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No. 09-494

IN THE

Supreme Court of the United States

JERRY CRAWFORD; CHARLES ANNABEL; DARRYL BALLARD; MATTHEW BURDO; DON HOSKINS, ROY LANNING; PETER POWELL, WANDA SIMPSON, DANIEL SLANE, PETITIONERS

v.

TRW AUTOMOTIVE U.S. LLC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE PROVISIONS OF §510 OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) APPLIES TO DECISIONS TO CLOSE PLANTS, AND WHETHER THE FAILURE TO RECALL INDIVIDUALS TO WORK PRIOR TO THE PLANT CLOSING WITH THE SPECIFIC INTENT TO PREVENT THEM FROM REACHING AN IMPORTANT THRESHOLD FOR SIGNIFICANT RETIREE BENEFITS, ARE PROHIBITED PRACTICES UNDER §510?

II. WHETHER IN THE FACE OF AN ADMISSION THAT PENSION COSTS WERE A FACTOR IN THE DECISION TO CLOSE ONE OF RESPONDENT'S PLANTS, THE LOWER COURTS ERRED IN ALLOCATING THE BURDENS OF PROOF UNDER THE MCDONNELL DOUGLAS/BURDINE FORMULATION RATHER THAN UNDER A MIXED MOTIVE STANDARD?

III. WHETHER THE LABOR LAW DOCTRINES OF ALTER EGO AND DOUBLE BREASTING APPLY IN THE CONTEXT OF AN ERISA 510 CASE TO PROVIDE EVIDENCE OF SPECIFIC INTENT AS WELL AS A REMEDY TO WORKERS LAID OFF FROM A CLOSED PLANT WHERE THE WORK INITIALLY SLATED FOR THAT PLANT WAS PLACED IN A NEWLY BUILT PLANT A FEW MILES AWAY?

IV. WHETHER THERE ARE EFFECTIVE REMEDIES AVAILABLE UNDER ERISA §510 WHERE VIOLATIONS OF PLANT CLOSINGS ARE FOUND.

V. WHETHER THE ABOVE STATED QUESTIONS IN WHICH EITHER THERE ARE CONFLICTS IN THE CIRCUITS OR WHERE THIS COURT HAS NOT BUT SHOULD SETTLE THESE IMPORTANT QUESTIONS ARE QUESTIONS WHICH MERIT PLENARY REVIEW BY THIS COURT?

VI. WHETHER IN LIGHT OF OVERWHELMING EVIDENCE THAT THE RESPONDENT HAD THE SPECIFIC INTENT TO VIOLATE PETITIONERS' RIGHTS UNDER ERISA 510, THE FAILURE OF THE LOWER COURTS TO FIND A QUESTION OF FACT UPON WHICH TO DENY SUMMARY JUDGMENT DEPARTED SO FAR FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SUCH THAT THIS COURT SHOULD EXERCISE ITS DISCRETION TO EXERCISE ITS SUPERVISORY POWER OVER THESE COURTS?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 560 F.3d 607 (6th Cir. 2009), (Appendix 1a -15a, hereinafter cited as "_a"). The opinion of the District Court granting summary judgment is not reported (23a - 42a). The District Court's Order Denying Reconsideration is not reported (16a-22a). The opinion of the District Court denying plaintiff's motion for relief from judgment under Federal Rule of Civil Procedure 60 (b)(2) is not reported 52a-60). The order denying reconsideration of the motion for relief from judgment under Federal Rules of Civil Procedure 60 (b)(2) is unreported.(45a-51a). The order denying plaintiff's motion for reconsideration in the Court of Appeals is unreported (43a-44a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 2009.A timely petition for rehearing en banc was denied on May 22, 2009. On August 12, 2009, Justice John Paul Stevens extended the time within which to file a petition for a writ of certiorari to October 19, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Employee Retirement Income Security Act (ERISA) 29 USC §1140, also known as ERISA §510, states, in relevant part:

> "... it shall be unlawful for any person to discharge... or discriminate against... a

participant or beneficiary... for purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."

STATEMENT OF THE CASE

In the second quarter of 2005, Respondent TRW Automotive ("TRW" or the "Company")[1] posted second quarter profits of $85 million, its best performance since becoming an independent parts maker. *The Detroit News, August 18, 2005, Exh 14.* [2]

The very next quarter TRW announced it would close its auto parts plant on Van Dyke Avenue in Sterling Heights, Michigan by August 2006. Petitioners, the named plaintiffs and the class they represent, were hourly unionized members of the United Auto Workers (UAW) who worked at the Van Dyke plant. They all were affected by the closing

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[1]TRW Automotive ("TRW" or the "Company") is a publicly-traded company operating worldwide in 23 countries supplying the world's major vehicle manufacturers with automotive components. The Company reported $13.1 billion in sales in the year 2006. The Company is an affiliate of The Blackstone Group ("Blackstone"), which owns approximately 57% of TRW's outstanding shares of common stock. As a result, Blackstone has the power to control all matters submitted to stockholders and the directors and to exercise control over the Company's decision to enter into any corporate transaction. *See TRW Automotive 2006 Annual Report, pgs. 2, 14, Exh. 19.*

[2]The references in this petition to exhibits are those exhibits attached to the briefing in the District Court. Some of the exhibits have bates numbers which denote that the documents were turned over by TRW in discovery.

decision.[3] The Van Dyke plant had opened in 1956. The collectively bargained for pension and welfare plans provided retirees with a defined benefit pension plan, with payment at retirement age of 62 of a benefit equal to $25.00 per year times years of service, and retiree health benefits. The plan also provided a special benefit for those workers who had at least thirty (30) years of credited who retired from Van Dyke These workers could retire at any age and receive their retiree health care along with a $2,100 a month supplement until it was coordinated with social security.

All of the named plaintiffs had over thirty years of seniority but because of lay offs over the years, they did not have 30 years of credited service. Plaintiffs Jerry Crawford, Don Hoskins, and Larry Powell had service credits in excess of 29 years. **At the time the plant closing was announced these three were on layoff . Each needed to be recalled to work and work only 170 hours before the plant closed in 2006 in order to attain 30 years of credited service.** The Van Dyke plant was strategically located close to Daimler Chrysler's (DCX) Sterling Heights assembly plant. In the fall of 2004 DCX solicited a bid from TRW on a five year contract to provide this plant with various modular pieces which could be delivered on a just in time basis to their plant for assembly into Chrysler cars. One criteria for the plant was that it had

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[3]This plant was part of the TRW's North American Braking and Suspension division which had sales of $2 billion in the year 2006. *Muckley 30-31.* Earnings and profits were so extraordinary in the year 2006 that the board of directors approved more than $36 million in annual compensation for CEO John Plant and three of his top executives. *Crane's Detroit Business , May 28, 2007, Exh 22.*

to be within a short distance from the Sterling Height assembly plant. When TRW put in its initial bid it proposed to put this "modular work" at the Van Dyke plant which was its only plant within the required distance. In early 2005 the contract with DCX contract was secured. The contract was worth $188 million per year. (*Eric Weiss dep p 89)*. TRW then decided to change its plans and place this modular work at a smaller plant which it caused to be built (and then leased) on Mancini Drive in Sterling Heights, Michigan. Mancini Drive was also within the required distance from the Sterling Heights Assembly plant and only a few miles from the Van Dyke plant. TRW then decided to close Van Dyke and move the remaining work that was being performed at Van Dyke plant[4] along with other work it had secured[5] but had not started, to other plants, either in Canada or low cost countries.

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[4]In early 2004 the Company outsourced a large part of its Van Dyke plant business allowing the Company to reduce head count to approximately 115 (22 salary, 93 hourly) at the Van Dyke plant. *Sterling Business Review, December 19, 2005, 06863, Exh 21.* One of the rationales for moving other work out was to create space for newer and larger projects which could take advantage of Van Dyke's floor space. According to projections made by TRW management, by 2006, the profitability of the Van Dyke plant would return to about 3.7%, 4% in 2007, and about 5% in 2008. *Exh. 20, 04470.* Thus, Van Dyke has always been profitable and projections made in late 2003 indicated the amount of profit was likely to increase.

[5]When the Company announced the closing of the Van Dyke plant it stated that it "lacked enough work to support the facility". In the communication plan which was written to address the question of whether TRW had been trying to find work to place at the plant, the answer was supposed to be yes, and that over 30 bids had been submitted and only four were accepted after customers demanded lowering of the price. Information provided in response to Plaintiffs' Motion to Compel showed that TRW materially

In the Fall of 2004, TRW developed a corporate plan to aggressively eliminate from its rolls those employees for which the Company was or would be obligated to pay ERISA protected benefits. These ERISA benefit laden employees, commonly referred to as employees with "heritage costs", were targeted for permanent eradication.

In management's discussion with regard to the North American Braking and Suspension Restructuring Program for the years 2004-2005, Company management stated:

> Wage structure within NABS (North American Brake & Suspension) is viewed as uncompetitive versus other tier one companies largely due to **heritage costs** coupled with the single tiered wage structure within both union and non-union facilities. (emphasis added)

N.A. Braking & Suspension Restructuring 2004-2005, September 24, 2004, 05081, pg. 2, Exh 2.

In further articulation of its heritage cost eradication program, the Company stated that its long-term goal was to "reduce heritage costs ... by bringing in new employees with modified compensation

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misrepresented the facts in the communication plan. Defendant provided letters of 44 bids submitted, *(08083-08163)* and a chart showing the date of the bid, who it was submitted to, and who won the bid. A chart showing an analysis of this information. This chart shows that 14 bids, not 4 bids, were accepted, with an estimated value of at least $14,439,399. *Exhibit 25.* No one requested a price change. This information shows almost 40% of the bids were accepted.

packages." *Id. pg. 5, 05084*. To this end, the Company adopted a new-hire health and welfare plan and a new-hire pension plan in April of 2005, which provided for "no retiree medical" and a defined contribution pension plan... *TRW Automotive, New Hire H&W Plan, New Hire Pension Plan, April 15, 2005, 05460-05463, Exh 8.*

When the plant closing was announced many of the workers who had already attained 30 years of credited service retired immediately. Others continued to work but retirements continued. Two high seniority employees were recalled by the plant human resources personnel. Both were in the same situation as Crawford, Hoskins and Powell in terms of needing only 170 hours of work to pass the 30 year threshold to full retiree benefits. They were able to obtain these 170 before the plant closed. In early March of 2006 the Human Resources personnel at the plant were ordered by high management officials not to recall any more workers from lay off. Crawford, Hoskins and Powell had the next highest seniority and would have been called back to work had that order not been issued. Instead of recalling workers the remaining workers worked thousands of hours of overtime. (See, *infra)*

Petitioners filed the instant two count complaint alleging that the decision to close the Van Dyke plant and/or not to place the Van Dyke workers at its new plant on nearby Mancini Drive was made with the specific intent to interfere with their ability to accrue additional service time under the plan allowing some of them to cross the 30 year threshold. The second count was brought on behalf of Crawford, Hoskins and Powell, and alleged that the Company's decision not to stop recalling anyone in March of 2006 before the Van

Dyke plant closed was made with the specific intent to **prevent them from attaining their 30 years of service time.**

Petitioners obtained discovery **in addition to the documents referenced above which articulated the specific intent to eliminate workers with "heritage costs"** proved the TRW's specific intent to violate **510**. This proof included, *inter alia,* (1) an admission by Ronald Muckley, Vice President of the NABS that pension costs was one reason for the decision to close the Van Dyke plant *(Muckley dep pp 152-153)*; (2) documents showing TRW's preoccupation with the savings on pension and health care which would be realized if the Van Dyke plant closed. These documents described to the penny the almost $2 million in savings to the company if the current employees were prevented from accruing any more service credits ("curtailment gain"), and also revised downward the cost to the Company of the immediate retirement of workers who had more than 30 years of service ("curtailment loss"); *TRW Automotive, Project Silver Curtailment Initiative, March 11, 2005 (07741-07760 and 05099)Exhibit 5,* (4) documents from the curtailment team set up to find ways to further lower curtailment losses at Van Dyke, and document s which showed that curtailment losses from the retirements of older workers at Van Dyke were to be offset by curtailment gains from closing two newer unionized plants; *N.A. Braking and Suspension Restructuring 2004/2005 September 24, 2004, 05083, 05080, 05093, Exhibit 2 and Exhibit 5.* (4) documents which disproved TRW's public justification for closing the plant which was that it could not get work (beyond the DCX modular work) for the Van Dyke plant (see footnote 5

and citations therein); (5) documents showing that cutting back on company's obligation for retiree health care was the centerpiece of plant closing negotiations with the Union, and emails from Company President John Plant which opposed negotiating for bridging high seniority workers, like the named plaintiffs to 30 years of service; *(Plant email to Hoover January 16, 2006, 07717, Exhibit 18).* (6) emails in early March 2006 from high level plant managers telling the Van Dyke Human Resources not to bring anyone back from layoff in the face of 10 retirements slated for April 1[6], and documents which showed the large number of overtime hours worked after no further recalls were allowed (*Emails from Hughes, March 8 2006, 07845, Exhibit 4, and Overtime summary Exhibit 26*); (7) documents showing that the plan for putting the module work at Van Dyke changed after the September 2004 plan to eliminate employees with heritage costs *(September 22, 2004 correspondence from Puuri to Daimler Chrysler, Bates 06427-06428, Exh 1, November 3, 2004;*

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[6]These emails were between Rachelle Mancini (HR at Van Dyke), Bruce Hoover (Director of Operations for Linkage and Suspension), Edmond Hughes (Vice President of HR) and Steven Kiwicz (Vice President of Compensation and Benefits), dated March 7, 2006 and March 8, 2006. On March 7, Ms. Mancini informed the others that ten hourly employees planned to retire on April 1, 2006. The following day Mr. Hoover responded by saying that TRW "must hold off any potential recall of employees," and Mr. Hughes, Director of Human Resources for North American Braking & Suspension, wrote to Steven Kiwicz that "[TRW is] working very hard not to recall any individuals."

correspondence from Puuri to Daimler Chrysler, 06407,06406-06413, Exh 3); (8) documents showing that the Van Dyke plant was always profitable (*Exhibit 20, 04470*), and (9) evidence that the number of people who remained at the plant or with recall rights to the Van Dyke plant equaled the number of people necessary to run the new plant on Mancini Drive.

The Respondent moved for summary judgment arguing *inter alia* (1) that ERISA 510 did not apply in the plant closing context or in the context of recalling laid off workers; (2) assuming *arguendo*, ERISA did apply in these contexts, TRW had a legitimate non interfering reason of plant "overcapacity" for its decision to close, and other business related reasons for not putting the modular work at Van Dyke, (3) and even if those reasons could be shown to be pretext, ERISA did not provide a remedy. Respondent also claimed that the Mancini Drive plant did not provide a remedy because it was not an alter ego to the Van Dyke plant. Respondent specifically claimed that module assembly work which was originally slated for the Van Dyke plant was different from and not compatible with the manufacturing work at Van Dyke.

The District Court agreed with petitioners that ERISA §510 applied to claims for interference with ERISA rights in a plant closing and failure to recall contexts[7]. The District Court also found using the

[7]In the initial judgment the District Court found that failure to recall from lay off was not a claim recognized under 510; on reconsideration, stated this claim would be cognizable under the the non-discrimination language in 510 but found, ***despite emails to the contrary***, no evidence had been presented that suggested TRW considered an employee's eligibility for ERISA benefits

McDonnell Douglas formulation that plaintiffs had proffered sufficient evidence to establish a prima facie case that TRW intended to interfere with plaintiffs' ERISA protected benefits when it closed the plant. The District Court then credited TRW's reasons for closing the plant and for not placing the DCX module work at the Van Dyke plant as originally planned, and stated that its business judgment may not be questioned as a means of proving pretext. The District Court also described Mr. Muckley's admission that pension cost had been a factor in the decision to close Van Dyke as not the same as showing it was a "motivating" factor. The District Court assumed that the alter ego concept applied in the ERISA context as it did in labor law, but found that the Mancini Drive plant was not an alter ego plant which would have required TRW to continue to employ the plaintiffs and provide them the benefits under their collective agreement and pension plan (34a). The District Court also found, ***despite emails to the contrary***, that no evidence had been presented that suggested TRW considered an employee's eligibility for ERISA benefits when deciding whom to recall (18a). The District Court did not address the issue of remedy in light of its ruling on liability. Rehearing was denied and an appeal was taken from this opinion.

After the appeal was filed, Crawford, et al, discovered new evidence they claimed had been concealed from them and the District Court while the

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when deciding whom to recall (18a). On reconsideration, the District Court also re-framed Mr. Muckley's admission into a finding that pension costs had been a factor in the decision to close the plant into it being a factor in TRW losing business (21a-22a).

motion for summary judgment was pending. This new information was that TRW had expanded and added more work at the Mancini Drive plant and specifically that the new work was not modular work, which exposed, as false, the Company's claim that the module/assembly work was not compatible with other types of auto parts fabrication, a reason given for not placing the module work at Van Dyke.

On March 5, 2008, plaintiffs filed a motion under FRCP Rule 60 (b) (2) seeking relief from judgment, claiming that the District Court's opinion on the alter ego issue would have been impacted if the information had been known. [8] Petitioners sought an order from the District Court to conduct formal discovery into the plans for the expansion when the plans were made, i.e. if they were being made when the Company was arguing to the court that the Mancini Drive plant was only for the modular work. The District Court denied the motion and the request for rehearing. In so doing, the District Court relied only on information obtained by petitioner Matt Burdo from "Dave" and did not consider the second Burdo affidavit in which he stated had been able drive to the back of the plant and because the temperature was warm , he could see into the plant from the open dock doors and saw machines similar to the ones at Van Dyke. These rulings were appealed and consolidated on appeal.

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[8]One of the reasons the District Court found the Mancini Drive plant was not an alter ego of the Van Dyke plant was that Mancini Drive was built in order to accommodate modular assembly work which was different from and incompatible with other types of business (19 a). The new evidence tended to show that new work in the expanded Mancini Drive plant was not modular work.

While the Sixth Circuit agreed that ERISA 510 applies in the plant closing context, and disagreed with the District Court on whether business judgment may be questioned to prove pretext, the panel rejected what it characterized petitioners' claimed right to be recalled or transferred to the Mancini plant (7a). Petitioners did not claim the right to transfer or recall to the Mancini Drive plant, **independent of a finding that Mancini Drive was an alter ego to Van Dyke.** [9] The Sixth Circuit rejected the District Court's finding which assumed the concept of alter ego applied in the ERISA context, when it "declined the invitation" to apply the doctrine of alter ego or "double breasting (a form of alter ego) to ERISA (8a).

The Sixth Circuit agreed that petitioners could question the credibility of stated business judgment to determine whether reducing pension benefits was a motivating factor in or incidental to the decision to shut down a plant "that was close to vesting". It found that there were only a few people close to vesting and that petitioners' evidence was not sufficient to withstand summary judgment.

The Sixth Circuit specifically did not "wade into the murky pond" of the remedy issue because of its findings on liability (15a). The Sixth Circuit upheld the District Court's decision not to give petitioners more discovery into the question of the expansion of the Mancini Drive plant, as a basis for seeking relief from

[9]The petitioners only recall claim was that TRW failed to recall Crawford, Hoskins and Powell to the Van Dyke plant before it closed so that they could work the necessary 170 hours in order to have 30 years of service credits.

judgment, thus upholding the District Court's denial of petitioner's motion under Federal Rules of Civil Procedure, 60 (b) (2). The Sixth Circuit adopted the view of the District Court that even with the expansion at Mancini Drive, since it was not expanded to the full size of the previous Van Dyke plant it could not have been an alter ego. (14a).

REASONS FOR GRANTING THE WRIT

Despite disagreements between the District Court and the Court of Appeals, this petition presents issues to this Court which merit plenary consideration, since there is either a conflict among the circuits, or involves important issues of federal law which have not been, but should be settled by this Court. Firstly, petitioners seek affirmation that actions by employers either to close plants or to not recall workers for the purpose of interfering with attaining their rights under a retirement plan, are within the purview of ERISA 510 protection. The majority of courts addressing this issue have so held. Second, petitioners seek a finding that both lower courts erroneously failed to allocate the burdens of proof to the parties under the mixed motive analysis, given the admission by Mr. Muckley that pension costs were a factor in the decision to close Van Dyke. The Courts of Appeals are split on the level of proof required to prove a violation of ERISA 510 and, in particular, have not addressed the impact of the 1991 amendments to Title VII and/or this Court's decision in *Desert Palace Inc. v Costa, 539 U.S. 90 (2003)*, in addressing the allocations of the burdens in cases where, as here, there is evidence of mixed motives. Third, petitioners seek a ruling that the alter ego doctrine is appropriate in an ERISA 510 case such as

this. There are many cases which so hold in the context of collections of indebtedness to pension funds but not in the setting as petitioners have raised. Fourth, there is a split in the circuits as to remedies available to those who have proven ERISA 510 claims. Although neither the District Court nor the Sixth Circuit addressed the remedies question, it is very likely that the concern that there was no remedy affected the Courts' opinions on liability. That is, judges are loathe to find the law is violated without being able to provide a remedy. In the face of the Sixth Circuit's reference to the remedies area, as a "murky pond" they did not want to wade into, this is an important question of federal law which has not been but which should be settled by this court.

Further, while it is true that the writ of certiorari is rarely granted when the error is one of erroneous factual findings or misapplication of a properly stated rule of law, where there is overwhelming evidence that an illegal factor motivated the decisions herein, the failure of the lower Courts to find a question of fact upon which to deny summary judgment has so far departed from accepted and usual course of judicial proceedings, it is respectfully submitted that this Court should exercise its discretion to exercise its supervisory power over these Courts.[10]

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[10]While petitioners believe that the Courts should have granted the motion for relief from Judgment under Federal Rules of Civil Procedure 60(b) (2), this petition will not address that issue as it is the underlying claims which are pertinent to this petition.

I. ERISA 510 PROTECTIONS APPLY TO PLANT CLOSING DECISIONS AND TO DECISIONS NOT TO RECALL LAID OFF WORKERS TO WORK

Since this Court's unanimous decision in *Inter-Modal Rail Employees Ass'n v Atchison, Topeka and Santa Fe Ry,* 520 U.S. 515 (1997), this Court has not addressed any ERISA 510 issue. While the issue in *Inter-Modal* was whether section 510 protected claims for interference with non-vesting welfare benefits in addition to attainment of rights which vest, that case involved a group of employees who lost both rights as a result of a decision by the Railroad to source their work to a new company which provided inferior pension and welfare benefits. The Court in *Inter-Modal* assumed a breadth to 510 protections based in the language of the law which goes beyond the right of an individual to assert a claim for interference with a right which may vest. This Court specifically recognized that when an employer acts in ways proscribed by 510 with the purpose of interfering with rights under the plan it violates that law[11]. Cases, both prior to *Inter-Modal,*[12]

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[11]The Court stated: ... "in the case where the employer acts with a purpose that triggers the protection of 510, any tension that might exist between an employer's power to amend the plant and a participant's rights under 510 is the product of a careful balance"... at 516.

[12]See e.g., *Gavalik v. Continental Can Co.,* 812 F.2d 834, 852 (3d Cir.), cert. denied, 484 U.S. 949 (1987), later proceeding sub nom *McLendon v. Continental Group, Inc.,* 802 F.Supp. 1216 (D.N.J. 1992), *Pickering v. USX Corp.,* 809 F.Supp. 1501, 1533 n.18 (D. Utah 1992).

and the instant case, after *Inter-Modal* have extrapolated from *Inter-Modal* to find an employers' discretion to modify or terminate a plan, does not permit a company to discharge employees or alter their plan rights "to circumvent the provision of promised benefits." *Id*, at 515. But, notwithstanding this, TRW argued that section 510 should not apply to plant closing decisions. This Court should hold otherwise. It must be remembered that "plant closings were not beyond the experience of ERISA's drafters. In fact, a plant closing may have been the final straw which convinced Congress of the necessity of pension reform. In 1963, Studebaker Corporation closed its automobile plant in South Bend, Indiana. As a result of that closing, thousands of employees lost their jobs. More importantly for future pension regulation, due to the under funding of the Studebaker pension plan, 6,900 employees lost some or all of their promised pension benefits. The widespread deprivation of pension benefits inspired Congress to investigate the general lack of security for private pension plans." See, Muir, *"Plant Closings and ERISA's Non-Interference Provision"*, 36 B.C. L. Rev. 201 (1995), pp. 203-204 .

While ERISA does not require companies to set up pension or welfare plans, and gave them the right to modify, terminate or alter them, nevertheless, Section 510 was enacted to counterbalance that flexibility to protect employees against employment actions which intentionally make promised benefits illusory. See, Spanitz. *Inter Modal Rail: Will ERISA's Newly Defined Welfare Benefit Non Interference Clause Curb Outsourcing?"*, 23 Del J Corp L 589 (1998), pp 603-604.

Thus, both lower Courts were correct when they found that 510 does apply to plant closings decisions. Both lower Courts were incorrect when they found that because lay offs and recalls are not a prohibited practice specified in 510, the decisions not to recall petitioners Crawford, Hoskins and Powell at a time when they could achieve 30 years of service credits at Van Dyke did not violate 510. To the extent they relied on the non discrimination portion of 510, both courts found no evidence of discrimination because recalls were based on seniority. This finding totally ignored the emails ordering the plant to stop recalling anyone after two people who had been recalled and qualified for the 30 year benefits. Petitioners assert that a lay off without recall in the plant closing context, when it was known a recall would have allowed for a vesting or even to accrue a larger benefit, is a prohibited practice under 510. It is, in fact, tantamount to a discharge for the purpose of interfering with the employee's rights to attain a benefit under the plan. The courts in *Gavalik* and *Pickering* under similar circumstances found lay offs which became permanent and interfered with the plaintiffs' ability to obtain and increase in benefit value to violate 510.

II. EVIDENCE AND ALLOCATIONS OF BURDEN'S OF PROOF TO WITHSTAND SUMMARY JUDGMENT IN A 510 CASE REQUIRE A MIXED MOTIVE ANALYSIS.

Because 510 describes the actions being taken "for the purpose of" interfering with attaining a benefit under the plan, it is a state of mind statute and evidence must be presented, either direct or

circumstantial of that intent. The fundamental distinction between employer actions which have been found to violate 510 is one of "which came first". Stated another way, was the decision to terminate an employee made first with the impact on benefits being an indirect effect, or was there a decision to first analyze the cost of the employee's benefits and then to make employment decisions consistent with eliminating employees whose jobs include those costs? See, *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993). *Daughtrey* stands for the principle that "measures designed to reduce costs in general that also result in an incidental reduction in benefit expenses do not suggest discriminatory intent. To succeed on a 510 claim the employee must produce evidence suggesting that the employer's decision was directed at ERISA rights in particular." Plaintiffs are not required to prove that the only reason for the decision is a specific intent to interfere. Rather, **at least one factor** which motivates the decision must be aimed at ERISA rights. *Nemeth v Clark Equipment Co.*, 677 F.Supp 899 (W.D. Mich 1987)

Consistent with *Daughtrey, supra,* petitioners submitted significant evidence that the loss of benefits was not incidental to their job loss, but rather central to it. The Company first stated as policy its plan to eliminate employees who had rich benefit packages (i.e., heritage costs), had analyzed how to eliminate the costs associated with these employees, and then made outsourcing and plant closing decisions consistent with this policy.

510 cases have been analogized to Title VII cases in employment. As a result, Courts have reflexively

applied the burden shifting and proof allocations set forth in *McDonnell Douglas v Green*, 411 U.S. 792 (1973) and *Department of Community Affairs v Burdine* 450 U.S. 248 (1981). This is because direct evidence of intent is rarely available. The lower courts herein analyzed the facts according to this framework. They started, though, by accepting, without question, TRW's claim that in 2004 it faced significant overcapacity within its North American Braking and suspension group and assumed that overcapacity translated into lost profits.[13] Both courts ignored TRW's own annual report and other public documents which showed TRW having record profits.

Even accepting there may have been overcapacity in the North America Braking and Suspension group due to off shoring work to low cost countries or other out-sourcing decisions by TRW itself to create that overcapacity in North America, the manner in which the Company addressed that overcapacity is what has 510 implications. There is nothing, except the intent to rid itself of employees with the richest benefit packages, which requires overcapacity to be addressed by targeting employees such as petitioners who possess the best benefits.[14] Similarly, after finding that petitioners had brought forth sufficient evidence to prove a prima facie case,

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[13]TRW presented nothing of substance to support these assertions.
[14]Beginning in 2005, the North American Braking Divsion closed five (5) union plants and transferred the work to non-union plants where heritage costs could be reduced or eliminated. *Summary of Closures, Exh 16.* Management developed an "anti-union campaign" designed to eliminate the higher labor costs associated with unionized activities. *Hoover email, March 23, 2005, 06830, Exh 7; Hoover email, April 22, 2005, Bates 06914, Exh 9.*

both lower Courts accepted without any question that the Van Dyke plant had to close due to overcapacity. The District Court also accepted without question TRW's reasons for not curing the overcapacity by placing the DCX module contract[15] at Van Dyke, and forbade petitioners from attacking the credibility of TRW's business judgment for not placing the DCX work at Van Dyke as a way of proving pretext. The Court of Appeals did not directly address TRW's reasons for not placing the DCX module contract at Van Dyke or accept that it was possible to cure the overcapacity issue by placing this huge contract there.[16] Although the Court of Appeals did disagree with the District Court about whether business judgment may be questioned to prove pretext, the Court of Appeals, like the District Court, was overly swayed by the fact that by 2004 TRW had so emptied out Van Dyke that it could see some logic in closing the plant. The Court of Appeals wrongly assumed, however, that to prevail petitioners had to show that more than a few people were on the verge of reaching the eligibility for the benefits associated with 30 years

[15]Vice President of Human Resources admitted that if the DCX contract had been placed there the overcapacity issue would have been solved. (*Hughes dep pp 108*) While TRW claims there still would have been more space in Van Dyke the question is not space but fixed costs associated with the building. The fixed costs before the decision was made were 26% when the Company wanted to get it to the 10% to 15% range. *(Sterling Business Review, September 19, 2005, 06857, Exhibit 21).* Placing the DCX contract there would have cured the problem.

[16]The Court of Appeals claimed petitioners stated that the overcapacity at Van Dyke was a false reason because the plant was so poorly run and that the company could have kept it going if it had cut costs and put the DCX contract there. This was not petitioner's position.

of service credits, and assumed those were the only costs TRW had analyzed, when in fact TRW predicted almost $2 million in savings from stopping the rest of the employees at Van Dyke from earning more service credits. Section 510 applies to **all** the employees (all of whom in this case were minimally vested with over five years of service credits) who lost the right to continue to accrue additional years of service so as to receive a higher pension[17]. Therefore, it was error for the Court of Appeals to even consider as probative evidence that the majority of the class was not close to achieving the benefits of those who passed the 30-year threshold.

The most important error was that lower Courts evaluated the evidence and allocated the burdens of proof through the *McDonnell Douglas/Burdine* prism. Mr. Ron Muckley, the Company's vice president of this division, **admitted that pension costs were a factor among others in the decision to close the Van Dyke plant.** Where a company concedes an illegal factor played a part in the decision, burdens of proof are to be analyzed according to cases presenting mixed motives.

The mixed motive burdens of proof were initially articulated in *Price Waterhouse v Hopkins,* 490 U.S. 228 (1989) where the defendant admitted that plaintiff was not made a partner in the accounting firm based on sex role stereotypes. The defendant claimed the same

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[17]See e.g. *Conkwright v Westinghouse Elec. Corp.* 933 F.3d 231 (4th Cir 1991), *Dister v Continental Group Inc.*, 859 F.2d 1108 (2d Cir. 1988), *Clark v Risistoflex Co, a Div. of Unidynamics Corp,* 854 F.2d 762 (5th Cir. 1988) and *Kross v Western Elec. Co.*, 701 F.2d 1238 (7th Cir 1983), for the proposition that 510 extends to claims by vested employees for intentional interference with their **ability to accrue additional benefits.**

result would have occurred even in the absence of these stereotyped attitudes. The Court allowed the company to attempt to prove its claim so as to avoid liability but the burden of proof was on the defendant.

In 1991, Title VII was amended so as to prevent an employer that has used an illegal reason in making an employment decision to avoid liability completely if it is able to demonstrate the same result would have occurred absent the illegal factor. In *Desert Palace v Costa supra*, this Court unanimously held that proof that an illegal factor played a part in the challenged decision did not have to be proven through direct evidence.

In this case, the Vice President admitted that pension costs were a factor among many in the Company's decision to close the Van Dyke plant. Once this admission was made (along with the other significant circumstantial and direct evidence consistent with this admission, and indeed make it appear it was the major factor), the lower Courts should have evaluated this case in the mixed motive framework, and required the Company to prove that the same results would have occurred absent the illegal factor. That is, the Company would have had to prove its stated reasons for not putting an almost billion dollar contract into Van Dyke was based only on legitimate reasons and not the desire to gain $2 million in savings from stopping the petitioners from earning more service credits and, in particular, not allowing petitioners Crawford, Hoskins and Powell[18] to attain 30 years of service credits.[19]

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[18]These three petitioners, the named plaintiffs and the class they

While petitioners may not be able to take advantage of the amendment to Title VII, as 510 was not similarly amended, this Court should settle the question of the proper allocation of burdens of proof in an ERISA 510 mixed motive case such as this and find that the lower Courts erred in this case by keeping the burden with the petitioners at all times, when it should have required TRW to prove its reasons for the challenged decisions were not based on the illegal reasons. [20] This error is so major as to which requires this Court's correction.

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represent have had to endure the hardship of no jobs, no health insurance, loss of property and loved ones as a result of the actions complained of herein. The only thing the named plaintiffs have done is devote more than thirty years of their working lives to this company only to be made expendable because they had earned the right to benefits through collective bargaining. In addition to the errors of law supporting granting of the writ, this Court should address the grave injustice that these workers should be left without a remedy when they have done nothing except live up to their side of the bargain only to lose the benefit of their bargain because management was not satisfied with record profits.

[19]TRW's managers offered differing explanations for the order not to recall anyone. Hoover asserted that the company was "managing [its] headcount." *Hoover, 94.* Hughes said the decision to keep employees laid off was made because the Company wanted "to build with the people [it had]." *Hughes,157.* He also questioned why a company would wish to "drag people back into an organization?" *Id.* These explanations are so general that they do not even state a legitimate non-interfering reason for not recalling these workers. Although the company should have been required to prove that not recalling them made more economic sense than paying the thousands of hours of overtime to the remaining workers, even under a *McDonnell Douglas/Burdine* standard the Company's stated reason for not recalling them, (i.e permanently laying them off) would not have even met the Company's burden of production.

[20]The Third Circuit in *Gavalik, supra,* and the District Court in *Nemeth, supra,* placed the burden on the companies to show that

III. ALTER EGO AND ERISA 510

An alter ego is an entity established to evade the original entity's responsibilities. *NLRB v. Watt* 273 NLRB 655 (1984). A new entity that is found to be the alter ego of the entity it replaced will be held to all of the prior entity's agreements and obligations. *NLRB v. Fullerton Transfer and Storage Limited, Inc.* 910 F2d 331 (6th Cir 1990). Although the alter ego doctrine was originally developed in the labor law context, it has been applied to cases involving employee benefits brought under ERISA. See *Laborer's Pension Trust Fund v. Sidney Weinberger Homes, Inc,* 872 F.2d 702 (6th Cir. 1988) (applying alter ego principles in ERISA case), and *Ensley v Ford Motor Company,* 2007 WL 2029638 (E.D. Mich. 2007). When an employing entity is found to be "a mere technical change in the structure or identity of the employing entity...(i.e. its alter ego) without any substantial change in its ownership or management" the Courts will disregard the form and find that the two entities are one and the same for purposes of imposing liability. *Howard Johnson Co Inc v. Detroit Local Joint Executive Bd Hotel and Restaurant Emp and Bartenders Intern Union, AFL-CIO,* 417 U.S. 249, 261, n5 (1974).

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the same decision would have been made in the absence of the illegal factor. In *Gavalik* the company was not successful, but in *Nemeth* the defendant was successful. But, see, *Pickering, supra,* where the company had developed a study entitled "Employee Benefits Costs Potential Shutdown of Geneva Plant", where the Court found a violation of ERISA 510 and did not allow the company try to prove it would have come to the same result absent the results of the study.

Petitioners claimed that the Mancini Drive plant was an alter ego of the Van Dyke plant as it was built for the purpose of evading TRW's obligations to the workers at Van Dyke who had been slated to get the DCX contract as it was originally bid to be placed in the Van Dyke plant . Petitioners claimed Mancini Drive had all the earmarks of an alter ego as it involved the same company, the same type of product, the same customers and many of the same management people. Petitioners' argument that Mancini Drive is an alter ego of Van Dyke was proffered as further evidence of intent to interfere, as the employees at Mancini Drive had lower pay and limited benefits. Petitioners also asserted that the existence of the Mancini Drive plant would have provided them with a reinstatement remedy. (See *infra*).

The lower Courts had different views of the alter ego issue. The District Court understood that the concept of alter ego could be applied in the ERISA context, but accepted TRWs claim of major difference between the manufacture of auto parts[21] and the assembly of auto parts, as well as the claim that there was no continuation of work from Van Dyke at Mancini Drive and that the salaried staff was not totally the same. The District Court also claimed that because a

[21]The District Court ignored plaintiffs' evidence that all of them had done assembly work at Van Dyke and that many of the parts they produced involved both manufacture and assembly. See e.g., Van Dyke plant also conducted "just in time" assembly. *Burdo, 64.* Van Dyke employees performed modular work for five years. *Hoskin, 21-22.* Numerous class members testified that they performed assembly work at Van Dyke. *Crawford, 6, 10, 11, Annabel 10-11, 27-28.*

subsidiary of TRW, (Kelsey Hayes) operated Mancini Drive, there was no disguised continuance.[22]

The Court of Appeals, on the other hand, refused to import into ERISA law, the concepts of alter ego and double breasting from labor law. In addition to these errors, the Court of Appeals assumed an equivalence between successors and alter egos. Successors are very different from alter egos. The owner of a successor must recognize the union if there is one. It is well know that an alter ego is bound by the obligations, including the collective bargaining agreement and benefits of it's "other self".

The Court of Appeals also erroneously found it irrelevant if the Mancini Drive plant was an alter ego because "they would not be entitled to transfer, because the plan granted them no such right, and neither would they be entitled to recall so long as the original discharge was lawful"(8a) If the Court of Appeals had found Mancini Drive to be an alter ego of Van Dyke, the Court would have had to find Mancini was set up to evade TRW's obligations to the workers at Van Dyke (i.e. liability), so that Mancini Drive would have been just a smaller Van Dyke, and the Van Dyke workers would, as a matter of law, have had the right

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[22]Typically, alter egos are called disguised continuances of a prior businesses. Often evasion of liabilities will require the original owner to start another business with a different name, etc. It is in these instances where the Courts will have to assess whether they are in fact the same company. In the case of the same company having different divisions, where one is used to avoid the liabilities of another, the alter ego takes the form of "double breasting". See *NLRB v Fullerton Transfer & Storage supra.*

to work there and be covered by their contract and pension plan.

The Court of Appeals' decision is so riddled with errors that it should not be allowed to stand. Unfortunately, as the case has been published it can be cited as precedent.

IV REMEDIES FOR ERISA 510 CASES

In their law review article entitled, "Failure of Equity: Discriminatory Plant Closings as an Irremediable Injury Under ERISA"[23], Lorraine Schmall and Nathan Ihnes take issue with the development of the law of remedies under ERISA as it applies to plant closings. They highlight the case of *Millsap v McDonnell Douglas Corp,* 368 F.3d 1246 (10th Cir. 2004), wherein the plaintiffs proved the company closed their plant for reasons related to their pension costs,[24] but where the Court determined (after

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[23]55 Cath.U. L. Rev 81 (2005)

[24]In *Millsap v. McDonnell Douglas, supra,* the District Court found a violation of §510 when the company closed its Tulsa, Oklahoma plant. This case is remarkably similar to petitioners' case in that the plaintiffs presented evidence of company memos from outside actuaries that analyzed the savings available if benefits were reduced. One memo consider[ed] various "what if" scenarios, analyzing the effect on costs and savings if the company decided to reduce heads. The financial experts examined "pension cost, savings cost, savings plan cost, healthcare cost, and just direct overhead cost". They also, as petitioners had, memos specifically discussing the curtailment gains from eliminating employees before they vested for higher cost benefits. Despite these documents (like here), McDonnell Douglas argued unsuccessfully that **pension considerations played no part in its decision to close**. That is, they argued that **the sole reason for closing was excess capacity based on economic and**

a settlement had been reached on the lost pension benefits) that the plaintiffs were not entitled to any front or back pay as a result of the illegal decision. Analyzed in the article are the cases cited by respondent herein, to wit: *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993)[25] and *Great-West Life & Annuity Ins. Co. v. Knudson*, [26]534 U.S. 204, 210 (2002), among others.

Their conclusion, similar to this Court's balancing of rights in *Inter Modal*, is that 510 should create some remedies that are part of doing business, and that ERISA 510 falls within the category of laws which regulate illegal entrepreneurial decision making." *Id.* at 139.

In this case, the Court of Appeals mentioned the unpublished case of *Alexander v. Bosch Automotive Systems, Inc.*, No. 05-6010 (6th Cir. May 14, 2007), wherein the plaintiffs alleged that the defendant

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financial considerations. The Court didn't buy it and so, too, this Court should not.

[25]*Mertens* found that relief under ERISA is limited to equitable relief and that "the term 'equitable relief' can assuredly mean ... whatever relief a court of equity is empowered to provide in the particular case at issue".

[26]In *Knudson*, Great-West paid medical bills on behalf of the insured defendant, who later recovered tort damages from a third party for her injuries but in a special needs trust. Great West sued the insured under a reimbursement provision of the insurance plan to collect the funds it had paid. Because the funds were not in the defendant's possession, Great West's claim was akin to an imposition of personal liability for the benefits conferred upon the defendant insured. Such relief was deemed not within the scope of equitable remedies under ERISA § 502(a)(3).

purposely *timed* their lay offs to prevent them from obtaining benefits under a negotiated plant closing agreement, and the Sixth Circuit ruled against them on the ground the value of the agreement was not an equitable remedy.

On the other hand, the Sixth Circuit has held that under *Mertens* restitution is a remedy typically available in equity, and therefore falls within §502(a)(3)'s category of "appropriate equitable relief." *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir. 1995). In *Schwartz, supra,* the plaintiff's claim was based on her retaliatory discharge by the defendant in violation of ERISA § 510. The plaintiff sought back pay and front pay as equitable relief under §502(a)(3). Relying on *Mertens* and its progeny, the Sixth Circuit held that back pay is an equitable remedy of restitution available under § 502(a)(3), as is front pay, because it is a traditional equitable remedy available in cases where reinstatement is not appropriate or feasible. *Schwartz*, 45 F.3d at 1023.

In this case, with the existence of the alter ego plant at Mancini Drive, the issue of reinstatement is not present. Nonetheless, the 10th and 6th Circuits have conflicting views regarding remedies in these cases. As noted above, Courts are loathe to find liability when no remedies are available. Similarly, it is difficult for an attorney to counsel clients to bring a case of this type where there is no adequate remedy. The result is illegal conduct is allowed to go either not found or unpunished. This is not a result this Court should countenance.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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