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FAILURE OF EQUITY: DISCRIMINATORY PLANT CLOSING AS AN IRREMEDIABLE INJURY UNDER ERISA

Lorraine Schmall* with Nathan Ihnes**

Downsizing and outsourcing are hallmarks of corporate success. At a time when shareholder and employee suits are daily news, a recent case in the Tenth Circuit shows another example of corporate miscreance.1 There, when deciding which of several plants to close, managers intentionally chose the one with thousands of senior employees in order to save money on the cost of their benefits.2 An oft-dormant and rarely used provision of the Employee Retirement Income Security Act (ERISA) of 1974 led to corporate liability in the amount of thirty-six million dollars paid to employees and their lawyers in Millsap v. McDonnell Douglas Corp.3 This provision, section 510 of ERISA, prohibits intentional employer interference with the enjoyment or attainment of vested or nonvested employee benefits.4 An eight-year battle between approximately one thousand employees and their transnational corporate employer ended with an alarum for those managers who create schemes to rid themselves of their most costly employees by basing business decisions, in part, on benefit cost savings.5 The victory for the workers was less than complete, unfortunately,

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3. 368 F.3d at 1249.
5. See Millsap, 162 F. Supp. 2d at 1306-07.

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since they were denied their request for the backpay necessary to make
them whole. As such, this irremediable wrong is a failure of equity.

There are a number of rationales for the results in Millsap, and other
similar cases. The best view is that circuit courts have been too wary of
affording expensive relief to litigants who prove their cases against their
firms, and have over-generalized judicial holdings. The cases in which the
United States Supreme Court has ostensibly limited equitable remedies
under ERISA are very different from the straightforward intentional
interference claims inherent in section 510. The courts may have
analogized to factually very different cases when they should have
distinguished them. Millsap is about approximately one thousand long-
tenured, skilled workers whose jobs were eliminated so their employer
could save millions in benefit costs. What their employer did unequivocally
violated the letter of the law. They were wrongfully discharged. The kinds
of remedies typically available in these slam-dunk cases were denied them
by two federal courts that thought the Supreme Court had dictated such a
result, although the High Court's pronouncements never arose in the
context of retaliatory firing. Most of ERISA deals with the protection of
employee benefit trusts, and the relationships among plan sponsors, other
fiduciaries, and plan participants and beneficiaries. Section 510 is the lone
provision that admonishes an employer against taking adverse action
against employees or classes of workers to frustrate their receipt of
promised employee benefits. As such, it is more a cousin of the federal
civil rights and labor laws that prohibit retaliatory discharges, and a direct
descendant of state wrongful discharge laws. Its uniqueness has not been
recognized as requiring unique remedies. And that inures to the detriment
of ERISA's protected class and purpose of the statute.

The appellate decision in Millsap was wrong. Neither the purpose of
ERISA in general, "to promote the interests of employees and their
beneficiaries in employee benefit plans," nor the specific goal of section
510, an antiretaliation provision, is effectuated by denying the victims of
employer discrimination a meaningful remedy. "The reforms in ERISA
embolden a worker-security theory of pensions." What is most frustrating
about the Tenth Circuit's refusal to affirm the carefully-thought-out remedy

6. See Millsap, 368 F.3d at 1260-61.
7. See Millsap, 162 F. Supp. 2d at 1264, 1306-07.
8. See Millsap, 368 F.3d at 1255-57.
10. Id. § 510, 29 U.S.C. § 1140.
13. JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF
created by the district court is the circuit court’s attempt to follow what it thinks is the law of the case. There is none.

The three plant-closing cases that successfully established section 510 violations have not been considered by the Supreme Court, and thus do not create mandatory law. Despite its protestations to the contrary, the Supreme Court has had neither the time nor the opportunity to develop an ERISA jurisprudence that is workable, predictable, and can actually resolve legal disputes before they evolve into complex litigation. It has considered a handful of ERISA cases each year, each with distinct and unique facts, the resolution of each not necessarily creating a coherent body of law that may help with the resolution of the next handful. That is not to say that the Court has refused to take on hard cases under the thirty-year-old law. The Court has grappled with the breadth of ERISA preemption in a diverse and distinct spectrum of challenges. There have been difficult questions about the relationship among ERISA’s promise of a uniform scheme of administration and judicial review of plan denials and state laws attempting to impose quality control on the provision of health care. State issues as diverse as their divorce laws have abutted ERISA, requiring Supreme Court intervention. The Justices of the Supreme Court have attempted to describe and evaluate trustee duties.


15. If the subject matters of ERISA cases presented for Supreme Court consideration were portrayed in a Venn diagram, there would be precious little overlap.

16. See, e.g., Ky. Ass’n of Health Plans, Inc. v. Miller, 538 U.S. 329, 331, 341-42 (2003) (finding that state statutes, which prohibited HMOs from excluding willing healthcare providers from their provider networks, were not preempted as relating to ERISA plans); Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 359, 362-63 (2002) (holding that an Illinois independent medical review statute was not preempted by ERISA so an HMO beneficiary could use an independent medical review in her favor to collect benefits for a procedure which her HMO had declared medically unnecessary); Pegram v. Herdrich, 530 U.S. 211, 214-15, 237 (2000) (finding that a mixed eligibility decision to delay medical treatment by sending patient to HMO-owned facility, with adverse consequences, made by the HMO through its physician was not a fiduciary decision under ERISA); De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 808-09, 815-16 (1997) (holding that a Health Facility Assessment was not preempted by ERISA because, while its operation “impos[ed] some burdens on the administration of ERISA plans, [it did] not ‘relate to’ them within meaning of [ERISA]”

17. See, e.g., Egelhoff v. Egelhoff, 532 U.S. 141, 143 (2001) (holding that ERISA preempted a state statute which “provid[ed] that the designation of a spouse as the beneficiary of a nonprobate asset [was] revoked automatically upon divorce”); Boggs v. Boggs, 520 U.S. 833, 835-38 (1997) (finding that in widow’s suit seeking determination of rights to decedent’s undistributed retirement benefits, decedent’s sons were improperly granted summary judgment, as testamentary transfer of benefits to sons by decedent’s first wife was preempted by ERISA).

18. See, e.g., Lockheed Corp. v. Spink, 517 U.S. 882, 884, 888, 891, 895 (1996) (holding that an employer’s amendment of benefits plan to condition payment of early retirement
became entangled in ERISA's morass. But these myriad ascendants to the High Court have not created a workable scheme on most ERISA matters, especially not in the area of remedies.

It could be argued that a purposive reading of ERISA is inappropriate, in light of several of ERISA's specific, albeit confusing, provisions that seem to limit remedies. Certain accepted conventions of statutory interpretation may mandate the result. This is essentially what the Supreme Court has said in *Great-West Life & Annuity Insurance Co. v. Knudson,* *Mertens v. Hewitt Associates,* and *Massachusetts Mutual Life Insurance Co. v. Russell.* Or, it is possible that the Court majority's statutory divination is wrong.

If we have to assume the Court is right, then another irrebuttable presumption is that, looking backward from empirical data, Congress did not actually pass a law that would accomplish the goals found in ERISA's preamble and legislative history, either because Congress did not want to or understand how to. To continue the syllogism, perhaps Congress did not want to end discrimination because, as the law operates, it essentially rewards law evasion or violation. Finally, Congress might have wanted to

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19. See, e.g., *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S. 365, 367-72, 376 (1990) (concluding that a trial court was without authority to place a constructive trust on petitioner's pension benefits, despite criminal conduct on petitioner's part, as the benefits were protected by federal statute and were not subject to alienation); *Massachusetts v. Morash,* 490 U.S. 107, 109-10, 119-21 (1989) (holding that the state prosecution of an employer for failing to pay accrued vacation benefits to discharged workers was not preempted because such benefits were not part of an employee welfare benefit plan under ERISA).


24. The argument goes as follows:

A) Employee benefits are voluntary, not tax-supported, and ostensibly desirable;
B) Placing huge transaction costs on employers for law violation may discourage them from voluntarily providing benefits in the first place;
C) Even without positive law, in many cases, cost equilibrium (e.g., for smaller employers who can save less on benefits) will keep employers from interfering with their employees' benefits; and
end some discrimination, but ending it all was too onerous for companies (and capitalism) and ending some was better than none.25 One might assume even more rationales, e.g., the transaction costs of defensive litigation as a deterrent to law violation, even where those costs are not solely economic, or the notion that courts, especially the Supreme Court, are in some turf war with Congress about who must assume the responsibility for making laws pragmatic and workable.26 But none of these arguments or theories explain why an antidiscrimination law does not punish or prevent discrimination.

PUBLIC POLICY INHERENT IN ERISA'S PROTECTIONS AGAINST RETALIATION AND INTERFERENCE

Although section 510, according to its sponsors and the Supreme Court, exists to prevent retaliation against workers who actually have benefits,27 its meaning and purpose is skewed by the inclination of a majority of the High Court to decide what equity allows and by an expansive reading of Supreme Court holdings in radically different factual contexts to apply to the discrete and infrequent section 510 claim.28 This ERISA admonition against reprisals adheres to a distinct normative model of appropriate income distribution among workers in this country, which is based upon vague meritocratic principles holding that only hardworking and efficient employees deserve to be retained. Workers who have earned benefits,

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25. See Eric M. Fink, Post-Realism, or the Jurisprudential Logic of Late Capitalism: A Socio-Legal Analysis of the Rise and Diffusion of Law and Economics, 55 HASTINGS L.J. 931, 934-35 (2004) ("[A]dvocates of Law and Economics contend that efforts to regulate individual behavior through the law are likely to be futile or have perverse or dangerous consequences. The argument against regulation is twofold: first, the costs (anticipated and unanticipated) of regulation often outweigh its benefits; second, regulation is a form of rent-seeking behavior by cartelizing groups seeking to gain a premium over the market price for their activity."

26. See Judith Resnik, Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power, 78 IND. L.J. 223, 224 (2003) ("The five-person majority that has become famous for its jurisprudence on the Commerce Clause, the Fourteenth Amendment, and sovereign immunity has also revised the scope of federal equitable and common law powers. The emerging legal rules stem from cases—such as Grupo Mexicano de Desarrollo, S.A., v. Alliance Bond Fund, Inc., and Great-West Life & Annuity Insurance Co. v. Knudson—that may not come trippingly off the constitutional scholar’s tongue but must be understood as working in tandem with the majority’s restrictions on the power of Congress to develop new federal rights. These holdings instruct federal judges not to craft remedies without express congressional permission, and, when permission has been granted, to read it narrowly.").


28. See supra notes 16-19 and accompanying text.
arguably by dint of hard work and long-term commitment to a firm, should be the most deserving. But even this exemplary cohort of workers, whose benefits become too costly, have no guarantee of, and in fact not even the barest entitlement to, a job or its proxy, or backpay for wrongful discharge. Thus, the social cost of their unemployment will ultimately be borne, after impoverishing their families, by the commonweal. This frustrates the public policy embedded in ERISA.

Oddly, ERISA's prohibition against making business decisions based on benefit costs seems to catapult the ethic of altruism over notions of market efficiency. It appears that Congress created legislation that is irrational in an economic sense, but which comports with other antidiscrimination laws. Since the law is clear—benefit costs cannot motivate discharge—then the only limits on its irrationality can be found in limiting the remedy for the law's violation. If rational economic behavior shapes and justifies law, then ERISA can be looked at as a practical equation. If McDonnell Douglas Corporation (MDC) can save millions of dollars by breaking the law, it ought to. McDonnell Douglas pays every benefit dollar it would have if it had kept all the retaliatory-discharged employees in the company's pension and health plans as part of a settlement. But it also fired a contingent of its highest-paid workers, and now potentially saves five or nine or twenty dollars per man hour and produces the same product for the same price. Profit-seeking is the logical role for market competitors. To ignore such an opportunity at disproportionately more benefit than cost would be

29. It is necessary to put aside the argument that many "senior" employees with good salaries, pensions, and health insurance may be unwitting beneficiaries of their employer's historic race, sex, or national origin discrimination. See Smith v. City of Jackson, 125 S. Ct. 1536, 1544 (2005) (holding that disparate impact may be sufficient to prove an Age Discrimination in Employment Act violation).

30. Shunting middle-class, tax-paying, wage-earners into the class of public dependents is inefficient since the effect is to reduce the number of paying contributors to Social Security and savings pools. This view mirrors those held by the original proponents of Title VII of the Civil Rights Act of 1964. See 88 Cong. Rec. 13,088 (1964) (statement of Sen. Humphrey) ("There is considerable evidence to demonstrate that permitting people to be hired on the basis of their qualifications not only helps business, but also improves the total national economy."). Moreover, pension-sponsoring firms enjoy enormous tax subsidies. See TERESA GHILARDUCCI, LABOR'S CAPITAL, at ix (1992) ("[W]orkplace pension coverage relieves the federal government of pressure to expand the Social Security system . . . .")


32. Compare Millsap v. McDonnell Douglas Corp., 162 F. Supp 1262, 1274 (N.D. Okla. 2001) (finding that the "actuarial asset value of the benefits was $33,199,000" at the time of the plant closing), rev'd, 368 F.3d 1246 (10th Cir. 2004), with Millsap v. McDonnell Douglas Corp., 368 F.3d 1246, 1249 (10th Cir. 2004) (noting the $36 million settlement agreement providing for "lost pension and health care benefits").

33. See Millsap, 162 F. Supp. 2d at 1270-71.
inefficient.\textsuperscript{34} But such logic lends to an inescapable, and completely
unpalatable, conclusion that ERISA was adopted to allow wrongdoers to
make some money even when they lose in court.

If ERISA is instead an avowedly inefficient drag on the market that has
some salutary motives and purposes, then ERISA, as it operates, has failed.
It does not guarantee a return to the status quo for victims. Looked at as a
prohibition against discrimination of some sort, it can only remedy this evil
by making it unprofitable for a market player to discriminate. If the law can
be inexpensively (relatively) violated, then law-abiding is irrational. This
would not be the first time we have sacrificed community efficiency to
guarantee individual rights. For example, this is precisely how many
scholars would describe the New Deal legislation which fundamentally
adjusted the free market system in order to achieve a more distributively
fair equipoise between workers and owners of capital.\textsuperscript{35} Our laws are laden
with legislative histories and purpose provisions that reflect an impressively
worded commitment to fairness and access. Were one to literally apply the
preambles of such congressional forays into sainthood, no plaintiff would
want for redress.\textsuperscript{36} But hard choices were made as the laws were applied,
and those choices reflect an even more primordial commitment to the
preservation of capital. The irony is that a firm’s logical consideration of
benefit costs are proscribed by ERISA’s antidiscrimination provisions,\textsuperscript{37} and
this fact may have put courts in the position of limiting remedies to make
sense in a business world.

ERISA can be considered a type of tax law, in that tax expenditures
support the creation of private pensions at considerable cost to the
government in lost tax revenues. There is a schema of carrot-and-stick
benefit provisions in the United States.\textsuperscript{38} Congress, and the people who

\textsuperscript{34} See John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit
Law 127 (2d ed. 1995) ("Do you think that employers make plant closure or other large scale
layoff decisions in ignorance of fringe benefit costs? . . . Do you think good managers make
such decisions ignorant of such fundamentally relevant information?").

\textsuperscript{35} See William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal

\textsuperscript{36} Americans with Disabilities Act (ADA) sponsors provide ready examples of this type
of rhetoric. See Kimberley A. Ackourey, Comment, Insuring Americans with Disabilities: How
Far Can Congress Go To Protect Traditional Practices?, 40 Emory L.J. 1183, 1183-84
(1991). As one ADA proponent windily insisted, “discrimination on the basis of disability in
any form will not be tolerated and people with disabilities will be able to hold their Federal
Government accountable for ensuring the enforcement of their rights.” 101 Cong. Rec. 8507


\textsuperscript{38} See Moore v. Reynolds Metals Co. Ret. Program for Salaried Employees, 740 F.2d
454, 456 (6th Cir. 1984) (“Neither Congress nor the courts are involved in either the decision
to establish a plan or in the decision concerning which benefits a plan should provide. In
particular, courts have no authority to decide which benefits employers must confer upon their
elect it, do not want to pay for expensive guaranteed benefits like pensions and health insurance. Instead, corporations are given tax benefits and protection from tort claims of unlawful discharge in exchange for their sponsorship, and, in some cases, funding of employee benefit packages.\textsuperscript{39}

Bottom line benefits inure to firms that offer pensions. Employers enjoy enormous tax advantages through the creation of pension plans: “It is inconceivable that the size of the current private system is not largely attributable to the special pension tax provisions in the U.S. Tax Code and the accompanying high marginal tax rates that have prevailed in the code since WWII.”\textsuperscript{40}

Congress favors the creation of private pension plans. The tax expenditure\textsuperscript{41}—the loss of federal tax revenues due to the preferential employees; these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation.” As a result, ERISA provides less protection than state law and can limit the remedies an employee can seek.

39. See ERISA § 514(a), 29 U.S.C. § 1144(a) (“[T]he provisions . . . of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title . . . .”); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139-42 (1990) (holding that a plaintiff's state common law suit for breach of contract and wrongful termination seeking compensatory and punitive damages was preempted by ERISA); Fort Halifax Packaging Co. v. Coyne, 482 U.S. 1, 10-11 (1987) (“It is thus clear that ERISA’s pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.”); cf. La Buhn v. Bulkmatic Transp. Co., 644 F. Supp. 942, 948 (N.D. Ill. 1986) (commenting on the general effect of preemption on a plaintiff's chances against an employer in a retaliatory discharge for complaining about unsafe working conditions, often times a “removing defendant tows the case into federal harbor only to try to sink it once it is in port”), aff’d, 865 F.2d 119 (7th Cir. 1988).

40. Lorraine Schmall, Defined Contribution Plans After Enron, 41 BRANDEIS L.J. 891, 934 (2003) (quoting RICHARD A. IPPOLITO, PENSIONS, ECONOMICS, AND PUBLIC POLICY 7 (1986)). According to economist Denis Kessler,

firms have a demand for such [pension] schemes. It is remarkable that in all industrialized countries, corporations have been actively implementing and extending old-age protection schemes. Therefore it should be of interest to try to understand the economic reasons underlying the behaviour of firms which lead to the increase of income transfers to retirees.

Denis Kessler, But Why Is There Social Security?, in WORKERS VERSUS PENSIONERS: INTERGENERATIONAL JUSTICE IN AN AGEING WORLD 80, 87 (Paul Johnson et al. eds., 1989).

treatment of pension plans in the tax code—was $314.080 billion in 2005.\textsuperscript{42} Tax-favored employment-based retirement benefits alone account for nearly seventeen percent of the tax breaks.\textsuperscript{43} Of course, these revenues are not completely lost; their collection is merely deferred. When the former worker starts receiving benefits from the pension plan, the benefit payment will be taxed, often at a lower rate, providing some revenue for the federal government. These kinds of tax expenditures support a strong argument for the existence of an articulated federal public policy favoring deferred benefits and preventing their loss through larceny, mismanagement, or discharge of workers.

Once established, such benefits (or their cost) cannot legally motivate an employer to discharge employees who enjoy them. But if there were such an illegal motive, certainly money damages to the discriminatees are unavailable, since such damages are not “equitable.” What kind of quid pro quo is there for the benefits-awarding employer who gave too much away and fires those eligible for the benefits? There is no doubt that companies must receive some benefit if they are to establish plans that cost a great deal of money. Firms that sponsor plans clearly benefit from them—firms are assured a better and more stable workforce, and both firms and employees receive tax advantages through the payment of deferred, rather than current, compensation. In cases of enhanced benefits and early retirement incentives, firms also enjoy the advantage of inducing employees to leave their payrolls with concomitant reductions in benefit obligations. An examination of the cases suggests that the interests of an employer/sponsor or plans themselves, as separate funded entities, more often prevail over the interests of plan participants and beneficiaries.\textsuperscript{44}

**OPERATIONAL DEFINITION OF ERISA'S PROHIBITED INTERFERENCE CLAUSE**

*Millsap* is the exemplar for plant-wide section 510 discrimination. McDonnell Douglas, an aircraft manufacturer, made a decision to close a


\textsuperscript{43} Id. at 1.

Tulsa, Oklahoma, plant after promising employees repeatedly that it would not be sold. So far, there is nothing atypical or illegal in such entrepreneurial decision-making. "In the late 1980's and early 1990's, the amount of government defense contracting work available to McDonnell Douglas and other defense contractors was declining." In an effort to remain competitive, the firm made some difficult choices. Its CEO, John McDonnell, issued a memorandum to all employees entitled "The Hard Reality." In this memo, Mr. McDonnell informed MDC employees that the company needed to reduce annual expenditures by $700 million a year. These expenditures were to come from all segments of the company and, according to the McDonnell memo, would include reductions in force that would affect the company's employees, of which there were then about 130,000 worldwide.

The trial court found that "[f]rom the beginning of ‘Hard Reality,’ MDC discussed ways to maximize its pension surplus by focusing on the

45. Millsap v. McDonnell Douglas Corp., 162 F. Supp. 2d 1262, 1264-66 (N.D. Okla. 2001), rev’d, 368 F.3d 1246 (10th Cir. 2004). Such promises were made repeatedly and with great fanfare, including a press conference at one of McDonnell Douglas's plants, by then-president George H.W. Bush, approving the company's manufacture of fighter aircrafts that the United States would sell to Saudi Arabia. Id. at 1265-66.

Named Plaintiffs James Millsap, Fred Davis and Vera Lehman were employees with many years of service at MDC's Tulsa facility until the plant closed. Prior to the facility closing, they recalled being told on multiple occasions that if the company was awarded the F-15 contract with the Saudi government, the plant would be open for at least three more years. They were asked by the company to write letters and to sign cards, not only to their Congressmen but also to the President.

... In response to these requests by MDC, the union and the company's employees lobbied the Oklahoma political delegation with letters and calls. The promise of at least three more years of work was made not only to MDC employees, but also at the job rally at which the President of the United States and several members of the Oklahoma congressional delegation were present. These promises were repeated on other occasions by the President of McDonnell Douglas Aerospace, John Capellupo, and the former general manager of the plant, Al Briggs, his successor, Don Bittle, and the plant director, Joe White. In addition, members of the Oklahoma political delegation were heard repeating the same promise to employees during their various visits to the plant.

... On September 11, 1992, President Bush announced at a McDonnell Douglas job rally held in St. Louis that he had approved the $9 billion sale of the 72 F-15's to the Saudi government. This message was broadcast to employees and the public at the Tulsa plant, where a similar rally was underway.

... The company's public relations staff took this occasion to repeat the representation from its 1991 Annual Report.

Id.

46. Id. at 1264.
47. Id.
relationship between plant closings and older, more senior workers approaching eligibility for pension and other benefits." In order to monitor its pension savings, the firm kept track of the average age and length of service of the employees it laid off. Even this corporate behavior is both rational and legal. However, it ultimately became clear that McDonnell Douglas chose to close its Tulsa plant with the prohibited intent of getting rid of those workers whose continued accrual of, or permanent vesting in, expensive pension benefits made them the most costly among its cohort.

At that point, McDonnell Douglas violated the retaliatory discharge provision of the law that federally regulates employee benefits. When a business decision is based in part on the age of the workers discharged or on predictions about pension savings, section 510 of ERISA protects affected employees from loss of benefits. It declares:

> 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... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan... 

Ordinarily, proving that an employer intended to interfere is difficult, and it is often impossible to rebut any legitimate "other" explanation for the change in job status. But, in Millsap, an Oklahoma district court found that the company violated ERISA by closing a plant with the intent to shed employees whose benefit costs were high or who were on the verge of vesting in pensions. The court found "smoking gun" evidence of the company's illegal motives. The evidence included certain memos from outside actuaries that presented and analyzed the savings available if benefits were reduced. One memo "consider[ed] various 'what if' scenarios, analyzing the effect on costs and savings if the company decided

48. Id. at 1268.
49. Id.
50. Id. at 1307.
51. Id.
53. Id. (citation omitted).
56. Id.
to reduce heads.” The financial experts examined “‘pension cost, savings cost, savings plan cost, health care cost, and just direct overhead cost.’” While such incontrovertible evidence rarely exists, it did in Oklahoma, and the result was a finding that ERISA should have protected employees from this adverse action. But, in this most unusual of ERISA claims, the plaintiffs were not granted the “make-whole” remedies they sought. This is so because of the Tenth Circuit’s conclusion that ERISA remedies for certain named violations of the Act, including the non-interference prohibition, were purely equitable. The appellate panel read proclamations from the United States Supreme Court about the breadth of equitable remedies under ERISA as precluding backpay.

57. Id. at 1269.
58. Id. (quoting Deposition of Richard Smoski at 7).
60. See id. at 1257 n.15 (citing Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 221 (2002)); id. at 1260 (citing Mertens v. Hewitt Assocs., 508 U.S. 248, 253, 261-62 (1993)); id. at 1259 (citing Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 (1985)). Other circuits have followed the Supreme Court’s lead, adopting its reasoning even in factually distinct cases. See, e.g., Calhoon v. Trans World Airlines, 400 F.3d 593, 596 (8th Cir. 2005) (holding that the plaintiffs were not entitled to a “make whole” remedy, including unpaid medical bills, for the period during which a fiduciary breach led to their temporary loss of insurance); Callery v. U.S. Life Ins. Co., 392 F.3d 401, 403-05 (10th Cir. 2004) (holding that the ex-spouse of a plan participant who continued to pay premiums on his life insurance was denied proceeds when he died, despite trustees’ failure to notify her that she was ineligible to pay); Felix v. Lucent Techs., Inc., 387 F.3d 1146, 1162-63 & 1163 n.16 (10th Cir. 2004) (referencing Millsap for the proposition that ERISA sometimes leaves employees without remedy in case alleging fiduciary breach by an employer who induced employees to retire without telling them what pension benefits they stood to lose), cert. denied, 125 S. Ct. 2961 (2005); De Pace v. Matsushita Elec. Corp. of Am., 257 F. Supp. 2d 543, 563 (E.D.N.Y. 2003) (holding that plaintiffs induced to retire by employers’ misrepresentation can proceed, but remedies are sorely limited).

In essence, Great-West Life dictates that plaintiffs’ claims for compensatory payments equal to the difference between the benefits they received and those they were promised is not a viable remedy under § 1132(a)(3) because “[a]lmost invariably ... suits seeking ... to compel the defendant to pay a sum of money to the plaintiff arc suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.” Id. at 561-62 (alterations in original) (quoting Great-West, 534 U.S. at 210). The plaintiffs' claims here for compensatory and punitive damages are illustrative of the type of tort-related monetary remedies that were not typically available in equity, and fall outside the Supreme Court's formulation of equitable relief.
THE PURPORT AND PRACTICE OF ERISA'S REGIME OF REGULATION

ERISA does impose certain clear obligations upon companies that offer benefits to their employees.61 Both pension and health plans are subject to four major requirements in addition to minimum vesting62 and funding standards.63 Employers must report the type and quantity of benefits to the Department of the Treasury,64 employers must disclose the content and procedure of plans to employees and their beneficiaries,65 companies cannot discriminate in favor of highly compensated employees,66 and any person who exercises control over ERISA funds must assume certain basic fiduciary responsibilities.67 The Supreme Court has recognized that "[a]s part of this closely integrated regulatory system Congress included various safeguards to preclude abuse and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.'"68 The Supreme Court explained that "Congress viewed this section [510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits."69 With ERISA decisions, as is true in all of law, interpretations and prejudices have come into play even with the most "literal" statutory interpretation.70

63. Id. § 302, 29 U.S.C. § 1082.
ERISA is jointly enforced by the Department of Labor and the Internal Revenue Service; hence, both Titles 26 and 29 of the United States Code are referenced.
66. Id. § 401(a), 29 U.S.C. § 1101(a). This requirement has been interpreted to mean that a company president cannot offer benefits to herself and her cronies while excluding all other employees. See id. § 401(a)(1), 29 U.S.C. § 1101(a)(1). However, deferred compensation pension plans which are unfunded and which benefit only a select group of highly compensated employees may be exempt from ERISA. See Pane v. RCA Corp., 868 F.2d 631, 637 (3d Cir. 1989).
69. Id. at 143.
70. See Wharton Scholar Sees Trend to Economic Approach to Labor Issues, 7 LAB. REL. WK. (BNA) 781, 781 (Aug. 11, 1993). Professor Janice R. Bellace has suggested that "efficiency arguments may simply be a device to conceal policy choices." Id. She argues that Justice Scalia has emphasized one goal of ERISA, "containing pension costs" while at the same time "discounting or thwarting ERISA's primary purpose of giving plan participants greater protection than they enjoyed at common law." Id.
The antiretaliation provision of ERISA, section 510, actually provided the Supreme Court with an early opportunity to explain the breadth of ERISA preemption in *Ingersoll-Rand Co. v. McClendon*.

[Respondent Perry] McClendon had worked [as a salesman and distributor of construction equipment] for nine years and eight months [when] the company fired him[,] citing a companywide reduction in force. McClendon sued the company in Texas state court, alleging that his pension would have vested in another four months and that a principal reason for his termination was the company’s desire to avoid making contributions to his pension fund.

He lost at the trial level, but the state supreme court reversed and remanded for trial, holding that public policy required recognition of an exception to the employment-at-will doctrine. The majority concluded that “the state has an interest in protecting employees’ interests in pension plans.” As support, the court noted that “[t]he very passage of ERISA demonstrates the great significance attached to income security for retirement purposes.” The court reasoned that McClendon was seeking future lost wages, recovery for mental anguish, and punitive damages, rather than lost pension benefits, and was, therefore, not subject to federal preemption and removal.

The Supreme Court reversed. Justice O’Connor wrote the decision, finding that the “claim falls squarely within the ambit of ERISA § 510,” which protects plan participants from termination motivated by an employer’s desire to prevent a pension from vesting. Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits. We have no doubt that this claim is prototypical of the kind Congress intended to cover under § 510 [of ERISA].

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72. Id. at 135-36.
73. Id. at 136.
75. Id.
76. Id. at 71 n.3.
77. Ingersoll-Rand, 498 U.S. at 137.
78. Id. at 142.
Not only is discharge motivated by a desire to preclude enjoyment or receipt of benefits prototypical, but section 510 is the benchmark for “but-for” types of proof. Whenever the employer can prove a legitimate nondiscriminatory reason for terminating an employee, then even though such termination may “have an incidental, albeit important effect on an employee’s pension rights,”\(^8\) the employee’s claim must fail.\(^3\) To accrue liability, an employer must exhibit the specific intent to discriminate because of the employee’s need for ERISA rights and benefits.\(^\) \(^2\) “ERISA does not guarantee every employee a job until he or she has fully vested into a company’s benefit plan.” Rather, ERISA guarantees that no employee will be terminated where the purpose of the discharge is the interference with one’s pension rights.\(^8\)

Although few in number overall, the more common ERISA section 510 violations are proven by a single employee who lost his job.\(^8\) One of the first courts to consider a retaliation claim awarded the plaintiff just the type of relief Perry McClendon sought, but was denied, in state court. Preemption was not an issue. John Folz may have been the first plaintiff to convince a federal court that he was discharged, shortly after he told his boss he had incurable multiple sclerosis, because his employer intended to interfere with his receipt of pension and medical plan benefits in violation of section 510.\(^6\) Giving credence to his claims of pretense and suspect timing, the court in Folz v. Marriott Corp.\(^7\) refused to accept the purported whether a state law claim that, by its factual allegations falls within § 510 is completely preempted”). \(\) But see Del Priore v. Citibank, No. 99-16174, 2000 WL 1195472, at *2 (9th Cir. Aug. 22, 2000) (holding that an employee’s claim that she was discharged in retaliation for filing an appeal for the company’s denial of ERISA benefits, which “sound[ed] identical” to an ERISA section 510 claim, was not preempted).\(^8\)

81. Id. at *6.
82. See, e.g., Conkwright, 933 F.2d at 238.
83. Id. (quoting Dister v. Cont’l Group, Inc., 859 F.2d 1108, 1111 (2d Cir. 1988)).
84. Most claims fall under an individual employee’s deprivation of health benefits. See, e.g., Kowalski v. L & F Prods., 82 F.3d 1283, 1291 (3d Cir. 1996) (finding that an employer discharged an employee in retaliation for exercising disability benefits rights); Kross v. We. Elec. Co., 701 F.2d 1238, 1239, 1246 (7th Cir. 1983) (concluding that an employee presented a cognizable section 510 claim when the employer reduced its workforce and employee lost his medical and dental benefits); Vallone v. Banca Nazionale del Lavoro, Nos. 02 Civ. 6064 (RCC), 02 Civ. 7102 (RCC), 2004 WL 2912887, at *1-3 (S.D.N.Y. Dec. 14, 2004) (denying an employer’s motion to dismiss); Folz v. Marriott Corp., 594 F. Supp. 1007, 1014-15 (W.D. Mo. 1984) (holding an employer liable for intentional interference with an employee’s benefits for discharging him to avoid paying costly health benefits after the employee informed the employer that he had multiple sclerosis).
85. See Folz, 594 F. Supp. at 1021.
86. See id. at 1010.
legitimate business reasons offered by the company as a justification for Folz’s dismissal two months after the company learned of his illness. This dismissal followed sixteen years of consistently positive evaluations and the recent laudatory industry review of the hotel Folz managed.

Finding circumstantial evidence of the company’s retaliation against its former employee, the court did all it could to put him back in the place he would have occupied were it not for his unlawful discharge. According to the district court:

A careful review of the pertinent statutory language and legislative history of ERISA, along with a comparison of ERISA to similar remedial statutes, leads this Court to conclude that its equitable power under ERISA is not limited to mere reinstatement of pension plan benefits. Rather, the Court concludes that it has the equitable power under ERISA to put the plaintiff “back into the position he enjoyed before the discharge. This includes awarding plaintiff back pay, reinstatement to his former position, restitution of his forfeited employee’s benefits, and any other relief necessary to make him whole.”

Section 510 has daunted, and dashed, most plaintiffs. For instance, in Kapetanovich v. Rockwell International, Inc., a former employee alleged that he was fired after eight years as an accountant because the company wanted to avoid paying his medical bills, which in the years immediately prior to his discharge had averaged $26,000 a year. Kapetanovich also claimed that the company had unduly delayed in paying his insurance claims, that because of the delay he had been forced to wait almost a year before getting an injection, which he was supposed to have monthly, and that the company had limited him to four days of treatment at a diabetes clinic, even though the average stay would have been two weeks. Plaintiff did not make separate claims against the trustees for each matter; rather, he used the facts as cumulative evidence of the company’s alleged unlawful motive. The court granted the company’s motion for summary judgment. Conceding that a section 510 violation is rarely “demonstrated by “smoking
gun” evidence,”97 the court stated the majority rule among jurisdictions accepting allegations based upon circumstantial evidence:

When a violation of Section 510 can only be proved by circumstantial evidence, this circuit has used the scheme of shifting burdens of proof developed by the United States Supreme Court in Texas Dep’t of Community Affairs v. Burdine, and other Title VII cases. To make out a prima facie case under section 510, a plaintiff must prove by the preponderance of the evidence that s/he “(1) belongs to the protected class, (2) was qualified for the position involved, and (3) was discharged . . . under circumstances that provide some basis for believing that the prohibited intent was present.” If the plaintiff is able to establish a prima facie case, “the burden of production shifts to the employer to introduce admissible evidence of a legitimate, nondiscriminatory reason for its challenged actions.” If the employer carries its burden, “the presumption drops from the case and the [plaintiff] is afforded the opportunity to demonstrate that the employer’s articulated reason is pretextual ‘either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.’”98

Applying this proof scheme, the court accepted Kapetanovich’s proof of the first two elements, but found that he “failed to show that he was discharged under circumstances that provide some basis for believing that [defendant] Rockwell possessed the intent to violate ERISA.”99 The court found no proof of the requisite “causal connection” to prove the company’s specific intent because there was no proof that anyone with the authority to fire the plaintiff knew how expensive his medical treatment was.100 Simply being aware of his absences would not suffice.101 Moreover, the medical claims were administered by an insurance company for Rockwell, which did not make individual reports on the employee to the employer.102 Finally, the court thought it important that “the size of Kapetanovich’s medical

97. Id. at *7 (quoting Gavalik v. Cont’l Can Co., 812 F.2d 834, 851-52 (3d Cir. 1987)).
98. Id. at *7-9 (alterations in original) (citations omitted); see also St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993) (holding that it is within the discretion of the fact finder to reject or accept the plaintiff’s proffered reason for the alleged adverse employment action). The seminal case for Title VII circumstantial evidence cases emerged from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). A finding of liability against McDonnell Douglas in that case should have prepared it for Millsap, since the same evidentiary burdens were applied in the later case.
100. Id. at *9-10.
101. Id. at *10.
102. Id. at *10-11.
benefits claims was insubstantial compared to Rockwell’s total outlay in medical claims payments in 1987. News apparently travels slowly in some multinational corporations.

In *Humphreys v. Bellaire Corp.*, the plaintiff was fired just shortly before becoming vested in his company’s pension plan. He made several claims, but the alleged ERISA violation was dependent upon section 510. Humphreys had worked at a number of management positions for a subsidiary of North American Coal Corporation for almost ten years when he was discharged. Although Mr. Humphreys alleged that he had been promised job security, when the mine was sold “North American discharged Humphreys [who was forced to take] a job at a lower salary with the purchaser of the mine.” The Sixth Circuit accepted the findings that Humphreys met his burden of presenting evidence to support each of the elements of a *prima facie* case. He was discharged, and it was his testimony that his pension would have vested in two months and that this would have cost the company a substantial amount. Although it is no more than the bare minimum that a plaintiff must show to meet the *prima facie* case threshold, in this case it satisfies that low threshold because, examining only Humphreys’ evidence, the proximity to vesting provides at least some inference of intentional, prohibited activity.

The court followed the lead of other circuits in analogizing to Title VII in both description of the violation and requirements of proof: “[T]o avoid summary judgment on a section [510] claim, a plaintiff must show the existence of a genuine issue of material fact that there was: ‘(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.” Once the employer offers a legitimate rationale for the discharge, the

103. *Id.* at *12.
104. 966 F.2d 1037 (6th Cir. 1992).
105. *Id.* at 1043-44.
106. *Id.* at 1039.
107. The defendant Bellaire Corporation was called North American Coal Corporation when the actions in this case took place. See *id.* at 1039 n.1.
108. *Id.* at 1039.
109. *Id.*
110. *Id.* at 1044. The court cites *Biggins v. Hazen Paper Co.*, 953 F.2d 1405 (1st Cir. 1992), for the proposition that such coincidences might establish a case, but then cites *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988), where “the court stated that its previous decisions ‘cannot be read to mean that mere cost savings and proximity to benefits are sufficient *per se* to create a genuine issue of material fact.’” *Humphreys*, 966 F.2d at 1043-44 (quoting *Dister*, 859 F.2d at 1117 n.1).
111. *Humphreys*, 966 F.2d at 1043 (quoting *Gavalik v. Cont'l Can Co.*, 812 F.2d 834, 852 (3d Cir. 1987)).
plaintiff must rebut with proof that such reason is pretextual.\textsuperscript{112} This is no easy task.

In denying a company’s motion for summary judgment on the section 510 claim of a longtime executive who was discharged, a district court in \textit{Blair v. Young-Phillips Corp.}\textsuperscript{113} explained:

In making the determination of whether the plaintiff has met his burden of showing pretext, "[t]he question is not whether [the defendants] exercised prudent business judgment,... but whether [the plaintiff] has come forward to refute the articulated, legitimate reasons for his discharge. In this regard, [the plaintiff] must do more than challenge the judgment of his superiors through his own self-interested assertions."\textsuperscript{114}

This approach has been consistently followed over the last two decades and continues to have currency.\textsuperscript{115} For example, in \textit{Parker v. Union Planters Corp.},\textsuperscript{116} the plaintiff, a former employee, filed an action claiming that his employer fired him for the purpose of interfering with his attainment of certain benefits under the employer’s Supplementary Executive Retirement Plan (SERP).\textsuperscript{117} Mr. Parker had been employed by Defendant Union Planters Corporation for a total of twenty-four years. . . . During the last ten years of his employment, from March 1990 until March 2000, he served as Chief Financial Officer ("CFO") of UPC. During Plaintiff’s tenure as CFO of UPC, the bank grew in size . . . from approximately $4 billion in assets to approximately $33 billion in assets. UPC also went from being a financial institution that had lost approximately $22 million in the year before Plaintiff became CFO to a financial

\begin{itemize}
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} 235 F. Supp. 2d 465 (M.D.N.C. 2002).
\item \textsuperscript{114} \textit{Id.} at 473 (quoting Dale v. Chi. Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986)); \textit{cf.} Rowe v. Marley Co., 233 F.3d 825, 830-31 (4th Cir. 2000) (affirming summary judgment where the plaintiff failed to “forecast any evidence that cast[] doubt on the veracity of [the defendant’s] proffered explanation” that the plaintiff was terminated as part of a company-wide reduction in force); Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 239-40 (4th Cir. 1991) (affirming summary judgment where the plaintiff’s only evidence of pretext was the fact that his termination saved the defendant money).
\item \textsuperscript{116} 284 F. Supp. 2d 931 (W.D. Tenn. 2003).
\item \textsuperscript{117} \textit{Id.} at 932-33.
\end{itemize}
institution that earned approximately $410 million in the last year he was CFO.

The company hired a new CFO, who promptly demoted Mr. Parker, and with similar efficacy terminated his employment. After his involuntary termination, the employee made a demand for payment of benefits under the SERP, but the employer informed him that he was ineligible for benefits because he was terminated sixteen months prior to his fifty-fifth birthday. The court found that the employee did “not establish[] the requisite causal connection necessary for the prima facie case” because “[t]here [was] no evidence that the SERP was a motivating factor or even a consideration in the decision to fire [the employee].” As the Third Circuit had concluded a decade earlier in Kapetanovich, the court saw no proof that the company knew what Mr. Parker stood to lose by being fired at precisely the time he was. “The fundamental problem with [the employee’s] case [was] that he [had no direct proof] that [the new CFO] was . . . aware of [the employee’s] potential SERP benefits at the time [he made the discharge decision].”

Beyond the difficulty of proving employer interference, some courts have tried to limit the claims to individuals, rather than large classes. The United States Court of Appeals for the District of Columbia Circuit has oft-been quoted for its reading of decisions by its sister circuit courts as “implicitly recogniz[ing] that a corporate organizational change that results in the termination of employees is really not a prototype of the sort of action that § 510 was primarily designed to cover.”

118. Id. at 933 (citations omitted).
119. Id. at 933-34, 936-37.
120. Id. at 938.
121. Id. at 940.
122. Id.
123. Id. at 939.
124. Andes v. Ford Motor Co., 70 F.3d 1332, 1337 (D.C. Cir. 1995). The court claims that motions for summary judgment in cases of individual section 510 claimants are harder to win.
Although the word "discharge" can have varying meanings—it is sometimes used to refer to any employment termination including a permanent layoff caused by impersonal factors—more often it is used to refer to a personalized decision. In this case, it seems rather clear to us that Congress was using the word "discharge" in the latter sense—which means an employer's decision to sell or close down an operation would not normally implicate § 510 merely because the action caused the termination of employees. If Congress had wished for § 510 to apply routinely to such decisions, which are virtually always based, at least in part, on labor costs, it would surely have included the terms "layoff" and "termination."125

The goal of section 510 is eviscerated if the section is not applicable when an employer closes a plant or division that contains its most senior personnel. Although, read literally, the statute does limit protection to "a participant or beneficiary." An obvious employer defense to section 510 is that plant closures fail to discriminate against employees' obtainment of their pension rights because a plant closure impacts all employees equally, regardless of pension benefits.127

Not irrelevant is that the impetus for employee pension benefit protection was the 1963 Studebaker plant closing that left thousands of automobile workers without their promised retirement benefits.128 Considering the extensive damage a plant closure can cause to workers' pension benefits, Congress considered section 510 an integral part of ERISA's protections.129 Despite this intended protection and congressional purpose for ERISA's creation, section 510 has been but an ancillary section to ERISA. Since the purpose of ERISA, particularly section 510, was to combat intentional interference with an employee's retirement benefits resulting from a plant

than with class or group actions. See id. "While Ford realized significant pension savings—an estimated $18.8 million," id. at 1334, the resulting loss to the employees was incidental, and not motivating, id. at 1336.

125. Id. at 1337-38; see also Aronson v. Servus Rubber, Div. of Chromalloy, 730 F.2d 12, 16 (1st Cir. 1984) (concluding that section 510 does not provide a remedy for an employee injured by a defendant-employer who sold a plant, laid off its employees and terminated its pension plan entirely with respect to those employees because employer's actions involved the pension plan in general as opposed to specific individuals).


127. See Aronson, 730 F.2d at 16.


129. See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143 (citing S. REP. NO. 93-127, at 35-36 (1973) and H.R. REP. NO. 93-533, at 17 (1973)) ("Congress viewed this section [510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits."); see also Muir, supra note 27, at 214.
closing, it is not surprising that today section 510 is an important cause of action to possibly hundreds of thousands of displaced workers.130

HISTORY OF THE CAUSE OF ACTION IN THE PLANT CLOSING CONTEXT

Proving that an employer had the intent to interfere with pension benefits in a discriminatory manner is extremely difficult when the employer's decision has affected hundreds, if not thousands, of employees equally, regardless of pension benefit entitlements.131 "ERISA, like the other statutes regulating workplace conduct, is not to be used as a vehicle for substituting another's business judgment . . . . [I]t is only where there is a legally sufficient basis to find illegal discrimination that an employer's business judgment must give way."132 Initially, courts assumed that section 510's proscriptions applied only to individual plaintiffs, and, even then, only when an employer interfered with vesting eligibility.133 Employees' use of section 510 in plant closure situations or as a basis for a class action is fairly infrequent, as many courts originally eschewed causes of action brought pursuant to section 510, limiting the section's scope by a strict interpretation.134 West v. Butler135 involved a union's claim that section 510


131. Employers typically counter that discriminatory intent is impossible in plant closure situations when all employees lose their job as the result of a plant closure. See, e.g., Pickering v. USX Corp., 809 F. Supp. 1501, 1548 (D. Utah 1992).


133. See, e.g., Aronson v. Servus Rubber, Div. of Chromalloy, 730 F.2d 12, 16 (1st Cir. 1984).

134. See Moehle v. NL Indus., Inc., 646 F. Supp. 769, 779 n.6 (E.D. Mo. 1986), aff'd, 845 F.2d 1027 (8th Cir. 1988). In Moehle, the Eastern District of Missouri reiterated Aronson, finding that "§ 1140 [ERISA § 510] only prohibits actions aimed at individuals" after the company had ceased its operations at its St. Louis plant shortly before the plaintiffs were to receive additional accrual on their pension benefits and abruptly dismissed the plaintiffs' complaint that the plant closure was violative of ERISA as the employer's had a legitimate business justification to close the plant. Moehle, 646 F. Supp. at 779 n.6, 780. Similarly, in
applied when secondary picketing allegedly caused the employer to decrease its contribution to the employees' pension plan. While finding such a factual context inapt for ERISA's 510 provision, the court also explained, albeit in dicta, that vested benefits were already protected, making section 510 irrelevant. The court quoted one of ERISA's sponsors for evidence of the sagacity of its conclusion:

"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. There are stiff criminal penalties if this type of interference takes the form of force, fraud or violence or threats of this nature." 

Later courts followed suit in limiting section 510 claims to workers whose discharge prevented their benefits from vesting, and also denying the claims of interference with benefits that were incapable of vesting, like health insurance benefits, although the circuits were not unanimous.

The Supreme Court addressed the split among the circuits in Inter-Modal Employees Ass'n v. Atchison, Topeka & Santa Fe Railway Co. (ATSF), deciding that § 510 prohibited employer interference with either kind of benefit. A subcontract was transferred from a company subsidiary to a stranger corporation, and all employees within the large bargaining unit

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West v. Butler, 621 F.2d 240 (6th Cir. 1980), the Sixth Circuit determined that "the section is aimed solely at protecting individual rights." Id. at 246.

135. 621 F.2d 240 (6th Cir. 1980).
136. Id. at 241-42.
137. See id. at 245-46.
138. Id. at 243-44 (emphasis omitted) (quoting 120 CONG. REC. 29,935 (1974) (statement of Sen. Javits)).
139. See, e.g., Inter-Modal Rail Employees Ass'n v. Atchinson, Topeka & Santa Fe Ry. Co., 80 F.3d 348, 351 (9th Cir. 1996) (concluding that ERISA provides protection only to those employees who have not yet vested with the reasoning that a vested employee is already protected, and ERISA provides no protection for any further accrual of pension benefits), vacated, 520 U.S. 510 (1997).
140. See, e.g., Shahid v. Ford Motor Co., 76 F.3d 1404, 1411-12 (6th Cir. 1996) (holding that section 510 draws no distinction between benefits that vest and those that do not); Heath v. Varity Corp., 71 F.3d 256, 258 (7th Cir. 1995) (same); Andes v. Ford Motor Co., 70 F.3d 1332, 1336 (D.C. Cir. 1995) (implying the same); Seaman v. Arvida Realty Sales, 985 F.2d 543, 546 (11th Cir. 1993) (same); McGann v. H & H Music Co., 946 F.2d 401, 408 (5th Cir. 1991) (implying the same); Nemeth v. Clark Equip. Co., 677 F. Supp 899, 907 (W.D. Mich. 1987) ("Class-based discrimination, whether based on race, sex, or under ERISA, pension rights, is every bit as illegal as individualized discrimination.").
were told to accept work with the new subcontractor or be fired.\footnote{142} The ERISA benefits, both vested and contingent, provided by the new subcontractor were far inferior to those of ATSF.\footnote{143} The plaintiffs sued, claiming that ATSF had discharged them for the purpose of interfering with their benefits.\footnote{144} The district court dismissed their claims, rejecting the argument that the discharge violated section 510 by interfering with the employees’ ability to assert claims for benefits.\footnote{145} The appellate court upheld the plaintiffs’ claims for pension benefits but dismissed their claims for welfare benefits since welfare benefits do not technically vest under ERISA.\footnote{146} The Supreme Court reversed, stating that “Congress’ use of the word ‘plan’ in § 510 all but forecloses the argument that § 510’s interference clause applies only to ‘vested’ rights.”\footnote{147} Justice O’Connor, while not explicitly stating what constitutes protected rights under section 510, affirmed: “[Section] 510 draws no distinction between those rights that ‘vest’ under ERISA and those that do not.”\footnote{148} Although non-vested benefits, like health insurance, can be legally amended or even ended, the sponsor must follow ERISA procedure.\footnote{149} Simply firing, transferring, or, as the Court said, amending one participant’s plan at a time, violates section 510.\footnote{150}

[I]n the case where an employer acts with a purpose that triggers the protection of § 510, any tension that might exist between an employer’s power to amend the plan and a participant’s rights under § 510 is the product of a careful balance of competing interests, and is most surely not the type of “absurd or glaringly unjust” result . . . that would warrant departure from the plain language of § 510.\footnote{151}

The Court was not asked to consider whether employees can seek section 510 protection against discharges that prevent them from further accrual of already-vested pension benefits. Because ATSF only involved health insurance, it does not mandate summary judgment on the basis of plaintiffs’ post-vested status.\footnote{152} The Millsap Court was sympathetic to the employees

\begin{footnotes}
\item[142] Id. at 512.
\item[143] Id. at 512-13.
\item[144] Id. at 513.
\item[145] Id.
\item[146] Id. at 513-14.
\item[147] Id. at 514-15. Justice O’Connor, writing the opinion for a unanimous Court, stated: “Had Congress intended to confine § 510’s protection to ‘vested’ rights, it could have easily substituted the term ‘pension plan’ for ‘plan,’ or the term ‘nonforfeitable’ right for ‘any right.’” Id. at 515 (citations omitted).
\item[148] Id.
\item[149] Id. at 515-16.
\item[150] Id. at 516.
\item[151] Id. (citation omitted).
\item[152] See id. at 516-17.
\end{footnotes}
who lost the chance to continue to accrue benefits they would have enjoyed were their plants not closed, and rightfully denied the company's motion to dismiss.

_Gavalik v. Continental Can Co._ set the standard for prospective injunctive relief for class action suits under section 510, taking guidance again from Title VII. First, "[t]he class representative ‘must establish that discrimination was the employer’s standard practice.’" In a second, remedial phase, the consequences of the employer's discrimination then determines each individual class member's entitlement to relief. For class members to receive money damages, the plaintiff must prove, under the determinative factor test, that the employer had the intent to, and actually did, interfere with the employees' pension rights. Employees who have been discharged as a result of a plant closure must prove that their employer was driven by the specific intent to interfere with their receipt of pension benefits and not just because the employer stood to benefit economically. Courts will not accept an employer's defense that pension costs were simply too expensive to sustain, holding that such an action still constitutes interference with pension benefits under section 510, but consideration of those costs must be shown to be a motivating factor. Plant closures inevitably will involve mixed motive problems consisting of both the employer's permissible motives, for example, a decline in business, and impermissible motivations, discharging an employee nearing pension benefit accrual. To determine which motive predominated, courts

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153. 812 F.2d 834 (3d Cir. 1987).
154. _See id._ at 852.
155. _Id._ (quoting Dillon v. Coles, 746 F.2d 998, 1004 (3d Cir. 1984)). “If the class establishes a prima facie case by a preponderance of the evidence, the burden of production shifts to the employer to introduce admissible evidence of a legitimate, nondiscriminatory reason for its challenged actions.” _Id._ at 853.
157. _Id._ at 1177.
158. _See, e.g.,_ Aronson v. Servus Rubber, Div. of Chromalloy, 730 F.2d 12, 16 (1st Cir. 1984) (dismissing a strict interpretation of section 510, which would make any plant closure, mass layoff, merger, downsizing, or termination illegal, and implying that courts require a demonstration of intent to defeat an employee's pension rights).
159. _See, e.g.,_ Nemeth v. Clark Equip. Co., 677 F. Supp. 899, 905 (W.D. Mich. 1987) (rejecting a pension cost defense by stating that “ERISA was intended to prevent employers from making employment decisions based upon their desire to avoid pension liability.... Allowing an employer to defend an ERISA claim solely on the ground that its pension program was too expensive to maintain would defeat the purpose of § 510, which is to prohibit employers from making employment decisions based upon pension costs.
160. _See id._ at 909 (noting that, in employer's defense, "[t]he defendant's documentary evidence also shows that pension costs were not singled out, in the final analysis, as one of the factors requiring the closing of Benton Harbor. The plant capacity study, in all its various drafts, does not even contain a separate line item for pension costs.")
eventually adopted the employment discrimination analysis from Title VII cases.\textsuperscript{161} Although some courts, earlier in ERISA's history, decided that the mixed-motive and burden-shifting inherent in the civil rights cases was pertinent only where a single plaintiff alleged a section 510 violation,\textsuperscript{162} the analogue to the Civil Rights Act (Title VII) of 1964 and the Age Discrimination in Employment Act (ADEA) became apparent; especially since in most mass 510 actions, the employer's interference is based upon the workers' age, years of service, and a heightened accrued benefit for pension purposes.

Before the 2001 \textit{Millsap} decision, there were few plaintiffs alleging that plant closures or relocated operations were section 510 violations affecting a group of employees.\textsuperscript{163} The proof is difficult to make, and perhaps even more trying to comprehend. As one court tried to untangle the complex of proofs and defenses associated with the beginning of the demise of the United States Steel Corporation (later called USX), it noted:

This case concerns the bureaucratic decision-making process of USX, a large and powerful steel company, its motivations for making decisions, and the consequences in the lives of those people affected by USX's decisions. . . .

This case is also about creative accounting practices, leveraged negotiations on a national level, a torn union, and a vulnerable work force on the local level; negotiations that pitted the desires of a small, ageing community of workers and their need for continued employment and assured retirement benefits, and the efforts of USX to minimize future costs and thus to avoid, if possible, the accumulation of long term benefit liabilities.\textsuperscript{164}

Although most corporate reorganizations result in termination of employees, courts have denied companies' motions to dismiss claims arising out of the "sale or closure of an entire unit [whenever] the plaintiffs [have a colorable claim] that some ERISA-related characteristic special to the unit (such as its having clearly above-average proportion of employees with

\begin{itemize}
\item[161.] See, e.g., Gavalik v. Cont'l Can Co., 812 F.2d 834, 852 (3d Cir. 1987); Nemeth, 677 F. Supp. at 903.
\item[162.] See, e.g., Aronson, 730 F.2d at 16.
\item[163.] See, e.g., Gavalik, 812 F.2d at 840, 854, 856 (concluding that the existence of a computer tracking program that red-flagged senior employees with higher pension benefits and the employer's systematic layoff of these red-flagged employees was done purposely to lower pension liability); Pickering v. USX Corp., 809 F. Supp. 1501, 1550 (D. Utah 1992) (finding employer's idling and eventual closing of plant done to prevent employees from obtaining additional pension benefits to be a section 510 violation). \textit{But see Nemeth}, 677 F. Supp. at 905, 910 (finding that transferring work to a younger, non-union plant was not enough to prove that the employer acted to prevent older Benton Harbor employees from obtaining their full pension benefits).
\item[164.] \textit{Pickering}, 809 F. Supp. at 1569-70.
\end{itemize}
pension rights about to vest) was essential to the firm’s selecting that unit for closure or sale.\(^6\) A plaintiff’s claim under ERISA section 510 must demonstrate specific intent by the employer to interfere with an employee’s benefits, but evidence that the entrepreneurial change would have taken place, even where the firm had neither actual knowledge of nor intent to interfere with specific benefits, usually justifies such managerial prerogatives.\(^6\)

In *Nemeth v. Clark Equipment Co.*\(^6\), the court required the plaintiff to show that the employer’s “motivating factor” behind terminating its employees was to interfere with their attainment of benefits.\(^6\) The employees claimed that Clark Equipment purposely interfered with their attainment of more lucrative pension benefits under the “30 and out” or “85 point” benefit plan, special pension subsidies that allowed laid-off employees who had accrued sufficient tenure or a combination of age and time-in-service to receive the same pensions they would have had they worked longer.\(^6\) The court rejected Nemeth’s claim and held that the employer met its burden of showing that it had a legitimate, nondiscriminatory reason since it considered only “the bottom line” of sales, assets, and pre-tax income, and not solely on pension costs.\(^7\)

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Because plaintiffs were furloughed as part of a reduction in force, and the entire fleet service group was eliminated and replaced with an outside contractor, the Court considers their furloughs to be a “corporate organizational change.” Accordingly, plaintiffs must show specific evidence of unlawful motivation in order to avoid having summary judgment entered against them.

*Id.* at *3.* The court further held that:

The problems that Shuttle was facing were much larger than plaintiffs’ pension costs—for example, the fact that Shuttle lost over $66 million in 1989 and still had tremendous debts to repay. Although the fleet service workers were an “aging” group of employees and Hallcom was concerned about the cost of the contributions that Shuttle was making to their pensions, such evidence is not enough to show a specific discriminatory intent.

*Id.* at *5.*


168. *Id.* at 906 (quoting Baker v. Kaiser Aluminum & Chem. Corp., 608 F. Supp. 1315, 1319 (N.D. Cal. 1984)). “If Clark had made the decision based primarily on the costs of the pension plan, Clark would have acted with the purpose of interfering with plaintiffs’ rights under the plan.” *Id.* However, a mere demonstration by the plaintiff that the employer received a financial gain by the plant closure will not suffice; a direct causal link must be shown. *Id.*

169. *Id.* at 902-03.

170. *Id.* at 905.
Despite a finding that the evidence was "sufficient to make out a prima facie case of pension discrimination in violation of section 510 of ERISA," and that the employer took into consideration the significant pension expenses at the closed plant, the plaintiffs could not rebut the employer's legitimate business reason for closing the plant—slow work and the need to save costs across-the-board. The district court was convinced that the employer "would have made the decision to close [the local plant] even if it had ignored the cost of the pension plan altogether." Although the evidence showed about a forty percent difference in labor costs between a closed Benton Harbor, Michigan, plant and work transferred to an Asheville, North Carolina, plant, the court found that "at most, pension costs amounted to 20% of the total difference in cost between the two plants," and ruled for the company. The court endorsed and believed the company's claims that it based its decision on a number of economic considerations, and that no one item of cost was singled out as the cost responsible for Benton Harbor's closure [even though it expressed some skepticism at Clark's argument] that it considered only "the bottom line," an elusive accounting concept which defied definition by any witness.

In Nemeth, the plaintiffs used comparison data of pension liabilities between the closed facility and the new facility to which the work was transferred. In a similar fashion, other complainants have utilized statistical data demonstrating the number of older employees, employees with more years of service, or facilities with more costly collective

171. Id. at 904-05.
172. Id. at 909.
173. Id. at 902 (citation omitted).
174. Id. at 909-10. The world-wide recession of the late 1970s and competition from foreign manufacturers had resulted in a drop in sales of nearly 41% between 1979 and 1982. Clark reported losses of $234 million in 1982. Reinhart determined that Clark might go bankrupt by the end of 1982 unless the company took drastic steps to reduce its production capacity and overhead costs. Id. at 902. The union Benton Harbor plant plaintiffs, of which there were eighteen, had an average age of 51.9 years with an average of 25.4 years of service with Clark. Id. at 902. The Asheville plant had considerably younger, non-union employees who all had less than five years service. Id. Clark contended that a drop in sales and declining economy forced them to seek cheaper labor and that pension costs were only incidental to their decision. Id. Interestingly, Benton Harbor employees who requested a transfer to Asheville so that they could meet the additional accrual requirements under the thirty years service of the eighty-five point system were denied by Clark. Id. at 903-05.
175. Id. at 905.
176. Id. at 903-04.
bargaining agreements. In *Gavalik v. Continental Can Co.*, the court utilized the "determinative factor" test to assess whether there existed a nexus between the employer's conduct of closing its plant and its discriminatory intent to defeat its employee's pension rights. Some courts have stated that the plaintiffs need not show that avoidance of pension liability was the sole reason for the plant closure. Nevertheless, a plaintiff may fail to meet his burden of proof for showing intentional interference with pension rights if the loss of benefits was a "mere consequence of, but not a motivating factor behind, a termination of employment." The plaintiffs must prove intent by the employer to defeat the employees' attainment of pension benefits through direct evidence of discriminatory intent or, alternatively, by Title VII burden-shifting standards that are used when only circumstantial evidence is available.

The *Gavalik* court applied the Title VII analysis, in a slightly modified form, for the Continental Can Company's steel can plant closure. The divested employee/plaintiff's case must show: "(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." The employer must then prove "that it would have reached the same conclusion or engaged in the same conduct in any event, i.e., in the absence of the impermissible consideration." The burden then shifts back to the employee to show that the employer's "justification [was] pretext, or that the discriminatory reason more likely motivated the defendant's action." 

In *Unida v. Levi Strauss & Co.*, employees failed in their suit against Levi Strauss when the employer decided to close its more costly San

177. 812 F.2d 834 (3d Cir. 1987).
178. Id. at 860. The court stated that while an incidental loss of an employee's pension benefits resulting from a legitimate business decision is not a section 510 infringement, nor is bad faith an element of a section 510 claim, concern over the company's economic situation does not justify employee termination to cut pension liabilities. Id. at 857 n.39.
182. See id. at 852.
183. Id. Although *Gavalik* set out the burden-shifting test, Continental operated a nationwide system to find the most senior employees that would save the company the greatest amount in pension liability. Id. at 854. The judge declared that "if Continental's liability avoidance scheme does not constitute direct proof of discrimination under § 510, we are hard pressed to imagine a set of facts that would." Id. at 856.
185. Id. (citing *Gavalik*, 812 F.2d at 853).
186. 986 F.2d 970 (5th Cir. 1993).
Antonio plant instead of cutting production at a Caribbean plant when demand dropped for its product.\footnote{187}

[T]he Plaintiffs pointed to: (1) evidence that the San Antonio plant was closed to “cut costs”; (2) evidence that Levi Strauss decided to close its San Antonio plant rather than cutting back its Program 807 operations in the Caribbean, a labor market where the company did not incur pension and benefit expenses; (3) evidence that, at the time the San Antonio plant was closed, management was aware that benefit and pension costs were rising steeply on a company-wide basis; and (4) evidence suggesting that the plant closure prevented 369 employees at the San Antonio plant with less than five years of service from becoming “fully vested.”\footnote{188}

The court accepted the company’s defense of company-wide cost-cutting, and found that five years was hardly suspect timing.\footnote{189}

In \textit{Pickering v. USX Corp.},\footnote{190} former employees used circumstantial evidence to prove that USX did seek to avoid long-term pension liability by idling and then closing its Geneva plant, and by its decision to outsource and pay overtime to replacement workers hired during a strike instead of recalling laid-off senior employees.\footnote{191} USX articulated three legitimate, nondiscriminatory business reasons for its decision to close the plant.\footnote{192} First, the company contended that it was simply seeking to be more profitable.\footnote{193} Second, the company asserted that a “Facility Rationalization” study recommended the closing of the particular plant in question in order to obtain specific profit goals.\footnote{194} To achieve its objective, the firm was forced to transfer work to another plant which could be operated with fewer costs.\footnote{195} By obviating the vesting of the laid-off, then discharged employees, the company saved over fifty million dollars.\footnote{196}

The district court accepted USX’s reasons for closing the Geneva plant as legitimate, but held them to be pretextual based on the evidence presented, finding that USX’s series of pension benefit cost studies were the motivating reasons.\footnote{187} \textit{Id.} at 973, 980. The company successfully presented evidence that its decision was made “without regard to costs associated with pension . . . or other employee benefits.” \textit{Id.} at 980 (quoting Peter Thigpen, Levi Strauss representative).

\footnote{188} \textit{Id.} at 980 (footnote omitted).

\footnote{189} \textit{Id.} at 980-81.


\footnote{191} \textit{Id.} at 1539.

\footnote{192} \textit{Id.} at 1550.

\footnote{193} \textit{Id.}

\footnote{194} \textit{Id.}

\footnote{195} \textit{Id.}

\footnote{196} \textit{Id.} at 1546.
factor for closing the Geneva plant.\(^{197}\) USX steel manufacturing was held to be liable under section 510 when nearly 1900 of its laid-off workers brought suit because its employer idled the Geneva plant before permanently closing it.\(^{198}\) USX had incurred significant additional overtime wage costs at other facilities in order to prevent the laid-off plaintiffs from reaching their "magic number" benefits (i.e., a combination of age and years and service) and avoid the substantially increased pension benefits the company would incur if the plaintiffs worked for USX until 1989.\(^{199}\) The district court held 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.'"\(^{200}\)

The best example of a nearly-successful section 510 claim arising out of a plant closure came with the flood of litigation from the Continental Can Company's (Continental) self-proclaimed "liability avoidance program," adopted in the late 1970s.\(^{201}\) In a real Ford Pinto-type direct evidence case, the employees of Continental proved the existence of the company's secret computer program designed to cut pension liability costs.\(^{202}\) It was termed "Bell," the clever reverse acronym for "'Lowest Level of Employee Benefits' or 'Let's Limit Employee Benefits.'"\(^{203}\) As in earlier plant closing cases, the employees were covered by a collective bargaining agreement which promised that Continental would provide additional, so-called "Magic Number" pension benefits to any employee laid off prematurely;\(^{204}\) these supplemental benefits were not to be paid out of the pension fund, but out of ordinary revenues.\(^{205}\) When Continental faced a severe decline in

\(^{197}\) Id. at 1548-49, 1552. The court also considered this evidence in light of the circumstantial evidence that by idling the plant, "USX could save in excess of $50 million if the closure of Geneva was accelerated and the employees were terminated prior to 1989." Id. at 1549.

\(^{198}\) Id. at 1511, 1550.

\(^{199}\) Id. at 1516-17, 1549.

\(^{200}\) Id. at 1548 (quoting Nemeth v. Clark Equip. Co., 677 F. Supp. 899, 907 (W.D. Mich. 1987)) (failing to even consider whether additional accrual was protected as a right under ERISA section 510).


\(^{202}\) See Gavalik, 812 F.2d at 840-41, 854; McLendon, 749 F. Supp. at 583, 589; McLendon, 660 F. Supp. at 1555, 1557-58.

\(^{203}\) McLendon, 749 F. Supp. at 589.

\(^{204}\) See Gavalik, 812 F.2d at 838; McLendon, 749 F. Supp. at 587; McLendon, 660 F. Supp. at 1555.

\(^{205}\) E.g., McLendon, 660 F. Supp. at 1555. Many union contracts, especially those negotiated by the United Steelworkers decades earlier, contained supplemental pension promises, since employers were unprepared for much-later business declines. See, e.g.,
business as a result of the boom in the use of aluminum cans in the 1970s, Continental sought ways to reduce extra pension costs, especially since the corporation could access the money used to fund those plans. The Bell computer tracking system identified workers by their age and years of service and those workers were laid off just prior to the time when they would become eligible for benefits. The Third Circuit found in that “if Continental’s liability avoidance scheme does not constitute direct proof of discrimination under § 510, we are hard pressed to imagine a set of facts that would.” The burden was placed on the plaintiff to prove that “‘but for’ the impermissible consideration appellants would not have lost work.” Continental was then allowed to assert its so-called “same loss defense,” meaning, essentially, that the employees “would have suffered the same loss of work even in the absence of the illegal plan.” Even with such glaring evidence of allegedly unlawful motivation, Continental’s liability avoidance program (LAP) could not be separated from its other legitimate business reasons to close their St. Louis plant, although Continental was enjoined from further use of the LAP.

A CLOSER LOOK AT MILLSAP v. MCDONNELL DOUGLAS CORP.

The Millsap lawsuit arose out of McDonnell Douglas’s aircraft manufacturing operations in Tulsa, Oklahoma. McDonnell Douglas began to struggle in the late 1980s as the government slashed its defense contracts and, without these contracts, production declined. At the time,


206. See Gavalik, 812 F.2d at 840.
207. E.g., id. at 840 & n.11.
209. Gavalik, 812 F.2d at 856. The district court in McLendon found:

The plan was shrouded in secrecy and executed company-wide at the specific direction of the highest levels of corporate management. It was intended to save hundreds of millions of dollars in unfunded pension liabilities. The evidence of the plan, its secrecy, and its execution comes from the files of the defendants themselves. The documents are more than a smoking gun; they are a fusillade.

McLendon, 749 F. Supp. at 583.

210. Gavalik, 812 F.2d at 859; see also McLendon, 908 F.2d at 1178 (“‘[B]ut for’ the discriminatory purpose, he or she would not have lost work.”).
211. Gavalik, 812 F.2d at 866.
212. See id. at 857, 865; McLendon, 908 F.2d at 1174, 1180, 1182-83.
213. Millsap v. McDonnell Douglas Corp., 162 F. Supp. 2d 1262, 1264 (N.D. Okla. 2001). The Tulsa plant was used primarily to fulfill government defense contracts, particularly its fighter aircraft, the F-15 Strike Eagle. Id. at 1264.
214. Id. In a company-wide memo, Chairman John McDonnell announced “The Hard Reality,” that company expenditures must be reduced by $700 million a year. Id.
it was known that the company's pension plans were substantially over-funded, creating tremendous amounts of potential capital for the company \(^{215}\) — especially if the employees on whose behalf the plans were so funded would cease accruing more benefits, or, indeed, become ineligible for maximum vesting. \(^{216}\) Actuaries subsequently informed McDonnell Douglas that the company could improve its financial situation if the company would terminate its greatest pension liability, the older and most senior employees. \(^{217}\) Following the Gulf War and the apparent successful alliance between the United States and Saudi Arabia, the Saudi government attempted to place a nine billion dollar order for seventy-two F-15s in 1991. \(^{218}\) McDonnell Douglas began an intense public campaign to win both congressional and presidential approval of the contract, asserting that the contract would save 7000 McDonnell Douglas jobs, thirty-three thousand subcontractor positions, and would help ensure that the Tulsa plant would remain open an additional three to five years. \(^{219}\) Despite the possible security risks, and in light of the recessionary economy, the government acceded to McDonnell Douglas's pressure, and President Bush announced the approval of the nine billion dollar contract on September 11, 1992. \(^{220}\)

In a company-wide survey on how to reduce costs, the "Project M" study recommended the closing of the Tulsa plant as early as August 1993. \(^{221}\) Throughout the company's waves of layoffs from 1990 to 1994, McDonnell Douglas monitored the savings from the pension fund and were able to track the age or length of service of each laid-off employee. \(^{222}\) These so-called "curtailment gains," savings reflected on financial statements, could be maximized if specifically applied to the company's "demographic profile" of senior employees. \(^{223}\) The Tulsa plant was found to fit the

\(^{215}\) Id. at 1268-69.
\(^{216}\) See id. at 1269-70.
\(^{217}\) See id. at 1268.
\(^{218}\) See id. at 1264.
\(^{219}\) See id. at 1265, 1275.
\(^{220}\) See id. at 1266.
\(^{221}\) See id.
\(^{222}\) Id. at 1268.
\(^{223}\) Id. at 1269-70. David Strom, an outside actuary with Alexander & Alexander, was given headcount information by Richard Smoski, McDonnell Douglas's director of pensions, savings, and payroll. Id. at 1269. Strom, in a memo to Smoski, estimated $57 million dollars in savings with 20,000 layoffs, but as much as $125 million dollars in pension savings if McDonnell Douglas laid off 20,000 of its "demographic profile" employees. Id. at 1269-70. This was based on an across the company average of a 40.3 year old employee and 10.07 years of service. Id. at 1270. Accordingly, "[i]f an older population with greater service was terminated, the pension gain would be greater." Id. The use of outside actuaries does not fall within the attorney-client privilege. Since McDonnell Douglas failed to cooperate with discovery, the Millsap plaintiffs largely relied on circumstantial evidence. Id. at 1287, 1309. The use of the actuary's advice and consultations with McDonnell Douglas helped the
demographic profile with the oldest and most senior employees at any of McDonnell Douglas’s plants.\textsuperscript{224} The plaintiffs found evidence that the company specifically targeted the worksite of its highest number of employees in the fifty to fifty-four year old age range.\textsuperscript{225} Under a company plan, an employee had to reach age fifty-five to become eligible for an enhanced pension.\textsuperscript{226} After discovering the potential savings in closing the Tulsa plant, the company then looked to “monetize” the new-found pension savings to pay for retiree health benefits, rather than finance them with corporate assets, and thereby increase the corporate cash flow.\textsuperscript{227} Such a move would reflect positively on the company’s financial statements to its shareholders and, eventually, to Boeing, who would acquire McDonnell Douglas in 1996.\textsuperscript{228}

On December 3, 1993, the company announced the closing of the Tulsa plant, despite its very public promises for continued operations after the

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\textsuperscript{224} Id. The table below is reprinted from the court’s findings of fact: McDonnell Douglas Average Age and Seniority by Facility 1993.

\textsuperscript{225} Id. at 1270-71.

\textsuperscript{226} Id. at 1271. These employees would cost McDonnell Douglas an estimated $79,000 to $86,000 each if given early retirement before reaching age fifty-five. Id. McDonnell Douglas would save this amount if the employees were no longer at McDonnell Douglas before age fifty-five. Id. Taking into account that the Tulsa plant had 300 employees in the fifty to fifty-four year age range, this would amount to $18 million in cut pension liabilities. Id. Furthermore, McDonnell Douglas stood to save nearly $7 million in medical benefits if it laid off its employees before they reached age fifty-five. Id. Ernst & Young calculated this as an “actuarial asset value” of $33,199,000 as of November 11, 1994. Id. at 1274.

\textsuperscript{227} Id. at 1271-72.

\textsuperscript{228} Id. at 1269, 1273.
Saudi F-15 contract was granted.\textsuperscript{229} The plaintiffs, James R. Millsap and his co-workers, were all vested employees in one of the two retirement plans at the Tulsa plant, and upon its closure, brought a class-action suit under ERISA section 510.\textsuperscript{230}

\textit{A. Procedural History—District Court}

The parties agreed to a bifurcated trial, in which the liability and damage phases of the suit were separated.\textsuperscript{231} In October 1997, the defendants moved for summary judgment on two bases: (1) plaintiffs lacked sufficient evidence to meet a prima facie case of intentional interference under section 510 and (2) the plaintiffs' cause of action was barred by the language of ERISA section 510, as they were already vested in their pension benefits at the time of their termination.\textsuperscript{232} Relying on \textit{Inter-Modal}, Judge Holmes denied McDonnell Douglas's motion, concluding that vested employees are not barred under section 510.\textsuperscript{233} He also buttressed his decision by following the Tenth Circuit's decision in \textit{Garratt v. Walker},\textsuperscript{234} where the court held that section 510's protection was not limited to vested employees, but also extended section 510's protections to those "rights . . . not yet earned."\textsuperscript{235} Judge Holmes concluded that the Tenth Circuit must ostensibly extend section 510 to protect those employees who had vested prior to their termination and had not yet reached the maximum amount of accrual.\textsuperscript{236}

After a 1999 trial, the court found that, based on the plaintiffs' evidence of balance sheets, outside actuary consultations by McDonnell Douglas, and circumstantial evidence of the defendant's enormous savings by terminating senior employees before their upcoming fifty-fifth birthdays, McDonnell Douglas intentionally interfered with the plaintiffs' pension rights.\textsuperscript{237} Although McDonnell Douglas had presented its own legitimate, nondiscriminatory business reasons of excess capacity and other financial and economic considerations, the court rejected them as pretextual because of the actuary's admission of its patent pension benefit costs analysis and because of the circumstantial evidence that the eleven hundred senior Tulsa

\begin{thebibliography}{9}

\item[229.] \textit{Id.} at 1263-64.
\item[232.] \textit{Millsap}, 1997 U.S. Dist LEXIS 23285, at *2.
\item[233.] See \textit{id.} at *6-7.
\item[234.] 121 F.3d 565 (10th Cir. 1997), \textit{vacated in part}, 164 F.3d 1249 (10th Cir. 1998).
\item[235.] \textit{Millsap}, 1997 U.S. Dist. LEXIS 23285, at *9 (citing \textit{Garratt}, 121 F.3d at 570).
\item[236.] \textit{Id.}
\end{thebibliography}
employees stood to accrue additional amounts of benefits within the next few years when they reached age fifty-five.  

Ultimately, the company's credibility gap and "[r]ecord of [c]orporate [d]ishonesty" prevented McDonnell Douglas from asserting its legitimate business reason defense simply because it lacked the evidentiary proof that there was, in fact, a legitimate reason. The court ultimately found in favor of the employees, reflecting upon testimony from the manager of the closed plant that even he had been misled, that the defendant's pattern of discovery responses was obfuscatory, that the company "never considered for a moment what commitments" it had made to the community or to public officials, and drawing permissible inferences of "dishonesty about a material fact as 'affirmative evidence of guilt.'" The court wrote: "'[O]nce the employer's justification has been eliminated, discrimination may well be the most likely explanation, especially since the employer is in the best position to put forth the actual reason for its decision.'" Writing for the court, Judge Holmes put it succinctly, stating: "[McDonnell Douglas Corporation] wanted to preserve the pension surplus from a plant closing for itself," and thus held McDonnell Douglas to be liable under section 510.

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238. See id. at 1268-71, 1275, 1300-01. McDonnell Douglas asserted both financial and political reasons as legitimate, nondiscriminatory reasons for closing the Tulsa plant. Id. at 1275-76. McDonnell Douglas had closed three plants prior to the Tulsa plant closing. Id. at 1275. The Mesa, Arizona plant could not be closed as McDonnell Douglas had recently spent over $100 million in updating that plant and it was considered integral to the company's helicopter operations. Id. at 1267. The Titusville, Florida plant, McDonnell Douglas asserted, could not be closed because the company had bid to be the sole supplier of Tomahawk cruise missiles and Titusville was the only plant that could handle fulfillment of the contract. See id. McDonnell Douglas also claimed it could not close the St. Louis facility as it was too large to merge into the Tulsa operations, housed McDonnell Douglas's engineering and technical departments, remained the point of delivery for their products, and was the corporate headquarters. Id. Another consideration was the fact that the Tulsa plant played a small part in operations, as it assembled only the tail section of the F-15s. See id. at 1264. Lastly, the Tulsa plant was leased to McDonnell Douglas from the Air Force and subsequently would have been leased to McDonnell Douglas by the city itself. Id. at 1275, 1287. As a result, McDonnell Douglas asserted that pension benefits played no part in its ultimate decision and were left with no choice but to close the Tulsa facility due to excess capacity. Id. at 1275.

239. Id. at 1275. Judge Holmes also referred to McDonnell Douglas's maneuvering as a "corporate culture of mendacity." Id. at 1301.

240. Id. at 1300-02.

241. Id. at 1306 (quoting Reeves v. Sandersen Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000)).

242. Id. at 1307. The defendants not only failed to cooperate in providing discovery, but possibly destroyed evidence after having notice of the impending lawsuit since June of 1994. Id. at 1308-09. Judge Holmes also found "that Plaintiffs' case was materially prejudiced" by the defense's spoliation of discovery documents and as a consequence "MDC [had] demonstrated its culpability" by its actions. Id.
B. District Court's Consideration of Equitable Relief and Backpay Precedent

McDonnell Douglas sought to exclude the plaintiffs' request for backpay under ERISA in a motion for summary judgment in June 2002. Under ERISA section 532, the civil enforcement provision of Title I of ERISA, a participant or beneficiary may bring a civil action, "(3)(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." 

McDonnell Douglas, in arguing against an award of backpay, asserted that Supreme Court precedent precluded prior backpay as equitable relief. At a minimum, the company argued that Supreme Court limitations on equitable relief in other, though disparate, cases instruct that Congress intended restitution to be equitable in Title VII cases only, and even then only if a court awards other equitable relief. Applying the voluminous but seemingly conflicting case law regarding the archaic difference between law and equity courts on relief, trust law, Title VII, and ERISA, Judge Holmes concluded that the plaintiffs' claim for backpay was appropriate statutory relief. The court correctly recognized that the Millsap plaintiffs did not seek to impose liability on McDonnell Douglas under a contractual obligation. As Judge Holmes indicated, ERISA section 510 cases are statutory and lack any basis in contract law. The court further recognized that the plaintiffs sought only to be restored to the "status quo ante," to the position plaintiffs would have occupied had McDonnell Douglas not wrongfully closed its Tulsa plant. Consequently, Judge Holmes found that "back pay, as a remedy for an ERISA § 510

246. Id. at *4 (citing Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 218 n.4 (2002)).
247. See id. at *2-5.
248. Id. at *4.
249. Id. (citing Held v. Mfr. Hanover Leasing Corp., 912 F.2d 1197, 1204-05 (10th Cir. 1990)).
250. See id. (citing Aguinaga v. United Food & Commercial Workers Int'l Union, 993 F.2d 1463, 1473 (10th Cir. 1993) ("[S]tating that the 'purpose of a back pay award is to make the employee whole — i.e., restore the economic status quo that would have been obtained but for the wrongdoing.").
violation, constitutes equitable restitution and therefore 'equitable relief' under section 502(a)(3).

Interpreting the Supreme Court's rationale in Title VII cases, Judge Holmes asserted: "'[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which ... would not frustrate the central statutory purposes of eradicating discrimination ... and making persons whole.' " While the Title VII equitable injunctive relief of reinstatement may not be available under the Millsap scenario, Judge Holmes concluded that the impossibility of reinstatement due to plant closure in no way precludes a plaintiff class from recovering because the employer's unlawful discrimination was the plant closure itself. An award of backpay is necessary because the wrongful discharge was intertwined with the company's intent to interfere with the plaintiffs' pension benefits. Thus, had it not been for McDonnell Douglas's impermissible and discriminatory termination, the plaintiffs would have remained at their employment and continued to receive pay. Since the employer intended to defeat pension rights, it was only just and appropriate to award backpay to a plaintiff class who would have remained at their positions, receiving their pay, but for the unlawful discrimination. Lastly, awarding backpay ensures the proper deterrent effect on employers who terminate employees in order to defeat employees' pension rights. Put simply, failing to award backpay would reward McDonnell Douglas for its action of unlawfully closing its Tulsa plant as part of its plan to interfere with and pilfer the employees' pension benefits.

The plaintiffs also asked for reinstatement or front pay in lieu of reinstatement. In order to receive prospective equitable relief, the court required the plaintiffs to prove that the business would have remained open

251. Id. at *4.
252. Id. at *5 (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (second and third alterations in original)).
253. Id. at *5 n.3 (contemplating the possibility that if backpay is unrecoverable as a matter of law under section 510, potentially liable employers would purposely prolong litigation to avoid the possibility of reinstatement and evade having to ever pay backpay). In the instant case, McDonnell Douglas's discovery fiasco would have allowed McDonnell Douglas to retain over eight years worth of employees' salaries despite its illegal termination under section 510. See id. at *5 n.3. Such an interpretation would render ERISA's protections for pension beneficiaries a token for employees and a boon for employers, in the face of ever-increasing corporate abuse and plant closures. Response Brief of Plaintiff-Appellees at 45-47, Millsap, 2002 WL 31386076 (10th Cir. Sept. 24, 2003) (No. 03-5124).
254. See Millsap, 2002 WL 31386076, at *4-5.
255. Id. at *5.
256. See id.
257. See id. at *5 n.3.
258. Id. at *6.
past their unlawful discharge by the defendant.\textsuperscript{259} In a previous Tenth Circuit front pay suit, it was held that where a defendant company closed its operations before the judgment, both front pay and reinstatement were impossible.\textsuperscript{260} Thus the district court found that, eight years since the Tulsa plant closing, "a reasonable factfinder could not conclude that, but for the discriminatory conduct, Defendant's plant would still be open today."\textsuperscript{261} The plaintiffs countered that reinstatement may have been possible at another facility, such as Rockwell, prior to Boeing's purchase of that plant, or reinstatement at McDonnell Douglas's St. Louis plant.\textsuperscript{262} Without proof of the employer's intention to retain or transfer the plaintiffs, the court could not sustain a claim based on reinstatement or front pay.\textsuperscript{263}

Of course, in other civil rights cases, and even among some ERISA retaliatory discharge cases, front pay has been awarded even where reinstatement was impossible or impracticable.\textsuperscript{264}

Finally, the plaintiff class sought reimbursement for lost health benefits for retirees and those benefits lost during the backpay accrual period.\textsuperscript{265} The district court did not determine whether these benefits were recoverable, nor did they determine how to value the lost health benefits.\textsuperscript{266} Prior to closing its Tulsa plant, McDonnell Douglas cancelled its coverage for salaried, retired, and non-union employees, and those parties were thus excluded from asserting any rights in retiree health benefits.\textsuperscript{267} Both salaried and hourly workers could contest their rights to health benefits during the backpay period.\textsuperscript{268} A split in the circuits exists over the value of lost health benefits, which can be measured by the form of replacement insurance costs, by the actual medical costs incurred by the plaintiff, or the cost of the insurance premiums had the defendant paid absent the illegal

\begin{itemize}
  \item \textsuperscript{259} Id.
  \item \textsuperscript{260} Id. (citing Sandlin v. Corporate Interiors, Inc., 972 F.2d 1212, 1215 (10th Cir. 1992)).
  \item \textsuperscript{261} Id.
  \item \textsuperscript{262} Id. (citing Gibson v. Mohawk Rubber Co., 695 F.2d 1093 (8th Cir. 1982), and Bonura v. Chase Manhattan Bank, 629 F. Supp. 353 (S.D.N.Y. 1986)).
  \item \textsuperscript{263} Millsap, 2002 WL 31386076, at *6-7.
  \item \textsuperscript{265} See Millsap, 2002 WL 31386076, at *7.
  \item \textsuperscript{266} See id. at *8.
  \item \textsuperscript{267} Id. at *7 (citing Curtiss-Wright Corp v. Schoonejongen, 514 U.S. 73, 78 (1995)) ("[F]inding retirees have no vested right to health care benefits because an employer that reserves its right to end or amend the plan is generally free to terminate health care benefits unilaterally.").
  \item \textsuperscript{268} Id.
\end{itemize}
discrimination. Judge Holmes followed a Western District Court of Virginia decision in holding that "the value of lost medical benefits is properly measured by 'the value of premiums that [the employer] would have paid had plaintiff continued working.'" Judge Holmes recognized that "health insurance has value, 'even to healthy people, if only because it provides peace of mind that medical expenses will be covered should they occur.'"

C. Stipulated Settlement and the Certified Question of Law on Backpay on Appeal

Following Judge Holmes' strident dismissal of McDonnell Douglas's motion for summary judgment on the issue of backpay, McDonnell Douglas settled with the Millsap plaintiffs on the pension and health benefits claims and sought a certified question of law on appeal on the issue of backpay. In February 2003, the parties proposed a "Stipulation of Settlement" in private mediation. The stipulated settlement was contingent upon the Tenth Circuit's certification on the question of law on the issue of backpay. On appeal, the Tenth Circuit rejected Judge Holmes' endorsement of an award of backpay as a civil remedy under ERISA. Circuit Judge Baldock, delivering the majority opinion of the Tenth Circuit,

269. Id. (citing Pearce v. Carrier Corp., 966 F.2d 958 (5th Cir. 1992), Kossman v. Calumet City, 800 F.2d 697 (7th Cir. 1986), and Galindo v. Stooky Co., 793 F.2d 1502 (9th Cir. 1986)).

270. Id. (quoting Roberts v. Wal-Mart Stores, Inc., No. 95-0059-H, 1997 WL 38138 (W.D. Va. Jan. 28, 1997). In so holding, Judge Holmes also rejected the Ninth Circuit's position that health insurance lacks a monetary benefit unless expenses are actually incurred. Id. at *8 (citing Galindo, 793 F.2d at 1517).

271. Id. at *8 (quoting Nemeth v. Clark Equip. Co., No. K84-433 CAB, 1988 WL 156345, at *6 (W.D. Mich. Sept. 9, 1988)). Additionally, if a plaintiff made an honest effort but failed to find substitute insurance and incurred medical expenses beyond what McDonnell Douglas would have paid, absent the discriminatory termination, the plaintiff, Judge Holmes ruled, is entitled to the costs of actual medical expenses incurred. Id.

272. Gary Young, Rare Settlement in Plant-Closing Case, NAT'L L.J., June 9, 2003, at 17. The settlement allowed for a rare settlement on the pension benefits issue for a $36 million common fund to be established for the plaintiff class members. Id. at 20. However, another dispute arose as to the amount of attorney's fees to award to class counsel. Id. at 17, 20. Jack Walbran, Vice President for Boeing, who purchased McDonnell Douglas following the Tulsa plant shut-down, pointed to Great-West for the company's decision to settle the pension benefits portion contingent upon the appellate court's acceptance of the question of law on backpay. Id. at 20. Mr. Walbran went on to explain that it was his company's stance that under Great-West, backpay was not available in ERISA cases, suggesting that the appellate court would be more favorable to McDonnell Douglas's position. See id.


found that ERISA section 502 simply did not allow for any remedy not specifically enumerated in the statute itself.\textsuperscript{276} Asserting that it was following the \textit{Mertens} and \textit{Great-West} decisions, the court held that the \textit{Millsap} plaintiffs were barred from collecting backpay, as it was not a demand under equitable relief, but rather as a traditional legal remedy.\textsuperscript{277} Judge Baldock noted that the plaintiffs' own method of calculating their backpay precluded them from collecting backpay under equitable principles.\textsuperscript{278}

The circuit court rejected this on the basis that the damages the plaintiffs sought were not to counter unjust enrichment, but to compensate the plaintiff class for their termination.\textsuperscript{279} The circuit court concluded that where the equitable relief sought—reinstatement—becomes impossible, so does the court's ability to award backpay.\textsuperscript{280}

Judge Baldock called attention to the fact that ERISA did not specifically include backpay as an equitable remedy.\textsuperscript{281} Congress did, however, specifically include backpay in both Title VII and the National Labor Relations Act (NLRA), the two other labor statutes to which \textit{Millsap} plaintiffs and other plaintiffs (and courts considering their cases) had

\begin{itemize}
\item \textsuperscript{276} \textit{Id.} at 1250. "The Supreme Court has repeatedly emphasized that Congress' deliberate care in comprehensively drafting ERISA's enforcement scheme 'provide[s] strong evidence that Congress did \textit{not} intend to authorize other remedies that it simply forgot to incorporate expressly.'" \textit{Id.} (alteration in original) (quoting Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985)). Further, Judge Baldock felt that ERISA's carefully drafted "'comprehensive legislative scheme including an integrated system of procedures for enforcement'" did not allow for an equitable remedy such as backpay. \textit{Id.} (quoting \textit{Russell}, 473 U.S. at 147).
\item \textsuperscript{277} \textit{Id.} at 1251, 1253 (citing ROBERT BELTON, REMEDIES IN EMPLOYMENT DISCRIMINATION LAW § 9.3 (1992), DAN B. DOBBS, LAW OF REMEDIES § 6.10(5), at 227 n.15 (2d ed. 1993), and 2 HENRY H. PERRITT, JR., EMPLOYMENT DISMISSAL LAW AND PRACTICE § 9.46 (4th ed. 1998)) (finding that "[B]ackpay is compensatory because the award is measured by an employee's loss rather than an employer's gain").
\item \textsuperscript{278} \textit{Id.} at 1254. The plaintiffs' calculation was based upon each former employee's loss rather than McDonnell Douglas's gain. \textit{Id.} Judge Baldock thus excluded their demand on the basis that it fell under compensatory damages, a straight legal remedy not allowable under section 502 of ERISA. \textit{Id.} at 1251, 1254. The plaintiff class cannot collect backpay when classified as compensatory damages, which are typically viewed by the Supreme Court as an ordinary damages claim. \textit{Id.} at 1253 (citing City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710-11 (1999)).
\item \textsuperscript{279} \textit{Id.} at 1255 n.9.
\item \textsuperscript{280} \textit{Id.} at 1255-56 (citing Terry v. Chauffeurs, Teamsters, & Helpers, 494 U.S. 558, 571 (1990)). In both \textit{Millsap} and \textit{Terry}, the reinstatement claim was dismissed due to impossibility. \textit{Id.} at 1255. Despite this, plaintiffs attempted to counter that an equity court possessed the power to award legal relief and, in addition, that a court sitting in equity should award backpay as incidental to a request for reinstatement. \textit{Id.} Again, the Court disposed of the plaintiffs' argument, finding backpay and reinstatement to be entirely independent and separate types of relief. \textit{Id.} at 1257.
\item \textsuperscript{281} \textit{Id.} at 1258.
\end{itemize}
The circuit court further reasoned that while Title VII and the NLRA seek to redress the effect a discriminatory action has on an individual, ERISA only seeks to redress actions that have a negative impact on an ERISA benefits plan, not the individual's rights. The *Millsap* plaintiffs' policy contentions, so strenuously pressed by the district court, also failed to persuade the Tenth Circuit. In closing, Judges Baldock and Tymkovich found that McDonnell Douglas had to compensate the plaintiffs for their lost benefits but, under ERISA, possessed no liability for compensatory damages in the form of backpay.

**D. Dissenting Opinion by Judge Lucero**

Dissenting Judge Lucero pointed out that the circuit court's decision not only failed to deter employers seeking to violate ERISA, but also rewarded employers who engage in discovery abuses, like McDonnell Douglas had. As Judge Lucero indicated, neither of the Supreme Court's holdings in *Mertens* or *Great-West* explicitly bar awarding backpay under ERISA section 502, thus leaving the lower courts to determine the issue. Judge Lucero pointed out the contradiction inherent in the majority's reference to Dobbs' *Law on Remedies*, which concedes that in wrongful termination and discrimination situations, backpay can indeed be considered an equitable remedy. The *Mertens* decision excluded compensatory damages as equitable relief, but statutory creations of backpay, Judge Lucero explains, are a phenomenon of the latter part of the twentieth century, thereby displacing antiquated rules of legal and equitable divisions.

The dissent argued, the majority's decision failed to directly address the meaning of ERISA section 502, but instead relied on *Great-West* and

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283. *Millsap*, 368 F.3d at 1259 ("ERISA, unlike Title VII and the NLRA, is not a make-whole statute."). The court also cited to its own decision in *Zimmerman v. Sloss Equip., Inc.*, 72 F.3d 822, 828 (10th Cir. 1995), in which the court refused to interpret ERISA as a make whole statute and instead sought "to protect the interests of participants in employee benefit plans." *Millsap*, 368 F.3d at 1259 (citing *Zimmerman*, 72 F.3d at 828).
285. *See Millsap*, 368 F.3d at 1260 n.20. The majority does suggest, however, that the aggrieved plaintiffs could seek backpay under the Age Discrimination in Employment Act. *Id.* at 1260.
286. *See id.* at 1261, 1266 (Lucero, J., dissenting) (noting that reinstatement became impossible as the trial lasted eight years due in large part to McDonnell Douglas's repeated attempts to delay the trial).
287. *See id.* at 1262.
288. *Id.*
289. *Id.* at 1261, 1263.
Failure of Equity

Mertens to answer the question whether backpay is equitable in nature despite the fact that these two decisions left the question open to interpretation. The language of section 502, “appropriate equitable relief,” leaves open to the courts the determination of what may be the appropriate relief to redress the ERISA violations at bar. While this is ambiguous, a court must turn to legislative history to determine congressional intent. Again, contrary to the majority’s interpretation of ERISA section 502, Congress intended that the “primary purpose of the bill is the protection of individual pension rights.”

The Tenth Circuit had previously held in Skinner v. Total Petroleum, Inc., that “the characterization of backpay as legal or equitable has been determined by whether the plaintiff has requested backpay as an adjunct to the equitable remedy of reinstatement.” In another Tenth Circuit decision, Bertot v. School District No. 1, the court affirmed that “back pay . . . is an integral part of the equitable remedy of reinstatement and is not comparable to damages in a common law action.” In the Millsap dissent, Judge Lucero ultimately “conclude[d] that back pay is appropriate equitable relief as contemplated by ERISA § 502(a)(3) under the present circumstances” presented by the Millsap plaintiffs.

DID CONGRESS MEAN TO IDENTIFY A WRONG WITHOUT CREATING A REMEDY?

Despite what the High Court says, neither it nor the myriad of district or circuit courts have ever approached ERISA remedies with any consistency. Soon after the passage of the now-dreaded ERISA, courts were generous both in their recognition of their own authority to create remedies and in the awards themselves. The open and imprecise language suggested that Congress decided to defer to the courts in establishing appropriate relief to employees wrongfully discharged. As many courts have noted, ERISA is rooted in the common law of trusts, and trust remedies can be fairly

290. Id. at 1262-63.
291. See id. at 1263.
292. Id. at 1264 (emphasis added) (quoting H.R. REP. NO. 93-533, at 1 (1973)).
293. 859 F.2d 1439 (10th Cir. 1988).
294. Id. at 1444.
295. 613 F.2d 245 (10th Cir. 1979).
296. Id. at 250 (alteration in original) (quoting Harmon v. May Broad. Co., 583 F.2d 410, 411 (8th Cir. 1978)).
297. Millsap, 368 F.3d at 1266 (Lucero, J., dissenting).
298. E.g., Monaghan, supra note 23, at 32 (“Other than tax cases, what set of Supreme Court decisions could be less interesting? Indeed, rumor has it that one well-known reason for recommending denial of certiorari is that ‘this is an ERISA case.’”).
The Supreme Court has written that Congress did not need to be overly specific in either its proscriptions or its remedies. In 1985, the Court decided an ERISA case in which an employer contested the right of trustees to demand an accounting of a fiduciary/sponsor. In *Century States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, the Court considered ERISA to be a broad grant of power to the federal government and the courts to establish a trust regime from a statute that was vague, and, in some cases, inarticulate. As with most labor statutes, interstitial lawmaking would become the norm. The Court concluded:

In general, trustees’ responsibilities and powers under ERISA reflect Congress’ policy of “assuring the equitable character” of the plans. Thus, rather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility. Under the common law of trusts, as under [these] trust agreements, trustees are understood to have all “such powers as are necessary or appropriate for the carrying out of the purposes of the trust.”

In recognizing ERISA’s extremely broad preemptive effect on similar state laws, the Supreme Court explained that specific ERISA provisions, like section 510’s prohibition against interference with or retaliation for the enjoyment of employee benefits, completely supplant any state law claims for wrongful, tortious discharge. Fortunately, in *Ingersoll-Rand Co. v. McClendon*, where an employee claimed he was discharged specifically for the purpose of preventing his vesting in a pension plan, the Court

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300. *See*, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (“ERISA abounds with the language and terminology of trust law. ERISA’s legislative history confirms that the Act’s fiduciary responsibility provisions, ‘codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.’” (alterations in original) (citations omitted) (quoting H. R. REP. No. 93-533, at 11 (1973))). Justice O’Connor continued: “Given this language and history, we have held that courts are to develop a ‘federal common law of rights and obligations under ERISA-regulated plans.’” *Id.* (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)).


302. *See* *Cent. States*, 472 U.S. at 561.

303. *See id.* at 570; *see also* *Pilot Life*, 481 U.S. at 56.


305. *Pilot Life*, 481 U.S. at 56.

happily opined that sufficient remedies abound. 307 "Not only is § 502(a) the exclusive remedy for vindicating § 510-protected rights, but there is no basis in § 502(a)’s language for limiting ERISA actions to only those which seek ‘pension benefits.’ It is clear that the relief requested here is well within the power of federal courts to provide." 308 Writing for the Court, Justice O’Connor opined that an employee’s suit for lost future wages, mental anguish, and punitive damages was “well within the power of the federal courts to provide” under 502(a)(3). 309 At that point in ERISA jurisprudential history, the proof of the claim, not the receipt of remedies, was the problem for most plaintiffs. 310

The Millsap plaintiffs were denied backpay, after proving that their employer intentionally closed its plant to interfere with their ERISA benefits, because of dicta in radically different kinds of cases. 311 Most scholars and courts track the incipience of the constriction of potential ERISA remedies to Massachusetts Mutual Life Insurance Co. v. Russell. 312 In this case, an insurance claims adjuster who was a beneficiary under two employee benefit plans administered by her employer and governed by ERISA brought suit against the employer in the California Superior Court based on an interruption in benefits from October 17, 1979, when her benefits were terminated, to March 11, 1980, when her eligibility was restored. 313 Although the plaintiff ultimately received all the benefits to which she was entitled under the plan, she alleged a breach of fiduciary duty based on the allegedly improper refusal to pay benefits during the period in question and sought to hold the employer, as a fiduciary, personally liable for extracontractual compensatory and punitive damages. 314 The section on which the plaintiff based her claim explicitly defines the duty of a fiduciary to manage the property and fringe benefit funds professionally and in the best interests of plan participants and beneficiaries. 315 The Court first

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307. See id. at 145.
308. Id.
309. Id. at 136, 145.
313. Id. at 136-37.
314. Id.
315. Id. at 139 & n.5.
decided that any remedy for a violation of ERISA's fiduciary duties would run to the plan, not to a plan participant.\textsuperscript{316} The Court also noted that the civil enforcement provisions lay out the two kinds of claims a participant can make: one for benefits or one for clarification of rights under a plan.\textsuperscript{317} Accordingly, the Court decided that remedies other than benefits are not available to individual plaintiffs.\textsuperscript{318} So far, so good. The plaintiff got everything she was owed, albeit somewhat belatedly, and she had to make do without a big money judgment from her employer for her inconvenience and aggravation. In other labor contexts, state claims for bad faith insurance adjusting cannot escape federal preemption, even where such petty claims are irremediable under federal labor law.\textsuperscript{319} Barring the plaintiff from state remedies for her ERISA plan administrator's delay in paying her health insurance claims sets no particular precedent for denying wrongfully-discharged factory workers a make-whole remedy.

The next Supreme Court consideration of equitable damages was in a case with another unique set of facts. In \textit{Mertens v. Hewitt Associates},\textsuperscript{320} a class of former employees who participated in the Kaiser Steel Corporation Retirement Plan sued Hewitt Associates, the plan's actuary.\textsuperscript{321} When Kaiser began to phase out its steelmaking operations, many plan participants opted for early retirement.\textsuperscript{322} The plaintiffs claimed that Hewitt failed to change the plan's actuarial assumptions to reflect the additional retirement costs, (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

\textit{Id.} at 139 (quoting ERISA § 409(a), 29 U.S.C. § 1109(a) (2000)). The Court also explained: “Because respondent relies entirely on § 409(a), and expressly disclaims reliance on § 502(a)(3), we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages.” \textit{Id.} at 139 n.5.

316. \textit{Id.} at 144.
317. \textit{Id.} at 139-40.
318. \textit{Id.} at 148.
320. 508 U.S. 248 (1993). “Thus, although we acknowledge the oddity of resolving a dispute over remedies where it is unclear that a remediable wrong has been alleged, we decide this case on the narrow battlefield the parties have chosen, and reserve decision of that antecedent question.” \textit{Id.} at 254-55.
321. \textit{Id.} at 250.
322. \textit{Id.}
causing the plan to be funded inadequately and eventually to be terminated. Consequently, the remaining participants were left with a bankrupt plan, and received only the much-diminished benefits available from the Pension Benefit Guarantee Corporation, rather than the substantially greater pensions due them under the company plan. "Petitioners sought certiorari only on the question whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty." The Court squarely rejected the claim for relief: "Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages — monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of legal relief." The Court read ERISA's language limiting plaintiffs to "equitable" relief as requiring courts to award what historically was included in equity. The Supreme Court acknowledged that equity courts, being moral and legal in nature, could fashion any kind of remedy, both legal and equitable. But, asserted Justice Scalia, Congress could not have used the word "equity" to mean equitable or legal. "'Equitable' relief must mean something less than all relief."

Moreover, the factual context of the case bothered the Court. There are labor department regulations and specific statutory provisions that relate to joint and several liability among co-fiduciaries. Hewitt, hired by the fund's managing fiduciary, might not have been liable in the first place under any interpretation of ERISA. The lawsuit the beneficiaries wanted to bring, rather than advancing ERISA's policy goals, could actually defeat them. Asking an actuary to make whole any losses to a plan based on its imprecise predictions would extend liability to heretofore unheard-of levels:

323. Id.
324. Id. To protect against the risk of underfunding and failed plans, ERISA provides an insurance scheme for defined benefit plans administered by the Pension Benefit Guaranty Corporation (PBGC), a government-created corporation. ERISA §§ 4002(a), 4022-4022(a), 29 U.S.C. §§ 1302(a), 1322-1322(a) (2000). Every plan must make a premium payment to cover the cost of the insurance. Id. § 4007(a), 29 U.S.C. § 1307(a). If a plan fails, the insurance covers some, but not all, of the losses. Id. § 4022a(b)-(c), 29 U.S.C. § 1322a(b)-(c). A primary limit on coverage is a cap on the maximum benefits the PBGC will pay. See id.
325. Mertens, 508 U.S. at 251.
326. Id. at 255.
327. Id. at 257-58.
329. Mertens, 508 U.S. at 258.
330. Id. at 258 n.8.
331. See id. at 262.
Exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves. There is, in other words, a "tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs." We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck.\(^3\)

The remedies were, at best, tangential to the scheme and purpose of ERISA. The plan's managers, even without assigning liability, could have been asked to make the plan whole.\(^3\) Dissenting in *Mertens*, Justice White lamented: "the anomaly [to interpret] ERISA in a way that 'would afford less protection to employees . . . than they enjoyed before ERISA was enacted.'\(^3\) Examining the history of equitable remedies—and their object of putting parties in the position they would have been had there been no breach of trust—Chief Justice Rehnquist and Justices White, Stevens, and O'Connor agreed that "appropriate equitable relief," described in section 3 of ERISA's civil action provisions, "encompass[es] what was equity's routine remedy for such breaches—a compensatory monetary award calculated to make the victims whole."\(^3\) Courts did not abandon make-whole remedies across the board after *Mertens*, and there were a panoply of equitable awards thereafter.\(^3\) *Mertens* was primarily understood as a case

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332. *Id.* at 262-63 (citations omitted) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 515 (1981)).

333. In fact, liability insurance policies can cover trustee-caused losses.


335. *Id.* at 266.

336. See, e.g., Howe v. Varity Corp., 36 F.3d 746, 755 (8th Cir. 1994) (*Mertens* simply holds that only 'equitable relief' is available under Section 502(a)(3), and that this phrase does not include the collection of damages from persons who are not fiduciaries but act in concert with those who are fiduciaries. Nothing in *Mertens* precludes an award of traditional equitable relief, including an injunction, restitution, and the like. (citation omitted)), *aff'd*, 516 U.S. 489 (1996); Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986, 993 (7th Cir. 1993) ("[A]n individual may seek equitable relief from a breach of fiduciary duty under section 1132(a)(3)."). The Tenth Circuit has delineated between legal and equitable relief of backpay in Title VII cases by inquiring whether backpay was requested as a supplement to equitable relief or as an element of legal damages for breach of the employment contract. See Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1443-44 (10th Cir. 1988).

In *Schwartz* v. *Gregori*, 45 F.3d 1017 (6th Cir. 1995), the Sixth Circuit held that backpay sought pursuant to a retaliatory discharge claim under ERISA is equitable in nature. *Id.* at 1021-22; Russell v. Northrup Grumman Corp., 921 F. Supp. 143, 153 (E.D.N.Y. 1996). The Second Circuit has also avoided limiting section 502's remedial reach in *Dunnigan* v. *Metropolitan Life Insurance Co.*, 277 F.3d 223 (2d Cir. 2002), reasoning that ERISA was not adopted "in isolation." *Id.* at 229 (quoting Strom v. Goldman, Sachs & Co., 202 F.3d 138, 147 (2d Cir. 1999)) (observing that both the National Labor Relations Act and Title VII allow for
about non-fiduciary liability, not as a bulwark against make-whole remedies across-the-board.\textsuperscript{335}

It may not have been until 2002 when Justice Scalia cited his own opinions in \textit{Russell} and \textit{Mertens} that anything resembling a line of decisions about remedies came into being.\textsuperscript{338} A third decision completes the triumvirate noted for denying make-whole remedies to plaintiffs who establish an ERISA violation: \textit{Great-West Life & Annuity Ins. Co. v. Knudson}.\textsuperscript{339} The Court's observers claim that this case allowed the Court to ultimately become convinced that equitable remedies could not be expanded beyond what they were in 1783.\textsuperscript{340} Justice Scalia, writing for the majority, identified the subrogation claim of a plan against the proceeds of a third party lawsuit as a suit for “specific performance of a \textit{contractual} obligation to pay \textit{past due} sums,”\textsuperscript{341} which, indeed, it was.

Janette Knudson was rendered quadriplegic by a car accident in June 1992. [The insurance plan offered by her husband’s employer] covered $411,157.11 of Janette’s medical expenses, of which all except $75,000 was paid by petitioner Great-West Life & Annuity Insurance Co. pursuant to a “stop-loss” insurance agreement with the Plan.

... [T]he Knudsons filed a tort action in California state court seeking to recover from Hyundai Motor Company, the manufacturer of the car they were riding in at the time of the accident, and other alleged tortfeasors. The parties to that action negotiated a $650,000 settlement, a notice of which was mailed to

backpay under ““other appropriate relief””). The Second Circuit in \textit{Strom}, and later \textit{Dunnnigan}, found that backpay was a “make-whole remedy . . . [that] sought to 'eliminate the direct economic effect of an alleged violation of the statute,' and did not seek any of the other subjects of compensation found in traditional tort damages.” \textit{Id.} (citation omitted) (quoting \textit{Strom}, 202 F.3d at 147); see also \textit{Clair v. Harris Trust & Sav. Bank}, 190 F.3d 495, 498 (7th Cir. 1999) (“Equity sometimes awards monetary relief . . . .”); \textit{Fotta v. Trs. of the United Mine Workers, Health & Ret. Fund of 1974}, 165 F.3d 209, 212 (3d Cir. 1998) (finding ERISA to be a make-whole remedy entitling the plaintiff to an award of interest where the plan participant finally received the benefits due, but the plan received an unjust enrichment in the delay of payment).

\textsuperscript{337} \textit{See Strom}, 202 F.3d at 148.

\textsuperscript{338} Even Justice Scalia was unsure all make-whole remedies were completely precluded by ERISA, as he observed in \textit{Mertens}: “We note at the outset that it is far from clear that, even if this provision does make money damages available, it makes them available for the actions at issue here.” \textit{Mertens v. Hewitt Assoc's.}, 508 U.S. 248, 253 (1993).

\textsuperscript{339} 534 U.S. 204 (2002).


\textsuperscript{341} \textit{Great-West}, 534 U.S. at 207, 212.
Great-West. This allocated $256,745.30 to a Special Needs Trust[\], created pursuant to a California statute describing such trusts which would[\] provide for Janette’s medical care; $373,426 to attorney’s fees and costs; $5,000 to reimburse the California Medicaid program (Medi-Cal); and $13,828.70 (the portion of the settlement attributable to past medical expenses) to satisfy Great-West’s claim under the reimbursement provision of the Plan.

The Court decided that the remedy Great-West sought was unavailable.\textsuperscript{341} "Here, petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available in equity. ‘A claim for money due and owing under a contract is “quintessentially an action at law.”’\textsuperscript{344} Not even restitution could provide Great-West relief. The money in the Special Needs Trust was not in the possession of the defendants; therefore, it could not qualify as an identifiable res which plaintiffs could attach.\textsuperscript{345} “The basis for petitioners’ claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to some funds for benefits that they conferred,”\textsuperscript{346} which is a patent claim for reimbursement, i.e., legal money damages.

Both Justices Ginsburg and Stevens dissented, concluding as they had in the two earlier cases that equitable remedies under ERISA should have afforded plaintiffs relief.\textsuperscript{347} They agreed that it was “fanciful to assume that in 1974 Congress intended to revive the obsolete distinctions between law and equity as a basis for defining the remedies available in federal court for violations of the terms of a plan under the Employee Retirement Income Security Act of 1974 (ERISA).”\textsuperscript{348}

Justice Ginsburg was appalled at the majority’s emasculation of ERISA and its salutary purpose. She wrote:

\textit{The Court is no doubt correct that ‘vague notions of a statute’s ‘basic purpose’ are . . . inadequate to overcome the words of its}
text regarding the specific issue under consideration. But when Congress' clearly stated purpose so starkly conflicts with questionable inferences drawn from a single word in the statute, it is the latter, and not the former, that must give way.

It is particularly ironic that the majority acts in the name of equity as it sacrifices congressional intent and statutory purpose to archaic and unyielding doctrine. "Equity eschews mechanical rules; it depends on flexibility." And "[a]s this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.'"\(^{349}\)

Separately, these three decisions cannot justify the conclusion that all remedies that cost a losing defendant money are barred outright by ERISA. Even together, they are no more than a trio of cases in which specific rights—timely payment of a claim; subrogation; the protection of a fund corpus—were recognized but their infringement not remedied as the plaintiffs prayed. In two of the cases, the claims sounded clearly in contract. Those are vastly, and significantly, different from claims of retaliatory discharge, which are based on clear public policy.

The case whose claims are closest, conceptually, to *Millsap* and the chink in the continuously evolving firewall against make-whole remedies is *Varity Corp. v. Howe*.\(^{350}\) Some 1500 beneficiaries of the benefit plan sued the employer as the plan's administrator, claiming that it had, "through trickery, led them to withdraw from the plan and to forfeit their benefits."\(^{351}\) There were also about 4000 retired workers whose benefit plans were transferred to a newly-created, but losing division.\(^{352}\) Plaintiffs sought, among other things, an order that, in essence, would reinstate each of them as a participant in the employer's ERISA plan.\(^{353}\) After petitioner Varity Corporation decided to transfer money-losing divisions in its subsidiary, Massey-Ferguson, Inc., to a separately incorporated subsidiary, Massey Combines, it held a meeting to persuade employees of the failing divisions to change employers and benefit plans.\(^{354}\) Varity, the Massey-Ferguson plan administrator as well as the employer, conveyed the basic message that

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349. *Id.* at 227-28 (Ginsburg, J., dissenting) (alterations in original) (citations omitted). Since most circuit and federal courts consider the proof and the remedy in analogous civil rights cases, it is significant that Justice Ginsburg cites to a Title VII decision. *Id.* at 228 (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) ("'[W]hen Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes.'" (alteration in original))).
351. *Id.* at 491-92, 494.
352. *Id.* at 494.
353. *Id.*
354. *Id.* at 493-94.
employees' benefits would remain secure when they transferred.\textsuperscript{355} In fact, Massey Combines was insolvent from the day it was created, and, when it ended its second year in a receivership, the employees who had transferred lost their non-pension benefits.\textsuperscript{356}

Justice Breyer wrote for the majority and summarized the facts thusly:

The business plan—which Varity called "Project Sunshine"—amounted to placing many of Varity's money-losing eggs in one financially rickety basket. It called for a transfer of Massey-Ferguson's money-losing divisions, along with various other debts, to a newly created, separately incorporated subsidiary called Massey Combines. The plan foresaw the possibility that Massey Combines would fail. But it viewed such a failure, from Varity's business perspective, as closer to a victory than to a defeat. That is because Massey Combine's failure would not only eliminate several of Varity's poorly performing divisions, but it would also eradicate various debts that Varity would transfer to Massey Combines, and which, in the absence of the reorganization, Varity's more profitable subsidiaries or divisions might have to pay.

Among the obligations that Varity hoped the reorganization would eliminate were those arising from the Massey-Ferguson benefit plan's promises to pay medical and other nonpension benefits to employees of Massey-Ferguson's money-losing divisions. Rather than terminate those benefits directly (as it had retained the right to do), Varity attempted to avoid the undesirable fallout that could have accompanied cancellation by inducing the failing divisions' employees to switch employers and thereby voluntarily release Massey-Ferguson from its obligation to provide them benefits (effectively substituting the new, self-funded Massey Combines benefit plan for the former Massey-Ferguson plan). Insofar as Massey-Ferguson's employees did so, a subsequent Massey Combines failure would eliminate—simply and automatically, without distressing the remaining Massey-Ferguson employees—what would otherwise have been Massey-Ferguson's obligation to pay those employees their benefits.\textsuperscript{357}

The Eighth Circuit fashioned a make-whole remedy for the plaintiffs:

The Retired Class should receive $696,195, an award in the nature of restitution to compensate them for benefits of which, at the time of trial, they had been deprived. The Retired Class should also receive restitution for benefits accrued between the time of

\textsuperscript{355} Id. at 494.
\textsuperscript{356} Id.
\textsuperscript{357} Id. at 493.
trial and the entry of a final decree on remand. Finally, they are entitled to an injunction reinstating them as members of the M-F Welfare Benefits Plan under the terms of that plan as it existed at the time of retirement.\(^{358}\)

Similar relief was granted to the employees whose benefits had been transferred to the losing division.\(^{359}\) These were "equitable" damages, according to the reviewing court,\(^{360}\) a conclusion the Supreme Court allowed to stand.\(^{361}\)

The relief awarded includes payments of money that plaintiffs would have received if they had remained members of the M-F Plan, but we do not think these payments can properly be characterized as "damages," and thus unavailable under Section 502(a)(3). Rather, we view the payments as restitution. Equity will treat that as done which ought to have been done. Or, to put it in words that fit the present case more precisely, equity will disregard that which ought not to have been done. Plaintiffs should never have been lured away from M-F into the financially shaky MCC. The payments we are ordering are exactly what plaintiffs would have gotten if they had remained at M-F. They are restored to their rightful position. This is restitution, and the Supreme Court in *Mertens* twice lists "restitution" as a type of equitable relief available under Section 502(a)(3). The statute itself mentions not only injunctions but also "other appropriate equitable relief (i) to redress . . . violations" of ERISA.\(^{362}\)

As scores of other courts had done before, the Eighth Circuit recognized that "[p]ayments of past-due benefits are analogous to awards of back pay in Title VII cases, relief uniformly regarded as equitable."\(^{363}\)

In approving a remedy as close as it could get to make-whole for these plaintiffs, the Supreme Court recognized that imprecisely defined "fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment."\(^{364}\) The Eighth Circuit stated: "We also recognize, however, that trust law does not tell the entire story. After all, ERISA's standards and procedural

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359. Id.
360. Id. at 756-57.
363. Id. at 757 (referencing again to *Mertens* as analogizing the remedies available under ERISA to those available under Title VII).
protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." As if anticipating the Millsap plaintiff’s petition, the Court continued:

Consequently, we believe that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA’s fiduciary duties. In some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements.

In Varity Corp., not only did the Court’s majority read the remedies provisions broadly, but it also recognized that fiduciary breaches can create a remedy for individual participants, and not just the plan itself. The irony is that it is a purposive reading of the statute that moves the Court toward its approval of the remedy:

ERISA’s basic purposes favor a reading of the third subsection that provides the plaintiffs with a remedy. The statute itself says that it seeks “to protect . . . the interests of participants . . . and . . . beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries . . . and . . . providing for appropriate remedies . . . and ready access to the Federal courts.” Section 404(a), in furtherance of this general objective, requires fiduciaries to discharge their duties “solely in the interest of the participants and beneficiaries.” Given these objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy.

Writing for the majority in Great-West, Justice Scalia distinguished Varity Corp., the holding of which he found not contrary to the Court’s conclusion that equity excludes anything that looks like money. Apparently, he was


And, even with respect to the trust-like fiduciary standards ERISA imposes, Congress “expect[ed] that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans” as they “development a federal common law of rights and obligations under ERISA-regulated plans.”


366. Id.

367. See id. at 513.

368. Id. (alterations in original) (citation omitted) (quoting ERISA §§ 2(b), 404(a), 29 U.S.C. §§ 1001(b), 1024(a)).

satisfied with the Eighth Circuit's arguments that the money damages allowed each plaintiff were equitable, and not legal. For some reason not clear from the facts of Varity Corp., the Great-West Court further argued that Varity Corp. did not depart from its three-case run on limiting the extent of equitable remedies because "[i]n Varity Corp. . . . it was undisputed that respondents were seeking equitable relief, and the question was whether such relief was 'appropriate' in light of the apparent lack of alternative remedies." In reality, the Varity Corp. plaintiffs got very creative remedies: an injunction ordering each plaintiff reinstated in a solvent company ERISA health plan and dollar-for-dollar reimbursement for lost benefits. The whole claim in Varity Corp., nota bene, was not retaliatory discharge or transfer with the express purpose of interfering with their benefits. Perhaps it could or should have been. It was, instead, a novel but not too radical claim that when plan fiduciaries lie outright to plan participants, they breach their fiduciary duties. However, like section 510, suits for breach of the fiduciary duty must be brought under the third section of 502, which allows for suits for violations of any part of ERISA.

RETALIATORY DISCHARGE AS A PROTOTYPEICAL CAUSE OF ACTION

General inquiry into the purpose of ERISA or the logical result of its enforcement mechanisms, as interpreted by the courts, is arguably all that is needed to establish the propriety of backpay for section 510 violations. More specifically, it is hard to imagine any legislative protection against discriminatory job loss that can be remedied any other way. Until the

370. See id. at 218 & n.4; Howe v. Varity Corp., 36 F.3d 746, 756 (8th Cir. 1994), aff'd, 516 U.S. 489 (1996). Both retirees and those employees whose benefit obligations were transferred to the insolvent subsidiary got $696,195, which the court called "an award in the nature of restitution to compensate them for benefits of which, at the time of trial, they had been deprived." Id.


372. See Varity Corp., 36 F.3d at 756.


374. Section 215(a)(3) of the Fair Labor Standards Act (FLSA) specifically prohibits employers from firing or discriminating against an employee because the employee has asserted his or her rights under the Act. See 29 U.S.C. § 215(a)(3) (2000). Section 216 provides, inter alia:

Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.
Supreme Court decided that ERISA section 510 preempts and supplants all common law claims for wrongful discharge, state courts "expressly recognized the public policy associated with the preservation of pension plans for both governmental and private employees." Where an employee or class of employees proves that the company intentionally interfered with ERISA benefits, and, as a result, employees lost their jobs (and their wages), courts can interpret the confusing language of the statute by deciding what Congress meant to accomplish. As immense and reticulated as ERISA is said to be, it certainly represents a public policy to protect promised employee benefits. This jurisprudence is well-developed, both in state and federal courts. When a plant full of the employees with the most costly ERISA benefits is closed, with the express purpose of saving the money that would be spent on these benefits, the resulting loss of jobs is due to the employer's discrimination against employees with benefits. The only incentive against such discharges, like those where the motive emanates from an employer's intentional interference with other statutorily-created rights, like protection against race-based discrimination, or protection for whistleblowers, is a remedy that puts the discriminatee in the place she would have been without the illegality. More importantly, section 510 discharges not only cause employees economic loss, they actually present a net gain for the wrongdoer.

Apparent in the passage of ERISA is that employer interference with ERISA rights thwarts public policy and must be remedied, for the lack of a better term, in the usual way. Public policy is not a precise concept, but neither is it amorphous:

There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the

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Id. § 216(b).


376. See Elizabeth H. Confer, Employment Law, 76 DENV. U. L. REV. 805, 810 (1999) ("A series of cases in the 1970s provided the 'framework of the types of employer actions that violate "public policy."' They established the foundation for causes of action currently recognized as retaliatory discharge in violation of public policy—that is, discharge contrary to a core societal value. These cases 'recognized that strict adherence to the at-will doctrine could bring potential harm to society in general.'" (footnotes omitted)).

377. While Mertens seemingly foreclosed the plaintiffs' remedies, the normal equitable relief of restitution leaves open the possibility of recovering any unjust enrichment gained by the employer. Under restitution, a plaintiff could obviously recover those benefits to which the employee was entitled, but were denied by the employer's intentional interference with pension benefits. For example, the Millsap plaintiffs essentially lost $24 million of pension and medical benefits to McDonnell Douglas and as a result, the defendant was unjustly enriched for retaining and cycling the money back into the corporate assets.

State's constitution and statutes and, when they are silent, in its judicial decisions. Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities.

Public policy exceptions to the common law rule of employment at will are the most commonly litigated cases, and have given rise to a significant body of law. In one of the earliest reported cases, *Frampton v. Central Indiana Gas Co.*, the state supreme court agreed that "under ordinary circumstances, an employee at will may be discharged without cause. However, when an employee is discharged solely for exercising a statutorily-conferred right an exception to the general rule must be recognized." Most states have recognized such claims of unlawful discharge where the firing violates what can be considered the public policy of that state. In some cases, specific anti-retaliatory discharge provisions were added as amendments to statutes creating positive rights.

As Justice Seymour Simon of the Illinois Supreme Court articulated prosaically and passionately:

With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic. In addition, unchecked employer power, like unchecked employee power, has been seen to present a distinct threat to the public policy carefully considered and adopted by society as a whole. As a result, it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out.

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382. Id. at 428.
383. See, e.g., Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978) (protecting an employee from discharge in retaliation for filing a workers compensation claim). The Illinois statute later specifically included a retaliatory discharge provision. See id.
384. Palmateer, 421 N.E.2d at 878 (citation omitted).
Naturally, a plethora of federal laws create anti-retaliation protections, most notably the NLRA, which is the benchmark Congress created, and later mimicked, in the federal civil rights laws.385

Because ERISA governs exclusively almost any claim relating to an employee benefit plan, workers are often denied the chance to seek relief under more protective state and, in some cases, even federal laws.386 Preemption of pension issues makes sense, since states have so far no clearly stated public policy interest in the development and protection of deferred compensation. But wrongful discharge and discrimination issues have become matters of great interest and mature reflection by both state and federal courts,387 and simply because they are preempted by a statute that was meant to occupy the entire field of issues that relate to employee benefit plans does not mean state and corresponding federal antidiscrimination and retaliation remedies should be eschewed.388 They exist in other contexts as reasonable deterrents and awards.

CONCLUSION

It is hard to lay blame when a business fails, or partially closes, and long-term employees are out of work.

385. Among the most significant federal statutes defining discrimination in employment for exercising a right created by federal law are the Labor Management Relations (Taft-Hartley) Act, limiting the employer's right to discriminate against union employees, see 29 U.S.C. § 158(a)(3) (2000), and the Fair Labor Standards Act of 1938, setting minimum wage and maximum hours levels, limiting child labor, prohibiting sex discrimination in wages, and protecting any employee from retaliation for exercising or vindicating those rights, id. §§ 206(a), (d), 207(a), 212(a). The Civil Rights Act of 1964 prohibits discrimination because of race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e (2000). Furthermore, Title VII makes it an "unlawful employment practice" for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Id. § 2000e-3(a).

386. See, e.g., Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, 826 F. Supp. 583, 588 (D.N.H. 1993), vacated, 37 F.3d 12 (1st Cir. 1994). In that case the plaintiff, an AIDS victim whose insurer had capped benefits, attempted to prevent ERISA preemption of state antidiscrimination law by arguing that the state law functioned as an enforcement vehicle for another federal law, the ADA. Id. at 585, 588. The court, however, rejected this contention. Id. at 588. The case arguably shows how a broader reading of ERISA by the federal courts may result in narrower readings of other federal statutes.

387. Indeed, the American Law Institute has appointed a committee to prepare the first Restatement on Employment Law. See American Law Institute—Projects and Participants: Restatement of the Law Third Employment Law, http://ali.org/ali/pp9.asp (last visited Nov. 2, 2005). It is not yet clear whether the tome is forthcoming, but there certainly is a surfeit of law out there.

It has always been true that if a company could not survive in the marketplace, its employees would face the risk of termination. But business closings are an inherent feature of a free market economy, and the risk of job loss due to business failure has been well understood. Whether or not their stories end happily, employees cannot reasonably expect to remain at work when there is nothing to produce or when the plant itself has shut down. But specific laws that remove certain criteria for making hard business and necessary decisions create remedies that must be considered part of the costs of doing business. ERISA section 510 falls within that aegis of expensive, counterintuitive, but illegal entrepreneurial decision making. Although "the United States relies on direct legal protections only as a second-best response" to job losses, that is precisely the case under section 510.

Whether Russell, Mertens, and Great-West will continue to frustrate Congress's efforts to deter and punish unjust discharge under ERISA is not certain. These Supreme Court decisions reflect an unworkable and static definition of equitable remedies in many different contexts and will, undoubtedly, not be the last word on the subject. For now, courts considering the claims of individuals and groups whose loss of employment is directly attributable to employer interference should be reluctant to apply overgeneralized conclusions from disparate cases and must not conclude that the Court's language limits all equitable relief claims coming under

390. Willborn, supra note 44, at 52.

If market forces can be harnessed to provide protection, that is the first (and last) response. Especially in the context of financially distressed firms, these types of market protections are viewed as preferable to legal protections for a number of reasons. First, market protections create a proper set of incentives for workers by encouraging them to focus their attention on other firms that may be able to better accommodate them, rather than backward to the distressed firms. Second, market protections avoid a drag on firm formation. With legal protection of jobs, firms may be reluctant to form or expand by creating more jobs because when they create a job, they also create a legal claim to that job by its current occupant. Thus, the lack of legal protections contributes to the ability of workers to find replacement jobs by expanding, at least in theory, the number of replacement jobs available. Third, market protections encourage the socially productive movement of workers from distressed and troubled firms to more successful firms. The first option for workers in financially distressed firms, and maybe their only option, is to search for a more successful firm rather than maintaining their connection to the old, troubled firm.

Having said all this, relying on market protections will leave some workers in a bad situation. Some will not be able to find alternative jobs quickly and easily, or at all. By assumption, they will have no legal alternative.

Id. at 52-53 (footnote omitted).
section 502(a)(3), regardless of the employees' relationship to the violator. It is the public policy of this country to protect, in whatever imperfect form, employee benefits. It makes little sense to deny that protection to the jobholders whose tenure is cut short by the cost of those benefits, whatever the Court's majority says.