Retaliation, Interference, and Pension Benefits: Claims Under ERISA Section 510

Kirsten Scott
Lewis, Feinberg, Lee, Renaker & Jackson, P.C.
476 9th Street, Oakland, CA 94607
(510) 839-6824 kscott@lewisfeinberg.com

What does ERISA § 510 provide?

Section 510 prohibits two types of conduct:

a) Interference with attainment of a right under ERISA, and

b) Adverse action (retaliation) for exercising or attempting to attain any right under a plan or ERISA.

Examples: Section 510 Pension Claims

- Termination shortly before an employee's pension benefits vest
- Layoff right before a significant increase in benefits
- Reduction of hours to prevent an employee's accrual of benefits

More Examples: Section 510 Pension Claims

- Outsourcing or RIF motivated by employer's desire to avoid benefit costs
- Termination after reporting misappropriation of pension funds
- Discharge after cooperating with the Dept. of Labor in an investigation

4

Mechanics of Section 510 Claim

- Who can sue?
- Who can be sued?
- When do Section 510 claims accrue?
- Exhaustion of administrative process?
- What is the statute of limitations?

5

Proving a Section 510 Claim with Direct Evidence

- Direct evidence of a specific intent to interfere with ERISA rights, if available.
- Defendant must prove that the same decision would have been made absent the discriminatory motivation.

6

Proving a Section 510 Claim With Circumstantial Evidence

- *McDonnell Douglas* burden shifting framework used in Title VII cases:
  - Plaintiff must prove a *prima facie* case;
  - Burden shifts to defendant to articulate a legitimate, non-discriminatory reason for the adverse action;
  - Employee must prove the asserted reason is pretextual; true reason was to interfere with his receipt of benefits.

7

Section 510 *Prima Facie* Case

(1) An adverse action or prohibited employer conduct;

(2) Intent to interfere or retaliate; and

(3) Existence of a benefit to which participant or beneficiary is or may become entitled to receive.

(slightly different depending on the jurisdiction)

8

Actionable Employer Conduct

- An employer can amend its plan to limit or eliminate benefit coverage.
- This is a fundamental business decision.
- But – possible Section 510 claim where employer acted in a discriminatory manner (e.g. selecting specific employees for RIF to prevent accruing rights to benefits)

9

Evidence of Intent

- Speculation or conjecture is insufficient.
- Look for emails, documents, testimony to support finding that layoff was motivated by *intent* to decrease/deprive employee of pension benefits.
- Look for causal connection: proximity in time, comparator employees, lack of other explanations.
- Must show intent was "a motivating factor."

10

Employers' Legitimate Non-Discriminatory Reasons

- Employer's financial concerns (cutting costs of benefits) may help establish *prima face* case, but may be legitimate, non-discriminatory explanation.
- To be actionable, employer's decision must be directed at ERISA rights in particular.
- Actions to protect solvency of plan does not suffice.
- Other legitimate reasons for action: organizational restructuring; legitimate company policy; employee's misconduct.

11

Establishing Pretext

- Burden is on plaintiff to show pretext.
- Look for lack of credibility and inconsistencies in employer's reasoning.

12

Remedies Under Section 510

- As with other ERISA claims under 502(a)(3), remedies limited to "appropriate equitable relief"

- Benefits reinstatement or instatement
- Injunction to modify plan records
- Job reinstatement
- Front pay and back pay (depending on jurisdiction)

13

Remedies Under Section 510

- *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011)
- Broadened "appropriate equitable relief" to include "traditional equitable remedies"

- Surcharge – monetary compensation from fiduciary
- Reformation of plan documents
- Estoppel
- Disgorgement
- Equitable trust

14

Remedies Under Section 510

- But defendant in *Amara* was a fiduciary, which Supreme Court found "makes a critical difference."

- Many Section 510 cases are against the employer, which arguably was not acting as an ERISA fiduciary.

15

Bringing Section 510 Claims With Other Claims

- Look for ways to couple Section 510 with other ERISA claims: for benefits or breach of fiduciary duty claim.
- Section 510 claim with ADEA claim.
- Preemption issues with state wrongful discharge or state whistleblowing claims.

16

2013 NATIONAL TRAINING CONFERENCE

Retaliation, Interference, and Pension Benefits: Claims Under ERISA Section 510

Kirsten Scott
Lewis, Feinberg, Lee, Renaker & Jackson, P.C.
476 9th Street, Oakland, CA 94607
(510) 839-6824 kscott@lewisfeinberg.com

I. THE SCOPE OF ERISA SECTION 510

Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), entitled "Interference with Protected Rights," is the anti-discrimination and anti-retaliation provision of ERISA. It prohibits a) interference with a person's ability to collect present or future benefits, and b) retaliation for exercising or attempting to attain any right under a plan or ERISA.[1]

Section 510 has potentially broad application to individual and class cases related to pension plans, including in situations involving discharges, layoffs, plant closings, and corporate restructuring to interfere with the attainment of plan benefits. Some fact patterns that might arise are the following:

- A discharge shortly before an employee's rights to pension benefits vest;
- Layoffs of a number of employees right before a significant increase in benefits vests;
- Reduction of hours to prevent an employee's accrual of benefits;
- Outsourcing for the purpose of reducing costs associated with benefits;
- A discharge in retaliation for whistleblowing such as reporting to or cooperating with the Department of Labor in an investigation related to misappropriation of pension funds.

In some cases, it might make sense to couple a Section 510 claim with a claim for age discrimination or a state law claim for wrongful termination.

[1] ERISA § 510, 29 U.S.C. § 1140.

II. PROCEDURAL ISSUES IN SECTION 510 CASES

A. Plaintiffs: Who Can Sue?

Section 510 claims are brought under the enforcement mechanism of ERISA § 502(a)(3). Thus, as with other claims under 502(a), "participants" and "beneficiaries" have standing to bring suit to remedy violations of Section 510.[2] An individual must have a "colorable claim for benefits" in order to have standing to bring a Section 510 case.[3]

B. Defendants: Who Can Be Sued?

Proper Defendants under Section 510 are "any persons" who unlawfully interfere with a participant or beneficiary's rights, and include employers, corporations and associations, plans and trustees, plan sponsors and plan administrators, and insurance agencies and insurance brokers.[4]

C. Accrual of Claims

As a general rule, a cause of action under Section 510 accrues at the time of the adverse employment action, if the participant is aware of facts that would put a reasonable person on notice that he has an actionable claim.[5] A number of Circuit Courts have held that an ERISA claim accrues "upon a clear repudiation by the plan that is known, or should be known, to the plaintiff-regardless of whether the plaintiff has filed a formal application for benefits."[6]

The First Circuit held that a Section 510 cause of action alleging discrimination due to misclassification as off-payroll employees begins to accrue on the date of hire when the employees were informed as to their status.[7]

---

[2] 29 U.S.C. § 1132(a).
[3] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 107, 117 (1989).
[4] *See Vogel v. Independence Federal Sav. Bank*, 728 F. Supp. 1210 (D. Md. 1990); *Custer v. Pan American Life Ins. Co.*, 12 F.3d 410, 421 (4th Cir. 1993); *but see, Place v. Abbott Laboratories, Inc.*, 938 F. Supp. 1373, 1377 (N.D. Ill. 1996) (agreeing that § 510 is not limited to employers, but dismissing suit brought against independent medical provider who allegedly refused to proceed with evaluation, which plaintiff alleges led to her discharge).
[5] *Thompson v. Retirement Plan for Emps. of S.C. Johnson & Son*, 651 F.3d 600 (7th Cir. 2011); *Burrey v. Pacific Gas & Elec. Co*., 159 F.3d 388 (9th Cir. 1998); *Librizzi v. Children's Mem'l Med. Ctr*., 134 F.3d 1302 (7th Cir. 1997); *Musick v. Goodyear Tire & Rubber Co*., 81 F.3d 136 (11th Cir. 1996); *Teumer v. General Motors Corp.*, 34 F.3d 542 (7th Cir. 1994); *Heideman v. PFL, Inc*., 904 F.2d 1262 (8th Cir. 1990); *Tolle v. Carroll Touch, Inc*., 977 F.2d 1129 (7th Cir. 1992); *Held v. Manufacturers Hanover Leasing Corp*., 912 F.2d 1197 (10th Cir. 1990).
[6] *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 521 (3d Cir. 2007); *see also Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan,* 201 F.3d 44, 48 (2d Cir. 1999); *Daill v. Sheet Metal Workers' Local 73 Pension Fund,* 100 F.3d 62, 65–67 (7th Cir. 1996); *Union Pac. R.R. v. Beckham,* 138 F.3d 325, 330–31 (8th Cir.), *cert. denied,* 525 U.S. 817, 119 S.Ct. 56, 142 L.Ed.2d 43 (1998); *Martin v. Construction Laborer's Pension Trust,* 947 F.2d 1381, 1384-86 (9th Cir. 1991).
[7] *Edes v. Verizon Commc'ns, Inc*., 417 F.3d 133 (1st Cir. 2005).

In an action for retaliatory discharge under Section 510, the Seventh Circuit held that "the accrual of a § 510 claim turns on the discovery of the decision to interfere with benefits rather than on the eventual effect of that decision."[8] The court rejected the plaintiffs' contention that "[i]t is the application of the policy to a particular plaintiff, not the existence of the policy in the abstract, that violates the law and causes injury to each employee."[9] Thus, the cause of action accrued when the corporation changed its method of determining full-time status, not when the participants lost their eligibility for benefits.

In *Alexander v. Bosch Automotive Systems, Inc*., the Sixth Circuit endorsed the discovery rule, stating that "accrual does not occur as soon as a defendant acts for an unlawful purpose; rather, accrual is delayed until the plaintiff discovers an injury resulting from the defendant's unlawful actions."[10] The court held that the triggering event was not the employer's decision to lay off the participants/employees, but the implementation of the scheme to deprive them of their plant closure benefits through the careful timing of the layoffs and the participants' discovery that they would not be entitled to closure benefits.[11] Similarly, the Third Circuit held in *Jakimas v. Hoffmann-La Roche, Inc*., that the triggering event in a Section 510 action is not the termination of the employee, but the termination with the intent to interfere with the employee's benefits. The action does not accrue until "the decision to terminate is made and the employee is informed of the pending termination."[12]

D. Exhaustion of Administrative Remedies

ERISA Section 503 requires all employee benefit plans to (1) provide adequate notice in writing of a denial of benefits, and (2) afford a reasonable opportunity for a full and fair review of the denial.[13] Regulations promulgated by the Department of Labor specify certain minimum requirements regarding the time period for notifying a claimant that his or her claim has been denied, and for the claimant to seek review of the decision.[14]

There is a split of authority as to whether these administrative remedies must be exhausted before access to the courts is permitted for Section 510 claims. The confusion stems from the fact that litigation of all types of ERISA claims is governed by Section 502,[9] and in many cases there is a compelling reason for requiring exhaustion. However, Section 510 claims are unique because they do not depend upon interpretation of the benefit plan at issue; the claim is for the violation of a statutory right. As one court observed in a Section 510 case: "We are

[8] *Berger v. AXA Network LLC*, 459 F.3d 804 (7th Cir. 2006).
[9] *Id*.
[10] 232 F. App'x 491, 495 (6th Cir. 2007).
[11] *Id*. at 495-96.
[12] 485 F.3d 770, 779 (3d Cir. 2007).
[13] 29 U.S.C. 1133.
[14] 29 C.F.R. § 2560.503-1.
[9] 29 U.S.C. § 1132.

faced solely with an alleged violation of a protection afforded by ERISA. There is no internal appeal procedure either mandated or recommended by ERISA to hear these claims."[12]

In some jurisdictions, courts have held that exhaustion of administrative remedies is not a prerequisite for bringing a claim under Section 510;[15] other Circuits Courts have held that exhaustion of administrative remedies is required;[16] and in still other Circuits, the rule is that the exhaustion requirement is within the discretion of the court.[17]

In a jurisdiction where the issue has not been decided, it would be prudent for plaintiffs to attempt exhaustion of administrative remedies, and to include this in the complaint. Alternatively, plaintiffs should consider pleading that it would be futile to exhaust administrative remedies, the available remedies in the administrative review process are inadequate, irreparable harm will result if exhaustion is required, access to the claims procedure is denied, and/or the claims procedures are defective.[18]

E. Statute of Limitations

There is no statute of limitations period provided in ERISA for Section 510 claims, so the limitations period is determined by examining the most analogous state statute. Note, however, that there is no settled interpretation as to which state cause of action is most analogous to Section 510 claims.[19] In addition, limitations periods for the same causes of action vary widely

---

[12] *Amaro v. Continental Can Co.,* 724 F.2d 747, 751, 5 EBC 1215 (9th Cir. 1984).

[15] *See, e.g., Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987); *Smith v. Sydnor*, 184 F.3d 356, 365 (4th Cir. 1999); *Chailland v. Brown & Root, Inc.*, 45 F.3d 947 (5th Cir. 1995) (exhaustion not required where § 510 claim was based solely on wrongful conduct of employer); *Richards v. General Motors*, 991 F.2d 1227 (6th Cir. 1993); *Amaro v. Cont'l Can Co.*, 724 F.2d 747, 750-52 (9th Cir. 1984); *Diaz v. United Agricultural Employees Welfare Benefit Plan & Trust*, 50 F.3d 1478 (9th Cir. 1995); *Held v. Manufacturers Havover Leasing Corp.*, 912 F.2d 1197 (10th Cir. 1990); *Mackay v. Rayonier, Inc*., 25 F. Supp. 2d 47 (D. Conn. 1998); *Alexander v. Fujitsu Bus. Communications Sys*., 818 F. Supp. 462 (D.N.H. 1993); *Hoodack v. Int'l Bus. Machines, Inc*., 202 F.Supp.2d 109, 115 (S.D.N.Y. 2002); *Toledo v. Ayerst-Wyeth Pharmaceutical, Inc*., 852 F. Supp. 91 (D. P.R. 1993).

[16] *See, e.g., Madera v. Marsh*, 426 F.3d 56 (1st Cir. 2005); *Byrd v. MacPapers, Inc.*, 961 F.2d 157 (11th Cir. 1992), *cert. denied*, 474 U.S. 1087 (1986).

[17] *See, e.g., Simmons v. Willcox*, 911 F.2d 1077 (5th Cir. 1990); *Powell v. AT&T Communications, Inc.*, 938 F.2d 823 (7th Cir. 1991); *Ames v. American Nat'l Can Co*., 170 F.3d 751 (7th Cir. 1999); *Burds v. Union Pacific Corp*.m 223 F,3d 714 (8th Cir. 2000);

[18] In *Salus v. GTE Directories Service Corp*., 104 F.3d 131, 138 (7th Cir. 1997), the Seventh Circuit held that the district court did not abuse its discretion in not requiring exhaustion where exhaustion would have been futile because the plan benefits committee lacked the power to grant a remedy. *See also Rush v. McDonald's Corp*., 760 F. Supp. 1349 (S.D. Ind. 1991) (exhaustion was not required where defendants failed to specify what if any administrative remedy was available); *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980); *Ames v. American National Can Co.*, 170 F.3d 751, 755 (7th Cir. 1999).

[19] *See, e.g., McClure v. Zoecon, Inc.*, 936 F.2d 777 (5th Cir. 1991) (finding suit most similar to wrongful discharge or discrimination claim, and applying two-year Texas statute for tort actions); *Edes v. Verizon Communications*, 417 F.3d 133 (1st Cir. 2005) (applying Massachusetts' three-year statute of limitations for torts); *Burrey v. Pacific Gas & Electric Co.*, 159 F.3d 388 (9th Cir. 1998) (applying one-year statute of limitations period because claim is most analogous to California claim for discharge in violation of public policy); *Held v. Manufacturers Hanover Leasing*

from state to state, so it is important to consult the specific provisions in the applicable state law. *See* **Appendix A** for Section 510 limitations periods by state. The Seventh Circuit has attributed this lack of uniformity to the "variant nature of the several rights recognized in" Section 510.[20]

F. Tolling of Limitations Period During Exhaustion of Internal Remedies

Courts differ on whether the limitation period is tolled during a participant's exhaustion of internal remedies. The Ninth Circuit has held that where the plan made representations as to the status of the participant's internal claim, which she reasonably relied on to conclude that the internal review was ongoing, the defendant is estopped from claiming a statute of limitations defense. [21]

The Second Circuit has held that tolling may be appropriate where the administrator did not provide the participant with adequate notice under Section 503, but would be inappropriate if the participant understood that she had the right to appeal notwithstanding the inadequate notice.[22] But the Sixth Circuit refused to toll the limitation period when the plan refused to rule on the participant's claim because the participant had also acted improperly by failing to pursue his claim with diligence.[23]

The Eighth Circuit has admitted that it has "given conflicting signals about whether an ERISA claim accrues at the time of the initial denial, or after the timely exhaustion of administrative remedies under the plan."[24] Rather than clarifying the proper approach, the court has taken "the view most favorable to" the plaintiff.[25] However, the court refused to toll the limitation period during a belated attempt to exhaust internal appeals, holding that "[i]f such a request for reevaluation of a claim previously denied were sufficient to delay the accrual date or renew the statute of limitations, then a participant could forestall the running of the statute of limitation simply by declining to pursue internal remedies under the ERISA plan."[26]

Fraudulent concealment tolls the limitation period until the fraud is discovered.[27] The Second Circuit has held that fraud is not a necessary element of fraudulent concealment.[28] Where

---

Corp., 912 F.2d 1197 (10th Cir. 1990) (three-year statute for discrimination actions applied to claim for injunctive relief, but six-year contract period applied to claim for recovery of benefits and damages);

[20]*Teumer v. General Motors Corp*., 34 F.3d 542, 547 (7th Cir. 1994).

[21]*Lamantia v. Voluntary Plan Adm'rs, Inc*., 401 F.3d 1114, 1118 (9th Cir. 2005).

[22]Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan, 497 F.3d 234 (2d Cir. 2007).

[23]*Longazel v. Fort Dearborn Life Ins. Co*., 363 F. App'x 365 (6th Cir. 2010).

[24] *Abdel v. U.S. Bancorp*, 457 F.3d 877, 881 (8th Cir. 2006) (citations omitted).

[25] *Id.*

[26] *Id.*

[27]*See Caputo v. Pfizer, Inc*., 267 F.3d 181 (2d Cir. 2001); *Sheet Metal Workers Local 19 v. 2300 Grp., Inc*., 949 F.2d 1274 (3d Cir. 1991) (where contributing employer falsified reports, court applied Pennsylvania's inherent fraud doctrine to toll limitations period until fund reasonably could have discovered fraud through audit); *Radiology Center, S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216 (7th Cir. 1990).

[28]*Veltri v. Building Serv. 32B-J Pension Fund*, 393 F.3d 318 (2d Cir. 2004),

a plan failed to provide a participant with notice of his right to an administrative appeal and right to subsequently file suit, the court held that "failure to comply with the regulatory obligation to disclose the existence of a cause of action to the plan participant whose benefits have been denied is the type of concealment that entitles plaintiff to equitable tolling of the statute of - limitations."[29]

G. Venue: Where to Sue?

Section 510 claims may be brought in the U.S. District Court in the district where the plan is administered, where the defendant resides, or where the alleged breach took place.[30]

Choice of forum under ERISA is interpreted liberally. Plaintiffs and beneficiaries are intended to have unrestricted choice of forum. Defendants may seek to change venue, but a party seeking transfer must demonstrate that the convenience of *both* parties, and the interest of justice would be served.

H. Right to a Jury Trial

ERISA is silent as to whether a jury trial is available. The weight of authority, however, suggests that there is no right to a jury in cases brought under Section 510. As discussed above, Section 502(a)(3) establishes the right to sue to remedy violations of Section 510. In *Mertens v. Hewitt Associates*, the Supreme Court made it clear that remedies under Section 502(a)(3) are equitable in nature.[31] Consequently, despite the arguably legal nature of Section 510 claims and remedies such as back pay, the right to a jury trial is doubtful.

I. Preemption

In *Ingersoll-Rand v. McClendon*, the Supreme Court held that ERISA preempts state common law claims that purport to provide a remedy for employees discharged to prevent their attainment of benefits under plans covered by ERISA.[32] Thus, any state law wrongful discharge claim that an employer terminated or otherwise discriminated against an employee to prevent him or her from vesting a right to a benefit or prevent accrual or receipt of a benefit would be preempted by Section 510. Similarly, state law whistleblowing claims have been held preempted.

At the same time, however, Section 514(d) of ERISA provides that "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States…or any rule or regulation issued any such law."[33] Thus, ERISA does not

[29] *Id*.
[30] ERISA § 502(e)(2), 29 U.S.C. 1132(e)(2).
[31] 508 U.S. 248 (1993).
[32] 498 U.S. 133 (1990).
[33] 29 U.S.C. § 1144(d).

preempt claims under other federal statutes such as ADEA.[34] In addition, the Supreme Court has found that state law employment discrimination claims may not be preempted to the extent the state law tracks federal employment discrimination law.[35] On the other hand, where the state law goes beyond the parallel federal statute, the state law claim will be preempted.

In addition, Section 510 does not require that interference with the attainment of ERISA benefits be the sole motive for the employer's wrongful act, and most state discrimination and wrongful discharge laws do not require that the employer's discriminatory or wrongful motive be its sole motive. As a result, it may be possible for a plaintiff to proceed simultaneously on a Section 510 claim and on a state law claim.

J. Remedies

Remedies under ERISA § 502(a)(3), the enforcement provision through which Section 510 actions are brought, are limited to "appropriate equitable relief."[36] However, the issue of what remedies constitute "appropriate equitable relief" has resulted in enormous confusion in the courts, including the Supreme Court. Over the years, courts have interpreted "appropriate equitable relief" in a way that has largely gutted the remedy provisions of ERISA, prompting one scholar to call ERISA the "Employer Security Act" since it has been used by employers as a shield against employee benefit claims.[37]

In 1993, the Supreme Court in *Mertens v. Hewitt Associates* interpreted "appropriate equitable relief" to mean relief that was typically available in courts of equity, such as injunction, mandamus, and restitution.[38] The Court reiterated its narrow reading of equitable relief in *Great-West Life & Annuity Ins. Co. v. Knudson*,[39] and further limited it by finding that not all relief falling under the rubric of restitution is available in equity. Rather, "'restitution is a legal remedy when ordered in a case at law and an equitable remedy…when ordered in an equity case,' and whether it is legal or equitable depends on the 'basis for [the plaintiff's] claim' and the nature of the underlying remedies sought.[40] For restitution to lie in equity, the action "generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or

[34] *See, e.g., Christopher v. Mobil Oil Corp*., 950 F.2d 1209 (5th Cir. 1992) (suit alleging violations of ERISA § 510 and age discrimination under ADEA based on former employer's amendment of pension plan and failure to disclose options, allegedly inducing hundreds of older employees into retirement without need to pay them early retirement bonus); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 563 (10th Cir. 1996) (adopting dual liability theory under ERISA and ADEA where plaintiff alleged he and other employees over 50 were laid off shortly before vesting in a supplemental executive pension plan, and where vesting under the plan was conditioned on age).
[35] *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983).
[36] 29 U.S.C. § 1132.
[37] Paul M. Secunda, "Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA," 61 Hastings Law Journal, 131 (2009).
[38] 508 U.S. 248 (1993).
[39] 534 U.S. 204 (2002).
[40] *Id.* at 213.

property in the defendant's possession."[41] In 2006, the Court in *Sereboff v. Mid Atlantic Medical Services, Inc.* held that recovery of medical expenses was equitable in nature.[42]

In 2011, the Supreme Court in *CIGNA Corp. v. Amara* changed the landscape by broadening the scope of relief available against fiduciaries under Section 502(a)(3).[43] In *Amara*, the Supreme Court held that "appropriate equitable relief" could include contract reformation, estoppel, and "surcharge" - a "form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's breach of duty."[44] The Court held that in a case against an ERISA fiduciary for breaching its duties, surcharge is appropriate "make-whole relief" because ERISA typically treats a plan fiduciary as trustee, and an ERISA plan as a trust.[45]

However, the Court in *Amara* noted that CIGNA, unlike the defendant in *Mertens*, was a fiduciary, which it found "makes a critical difference."[46] It remains to be seen whether courts will extend Amara to Section 510 cases, where the defendant may not be an ERISA fiduciary, or arguably is not acting in its fiduciary capacity. For example, if a plaintiff alleges that her employer violated Section 510 by terminating her employment shortly before she vested in early retirement benefits, the employer might argue that, even if it is a fiduciary of the retirement plan, it was acting in its employer capacity when it made the decision to terminate the plaintiff. It is well accepted that a company can wear two hats – of an employer and a plan administrator – and while the company owes a fiduciary duty when it acts with respect to plan management or administration, it owes no fiduciary duties when it acts in its employer capacity.[47] If courts hold that *Amara* does not apply in such instances, then the more limited remedies under *Mertens*, *Great-West*, and *Sereboff* will continue to be controlling in Section 510 cases. The effect of these cases on available remedies remains to be seen, and likely will depend on the extent to which back pay, front pay, and prejudgment interest may be interpreted as having analogues among traditional equitable remedies.

Courts have generally held that monetary relief, other than restitution and disgorgement, is generally not available in Section 510 cases, including consequential or compensatory damages, punitive damages, or emotional distress damages.[48] Historically, courts permitted

---

[41] *Id.* at 214.
[42] 126 S. Ct. 1869 (2006).
[43] 131 S. Ct. 1866 (2011).
[44] *Id.* at 1878, 1880. Note that, in his concurring opinion, Justice Scalia says the Court's discussion of relief under 502(a)(3) is *dicta*, *see* 131 S. Ct. at 1884, and at least one court has followed this approach, *see Biglands v. Raytheon Employee Sav. & Inv. Plan*, 2011 WL 2709893, at *5 (N.D. Ind. 2011). However, the Department of Labor has taken the position that it is not dicta, and regardless of whether it was dicta, a number of courts have followed the Court's "clear statement of the law" regarding available equitable relief. *See Amara v. CIGNA Corp.*, 2012 WL 6649587 (D. Conn. Dec. 20, 2012 (on remand, ordering reformation of the pension plan and surcharging the plan fiduciary to allow participants to receive benefits promised to them); *McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176, 181 n.2, 182-83 (4th Cir. 2012); *Moon v. BWX Technologies, Inc.*, 2012 WL 5992209, at *1-2 (4th Cir. Dec. 3, 2012).
[45] 131 S. Ct. 1866, 1879, 1880 (2011).
[46] 131 S. Ct. 1866, 1880 (2011).
[47] Varity Corp. v. Howe, 516 U.S. 489, 498-502 (1996).
[48] *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144-48 (1985); *see also LeBlanc v. Cahill*, 153 F.3d

claims for front and back pay in Section 510 cases; since *Great-West*, however, courts have been split on this, but most have found back pay to be unavailable under Section 502(a)(3).[49]

Some courts have held that injunctive relief, including reinstatement into a job and/or benefits plan, is appropriate under Section 502(a)(3).[50] In *Mathews v. Chevron*, the Ninth Circuit granted an injunction which required the defendant to modify plan records in order to make former employees eligible for plan benefits, resulting in the individuals receiving severance packages.[51] The Court found that, "[a]lthough in this instance the…remedy will result in [the employer] paying plaintiffs 'sums of money' equivalent to the [severance] benefits they lost because of [the employer's] breach, the mere payment of money does not necessarily render the award compensatory 'monetary damages.'"[52]

In sum, finding an adequate remedy for Section 510 claims is a challenge today. To maximize potential recovery, plaintiffs should look for ways to couple Section 510 cases with breach of fiduciary duty or benefit claims to enhance the argument that *Amara* applies. Whether

---

134 (4th Cir. 1998) (restitution is appropriate equitable relief under §502(a)(3) to restore pension fund to position before the fiduciary breach and to disgorge profits defendants realized as a result of wrongful conduct); *Farr v. US West*, 151 F.3d 908, *amended by* 179 F.3d 1252 (9th Cir. 1998) (although defendants breached their fiduciary duties by failing to inform participants about tax consequences of lump-sum consequences, there were no available equitable remedies); *FMC Medical Plan v Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997) (recognizing constructive trust as a permissible equitable remedy where one party acquired ill-gotten gains).

[49] *Blaj v. Stewart Enterprises*, 2011 WL 669134, at *2 (S.D. Cal. Feb. 14, 2011) ("front pay may be an available equitable remedy where it is sought in lieu of reinstatement"); *Greenburg v. Life Ins. Co. of North America*, 2009 WL 1110331 at *3 (N.D.Cal. Apr.23, 2009) ("Reinstatement of employment, front pay and back pay may be an appropriate remedy under § 1132(a)(3)."); *Asgaard v. Administrator, Pension Plan for the Employees of Cleveland-Cliffs*, 2008 WL 186179 at *3 (W.D.Mich. Jan.18, 2008) (noting "there is precedent for the possibility of equitable relief such as reinstatement, reformation, and front pay"); *Millsap et al v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004) (finding backpay is not available as "appropriate equitable relief" under Section 502(a)(3)); *Hicks-Wagner v. Qwest, Inc.*, 462 F.Supp.2d 1163, 1170-71 (D.N.M.2006) (front pay not available as equitable relief in Section 510 case alleging wrongful termination); *Serpa v. SBC Communications, Inc.*, 318 F.Supp.2d 865 (N.D.Cal.2004) (front pay for woman who alleged she was duped into early retirement was equitable restitution and unavailable under ERISA and *Great-West*); *Oliver-Pullins v. Assoc. Materials Handling Indus., Inc.*, 2003 WL 21696207 (S.D. Ind. May 20, 2003) (denying back pay as a legal remedy under *Great-West*); *Williams v. Pinkerton's, Inc.*, 2005 U.S. Dist. LEXIS 1066 (D. Minn. 2005) (dismissing Section 510 claim on summary judgment because plaintiff's claim for back pay and front pay constituted monetary relief not available under *Mertens*); *Nicolaou v. Horizon Media, Inc*., 2003 U.S. Dist. LEXIS 16706 (S.D. N.Y. 2003), *rev'd on other grounds,* 402 F.3d 325 (2d Cir. 2005); *Alexander v. Bosch Automotive Sys*., Inc., 232 F. App'x 491, 495 (6th Cir. 2007) (remedy of instating plaintiffs to list of employees eligible for plant closure benefits did not constitute "appropriate equitable relief"); *Pelosi v. Schwab Capital Markets, L.P*., 462 F. Supp. 2d 503 (S.D.N.Y. 2006) (relief sought in form of payment of compensation equal to 12 months of severance pay, plus premium payments and other benefits, was not available).

[50] *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *see also, Greenburg v. Life Ins. Co. of North America*, 2009 WL 1110331 at *3 (N.D.Cal. Apr. 23, 2009) (finding it appropriate to seek reinstatement of employment for Section 510 claim); *Asgaard v. Administrator, Pension Plan for the Employees of Cleveland-Cliffs*, 2008 WL 186179 at *3 (W.D.Mich. Jan.18, 2008) (finding reinstatement and reformation potential remedies for Section 510 cases). *But see Alexander v. Bosch Automotive Sys*., Inc., 232 F. App'x 491, 495 (6th Cir. 2007) (remedy of instating plaintiffs to list of employees eligible for plant closure benefits did not constitute "appropriate equitable relief").

[51] *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1186 (9th Cir. 2004).

[52] *Id.*

this is possible will largely depend on the facts of the case. For example, in a layoff situation, where the layoff was arguably a Section 510 violation (*i.e.* the purpose of the layoff was to reduce pension costs), perhaps it can be coupled with a breach of fiduciary duty claim (*i.e.* the employer is a plan fiduciary, and in acting out of concern for saving the plan money, it failed to act in the interest of participants). Where the unlawful act is not a fiduciary act, Plaintiffs must look for creative ways to seek relief in the form of restitutionary and injunctive remedies.

K. Attorneys' Fees

ERISA provides for the discretionary award of attorneys' fees and costs to either party.[53] Generally, courts employ a multi-factor test in the analysis including bad faith, the ability of an opposing party to satisfy an award, the deterrent effect of awards on future claims, the significance of the substantive legal issue for the participants, and the merit of the parties' claims.

III. ELEMENTS OF A SECTION 510 CLAIM

If there is direct evidence of specific intent to interfere with ERISA rights, then no inference of intent need be drawn.[54] Where there is direct evidence, the defendant must prove that the same decision would have been made absent the discriminatory motivation.[55]

However, direct evidence of discrimination is rare today, and instead the evidence available is circumstantial evidence. In this situation, courts typically apply the *McDonnell Douglas* burden shifting framework used in Title VII employment discrimination claims,[56] whereby plaintiffs must prove a *prima facie case*; then the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action; and then the employee must prove that the asserted reason is pretextual and that the true reason was to interfere with the plaintiff's receipt of benefits.

A. Plaintiffs Must First Establish a *Prima Facie* Case

Different jurisdictions articulate the elements of the *prima facie* case in different ways. In some Circuits, to establish a *prima facie* case, plaintiff must show (1) an adverse action or prohibited employer conduct against a participant or beneficiary (2) taken for the purpose of interfering (3) with the attainment of an employee benefit to which the participant or beneficiary

[53] ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1).
[54] *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987) (reductions-in-force intended to avoid pension liability of non-vested employees is direct evidence).
[55] *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1222 (11th Cir. 1989). *See generally Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
[56] *See, e.g., Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987) (applying the three-part *McDonnell Douglas* test for Section 510 claims).

is or may become entitled.[57] Alternatively, in other Circuits, a *prima facie* case is articulated by demonstrating that plaintiff (1) belongs to a protected class; (2) was qualified for his job position; and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent to retaliate was present.[58]

A properly pled Section 510 claim requires the plaintiff to show that the illegal activity has a causal connection to the plaintiff's receipt of an identifiable benefit; failure to do so may result in summary judgment in favor of the employer.

1. Actionable Employer Conduct

Adverse actions that are actionable under Section 510 include discharge, fines, suspensions, expulsions, discipline, and discrimination.[59] Plaintiff must establish that the employer, or some other person or entity, took some action to interfere with plaintiff's right to some benefit or to retaliate against plaintiff for seeking benefits. Courts have held that the plaintiff must prove actual eligibility for a benefit, and not just a *bona fide* belief.[60] The most common employer action in Section 510 claims is discharging an employee shortly before he or she would have become eligible for a benefit (e.g. right before pension benefits vest, or right before becoming eligible for an early retirement).[61] Other examples of adverse employer actions subject to Section 510 claims include where an employee is discharged for refusing to accept a change of status to independent contractor, with consequent loss of benefits; employees of a subsidiary company were prevented from returning to the parent corporation until after their pension bridging rights had lapsed; a sham transfer to a successor employer to avoid payment of benefits; and termination rather than lay-off to avoid payment of pension benefits. Also, although the statute does not expressly say so, courts have held that a constructive discharge or harassment is sufficient to state a claim.

It is now well-settled that Section 510 will not support an action against an employer for amending its plan to limit or eliminate benefit coverage.[62] In *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Railway Co.*, the Supreme Court distinguished between cases actionable under Section 510 and the "power to amend or abolish" a plan where the amendment

[57] *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 455 (6th Cir. 2003); *Adams v. LTV Steel Mining Co.*, 936 F.2d 368, 370 (8th Cir. 1991); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir. 1987).
[58] *Salus v. GTE Directories Service Corp.*, 104 F.3d 131, 134 (7th Cir. 1997); *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 38 (1st Cir.1995); *Henson v. Liggett Group., Inc.*, 61 F.3d 270, 277 (4th Cir. 1995); *Dister v. Continental Group, Inc*., 859 F.2d 1108, 1114-15 (2d Cir. 1988).
[59] 29 U.S.C. § 1140.
[60] *See Pendleton v. QuikTrip Corp.*, 567 F.3d 988, 993 (8th Cir. 2009).
[61] *See, e.g., Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir. 1983) (where employer discharged an employee with 29 ½ years seniority to prevent his eligibility for a 30-year pension).
[62] *See, e.g., McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 668 (7th Cir. 1993) (Section 510 only applies to the employment relationship between the employer and employee - that is, hiring and firing - and amending the plan to avoid providing benefits was not prohibited by Section 510).

is a fundamental business decision.[63] Employers generally will not be held liable under Section 510 if the interference with benefits or discharge is merely incidental to legitimate business concerns or decisions. However, if the plaintiff can demonstrate that, notwithstanding legitimate business concerns, the employer effectuated its concerns in a discriminatory manner (*e.g.* selecting specific employees for a reduction-in-force to prevent them from accruing rights to benefits), then the requisite intent is present.[64]

2. Proving Intent

Specific intent is often characterized as the causal connection between the adverse action and lost benefits. Plaintiffs need not prove that the sole purpose of their employer's conduct was to interfere with the attainment of benefits, but rather must demonstrate that it was a motivating factor.[65] Evidence of specific intent involves an analysis of the specific circumstances of each case.

The timing of a discharge or other adverse employment conduct is often critical to proving (or disproving) intent. For example, where a long-term employee is discharged right before vesting in benefits, or where a person's illness and discharge coincide temporally, a court may find specific intent. Similarly, circumstantial evidence comparing the treatment of plaintiff to that of other employees may also be critical to proving intent. Note, however, that such evidence alone may not suffice to satisfy the plaintiff's ultimate burden of proving intent.

3. Notice to or Knowledge of the Employer

For a plaintiff to prove specific intent, the employer must be aware that the plaintiff may have a claim for benefits. A decision maker must have actual knowledge that his or her actions will impact benefits. However, knowledge that a plaintiff may be entitled to benefits is not enough to satisfy the specific intent requirement in a Section 510 case. The employer's knowledge that a plaintiff may seek benefits, or that benefits would be affected, must be a motivating factor in their decision to take an adverse action.

4. Cost-Cutting Considerations

The cost of an employee's benefits alone does not constitute sufficient evidence to prove specific intent. In addition, an employer's financial concerns regarding the cost of benefits may help establish a *prima facie* case, but may also be a legitimate, non-discriminatory reason for the

[63] 520 U.S. 510 (1997).
[64] *See, e.g., Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987).
[65] *See Nero v. Industrial Molding Corp.*, 167 F.3d 921 (5th Cir. 1999); *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987); *Humphreys v. Bellaire Corp.*, 966 F.2d 1037 (6th Cir. 1992); *Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir. 1993); *Garratt v. Walker*, 164 F.3d 1249, 1256 (10th Cir. 1999) (*en banc).*

employer's conduct. Also, nominal savings or actions which protect the solvency of the plan and distribute the cost of benefits fairly between groups of participants do not evidence specific intent.

B. Defendant's Legitimate Non-Discriminatory Reasons

Once an employee establishes a *prima facie* case, the employer must proffer a legitimate, non-discriminate reason for its conduct. Types of legitimate, nondiscriminatory reasons proffered by defendants take various forms. Some examples where defendants have established non-discriminatory reasons for an action include: organizational restructuring motivated the discharge; the discharge is based on legitimate company policy; or the employee engaged in misconduct legitimating the employer's conduct.

In addition, as discussed above, an employer's decision to cut the cost of benefits may be a legitimate, non-discriminatory reason for its action. In order for the employer's action to suggest an illegitimate motive, the evidence must suggest that the employer's decision was directed at ERISA rights in particular, such as a substantial savings in benefit expenses.

C. Plaintiff's Demonstration of Pretext

The Supreme Court's decision in *St. Mary's Honor Center v. Hicks*[66] established that the burden is on the plaintiff to show that the employer's proffered legitimate, non-discriminatory explanation is pretextual. When an employer's reason for its conduct is riddled with inconsistencies, a court may infer pretext for discrimination. Also, a lack of credibility may be fatal to an employer's alleged motivation for conduct.

Conversely, where the employer's articulated reason for action is supported by the evidence, and where employee's attempts to characterize the reason as pretextual are not supported, or supported only by weak evidence, the employer may succeed on summary judgment or at trial.

[66] 509 U.S. 502 (1993).

Appendix A: Limitations Periods in Section 510 Cases, By State

Alabama: 2 years for wages and retaliatory discharge.[67]

Arizona: 2 years for wrongful termination.[68]

California: 2 years for torts in violation of public policy.[69]

Colorado: 2 years for wrongful discharge.[70]

Delaware: 3 years for breach of contract.[71]

District of Columbia: 1 year for employment discrimination[72]; 3 years for wrongful discharge[73].

Florida: 4 years for retaliatory discharge under Workers' Compensation Law.[74]

Georgia: 2 years for recovery of wages; 20 years for equitable enforcement of statutory rights, such as reinstatement.[75]

Illinois: 5 years for retaliatory discharge.[76]

Indiana: 2 years on actions for retaliatory discharge.[77]

Kansas: 3 years for liability created by statute.[78]

Louisiana: 1-year prescriptive period.[79]

Michigan: 3 years for retaliation in workers' compensation or wrongful discharge.[80]

Minnesota: 2 years for wage claims.[81]

Mississippi: 3 years for "catchall" actions.[82]

---

[67] *Musick v. Goodyear Tire & Rubber Co*., 81 F.3d 136 (11th Cir. 1996).
[68] *Felton v. Unisource Corp*., 940 F.2d 503 (9th Cir. 1991).
[69] *Burrey v. Pacific Gas & Elec. Co*., 159 F.3d 388 (9th Cir. 1998); *Virtusio v. Fin. Indus. Regulatory Auth. Long Term Disability Income Plan*, 2012 WL 5389918, at *6 (N.D. Cal. Nov. 5, 2012).
[70] *Kennedy v. Colorado RS, LLC*, 872 F. Supp. 1146, 1153 (D. Colo. 2012).
[71] *DeWitt v. Penn-Del Directory Corp*., 872 F. Supp. 126 (D. Del. 1994), *aff'd in part, rev'd in part on other grounds*, 106 F.3d 514 (3d Cir. 1997); *Rich v. Zeneca*, 845 F. Supp. 162 (D. Del. 1994).
[72] *Cox v. Graphic Commc'ns Conf. of Int'l Bhd. of Teamsters*, 603 F. Supp. 2d 23 (D.D.C. Mar. 25, 2009).
[73] *Walker v. Pharmaceutical Research & Mfrs. of Am*., 439 F. Supp. 2d 103 (D.D.C. 2006).
[74] *Byrd v. MacPapers, Inc.*, 961 F.2d 157 (11th Cir. 1992).
[75] *Clark v. Coats & Clark, Inc*., 865 F.2d 1237 (11th Cir. 1989).
[76] *Teumer v. General Motors Corp*., 34 F.3d 542 (7th Cir. 1994).
[77] *Ahnert v. Delco Elecs. Corp*., 982 F. Supp. 1320 (S.D. Ind. 1997); *Potter v. ICI Americas Inc*., 103 F. Supp. 2d 1062, 1073 (S.D. Ind. 1999).
[78] *Burnett v. Southwestern Bell Tel., L.P*., 283 Kan. 134, 151 P.3d 837 (2007).
[79] *Stewart v. Project Consulting Servs*., 2001 U.S. Dist. LEXIS 13680 (E.D. La. Aug. 29, 2001).
[80] *Zappley v. Stride Rite Corp*., 2010 WL 234713 (W.D. Mich. Jan. 13, 2010).
[81] *Larson v. University Women's Health Pension Plan*, 971 F. Supp. 398 (D. Minn. 1997).
[82] *Burditt v. Kerr-McGee Chem. Corp*., 982 F. Supp. 404, 21 EB Cases (BNA) 1943 (N.D. Miss. 1997).

Appendix A: Limitations Periods in Section 510 Cases, By State

Missouri: 5 years for contracts.[83]

New Jersey: 2 years for §1983 actions, 2 years under Law Against Discrimination.[84]

New York: 2 years for retaliatory discharge.[85]

Ohio: 4 years for certain tort injuries not arising from a contract.[86]

Oklahoma: 2 years for public policy torts.[87]

Pennsylvania: 2 years for wrongful discharge.[88]

Tennessee: 6 years for contract claim[89]; 1 year for wrongful discharge.[90]

Texas: 2 years for wrongful discharge.[91]

Utah: 4-year catchall.[92]

Virginia: 2-year catchall for wrongful discharge.[93]

[83] *Pendleton v. Quiktrip Corp*., 2007 WL 607662 (E.D. Mo. Feb. 22, 2007).
[84] *Jakimas v. Hoffmann-La Roche, Inc*., 485 F.3d 770, 40 EB Cases (BNA) 2217 (3d Cir. 2007).
[85] *Berger v. AXA Network, LLC*, 459 F.3d 804, 38 EB Cases (BNA) 1966 (7th Cir. 2006); *Sandberg v. KPMG Peat Marwick, L.L.*P., 111 F.3d 331, 21 EB Cases (BNA) 2301 (2d Cir. 1997).
[86] *Taylor v. Goodyear Tire & Rubber Co*., 38 F.3d 1216, 1994 U.S. App. LEXIS 29307 (6th Cir. Oct. 17, 1994) (unpublished table decision).
[87] *Woods v. Halliburton Co*., 49 F. App'x 827, 29 EB Cases (BNA) 1663 (10th Cir. 2002).
[88] *Anderson v. Consolidated Rail Corp*., 297 F.3d 242 (3d Cir. 2002); *Grosso v. Federal Express Corp*., 467 F. Supp. 2d 449, 457 n.5 (E.D. Pa. Dec. 19, 2006).
[89] *Heideman v. PFL, Inc.*, 904 F.2d 1262, 53 FEP Cases (BNA) 92 (8th Cir. 1990).
[90] *Alexander v. Bosch Auto. Sys., Inc*., 232 F. App'x 491, 40 EB Cases (BNA) 2245 (6th Cir. 2007).
[91] *McClure v. Zoecon, Inc*., 936 F.2d 777 (5th Cir. 1991).
[92] *Pickering v. USX Corp*., 809 F. Supp. 1501 (D. Utah 1992).
[93] *Flickinger v. E.I. du Pont de Nemours & Co*., 466 F. Supp. 2d 701, 708 n.9, 39 EB Cases (BNA) 2126 (W.D. Va. 2006); *Carter v. Times-World Corp*., 1997 U.S. Dist. LEXIS 10743 (W.D. Va. May 23, 1997), *aff'd on other grounds*, 1998 U.S. App. LEXIS 10497 (4th Cir. 1998).