No. 08-1109

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

KENNETH J. SOWERS, ANTHONY J. ZANGHI and ROBERT A. HAYDEN, JR. on behalf of themselves and others similarly situated,
Plaintiffs-Appellees,

v.

FREIGHTCAR AMERICA, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES

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STATEMENT OF THE ISSUE

This case involves an interlocutory appeal filed by defendant-appellant FreightCar America, Inc. ("FCA") from a district court order granting a preliminary injunction to two subclasses of employees who were laid off from positions at a FCA plant in Johnstown, Pennsylvania, that FCA planned to close down. The employees sued alleging that these layoffs violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., because they were timed to prevent the vesting of their collectively-bargained pension benefits in violation of ERISA section 510, 29 U.S.C. § 1140. They moved for, and the district court granted, a preliminary injunction under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), reinstating the plaintiffs to employment in order to allow them to accrue the necessary age and service length requirements to vest in their pensions under the terms of the plan and the governing collective bargaining agreement. Although FCA has appealed the grant of the preliminary injunction on a number of bases, the Secretary's brief is solely addressed to the following issue:

Whether reinstatement to a job position constitutes "appropriate equitable relief" within the meaning of ERISA section 502(a)(3).[1]

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor has primary responsibility for enforcing and interpreting Title I of ERISA. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (en banc) (the Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets). Moreover, the Secretary is authorized under section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5), to institute civil actions to obtain "appropriate equitable relief" to redress violations of, and to enforce, Title I of ERISA, including ERISA section 510. The Secretary therefore has a strong interest in ensuring that courts correctly construe the "appropriate equitable relief" available under section 502(a)(3) to remedy ERISA section 510 violations both because of her interest in ensuring that plaintiffs may bring private suits to

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[1] In addition to making an argument about the remedial scope of section 502(a)(3) that will be the sole focus of this brief, FCA raises a number of other issues on appeal that the Secretary will not address, related primarily to whether the court properly granted a preliminary injunction under the applicable standards. Because the Secretary's interest here is to ensure that this Court does not improperly restrict the remedial scope of section 502(a)(3), and not to address the merits of this case, the Secretary does not intend to address these additional arguments.

vindicate their rights under ERISA, and because resolution of this issue has an impact on the scope of the Secretary's own authority.

STATEMENT OF THE CASE[2]

1. FCA is a leading manufacturer of aluminum-bodied rail cars in North America and specializes in coal-carrying rail cars. Hayden v. FreightCar America, Inc., Memorandum Opinion and Order Of Court, C.A. NO. 3:07-cv-201-KRG, Document No. 103, p. 43 (February 11, 2008, Judge Gibson) (W.D. Penn.). (Joint Appendix, J.A., 51). FCA has manufacturing facilities located in Danville, Illinois, Johnstown, Pennsylvania, and Roanoke, Virginia. (J.A. 52). The bargaining unit employees at the Johnstown facility are represented by the United Steelworkers ("USW"). (J.A. 57).

On February 16, 2007, FCA sent a Worker Adjustment and Retraining Notification ("WARN") Act notice announcing 237 layoffs at the Johnstown facility on March 31, 2007. (J.A. 1011-17). FCA issued a second WARN Act notice on May 31, 2007, announcing 187 more layoffs at Johnstown on July 31, 2007. (J.A. 1018-23). These 424 laid-off employees were among the approximately 700 total employees (from all three plants) who were laid off by FCA during this period. (J.A. 79).

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[2] We have based our description of the facts primarily on the district court's opinion and order of February 11, 2008.

On December 18, 2007, FCA filed a Form 8-K with the Securities and Exchange Commission attaching a press release that announced that FCA was considering closing the Johnstown facility. (J.A. 1158-64). FCA asked the USW for decisional bargaining and may close the facility within 60 days of such notice pursuant to the CBA. (J.A. 83).

2. Plaintiffs filed the current suit and, shortly thereafter, on August 15, 2007, moved for a temporary restraining order or preliminary injunction seeking reinstatement of laid-off class members to their employment at FCA's Johnstown facility to allow those employees to satisfy the necessary time of service requirements for their respective pensions. They alleged that FCA illegally interfered with the employees' eligibility for pension benefits and for health and welfare benefits in violation of ERISA section 510. Plaintiffs also filed a motion to certify a class of employees represented by the USW who were participants in the FCA Plan and who were participants in the Johnstown America Corporation Bargaining Unit Pension Plan (the Plan) and who were either: "(i) among the 100 persons who were laid off pursuant to the announcement in the May 31, 2007 WARN Notice, and who will accrue sufficient years and service under the FCA Pension Plan to qualify for [certain pension rights] and associated benefits if they are reinstated and work through 2008 or 2009; or (ii) among the approximately

70 persons who were laid off pursuant to the announcement in the February 16, 2007 WARN Notice, and who had been hired between August 16, 2004 and October 10, 2004." (J.A. 15, quoting Plaintiffs' Motion to Certify Class, p. 2). On August 21, 2007, the district court denied the motion for a temporary restraining order.

On January 11, 2008, after allowing limited and expedited discovery and holding two hearings, the district court issued an order that granted plaintiffs' request for class certification, ordering the creation of two subclasses and granting a preliminary injunction. (J.A. 4-8). The first subclass consists of the approximately 100 FCA employees from the Johnstown facility who were laid off pursuant to the February 16, 2007 and May 31, 2007 WARN Act notices and who would have met the eligibility requirements of certain pensions absent the lay-off (the "special pension group subclass"). (J.A. 4-5). The second subclass consists of the FCA employees who were hired between August 16, 2004 and October 11, 2004 (the "deferred vested pension group subclass"), and who had three years of service between August 16 and October 11, 2007, and would thus qualify for these deferred pensions if they were laid off thereafter. (J.A. 5).

The district court granted a preliminary injunction for the benefit of both subclasses. The court concluded that the plaintiffs had shown both

likelihood of success and irreparable harms and that a balancing of the equities favored the grant of a preliminary injunction as to the first subclass. (J.A. 106-07). The court therefore ordered reinstatement of the special pension subclass "under such terms that will allow the members of this subclass to accrue the necessary age and service time requirements for the special pensions" as set forth in the operative CBA and in the Plan. (J.A. 6). As to the second subclass, the court found that although the deferred vested pension group subclass had not shown a likelihood of success on the merits because they had not shown a specific intent by the defendant to prevent their deferred pensions from vesting, given the strong showing of irreparable harm and the balance of harm to the defendant and the public interest weighing in favor of the class, the court also granted a preliminary injunction ordering that members of this class be reinstated to full-time employment to allow them to accrue the necessary service time requirements for their deferred benefits as set forth in the CBA. (J.A. 6). By memorandum and order of February 11, 2008, the district court reiterated its earlier order and issued a complete statement of findings of fact and conclusions of law.

On January 13, 2008, FCA filed a notice of interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1). This Court stayed the district court's

order of reinstatement, but enjoined appellant from closing its Johnstown facility during pendency of the appeal.

SUMMARY OF THE ARGUMENT

ERISA section 510 makes it unlawful to discharge or suspend an employee for the purpose of interfering with that employee's attainment of pension rights, as the plaintiffs claim FCA did in this case. Furthermore, section 502(a)(3), the appropriate provision for enforcing violations of section 510, permits a civil action "to enjoin any act or practice" that violates any provision of Title I of ERISA or to obtain "other appropriate equitable relief" to redress any such violation. The district court's order granting a preliminary injunction requiring FCA to reinstate the plaintiffs to allow them to accrue the necessary age and service requirements for vesting in their pensions in order to prevent FCA's interference with these benefits comes within the plain terms of this provision.

FCA's argument to the contrary finds no support in the statute, in the relevant case law or in common sense. Where an employer has discharged an employee to prevent his attainment of pension or other benefits, the purpose of an injunction requiring his reinstatement is to prevent the illegal interference with these benefits. While such an order will require the employer to pay the benefits as they vest, this does not take the order outside

the remedial purview of section 502(a)(3), and none of the cases cited by FCA so hold. Instead, as this Court has correctly recognized, such a reinstatement order is a quintessential remedy for a violation of ERISA section 510.

ARGUMENT

An Injunction Requiring Reinstatement of Employees To Allow For Vesting Of Their Benefits Is Available Relief Under ERISA Section 502(a)(3) To Remedy A Violation Of ERISA Section 510

Section 510 of ERISA provides that "[i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary ... for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140. As the Supreme Court has noted "Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." Ingersoll-Rand v. McClendon, 498 U.S. 133, 143 (1990) (citing S. Rep. No. 93-127, pp. 35-36 (1973); H.R. Rep. No. 93-533, p. 17 (1973)). "Congress enacted § 510 'primarily to prevent unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension benefits.'" Eichorn v. AT & T Corp., 248 F.3d

131, 149 (3d Cir. 2001) ("Eichorn I") (citing Dewitt v. Penn-Del Directory Corp., 106 F.3d 514, 522 (3d Cir. 1997)).

Section 510 specifies that "[t]he provisions of section 502 [29 USC § 1132] shall be applicable in the enforcement of this section." Courts, including the Third Circuit, uniformly have held that section 502(a)(3) is the appropriate provision for enforcing a section 510 interference claim. Eichorn v. AT&T Corp., 484 F.3d 644, 652-53 (3d Cir. 2007)("Eichorn II"). Section 502(a)(3) allows for a civil action "by a participant, beneficiary, or 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 provision of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3).

It is clear that injunctions to prevent violations of ERISA are not only expressly permitted under section 502(a)(3)(A) (permitting a civil action "to enjoin any act or practice which violates any provision of the this title or the terms of the plan"), but are inherently equitable remedies. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 211 n.1 (2002) (citing Reich v. Cont'l Casualty Co., 33 F.3d 754, 756 (7th Cir. 1994); 1 D. Dobbs, Law of Remedies § 1.2, p. 11 (2d ed. 1993)). Further, the kind of the injunction at issue in this case, ordering reinstatement to allow plan participants to vest in

their pensions, is an equitable remedy and also constitutes "appropriate equitable relief" available under section 502(a)(3)(B) to remedy a violation of the statutory prohibition on discharging employees to interfere with vesting..

The Supreme Court has ruled that the phrase "appropriate equitable relief" under section 502(a)(3)(B) refers to "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993). Stressing that "the basic contours of the term [equitable relief] are well known" the Court has advised consultation with "standard current works such as Dobbs, Palmer, Corbin, and the Restatements" to determine the equitable nature of the particular remedy being sought. Great-West, 534 U.S. at 217. Although reinstatement of employees was and is greatly disfavored at common law, and thus not widely available in the days of the divided bench, reinstatement was generally considered equitable. See 3 Dobbs § 12.21(4), p. 489, 2 Dobbs § 6.10(1), p. 193; Great-West, 534 U.S. at 211, 214 nn.1 & 4.

Thus, while this Court in Eichorn II disallowed a claim for pension benefits under ERISA section 502(a)(3) to remedy a section 510 violation, the Court pointed out that its holding did not render section 510 a nullity

because, the Court correctly reasoned, for the "'prototypical'" section 510 claim of termination in order to prevent vesting, "the typical remedy is reinstatement, which is an equitable remedy within the terms of the statute." 484 F.3d at 658 (emphasis added) (citing Ingersoll-Rand, 498 U.S. at 143; 2 Dobbs § 6.10(5), p. 226).[3] Indeed, every court to have addressed the issue in the ERISA context has concluded as much. See Millsap v. McDonnell Douglas Corp., 368 F.3d 1246, 1255 n.8 (10th Cir. 2004) ("The remedy of reinstatement is essentially injunctive relief"); Myers v. Colgate-Palmolive Co., No. 00-3172, 2002 WL 27536, at *4 n.11 (10th Cir. 2002) (section "510 broadly protects employees in the exercise of employment privileges . . . and confines relief to the equitable remedies of backpay, restitution and reinstatement"); Sandberg v. KPMG Peat Marwick, LLP, 111 F.3d 331, 336 (2d Cir. 1997) (same). Moreover, because courts uniformly recognize reinstatement in a section 510 case as an equitable remedy, some courts have

[3] Although courts in this Circuit could not, under this Court's decision in Eichorn II, simply issue an order requiring an employer to pay benefits without reinstatement, it may be appropriate in some instances for a court to structure its order of reinstatement in such a manner that the employer can elect to treat the employees as having vested in their benefits, as an alternative to reinstatement for an extended period of time. Such a remedy (coupled with backpay, as appropriate), would compensate employees who have been illegally discharged, deprive the employer of ill-gotten profits, and still give the employer a means of making otherwise legally permissible personnel and business decisions.

also allowed front pay awards as a substitute for reinstatement when reinstatement is not available. See Schwartz v. Gregori, 45 F.3d 1017, 1023 (6th Cir. 1995) ("Front pay is awarded [for a section 510 violation] . . . when the preferred remedy of reinstatement, indisputably an equitable remedy, is not appropriate or feasible.") (emphasis added); Warner v. Buck Creek Nursery, Inc., 149 F. Supp. 2d 246, 257 (W.D. Va. 2001) ("front pay, when sought as a substitute for reinstatement, is an available equitable remedy under Section 502(a)(3)"); see also Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir.1987) (recognizing the availability of front pay in a Title VII case as "an alternative to the traditional remedy of reinstatement" before a statutory amendment made damages available under Title VII).

There is no support for FCA's argument that the requirement that the class members be reinstated in order for their pensions to vest takes the preliminary injunction outside the proper scope of section 502(a)(3). This Court and other have recognized that "[i]t is not unusual for a defendant in equity to expend money in order . . . to perform the act mandated by the injunction. Injunctions, which by their terms compel expenditures of money, may similarly be permissible forms of equitable relief." United States v. Price, 688 F.2d 204, 212-13 (3d Cir. 1982); see also Bowen v. Massachusetts, 487 U.S. 879, 893-95 (1988) (holding that a State's action for

a declaratory judgment and injunctive relief that would require the Department of Health and Human Services to pay higher future installments for residential care facilities as well as reimbursement for past underpayments was not an action for "money damages" within the meaning of the APA, but rather an equitable action for specific performance); Penn Terra Ltd. v. Dept. of Envt. Res., 733 F.2d 267, 278 (3d Cir. 1984) (holding that an injunction obtained by the Pennsylvania Department of Environmental Resources ordering a bankrupt company "to remedy environmental hazards was properly brought as an equitable action to prevent future harm, and did not constitute an action to enforce a money judgment," even though the remediation order required the expenditure of almost all of the debtor's funds).

In the context of a suit under ERISA section 510 for illegal interference with the attainment of benefits, the argument makes even less sense. The purpose of section 510 is to protect plan participants from employment action that is improperly aimed at preventing the vesting of their pension rights. Ingersoll-Rand, 498 U.S. at 143. See also Wood v. Prudential Ins. Co. of America, 207 F.3d 674, 685 (3d Cir. 2000) (Stapleton, J., dissenting) (suggesting that reinstatement is available under section 510, but only where it would "result in a participant receiving pension benefits

from his employer") (emphasis in original). Thus, the Supreme Court in Varity Corp. v. Howe, 516 U.S. 489, 515 (1996), held that section 502(a)(3) authorized the reinstatement of the plaintiff employees to a plan so that they could obtain benefits under that plan, where they had been tricked into leaving employment by the plan fiduciary, although the Court specifically declined to address whether the order requiring the company to pay other monetary relief was also permissible under section 502(a)(3). Id. at 495.[4]

The cases cited by appellant are not to the contrary. See Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371 (4th Cir. 2001); Callery v. U.S. Life Ins. Co. in City of New York, 392 F.3d 401 (10th Cir. 2004); Alexander v. Bosch Auto. Sys., Inc., 232 Fed. App'x 491 (6th Cir. 2007), petition for certiorari filed, No. 07-891 (U.S. Jan. 3, 2008). Other than generally addressing "appropriate equitable relief" under section 502(a)(3), these cases are all inapposite.

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[4] Even if appellant were correct that, by ordering reinstatement of class members to allow vesting of their pension benefits, the district court's order constitutes monetary relief, the Supreme Court has recognized that monetary relief, including back pay, is equitable where it is "incidental to or intertwined with injunctive relief." Tull v. United States, 481 U.S. 412, 424 (1987); see Wood, 207 F.3d at 685 (Stapleton, J., dissenting) (noting that relief sought in that case could not be "characterized as incidental to or intertwined with injunctive relief (and thus equitable in nature) because no equitable relief is sought").

Griggs involved a plan participant who claimed that he had been misled by plan fiduciaries about the tax consequences of his early retirement and therefore improperly induced to retire. He brought a suit for breach of fiduciary duty, not for interference with his benefits under section 510, and the Fourth Circuit agreed that E.I. DuPont had breached its fiduciary duty to provide complete and accurate information to Griggs regarding his early retirement. 237 F.3d at 381. Moreover, analogizing to Title VII, the court ruled that reinstatement was an available remedy under section 502(a)(3), but noted that Griggs must, if reinstated, return his early retirement benefits because he would not then be entitled to those benefits. 237 F.3d at 385. Nothing in Griggs undercuts the district court's order in this case.

The decision in Callery also did not address the appropriate remedy for a violation of ERISA section 510. There, the plaintiff sought as "appropriate equitable relief" under ERISA section 502(a)(3) a monetary award equal to the amount she claimed she would have qualified for in life insurance benefits but for fiduciary breaches. The Tenth Circuit held that what she was seeking was merely an award of compensatory damages and, as such, not allowed under section 502(a)(3). 392 F.3d at 405-06. Thus, the Tenth Circuit's ruling has no bearing on the present case because it did not

involve a violation of section 510 and did not address whether reinstatement to employment is a proper remedy for such a violation. Id.

Nor does the Sixth Circuit's decision in Alexander support the appellant's position. Unlike in this case, where the district court ordered plaintiff-employees reinstated to employment at an open facility as a remedy for the employer's interference with the employees' eligibility for pension benefit in violation of ERISA section 510, the plaintiffs in Alexander did not sue until two months after the plant where they had worked had closed. 232 Fed. App'x at 493. The Sixth Circuit reversed the order of the district court requiring the company to add the plaintiffs to the list of employees entitled to plant closure benefits precisely because reinstatement of the employees was not possible given the timing of the suit. As a result, the court viewed the order as simply an award of damages. 232 Fed. App'x at 502. Far from suggesting that reinstatement in order to obtain benefits is prohibited, the court noted that "had Plaintiffs filed this action before the plant closed, they would at least have had a stronger argument that they were entitled to be recalled to their former positions and thus made eligible for the plant closing benefits." Id. Thus, Alexander, like the other cases cited by FCA, fully supports that reinstatement, which is an equitable remedy within the terms of

the statute," Eichorn II, 484 F.3d at 658, is an available remedy in a section 510 case of illegal discharge. .

CONCLUSION

For the reasons stated above, the Secretary respectfully requests that this Court affirm that the district court's preliminary injunction ordering reinstatement is a permissible remedy under ERISA section 502(a)(3).

Respectfully submitted,

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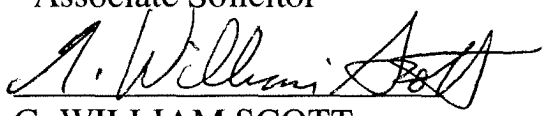

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JUNE 6, 2008

COMBINED CERTIFICATIONS

1. **Certification of Bar Membership**

I hereby certify that G. William Scott, Deputy Associate Solicitor, Office of the Solicitor, Plan Benefits Security Division, U.S. Department of Labor, is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. **Certification of Word Count**

I hereby certify that this brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B), contains 3,761 words, excluding the parts exempted by Fed. R. App. R. 32(a)(7)(B))(iii), and has been prepared in a proportionally-spaced typeface using Microsoft XP in Times New Roman font, 14-point.

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I hereby certify that on this 6th day of June, 2008, electronic copies of this brief were sent to the U.S. Court of Appeals for the Third Circuit and the parties of record. In addition, 10 copies of this brief were mailed to the Court, and 2 copies were mailed, via Federal Express courier service, to the following:

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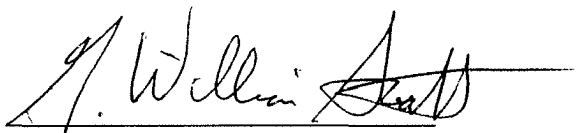

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