1994

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Recommended Citation

Jared A. Goldstein, *Employment Discrimination Claims Under ERISA Section 510: Should Courts Require Exhaustion of Arbitral and Plan Remedies?*, 93 MICH. L. REV. 193 (1994).

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NOTES

Employment Discrimination Claims Under ERISA Section 510: Should Courts Require Exhaustion of Arbitral and Plan Remedies?

Jared A. Goldstein

INTRODUCTION

The Employee Retirement Income Security Act of 1974 (ERISA)¹ regulates employer-sponsored welfare and pension plans² in two distinct ways. First, it requires plan administrators to provide benefits according to the terms of the plans. If a plan administrator wrongfully denies a benefit guaranteed by the plan, the beneficiary can sue in federal court to recover the benefit.³ Courts refer to such claims as "benefits claims."⁴ These claims amount to breach-of-contract actions and require courts to construe the terms of ERISA-governed plans in order to determine whether the plan owes the plaintiff benefits.⁵

Second, ERISA establishes minimum standards to govern plans and the actions of plan fiduciaries. Minimum standards established

1. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988) and in scattered sections of the I.R.C. (1988)).

2. ERISA defines two types of plans covered by the Act. Employee welfare benefit plans or "welfare plans" include plans that provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services." 29 U.S.C. § 1002(1)(A) (1988). Employee pension benefit plans or "pension plans" are those plans that "provide[] retirement income to employees, or . . . result[] in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A) (1988).

3. ERISA § 502(a)(1)(B) provides that a participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (1988). In addition, ERISA § 404(a) establishes that plan fiduciaries must adhere to plan documents: "A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1) (1988).

4. See, e.g., *Quesinberry v. Life Ins. Co.*, 987 F.2d 1017, 1027 (4th Cir. 1993); *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1415 (9th Cir. 1991); *McMahan v. New England Mut. Life Ins. Co.*, 888 F.2d 426, 429 (6th Cir. 1989); *Leonelli v. Pennwalt Corp.*, 887 F.2d 1195, 1199 (2d Cir. 1989).

5. Cf. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (holding that ERISA §§ 502(a)(1)(B) and 514(a) preempt a state breach-of-contract action based on a violation of the terms of a plan).

by ERISA include vesting schedules that pension plans must meet⁶ and broad fiduciary obligations to which plan administrators must adhere.⁷ ERISA provides plan participants and beneficiaries a federal cause of action to enforce these standards.⁸ Courts characterize such claims as "statutory claims,"⁹ which require courts to interpret the provisions of ERISA itself.¹⁰

ERISA section 510,¹¹ the subject of this Note, provides one of the statutory rights guaranteed by ERISA. Section 510 prohibits employers both from discriminating against an employee on the basis of her eligibility for benefits and from retaliating against an employee for asserting her rights under ERISA:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this title . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or this title].¹²

Section 510 amounts to antidiscrimination legislation. One court has analogized the protection offered by section 510 to that offered by Title VII of the 1964 Civil Rights Act:¹³ "As Title VII prohibits discrimination on the basis of race with respect to such employment, so does section 510 prohibit discrimination with respect to pension benefits on the basis of one's proximity to such benefits."¹⁴

6. ERISA § 203 requires pension plans to provide participants a nonforfeitable right to their accrued benefits after no more than seven years. 29 U.S.C. § 1053 (1988).

7. These obligations include the requirements that fiduciaries perform their duties in accordance with the "prudent man" standard of trust law, that fiduciaries act for the exclusive benefit of participants and beneficiaries, and that fiduciaries act in accordance with plan documents. 29 U.S.C. § 1104 (1988).

8. ERISA § 502(a)(3) provides a cause of action to a participant, beneficiary, or fiduciary "(A) to enjoin any act or practice which violates any provision of this subchapter . . . or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter." 29 U.S.C. § 1132(a)(3) (1988).

9. See, e.g., *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 665 (2d Cir. 1994); *Amaro v. Continental Can Co.*, 724 F.2d 747, 749 (9th Cir. 1984) ("This *statutory claim* is not for benefits under a collective bargaining agreement." (emphasis added)); *Air Line Pilots Assn. v. Northwest Airlines*, 627 F.2d 272, 276 (D.C. Cir. 1980).

10. See *Amaro*, 724 F.2d at 751 ("We are faced solely with an alleged violation of a protection afforded by ERISA. . . . [T]here is only a statute to interpret."); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1244 (7th Cir. 1983) ("It is clear from the language of § 502(a) . . . that § 502(a)(1) encompasses civil actions for violations of the *terms of a benefit plan*, while § 502(a)(3) authorizes civil actions for violations of the *provisions of ERISA itself*.").

11. 29 U.S.C. § 1140 (1988).

12. 29 U.S.C. § 1140 (1988).

13. 42 U.S.C. §§ 2000e-17 (1988 & Supp. III 1991).

14. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 847 (3d Cir. 1987) (quoting *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1503-04 (D.N.J. 1985)); see also *EMPLOYEE BENEFITS COMM.*, ABA, *EMPLOYEE BENEFITS LAW* 529 (1991) ("Section 510 of ERISA is an antidiscrimination in employment and antiretaliation statute similar in concept to the ADEA, Title VII of the Civil Rights Act and the Rehabilitation Act.").

Unlike Title VII, which prohibits discrimination on the basis of personal characteristics such as race, religion, and sex, section 510 explicitly prohibits employers from discriminating for purely economic reasons.¹⁵ For instance, one employee established a prima facie case of discrimination under section 510 by showing that her employer fired her in order to prevent her from becoming eligible for substantial disability benefits.¹⁶ In another case, an employee established a prima facie case of a section 510 violation by showing that his employer discharged him to prevent him from qualifying for an additional \$550,000 in pension benefits.¹⁷

Although ERISA provides a federal cause of action to enforce section 510, ERISA-governed plans themselves may provide a private mechanism for reviewing the actions of plan administrators.¹⁸ Additionally, employment contracts and collective bargaining agreements frequently specify private arbitration as the exclusive means for handling employment disputes.¹⁹ In the context of plan remedies, courts typically defer to the determinations of plan ad-

In analyzing § 510 claims, courts often explicitly apply Title VII principles in allocating burdens of proof. Thus, as in a Title VII claim, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Dister v. Continental Group, Inc.* 859 F.2d 1108, 1111-12 (2d Cir. 1988) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981)); *Gavalik*, 812 F.2d at 852 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). If the plaintiff establishes a prima facie case, the employer then must articulate a legitimate nondiscriminatory reason for the allegedly discriminatory action. 859 F.2d at 1112; 812 F.2d at 853. If the employer meets this burden, the plaintiff must then attempt to show that the employer's decision was based on an unlawful motive, either through direct evidence of discrimination or by proving that the employer's articulated reason is unworthy of credence. 859 F.2d at 1112; 812 F.2d at 853.

15. Another important distinction between § 510 and Title VII is that, unlike Title VII, ERISA preempts otherwise applicable state law. 29 U.S.C. § 1144(a) (1988); see *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (holding that ERISA § 510 preempts a state wrongful discharge claim). Thus, § 510 offers employees their only protection against actions by their employers — including firing — intended to prevent employees from obtaining pension, disability, or other benefits under employer-sponsored plans.

16. See *Zipf v. AT&T*, 799 F.2d 889, 891-93 (3d Cir. 1986).

17. *Dister*, 859 F.2d at 1114-15. Although the typical § 510 case alleges wrongful discharge, other employer actions may also give rise to a successful § 510 claim. For instance, an employee stated a § 510 claim in alleging that his employer fraudulently induced him to waive his rights to benefits under the employer's pension plan. See *Healy v. Axelrod Constr. Co. Defined Benefit Pension Plan & Trust*, 787 F. Supp. 838 (N.D. Ill. 1992).

18. See ERISA § 503, 29 U.S.C. § 1133 (1988) (requiring plans to include a procedure for appealing denials of benefits); *infra* notes 39, 70-73 and accompanying text.

19. In 1975, the Department of Labor estimated that 96.1% of collective bargaining agreements included a grievance and arbitration system. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS, JULY 1, 1975, tbls. 8.1-8.2 (1977). An extensive 1989 survey found that 98% of sample contracts contained arbitration provisions. See BUREAU OF NATL. AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 37 (12th ed. 1989) [hereinafter BNA, BASIC PATTERNS]. Although the Department of Labor does not maintain comparable statistics for individual employment contracts, arbitration agreements may be becoming increasingly prevalent for individual employees. See Steven A. Holmes, *Some Employees Lose Right to Sue for Bias at Work*, N.Y. TIMES, Mar. 18, 1994, at A1 ("Prompted largely by fears that federal juries will grant large monetary awards in bias cases, more and more companies are requiring their

ministrators, upholding their conclusions unless they are "arbitrary and capricious."²⁰ Courts review the decisions of private arbitrators with even greater deference, upholding arbitral decisions unless the award is "completely irrational or evidences a 'manifest disregard for law' "²¹ or the arbitrator exceeds the scope of her authority.²²

Federal courts disagree over whether to require plaintiffs to exhaust private dispute mechanisms before bringing section 510 claims to court. The Sixth, Seventh, and Eleventh Circuits generally require section 510 claimants to exhaust the appeal procedures provided by ERISA-governed plans before they may sue in federal court.²³ The Third, Ninth, and Tenth Circuits, on the other hand, have held that the text and legislative history of ERISA do not provide evidence of a congressional intent to require exhaustion of plan remedies.²⁴ The courts also disagree over whether plaintiffs must exhaust arbitral remedies.²⁵ The Ninth Circuit has held that section 510 claims are not subject to otherwise valid arbitration clauses on the grounds that only the federal judiciary can enforce the rights protected by section 510.²⁶ The Second, Third, Eighth, and Eleventh Circuits have concluded otherwise and have upheld

employees to submit claims of discrimination, including sexual harassment, to binding arbitration.").

20. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108-15 (1989), the Supreme Court held that courts should review discretionary decisions of plan administrators under the "arbitrary and capricious" standard.

21. *Lee v. Chica*, 983 F.2d 883, 885 (8th Cir. 1993).

22. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 594, 597 (1960).

23. See *Costantino v. TRW, Inc.*, 13 F.3d 969 (6th Cir. 1994) (holding that ERISA statutory claims are generally subject to an exhaustion requirement, although an exception to the requirement applied in the instant case); *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1245 (7th Cir. 1983).

24. See *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197 (10th Cir. 1990); *Zipf v. AT&T*, 799 F.2d 889 (3d Cir. 1986); *Amaro v. Continental Can Co.* 724 F.2d 747 (9th Cir. 1984).

25. In some ways, it may be misleading to refer to the issue of whether plaintiffs must arbitrate § 510 claims as an issue of exhaustion. Exhaustion typically refers to whether a claimant must seek review *before* resorting to court. See *infra* notes 31-35 and accompanying text. In contrast, when an arbitration agreement covers a claim, claimants must usually resort to the arbitral forum *instead of* going to court. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). Perhaps partly because limited judicial review of arbitral decisions is available in court, however, courts tend to discuss the issue as one of exhaustion. See, e.g., *Mason*, 763 F.2d at 1222; *Amaro*, 724 F.2d at 750. Moreover, exhaustion in this context also refers to the situation in which courts require plaintiffs to pursue arbitration of contract disputes before bringing claims for statutory ERISA violations. See 724 F.2d at 752 ("A trial court can stay any statutory claim that arises out of substantially the same facts present in an ongoing administrative or arbitral proceeding.").

26. See 724 F.2d at 750-51.

arbitration agreements covering statutory ERISA claims such as section 510 claims.²⁷

This Note examines whether courts should require section 510 claimants to exhaust either plan-based or arbitral remedies before seeking judicial relief. It begins by comparing the basis for an exhaustion requirement with respect to *benefits* claims with the basis for such a requirement with respect to *statutory* claims — like those under section 510. Part I examines the rationale courts have offered for requiring exhaustion of plan remedies for benefits claims. Part I concludes that federal courts have correctly determined that Congress intended individuals bringing benefits claims to exhaust the remedies provided by the plan before seeking judicial relief. Part II argues, however, that courts should not impose an exhaustion of plan remedies requirement for statutory claims such as section 510 claims because neither the text nor the legislative history of ERISA indicates that Congress intended to require exhaustion for statutory claims. Part II further argues that even if courts generally apply an exhaustion requirement to statutory ERISA claims, they should waive this requirement for most claims brought under section 510 by applying the judicially recognized exceptions to exhaustion for futility and inadequate remedies.

Having determined that ERISA does not require exhaustion of plan-based remedies before plaintiffs may bring section 510 claims, this Note then turns to the related issue of whether courts should require section 510 claimants to exhaust contractually agreed-upon arbitral remedies. Part III argues that under recent Supreme Court decisions the determination of whether section 510 claims are subject to arbitration depends on whether the arbitration agreement is governed by the Labor Management Relations Act or the Federal Arbitration Act. This determination, in turn, depends on the type of contract containing the arbitration agreement — whether the arbitration agreement appears in a collective bargaining agreement, a commercial contract, or an individual employment contract. Part III then concludes that under relevant Supreme Court precedent courts should not require those bringing a section 510 claim to exhaust arbitration specified by a collective bargaining agreement. Courts should, however, require exhaustion of arbitral remedies when the arbitration agreement is found in an individual employment contract or a commercial contract.

27. See *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993) (holding that, in general, ERISA statutory claims are subject to arbitration under the Federal Arbitration Act); *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116 (2d Cir. 1991) (same); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988) (same); *Mason*, 763 F.2d at 1224 (holding that ERISA claims are subject to arbitration under the terms of a collective bargaining agreement).

I. THE EXHAUSTION OF REMEDIES REQUIREMENT

All courts agree that those seeking to recover wrongfully denied benefits must exhaust the appeals procedures provided by the plan before bringing suit in federal court.²⁸ Some courts have expanded the reach of the exhaustion requirement beyond these benefits claims and apply it also to statutory claims.²⁹ These courts find that the rationale for requiring exhaustion in the context of benefits claims applies to all ERISA claims, including section 510 claims.³⁰ This Part examines the rationale for applying an exhaustion of remedies requirement to benefits claims in order to set the stage for a similar analysis of statutory claims in Part II. Section I.A explores the development of the exhaustion requirement in the context of benefits claims. Section I.B describes another aspect of exhaustion doctrine, the judicially recognized exceptions to the requirement. This Part provides the framework that will be employed in Part II to determine whether the rationale for requiring exhaustion in the context of benefits claims applies in the section 510 context as well.

A. *Foundation of the Exhaustion Requirement*

In the federal labor law context, courts have applied an exhaustion of remedies requirement as a means of accommodating two potentially conflicting policies — providing access to the courts and encouraging private resolution of disputes. On the one hand, section 301 of the Labor-Management Relations Act of 1947 (LMRA)³¹ provides a federal cause of action to those claiming a violation of a collective bargaining agreement.³² On the other

28. See *EMPLOYEE BENEFITS COMM.*, ABA, *supra* note 14, at 498 ("In general, a participant or beneficiary may not bring an action in state or federal court under Section 502(a)(1)(B) for benefits under the plan unless he has first exhausted the plan's internal claims procedure, including appeals."); James S. Ray, *Overview of ERISA Title I Enforcement: Procedural Aspects*, in ALI-ABA COURSE OF STUDY: EMPLOYEE BENEFITS LITIGATION 385, 417 (1994); Whitman F. Manley, Note, *Civil Actions Under ERISA Section 502(a): When Should Courts Require That Claimants Exhaust Arbitral or Intrafund Remedies?*, 71 CORNELL L. REV. 952, 958 (1986) ("Courts uniformly hold that the failure of a participant to exhaust internal review procedures when challenging a benefit denial under the terms of a benefit plan will bar his subsequent suit under ERISA section 502(a)(1)(B).").

29. See *Costantino v. TRW, Inc.*, 13 F.3d 969, 974 (6th Cir. 1994) (holding that the exhaustion doctrine applies to a claim under ERISA § 204(g), 29 U.S.C. § 1054(g) (1988), which prohibits employers from amending pension plans to eliminate or decrease early retirement benefits or subsidies); *Mason*, 763 F.2d at 1227 (holding that the exhaustion requirement applies to statutory ERISA claims); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1244 (7th Cir. 1983) (same).

30. See 763 F.2d at 1227 ("[I]mposing an exhaustion requirement [for ERISA statutory claims] appears to be consistent with the intent of Congress that pension plans provide intrafund review procedures."); 701 F.2d at 1245 (concluding that "well-established federal policy, and supporting case law, favoring exhaustion of administrative remedies" applies to statutory claims as well as benefits claims).

31. 29 U.S.C. § 185 (1988).

32. LMRA § 301(a) provides:

hand, LMRA section 203(d) establishes a policy of encouraging the development of private grievance procedures to settle workplace disputes.³³ In *Republic Steel Corp. v. Maddox*,³⁴ the Supreme Court resolved the tension inherent in these provisions by requiring those claiming a violation of a collective bargaining agreement to exhaust the agreement's grievance procedure before bringing a federal cause of action.³⁵

Like the LMRA, ERISA provides access to courts but also encourages private resolution of disputes. ERISA itself declares that one of its primary purposes is to provide participants and beneficiaries "ready access to the Federal courts."³⁶ Section 502(a)(1)(B) helps implement this goal by creating a cause of action for plan participants and beneficiaries to recover wrongfully denied benefits.³⁷ Standing alone, section 502(a)(1)(B) creates no special procedural barriers for those bringing a claim for benefits. ERISA section 503, however, requires plans to include an internal procedure for reviewing denials of benefits.³⁸ In contrast to section 502(a)(1)(B), section 503 expressly anticipates private dispute resolution. Nothing in the text of ERISA indicates how, or if, Congress intended these two provisions to work together. Applying a doctrine that developed in labor law, courts have resolved this apparent tension by requiring those seeking benefits to exhaust plan remedies before bringing suit.³⁹

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1988).

33. LMRA § 203(d) states: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d) (1988).

34. 379 U.S. 650 (1965).

35. 379 U.S. at 652 ("As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress.").

36. 29 U.S.C. § 1001(b) (1988).

37. 29 U.S.C. § 1132(a)(1)(B) (1988).

38. Under § 503, all plans must establish procedures that "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. § 1133 (1988).

39. In *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980), the court decided to follow "[t]he usual rule in the field of labor law":

[W]here administrative procedures have been instituted for the resolution of disputes between parties to a collectively bargained or other agreement, the courts will generally require the exhaustion of those procedures before exercising the jurisdiction they might otherwise have over disputes subject to resolution through said procedures.

618 F.2d at 566; see *Baxter v. C.A. Muer Corp.*, 941 F.2d 451, 453 (6th Cir. 1991); *Springer v. Wal-Mart Assocs.' Group Health Plan*, 908 F.2d 897, 899 (11th Cir. 1990); *Leonelli v.*

ERISA's requirement that plans include an appeals procedure implies a congressional understanding that those bringing benefits claims in federal court would first resort to the plan procedures. As the courts have noted, section 503 was "intended by Congress to help reduce the number of frivolous lawsuits under ERISA; to promote the consistent treatment of claims for benefits; to provide a nonadversarial method of claims settlement; and to minimize the costs of claims settlement for all concerned."⁴⁰ Plan remedies would not fulfill these purposes if claimants could avoid the procedure by going directly to court. As the Ninth Circuit stated: "It would certainly be anomalous if the same good reasons that presumably led Congress and the Secretary to require covered plans to provide administrative remedies for aggrieved claimants did not lead courts to see that those remedies are regularly used."⁴¹

The legislative history of ERISA further demonstrates a congressional intent to require exhaustion for benefits claims. The conference report accompanying ERISA declares that in adjudicating benefits claims courts should follow the procedures established for LMRA section 301.⁴² As noted above, the Supreme Court has read section 301 of the LMRA to require exhaustion of the grievance procedures furnished by a collective bargaining agreement.⁴³ Thus, the conference report suggests that, just as section 301 requires the exhaustion of collective bargaining agreement grievance procedures, so too does ERISA require exhaustion of plan remedies before a plaintiff can bring a benefits claim in federal court.⁴⁴

An exhaustion requirement for benefits claims also appears to comport with the purposes of ERISA. The legislative history indicates that Congress sought to provide a means of resolving questions of benefits eligibility quickly and cheaply: "The [Senate Finance Committee] believes that all workers and plan beneficiaries should have the opportunity to resolve any controversy over their

Pennwalt Corp., 887 F.2d 1195, 1199 (2d Cir. 1989); *Makar v. Health Care Corp.*, 872 F.2d 80, 82 (4th Cir. 1989); *Denton v. First Natl. Bank*, 765 F.2d 1295, 1300-02 (5th Cir. 1985); *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 185 (3d Cir. 1984); *Jenkins v. Teamsters Local 705 Pension Plan*, 713 F.2d 247, 254 (7th Cir. 1983); see also *EMPLOYEE BENEFITS COMM.*, ABA, *supra* note 14, at 498 (stating that the exhaustion requirement "is not found in the statute; instead, it has been created and uniformly accepted by the federal courts and has its roots in ERISA's legislative history and federal labor law").

40. *Amato*, 618 F.2d at 567; see *Makar*, 872 F.2d at 83; *Denton*, 765 F.2d at 1301; *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1244-45 (7th Cir. 1983).

41. *Amato*, 618 F.2d at 567; see also *Makar*, 872 F.2d at 83; *Denton*, 765 F.2d at 1301; *Mason*, 763 F.2d at 1227; *Kross*, 701 F.2d at 1245; *Manley*, *supra* note 28, at 967.

42. The report states that courts should treat § 502 claims "in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 327 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107.

43. See *supra* notes 31-35 and accompanying text.

44. See *Amato*, 618 F.2d at 567.

retirement benefits under qualified plans in an inexpensive and expeditious manner.”⁴⁵ Another committee indicated its desire to minimize the number of frivolous benefits suits.⁴⁶ Federal courts have concluded that imposing a requirement that benefits claimants exhaust plan remedies serves these purposes.⁴⁷ Plan procedures reduce expenses by avoiding many of the costs associated with litigation, such as filing fees and attorney’s fees. In addition, an exhaustion requirement ensures that the cheap and quick remedy provided by plan procedures will be used.⁴⁸ At the same time, requiring exhaustion helps reduce frivolous lawsuits by weeding out unmeritorious claims at an early stage.⁴⁹ Imposing an exhaustion requirement also helps courts minimize frivolous suits by creating a more complete factual record for those benefits claims that do reach federal court.⁵⁰

Requiring exhaustion for benefits claims also serves ERISA’s purposes by promoting the expertise of plan administrators in managing ERISA-governed plans.⁵¹ The exhaustion requirement gives plan administrators the primary responsibility for determining eligibility for benefits. Determining and reviewing benefits eligibility

45. S. REP. NO. 383, 93d Cong., 1st Sess. 117 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4890, 5000.

46. H.R. REP. NO. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682.

47. *Amato*, 618 F.2d at 567; *see Makar v. Health Care Corp.*, 872 F.2d 80, 83 (4th Cir. 1989); *Denton v. First Natl. Bank*, 765 F.2d 1295, 1301 (5th Cir. 1985); *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1244-45 (7th Cir. 1983).

48. Fiduciaries ordinarily must review appeals of benefit denials within 60 days after the filing of the appeal. Department of Labor regulations implementing § 503 state:

A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan’s receipt of a request for review, unless special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review.

29 C.F.R. § 2560.503-1(h) (1993).

49. Because courts typically defer to plan administrators’ decisions, *see supra* note 20 and accompanying text, plaintiffs should be less willing to incur the expense of litigation to dispute an adverse decision.

50. In *Amato*, the Ninth Circuit concluded:

Finally, a primary reason for the exhaustion requirement . . . is that prior fully considered actions by pension plan trustees interpreting their plans and perhaps also further refining and defining the problem in given cases, may well assist the courts when they are called upon to resolve the controversies.

618 F.2d at 568. This reasoning has been cited by the Eleventh Circuit in *Mason*, 763 F.2d at 1227, and by the Seventh Circuit in *Kross*, 701 F.2d at 1245.

51. *See, e.g.*, 618 F.2d at 567 (“Moreover, the trustees of covered benefit plans are granted broad fiduciary rights and responsibilities under ERISA, . . . and implementation of the exhaustion requirement will enhance their ability to expertly and efficiently manage their funds by preventing premature judicial intervention in their decision-making processes.”).

requires fiduciaries to interpret the terms of the plan, which perhaps improves their familiarity with plan details.⁵²

The text, history, and purposes of ERISA thus suggest that exhaustion of plan remedies for benefits claims is a sensible requirement. The next section considers two exceptions to the rule.

B. *Exceptions to Exhaustion*

Although the exhaustion requirement mandates that claimants ordinarily should employ plan remedies before bringing suit, courts have created two exceptions to the requirement. Under these exceptions, district courts have discretion to waive the exhaustion requirement when resort to plan procedures would be "futile" or when the plan procedures provide "inadequate remedies."⁵³ As with the exhaustion requirement itself, these exceptions are derived from labor law precedent.⁵⁴

In the context of ERISA benefits claims, the futility exception allows a court to waive the exhaustion requirement if the court concludes that reliance on a plan's internal claims procedure would be unavailing, unsuccessful, or a waste of time.⁵⁵ Plaintiffs can demonstrate futility, for example, by showing that plan administrators have unequivocally stated that they are not entitled to benefits.⁵⁶ Courts have also indicated that the exhaustion requirement may be excused for futility when a plan administrator has displayed hostility or personal bias against the plaintiff.⁵⁷ Finally, a plaintiff can

52. See 618 F.2d at 567.

53. See, e.g., *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 160 (11th Cir. 1992) (noting that "an exception should be recognized for pleading impossibility of exhaustion in cases where claims procedures prove futile"); *Amato*, 618 F.2d at 568 ("There are occasions when a court is obliged to exercise its jurisdiction and is guilty of an abuse of discretion if it does not, the most familiar examples perhaps being when resort to the administrative route is futile or the remedy inadequate.") (quoting *Winterberger v. General Teamsters Auto Truck Drivers & Helpers Local Union 162*, 558 F.2d 923, 925 (9th Cir. 1977)); see also *Ray*, *supra* note 28, at 421-22.

54. See *Clayton v. UAW*, 451 U.S. 679, 685 (1981) (holding that the inadequate remedies exception applies to cases brought under LMRA § 301); *Glover v. St. Louis-S.F. Ry.*, 393 U.S. 324, 329-31 (1969) (holding that the futility exception applies to LMRA § 301 cases).

55. See *Ludwig v. NYNEX Serv. Co.*, 838 F. Supp. 769, 781 (S.D.N.Y. 1993) ("The 'futility doctrine' is perhaps best understood as a term of art that considers whether, in light of both the claimant's and the plan administrator's actions, it is *fair* to require the dismissal of the claimant's suit pending her reapplication for benefits in accordance with the procedures set forth in the summary plan description.").

56. See *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1416 (9th Cir. 1991).

57. Cf. *Denton v. First Natl. Bank*, 765 F.2d 1295, 1302 (5th Cir. 1985) (holding that without a showing of hostility or bitterness on the part of plan administrators, the plaintiff failed to demonstrate futility); *Amato*, 618 F.2d at 569 (holding that the plaintiff failed to show futility because he had not clearly proven that plan administrators exhibited personal bias against him).

demonstrate futility by showing that she had no meaningful access to plan procedures.⁵⁸

The inadequate remedies exception to the exhaustion requirement applies when the remedies available under the private procedures would not compensate the plaintiff for the injuries she claims to have suffered. In the labor law context, the Supreme Court has held that exhaustion of collectively bargained procedures is not required when those procedures would not provide the "complete relief" available in court.⁵⁹ Courts have indicated that this exception to the exhaustion requirement may be available in the ERISA context as well.⁶⁰

These two exceptions are part and parcel of the exhaustion requirement for benefits claims under ERISA. The next Part examines how this requirement, including its two exceptions, should apply to ERISA statutory claims.

II. THE INAPPLICABILITY OF THE EXHAUSTION REQUIREMENT TO SECTION 510 CLAIMS

The previous Part demonstrated that those bringing benefits claims must exhaust plan procedures. The application of the exhaustion requirement to statutory ERISA claims, however, remains an open question. The Seventh and Eleventh Circuits infer from the evidence indicating a congressional intent to require exhaustion for benefits claims a general intent to require exhaustion for most ERISA claims, including statutory claims such as alleged section 510 violations.⁶¹ These circuits conclude that the requirement of an internal appeals procedure indicates a congressional intent to require exhaustion in all cases.⁶² The general requirement that claimants exhaust their administrative remedies before bringing suit, these courts maintain, demonstrates Congress's desire to minimize all types of frivolous claims.⁶³ This Part argues to the contrary that

58. In one illustrative case, the Eleventh Circuit found that a plan denied a claimant meaningful access to plan procedures because plan administrators failed to provide documents describing the remedies available under the plan. *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842, 846-47 (11th Cir. 1990).

59. See *Clayton v. UAW*, 451 U.S. 679, 685 (1981).

60. See, e.g., *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980); *Curry*, 891 F.2d at 846. No ERISA benefits case, however, appears to have applied the exception for inadequate remedies. The lack of cases arising under this exception is not surprising. Benefits claimants seek only the benefits promised by the plan. As a result, the remedies available under plan procedures provide the identical relief available in court.

61. See *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 160 (11th Cir. 1992); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1245 (7th Cir. 1983).

62. See 961 F.2d at 160; 701 F.2d at 1245.

63. See 961 F.2d at 160 ("Policy considerations supporting the exhaustion requirement include reducing the number of lawsuits under ERISA."); *Powell v. AT&T*, 938 F.2d 823, 826 (7th Cir. 1991) ("Congress's apparent intent in mandating internal claims procedures found in ERISA . . . was to minimize the number of frivolous lawsuits.").

the rationale for requiring exhaustion for benefits claims does not support imposing an exhaustion requirement for section 510 claims. Section II.A explores the evidence of congressional intent on which the Sixth, Seventh, and Eleventh Circuits rely and argues that this evidence indicates that Congress never intended, nor even anticipated, that section 510 claimants would utilize a plan's internal procedures. Section 510 therefore lacks the tension that the exhaustion requirement seeks to resolve — the tension between a congressional intent to encourage private resolution of disputes and a congressional intent to provide access to the courts. Section II.B argues that even if courts generally require exhaustion for statutory ERISA claims, they should nonetheless waive the requirement for most section 510 claims through the judicially recognized exceptions for futility and inadequate remedies.

A. *Evidence of Congressional Intent*

Although the exhaustion requirement is a judicial creation, its application turns on principles of statutory construction.⁶⁴ Courts apply an exhaustion requirement to resolve the tension between apparently conflicting congressional goals — providing access to courts, on the one hand, and promoting private dispute resolution, on the other.⁶⁵ Part I demonstrated that the text, history, and purposes of ERISA make application of the exhaustion requirement reasonable in the context of benefits claims. Nothing, however, indicates that Congress intended individuals bringing claims under section 510 to exhaust plan remedies before bringing suit. Indeed, the text and legislative history of ERISA indicate that Congress only anticipated that plans would provide a remedy for breach of the plan; Congress never anticipated that plans would provide a procedure for handling claims based on a violation of ERISA itself.

Courts have also concluded that requiring exhaustion for statutory claims serves the congressional purpose of enhancing the expertise of fiduciaries, just as this purpose is served by requiring exhaustion for benefits claims. *See* *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985) (holding that exhaustion of plan procedures "enhance[s] the plan trustees' ability to carry out their fiduciary duties expertly and efficiently by preventing premature judicial intervention in the decisionmaking process"), *cert. denied*, 474 U.S. 1087 (1986); *Kross*, 701 F.2d at 1245 (reaching the same conclusion).

64. *See Amato*, 618 F.2d at 566 ("It is true that the text of ERISA nowhere mentions the exhaustion doctrine. The question therefore may be raised as to whether Congress intended to grant the authority to the courts to apply that doctrine to suits arising under ERISA."); *Manley*, *supra* note 28, at 967 (arguing that exhaustion should apply to benefits claims because "Congress specifically intended that claimants exhaust internal procedures prior to bringing an action under ERISA").

65. *See supra* notes 31-39 and accompanying text.

1. Evidence from the Text of ERISA

Some courts have relied on ERISA section 503 to support an exhaustion requirement for statutory claims.⁶⁶ This section, however, applies only to claims for benefits. Section 503 provides:

In accordance with regulations of the Secretary [of Labor], every employee benefit plan shall —

(1) provide adequate notice in writing to any participant or beneficiary whose *claim for benefits* under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose *claim for benefits* has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.⁶⁷

By its terms, the procedure required by section 503 covers only *benefits* claims; section 503 says nothing about statutory claims.⁶⁸ Reliance on the text of section 503 to require exhaustion of plan remedies for section 510 claims makes little sense because section 503 provides no remedy for section 510 plaintiffs to exhaust.⁶⁹ Section 503 thus provides no support for a congressional intent to require exhaustion for statutory claims.

2. Evidence from the Legislative History of ERISA

Although the legislative history of ERISA indicates a congressional intent to require exhaustion for benefits claims, the legislative history suggests that this requirement should not apply to statutory claims. As Part I discussed, the conference report to ERISA states that courts should treat benefits claims according to principles derived from LMRA section 301, which courts have held to require exhaustion.⁷⁰ Some courts point to this statement in the

66. See *Mason*, 763 F.2d at 1227; *Amato*, 618 F.2d at 567.

67. 29 U.S.C. § 1133 (1988) (emphasis added).

68. See *Zipf v. AT&T*, 799 F.2d 889, 891-92 (3d Cir. 1986) ("The provision relating to internal claims and appeals procedures, Section 503, refers only to procedures regarding claims for *benefits*. There is no suggestion that Congress meant for these internal remedial procedures to embrace Section 510 claims based on violations of ERISA's substantive guarantees.").

Department of Labor regulations implementing ERISA support the conclusion that § 503 deals only with benefits claims. These regulations speak only to the procedures for handling benefits claims and nowhere mention a procedure for handling statutory claims. The regulations state: "This section sets out certain minimum requirements for employee benefit plan procedures pertaining to claims by participants and beneficiaries (claimants) for *plan benefits*, consideration of such claims, and review of claim denials." 29 C.F.R. § 2560.503-1(a) (1993) (emphasis added). The Department of Labor regulations, like ERISA itself, nowhere suggest that the § 503 procedure applies to statutory as well as benefits claims.

69. See *Amaro v. Continental Can Co.*, 724 F.2d 747, 751 (9th Cir. 1984) ("There is no internal appeal procedure either mandated or recommended by ERISA to hear these claims.").

70. H.R. CONF. REP. NO. 1280, *supra* note 42, at 327, reprinted in 1974 U.S.C.C.A.N. at 5107. See *supra* notes 31-35, 42-44 and accompanying text.

conference report as evidence that Congress intended to require exhaustion for all ERISA claims.⁷¹ The text of the report, however, does not support this conclusion. The report states:

[W]ith respect to suits to enforce *benefit rights* under the plan or to recover *benefits* under the plan *which do not involve application of the title I provisions* . . . [a]ll such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.⁷²

This statement discusses benefits claims only. More importantly, the conference report specifically excludes claims that "involve application of title I provisions" from the scope of those claims that should be guided by LMRA section 301. Title I of ERISA specifies the statutory standards that govern plans and includes the antidiscrimination protection embodied in section 510.⁷³ The conference report therefore only instructs courts to apply LMRA principles — including the exhaustion requirement — to benefits claims, not to statutory claims like those arising under section 510.

B. *The Applicability to Section 510 Claims of the Exceptions to the Exhaustion Requirement*

The previous section argued that neither the text nor the history of ERISA support a requirement that plaintiffs bringing statutory claims must exhaust plan remedies before suing in federal court. This section examines whether, even if an exhaustion requirement generally applies to statutory ERISA claims, statutory claims based on section 510 should fall within one of the judicially recognized exceptions to exhaustion. Section II.B.1 argues that the futility exception to the exhaustion requirement should apply to most section 510 claims. Because plan administrators typically are aligned with the employer, resort to plan procedures to determine whether the employer is guilty of employment discrimination raises a strong possibility of bias, which makes such a resort to plan procedures futile. Section II.B.2 argues that the inadequate remedies exception should excuse the exhaustion requirement for most section 510

71. See *Denton v. First Natl. Bank*, 765 F.2d 1295, 1301 n.9 (5th Cir. 1985); *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986).

72. H.R. CONF. REP. NO. 1280, *supra* note 42, at 327 reprinted in 1974 U.S.C.A.N. at 5107 (emphasis added). Courts have interpreted this statement to mean that principles established under LMRA § 301 should apply to ERISA claims. See, e.g., *Mason*, 763 F.2d at 1227; *Amato v. Bernard*, 618 F.2d 559, 567-68 (9th Cir. 1980). One commentator, however, argues that the statement actually refers only to whether ERISA actions arise under federal law rather than state law. See G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEXAS L. REV. 509, 559 (1990).

73. See 29 U.S.C. §§ 1001-1168 (1988).

claims because plan procedures typically provide only for recovery of plan benefits, which do not fully compensate a victim of section 510 employment discrimination.

1. *The Futility Exception*

Under the futility exception, courts do not require exhaustion of plan remedies when a plaintiff can show that the private decisionmaker clearly is biased against her claim, making resort to the plan procedures a waste of the plaintiff's time and resources.⁷⁴ In the labor law context, the Supreme Court has held that it would be futile to require those alleging discrimination to submit their claims to arbitrators chosen by the alleged wrongdoers. In *Glover v. St. Louis-San Francisco Railway*,⁷⁵ the Supreme Court held that it would be a waste of time to require the plaintiffs to submit their race discrimination claim to "a group which is in large part chosen by the [defendants] against whom their real complaint is made."⁷⁶

It would be no less futile to require an employee claiming discrimination under ERISA section 510 to submit her claim to the plan administrator when the administrator is selected by the employer. In most single-employer plans, the person designated by the plan to handle claims is aligned with the employer.⁷⁷ ERISA does not require plans to appoint a disinterested decisionmaker to handle claims-review procedures. Rather, it only requires that the decisionmaker be an "appropriate named fiduciary."⁷⁸ Under Department of Labor regulations, this fiduciary "may be the plan administrator or any other person designated by the plan."⁷⁹ Following these regulations, plans typically endow the employer with exclusive authority to decide who hears claims.⁸⁰ Requiring section 510 claimants to exhaust plan remedies, therefore, would force them to present their claims of discrimination to those aligned with the alleged wrongdoer. In fact, the person alleged to have violated section 510 may be the plan administrator herself.⁸¹ Utilizing plan remedies when an employee alleges discrimination by the plan

74. See *supra* notes 55-58 and accompanying text.

75. 393 U.S. 324 (1969).

76. 393 U.S. at 330 (quoting *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 206 (1944)).

77. See HENRY H. PERRITT, JR., *EMPLOYEE BENEFITS CLAIMS LAW AND PRACTICE* 243-44 (1990) ("Employers usually are the administrators of single-employer plans sponsored by them.").

78. 29 U.S.C. § 1133 (1988).

79. 29 C.F.R. § 2560.503-1(g)(2) (1993).

80. Joseph R. Simone, *Statutory Framework, Language, and Fiduciary Responsibility Provisions of ERISA*, in *UNDERSTANDING ERISA: AN INTRODUCTION TO BASIC EMPLOYEE BENEFITS* 9, 18 (1990).

81. See, e.g., *Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir. 1986). Note that this creates a potential bias problem even for those multiemployer plans in which the administrator is not directly selected by the claimant's employer.

administrator would allow the alleged wrongdoer to serve as her own judge. Certainly, a court cannot expect those accused of discrimination to make an objective determination of their own guilt. Even when the decisionmaker under the plan procedure is not the section 510 defendant, bias inevitably arises when the plan's named fiduciary is drawn from management. Utilizing plan procedures in such cases would require the plaintiff to bring her discrimination claim before an official of the very organization alleged to have discriminated against her.

It is true that in the context of benefits claims, courts have rejected the argument that pursuing plan remedies would be futile when plan administrators are aligned with the employer.⁸² As in the context of discrimination claims, plan administrators aligned with the employer sponsoring the plan may have an incentive to deny benefits claims.⁸³ The courts have concluded, however, that Congress intended plan administrators to have primary responsibility for deciding benefits claims.⁸⁴ Thus, to hold that beneficiaries need not pursue plan procedures when administrators are aligned with employers would be to oust administrators from the role Congress intended.⁸⁵ In addition, Congress attempted to ensure the neutrality of plan administrators in determining benefits by imposing the so-called "exclusive benefit" rule. This rule establishes that plan administrators must work "for the exclusive purpose" of providing benefits to participants and their beneficiaries.⁸⁶ The exclusive benefit rule protects benefits claimants against bias by imposing an enforceable fiduciary duty on plan administrators to determine benefits eligibility fairly.⁸⁷

The reasons for concluding that benefits claimants must exhaust plan remedies even though plan administrators are aligned with the employer do not apply to section 510 claims. As section II.A demonstrated, nothing in ERISA or its legislative history suggests that Congress intended plan administrators to determine whether

82. See *Amato v. Bernard*, 618 F.2d 559, 569 (9th Cir. 1980) (stating that "the appeal procedures are not inadequate simply because they are administered by the Trustees themselves, rather than some 'neutral arbitrator'"); *Springer v. Wal-Mart Assocs.' Group Health Plan*, 908 F.2d 897, 901 (11th Cir. 1990) (quoting *Amato*); *Denton v. First Natl. Bank*, 765 F.2d 1295, 1303 (5th Cir. 1985) (quoting *Amato*).

83. See *Springer*, 908 F.2d at 901 (noting the lower court finding that plan administrators have "an interest in holding costs down" (internal quotations omitted)); *Denton*, 765 F.2d at 1303 (acknowledging that plan administrators are not neutral decisionmakers); *Amato*, 618 F.2d at 569 (same).

84. See, e.g., *Amato*, 618 F.2d at 569 ("The internal administration of such procedures is the very thing contemplated by section 503 . . ."); *Springer*, 908 F.2d at 901.

85. See, e.g., 618 F.2d at 569; 908 F.2d at 901.

86. 29 U.S.C. § 1104 (1988).

87. ERISA § 503 requires that appeals of benefits determinations be both "full and fair." 29 U.S.C. § 1133 (1988).

an employer has discriminated against an employee. Thus, granting alleged victims of discrimination immediate access to the courts would not deprive administrators of any congressionally assigned functions. In addition, the exclusive benefit rule does not protect section 510 claimants. The rule only instructs fiduciaries to provide *benefits* to plan participants. Section 510 claimants ordinarily seek reinstatement and back pay, not benefits,⁸⁸ and the terms of the exclusive benefit rule therefore do not apply. Thus, neither the plan administrator's statutory role nor the exclusive benefit rule provide reason to reject *Glover's* warning that victims of discrimination are unlikely to get a fair hearing from a plan administrator aligned with the perpetrator of the discrimination.

2. Inadequate Remedies

ERISA section 502(a)(3) authorizes courts to award successful section 510 claimants "appropriate equitable relief" adequate to "redress [the] violation[]."⁸⁹ Such relief may include remedies unavailable under plan procedures.⁹⁰ Courts considering the remedies available to prevailing section 510 plaintiffs have concluded that section 502(a)(3) authorizes awards suitable to return the plaintiff to the position in which she would have been but for the act of discrimination.⁹¹ A court's equitable power under section 502(a)(3) includes "awarding the plaintiff backpay, reinstatement to his former position, restitution of his forfeited benefits, and any other relief necessary to make him whole."⁹²

In contrast to the broad equitable relief courts may provide under ERISA section 502(a)(3), plan procedures generally ensure

88. See *infra* notes 95-96 and accompanying text.

89. 29 U.S.C. § 1132(a)(3) (1988).

90. See William C. Martucci & John L. Utz, *Unlawful Interference with Protected Rights Under ERISA*, 2 LAB. LAW. 251, 262-65 (1986).

91. See e.g., *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1015 (W.D. Mo. 1984); *Bittner v. Sadoff & Rudoy Indus.*, 490 F. Supp. 534, 536 (E.D. Wis. 1980). The legislative history of ERISA supports the power of courts to fashion broad relief for § 510 claimants:

The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations [of ERISA]. The intent of the Committee is to provide *the full range of legal and equitable remedies available in both state and federal courts* and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement

S. REP. NO. 127, 93d Cong., 2d Sess. 35, reprinted in 1974 U.S.C.C.A.N. 4838, 4871 (emphasis added). This passage has led courts and commentators to conclude that the equitable power under ERISA § 510 "is broad enough to recreate the circumstances that would have existed absent an employer's illegal conduct." *Folz*, 594 F. Supp. at 1015; see also Terry Collingsworth, *ERISA Section 510 — A Further Limitation on Arbitrary Discharges*, 10 INDUS. REL. L.J. 319, 343-48 (1988); Martucci & Utz, *supra* note 90, at 262-65.

92. *Bittner*, 490 F. Supp. at 536. In some circumstances, courts may determine that awarding reinstatement would be inappropriate because of the antagonism between the parties, and order front pay instead. *Folz*, 594 F. Supp. at 1018-19.

only that claimants will receive the benefits denied them. The ERISA scheme manifests only an intent to require that plan administrators make these benefits determinations fairly. Thus, section 503, which requires plans to include a review procedure for benefits denials, does not anticipate that plans will make available any additional remedy other than the benefits at issue.⁹³ Section 503 requires only that plans provide for a "full and fair review" of benefit denials.⁹⁴ If successful, those employing plan remedies can expect to receive only the benefits to which they were entitled under the plan.

Providing an award of benefits does not make section 510 claimants whole. In many cases, section 510 claimants lost their jobs before they would have become eligible for benefits.⁹⁵ Even if claimants can prove that such actions were taken to prevent them from becoming eligible for benefits, such claimants cannot recover lost benefits because they had not yet become entitled to any benefits. Only such equitable awards as back pay, front pay, and reinstatement can fully redress the harm caused by this type of employment discrimination.⁹⁶ Plan benefits provide inadequate remedies for discrimination under section 510; courts therefore should not require section 510 claimants to exhaust plan procedures.

III. THE ARBITRABILITY OF SECTION 510 CLAIMS

The previous Part argued that as a matter of statutory construction, courts should not require alleged victims of benefits-based discrimination to exhaust the remedies provided by an ERISA-governed plan before bringing suit. A different problem arises, however, when the parties to a section 510 claim have agreed in a contract *separate from the plan itself* to settle their disputes through arbitration. As Part II argued, ERISA itself does not impose an exhaustion requirement. However, separate arbitration agreements may have independent force. Whether failure to exhaust an arbitral remedy should bar a section 510 claim turns not on an interpreta-

93. See *supra* text accompanying note 67 (quoting § 503).

94. 29 U.S.C. § 1133(2) (1988).

95. See *Zipf v. AT&T*, 799 F.2d 889, 893 (3d Cir. 1986) (noting that the plaintiff "is making no claim for benefits and concedes that she is not entitled to disability payments" (emphasis added)); *Folz*, 594 F. Supp. at 1015 (concluding that "[t]he inescapable inference is that an ulterior motive lay behind defendants' maneuvers, and that a speedy discharge, before [the plaintiff's] pension vested, was aimed at" (emphasis added) (quoting *Ursic v. Bethlehem Mines*, 556 F. Supp. 571, 575 (W.D. Pa. 1983))).

96. See *Folz*, 594 F. Supp. at 1016 (concluding that back pay, reinstatement, and restitution of benefits were necessary to make the plaintiff whole); *Bittner v. Sadoff & Rudoy Indus.*, 490 F. Supp. 534, 536 (E.D. Wis. 1980) (holding that back pay, reinstatement, and restitution of benefits may be awarded to make plaintiffs whole).

tion of ERISA but on the enforceability of the arbitration agreement.

The federal courts disagree over whether failure to exhaust arbitral remedies constitutes a valid ground for dismissing statutory ERISA claims, including section 510 claims.⁹⁷ The Ninth Circuit has held that ERISA statutory claims are not subject to arbitration.⁹⁸ As a result, plaintiffs bringing section 510 claims in the Ninth Circuit need not exhaust arbitral remedies.⁹⁹ Until November 1993, the Third Circuit agreed;¹⁰⁰ then, reversing itself, it joined the Second, Eighth, and Eleventh Circuits in concluding that ERISA statutory claims *are* subject to arbitration.¹⁰¹ These circuits require section 510 claimants to exhaust any available arbitral remedies.

This Part argues that the question whether section 510 claimants must exhaust arbitral remedies before resorting to court depends on the type of contract in which the arbitration agreement appears. Section III.A surveys federal law regarding the arbitration of claims based on statutes. Although the Supreme Court has held consistently that arbitration is appropriate to resolve breach-of-contract claims,¹⁰² the Court has expressed greater reluctance to enforce the

97. Although the Supreme Court has never determined the arbitrability of § 510 claims, the Court has indicated that certain statutory ERISA claims may be subject to commercial arbitration. In *Shearson Lehman/American Express, Inc. v. Bird*, 493 U.S. 884 (1989), the Supreme Court vacated a judgment by the Second Circuit holding that claims alleging breach of ERISA's fiduciary standards are not subject to commercial arbitration. Drawing support from *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1973), discussed *infra* in section III.A.2, the Second Circuit had concluded as a general rule that statutory ERISA claims are not subject to commercial arbitration. *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292, 295-98 (2d Cir.), *vacated*, 493 U.S. 884 (1989). The Supreme Court granted certiorari, vacated the decision, and remanded the case in light of *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), a commercial arbitration decision. 493 U.S. at 884-85. On remand, the Second Circuit concluded that the claim was arbitrable. *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116 (2d Cir.), *cert. denied*, 501 U.S. 1251 (1991). This case, however, does not address the arbitrability of § 510 claims.

98. *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984).

99. 724 F.2d at 750-52.

100. *See Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985).

101. *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993); *Byrd v. MacPapers, Inc.*, 961 F.2d 157 (11th Cir. 1992); *Bird v. Shearson/American Express, Inc.*, 926 F.2d 116 (2d Cir.), *cert. denied*, 501 U.S. 1251 (1991); *Arnulfo P. Sult, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988).

102. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("[Under the Federal Arbitration Act] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."); *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 254-55 (1977) (holding that federal labor law expresses a strong presumption that disputes over interpretation of a collective bargaining agreement are subject to arbitration).

arbitration of claims based on statutes.¹⁰³ Recently, however, the Court has concluded that certain statutory claims may be subject to arbitration.¹⁰⁴ The Court has suggested that the test for determining whether statutory claims will be subject to arbitration depends on whether the arbitration agreement is governed by the LMRA or the Federal Arbitration Act (FAA). Section III.A shows that this, in turn, depends on whether the arbitration agreement appears in a collective bargaining agreement, a commercial contract, or an individual employment contract. Section III.B applies these principles and argues that courts should require arbitration of section 510 claims pursuant to commercial contracts but should not require arbitration of section 510 claims pursuant to collective bargaining agreements.¹⁰⁵ Although the Supreme Court has not yet decided whether courts examining arbitration pursuant to individual employment contracts should follow labor arbitration precedent or commercial arbitration precedent, this Part concludes that commercial arbitration presents a closer analogy and that courts should require plaintiffs to exhaust arbitration pursuant to individual employment contracts.

A. Federal Arbitration Law

Federal policy, reflected in federal statutes and Supreme Court decisions, supports private arbitration as a means of settling private disputes.¹⁰⁶ Federal law makes arbitration agreements enforceable in state and federal courts.¹⁰⁷ The Supreme Court has concluded that parties to an arbitration agreement must pursue arbitration before resorting to federal court¹⁰⁸ and that judicial review of arbi-

103. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1973) (holding that labor arbitration cannot resolve an employee's claim of discrimination under Title VII); *Wilko v. Swan*, 346 U.S. 427 (1953) (holding that arbitration provides an inappropriate forum for resolving claims under the 1933 Securities Act).

104. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (reversing *Wilko* and holding that arbitration may resolve claims under the 1933 Securities Act).

105. Professor G. Richard Shell has reached the same conclusion. See Shell, *supra* note 72, at 517 (concluding that "commercial arbitration, but not labor arbitration, provides procedures that are an adequate substitute for the courts to resolve all claims under ERISA"). For contrary views, compare Manley, *supra* note 28, at 972-73 (arguing that statutory ERISA claimants generally should not be required to submit to either commercial or labor arbitration) with Charles S. Mishkind, *Protected Rights Under Section 510 of ERISA: Avoiding "Something for Nothing,"* in ALI-ABA COURSE OF STUDY: QUALIFIED PLANS, PCs, AND WELFARE BENEFITS 425, 444-45 (1991) (arguing that § 510 claims should be subject to both commercial and labor arbitration).

106. See FAA § 2, 9 U.S.C. § 2 (1988); LMRA § 203(d), 29 U.S.C. § 173(d) (1988); *supra* note 102.

107. FAA § 2, 9 U.S.C. § 2 (1988); LMRA § 301, 29 U.S.C. § 185(a) (1988).

108. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

tral decisions is limited to whether the arbitrator exceeded the scope of her authority.¹⁰⁹

Until recently, however, the Supreme Court refused to require arbitration of claims involving alleged violations of statutes.¹¹⁰ Thus, the Court held that an agreement to arbitrate “any controversy” arising between two parties would not be enforced for a claim that federal securities law had been violated, and the plaintiff could bring her securities claim in federal court without resorting to arbitration.¹¹¹ In recent years, however, the Court has changed course and has begun to enforce agreements to arbitrate disputes involving statutory questions.¹¹²

This section examines Supreme Court decisions regarding the enforceability of agreements to arbitrate statutory claims. Section III.A.1 examines why federal law distinguishes between labor arbitration and commercial arbitration. Section III.A.2 discusses Supreme Court opinions concerning arbitration of statutory claims in the labor law context, in which the Supreme Court has consistently refused to require arbitration of statutory claims. Section III.A.3 explores Supreme Court opinions concerning arbitration of statutory claims pursuant to commercial contracts. These opinions enforce such arbitration. In contrast to the labor law cases, these cases conclude that arbitrators are competent to interpret statutes and that arbitration provides an appropriate forum for resolving statutory claims. Section III.A.4 considers the impact of the Court’s most recent decision in this area, *Gilmer v. Interstate/Johnson Lane Corp.*¹¹³ Although *Gilmer* arises out of a commercial contract, the opinion confirms that arbitration pursuant to a collective bargaining agreement remains an inappropriate forum for resolving statutory claims because of the tension between individual rights and collective representation.

1. *The Distinction Between Labor Arbitration and Commercial Arbitration*

Arbitration may be fairly divided into two categories: labor arbitration and commercial arbitration. Each category of arbitration is governed by its own statutory authority and body of precedent,

109. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598-99 (1960).

110. See *supra* note 103-04 and accompanying text.

111. *Wilko v. Swan*, 346 U.S. 427, 432 n.15 (1953).

112. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (overruling *Wilko* and holding that claims under federal securities laws are subject to arbitration agreements); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (holding that claims under federal antitrust laws are subject to arbitration agreements).

113. 500 U.S. 20 (1991).

each employs its own procedures, and each is seen by the courts as serving different functions.¹¹⁴

Labor arbitration refers to arbitration governed by section 301 of the LMRA.¹¹⁵ Labor arbitration represents the final stage of the grievance procedure provided by most collective bargaining agreements.¹¹⁶ Professor G. Richard Shell has succinctly described the labor arbitration process as follows:

Essentially, employees have the right under the collective-bargaining agreement to file a grievance if they feel their rights have been violated under the labor contract. *Once filed, however, the grievance is handled by the union, not the individual employee. . . .*

If, after presenting the grievance to the company, the union is dissatisfied with the result, it may pursue the claim through successively higher levels of grievance machinery.

If the parties cannot resolve the dispute through the grievance process, the union may invoke arbitration under the arbitration provision of the collective bargaining agreement. The union and management select an arbitrator, who then holds hearings. In these proceedings, *the employee's interests are represented by the union*, which typically uses a business agent whose full-time job is dealing with grievances.¹¹⁷

The unique and crucial aspect of labor arbitration is that the union — not the individual employee — controls when and how to proceed with arbitration.¹¹⁸ In so doing, the union must only fulfill its duty of fair representation, which it fulfills so long as it acts in good faith and in a nonarbitrary and nondiscriminatory fashion.¹¹⁹

Federal law has long supported this form of arbitration as a means of resolving labor disputes and avoiding the problems associ-

114. As Shell observes:

Scholars have long noted two models of the arbitration process. Under the first model, arbitration is viewed as a form of extended negotiation between highly interdependent parties. The first model requires arbitrators to act as agents of the parties and formulate compromises on difficult matters of contract interpretation, thereby preserving the parties' relationship. Under the second model, arbitration is a cheap and efficient form of trial for resolving transactional disputes. The second model requires arbitrators to act as judges.

Labor arbitration under LMRA section 301 has aspired to the first model. . . . By contrast, commercial arbitration under the FAA has molded its procedures to fit the second model.

Shell, *supra* note 72, at 512.

115. 29 U.S.C. § 185 (1988); see Shell, *supra* note 72, at 518 (noting that the Supreme Court has "develop[ed] a federal common law of labor arbitration under section 301 of the LMRA").

116. See BNA, BASIC PATTERNS, *supra* note 19, at 38 (noting that 98% of union contracts sampled contained arbitration provisions); FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 153 (4th ed. 1985).

117. Shell, *supra* note 72, at 519-20 (emphases added) (citations omitted).

118. See ELKOURI & ELKOURI, *supra* note 116, at 175-80 (discussing representation of employees in grievance proceedings).

119. See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

ated with strikes, lockouts, and boycotts.¹²⁰ As the Supreme Court has noted, the labor arbitrator performs a unique role in the relations between the parties to a labor contract:

The labor arbitrator performs functions which are not normal to the courts

. . . .

. . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the . . . agreement permits, such factors as the effect on productivity of a particular result, its consequences on the morale of the shop, his judgment whether tensions will be heightened or diminished.¹²¹

Shell has also noted that “a substantial amount of evidence indicates that arbitrators often split the difference between the conflicting parties rather than render an ‘all-or-nothing’ decision. Such decisions echo the overall purpose of labor arbitration — keeping industrial peace.”¹²²

The role of labor arbitrators is strictly limited to interpreting the terms of collective bargaining agreements. As the Supreme Court has stated, “[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.”¹²³ In fact, if an arbitral decision is “based solely upon the arbitrator’s view of the requirements of enacted legislation,” the arbitrator has exceeded the scope of his authority and the award will not be enforced.¹²⁴

In contrast to labor arbitration, commercial arbitration simply represents an alternative to a judicial forum. *Commercial arbitration* refers to arbitration governed by the Federal Arbitration Act of 1925.¹²⁵ The FAA establishes that, as a matter of substantive federal law applicable in state and federal courts, courts must enforce all agreements to arbitrate existing or future disputes as long as the underlying contract affects interstate commerce.¹²⁶ The FAA excludes from its coverage, however, “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹²⁷ The Court has nonetheless enforced arbitration provisions contained in collective bargaining

120. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960) (observing that arbitration “substitutes a regime of peaceful settlement for the older regime of industrial conflict”); Shell, *supra* note 72, at 518.

121. 363 U.S. at 581-82.

122. Shell, *supra* note 72, at 521-22; see NOEL ARNOLD LEVIN, *SUCCESSFUL LABOR RELATIONS* 229 (1978).

123. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

124. 363 U.S. at 597.

125. 9 U.S.C. §§ 1-15 (1988).

126. 9 U.S.C. § 2 (1988).

127. 9 U.S.C. § 1 (1988).

agreements, through section 301 of the LMRA.¹²⁸ The Court has employed the FAA for all other arbitration agreements, from one contained in a contract between a stock broker and customer¹²⁹ to one contained in an application for registration with the New York Stock Exchange.¹³⁰

As Shell has noted, the procedure for bringing a claim in commercial arbitration differs fundamentally from that involved in labor arbitration:

At the outset, the aggrieved plaintiffs in commercial cases have usually agreed in a signed contract to arbitrate their disputes. . . . This scenario contrasts with that of labor arbitration, in which the union has negotiated and signed the arbitration clause on behalf of its members. Moreover, plaintiffs in commercial arbitration individually control the decision to proceed with a claim and may select their own lawyer or agent to represent their interests. They do not depend, as in the collective bargaining context, on [the union] to control the resolution of the dispute.¹³¹

The primary differences in the commercial arbitration process are that individuals represent themselves both in the negotiation of commercial contracts and in the resolution of disputes arising under such contracts;¹³² neither is true in the collective bargaining context.

Commercial and labor arbitration also differ in their use of substantive law. Commercial arbitrators — unlike labor arbitrators — are not strictly confined to the terms of the contract when making awards. Commercial arbitration decisions often rely upon public law,¹³³ and arbitrators are encouraged by professional arbitration organizations to grant awards on the merits of legal claims.¹³⁴

Summarizing the distinction between labor arbitration and commercial arbitration, the Supreme Court has stated that “[i]n the commercial case, arbitration is the substitute for litigation. [Labor] arbitration is the substitute for industrial strife.”¹³⁵

2. Labor Arbitration

The Supreme Court has consistently held that individual statutory claims fall outside the scope of labor arbitration.¹³⁶ As this

128. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

129. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

130. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

131. Shell, *supra* note 72, at 531.

132. See generally GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 1.01 (1991) (describing the commercial arbitration process).

133. See *id.* § 25.01.

134. See Shell, *supra* note 72, at 532.

135. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

136. See *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (holding that claims under 42 U.S.C. § 1983 are not subject to labor arbitration); *Barrentine v. Arkansas-Best*

section demonstrates, however, the basis for this holding has shifted over time. Initially, the Court based its conclusion on two rationales. First, the Court concluded that arbitration provides a procedurally inappropriate forum for resolving statutory claims: arbitrators lack competence in interpreting statutes, the Court concluded, and the procedures of arbitration do not offer the legal formalities available in court.¹³⁷ Second, the Court concluded that the purpose of labor arbitration — maintaining collective industrial peace in the face of issues that affect an entire workforce — does not comport with the goal of resolving the individual statutory claims of individual employees.¹³⁸ Recently, however, the Court rejected the former rationale and concluded that arbitration does provide a procedurally adequate forum for hearing statutory disputes.¹³⁹ The Court nevertheless has indicated that the latter rationale remains valid; enforcing the collective obligations of labor and management still does not jibe with enforcing individual rights.¹⁴⁰ As a result, this section argues, labor arbitration remains an inappropriate forum for resolving individual statutory claims.

In the 1974 case *Alexander v. Gardner-Denver Co.*,¹⁴¹ the Supreme Court held that arbitration pursuant to a collective bargaining agreement does not bar a subsequent Title VII claim.¹⁴² The plaintiff pursued arbitration in compliance with the collective bargaining agreement, claiming that his employer had fired him in violation of the agreement. The collective bargaining agreement prohibited dismissals without "just cause" and also prohibited discrimination on the basis of race. After the arbitrator ruled that the employer had cause to discharge the employee, the employee brought a Title VII claim in federal court alleging that he had been fired on the basis of race. The district court dismissed the case, holding that the arbitral decision had disposed of the discrimination claim. The court of appeals affirmed.¹⁴³

Freight Sys., Inc., 450 U.S. 728 (1981) (holding that claims under the Fair Labor Standards Act of 1938 are not subject to labor arbitration); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding that labor arbitration cannot resolve claims under Title VII of the 1964 Civil Rights Act).

137. 415 U.S. at 57-58; see *infra* notes 147-50 and accompanying text.

138. See *McDonald*, 466 U.S. at 291; *Barrentine*, 450 U.S. at 739-40; *Gardner-Denver*, 415 U.S. at 51, 55; see also *infra* notes 155-59 and accompanying text.

139. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); see also *infra* notes 173-80 and accompanying text.

140. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33-35 (1991); see also *infra* notes 189-96 and accompanying text.

141. 415 U.S. 36 (1974).

142. 415 U.S. at 59-60.

143. 415 U.S. at 45-54.

The Supreme Court reversed, holding that Title VII provides a remedy that is independent of the remedies available under a collective bargaining agreement.¹⁴⁴ The Court concluded that the plaintiff was entitled to a trial *de novo* on his Title VII claim.¹⁴⁵ The Court therefore allowed employees under a union contract to pursue arbitration, litigation, or both:

We think . . . that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of his collective-bargaining agreement and his cause of action under Title VII.¹⁴⁶

The Court cited two reasons for its decision. First, the Court stated that arbitration provides a procedurally inadequate forum for resolving statutory claims.¹⁴⁷ The competence of labor arbitrators, the Court wrote, "pertains primarily to the law of the shop, not the law of the land."¹⁴⁸ Moreover, arbitral procedures do not allow for the extensive fact-finding necessary to resolve Title VII claims.¹⁴⁹ In addition, arbitrators generally are not required to produce written opinions explaining the rationale for their decisions, and thus, arbitration does not create a body of decisions informing employers of the legality of their actions.¹⁵⁰

Second, the Court found that because a collective bargaining agreement constitutes a contract between an employer and a union — not an employer and an individual employee — it cannot be used to waive an individual employee's statutory rights.¹⁵¹ A union may waive through negotiation any rights statutorily conferred upon it, but a union may not waive an individual employee's statutory rights. For instance, a union may waive its statutory right to strike, because this right properly belongs to the union.¹⁵² The right to be free from race discrimination, in contrast, belongs to the indi-

144. 415 U.S. at 43.

145. 415 U.S. at 60.

146. 415 U.S. at 59-60.

147. 415 U.S. at 56 ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.")

148. 415 U.S. at 57 (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-83 (1960)).

149. 415 U.S. at 57.

150. 415 U.S. at 57. The Court also found deficiencies in other aspects of arbitral procedures: "[T]he usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." 415 U.S. at 57-58.

151. 415 U.S. at 47-54; *see also* Shell, *supra* note 72, at 519 n.48.

152. 415 U.S. at 51 ("It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or

vidual employee, not to her union.¹⁵³ A union, therefore, may not waive an individual's right to a judicial forum for a Title VII claim because Title VII "represent[s] a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process"¹⁵⁴

The decision in *Gardner-Denver* reflects the Supreme Court's acknowledgment that the process of labor arbitration creates a tension between the interests of individual employees and their unions.¹⁵⁵ As discussed above, once an employee files a grievance, the union, not the individual employee, pursues it.¹⁵⁶ A union may decide not to spend its resources on a particular grievance.¹⁵⁷ If individual statutory claims were subject to labor arbitration, the individual claimant could be bound by her union's handling of the claim.¹⁵⁸ To resolve the potential conflict between individual and collective rights, the *Gardner-Denver* Court concluded that collective bargaining agreements cannot grant unions the authority to decide how, or whether, to press an individual's Title VII claim.¹⁵⁹

As a result of *Gardner-Denver*, individual employees are free to bring Title VII claims in federal court regardless of the results of labor arbitration.¹⁶⁰ In two subsequent cases, the Court extended its decision in *Gardner-Denver* to individual rights guaranteed by

relinquished by the union as collective-bargaining agent to obtain economic benefits for union members." (citations omitted)).

153. 415 U.S. at 51 ("Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities.").

154. 415 U.S. at 51.

155. Cf. *Shell*, *supra* note 72, at 519 n.48 ("The collective bargaining agreement is a contract between the union and the employer, not between the individual employee and the employer. Thus, the employee who files a grievance is, in essence, bringing a violation of the agreement to the attention of the union, which has the contractual right to contest the matter.").

156. See *supra* notes 116-19 and accompanying text.

157. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981) ("[E]ven if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration.").

158. This result would flow from the great deference courts give to arbitral decisions. See *supra* notes 21-22 and accompanying text.

159. 415 U.S. at 51. As Chief Justice Burger later explained, the Court in *Gardner-Denver* was concerned that given the history of discrimination within unions, granting unions exclusive authority to press an individual member's discrimination claim through arbitration "would have made the foxes guardians of the chickens." *Barrentine*, 450 U.S. at 750 (Burger, C.J., dissenting).

160. 415 U.S. at 59-60 (ordering de novo review of the plaintiff's Title VII claim despite completed arbitration involving the same factual issues). It should be noted, however, that the Court allowed the district court to admit the arbitral decision as evidence in the Title VII claim and provided that this evidence be "accorded such weight as the court deems appropriate." 415 U.S. at 60 n.21.

other statutes,¹⁶¹ declaring that the principles embodied in *Gardner-Denver* apply to statutes "designed to provide *minimum substantive guarantees* to individual workers."¹⁶²

Although *Gardner-Denver* makes clear that arbitration does not preclude federal claims, courts could nonetheless require claimants to exhaust arbitral remedies before seeking judicial relief. The Supreme Court, however, has effectively rejected such an exhaustion requirement for claims based on individual statutory rights. In *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*,¹⁶³ the Court held that a Title VII claim would not be tolled during the pendency of arbitration proceedings. The Court found that the decision in *Gardner-Denver* mandated that there would be no tolling because that decision had clearly established the independence of the contractual and statutory dispute mechanisms.¹⁶⁴ As Judge Harry Edwards has observed, an exhaustion requirement for Title VII claims would be inconsistent with the Court's decision in *Robbins & Myers* because it would have the effect of rendering many Title VII claims time-barred while still in arbitration — hardly a result consistent with the independence of the two remedies.¹⁶⁵

Lower courts have also concluded that requiring exhaustion of arbitral remedies would run counter to the principles of *Gardner-Denver*.¹⁶⁶ These courts reason that, given the Supreme Court's

161. In *Barrentine*, the Supreme Court held that the principles of *Gardner-Denver* apply to cases brought under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-19 (1988). 450 U.S. at 745-46. Then, in *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984), the Court held that *Gardner-Denver* applies to causes of action brought pursuant to 42 U.S.C. § 1983 (1988). Under these cases, arbitration pursuant to a collective bargaining agreement holds no preclusive effect for a subsequent FLSA or § 1983 claim.

162. 450 U.S. at 737 (emphasis added).

163. 429 U.S. 229, 230 (1976).

164. 429 U.S. at 236.

165. See *Hammontree v. NLRB*, 925 F.2d 1486, 1500-01 (D.C. Cir. 1991) (Edwards, J., concurring). Judge Edwards also cited the Supreme Court's decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), as additional evidence that the Supreme Court has rejected an exhaustion requirement for individual statutory claims. See 925 F.2d at 1501. In *Railway Express*, the Court held that a plaintiff seeking relief under both Title VII and 42 U.S.C. § 1981 (1988) need not exhaust her Title VII remedies before bringing the § 1981 claim. The Court stated that it was "disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies" to express a preference for one remedy by requiring its procedures to be exhausted before the other's procedures could be invoked. 421 U.S. at 461. As Judge Edwards noted, *Railway Express* indicates that the Court views an "exhaustion requirement as simply inconsistent with the notion of distinct and independent remedies." 925 F.2d at 1501.

166. See *Miller v. Bank of Am.*, 600 F.2d 211, 214 (9th Cir. 1979) (holding that following *Gardner-Denver*, race discrimination claimants need not pursue otherwise-required arbitration); *Gibson v. Longshoremen's & Warehousemen's Union*, 543 F.2d 1259, 1266 n.14 (9th Cir. 1976) ("Exhaustion of [arbitral remedies] is . . . not a precondition to a Title VII suit."); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1316 (7th Cir. 1974) (holding that "plaintiffs could properly proceed . . . under section 1981 without first exhausting any contractual remedies . . ."); see also *Hammontree*, 925 F.2d at 1500 (Edwards, J., concurring) ("A close look

conclusion that an individual's statutory rights are independent of collectively bargained rights, they cannot require a plaintiff bringing a claim under a statute protecting individual rights to exhaust the remedies provided by a collective bargaining agreement.¹⁶⁷ By not requiring exhaustion, these courts properly implement the Court's conclusion that an individual may "fully pursue" both her statutory rights and her rights under a collective bargaining agreement. As the Court made clear in *Gardner-Denver*, labor arbitration can *only* determine a plaintiff's collectively bargained rights — rights that are independent of individual statutory rights.

3. Commercial Arbitration

Although, as the previous section noted, the Supreme Court has consistently held that courts cannot require plaintiffs to resolve statutory claims exclusively through labor arbitration, courts' willingness to allow statutory claims to be resolved in commercial arbitration has undergone a dramatic shift in recent years. The Supreme Court first considered the arbitrability of statutory claims arising out of commercial agreements in 1953 in *Wilko v. Swan*.¹⁶⁸ The Court in *Wilko* held that claims under the Securities Act of 1933¹⁶⁹ are not subject to a contractual agreement to arbitrate.¹⁷⁰ As in the labor cases, the Court expressed basic doubts about the capacity of arbitrators to enforce statutory rights.¹⁷¹ The Court concluded that statutory interpretation falls within the exclusive expertise of the judiciary.¹⁷² In 1989, however, the Court explicitly overruled *Wilko* and held that commercial arbitrators may decide purely statutory claims.¹⁷³ The Court concluded that the decision in *Wilko* was based on an "outmoded presumption of disfavoring arbitration."¹⁷⁴

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,¹⁷⁵ the Court endorsed a two-part test for determining the arbitrability

at *Alexander, Barrentine, and McDonald*, and their progeny, reveals that the logic driving the Court's holding in those cases would also preclude an exhaustion of remedies . . . requirement for the statutes involved.").

167. See, e.g., *Gibson*, 543 F.2d at 1266 n.14.

168. 346 U.S. 427 (1953).

169. 15 U.S.C. §§ 77a-77b (1988).

170. 346 U.S. at 438.

171. 346 U.S. at 435-37 (reasoning that arbitration is inappropriate because arbitrators lack legal training and because arbitration does not create a sufficient written opinion).

172. See 346 U.S. at 437 ("[T]he protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness.").

173. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 485-86 (1989).

174. 490 U.S. at 481.

175. 473 U.S. 614 (1985).

of statutory claims under the FAA.¹⁷⁶ Under this test, a court first must determine as a matter of contract interpretation whether the parties' agreement to arbitrate reaches the statutory claim asserted.¹⁷⁷ If so, a court should then consider, under principles of statutory interpretation, whether Congress intended to foreclose arbitration of the claim.¹⁷⁸ Such a congressional intent to bar arbitration of a statutory claim must be apparent from the text, legislative history, or purposes of the statute under which the claim is asserted.¹⁷⁹ Current Supreme Court precedent therefore establishes a presumption that statutory claims will be subject to commercial arbitration under the FAA, rebuttable by evidence of congressional intent to the contrary.

The Court's reasoning in commercial arbitration cases rejects the first of *Gardner-Denver's* rationales — that arbitration provides a procedurally inadequate substitute for a judicial forum.¹⁸⁰ For several years after *Mitsubishi*, it was therefore unclear whether labor arbitration, like commercial arbitration, would be considered an adequate forum for statutory claims. In the 1991 case *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁸¹ the Supreme Court clarified the matter, indicating that *Gardner-Denver's* second rationale — that labor arbitration is inappropriate for individual statutory claims because of the tension between individual and collective representation — remains valid. In so doing, the next section demonstrates, the Court upheld the distinction between labor and commercial arbitration and affirmed the continuing vitality of the earlier labor arbitration cases.

4. *Statutory Employment Discrimination Claims in Commercial Arbitration: Gilmer v. Interstate/Johnson Lane Corp.*

The Supreme Court held in *Gilmer* that commercial arbitration provides an adequate forum for hearing a claim of employment discrimination under the Age Discrimination in Employment Act of 1967 (ADEA).¹⁸² *Gilmer* represents the first occasion on which the

176. 473 U.S. at 628.

177. 473 U.S. at 628.

178. The Court stated: "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 473 U.S. at 628.

179. In *Mitsubishi*, the Court said that congressional intent must be "deducible from [the statute's] text or legislative history." 473 U.S. at 628. The Court has subsequently stated that statutory claims may also be exempted from commercial arbitration if there is an "inherent conflict between arbitration and the statute's underlying purposes." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

180. *Mitsubishi*, 473 U.S. at 628-40.

181. 500 U.S. 20, 33-35 (1991).

182. 29 U.S.C. §§ 621-34 (1988). The facts of *Gilmer* are as follows. Robert Gilmer was hired by Interstate/Johnson Lane Corporation in May 1981, and as part of the terms of em-

Court has upheld the arbitrability of a statutory civil rights claim. The Court in *Gilmer* did not, however, overrule *Gardner-Denver* and its progeny. To the contrary, the Court expressly reaffirmed the validity of its decisions regarding labor arbitration, implicitly limiting its decision to commercial arbitration.¹⁸³ In so doing, this section argues, *Gilmer* suggests that the arbitrability of statutory claims depends primarily on the type of contract containing the arbitration agreement, not on the type of statutory claim asserted.¹⁸⁴

In *Gilmer*, the Supreme Court strongly implied that the standard for determining the arbitrability of statutory discrimination claims depends on the type of contract containing the arbitration agreement. The arbitration clause at issue in *Gilmer* appeared in a New York Stock Exchange (NYSE) registration application filed by the plaintiff. Because the clause did not appear in the plaintiff's contract with his employer, the Court concluded that the agreement was governed by the FAA, which covers commercial contracts.¹⁸⁵ The Court therefore applied *Mitsubishi's* two-part test,¹⁸⁶ holding that the parties had agreed to arbitrate and that the plaintiff had not demonstrated that Congress intended to preclude arbitration of ADEA claims.¹⁸⁷ In dissent, Justice Stevens argued that because the plaintiff was required to submit the application as a term of his employment, the arbitration agreement was part of the plaintiff's employment contract.¹⁸⁸ Stevens further argued that employment contracts are not covered by the FAA and that the *Mitsubishi* test should not apply. Thus, both the majority and dissenting opinions in *Gilmer* seem to agree that the test for determining the arbi-

ployment, Interstate required *Gilmer* to register with the New York Stock Exchange (NYSE). The NYSE registration application contained a clause requiring *Gilmer* to arbitrate "any dispute, claim or controversy" arising between *Gilmer* and Interstate. 500 U.S. at 23. In 1987, Interstate fired *Gilmer*, and *Gilmer* filed an age discrimination claim under the ADEA. Interstate responded by moving to compel arbitration under the arbitration agreement contained in the NYSE application. 500 U.S. at 23-24.

In upholding the arbitrability of the ADEA claim, the Supreme Court concluded that the NYSE application containing the arbitration clause was *not* an employment contract of any kind and therefore was governed by the FAA. 500 U.S. at 25 n.2. Consequently, the Court applied *Mitsubishi's* two-part test. 500 U.S. at 26. The Court then found that *Gilmer* failed to meet his burden of proving that Congress intended to preclude arbitration of ADEA claims. 500 U.S. at 26-33.

183. 500 U.S. at 33-35.

184. Cf. *Shell*, *supra* note 72, at 514 (arguing that in determining the arbitrability of statutory claims, courts have not adequately considered the distinction between labor and commercial arbitration).

185. 500 U.S. at 25 n.2. See *supra* notes 125-27 (discussing the coverage of the FAA). The Court avoided the question of whether the FAA excludes *all* contracts of employment, or only certain employment contracts, by deciding that the contract at issue was not an employment contract at all. 500 U.S. at 25 n.2. See *infra* note 232 and accompanying text.

186. 500 U.S. at 26.

187. 500 U.S. at 26.

188. 500 U.S. at 39-41 (Stevens, J., dissenting).

trability of statutory disputes turns on the type of contract containing the arbitration agreement.

The *Gilmer* majority explicitly distinguished its holding from that of *Gardner-Denver*, suggesting that the decision in *Gardner-Denver* remains good law.¹⁸⁹ The Court distinguished the labor arbitration cases on three grounds. First, the Court stated that the arbitration clauses at issue in the *Gardner-Denver* line of cases did not constitute agreements to arbitrate individual statutory claims. Rather, according to the Court, the collective bargaining agreements in those cases granted the labor arbitrator authority only to resolve questions involving interpretation of the collective bargaining agreement.¹⁹⁰ Because the contractual language in *Gilmer* and *Gardner-Denver* was effectively the same, this statement cannot be read as distinguishing the language of the specific agreements at issue in the cases.¹⁹¹ Instead, it should be read to distinguish the scope of labor arbitration from that of commercial arbitration.

Second, the *Gilmer* Court reaffirmed the vitality of *Gardner-Denver* in the special context of union representation. The Court stated that an "important concern [in *Gardner-Denver*] was the tension between collective representation and individual statutory rights."¹⁹² This tension, the Court stated, was absent in the non-union context.¹⁹³ In recharacterizing this concern, already voiced in *Gardner-Denver*, the *Gilmer* Court reaffirmed *Gardner-Denver*'s resolution of the tension between individual rights and union repre-

189. 500 U.S. at 35.

190. In *Gilmer*, the Court stated that the *Gardner-Denver* line of cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions.
500 U.S. at 35.

191. The NYSE registration in *Gilmer* called for arbitration of "any dispute, claim or controversy." 500 U.S. at 23. In *Gardner-Denver*, the arbitration agreement provided for arbitration of "any trouble" arising in the workplace. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 40 n.3 (1974). The arbitration agreement in *Barrentine* provided for the arbitration of "any controversy which might arise." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 731 n.5 (1981). The difference between the arbitration agreement in *Gilmer* and those in *Gardner-Denver* and *Barrentine*, therefore, does not derive from differences in contractual language. Instead, the Court read essentially the same contractual language in the commercial context to include potential statutory disputes, but in the labor context, the Court limited the scope of the clause to contractual conflicts. This distinction between *Gardner-Denver* and *Gilmer* comports well with the Court's differing models of labor and commercial arbitration. Restricting labor arbitration to disputes over the collective bargaining agreement keeps labor arbitration focused on its fundamental goal — providing a method for resolving workplace tensions and thus avoiding strikes. See *supra* notes 120-22 and accompanying text.

192. 500 U.S. at 35.

193. 500 U.S. at 35 (noting the "potential disparity in interests between a union and an employee").

sentation — a resolution that allows individual employees to litigate statutory claims despite the availability of labor arbitration.¹⁹⁴

Third, the *Gilmer* Court pointed out that labor arbitration cases such as *Gardner-Denver* were not decided under the FAA, which reflects a “liberal federal policy favoring arbitration agreements,” but instead were decided under the LMRA, which reflects very different concerns.¹⁹⁵ As discussed above, the primary goal of the LMRA in supporting arbitration is to promote industrial peace — a goal that the Supreme Court has concluded is incompatible with enforcing individual rights.¹⁹⁶

The three distinctions identified in *Gilmer* between the commercial contract in that case and the labor contracts in the *Gardner-Denver* line of cases indicate that courts determining the arbitrability of statutory claims must apply one standard to arbitration under collective bargaining agreements and another standard to arbitration under commercial agreements. Arbitration of statutory claims pursuant to collective bargaining agreements should follow the precedent established in *Gardner-Denver* and its progeny. These cases hold that individual employees should not be required to arbitrate claims based on statutes “designed to provide minimum substantive guarantees to individual workers.”¹⁹⁷ When commercial contracts are involved, however, the test established in *Mitsubishi* makes clear that arbitration is an appropriate forum for resolving statutory disputes unless Congress intended to preclude arbitration of the dispute.¹⁹⁸ The next section assesses section 510 claims in light of the different standards applied to labor and commercial arbitration.

B. *Applying the Mitsubishi and Gardner-Denver Standards to the Arbitration of Section 510 Claims*

This section argues that under recent Supreme Court decisions section 510 plaintiffs must exhaust arbitral remedies pursuant to commercial contracts but need not arbitrate pursuant to collective bargaining agreements. This section further concludes, however, that the unique concerns that preclude labor arbitration of individual statutory claims are absent in the context of *individual* employment contracts.¹⁹⁹ Consequently, courts should enforce arbitration

194. See *Gardner-Denver*, 415 U.S. at 59-60; *supra* notes 151-59 and accompanying text.

195. 500 U.S. at 35 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)).

196. See *supra* notes 120-22, 151-59 and accompanying text.

197. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981).

198. See *supra* notes 175-79 and accompanying text.

199. The Supreme Court has not stated whether individual employment contracts should be governed by labor or commercial precedent. See *infra* note 232 and accompanying text.

of section 510 claims when an arbitration agreement appears in an individual employment contract.

1. *Arbitration of Section 510 Claims Pursuant to Collective Bargaining Agreements*

Section 510 falls within the category of statutory provisions "designed to provide minimum substantive guarantees to individual workers."²⁰⁰ It guarantees individual employees protection against employment discrimination on the basis of eligibility for benefits.²⁰¹ Because section 510 falls within the type of claim precluded from labor arbitration by *Gardner-Denver*,²⁰² courts should not require arbitration of section 510 claims when the arbitration agreement appears in a collective bargaining agreement.

The principles announced in *Gardner-Denver* with respect to the arbitrability of Title VII discrimination claims apply with equal force to section 510 discrimination claims. Unions lack authority to negotiate over an individual's statutory rights.²⁰³ Thus, an employee should not lose her right to bring a section 510 claim in federal court as a result of an arbitration agreement contained in a collective bargaining agreement.²⁰⁴ As with Title VII, the rights conferred by ERISA section 510 "can form no part of the collective-bargaining process."²⁰⁵ *Gardner-Denver* and its progeny make clear that labor arbitrators have no authority to decide an employee's rights under a statute, such as ERISA section 510, that was designed to offer individuals minimum workplace protections.

Furthermore, employees bringing section 510 claims should not be required to rely on their unions to advocate their claims. For a variety of legitimate reasons, a union may choose not to press an individual member's claim.²⁰⁶ Thus, a union's decision not to pursue an employee's claim with diligence should not bind a section

200. *Barrentine*, 450 U.S. at 737; see *supra* notes 161-62 and accompanying text.

201. See *supra* notes 11-14 and accompanying text.

202. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

203. See *supra* notes 151-54 and accompanying text.

204. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (holding that labor arbitrators may interpret only the terms of the agreement and may not independently interpret public laws).

205. *Gardner-Denver*, 415 U.S. at 51.

206. As the Court has noted:

[W]hen, as is usually the case, the union has exclusive control over the "manner and extent to which an individual grievance is presented," there is an additional reason why arbitration is an inadequate substitute for judicial proceedings. The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee.

McDonald v. City of West Branch, 466 U.S. 284, 291 (1984) (citations omitted) (quoting *Gardner-Denver*, 415 U.S. at 58 n.19); see also *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981).

510 claimant. Courts therefore should not require section 510 claimants to exhaust arbitral remedies pursuant to a collective bargaining agreement.

2. Arbitration of Section 510 Claims Pursuant to Commercial Contracts

The two-part test established by the Supreme Court in *Mitsubishi* determines the arbitrability of section 510 claims arising out of commercial contracts.²⁰⁷ Under the first part of the test, a court must determine whether an arbitration clause reaches a section 510 claim.²⁰⁸ This requires the court to interpret the specific arbitration clause at issue. The Supreme Court has indicated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."²⁰⁹ This suggests that courts should read arbitration clauses purporting to require arbitration of "all disputes" to cover any possible dispute between the parties, including statutory claims.²¹⁰ For example, the arbitration clause at issue in *Gilmer*, which the Supreme Court concluded covered a statutory age discrimination claim, provided for arbitration over "any dispute, claim or controversy" arising between the parties.²¹¹ Section 510 claims, therefore, may be subject to arbitration even if the arbitration clause does not refer specifically to section 510.²¹²

If a court concludes that an arbitration agreement covers a section 510 claim, the second part of the *Mitsubishi* test requires that the claim be subject to arbitration unless Congress specifically intended to preclude arbitration of section 510 claims.²¹³ The text, legislative history, and underlying purposes of ERISA do not demonstrate such an intent. The text of ERISA makes no mention of arbitration. ERISA section 514(d), however, does state that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law."²¹⁴

In *Gilmer*, the Court reaffirmed this reasoning, stating that *Gardner-Denver* adequately resolved "the tension between collective representation and individual statutory rights, a concern not applicable" to commercial arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

207. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *supra* notes 175-79 and accompanying text.

208. See 473 U.S. at 628.

209. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

210. See *supra* note 191.

211. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

212. See *Mitsubishi*, 473 U.S. at 625 (rejecting the argument that in order to arbitrate a statutory claim, the arbitration clause must refer to the particular statute).

213. 473 U.S. at 628; see *supra* notes 178-79 and accompanying text.

214. 29 U.S.C. § 1144(d) (1988).

In the absence of authority to the contrary, this provision confirms the congressional support for commercial arbitration found in the FAA.²¹⁵

Several other provisions of ERISA, however, may appear to support a congressional intent to foreclose arbitration of ERISA-based claims. One such provision can be found in ERISA's declaration of policy, in which Congress announced its intention of providing claimants "ready access to the Federal courts."²¹⁶ Enforcing arbitration agreements arguably denies section 510 claimants the access to the courts that Congress intended. This argument, however, misconstrues congressional intent. Congress's intent to provide access to the courts is not equivalent to a congressional intent to foreclose potential plaintiffs' ability to waive that right.²¹⁷ Parties to arbitration agreements necessarily forgo access to the courts in exchange for the procedures offered by commercial arbitration.²¹⁸ The FAA expresses a congressional intent to support this exchange. It does not follow that by providing a federal judicial forum for section 510 claims Congress also intended to override the goals of the FAA. In short, by providing section 510 claimants access to federal courts, Congress did not prevent them from choosing an arbitral rather than a judicial forum.

The fact that ERISA provides for exclusive federal jurisdiction for section 510 claims²¹⁹ may also appear to support the argument that Congress intended to preclude arbitration of section 510 claims. As the Second Circuit has noted, however, this provision "speaks only to which *judicial* forum [federal or state] is available, not to whether an *arbitral* forum is also available."²²⁰ Furthermore, the Supreme Court has already rejected the same argument in another context. Like ERISA, the Securities Exchange Act of 1934 grants federal courts exclusive jurisdiction.²²¹ Yet the Court determined that claims under the Act are subject to arbitration.²²² After

215. See *Shell*, *supra* note 72, at 558 (arguing that § 514(d) suggests a congressional intent to apply the FAA to statutory ERISA claims).

216. 29 U.S.C. § 1001(b) (1988).

217. See *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 120 (2d Cir. 1991) (concluding that the "ready access to Federal courts" provision "does not speak to whether Congress intended to require that parties avail themselves of that forum"); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 478-79 (8th Cir. 1988).

218. As the Court stated in *Mitsubishi*, "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628.

219. 29 U.S.C. § 1132(e) (1988).

220. *Bird*, 926 F.2d at 120 (emphasis added).

221. 15 U.S.C. § 78aa (1988).

222. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987); see also *Mitsubishi*, 473 U.S. at 629 (finding claims under the Sherman Act arbitrable despite exclusive federal jurisdiction).

the Court's decision, the Second Circuit concluded that " 'any claim that the jurisdictional language of ERISA evidences a congressional intent to foreclose arbitrability would appear to be untenable.' " ²²³

The legislative history of ERISA similarly does not indicate a congressional intent to foreclose arbitration of section 510 claims. The Senate version of ERISA contained a provision requiring each plan to provide for arbitration over "any dispute between the administrator of the plan and any participant or beneficiary of the plan." ²²⁴ Because plan administrators may be subject to section 510 as well as other statutory ERISA claims, ²²⁵ this provision would have allowed for the arbitration of statutory claims. Although this provision was eliminated by the Conference Committee, its elimination does not demonstrate a rejection of arbitration. In contrast to the Senate version of ERISA, the House version included no provision whatsoever for appeal of benefits decisions. ²²⁶ As a compromise, the Conference Committee drafted section 503, which requires plans to include some procedure for appealing a plan administrator's denial of benefits. ²²⁷ Although section 503 does not mention arbitration, the Conference Committee report indicates that section 503 represents a compromise between mandating that plans include a specific procedure — such as arbitration — and not mandating that plans include any review procedure at all. ²²⁸ By making no mention of arbitration, section 503 therefore avoids the question of the arbitrability of statutory ERISA claims, leaving this question to be determined by existing law — the LMRA for labor arbitration and the FAA for commercial arbitration.

Finally, arbitration pursuant to a commercial contract does not undermine the underlying purposes of section 510. The purpose of section 510 is to prohibit employment discrimination on the basis of

223. *Bird*, 926 F.2d at 120 (quoting *Southside Internists Group v. Janus Capital Corp.*, 741 F. Supp. 1536, 1541 (N.D. Ala. 1990)); see also *Shell*, *supra* note 72, at 557-58 (arguing that *McMahon* and *Mitsubishi* demonstrate that exclusive federal jurisdiction does not preclude arbitrability).

224. H.R. 4200, 93d Cong., 1st Sess. § 691 (1973), reprinted in 2 SUBCOMM. ON LABOR, COMM. ON LABOR & PUBLIC WELFARE, U.S. SENATE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 1883, 2096 (1976) [hereinafter LEGIS. HIST.].

225. Section 510 prohibits "any person," not only employers, from discriminating against participants and beneficiaries. 29 U.S.C. § 1140 (1988). In addition, plan administrators may be subject to another statutory claim — breach of fiduciary duties. See, e.g., *Acosta v. Pacific Enters.*, 950 F.2d 611 (9th Cir. 1991).

226. SUMMARY OF DIFFERENCES BETWEEN THE SENATE VERSION AND THE HOUSE VERSION OF H.R. 2 TO PROVIDE FOR PENSION REFORM 24 (1974), reprinted in 3 LEGIS. HIST., *supra* note 224, at 5249, 5274.

227. See *id.* at 25, reprinted in 3 LEGIS. HIST., *supra* note 224, at 5275; *supra* notes 38, 67-68 and accompanying text.

228. H.R. CONF. REP. NO. 1280, *supra* note 42, at 327, reprinted in 1974 U.S.C.C.A.N. at 5108.

eligibility for benefits.²²⁹ In *Gilmer*, the Supreme Court concluded that private arbitration could provide an adequate forum for promoting the "important social policies" served by the antidiscrimination law embodied in the ADEA: "We do not perceive any inherent inconsistency between those policies . . . and enforcing agreements to arbitrate age discrimination claims."²³⁰ Like the ADEA at issue in *Gilmer*, section 510 serves the important social value of eliminating one category of arbitrary discrimination. Nonetheless, the Supreme Court has concluded that commercial arbitration provides an adequate forum for enforcing even claims implicating "important social policies."²³¹

Thus, the text, legislative history, and purposes of ERISA section 510 do not indicate a congressional intent to preclude arbitration. Under the test established by the Supreme Court in *Mitsubishi*, courts should therefore enforce agreements in commercial contracts to arbitrate such claims.

3. Arbitration Pursuant to Individual Employment Contracts

Neither labor arbitration precedent nor commercial arbitration precedent clearly controls the arbitrability of statutory claims pursuant to individual employment contracts.²³² It therefore remains

229. See *supra* notes 11-14 and accompanying text.

230. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991).

231. 500 U.S. at 28 ("The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but . . . claims under those statutes are appropriate for arbitration.").

232. *Gardner-Denver* deals only with arbitration pursuant to collectively bargained arbitration agreements. Individual employment contracts do not fall within the scope of the LMRA, and therefore *Gardner-Denver's* reasoning can apply only by analogy. *Mitsubishi*, on the other hand, involves commercial arbitration under the FAA. The FAA may not apply to arbitration under individual employment contracts because § 1 of the FAA excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1988). Lower courts are divided over the scope of this exclusion. Some courts read the exclusion quite broadly to exempt all employment contracts from the terms of the FAA. See, e.g., *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1120 (3d Cir. 1993) (noting in dictum that "the FAA by its own terms does not apply to employment contracts"). Other courts read the exclusion much more narrowly, concluding that it excludes only the contracts of workers engaged in the transportation industry. See, e.g., *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Signal-Stat Corp. v. Local 475, United Elec., Radio & Machine Workers*, 235 F.2d 298, 302 (2d Cir. 1956). The Supreme Court has never addressed the issue. In *Gilmer*, the Court avoided the question by deciding that the securities registration application was not an employment contract, despite the fact that submitting the application was required as a term of *Gilmer's* employment. See 500 U.S. at 36 (Stevens, J., dissenting) ("The Court today . . . skirts the antecedent question of whether the coverage of the Act even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue . . ."); see also Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 272-79 (arguing that the *Gilmer* Court opted for a restrictive definition of employment contract in order to avoid confronting the scope of the FAA employment contract exclusion).

unclear whether the reasoning of *Mitsubishi* or of *Gardner-Denver* controls the arbitrability of section 510 claims when an arbitration clause appears in an individual employment contract. Nevertheless, the principles guiding the Supreme Court in its labor arbitration cases and its commercial arbitration cases support enforcing arbitration of statutory claims, including those under ERISA section 510, pursuant to individual employment contracts.

Although the Supreme Court has held that claims raising individual statutory rights are not subject to labor arbitration,²³³ this conclusion stands as an exception to the general policy of enforcing agreements to arbitrate. The rationale for the exception derives from the distinct nature of labor arbitration, which seeks to maintain labor-management relations and avoid strikes.²³⁴ This rationale is inapplicable to arbitration pursuant to individual employment contracts. Arbitration under individual employment contracts seeks only to resolve a particular dispute between employee and employer.²³⁵ As in the commercial context, arbitration is desirable in the individual employment context in order to resolve disputes cheaply and efficiently.²³⁶ Arbitration of individual employment contracts is directed at avoiding the expense of a trial, not the expense of a strike. As such, arbitration of individual employment contracts parallels commercial arbitration, not labor arbitration.

Arbitration under individual employment contracts also lacks the "tension between collective representation and individual statutory rights"²³⁷ that precludes labor arbitration of statutory claims. Although employees subject to a collective bargaining agreement must rely on a union to pursue arbitration of their grievances,²³⁸ nonunionized employees decide for themselves whether to bring a claim to arbitration. Requiring individual employees to arbitrate statutory claims does not force them to rely on a union to press their claims. Thus, the rationale that supports an exception in the context of labor law to the general rule of enforcing arbitration agreements is absent in the context of individual employment contracts.

CONCLUSION

ERISA section 510 provides a judicial remedy for any employee whose employer discriminated against her to prevent her from obtaining benefits under an employer-sponsored pension or welfare

233. See *supra* section III.A.2.

234. See *supra* notes 117-22, 151-54 and accompanying text.

235. See WILNER, *supra* note 132, § 1.01.

236. See *id.*

237. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

238. See *supra* notes 117-19 and accompanying text.

plan. Two private remedies may also be available: remedies through the plan's appeals procedure and remedies through contract-based arbitration. This Note has examined whether plaintiffs bringing section 510 claims must first exhaust plan-based or arbitral remedies before resorting to the federal courts.

Courts should not require section 510 plaintiffs to exhaust plan procedures before resorting to the courts. Courts generally apply an exhaustion requirement in order to resolve the tension between conflicting congressional messages: providing access to the courts while at the same time encouraging private dispute resolution. This tension, however, is absent in the context of section 510 claims. Nothing in the text or history of ERISA indicates that Congress sought to encourage the private resolution of discrimination claims under section 510.

Even if courts conclude that an exhaustion requirement applies generally to statutory ERISA claims, courts should excuse this requirement for most section 510 claims. Section 510 claims typically fall within the judicially created exception to exhaustion for futility because most plan administrators are aligned with employers — the party accused of discrimination under section 510. In addition, because plan procedures provide only benefits, courts should excuse the exhaustion of plan remedies requirement for section 510 claims due to the inadequacy of plan remedies.

Arbitration agreements operate on a different premise from plan remedies. Potential section 510 plaintiffs may agree to arbitration by contract, whereas they do not necessarily agree upon plan-based remedies. Whether courts should require section 510 plaintiffs to exhaust arbitration depends on the type of contract — and with it the type of arbitration — to which the parties agreed. Supreme Court labor law decisions indicate that courts should not require arbitration of section 510 claims pursuant to collective bargaining agreements. The Court has concluded that arbitration pursuant to collective bargaining agreements cannot resolve statutory claims involving minimum guarantees to individual employees. Section 510 claims fall within this category of claims exempt from labor arbitration.

The Supreme Court, however, has been much more willing to enforce arbitration of statutory claims pursuant to commercial contracts. The Court has held that, unlike labor arbitration, commercial arbitration provides an adequate forum for resolving statutory claims unless Congress specifically intended to preclude arbitration of the statutory claim. The text, legislative history, and underlying purposes of ERISA do not indicate a congressional intent to preclude arbitration of section 510 claims. Courts therefore should enforce arbitral agreements covering section 510 claims.

The arbitrability of section 510 claims pursuant to individual employment contracts remains less clear. The Supreme Court has not determined whether court enforcement of such arbitration agreements will follow labor arbitration precedent or commercial arbitration precedent. Nonetheless, individual employment contracts lack the tension between individual rights and collective representation that precludes labor arbitration of statutory claims. Courts therefore should enforce arbitration of section 510 claims pursuant to individual employment contracts.