ERISA Section 510—A Further Limitation on Arbitrary Discharges

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This Article explores the scope and coverage of ERISA's section 510, which makes it unlawful to discharge an employee if the discharge is done for the purpose of interfering with a benefit plan to which the employee "may become entitled." The primary issue explored is whether coverage extends to all employees covered by a benefit plan or whether the "may become entitled" language limits coverage to those employees whose rights to the benefit plan have not yet vested. If the former is true, then section 510 provides a significant limitation on employment-at-will, as a large number of employees would be added to those protected by statute against arbitrary discharge. After examining the language of the statute, the legislative history, and interpretive case law, the Article concludes that Congress intended to protect all employees covered by a benefit plan.

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INTRODUCTION

The law of employment-at-will\(^1\) continues to be dealt with inconsistently on the state level. On the federal level, however, Congress took a major step toward providing some uniform protection against arbitrary discharges. In passing section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"),\(^2\) which makes illegal any discharge done for the purpose of interfering with an employee's benefits,\(^3\) Congress enacted a very broad prohibition of arbitrary discharges. The unique feature of section 510, which sets it apart from other statutes which limit an employer's right to discharge at will,\(^4\) is that its coverage extends to a much larger group—all employees covered by a benefit plan.\(^5\)

Section 510 has been largely ignored. There is virtually no commentary addressing its scope and application,\(^6\) and while courts have applied the section in limited contexts,\(^7\) they have given very little attention to a systematic procedural formula to enforce section 510 or to the larger question of the section's effect on an employer's right to discharge at will.

This Article focuses on the larger question of whether courts can apply section 510 to limit an employer's ability to discharge employees at will. The Article first explores which employees section 510 covers. Determining the scope of coverage involves an interpretation of the literal reach of the section and an examination of legislative history, legislative policy, and the applicable case law. The discussion then shifts to the

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1. Employment-at-will refers to the doctrine that both an employer and an employee, in the absence of a contract, are free to terminate the employment relationship for any reason. *E.g.*, Henkel v. Educational Research Council of America, 45 Ohio 2d 249, 344 N.E.2d 118 (1976). Numerous exceptions have been developed for the rule, however, and the exceptions have largely been directed towards protecting employees from the more egregious forms of arbitrary dismissal. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 743-65 (2d ed. 1983).


3. Section 510 is quoted *infra* text accompanying note 10, and the scope of the provision is discussed in detail *infra* Part I, pp. 322-30.


5. Specific discussion of the employees covered by section 510 is contained *infra* Part I, pp. 323-30.


7. For a complete list of all section 510 decisions, see Vogel, *supra* note 6, at 1025-26 n.6.
cases that have attempted to provide a procedural framework for applying section 510, followed by a proposal for a more workable procedural model by analogy to procedural models utilized with other unlawful discharge statutes. Finally, this Article outlines the remedies that are, or ought to be, available to a successful plaintiff under section 510.8

I

EMPLOYEES PROTECTED BY THE ACT

A. Statutory Language

Any discussion of the interpretation of a statute must begin with the language itself.9 The relevant portion of section 510 provides:

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 subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. §§ 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter or the Welfare and Pension Plans Disclosure Act.10

The interpretative tasks are to identify the language which limits an employer's discretion in discharging an employee and to define the scope of that language.

Section 510 contains two major prohibitions of an employer's conduct. First, an employer may not take any adverse action against a "participant" or a "beneficiary" when either exercises a right "to which he

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8. This Article is limited to the effect of section 510 on employment-at-will, and will not discuss other possible violations that do not involve discharges, nor will it discuss procedural questions relating generally to litigation of claims under section 510.

11. Section 510 literally prohibits "any person" from engaging in the prohibited conduct, which would clearly include an employer. 29 U.S.C. § 1140.
12. A participant is defined by ERISA as an employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from
is entitled" under a benefit plan. This provision simply prevents an employer from retaliating against anyone for exercising their right to realize a benefit. While the provision would clearly limit an employer's right to discharge an employee in the limited retaliation situation, Congress provided much broader protection with the second proviso, which prohibits an employer from "discharg[ing], . . . suspend[ing], . . . disciplin[ing] or discriminat[ing] against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled [under a benefit plan]."

Both participants and beneficiaries have a right to sue under the express provisions of this second proviso, but the focus is on whether there is an "interference with" the participant's right. A participant is an "employee or former employee . . . who is or may become eligible to receive a benefit . . . from an employee benefit plan." Given the literal language, arguably every employee who is covered by a benefit plan, or who has an expectation of becoming eligible, has rights under section 510, which potentially extends coverage to an employer's entire work force if a comprehensive benefit plan has been provided. However, the courts, relying upon the statutory language and the legislative history, have differed in their interpretations of whether the scope of section 510 is as broad as its language suggests and what protections from discharge are created by the statute.

B. Interpretations of the Statutory Language

Given the broad literal reach of section 510, the crucial question is whether the potential of section 510 to limit an employer's ability to discharge employees at will will be realized. Since virtually all pensions

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an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.


13. A beneficiary is defined by ERISA as "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." 29 U.S.C. § 1002(8) (1982).

14. 29 U.S.C. § 1140. The benefits protected by § 1140 are listed in that section. See supra text accompanying note 10. Further, § 1002(3) defines an employee benefit plan as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3) (1982). These terms are more specifically defined in § 1002(1) (employee welfare benefit plan) and § 1002(2)(A) & (B) (pension plans and severance pay). See infra note 20.


16. 29 U.S.C. § 1002(7). The text of section 1002(7) is provided supra note 12.

17. There is disagreement in the cases over whether an employee whose rights have vested remains protected. See infra notes 28-68 and accompanying text.

18. Probationary employees excluded from a benefit plan, but who have an expectation of inclusion in the plan, are also covered. See Kross v. Western Elec. Co., 701 F.2d 1238, 1241-43 (7th Cir. 1983).
contained in benefit plans are based on age and years of service,19 and most other benefits are dependent upon continued employment,20 arguably any discharge of a covered employee would interfere with that employee’s benefits. A discharge would terminate any years-of-service formula and the pension could not increase; that is, but for the termination, the pension would have been larger. Also, any other benefits dependent upon continued employment would be terminated by a discharge.

If section 510 has this broad reach, then a violation would occur with every discharge of a covered employee and the employer would have to justify21 the discharge, thus preventing the application of the employment-at-will concept to a vast number of employees. As it necessarily affects an employee’s benefits, the employment relationship itself would be protected by section 510 to the extent that the employer could not terminate the relationship for the purpose of interfering with protected benefits.22

The courts are divided on whether to interpret section 510 in this way, and most of the courts have not engaged in any systematic analysis of the larger implications of their interpretations.23 All of the courts seem to agree that an employee who is discharged to prevent him from receiving a benefit to which he is not yet entitled is covered. This situation fits squarely within the statutory language since it is a discharge “for the purpose of interfering with the attainment of [a] right to which [the employee] may become entitled.”24 Some courts have limited section 510’s coverage to just this group of employees, reasoning that once a benefit is vested, a discharge does not “interfere” with the attainment of the benefit.25 However, the majority of the courts considering the question have recognized that a discharge of an employee necessarily inter-

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20. Benefits besides pensions that are protected by ERISA are numerous. For example, § 1002(1) defines “employee welfare benefit plan” and “welfare plan” as any plan set up to provide “medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.” 29 U.S.C. § 1002(1)(A) (1982). Typically, termination of an employee terminates the employee’s eligibility for these types of benefits. See, e.g., Folz v. Marriott Corp., 594 F. Supp. 1007, 1014-15 (W.D. Mo. 1984).

21. A discussion of the respective burdens of proof each of the parties would bear is contained infra Parts II.B-C, pp. 338-43.

22. E.g., UAW v. Park-Ohio Indus., 661 F. Supp. 1281 (N.D. Ohio 1987) (The court concluded that “it appears Congress designed § 510 primarily to protect the employment relationship that gives rise to an individual’s pension rights.” Id. at 1303.).

23. See infra notes 90-132 and accompanying text.


fers with a benefit dependent on years of service or continued employment, regardless of whether the right to the benefit is vested.\(^{26}\) These courts reason that an employee whose pension stops accumulating upon discharge or who loses a prior right to medical insurance benefits based on continued employment has lost a right to which he “may become entitled.” The precise point of disagreement between the courts seems to be whether ERISA protects only the right to the bare minimum of benefits available upon vesting or whether it protects benefits that naturally increase with years of service, consistent with the expectation that employees have when they commit to long-term employment.

In deciding whether employee rights under ERISA should be broadly or narrowly construed, the courts have recognized that ERISA is a remedial statute “coverage of which should be liberally construed, and exemptions from which should be confined to their narrow purpose.”\(^{27}\)

On the issue of whether the language of section 510 prevents the discharge of an employee who has already attained a benefit, the statutory language is not conclusive. It does, however, permit an interpretation that would cover all employees who are covered by a benefit plan, whether or not they are vested. The precise interpretative issue is whether “[a] right to which [a] participant may become entitled”\(^{28}\) includes a right that has already vested, but which will be terminated or will stop increasing once the employee is discharged. The language of the statute is future oriented, but the right to an increased pension based on continued employment and the right to insurance benefits that might be awarded in the future based on continued employment are both within the literal scope of the statute.\(^{29}\) Further, section 1002(7) defines a “participant” to include an employee “who is or may become eligible” to receive a benefit.\(^{30}\) This language adds further support to the position that section 510 covers an employee who already is eligible to receive benefits. The overall remedial scheme would make little sense if it broadly defined “participant” to include employees with vested benefits, only to have

\(^{26}\) E.g., Kross v. Western Elec. Co., 701 F.2d 1238 (7th Cir. 1983); Garry v. TRW, Inc., 603 F. Supp. 157 (N.D. Ohio 1985); see discussion of these decisions infra notes 36-43.


\(^{29}\) The court in Kross adopted this position in rejecting the argument that a terminated employee with vested rights did not lose any benefit to which he “may become entitled.” 701 F.2d at 1241-43; see also West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980) (the court stated that a primary purpose of § 510 was to prevent employers from depriving employees of vested pension rights); Folz, 594 F. Supp. at 1014-15 (termination unlawfully deprives employee of present right to future insurance benefits).

them left without a section 510 remedy once a discharge terminated those benefits.

The legislative history provides direct support for this construction. The conference report upon which ERISA was based included a bill of rights containing fourteen express goals of the pending bill to effect pension and benefit reform. Among those was:

Every employee is to have the right . . . to be free from interference with his pension benefits. This means that he cannot be discharged, fired, suspended, expelled or otherwise interfered with in order to prevent him from receiving pension benefits or attaining eligibility for pension benefits.31

A clear statement of the congressional policy underlying a statute is entitled to great weight.32 Other statements of legislative history provide additional support. For example, one Senate Report addressing the purpose for enacting section 510 stated:

[Section 510 was] added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectation of those rights were interfered with by the use of economic sanctions . . . . [Section 510 is] required to preclude this type of abuse from being carried out and in order to completely secure the rights and expectations brought into being by this landmark reform legislation.33

Commenting on this language, the Court of Appeals for the Sixth Circuit in West v. Butler34 concluded that “the legislative history reveals 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.”35

Adopting the West reasoning, the Court of Appeals for the Seventh Circuit held in Kross v. Western Electric Co.36 that an employee who lost his insurance benefits once he was discharged was covered by section 510. The defendant argued that since the plaintiff had been receiving insurance coverage before he was discharged, there was no right under section 510 to which he “may become entitled.”37 The court rejected this defense, stating it was

apparently based on the theory that once an employee qualified for participation in an insurance plan, the employee can attain no increased

32. See, e.g., 4 SUTHERLAND, STATUTORY CONSTRUCTION 154-61 (Sands ed. 1975).
34. 621 F.2d 240 (6th Cir. 1980).
35. Id. at 245 (emphasis added).
36. 701 F.2d 1238 (7th Cir. 1983).
37. Id. at 1242.
“right” under the particular insurance plan regardless of his period of uninterrupted employment with the particular company. The defendant cites no authority to support this novel theory, and our review of the case law and ERISA’s legislative history reveals no support for such a narrow reading of section 510.\textsuperscript{38}

The court added that to the extent the language of section 510 is future oriented, the future right is the right to receive payment for medical and dental expenses yet to be incurred.\textsuperscript{39}

After examining the language of the statute and the legislative history, the court concluded that the construction of section 510 urged by the defendant would create an anomalous result: a probationary employee who had not qualified for any company benefits would be protected from an improperly motivated discharge, while a senior employee who had been covered by the benefit plan for many years would not be protected. The court concluded:

Certainly, Congress did not enact ERISA with the intent to negate the long established practice of affording greater benefits and protections to those employees who have more seniority in time of service with the company than to junior employees.\textsuperscript{40}

Reaching the same result, the court in \textit{Garry v. TRW, Inc.},\textsuperscript{41} held that a discharged employee who had a vested pension right stated a claim under section 510 because the pension benefits were based on years of service and salary level. Thus, the discharge terminated the employee’s right to have his pension increase based on further service and salary increases. The court rejected the defendant’s argument that there was not an interference with any right to which plaintiff “may become entitled” under section 510 because he was fully vested. The court noted that plaintiff’s discharge prevented him from accruing additional benefits, even though he was paid all that he was entitled to when he was discharged.\textsuperscript{42} Other courts have agreed with this analysis,\textsuperscript{43} which appears to be consistent with congressional intent.

\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.} at 1241-43.
\textsuperscript{40} \textit{Id.} at 1243. A similar result was reached in \textit{Folz v. Marriott Corp.}, 594 F. Supp. 1007, 1014-15 (W.D. Mo. 1984), where the court held that Marriott’s discharge of plaintiff was accomplished for the illegal motive of terminating plaintiff’s insurance and medical benefits which he had a present right to claim.
\textsuperscript{41} 603 F. Supp. 157 (N.D. Ohio 1985).
\textsuperscript{42} \textit{Id.} at 161-62.
\textsuperscript{43} See, e.g., \textit{Citro v. TRW, Inc.}, 41 Fair Empl. Prac. Cas. (BNA) 391 (E.D. Ohio 1984) (even though plaintiff’s pension rights were fully vested when he was terminated, he could still recover under § 510 since the benefit levels were to increase based on years of service); \textit{Bumpers v. International Mill Servs., Inc.}, 595 F. Supp. 166 (E.D. Pa. 1984) (discharge that deprived plaintiff of maximum possible pension benefits was an adequate basis for claim under § 510, even though plaintiff was fully vested when discharged); \textit{Folz}, 594 F. Supp. 1007 (discharge of employee for purpose of terminating insurance benefits was a violation of § 510 even though plaintiff had a present right to the benefits when he was terminated).
Cases going the other way are based largely on the belief that section 510 was not meant to protect employment rights, and that a discharge of an employee with vested rights has only an incidental impact on the benefits. For example, in *Baker v. Kaiser Aluminum & Chemical Corp.*, the court dismissed plaintiff's section 510 action on summary judgment. Plaintiff was fully vested, but his discharge disqualified him from early retirement. After analyzing the merits of Kaiser's defense that plaintiff was discharged for cause, the court granted defendant's summary judgment, reasoning that 

"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 amount of work to be performed in the future."

The *Baker* court's reasoning can be criticized on several grounds. First, in completely dismissing the idea that section 510 protects the employment relationship, and concluding that any loss of benefits due to the discharge of a vested employee was incidental and not actionable, the court ignored the express language of the statute and the clear legislative history indicating that the very heart of congressional purpose was to protect employees from arbitrary discharges that had the effect of interfering with their benefits. To conclude, as the *Baker* court apparently did, that once an employee's benefit rights are vested he is no longer protected by section 510, subjects vested employees to all of the abuses that the drafters of section 510 sought to make illegal.

An additional problem with the *Baker* decision is that it apparently removes protection from vested employees regardless of the reason for their discharge. If an employer discharges an employee to save on in-

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44. 608 F. Supp. 1315 (N.D. Cal. 1984).
45. *Id.* at 1318-19.
46. *Id.* at 1319 (emphasis added).
47. See *supra* text accompanying notes 9-16 & 31-33.
48. See, e.g., *supra* text accompanying notes 31-33.
49. Under § 1053(a)(2) of ERISA, the longest period an employer can forestall vesting is 10 years, but there is no minimum set, so an employer could cause the employee's right to vest immediately. 29 U.S.C. § 1053(a)(2) (1982).
50. 608 F. Supp. at 1319.
urance costs or to avoid having the pension benefit increase, clearly the purpose of ERISA is frustrated. Labeling this an incidental effect and failing to hold the employer liable does not alter the unlawful purpose. As the statute requires, the focus should be on whether there was an unlawful purpose motivating the discharge.

Further, as the Kross court observed,\(^5\) it would be completely incongruous with the goals of ERISA if employers could arbitrarily discharge senior, vested employees because their rights are vested, but not probationary employees because their rights are not vested.

The problems with the Baker court's reasoning are illustrated by an examination of the holding. The court found that the discharged employee was entitled to receive only those pension benefits he had accumulated up to the date of his discharge. However, the court did not examine the issue closely enough to determine whether the discharged employee would lose any right to increase his pension. If his actual benefit was not affected in any way, then clearly ERISA would not be violated since the only loss would be the right to collect future wages, an effect that is incidental and not protected. However, as the Kross\(^5\) and Garry\(^5\) decisions both point out, if an employee's pension benefit increases with continued service, then a discharge clearly interferes with the right to those future benefits, regardless of whether the employee receives the entire benefit he earned up to the time of the discharge. For example, imagine that the employee in Baker had just met the minimum vesting requirements and was entitled to a pension of $100 per month upon reaching age sixty, and that by working an additional ten years he would get $400 per month. By discharging the employee, Kaiser would then have interfered with his expectation just as directly as it would have if it had discharged before vesting an employee who would get nothing at age sixty rather than the minimum $100.

Finally, the broad sweep of the Baker decision ignores the fact that by excluding vested employees from coverage, those employees covered by insurance or other benefits dependent upon continued employment would lose completely their right to continued coverage, regardless of what had been awarded in the past. Thus, to say that because the right to a pension is vested there is no interference with the benefits accumulated as of the date of the discharge, ignores the effect on other benefits which are directly tied to continued employment.

Section 510 protects a broad range of "rights" from interference, including any right under an "employee benefit plan,"\(^5\) a phrase which

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51. See supra text accompanying note 40.
52. See supra text accompanying notes 36-39.
53. See supra text accompanying notes 41-42.
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includes an employee benefit welfare plan and an employee pension benefit plan. The former includes any plan to provide "medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits." These benefits are on an equal footing with pension benefits, and in most cases termination of employment terminates the right to these benefits. Regardless of what benefits were awarded in the past and regardless of whether the employee was vested, termination interferes with the right to receive the benefits in the future.

The only other decision which expressly holds that an employee with vested benefits is not protected is Corum v. Farm Credit Services. There the plaintiff was discharged short of the time necessary to receive early retirement benefits, but his basic pension rights were vested. The court, expressly relying on Baker, held that "[s]ince plaintiff's pension rights were vested, he cannot maintain that defendant fired him in order to prevent [him] from obtaining vested pension rights." The court rejected plaintiff's argument that continued employment would have entitled him to accrue additional benefits, and dismissed the effect on future benefits as "incidental," noting that such an impact "would result from any discharge."

The Corum decision is obviously subject to the same criticisms as the Baker decision. However, Corum invites further analysis because the court denied that section 510 should have any role at all in protecting employment rights. While certain questions concerning congressional intent in passing section 510 may remain, there seems little doubt that Congress's aim was to protect employees from being discharged by employers seeking to avoid or reduce their pension and benefits costs. The legislative history makes clear that an employee "cannot be discharged ... to prevent him from receiving pension benefits or attaining eligibility for pension benefits."

Considering the broad language of section 510, the remedial purpose of the statute, the clear expressions of congressional intent, and the great

55. See supra note 14.
58. See supra text accompanying notes 37-39, which addresses this precise point.
60. Id. at 717.
61. Id.
62. Id. at 718.
64. See supra text accompanying notes 47-58.
66. See supra text accompanying notes 31-33.
67. LEGISLATIVE HISTORY, supra note 31, at 4753.
weight of authority, ERISA's section 510 should extend to all employees covered by an employee benefit plan, whether or not the employee's rights are vested. As one court succinctly put it, section 510 "was designed primarily to protect employment relationships that give rise to an individual's rights under an employment benefit plan."68

II
THE FRAMEWORK FOR ESTABLISHING A SECTION 510 VIOLATION

While various statutes69 restrict an employer's ability to discharge an employee at will,70 most of them apply to a specific group of employees that share a particular characteristic and make it unlawful to discharge an employee because of that characteristic.71 The most common examples are Title VII of the Civil Rights Act of 1964,72 which prohibits discharges based on "race, sex, religion or national origin"73; the Age Discrimination in Employment Act of 1967,74 which prohibits discharging employees over forty because of their age75; and the National Labor Relations Act of 1935,76 which, among other things, prohibits an employer from discharging employees who engage in union organizing.77 Further protection is provided by collective bargaining agreements which often have a provision requiring an employer to demonstrate "just cause"78 for all discharges, but less than half of all employees covered by a pension plan have the protection of a collective bargaining agreement.79

If the interpretation of the Kross80 line of cases is applied to section 510, this would expand tremendously the number of employees who can receive protection from arbitrary discharges. Congressional intent81 and the great weight of authority support this position,82 which is a sufficient justification for its application without regard to the obvious social utility of this result.

69. See supra note 4 and accompanying text.
70. See supra note 1.
71. See supra note 4 and accompanying text.
73. Id. § 2000e-2(a)(1).
75. Id. § 631(a).
77. Id. § 158(a)(3).
79. Legislative History, supra note 31, at 1774-75.
80. See supra text accompanying notes 36-40.
81. See supra text accompanying notes 31-33.
82. See supra text accompanying notes 34-66 for a discussion of the cases interpreting § 510's coverage.
Assuming that all employees covered by a benefit plan are covered by section 510, the task remains to identify the necessary steps to establish a violation. The basic framework in discharge cases has three elements. First, the plaintiff bears the initial burden of establishing a prima facie case.\(^8\) Next, the burden shifts to the defendant to give reasons for the discharge.\(^4\) Finally, if the defendant meets its burden, then the plaintiff has an opportunity to establish pretext.\(^5\)

The remainder of this Part examines the three elements of this framework. The analysis includes a discussion of the section 510 cases that have attempted to develop a systematic procedure for establishing a violation. Each Section will analogize to the procedures set forth in *McDonnell Douglas Corp. v. Green*\(^6\) to establish a violation of Title VII of the Civil Rights Act of 1964,\(^7\) and the similar procedure utilized in establishing violations of section 8(a)(3) of the National Labor Relations Act.\(^8\) A model procedural standard will be recommended for each step of the analysis.

### A. The Employee's Prima Facie Case

Few section 510 cases discuss the plaintiff's burden in establishing a prima facie case for wrongful discharge under ERISA. Cases under Title VII, NLRA and the Age Discrimination and Employment Act of 1967\(^9\) have developed standards for a prima facie case, and they are practically identical. This is because the main concern for the courts is the same in these different types of cases. A plaintiff would face a heavy burden if she had to establish actual intent by the employer to discharge for an illegal purpose, given that the employer controls the evidence relevant to intent. To ameliorate this burden, courts have allowed the fact-finder to infer an illegal intent when the plaintiff eliminates the most likely reasons for her discharge. This concern applies equally to section 510 cases, and the construction of a systematic procedural framework would be greatly aided by applying standards from these other areas of discrimination law.

The case law which addresses the employee's burden under section 510 lacks any systematic approach. This is due largely to the relative state of infancy of the law under section 510. Many of the opinions decide motions for failure to state a claim\(^10\) or summary judgment,\(^11\) most

\(^{83}\) See infra Part II.A, pp. 331-38.

\(^{84}\) See infra Part II.B, pp. 338-40.

\(^{85}\) See infra Part II.C, pp. 340-43.

\(^{86}\) 411 U.S. 792 (1973).


\(^{90}\) See, e.g., Kross v. Western Elec. Co., 701 F.2d 1238, 1241-43 (7th Cir. 1983) (court reversed the trial court's dismissal for failure to state a claim under § 510); West v. Butler, 621 F.2d
going to the issue of whether an employee with vested benefits is covered by section 510.\textsuperscript{92} Most of the courts that have actually rendered a final decision on the merits were dealing with such egregious violations that there was no need to develop a precise procedural framework.\textsuperscript{93}

Many courts have dismissed plaintiffs' claims based on strict application of section 510's requirement that a plaintiff demonstrate that the discharge was "for the purpose of interfering with the attainment of [a benefit]."\textsuperscript{94} Based on this language, several courts have dismissed claims because of the lack of direct evidence that the employer intended to interfere with the plaintiff's benefits.\textsuperscript{95}

For example, the court in \textit{Shippes v. Avon Products, Inc.}\textsuperscript{96} dismissed plaintiff's section 510 claim on defendant's motion for summary judgment\textsuperscript{97} where a plaintiff with almost ten years of service was dismissed shortly before her right to a pension vested. Plaintiff alleged that she was dismissed pursuant to "a 'premeditated, deliberate and wrongful plan to systematically terminate Avon employees approaching the tenth anniversary of their employment, so as to avoid an obligation to pay accrued pension benefits.'"\textsuperscript{98} The court acknowledged that plaintiff had a "difficult burden" of proving intent, and that plaintiff must assert "some facts 'to support the claim that the state of mind existed.'"\textsuperscript{99} The court went on to dismiss plaintiff's claim because plaintiff had failed to assert specific facts that would establish intent.\textsuperscript{100}

Other courts have added that a plaintiff's clear demonstration of a discharge which had the \textit{effect} of interfering with protected rights is not

\textsuperscript{92}240 (6th Cir. 1980) (court upheld dismissal of lawsuit brought under § 510 by pension fund trustees seeking to enjoin secondary picketing).
\textsuperscript{94}See supra text accompanying notes 34-66.
\textsuperscript{95}See, e.g., Folz v. Marriott Corp, 594 F. Supp. 1007 (W.D. Mo. 1984) (court entered verdict for plaintiff in case where 16-year employee with a good record was terminated when he was diagnosed as having multiple sclerosis; the employer was self-insured and would have incurred substantial costs due to plaintiff's affliction); Ursic v. Bethlehem Mines, 556 F. Supp. 571 (W.D. Pa. 1983) (court found for plaintiff after he established that he was discharged less than seven months before he was to qualify for a pension based on 30 years of service, the court having summarily disposed of as being pretextual the reason given for his discharge), aff'd, 719 F.2d 670, 672 (3d Cir. 1983).
\textsuperscript{98}605 F. Supp. 701 (S.D.N.Y. 1985).
\textsuperscript{99}Id. at 707.
\textsuperscript{100}Id. at 706 (footnote omitted).
sufficient to prove a violation of section 510 absent a specific showing of intent. These cases illustrate the difficult burden that a plaintiff has in establishing a violation of section 510. Direct evidence of intent is often not available, particularly in cases of an individual discharge where the employer asserts some explanation, such as inadequate performance, unrelated to benefit costs.

Recognizing the difficulty of proving intent, the courts have established procedural mechanisms to allow the inference of intent in other areas of wrongful terminations. The best example of this is Designbase Corp. v. United States, the landmark decision under Title VII of the Civil Rights Act of 1964. In the context of a race discrimination case based on a refusal to hire, the Court recognized that the burden of proving intent was too great and held that a plaintiff may establish a prima facie case of race discrimination, without direct evidence of the employer's intent to discriminate. The Court then listed the following criteria to establish a prima facie case: The plaintiff must establish that (1) he belonged to a racial minority; (2) he applied for and was qualified for the position for which the employer was seeking applications; (3) he was rejected despite his qualifications; and (4) the employer continued to seek applications for the position for which plaintiff applied.

The McDonnell Douglas standard is expressly based on the premise that intent is difficult to establish and that the employer has best access to evidence relating to the reasons for the employment decision. Clearly, no part of the test applies directly to prove intent. Instead, the assumption is that if a plaintiff eliminates the most likely reasons for a refusal to hire, such as qualification for the position and compliance with the employer's application requirements, then there exists a basis for inferring an unlawful motive.

Thus, despite the plaintiff's lack of direct evidence of intent, he is still entitled to a trial and an explanation from the employer, provided he can establish a prima facie case. As stated by the Supreme Court in Furnco Construction Corp. v. Waters, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not that the employer, whom we

101. See supra note 95.
102. See Vogel, supra note 6, at 324-25.
105. 411 U.S. at 802.
106. Id.
107. See, e.g., Loeb v. Textron, Inc., 600 F.2d 1003, 1014-15 (1st Cir. 1979) (the court expressly relied on these two reasons to support the application of the McDonnell Douglas standard to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982)).
109. Loeb, 600 F.2d at 1014.
generally assume acts only with some reason, based his decision on an impermissible consideration.¹¹⁰

The McDonnell Douglas test has been modified and applied to a number of situations, including wrongful discharges in violation of the Age Discrimination and Employment Act. In rejecting a challenge by an employer that the McDonnell Douglas standard should not be applied to ADEA because of major differences in the statutory language, the Court of Appeals for the First Circuit in Loeb v. Textron, Inc. held that the difference between the statutes does not establish that Congress intended them to be subject to different standards of proof.¹¹¹ To the contrary, the court stated: "There are important similarities between the two statutes . . . both in their aims—the elimination of discrimination from the workplace—and in their substantive provisions."¹¹²

The court then approved a modified version of the McDonnell Douglas standard to apply to discharges allegedly in violation of ADEA.¹¹³ The court reasoned that an ADEA plaintiff, like a Title VII plaintiff, faces a difficult burden in proving intent and should, by eliminating the most likely reasons for a discharge, establish a prima facie case and get the benefit of an inference of intent which will force the employer, who has greater access to the evidence, to explain the reasons for the discharge.¹¹⁴

Likewise, in discrimination cases brought under section 8(a)(3) of the National Labor Relations Act,¹¹⁵ which prohibits any discrimination against employees engaging in union organizing,¹¹⁶ the courts will infer intent once a prima facie case is established.¹¹⁷ This is particularly significant since the legislative history indicates congressional intent to model section 510 after section 8(a)(3).¹¹⁸

The reasoning applied to allow an inference of intent in other areas

¹¹¹. 600 F.2d at 1015.
¹¹². Id. (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)).
¹¹³. The court held that a plaintiff alleging a discharge in violation of the ADEA may, in appropriate circumstances, establish a prima facie case by proving the elements set forth in McDonnell Douglas: (1) he was in the protected age group; (2) his performance met his employer's legitimate expectations; (3) he was discharged; and (4) the employer sought someone to perform the same work after the discharge. Id. at 1014.
¹¹⁴. Id.
¹¹⁶. Section 8(a)(3) provides that it is an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Id.
¹¹⁷. See, e.g., NLRB v. Erie Resistor Co., 373 U.S. 221, 227 (1963). In a later case, the Supreme Court went further and held that even inferential proof of an antinunion discriminatory motive is not a necessary element of a plaintiff's 8(a)(3) case if the employer's conduct is “inherently destructive” of union rights. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967).
¹¹⁸. LEGISLATIVE HISTORY, supra note 31, at 1775 (Senator Muskie commented that “[t]he language parallels section 8(a)(3) of the National Labor Relations Act and should do the trick.”).
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of wrongful discharge law applies just as well to section 510. Evidence of intent is virtually impossible to obtain. Once the employee has eliminated the most likely legitimate reasons for his discharge, it seems appropriate to require the employer, who has better access to evidence relating to the reasons for the discharge, to provide evidence justifying discharge.119

A few early decisions under section 510 have simply assumed that the McDonnell Douglas procedural framework applies, without any discussion of the precise elements of a prima facie case.120 Still other courts have allowed an inference of intent based on the egregious nature of the employer's actions. For example, in Ursic v. Bethlehem Mines,121 plaintiff was eligible for a pension after thirty years of service. After working for twenty-nine years, five months and eleven days, he was fired. The stated reason was that plaintiff was caught with some company tools in his truck, which he claimed he was borrowing to work on his tractor. A new supervisor had implemented a plan to cut down on tool expenditures, and plaintiff was the first and only employee discharged for violating the plan.122 The court rejected the company's explanation, stating:

Whatever importance the cost-conscious superintendent attached to his pet program of cutting tool expenditures, there is an atmosphere of "invidious discrimination" when only one employee, and the one who is within hailing distance of his hard-earned pension, is subjected to strict enforcement of [the supervisor's] unwritten edict. . . .

The inescapable inference is that an ulterior motive lay behind defendant's maneuvers, and that a speedy discharge, before Ursic's thirty year pension vested, was aimed at.123

Thus, without articulating a standard, the court allowed an inference of intent based on the nature of the conduct and the pretextual explanation by the employer.124

In Gavalik v. Continental Can Co.,125 the first reported decision to analyze the reasons for applying the McDonnell Douglas test to section

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119. See supra text accompanying notes 107-10.
120. For example, in Fischer v. Doremus & Co., No. 83 C-8214 (N.D. Ill. Feb. 4, 1985), the court cited to McDonnell Douglas and held that since the employer had rebutted plaintiff's prima facie case by "respond[ing] to" it, and there was no evidence of pretext, plaintiff could not prevail. There is no discussion of the elements of plaintiff's prima facie case. Similarly, in Hamann v. International Harvester Co., No. 84 C-10552 (N.D. Ill. Oct. 30, 1985) (LEXIS, Genfed library, Dist file), the court cited to an age discrimination case for the proposition that plaintiff must establish a prima facie case, but held simply that plaintiff's evidence was insufficient, without discussion of the elements.
122. Id. at 573-74.
123. Id. at 574-75; see also Folz v. Marriott Corp., 594 F. Supp. 1007, 1014-15 (W.D. Mo. 1984) (employer's substantial economic incentive to discharge plaintiff, as well as the timing and manner of the discharge, gave rise to inference of illegal intent).
124. 556 F. Supp. at 574-75.
510 cases, the Court of Appeals for the Third Circuit recognized the difficulty of proving intent since "smoking gun" evidence is rarely available. The court concluded that a *McDonnell Douglas* test should be applied and that the evidentiary burden may be satisfied by the introduction of circumstantial evidence.\(^\text{126}\)

The court went on to state: "[T]o establish a *prima facie* case under ERISA § 510, an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled."\(^\text{127}\)

While the decision is significant in that it recognizes the reasons for establishing a system for establishing intent without direct evidence, the *Gavalik* court's formulation simply tracks the precise language of section 510.\(^\text{128}\) Since the standard ostensibly requires a showing of "purpose," it does nothing procedurally to allow for an inference of purpose or intent, the very reason for allowing plaintiff a reduced burden in her *prima facie* case.

In applying the *Gavalik* holding, the court in *Furcini v. Equibank, NA*\(^\text{129}\) noted that

*Gavalik* requires a plaintiff not only to show employer conduct that is prohibited, but also to show that it was taken for the purpose of interfering with the plaintiff's attainment of some benefit. . . . A literal application of this requirement would mean that a plaintiff with only indirect evidence of purposeful interference would have to produce direct evidence of purposeful interference as part of his *prima facie* case. The plaintiff would be placed in an obviously impossible position: he would be required to prove initially by direct evidence, that which he need only prove ultimately by indirect evidence.\(^\text{130}\)

The *Furcini* court concluded, however, that since there was direct evidence of intent available in *Gavalik*,\(^\text{131}\) it was not necessary for the court to propose a more refined standard for a *prima facie* case.\(^\text{132}\)

Recognizing that there was direct evidence of intent in *Gavalik*, which made a refined standard unnecessary, and that the court had expressly stated that circumstantial evidence would suffice, the *Furcini* court took the next step and proposed a standard for a *prima facie* case that assumed there was no direct evidence of intent available. The court relied on *McDonnell Douglas* and its progeny, which hold that the *Mc-
Donnell Douglas test should be flexible enough to fit new situations.\textsuperscript{133} The court proposed the following standard for a prima facie case where a discharged employee was denied severance benefits because he was characterized as having been discharged for willful misconduct: "[T]o make out a prima facie case of discrimination, [the employee] must only demonstrate (i) that he was a candidate for a benefit protected by ERISA; (ii) that he was denied that benefit; and (iii) that he satisfied the conditions for receiving that benefit."\textsuperscript{134} The court recognized that the burden of establishing a prima facie case is not onerous,\textsuperscript{135} and that the entire assumption of applying the procedural mechanism was to dispense with the necessity of proving intent with direct evidence.\textsuperscript{136}

In Furcini, plaintiff did not challenge his discharge; he argued instead that his employer characterized the reason for discharge as willful misconduct in order to disqualify him from receiving severance pay.\textsuperscript{137} To apply a McDonnell Douglas standard to a direct challenge to a discharge requires further modifications, which would be consistent with the recognized flexibility of the standard.\textsuperscript{138}

In proposing a modified standard, the reasoning of the McDonnell Douglas Court must be considered. The main premise underlying the McDonnell Douglas test is that since direct evidence of intent is not available, the plaintiff need only eliminate the most likely legitimate reasons for the discharge to create an inference that the discharge was for unlawful reasons.\textsuperscript{139} Given this, the following elements should establish a prima facie case for wrongful discharge under section 510: (1) plaintiff was discharged;\textsuperscript{140} (2) the discharge resulted in a substantial interference with a benefit protected by section 510;\textsuperscript{141} and (3) plaintiff was performing satisfactorily at the time he was discharged.\textsuperscript{142}

This standard closely tracks the McDonnell Douglas standard as applied to terminations\textsuperscript{143} and eliminates the most likely legitimate reason

\textsuperscript{133} Id. at 1442.  
\textsuperscript{134} Id.  
\textsuperscript{135} Id. at 1440.  
\textsuperscript{136} Id.  
\textsuperscript{137} Id. at 1439.  
\textsuperscript{138} Id. at 1441.  
\textsuperscript{139} See supra notes 109-10 and accompanying text.  
\textsuperscript{140} The court in Lojek v. Thomas, 716 F.2d 675, 680-81 (9th Cir. 1983), held that an employee who resigns after being "constructively discharged" has a claim under § 510.  
\textsuperscript{141} For a discussion of the benefits protected by § 510, see supra text accompanying notes 54-57.  
\textsuperscript{142} While the argument has been made in discharge cases under ADEA that a plaintiff should have to prove that the discharge was not for just cause and/or that he was performing better than those not discharged, the great weight of authority agrees that a plaintiff need only establish that his performance was satisfactory. It is the employer's burden to establish cause for discharge or comparative performance deficiencies. Player, Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme, 17 GA. L. REV. 621, 646-47 (1983).  
\textsuperscript{143} See supra text accompanying note 106.
for a discharge: unsatisfactory performance. Further, by establishing that there was a substantial interference with a protected benefit, the standard directly puts into question the employer's motive for the discharge, and lays a substantial foundation for inferring unlawful intent.

B. The Employer's Burden to Rebut the Inference

In the context of the plaintiff's prima facie case, it makes no difference whether courts follow the *McDonnell Douglas* model or whether they follow cases applying section 8(a)(3) of the National Labor Relations Act. In both situations the goal is to avoid the necessity of establishing intent with direct evidence by substituting indirect evidence that eliminates the most likely legitimate reasons for the discharge. Further, under both models, the plaintiff's successful establishment of a prima facie case merely shifts a burden of production to the employer to justify its conduct, leaving the burden of persuasion on the ultimate issue of discrimination with the plaintiff. However, the nature of the explanation that will suffice to meet the employer's burden differs under the two models.

Under the *McDonnell Douglas* model, as modified by *Texas Department of Community Affairs v. Burdine*, once the plaintiff establishes a prima facie case, the employer must "articulate some legitimate, nondiscriminatory reason" for the employment decision. The primary issue presented by this standard as applied to section 510 is whether the employer's reason must be a good reason, or whether any "at-will" reason will suffice, provided the discharge was not related to pension benefits.

Although much has been written to illustrate the uncertainty about the exact nature of the employer's burden, a few generalizations can be made. First, neither the judge nor the jury can second-guess the employer's reason provided it was nondiscriminatory. Second, although reasonableness is not an express requirement, the more unreasonable the explanation, the more likely it is that the factfinder will dismiss the explanation as a pretext.

The cases under section 8(a)(3) of the National Labor Relations Act

144. *E.g.*, Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978) The Court held that the risk of nonpersuasion did not shift to the defendant in a Title VII case once a prima facie case is established. The employer need only articulate a legitimate, nondiscriminatory reason. Under § 8(a)(3), the burden of persuasion rests with the General Counsel, who represents the interests of the charging party. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-01 (1981). For a discussion of the shifting burdens in mixed-motive cases, see *infra* Part II.C, pp. 340-43.


149. *E.g.*, Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979).
use slightly different language in stating the employer's burden: the proffered reason must be a "legitimate and substantial business justification."  

The addition of the word "substantial" makes clear that the reason must be a good reason, one that is reasonable and not frivolous. Thus, while the McDonnell Douglas standard includes a de facto requirement that the reason must be a good one, the section 8(a)(3) standard makes this an express requirement.

While it would apparently make little difference in practice which model is adopted for section 510, the 8(a)(3) model is a more legally sound choice for several reasons. First, the legislative history makes clear that, for enforcement purposes, section 510 is modeled after section 8(a)(3). Further, the section 8(a)(3) model expressly requires that the employer's justification be substantial. It is important to make this requirement clear for section 510 violations since the employer automatically gets a financial windfall by discharging a protected plaintiff. While an employer who intentionally discharges someone based on sex bias may experience no gain in a material sense, an employer who discharges an employee to cut off pension benefits gets a very real financial benefit, making the incentive to discharge very great. Thus, the employer's reason should be closely scrutinized; a frivolous or unreasonable justification should not satisfy the employer's burden to provide a legitimate and substantial business justification.

Courts remain reluctant to second-guess an employer's business judgment. However, since most section 510 violations are cost-cutting measures, the courts should scrutinize an employer's justification when the employer gives cost as the reason for discharging protected employees. An illustrative case is Gavalik v. Continental Can Co., where the employer implemented a systematic plan to identify and permanently lay off employees who were about to qualify for one of the company's pension plans. There was no dispute that the company applied the plan or that the effect of the plan was to deny pension benefits to a large group of protected employees. Instead, the company asserted that its action was legitimate because there was not an unlawful motivation; the company claimed to be acting out of economic necessity, not out of malice towards

150. E.g., NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967) (emphasis added). This is the standard applied if the interference with § 8(a)(3) rights is "comparatively slight." In cases where the employer's conduct is "inherently destructive" of § 8(a)(3) rights, the employer's reasons for doing so is irrelevant. Id.

151. LEGISLATIVE HISTORY, supra note 31, at 1775.

152. See supra text accompanying note 150.

153. See supra note 148 and accompanying text.


155. Id. at 840-41.
the protected employees.\textsuperscript{156}

The \textit{Gavalik} court rejected the employer's reasoning, stating:

That the avoidance of the pension liability was [the employer's] sole purpose in instituting the liability avoidance program cannot be gainsaid. Nor can it be seriously contended that the liability avoidance scheme was legitimately designed to save the company from economic ruin.

Section 510 proscribes exactly this type of conduct. In enacting this provision, Congress recognized that it may sometimes be in the employer's economic self-interest to abort its employee's accumulation of the requisite age and service prior to vesting . . . . Thus, section 510's essential purpose is to prevent employers from intentionally interfering with impending pension eligibility whether motivated by malice toward the particular employee(s) or by a general concern for the economic stability of the company. Of course . . . incidental loss of pension benefits as the result of a legitimate business practice will not constitute a violation of ERISA. Bad faith, however, is not an element of a section 510 claim.\textsuperscript{157}

Thus, economic necessity is not an acceptable defense if the goal of any cost saving plan is to reduce pension responsibility. Perhaps a massive layoff that included individuals who are protected by section 510 would be acceptable, provided unprotected employees were included, but a goal of any such plan cannot be reduced pension costs.\textsuperscript{158}

To summarize, once an employee establishes a prima facie case, the employer has the burden of going forward with sufficient evidence to establish a legitimate and substantial business justification. The justification advanced should be reasonable, and cannot include a plan implemented for economic necessity which aims to reduce pension costs.

\textbf{C. The Employee's Opportunity to Demonstrate Pretext and the Mixed-Motive Problem}

Under both the \textit{McDonnell Douglas}\textsuperscript{159} and the section 8(a)(3)\textsuperscript{160} models, an employee has the opportunity to demonstrate that the em-

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{156}] \textit{Id.} at 856-57.
\item[\textsuperscript{157}] \textit{Id.} at 857 n.39.
\item[\textsuperscript{158}] This analysis is similar to the disparate impact analysis used by the Supreme Court in \textsuperscript{Griggs v. Duke Power, 401 U.S. 424 (1971).} There the Court dispensed with the intent requirement of Title VII if any challenged employment practice had a disparate impact on the protected group. The court held that specific intent to discriminate was not necessary if the plaintiff could establish disparate impact. \textit{Id.} at 432. Likewise, the \textit{Gavalik} court seems to be saying that even if the employer did not have the intent to discriminate against persons protected by \textsection{510}, if the plan had the effect of interfering with pension benefits of individuals protected by \textsection{510}, it is unlawful regardless of the employer's intent. Presumably, if the plan in \textit{Gavalik} was not so blatant, and instead resulted in a massive discharge of individuals with a specified seniority date, many of whom were protected by \textsection{510}, the result would be the same.
\item[\textsuperscript{159}] \textit{E.g., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).}
\item[\textsuperscript{160}] \textit{E.g., American Mfg. Assocs. v. NLRB, 594 F.2d 30, 36 (4th Cir. 1979). See generally I C. Morris, THE DEVELOPING LABOR LAW 214 (2d ed. 1983).}
\end{enumerate}
\end{footnotesize}
ployer's proffered justification is a pretext, and that the real reason is discriminatory. Even the section 510 cases that have not articulated a systematic approach to proving violations have allowed the employee an opportunity to show pretext.\textsuperscript{161} The employee has to demonstrate only that the reason offered is not the real reason, and that it is a guise for an unlawful discharge.\textsuperscript{162} As the burden of persuasion is ultimately on the plaintiff,\textsuperscript{163} the trier of fact must decide if the plaintiff has proven by a preponderance of the evidence that the real reason was discriminatory.

The real problem arises when the employee's evidence is too weak to show that the employer's justification is a pretext but is strong enough to raise an issue of mixed motives. In many cases, the evidence will demonstrate that although the employer acted in part out of an unlawful motive, there was a sufficient reason for the discharge. For example, mixed motives may appear where an employer is aware that a particular employee's benefits are about to vest and it wants to find a reason to discharge the employee, and coincidentally the employee engages in conduct that gives the employer cause to discharge the employee.

This was the situation in \textit{Ursic v. Bethlehem Mines},\textsuperscript{164} where the employee was just months away from receiving a pension for thirty years of service and the employer discharged him for stealing tools.\textsuperscript{165} There the court did not believe the employer's explanation and held it to be a pretext, mainly because it appeared that the employee had been targeted for discharge because of his impending pension eligibility.\textsuperscript{166} However, if the employer's reason had been more credible, then a true mixed-motive case would have been presented.

Much has been written about resolving the difficult mixed-motive problem in Title VII\textsuperscript{167} and section 8(a)(3) cases.\textsuperscript{168} In addition, one commentator has addressed the issue in the context of section 510.\textsuperscript{169} Therefore, the focus here is on a single major issue: the assigning of the burden of persuasion. It seems clear that in a mixed-motive situation the burden of persuasion rests with the employer to demonstrate that it acted with a lawful motive. In \textit{NLRB v. Transportation Management Corp.},\textsuperscript{170} a case involving an 8(a)(3) violation, the Court held that once the em-


\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{See supra} note 144 and accompanying text.

\textsuperscript{164} 556 F. Supp. 571.

\textsuperscript{165} \textit{Id.} at 574.

\textsuperscript{166} \textit{Id.} at 574-75.


\textsuperscript{168} E.g., \textit{NLRB v. Transportation Management Corp.}, 462 U.S. 393.

\textsuperscript{169} Vogel, \textit{supra} note 6, at 327-34.

\textsuperscript{170} 462 U.S. 393.
ployee established that an unlawful motivation played a part in the employer's decision, the burden of persuasion shifted to the employer to demonstrate that it would have reached the same decision in the absence of the unlawful motivation.\textsuperscript{171}

The Court reasoned that in mixed-motive cases,\textsuperscript{172} where by definition at least part of the employer's reason was unlawful,

\[ \text{[the employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal reasons cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.} \textsuperscript{173} \]

Courts applying Title VII in mixed-motive cases have likewise agreed that the burden of persuasion shifts to the employer.\textsuperscript{174}

There is only one reported decision under section 510 which deals with the issue, \textit{Gavalik v. Continental Can Co.}\textsuperscript{175} The \textit{Gavalik} court appropriately applied the same test as the \textit{Transportation Management Court}\textsuperscript{176} and held that the plaintiff in a mixed-motive case has the initial burden of establishing but-for causation.\textsuperscript{177} Once but-for causation is established, the employer "[bears] the burden of persuasion to prove by a preponderance of the evidence that it would have made the same decision in any event."\textsuperscript{178}

It is clear, then, that once a partial unlawful motive is established, further protection is necessary to prevent an individual from losing a hard-earned pension\textsuperscript{179} and an employer from gaining a financial windfall from the unlawful activity.\textsuperscript{180} Accordingly, the employer who has engaged in unlawful activity bears the risk that the evidence will not be

\textsuperscript{171} Id. at 403. In placing the burden of persuasion on the employer in mixed-motive cases, the Court relied upon Mount Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), a case involving mixed motives in constitutional violations. One commentator has criticized the application of the \textit{Mount Healthy} standard in all § 510 cases, recognizing the difficulties of proving intent and that due to the wide variety of claims available under § 510, the same test should not apply in all circumstances. The author does not appear, however, to dispute that a \textit{Mount Healthy} test would be appropriate in a discharge case where the employee is seeking reinstatement and back pay. Vogel, supra note 6, at 329-33.

\textsuperscript{172} This is distinct from the situation where the employer disputes the issue of unlawful motivation, and the issue for the trier of fact is deciding what the motivation was. The burden of persuasion remains with the General Counsel in these cases. 462 U.S. at 400 n.5.

\textsuperscript{173} 462 U.S. at 403.

\textsuperscript{174} \textit{E.g.}, Calviale v. State of Wis. Dept. of Health & Social Servs., 744 F.2d 1289, 1296 (7th Cir. 1984); Perryman v. Johnson Prods. Co., 698 F.2d 1138, 1143 (11th Cir. 1983).

\textsuperscript{175} 812 F.2d 834 (3rd Cir.), cert. denied, 108 S. Ct. 495 (1987).

\textsuperscript{176} See supra text accompanying notes 170-73.

\textsuperscript{177} 812 F.2d 859-60. The court explained that but-for causation means that the unlawful motivation was "a determinative factor." Id. at 859 (quoting Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 179 n.1 (3rd Cir. 1985), cert. denied, 475 U.S. 1035 (1986)).

\textsuperscript{178} Id. at 864.

\textsuperscript{179} See supra text accompanying notes 31-33.

\textsuperscript{180} See supra text after note 152.
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strong enough to establish that it would have taken the same action regardless of the unlawful motivation.

III

REMEDIES AVAILABLE FOR AN UNLAWFUL DISCHARGE UNDER SECTION 510

The case law is particularly sparse on the issue of remedies available to a successful plaintiff in a section 510 action. This is due largely to the extremely small number of cases that actually go to trial and result in a verdict for the plaintiff. Before examining the case law, the statutory language and legislative history must be examined.

Section 510 does not contain any procedural or remedial provisions, but instead provides that “[t]he provisions of section 1132 of this title [ERISA section 502] shall be applicable to the enforcement of this section.” The relevant enforcement language is contained in section 1132(a)(3):

A civil action may be brought— . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter 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 subchapter or the terms of the plan.

The primary interpretative problem is the scope of “other appropriate equitable relief.” The legislative history indicates that Congress intended to provide a wide range of remedies:

The enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.

Given this broad mandate, and general congressional intent that federal courts develop a federal common law to enforce ERISA, courts

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181. Most of the cases are dismissed on summary judgment due to the lack of direct evidence. See supra notes 95-96 and accompanying text.
184. Id. Section 1132(g)(2)(E) goes further and provides for “legal or equitable relief.” Id. § 1132(g)(2)(E) (emphasis added). That section applies only to suits brought by a fiduciary “for or on behalf of a plan,” id., and would thus not be available to a wrongfully terminated employee.
have applied a wide range of remedies to redress violations of section 510.\textsuperscript{187} However, there is a division of authority on whether compensatory\textsuperscript{188} or punitive\textsuperscript{189} damages are available.\textsuperscript{190}

In \textit{Folz v. Marriott Corp.},\textsuperscript{191} one of the few decisions with any detailed discussion of the remedies available in a section 510 wrongful discharge case, plaintiff prevailed after proving that his employer discharged him to save the medical expenses that would follow plaintiff’s development of multiple sclerosis.\textsuperscript{192} The employer was self-insured and would have borne the substantial medical costs directly.

At the remedy stage of the trial, defendant Marriott argued that the only appropriate remedy was reinstatement of the employee as a benefit plan beneficiary. Marriott asserted that reinstatement of employment and back pay were not appropriate remedies because ERISA was designed to protect benefits, not salary and wages.\textsuperscript{193} The court rejected this argument. Relying on the statutory language,\textsuperscript{194} the legislative history,\textsuperscript{195} and the general remedial nature of ERISA,\textsuperscript{196} the court found that its “equitable power under ERISA is broad enough to recreate the circumstances that would have existed absent an employer’s illegal conduct.”\textsuperscript{197}

The court examined the remedies available under the Age Discrimination in Employment Act of 1967\textsuperscript{198} and Title VII of the Civil Rights Act of 1964\textsuperscript{199} and concluded that it has broad equitable power to make plaintiff whole, subject only to review for abuse of discretion.\textsuperscript{200} The court then went on to award back pay,\textsuperscript{201} prejudgment interest,\textsuperscript{202} front

\textsuperscript{187} See infra notes 201-06 and accompanying text.

\textsuperscript{188} Compensatory damages refer to general and extracontractual damages. General damages usually refer to “make whole” monetary damages such as the loss of benefits. Extracontractual damages refer to damages caused by the effects of the wrongful act, such as mental distress. See Note, Participant and Beneficiary Remedies Under ERISA: Extra Contractual and Punitive Damages After Massachusetts Mutual Life Insurance Co. v. Russell, 71 CORNELL L. REV. 1014, 1016-17 (1986).

\textsuperscript{189} Punitive damages are over and above any actual damages and serve mainly to penalize and deter similar conduct. \textit{Id.} at 1017.

\textsuperscript{190} See infra notes 210-27 and accompanying text.

\textsuperscript{191} 594 F. Supp. 1007 (W.D. Mo. 1984).

\textsuperscript{192} \textit{Id.} at 1014-15.

\textsuperscript{193} \textit{Id.} at 1015.

\textsuperscript{194} See supra text accompanying note 10.

\textsuperscript{195} See supra text accompanying notes 31-33.

\textsuperscript{196} 594 F. Supp. at 1015 (citing Kross v. Western Elec. Co., 701 F.2d 1238, 1242 (7th Cir. 1983)).

\textsuperscript{197} \textit{Id.} at 1015-16.

\textsuperscript{198} \textit{Id.} at 1016.

\textsuperscript{199} \textit{Id.}

\textsuperscript{200} \textit{Id.} at 1016-20.

\textsuperscript{201} \textit{Id.} at 1016-18.

\textsuperscript{202} \textit{Id.} at 1016-17.
pay (in lieu of reinstatement),203 and payment of all lost benefits.204 The court also allowed an award of attorneys fees,205 pursuant to section 1132(g)(1).206

There is no authority contradicting the Folz court’s analysis of the remedies available based on a court’s power to award “equitable” relief, and the decision is generally accepted as a well-reasoned example of the remedies available.207 The remedies were consistent with those awarded under similar statutory schemes,208 and are consistent with the legislative history.209

Courts have not agreed on the availability of punitive or compensatory damages, however. The Supreme Court had a chance to resolve this issue in Massachusetts Mutual Life Insurance Co. v. Russell,210 a suit for damages against a pension plan fiduciary for improperly processing claims.211 The suit was brought under section 409(a),212 which makes the fiduciary liable to the benefit plan for any breaches of a fiduciary duty.

In Russell, plaintiff was a beneficiary of the benefit plan and sought to recover, among other things, compensatory and punitive damages. Holding that only the plan could recover under section 409(a), the court rejected plaintiff’s claim for compensatory and punitive damages.213 The court expressly left open the question of whether compensatory or punitive damages are available under section 502(a)(3),214 although there is broad dicta indicating that compensatory and punitive damages should never be awarded.215

The lower courts are divided on whether such damages are available under section 502. The Court of Appeals for the Ninth Circuit216 has consistently held that punitive damages are available in “limited circumstances” under section 502(g)(2).217 The Ninth Circuit has stated that the standard showing of “aggravated conduct” must be made before the

203. Id. at 1018.
204. Id. at 1019-20.
205. Id. at 1021.
207. See, e.g., Martucci & Utz, supra note 6, at 254-57.
208. See supra note 4.
209. See supra text accompanying notes 31-33.
211. Id. at 136.
213. 473 U.S. at 144, 148.
214. Id. at 139 n.5; see also id. at 150 (Brennan, J., concurring).
215. Id. at 146-47. For a criticism of the dicta, see Note, supra note 188, at 1024-26.
216. See, e.g., Kuntz v. Reese, 760 F.2d 926, 938 (9th Cir. 1985), cert. denied, 107 S. Ct. 318, vacated, 785 F.2d 1410 (9th Cir. 1986); Winterrowd v. David Freedman & Co., 724 F.2d 823, 826 (9th Cir. 1984).
217. 29 U.S.C. § 1132(g)(2) (1982) (subsection 2(E) allows for “such other legal or equitable relief as the court deems appropriate”).
discretionary award is possible.\textsuperscript{218} Other courts have upheld claims for punitive damages against fiduciaries.\textsuperscript{219}

Courts taking the opposite view have advanced a number of rationales.\textsuperscript{220} One court held that punitive damages are not available if payment would come from the benefit fund itself.\textsuperscript{221} Other courts have held that since Congress intended the federal courts to develop a federal common law of ERISA,\textsuperscript{222} trust law must be incorporated, and these courts have concluded that trust law does not allow a beneficiary to recover punitive damages from a trustee.\textsuperscript{223} There is, however, some disagreement as to whether trust law, if applicable, would preclude punitive damages.\textsuperscript{224}

Likewise, there is uncertainty in the lower courts as to the availability of compensatory damages.\textsuperscript{225} The basic issue is the same: whether Congress intended to allow for any damages beyond the precise monetary loss. However, compensatory damages may be available even if punitive damages are not,\textsuperscript{226} since the general presumption against the award of punitive damages absent clear congressional guidance\textsuperscript{227} does not apply to compensatory damages.

The cases discussed above deal with the availability of compensatory or punitive damages primarily in the context of a suit brought by a beneficiary against a trustee or the plan itself. Under these circumstances, courts appropriately apply the concepts of trust law which can provide a framework for analyzing the range of damages available. These trust concepts, however, are not directly applicable to a suit for wrongful discharge under section 510.\textsuperscript{228} The only relevant consideration is the basis for the general availability of damages under section 1132.

\textsuperscript{218} See, e.g., Winterrowd, 724 F.2d at 826.


\textsuperscript{221} Maxfield v. Central States Southeast & Southwest Areas Health, Welfare & Pension Funds, 559 F. Supp. 158, 160 (N.D. Ill. 1982).

\textsuperscript{222} See supra note 186 and accompanying text.


\textsuperscript{224} See, e.g., Miner, 601 F. Supp. at 1393. See generally, Note, supra note 188, at 1027-31.


\textsuperscript{226} See Note, supra note 188, at 1031-36.


\textsuperscript{228} An employer who administers his own pension plan will, in some instances, be a fiduciary to his employees, but this occurs only while acting as the trust administrator. Other decisions an employer makes in his capacity as an employer are not covered by a fiduciary duty. See Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1416-17 (2d Cir. 1985), cert. denied, 106 S. Ct. 1167 (1986).
Only one reported case discusses the availability of punitive damages in a section 510 discharge case. In *Dependahl v. Falstaff Brewing Corp.*, the Court of Appeals for the Eighth Circuit reversed the trial court's award of punitive damages. The trial court awarded punitive damages based on a state law claim of tortious interference with contract. The appeals court first recognized that ERISA preempts state law claims based on the same conduct alleged in the ERISA claim. The court then considered whether punitive damages were available under ERISA. The court did not rule as a matter of law that punitive damages were never appropriate, but in dicta indicated a strong leaning against their availability: "[I]f Congress had desired to provide for punitive damages, it could have easily so stated, as it has in other acts. However, we need not decide this issue, because we find that punitive damages are inappropriate in this case."

The court next examined the historical basis for tortious interference with contract, and concluded that no redeeming purpose would be furthered by an award of punitive damages. The court's reasoning does not make clear whether it actually applied the tort of interference with contract or utilized reasoning underlying the application of that tort to evaluate the reasons for awarding punitive damages under ERISA. However, since the court recognized that ERISA preempts state law, the basis for the holding must be that punitive damages were inappropriate under ERISA based on the facts of that case.

The same court did allow an award of punitive damages based on fraud in a case alleging a breach of fiduciary duty under section 1104. The court seemed to allow punitive damages for the separate tort of fraud, even though the fraudulent conduct was a breach of fiduciary duty made illegal by ERISA. As section 1144 expressly preempts state law, making the holding implicitly based on federal ERISA law, for the same court that decided *Dependahl* to have awarded punitive damages seems inconsistent.

At best, it is clear that there is a split in the courts that must be resolved by the Supreme Court. Section 1140 cases are unique from the vast majority of cases that have discussed the issue to date since the law

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230. *Id.* at 1214.
231. *Id.* at 1214-15.
232. *Id.* at 1216.
233. *Id.*
234. *Id.* at 1216-17.
235. *Id.*
236. *Id.*
238. *Id.* at 1302-03.
of trusts that most authorities rely upon does not directly apply to the employer-employee relationship.

Until the issue is finally resolved, a court could use its equitable powers to award any relief, including punitive damages, and reserve the right to do so in extraordinary cases. This seems particularly appropriate in section 1140 cases in order to combat what Congress identified as a major social problem. This is especially true since ERISA preempts state tort claims based on the same conduct giving rise to an ERISA claim. It seems unlikely that Congress would remove a powerful state tort remedy from a group it chose to protect without allowing for a similar remedy.

CONCLUSION

In passing section 510, Congress intended to protect employees from being discharged by employers seeking to reduce their pension and benefit costs. This general goal is laudable and was necessary in the face of evidence that employees were subject to arbitrary discharge despite long years of service and developed expectations of receiving continued benefits through their continued employment and, ultimately, a pension.

The passage of section 510 is a hollow victory for most employees, however, unless those with vested rights that depend upon continued employment are also protected. While the language of section 510 is not precise on this matter, the legislative history supplements the language to make clear that Congress did not intend to exclude from protection those employees who have the most to lose from arbitrary discharges—long-term employees whose pensions are calculated based on years of service and whose right to expensive health and medical insurance is dependent upon continued employment. The better reasoned decisions have relied upon the legislative history in interpreting section 510 as including these employees.

The rights of all employees covered by section 510 are threatened by a strict, literal application of the statutory language which requires direct evidence of intent. As courts in other areas of wrongful discharge law have recognized, direct evidence is often impossible to gather; requiring it only rewards employers who are able to accomplish their unlawful scheme without generating discoverable evidence.

Applying a procedural framework similar to that used in Title VII and the National Labor Relations Act cases will remove the impossible

240. See supra notes 216-17 and accompanying text.
241. Id.
242. See supra notes 31-33 and accompanying text.
243. See supra note 231 and accompanying text.
244. See supra notes 34-43 and accompanying text.
burden of proving intent from the plaintiff and will make the application of section 510 consistent with similar statutory schemes protecting equally important rights.

The cost of doing this is that the employer will often have to demonstrate the reasons for discharging an employee who has worked long enough to be eligible for a pension or other benefit. Given the strong financial incentive an employer has for reducing his benefit costs, the courts should require an employer to justify the discharge of a protected employee. If the employer cannot, he should incur liability under section 510.

In sum, arbitrary discharges—which are difficult to justify in any context—must not operate to deprive an employee of a hard-earned benefit or pension. Allowing such interference in vested benefit and pension rights would frustrate the laudable goals of section 510.