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The Road to Retirement—Paved with Good Intentions but Dotted with Potholes of Untold Liability: ERISA Section 510, Mixed Motives and Title VII

Christina A. Smith*

In January 1996, AT&T announced that it would eliminate 40,000 jobs, its largest single job cut ever,1 in an effort to increase competitiveness and profitability. AT&T is one of several companies2 contributing to the increase in the elimination of corporate jobs in recent years.3 Labor Department statistics show the elimination of more than 36 million jobs from 1979 through 1993.4 The New York Times estimates the number of jobs eliminated through 1995 to be 43 million.5

Employers who eliminate jobs to insure corporate competitiveness and continued profitability in a global market may find themselves confronted with the threat of extensive liability lurking in the shadows of a pension promise they made to their employees in brighter days. As companies continue to

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1. AT&T to Eliminate 40,000 Jobs, STAR TRIB., Jan. 3, 1996, at D1.
2. See Louis Uchitelle & N.R. Kleinfield, As Work Is Redefined, Millions Become Casualties: Replacing Lost Job Is Often a Downer, STAR TRIB., Mar. 10, 1996, at A19, A20 (listing fifteen companies who have announced the elimination of the most jobs in the past four years).
3. Id. at A20. The article found that
   At the same time some layoffs seem rooted in economic fashion. An unforgiving Wall Street has given its signals of approval—rising stock prices—to companies that take the meat-ax to their costs. The day Sears announced it was discarding 50,000 jobs, its stock climbed nearly 4 percent. The day Xerox said it would prune 10,000 jobs, its stock surged 7 percent.

Id.

4. Id.
5. Id.
merge\textsuperscript{6} and "downsize,"\textsuperscript{7} cases involving employee benefits\textsuperscript{8} increasingly find their way into the courtroom.\textsuperscript{9} Much of the

6. See Don L. Boroughs, Big! Heightened Global Competition, Innovative Technology and Washington's Friendly Regulatory Climate Have Unleashed a New Tidal Wave of Corporate Mergers in America, U.S. NEWS & WORLD REP., Sept. 11, 1995, at 46 (discussing the difference between mergers in the 1980s and those occurring in the 1990s, and stating that "1995 is on its way to becoming the biggest year for mergers and acquisitions in history").

According to one merger consultant, since the beginning of 1995 more than $270 billion worth of mergers and takeovers have been announced, signalling the start of a merger wave that may dwarf the merger mania of the 1980s: "As your competitors get bigger, you're almost forced to get bigger to stay equal," says Norman C. Selby, head of McKinsey & Co's pharmaceutical practice. "It's a continual game of catch-up." Michael Mandel, Land of the Giants, BUS. WK., Sept. 11, 1995, at 34; see also Deirdre McMurdy, Merger Meltdown: With All the Recent Mega-deals, There Is a New Chill Creeping into the Business Sector, MACLEAN'S, Sept. 4, 1995, at 35 (discussing the different attitude of Canadian mergers); Gerald F. Seib, Is Big Bad? The Disgruntled Say That It Is, WALL ST. J., Sept. 6, 1995, at A20 (discussing the "spate of summertime mergers").

7. The term "downsize" has recent origins. It "didn't even enter the language until the early 1970s, when it was coined by the auto industry to refer to the shrinking of cars. Starting in 1982, it was applied to humans and entered in the college edition of the American Heritage Dictionary." Louis Uchitell and N.R. Kleinfield, As Work Is Redefined, Millions Become Casualties: Replacing Lost Job Is Often a Downer, STAR TRIB., Mar. 10, 1996, at A19, A20; see also PAUL F. GERHART, SAVING PLANTS AND JOBS 33-69, 106 (1987) (examining union strategy to avoid a plant closing situation and advocating advanced warning of a plant shut down); MARIE HOWLAND, PLANT CLOSINGS AND WORKER DISPLACEMENT: THE REGIONAL ISSUES 156, 157 (1988) (reporting on an empirical study advocating advanced warning to workers and communities of plant closings); WEYMANN T. JOHNSON, JR. & DEBORAH A. SUDBURY, PRACTICAL GUIDE TO THE WARN "PLANT CLOSING" LAW, at i (1989) (citing widespread plant closings and layoffs); JOHN PORTZ, THE POLITICS OF PLANT CLOSINGS 3-5 (1990) (discussing local response to plant closings); LAWRENCE E. ROTHSTEIN, PLANT CLOSINGS: POWER, POLITICS, AND WORKERS 167-70 (1986) (discussing reasons for plant closings); Paul I. Weiner, Involuntary Reductions in Force: A Step by Step Approach, in REDUCTIONS IN WORKFORCE AND BENEFITS IN A SHRINKING ECONOMY 17 (PLI ed., 1991) (finding that during the 1980s an unprecedented number of reductions in force (RIFs) occurred and that these RIFs will continue to occur as U.S. businesses become more integrated with the international markets); AT&T to Eliminate 40,000 Jobs, STAR TRIB., Jan. 3, 1996, at D1, D2 (stating that "[t]op executives expressed anguish about the cuts but said competition and new technology made it necessary"); G. Pascal Zachary, Layoff Announcements Increased 39% in August as Merger Activity Picked Up, WALL ST. J., Sept. 6, 1995, at A2.

8. For a discussion of two types of employee benefit plans—defined contribution plans and defined benefit plans—see infra notes 43 & 174.

9. See Weiner, supra note 7, at 17. Weiner discusses the impact of reduction-in-force termination litigation. He states that "[s]ome of these claims
growth in litigation involves claims based on the Employee Retirement Income Security Act of 1974 (ERISA). The applicability of ERISA to cases involving plant closings is determined under Section 510 of ERISA, which Congress enacted to protect employee benefit plans.

Section 510 cases brought against companies by former employees who were terminated in a plant closing currently face uneven adjudication, due largely to the judicial application of a Title VII analysis to such cases. Title VII provides courts with a proof mechanism to use when examining cases that involve mixed motives. Many of these plant closing cases involve management decisions in which pension benefits "played

have become class actions involving hundreds of terminated employees, and in some cases have resulted in judgments amounting to millions of dollars." Id. 10. Charles S. Mishkind & Akusin B. Marshall, A Management Perspective on Reductions in Force: ADEA, ERISA and Related Litigation, 723 PLI/Corp. 287, 359 (PLI Corp. L. & Practice Course Handbook Series, Jan.-Feb. 1991). The authors write: "Employee benefit litigation is on the rise. This phenomenon can be traced to a heightened awareness by plaintiffs and counsel of the rights and causes of action created by and available under the Employee Retirement Income Security Act." Id.

11. The Worker Adjustment and Retraining Notification Act (WARN) defines the term "plant closing" as:

[T]he permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees . . . .


12. ERISA § 510 provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 U.S.C.S. § 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. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. § 1140 (1985) [hereinafter § 510]. This Note addresses plant closings in the context of the "non-interference provision" of § 510, the third clause of the statute.


14. For a discussion of judicial application of Title VII proof models to cases involving mixed motives, see infra Part I.D.
a part" in the final decision to close the plant. The term "played a part" refers to a decision that was motivated in part by pension benefits. Such a decision can also be referred to as a decision which is based upon "mixed motives." Without an equitable judicial examination of all the factors that lead to plant closing decisions, companies that maintain pension plans and decide to close plants open themselves to extensive litigation and massive amounts of potential damages. Because Title VII claims also involve a mixed motive analysis, courts examining mixed motive plant closing decisions have looked to employment discrimination law for judicial guidance.

As the judicial interpretation of Title VII changes within the employment context, it is unclear whether the judicial interpretation of Title VII in § 510 cases will reflect these changes. This uncertainty creates an uneasiness for both the potential employee plaintiff and the potential corporate defendant. The employee plaintiff does not want to further jeopardize his or her financial situation through entry in a futile lawsuit, while the corporate defendant fears that the use of pension benefits in any cost-benefit analysis could portend extensive liability.

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15. See infra Part I.D (discussing mixed motive plant closing cases).
16. Pension plans and plan assets have grown dramatically since the enactment of ERISA. See IZZET SAHIN, PRIVATE PENSIONS AND EMPLOYEE MOBILITY 18 (1989). Sahin writes that "between 1975 and 1987 the total number of pension plans has more than doubled and assets have grown from $290 billion to $1.5 trillion." Id.
17. One case involved 1,892 plaintiffs. Pickering v. USX Corp., 809 F. Supp. 1501, 1570 (C.D. Utah 1992). The court found that "the amount and kind of relief to which each prevailing individual plaintiff is entitled will be determined on an individual basis in subsequent proceedings." Id. at 1571.
19. For an analysis of Title VII changes see infra notes 115-118 and accompanying text.
20. JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 127 (2d ed. 1995). The authors discuss the employers decision making process:

Do you think that employers make plant closure or other large scale layoff decisions in ignorance of fringe benefit costs? . . . Do you think good managers make such decisions ignorant of such fundamentally relevant information? . . . Does the risk of such liability promote or retard the adoption and the sweetening of pension and employee benefit plans?

Id.
This Note argues that courts' analyses of § 510 claims should vary under different factual scenarios. Courts' current mechanical application of Title VII proof models invariably leads to inequitable results. This Note addresses current judicial issues arising under the "non-interference" provision of § 510. Part I of this Note examines the text, legislative intent and purpose of § 510 as well as the application of Title VII judicial models to § 510 mixed motive plant closing cases. Part II provides a critique of judicial approaches to § 510 cases. This Note concludes that the flexible application of an equitable, Title VII-like proof standard to mixed motive plant closings would insure that § 510's purpose is fulfilled, without requiring employers to "mold" plant closing justifications to satisfy court-imposed "acceptable" motivations.

21. See Johnson v. Minnesota Historical Soc'y, 931 F.2d 1239, 1241 (8th Cir. 1991). The court found that "[a]lthough the four criteria set forth in McDonnell Douglas provide one way of establishing a prima facie case of employment discrimination, the proof necessary will vary according to the circumstances of the case." (citations omitted). Id. at 1242. The McDonnell Douglas test, discussed infra notes 107-111, is used by courts in cases involving circumstantial evidence of employment discrimination under Title VII and also in cases arising under § 510. See McDonnell Douglas v. Green, 411 U.S. 792, 802-04 (1973) (adopting a proof model for circumstantial evidence-based Title VII claims); Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir. 1987) (adopting the McDonnell Douglas test for § 510 cases).

22. This section follows the form of analysis suggested by William N. Eskridge, Jr. & Philip P. Frickey in Statutory Interpretation As Practical Reasoning, 42 STAN. L. REV. 321, 353 (1990).


24. The implementation of a flexible, purpose-based standard would consider such factors as the actual purpose of the plant closing and the amount of weight accorded to pension benefits in the plant closing decision. The standard would insure that those affected by plant closings (both employees and employers) understand fully their rights under ERISA. The flexible purpose-based standard advocated in this Note would involve a continued application of current Supreme Court Title VII analysis in cases involving circumstantial evidence of intent and an application of pre-1991 Supreme Court Title VII analysis in cases involving direct evidence of intent. For a further discussion of Supreme Court Title VII decisions see infra Part I.D.

25. See Frank Cummings, ERISA Litigation: An Overview of Major Claims and Defenses, C996 ALI-ABA 1, 93 (Jan. 26, 1995). Cummings writes:

Surely there is precious little comfort in knowing that every "competent management" should "consider" the estimated employee benefit cost saving in a particular layoff, but that the cost saving should not be the "prime catalyst." In other words: think about it, but don't think exclusively or primarily about it. That appears to be an invitation to create less-than-accurate paper trails. But the statute itself provides no completely safe guideline.
I. ERISA, SECTION 510 AND TITLE VII IN MIXED MOTIVE PLANT CLOSINGS

ERISA and Title VII appear to peacefully coexist within § 510 judicial decisions. This coexistence is premised upon similarities between the text, intent and purpose of ERISA and Title VII.26

A. ERISA'S ENACTMENT AND SECTION 510'S TEXT, INTENT AND PURPOSE

Prior to the enactment of ERISA, many abuses existed within private pension plans.27 These abuses and problems adversely affected both union and non-union employees alike.28 Enacted to eliminate such abuses, ERISA protects private

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26. For a discussion of the similarities and differences between Title VII and § 510 see infra notes 158-161 and accompanying text.


The Senate committee investigations found that the extremely rapid growth of private pension plans had led to all manner of abuses, ranging from ineptness and lack of know-how to outright looting of benefit funds and corrupt administration. In addition to embezzlements, kickbacks, unjustifiably high administrative costs, and excessive investment of funds in employer securities, serious examples of improper insurance practices were also found, including exorbitantly high commission and administrative charges, fictitious fees, retention by some insurance carriers of an unduly large share of the premiums . . . and collusion between insurance representatives, union officials and management.

28. Id. (discussing collusion between insurance representatives and union agents). The union bargaining contract has remained a sounding block for those who find rationality in such agreements and argue that the risk should be borne by the contracting parties. Robert Royes, an AT&T pension plan official, argues that the parties to such an agreement should bear the risk of loss. He asks: "Should the parties who assume the risk of establishing a pension plan with large unfunded liabilities expect others to bail them out if things go wrong?" LANGBEIN & WOLK, supra note 20, at 66.
pension benefits. 29 One of the primary impetuses for the government regulation of pension benefits embodied in ERISA was the 1963 closing of a Studebaker automobile plant. 30 The Studebaker plant closing involved a pension plan termination affecting 11,000 autoworkers. 31 The termination agreement reached between Studebaker and the United Automobile Workers (UAW) divided pension plan participants into three priority groups. 32 Members of the first priority group received

29. ERISA § 2(b). "It is hereby declared to be in the policy of this Act to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . ."

30. Michael Allen, The Studebaker Incident and Its Influences on the Private Pension Plan Reform Movement, in LANGBEIN & WOLK, supra note 20, at 62. "The closing of the Studebaker automobile plant in South Bend, Indiana, in December of 1963 is widely regarded as a pivotal event in the history of the movement toward comprehensive federal regulation of private pension plans." Id. Prior to the enactment of ERISA much of the regulation of pensions was left to the private employer. Id. The private employer-regulated pension plan model was based on a belief that private employers owed a "moral duty" to employees to insure that they were duly compensated in old age. Id. In 1949, a presidential fact-finding commission report stated:

We think all industry in the absence of adequate Government programs, owes an obligation to workers to provide for maintenance of the human body in the form of medical and similar benefits and full depreciation in the form of old age retirement—in the same way as it now does for plant and machinery.

H.R. REP. No. 93-533, at 3 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4641. The closing of the Studebaker plant may have provided one reason for the change in government policy toward the regulation of pension benefits, but another reason is the growth of pension coverage. Id.

In 1940, an estimated four million employees were covered by private pension plans; in 1950, the figure had increased to almost 10 million and in 1960 over 21 million were covered. Currently, [circa 1974] over 30 million employees or almost one half of the private non-farm work force are covered by these plans. . . . Today, in excess of $150 billion in assets are held in reserve to pay benefits credited to private plan participants. This rapid growth has constituted the basis for legislative efforts at both the federal and state levels to assure equitable and fair administration of all pension plans.

Id.


32. Id. at 63.

The agreement [between the company and the United Automobile Workers (UAW)] divided the plan participants into three groups: (1) 3,600 retirees and active workers who had already reached the permitted retirement age of 60; (2) approximately 4,000 employees, aged 40 to 59, who had at least ten years of service with the company and whose pension benefits had therefore vested; and (3) a residual group of 2,900 workers who had no vested rights.

Id. A "vested pension" right exists "when an employee (or his or her estate) has rights to all the benefits purchased with the employer's contributions to
lifetime annuities. After the purchase of these annuities, the funds remaining did not cover the vested claims of the employees in the second priority group. Workers falling into the third priority group, those with nonvested pension rights, received nothing. This plan termination resulted in approximately 4,400 workers losing a portion or all of their vested pension rights.

Explicitly noting the impact of the Studebaker incident, Congress passed ERISA with the intent of protecting "those benefits that an employer voluntarily agrees to provide" and "those benefits an employee has earned through working." ERISA attempted to correct the deficiencies found in existing pension plans and insure that workers would ultimately enjoy their earned benefits.

the plan even if the employee is not employed by this employer at the time of retirement." BLACK'S LAW DICTIONARY 1563 (6th ed. 1990).

33. See Allen, supra note 30, at 62-63.

34. Id. "These workers [those in the second group] received lump-sum payments equal to about 15 percent of the actuarial value of their accrued pension benefits." Id.

35. Id.

36. Gordon, supra note 27, at 70.

37. H.R. REP. NO. 93-807, at 3 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4680. "Concern has also been expressed over the possible loss of pension benefits as a result of termination of pension plans. The Studebaker case, which has been widely publicized, illustrates how pension benefits can be lost as a result of termination of a plan." Id.

38. Charles S. Mishkind, Protected Rights Under Section 510 of ERISA: Avoiding "Something For Nothing," 585 ALI-ABA 425, 429 (February 21, 1991). For one judicial interpretation of the purpose of ERISA see Nemeth v. Clark Equip. Co., 677 F. Supp. 899, 905 (W.D. Mich. 1987). "Allowing an employer to defend an ERISA claim solely on the ground that its pension program was too expensive to maintain would defeat the purpose of § 510, which is to prohibit employers from making employment decisions based upon pension costs." Id.

39. Mishkind, supra note 38, at 429. "ERISA is not and was not intended to be a 'guaranteed employment' statute. . . . [C]ourts have recognized that ERISA is a 'sweat equity' statute and not, in effect a guarantee-of-employment act." Id.; see also Peter M. Panken, et al., Discriminatory Discharge Under ERISA Section 510, Q206 ALI-ABA 49, 53 (May 16, 1991) ("The difficulty in a literal reading of § 510 is that it could make it unlawful to discharge anyone. After all, any termination prevents the terminated individual from accruing further benefits . . . .").

40. Senator Domenici commented on the pension protections offered to workers through ERISA:

This measure is designed to eliminate the deficiencies which our study identified in the existing private pension system. Its basic goal is to assure workers that they will receive the promised pension benefits earned for their retirement during their working lives. It also responds to the proven need for a comprehensive and meaningful
Section 510 provides the statutory basis for employee claims against companies involved in plant closings.\textsuperscript{41} Section 510's language permits an employee to bring suit against an employer who interfered with the "attainment of any right" under the employee's pension plan.\textsuperscript{42} Termination is the ultimate form of interference affecting both vested and nonvested employees; the vested employee can no longer accrue pension benefits,\textsuperscript{43} and the nonvested employee loses the opportunity to become vested in the first place.

Under a strictly textual approach to § 510, the plaintiff employees alleging that plant closings interfered with their pension benefits\textsuperscript{44} should generally prevail.\textsuperscript{45} This result is due to the absolutist language that formulates the employer's duty to the employee. Section 510 also describes the plaintiff class in expansive terms.\textsuperscript{46} Consequently, under a strict reading of reform of our private pension system. It proposes fair, feasible, and effective regulatory measures which will fulfill the fundamental purposes of a pension.

\textbf{SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 1830 (Comm. Print 1976) (remarks of Senator Domenici).}


42. ERISA § 510.

43. This example assumes a defined benefit pension plan. Such a plan involves a set period of time during which an employee becomes "vested" in the plan and therefore entitled to the employer contributions made to the plan. The allocation of benefits from a defined benefit plan are made subject to a set mathematical formula that takes into account years of service, age, final salary, and a plan-mandated percentage to formulate an employee's pension benefit.

44. \textit{See infra} note 140 (discussing courts' unwillingness to apply a textual analysis to § 510).

45. Section 510 states: "\textit{It shall be unlawful ... for any person ... to discriminate against a participant ... for exercising any right to which he is entitled ... or for the purpose of interfering with the attainment of any right ...}" 29 U.S.C. § 1140 (emphasis added). For a discussion of the use of such mandatory language in the context of statutory interpretation, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, \textbf{CASES AND MATERIALS ON LEGISLATION STATUTES AND THE CREATION OF PUBLIC POLICY} 642 (2d ed. 1995). For discussion of the term "may become entitled," see \textit{Bass v. Retirement Plan of Conoco, Inc.}, 676 F. Supp. 735, 746 (W.D. La. 1988). For a contrary interpretation, see \textit{Zipf v. American Telephone & Telegraph Co.}, 799 F.2d 889, 893 (3rd Cir. 1986).

46. Section 510 enlarges the potential plaintiff class. It provides causes of action for both the class of individuals who are entitled to benefits "under the provisions of an employee benefit plan" and the class of individuals who "may become entitled under the plan." \textit{See ESKRIDGE & FRICKEY, supra} note 45, at
the statute, an employer defendant can be held liable to a surprisingly large number of former employees.

Section 510’s intent and purpose also indicate broad protection for employees. Congress passed § 510 intending to provide a mechanism to “deal with Benefit Plan motivated terminations.” The paradigm case under § 510 exists when an employee claims that he or she was terminated to save pension costs. For example, a plaintiff who was fired shortly before she was to vest in her pension benefits could bring a successful § 510 claim. In cases like this, § 510 also fulfills the broader congressional purpose of protecting employees from unscrupulous employers.

641 (stating that “(t)erms connected by the disjunctive 'or' are often read to have separate meanings and significance”).

47. See Peter M. Panken, et al., Reductions in Workforce: Legal Rights and Remedies in Downsizing, Discriminatory Discharge Under ERISA Section 510, Q206 ALI-ABA 49, 52 (May 16, 1991). Panken writes: “Every termination means plaintiff stops accruing fringe benefits and credit for additional pension plan benefits. Yet the statute was clearly not passed to add another cause of action to every termination suit.” Id.

48. LANGBEIN & WOLK, supra note 20, at 126.

49. ERISA § 203 provides an explanation of vesting requirements that all ERISA regulated plans must meet. This section deals with the nonforfeitable percentage of employer contributions to the plans. ERISA § 203(a)(1) provides that “an employee’s rights in his accrued benefit derived from his own contributions are nonforfeitable.” Thus, this section perpetuates the dichotomy between defined benefit and defined contribution plans. Id. For a further discussion of defined benefit plans and defined contribution plans, see infra notes 43 & 174. If the plan meets one of two vesting schedules it will satisfy the ERISA-mandated vesting schedule. Section 203(a)(2)(A) describes a “five-year cliff” vesting schedule. A five-year cliff is a vesting schedule in which “an employee who has completed at least five years of service has a nonforfeitable right to 100 percent of the employee’s accrued benefit derived from employer contributions.” ERISA § 203(a)(2)(A). The second possible vesting schedule is a seven-year graduated schedule. ERISA § 203(a)(2)(B). Section 203(a)(2)(B) provides a table enumerating the years of service and the nonforfeitable percentage for those years of service. Under the seven-year graduated vesting schedule, at three years of service the percentage of nonforfeitable benefits is 20%. ERISA § 203(a)(2)(B). As each year of service increases, the percentage of nonforfeitable benefits increases by 20% until at the seven-year point the employee is 100% vested. Id.

50. See Reichman v. Bonsignore, Brignati & Mazzotta, P.C., 818 F.2d 278, 280 (2d Cir. 1987) (holding that the jury could find that the firing of an employee ten months before her pension vested was a pretext to avoid paying pension costs).

51. See West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980) (finding that the legislative history shows that “prohibitions were aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights”). Senator Hartke further identified those employees § 510 covered:
B. THE PARADIGM SECTION 510 CASE INVOLVING INTENT, TEXT, PURPOSE, DIRECT EVIDENCE AND ADJUDICATION

The scenario in McLendon v. Continental Can Co.\textsuperscript{52} is an appropriate example of what Congress intended § 510 to combat. Continental Can Company entered into an agreement with the United Steelworkers of America to establish two pension plans.\textsuperscript{53} Continental realized that these plans created "substantial, unfunded, pension liabilities"\textsuperscript{54} at a time when the market for their product was shrinking.\textsuperscript{55} As a means of avoiding these unfunded liabilities, Continental instituted a "liability avoidance program"\textsuperscript{56} (LAP) that laid off workers approaching eligibility for pension benefits.\textsuperscript{57}

Continental instituted its LAP, also known as a BELL system,\textsuperscript{58} at its St. Louis plant to offset "[d]windling profits from declining business volume."\textsuperscript{59} From 1976 to the end of 1980, Continental gradually reduced its St. Louis work force from 550 to 237.\textsuperscript{60} John Middleton,\textsuperscript{61} laid off in 1980 from the St.

Most collective bargaining agreements protect employees against discharge without good cause and provide effective enforcement machinery and arbitration proceedings. . . . But roughly one half of all pension participants are not unionized so they lack such protection. Especially vulnerable are managers and executives whose substantial pension potentialities provide an incentive to their discharge before vesting . . . . Discipline and discrimination can be so unpleasant as to amount to constructive discharge . . . . That can be the type of harassment which does not say that one is fired, but makes living such a hell that a persons wishes he did not have to hang on and endure.

Mishkind, supra note 38, at 431 (citing SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 1774-75 (Comm. Print 1976) (comments made by Senator Hartke during floor debate of § 510)).

52. 908 F.2d 1171, 1174 (3d Cir. 1990).
54. Id.
55. Id.
56. Id.
57. "The LAP was executed by a computer tracking system which identified workers at a particular plant according to their age and years of service. It operated nationwide." Continental Can Co., 908 F.2d at 1175.
58. The district court found that BELL is a reverse acronym for "Let's Limit Employee Benefits" or "Lowest Level of Employee Benefits." Id. at 1175 n.4.
59. Id. at 1175-76.
60. Id. at 1176.
Louis plant, illustrates the actual human cost of a LAP's implementation. Middleton found it impossible to find another job after his layoff because other employers, aware of his layoff status, expected Continental to call him back to work.\(^6\) Middleton's loss of employment ultimately led to his qualification for public assistance.\(^63\) The pension promise entered into by Continental Can and the United Steelworkers of America provided a seemingly clear numerical rationale for the displacement of workers like Middleton without considering the toll of its implementation upon its workers' lives.\(^64\)

Continental Can's use and development of a LAP, according to the court, provided ample evidence of an ERISA § 510 violation.\(^65\) The evidence surrounding the LAP provided a "smoking gun"\(^66\) denoting intentional interference with employee pension benefits.\(^67\)

C. AN EXAMINATION OF THE JUDICIAL APPLICATION OF SECTION 510 TO MIXED MOTIVE PLANT CLOSINGS

Current § 510 adjudication becomes especially problematic within the context of plant closings.\(^68\) A strict reading of § 510

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\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) Middleton stated, "I think it was a rotten thing for the company to do. I was ready to devote my life to them, and I would have if they would have done the right thing. But they just decided to do us dirty and we found it out too late." Id.

Pat Bolinger's husband worked for Continental Can and developed cancer after his layoff:

[His layoff] meant the loss of his health insurance or the disability pension he might have received. By the time of his death in 1987, his medical bills had consumed the family savings and forced [me] to sell [our] home and furniture. . . . I filed a bankruptcy. To me, in the working class we were always taught you work; you earn your pay. . . . I felt very degraded. Not only had I lost a husband, I lost everything he'd worked for all of his life.

Id.

\(^{65}\) "Continental developed and used the LAP specifically intending to interfere with their employee's benefit plans." McLendon v. Continental Can Co., 908 F.2d 1171, 1177 (3d Cir. 1990).

\(^{66}\) See infra Part III.B (discussing the use of "smoking gun" evidence by plaintiffs).

\(^{67}\) McLendon, 908 F.2d at 1179 n.15.

\(^{68}\) See Bruce McLanahan, Special Problems in the ERISA "Fringe" Areas, in 410 PLI/LIT. 153, 159 (1991) (noting that "[w]hile the potential for liability is more remote, attorneys should be aware of the possible applications of ERISA Section 510 to plant closings").
seemingly makes it illegal for anyone to discharge a participant in a pension plan with the intention of interfering with that participant's pension benefits. Such a reading of the statute creates a cause of action for virtually all employees who lose their jobs in a plant closing situation if they can prove their employer closed the plant for the "purpose" of preventing the attainment of pension benefits. Some courts have found

Until the last year or so, this innocuous provision, which was established prior to the erosion of the at-will doctrine . . . had not been the subject of much litigation. Recently, however, this Section has become the focus of "big-stakes" class-type litigation in which courts have expanded the section's protection well beyond its original purpose and intended scope to the point where employers are "at-risk" whenever they consider and undertake essential and legitimate business decisions.


69. See ERISA § 510. "[Keep in mind that a literal reading of § 510 might make it unlawful to discharge anyone. After all, one of your purposes in discharging a person is so that you do not have to keep paying his compensation (including his benefit costs).]" Cummings, supra note 25, at 91.

70. Mishkind writes:

In short, if Section 510 is read too expansively, so that employers may not commit any conduct which interferes with the attainment of benefits no matter how legitimate the business reason for that conduct, then every discharge, reduction-in-force, partial or complete closing . . . will violate Section 510 even if there is no evidence that the motivating factor was the employer's specific intent to deny benefit attainment and that the same result would have happened even absent consideration of the proscribed criteria. Mishkind, supra note 38, at 435.

71. The question of what constitutes "purpose" within the context of § 510 is being continually litigated in the courts. It is the intent of this Note to address the on-going debate on the meaning of the term "purpose" and to propose a new formulation of the term that is consistent with the statute and with surrounding business realities. In an age of increased mergers, "downsizing" and plant closings, the imposition of such extensive employer liability could serve to stagnate particular economic endeavors.

In enacting Section 510, Congress did not intend to proscribe the conduct of employers that seek to ensure their businesses' existence by adopting "survival plans" (which may include plant closings . . .) undertaken for legitimate business reasons typically within the exercise of business judgment, and not with the specific and dominant intent of interfering with pension eligibility of individual employees. Mishkind & Marshall, supra note 10, at 287; see, e.g., Aronson v. Servus Rubber, 730 F.2d 12, 16 (1st Cir. 1984) (arguing that "[a]n overly literal interpretation of this section would make illegal any partial termination, since such terminations obviously interfere with the attainment of benefits by the terminated group, and, indeed are expressly intended so to interfere. Such cannot be the intent of the section."); Heath v. Massey-Ferguson Parts Co., 869 F. Supp. 1379, 1385 (E.D. Wis. 1994) (stating that a literal reading of the statute "would thus greatly restrict an employer's ability to alter or reduce his future
the companies that used pension benefits as a main factor in making a plant closing decision liable to their laid off employees.\textsuperscript{72}

In plant closing cases brought under § 510, plaintiffs must prove that the defendant \textit{intended} to interfere with the vesting of pension benefits.\textsuperscript{73} In addressing the issue of intent, courts have applied varying standards. Some courts have held that the plaintiff must prove specific discriminatory intent to prevail in a plant closing case brought under § 510.\textsuperscript{74} Such courts

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benefit obligations so as to address the changing economic realities unique to each employer\textsuperscript{72}); Gerald F. Seib, \textit{Is Big Bad? The Disgruntled Say That It Is}, \textit{WALL St. J.}, Sept. 6, 1995, at A18 (discussing trends in politics and business surrounding the summer's large corporate mergers); G. Pascal Zachary, \textit{Lay-off Announcements Increased 39% in August as Merger Activity Picked Up}, \textit{WALL St. J.}, Sept. 6, 1995, at A2 (discussing the increasing number of lay-offs and providing predictions for the future). \textit{But see} Gavalik \textit{v. Continental Can Co.}, 812 F.2d 834, 857 n.39 (3d Cir. 1987) (explaining that "section 510's essential purpose is to prevent employers from intentionally interfering with impending pension liability whether motivated by malice toward the particular employee(s) or by a general concern for the economic stability of the company").


\textsuperscript{73} ERISA § 510.

\textsuperscript{74} \textit{See} Teumer \textit{v. General Motors Corp.}, 34 F.3d 542, 550-51 (7th Cir. 1994) (affirming a summary judgment for the defendant on a § 510 claim).

The court found:

A plaintiff seeking relief under § 510 must establish that the complained of action affecting his employment situation was taken by his employer with the specific intent of interfering with his benefit rights.\ldots That is, the plaintiff must ultimately show that a desire to frustrate his attainment or enjoyment of benefit rights contributed toward the employer's decision and can avoid summary judgment only if the materials properly before the district court, construed sympathetically allow for such a conclusion.

\textit{Id.} at 550. In \textit{Unida}, the court found:

In an era when benefits costs are ever increasing, if mere evidence of company-wide cost increases in ERISA benefits supported an inference that a plant was closed with specific intent to violate ERISA, every plant closure could be challenged under ERISA section 510, and such claims would be immune to summary judgment.

\textit{Unida}, 986 F.2d at 980; \textit{see also} Clark \textit{v. Coates & Clark, Inc.}, 990 F.2d 1217, 1222 (11th Cir. 1993) (noting that "[t]he ultimate inquiry in a § 510 case is whether the employer had the specific intent to interfere with the employee's ERISA rights"); Tiisch \textit{v. Reliance Group, Inc.}, 548 F. Supp. 983, 985 (S.D.N.Y. 1982) (explaining that "[n]o 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"). For a further examination of the issue of specific intent in a § 510 case, see Roger C. Siske, et. al., \textit{What's New in Employee
view general corporate policy or allegations of non-specific actions as speculative and falling short of fulfilling the requirement of specific intent. The specific intent requirement places a greater burden on plaintiffs to procure specific detailed information to survive a summary judgment motion by a § 510 defendant.

Other courts have accepted a more relaxed showing of intent on the part of the plaintiff. In Nemeth v. Clark Equipment Co., the court held that in order to prevail on a § 510 claim, the plaintiff must prove that the defendant terminated the employee with a specific intent to violate ERISA. Yet, the court also stated that the “[p]laintiffs need not prove that defendant’s desire to interfere with their pension benefits was the sole reason for their termination.” Under this formulation of intent, plaintiffs can establish intent if they can prove that the accrual of pension benefits was but one of several reasons for their termination.

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Benefits—A Summary of Current Cases and Other Developments, C991 ALI-ABA 1, 123 (March 22, 1995).

75. See Unida, 986 F.2d at 980 (explaining that evidence of rising costs in an era of ever increasing benefit costs and plant closings does not fulfill the intent requirement of § 510).

76. See, e.g., Nemeth v. Clark Equip. Co., 677 F. Supp. 899, 903 (W.D. Mich. 1987) (describing how “[p]laintiffs need not prove that defendant’s desire to interfere with their pension benefits was the sole reason for their termination”); McLanahan, supra note 68, at 159 (attempting to find a common theme in Continental Can and McLendon). McLanahan writes, “It is difficult to draw broad conclusions from the holdings of these cases other than to note that they establish the Third Circuit among the Circuits clearly not requiring an ‘evil intent’ to find a violation of ERISA Section 510.” Id.


78. Id.

79. Id.

80. Id. (requiring proof of accrual of pension benefits as one of several factors, as opposed to the sole reason, for termination). The Nemeth court cites Continental Can for the proposition that “[o]nce the plaintiffs establish that the desire to avoid pension liability was a determining factor in the decision to terminate their employment, the defendant, in order to avoid liability, must prove, that it would have . . . engaged in the same conduct in any event.” Id. (citing Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir. 1987)). The Nemeth court’s use of such a standard mirrors the Title VII standard applied in cases involving direct evidence of intent prior to the enactment of the 1991 Civil Rights Amendments. See infra Part I.D.1 (discussing Title VII proof models prior to the passage of the Civil Rights Amendments).
1. A Tale of Two Cases

The issue of liability becomes more tenuous when the company considered pension benefits as only one of many factors involved in a plant closing decision.81 Two of the major cases in § 510 mixed motive plant closings reached very different results. In *Pickering v. USX Corp.*,82 a federal district court in Utah found USX's plant closing violated § 510.83 This case involved a restructuring plan that called for the permanent

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81. *See, e.g.,* Teumer v. General Motors Corp., 34 F.3d 542, 545 (7th Cir. 1994) (noting that "[s]ection 510 . . . does not protect employees against all employer actions undertaken with an eye toward thwarting the attainment of benefits; only changes in one's employment status cannot stem from benefit based motivations"); Hendricks v. Edgewater Steel Co., 898 F.2d 385, 389-90 (3d Cir. 1990) (refusing to "turn [a] company's decision to lay off employees during economic difficulties into an intention to violate ERISA"); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1117-18 (2d Cir. 1988) (granting summary judgment for the defendant employer because the employer successfully articulated a non-discriminatory reason for the plaintiff employee's discharge); *Varhola v. Doe*, 820 F.2d 809, 815 (6th Cir. 1987) (finding no § 510 violation); *Continental Can*, 812 F.2d at 865 (finding "Continental's liability avoidance scheme constituted a violation of ERISA when, pursuant to that scheme, individual class members . . . were designated as permanently laid off for the purpose of defeating their pension eligibility"); Aronson v. Servus Rubber, 730 F.2d 12, 16 (1st Cir. 1984) (finding that § 510 applies to discriminatory conduct directed at individuals and not to actions involving the pension plan); *Colizza v. U.S. Steel Corp.*, No. 86-561, 1989 WL 407241, at *14 (W.D. Pa. March 29, 1989) (noting that in any reduction in force "a number of employees are bound to fall just short of the line to qualify for enhanced benefits. . . . [N]o ERISA cause of action lies where the loss of pension benefits was a mere consequence of, but not a motivating factor behind termination of employment"); *Nemeth v. Clark Equipment Co.*, 877 F. Supp. 899, 910-11 (W.D. Mich. 1987) (ruling in favor of defendant employer in a § 510 case involving a plant closing).

82. 809 F. Supp. 1501, 1540 (C.D. Utah 1992). The *Pickering* court, in a case dealing with direct evidence of a "liability avoidance program," adopted a burden-shifting mechanism that resembles that of *McDonnell Douglas*. *Id.; see infra* notes 107-111 and accompanying text (discussing the *McDonnell Douglas* burden of proof mechanism). The *Pickering* court found that the plaintiffs established a prima facie case for a § 510 violation by a preponderance of the evidence. *Pickering*, 809 F. Supp. at 1536. The court found that the burden of production then shifts to the defendants. *Id.* The defendants articulated legitimate business reasons for USX's actions. *Id.* The court found all of these proffered reasons to be pretextual and held USX liable under § 510. *Id.* at 1538. The judicial standard applicable in cases involving direct evidence of impermissible motivation is that found in *Price Waterhouse*. *See infra* notes 112-114 and accompanying text (discussing the *Price Waterhouse* burden of proof standard). For a further discussion of issues raised by the 1991 Amendments to the Civil Rights Act, passed after the *Price Waterhouse* decision, *see infra* notes 115-118 and accompanying text.

shutdown of several plant facilities. In determining whether to shutdown the plant at the center of this litigation, the company prepared a study in June 1985 entitled the "Employee Benefit Costs Potential Shutdown of Geneva Plant." In August 1986, after failing to reach a labor agreement with the union, a work stoppage ensued at Geneva. In January 1987, the Corporate Policy Committee of USX authorized the "indefinite idling" of the Geneva plant. Despite the fact that the court found legitimate non-discriminatory reasons for the non-recall of employees, the court found USX liable under § 510 for basing its decisions not to recall employees on pension benefits.

In the second case, Unida v. Levi Strauss & Co., the Fifth Circuit reached a different conclusion. In 1989, Levi Strauss experienced a downturn in the sale of its "Dockers" pants, produced at a San Antonio plant. Levi Strauss examined the cost of producing the pants at its various locations and decided to close the San Antonio plant. Terminated workers filed suit, alleging violation of § 510.

The Fifth Circuit affirmed the district court's granting of summary judgment for the company. The court soundly rejected the plaintiffs' arguments that they need not show specific intent to violate ERISA, and that a general inference of

84. Id. at 1517.
85. Id. at 1520. While this study was conducted in June 1985, a second study was completed in November 1985. Id. Both studies estimated the "employee-related costs if Geneva were shut down in 1989" as $169,056,000. Id. "An expert for plaintiffs testified that, based on the June and November studies, USX's increased shutdown liability in 1989 as compared to 1986, would be an additional $50 million." Id. at 1521.
86. Id.
87. Id. at 1522.
88. Id. at 1537.
89. Id. at 1538. The Geneva plant manager "expressly testified that he did not base his recall decisions on benefit eligibility." Id. at 1540. The court, while acknowledging this testimony, found that the "direct evidence of a corporate-wide policy to avoid recalls . . . in order to avoid triggering benefits" outweighed the evidence given by the manager. Id.
91. Id. at 972.
92. Id. at 973.
93. Id.
94. Id. at 981.
95. Id. at 979-80.
96. The plaintiffs claimed this inference could be drawn despite direct testimony to the contrary. See id. at 980. The court quotes Larry Thigpen,
a § 510 violation had been established.\textsuperscript{97} Instead, the court found the plaintiff's evidence too general and speculative to defeat a summary judgment motion.\textsuperscript{98}

D. TITLE VII JUDICIAL MODELS AND MIXED MOTIVES IN PLANT CLOSING CASES

Judicial interpretation and legislative changes\textsuperscript{99} to Title VII call into question the continued viability of using a Title VII proof model to establish the element of employer intent.\textsuperscript{100} Legislative and judicial refinement of the appropriate Title VII proof models brings uncertainty to the appropriate burdens of § 510 plaintiffs and defendants.

1. Pre-1991 Title VII

Courts faced with mixed motive § 510 claims have adopted Title VII\textsuperscript{101} as a model for analyzing employer intent.\textsuperscript{102} Like

the ultimate decision maker in the closing of the San Antonio plant, as testifying that his "decision to close the San Antonio plant was made without regard to costs associated with pension, workers' compensation, or other employee benefits." \textit{Id.} Despite this testimony, the plaintiffs argued that (1) the plant had been closed to "cut costs"; (2) Levi Strauss continued to expand in an operation in the Caribbean where it would not "incur pension" expenses; (3) Levi Strauss management was aware of the rising employee benefit costs; and (4) the San Antonio plant closure prevented 369 employees at the plant with less than five years of service from vesting in their pension benefits. \textit{Id.} This evidence, according to the plaintiffs, was sufficient to raise an inference of a § 510 violation and to defeat a summary judgment motion. \textit{Id.}

\textsuperscript{97} \textit{Id.}

\textsuperscript{98} \textit{Id.} The court found that the plaintiffs had "pointed to no evidence suggesting that Levi Strauss closed the San Antonio plant because of high pension and benefit costs at that plant." \textit{Id.}


\textsuperscript{100} \textit{See infra} Part I.D.3 (discussing the impact of changes in Title VII on § 510 jurisprudence).

\textsuperscript{101} Title VII § 703(m), as amended by the Civil Rights Act of 1991, deals specifically with mixed motive cases brought under Title VII. Section 703(m) states: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1964 § 703(m), amended by 42 U.S.C. § 2000e-2(m) (1994).

\textsuperscript{102} For examples of judicial use of the Title VII proof model in § 510 cases, see \textit{Gavalik v. Continental Can Co.}, 812 F.2d 834, 852 (3d Cir. 1987); \textit{Colizza v. United States Steel Corp.}, No. 86-561, 1989 WL 407241, at *10
ERISA, Title VII is a worker protection statute, enacted to provide a judicial remedy for victims of employment discrimination. Under Title VII, an employer who makes an employee hiring, firing, or classification decision on the basis of race, color, religion, national origin, or sex faces liability.

In Title VII adjudication, the type of evidence available to the plaintiff on the issue of the defendant's intent determines the appropriate proof model. The proof model when direct evidence of intent is available differs from the proof model imposed on cases proven by circumstantial evidence.


103. Section 703 of Title VII defines "unlawful employment practice" as follows:

(a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


104. Id.

105. Title VII provides limited exemptions from liability for religious organizations. Id. § 2000e-1(a).

106. Under Title VII, the Supreme Court established two proof models to be used in mixed motive cases. See Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (outlining the direct evidence test); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) (outlining the circumstantial evidence test). Courts applying § 510 have adopted these models. See, e.g., Gavalik v. Continental Can Co., 812 F.2d 834, 860 (3d Cir. 1987) (applying the circumstantial evidence proof model). If a plaintiff has direct evidence of the employer's impermissible motivation, the court will apply the Price Waterhouse formulation. The Supreme Court held:

[When a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.

Price Waterhouse, 490 U.S. at 258. Title VII was amended in 1991 to respond to Price Waterhouse. 42 U.S.C. § 2000e-1 to -17 (1994). The 1991 Amendments further provide that if the plaintiff makes a successful showing of employer liability under § 703(m) and the employer demonstrates that the same action would have been taken in the absence of the impermissible motive, the plaintiff can only claim injunctive relief, attorney's fees and costs. Id. § 2000e-5(g)(2)(B). In such a situation, the plaintiff shall not be entitled to damages or to an "order requiring any admission, reinstatement, hiring, promotion, or payment." Id.
When direct evidence of an employer's impermissible motivation does not exist, courts use a proof model initially espoused in *McDonnell Douglas Corp. v. Green.* The *McDonnell Douglas* test requires a Title VII plaintiff to show membership in a protected class, application and qualification for an open employment position with the defendant, plaintiff's rejection from the position, and the employer's continued search for an individual with the plaintiff's qualifications to fill the position. As refined by subsequent decisions, the establishment of a prima

If a plaintiff only has circumstantial evidence of the employer's impermissible motivation, the court should apply the *McDonnell Douglas/Burdine/Hicks* model. The Supreme Court in *McDonnell Douglas* established the proof model that would be applied to mixed motive situations in which the plaintiff could only establish circumstantial evidence of the impermissible motivation. *McDonnell Douglas,* 411 U.S. at 802-04. The Court held:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. ... The burden then must shift to the employer to articulate some legitimate nondiscriminatory reason for the employee's rejection. ... [The employee] must ... be afforded a fair opportunity to show that ... stated reason ... was in fact pretext.

*Id.*

The Court's holding in *McDonnell Douglas* was further modified by the Court's subsequent holdings in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981) and *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742, 2756 (1993). The Court in *Burdine* held that once a plaintiff establishes a prima facie case under *McDonnell Douglas,* the burden shifts to the defendant "to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected ... for a legitimate nondiscriminatory reason." *Burdine,* 450 U.S. at 254. The defendant need not persuade the court that it was actually motivated by the proffered reasons. *Id.* Further, it is the plaintiff who holds the ultimate burden of persuasion to convince the factfinder that the "proffered reason was not the true reason for the employment decision." *Id.* at 256. In *Hicks,* the Supreme Court further defined the proof model in circumstantial evidence mixed motives cases. *Hicks,* 113 S. Ct. at 2756. The Court held that just because the "employers reason is unpersuasive, or even obviously contrived" that "does not necessarily establish that the plaintiffs proffered reason of race is correct. That remains a question for the factfinder to answer." *Id.*


108. *Id.* at 802.

109. *See Burdine,* 450 U.S. at 254 (refining the requirements for establishment of a prima facie case). For a further discussion of the continual refinement of the circumstantial evidence test, see *infra* notes 124-130 and ac-
facie case under the *McDonnell Douglas* test simply requires a plaintiff to produce circumstantial evidence.110 Once the *McDonnell Douglas* prima facie case is established, the burden shifts to the defendant to offer a legitimate reason for the employment decision, under the Supreme Court decision in *Texas Department of Community Affairs v. Burdine*.111

In Title VII cases in which direct evidence of an impermissible motivation does exist as one of many possible motivations for the employment decision (the paradigm mixed motive situation), courts employ the test set forth in *Price Waterhouse v. Hopkins.*112 Under *Price Waterhouse*, the plaintiff must establish that “an impermissible motive played a motivating part in an adverse employment decision.”113 Once established, the burden then shifts to the defendant to show, by a preponderance of the evidence, that it “would have made the same decision in the absence of the unlawful motive.”114

2. Post-1991 Title VII

Both Congress and the courts have considered Title VII issues in the years following the establishment of the circumstantial and direct evidence models. In 1991, Congress reacted to the Court’s decision in *Price Waterhouse* by passing the 1991 Amendments to the Civil Rights Act of 1964.115 Likewise, in 1993, the Supreme Court refined the circumstantial evidence model in *St. Mary's Honor Center v. Hicks.*116

The amended Title VII provides that once plaintiffs establish the use of an impermissible motivation, they have established an “unlawful employment practice.”117 Even if the defendants can establish that the decision would have been made without taking the impermissible classification into considera-

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companying text. This circumstantial evidence model will be referred to in the text as the *McDonnell Douglas/Burdine/Hicks* model.


112. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (outlining the proof model that should be applied in mixed motive employment discrimination cases where there is direct evidence of discriminatory intent). This decision has been partially overturned by the Civil Rights Act of 1991. *See infra* notes 115-118 (discussing the changes made to Title VII by the 1991 amendments).


114. *Id.* at 250.


tion, they still face liability under Title VII. The liability faced by the defendants in these cases is limited to injunctive relief, attorney's fees and costs.

For its part, the Supreme Court refined the burden-shifting mechanism of *McDonnell Douglas* in *Hicks*. The Court held that even if the factfinder in a circumstantial evidence case rejects the defendant's proffered reasons, a finding for the plaintiff is not mandated. The factfinder must determine that the employer's decision was based upon the plaintiff's membership in a protected group.

3. Application of Title VII Proof Models to Section 510 Plant Closing Cases

The application of Title VII proof models to § 510 cases involves the judicial acceptance of circumstantial evidence to establish a violation, and the further application of the Civil Rights Act of 1991 to § 510 mixed motive cases. If circumstantial evidence of a § 510 violation is permitted, then the court, following the Title VII proof model, will apply a different evidentiary burden upon both the plaintiff and the defendant. Likewise, if direct evidence of intent is proffered by the plaintiff, as is the case in a traditional mixed motive scenario, the court will impose the post-1991 Civil Rights Amendments burden-shifting mechanism.

a. Judicial Acceptance of Circumstantial Evidence in Title VII

Obtaining direct evidence that an employer specifically intended to close a plant for the purpose of interfering with its employees' pension benefits is difficult. Most plaintiffs do

118. 42 U.S.C. § 2000e-5(g)(2)(B) (1994). The statute provides that once an individual proves a violation under the mixed motive section, if the defendants can prove it would have made the decision anyway, the court may grant declaratory and injunctive relief, attorney's fees and costs. *Id.* The court may not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment. *Id.*


120. *Id.*

121. *Id.*

122. *See supra* notes 107-111 and accompanying text (discussing circumstantial evidence proof models).

123. *See supra* notes 112-114 and accompanying text (discussing direct evidence proof models).

not possess the proverbial "smoking gun" with which they can establish that the company intentionally interfered with the vesting of pension benefits. Under a Title VII analysis, when no direct evidence of intent exists, this showing of intent can be demonstrated through circumstantial evidence.

The judicial acceptance of a proof model based upon circumstantial evidence in a § 510 claim dispenses with any requirement that the plaintiff prove actual purpose or, more simply, a direct causal link between the interference with the employee's pension benefits and the adverse employment decision. A plaintiff instead need only satisfy the requirements of McDonnell Douglas to shift the burden of proof to the employer.

Due to the lack of direct evidence of intent, adjudication of mixed motive plant closing cases under § 510 often involves the application of the McDonnell Douglas circumstantial proof model. In Gavalik v. Continental Can Co., the Third Circuit set forth the essential elements of a § 510 claim based on circumstantial evidence.

record gives the least indication, that Conoco entered this six hundred million dollar sale of assets for the purpose of preventing the plaintiffs from receiving [early retirement opportunity].


126. See Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir. 1987) ("In most cases, however, specific intent to discriminate will not be demonstrated by 'smoking gun' evidence. As a result, the evidentiary burden in discrimination cases may also be satisfied by the introduction of circumstantial evidence.").


128. See Continental Can, 812 F.2d at 852 (adopting the McDonnell Douglas test for § 510 claims); see also Pickering v. USX Corp., 809 F. Supp. 1501, 1532 (C.D. Utah 1992) (noting that in deciding cases under § 510 courts apply the rules for analyzing discrimination claims developed under Title VII, and citing Continental Can as the appropriate test where no specific employer intent has been established); Nemeth v. Clark Equip. Co., 677 F. Supp. 899, 903 (W.D. Mich. 1987) (following the proof model established in Continental Can).

129. Continental Can, 812 F.2d at 852. Such a test does not strictly adhere to the McDonnell Douglas framework. See supra notes 107-111 (discussing the McDonnell Douglas proof model); see also Colizza, 1989 WL 407241, at *10 (describing the prima facie test as requiring a plaintiff to establish some prohibited employer conduct, taken for the purpose of interfering with the attainment of any right to which the employee may become entitled. Id. Once plaintiff satisfies these requirements, the employer "must articulate—but not prove—a legitimate, nondiscriminatory reason for the layoff of plaintiffs." Id. at *13; see also JOEL
The *Gavalik* court altered the *McDonnell Douglas* burden-shifting mechanism to "fit" into the context of plant closings. The court held that a plaintiff's prima facie case under § 510 must include: "(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."\(^{30}\)

b. **Mixed Motives and the 1991 Amendments**

The 1991 Amendments to the Civil Rights Act of 1964 (the 1991 Amendments) throw a wrench into both the circumstantial evidence and direct evidence tests. Prior to the 1991 Amendments, if the employee possesses "smoking gun" direct evidence, she can avail herself of the *Price Waterhouse*\(^{131}\) direct evidence test which permits an employer the opportunity to articulate a legitimate reason for the dismissal. After the 1991 Amendments, the use of the direct evidence test has resulted in almost certain employer liability where an impermissible motivation is established.\(^{132}\) The establishment of liability, however, remains uncertain as courts continue to disagree on the requisite level of intent.\(^{133}\)

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\(^{30}\) Friedman and Strickler point out:

Where a plaintiff alleges that she was chosen to be the victim of a reduction-in-force or other form of structural reorganization, it often would be impossible to satisfy the fourth element of the *McDonnell Douglas* prima facie case standard, i.e., that after her rejection, the position remained open and that the employer continued to seek applicants from persons of the plaintiff's qualifications. By definition, most victims are not replaced in reduction-in-force cases. ... Reduction-in-force cases also raise an interesting question concerning the second part of the *McDonnell Douglas* formula—i.e., that the plaintiff was qualified and performing satisfactorily. Now that the plaintiff has been discharged and her position no longer exists, how does she prove she is qualified? Qualified for what? Her nonexistent position?

\(^{131}\) "Although the four criteria set forth in *McDonnell Douglas* provide one way of establishing a prima facie case of employment discrimination, the proof necessary will vary according to the circumstances of the case."

\(^{132}\) For a discussion of the Civil Rights Act of 1991, see supra notes 115-118 and accompanying text.

\(^{133}\) For a discussion of the *Continental Can* court's formulation of the *McDonnell Douglas* test in the § 510 context, see supra note 129 and accompanying text.
Once an employee establishes a prima facie case resulting in liability, the employer can limit its liability by showing that it would have made the same decision despite the impermissible factor.\textsuperscript{134} The employee is then only entitled to injunctive relief, attorney's fees, and costs.\textsuperscript{135} Even with this limitation on available remedies, such injunctive relief could plausibly prohibit the closing of an ailing plant and could dramatically impact a corporation's business judgment, as well as its economic well-being.

Even if a plant's potential pay-out in pension benefits is only a collateral matter in the decision to close a plant and terminate employees,\textsuperscript{136} the company could still be held liable under § 510 under the 1991 Amendments. The finding of liability would not differ despite the fact that the decision to close the plant would have been made without the consideration of pension benefits.\textsuperscript{137}

\section*{II. LEGAL AND PRAGMATIC CONCERNS ASSOCIATED WITH EXTENSIVE CORPORATE LIABILITY UNDER SECTION 510}

Corporate liability under § 510 raises both legal and pragmatic concerns. On a threshold level, questions arise regarding the ultimate applicability of § 510 to plant closing situations.\textsuperscript{138} Once the court decides that § 510 applies, further questions surround the application of Title VII proof models to establish corporate liability.\textsuperscript{139}

\begin{itemize}
\item \textsuperscript{134} The Court in \textit{Price Waterhouse} found:
\begin{quote}
[An] employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed motives case is that a legitimate reason was present... Price Waterhouse already has made this showing... The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.
\end{quote}

\item \textsuperscript{135} \textit{See supra} note 118 (discussing possible employer liability).
\item \textsuperscript{136} For a prior case dealing with this issue, see \textit{Clark v. Coats & Clark, Inc.}, 990 F.2d 1217, 1224 (11th Cir. 1990).
\item \textsuperscript{137} For a prior case dealing with this issue, see \textit{Nemeth v. Clark Equipment Co.}, 677 F. Supp. 899, 909 (W.D. Mich. 1987).
\item \textsuperscript{138} \textit{See infra} Part II.A.
\item \textsuperscript{139} \textit{See infra} Part II.B.
\end{itemize}
A. The Possible Misapplication of Section 510 to Plant Closings

Courts have applied § 510 to plant closings without considering certain threshold concerns, such as the propriety of using a class-based approach, the type of employer intent required to establish liability, and the potential for absurd results in individual cases.

The first threshold issue involves the applicability of the statute to a class of individuals. Under a purely textualist approach to § 510, the statute only applies to cases in which an individual is discharged for the purpose of interfering with his or her pension benefits. Only a few courts, however, have addressed the issue surrounding whether § 510 applies to groups or to individuals. Most courts, without addressing the issue, make blanket assumptions that § 510 applies to both individuals and class action suits. Other courts that have

140. At least one court has acknowledged the absurdity of applying a purely textualist approach to § 510. See Phillips v. Amoco Oil Co., 614 F. Supp. 694, 723 (N.D. Ala. 1985) (finding it unlikely that § 510 was intended to outlaw the termination of all contingent future liabilities).

141. Recall that § 510 provides: “It shall be unlawful for any person to discharge . . . a participant or beneficiary . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .” ERISA § 510. The factfinder could plausibly find that the statute was only intended to cover cases of individuals who were discharged for the purpose of interfering with the attainment of pension benefits. In a suit brought under both the ADEA and ERISA § 510, the Supreme Court clarified its holding, stating that the court did not “mean to suggest that an employer lawfully could fire an employee in order to prevent his pension benefits from vesting. Such conduct is actionable under § 510 of ERISA.” Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993). This wording may intimate that the Court will accept the claim of an individual § 510 claimant, a finding consistent with the legislative history of ERISA. The Committee on Education and Labor reported that the primary purpose of ERISA “is the protection of individual pension rights.” H.R. REP. No. 93-533, at 3 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4639.

142. See McLendon v. Continental Can Co., 908 F.2d 1171, 1181-82 (3d Cir. 1990) (discussing liability both at the “class” and “individual level”); Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir. 1987) (discussing both individual and class action context under § 510).


Class-based discrimination, whether based on race, sex or, under ERISA, pension rights, is every bit as illegal as individualized discrimination. . . . ERISA does not distinguish between the termination of one employee and the termination of 100 employees. Either action is illegal if taken with the purpose of avoiding pension liability.

Id.
specifically addressed the issue have held that § 510 can only apply to action directed toward individual employees.\textsuperscript{144}

The second question surrounds the issue of intent. Courts require that plaintiffs establish intent in their prima facie case.\textsuperscript{145} Such intent can be established through either the direct evidence or the circumstantial evidence Title VII judicial models.\textsuperscript{146} Intent to "interfere" with pension benefits can be established by the plaintiff by proffering evidence that pension benefits played a role in the decision to close the plant.\textsuperscript{147} In applying Title VII proof models to § 510 cases, courts have differed in the role that they will allow pension benefits to play in the ultimate plant closing decision. Some courts have held that the plaintiffs need only prove that pension benefits were a "determinative factor" in the business decision.\textsuperscript{148} In determin-

144. Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1224-29 (11th Cir. 1993). The Clark court looked at the unique situations of each individual plaintiff to determine if the employer's action was "directed at ERISA rights in particular." Id. at 1224. Another court stated that "[t]he purpose of § 510 is to prevent discharge or constructive discharge of specific employees to prevent their pension rights from vesting." Bass v. Retirement Plan of Conoco, Inc., 876 F. Supp. 735, 746 (W.D. La. 1995) (emphasis added); see also West v. Butler, 621 F.2d 240, 246 (6th Cir. 1980) (finding that § 510 is aimed solely at protecting individual rights); Moehle v. NL Industries, Inc., 646 F. Supp. 769, 779 n.6 (E.D. Mo. 1986) (noting that § 510 only prohibits action aimed at individuals).

145. For statement of plaintiff's prima facie case, see supra note 129.


147. See supra notes 136-137 and accompanying text (discussing appropriate proof models).

148. See Continental Can., 812 F.2d at 860 ("[Section] 510 of ERISA requires no more than proof that the desire to defeat pension eligibility is "a determinative factor" in the challenged conduct."); Nemeth, 677 F. Supp. at 903 ("Plaintiffs need not prove that defendant's desire to interfere with their pension benefits was the sole reason for their termination."). The Nemeth court employed a "determinative factor" test which the court adopted from Continental Can. Id. This test requires that the plaintiff establish that the "desire to avoid pension liability was a determining factor in the decision to terminate their employment." Id. For the defendant to avoid liability upon a successful showing by the plaintiff, the defendant must prove that the same outcome would have occurred regardless of the impermissible motive. Id. If the defendant carries the burden on this point, the burden then shifts back to the plaintiff to demonstrate pretext. Id.

This formulation of a mixed motive proof model lacks any semblance of the McDonnell Douglas model. In the McDonnell Douglas/Burdine/Hicks formulation, the defendant need only offer a non-discriminatory motive for the employment decision. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1972). "The defendant need not persuade the court that it was actually motivated by the proffered reasons." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The burden then shifts to the plaintiff to argue (not
ing whether the pension benefits constituted a "determinative factor" in the plant closing decision, courts have made conflicting decisions based solely upon their discretionary powers.\textsuperscript{149}

The third issue involves the need to look for rationality in result. The continued expansion of § 510 into plant closing cases will invariably lead to absurd results because decisions to close plants always contain some calculation of pension benefits to ascertain the "true liabilities" of a particular plant.\textsuperscript{150} True, the managers are motivated "in part" by the rising cost of

\textquotedblleft demonstrate\textquotedblright) pretext. The ultimate decision remains with the factfinder as to whether the plaintiff has proved that the defendant's proffered reason was pretextual and that the defendant actually acted with a discriminatory motivation. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 501 (1993) (finding that once the defendant successfully carries his/her burden of production any presumption raised through plaintiff's establishment of a prima facie case "drops out of the picture"). The *Hicks* Court also states that it has "no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines . . . that the employer has unlawfully discriminated." *Id.* at 515.

After applying its "pro-plaintiff" test, the *Nemeth* court did not find liability on the part of the employer. The court held that "[w]hile termination of employees in order to reduce labor costs is not always illegal, ERISA prohibits such actions if the primary reason for high labor costs is pension liability." *Nemeth*, 677 F. Supp. at 907. The *Nemeth* court found that the employer would have made the decision even if it had ignored the cost of the pension plan altogether. *Id.* at 909. The court stated that

[The employer] sustained its burden of proving an alternative, non-discriminatory reason for its action. [The employer] would have made the same decision, even if it had factored pension benefits out of the study entirely, because the evidence showed that [the employer] was looking for the least costly alternative [between the two plants].

*Id.* at 910.

\textsuperscript{149} See *Moehle* v. NL Industries, Inc., 646 F. Supp. 769, 779 n.6 (E.D. Mo. 1986). The court rejected the plaintiff's attempt to use § 510 as a mechanism for liability. The court found:

Firstly, plaintiffs were vested[,] and [§ 510] is designed to prevent employers from discharging employees in order to prevent vesting. Secondly, plaintiffs cannot make a good faith allegation that the closure of the St. Louis plant and the termination of plaintiffs were done "for the purpose of interfering with [plaintiffs'] attainment of" benefits. The closure and termination had readily apparent business justifications. Thirdly, [§ 510] only prohibits action aimed at individuals. The decision to close a plant is not a [§ 510] violation, even though it necessarily interferes with the terminated employees' attainment of benefits, so long as the plant closure had business justification.

*Id.*

\textsuperscript{150} See *Cummings*, supra note 25, at 92 ("[U]t strikes me a fundamental mistake to force a business to operate with blinders on, to force a company to ignore an indisputable fact, when that fact is the only fact that counts—cost.").
potential pension payouts, but the pension benefits are not often the determinative factor in deciding to close the plant. They are only one of many factors, calculated to obtain the "bottom line," considered in the ultimate decision.

The imposition of a judicial rule that imposes extensive liability upon corporations negates the original two-pronged legislative purpose of providing regulation to private pension plans and encouraging their continued growth. Corporations are effectively placed in a "Catch-22" position: in exercising sound business judgment, corporations must take all possible expenses into consideration when calculating the "bottom line" of their business. But a company cannot close a plant

151. H.R. REP. NO. 93-533, at 3 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4639-40. The House of Representatives Report states that the "primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans." Id. The Report further states that

[ERISA] is designed to: (1) establish equitable standards of plan administration; (2) mandate minimum standards of plan design with respect to the vesting of plan benefits; (3) require minimum standards of fiscal responsibility by requiring the amortization of unfunded liabilities; (4) insure the vested portion of unfunded liabilities against the risk of premature plan termination; and (5) promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits.

Id. For the primary purpose of ERISA to coexist with the fifth enumerated goal, employers cannot be held to a standard which imposes virtually strict liability. If held to such a standard, the primary purpose may be achieved, but the knowledge of extensive liability would not encourage employers to develop private pension plans. See also Mishkind, supra note 38, at 432:

In enacting Section 510, Congress did not intend to proscribe the conduct of employers that seek to ensure their businesses' existence by adopting "survival plans" (which may include plant closings, reductions-in-force, reorganizations, position consolidations) undertaken for legitimate business reasons typically within the exercise of business judgment, and not with the specific and dominant intent of interfering with pension eligibility of individual employees.

Id.; see also Duane E. Thompson, et. al., Age Discrimination in Reduction-In-Force: The Metamorphosis of McDonnell Douglas Continues, 8 INDUS. REL. L.J. 46, 66 (1986) ("Clearly employers can legally opt to reduce their work force as a cost cutting device."). But see Gavalik v. Continental Can Co., 812 F.2d 834, 857 n.39 (3d Cir. 1987) (finding that § 510's essential purpose is "to prevent employers from intentionally interfering with impending pension eligibility whether motivated by malice toward the particular employee(s) or by a general concern for the economic stability of the company").

152. Langbein and Wolk ask rhetorically: "Do you think good managers make [plant closing] decisions ignorant of such fundamentally relevant information [as employee benefit costs]?") LANGBEIN & WOLK, supra note 20, at 127.
without affecting the ability of some employees to vest in their pension benefits. Courts have acknowledged the fact that in plant closing situations some pension benefits will always be affected.\textsuperscript{154}

**B. TITLE VII AND PLANT CLOSINGS—EXAMINING THE MODEL**

The Title VII model has been applied in plant closing contexts without an evaluation of whether the model is appropriate.\textsuperscript{155} An evaluation of the appropriateness of the Title VII model is needed in light of the dramatic legislative changes made to Title VII in 1991. Title VII now permits the finding of liability in cases in which the plaintiff proves that the defendants used an impermissible motive as one factor in making the employment decision.\textsuperscript{156} The plaintiff can establish an impermissible motivation through either direct or circumstantial evidence, resulting in the defendant's liability despite the fact that the defendant can prove that the action was also motivated by legitimate factors. This has the effect of collapsing the circumstantial and direct evidence analyses into one another. The continued application of Title VII (as amended) could inappropriately impose extensive liability upon corporations who decide to close plants.


\textsuperscript{154} See Hendricks v. Edgewater Steel Co., 898 F.2d 385, 390 (3d Cir. 1990) (stating that it could not "turn the company's decision to lay off employees during economic difficulties into an intention to violate ERISA"); Colizza v. United States Steel Corp., No. 86-561, 1989 WL 407241, at *14 (W.D. Pa. 1989) (finding that "in any massive reduction in force situation, a number of employees are bound to fall just short of the 'line' to qualify for enhanced benefits"); Moehle v. NL Industries, Inc., 646 F. Supp. 769, 779 n.6 (E.D. Mo. 1986) (holding that, where a plant closing and employee termination had readily apparent business justifications, plaintiffs could not even make a good faith allegation that employer was acting with the purpose of interfering with plaintiffs' attainment of benefits).

\textsuperscript{155} The application of Title VII to § 510 claims could well be misplaced. "Just as meanings are sometimes lost in the translation of expressions from one language to another, the utility of formulae can be lost in their migration across legal fields." Furcini v. Equibank, N.A., 660 F. Supp. 1436, 1440 (W.D. Pa. 1987).

\textsuperscript{156} For a discussion of the 1991 amendments, see *supra* notes 115-118 and accompanying text.
Despite questions raised about its ultimate applicability, courts continue to impose corporate liability based on plaintiffs' claims of § 510 violations in plant closing cases. Courts adjudicating these cases also impose a Title VII proof burden on § 510 litigants, notwithstanding the difficulty of reconciling pre-1991 precedents with the 1991 Amendments. Moreover, a mixed motive plant closing raises issues beyond the scope of a Title VII analysis, because the factfinder cannot look at how role-differing motivations affected the ultimate decision.

III. A REASONED RESPONSE TO SECTION 510 AND TITLE VII

Superficially, both ERISA and Title VII were intended to prohibit employment discrimination. However, the prohibitions of the two statutes are not directed toward the same animus. ERISA provides protection against economic discrimination, while Title VII provides protection against discrimination based on race, religion, national origin and sex. Thus, Title VII prohibits discrimination based upon immutable human characteristics while ERISA prohibits discrimination based upon economic standing.

If courts continue to utilize a Title VII approach in plant closing cases, the courts should fashion their analysis to fit current Supreme Court precedent (as evidenced in the evolving...
McDonnell Douglas proof model) on Title VII adjudication. In doing so, the courts would promote consistency in judgment and provide a standard for corporations to use in implementing plant closing decisions.

A. CIRCUMSTANTIAL EVIDENCE REEXAMINED

In mixed motive cases of circumstantial evidence, the courts should adopt a third prong to their current McDonnell Douglas/Burdine proof model. This third prong is embodied in the Supreme Court's holding in St. Mary's Honor Center v. Hicks. The Hicks prong would require a plaintiff to prove that defendant's proffered reason for closing the plant is pretextual.

Courts should also not permit a mechanical application of the McDonnell Douglas prima facie case to plant closing cases. The Supreme Court recently ruled that "the very name 'prima facie case' suggests there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes" a rebuttable presumption. In requiring such a "logical connection" between the elements of a plaintiff's prima facie case and the employer's motivation, the circumstantial evidence model appears to be developing into a proof model which may offer some consistency in § 510 cases.

B. ANOTHER LOOK AT THE "SMOKING GUN"

Cases involving direct evidence of employer intent similarly create liability problems for employers. The issue facing employers in these cases is when, if ever, can an employer take pension costs into consideration when closing a facility. Could, for example, a cost-benefit analysis which included pension

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162. The current “two-pronged” approach stems from the McDonnell Douglas prima facie case combined with the Burdine/Hicks burden-shifting mechanism. For further discussion of the McDonnell Douglas/Burdine/Hicks model, see supra notes 107-111 & 119 and accompanying text.


164. Id. at 508.


166. It is difficult to rely on this ruling to provide a method of consistent analysis in § 510 cases, because the Supreme Court has not yet ruled on the expansion of Title VII proof models to § 510. The issue thus remains open for development in the circuits. A piecemeal adaptation will only serve to exacerbate current problems associated with varying analyses under § 510.
benefits as only one of many factors be considered the proverbial "smoking gun" that would fix extensive liability on the employer?

C. CONTINENTAL CAN (THE PARADIGM) AND PRICE WATERHOUSE

Mixed motive cases involving direct evidence of intent, such as Continental Can's "liability avoidance program," provide a closer case for liability. Such a case brought under the current text of § 510 should be examined under a Price Waterhouse proof model. Under this model, if the plaintiffs prove through the use of direct evidence that pension benefits played a "motivating part" in the plant closing decision, the defendants can avoid liability by proving by a preponderance of the evidence that the same decision would have been made without taking the impermissible factor into consideration. The 1991 Civil Rights Act should not mandate liability upon the finding of an impermissible motivation. Instead the defendants should be given the opportunity to establish a permissible motivation.

D. THE CONSISTENT SOLUTION

Instead of facing uncertain liability under § 510, Congress could allow companies to opt out of pension programs and

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167. For a discussion of the use of pension benefits as one of many factors in a plant closing decision, see supra Part I.D.3.b.
169. See supra notes 112-114 and accompanying text (outlining the Price Waterhouse direct evidence test).
171. Id.
172. Companies with existing pension plans would conceivably be required to adhere to the termination requirements of ERISA. Such action, to avoid the uncertain liability problems arising under § 510 as addressed in this Note, should not be initiated on the eve of a plant closing decision. Issues such as whether a plan termination decision could be made on the eve of a plant closing decision, and plan termination generally, are beyond the scope of this Note. For a complete discussion of pension plan terminations, see EDWARD THOMAS VEAL & EDWARD R. MACKIEWICZ, PENSION PLAN TERMINATIONS § 1.2 (1989).
173. The "pension plans" that employers would opt out of would be "defined benefit plans." A defined benefit plan is a retirement plan that (1) expresses the benefit as a certain amount to be paid at an employee's retire-
instead promote the use of Individual Retirement Accounts by their employees. Companies could opt out of a pension promise because pension plans are voluntary in nature. While such a solution would provide a means of avoiding § 510

174. Individual Retirement Accounts are one example of a “defined contribution plan.” ERISA § 3(34) defines a defined contribution plan as a “pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant’s account . . . .” The number of defined contribution plans have been increasing over the past ten to fifteen years. See supra note 173, at 919. One reason for the increase in the number of defined contribution plans is that much of ERISA does not apply to defined contribution plans, thus an employer is not subject to the strict ERISA regulations while still providing a retirement option for its employees. LANGBEIN & WOLK, supra note 20, at 44. This sentiment is echoed by Clark and McDermed. They write: “The long-run trend away from defined benefit plans, however, is consistent with the evolution of federal pension regulation since 1974.” ROBERT L. CLARK & ANN A. MCDERMED, THE CHOICE OF PENSION PLANS IN A CHANGING REGULATORY ENVIRONMENT 106 (1990).

175. LAWRENCE E. ROTHSTEIN, PLANT CLOSINGS: POWER, POLITICS, AND WORKERS 47 & n.71 (1986) (finding that the labor movement achieved partial and fragile successes only in legislation providing minimum standards of protection for workers from loss of pension benefits under ERISA). The author explains that the “fragility of these successes has become evident since 1982 with the . . . encouragement of businesses to opt out of pension programs altogether by promoting the Individual Retirement Account . . . .” Id. An empirical study completed by Coopers & Lybrand explains the paradox. The study states:

There is currently no law that requires an employer to offer employee benefits other than those mandated under Worker’s Compensation, Social Security, unemployment insurance, and in some states, disability insurance. However, once an employer does offer a plan, that plan becomes subject to many laws. At a minimum, employee benefit plans are subject to the requirements of [ERISA].

COOPERS & LYBRAND L.L.P., CLOSING PLANTS: PLANNING AND IMPLEMENTING STRATEGIES 37 (1986). If companies provide pension programs for their employees, they are subject to the requirements of ERISA. If companies do not provide pension programs to their employees, they avoid ERISA.

176. Indeed, Congress recognized ERISA’s limited scope precisely because of the “voluntary nature of private retirement plans.” H.R. REP. NO. 93-533, at 3 (1974), reprinted in 1974 U.S.C.C.A.N 4639, 4639. The Committee on Education and Labor noted that the bill “represents an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations.” Id.; see also Mishkind, supra note 38, at 429 (“ERISA protects only those benefits that an employer voluntarily agrees to provide.”).
liability, it would also undermine the ultimate goals of ERISA, because by opting out of the pension program a company can opt out of ERISA regulation. However, this is one road for companies to take when discussing the possibility of uncertain ERISA liability.

Consistent application of § 510 in plant closing cases is necessary to insure corporate profitability, employee security and judicial efficiency. By adhering to pre-1991 Supreme Court direct evidence proof models and adopting current Supreme Court analysis in cases involving circumstantial evidence, courts faced with mixed motive cases under § 510 can insure this consistency in adjudication and equity in result, while achieving the purposes of ERISA.

CONCLUSION

Courts finding a valid cause of action under § 510 should examine the totality of the plant closing situation. This examination would take into consideration not only the concerns of the affected employees but also the legitimate business concerns of the employer. The consistent application of post-1991 Supreme Court decisions in cases involving circumstantial evidence, and pre-1991 Supreme Court decisions in cases involving direct evidence, would permit more equitable results.

Until Congress alters the absolutist language of the statute or the Supreme Court rules on the applicability of the Title VII proof models, courts need to take a more pragmatic approach, examining not only the economic impact on employees, but also the economic impact on the employer. Such a pragmatic examination, coupled with the consistent application of Title VII proof models, will insure that companies continue to supply pension security for their employees, thus lessening the uncertain liability faced by companies in making plant closing


The enactment of progressive and effective pension legislation is also certain to increase stability within the framework of our nation's economy, since the tremendous resources and assets of the private pension plan system are an integral party of our economy. It will also serve to restore credibility and faith in the private pension plans designed for American working men and women, and this should serve to encourage rather than diminish efforts by management and industry to expand pension plan coverage and to improve benefits for workers.

Id.
decisions and effectuating the pension promise embodied in ERISA.