No. 03-5124

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES R. MILLSAP, et al.,
Plaintiffs-Appellees

v.

McDONNELL DOUGLAS CORPORATION,

Defendant-Appellant

On Appeal from the United States District Court
for the Northern District of Oklahoma, Case No. 94-CV-633H
Judge Sven Eric Holmes

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE

HOWARD M. RADZELY
Acting Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate
And Special Litigation
Plan Benefits Security Division

MARK E. PAPADOPOULOS
Attorney

U.S. Department of Labor
Room N-2700
200 Constitution Avenue, N.W.
Washington, DC 20210

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes and Regulations:

Other Authorities:

STATEMENT OF INTEREST

This case involves an action under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1101-1169, and presents an important and recurring question: whether Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), authorizes back pay as "appropriate equitable relief" to remedy a violation of Section 510, 29 U.S.C. § 1140. The Secretary of Labor is authorized under Section 502(a)(5), 29 U.S.C. § 1132(a)(5), to bring civil actions to obtain "appropriate equitable relief" to redress violations of, and to enforce, Title I of ERISA. Accordingly, this Court's determination of what constitutes "appropriate equitable relief" may affect not only the scope of private civil actions under Section 502(a)(3), which are a necessary complement to actions by the Secretary, but also the scope of the Secretary's own authority to enforce Title I of ERISA. The Secretary respectfully submits this brief pursuant to Federal Rules of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

This Court accepted the following certified question for appellate review on July 14, 2003: "Whether in this ERISA § 510 case, and as a result of Great-West Life & Annuity Ins. Co. v. Knudson, 435 U.S. 204 (2002), back pay (and as a result, any other damages based upon back pay) are available as 'appropriate equitable relief' to the class members pursuant to ERISA §502(A)(3)."

STATEMENT OF THE CASE

On December 3, 1993, Appellant McDonnell Douglas Corporation ("Defendant") announced that it was closing its Tulsa, Oklahoma facility. Millsap, et al. v. McDonnell Douglas Corp., 162 F. Supp. 2d 1262, 1264 (N.D. Okla. 2001) (Millsap I). Plaintiffs-Appellees were employees of the facility at the time of the announcement and participants in one of two qualified retirement plans and one health care plan. Id.

In June 1994, Plaintiffs filed this lawsuit in the United States District Court for the Northern District of Oklahoma, alleging Defendant had violated ERISA Section 510, by "clos[ing] its Tulsa facilities for the purpose of depriving Plaintiffs of benefits covered by ERISA[.]" Millsap I, 162 F. Supp. 2d at 1264. Plaintiffs sought all appropriate equitable relief under Section 502(a)(3), including lost benefits, back pay, and reinstatement or front pay in lieu of reinstatement. Millsap, et al. v. McDonnell Douglas Corp., No. 94-CV-633-H, 2002 WL 31386076 (N.D. Okla. Sept. 25, 2002) (Millsap II).

The case was bifurcated into separate liability and damages phases, and the court conducted a bench trial on liability in April 1999. Millsap I, 162 F. Supp. 2d at 1263. On September 5, 2001, the court ruled in Plaintiffs' favor on the Section 510 claim. Id. at 1309. Based on the evidence presented, the court concluded that the company's "inability to produce financial and economic bases for the Tulsa

closing and its overall lack of credibility about its decision-making process [was] probative of pretext, and [was] legally sufficient, combined with the other circumstantial evidence presented by Plaintiffs, to support the inference that the proffered reason was not the true reason for the employment decision, and interference with Plaintiffs' rights was." Id. at 1307.

On September 25, 2002, the court ruled on Defendant's motion to exclude certain remedies including back pay. Millsap II, 2002 WL 31386076, at *1. The principal ground for Defendant's motion was that the Supreme Court's decision in Great-West "precludes an award of back pay as a remedy for a violation of ERISA § 510." Id. at *2. The court denied the motion, noting that every court that had considered the question had found back pay to be an available remedy under Section 502(a)(3), which authorizes civil actions to obtain "appropriate equitable relief" to redress violations of ERISA including Section 510. Id. at *4. The court rejected the notion that Great-West implicitly overturned this established precedent or controlled this case, pointing out that "[t]he holding in Great-West Life does not address back pay as a remedy[,] . . . does not arise in the context of an ERISA § 510 discrimination claim . . . [and] [t]hus . . . does not mandate a determination that back pay is an unrecoverable remedy in this case." Id. at *3. The district court acknowledged that Great-West further refined the definition of "equitable relief" under Section 502(a)(3) by clarifying that not all forms of restitution are equitable

and by requiring courts to "determine whether [the plaintiff is seeking] a legal or equitable type of restitution." Id.

The district court also noted that the Tenth Circuit had previously considered whether back pay was equitable in the Title VII context: "'[T]he characterization of back pay as legal or equitable has been determined by whether the plaintiff has requested back pay as an adjunct to the equitable relief of reinstatement, in which case it has been characterized as equitable, or as an element of the plaintiff's damages for the breach of his employment contract.'" Millsap II, 2002 WL 31386076, at *3 (quoting Skinner v. Total Petroleum, 859 F.2d 1439, 1443-44 (10th Cir. 1988)). Applying the same rationale, the court found that "Plaintiffs [sought] back pay as part of an aggregate equitable remedy that will restore them to the status quo ante, that is, their rightful positions absent the discriminatory discharge resulting from the closing of the Tulsa facility." Id. at *4. Under the precedent of Great-West and Skinner, "the Court [found] that back pay, as a remedy for an ERISA § 510 violation, constitutes equitable restitution and therefore 'equitable relief' under section 502(a)(3).'" Id.

Finally, the court concluded that footnote four of Great-West, which contains a discussion of Title VII back pay, "is dicta." Millsap II, 2002 WL 31386076, at *5. The court also stated footnote four would not change the outcome of the case because Plaintiffs were not seeking back pay as a

"freestanding" claim for money damages as in Great-West but rather were seeking back pay in conjunction with other remedies, such as lost pension benefits and front pay in lieu of reinstatement. Id.[1]

On February 3, 2003, the parties filed a stipulated settlement with the court, resolving all claims in the lawsuit except back pay. Millsap, et al. v. McDonnell Douglas Corp., No. 94-CV-633-H(M), 2003 WL 21277124, at *2 (N.D. Okla. May 28, 2003) (Millsap III). The settlement permitted Defendant to appeal the court's determination on back pay but was contingent on this Court accepting the district court's certification of the back pay issue, id., which this Court did on July 14, 2003.

SUMMARY OF ARGUMENT

Back pay is an appropriate equitable remedy under Section 502(a)(3) for violations of Section 510, as virtually every court to date has concluded. The Supreme Court has held that back pay is an equitable remedy where it is intertwined with equitable relief or is made an integral part of an overall equitable remedy. See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 571 (1990); Curtis v. Loether, 415 U.S. 189, 197 (1974). Title VII back pay is the prototypical example of back pay that has been made part of an overall

[1] The court determined that reinstatement was impossible given the closing of the Tulsa facility, and that front pay was inappropriate under the circumstances of this case. Id. at *7.

equitable remedy, which the Supreme Court acknowledged most recently in Great-West, 534 U.S. at 218 n.4. Section 510 was specifically modeled after Title VII -- as demonstrated by both the text and legislative history of Section 510 -- and courts look to the law of Title VII in deciding Section 510 cases. Congress, moreover, enacted ERISA shortly after Title VII and against a backdrop of courts interpreting equitable relief broadly in the employment and public policy context. In prohibiting discriminatory and retaliatory conduct under Section 510 and allowing that right to be remedied through "appropriate equitable relief," Congress intended to pick up no less than the full range of equitable remedies available to Title VII plaintiffs (including back pay). Courts are nearly unanimous in the view that back pay is an available equitable remedy under Section 502(a)(3) for a Section 510 violation.

The Supreme Court has never decided this issue under Section 502(a)(3), including in Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) and Great-West, 534 U.S. 204. In the context of the common law remedies sought in those cases, the Court held that "appropriate equitable relief" under Section 502(a)(3) refers to "those categories of relief that were typically available in equity." Mertens, 508 U.S. at 256; Great-West, 534 U.S. at 210. The Court left unresolved the question of how to classify purely statutory remedies such as back pay, which were unknown at common law in either courts of equity or courts of law. The back pay

discussion in footnote four of Great-West, 534 U.S. at 218 n.4, is not to the contrary.

Broader statutory and equitable considerations also counsel in favor of back pay as an available remedy under Section 502(a)(3). Every major anti-retaliation provision (including whistleblower provisions administered by the Department of Labor) either explicitly or implicitly allows back pay to remedy an unlawful discharge. Precluding back pay in Section 510 cases would uniquely single out Section 510 from all other anti-retaliation and anti-discrimination provisions. Such a statutory construction is not only unjustified but would also create perverse incentives for employers to delay litigation to the point where indisputably equitable remedies such as front pay and reinstatement are unavailable, thus leaving plaintiffs with no remedy.

ARGUMENT

I. Statutory Awards of Back Pay are Equitable Where They are Intertwined with and Made Part of an Equitable Remedy

Under federal employment and discrimination law "back pay and reinstatement remedies are usually considered equitable. For this reason, there was no jury trial right under Title VII before 1991." 2 Dan B. Dobbs, Law of Remedies § 6.10(1) at 193 (2d ed. 1993). Back pay is generally considered equitable relief under the following major employment and discrimination statutes: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., see Chauffeurs, Teamsters

& Helpers, Local No. 391 v. Terry, 494 U.S. 558, 572 (1990); the National Labor Relations Act, 29 U.S.C. § 151, et seq., see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937); the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq., see Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292-93 (1960); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq., see Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75-76 (1992); Section 1981, 42 U.S.C. § 1981, see Earlie v. Jacobs, 745 F.2d 342, 344 (5th Cir. 1984); and Section 1983, 42 U.S.C. § 1983, see Bertot v. Sch. Dist. No. 1, 613 F.2d 245, 250 (10th Cir. 1979).

The Supreme Court has recognized that back pay is equitable where it is characterized as such by statute, Chauffeurs, 494 U.S. at 571, where it is "intertwined with injunctive relief," Tull v. United States, 481 U.S. 412, 424 (1987), or "where it is an integral part of an equitable remedy." Curtis, 415 U.S. at 197. Back pay can even be made implicitly part of an overall equitable remedy. In Mitchell (a suit by the Secretary of Labor to enforce parallel anti-discrimination and anti-retaliation provisions of the FLSA), the Court held that the district court could award back pay (along with reinstatement) even though the statute explicitly authorized courts only to "restrain violations of [the Act]." 361 U.S. at 289. The Court held that when Congress entrusts courts with the enforcement of prohibitions in a regulatory scheme, "it must be taken to have acted cognizant of the historic

power of equity to provide complete relief in light of the statutory purpose." Id. at 291-92. The Court then stressed the importance of the anti-discrimination provision to effective enforcement of the FLSA, and "the significance of reimbursement of lost wages" in order to secure that protection. Id. at 292.

More specifically, as the Court recognized in Great-West, Title VII exemplifies a statute where back pay has been made part of an overall equitable remedy. 534 U.S. at 218 n.4. "[T]itle VII back pay [is] a remedy designated by statute as 'equitable[.]'" In re Monumental Life Ins. Co. v. W. & S. Life Ins. Co., 343 F.3d 331, 342 (5th Cir. 2003) (citing Great-West, 534 U.S. at 218 n.4). "[Title VII back pay] is an integral part of the equitable remedy of reinstatement . . . and is not comparable to damages in a common law action for breach of contract." Robert Belton, Remedies in Employment Discrimination Law § 9.1, at 302 (1992). For this reason, courts view Title VII back pay (even standing alone) as a claim for equitable relief that does not entitle a plaintiff to a jury trial under the Seventh Amendment. See, e.g., Curtis, 415 U.S. at 197 (noting that courts of appeals have treated Title VII back pay as equitable relief which does not require a jury trial); McCue v. State of Kansas, 165 F.3d 784, 791-92 (10th Cir. 1999) (back pay is an explicit equitable remedy under Title VII to be determined by the court); Wilson v. Belmont Homes, Inc., 970 F.2d 53, 55-56 (5th Cir. 1992) ("[Circuit's] longstanding rule [is] that back pay under title VII is an equitable remedy . . . [and no] circuit

court that has considered the issue has held that jury trials are available under title VII."); Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975) (Title VII back pay standing alone is equitable relief).[2]

ERISA Section 510, which forbids both discriminatory treatment in regard to employee benefits and retaliatory treatment for testifying or engaging in other protected conduct, was modeled in significant part after Title VII.[3] Specifically, Section 510 mimics Title VII in its prohibition against "unlawful discharge" of employees. See 29 U.S.C. § 1140 ("It shall be unlawful for any person to discharge . . . a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become

---

[2] There are a few distinct employment law statutes under which back pay, while still an available remedy, is considered legal relief. See, e.g., Sailor v. Hubbell, Inc., 4 F.3d 323, 325-26 (4th Cir. 1993) (Age Discrimination in Employment Act); Wooddell v. Int'l Bhd. of Elec. Workers, Local 71, 502 U.S. 93, 97-98 (1991) (Labor Management Reporting and Disclosure Act of 1959); Waldrop v. S. Co. Servs., 24 F.3d 152, 159 (11th Cir. 1994) (Rehabilitation Act of 1973). These statutes are unique. The Age Discrimination in Employment Act, for example, specifically authorizes "legal" relief and makes back pay mandatory -- not discretionary. See Lorillard v. Pons, 434 U.S. 575, 584 (1975) (differentiating ADEA from Title VII for jury trial purposes based on these two statutory differences).

[3] There is some indication that Section 510 was modeled after Section 8(a)(3) of the National Labor Relations Act also. See, e.g., Stiltner v. Beretta U.S.A. Corp., 74 F.3d 1473, 1483 (4th Cir. 1996) (Section 510 modeled after NLRA Section 8(a)(3)) (citing legislative history). Back pay is considered equitable under the NLRA. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 48-49.

entitled under the plan[.]"); 42 U.S.C. § 2000e-2 ("It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin."). Legislative history confirms that Section 510's language was based upon Title VII and that the available equitable remedies under Section 510 should be interpreted consistent with Title VII. During the debates leading to the passage of ERISA, Senator Javits of New York characterized Section 510 as "provid[ing] a remedy for any person fired such as is provided for a person discriminated against because of race or sex, for example." 119 Cong. Rec. 30044 (1973). Senator Javits reemphasized that Section 510 "gives the employee the same right[s]" as a person discriminated against on the basis of race or sex discrimination. Id. Still other evidence indicates that Congress intended Section 510 plaintiffs to possess the same broad equitable remedies that are available under Title VII, presumably including back pay and reinstatement. In enacting Section 510, both houses of Congress specifically noted: "The enforcement provisions have been designed specifically to provide . . . beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts[.]" H.R. Rep. No. 93-453,

reprinted in 1974 U.S.C.C.A.A.N. 4639, 4655 (emphasis added); S. Rep. No. 93-127, reprinted in 1974 U.S.C.C.A.A.N. 4838, 4871.[4]

Courts have therefore looked to Title VII in interpreting Section 510. See, e.g., Heimann v. Nat'l Elevator Indus. Pension Fund, 187 F.3d 493, 505-06 (5th Cir. 1999) (relying on Title VII and its case law to interpret meaning of same "discriminate against" language in Section 510); Barbour v. Dynamics Research Corp., 63 F.3d 32, 37-38 (1st Cir. 1995) (applying Title VII burden-shifting framework to Section 510 case and noting the "number of circuits [that] have applied the McDonnell Douglas framework to section 510 claims"). A prime example of Title VII's influence on ERISA is the remedial language in Title VII permitting "any other equitable relief as the court deems appropriate." See Equal Opportunity Act of 1972, 42 U.S.C. § 2000e-5(g)(1981)). This language was inserted into Title VII in 1972, shortly before ERISA's enactment. The Supreme Court in Mertens interpreted Section 502(a)(3)'s related "appropriate equitable relief" in pari materia with Title VII's "other equitable relief." The Court reasoned that "though we have never interpreted the precise phrase 'other appropriate

---

[4] These committee reports accompanied an early version of ERISA that provided plaintiffs with legal remedies as well as equitable. See, e.g., H.R. 2, § 693, 93d Cong., 2d Sess., reprinted in 3 Leg. Hist. at 3816 ("Civil actions for appropriate relief, legal or equitable, to redress or restrain a breach[.]"). Though the legal remedy provision was ultimately deleted, the concept of broad equitable relief remained through to enactment.

equitable relief,' we have construed the similar language of Title VII of the Civil Rights Act of 1964 . . . to preclude 'awards for compensatory or punitive damages.'" 508 U.S. at 255 (citations omitted). For this reason, though not specifically decided in Mertens, compensatory and punitive damages have generally been disallowed under Section 502(a)(3) as well. See Zimmerman v. Sloss Equip., Inc., 72 F.3d 822, 828 (10th Cir. 1995).

Thus, Section 510 can only sensibly be viewed as making back pay an integral part of an equitable remedy in the tradition of Title VII. Under Section 510, as under Title VII, back pay is integrally related to the equitable remedy of reinstatement, even though reinstatement itself may not be available in a particular case.[5] Back pay awards to remedy Section 510 and Title VII violations are not simply "freestanding claims for money damages," of the kind rejected by the Court in Great-West, 534 U.S. at 218 n.4, but are best viewed "as part of an aggregate equitable remedy that will restore [employees] to the status quo ante, that is, their rightful positions absent the discriminatory discharge[.]" Millsap II, 2002 WL 31386076, at *4.

---

[5] See, e.g., Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir. 1979) (reinstatement not a precondition to court-ordered back pay); Thomas v. National Football League Players Ass'n, 131 F.3d 198, 207 (D.C. Cir. 1997) (back pay awarded by court even where reinstatement denied), vacated in part on rehearing by, 1998 WL 1988451 (D.C. Cir. 1998).

Of course, Section 510 itself does not authorize back pay or indeed any kind of remedy. Instead, Section 510, like most substantive provisions of ERISA relies on the enforcement mechanisms of Section 502, which contains more generally-stated remedial provisions such as Section 502(a)(3)'s reference to "appropriate equitable relief." Nevertheless, courts have uniformly recognized that reinstatement and front pay are available under Section 502(a)(3) to remedy violations of Section 510 even though those remedies are not specified in the statute either. See Great-West, 534 U.S. at 211, 214 nn.1 & 4 (reinstatement an equitable remedy); 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."); Warner v. Buck Creek Nursery, Inc., 149 F. Supp. 2d 246, 257 (W.D. Va. 2001) ("[F]ront pay, when sought as a substitute for reinstatement, is an available equitable remedy under Section 502(a)(3)[.]"); see generally Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 964 (10th Cir. 2002) ("Front pay is an equitable remedy and its calculation and award are the responsibility of the court[.]"). The absence of the term "back pay" in Section 502(a)(3) is therefore unexceptional. Back pay, like reinstatement and front pay, is "appropriate equitable relief" for a Section 510 violation.

Congress, moreover, is presumed to legislate purposefully against the backdrop of existing law, see Cannon v. Univ. of Chicago, 441 U.S. 677, 698-99 (1979), and existing law at the time of ERISA's enactment would have held back pay within the realm of appropriate equitable relief for a discriminatory discharge. Laws proscribing discrimination and retaliation are based on important policy judgments of a national and public character, see Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975), and courts generally retained broad equitable powers in enforcing these statues. See, e.g., Porter v. Warner Holding Co., 328 U.S. 395, 398-400 (1946) ("The inherent equitable jurisdiction . . . clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress."); Virginia Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."). This equity power included the power to award back pay as part and parcel of a court's power to effectuate the purpose of a statute. See Mitchell, 361 U.S. at 291-92 (Court retains "historic power of equity" to award back pay to workers as part of larger injunction for reinstatement, thereby effectuating anti-retaliation purpose of the Fair Labor Standards Act even though statute by its terms did not authorize back pay awards).

Section 510 case law is in accord: this Court and virtually every court to consider back pay under Section 502(a)(3) as a remedy for a Section 510 violation has classified back pay as available equitable relief. See Myers v. Colgate-Palmolive Co., No. 00-3174, 2002 WL 27536, at *4 n.11 (10th Cir. Jan. 8, 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) (remedies available for violations of Section 510 include "back pay, restitution, and reinstatement"); Schwartz v. Gregori, 45 F.3d at 1022-23 (back pay is equitable remedy available under Section 502(a)(3) for Section 510 violation); Warner v. Buck Creek Nursery, Inc., 149 F. Supp. 2d at 257 ("back pay is available as an equitable remedy under Section 502(a)(3)"); Anglin v. Sears, Roebuck & Co., 139 F. Supp. 2d 914, 920 (N.D. Ill. 2001) (back pay is "[a]rguably . . . [a] monetary equitable remed[y]"); Russell v. Northrup Grumman Corp., 921 F. Supp. 143, 149 (E.D.N.Y. 1996) ("lost wages [are] equitable in nature and therefore appropriately recoverable under ERISA."); DeSimone v. Transprint USA, Inc., No. 94 CIV. 3130 (JFK), 1996 WL 209951, at *6 (S.D.N.Y. Apr. 29, 1996) ("an award of back-pay is available to [the Section 510] Plaintiff in this action."); Zimmerman v. Sloss Equip., Inc., 835 F. Supp. 1283, 1293 (D. Kan. 1993) (plaintiff's claims in Section 510 case including "back pay, front pay, reinstatement, [and] restitution of

forfeited benefits . . . are equitable in nature"), aff'd, 72 F.3d 822 (10th Cir. 1995); Folz v. Marriot Corp., 594 F. Supp. 1007, 1016 (W.D. Mo. 1984) (equitable relief for violation of ERISA includes back pay); cf. Pegg v. Gen. Motors Corp., 793 F. Supp. 284, 287 (D. Kan. 1992) (no jury trial right for reinstatement and back pay claims under Section 510 which is "relief that is equitable in nature"); see also ABA Section of Labor and Employment Law, Employee Benefits Law, 1175-76 (2d ed. 2000) ("The most commonly requested forms of relief in Section 510 cases are reinstatement and back pay, or front pay in lieu of reinstatement."); but see Oliver-Pullins v. Associated Material Handling Indus., Inc., No. 1:03CV0099-JDT-WTL, 2003 WL 21696207, at *3 & n.2 (S.D. Ind. May 20, 2003) (Section 510 claim for lost wages is legal and not equitable under Great-West); Nicolaou v. Horizon Media, Inc., No. 01 CIV. 0785 (BSJ), 2003 WL 22208356 (S.D.N.Y. Sep. 23, 2003) (same).

Most of these cases were decided after Mertens's "typically available in equity" formulation, see infra, pp. 18-22, and many of these courts found back pay available under Section 502(a)(3) on multiple grounds including that back pay under Section 510 is inextricably intertwined with injunctive relief in a manner similar to Title VII. See, e.g., Russell, 921 F. Supp. at 153 ("because [lost wages] are intertwined with the injunctive relief of reinstatement sought . . . the damages are properly recoverable as equitable relief under ERISA § 502(a)(3)"); DeSimone,

1996 WL 209951, at *6 ("claim for backpay . . . is also properly viewed as equitable relief because it is intertwined with [a] request for reinstatement"); Pickering v. USX Corp., Nos. 87-C-838J, 88-C-763J and 91-C-636J, 1995 WL 584372, at *35 (D. Utah May 8, 1995) ("remed[y of back pay is] consistent with those [remedies] awarded under similar statutory schemes [to Section 510], and [is] consistent with the legislative history") (quotation marks and citation omitted).

II. Mertens and Great-West Involved Common Law Claims and Remedies and Do Not Control This Case

The issue of appropriate equitable relief under Section 502(a)(3) has been the subject of two recent Supreme Court decisions: Great-West, 534 U.S. at 210 and Mertens, 508 U.S at 255. Neither case considered "appropriate equitable relief" in the context of a Section 510 retaliation case, and neither specifically held that back pay is unavailable. Even where the Court discussed back pay under Title VII in Great-West, the Court was at pains to point out that it was not deciding any issue concerning back pay (under Title VII or Section 510). Importantly, the Court focused not on whether back pay was available at common law but on the manner in which Congress had treated back pay in Title VII as an integral part of an equitable remedy. Mertens and Great-West do not control this case.

Mertens was a breach of fiduciary duty case. In Mertens, a class of former employees sued the fiduciaries (including their former employer) and a nonfiduciary actuary of a failed pension plan claiming the employer had

underfunded the retirement plan to the point of termination and the actuary had knowingly participated in the breach of duty. 508 U.S. at 250-51. The Supreme Court ultimately denied the monetary damages sought against the actuary, holding that such damages do not constitute "appropriate equitable relief." Id. at 255. In so holding, the Court stated that Section 502(a)(3)'s equitable relief encompasses "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." Id. at 256. In short, the remedy sought in Mertens was "nothing other than compensatory damages," a remedy typically available at law and not equity. Id. at 255.

Great-West was a breach of contract case. Respondent Janette Knudson was injured in a car accident and Great-West Life, on behalf of her husband's employee health plan, paid her medical expenses. 534 U.S. at 207. The health plan's reimbursement provision gave the plan the right to recover from a beneficiary any payment for benefits paid by the plan, which the beneficiary recovers from a third party. Id. When the Knudsons obtained a legal settlement from the car manufacturer in a tort suit, Great-West sought to enforce the plan through Section 502(a)(3) and recover its medical expenses. Id. at 207-08. The Court characterized the reimbursement relief sought as a legal claim for money damages under a contract and thus outside ERISA's relief provisions. Id. at 210. The Court

repeated its Mertens formulation that equitable relief under the statute is confined to those remedies that were typically available in equity, refining the inquiry to distinguish between restitution at law and restitution in equity: "[F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." Id. at 214. Restitution sought under Section 502(a)(3) must be restitution "in equity" as opposed to restitution "at law." Id. at 212-13. The remedy sought in Great-West, like the remedy sought in Mertens, was one classically available in law, not equity. Id. at 210.

In footnote four of Great-West, the Court discussed back pay awards under Title VII in response to a point raised in Justice Ginsburg's dissent. 534 U.S. at 218 n.4. Justice Ginsburg argued that because Congress had treated back pay -- "a type of restitution substantially similar to the [reimbursement] relief Great-West seeks here" -- as an equitable remedy under Title VII, the restitutionary relief in Great-West should also be considered equitable. Id. at 230 (Ginsburg, J., dissenting). The majority disputed that Congress had ever regarded back pay as an inherently equitable remedy, explaining that "Congress 'treated [backpay] as equitable' in Title VII only in the narrow sense that it allowed backpay to be awarded together with equitable relief. . . . Curtis recognized that courts of appeals had treated Title VII backpay as equitable because § 2000e-5(g)(1) had made

backpay an integral part of 'an equitable remedy[.]'" Id. at 218 (internal citations omitted). Thus, in disputing the notion that "all forms of restitution are equitable," the Court rejected that back pay is equitable because it is restitutionary; instead, the Court recognized back pay under Title VII as equitable in large part because it is intertwined with the equitable remedy of reinstatement. Id. at 218 n.4.[6] Because "the restitution sought here by Great-West is not [equitable], but a freestanding claim for money damages," the Court concluded that "Title VII has nothing to do with this case." Id.

Importantly, the Court refrained from inquiring whether the remedy of back pay was typically available in courts of equity. The Court might have said that back pay was not a remedy available at all at common law (let alone one typically available in equity), and thus back pay offers no support to Justice Ginsburg's argument. Instead, the Court engaged in a discussion of how Congress had treated back pay under Title VII, id. at 218 n.4, presumably because what Congress has said about a remedy that it created, like back pay, is helpful in understanding the nature of the remedy.[7] The exact nature of back pay under other statutes was not

---

[6] See also In re Monumental Life Ins. Co., 343 F.3d at 342 ("[T]itle VII back pay is a remedy designated by statute as equitable . . . [because] it [is] an integral component of Title VII's make-whole remedial scheme.'") (citing in part Great-West, 534 U.S. at 218 n.4) (internal quotation marks and citations omitted).

[7] Seventh Amendment jurisprudence, which customarily looks in part to the most analogous Eighteenth Century cause of action in England, see Tull, 492 U.S. at

broached in Great-West. Instead, the Court held that back pay was not an inherently equitable remedy. Id. While "Title VII has nothing to do with th[at] case," id., Title VII has a great deal to do with a Section 510 case for back pay.

This is confirmed by the Court's suggestion in Great-West that the answer to any Mertens/Great-West inquiry can most often be "made clear" by reference to "standard current works such as Dobbs, Palmer, Corbin, and the Restatements." 534 U.S. at 217. That the Court did not intend this common law inquiry to govern cases involving purely statutory remedies like back pay is self-evident. Dobbs is the only one of the four texts cited that purports to characterize back pay as either a legal or equitable remedy. Though Dobbs suggests that back pay "seems on the surface to be an ordinary damages claim . . . . which would be tried to a jury if one is demanded," that same paragraph concludes with a more ambiguous judgment: "But in fact the cases do not yield up any such single conclusion." 2 Dobbs

---

417, lends support to this analysis. In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 49, the Court, in considering a jury trial demand, rejected the theory that back pay was legal relief under the National Labor Relations Act. Congressional intent -- not ancient classification of back pay at common law -- was paramount where Congress had created a new cause of action and new remedies unknown at common law: "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement." Id. at 48-49; see also Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. 442, 454-55 (1977) (Seventh Amendment jury trial analysis inapplicable where Congress has created new public rights and remedies and assigned their adjudication to administrative agency).

§ 6.10(5), at 226 (2d ed. 1993). Later, in summarizing wrongful discharge and job discrimination law, Dobbs states that "back pay and reinstatement remedies are usually considered equitable." 2 Dobbs § 6.10(1), at 193 (emphasis added). Dobbs thus provides no clear answer.

The other texts -- Palmer, Corbin, and the Restatements -- serve to demonstrate chiefly that no remedy like back pay existed at common law. Traditional contract and tort remedies such as: (1) a quasi contract action at law "for the value of goods or services transferred," I George E. Palmer, The Law of Restitution § 4.1, at 365 (1978), or (2) an employee's recovery of "quantum meruit for service rendered," 5 Arthur L. Corbin, Corbin on Contracts § 1107, at 577 (1964), or (3) "restitution [for a terminated employee with a year-long contract] based on the reasonable value of his services[,]" Restatement (Second) of Contracts, § 373, at 212-13, cmt. d. illus. 12 (1981), are traditional common law remedies still in existence today. Each involves compensation for work or services performed, and is therefore distinctly unlike the statutory remedy of back pay (often accompanying reinstatement) where an employee is reinstated to his job and paid for hours he did not work because of the termination.

This common law remedy does not appear in these texts. Reinstatement of an employee was, and still is, disfavored as a common law remedy due in part to the inevitable friction and social costs of reuniting an employer and an employee in

a failed relationship. See 3 Dobbs § 12.21(4), at 489 ("traditional view is that courts will not specifically enforce a personal services contract in favor of either party . . . as to employment itself, the general rule leaves the employee to a claim for damages or restitution."); see also Restatement (Second) of Contracts § 367 (1981) (specific performance of employment contracts disfavored). The four treatises provide no evidence of common law compensation in the days of the divided bench for hours not worked because the employee had been terminated on the basis of a prohibited reason. "The truth is that reinstatement of the employee and payment for time lost are remedies not known to the common law but created by statute." NLRB v. W. Ky. Coal Co., 116 F.2d 816, 821 (6th Cir. 1940) (Arant, J., dissenting in part). These state and federal statutes were enacted in the latter half of the Twentieth Century and displaced "[t]he traditional rule . . . that an 'at-will' employee could be discharged at any time and for any reason." 2 Dobbs § 6.10(1), at 190.

III. Broader Statutory and Policy Considerations Favor Back Pay as Equitable Relief Under Section 502(a)(3)

The Secretary of Labor is charged with administering more than a dozen anti-retaliation provisions similar to Section 510. These provisions are embedded in statutes directed at matters ranging from corporate financial disclosure to waste disposal to mine safety. See, e.g., 18 U.S.C. § 1514A(c)(2)(C) (Sarbanes-Oxley Act); 29 U.S.C. § 215(a)(3) (FLSA); 29 U.S.C. § 2615 (Family and Medical Leave

Act); 30 U.S.C. § 815(c) (Mine Safety and Health Act); 42 U.S.C. § 7622 (Clean Air Act); 42 U.S.C. § 6971 (Solid Waste Disposal Act). While each of these statutes concerns a distinct subject matter (often substantively enforced by a different agency), each retaliation provision concerns the same thing: protecting employees who engage in protected conduct from adverse employment action. Back pay is an available remedy under each of these statutes and under every major federal retaliation provision. See generally Daniel P. Westman, Whistleblowing: The Law of Retaliatory Discharge 188-97 (1991) (listing more than 20 federal retaliation statutes that provide back pay as a remedy for aggrieved workers). Indeed, back pay is available even under retaliation provisions that do not explicitly provide for back pay. See Mitchell, 361 U.S. at 292-93 (FLSA implicitly authorizes back pay awards).

Section 510 should be read consistent with these anti-retaliation provisions. There is no indication in the text or the history of ERISA that Congress, in crafting Section 510's anti-discrimination and anti-retaliation provisions and directing that these provisions be enforced through Section 502(a)(3), intended to shield uniquely ERISA employers from liability for their unlawful conduct. Unlawful retaliation or discrimination in the employee benefits context is no more acceptable than in any other area of law.

Moreover, interpreting Section 502(a)(3) to preclude back pay as an available remedy for violations of Section 510 creates perverse incentives for employers and strips ERISA's enforcement provisions of much of their broad remedial intent where, as here, employees have been discharged to prevent the full attainment of their ERISA benefits. Here the district court entered a liability judgment not only after the plant was closed but after the plant would have closed on its own accord for nondiscriminatory reasons, Millsap II, 2002 WL 31386076, at *6, thereby rendering the equitable remedies of front pay and reinstatement unavailable.[8] If back pay is unavailable, a company would be rewarded, even in a case of abuse, for effectively delaying a liability judgment from the front pay or reinstatement period into the back pay period.[9] Back pay therefore is encompassed within the broad equitable power of a court to restore the status quo ante. See Tull, 461 U.S. at 424. A court may order, in effect, a constructive reinstatement for the period that back pay was awarded. Here, as in Mitchell, the employer "cannot be

---

[8] Employee benefits, such as the health care and pension benefits in this case, should remain an available remedy for Section 510 plaintiffs. These benefits, however, do not rectify the unlawful discharge itself, and, analytically, should be just one element of an appropriate back pay award. See Belton § 9.34, at 337-38 (back pay award encompasses "a list of elements . . . . [including] fringe benefits . . . such as health or medical insurance [and] pension benefits[.]").

[9] This point is not mere conjecture as Defendant's record of discovery abuse and delay in this case demonstrates. See Millsap I, 162 F. Supp. 2d at 1287-98, 1307-10 (district court's detailed findings of fact and conclusions of law regarding Defendant's "discovery abuse" and resulting sanctions).

heard to assert that wages are ordered to be paid for services that were not performed, for it was the employer's own unlawful conduct which deprived the employees of their opportunity to render services." 361 U.S. at 293.

Finally, there is simply no ERISA purpose that would be served by the denial of back pay. See Varity Corp. v. Howe, 516 U.S. 489, 515 (1996) ("We are not aware of any ERISA-related purpose that denial of a remedy would serve."); see also Dana M. Muir, Plant Closings and ERISA's Noninterference Provision, 36 B.C. L. Rev. 201, 254 (1995) ("The lack of such remedies for a successful section 510 plaintiff seems anomalous, stripping Section 510 of its intended effect.") (internal quotation marks omitted).

CONCLUSION

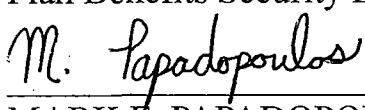
The opinion of the district court should be affirmed on grounds consistent with the views expressed herein.

Respectfully submitted,

HOWARD M. RADZELY
Acting Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation
Plan Benefits Security Division



MARK E. PAPADOPOULOS
Attorney
U.S. Department of Labor
Room N-2700
200 Constitution Avenue, N.W.
Washington, DC 20210
(202) 693-5760 - Phone
(202) 693-5774 - Fax

Dated: October 9, 2003

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6,859 words. I relied on my word processor to obtain the count and it is Microsoft Word 2000.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

M. Papadopoulos

Mark E. Papadopoulos

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of the Secretary of Labor as Amicus Curiae were mailed via First-Class U.S. Mail, postage prepaid, this 9th day of October 2003, to the following:

Joseph R. Farris, Esq.
Paula J. Quillin, Esq.
Jody R. Nathan, Esq.
FELDMAN, FRANDEN,
WOODARD, FARRIS &
BOUDREAUX
1000 Park Centre, 525 S. Main
Tulsa, OK 74103

Bill Brumley, Esq.
BRUMLEY & BISHOP
Bank of America Center
15 West 6th St., Suite 1303
Tulsa, OK 74119

John W. Walbran, Esq.
McDonnell Douglas Corporation
McDonnell Blvd. at Airport Road
St. Louis, MO 63611

Daniel S. Hoffman, Esq.
Sean Connelly, Esq.
HOFFMAN, REILLY, POZNER
& WILLIAMSON, LLP
511 Sixteenth St., Suite 700
Denver, CO 80202

Thomas R. Meites, Esq.
Michael M. Mulder, Esq.
Paul W. Mollica, Esq.
Josie Raimond, Esq.
MEITES, MULDER, BURGER
& MOLLICA
208 S. La Salle St., Suite 1410
Chicago, IL 60604

Christopher G. Mackaronis, Esq.
BELL, BOYD & LLOYD
1615 L Street, N.W., Suite 1200
Washington, D.C. 20036

Thomas E. Wack, Esq.
BRYAN CAVE LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, MO 63102

M. Papadopoulos

Mark E. Papadopoulos