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# Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?

Joan Vogel\*

The recent sharp increase in the cost of medical and disability benefits has prompted employers to take a variety of defensive measures. Some have reorganized their plans to reduce benefits.<sup>1</sup> Others have taken a different approach: they discharge—or refuse to hire—employees who have become or are thought likely to become seriously ill.<sup>2</sup> Advances in genetic and other medical screening procedures are likely to increase this latter trend. Most scholarly commentary has focused on whether federal antidiscrimination laws forbid excluding employees who are or may be susceptible to occupational diseases.<sup>3</sup> Curiously, very little commentary has addressed relief under the Employee Retirement Income Security Act (ERISA), a statute specifically designed to safeguard workers' pensions and other employee benefits.<sup>4</sup>

This Article will explore whether and to what extent ERISA provides redress for employees who are discharged or otherwise disadvantaged because they are considered insurance risks. In general, section 510 prohibits employers from taking action against participants or beneficiaries<sup>5</sup> for exercising any right to which they are entitled under their benefit

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1 See Bernstein, *Chopping Health Care Costs: Labor Picks Up An Ax*, BUS. WK., March 31, 1986, at 78-80; Sieverts, *Health Cost Containment Strategies*, in EMPLOYEE BENEFITS HANDBOOK §§ 22-1 to 25 (F. Foulkes ed. Supp. 1985); Spring, *Medical Benefit Plan Costs*, 29 PERSONNEL ADMIN. 64-72 (1984); Stone & Reitz, *Health Care Cost Containment and Its Impact on Employee Relations*, 29 PERSONNEL ADMIN. 27, 27-28 (1984); Walsh, *Health Cost Containment Strategies*, in EMPLOYEE BENEFITS HANDBOOK §§ 22-1 to 22-4 (F. Foulkes ed. 1982).

2 The employer may also be concerned with medical claims filed by the employee's spouse and children. Most health insurance plans cover spouses and dependent children. See *Bittner v. Sadoff & Rudoy Indust.*, 728 F.2d 820 (7th Cir. 1984) (employer fired employee for bringing action to challenge termination of benefits for his son's illness).

3 See *infra* note 43.

4 ERISA §§ 1-4082, 29 U.S.C. §§ 1001-1461 (1982). This Article, which focuses on the anti-retaliation provisions of ERISA, is part of a larger study the author is conducting of the role of antiretaliation principles in American law generally. A forthcoming article surveys several areas of U.S. law in which an individual when acting for an impermissible purpose is barred from taking action that would normally be permissible, in particular when he or she is retaliating for another's previous exercise of a statutory or constitutional right. American scholarship lacks a coherent theory of antiretaliation law. The article will compare the experience of other legal systems in an effort to formulate fair and just antiretaliation laws and principles in the United States.

5 A participant is an employee or former employee who is or may become eligible to receive a benefit from an employee benefit plan. ERISA § 3(7), 29 U.S.C. § 1001(7) (1982). Also, note that a "participant" may not include all employees but only employees who are or will be eligible for benefits under the terms of the plan. Probationary or part-time employees may not be participants in health and disability insurance plans if they are not covered. A beneficiary is a person designated by a participant to receive benefits or a person who can receive benefits under the terms of a plan. 29 U.S.C. § 1001(8) (1982).

plans or the Act or from interfering with the attainment of any right under the Act or a plan.<sup>6</sup> Congress included this provision in ERISA

6 ERISA § 510, 29 U.S.C. § 1140 (1982). See also *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987); *Zipf v. American Tel. & Tel. Co.*, 799 F.2d 889 (3d Cir. 1986); *Burke v. Latrobe Steel Co.*, 775 F.2d 88 (3d Cir. 1985); *Amato v. Western Union Int'l, Inc.*, 596 F. Supp. 963 (S.D.N.Y. 1984), *aff'd in part, rev'd in part*, 773 F.2d 1402 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1167 (1986); *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd sub nom.*, *Brooks v. Burlington Indus., Inc.*, 106 S. Ct. 3267 (1986); *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805 (10th Cir. 1984); *Aronson v. Servus Rubber, Div. of Chromalloy*, 566 F. Supp. 1545 (D. Mass. 1983), *rev'd*, 730 F.2d 12 (1st Cir.), *cert. denied*, 469 U.S. 1017 (1984); *Bittner v. Sadoff & Rudoy Indus.*, 490 F. Supp. 534 (E.D. Wis. 1980), *aff'd in part, rev'd in part*, 728 F.2d 820 (7th Cir. 1984); *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984); *Ursic v. Bethlehem Mines*, 556 F. Supp. 571 (W.D. Pa.), *aff'd in part, rev'd in part*, 719 F.2d 670 (3d Cir. 1983); *Kross v. Western Elec. Co.*, 534 F. Supp. 251 (N.D. Ill. 1982), *aff'd in part, rev'd in part*, 701 F.2d 1238 (7th Cir. 1983); *Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911 (2d Cir.), *cert. denied*, 459 U.S. 1039 (1982); *Marquardt v. North Am. Car Corp.*, 652 F.2d 715 (7th Cir. 1981); *Dependahl v. Falstaff Brewing Corp.*, 491 F. Supp. 1188 (E.D. Mo. 1980), *aff'd in part, rev'd in part*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 1687 (1981); *West v. Butler*, 621 F.2d 240 (6th Cir. 1980); *Drinkwater v. Metropolitan Life Ins. Co.*, No. 85-4468-Y (D. Mass. May 21, 1986) (LEXIS, Genfed library, Dist File); *Donohue v. Custom Management Corp.*, 634 F. Supp. 1190 (W.D. Pa. 1986); *Bemis v. Hogue*, 635 F. Supp. 1100 (E.D. Mich. 1986); *Quattrochi v. Allied Chem. Corp.*, 633 F. Supp. 838 (E.D. Pa. 1986); *Barnes v. Insurance Co. of N. Am.*, 631 F. Supp. 248 (D. Minn. 1986); *Corum v. Farm Credit Servs.*, 628 F. Supp. 707 (D. Minn. 1986); *Lackus v. Acme Mkts., Inc.*, No. 85-1341 (E.D. Pa. Jan. 29, 1986) (LEXIS, Genfed library, Dist File); *Brill v. Central States, Southeast and Southwest Areas Pension Fund*, No. 82 C 7973 (N.D. Ill. Dec. 20, 1985) (LEXIS, Genfed library, Dist file); *Hamann v. International Harvester Co.*, No. 84 C 10552 (N.D. Ill. Oct. 30, 1985) (LEXIS, Genfed library, Dist file), *aff'd*, 801 F.2d 1343 (7th Cir. 1986); *Independent Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 620 F. Supp. 447 (N.Y. 1985), *aff'd*, 789 F.2d 139 (2d Cir. 1986); *Inglis v. Bethlehem Steel Corp.*, No. 85-1344 (E.D. Pa. June 25, 1985) (LEXIS, Genfed library, Dist file); *Beckwith v. International Mill Servs., Inc.*, 617 F. Supp. 187 (E.D. Pa. 1985); *Baker v. Kaiser Aluminum and Chem. Corp.*, 608 F. Supp. 1315 (N.D. Cal. 1984); *McKay v. Capital Cities Communications, Inc.*, 605 F. Supp. 1489 (S.D.N.Y. 1985); *Ferguson v. Freedom Forge Corp.*, 604 F. Supp. 1157 (W.D. Pa. 1985); *Shipper v. Avon Prods., Inc.*, 605 F. Supp. 701 (S.D.N.Y. 1985); *Fischer v. Doremus & Co.*, No. 83 C 8214 (N.D. Ill. Feb. 4, 1985) (LEXIS, Genfed library, Dist File); *Garry v. TRW, Inc.*, 603 F. Supp. 157 (N.D. Ohio 1985); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492 (D.N.J. 1985); *Corkery v. SuperX Drugs Corp.*, 602 F. Supp. 42 (M.D. Fla. 1985); *King v. James River-Pepperell, Inc.*, 592 F. Supp. 54 (D. Mass.), *later proceeding*, 593 F. Supp. 1344 (D. Mass. 1984); *Citro v. TRW, Inc.*, No. C82 2911 (N.D. Ohio Oct. 12, 1984) (LEXIS, Genfed library, Dist file); *Bumpers v. International Mill Servs., Inc.*, 595 F. Supp. 166 (E.D. Pa. 1984), *later proceeding*, *Beckwith v. International Mill Servs., Inc.*, 617 F. Supp. 187 (E.D. Pa. 1985); *Wilke v. Morton Thiokol, Inc.*, No. 84 C 1352 (N.D. Ill. June 26, 1984) (LEXIS, Genfed library, Dist file); *Toni v. National Business Forms Co.*, No. 84 C 1541 (N.D. Ill. May 7, 1984) (LEXIS, Genfed library, Dist file); *Goins v. Teamsters Local 639-Employers Health & Pension Trust*, 598 F. Supp. 1151 (D.D.C. 1984); *Folz v. Marriott Corp.*, 594 F. Supp. 1007 (W.D. Mo. 1984); *Cowden v. Montgomery County Soc'y for Cancer Control*, 591 F. Supp. 740 (S.D. Ohio 1984); *Watkinson v. Great Atl. and Pac. Tea Co.*, 585 F. Supp. 879 (E.D. Pa. 1984); *Korn v. Levine Bros. Iron Works Corp.*, 574 F. Supp. 836 (S.D.N.Y. 1983); *Kelly v. International Business Mchs. Corp.*, 573 F. Supp. 366 (E.D. Pa. 1983), *aff'd mem.*, 746 F.2d 1467 (3d Cir. 1984); *Watson v. Fuller Brush Co.*, 570 F. Supp. 1299 (W.D. Mich. 1983); *Shestina v. Cotter & Co.*, 32 Fair Empl. Prac. Cas. (BNA) 674, 33 Empl. Prac. Dec. (CCH) ¶ 34,094 (N.D. Ohio 1983); *Gordon v. Matthew Bender & Co.*, 562 F. Supp. 1286 (N.D. Ill. 1983); *Maxfield v. Central States, Southeast and Southwest Areas Health, Welfare & Pension Funds*, 559 F. Supp. 158 (N.D. Ill. 1982); *Gavalik v. Continental Can Co.*, 3 Employee Benefits Cas. (BNA) 1311 (W.D. Pa.), *later proceeding*, 3 Employee Benefits Cas. (BNA) 2023 (W.D. Pa. 1982); *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983 (S.D.N.Y. 1982), *aff'd mem.*, 742 F.2d 1441 (2d Cir. 1983); *Shefton v. U.S. Steel Corp.*, 2 Employee Benefits Cas. (BNA) 1853 (D. Utah 1981); *Silverman v. Wilmit*, No. 79 Civ. 6736 (S.D.N.Y. Apr. 22, 1981) (LEXIS, Genfed library, Dist file); *International Molders and Allied Workers Union v. Aquarius Shoe Corp.*, 511 F. Supp. 361 (E.D. Mo. 1981), *aff'd*, 770 F.2d 43 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 800 (1986); *Turner v. CF&I Corp.*, 510 F. Supp. 537 (E.D. Pa. 1981); *McGinnis v. Joyce*, 507 F. Supp. 654 (N.D. Ill. 1981); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979); *Lucas v. Warner & Swasey Co.*, 475 F. Supp. 1071 (E.D. Pa. 1979); *Baeten v. Van Ess*, 474 F. Supp. 1324 (E.D. Wis. 1979); *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271 (E.D. Pa. 1977); *Price v. Carmack Datsun, Inc.*, 124 Ill. App. 3d 979, 464 N.E.2d 1245

primarily to prevent employers from circumventing the Act's requirements by firing employees before their pension benefits vested.<sup>7</sup> The provision is not limited to pension benefits, however, but extends to welfare benefits, such as medical and disability insurance, which are as important to employees as pensions.

A number of recent decisions addressed medical insurance and other welfare benefits lost when the employee suffered illness or incapacity.<sup>8</sup> This Article will examine an area where the case law is sparse: where health problems arise outside the job setting. Section 510, its history, the subsequent case law and similar antidiscrimination laws should yield an approach under which employees may recover under ERISA when their employer improperly deprives them of their medical and disability benefits.

Part I of this Article will analyze the economic incentives under medical and disability insurance plans that employers have to eliminate medically risky employees. Part II will explore four situations where these incentives are especially strong: (1) when the employee reports an illness or injury; (2) when medical or genetic testing identifies employees as a greater than average risk of incurring serious illnesses; (3) when the employer learns that the employee has an unhealthful lifestyle; and (4) when absenteeism serves as a proxy for a medical condition. Part III will show how courts should analyze claims in such settings. In particular, it will show that section 510's provisions may be interpreted and extended by borrowing principles and approaches from cases interpreting other remedial labor legislation, such as Title VII,<sup>9</sup> the Age Discrimination in Employment Act,<sup>10</sup> and the National Labor Relations Act (NLRA).<sup>11</sup> Part III will also explore what defenses should be available to employers and what remedies are appropriate if the employee prevails.

## I. The Structure of Health and Disability Insurance Plans

Unlike pension plans, ERISA imposes few substantive requirements on insurance plans. Minimum funding, participation and vesting requirements do not apply to welfare benefits; employers have great latitude in structuring them.<sup>12</sup> As a result, the benefits available under

(1984), *aff'd*, 109 Ill. 2d 65, 485 N.E.2d 359 (1985); *Imler v. Southwestern Bell Tel. Co.*, 8 Kans. App. 2d 71, 650 P.2d 712 (1982).

7 S. REP. NO. 127, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4872; *West v. Butler*, 621 F.2d 240, 243-45 (6th Cir. 1980).

8 See cases cited *supra* note 6.

9 42 U.S.C. §§ 2000e to e-17 (1982).

10 29 U.S.C. §§ 621-634 (1982).

11 N.L.R.A. § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982), in relevant part, provides:

(a) It shall be an unfair labor practice for an employer—

....

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

12 ERISA §§ (1) & 2(A), 29 U.S.C. §§ 1002(1) & 2(a) (1982), distinguishes between welfare and pension benefit plans:

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was established or maintained by an employer or by an employee organization, or by both, to the extent that such plan . . . was established or . . . maintained

health and disability insurance plans vary widely from employer to employer.<sup>13</sup> For example, medical insurance plans may pay various amounts or percentages of medical expenses, cover certain procedures and not others, and require the employee to pay some of the cost of the insurance premiums.<sup>14</sup> Disability plans, which provide lost income to injured or sick employees, vary with respect to eligibility requirements, percentages of wages or salaries paid and the length of time over which the employee can receive benefits.<sup>15</sup> Thus, the more comprehensive and generous the benefits, the greater the costs to the employer if the employee or insured dependent becomes ill or injured.

Despite the variation in benefits offered, most medical and disability benefits are administered and financed in similar ways. For nonunion and most union employees, benefit plans are administered by the employer alone.<sup>16</sup> For union employees in multibargaining units, benefit plans are jointly administered by Taft-Hartley trusts.<sup>17</sup> To satisfy the requirements of the Labor Management Relations Act, payments must be made to a trust fund administered by an equal number of union and management trustees, payments must be made as specified in a written agreement, and all disputes which end in a deadlock must be submitted to an impartial arbitrator.<sup>18</sup> With a Taft-Hartley trust, the employer's responsibility is normally limited to making payments under the collective bargaining agreements. As a result, relatively few disputes arise and those that do rarely include claims of discrimination.<sup>19</sup> Where the em-

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for the purpose of providing . . . (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services or (B) any benefit described in section 186(c)(5) of [the Labor Management Relations Act], (other than pension on retirement or death . . . )

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was . . . maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . .

See also ERISA §§ 201 & 301, 29 U.S.C. §§ 1051 & 1081 (1982) (vesting, participation, and funding requirements do not apply to welfare benefit plans); *Hansen v. White Farm Equip. Co.*, 5 Employee Benefits Cas. (BNA) 2130, 2137 (N.D. Ohio 1984), *rev'd on other grounds*, 788 F.2d 1186 (6th Cir. 1986).

13 Unlike medical insurance plans, disability plans can be provided either through a welfare or a pension plan. See Brown, *Disability Benefit Plans*, in *EMPLOYEE BENEFITS HANDBOOK* §§ 18-25 (F. Foulkes ed. 1982).

14 *EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS* 139-45 (2d ed. 1985) [hereinafter *FUNDAMENTALS OF EMPLOYEE BENEFITS*].

15 *Id.* at 187-91.

16 See R.D. COOPER, *MULTIEMPLOYER HEALTH AND WELFARE PLAN OPERATIONS AND EXPENSES* 14 (1983). N. LEVIN, *ERISA AND LABOR-MANAGEMENT BENEFIT FUNDS* 1, 4-5 (1975) [hereinafter *LEVIN*].

17 Labor Management Relations Act § 302(c)(5), 29 U.S.C. § 186(c)(5) (1982), governs the structure of jointly administered plans. Jointly administered plans can be found in single employee bargaining units but they are not common. See N. LEVIN, *supra* note 16, at 245; D. MCGINN, *JOINT TRUST PENSION PLANS* 9-12 (1978).

18 LMRA § 302(c)(5), 29 U.S.C. § 186(c)(5) (1982).

19 There are only four cases involving jointly administered trust funds. These cases are as follows: *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805 (10th Cir. 1984); *Brill v. Central States, Pension Fund*, No. 82 C 7973 (N.D. Ill. July 31, 1986) (LEXIS, Genfed library, Dist file);

ployer administers the plans, as is the case with most plans, the employer has more opportunity to single out and take action against employees with medical risks. Moreover, the employer has far more medical information about employees and their dependents than when the benefit is administered by a third party.

Medical and disability insurance benefits are provided and paid for in three different ways. The most common method is for the company to purchase a group insurance policy from an insurance company. The insurance company then processes and pays all meritorious claims, determining the amount of the premium by the employer's experience rating. If employees and their families submit many expensive claims, the cost of the insurance premium will rise, and the employer may be tempted to eliminate the workers responsible.<sup>20</sup>

The second alternative is self-funding or self-insurance.<sup>21</sup> In a self-funded plan, the employer, rather than a third party insurer, directly pays for its employees' medical and disability claims.<sup>22</sup> Self-insured plans are commonly used by large, multistate employers. These plans save administrative costs, avoid the burden of complying with state insurance regulations, and give the employer considerable freedom in designing the plan.<sup>23</sup> If the employer is paying the benefit claims directly, then it will be concerned about employees who have or might contract catastrophic diseases. As claim-processor, the employer also acquires extensive knowledge about its employees' health.<sup>24</sup>

The third way is for the employer to have a self-insured plan which is administered and designed by an insurance company. The employer then has the advantages of self-insurance, in particular the ability to circumvent state regulation and flexibility in designing the benefits, while leaving the day-to-day administrative tasks to the insurance company.<sup>25</sup> Even though an insurance company processes the claims, the employer still has the same concern about costs as in the other two administrative and funding arrangements. In all three approaches, the employer is in a position to acquire a good deal of information about its employees' health histories.<sup>26</sup>

The administration and funding of disability benefits can be some-

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Goins v. Teamsters Local 639 Employers Health and Pension Trust, 598 F. Supp. 1151 (D.D.C. 1984); Maxfield v. Central States Welfare and Pension Funds, 559 F. Supp. 158 (N.D. Ill. 1982).

20 Walsh, *supra* note 1, §§ 22-7 to 22-8.

21 *Id.*

22 *Id.*

23 *Id.* Although ERISA § 514(a), 29 U.S.C. § 1144(a) (1982), preempts all state laws which "relate to any employee benefit plans," ERISA § 514(b)(2), 29 U.S.C. § 1144(b)(2), preserves state laws which regulate insurance. Therefore, if the plan purchases a policy from an insurance company, that policy is subject to state regulation including state laws which mandate that medical policies include coverage for certain medical procedures. However, employers can avoid these laws if the plan is self-insured. See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

24 Folz v. Marriott Corp., 594 F. Supp. 1007, 1014-15 (W.D. Mo. 1984). In a much-cited case, an employee was discharged shortly after informing his employer that he was diagnosed as suffering from multiple sclerosis. The court indicated that because the employer's medical plan was self-insured, the employer had an economic incentive to discharge the employee once it became aware that he was likely to file large medical claims.

25 Walsh, *supra* note 1, § 22-8.

26 Brown, *supra* note 13, §§ 18-21.

what different from that of medical insurance. The employer can provide disability benefits as separate welfare benefits or as part of a pension plan.<sup>27</sup> There are two general types of disability benefits: Short and long term. Short term benefits typically include sick pay plans and formal accident and sickness plans. When an employee qualifies for sick pay, the employer usually continues to pay his or her full salary for a specified period. The employer typically purchases an accident and sickness (A&S) plan from an insurance company. These plans provide a certain percentage of the employee's wages or salary, usually for twenty-six weeks. A&S benefits are normally available to the employee after a waiting period and after sick pay is exhausted. If the employee meets the eligibility criteria, the employer provides long term disability benefits either through a pension plan or by means of insurance. The benefits under a long term disability insurance plan can last several years or even until retirement. Disability pension plans usually provide lost income until the normal retirement age of sixty-five.<sup>28</sup> If the employer is providing benefits over a long period of time, it is thus concerned with the number of employees who will need these benefits. When the costs of medical and disability benefits are added together, serious injuries and chronic or catastrophic diseases can cost an employer an enormous amount of money. Many employers, understandably, will consider means of reducing these expenses.

## II. Targeting Medical Risks

Rising insurance costs, together with rapid advances in medical screening, place employees in jeopardy of losing their jobs if their employer believes they need or will need extensive medical and disability insurance benefits. This section will explore four general ways that the employer might seek to lower its insurance costs:<sup>29</sup> (1) by dismissing sick and injured employees; (2) by medical testing and screening of employees and terminating those who test positive; (3) by identifying and discharging employees with unhealthful lifestyles; and 4) by establishing rules on absenteeism which result in discharging employees before they qualify for benefits.

During the course of their work lives, many persons will become sick or injured and will need to file substantial medical and disability claims. Most also have medical and disability insurance obtained through their employment. Insurance, especially medical insurance, is crucial to receiving medical care in this country. If employees can lose their jobs just because they need their insurance or if they can be fired because they

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27 FUNDAMENTALS OF EMPLOYEE BENEFITS, *supra* note 14, at 189-90.

28 Brown, *supra* note 13, §§ 18-21.

29 Unlike other federal antidiscrimination statutes, ERISA § 510 covers both participants (employees) and beneficiaries (spouses and children). If an employer takes action against an employee because of a spouse's or child's medical claims, then ERISA creates a cause of action. See, e.g., *Bittner v. Sardoff & Rudoy Indus.*, 490 F. Supp. 534 (E.D. Wis. 1980), *aff'd in part, rev'd in part*, 728 F.2d 820 (7th Cir. 1984) (plaintiff claimed that he was fired for challenging termination of benefits to his son). Section 502 provides a cause of action for participants and beneficiaries. 29 U.S.C. § 1132 (1982).

pose risks of insurance claims in the future, few could afford the care they need, and the many safeguards in ERISA would be vitiated. Employers could promise benefits without having to worry about delivering on that promise. As this Article will indicate, benefit costs can be contained in many ways without creating a group of individuals facing destitution, unemployability and uninsurability.<sup>30</sup> The purpose of insurance is to pool risks; some will get sick or injured and others will not. If ERISA is to mean anything to employees and their families, it must prohibit employers from reducing insurance costs in ways that defeat this purpose.

### A. *Employees with Disease or Injury*

The most common and notorious form of aggressive cost-cutting is to terminate employees who become seriously ill or injured.<sup>31</sup> Because most medical plans cover family members, the employer may take similar action when an employee's family member is afflicted. For illustrative purposes, this section will examine two situations in which coverage is often terminated: Cancer and Acquired Immune Deficiency Syndrome (AIDS).

Cancer patients have long experienced difficulty in obtaining and keeping employment even if they have been free of the disease for many years.<sup>32</sup> This unfairness is especially serious because cancer occurs frequently—about thirty percent of the population will develop some form of cancer in their lifetimes.<sup>33</sup> Cancer treatment is often expensive; many must rely on medical insurance to obtain it.<sup>34</sup> Often, the patient will not be able to work during treatment so that disability benefits are essential to meeting everyday expenses. If cancer patients lose their jobs and their benefits, then the public ultimately will bear the costs of treating them and providing them with shelter and food.<sup>35</sup>

Employers take action against cancer patients in a variety of ways and for a variety of reasons. Cancer patients or even healthy employees found to have a history of cancer may be demoted or fired, transferred to another job, required to take medical exams even though the reasons are unrelated to employment, or refused employment. Even if they are hired, they are often excluded from medical and other benefit programs.<sup>36</sup> Often the measures are based on misconceptions about cancer. Many employers believe that a person diagnosed with cancer will die or become a great financial liability. Coworkers may shun the cancer pa-

30 See, e.g., *infra* notes 70-71 and accompanying text.

31 This Article will only discuss injuries and diseases which are not occupationally related. Occupational diseases and injuries are processed through the workers' compensation system, and that system is governed by state law, not ERISA.

32 See, e.g., Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 TEMPLE L.Q., 1, 2-7 (1985); Note, *Legal Recourse for the Cancer Patient-Returnee: The Rehabilitation Act of 1973*, 10 AM. J.L. MED. 309 (1985).

33 Hoffman, *supra* note 32, at 2-7.

34 See generally *Mamula v. Stralloy, Inc.*, 578 F. Supp. 563, 577 (S. D. Ohio 1983) (medical insurance is the "passport" to health care in this society).

35 Cancer is a term used to cover a number of diseases, and not all forms of cancer are life-threatening or debilitating. For example, most forms of skin cancer require little extended treatment if diagnosed early. Hoffman, *supra* note 32, at 2-6.

36 *A New Front in the War on Cancer*, 64 PERSONNEL J. 19 (1985).



tient out of groundless fear of contagion or because the coworker's illness reminds them of their own mortality.<sup>37</sup> These concerns are widespread even though many cancer patients fully recover from the disease and are not incapacitated or unable to work.<sup>38</sup> Nonetheless, many employers concerned about the cost of the health and disability benefits and the possibility of absenteeism may establish a policy of discharging all cancer patients.<sup>39</sup> If so, the employee may have a cause of action under ERISA. As this Article will later indicate, the employee must be able to show that the adverse decision was made with the intent to deprive him or her of benefits.<sup>40</sup> Intent is not always easy to prove.

In recent years, many AIDS patients have been subject to similar, if not harsher, treatment. Coworkers are often afraid to work with AIDS patients for fear of contracting the disease. The company and other coworkers may disapprove of the AIDS patient's actual or presumed sexual orientation.<sup>41</sup> The economic reasons for discharge are sobering. At present, it is estimated that the cost of treatment averages \$140,000 per patient; the disease is usually fatal.<sup>42</sup> If the company can discharge an employee with AIDS, then it may not have to bear these costs. Currently, there are no estimates of the cost of disability benefits, but these are undoubtedly high as well. As with cancer, employees may have a cause of

37 Hoffman, *supra* note 32, at 4-5; Note, *supra* note 32, at 310. One study showed that a quarter of all cancer survivors were fired from their jobs. Hoffman, *supra* note 32, at 3-4.

38 *Cancer and Job Discrimination*, 40 TRAINING & DEVELOP. J. 11-12 (1986); *A New Front in the War on Cancer* 64 PERSONNEL J. 19-22 (1985).

39 Hoffman, *supra* note 32, at 3-6. According to Hoffman, cancer survivors, that is those who have fully recovered from cancer, do not have any greater absenteeism or death rates significantly different from those who have not had cancer. *Id.* at 6.

Because these beliefs are so widespread and because discrimination against cancer survivors is so pervasive, Representative Biaggi has introduced a bill in Congress. The Cancer Patients Employment Rights Act of 1985, H.R. 1294, prohibits discrimination on the basis of cancer history. Hoffman, *supra* note 32, at 4-6; *supra* note 36. As will be discussed later, ERISA does not apply to job applicants. If an employer refuses to hire someone because they might cost more in insurance benefits, § 510 would not proscribe that conduct. By its terms, § 510 only covers participants and beneficiaries. See *infra* note 117 and accompanying text. Job applicants do not fall into either category. However, the employer may be liable under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1982), or state handicap laws because cancer or a cancer history is considered a handicap. See 28 C.F.R. § 41.3(b)(1)-(2) (1986); 34 C.F.R. § 104 app. A (1986); Hoffman, *supra* note 32, at 10-21; Richards, *Handicap Discrimination in Employment: The Rehabilitation Act of 1973*, 39 ARK. L. REV. 1, 5-9 (1985); Note, *supra* note 32, at 312-20.

40 See *infra* notes 148-232 and accompanying text.

41 From all available information, AIDS cannot be spread through casual contact. See Aberth, *AIDS in the Workplace*, 74 MGMT. REV. 49 (1985); Clark, Cosnell, Witherspoon, Hager & Coppola, *AIDS*, NEWSWK, Aug. 12, 1985, at 20-47; Engel, *AIDS in the Workplace*, 228 INDUSTRY WK. 28, 29 (Feb. 3, 1986); *AIDS in the Workplace*, 64 PERSONNEL J. 20 (1985); *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III Lymphadenopathy-Associated Virus in the Workplace*, 34 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 682 (Nov. 15, 1985).

At the present time, the disease is concentrated primarily among homosexual men and intravenous drug users. Obviously, these groups have experienced discrimination in the past even before the AIDS epidemic. The spread of AIDS reinforces existing prejudice. M. ROTHSTEIN, *MEDICAL SCREENING OF WORKERS* 72-73 (1984). Because the discrimination against AIDS victims is so intense, some cities have passed legislation prohibiting such discrimination. See, e.g., Los Angeles Municipal Code ch. III, art. 5.8 §§ 45.80-.93 (1985); West Hollywood (Calif.) Mun. Code art. 4, ch. 2, pt. E § 4270 (1985); New York City, Admin. Code, § 8-10811 (1986). See *infra* notes 52-69 and accompanying text.

42 Engel, *supra* note 41, at 30; Halcrow, *AIDS in the Workplace*, 64 PERSONNEL J. 11 (1985).

action under ERISA if the employer has discharged them in order to avoid incurring the insurance claims.

### B. *Medical and Genetic Testing*

Medical advances in recent years have made it possible to detect genetic or other susceptibility for certain diseases through blood and urine tests.<sup>43</sup> For example, blood tests can now determine whether the patient carries the trait for sickle cell anemia,<sup>44</sup> the trait for Tay Sachs disease,<sup>45</sup> the genes for Huntington's Disease and cystic fibrosis and many other hereditary-linked conditions.<sup>46</sup> In the near future, tests may also reveal susceptibility to certain forms of cancer and heart disease.<sup>47</sup> Such tests can aid persons in making lifestyle and procreative choices so as to avert these risks.<sup>48</sup>

Problems arise when these tests are used in making employment decisions.<sup>49</sup> Much of the scholarly literature has focused on the employer's uses of such tests to screen out applicants and employees who are at increased risk of injury from exposure to toxic chemicals used in the workplace.<sup>50</sup> Genetic tests, however, can also be used to cut down on nonoccupational insurance costs. An employee whose tests indicate susceptibility to catastrophic or chronic diseases could be demoted, transferred or discharged in order to reduce liability. If such practices go

43 See M. ROTHSTEIN, *supra* note 41, at 52-80; Appleson, *Genes and Jobs*, 68 A.B.A. J. 1061 (1982); Brown, *Employment Tests: Issues Without Clear Answers*, PERSONNEL ADMIN., Sept 1985, at 43; Chapman, *The Ruckus over Medical Testing*, FORTUNE, Aug. 19, 1985, at 57; Dentzer, Raine, Carroll & Quade, *Can You Pass the Job Test?*, NEWSWK, May 5, 1986, at 46 [hereinafter Dentzer]; Diamond, *Genetic Testing in Employment Situations: A Question of Worker Rights*, 4 J. LEGAL MED. 231 (1983); Englade, *Who's Hired and Who's Fired*, STUDENT LAW., April 1986, at 20; Hamilton & Rhein, *The Giant Strides in Spotting Genetic Disorders Early*, BUS. WK., Nov. 18, 1985, at 82; Kolata, *Genetic Screening Raises Questions for Employers and Insurers*, 232 SCIENCE 317 (April 18, 1986); McGarity & Schroeder, *Risk-Oriented Employment Screening*, 59 TEX. L. REV. 999 (1981); Murray, *Genetic Testing at Work: How Should It be Used?*, PERSONNEL ADMIN., Sept. 1985, at 91; Olian, *Genetic Screening for Employment Purposes*, 37 PERSONNEL PSYCH. 423 (1984); Pave, *Fear and Loathing in the Workplace: What Managers can do About AIDS*, BUS. WK., Nov. 25, 1985, at 126; Pierce, *The Regulation of Genetic Testing in the Workplace—A Legislative Proposal*, 46 OHIO ST. L.J. 771 (1985); Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 MICH. L. REV. 1379 (1983); Sanchez, *Genetic Testing: The Genesis of a New Era in Employee Protection*, 11 W. ST. U. L. REV. 199 (1984); Schulman, *Reading the DNA Spiral for Lurking Hereditary Risks*, BUS. WK., Oct. 21, 1985, at 72; Sweltz, *Genetic Testing in the Workplace: An Analysis of the Legal Implications*, 19 FORUM 323 (1983-84).

Much of what is said about medical tests is also applicable to drug testing, but drug testing will be discussed in the section on unhealthful lifestyles. See *infra* notes 88-96 and accompanying text.

44 M. ROTHSTEIN, *supra* note 41, at 73-76; Appleson, *supra* note 43, at 1061-62; McGarity & Schroeder, *supra* note 43, at 1010-11; Murray, *supra* note 43, at 94; Pierce, *supra* note 43, at 778; Rothstein, *supra* note 43, at 1390; Sanchez, *supra* note 43, at 200-01.

45 Sweltz, *supra* note 43, at 327.

46 Hamilton & Rhein, *supra* note 43, at 82-83; Kolata, *supra* note 43, at 317; Schulman, *supra* note 43, at 72.

47 Schulman, *supra* note 43, at 72. See also AMERICAN MANAGEMENT ASSOC., AIDS: THE WORKPLACE ISSUES (1985) [hereinafter AMA]; Abert, *AIDS in the Workplace*, 74 MGMT. REV. 49 (1985); AIDS is Now Becoming a Legal Epidemic, Too, INC., Dec. 1985, at 19 [hereinafter *Aids, a Legal Epidemic*]; Chapman, *supra* note 43, at 61-62; Dentzer, *supra* note 43, at 47; Halcrow, *supra* note 42, at 10; Englade, *supra* note 43, at 26-27; Hamilton, *AIDS Tests that Could Offer Proof Positive*, BUS. WK., April 28, 1986, at 27-28; Pave, *supra* note 43, at 126.

48 See Sweltz, *supra* note 43, at 327.

49 See articles cited *supra* note 43.

50 See, e.g., M. ROTHSTEIN, *supra* note 41; Olian, *supra* note 43; Rothstein, *supra* note 43.

unchallenged, they may result in employment only for the fit.<sup>51</sup> This section will discuss two controversial types of medical tests: AIDS antibody and genetic testing.

As indicated earlier, the spread of AIDS has caused a wave of concern verging on panic. Since 1979, more than twelve thousand people have died of the disease, more than twenty-five thousand Americans have contracted it,<sup>52</sup> and at least one million others have been exposed to it.<sup>53</sup> Thus far, the disease is concentrated primarily among homosexual males, hemophiliacs, and intravenous drug users.<sup>54</sup> Employers and co-workers are concerned about the spread of this disease because it is contagious and usually fatal.<sup>55</sup> Yet, medical scientists believe AIDS can be contracted only through intimate contact with infected blood or other body fluids, not by casual contact such as what would generally occur in the workplace.<sup>56</sup> Insurance companies and some employers are pressing to test applicants and employees for the disease or the antibody associated with exposure to it. One justification for testing is to avoid the high medical costs associated with the disease. Another is concern over reaction by other employees and customers, some of whom irrationally fear contagion from a worker who has AIDS.<sup>57</sup>

The test for AIDS is actually a test for the antibody to the AIDS virus, HIV, not a test to determine if the individual suffers from AIDS.

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51 Chapman, *supra* note 43, at 62. See also Schmeck, *Advances in Genetic Forecasts Increase Concerns*, N.Y. Times, Aug. 19, 1986, at C1, col. 1-4 & C9, col. 1-4.

52 Boffery, *Federal Efforts on AIDS Criticized as Gravely Weak*, N.Y. Times, Oct. 30, 1986, at 1, col. 1 & 9, col. 1-2. See also AMA, *supra* note 47, at 9; Engel, *supra* note 41, at 28; Pave, *supra* note 43, at 126.

53 AMA, *supra* note 47, at 7; Pave, *supra* note 43, at 126.

54 Mass, *Medical Answers About AIDS*, in AIDS: THE WORKPLACE ISSUES 58-59 (AMA 1985).

55 *Id.* at 56.

56 *Id.* at 58-61, 66, 68-69.

57 Aberth, *supra* note 41, at 50; *AIDS, a Legal Epidemic*, *supra* note 47, at 20; Pave, *supra* note 43, at 126; Skagen & Aberth, *Responding to AIDS in the Workplace*, in AIDS: THE WORKPLACE ISSUES 11-18 (1985).

Another reason for discrimination is prejudice against gay men, the main group who have contracted the disease in the United States. Mass, *supra* note 54, at 58-61. Other groups such as intravenous drug users or possibly Haitian immigrants are also at greater risk of coming down with the disease. The employer might overreact and fire anyone in one of the high risk groups even if they are perfectly healthy. While Haitians would have an action for discrimination on the basis of national origin under Title VII § 703a, 42 U.S.C. § 2000e-1 (1982), federal law does not protect homosexuals from being discharged for sexual orientation. See *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

Although no federal court has specifically determined whether having AIDS or carrying the AIDS antibody is a handicap under the Rehabilitation Act, a recent Supreme Court decision, *School Bd. of Nassau County v. Arline*, 107 S. Ct. 1123 (1987), held that a person with the contagious disease of tuberculosis may be handicapped under the Rehabilitation Act. *Id.* at 1127-30. In particular, the court rejected the Justice Department's position that an employer could discharge an employee because of an irrational fear of contagion. *Id.* at 1128-30. However, the court specifically declined to decide if a carrier of a contagious disease such as AIDS or if a person with a contagious disease but with no physical impairment was covered under the Act. *Id.* at 1128 n.7.

Last year, the Justice Department issued an opinion that discriminating against someone with AIDS violates the Rehabilitation Act, but employers could fire or refuse to hire an AIDS victim if they have a real or irrational fear of contagion. Pear, *Rights Laws Offer Only Limited Help on AIDS*, U.S. Rules, N.Y. Times, June 23, 1986, at 1, col. 2 & 13, col. 2-3. This view has been severely criticized by many commentators. See Pear, *States' AIDS Discrimination Laws Reject Justice Department's Stand*, N.Y. Times, Sept. 17, 1986, at A-20, col. 1-3. For a view that AIDS is a handicap, see Leonard, *Employment Discrimination Against Persons With AIDS*, 10 U. DAYTON L. REV. 681 (1985); Wilson, *From AIDS to Z: A Primer for Legal Issues Concerning AIDS, Drugs, and Alcohol in the Workplace*, 2 LAB. LAW. 631, 639-40

Of those exposed to the virus, only between two and twenty percent actually develop the disease.<sup>58</sup> A positive test result may thus cause hardship for many who are healthy and will never develop the disease.<sup>59</sup> Furthermore, the test creates many false positives—persons mistakenly believed to have been exposed to AIDS.<sup>60</sup> Accuracy aside, it is difficult to see how an employer can justify requiring or using such a test. Protection of other workers is not a valid reason—as indicated earlier, an employee with AIDS is unlikely to pass the disease to other employees.<sup>61</sup> Of course, companies may wish to discharge employees with AIDS simply to reduce insurance costs. As this Article will show, however, ERISA forbids that justification.<sup>62</sup>

Like testing for the AIDS antibody, genetic testing is fairly new and equally controversial. Genetic tests would detect job applicants or employees more susceptible than others to disease if they were exposed to certain chemicals.<sup>63</sup> For example, it was believed that persons carrying the sickle cell trait, detectable through a blood test, could suffer a sickling crisis if exposed to chemicals which create low oxygen environments.<sup>64</sup> Later evidence questioned this assumption.<sup>65</sup> After adverse publicity from House hearings<sup>66</sup> and an Office of Technology Assessment report,<sup>67</sup> most employers who were using genetic screening

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(1986); Note, *AIDS: Does It Qualify as a "Handicap" Under the Rehabilitation Act of 1973?*, 61 NOTRE DAME L. REV. 572 (1986).

In addition to a federal cause of action, AIDS victims may also bring an action under state handicap laws. See Pear, *supra*, at A-20, col. 1-3; Wilson, *supra*, at 637-42.

58 Chapman, *supra* note 43, at 60; Englade, *supra* note 43, at 26-27; Halcrow, *supra* note 42, at 11; Pave, *supra* note 43. In fact, the test was developed to screen blood donors for the AIDS antibody in order to reduce the risk of transmitting AIDS through blood transfusions. The test was not designed to screen people for AIDS. See Mass, *supra* note 54, at 69-72.

59 See *id.*

60 Hamilton, *AIDS Tests That Could Offer Proof Positive*, Bus. Wk., April 28, 1986, at 27-28 [hereinafter *AIDS Tests*]; Pave, *supra* note 43.

61 See Rothstein, *Medical Screening of Workers: Genetics, AIDS, and Beyond*, 2 LAB. LAW. 675, 681 (1986); Wilson, *supra* note 57, at 637.

62 See *supra* note 5 for the definition of participant and beneficiary. ERISA § 3, 29 U.S.C. § 1001 (1982). Section 502 allows participants and beneficiaries to sue under the Act. 29 U.S.C. § 1132. Section 510 does not protect job applicants because by its terms it covers only participants and beneficiaries. Job applicants have no benefit rights and therefore do not fit into either category.

Because the disease does not spread through casual contact, few large organizations—other than the U.S. military—have used the AIDS antibody test. Thus far, there are no decisions involving employees in the private sector who were fired for failing the test. It is unclear if this trend will continue in the future especially if the disease spreads and medical research develops a more accurate test. See *AIDS Tests*, *supra* note 60, at 27-28. Some companies are trying to develop an inexpensive test to detect the AIDS virus, not just the antibody. *Id.*

63 See M. ROTHSTEIN, *supra* note 41, at 23-27, 52-61; Appleton, *supra* note 43, at 1061-63; Brown, *supra* note 43, at 44-46; Diamond, *supra* note 43, at 231-34; Englade, *supra* note 43, at 27; Kolata, *supra* note 43, at 317-19; Murray, *supra* note 43, at 91-102; Olian, *supra* note 43, at 423-25; Pierce, *supra* note 43, at 771-79; Rothstein, *supra* note 43, at 1384-88; Sanchez, *supra* note 43, at 199-202; Sweltz, *supra* note 43, at 323-32.

64 M. ROTHSTEIN, *supra* note 41, at 54-55; Rothstein, *supra* note 43, at 1384-86; Sanchez, *supra* note 43, at 200-01.

65 M. ROTHSTEIN, *supra* note 41, at 55; Kolata, *supra* note 43, at 232; Rothstein, *supra* note 43, at 1386; Sanchez, *supra* note 43, at 200-11.

66 *Genetic Screening of Workers: Hearing before the Subcommittee of Investigations and Oversight of the Committee on Science and Technology of the U.S. House of Representatives*, 97th Cong., 2d Sess. 119 (1982).

67 OFFICE OF TECHNOLOGY ASSESSMENT, *THE ROLE OF GENETIC TESTING IN THE PREVENTION OF OCCUPATIONAL DISEASE* (1983).

stopped doing so.<sup>68</sup> At present, genetic testing is capable of detecting only a few hundred hereditary conditions with less than perfect accuracy. However, advances in molecular genetics and genetic engineering are soon likely to yield more accurate tests about an array of diseases.<sup>69</sup> Does ERISA prohibit the use of such information to screen workers at risk for diseases? Part III addresses this question. Its resolution will entail important issues of economic and distributive justice.

### C. *Eliminating Employees with Unhealthful Lifestyles*

It is well known that certain unhealthful behavior on the part of a worker increases the likelihood that he or she will develop a serious illness during his or her working life. Rising insurance costs and economic setbacks have made employers less willing than in the past to absorb the costs of unhealthful and self-destructive behavior.<sup>70</sup> Some have acted constructively, by, for example, establishing voluntary wellness and fitness programs for their employees.<sup>71</sup> But, some employers are also taking steps to identify employees with certain lifestyles and punishing those unwilling to modify their behavior. In some cases, for example obesity and smoking, identification is easy—the behavior or condition is obvious. In others, testing or a physical examination may be required.<sup>72</sup> Job application forms might also ask about medical conditions.<sup>73</sup> An employer who is self-insured may find out when it processes medical and disability claims. As indicated earlier, employers with self-insured plans are likely to accumulate considerable medical and health data about their employees and their families. Few state or federal laws prohibit the accumulation of such data.<sup>74</sup> Some insurance companies have also urged employers to distribute health surveys to employees ostensibly to aid em-

68 Englade, *supra* note 43, at 27; Kolata, *supra* note 43, at 317-18.

69 Englade, *supra* note 43, at 27; Kolata, *supra* note 43, at 317-19; Schulman, *supra* note 43, at 72; Schmeck, *supra* note 51, at C1 & C9; Schmeck, *Burst of Discovering Reveals Genetic Basis for Many Diseases*, N.Y. Times, March 31, 1987, at 17, col. 3-5 & 18, col. 1-6; Schmeck, *Rapid Advances Point to the Mapping of all Human Genes*, N.Y. Times, July 15, 1986, at C1, col. 1-6 & C3, col. 1-6.

70 This is particularly true of smoking, alcohol and drug abuse. See *infra* notes 76-98 and accompanying text.

71 Executives See *Continuing Crisis in Health Care Costs*, EMPL. BEN. PLAN REV., Dec. 1985, at 52; Gibson, *Insurers Can Help Set Up Health Risk Assessments*, BUS. INS., April 22, 1985, at 16; Harker, *Employers' Response to Runaway Health Care Costs*, 9 J. PENSION PLAN. & COMP. 223, 226-27 (1983); Walsh, *supra* note 1, §§ 22-38 to 22-41.

72 See *infra* notes 88-92 and accompanying text.

73 Rothstein, *supra* note 43, at 1411-12. See also Gibson, *supra* note 71, at 16.

74 M. ROTHSTEIN, *supra* note 41, at 90-94. See also Rothstein, *supra* note 43, at 1412-13, 1424-96.

Most employees are unaware of the ease with which an employer may have access to their medical information. Frequently the employee signs a medical information release as part of either the initial insurance application or a claim application. This release is often vaguely worded to authorize unrestricted access to the medical records of the employee or claimant. See Winslade, *Confidentiality of Medical Records: An Overview of Concepts and Legal Policies*, 3 J. LEGAL MED. 497, 506 (1982); *Protecting Your Files from Snoopers*, CHANGING TIMES, July 1981, at 42. See generally R. SMITH, *PRIVACY: HOW TO PROTECT WHAT'S LEFT OF IT*, 105-19, 132-44 (1979). Such blanket releases have been characterized as a "search warrant without due process." Linowes, *Must Personal Privacy Die in the Computer Age?*, 65 A.B.A. J. 1180, 1182 (1979). Signing of such releases has been compared to a contract of adhesion since the employee or claimant most likely sees the alternative as having to pay his own medical bills. Solomon, *Personal Privacy and the "1984" Syndrome*, 7 W. NEW ENG. L. REV. 753, 770 (1985). An additional danger of the wholesale release of medical records is that they often contain extraneous

ployers in setting up wellness programs.<sup>75</sup> This data might also be used for less beneficial purposes.

## 1. Smoking

Smoking is the leading cause of preventable disease and premature death in the United States.<sup>76</sup> It costs society between twenty-seven and sixty-one billion dollars annually.<sup>77</sup> In addition, each smoker costs employers approximately six hundred and fifty dollars in increased insurance and "clean-up costs."<sup>78</sup> Apart from injuring the health of the smoker, smoking poses health hazards to non-smokers or "passive smokers" who inhale the smoke.<sup>79</sup>

Thus, more and more employers are restricting or banning smoking in the workplace. Such restrictions are perfectly legal and contain costs,

information. This may include anecdotal information about such things as the person's emotional state, financial affairs, sexual preference, and drug or alcohol use. See Winslade, *supra*, at 504.

Some insurance companies give a price break to employers who process their employees' claims. *Access to Your Medical Records*, WORKING WOMAN, June 1984, at 57. Simply processing a bill from a doctor can reveal significant information just from the doctor's specialty. *Id.*

Another way in which an employer might gain access to medical information is through an investigative company. Equifax, an Atlanta based firm, makes preemployment checks and investigations of persons applying for insurance. *Your Medical Records: Not So Private Anymore*, CHANGING TIMES, July 1981, at 41-42. A substantial portion of Equifax's annual business is in the medical records and information field. *Id.* Presumably an employer could also hire companies like Equifax to conduct investigations on current employees.

Some insurance companies have voluntarily established procedures to restrict further disclosure of claim information unless authorized by the claimant. Podgers, *Insurers Do More to Cut Privacy Abuses: Survey*, 67 A.B.A. J. 146 (1981).

In addition, some states have enacted insurance information and privacy protection statutes consistent with model legislation proposed by the National Association of State Insurance Commissioners. These laws require that release forms be specific as to the type of information to be disclosed and have an expiration date. ARIZ. REV. STAT. ANN. § 20-2106 (Supp. 1986); CAL. INS. CODE § 791.06 (West Supp. 1987); CONN. GEN. STAT. ANN. § 38-506 (West Supp. 1987); and ILL. ANN. STAT. ch. 73, § 1065.707 (Smith-Hurd Supp. 1985). These states also restrict further disclosure of information collected by insurance companies: ARIZ. REV. STAT. ANN. § 20-2133 (Supp. 1986); CAL. INS. CODE § 791.13 (West Supp. 1987); CONN. GEN. STAT. ANN. § 38-513 (West Supp. 1987); and ILL. ANN. STAT. ch. 73, § 1065.714 (Smith-Hurd Supp. 1985). See also R. SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS 13-17 (1984).

The American Medical Association has also proposed legislation which includes a provision prohibiting the recipient of medical information from further disclosure without a new authorization. See CAL. CIV. CODE § 56.13 (Deering 1982); R.I. GEN. LAWS §§ 5-37.3 to 37.4(e) (Supp. 1985).

<sup>75</sup> Gibson, *supra* note 71, at 16.

<sup>76</sup> U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, HEALTHY PEOPLE—THE SURGEON GENERAL'S REPORT ON HEALTH PROMOTION AND DISEASE PREVENTION 121 (1979). For example, smoking can cause lung cancer, other lung disorders, heart disease, and injuries to newborn infants. Rothstein, *supra* note 43, at 1399; Tuofexis, *A Cloudy Forecast for Smokers*, TIME, April 7, 1986, at 45; *Smoking on the Job*, CONSUMER RESEARCH, Feb. 1986, at 4; *What Are the Hazards of Smoking?*, CONSUMER RESEARCH, April 1984, at 11-14 [hereinafter *Hazards of Smoking*]. See also Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940 (1987) [hereinafter *Refusing to Employ Smokers*].

<sup>77</sup> *Hazards of Smoking*, *supra* note 76, at 14. Raloff, *An Economic Case for Banning Smoking*, SCI. NEWS, Jan. 18, 1986, at 40.

<sup>78</sup> See *Hazards of Smoking*, *supra* note 76, at 11-14; Molotsky, *Smokers' Ills Cost Billions*, U.S. SAYS, N.Y. TIMES, Sept. 16, 1985, at A-13, col. 1; Raloff, *supra* note 77, at 40; Rolland, *A Burning Issue on the Job and Off*, NEWSWK, Jan. 13, 1984, at 9; Rothstein, *supra* note 43, at 1399; Walsh, *supra* note 1, at §§ 22-38 to 22-40. See also OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, SMOKING-RELATED DEATHS AND FINANCIAL COSTS 3-13, 19-20, § 55 (1985).

<sup>79</sup> Molotsky, *supra* note 78, at A-13, col. 1; Raloff, *supra* note 77, at 40.

as well as reduce hazards to other employees.<sup>80</sup> Some states have laws which require them.<sup>81</sup> The employer might also justify banning or restricting smoking due to loss of productivity.<sup>82</sup> One major problem is that smoking is an addiction, not strictly a matter of choice. Accordingly, some employers have instituted "smoking-cessation classes" and dispensed nicotine chewing gum to reduce withdrawal symptoms.<sup>83</sup> It is not clear whether smoking caused by nicotine addiction would be found to be a handicap under handicap discrimination laws. Even if it is, smoking-cessation classes, restricted smoking areas, and distributing nicotine gum might be considered reasonable accommodations for smoking employees.<sup>84</sup> And these measures, even though designed to reduce insurance costs, would not violate section 510 of ERISA because they do not deprive smokers of medical or other benefits.<sup>85</sup>

But suppose the employer goes further and refuses to hire or fires anyone who smokes?<sup>86</sup> Whatever the justification for restricting smoking on the job, it is difficult to see how an employer could justify this action against a smoker if he or she is prepared to forego smoking on the job and the habit does not affect job performance. One rationale might be that smoking is unhealthy, and the employer should not have to bear the costs associated with it.<sup>87</sup> Refusing employment or threatening to discharge smokers would, of course, encourage them to stop smoking. Moreover, even if the employee refrains from smoking on the job, smok-

80 BUREAU OF NATIONAL AFFAIRS, WHERE THERE'S SMOKE: PROBLEMS AND POLICIES CONCERNING SMOKE IN THE WORKPLACE 135-36 (1986); Engel, *No Smoking!*, INDUSTRY WEEK, Nov. 11, 1985, at 20-21; Hubbart, *Smoking At Work—An Emerging Office Issue*, ADMIN MGMT., Feb. 1986, at 21-23; *Refusing to Employ Smokers*, *supra* note 76, at 946-50; *Cigarette Smoking is a Growing Hazard to Careers in Business*, WALL ST. J., April 23, 1987, at 1, Col. 6 and 21, Col. 1-3.

81 See, e.g., ARIZ. REV. STAT. ANN. § 35-501.02 (Supp. 1986); CONN. GEN. STAT. ANN. § 31-40q (West Supp. 1986); FLA. STAT. ANN. §§ 386.201-.209 (West 1986); ME. REV. STAT. ANN. tit. 22, § 1580-A (Supp. 1986); MINN. STAT. ANN. §§ 144.411-.417 (West Supp. 1987); MONT. CODE ANN. §§ 50-40-101 to 40-107 (1985); NEB. REV. STAT. §§ 71-5701 to 5713 (1986); N. H. REV. STAT. ANN. §§ 155:50-.53 (Supp. 1986); N. J. STAT. ANN. §§ 26:3D-23-.3D-31 (West 1987); R. I. GEN. LAWS §§ 23-20.7-1 to 20.7-7 (Supp. 1986); UTAH CODE ANN. § 76-10-106 (Supp. 1986); *Refusing to Employ Smokers*, *supra* note 76, at 946-47; Comment, *The Worker's Right to a Smoke-Free Workplace*, 9 U. DAYTON L. REV. 275, 281 n.34 (1984).

82 Raloff, *supra* note 77, at 40; Rolland, *supra* note 78, at 9.

83 Rolland, *supra* note 78, at 9; Walsh, *supra* note 1, at § 22-39.

84 While courts have found that smoke-sensitivity is a handicap, see, e.g., *Vicker v. Veterans Admin.*, 549 F. Supp. 85 (S.D. Tex. 1982), there are no cases which hold that smoking per se is a handicap under the Rehabilitation Act. It might be possible to argue that smoking is an addiction to a drug, specifically nicotine. The Rehabilitation Act protects drug addicts if the condition does not affect job performance. 29 U.S.C. § 706(7)(B) (1982). It is unclear if courts would be willing to stretch this provision to cover smokers, nor is it clear that Congress intended to include nicotine addiction in the Act. Furthermore, smoking also affects the health of other employees who breathe the smoke.

85 These actions would not violate § 510 as long as these rules are not set up to eliminate "expensive" employees who smoke. Would a total ban run afoul of ERISA? Obviously, the employer can ban smoking where there are flammable chemicals or substances. Such a ban is not likely to violate ERISA.

86 USG Accoustical Products Company (formerly United States Gypsum) recently established a policy prohibiting employees from smoking during or outside of work. *Smoking is Grounds for Being Dismissed by Illinois Company*, N.Y. Times, June 21, 1986, at 5. Cf. *Manufacturer Now Says Smoking Won't Mean Automatic Dismissal*, N.Y. Times, Jan. 29, 1987, at 11.

87 Molotsky, *supra* note 78, at A-13; Raloff, *supra* note 77, at 40; Rolland, *supra* note 78, at 40.

ers are more likely to cost the employer in time lost and in insurance claims.

## 2. Alcohol and Drug Abuse

Employers have many reasons to be concerned over employees' abuse of alcohol or drugs. The cost of drug and alcohol abuse in employee theft, lost productivity, accidents, injuries and medical costs has been conservatively estimated at over sixty billion dollars annually.<sup>88</sup> Alcohol and drug abuse is a problem for all employers in every sector of the economy; it occurs among executives, professionals, white and blue collar workers.<sup>89</sup> Employers have strong economic incentives to identify and eliminate alcoholics and drug abusers.

Sometimes, the employee's erratic behavior may indicate a drug or alcohol problem. But other times there may not be any obvious indication. Accordingly, a growing number of companies are now requiring employees and job applicants to undergo urine and blood tests to determine if they abuse alcohol and illegal drugs. Currently, around twenty-five percent of the Fortune 500 or largest companies screen employees and job applicants for illegal drugs,<sup>90</sup> and the number is growing. Drug testing has been severely criticized by civil libertarians and others concerned that the tests used are unreliable and needlessly invade employees' privacy.<sup>91</sup> Employees in the private sector generally have no recourse unless there is a statute which prohibits testing; no federal and few state laws do so.<sup>92</sup>

88 Dentzer, *supra* note 43, at 50; Castro, *Battling the Enemy Within: Companies Fight to Drive Illegal Drugs Out of the Workplace*, TIME, Mar. 17, 1986, at 52, 53. Other sources estimate that the cost of drug abuse alone is at least \$25 billion. Belohave & Popp, *Employee Substance Abuse: Epidemic of the Eighties*, BUS. HORIZONS, July-Aug. 1983, at 29, 31; Chapman, *supra* note 43, at 58; Englade, *supra* note 43, at 22; Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 EMP. REL. L.J. 422 (1985-86); Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42 (1985).

For example, employees with drinking problems "are responsible for 15 percent of the health claims paid annually." Belohave & Popp, *supra*, at 32. Employees who abuse drugs may cost 3 times more in medical claims than other employees. Englade, *supra* note 43, at 22.

89 Brown, *supra* note 43, at 46-50; Castro, *supra* note 88, at 52-58; Galante, *Damage Done by Drug Abuse Can Cripple Smaller Company*, WALL ST. J., May 19, 1986, at 45, col. 1; O'Connell, *Companies Are Starting to Sniff out Cocaine Users*, BUS. WK., Feb. 18, 1985, at 37; Susser, *supra* note 88, at 42-43.

90 Castro, *supra* note 88, at 57. Chapman, *supra* note 43, at 58; Rothstein, *supra* note 88, at 423; Rubin, *Defusing A Construction: Management and Labor Join to Battle Drug and Alcohol Abuse*, ENGINEERING NEWS-RECORD, Feb. 6, 1986, at 24-25; *Worker Drug Tests Spread Despite Drug Controversy*, MONEY, Oct. 1985, at 13.

Drug abuse has received greater attention than alcohol abuse even though alcohol is the most abused drug. Rothstein argues that screening programs have concentrated on drugs because drugs are detectable for significantly longer periods than alcohol, most drug abuse involves illegal drugs and because there is more of a social stigma attached to drug use. Rothstein, *supra* note 86, at 423. Because alcohol testing is less common, most of the discussion will focus on drug testing.

91 Angaroia, *Drug Testing in the Workplace: Is It Legal?*, PERSONNEL ADMIN. Sept. 1985, at 79, 81; Bishop, *Worker Drug Tests Resisted: Court Cases Are Watched*, N.Y. TIMES, Nov. 27, 1985, at DA, col. 3-5. DA, col. 1-4; Castro, *supra* note 86, at 53; Chapman, *supra* note 43, at 57-58; Englade, *supra* note 43, at 20-26; Gampel & Zeese, *Are Employers Overdoing on Drug Testing*, BUS. & SOC. REV., Fall 1985, at 34-38; Geidt, *Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights*, 11 EMP. REL. L.J. 181, 186-90 (1985-86); Lehr & Middlebrooks, *Work Place Privacy Issues and Employer Screening Policies*, 11 EMP. REL. L.J. 407, 411-12 (1985-86) [hereinafter Middlebrooks]; Lindsay, *Worker Drug Test Provoking Debate*, N.Y. TIMES, May 3, 1986, at 1 col. 3, 32 col. 1-4; Rothstein, *supra* note 88, at 422-31.

92 See sources cited *supra* note 91. Only public sector employees can claim that drug and alcohol testing constitutes an unconstitutional search and seizure under the federal constitution. Because



However, the unreliability of drug testing has spurred proposed legislation which would limit the use of such tests to jobs in which alertness is essential to public safety.<sup>93</sup> The proponents of such legislation point out that the tests produce many false positives; for cocaine the figure is about twenty-five percent. False positives can occur because the person has taken cold medicines or cough syrup.<sup>94</sup> Because accurate tests often cost ten or twenty times more to conduct, few employers conduct back up tests to confirm positive test results.<sup>95</sup> Moreover, the tests do not distinguish between habitual and occasional users.<sup>96</sup> The drug may show up in the tests days or even weeks after use.

### 3. Obesity

People who are overweight or who eat improperly bear a greater risk of heart disease, cancer, diabetes, high blood pressure and other diseases than persons of normal weight.<sup>97</sup> Obesity is often but not invariably caused by poor eating habits.<sup>98</sup> People who are seriously or significantly overweight often experience various kinds of discrimination in the workplace, though not always for health-related reasons. Overweight people are often victimized by stereotypes that they are unhealthy, lazy, undisciplined, and sloppy.<sup>99</sup> Even if the job applicant or employee can show that obesity is due to a medical condition, the employer may be unwilling to bear the cost of treating it.<sup>100</sup>

there is no state action, private sector employees cannot make this claim. Rothstein, *supra* note 88, at 433. See, e.g., McDonald v. Hunter, 612 F. Supp. 1122 (D.C. Iowa 1985) (policy requiring correctional employees to give blood and urine samples on management's demand an unreasonable search and seizure), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987) (allowing strip search on objective criteria and allowing urinalysis test where uniform, systematic random selection or based on reasonable suspicion). See also SAN FRANCISCO, CAL., ORDINANCES part II, ch. VIII, art. 33A (1985) (ordinance prohibits drug testing except where employee shows signs of impairment and impairment presents danger to others).

93 Thus far, only San Francisco has passed such an ordinance. See *supra* note 92. See generally BUREAU OF NATIONAL AFFAIRS, ALCOHOL & DRUG TESTING IN THE WORKPLACE: COSTS, CONTROLS AND CONTROVERSIES 59-69, 73-75 (1986).

94 Dentzer, *supra* note 43, at 50; Englade, *supra* note 43, at 53; Gampel & Zeese, *supra* note 91, at 34-35; Rothstein, *supra* note 88, at 426-27. Even over-the-counter drugs such as Contac, Sudafed and aspirin will register as illegal drugs with some of the tests. Wilson, *supra* note 57, at 659. According to the Center for Disease Control (CDC), a recent study made in 1985 reported "error rates as high as 69 percent in labs performing the EMIT tests," the main test used for most drug testing. Wilson, *supra* note 57, at 659; *Corporate World Takes to Drug Tests*, Los Angeles Times, July 27, 1985, at 1 (Part I).

The other reason for inaccurate results is carelessness in the testing procedures. Many of the tests are conducted at the workplace, not a laboratory. Furthermore, the tests are not always conducted by qualified laboratory technicians. Samples may become contaminated or the tests may not be conducted properly in other respects. See Rothstein, *supra* note 88, at 426-27.

95 See Chapman, *supra* note 43, at 60; Englade, *supra* note 43, at 53. The two major tests in use, the Enzyme Multiplied Immunoassay Technique (EMIT) and Radioimmunoassay (RIA), do not measure the concentration of drugs but rather the effect of the drug on certain enzymes. Rothstein, *supra* note 88, at 426-27.

96 See Dentzer, *supra* note 43, at 50; Englade, *supra* note 43, at 23-24; Gampel & Zeese, *supra* note 91, at 36-38.

97 Kolata, *Obesity Declared a Disease*, 227 SCIENCE 1019-20 (1985); Rothstein, *supra* note 43, at 1398-99; Comment, *The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination?*, 29 U.C.L.A. L. REV. 947, 948-50 (1982).

98 Comment, *supra* note 97, at 948-50.

99 *Id.* at 951-55.

100 As this Article will later indicate, if the employee would show that he or she was fired for this

#### D. *Absenteeism and Leave Policies*

Thus far, this Article has described several ways employers can directly identify and target employees who are or are likely to become medical risks. There are also indirect ways. Instead of excluding such employees directly the employer might adopt absenteeism rules under which employees are discharged if they accumulate a certain number of absences from work for medical reasons. The employer might justify such a policy as necessary to eliminate malingerers—employees who continually miss work for no good reason.

Absentee policies can take a number of forms. First, some employers only excuse absences if the employee's illness falls under an approved list. Then if the employee misses too much work because of an illness or an injury not contained in the list, he or she can be terminated. While the employer is likely to excuse absences for serious illnesses such as cancer, absences due to recurring medical problems such as back pain or migraine headaches might not be recognized even if the employee could produce a doctor's note or certificate that the condition was genuine.<sup>101</sup>

Other employers limit even the number of excused absences so that a victim of heart disease or cancer could be terminated before becoming eligible for disability benefits or leave. Most disability benefit plans condition eligibility on length of service and duration of the illness.<sup>102</sup> If employers can discharge employees before they become eligible for disability benefits, employers can avoid these costs.<sup>103</sup>

Another group of employers refuse to excuse absences for medical conditions which developed prior to employment.<sup>104</sup> Similarly, the employer might limit sick leave in ways similar to absences from work—by permitting employees to take sick leave only if their illness or injuries are on an approved list or their condition developed after employment.<sup>105</sup> The employer might also severely limit the number of days off and, perhaps, provide no sickness and accident insurance policy to cover the employee before he or she would be eligible for long term disability benefits.

If employees are terminated because of restrictive absentee and sick leave policies, can they challenge these practices under ERISA? As will be discussed more fully later, one immediate difficulty is that the pertinent statutory provision requires intent—plaintiffs must show that the

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reason, then the employee could bring an action under § 510. See *infra* notes 199-211 and accompanying text. Apparently, only Michigan specifically prohibits discrimination against overweight people. See Reaves, *Fat Folks' Rights*, 69 A.B.A. J. 878 (1983). Few cases have succeeded under state laws. But see *McDermott v. Xerox Corp.*, 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S. 2d 106 (1985) (obesity is a handicap under New York disability statute), *limited in* Application of State Div. of Human Rights on Complaint of Granville, 504 N.Y.S.2d 92 (1986).

101 See F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 578-81 (4th ed. 1985).

102 See *supra* earlier discussion of disability benefits at notes 26-28 and accompanying text.

103 *Id.*

104 Some employers do exclude these illnesses as a qualification for sick leave. For example, the collective bargaining agreement for the Regional Transportation District and the Amalgamated Transit Union excludes sick pay benefits for "any chronic ailment existing before entering the employ of the Employer." 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) § 62:905 (1985). Such a clause could also be included in the policy on absenteeism.

105 See *supra* note 104.

employer's policy is aimed at depriving employees of benefits. Here the employer would argue that the intention is not deprivation of benefits but deterrence of excess absenteeism, a legitimate concern.<sup>106</sup> Yet there are ways of promoting that interest—such as by requiring a doctor's certificate or a physical exam to show that the medical condition is genuine<sup>107</sup>—that do not deprive employees of benefits when they need them. Part III offers an analysis of section 510 cases which suggest that these means may be statutorily mandated.

### III. Interfering with Insurance Benefits Under ERISA

While section 510 of ERISA is not a broad antidiscrimination statute such as ADEA, Title VII or the Rehabilitation Act,<sup>108</sup> this provision can protect employees and family members identified as medical risks from losing their insurance benefits. Section 510 makes it unlawful:

for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, [or] this title, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, [or this title] . . . . 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] . . . . The provisions of section 1132 shall be applicable in the enforcement of this section.<sup>109</sup>

Section 510 prohibits two types of acts. First, the employer or any party cannot discharge or in any other way discriminate against participants and beneficiaries who exercise their rights under a benefit plan or the Act. This antiretaliation provision is similar to those found in other federal labor statutes.<sup>110</sup> Thus, if an employee or a member of his or her family files a medical claim or brings a court action over loss of benefits and the employer responds by discharging the employee he or she may sue under section 510.<sup>111</sup> As indicated earlier, this provision is essential to protect the integrity of the statutory scheme for medical and disability benefits.<sup>112</sup>

A second part of section 510, which is unique to ERISA and has far broader application than the first, prohibits interference "with the attain-

106 F. ELKOURI & E. ELKOURI, *supra* note 101, at 578-81.

107 *Id.*

108 Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982) [hereinafter ADEA]; Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e to e-17; Rehabilitation Act, 29 U.S.C. §§ 701-796.

109 29 U.S.C. § 1140 (1982). ERISA § 511, 29 U.S.C. § 1141, makes it a criminal offense to use fraud, force, or violence in order to interfere with a participant's and beneficiary's rights under the Act or a benefit plan. However, this statute does not create a private cause of action. *See West v. Butler*, 621 F.2d 240 (6th Cir. 1980).

110 *See, e.g.*, § 4(d) of ADEA, 29 U.S.C. § 623(d) (1982); § 8(a)(1) and (3) of the NLRA, 29 U.S.C. § 158(a)(1) and (3).

111 *But see Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820 (7th Cir. 1984) (employees did not state a cause of action under § 510 if discharged for bringing state law actions against employer).

112 *See supra* notes 12-28 and accompanying text.

ment of any right to which such participant may become entitled."<sup>113</sup> Like the prohibition against firing workers for filing claims, this provision is essential to make ERISA effective. It would be meaningless to require, for example, that a pension vest after ten years if the employer could simply fire employees just before the allotted time expires.<sup>114</sup> Therefore, section 510 prohibits an employer from discharging or otherwise discriminating against an employee simply because he or she poses a risk of high insurance costs. But, because employees usually lose their benefits after they are discharged regardless of the reason for the discharge, the decisions uniformly require employees to show that their employer discharged them in order to deprive them of benefits. This may be difficult to prove, especially if the employer can present independent reasons for the action.<sup>115</sup>

To analyze section 510, this part will first examine what parties are covered by it, who can bring an action and then whether plaintiffs must exhaust the plan's claim procedures before bringing an action in federal court. The last subsection will analyze the case law with regard to section 510 and its deficiencies. To remedy these deficiencies, this Article proposes applying, with modifications, case law under Title VII and the NLRA to claims brought under section 510.

### A. *Parties Covered by Section 510*

Section 510 applies only to participants and beneficiaries—individuals who have or will have rights to employee benefits.<sup>116</sup> It covers all employees who are or will be eligible for benefits but not job applicants or employees who do not have any prospect of receiving benefits.<sup>117</sup> If the employer chooses not to hire someone because of expected benefit costs, ERISA provides no relief—although other antidiscrimination laws might.<sup>118</sup> Moreover, employees who have no benefits cannot bring an action under ERISA. ERISA does not require the employer to provide any benefits.<sup>119</sup>

A "beneficiary" under ERISA is defined as anyone "designated by a participant," or who is or may be entitled to receive benefits under the

<sup>113</sup> ERISA § 510, 29 U.S.C. § 1140 (1982).

<sup>114</sup> See *supra* notes 7-8 and accompanying text for a discussion of the legislative history.

<sup>115</sup> See, e.g., *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982) (no cause of action under § 510 where loss of benefits a mere consequence of rather than a motivating factor behind termination).

<sup>116</sup> 29 U.S.C. § 1140 (1982). ERISA defines a plan participant as an "employee or former employee . . . who is or may become eligible to receive a benefit . . . from an employee benefit plan." ERISA § 3(7), 29 U.S.C. § 1002(7).

<sup>117</sup> On the other hand, § 510 does cover probationary employees who may not, as yet, have acquired any right to benefits under the terms of a benefit plan. See *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1241-43 (7th Cir. 1983). If the employer hired and regularly fired new or probationary employees before they became eligible for benefits, these employees could have an action under ERISA. As indicated earlier, Congress was especially concerned that employers would fire employees before their pension benefits vested. For that reason, § 510 specifically covers employees who will be eligible for benefits in the future. See *supra* note 7 and accompanying text.

<sup>118</sup> See Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to e-17 (1982); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634; The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796.

<sup>119</sup> See *Murphy v. Heppenstall Co.*, 635 F.2d 233, 239 (3d Cir. 1980) (ERISA only provides minimum requirements if employer chooses to provide employee benefits).

terms of the benefit plan.<sup>120</sup> The beneficiary is typically a member of the employee's immediate family such as a spouse or child. If any action is taken against the employee and his or her family in order to interfere with their benefits then ERISA provides a cause of action.

Although ERISA restricts who may sue, section 510 contains a broad definition of who can be a defendant. Section 510 provides that it is unlawful for "any person" to interfere with a participant or beneficiary's benefit rights.<sup>121</sup> In practical terms, the defendant will usually be the employer.<sup>122</sup> In most of the cases that have been brought, the employer has been charged with discharging the employee to deprive him or her of benefits.<sup>123</sup> Although jointly administered trusts or plans may be sued under section 510, they rarely have the power or incentive to discharge workers for health risks.<sup>124</sup>

### B. *Exhaustion of Claims Procedures*

The case law is divided on whether participants and beneficiaries must exhaust the benefit claims procedures before bringing a section 510 action.<sup>125</sup> Neither section 510 nor its civil enforcement provision, section 502, contains any exhaustion requirement.<sup>126</sup> However, section 503 requires all welfare and pension plans to have appeal and claims procedures.<sup>127</sup> Courts have inferred that Congress intended that claimants exhaust those procedures before going to court.<sup>128</sup> However, plan claim procedures are generally designed to interpret the terms of a plan or to review the fairness of an administrator's denial of benefits.<sup>129</sup> Section 510 claims, by contrast, concern discrimination or improper motive. The focus is on the underlying reasons for the employer's action, not the terms of the benefit plan. Therefore, the claims procedures are not

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120 ERISA § 3(8), 29 U.S.C. § 1002(8) (1982). ERISA is the only federal antidiscrimination provision which covers someone other than an employee or job applicant. In covering beneficiaries, the coverage of ERISA is broader than other antidiscrimination statutes. However, ERISA is also narrower than other statutes because § 510 does not cover job applicants or employees who are not covered by any benefit plan.

121 ERISA § 510, 29 U.S.C. § 1140 (1982).

122 See *supra* notes 12-20 and accompanying text for a discussion of plan organization or administration. As indicated, most benefit plans are administered by the employer in both union and non-union settings.

123 See cases cited *supra* note 6.

124 See cases cited *supra* note 19.

125 The following cases have required employees to exhaust the claims procedures before bringing an action: *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985); *Kross v. Western Elec. Co.*, 701 F.2d 1238 (7th Cir. 1983); *Mann v. Meatcutters Local 227*, 4 Employee Benefits Cas. (BNA) 2659 (W.D. Ky. 1983).

These cases have not required exhaustion: *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987); *Zipf v. American Tel. & Tel. Co.*, 799 F.2d 889 (3d Cir. 1986); *Burke v. Latrobe Steel Co.*, 775 F.2d 88 (3d Cir. 1985); *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492 (D.N.J. 1985).

126 29 U.S.C. § 1132 (1982).

127 *Id.* § 1133.

128 See, e.g., *Kross*, 701 F.2d at 1244-45; *Challengers v. Local 1 Ironworkers*, 619 F.2d 645 (7th Cir. 1980); *Amato v. Bernard*, 618 F.2d 559, 567-68 (9th Cir. 1980); *Taylor v. Bakery and Confectionary Union Welfare Fund*, 455 F. Supp. 816 (E.D.N.C. 1978).

129 See ERISA § 503, 29 U.S.C. § 1133 (1982). See also *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987); *Zipf*, 799 F.2d 889; *Burke*, 775 F.2d at 90; *Amaro*, 724 F.2d at 749-52; *McLendon*, 602 F. Supp. at 1501; *Gavalik*, 3 Employee Benefits Cas. (BNA) 1311.

designed to hear this kind of claim.<sup>130</sup>

With collective bargaining, the situation may be different. Most collective bargaining agreements provide that a union employee cannot be discharged or disciplined except for "just cause."<sup>131</sup> At the same time, collectively bargained plans typically have separate administrative appeal procedures which coexist with the workplace grievance and arbitration system.<sup>132</sup> Although this claims procedure cannot address the section 510 claim for the above reason, it is often possible for the union to bring a claim for wrongful discharge and discipline to arbitration.<sup>133</sup> Even though the claim is arbitrable, some courts have not required union employees to arbitrate the claim nor precluded them from bringing an action in court if they arbitrate the claim first.<sup>134</sup> The overlap between arbitrable and statutory claims has existed in Title VII and other federal labor laws. With Title VII, for example, courts do not require exhaustion because a Title VII claim is an independent statutory claim.<sup>135</sup> Arbitration is aimed at resolving questions regarding the interpretation of the collective bargaining agreement, not claims under federal law. Courts disagree as to whether section 510, as an independent statutory claim, should be treated the same way as Title VII.

In *Kross v. Western Electric Co.*,<sup>136</sup> the plaintiff maintained that he was discharged because the employer no longer wanted to pay for his medical and life insurance benefits and because the employee's pension would have vested in two years.<sup>137</sup> The plaintiff did not exhaust the benefit plan's administrative procedures before bringing the court action. The Seventh Circuit found that exhaustion of the administrative appeal procedures was required before bringing an action under section 510.<sup>138</sup> The court stated that requiring exhaustion furthered the private resolution of ERISA-related disputes, reduced the number of frivolous lawsuits, reduced the cost of legitimate disputes, and helped develop procedures mandated by the Act.<sup>139</sup> The court found that requiring exhaustion furthered these goals even though the procedures could only interpret the terms of the benefit plan and even though the court recog-

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130 See *Amaro*, 724 F.2d at 751-52; *Kross*, 701 F.2d at 1245-46. In fact, the claims' procedures will often indicate that such claims cannot be processed. Section 510 claims are statutory rather than contractual claims, and courts do not require exhaustion of statutory claims. See *Barrentine v. Arkansas Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (employees who lose in arbitration can bring Fair Labor Standard action in court); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (as independent statutory claims, Title VII claims need not go through arbitration, nor would adverse arbitral decisions preclude court action).

131 F. ELKOURI & E. ELKOURI, *supra* note 101, at 651-54.

132 Interview with Karin Feldman, Assistant General Counsel, United Steelworkers of America, Pittsburgh, Pa. (Dec. 8, 1986). If the benefits are administered by a jointly administered trust fund, then the claims procedures are separate from the other arbitration system. See also 29 C.F.R. § 2560.503-1(b) (1986).

133 That is, if the union chooses to do so. That is one of the flaws in the arbitral system. See *McLendon*, 602 F. Supp. at 1501-06.

134 See cases cited *supra* note 129.

135 *Alexander*, 415 U.S. 36. See also *Barrentine*, 450 U.S. 728.

136 701 F.2d 1238 (7th Cir. 1983).

137 *Id.* at 1241-42.

138 *Id.* at 1246.

139 *Id.* at 1244-45 (quoting *Amato v. Bernard*, 618 F.2d 559, 567-68 (9th Cir. 1980)).

nized that a section 510 claim was a statutory and not a contractual claim.<sup>140</sup>

*Kross* is questionable—courts have never required exhaustion for other statutory claims under ERISA, such as claims alleging fiduciary violations.<sup>141</sup> Also, it is difficult to see how exhaustion can further the goal of private resolution of disputes if private procedures cannot address the claim. Exhaustion requires plaintiffs to engage in a futile act. Therefore, the better view is not to require exhaustion. In *Amaro v. Continental Can Co.*,<sup>142</sup> plaintiffs charged that the employer laid them off to prevent them from obtaining the service time required to qualify for their shutdown pension benefits.<sup>143</sup> The union submitted one of the grievances to arbitration and lost. The second grievance was not arbitrated. The Ninth Circuit found that the adverse arbitration decision did not preclude an action under ERISA because the section 510 claim was a statutory and not a contractual claim and a statutory right is “independent of any collectively bargained rights.”<sup>144</sup> The court’s reasoning seems correct. Arbitrators rarely consider statutory claims,<sup>145</sup> and thus seldom develop expertise in interpreting federal statutes or sensitivity to matters of federal policy.<sup>146</sup> If arbitration procedures cannot effectively protect individual claims, then the nonunion claims procedures discussed earlier are even more ineffective.<sup>147</sup>

### C. Adopting Federal Antidiscrimination Law to Section 510

Section 510 merely declares impermissible certain actions on the employer’s part. Neither it nor the case law provides needed guidance in analyzing claims and allocating burdens of proof. Most of the cases either do not specify what the plaintiff must do to establish discriminatory motive or require plaintiffs to prove not only discriminatory motive but also that the adverse decision would not have occurred in the absence of such a motive, a much higher burden than is generally required under other antidiscrimination laws.<sup>148</sup> Given the inadequacy of the case

140 *Id.* at 1243-46.

141 *See, e.g.,* Delgrossi v. Spang and Co., 586 F. Supp. 177, 179-82 (W.D. Pa. 1983), *rev’d on other grounds*, 769 F.2d 928 (3d Cir. 1985).

142 724 F.2d 747 (9th Cir. 1984).

143 *Id.* at 748-49.

144 *Id.* at 749-53. *See also* cases cited *supra* note 129.

145 *Amaro*, 724 F.2d at 750.

146 *See Ziff*, 799 F.2d at 893.

147 *See supra* notes 128-31 and accompanying text.

148 The following cases simply state that the plaintiff must show discriminatory motive: *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805 (10th Cir. 1984); *Aronson v. Servus Rubber*, 730 F.2d 12 (1st Cir.), *cert. denied*, 469 U.S. 1017 (1984); *Pompano v. Michael Schiavone & Sons*, 680 F.2d 911 (2d Cir.), *cert. denied*, 459 U.S. 1039 (1982); *West v. Butler*, 621 F.2d 240 (6th Cir. 1980); *Quatrochi v. Allied Chem. Corp.*, 633 F. Supp. 838 (E.D. Pa. 1986); *Barnes v. Insurance Co. of N. Am.*, 631 F. Supp. 248 (D. Minn. 1986); *Corum v. Farm Credit Servs.*, 628 F. Supp. 707 (D. Minn. 1986); *Lackus v. Acme Mkts.*, No. 85-1341 (E.D. Pa. Jan. 29, 1986) (LEXIS, Genfed library, Dist file); *Hamann v. International Harvester Co.*, No. 84-C-10552 (N.D. Ill. Oct. 31, 1985) (LEXIS, Genfed library, Dist file); *Inglis v. Bethlehem Steel Corp.*, No. 85-1344 (E.D. Pa. June 25, 1985) (LEXIS, Genfed library, Dist file); *Beckwith v. International Mill Servs., Inc.*, 617 F. Supp. 187 (E.D. Pa. 1985); *Baker v. Kaiser Aluminum and Chem. Corp.*, 608 F. Supp. 1315 (N.D. Cal. 1984); *Shipper v. Avon Prods.*, 605 F. Supp. 701 (S.D.N.Y. 1985); *Ferguson v. Freedom Forge Corp.*, 604 F. Supp. 1157 (W.D. Pa. 1985); *Wilke v. Morton Thiokol, Inc.*, No. 84 C 1352 (N.D. Ill. June 26, 1984)

law, it is necessary to look to and adapt the analysis in other federal discrimination law to section 510 claims. In particular, the case law under the retaliation provision of Title VII, ADEA and the NLRA is most relevant.<sup>149</sup> Section 510's legislative history indicates that it was modeled on other federal labor law provisions, particularly with respect to antiretaliation provisions.<sup>150</sup>

Commentators have long understood that proving discriminatory motive can be difficult in employment discrimination actions.<sup>151</sup> Employers rarely admit that they are taking actions for prohibited reasons; plaintiffs generally must prove their case with circumstantial evidence.<sup>152</sup> Therefore, the allocation of the burden of persuasion is crucial.<sup>153</sup> In

(LEXIS, Genfed library, Dist file); *Goins v. Teamsters Local 639 Health and Pension Trust*, 598 F. Supp. 1151 (D.D.C. 1984); *Cowden v. Montgomery County Soc'y for Cancer Control*, 591 F. Supp. 740 (S.D. Ohio 1984); *Watkinson v. Great Atl. & Pac. Tea Co.*, 585 F. Supp. 879 (E.D. Pa. 1984); *Watson v. Fuller Brush Co.*, 570 F. Supp. 1299 (W.D. Mich. 1983); *Titsch v. Reliance Group*, 548 F. Supp. 983 (S.D.N.Y. 1982), *aff'd mem.*, 742 F.2d 1441 (2d Cir. 1983); *Silverman v. Wilmit*, No. 79 Civ. 6736 (S.D.N.Y. Apr. 22, 1981) (LEXIS, Genfed library, Dist file); *McGinnis v. Joyce*, 507 F. Supp. 654 (N.D. Ill. 1981); *Turner v. CF&I Corp.*, 510 F. Supp. 537 (E.D. Pa. 1981); *Baeten v. Van Ess*, 474 F. Supp. 1324 (E.D. Wis. 1979). *But see* *Gavalik v. Continental Can Co.*, Nos. 81-15190 and 82-1995 slip op. (W.D. Pa., Sept. 24, 1985) (Defendant was not liable even though plaintiffs proved that the layoff policy was designed to reduce benefit costs. The plaintiff was not able to show that the layoff would not have occurred for other reasons). For a critique of *Gavalik*, see *infra* notes 178-203, 210 and accompanying text.

149 Title VII § 704(a), 42 U.S.C. § 2000e-3 (1982); ADEA § 4(d), 29 U.S.C. § 623(a); NLRA § 8(a)(3), 29 U.S.C. § 1158(a)(3). Because the statutory language in Title VII and ADEA is identical, the two statutes will be discussed together.

150 [Section 610 of § 4 as originally reported—made it illegal to 'discharge, fine, suspend, expell [sic], discipline or discriminate' against plan participants to defeat rights under the act or a plan. The language parallels section 8(a)(3) of the National Labor Relations Act and should do the trick—but only if an adequate enforcement machinery exists. Speech by Senator Hartke; 119 CONG. REC. 30,374, *reprinted in* LEGISLATIVE HISTORY at 1774-75. See also *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980).

See *supra* notes 108-12 & 145 and accompanying text. Compare ERISA § 510, 29 U.S.C. § 1140 (1982) with Title VII § 704a, 42 U.S.C. § 2000e-3; ADEA § 4(d), 29 U.S.C. § 623(a); NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3).

151 See, e.g., B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 557-62, 1286-324 (2d ed. 1983) and 107-09, 242-54 (Supp. 1985) [hereinafter SCHLEI & GROSSMAN and SCHLEI & GROSSMAN SUPP.]; C. SULLIVAN, M. ZIMMER, & R. RICHARD, *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* § 1.4 (1980) [hereinafter SULLIVAN & ZIMMER]; Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981); Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Sound Policy Perspective*, 82 COLUM. L. REV. 292, 292-94, 321-22 (1982); DuRoss, *Toward Rationality in Discriminatory Discharge Cases*, 66 GEO. L.J. 1109 (1978); Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1130-31, 1159-61 (1980).

See also Bellace, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 IOWA L. REV. 655 (1984); Denis, *How to Identify Employment Discrimination Retaliation Claims*, 66 CHI. B. REC. 168 (1984); Lamber, *Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases under Title VII*, 1985 WIS. L. REV. 1; Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO. L. REV. 17 (1984); Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401 (1984); Zimmer & Sullivan, *The Structure of Title VII Individual Disparate Treatment Litigation: Anderson v. City of Bessemer City, Inferences of Discrimination, and Burdens of Proof*, 9 HARV. WOMEN'S L.J. 25 (1986); Note, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587 (1986); Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984); Comment, *Bazemore v. Friday: Salary Discrimination Under Title VII*, 99 HARV. L. REV. 655 (1986); Recent Developments, *Labor Law—Employer Violates Section 8(a)(3) of NLRA if Employee Would Not Have Been Discharged But for Union Activity—Burden of Persuasion Remains with Employee*, 28 VILL. L. REV. 470 (1982-83).

152 See SCHLEI & GROSSMAN, *supra* note 151, at 15; Mendez, *supra* note 151, at 1130.

153 Mendez, *supra* note 151, at 1130.



addition, as with many discrimination suits, proof of wrongful motive may be complicated under section 510 because decisions taking away medical and disability benefits may be made for both illegal and legitimate reasons. The question then becomes how much of the adverse action must be made for illegal reasons before a court will find the employer liable.<sup>154</sup> Finally, once the plaintiff establishes an illegal motive on the employer's part, it is uncertain what he or she can recover if the action was "independently justified on legitimate grounds"—that is, would the employee have been terminated anyway?<sup>155</sup> As will be noted, federal discrimination case law on all these issues is unclear.<sup>156</sup>

This section will propose apportioning the burden of proof in the following manner: The plaintiff must prove that interference with existing or future rights under an employee benefit plan was a substantial or motivating factor behind the adverse employment action.<sup>157</sup> The particular elements of the plaintiff's case will vary depending on whether the action was an individual claim or a "pattern and practice" class action.<sup>158</sup> If the plaintiff is able to make this showing, he or she will have successfully established the defendant's liability. The defendant would then be given the opportunity of showing that he or she would have made the same decision on independent, legitimate grounds. Such a showing would generally limit plaintiffs to prospective relief and attorney's fees. The employer would ordinarily not be required to reinstate plaintiffs or to provide back and front pay or the value of lost benefits. As will be indicated, finding liability after plaintiffs establish that interference with benefit rights was a motivating factor in the decision to terminate fully vindicates the purpose of section 510—protects benefits while not requiring reinstatement or other damages when the employer can demonstrate the termination would nevertheless have occurred for legitimate reasons.<sup>159</sup> If the defendant cannot show that he or she would have made the same decision on legitimate grounds, the full range of legal and equitable remedies would be available.

## 1. Individual Claims

Section 510 does not specify the elements of plaintiff's case. Analogizing from retaliation cases under Title VII, plaintiffs should be required to show: (1) that the employer knew that the plaintiff was or was likely to become a medical risk; (2) that adverse employment action was taken against the plaintiff; and (3) that the adverse action was taken, in

154 Brodin, *supra* note 151, at 293.

155 *Id.*

156 See SCHLEI & GROSSMAN, *supra* note 151, at 560-62; SCHLEI & GROSSMAN SUPP., *supra* note 151, at 109; Brodin, *supra* note 151, at 293, 299-304.

157 This analysis is similar to the same decision test in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). See *infra* notes 178-98.

158 A pattern and practice case exists where plaintiffs claim that the discriminatory treatment was not simply an isolated, discrete act but rather a policy directed at a particular class of individuals. Pattern and practice cases have been brought under Title VII. See *Teamsters v. United States*, 431 U.S. 324, 325 (1977); SCHLEI & GROSSMAN, *supra* note 151, at 13-15, 1233-24; SCHLEI & GROSSMAN SUPP., *supra* note 151, at 253-54.

159 See *infra* notes 177-90.

substantial part, to interfere with the plaintiff's rights under a health and welfare benefit plan.<sup>160</sup> The specification of elements is tailored to the health and disability insurance issues raised earlier.<sup>161</sup> Courts could easily adapt this analysis to fit pensions or other claims under section 510. Once the plaintiff has established that an illicit motive was a substantial reason for the employment action, then the plaintiff has established the employer's liability.

To establish that the employer interfered with his or her right to receive medical and disability benefits, the plaintiff must show that the employer was aware that the employee or a member of the employee's family was a medical risk. This may be done by showing that the employee or someone else told the employer about the condition.<sup>162</sup> The condition may be self-evident, or the employer may know about it from a physical examination, one of the medical tests described earlier,<sup>163</sup> or a health form.<sup>164</sup> Finally, the employer may have medical information if it is self-insured and processes and pays medical and disability insurance claims routinely.<sup>165</sup> It should not matter that the employer's perception is mistaken—based on rumor or inaccurate tests. If the employer regards the employee as a medical risk, even mistakenly, that should meet the "knowledge" requirement.<sup>166</sup>

The plaintiff ordinarily has little difficulty establishing the second element of the case—that he or she suffered some adverse employment action. Benefits are tied to employment, and employees usually lose them if discharged or drastically demoted. Section 510 specifically prohibits the employer from discharging, firing, suspending, expelling, disciplining or discriminating against employees.<sup>167</sup> While this list is fairly comprehensive, the case law indicates that it is not exclusive. Other actions, such as forcing an employee to quit or constructive discharge have also been found to violate this provision.<sup>168</sup>

Of all the requirements, the most difficult is establishing a causal connection between the medical risk, the loss of benefits and the adverse action. Many section 510 claims fail because the plaintiff cannot marshal

160 SCHLEI & GROSSMAN SUPP., *supra* note 151, at 107-08. See, e.g., McKenna v. Weinberger, 729 F.2d 783, 791 (D.C. Cir. 1984); Canino v. United States E.E.O.C., 707 F.2d 468, 471 (11th Cir. 1983); Deanda v. St. Joseph Hosp., 671 F.2d 850 (5th Cir. 1982); Lamb v. Rantoul, 538 F. Supp. 34 (D.R.I. 1981); Kellin v. ACF Indus., 517 F. Supp. 226 (E.D. Mo. 1981), *aff'd*, 671 F.2d 279 (8th Cir. 1982).

161 See *supra* notes 29-107 and accompanying text.

162 See Folz v. Marriott Corp., 594 F. Supp. 1007 (W.D. Mo. 1984) (plaintiff told employer he had multiple sclerosis two months before he was fired).

163 See *supra* notes 43-69 and accompanying text for the discussion of medical and genetic testing.

164 See *supra* notes 72-74 and accompanying text.

165 For a discussion of insurance plan funding and administration, see *supra* notes 21-24 and accompanying text.

166 This analysis is similar to the Federal Rehabilitation Act, 29 U.S.C. § 706(7)(B) (1982), where a person is handicapped if they are "regarded as having such an impairment." *Id.*

167 29 U.S.C. § 1140 (1982).

168 See Crouch v. Mo-Kan Iron Workers Welfare Fund, 740 F.2d 805 (10th Cir. 1984) (plaintiff entitled to relief under § 510 when defendant made plaintiff's working condition intolerable and forced her to quit because she claimed pension benefits); Corkery v. Super Drugs Corp., 602 F. Supp. 42 (M.D. Fla. 1985) (hostile working conditions forced plaintiff to take early retirement).

enough circumstantial evidence to establish this connection.<sup>169</sup>

One crucial factor in proving motive is the timing of the action. The inference of discriminatory motive is strong if the employer takes action close to the time when it discovers the medical condition or risk. Conversely, the longer the delay, the weaker the inference unless, perhaps, the condition worsens.<sup>170</sup> For example, in *Folz v. Marriott Corp.* the employer fired the plaintiff, an eighteen-year employee, only two months after the plaintiff informed the employer that he had multiple sclerosis.<sup>171</sup> The timing of the discharge, along with other evidence, created a strong inference of discriminatory motive.<sup>172</sup>

Another indication of motive is a change in the way the employer treats the employee after the employer learns of the employee's condition. The inference strengthens if the employer has previously fired or disciplined other individuals who posed medical risks or if the employer deviates from its own self-prescribed disciplinary procedures. In *Foltz*, the plaintiff was placed on probation allegedly for poor performance but did not receive the progressive discipline as required in the company's personnel manuals. Failure to follow these procedures and the harshness of plaintiff's treatment also created the suspicion that the discharge was for illegal reasons.<sup>173</sup> Similarly, in *Ursic v. Bethlehem Mines*,<sup>174</sup> the employer fired the plaintiff, a thirty year employee, just before he became eligible for a disability pension because he allegedly borrowed tools from the workplace without permission. Other employees had regularly borrowed tools from the mine under similar circumstances without being disciplined or fired.<sup>175</sup>

Apart from the timing of the action or differential treatment, the causal connection might also be established by showing that the employer had a strong economic incentive to deprive the plaintiff of benefits. This particular factor must, of course, be applied cautiously. For example, whenever an employee loses his or her job, the employer saves money—it no longer has to provide welfare benefits to that person. But, not all discharges are impermissible simply for this reason. This factor could be significant if combined with other circumstantial evidence, such as in *Folz*, where the employer's health and welfare plans were self-funded. The court found that because the employer paid the medical and disability claims directly out of company funds, there was a strong economic incentive to discharge anyone suffering from a progressive and potentially catastrophic disease such as multiple sclerosis.<sup>176</sup> Together

169 See, e.g., *Beckwith v. International Mill Servs., Inc.*, 617 F. Supp. 187 (E.D. Pa. 1985); *Baker v. Kaiser Aluminum and Chem. Corp.*, 608 F. Supp. 1315 (N.D. Cal. 1984); *Shipper v. Avon Prods., Inc.*, 605 F. Supp. 701 (S.D. N.Y. 1985); *Ferguson v. Freedom Forge Corp.*, 604 F. Supp. 1157 (W.D. Pa. 1985); *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983 (S.D. N.Y. 1982). See also cases cited *supra* note 148.

170 See SCHLEI & GROSSMAN, *supra* note 151, at 559.

171 594 F. Supp. 1007, 1011-13 (W.D. Mo. 1984).

172 *Id.* at 1014-15. See also SCHLEI & GROSSMAN, *supra* note 151, at 558-59.

173 594 F. Supp. at 1014.

174 556 F. Supp. 571 (W.D. Pa. 1983), *aff'd in pertinent part*, 719 F.2d 670 (3d Cir. 1983).

175 *Id.* at 573-74.

176 *Folz*, 594 F. Supp. at 1014-15.

with the timing and differential treatment, this evidence strengthened the finding of discriminatory motive. Similarly in *Ursic*, the plaintiff would have been the youngest employee to retire with a disability pension. The employer manifested its displeasure with the plaintiff's decision to retire and fired him shortly thereafter.<sup>177</sup>

After the plaintiff establishes all the elements of its case for the employer's liability under section 510, the employer will be given the opportunity to rebut the plaintiff's case by showing that it acted for legitimate, nondiscriminatory reasons. To escape liability entirely the employer must establish the discriminatory motive played no significant part in the adverse employment decision. Under the better approach, the employer would not escape liability merely by showing that the same decision would have been made had its motives been pure. Rather this "same decision" argument would only bear on the extent of the remedy to be afforded.

This approach, advocated by one commentator and applied in certain discrimination cases,<sup>178</sup> goes beyond the approach taken by the Supreme Court in the well-known decision, *Mt. Healthy City School Board of Education v. Doyle*.<sup>179</sup> In *Mt. Healthy*, the Supreme Court allocated the burdens of proof as follows. The plaintiff has the initial burden of showing that the constitutional violation played a motivating or substantial factor in the employment decision. Once the plaintiff makes this showing, the burden then shifts to the employer to establish by a preponderance of the evidence that it would have reached the "same decision" even in the absence of the protected conduct.<sup>180</sup> Although it is not clear from the decision whether the "same decision" test applies to the determination of liability or only to the issue of the appropriate remedy,<sup>181</sup> the application of the *Mt. Healthy* test to anti-union discrimination cases

177 *Ursic*, 556 F. Supp. at 573-74.

178 *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985) (en banc) (the same decision test applies only in determining the remedy); Brodin, *supra* note 151. The same decision test was originally articulated by the Supreme Court in a first amendment case, *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). See *infra* note 191.

There is some support for the approach I advocate in one § 510 case. Although *Zipf v. American Tel. and Tel. Co.*, 799 F.2d 889 (3d Cir. 1986), holds that plaintiff need not exhaust claims procedures before bringing an action, the Third Circuit, in dicta, stated that the plaintiff need not satisfy a "but for" standard like that in *Mt. Healthy*.

Section 510 itself indicates that the employee need not show that "but for" the unlawful interference, the employee would have been entitled to benefits. The statutory language forbids conduct taken for "the purpose of interfering with the attainment of any right to which such participant may become entitled," regardless of whether the interference is successful and regardless of whether the participant would actually have received the benefits absent the interference. Thus Section 510 does not require Zipf to demonstrate that she would have been entitled to benefits on April 6, or at any other specific time.

799 F.2d at 893.

179 429 U.S. 274 (1977).

180 *Id.* at 287.

181 The following passage indicates the ambiguity in the decision:

One plausible meaning of the [district] court's statement is that the Board and the Superintendent not only could, but in fact *would* have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.

under section 8(a)(3) of the NLRA indicates that the test goes to the establishment of liability.<sup>182</sup> It is this part of the *Mt. Healthy* test that should be reassessed. The following criticism will proceed on the assumption that the "same decision" test of *Mt. Healthy* applies to the establishment of liability. The principal rationale for the *Mt. Healthy* test is that it merely places the plaintiff in as good a position as he or she would have been had there been no discriminatory motivation.<sup>183</sup> In judging employment decisions, courts must balance legitimate employer interests in an efficient workplace with the protections afforded employees under federal law.<sup>184</sup> The employee should not be in a "better position" than other employees merely because the employer was motivated, in part, by a discriminatory reason.

A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.<sup>185</sup>

Furthermore, the *Mt. Healthy* test adequately protects the constitutional rights of employees by requiring the employer to prove that the action would have taken place in any case. As commentators have indicated, it is exceedingly difficult to prove a negative—that the decision would have been different absent the discriminatory motive.<sup>186</sup> Placing the burden on the party who has access to the required information is also sensible. Since the employer makes the decision, it should have the ultimate burden of justifying it or establishing that it would have been made the same way.<sup>187</sup>

Nonetheless, there are other strong policy and practical reasons for rejecting the *Mt. Healthy* analysis in section 510 cases. First, under the *Mt. Healthy* test, conceivably the employer would not be liable under section 510 even though interference with existing or future rights under a benefit plan played a significant part in the employment decision.<sup>188</sup> Employers are likely to argue that if independent reasons exist for the action they have not violated the statute. But because the purpose of section

*Id.* at 285 (emphasis in original). See also Brodin, *supra* note 151, at 308, 325 n.136; Wolley, *What Hath Mt. Healthy Wrought?*, 41 OHIO ST. L.J. 385 (1980).

182 NLRB v. Transportation Management Corp., 462 U.S. 393 (1983); Wright Line, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

183 *Mt. Healthy*, 429 U.S. at 286; Brodin, *supra* note 151, at 306-07.

184 *Mt. Healthy*, 429 U.S. at 284.

185 *Id.* at 286.

186 See Belton, *supra* note 151, at 1284-87; Brodin, *supra* note 151, at 307.

187 See Gomez v. Toledo, 446 U.S. 635 (1980); Belton, *supra* note 151, at 1284; Brodin, *supra* note 151, at 307 n.69, 321.

188 As commentators have indicated, it is not difficult for an employer to put forward what appears to be a legitimate reason even if this reason played no part in the adverse employment decision. The employer simply has to know how to develop a convincing personnel file. As a result, the plaintiff may have a difficult time refuting such a showing. Brodin, *supra* note 151, at 321; Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1355 (1979).

510 is to prohibit and ultimately eliminate this form of discrimination, this showing should be sufficient to establish liability. Congress recognized that fringe benefits are crucial to the well-being of employees and their families, and the only way to protect benefits is to protect the employment relationship.<sup>189</sup> Finding liability would deter employers from making employment decisions on inappropriate grounds.<sup>190</sup>

However, the better analysis for section 510 cases is more lenient than that applied in NLRA section 8(a)(3) or many Title VII cases.<sup>191</sup> Under these statutes, the employer can escape liability only if it can show that the employment action would have occurred for legitimate reasons, a relatively stringent standard. The analysis under section 510 should be more liberal. The interference with benefit rights is not more reprehensible than discrimination against people with immutable characteristics such as race or sex or discrimination against employees for engaging in union activities. However, both the NLRA and Title VII contain statutory language which prohibits reinstatement or back pay if the employee was discharged for cause. Therefore, the stricter formulation of the *Mt. Healthy* test arguably comports better with these statutory restrictions.<sup>192</sup>

By contrast, section 510 and its companion section 502, contain no

189 See *supra* notes 5-7 and accompanying text.

190 The same argument can be made for all federal discrimination laws, but for a discussion of deterrence and Title VII, see Brodin, *supra* note 151, at 318-23. If the purpose is to deter discrimination, it might be better to find liability once the plaintiff can show that the discriminatory motive played "any part" in the employment decision. With a substantial motive test, an employer could escape liability if the discriminatory motive played only an insignificant or de minimus part in the employment action. For example, under § 510, an employer would not be liable if there were 20 other, more significant reasons for the employment action apart from interfering with existing or future rights under a benefit plan. See *supra* notes 177-78 and accompanying text. While an "any part" test is preferred, courts are unlikely to adopt this test for § 510 cases when they are moving away from this test in Title VII discrimination and retaliation cases. See Brodin, *supra* note 151, at 293, 301, 308-10. For a view that race is never de minimus, see generally Stonefield, *Non-Determinative Discrimination, Mixed Motives and the Inner Boundary of Discrimination Law*, 35 BUFFALO L. REV. 85, 95 (1986) (discrimination not only involves loss of equal opportunity but also loss of self-respect, confidence, and dignity).

191 The *Mt. Healthy* test has been adopted by the NLRB and the Supreme Court for § 8(a)(3) cases. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *DuRoss*, *supra* note 151.

The analysis employed in mixed-motive cases under Title VII in more recent cases is similar to the *Mt. Healthy* test. See, e.g., *McMillan v. Rust College, Inc.*, 710 F.2d 1112 (5th Cir. 1983); *Kauffman v. Sidereal Corp.*, 695 F.2d 343 (9th Cir. 1983) (plaintiff must establish that he or she was discharged for engaging in protected activities and but for this activity, plaintiff would not have been terminated); *Shanley v. Youngstown Sheet & Tube Co.*, 552 F. Supp. 4 (N.D. Ind. 1982). See also Brodin, *supra* note 151, at 308-10.

192 NLRA § 10(c), 29 U.S.C. § 160(c) (1982) states in pertinent part:

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) was modeled on NLRA § 10(c) and provides:

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of [section 704(a)].

Even these statutory restrictions could be interpreted only to prohibit or restrict courts from granting certain remedies in the event that the employer is able to establish an independent reason

such restrictions. Section 502 permits all forms of equitable and other relief without any restrictions on or even mention of reinstatement or back pay.<sup>193</sup> Therefore, courts can take the more liberal view as advocated in this Article. Congress was aware of the restrictions in the NLRA and Title VII and chose not to include them in ERISA. Furthermore, an expansive analysis for section 510 cases need not be justified on grounds that this prohibited discrimination is as bad or worse than other forms of discrimination prohibited by federal law. Congress enacted this provision in ERISA to safeguard employee benefits, and what matters is whether the proposed analysis accomplishes this purpose.<sup>194</sup>

In any case, finding liability after the plaintiff establishes that dis-

for the employment action. Neither provision explicitly prohibits a finding of liability after the plaintiff establishes that the dominant motive was discriminatory.

In the *Mt. Healthy* group of cases, of course, the Supreme Court's mixed-motives analysis is used to establish the defendant's liability in the first place, not simply to determine the appropriate remedy. If the defendant establishes that it would have made the same decision in the absence of the illegitimate factor, it wins the case, and the complaint is dismissed. Our reading of Title VII is significantly different. In that statute, Congress has made unlawful any kind of racial discrimination that actually deprives someone of a job. A defendant's showing that the plaintiff would not have gotten the job anyway does not extinguish liability. It simply excludes the remedy of retroactive promotion or reinstatement.

*Bibbs v. Block*, 778 F.2d 1318, 1323 (8th Cir. 1985) (en banc). See also Brodin, *supra* note 151, at 294-99 (indicating that the legislative history does not resolve the mixed-motive problem in Title VII actions); but see DuRoss, *supra* note 151, at 1123-26 (Congress intended to incorporate the dominant motive test into NLRA § 8(a)(3) actions).

193 Section 502(a), 29 U.S.C. § 1132(a) (1982), states in pertinent part:

A civil action may be brought—

(1) By a participant or beneficiary—

(A) for the relief provided in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .

(3) by a participant, beneficiary, a fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or terms of the plan; . . .

The legislative history indicates that Congress intended that the court have broad equitable powers to fashion relief.

The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Retirement Income Security for Employees Act as well as the amendments made to the Welfare and Pension Plans Disclosure Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.

S. Rep. No. 93-127, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4871 (emphasis added). See also *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1015 (W.D. Mo. 1984).

194 Although I apply the mixed-motive analysis proposed by Brodin, *supra* note 151, for Title VII actions, Brodin is critical of applying the same standard to NLRA, Title VII and ADEA actions. In particular, he argues that race discrimination, the primary focus of his article, is significantly different from discrimination based on age or union activity.

There is a long history of intentionally unequal treatment based on race; race discrimination is founded on offensive stereotyped characteristics; and the victims of racism constitute a 'discrete and insular' minority deserving of 'extraordinary protection from the majoritarian process.'

*Id.* at 310-11 n.80. Of course, Title VII prohibits more than just racial discrimination; it also prohibits discrimination on the basis of sex, religion and national origin. Presumably, Brodin would apply his analysis at least to sex discrimination. See 42 U.S.C. § 2000e-2 (1982).

crimutory motive played a significant role in the adverse employment decision would not require an employer to reinstate the employee, pay back wages or compensate the employee for lost benefits, nor would it put the plaintiff in a better position than that of other employees.<sup>195</sup> However, the plaintiff would be entitled to prospective relief, such as an injunction, court costs, and attorneys' fees.<sup>196</sup> An injunction could be important to plaintiffs because the employer often has taken similar actions against other employees; an injunction would prohibit such action in the future even if other damages are not forthcoming.<sup>197</sup> Furthermore, the ability to collect attorney's fees is crucial because most plaintiffs would not be able to afford to bring an action otherwise. As with other federal antidiscrimination laws, the enforcement of section 510 depends primarily on private initiative. If employees have difficulty proving liability, they will bring relatively few actions.<sup>198</sup>

If, as proposed, the *Mt. Healthy* test is applied to determine relief, it is necessary to examine what constitutes legitimate nondiscriminatory reasons for terminating medically risky employees. If the employer cannot prove that it was motivated by legitimate reasons, then there is no mixed-motive issue. The plaintiff will be entitled to all appropriate remedies, damages, and injunctive relief because the employer was motivated solely by a discriminatory reason. This result can occur in two ways. The first occurs where the employer simply cannot articulate *any* legitimate or acceptable reason for the adverse action. The second and more common situation occurs when the plaintiff shows that the employer's reason was mere pretext; in other words, the reason given is simply untrue.<sup>199</sup>

Courts will most likely view job-related reasons as nondiscriminatory reasons for adverse employment actions.<sup>200</sup> For example, the employer

195 See Brodin, *supra* note 151, at 321-26.

Courts may refuse to reinstate employees even if the employer is unable to show legitimate reasons for the discharge if the hostility between the employer and the former employee is so great as to preclude an effective working relationship. See, e.g., *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1018 (W.D. Mo. 1984) (no reinstatement where "plaintiff's prior managerial position requires mutual trust and cooperation which could not be possible in light of the circumstances").

However, if the court refuses to reinstate the plaintiff, it will usually give back pay and occasionally front pay as well. In *Folz*, the court granted front pay because the plaintiff was already 53 years old and was suffering from multiple sclerosis. Expert testimony indicated that anyone with this disease would be unable to work for long periods of time. Front pay was necessary to fully compensate the plaintiff. 594 F. Supp. at 1018-19. See Note, *Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*, 53 *FORDHAM L. REV.* 579 (1984).

196 ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1982), permits the court to grant attorneys' fees and costs to the prevailing party.

197 See Brodin, *supra* note 151, at 320, 323-24 for a similar observation in Title VII actions.

198 See Brodin, *supra* note 151, at 322-23.

199 See *Folz*, 594 F. Supp. at 1015 (poor performance was pretext for discharge; employer did not want to pay for plaintiff's medical and disability benefits); *Ursic v. Bethlehem Mines*, 556 F. Supp. 571, 575 (W.D. Pa. 1983), *aff'd in relevant part*, 719 F.2d 670 (3d Cir. 1983) (unauthorized removal of tools was pretext for firing employee; employer wanted to prevent plaintiff's pension from vesting).

200 Does the employer's reason have to be job-related to be a legitimate nondiscriminatory reason under § 510? If the employer must articulate a job-related reason, then § 510 will further erode the employment-at-will doctrine which allows employers to fire people for any reason or no reason at all. However, § 510 and other antidiscrimination laws have to limit the at-will doctrine to prevent discrimination against employees within protected classes (race, sex, age, union activity, etc.). The at-will doctrine has been seriously eroded in recent years and perhaps will not survive. See, e.g., W. HOLLOWAY & M. LEISH, *EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES* 111-14 (1985);



might argue that the employee's job performance declined or the employee was absent from work too often because of an illness or injury, factors with which the employer is legitimately concerned.<sup>201</sup> However, the plaintiff may be able to counter this explanation if he or she can show that he or she would have been eligible for disability leave and benefits and was terminated without being given the option of going on leave.<sup>202</sup> However, courts must make an exception if the employee's poor performance is due to drug or alcohol abuse and the job affects the safety and health of coworkers and the public. But even in these situations, the action may be discriminatory if the employer provides a drug and alcohol rehabilitation program and if employees are allowed to take disability leaves for these conditions.<sup>203</sup>

Other reasons which appear to be job-related may not withstand scrutiny because the reason violates the Rehabilitation Act or other federal law. The employer might, for example, argue that an employee with AIDS could not work effectively with coworkers or the public because of the latter's unwarranted fears of contracting the disease from casual contact.<sup>204</sup> Assuming that discharging an employee with AIDS is ultimately found to violate the Rehabilitation Act, courts should not permit an employer to argue that it can fire an employee with AIDS because coworkers or the public have unwarranted fears of contagion. Moreover, a positive test result for the AIDS antibody does not guarantee that a person will contract the disease.<sup>205</sup> Technically, ERISA protects employees and family members from interference with benefits, not other forms of discrimination. Nonetheless, ERISA should not undermine other discrimination laws.<sup>206</sup> If this view is adopted, employers may simply have to educate their workforce about the facts of certain illnesses.

Other supposed job-related reasons do not concern contagion but center on voluntary lifestyle choices that primarily endanger the individual who makes them. An employer might argue that it screens for unhealthful lifestyles both to encourage employees to adopt good health habits and to avoid having to deal with risky workers later.<sup>207</sup> Courts

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Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFFALO L. REV. 89, 154-57 (1985); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983); Note, *Defining Public Torts in At-Will Dismissals*, 34 STAN. L. REV. 153 (1981). While employers need the flexibility to make employment decisions, it is not burdensome to require the employer to articulate a job-related reason for a decision. The at-will rule encourages arbitrary decisions which affect the worklives and careers of employees. If the employer cannot articulate such a reason, then this failure should create an inference that a discriminatory reason exists.

201 As indicated earlier, many companies carefully regulate excused absences to reduce malingering. See *supra* notes 100-06 and accompanying text.

202 See *supra* notes 105-07.

203 See *infra* note 229 and accompanying text.

204 See *supra* notes 52-57 and accompanying text.

205 See *supra* notes 58-61 and accompanying text.

206 Obviously, the employer is not likely to articulate a reason which will make it liable under other discrimination laws. However, it is possible that the plaintiff may not be able to bring an action under Title VII or the Rehabilitation Act if the statute of limitations has run. In that instance, the employer may risk little by articulating such a reason. Such reasons should not be valid under § 510 even if this provision only protects plaintiffs from retaliation or interference with their rights under benefit plans.

207 See *supra* notes 76-100 and accompanying text.

should reject such broad grounds; otherwise, ERISA would afford little protection. Few people have totally healthful lifestyles. Genetically-based vulnerability should be rejected for the same reason—no one can change his or her genetic make-up if it turns out that they are genetically susceptible to certain illnesses.<sup>208</sup> After all, the purpose of insurance is to cover illnesses and injuries when they occur. The employer should not be able to use these broad reasons to prevent plaintiffs from fully recovering for the loss of benefits. They come close to amounting to a “cost defense,” which, if permitted, would vitiate ERISA in a most undesirable way.

Analogous “cost defense grounds” have been raised in cases stemming from plant closings and layoffs. In *Gavalik v. Continental Can Co.*,<sup>209</sup> for example, the employer instituted a program which targeted employees who were close to qualifying for plant shutdown pensions. The Third Circuit found that the employer decided to close plants and lay off employees to reduce the number eligible for these pensions.<sup>210</sup> While the employer can shut down plants or lay off employees because of loss of business, it should not be able to do so simply because their benefits will cost more than others. Employers already face possible charges of age discrimination when they target older employees with higher wages, salaries and benefits.<sup>211</sup> ERISA mandates similar protection for em-

208 See generally M. ROTHSTEIN, *supra* note 41, at 197-201; Note, *Employment Discrimination Implications of Genetic Screening in the Workplace Under Title VII and the Rehabilitation Act*, 10 AM. J. L. & MED. 323 (1985).

209 812 F.2d 834 (3d Cir. 1987). Unlike many discrimination cases, plaintiffs had direct evidence of the company's discriminatory motives to reduce its pension eligibility. *Id.* at 856-57. As business declined, Continental Can instituted a “cap and shrink” program in the mid-1970s to reduce its liability for plant shutdown benefits. Plant shutdown pension benefits are triggered for senior employees in the event of a plant closing. The “cap and shrink” program laid off employees who were close to vesting and kept all employees with enough years of service and age to qualify for their benefits. With the aid of computers, the company kept track of all employees. It ran a line through the seniority chart to indicate what employees had to be laid off and who could not be recalled to service. In addition, if plant managers wanted to recall an employee below the line, the head office had to approve the decision. Continental also shifted work to plants with low pension liability or to plants with a high proportion of employees with vested benefits. *Id.* at 840-42.

210 *Id.* at 850-66. Even though the district court found that Continental was substantially motivated by a desire to avoid pension liability, it still found in favor of the employer on the grounds that the plants would have been closed anyway for other legitimate business reasons. *Id.* at 841-42. The opinion apparently places the burden of proving that the same decision would not have occurred for legitimate reasons on the plaintiff. As indicated, this burden is far more onerous than is required under the *Mt. Healthy* test. See *supra* notes 177-98 and accompanying text. For this reason, the Third Circuit overturned the district court and appeared to adopt the *Mt. Healthy* test. Plaintiffs met their burden by establishing that Continental's actions were substantially motivated by a “desire to prevent pension eligibility.” 812 F.2d at 863.

The policy in dispute in *Gavalik* was also the subject of class actions in California and New Jersey. See *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492 (D.N.J. 1985).

211 Usually older employees with greater seniority have accumulated the years of service necessary to qualify for pension and other expensive benefits. Furthermore, older employees are more susceptible to serious illnesses which incur larger medical and disability costs (heart disease, cancer, etc.). As a result, termination may also violate the Age Discrimination Act, 29 U.S.C. §§ 621-634 (1982). See, e.g., *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1396 (3d Cir. 1984), *cert. denied*, 469 U.S. 1087 (1984) (steel company violated Age Discrimination Act when it terminated the four highest paid salespeople who also had higher pension, insurance and social security costs); *Powers, Reductions in Form Under the Age Discrimination in Employment Act*, 2 LAB. LAW. 197, 202-05 (1986). But see *Holley v. Sanyo Mfg. Inc.*, 771 F.2d 1161, 1168 (8th Cir. 1985) (employee terminated

ployee benefits. Otherwise, few employees in declining industries will have benefits when they most need them. During difficult times employers would naturally want to discharge employees whose benefits cost more than others.

In summary, courts should carefully scrutinize the employer's evidence that it would have made the same decision even in the absence of discriminatory motive. What appear to be job-related reasons should not withstand scrutiny if the employee is eligible to take disability leave or enter rehabilitation programs provided under benefit programs and if these reasons violate other federal discrimination laws. The cost of benefits or the health of employees themselves should also not be acceptable reasons. If these reasons are viewed as nondiscriminatory, it would be impossible to protect insurance or any other benefits under section 510.

## 2. Pattern and Practice Cases

As in Title VII and ADEA cases, plaintiffs may bring class actions challenging employer actions as part of a "pattern and practice" of interference with existing or future rights under a benefit plan.<sup>212</sup> Class actions may arise when employers take adverse employment actions as a result of medical, genetic or drug testing or any other program that targets medically risky employees.<sup>213</sup> Although the plaintiff's case would be structured differently in a pattern and practice case, the general analysis developed earlier would still apply. The mixed-motive analysis possibly works even better in a class action than in an individual case. For one thing, courts often bifurcate class actions into liability and remedial stages or phases for reasons of judicial management.<sup>214</sup> Applying a different analysis to the liability and remedial phases should present few difficulties. Also, if the employer is able to show the same decision would have been made for nondiscriminatory reasons, then the plaintiffs are even more concerned with injunctive relief which would be needed to put an end to the discriminatory practice. The Supreme Court has held that when plaintiffs establish class wide violations, the defendant must establish that the violation did *not* cause the individual job losses.<sup>215</sup> Apart from the differences between the plaintiff's cases in individual and in pattern and practice suits, the defenses should be similar to those discussed in the previous section.

Although there are few class action cases under section 510, the large body of case law under Title VII provides a general framework for

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because position was eliminated; mere fact that a lower paid employee replaced him did not establish age discrimination); *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1411-12 (7th Cir. 1984) (even if cost-cutting was a motivation for the discharge of older employee, this may not violate ADEA).

212 See SCHLEI AND GROSSMAN, *supra* note 151, at 1322-24.

213 See *supra* notes 43-107 and accompanying text.

214 See, e.g., *Teamsters v. United States*, 431 U.S. 324, 360-61 (1977); 4 NEWBERG ON CLASS ACTIONS § 24.120 (2d ed. 1985).

215 See, e.g., *Teamsters*, 431 U.S. at 360-61 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771-73 (1976); SCHLEI AND GROSSMAN, *supra* note 151, at 1322.

pattern and practice cases.<sup>216</sup> As with individual actions, plaintiffs rarely have direct evidence of the discriminatory motive but must establish it by circumstantial evidence. To establish liability, the plaintiff must show that a pattern or practice of discrimination exists, and "that the pattern or practice of differential treatment is the [employer's] regular and standard operating procedure."<sup>217</sup> Plaintiffs usually prove this in two ways. First, plaintiffs may present evidence of individual instances of discrimination against class representatives. Proving the individual cases of discrimination would be accomplished in the ways described in the previous section.<sup>218</sup> However, plaintiffs need not establish that each member of the class suffered similar discrimination in order to show that there was a discriminatory policy.<sup>219</sup> In addition, plaintiffs may show discrimination by presenting statistical evidence.<sup>220</sup> Plaintiffs may have less difficulty in obtaining this sort of data in an ERISA action than in other actions because employers are required to keep detailed records if they administer benefit plans.<sup>221</sup> In addition, employees will not have difficulty establishing a policy if the employer conducts medical or other tests and takes action against all workers who test positively.<sup>222</sup>

As indicated earlier, justifying medical or other screening devices will be difficult if these are not job related. For example, employers will find it difficult to justify testing for the AIDS antibodies because the test is unreliable and there is no evidence that the disease can be spread by casual contact at the workplace.<sup>223</sup> The employer is likely to defend such testing on grounds other than reducing benefits costs. But other reasons, such as fear of contagion, have no medical justification and may, on their own, violate federal and state handicap laws.<sup>224</sup> Considering such reasons legitimate under ERISA would not promote the goal of eliminating discrimination.

Genetic screening would face similar hurdles. Even if testing is reliable enough to show that an employee has a risk of contracting certain serious diseases such as heart disease, multiple sclerosis, and cancer, few occupational reasons exist to make employment decisions on the basis of genetic propensity.<sup>225</sup> Even if the test results are used to minimize the incidence of occupational diseases, commentators have severely criticized the use of genetic or other medical testing as a way of evading the responsibility of providing a safe workplace.<sup>226</sup>

Although the literature indicates that employers are concerned about the medical and disability costs of alcohol and drug abuse, employ-

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216 SCHLEI AND GROSSMAN, *supra* note 151, at 1322-24. See, e.g., *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *Teamsters*, 431 U.S. 324.

217 SCHLEI AND GROSSMAN, *supra* note 151, at 1322. See also *Teamsters*, 431 U.S. at 336.

218 See *supra* notes 160-211 and accompanying text.

219 See *supra* note 215.

220 SCHLEI AND GROSSMAN, *supra* note 151, at 1322-23.

221 See disclosure and reporting requirements in ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031 (1982 & Supp. III 1985).

222 The employers will keep records of test results in employee files. See *supra* note 74.

223 See *supra* notes 52-62 and accompanying text.

224 See *supra* note 57 for a discussion of liability under the handicap discrimination laws.

225 See M. ROTHSTEIN, *supra* note 41, at 69, 197.

226 See sources cited *supra* note 43.

ees may have difficulty establishing that drug and alcohol testing discriminates against them in violation of section 510.<sup>227</sup> Employers do not usually justify the testing because of increased medical or disability costs. Rather employers justify drug and alcohol testing because of concerns about job performance, absenteeism, theft and safety. Drug use will be treated more severely than alcohol abuse because drugs are usually illegal and their use is an indication of deviant or undesirable behavior.<sup>228</sup> But, if the alcohol or drug abuse does not endanger job performance or jeopardize the safety and health of the public, then discharging someone for this addiction may violate federal and some state handicapped laws. The employer's rationale should be no more legitimate under ERISA.<sup>229</sup>

As indicated earlier, many tests do not accurately measure drug and alcohol abuse. They yield a large number of false positives.<sup>230</sup> If the tests are as unreliable as reported, a positive result should not enable the employer to satisfy its burden of proof.

In addition, the employer may find it difficult to justify discharging an employee if the employer provides drug and alcohol treatment programs and the employee is eligible for such programs but he or she is discharged instead.<sup>231</sup> As with other disability programs, the employer should not be able to promise employees that they can enter the programs and then not allow employees in need to use them. Such programs can be costly, and preventing affected employees from using the program could be strong evidence that the employer was substantially

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227 See sources cited *supra* note 88.

228 See Rothstein, *supra* note 88, at 423.

229 The Federal Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-796 (1982 & Supp. III 1985), prohibits discrimination against handicapped individuals by the government and by private employers receiving federal funds. The Act defines a handicap as "a physical or mental impairment which substantially limits one or more of such person's major life activities, [or] . . . has a record of such an impairment, or . . . is regarded as having such an impairment." 29 U.S.C. § 706(7)(B).

The Rehabilitation Act, 29 U.S.C. § 706(7)(B), does, however, exclude an alcoholic or drug abuser from the protection of the statute if: "an alcoholic or drug abuser[s] . . . current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."

Therefore, an alcoholic or drug abuser would be protected under the Rehabilitation Act if their condition did not affect job performance nor present a safety hazard to other employees or the public. See *Walker v. Weinberger*, 600 F. Supp. 757 (D.D.C. 1985) (employer violated the Rehabilitation Act by considering "pretreatment transgressions" of alcohol in decision to discharge employee); *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) (City of Philadelphia's across-the-board policy of refusing to hire any former or current drug users violated Rehabilitation Act); *Whitaker v. Board of Higher Educ.*, 451 F. Supp. 99 (E.D.N.Y. 1978) (college professor's claim that he was denied tenure due to alcoholism stated cause of action under the Rehabilitation Act).

While there are few reported cases, many state handicap laws would regard alcoholism and drug addiction as handicaps. See, e.g., *Hazlett v. Martin Chevrolet, Inc.*, 25 Ohio St. 3d 279, 496 N.E. 2d 478 (1986); *Connecticut Gen. Life Ins. Co. v. Department of Indus., Labor & Human Relations*, 86 Wis. 2d 393, 273 N.W.2d 206 (1979). Wilson, *supra* note 57, at 650.

California requires employers with 25 or more employees to allow employees to take time off from work to enter alcohol treatment programs. CAL. LAB. CODE §§ 1025-1028 (West 1972); Wilson, *supra* note 57, at 650.

230 See *supra* notes 90-96 and accompanying text.

231 Drug and alcohol rehabilitation programs are common in benefit programs. Geidt, *supra* note 91, at 186-87; Rothstein, *supra* note 88, at 434-35.

motivated by a desire to deprive employees of benefits.<sup>232</sup>

### 3. Plan Termination

An employer can deprive employees of benefits and avoid liability under section 510 simply by terminating the medical and disability benefit plan entirely. In that event, the purposes of section 510 in protecting participants and beneficiaries from loss of benefits collide with another policy under ERISA, the freedom given employers not to provide benefits at all.<sup>233</sup> Employers can generally terminate welfare benefits (although not pensions) with few restrictions unless they have contractually bound themselves not to do so.<sup>234</sup> Therefore, an employer could argue that plan termination does not violate section 510 or any other part of ERISA even though the termination may intentionally deprive participants and beneficiaries of their benefits.

It is unclear how courts will handle plan terminations under ERISA. Thus far, only two cases address the issue. In *Aronson v. Servus Rubber, Division of Chromalloy*,<sup>235</sup> the First Circuit held that partial plan termination did not violate section 510 because other provisions of ERISA permit this kind of termination and because the plan termination had "a readily apparent business justification."<sup>236</sup> The company terminated the part of the plan that covered employees in the plant that was shut down.<sup>237</sup> According to *Aronson*, it is possible that the employer might violate section 510 if the partial termination was done solely to deprive a group of employees likely to need or to qualify for the benefits in the near future.<sup>238</sup>

This situation occurred in *Dependahl v. Falstaff Brewing Corp.*<sup>239</sup> where the company terminated a severance pay plan just before a group of employees were to be laid off and before they would have collected the benefits.<sup>240</sup> The district court never addressed the section 510 issue, and found for the plaintiffs under a different theory—that the employer, as

232 This analysis assumes that the employee has not been guilty of any other serious misconduct as a result of the drug or alcohol abuse.

233 Vogel, *Until Death Do Us Part: Vesting of Retiree Insurance*, 9 INDUS. REL. L.J. 183, 225 (1987). See generally Barnes & Mishkind, *Retiree Health and Welfare Benefits: Controversy Over Their Duration*, 10 EMPL. REL. L.J. 584, 592 (1985). See also Murphy v. Heppenstall, 635 F.2d 233, 239 (3d Cir. 1980) (ERISA provides the minimum; employers can provide more than is required under the Act).

234 See Title IV of ERISA, 29 U.S.C. §§ 1301-1461 (1982 & Supp. III 1985), which regulates pension plan termination.

Courts have often found that employers cannot terminate retiree insurance plans for employees who have already retired because plans were generally established as status or lifetime benefits. As long as the employee remains retired, he or she would continue to receive benefits for life. See, e.g., *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), cert. denied, 465 U.S. 1007 (1984); *Hansen v. White Farms Equip. Co.*, 5 Employee Benefits Cas. (BNA) 2130 (N.D. Ohio 1984), rev'd on other grounds, 788 F.2d 1186 (6th Cir. 1986); *Eardman v. Bethlehem Steel Corp.*, 607 F. Supp. 196 (W.D.N.Y. 1984); Vogel, *supra* note 233, at 203-16.

235 730 F.2d 12 (1st Cir. 1984). See also Martucci & Utz, *Unlawful Interference with Protected Rights Under ERISA*, 2 LAB. LAW. 251, 258-60 (1985-86).

236 730 F.2d at 16.

237 *Id.* at 13-15.

238 *Id.* at 16.

239 491 F. Supp. 1188 (E.D. Mo. 1980), aff'd in pertinent part, 653 F.2d 1208 (8th Cir. 1981).

240 *Id.* at 1189-93.

fiduciary, violated its duties under ERISA to act "solely in the interest of the participants and beneficiaries."<sup>241</sup> The court held that ERISA is designed to protect employee benefits and does not permit termination of any employee to prevent the attainment of any rights to which the employee may become entitled especially when the termination deprives employees of their benefits just as they are about to qualify for them.<sup>242</sup>

Employees may also be able to argue that contract principles prohibit termination under these circumstances. These arguments have been used with some success in retiree insurance cases.<sup>243</sup> It is debatable, however, whether section 510 is designed to prohibit plan termination where it is otherwise permissible. Congress may ultimately have to consider restricting welfare plan terminations to avoid this kind of termination in the future.<sup>244</sup>

#### IV. Conclusion

Concern with the increased costs of medical and disability insurance benefits coupled with advances in medical and genetic testing create a strong incentive for employers to cut costs by targeting and eliminating employees at risk of contracting serious illness. This Article shows that section 510 of ERISA provides relief if the employees or family members can establish that the adverse employment action was taken, in substantial part, to interfere with existing or future rights under an employee benefit plan. The case law thus far has provided little guidance on the burdens and elements of proof in section 510 claims. Adapting analytical approaches from other federal discrimination law, this Article proposes that courts treat the liability and remedial phases of the action separately. At the liability phase in an individual or a class action, plaintiffs should be required to show that interference with existing or future benefits rights was a substantial or motivating factor behind the employer's employment decision. At the remedial stage, the employer should be permitted to show that it would have made the same decision on independent, nondiscriminatory grounds. If such a showing is made, the plaintiff's remedies are limited to injunctive relief, court costs and attorneys' fees. If not, the plaintiff should be entitled to all appropriate equitable and legal relief. This analysis would promote the purposes of ERISA by finding liability if the discriminatory motive played a significant part in the adverse employment action, and at the same time it would not require the employer to reinstate or pay other damages if it can establish independent grounds for the action.

With the passage of ERISA, Congress recognized the importance of

241 ERISA § 404(1), 29 U.S.C. § 1104(a)(1) (1982). See also *Falstaff Brewing*, 491 F. Supp. at 1197.

242 *Falstaff Brewing*, 491 F. Supp. at 1197; Martucci & Utz, *supra* note 233, at 258-60.

Retirees have made similar arguments when the employer reduced or terminated retiree health and welfare plans. See cases cited *supra* note 234. See also *Musto v. American Gen. Corp.*, 615 F. Supp. 1483 (M.D. Tenn. 1985) (employer violated fiduciary duty to follow plan documents when it reduced benefits when plan documents indicated that reductions or termination could only occur in the event of financial hardship); Vogel, *supra* note 233, at 206-16.

243 See *supra* notes 235-42.

244 For a discussion of such a proposal for retiree insurance benefits, see Vogel, *supra* note 233, at 231-40.

employee benefits to the welfare of employees and their families. Medical and disability benefits, the focus in this Article, are crucial to the worker's well-being in the event of illness or injury. Medical insurance today is the ticket to health care in this country—few can receive medical treatment without it. Disability benefits replace lost income if an illness or accident causes an employee to miss work for any period of time. They are the means by which families under these circumstances can maintain a decent standard of living. In an era of cost-consciousness, the expansive analysis proposed in this Article will cushion employees and their families from unwarranted loss of benefits in times of urgent need.