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LITIGATION UNDER ERISA SECTION 510

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I. TEXT OF STATUTE/INTRODUCTION

A. ERISA Section 510, 29 U.S.C. § 1140, provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 U.S.C. § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act.

B. The oft-stated reason for the enactment of ERISA section 510 — "We have recognized that Congress enacted § 510 primarily to prevent employers from discharging or harassing their employees in order to keep them from obtaining ERISA-protected benefits." *Kowalski v. L&F Prods.*, 82 F.3d 1283, 1287 (3d Cir. 1996). *See also Tolle v. Carroll Touch, Inc.*, 977 F. 2d 1129, 1133 (7th Cir. 1992) (purpose of Section 510 is to "prevent persons and entities from taking actions that might cut off or interfere with a participant's ability to collect present or future benefits or which punish a participant for exercising his or her rights under an employee benefit plan"). "Congress viewed [§510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990). *See also Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, and Santa Fe*, 520 U.S. 510, 515 (1997).

C. Retaliatory discharge. A discharge in retaliation for a participant's exercise of a plan right is also actionable under ERISA Section 510. According to the legislative history to Section 510, the section was "added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions or violent reprisals." S. Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News at 4838, 4872. *See also Montgomery v. John Deere & Co.*, 169 F.3d 556, 561 (8th Cir. 1999) (to make out prima facie case of ERISA retaliation, plaintiff must prove that: 1) he participated in a statutorily protected activity; 2) that an adverse employment action was taken against him; and 3) that a casual connection existed between the two); *Smith v. Don's Paint and Body Shop*, No. Civ. 04-3078RHKAJB, 2005 WL 1124738, at *8 (D. Minn. May 11, 2005) (same).

1. *But see Bilow v. Much, Shelist & Freed*, 227 F.3d 882, 892 (7th Cir. 2001)("a plan must exist before a retaliation case is possible"); *Makenta v. University of Pennsylvania*, 88 Fed. Appx. 501, 505 n.4 (3d Cir. 2004)(tuition reimbursement program "is not protected under ERISA . . .

and therefore its reduction or elimination cannot be the basis for a Section 510 claim"); *Young v. Pennsylvania Rural Electric Ass'n*, 80 Fed. Appx. 785, 790 (3d Cir. 2003)("We are doubtful that §510 was intended to apply in any situation in which the right interfered with has not yet been created, i.e., where there is no plan in existence . . . The consequences of a contrary conclusion would be startling. Any decision made by an executive in the course of formulating a plan would violate §510 if it narrowed the class of participants who could qualify for a benefit.").

D. "This statute is clearly meant to protect whistleblowers." *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 411 (9th Cir. 1993). Nevertheless, the protections of Section 510 may not extend to informal complaints to a supervisor. *King v. Marriott-International, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003). *But See Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005) (". . . the proper focus [in a Section 501 whistleblower action] is not on the formality or informality of the circumstances under which an individual gives information, but rather on whether the circumstances can fairly be deemed to constitute an 'inquiry' [under Section 510].").

E. A plan provision differentiating benefits may preclude suit under Section 510. *Ameritech Benefit Plan Comm. v. Communication Workers of Am.,* 220 F.3d 814, 824 (7th Cir. 2000) ("[S]ection 510 only applies if the employees can show (among other things) that they were qualified under the plan for the denied benefits. If the plan itself provides for discriminatory practices, such that they do not qualify for benefits under its terms, they cannot prevail on an ERISA claim.").

II. PROPER PARTIES

A. As Section 510 has no enforcement or remedial provision, courts generally look to ERISA Section 502(a)(3) to determine standing. *Zipf v. American Tel. and Tel.*, 799 F.2d 889, 891 (3d Cir. 1986). *See also Sandberg v. KPMG Peat Marwick, LLP*, 111 F.3d 331, 333 (2d Cir. 1997) ("Section 510 may be enforced by an action under section 502(a)(3) to protect employees from actions designed to prevent the vesting of pension rights."); *Millsap v. McDonnell Douglas Corp.*, No. 03-5124, 2004 WL 1127189, at * 1 (10th Cir. 2004)("Section 502(a)(3) of ERISA provides the plan participant with his exclusive remedies for a §510 violation.").

B. ERISA Section 502(a)(3), the "catchall" provision of ERISA's remedial section, permits a "participant, beneficiary or fiduciary:"

> (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan . . . .

29 U.S.C. § 1132(a)(3).

1. Section 3(7) of ERISA defines a "participant" as an employee or former employee "who is or may become eligible for a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). This "may become eligible" language, according to the Supreme Court, includes a former employee who can show "a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989). For some courts, participant status is determined at the time of filing suit. *Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 933 (9th Cir. 1994).

    a. Similar to other claims brought under Section 502(a)(3), a plaintiff may seek to prove that "but for" the employer's misconduct, she would have continued to enjoy participant status and, therefore, is entitled to pursue a remedy under section 510. *Shadid v. Ford Motor Co.*, 76 F.3d 1404, 1410 (6th Cir. 1996). In other words, an employer cannot discharge an employee in violation of Section 510 and then argue that the former employee is no longer a participant without standing to sue under Section 510. *See also McBride v. PLM Int'l., Inc.*, WL 355936, at *5 (9th Cir. June 4, 1999) ("when an individual alleges, as here, the he was discharged in violation of ERISA's whistleblower provisions, his employer cannot be allowed to evade section 1140 accountability simply by terminating the plan and distributing the benefits."). The "but for" test does not extend to former employees. *Becker v. Mack Trucks, Inc.*, 281 F.3d 372, 378 (3d Cir. 2002)("The 'but for' test does not establish standing for former employees who are not rehired after being laid off due to an economic downturn.").

    b. Nevertheless, some courts strictly construe ERISA's standing requirements and deny former employees the opportunity to pursue a remedy. *E.g.*, *Raymond v. Mobil Oil Corp.*, 938 F.2d 1528, 1534-35 (10th Cir. 1993) ("The statute by its terms does not permit a civil action by someone who was [only] a participant at the time of the alleged ERISA violation. Rather, it is written in the present tense, indicating that current participant status is the relevant test." *See also Sallee v. Rexnord Corp.*, 985 F.2d 927, 929 (7th Cir. 1993) (rejecting "but for" standing in §1140 context).

    c. "Beneficiaries" are equally entitled to prosecute suits under ERISA Section 510 suggesting, at least for one court, that an employment relationship is not the *sine qua non* of a Section 510 claim. *Mattei v. Mattei,* 126 F.3d 794, 801 (6th Cir. 1997). *But see Becker v. Mack Trucks, Inc.*, 281 F.3d 372, 382 n. 10 (3d Cir. 2002) (rejecting *Mattei*). According to one district court, "[i]t seems only

logical that former employees and beneficiaries, who in many instances have as strong an interest in their pension rights as their employee counterparts, receive some protection from the alienation of those rights under section 510." *Straus v. Prudential Employee Savings Plan*, 253 F. Supp. 2d 438, 448 (E.D.N.Y. 2003).

C. An ERISA Plan is not a proper defendant in a Section 510 claim. *Degrave v. Nat'l Automatic Merchandising Assoc. Pension Plan*, No. 04 C 8147, 2005 WL 1204605, at *3 (N.D. Ill. May 18, 2005).

III. LIMITATIONS PERIOD

A. Because ERISA does not set out any limitations periods for non-fiduciary breach claims, courts "borrow" the statute of limitations for the state law claim most analogous to the ERISA claim pursued. *E.g., Gluck v. Unisys Corp.*, 960 F.2d 1168, 1179 (3d Cir. 1992); *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987).

1. More specifically, claims under ERISA Section 510, for interference with plan rights, are often subjected to an analogous state law limitations period for retaliatory discharge. *Edes v. Verizon Comm., Inc.*, 417 F.3d 133, 138 (1st Cir. 2005) (three year statute of limitations governing tort claims in Massachusetts applied to plaintiffs' claims that defendant misclassified their employment status in violation of Section 510); *Teumer v. General Motors Corp.*, 34 F.3d 542, 549-50 (7th Cir. 1994)(five year statute of limitations governing retaliatory discharge claims in Illinois applies to § 510 actions). *See also Musick v. Goodyear Tire & Rubber Co.*, 81 F.3d 136, 138-39 (11th Cir. 1996)(two year statutes of limitations for wage claims and retaliatory discharge apply to ERISA Section 510); *DeWitt v. Penn-Del Directory Corp.*, 872 F. Supp. 126, 133 (D. Del. 1994)(Section 510 claim analogous to a wrongful termination claim); *Muldoon v. C.J. Muldoon & Sons*, 278 F.3d 31, 32 (1st Cir. 2002)(per curiam)(because Section 510 claim most analogous to claim for wrongful termination or retaliatory discharge, three year Massachusetts statute of limitations controls)

2. "[A] cause of action accrues under §510 of ERISA when the plaintiff is told of the adverse employment decision, not on the date she is terminated or her benefits denied." *Myers v. Colgate-Palmolive Co.*, 26 Fed. Appx. 855, 864 (10th Cir. 2002).

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. Typically, exhaustion of administrative remedies is not a prerequisite to the initiation of a claim under Section 510. *E.g., Smith v. Sydnor*, 184 F.3d 356, 364 (4th Cir. 1999). *See also Blessing v. J.P. Morgan Chase & Co.*, No. 02 Civ. 3874, 2003 WL 470388 (S.D.N.Y. Feb. 24, 2003)("[T]he Court finds that exhaustion is

not required for claims under section 510."). However, "[i]n cases where resolution of the §510 issue turns on an interpretation of the ERISA benefits plan at issue, a district court does not abuse its discretion in requiring plaintiffs to exhaust their administrative remedies." *Burds v. Union Pacific Corp.*, 223 F.3d 814, 817 (8th Cir. 2000). *See also Coomer v. Bethesda Hospital, Inc.*, 370 F.3d 499, 505 (6th Cir. 2004)(requiring exhaustion before commencement of action claiming defendant discriminatorily amended plan in favor of some but not others).

V. GENERAL DESCRIPTION OF THE CAUSE OF ACTION

A. To recover under ERISA Section 510, a plaintiff must establish "(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." *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir. 1987). *See also Bunnion v. Consolidated Rail Corp.*, No. 97-4877, 1998 WL 32715, at *3 (E.D. Pa. Jan. 6, 1998)(same).

B. The plaintiff need not seek to protect a vested right to benefits and may challenge defendant's interference with a prospective right to benefits. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Railway Co.*, 117 S.Ct. 1513, 1515 (1997)("Congress' use of the word 'plan' in § 510 all but forecloses the argument that § 510's interference clause applies only to 'vested' rights."). *See also Heath v. Varity Corp.*, 71 F.3d 256, 257 (7th Cir. 1995)(Section 510 applies to unvested benefits).

1. In a similar vein, the fact that an employer retains, under the terms of the benefits plan, the discretionary right to refuse benefits, does not provide an absolute defense under Section 510. *Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411-12 (6th Cir. 1996).

2. Nevertheless, the plaintiff must point to a right secured in either the plan or ERISA, the exercise of which has been frustrated by defendant's conduct. *Straus v. Prudential Employee Savings Plan*, 253 F. Supp. 2d 438, 448 (E.D.N.Y. 2003)(the "right" interfered with must be one specifically conferred by the plan or by ERISA)(*quoting Owens v. Storehouse, Inc.*, 984 F.2d 394, 399 (11th Cir. 1993)). *See also supra* at 2.

C. The discharge of any employee will, of course, interfere with that individual's continuing accrual of benefits; hence, some latitude is afforded employers in construing ERISA Section 510.

1. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 906 (2d Cir. 1997)("[Plaintiff] argues on appeal, that pre-termination discrimination against him 'must' have resulted from [defendant's] desire to interfere with his pension benefits because it had that effect. This is a textbook illustration of the *post hac ergo propter hac* fallacy."); *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1544 (3d Cir. 1996)(Proof of only

an "incidental loss of benefits" will not constitute a violation of ERISA Section 510); *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 522 (3d Cir. 1997)(same); *Pace v Eureka, Inc.*, No. 97-3245, 1998 WL 162877, at * 4 (E.D. Pa. April 8, 1998)("[W]here the only evidence that an employee specifically intended to violate ERISA is the employee's lost opportunity to accrue additional benefits, the employee has not put forth evidence sufficient to separate that intent from the myriad of other possible reasons for which an employer might have discharged him" and "summary judgment [is] properly granted."); *Armbruster v. Unisys Corp.*, No. 91-5942, 1993 WL 93975, at *15 (E.D. Pa. 1993)("Since a loss of benefits is an inevitable consequence of virtually all employment terminations, courts consistently require plaintiff-employees to demonstrate that their employer specifically intended to interfere with their entitlement to benefits in reaching disputed personnel decisions."), *rev'd on other grounds,* 32 F.3d 768 (3d Cir. 1994); *Nemeth v. Clark Equip. Co.*, 677 F. Supp. 899, 906 (W.D. Mich. 1997)("Plaintiffs must show 'more than . . . that the termination of [their] employment meant a monetary savings to defendants,' for otherwise an ERISA violation would automatically occur every time an employer terminated a fully-vested employee ."); *Sharp v. BW/IP Int'l, Inc.*, 991 F. Supp. 451, 458 (E.D. Pa. 1998)("Plaintiff's 'evidence' of a specific intent to interfere with his pension benefits amounts to nothing more than an assertion of the fact that he was deprived of the pension benefits as a result of his termination. As stated supra, this 'inevitable consequence of virtually all employment terminations,' standing alone, is insufficient to show a specific intent to interfere with the pension plan under § 510 of ERISA.").

a. Absent a showing of specific intent, "an employee could sue under § 510 for being negligently terminated, and that goes too far to vindicate the pension rights of employees." *Newell v. McDonnell Douglas Corp.*, No. 92-CV-2239, 1994 WL 880432, at *10 (E.D. Mo. Aug. 31, 1994). *See also Duffy v. Drake Beam Morin, Harcourt General, Inc.*, No. 96 Civ. 5606, 1998 WL 252063, at *10 (S.D.N.Y. May 19, 1998)("No ERISA cause of action lies where the loss of pension benefits was a mere consequence of, but not a motivating factor behind, a termination of employment.").

2. A tension necessarily arises between an employer's unfettered right to discharge an at-will employee and the protections afforded by ERISA Section 510.

a. According to the Second Circuit, "ERISA does not guarantee every employee a job until he or she has fully vested into a company's benefit plan." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988). *See also Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 524 (3d Cir. 1997)("Because Dewitt was an at-will employee, her employer could terminate her employment, for any

reason and on any date the employer chose."); *Russell v. Northrop Grumman Corp.*, 921 F. Supp. 143, 149 (E.D.N.Y. 1996)(Because of at-will status, "the employee is left the very difficult task of proving that he was fired at least partly to avoid the vesting of his pension benefits.")(quoting *Shipper v. Avon Prods., Inc.*, 605 F. Supp. 701, 706 (S.D.N.Y. 1985)).

D. The "specific intent" requirement, read into Section 510 by all courts construing the provision, serves as yet another check upon the indiscriminate finding of liability under ERISA Section 510.

1. Simply stated, "[t]o recover under Section 510 the employee must show that the employer made a conscious decision to interfere with the employee's attainment of benefits." *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 347 (3d Cir. 1990). *See also Schweitzer v. Teamsters Local 100*, 413 F.3d 533, 537 (6th Cir. 2005) (plaintiff must show a "causal connection" between employer's decision to terminate and the issue of benefits); *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 522 (3d Cir. 1997)(plaintiffs must show a "specific intent" on the part of defendants to interfere with plaintiffs' attainment of benefits).

2. The specific intent requirement has been equated with the showing required under the criminal law. *Asprino v. Independent Blue Cross/Pennsylvania Blue Shield*, No. 96-7788, 1997 WL 634522, at * 5 (E.D. Pa. Oct. 16, 1997)("Specific intent, as this Court has often charged juries, means more than a general intent to commit an act. It requires that the defendants knowingly did an act which the law forbids, purposely intending to violate the law.").

3. "This specific intent is present where the employee's (future or present) entitlement to protected benefits is a motivating factor in the employer's decision. A factor is motivating if it can be said that it has 'a determinative influence on the outcome.'" *Koons v. Aventis Pharmaceuticals, Inc.*, 367 F.3d 768, 777 (8th Cir. 2004). "In other words, [plaintiff] had to show that he would not have been terminated had he not been entitled to benefits." *Id.*

E. Nevertheless, plaintiff need not prove that "the sole reason for his termination was to interfere with pension rights." *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987). Rather, "§ 510 of ERISA requires no more than proof that the desire to defeat pension eligibility is 'a determinative factor' in the challenged conduct." *Id.* at 860. *See also Gitlitz v. Compagnie National Air* France, 129 F.3d 554, 558 (11th Cir. 1997)("a plaintiff is not required to prove that interference with ERISA rights was the sole reason for the discharge but must show more than the incidental loss of benefits as a result of the discharge."); *Tavoloni v. Mt. Sinai Medical Center*, 26 F. Supp. 2d 678, 680 (S.D.N.Y. 1998)(plaintiff must demonstrate that the challenged actions were taken "at least

in part for the specific purpose of interfering with or preventing plaintiff from realizing his benefits . . .”); *Morris v. Winnebago Indus., Inc.*, 950 F. Supp. 918, 925 (N.D. Iowa 1996)(“[C]ourts consistently define ‘specific intent’ to violate ERISA as meaning that a motivating factor in the defendant’s action was the purpose of interfering with the plaintiff’s entitlement to benefits.”).

1. In other words, it appears that, at least in the Third and Second Circuits, plaintiffs should prevail in the mixed motive case, *i.e.*, where the employer harbors both illicit and proper motives. “An essential element of plaintiff’s proof under the statute is to show that an employer was at least in part motivated by the specific intent to engage in activity prohibited by § 510.” *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988). *See also Nero v. Industrial Molding Corp.*, No. 98-10020, 1999 WL 68258, at *5 (5th Cir. March 2, 1999)(“A plaintiff need not show that the sole reason for the termination was to interfere with rights protected by ERISA; he need only prove that a specific intent to violate ERISA partly motivated the employer.”). Other courts, however, require a more exacting causal relationship between the illicit motive and the discharge. *E.g.*, *Schweitzer*, 413 F.3d at 537 (plaintiff must show a “causal connection” between employer’s decision to terminate and the issue of benefits); *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1044 (6th Cir. 1992) (plaintiff had to show a “causal link” between the employee benefits and the dismissal); *Koons*, 367 F.3d at 777 (“[Plaintiff] had to show that he would not have been terminated had he not been entitled to benefits.”). However, “[w]hen a plaintiff makes a mixed motive claim and establishes the unlawful consideration was a motivating factor in the employer’s decision, the employer is saddled with the burden of proving that the adverse employment action would have occurred notwithstanding the unlawful consideration.” *Id.* at 777 n. 5.

2. Inconsistent treatment of employees may not evidence a specific intent to interfere with benefits. *Koons*, 367 F.3d at 779 (“To the extent Aventis may have acted inconsistently in disciplining its employees, this does not prove an intent to interfere with his severance benefits.”). Indeed, “ERISA does not prohibit employers from firing employees they don’t like, so long as their purpose is not to interfere with the employees’ benefits.” *Id.* at 779.

3. “The plaintiff may use both direct and circumstantial evidence to establish specific intent, but when the plaintiff offers no direct evidence that a violation of [Section] 510 has occurred, the court applies a shifting burden analysis, similar to that applied in Title VII employment discrimination claims.” *Makenta v. University of Pennsylvania*, 88 Fed. Appx. 501, 504 (3d Cir. 2004).

4. The Third Circuit has held that, to prove pretext, a plaintiff must prove something more. *DiFederico v. Rolm Co.*, 201 F.3d 200, 207 n. 3 (3d Cir.

2000) ("While our opinions and the opinions of other circuits do sometimes use terms like 'a motivating factor,' 'contributing factor' or 'sole reason' to describe what is or is not an employer's motive, we believe it is preferable, in a pretext case analysis, to speak either in terms of 'determinative' . . . or 'real reason'"). *See also Eichorn v. AT&T Corp.*, 248 F.3d 131, 149 (3d Cir. 2001) ("Then, the burden shifts back to the plaintiff to show that the employer's rationale was pre-textual and that the cancellation of benefits was the 'determinative influence' on the employer's actions."). According to the Fifth Circuit, "[t]he plaintiff need not prove that the discriminatory reason was the only reason for the discharge, but he must show that the loss of benefits was more than an incidental loss from his discharge." *Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254, 260 (5th Cir. 2001).

5. In a class action, as more fully described below, notwithstanding the fact that the class can show that the decision to terminate the plaintiffs was motivated, in part, by an illicit consideration, the employer is given an opportunity to disprove causation. Once the plaintiffs establish that the desire to avoid benefits liability was a determining factor in the decision to terminate plaintiffs' employment, the defendant, in order to avoid liability, remains free to 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." *Gavalik*, 812 F.2d at 863.

VI. SHIFTING BURDENS UNDER 510

A. Not surprisingly, a plaintiff should prevail when she has direct evidence of discrimination under ERISA section 510. "Evidence is direct when it is sufficient to prove discrimination without inference or presumption." *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1223 (11th Cir. 1993).

1. Moreover, where direct evidence of discriminatory conduct is available to he plaintiff, "problems of proof are no different than in other civil cases." *Gavalik v. Continental Can Co.*, 812 F.2d 834, 853 (3d Cir. 1987).

2. "The plaintiff may use both direct and circumstantial evidence to establish specific intent, but when the plaintiff offers no direct evidence that a violation of § 510 has occurred, the court applies a shifting burdens analysis, similar to that applied in Title VII employment discrimination claims." *DiFederico v. Rolm Co.*, 201 F.3d 200, 205 (3d Cir. 2000).

B. Plaintiffs' likely inability to tender such a "smoking gun," demonstrating defendants' culpability with precision, led courts to scrutinize Section 510 claims under the burden shifting approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and restated in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *E.g., Curby v. Solutia, Inc.*, 351 F.3d 868, 871 (8th Cir. 2003)("We analyze claims brought pursuant to section 510 of ERISA under

the three-stage burden-shifting paradigm articulated in *McDonnell Douglas . . .*"); *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992)("When applying this statute, most courts have held that it is appropriate to employ a *Burdine*, burden-shifting approach if there is no direct evidence of the employer's motivation."). "We have recognized that, in most cases, however, 'smoking gun' evidence of specific intent to discriminate does not exist." *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 523 (3d Cir. 1997). *See also Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988)(same).

1. The burden shifting approach "is designed to sharpen vague allegations of discrimination and flush out the true reasons that prompted an employer's action." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111-12 (2d Cir. 1988). *See also Montgomery v. John Deere & Co.*, 169 F.3d 556, 561 (8th Cir. 1999)("the same burden-shifting framework that applies to [plaintiff's] ADEA claim also applies to his ERISA claim.").

2. "On appeal of a factfinder's verdict though, the three stages of *McDonnell Douglas* fade and we focus on the ultimate question of whether the plaintiff carried his burden of proof as to the employer's intent." *Koons v. Aventis Pharmaceuticals, Inc.*, 367 F.3d 768, 777 (8th Cir. 2004).

3. The *McDonnell Douglas* construct first requires the plaintiff to demonstrate, by a preponderance of the evidence, a *prima facie* case of discrimination.

    a. If the plaintiff does so, a presumption of discrimination is created, and the defendant must articulate a legitimate nondiscriminatory reason for its conduct. *Burdine*, 450 U.S. at 253. *See also Gitlitz*, 129 F.3d at 559.

    b. The burden of proving a *prima facie* case is not onerous. *Isbell, et al. v. Allstate Ins. Co.*, No. 04-2310, 04-2365, 2005 WL 1939722 (7th Cir. Aug. 15, 2005) (plaintiff need not even demonstrate a *prima facie* case if defendant offers a legitimate, nondiscriminatory reason for the decision); *Newell v. McDonnell Douglas Corp.*, No. 92-CV-2239, 1994 WL 880432, at *9 (E.D. Mo. Aug. 31, 1994)("The nature of the plaintiff's burden of proof at the *prima facie* stage is de minimis."). *See also Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1044 (6th Cir. 19920 ("it is no more than the bare minimum that a plaintiff must show to meet the prima facie case threshold").

        (1) In the context of a Section 510 claim alleging unlawful discharge, a plaintiff may establish a *prima facie* case of discrimination by showing (1) she is entitled to ERISA's protection; (2) she was qualified for the position, and (3) she was discharged under circumstances that give rise to an

inference of discrimination. *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 348 (3d Cir. 1990). *See also Gavalik v. Continental Can Co.,* 812 F.2d 834, 852 (3d Cir. 1987); *Gitlitz,* 129 F.3d at 559. To satisfy that last element, plaintiff does not have to prove discriminatory intent but must introduce evidence suggesting that interference with ERISA rights was a motivating factor. *Turner,* 901 F.2d at 348. *See also Gavalik v. Continental Can Co.*, 812 F.2d 834, 859 (3d Cir. 1987)("The 'but for' test does not require a plaintiff to prove that the discriminatory reason was the determinative factor, but only that it was a determinative factor.")(quoting *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 179 n.1 (3d Cir. 1985); *Gitlitz,* 129 F.3d at 559 (same)).

(a) At the threshold, according to the Eighth Circuit, for plaintiff to show "she engaged in protected activity (i.e., making a claim for ERISA benefits), her claim has to be reasonable." *Curby v. Solutia, Inc.*, 351 F.3d 868, 871 (8th Cir. 2003). In other words, where the underlying plan documents clearly do not provide benefits, plaintiff cannot ground her Section 510 claims on those documents. *Id. See also Plante v. Foster Klima & Co.*, 2004 WL 2222318, at * 4 (D. Minn. Sept. 30, 2004)(where claim not grounded upon an ERISA plan, Plaintiff "has not established a prima facie case of interference because he does not have a federally protected right to . . . benefits"); *Tambash v. St. Bonaventure Univ.*, No. 2004 WL 2191566, at * 7 (W.D.N.Y. Sept. 24, 2004)("Because the plaintiff has failed to establish that the Medical Leave of Absence Plan at issue is an ERISA-covered 'employee benefit plan,' the plaintiff has failed to establish a prima facie case with respect to his claim under § 510."). *See also supra* at 2.

(b) "We now join our sister circuits in deciding that qualification for the position sought is an element of a prima facie ERISA claim." *Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254, 261 (5th Cir. 2001).

(2) The plaintiff, however, cannot establish a *prima facie* case merely by showing that, as a result of the termination, he was deprived of the opportunity to accrue additional benefits. *Id.*

(3) Moreover, measures designed to reduce costs in general that also result in an incidental reduction in benefit expenses do not suggest discriminatory intent. *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 979 (5th Cir. 1993); *Gitlitz*, 129 F.3d at 559 (same). *But see Makenta v. University of Pennsylvania*, 88 Fed. Appx. 501, 505 (3d Cir. 2004)("Economic benefits enjoyed by defendants when pension benefits are cancelled can be circumstantial evidence of specific intent, particularly when other circumstances make that cancellation suspicious."). Nevertheless, "[c]utting costs, even if that alone were a motivating factor here, can be a legitimate reason for [the] decision to eliminate certain benefits." *Id.* at 506 n. 7.

(4) Instead, the employee must introduce evidence suggesting that the employer's actions were directed at ERISA rights in particular. *Unida*, 986 F.2d at 979. The employee can discharge this burden by showing that his termination resulted in a "substantial savings" in benefits expenses. *Eichorn v. AT&T Corp.*, 248 F.3d 131, 149 (3d Cir. 2001); *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1224 (11th Cir. 1993). *See also Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 523 (3d Cir. 1997)(savings must be of "sufficient size" to be "realistically viewed as a motivating factor"); *Krisher v. Xerox Corp.*, 102 F. Supp.2d 715, 722 (N.D. Tx. 1999)("Plaintiff's subjective belief that she was terminated as a cost-cutting measure is insufficient to satisfy the third element of the prima facie showing. . . .").

(5) Plaintiff's temporal proximity to vesting, at the time of her discharge, may be sufficient to establish the threshold *prima facie* showing. *Shahid v. Ford Motor Co*., 76 F.3d 1404, 1411 (6th Cir. 1996)(proximity to vesting provides some inference of intentional, prohibited activity); *Humphreys*, 966 F.2d at 1044 (same). *See also Eichorn v. AT&T Corp.*, 248 F.3d 131, 149 (3d Cir. 2001) ("temporal proximity provides circumstantial evidence that the cancellation of the benefits was a motivating factor in the timing of the no-hire agreement"); *Pennington v. Western Atlas, Inc*., 202 F.3d 902, 908 (6th Cir. 2000)("Plaintiffs established a prima facie case based upon the proximity of Plaintiffs discharge to their age of receiving full retirement benefits.").

(6) "An inference of retaliatory motive can be raised by showing a discharge shortly after an exercise of protected

rights." *Eckelkamp v. Beste*, 315 F.3d 863, 871 (8th Cir. 2002).

4. Upon a *prima facie* showing, the burden of production shifts to the employer to show a legitimate nondiscriminatory reason for the challenged conduct. In other words, a rebuttable presumption arises. Nevertheless, if the employer then makes a *prima facie* of a nondiscriminatory reason, then the burden of proof remains with the plaintiff, and **"**the presumption drops from the case." *Gavalik v. Continental Can Co.*, 812 F.2d 834, 853 (3d Cir. 1987).

   a. In other words, "[t]he employer must then rebut that presumption by producing evidence of a legitimate, nondiscriminatory reason for its actions toward the plaintiff, though at this stage the employer need not persuade the court that it was actually motivated by the proffered reasons." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988). "If the employer is successful, the presumption drops out of the case." *Id.* The employer's burden to show a legitimate non-discriminatory reason has been described as "relatively light." *Kowalski v. L&F Prods.*, 82 F.3d 1283, 1289 (3d Cir. 1996); *Savage v. Connecticut Gen. Life Ins. Co.*, No. 96-1709, 1997 WL 587343, at *6 (E.D. Pa. Sept. 11, 1997)(same).

      (1) More specifically, the employer "can satisfy this burden of production by introducing evidence which, taken as true, would permit the conclusion that there was a non-discriminatory reason for the discharge." *Dister*, 859 F.2d at 1112.

      (2) The need for a corporate reorganization or change in business priorities will typically rebut the presumption. *Id*. at 1115.

      (3) Evidence suggesting that employer focused on a plant's "bottom line," and not simply pension costs, may also be sufficient to rebut the presumption. *Nemeth v. Clark Equip. Co.*, 677 F. Supp. 899, 905 (W.D. Mich. 1987).

   b. The employer's failure to offer such proof, rebutting the *prima facie* showing of discrimination, requires a judgment in favor of the plaintiff. *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 853 (3d Cir. 1987).

   c. The truthfulness of the defendant's proffer at this stage is presumed. *E.g., Winkel v. Kennecott Holdings Corp.*, No. 99-

4114, 2001 WL 23163, at *8 (10th Cir. Jan. 10, 2001) ("We reiterate that the defendant merely has to present admissible evidence of a legitimate reason for its conduct. Its burden is that of production, not persuasion, and the truthfulness of its proffered explanation is assumed.").

5. The plaintiff's ultimate burden of persuading the trier of fact that she was the victim of intentional discrimination then merges with the plaintiff's burden of proving that the employer's reason is pretextual. *Humphreys*, 966 F.2d at 1043.

a. Plaintiff may satisfy the ultimate burden of proving pretext "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." *Dister v. Continental Group, Inc*., 859 F.2d 1108, 1113 (2d Cir. 1988)(quoting *Burdine*, 450 U.S. at 256).

(1) More specifically, plaintiff must "put forth evidence demonstrating that the employer's proffered non-discriminatory reason 'was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext).'" *Kowalski v. L&F Prods*., 82 F.3d 1283, 1289 (3d Cir. 1996)(quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)).

(2) To that end, the plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherences or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder "could rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] non-discriminatory reasons." *Kowalski*, 82 F.3d at 1289. *See also Savage v. Connecticut Gen. Life Ins. Co.*, No. 96-1709, 1997 WL 587343, at *6 (E.D. Pa. Sept. 11, 1997)(same).

(3) While the plaintiff may offer sufficient proof to show pretext that proof, standing alone, may not be sufficient to require the entry of judgment in favor of the plaintiff. *Stout v. Bethlehem Steel Corp*., 957 F. Supp. 673, 694 (E.D. Pa. 1997)("[A]t all times the plaintiff retains the ultimate burden of proof, and that simple rebuttal proof of the incredibility of the defendant's proffered reasons is not an independent, sufficient means of finding for the plaintiffs."). *See also Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir. 1987)(burden of persuasion on the ultimate issue of intentional discrimination remains at all

times with the plaintiff). *But see Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000), discussed below.

b. In the summary judgment context, "to survive summary judgment when the defendant articulates a legitimate, non-discriminatory reason for the discharge, the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an individual's discriminatory reason was more likely than not the reason for the discharge." *Kowalski v. L&F Prods.*, 82 F.3d 1283, 1289 (3d Cir. 1996).

(1) It should be noted that, while the burden shifting of *McDonnell Douglas* may be applied to claims under Section 510, summary judgment remains a tool available to weed out meritless claims. *Duffy v. Drake Beam Morin, Harcourt General, Inc.*, No. 96 Civ. 5606, 1998 WL 252063, at *4 (S.D.N.Y. May 19, 1998)("When an employer provides convincing evidence explaining its conduct, and the plaintiff's case rests on conclusory allegations of discrimination, the court may properly conclude that there is no genuine issue of material fact and grant summary judgment to the employer.").

(2) To get to the jury, a plaintiff need only offer two categories of evidence: first, evidence establishing a prima facie case; and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. *Reeves for Sanderson Plumbing*, 530 U.S. 133 (2000). "Put another way, in *Reeves*, the Supreme Court held that when a plaintiff establishes a prima facie employment discrimination case and that his employer's explanation is pretextual, this does not automatically create a jury question, but it may do so. Even when a plaintiff demonstrates a prima facie case and pretext, his claim should not be submitted to a jury if there is evidence that precludes a finding of discrimination, that is if 'no rational factfinder could conclude that his employer's explanation is pretextual.'" *Rowe v. The Marley Co.*, 233 F.3d 825, 830 (4th Cir. 2000).

C. Evidence of corporate ineptitude or poor decision making is *not* probative of an intent to discriminate under ERISA section 510.

1. *Register v. Honeywell Federal Mfg. & Tech.*, LLC, 397 F.3d 1130, 1138 (8th Cir. 2005) ("The issue is what the employer honestly believed, not whether it was right."); *Hutson v. McDonnell Douglas Corp*., 63 F.3d 771,

781 (8th Cir. 1995)(absent evidence of intent to violate ERISA section 510, federal courts are not to sit as "super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers."); *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 678 (7th Cir. 1997)("[A]rguing about the accuracy of the employer's assessment is a distraction, because the question is not whether the employer's reasons for a decision are right but whether the employer's description of its reasons is honest."); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988)("[I]t is not the function of a fact-finder to second-guess business decisions or to question a corporation's means to achieve a legitimate goal."); *Morris v. Winnebago Indus., Inc.*, 950 F. Supp. 918, 927 (N.D. Iowa 1996) (Defendant "was entitled to make the choice it made in the exercise of its business judgment."); *Savage v. Connecticut Gen. Life Ins. Co*., No. 96-1709, 1997 WL 587343, at *8 (E.D. Pa. Sept. 11, 1997)("[T]he court may not interfere, in the absence of discrimination, with the business judgment of an employer even if such judgment seems poor."). *See also Winkel*, 2001 WL 23163 at *9 ("[W]e will not second guess Kennecott's decision as to what projects or tasks should be assigned to Winkel's replacement."); *Koons v. Aventis Pharmaceuticals Inc.*, 367 F.3d 768, 778 (8th Cir. 2004)(even if plaintiff had not violated corporate policy cited as basis for firing, if [defendant] honestly believed he did and terminated him for that reason, then no section 1140 action would exist").

VII. APPORTIONING BURDENS OF PROOF IN 510 CLASS ACTIONS

A. ERISA section 510 claims may be suited for class treatment under Rule 23, especially upon a showing that an employer's alleged misconduct impacted numerous employees in a similar manner. *E.g., Bunnion v. Consolidated Rail Corp.*, No. 97-4877, 1998 WL 372644, at *5 (E.D. Pa. May 14, 1998); *Feret v. CoreStates Financial Corp.*, No. 97-6759, 1998 WL 512933, at *7 (E.D. Pa. Aug. 18, 1998).

B. As noted above, the Third Circuit in *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), applied the familiar burden shifting approach of *McDonnell Douglas* and *Burdine* to aid those plaintiffs without "smoking gun" evidence of illegal conduct under ERISA Section 510.

C. The Court of Appeals in *Gavalik* placed some further restraints on the application of 510 to class action claims.

1. First, although a plaintiff may prove a *prima facie* case of discrimination by proving the three threshold elements, that proof may not be sufficient to permit a similar class wide finding.

a. In other words, and according to Judge Higginbotham, "[i]n a class action context, it is not enough for the class representative to prove

the validity only of his or her own claim. . . . Rather, the class representative 'must establish that discrimination was the employer's standard practice.'" *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir. 1987)(quoting *Dillon v. Coles*, 746 F.2d 998, 1003 (3d Cir. 1984)). *See also Vaszlavik v. Storage Technology Corp.* 183 F.R.D. 264, 266 (D. Col. 1998)("If the representative plaintiffs show a pattern and practice of discrimination in phase one of the trial, the class members are entitled to a presumption that they were individually discriminated against.").

D. Nevertheless, proof that the defendant acted with the "specific intent" to violate ERISA may be sufficient to warrant prospective class-wide injunctive relief, even in the absence of proof that the defendant's conduct caused harm to an individual plaintiff. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 857 (3d Cir. 1987)("[T]he maintenance of the program with the specific intent to interfere with class members' pension eligibility was in itself a classwide violation of ERISA entitling them to injunctive relief.").

E. Such a prospective class-wide injuctive remedy, does *not* mean, however, that each class member is immediately entitled to an individual remedy.

1. Quoting the Supreme Court, Judge Higginbotham further explained in *Gavalik*, that "[w]hile a finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class, additional proceedings are ordinarily required to determine the scope of individual relief for the members of the class." *Gavalik*, 812 F.2d at 859 (quoting *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)).

   a. Typically, plaintiff must prove that, "but for" the impermissible discriminatory conduct, plaintiff would not have lost his job. *Gavalik*, 812 F.2d at 859. However, proving "but for" causation in support of a 510 claim requires only proof that the illicit conduct was *a* determinative factor, not *the* determinative factor. *Id.* at 860 ("510 of ERISA requires no more than proof that the desire to defeat pension eligibility is a 'determinative factor' in the challenged conduct"). In other words, "[u]ntil the individual has demonstrated actual injury to himself, the court may not direct individual relief." *Id*. at 862.

   b. Nevertheless, where the plaintiffs in a class action have proven an intentionally discriminatory plan or policy, "a presumption that [plaintiffs] were actual victims of the discriminatory policy inures to the benefit of the individual class members." *Id*. at 861-62.

      (1) That presumption of discrimination is, in turn, limited to only those employer actions that are related to the

discriminatory policy. *Id*. at 861 ("The presumption that arises upon proof of a discriminatory policy attaches to all employer actions that may reasonably be considered as within the ambit of that policy.").

c. The employer remains free to prove, on an individual basis, that, notwithstanding the presumption of discrimination, the class members would have lost their jobs. In other words, "[t]his 'but for' burden requires proof from the defendant that it would have reached the same decision or engaged in the same conduct in any event, i.e., in the absence of the impermissible consideration, and operates to limit the scope of the relief available to individual class members." *Id*. at 863.

VIII. LIMITS TO LIABILITY UNDER 510

A. Fundamental business decisions

1. The Supreme Court held, in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Railway Co.*, 117 S.Ct. 1513 (1997), that ostensibly discriminatory conduct may be insulated from liability under 510 upon a showing that the defendant acted in furtherance of a "fundamental business decision."

2. Benefits cost money and, for better or worse, may form a predicate to an employer's decision to discharge an employee. Prior to *Inter-Modal*, an employer may have been motivated to obscure from judicial scrutiny a decision motivated by benefits costs. As noted above, however, the *Inter-Modal* opinion suggests that a reduction in benefits motivated by a need to cut costs may not be actionable under Section 510, so long as the challenged steps were undertaken in furtherance of a fundamental business objective.

3. In other words, the Supreme Court's *Inter-Modal* ruling may call into question previous lower court opinions holding that such considerations as profitability may not be an absolute defense from liability under ERISA Section 510.

a. For some, the protections of ERISA section 510 are available to the participants in the face of arguments suggesting that the otherwise actionable conduct was necessitated by the employer's financial circumstances. According to one court, while granting defendant's motion for summary judgment "[a]llowing 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." *Nemeth v.*

Clark Equip. Co., 677 F. Supp. 899, 905 (W.D. Mich. 1987). *See also Gavalik v. Continental Can Co*., 812 F.2d 834, 857 n.39 (3d Cir. 1987)("Thus, section 510's essential purpose is to prevent employer from intentionally interfering with impending pension eligibility whether motivated by malice toward the particular employee(s) or by a general concern for the economic stability of the company.").

B. Amendments to benefits plans

1. Generally, an amendment to an ERISA plan cannot be challenged under ERISA Section 510 because a plan amendment does not impact the participant's employment status.

a. *Haberern v. Kaupp Vascular Surgeons, Ltd. Defined Benefit Pension Plan,* 24 F.3d 1491, 1503 (3d Cir. 1994)(ERISA section 510 "protects only against actions intended to deny plan rights that affect the employment relationship."); *Feret v. CoreStates Financial Corp.*, No. 97-6759, 1998 WL 426560, at *3 (E.D. Pa. July 27, 1998)(dismissing Section 510 claim challenging amendment to benefits plan, citing *Haberern*); *Pierson v. Hallmark Marketing Corp.*, 990 F. Supp. 380, 388 (E.D. Pa. 1997)(510 claims are "limited to actions affecting the employer-employee relationship, not mere changes in the level of benefits.")(quoting *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1543 (3d Cir. 1996); *Devlin v. Transportation Communications Int'l Union*, No. 95 Cir. 0742 (JFK), 1997 WL 570512, at *6 (S.D.N.Y. Sept. 15, 1997)(increase in participant premiums for health benefits not actionable under Section 510 because "it is undisputed that the change in coverage had no effect on any employer-employee relationship.").

(1) That limitation on the reach of Section 510 necessarily follows from the indisputable proposition that an employer is always free to amend a benefits plan. "Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans," so long as the amendment is made in accordance with the formal procedures set forth in the plan. *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223, 1228 (1995). *See also Mattei v. Mattei*, 126 F.3d 794, 800 (6th Cir. 1997)(Section 510 "offers no protection against an employer's actions affecting the status or scope of an ERISA plan itself."); *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1128 (7th Cir. 1990)(Section 510 "is simply not the appropriate vehicle for redressing the unilateral

elimination of severance benefits accomplished independently of employee termination or harassment.").

b. In other words, "[i]n contrast to § 502, § 510 is designed to protect the employment status of participants and beneficiaries." *Coats v. Kraft Foods, Inc.*, 12 F. Supp.2d 862 (N.D. Ind. 1998). Moreover, "a fundamental prerequisite to a Section 510 action is an allegation that the employer-employee relationship . . . was changed in some discriminatory or wrongful way." *Stout v. Bethlehem Steel Corp.*, 957 F. Supp. 673, 694 (E.D. Pa. 1997)

c. Such rulings are entirely consistent with the principle that an employer has unfettered discretion to modify its benefits plans. *Curtiss Wright Corp. v. Schoonejongen*, 514 U.S. 73, 77 (1995).

(1) There is *dictum*, however, in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Railway Co.*, 117 S.Ct. 1513 (1997), suggesting that 510 "counterbalances" the flexibility to amend or terminate plans, where an employer acts with the requisite illicit intent. In other words, *Inter-Modal* might be read to prohibit an employer from amending a benefit plan to save money raises questions about when, if ever, such an amendment would be proper. Such a reading of *Inter-Modal* runs directly afoul of *Schoonejongen. See also Haberern v. Kaupp Vascular Surgeons, Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1504 (3d Cir. 1994)("Our analysis compels us to hold that the appellants' action in adopting the life insurance amendment is not actionable under section 510.").

d. Amending a plan to benefit some but not others is not actionable under Section 510. *Coomer v. Bethesda Hospital, Inc.*, 370 F.3d 499, 507 (6th Cir. 2004).

C. A participant's voluntary decision to terminate her employment is beyond the reach of Section 510.

1. *Curby v. Solutia, Inc.*, 351 F.3d 868, 872 (8th Cir. 2003)("An employee cannot submit a resignation and then claim the employer's acceptance of the resignation is an adverse employment action."); *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1543 (3d Cir. 1996)("None of the employees were 'discharge[d], fine[d], suspende[d], expel[led], [or] disciplined.' They were simply allowed to retire when they wished.")(quoting 29 U.S.C. § 1140).

a. However, retaliatory discharge, even after all benefits obligations have been satisfied, is actionable under Section 510. *Kowalski v. L&F Prods.*, 82 F.3d 1283 (3d Cir. 1996).

b. Moreover, plaintiff may seek to prove a constructive discharge at the threshold of a Section 510 claim. *E.g., Maez v. Mountain States Tel. and Tel., Inc.*, 54 F.3d 1488, 1503 (10th Cir. 1995). *See also Garratt v. Walker*, No. 96-1470, 1998 WL 856568, at *7 (10th Cir. Dec. 9, 1998)("To prove constructive discharge, the employee must show that her 'employer by [his] illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign.'"); *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 923 (3d Cir. 1990)(same); *Becker v. Mack Trucks, Inc.*, 281 F.3d 372, 378 (3d Cir. 2002)("While termination of employment is the prototypical action Congress intended to cover in §510, that section also reaches employee harassment which falls short of firing.").

c. Subjecting a participant to choose between employment options impacting benefits does not constitute a constructive discharge under Section 510. *E.g., Welsch v. Empire Plastics, Inc.*, 42 F. Supp. 2d 748, 754 (N.D. Ohio 1999) (no adverse employment action under 510 where plaintiffs quit to secure retiree medical benefits – plaintiffs were not "fleeing from a stick, [but were] reaching for a carrot").

d. Evidence of reclassification of an employee to independent contractor status may be sufficient to establish a *prima facie* case under Section 510. *Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 559 (11th Cir. 1997).

D. The payment of benefits beyond the plan's terms to one participant does not unlawfully discriminate against another participant.

1. In other words, "ERISA § 510 affords protection from discrimination that interferes 'with the attainment of any right to which such participant may become entitled under the plan.' [Plaintiff] does not have a right to treatment that is contrary to the terms of the plan, even if those terms are breached for others." *Jefferson v. Vickers, Inc.*, 102 F.3d 960, 964 (8th Cir. 1996)(quoting *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 670 (7th Cir. 1993)).

E. The extension of an offer of employment on less favorable terms than those offered other workers does not constitute discrimination actionable under Section 510.

1. *Feret v. CoreStates Financial Corp.*, No. 97-6759, 1998 WL 426560, at * 4 (E.D. Pa. July 27, 1998)("Offering a job or the chance to continue employment has never been prohibited employer conduct and 'it would be a ludicrous distortion of ERISA to make it so.'"); *Stout v. Bethlehem Steel Corp.*, 957 F. Supp. 673, 694 (E.D. Pa. 1997)("All Defendants have done is offer continued employment to Plaintiffs; this cannot be construed as prohibited employer conduct.").

2. The refusal to re-hire vested participants to avoid additional pension costs is not actionable under Section 510. *Becker v. Mack Trucks, Inc.*, 281 F.3d 372, 380 (3d Cir. 2002) ("The plain language of § 510 omits a refusal to 'rehire,' 'hire' or to take any action related to hiring from its enumeration of prohibited acts."); *West v. Greyhound Corp.*, 813 F.2d 951, 955 (9th Cir. 1987)("We hold that no violation of section 510 of ERISA is shown where the seller of a business terminates employment under the provisions of a collective bargaining agreement and the purchaser refuses to hire any of the employees because they refuse to accept a reduction of unaccrued employee benefits").

F. A refusal to terminate does not give rise to a valid Section 510 claim. *Bodine v. Employers Casualty Co.*, 352 F.3d 245, 250 (5th Cir. 2003).

G. Alleged misstatements related to benefits typically are not actionable under 510. *Marks v. Newcourt Credit Group*, 342 F.3d 444, 455 (6th Cir. 2003).

H. The temporal remoteness of vesting may negate a finding of specific intent under ERISA Section 510. *Newell v. McDonnell Douglas Corp.*, No. 92-CV-2239, 1994 WL 880432, at *11 (E.D. Mo. Aug. 31, 1994)("Any possible inference of intentional interference is eliminated by the several years time-span between the date of lay-off and the date of vesting of any additional benefits.").

I. The modification of the terms of employment, standing alone, although having an impact on the level of benefits does not constitute impermissible conduct under ERISA Section 510. *Haberern v. Kaupp Vascular Surgeons Ltd.*, 24 F.3d 1491, 1497 (3d Cir. 1994)("Of course, it follows that if an employer may terminate an employee without cause, it has the right to decrease her compensation, as this constitutes a more modest change in the employment relationship."); *Tavoloni v. Mount Sinai Medical Center*, 26 F. Supp.2d 678, 682 (S.D.N.Y. 1998)(pay reductions reducing contributions to pension plan not sufficient to raise genuine issue of material fact "at least absent any other evidence suggesting that reduction of contributions to the Plan was a motivating factor in [defendant's] actions").

J. Mindful that Section 510 has been construed to protect the employment relationship, "Section [510] does not purport to protect the financial security of pension funds." *Abbott v. Pipefitters Local Union No. 522*, 94 F.3d 236, 242 (6th Cir. 1996). Reduction in compensation, yielding a reduced level of benefits, may not give rise to a remedy. *Tavoloni v. Mt. Sinai Medical Center*, 26 F. Supp. 2d

678, 682 (S.D.N.Y. 1998)("the only effect on plaintiff's rights under the Plan of any of the matters complained of in this lawsuit is that the pay reductions reduced Mt. Sinai's annual contributions and, pro tanto, plaintiff's ultimate benefits.").

IX. *INTER-MODAL* AND THE OUTSOURCING/RIF DILEMMA

A. The Supreme Court in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Railway Co.*, 117 S.Ct. 1513 (1997), reviewed a Ninth Circuit opinion holding, among other things, that an employer could not violate ERISA section 510 by interfering with a participant's claimed right to unvested welfare benefits. Despite the fact that the plan sponsor was free to terminate the plan at any time and prior to vesting, the Court concluded that Section 510 protects employees from interference with "rights" under such plans. *Id*. at 1515 ("But § 510 draws no distinction between those rights that 'vest' under ERISA and those that do not.").

B. Although not the issue upon which the Supreme Court granted *certiorari*, the *Inter-Modal* opinion is equally noteworthy for its impact on large-scale workforce restructurings. At issue in *Inter-Modal* was the outsourcing of those employees of an Atchison, Topeka subsidiary, allegedly to reduce benefits costs in violation of ERISA section 510. Prior to the Supreme Court's *Inter-Modal* decision, a number of Circuit Courts concluded that ERISA section 510 did not reach transactions like outsourcing, subcontracting, reductions in force and spin-offs, even when the transactions are motivated by benefit costs. These decisions held that Section 510 was designed to protect against individual employment decisions, and did not extend protection to groups of employees whose employment was terminated in such circumstances.

   1. *Andes v. Ford Motor Co.*, 70 F.3d 1332, 1337-38 (D.C. Cir. 1995)("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.'"); *Blaw Knox Retirement Income Plan v. White Consolidated Indus., Inc.*, 998 F.2d 1185, 1191 (3d Cir. 1993)("the sale of an ongoing business is not prohibited by section 510"). *But see Nauman v. Abott Laboratories*, No. 04 C 7199, 2005 WL 1139480, at *4 (N.D. Ill. April 27, 2005) (allowing claim to proceed where plaintiffs allege that spin-off of company was an indirect method of discharging plaintiffs to avoid the high cost of benefits

C. Employers and plan sponsors should consider a plan amendment before discharging a large group of employees. *Inter-Modal* arguably expresses a clear preference for plan amendments over actions affecting the employee's status, notwithstanding a plan provision permitting plan amendments. In other words,

one reading of *Inter-Modal* suggests that an employer should not take actions impacting upon the participant's employment status, and thereby eliminating or reducing eligibility for benefits, although the plan document reserved to the employer the right to reduce or eliminate that benefit. The better course might be to formally amend the plan first, and then take those steps, *e.g.*, outsourcing or salary reduction, modifying the employment status. *Garratt v. Walker*, No. 96-1470, 1998 WL 856568, at *3 (10th Cir. Dec. 9, 1998)("Analogously, although the employee in this case lacked a present right to a plan benefit, a contribution, she still is protected against unilateral changes designed to interfere with that right. Whether a welfare plan or a pension plan, an employer must operate within the terms of the plan, administer the plan in a non-discriminatory fashion and not informally amend the plan a participant at a time.").

1. *See also Seaman v. Arvida Realty Sales*, 985 F.2d 543, 547 (11th Cir. 1993)("If the employer decides to offer benefits, it must allow its employees to take advantage of the plan and must administer the plan in a nondiscriminatory fashion. But the employer can make the initial decision whether to offer any benefits and may even modify or terminate non-vested benefits at any time."); *Morabito v. Master Builders, Inc.*, No. 96-3898, 1997 WL 668955, at *2 (6th Cir. Oct. 27, 1997)(unpublished opinion)("Although an employee may sue for discrimination even if the benefit plan is discretionary, the fact that the employer could eliminate all benefits indicates that the employer lacked the intent to discriminate."); *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1497 (3d Cir. 1994)(Where employee status is at will, defendant is free to reduce compensation even if steps are undertaken with the specific intent to reduce pension contribution. "Of course, it follows that if an employer may terminate an employee without cause, it has the right to decrease her compensation, as this constitutes a more modest change in the employment relationship.").

2. After acknowledging that a plan sponsor typically enjoys the absolute authority to amend or terminate a plan, the Ninth Circuit in *Lessard v. Applied Risk Management*, 307 F.3d 1020 (9th Cir. 2002), reinstated 510 claims of employees on long term leave subject to an asset sale agreement terminating their medical benefits following the sale of their employer's assets to a purchaser/successor. Once segregated for special treatment pursuant to the terms of the asset sale agreement plaintiffs were "presumptively discharged" and subject to the protections of Section 510.

D. Nevertheless, some courts continue to rule that the sale of a business cannot be challenged under Section 510, even if benefits costs were a factor motivating the transaction.

1. *Coats v. Kraft Foods, Inc.*, 12 F.Supp.2d 862 (N.D. Ind. 1998)("This court agrees with the defendants that § 510 was not intended to preclude a company from selling a business, even where the sale takes place in the

context of allegedly rising health care costs. . . . If Congress had intended to include organizational changes within the ambit of § 510, it could have easily done so.").

X. JURY TRIAL

A. For most, there is no right to a jury trial under ERISA Section 510. *Cox v. Keystone Carbon Co.*, 894 F.2d 647, 650 (3d Cir. 1990). S*ee also Rufo v. Metropolitan Life Ins. Co.*, No. 96-6376, 1997 WL 732859, at *5 n.10 (E.D. Pa. Nov. 4, 1997)("There is no right to a jury trial for a claim under Section 510 of ERISA.").

1. There is some contrary district court authority in other jurisdictions. *Algie v. RCA Global Communications, Inc*., 891 F. Supp. 875 (S.D.N.Y.1994); *Steeples v. Time Ins. Co.*, 139 F.R.D. 688, 693-94 (N.D.Okla.1991); *McDonald v. Artcraft Electric Supply Co.*, 774 F. Supp. 29, 35 (D.D.C.1991); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of Am. v. Midland Steel Prods. Co.*, 771 F. Supp. 860, 865 (N.D.Ohio 1991); *Vicinanzo v. Brunschwig & Fils, Inc.*, 739 F. Supp. 882, 885 (S.D.N.Y.1990); *Blue Cross & Blue Shield of Alabama v. Lewis*, 753 F. Supp. 345 (N.D.Ala.1990); *Weber v. Jacobs Mfg. Co.*, 751 F. Supp. 21 (D.Conn.1990).

XI. DAMAGES

A. Prior to *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), successful plaintiffs under ERISA section 510 were entitled to the remedies typically available under the federal discrimination statutes, back pay and front pay (in lieu of reinstatement). *Schwartz v. Gregori*, 45 F.3d 1017 (6th Cir. 1995).

B. Post *Great-West*. "Plaintiffs' proposed method of calculating their backpay award is based on each individual class member's loss rather than Defendant's gain. Plaintiffs' freestanding claim for backpay is thus in the nature of compensatory damages." *Millsap v. McDonnell Douglas Corp.*, No. 03-5124, 2004 WL 1127189, at * 6 (10th Cir. May 21, 2004) *See also Nicholaou v. Horizon Media, Inc.*, No. 01 Civ. 0785 (BSJ), 2003 WL 2208356, at * 2 (S.D.N.Y. 2003)("Plaintiff [suing under 510] does not seek reinstatement or any other form of equitable relief, but rather seeks only lost wages and other money damages. Because neither lost wages nor other money damages constitute an equitable remedy, plaintiff cannot recover under ERISA and this claim must be dismissed.").

XII. PREEMPTION

A. ERISA's preemption provision, section 514, 29 U.S.C. § 1144, works to preempt most state law claims seeking benefits and challenging an employer's intentional efforts to interfere with rights to benefits. *E.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). *See also Heimann v. The National Elevator Indus. Pension*

Fund, No. 97-50165, 1999 WL 669186, at * 5 (5th Cir. Aug. 27, 1999) ("*Ingersoll-Rand* held that ERISA preempted, by both ordinary express and conflict preemption, the plaintiff employee's state law wrongful discharge claim based on allegations that his employer took the adverse action for the purpose of interfering with his rights under his pension plan."); *Wood v. Prudential Ins. Co.*, 207 F.3d 674 (3rd Cir. 2000)(state law claims challenging alleged wrongful termination seeking remedies beyond ERISA section 502(a) completely preempted); *Kalo v. Moen Inc.*, 93 F. Supp.2d 869, 876 (N.D. Ohio 2000)("Because the gravamen of [plaintiff's] claim is that [defendant] discharged him in order to prevent him from attaining plan benefits, this claim falls squarely within the proscription of § 1140.").

1. Through 9/3/05.