basic rights" which were "at the heart of pension reform and provide much-needed and long-denied protections."[176] Vesting was one of the fourteen rights in this "Pension Bill of Rights," but among the other basic rights were fair eligibility standards for plan participation and standards to ensure that plans used reasonable criteria to calculate credit for time worked.[177] Both concepts are important in determining benefit accruals. The final basic right was entitled "Protection of Pension Rights Against Employer or Union Interference" and 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.[178]

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 latest of the time they reach age 25 or complete one year of service. Therefore, the term eligibility must cover more than just vesting. And so long as the phrase "attaining eligibility" extends beyond protection of the vesting process, it is logical to interpret the phrase as extending to accruals because, like vesting, accruals affect benefit entitlements. 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.

To summarize the legislative history, the floor debates of ERISA contain indications that Congress was especially concerned 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, indicates 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*[179] and *Malone*[180] both cited *West v. Butler*[181] as authority for their conclusion that the Interference Clause protects a participant's right to vesting, but not accrual, of benefits. In *Nemeth*,[182] 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. And to reach its decision that Section 510 protects a participant's right to future accruals, the court in *Conkwright*[183] 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. The CBAs required employers to contribute to pension and welfare funds ("SLU Funds") created under the Taft-Hartley Act.[184] The level of required contributions was tied directly to the tons of coal produced. Therefore, the production cutbacks caused a drop in employer contributions to the SLU funds.[185]

Trustees of the SLU Funds sued the picketers claiming their actions violated ERISA section 511 ("Section 511")[186] "by engaging in violent secondary picketing for the purpose of interfering with SLU miners' ERISA-protected rights."[187] 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. 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. In the end, the court determined the trustees had no right of action under Section 511 and decided the case as though the claim was based upon Section 510.[188]

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 . . . ."[189] The court cited the floor debate where Senator Hartke expressed his concern that employers would discharge employees on the eve of vesting in order to minimize benefit costs. The final piece of legislative history cited was Senator Javits's reliance on Section 510's protections to allay Senator Hartke's concerns. 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*."[190] This is the statement relied upon by the *Donohue* and *Malone* courts 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."[191] 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 this standard because the secondary pickets could not interfere directly with the employment relationship.[192]

Therefore, the critical factor to the court was the extent to which the alleged action interfered with the employment relationship. 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. Thus, the

West court believed Congress's primary concern was with the specific problem of discharging or harassing employees to avoid benefit costs.

While the *West* court referred to vesting of benefits, arguably it did so because that is 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 the narrow reading to the extreme, it could be noted that, at the time of the floor debates, ERISA permitted employers to delay vesting until the employee attained age 30. The age limitation enacted was 25 and later was amended to age 21. However, the examples in the legislative history provide that Section 510 prohibits terminations as a participant approaches age 30. It would be absurd to infer from this legislative history that a participant is not entitled to protection under Section 510 until almost age 30. Yet the argument is not dissimilar to the argument that Section 510 protects only vested benefits because of the examples in the legislative history.

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. The court did not cite, let alone 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 . . . ."[193]; 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.[194] Although these three portions of the legislative history should be accorded 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 an interference with the employment relationship and not the issue of whether a vested plaintiff is protected.

In addition, the underlying concern of the SLU trustees was the reduction in employer *contributions*. The level of contributions in no way affects whether benefits vest in the type of plan at issue; instead, contribution levels affect only the rate of benefit accruals. 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. 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.[195]

e. *Implications for Employers and Vested Participants*

The language of the Interference Clause is broad enough to protect the attainment of rights other than vesting. In fact, the language of the Interference Clause implies that its protections extend to more than vesting. Furthermore, the legislative history indicates that Congress was concerned about protecting all rights granted in ERISA including, but not limited to, vesting. Finally, many courts have misinterpreted the language in *West v. Butler*, which refers to Section 510's protection of vested benefits. Like the legislative history, that language simply used vesting as a prototypical example of interference with benefits. Therefore, Section 510 protects employees from interference with their right to earn benefit accruals.

This reading of the Interference Clause 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. An employer could simply vest employees in their benefits shortly after hiring.[196] This would cost the employer little because, under most plans, the value of a new employee's accrued benefit would be minimal. However, if the right to earn accruals were not protected, an employee who was fired to prohibit him from earning a larger pension benefit would have no claim under Section 510 because he was already vested.[197]

Similarly, a number of courts have recognized the incongruity of according vested participants less protection than unvested participants.[198] And protecting participants' rights to earn accruals comports with the courts' historic practice of protecting participants' rights to become eligible for enhanced levels of benefits such as Continental Can's Rule of 70/75 program. As a technical manner, ERISA does not impose any special vesting requirements on those enhanced benefit programs. Therefore, Section 510's protection of the right to earn additional accruals is consistent with its protection of the right to earn enhanced benefits.[199]

This does not mean, though, that every termination of employment and plant closing violates Section 510 just because the discharge has the effect of denying the former employee the right to earn additional benefit accruals. Section 510 only protects the employment relationship from specific acts taken for the purpose of interfering with a participant's attainment of a benefit right. As indicated above,[200] 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. 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.*[201] the court *sua sponte* determined that "a long line of cases" concludes that Section 510 does not protect vested benefits. 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 him from qualifying for [the larger benefits he would receive if he had retired at age 65] . . . . *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.[202]

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 is appropriate to 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 application of Section 510 to vested plaintiffs apparently arises from the statement that the termination of employment has only an incidental effect on benefits. First, the statement often is incorrect because accruals in the final years of employment typically have a significant effect on benefits in a defined benefit plan. Second, even if the effect on benefits is only incidental, Section 510 prohibits interference with "the attainment of any right,"[203] not just with the attainment of substantial rights. Some courts have committed essentially the same error when they determine 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.[204] Again, this is important in determining whether the employee has proven the necessary malevolent 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 are discharged just prior to vesting, a prototypical Section 510 situation,[205] the proximity in time alone provides important evidence of prohibited intent on the part of the employer.[206] However, where vested employees claim interference with their right to earn additional accruals, the discharge alone does not help prove prohibited employer conduct.[207] 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.[208]

In sum, the protections of Section 510 extend to the right to accrue benefits as well as to the right to vest in benefits. However, in each case the employee must show specific intent. The difference is in the type of evidence the employee may rely upon to prove the 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 Section 510 protects the right to earn additional accruals as well as the right to become vested and concluded that accruals are entitled to protection. This section briefly analyzes the application of Section 510 to welfare benefits in order to ensure consistency with the protections accorded to pension benefits.

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 Elec. Co.*[209] Kross brought a class action lawsuit resulting from a substantial reduction in workforce at Western Electric's Hawthorne Works facility.[210] 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 since he participated in those plans when discharged.[211] 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.[212] Likewise, an employer may not fire an employee to prevent that employee from taking part in the employer's health care plan.[213] 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.[214]

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.*,[215] 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 impermissably targeting McGann because the reduction applied to all employees who might file AIDs-related claims.[216] The court distinguished *Vogel v. Independence Federal Sav. Bank*,[217] where the employer impermissably excluded only Vogel from coverage under its health insurance plan. 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.[218]

These applications of Section 510 in the welfare benefit plan context are consistent with Section 510's application, discussed above,[219] 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 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 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. 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, Section 510 is violated only where the employer closes a plant with the specific intent to interfere with 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 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*.[220]

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

As recognized by the court in *Levi Strauss & Co.*,[221] to state a valid Section 510 claim, a plaintiff "must show the employer had the 'specific intent to violate ERISA.'" However, because direct -- or "smoking gun" -- evidence frequently is not available to prove a Section 510 claim, a plaintiff 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 Dep't of Community Affairs v. Burdine*[222] and *McDonnell Douglas Corp. v. Green*[223] for Title VII disparate treatment cases.[224]

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. Once the plaintiff successfully establishes a prima facie case, the plaintiff receives a presumption that the defendant discriminated against the plaintiff. Also, the defendant then bears the burden of producing evidence of a "legitimate, nondiscriminatory reason"[225] for the defendant's action. Production of such evidence by the defendant eliminates the presumption in favor of the plaintiff. The plaintiff next has an opportunity to prove the defendant's asserted reason was not the actual motivation for the challenged employment decision. Here the plaintiff's burden of proof "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination."[226]

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. First, the plaintiff must belong to a protected class. Second, the plaintiff must have applied and been qualified for the job opening sought to be filled by the defendant. Third, the defendant must have rejected the plaintiff. Fourth, the defendant must have continued to solicit applications from individuals with similar qualifications for the same job for which the plaintiff applied.[227] 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.[228] In fact, a number of different elements have emerged depending on the nature of the Title VII case.[229]

In *St. Mary's Honor Center v. Hicks*,[230] the Supreme Court clarified[231] 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. One of the key phrases at issue was the "merger" language from *Burdine*, which is quoted above.[232] 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, . . ."[233] This decision has spawned significant criticism[234] and legislation has been introduced to counteract the holding.[235]

Finally, a Title VII plaintiff may raise a so-called "mixed motive"[236] claim. 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*[237] 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.[238] Thus, the burden of *persuasion*, instead of simply the burden of production, shifted to the defendant. The Civil Rights Act of 1991[239] ("CRA") essentially reinstituted the standard of proof that existed in the case law prior to *Price Waterhouse*. Under the CRA, a violation of Title VII is established whenever the plaintiff proves that a prohibited criteria was "a motivating factor."[240]

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. However, the nature of the prima facie case in a Section 510 action has been refined over recent years. Initially, intent appeared as an element of the prima facie case.[241] 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 the basis for the decision was a prohibited intent.[242]

Alternatively, 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*,[243] the employer argued that even if a prohibited 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.[244]

In contrast, the courts in *Gavalik*[245] and *McLendon*,[246] 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.'"[247] 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 the Third Circuit permits the employer to defend by proving that it would have taken the same action even in the absence of the prohibited motive.[248]

Thus, 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 uniformity will be achieved in the near future through litigation. However, additional statutory refinement of ERISA became far more likely after the unpopular 1993 Supreme Court decision in *Mertens v. Hewitt Associates*[249] discussed in the next section.

B. *Remedies*

Traditionally a wide variety of remedies have been available in successful Section 510 actions. However, in 1993 the Supreme Court unexpectedly narrowed the scope of relief available under the relevant remedial provision of ERISA. This section reviews the relevant statutory provision and its historical application before turning to a discussion of the decision in *Mertens v. Hewitt Associates*.[250] The section ends with a brief discussion of the post-*Mertens* outlook for ERISA remedies.

Even if a group of plaintiffs successfully challenges an employer's plant closing decision, currently the plaintiffs' remedies are limited. While Section 510 prohibits interference with an employee's benefits and retaliation against an employee who files a benefit claim, enforcement of these prohibitions occurs under ERISA Section 502 ("Section 502")[251] which contains ERISA's general enforcement provisions. Section 502 was carefully drafted to provide a variety of remedies, depending on the nature of the claim being raised and the status of the party bringing the claim.[252]

According to Section 502(a)(3),[253] 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 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; . . .[254]

The major interpretative question concerns the phrase "to obtain other appropriate equitable relief."[255] Early commentators on Section 510 relied on 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 one

commentator even recommended punitive awards.[256] Courts did permit a variety of remedies.

However, in *Mertens v. Hewitt Associates*,[257] the Supreme Court determined that only traditional equitable remedies are available under ERISA Section 502(a)(3).[258] Pension plan participants sued Hewitt Associates after their employer phased out its steel operations, leaving an underfunded pension plan that could not provide promised benefits.[259] The participants believed that Hewitt, as actuary to the plan, participated in a breach of the employer's fiduciary duty by permitting the employer to select the actuarial assumptions for the plan and by failing to disclose either the funding deficiency or that the employer was a client of Hewitt.[260] The Court rejected the participants' request for monetary relief under Section 502(a)(3), deciding that "equitable relief," as used in that section, permits only awards of "categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[261]

The lower courts are still struggling with the full import of *Mertens* and its limitations on available remedies. For example, prior to *Mertens*, a number of courts permitted plaintiffs to recover monetary damages from an ERISA plan or from an employer on the theory of equitable estoppel.[262] However, in *Watkins v. Westinghouse Hanford Co.*,[263] the Ninth Circuit Court of Appeals decided that *Mertens* required reversal of the lower court's equitable estoppel award against Westinghouse Hanford Co. According to the Ninth Circuit, after *Mertens* the key is "the substance of the remedy sought (i.e., injunction versus damages) rather than the label placed on that remedy."[264] On that basis, the Ninth Circuit Court denied the petitioner's request for monetary relief through equitable estoppel.[265] In comparison, even after *Mertens*, the Seventh Circuit has indicated that monetary relief may be awarded under Section 502(a)(3) through a constructive trust.[266] The courts are likely to struggle with similar questions for some time to come.

The current limitation on remedies affects the strategy and dynamics of plant closing law suits under Section 510. Plaintiffs are forced to seek injunctive relief very early in the process in an attempt to avoid a plant closing. On the other hand, if an employer succeeds in closing a plant, the plan participants may be left without any realistic remedy, even if they have a valid Section 510 claim.[267] Therefore, in the absence of a legislative amendment or reversal of *Mertens*, the real battles with respect to Section 510 plant closing cases will be fought at the time the employer announces the closing, or the cases may become moot.

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, plant closing decisions made in reliance exclusively on employee benefit costs violate Section 510 of ERISA.

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 in a plant closing situation. This Article concludes that, while it should apply, every plant closing decision does not violate Section 510 simply because the decision affects employee benefits or even because it results in a cost savings to the employer. Instead, a violation occurs only if the employer closed the plant with the specific intent to interfere with employee benefits.

However, this is not the end of the inquiry. The next question becomes, what type of benefits does Section 510 protect? This is a question that has caused considerable controversy in the courts. However, this Article concludes that the disagreement is based

in large part on a misreading of early case law and a failure to distinguish between Section 510's scope and the separate need to prove specific intent. The Article concludes that Section 510 protects a vested participant's right to accrue additional benefits as well as an unvested participant's right to become vested. Thus, employers may not close plants for the purpose of avoiding the costs of benefit accruals or vesting.

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 are beginning to break down as Congress has modified Title VII but has left Section 510 untouched. Another area currently open to some doubt is the extent of remedies available to address a Section 510 violation. The courts currently are struggling with the import of the Supreme Court's 1993 opinion in *Mertens v. Hewitt Associates*[268] which decided that relief is limited to traditional equitable remedies.

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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 50-51. 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's "Magic Number" plan, and Clark Equipment Company's "30 and out" and "85 point" systems are discussed *infra* at notes 65 and 93 and accompanying text.

2. Eric Reguly, *Corporate Downsizing Continues Apace*, THE FIN. POST, July 14, 1993, § 1, at 5; *U.S. Companies Take Hatchet to Jobs Again*, LOS ANGELES TIMES, July 9, 1993, at D3.

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., 1994 U.S. App. LEXIS 3701 (3d Cir. Mar. 3, 1994); U.A.W. v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); Sprague v. General Motors Corp., 1994 U.S. Dist. LEXIS 977 (E.D. Mich. Feb. 2, 1994); *infra* note 53 and accompanying text.

5. *See, e.g.*, McGann v. H & H Music Co., 946 F.2d 401 (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' District 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 38-40.

7. *Small Firms Lead Exit from Defined Benefit Pension Plans According to Enrolled Actuaries*, 5 Benefits Coordinator (WGL) No. 13, ¶ 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 at note 74 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).

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 74 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.*, Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09 (1988); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1988 & Supp. IV 1992).

13. Similar considerations apply to sourcing and other production decisions. See *infra* text accompanying notes 93-103 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 Economic Comm.*, 89th Cong., 2nd 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., 1991).

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." Fassar, *The New Pension Law*, 28 PROC. N.Y.U. CONF. ON LAB. 59 (1975).

22. 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.C.A.N. 4639, 4640.

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

24. ERISA §§ 101-11, 29 U.S.C. §§ 1021-31 (1988 & Supp. IV 1992).

25. ERISA §§ 201-11, 29 U.S.C. §§ 1051-61 (1988 & Supp. IV 1992).

26. ERISA §§ 301-08, 29 U.S.C. §§ 1081-86 (1988 & Supp. IV 1992).

27. ERISA §§ 401-14, 29 U.S.C. §§ 1101-14 (1988 & Supp. IV 1992).

28. ERISA §§ 501-15, 29 U.S.C. §§ 1131-45 (1988 & Supp. IV 1992).

29. ERISA §§ 601-08, 29 U.S.C. §§ 1161-68 (1988 & Supp. IV 1992).

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, 444-6 (1987).

32. ERISA §§ 3001-43, 29 U.S.C. §§ 1201-42 (1988 & Supp. IV 1992).

33. The original designation of agency authority was revised by Reorganization Plan No. 4. Reorganization Plan 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 relatively 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).

39. *See, e.g.*, the discussion of Continental Can's Rule of 70/75 benefits *infra* at note 93.

40. 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).

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

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

43. *See, e.g.*, ERISA §§ 101-11, 401-14, 29 U.S.C. §§ 1021-31, 1101-14 (1988 & Supp. IV 1992).

44. *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 proposed national health care legislation.

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

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

47. 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).

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

49. 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.

50. This is sometimes known as a unit benefit formula. The major alternative way of calculating benefits is known as a flat benefit formula. *See* LANGBEIN & WOLK, *supra* note 18, at 42.

51. *See* R. IPPOLITO, *supra*, note 40, 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 the intricacies of accrual requirements are not germane to the topic of this Article. *See* I.R.C. § 411(b) (1988); 1 GARY BOREN, QUALIFIED DEFERRED COMPENSATION PLANS §§ 3:22, 3:27 (Norman P. Stein & Carolyn E. Smith eds., 1992). 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 (1989).

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

53. 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 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.*, Sprague v. General

Motors Corp., 1994 U.S. Dist. LEXIS 977 (E.D. Mich. Feb. 2, 1994); Steven J. Sacher & Evan Miller, *The Obligation to Provide Postretirement Welfare Benefits -- The Evolving Case Law*, 4 THE LAB. LAW. 735 (1988). The Third Circuit further limited employer's rights in Schoonejongen v. Curtiss-Wright Corporation, 1994 U.S. App. LEXIS 3701, at *17-18 (3d Cir. Mar. 3, 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). Again, national health care legislation could make dramatic changes to the law in this area.

54. 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.

55. 986 F.2d 970 (5th Cir. 1993).

56. *Id.* at 973.

57. ERISA § 510, 29 U.S.C. § 1140 (1988). See *infra* text accompanying note 74 for the relevant portion of § 510.

58. 986 F.2d at 979-80.

59. *Id.* at 980-81.

60. *Id.* at 980-81.

61. 809 F. Supp. 1501 (D. Utah 1992). Other claims at issue 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. The plaintiffs won on the first allegation but lost on the remaining two claims.

62. The classifications of employees were defined for purposes of the case to distinguish among the various types of plaintiffs. *Id.* at 1511-12.

63. *Id.* at 1546.

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

65. *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. 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 1548-49.

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

67. 809 F. Supp. at 1548.

68. *Id.* at 1550-51. According to St. Mary's Honor Center 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 preferred 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.

69. 809 F. Supp. at 1548.

70. *Id.* at 1552.

71. *Id.*

72. *See, e.g.*, Pickering v. USX Corp., 809 F. Supp. 1501, 1548 (D. Utah 1992).

73. 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 THE LAB. LAW. 603, 605 (1993).

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

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

76. 1 U.S.C. § 1 (1982).

77. 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 employment, because of such individual's race, color, religion, sex, or national origin; . . . .

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

79. Disparate treatment class actions and disparate impact cases are examples of such recognized claims. *See* BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 187-89, 194-96 (N. Thompson ed. 2nd ed. 1987-89 Supp.).

80. See *supra* note 77 for the relevant language of Title VII.

81. Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan, 854 F.2d 1516, 1537 (3d Cir. 1988) (Mansmann, J., concurring and dissenting), *cert. denied*, 490 U.S. 1105 (1989).

82. 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams).

83. *Id.* at 29,935; see *infra* text at notes 176-178 for a more detailed discussion of this portion of the legislative history.

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

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

86. *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 Empl. Ben. Cas. (BNA) 1551, 1557-58 (N.D. Ind. 1991) (plaintiff's 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. 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." 646 F. Supp. 769, 779 n.6 (E.D. Mo. 1986), *aff'd per curiam*, 845 F.2d 1027 (8th Cir. 1988).

87. 809 F. Supp. at 1548.

88. 677 F. Supp. 899 (W.D. Mich. 1987).

89. Under the standard plan, workers who began receiving benefits prior to age 65 received benefits that were actuarially reduced. 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.* at 903.

90. *Id.* at 905.

91. *Id.* at 907.

92. *Id.* at 909; *see also* Deeming v. American Standard, Inc., 905 F.2d 1124, 1127 (7th Cir. 1990) (no violation of § 510 where employer closed plant due to increased competition and decreased demand, and not primarily to avoid benefit costs).

93. 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. 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. Continental later agreed to a plan even more favorable to laid off employees, that plan was known as the Rule of 65 plan. Gavalik v. Continental Can Co., 812 F.2d 834, 839 (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).

94. McLendon v. Continental Group, Inc., 908 F.2d 1171, 1175 n.4 (3d Cir. 1990), *later proceeding sub nom.* McLendon v. Continental Group, Inc., 802 F. Supp. 1216 (D.N.J. 1992).

95. *McLendon*, 908 F.2d at 1175.

96. 812 F.2d 834 (3d Cir. 1987). For a more detailed discussion of the *Gavalik* and *McLendon* cases, see CLARK, PENSIONS AND CORPORATE RESTRUCTURING IN AMERICAN INDUSTRY, 48-100 (1993).

97. No. 82-1995 (W.D. Pa. 1992).

98. 908 F.2d 1171 (3d Cir. 1990).

99. *McLendon*, 802 F. Supp. 1216, 1217, 1221 (D.N.J. 1992).

100. *Gavalik*, 812 F.2d at 863.

101. *McLendon*, 749 F. Supp. at 582.

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

103. *McLendon*, 802 F. Supp. 1216 (D.N.J. 1992).

104. 730 F.2d 12 (1st Cir. 1984).

105. *See* William C. Martucci & John L. Utz, *Unlawful Interference with Protected Rights Under ERISA*, 2 THE 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 IND. RELS. L.J. 319, 340 (1988) (stating that mass layoffs violate § 510 if undertaken with the goal of avoiding pension expenses).

106. 730 F.2d at 14-16.

107. 730 F.2d at 16; Owens v. Storehouse, Inc., 984 F.2d 394, 398-99 (11th Cir. 1993) (modification of an ERISA welfare benefit plan); Seaman v. Arvida Realty Sales, 985 F.2d 543, 545 (11th Cir. 1993) (distinguishing termination of employment from modification or termination of an ERISA welfare benefit plan), *cert. denied*, 114 S. Ct. 308 (1993); McGann v. H & H Music Co., 946 F.2d 401, 403-05 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992) (similar analysis with respect to modification of an ERISA welfare benefit plan). See *infra* text accompanying notes 111-14 for a further discussion of plan terminations.

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

109. *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).

110. *See supra* text accompanying note 107.

111. *See, e.g.*, ERISA § 4041, 29 U.S.C. § 1321 (1988 & Supp. IV 1992).

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

113. *Id.*

114. *See, e.g.*, ERISA §§ 4041-48, 29 U.S.C. §§ 1321-48 (1988 & Supp. IV 1992).

115. 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).

116. Gavalik v. Continental Can Co., 812 F.2d 834 (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).

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

118. CLARK, *supra* note 96, 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).

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

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

121. Ingersoll-Rand v. McClendon, 498 U.S. 133, 145 (1990). See *infra* text accompanying notes 135-36 for a discussion of *Ingersoll-Rand.*

122. 809 F. Supp. 1501 (D. Utah 1992).

123. On the other hand, an employer also violates § 510 if the employer transfers an employee who is eligible for plant closing benefits to another plant without giving the employee the usual opportunity to decline the transfer. Eret v. Continental Holding Inc., 1993 U.S. Dist. LEXIS 10537, *16 (N.D. Ill. July 30, 1993).

124. 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 injury in a plant closing situation.

125. ERISA § 510, 29 U.S.C. § 1140 (1988); see *supra* text accompanying note 74 for the complete language of the relevant portion of § 510.

126. Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 825 (7th Cir. 1984). See *infra* text accompanying note 133 for a discussion of Bittner.

127. 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.).

128. 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).

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

130. *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).

131. *See infra* Part IV.

132. McGann 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 *McGann*, see *infra* text accompanying notes 215-18.

133. Bittner v. Sadoff & Rudoy Indus, 728 F.2d 820, 825-26 (7th Cir. 1984).

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

135. 498 U.S. 133, 143 (1990).

136. *Id.* at 135-36. Actually, because of I.R.S. regulations that apply to terminated employees, 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.

137. 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).

138. *See, e.g.*, Dister v. Continental Group, Inc., 859 F.2d 1108, 1110-11 (2nd 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 and Chem. Corp., 608 F. Supp. 1315, 1318-19 (D.C. 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 203-208.

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

140. *See supra* note 51 and accompanying text.

141. 621 F.2d 240 (6th Cir. 1980)

142. 634 F. Supp. 1190, 1197 (W.D. Pa. 1986).

143. 621 F.2d 240 (6th Cir. 1980). For discussion of *West*, see *infra* Part III.B.2.d.

144. 634 F. Supp. at 1197 (quoting West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980)) (emphasis added).

145. 634 F. Supp. at 1197. 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 200-208 for a discussion of the specific intent requirement.

146. 737 F. Supp. 88 (S.D. Ga.), *aff'd without op.*, 921 F.2d 285 (11th Cir. 1980); *see also* 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 op.*, 845 F.2d 1027 (8th Cir. 1988); Weir v. Litton Bionetics, Inc., 41 Fair Empl. Prac. Cas. (BNA) 1150, 1153 (D. Md. 1986), *later op.*, 43 Fair Empl. Prac. Cas. (BNA) 663 (D. Md. 1987) (it appears that Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 236 (4th Cir. 1991), implicitly overruled the holding in *Weir*); Baker v. Kaiser Aluminum & Chem. Corp., 608 F. Supp. 1315, 1319 (N.D. Cal. 1984).

147. *See supra* text accompanying note 144.

148. 737 F. Supp. at 90.

149. 677 F. Supp. 899, 907-08 (W.D. Mich. 1987). See *supra* text accompanying notes 88-92 for a discussion of *Nemeth.*

150. 933 F.2d 231, 233 (4th Cir. 1991).

151. *Id.* at 236-39.

152. 990 F.2d 1217 (11th Cir. 1993); *see also* Marcoz v. Summa Corp., 801 P.2d 1346, 1352-53 (Nev. 1990); 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). 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]."

153. 990 F.2d at 1222.

154. *Id.* at 1226.

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

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

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

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

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

160. *See* Collingsworth, *supra* note 105, at 328-29.

161. 621 F.2d 240 (6th Cir. 1980).

162. *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).

163. 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).

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

165. *Id.* (emphasis added).

166. *Id.* at 4871.

167. 933 F.2d at 236-37.

168. 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)(i) (1988) (current age limitation of 21).

169. For an explanation of the costs associated with vested benefits, see IPPOLITO, *supra* note 40, at 36-42.

170. 119 CONG. REC. 30,043-44 (1973).

171. *Id.* at 30,374.

172. 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.

173. Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 236 (4th Cir. 1991).

174. 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams) (emphasis added).

175. *See supra* text accompanying note 46.

176. 120 CONG. REC. 29,935 (1974) (statement of Sen. Williams).

177. *Id.*

178. *Id.*

179. 634 F. Supp. 1190, 1197 (W.D. Pa. 1986). *See supra* text accompanying notes 142-45.

180. 737 F. Supp. 88, 90 (S.D. Ga.) (actually citing Corum v. Farm Credit Services, 628 F. Supp. 707, 717 (D. Minn. 1986) which quoted West), *aff'd without op.*, 921 F.2d 285 (11th Cir. 1990). *See supra* text accompanying notes 146-48.

181. 621 F.2d 240 (6th Cir. 1980).

182. 677 F. Supp. 899, 908 (W.D. Mich. 1987). *See supra* text accompanying note 149.

183. 933 F.2d 231, 237 (4th Cir. 1991). *See supra* text accompanying notes 150-51.

184. 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.

185. 621 F.2d at 242.

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

187. 621 F.2d at 242-43 (footnote omitted).

188. *Id.* at 243-44.

189. *Id.* at 245.

190. *Id.* (emphasis added).

191. *Id.* (emphasis added, footnote omitted). In reliance on this statement, most courts have decided that employer actions must affect the employment relationship in order for a claim to exist under ERISA § 510. *See, e.g.*, McGath v. Auto-Body North 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, Division of Chromalloy, 730 F.2d 12, 16 (1st Cir.) (indicating that, under certain circumstances, a plan termination could violate § 510), *cert. denied*, 469 U.S. 1017 (1984). 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).

192. 621 F.2d at 245-46.

193. 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams) (emphasis added).

194. *Id.* at 29,935 (statement of Sen. Williams).

195. *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 *Nemeth*).

196. ERISA's vesting requirements are *minimum* requirements; an employer may adopt a schedule that provides for vesting more quickly than ERISA's requirements. *See* ERISA § 203, 29 U.S.C. § 1053 (1988 & Supp. IV 1992).

197. Collingsworth, *supra* note 105, at 327.

198. 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).

199. However, 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 206-208.

200. *See supra* text accompanying note 58.

201. 737 F. Supp. 88, 89 (S.D. Ga.), *aff'd without op.*, 921 F.2d 285 (11th Cir. 1990).

202. 737 F. Supp. at 90 (quoting Baker v. Kaiser Aluminum and Chem. Corp., 608 F. Supp. 1315, 1318-19 (N.D. Cal. 1984)) (emphasis added).

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

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

205. *See supra* text accompanying notes 135-36.

206. Technically this evidence becomes important to the employee's prima facie case. See *infra* text accompanying note 242 for a brief discussion of the current requirements of a prima facie case.

207. *See, e.g.*, Titsch v. Reliance Group, 548 F. Supp. 983, 985 (S.D.N.Y. 1982).

208. *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 and Chem. Corp., 608 F. Supp. 1315, 1319 (D.C. Cal. 1984).

209. 701 F.2d 1238, 1243 (7th Cir. 1983).

210. *Id.* at 1239.

211. 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.

212. *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).

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

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

215. 946 F.2d 401, 403 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

216. *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 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); Greci, *supra*, note 191; James R. Bruner, Note, *AIDS and ERISA Preemption: The Double Threat*, 41 DUKE L.J. 1115(1992); T. J. Dorsey, Recent Developments, *McGann v. H & H Music Co.: The Limited Meaning of "Discrimination" Under Section 510 of ERISA*, 67 TUL. L. REV. 305 (1992).

217. 728 F. Supp. 1210, 1225 (D. Md. 1990).

218. 946 F.2d at 405-08.

219. *See supra* Parts III.A. and III.B.

220. 113 S. Ct. 2063 (1993).

221. 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 International, 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).

222. 450 U.S. 248, 252-56 (1981).

223. 411 U.S. 792 (1973).

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

225. 450 U.S. at 254.

226. *Id.* at 255-256. The quoted language was at the center of the dispute in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2752 (1993); *see infra* notes 230-33 and accompanying text.

227. 411 U.S. at 802.

228. *Id.* at 802 n.13.

229. *See, e.g.*, Roberts v. Gadsden Memorial Hosp., 835 F.2d 793, 796 *modified*, 850 F.2d 1549 (11th Cir. 1988) (discrimination in promotion); 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).

230. 113 S. Ct. 2742 (1993).

231. However, the court split 5 - 4 on the outcome. *Hicks* involved the demotion and later discharge of an African American correctional officer. Once the trier of fact decided that the defendants' stated reasons for the demotion and discharge were pretextual, the Eight Circuit determined that the plaintiff was entitled to win as a matter of law. 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. 113 S. Ct. at 2745-47.

232. *See supra* text accompanying note 226.

233. 113 S. Ct. at 2749.

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

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

236. In addition to mixed motive and disparate treatment cases, plaintiffs may bring claims under theories of disparate treatment class action or disparate impact. *See* SCHLEI & GROSSMAN, *supra* note 79, 187-89, 194-96.

237. 490 U.S. 228, 247 (1989).

238. *Id.* at 253.

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

240. 42 U.S.C. § 2000e-2(m) (1988 and 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 and Supp. IV 1992).

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

242. *See, e.g.*, Kapetanovich v. Rockwell International, Inc., 15 Employee Benefits Cas. (BNA) 2580, 2582-83 (1992).

243. Pickering v. USX Corp., 809 F. Supp. 1051, 1533 n.18 (D. Utah 1992).

244. 809 F. Supp. at 533 n.18.

245. Gavalik v. Continental Can Co., 812 F.2d 834 (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).

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

247. *Id.* at 1178 (quoting *Gavalik*, 812 F.2d at 866) (emphasis added by the *McLendon* court).

248. 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.

249. 113 S. Ct. 2063 (1993).

250. *Id.*

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

252. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146-47 (1985).

253. Section 502 also permits suits by participants or beneficiaries to: (i) force compliance with ERISA's reporting and disclosure requirements; (ii) recover, enforce, or clarify benefits due under the plan; and (iii) recover for a breach of fiduciary duty in conjunction with ERISA § 409. ERISA § 502(a), (c), 29 U.S.C. § 1132(a), (c) (1988 and Supp. IV 1992) (amended 1993). The remedies vary for these types of suits; however, none of these provisions apply to the type of plant closing situation discussed by this Article.

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

255. *Id.*

256. Collingsworth, *supra* note 105, at 348; *see also* Martucci & Utz, *supra* note 105, at 262-64; Vogel, *supra* note 105, at 1047, 1053-54.

257. 113 S. Ct. 2063, 2069-70 (1993).

258. The 5 - 4 decision in *Mertens* has generated a significant amount of negative commentary for its limitation on remedies. Since *Mertens*, the United States Department of Labor ("DOL") has lost a number of cases because of a lack of available relief. *See, e.g.*, Reich v. Compton, 834 F. Supp. 753 (E.D. Pa. 1993). The DOL is seeking enactment of a federal law to counteract *Mertens*. *Clinton Health Plan, Reversing Mertens Top DOL's Priority List, Official Says*, Pen. & Benef. Dly. (BNA) (Sept. 10, 1993). However, the only current piece of legislation proposed in response to *Mertens* would not expand remedies for plaintiffs in plant closing situations. S. 1312, 103rd Cong., 1st Sess. (1993).

259. 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, as a result, the benefits promised to them by the pension plan were substantially higher than the PBGC guarantees. *Mertens*, at 2065.

260. 113 S. Ct. at 2065.

261. *Id.* at 2068. Attorney fees and costs remain available, usually at the court's discretion, for actions under ERISA. ERISA § 502(g), 29 U.S.C. § 1132(g) (1988).

262. *See, e.g.*, Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1096 (9th Cir. 1985); *cf.* Greany v. Western Farm Bureau Life Insurance Co., 973 F.2d 812, 821 (9th Cir. 1992) (limiting equitable estoppel to situations where plan provisions are ambiguous and employees receive representations regarding plan interpretation).

263. 12 F.3d 1517 (9th Cir. 1993).

264. *Id.* at *31 n.5.

265. *Id.* at *33. The employer had notified the employee that his retirement benefit would be a certain amount and that the calculation would include certain years of service. After the employee retired, the employer discovered the plan did not permit inclusion of all of the years of service and reduced the former employee's pension accordingly.

266. Anweiler v. American Elec. Power Service Corp., 3 F.3d 986, 993 (7th Cir. 1993) (en banc).

267. A court order requiring an employer to grant additional years of credited service, as contemplated by the court in *USX*, smacks of compensatory relief. As such, that remedy would appear to be unavailable after *Mertens*. Also, at some point, it becomes impracticable to order the employer to reopen the plant.

268. 113 S. Ct. 2063 (1993).