Employee Welfare Benefit Entitlement and Title I of the Americans with Disabilities Act

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It is difficult to imagine a more publicized work-related issue concerning contemporary employees than the maintenance and scope of their employer-provided health insurance. [1] While the cost of medical insurance continues to skyrocket, employees are either finding their welfare benefits contracting as their insurance coverage is narrowed or are finding their paychecks smaller as they are required to make larger contributions to offset increased medical insurance costs. With Congress currently deadlocked on the acceptability of national health insurance legislation proposed by the Clinton administration, it seems as though the nation's health insurance crisis may get even worse.

In the midst of this crisis, some commentators have argued that Title I of the Americans with Disabilities Act (ADA) has created a statutory basis through which employees can prohibit their employers from altering or decreasing health benefits. [2] As discussed in this article, the ADA prohibits employment discrimination on the basis of an employee or job applicant's handicap. The proponents of this view argue that any diminishment of employer provided health benefits would necessarily have an adverse effect upon disabled employees and would presumptively violate the ADA. [3]

Other legal commentators have taken the opposite view. They claim that the ADA does not limit an employer's right to modify employee health insurance benefits and that the only provision which governs health plan modifications is the Employee Retirement Income Security Act (ERISA). [4] The saliency of both views is currently being tested in litigation pending both in the New York and Maryland U.S. District Courts. [5]

ERISA and the Vesting of Employee Welfare Benefits

In 1974 Congress passed ERISA, a comprehensive statute which established the legal framework through which employers may provide their employees with non-wage supplemental benefits such as a

[1] In 1970 the percentage of employees in both the public and private sectors who were provided with some form of health insurance by their employer was roughly 75. Today, this percentage is considerably larger. See George Rubin, "Major Collective Bargaining Developments—A Quarter Century Review," *Current Wage Developments* (February 1974), p. 47.

[2] Lizzett, Palmer, "The American With Disabilities Act Limits Capping As Disability-Based Discrimination," 30 *Houston Law Review* 1348 (1993).

[3] *Id.* at p. 1376-77.

[4] 29 USC 1001-1461 (1980). See also, Carl A. Greci, "Use It and Lose It: The Employer's Absolute Right Under ERISA Section 510 to Engage in Post-Claim Modifications of Employee Benefit Plans," 68 *Indiana Law Journal* 177 (Winter 1992); Ackawrey, Kimberly A., "Insuring American with Disabilities: How Far Can Congress Go to Protect Traditional Practices," I 184 *Emory Law Journal 40 (1991).*

[5] *Mason Tenders District Council Welfare Fund v. Doneghey*, 93 Civ. 1154 (SD NY, Nov. 1993) (JES); *EEOC v. Monroe Foods, Inc.*, Y-93-2925 (Dist Ct Md, May 16, 1994).

pension and medical insurance.[6] ERISA has three primary objectives: (1) to ensure vesting of retirement benefits; (2) to establish strict fiduciary requirements for trustees of ERISA covered employee benefit plans; and (3) to require reporting, disclosure, termination insurance, and specified funding for employee benefit plans in order to insure their fiscal integrity.[7] In this respect, ERISA was enacted by Congress as a remedial statute which was intended to prevent previous employer misconduct which jeopardized the fiscal viability of benefit plans. Prior to ERISA's enactment, employers often found ways to withdraw employees' pension entitlement, even though they had accrued substantial equity in their plan.[8]

ERISA only covers employee benefit plans. An employee benefit plan as defined by ERISA may be either an employee welfare plan or an employee pension plan. ERISA defines an employee welfare plan as "any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds or pre-paid legal services, or (B) any benefit described in Section 302(c) of the Labor Management Relations Act, 1947 (other than pensions or retirement or death, and insurance to provide such pensions)."[9]

Under this definition, health insurance provided by an employer to its employees is an "employee welfare plan" and is subject to ERISA's provisions.

While ERISA specifically prohibits the divestiture of retirement benefits, and contains minimum vesting standards for pensions,[10] it does not contain comparable terms for employee welfare plans. Case law clearly recognizes that an employer has an absolute right to modify health insurance, to reduce benefits, or even to terminate benefits completely.[11] The decision in *Moore v. Metropolitan Life Insurance Company*[12] established the fundamental principle that ERISA does not mandate the "vesting" of health benefits once such benefits are provided to employees.[13]

To prevent welfare insurance modifications, an employee, prior to the enactment of the Rehabilitation Act and the ADA, could only argue that the change violated either ERISA's antidiscrimination provisions or ERISA's fiduciary responsibility

[6] It should be noted that ERISA does not *require* that employers provide supplemental wage benefits to their employees. Benefits are monitored and regulated by ERISA, only if an employer chooses to provide them to its employees, and the benefit plans qualify as ERISA trust funds.

[7] Finding and Declaration of Policy, 29 USC 1000, ERISA Section 2.

[8] See, e.g., *Wilson v. Rudolph Wurlitzer Co.*, 450 N.E. 441, 48 Ohio App. 450 (1934), where an employee who faithfully discharged his duties for over twenty-four years lost his pension entitlement, even though the employee handbook had promised a pension to employees who worked for longer than twenty-five years, because he had simply refused to work overtime on one occasion.

[9] *29 USC 1002(1)* and *(3)*, *ERISA Section 3(1)* and *(3)*.

[10] 29 USC 1053(a), ERISA Section 203(a).

[11] Such modification or termination may not be implemented unilaterally when health benefits are provided to employees under a collective bargaining agreement. Taft-Hartley Act Section 8(d) requires good faith bargaining between labor and management over wages, hours, and other terms and conditions of employment. Health insurance is included in the scope of labor and management's Section 8(d) bargaining obligations and is considered a mandatory topic of bargaining, *Inland Tugs v. NLRB* 918 F2d 1299(7th Cir, 1990).

[12] 856 F2d 488, 492 (2d Cir, 1988).

[13] ERISA also contains a very broad pre-emption clause which, except in limited instances, supersedes all state laws relating to employee benefit plans that require plans to include specific benefits, ERISA Section 514, 29 USC 1144. (In *Metropolitan Life Insurance Company*, 471 US 724 (1985), the Supreme Court held that a Massachusetts law which mandated that employers provide a minimum level of mental health benefits to their employees violated ERISA's Section 514.) ERISA's presumption provision was enacted to provide uniformity in the administration of employee benefits and to allow for the federalization of this area of law. *NGS America, Inc. v. Barnes* F2d 296 (5th Cir, 1993).

requirements.[14] A review of case law under these sections of ERISA reveals that there is an almost insurmountable burden on a plaintiff to demonstrate that a plan modification was violative of ERISA.[15]

ERISA's fiduciary obligations provision[16] requires a fiduciary (the plan administrator or trustee) to discharge her duties with respect to a plan solely in the interests of the plan's participants and/or beneficiaries. Some employees have initiated suits challenging limitations imposed upon their welfare benefits on the ground that the fund's trustees had violated their fiduciary duty under ERISA by imposing such limitations.

In *Musto v. American General Corporation*,[17] several retirees brought a class action suit against the administrator of their welfare fund under ERISA Section 404 in an attempt to block anticipated plan modifications decreasing their post-retirement medical insurance. The Sixth Circuit reversed a preliminary injunction granted by the trial court barring diminution of benefits. The court held that ERISA's fiduciary standards applied only to the administration of an employee benefit plan and not to the determination whether specific plan benefits should be maintained. Since welfare benefits were not vested, according to the welfare plan's terms, the trustees prerogative to modify or terminate these benefits was not limited.[18]

A similar holding was the result in *Sutton v. Wierton Steel Division of National Steel Corporation*.[19] This case involved an employer's decision to terminate benefits for non-vested severance and contingent early retirement. In deciding that the elimination of these benefits was permissible and that ERISA's fiduciary standards were inapplicable to prohibit it, the court held that "Congress authorized an employer to administer its pension plan, and in the discharge of its duties with respect to the plan, the employer must satisfy the exacting fiduciary standards imposed by ERISA. Congress, however, has not prohibited an employer who is also a fiduciary from exercising the right accorded other employers to renegotiate or amend, as the case may be, unfunded contingent benefits payable before retirement age. The changes, accomplished in the manner, are not to be reviewed by fiduciary standards."[20]

In a more recent decision, *Paul v. Valley Truck Parts, Inc.*,[21] the court went in the other direction, finding that a genuine issue of material fact existed whether a trustee's retroactive amendment of an employee profit-sharing plan violated ERISA's fiduciary standards. In this action, the court found a genuine issue of material fact existed as to whether previous employer contributions to the profit-sharing plan had actually vested for the benefit of plan participants. If the benefits had vested, the trustee's diminution of those benefits might have in fact breached their ERISA fiduciary responsibility.[22] The court's decision in *Valley Truck Parts, Inc.*, is easily distinguished from the decisions in *Musto* and *Sutton*, since the latter two actions involved employee benefits which indisputably were not vested. ERISA's anti-discrimination

[14] An ERISA fiduciary's responsibilities are contained in 29 USC 1104, ERISA Section 404; ERISA's antidiscrimination provisions are found in 29 USC 1140, ERISA Section 510.

[15] In some pre-ERISA cases, plaintiffs, rather than arguing that fiduciary duties had been breached by a plan's modification or that the modification was discriminatory, argued that the modification was a breach of their collective bargaining agreement under Section 301 of Taft-Hartley Act. See *Turner v. Local Union 302 of the IBT*, 604 F2d 1219 (9th Cir, 1979). However, so long as the plan's modification was accomplished through the process of collective bargaining and was not imposed unilaterally, such claims invariably failed.

[16] Section 404.

[17] 861 F2d 897(6th Cir, 1988).

[18] 861 F2d at 912.

[19] 724 F2d 406(4th Cir, 1983).

[20] *Sutton*, 724 F2d at 410-11.

[21] 1990 US Dist Lexis 4554 (N.D. Ill. 1990).

[22] *Valley Truck Parts, Inc.*, 1990 US Dist Lexis 4554 at 6.

provision states that: "It shall be unlawful for any person to discharge, fire, 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, this title, Section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fire, suspend, expel, or discriminate against any person because he has given information relating to this act." [23]

Some disabled employees have argued that a diminution or capping of the particular health benefits provided by their plan for treatment of their condition constitutes discrimination contrary to ERISA Section 510. A review of these decisions reveals that this argument has also failed to gain a firm enough judicial foothold to prevent employee health benefits from eroding. The seminal case involving ERISA Section 510's effect upon employee health benefit entitlement is *McGann v. H&H Music Company.* [24] In this action the plaintiff, McGann, who had become infected with the AIDS virus, sued his employer for allegedly violating ERISA Section 510. The suit was premised on H&H Music's reducing the maximum benefits available to AIDS victims under its welfare plan from one million to five thousand dollars. McGann contended that the reduction of his benefits was illegally motivated because it was implemented almost immediately after he had disclosed his medical condition to his employer.

The district court granted summary judgment in favor of H&H Music and dismissed McGann's complaint. The court held that "an employer has an absolute right to alter the terms of medical coverage available to plan beneficiaries." [25] The Fifth Circuit affirmed the district court opinion and refused to reinstate McGann's suit.

The circuit court based its affirmance on appellant's failure to satisfy two fundamental components of a *prima facie* Section 510 suit: intentional discrimination against a plan beneficiary and a denial of vested benefits. The court determined that dismissal was warranted since appellant had failed to prove that H&H Music had specifically intended to discriminate against him. Dismissal was also based upon appellant's failure to adduce any concrete evidence of his irrevocable entitlement to specific benefits under the welfare plan.

Regarding the first Section 510 element (intentional discrimination), the court found that ERISA had conclusively established that the plaintiff has the burden to prove that his employer had specifically intended to interfere with or circumscribe his benefit entitlement. It is not enough to contend that the employer's actions had a disparate impact upon the participant's welfare benefit entitlement. Nor is it enough to show that a discriminatory motivation was one among many factors (mixed motive) that led to the employer's decision to eliminate benefits. [26] McGann needed to demonstrate that the reduction

[23] 29 USC 1140, ERISA Section 510. Section 510 was enacted by Congress "in the light of evidence that in some plans a worker's pension rights or the expectations of these *rights were interfered with by the use of economic sanctions* or violent reprisals." See Senate Report No. 127, 93rd Congress, 2d Session 36 (1974). Though Section 510 was enacted to provide additional protection for plan participants and to prevent divestiture of an employee's anticipated benefits, courts have rarely found that Section 510 has actually been violated. See *Simmons v. Willcox*, 911 F2d 1077, 1082 (5th Cir, 1990), *Clark v. Resistoflex Company*, 854 F2d 762, 770 (5th Cir, 1989). See also Joan Vagal, "Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?," 62 *Notre Dame Law Review* 1024, 1025-27 (1987).

[24] 946 F2d 401(5th Cir, 1991), *cert denied sub nom Greenberg v. H&H Music Company*, 113 SCt 482, 121 LEd2d 237 (1992).

[25] *McGann*, 946 F2d at 403.

[26] *McGann*, 946 F2d at 404. See also *Dister v. Continental Group, Inc.*, 859 F2d 1108 (2d Cir, 1988); *Gavalik v. Continental Can Company*, 812 F2d 834, 851 (3d Cir), cert denied 484 US 974 (1987).

was meant to impair only *his* benefit entitlement. McGann failed to meet this criterion, since the plan's reduction in AIDS benefits applied equally to each and every one of H&H Music's employees, even though the court had found a connection between the employer's decision to modify its welfare plan and McGann's medical condition.

The court expanded: "Although we assume there was a connection between the benefits reduction and either McGann's filing of claims or his revelations about his illness, there is nothing in the record to suggest that defendant's motivation was other than as they asserted, namely to avoid the expense of paying for AIDS treatment, no more for McGann than for any other present or future plan beneficiary who might suffer from AIDS. McGann concedes that the rescission in AIDS benefits will apply equally to all employees filing AIDS-related claims and that the effect of the reduction will not necessarily be felt only by him. He fails to allege that the coverage reduction was otherwise specifically intended to deny him particularly medical coverage except in effect." [27]

Even if McGann provided the requisite indicia that his employer's AIDS benefits cap intentionally discriminated against him, he still would have failed to allege a *prima facie* Section 510 suit without producing evidence that he had a vested right to a specific level of health benefits. The court held that this right: "is not simply any right to which an employee may conceivably become entitled, but rather any right to which an employee may become entitled pursuant to an existing, enforceable obligation assumed by the employer." [28]

Since McGann's health insurance plan's summary description permitted his employer to modify or amend benefits at any time, McGann was incapable of demonstrating that he had an immutable right to a specific level of benefits. [29] Further, even if the summary description had not contained language allowing the plan's sponsor to terminate or modify welfare benefits, the court would have still found McGann incapable of adducing that he had an entitlement to a given level of benefits. [30] The decision in *McGann* effectively prohibits individuals whose welfare benefits have been modified (even if the modification is motivated by a discriminatory intent) from bringing a Section 510 action, unless they can show that the summary plan description, or sponsoring employer, had guaranteed that the benefits would in fact be permanent. [31]

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[27] *McGann*, 946 F2d at 404.

[28] *McGann*, 946 F2d at 405.

[29] *McGann*, 946 F2d at 405. ERISA provides that individuals covered by a pension or welfare plan must be provided with a summary description of the plan's benefits written in laymen's terms so that their rights and obligations are clearly defined. 29 USC 1023, ERISA Section 103.

[30] "ERISA does not require such vesting of the right to a continued level of the same medical benefits once these are. . . included in a welfare plan." *McGann*, 946 F2d at 405.

[31] The *McGann* decision has produced a huge outcry for either a welfare benefit vesting provision in ERISA or a comprehensive national health insurance plan. For example, one periodical lamented, after the Supreme Court refused to review the Fifth Circuit's decision in *McGann*, that: "There are almost 35 million Americans without health insurance, and tens of millions more who are underinsured . . . By permitting employers to cut off the health benefits of their employees after they or one of their family members develops AIDS or any other serious illness, this decision will [increase] the ranks of the uninsured." *High Court Declines to Review Insurance Discrimination Case for Employees With AIDS*, 1992 Drug Research Reports, The Blue Sheet, Nov. 11, 1992. Other commentators have extolled the soundness of the *McGann* decision, since to them any other interpretation of Section 510 would require a *de facto* vesting of welfare benefits once they were provided to employees. These commentators argue that a *de facto* vesting would actually create an incentive for employers not to provide any health benefits. See, e.g., Dirrim, Craig C., "Unpopular But Not Unfair: The Fifth Circuit Considers the Terms But Ignores the Endearment in *McGann v. H&H Music Company*," *72 Nebraska Law Review* 860 (1993). These commentators, however, ignore the fact that pension benefits are uniformly provided as part of employees' overall compensation package despite the fact that ERISA contains a pension vesting provision. Apparently, vesting does not interfere with an employer's willingness to provide pension benefits. Why should it interfere with an employer's willingness to provide health benefits? (Ultimately cost is the critical factor that prevents employer's from guaranteeing health benefits. While pension payouts can be, more or less, accurately determined by actuarial assessment, welfare benefit utilization and cost per employee is hardly as predictable).

A more recent decision, *Owens v. Storehouse, Inc.*,[32] was based upon a scenario almost identical to *McGann*, amply demonstrating how *McGann* has precluded successful Section 510 litigation when an employer's decision to decrease or cap welfare benefits is the basis of the suit. In *Owens*, an employer had modified its welfare plan so that there would be a lifetime cap of $25,000 on benefits provided to employees infected with the AIDS virus. Owens sought relief under ERISA Section 510, as well as a temporary restraining order prohibiting the reduction of plan benefits. His suit was dismissed by the district court and the Eleventh Circuit affirmed the district court's decision.[33]

As in *McGann*, the *Owens* court based its decision on the fact that Owens' employer's welfare plan amendment had not derogated any right which he might have had to specific welfare benefits: "the record does not establish that Storehouse amended its plan to interfere with the 'attainment of any right' to which Owens might have been entitled under Section 510. The 'right' referred to is not any right in the abstract. Rather, it is one specifically conferred by the plan or ERISA."[34]

As discussed, ERISA does not confer a right to particular health benefits. Additionally, since the cap was uniformly applied to all employees, Owens could not prove the existence of the type of discriminatory intent required by ERISA Sec. 510.[35] From these decisions, it is clear that ERISA, standing alone, provides little protection for an individual whose health benefits have been diminished or terminated. This is true even when a discriminatory motive is involved; primarily because ERISA lacks a vesting provision for health benefits.

Denial of Welfare Benefits Under the Rehabilitation Act

Before exploring the possibility that modification of benefits may violate ADA, it will be instructive to examine cases involving the ADA's predecessor statute, the Rehabilitation Act, to first determine what effect it has had on covered employees' benefit entitlement.[36]

There are relatively few Rehabilitation Act decisions which involve the denial of a handicapped individual's welfare benefits entitlement. However, the few cases that do involve welfare benefit denial reveal that a litigant suing under Rehabilitation Act Section 504 has as difficult a burden proving a legally sufficient case as does an ERISA litigant.

In *Bernard B. v. Blue Cross and Blue Shield*,[37] a class action suit was brought by class representatives suing Blue Cross/Blue Shield under Section 504. The suit was initiated when Blue Cross/Blue Shield modified plan benefits to exclude coverage for psychiatric inpatient care. Plaintiffs argued that the insurance company's action had an adverse impact upon individuals suffering from psychiatric disorders and was, therefore, impermissibly discriminatory. The court denied plaintiffs' request for relief and granted defendant's motion for summary judgment, dismissing the complaint and holding that there was no violation of the Rehabilitation Act, because the plan's modification was based upon non-discriminatory factors (such as the huge cost of coverage for inpatient psychiatric care).

The court noted that Blue Cross/Blue Shield had not excluded certain insurance benefits only from individuals with psychiatric handicaps. Clearly, such an action would have been impermissible. Rather, Blue Cross/Blue Shield had implemented a limitation which applied to

[32] 984 F2d 394(11th Cir, 1993).

[33] *Owens*, 984 F2d at 400.

[34] *Owens*, 984 F2d at 399.

[35] *Owens*, 984 F2d at 398.

[36] 29 USC 794(a).

[37] 528 FSupp 125 (SD NY, 1981), aff'd 679 Fd 2d 7 (2nd Cir, 1982).

all plan participants across the board: benefits were limited for both the handicapped and non-handicapped alike.[38] Since the defendant's determination to discontinue psychiatric benefits was at least partially dictated by cost considerations, it was found to be "substantially justified."[39] This rationale was sufficient to shield the defendant from the operation of the Rehabilitation Act.[40]

The Supreme Court in *Alexander v. Choate,*[41] also considered whether limitation or elimination of welfare benefits by a covered employer was contrary to the protection afforded by the Rehabilitation Act. The Court was asked to determine whether the Tennessee legislature's proposal to reduce state provided Medicaid benefits (reducing benefits provided for in-patient medical services from 20 to 14 days) violated the Rehabilitation Act.

Plaintiffs argued that since handicapped individuals were more likely to require a longer duration of in-patient hospital care than non-handicapped individuals, the legislature's proposal was inherently discriminatory.[42] This benefit reduction, it was contended, would necessarily have an adverse and discriminatory impact on the handicapped.

The Court first considered whether discriminatory animus, required by ERISA Section 510, was also a required element of an action under Section 504 of the Rehabilitation Act. If discriminatory animus was a necessary component of a Section 504 action, then plaintiff's case, based solely upon the statistically adverse impact of defendant's proposal, was without a sufficient legal basis.

The Court reviewed decisional law under Title VI of the Civil Rights Act of 1964,[43] such as *Guardians Association v. Civil Service Commission of New York City,*[44] to determine whether disparate impact discrimination was redressible under the Rehabilitation Act. Based upon *Guardians,* the Court held that the form of disparate impact discrimination challenged in *Alexander* was actionable under the Rehabilitation Act, stating: "*Guardians* does not support petitioner's blanket proposition that federal law proscribes only intentional discrimination against the handicapped. Indeed, to the extent our holding in *Guardians* is relevant to the interpretation of Section 504, *Guardians* suggests that the regulations implementing Section 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case."[45]

The Court also held that Congress had specifically intended that disparate impact discrimination would be covered by Section 504. The Act's legislative history indicated that Section 504 was intended to address all forms of discrimination regardless of how discriminatory conduct was (covertly) manifested: "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect . . . Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus . . . In addition, much of the conduct that Congress sought to alter in passing the

[38] *Bernard B.,* 528 FSupp at 132.

[39] This court explicitly recognized the "substantial justification" exception to Section 504 which was first espoused by the Second Circuit in *Kampmeier v. Nyquist,* 553 F2d 296 (2d Cir, 1977).

[40] *Bernard B.,* 528 FSupp at 132.

[41] 469 US 287 (1985).

[42] Plaintiffs produced undisputed statistical evidence which revealed that "in the 1979-1980 fiscal year, 27.4% of all handicapped users of hospital services who received Medicaid required more than fourteen days of care, while only 7.8% of non-handicapped users required more than fourteen days of inpatient care." *Alexander,* 469 US at 665.

[43] Title VI of the Civil Rights Act of 1964,42 USC 2000 prohibits programs receiving federal grants and federal aid from discriminating against racial and ethnic minorities.

[44] 463 US 582 (1983).

[45] *Alexander,* 469 US at 294.

Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." [46]

Hence, plaintiff's evidence of the disparate impact of Tennessee's proposition was deemed sufficient to set forth a Section 504 *prima facie* case. This holding is extremely significant in regard to the ADA, since the ADA is modeled on the Rehabilitation Act and prohibits the same forms of discrimination as that Act.

Nevertheless, the *Alexander* court denied plaintiffs their requested relief even though the Court recognized the state's proposal would have an adverse impact on handicapped employees. The Court found the legislature's proposal was neutral on its face and did not bar handicapped individuals from receiving the same benefits which non-handicapped individuals would receive. [47] The same level of benefits were available to both handicapped and non-handicapped individuals alike. [48]

Though it was not explicitly stated by the Court as a basis for its holding, since Tennessee's decision to decrease its Medicaid benefits was premised on the state's desire to reduce Medicaid costs, there apparently was a "substantial justification" for the state's discriminatory treatment of handicapped individuals, the Supreme Court implicitly accepting the "substantial justification" defense posited in both *Bernard B.* and *Kempmeier*. In each of these cases, an employer's decision to eliminate excessive insurance costs was deemed a sufficient basis for its decision to modify health insurance benefits in a way which impaired handicapped individuals' benefit entitlement.

If decisions under the Rehabilitation Act are used as a model for determinations rendered under the ADA, it would seem that in very few instances would an employer's decision to limit health benefits create liability. As long as an employer could show that there either was a nondiscriminatory reason for the modification or substantial justification for it, such as the necessity of reducing plan costs, no legal action would lie. As we will see, however, this result is not inevitable. The ADA contains specific language regarding employee benefits and stricter scrutiny of an employer's decision to limit their benefits is justified.

The ADA and Employee Welfare Benefit Entitlement

The ADA contains specific language which addresses employee benefit plans, language which is not contained within the Rehabilitation Act and which is without precedent in civil rights legislation. Recently, a federal court has interpreted this provision in a way which might render employers culpable under the ADA if they terminate or cap welfare benefits in a manner which discriminates against handicapped individuals. [49] Apparently the ADA's antidiscrimination mandate also applies to employer welfare benefit plans established under ERISA. [50]

That provision states: "Insurance Subchapters I through III of this Chapter and Title IV of this Act shall not be construed to prohibit or restrict—(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, or administering such risks that are based on or not inconsistent with State law; or (2) a person or organization covered by this Chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwrit-

[46] Alexander, 469 US at 668-669.

[47] *Alexander*, 469 US at 677.

[48] *Alexander*, 469 US. at 672-673.

[49] See *Mason Tenders District Council Welfare Fund v. Donaghey*, 93 Civ 1154 (JES) (SD NY Nov., 1993).

[50] As we will see, the ADA's legislative history also suggests that ERISA covered welfare funds are entities covered under the ADA.

ing risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or (3) a person or *organization covered by this chapter from establishing, sponsoring, observing, or administering the terms of a bona fide plan that is not subject to State laws that regulate insurance . . . Paragraphs (1), (2), (3) shall not be used as a subterfuge to evade the purposes of Subchapter I and III of this chapter* (emphasis added)."

In one of the first federal decisions concerning the application of Section 12201(c)(3), *Mason Tenders v. Donaghey*, [51] the court was asked to determine whether the ADA prohibited a welfare benefit plan modification which virtually eliminated benefits for AIDS patients. [52] The Mason Tenders Welfare Fund had initiated a suit against both the EEOC and several welfare fund participants who had claimed discriminatory changes to the fund benefits. [53] The Fund sought a declaratory judgment that the ADA did not apply to ERISA covered welfare plans and that, even if did, this did not prohibit the capping or elimination of health benefits; a situation virtually identical to that encountered by the Fifth Circuit in *McGann* and the Eleventh Circuit in *Gwens* (except the court's decision would now be based upon the ADA rather than ERISA Section 510).

On November 19, 1993, the Fund moved for summary judgment and sought an order granting it the full relief contained in its complaint. In an oral decision issued from the bench, the court denied the Fund's motion and found that a genuine issue of material fact existed whether the fund's elimination of coverage for AIDS patients had violated the ADA. [See Transcript of Plaintiffs Summary Judgment Motion's Oral Argument, November 19, 1993, *Mason Tenders v. Donaghey*, 93 Civ. 1154 (JES), pp. 20-21.]

Despite plaintiff's arguments, the court determined that an ERISA fund was a covered entity under the ADA. The fact the statute provided that employer-supplied health insurance could not be used as a subterfuge to evade the purposes of the ADA indicated to the court that such funds were indeed covered entities. [54] Presiding United States District Judge John E. Sprizzo stated on the record that Congress had intended that the ADA apply to welfare plans: "Why talk about pension plans at all if there were no way in which an ERISA trustee could be liable under the ADA? . . . I wonder what Congress was talking about when they talked about a fund not being a basis to avoid the ADA if the ADA didn't apply in the first place to funds, which seems to be most of your argument . . . your argument flies in the face of the language of the statute which says the ADA applies notwithstanding any other provision of law; which would include ERISA. They specifically make reference to the fact that a fund is not a way to avoid liability under ADA, which seems to be redundant if there would be no liability under the ADA on the part of the funds." [55]

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[51] 93 Civ. 1154 (JES) (SD, NY).

[52] This suit was initiated on March 1, 1993 (as stated previously, *infra*, p. 41, In. 119, these plans are specifically exempted from modification or regulation by state law).

[53] The participants had filed charges with the EEOC alleging that the welfare fund had violated the ADA.

[54] In *EEOC v. Monroe Foods, Inc.*, Civ. No. Y-93-2925 (D MD, 1994), the District Court considered and rejected a similar claim that a jointly administered ERISA welfare fund was not an entity covered by the ADA. The court held that: "The EEOC and Johnson argue that under the ADA, the employers have a duty as employers, regardless of whether they actually manage the Fund, to ensure that the Fund did not include disability biased discriminatory provisions . . . It is clear they have presented evidence showing that the employers have a relationship with the Trustees. The employers incorporated in their collective bargaining agreements the creation of the Fund to administer health and other benefits to its employees . . . Again, these matters raise factual disputes as to whether or not the employers, directly or indirectly, had control over the Trustees' decisions and, again, preclude granting summary judgment." *EEOC v. Monroe*, Memorandum Decision, May 16, 1994 at 2. Like the court had in *Donaghey*, the *Monroe* court denied summary judgment and held that the case presented triable issues of fact.

[55] See Transcript of Oral Argument, November 19, 1993, *Mason Tenders v. Donaghey*, 93 Civ. 1154 (JES), at 4-8. Judge Sprizzo also premised his decision on 29 USC 1144(d), ERISA Section 514(d), which states: "by its own terms

That this was the result intended by Congress is borne out by the ADA's legislative history. The House Education & Labor Committee Report stated that: "This legislation [Section 501(c)] assures that decisions concerning the insurance of persons with disabilities which are not based on bona fide risk classification be made in conformity with non-discrimination requirements. Without such a clarification, this legislation could arguably find violative of its provisions any action taken by an insurer or employer which treats disabled person's differently under an insurance or benefit plan because they represent an increased hazard of death or illness." [56]

Thus, the plaintiff's argument that only ERISA covered the operation of the Mason Tenders District Council Welfare Fund was correctly rejected by the court. *McGann* and its progeny did not dictate that summary judgment be granted in this instance. This would have been the result had the court found that only ERISA provided the standards by which the trustee's conduct was to be judged.

Nevertheless, a decision contrary to *Donaghey* was issued two years ago by the New Hampshire District Court in *Carparts Distribution Center v. Automotive Wholesalers.* [57] This action involved an employee's suit against the Automotive Wholesalers Association of New England, Inc., Insurance Plan, which had placed a $25,000 life-time cap on benefits provided to individuals infected with the AIDS virus. Like McGann, this limitation was implemented immediately after the fund discovered that the plaintiff was HIV positive. The court held that although a direct employer might be considered a covered entity under the ADA, the fund which provided an employee's welfare benefits was not, and the plaintiff's ADA claim was dismissed.

The *Carparts* decision was, in large part, based upon the court's very limited interpretation of the ADA's definition of a covered entity. The court held that under the ADA a "covered entity is defined to include an employer, employment agency, labor organization, or joint labor-management committee. 42 USC 12111(2). Carparts, as the former employer of Randy Senter, qualifies as a covered entity. Paragraph 24 of plaintiff's amended complaint states that AWANE and [the] AWANE PLAN are also covered entities under Section 12111(2). This is incorrect. Neither AWANE nor AWANE PLAN qualify as a covered entity as that term is defined in the statute, as neither was an employer of Randy J. Serter." [58]

Under this court's interpretation of Section 12112(a), liability under the ADA could only fall upon a direct employer of a qualified disabled individual. [59] Since the ADA was inapplicable to the AWANE PLAN, its terms were subject only to the requirements of ERISA and ERISA's antidiscrimination provision. Furthermore, any ERISA action based on arguments rejected in *Gwens* and *McGann* will be unsuccessful.

Despite *Carpart's* strict construction of the ADA's definition of an employer, prior case law formulated under Title VII has advocated a more comprehensive view of what entities are covered by civil rights

(Footnote Continued)

ERISA shall not be construed to alter, amend, modify, invalidate, impair, or supersede federal law or any rule or regulation issued under such law." Plaintiffs argument that only ERISA guides the operation of its welfare fund was shown even to be erroneous by ERISA's own terms. The court concluded that there was no inherent incompatibility between the ADA and ERISA. See Transcript of Oral Argument, November 19, 1993, *Mason Tenders v. Donaghey*, 93 Civ. 1154 (JES), at 10-11.

[56] House Education & Labor Committee Report, 101-485 at 136-38 (1990 US Code Congressional & Admin. News 303, 419-21).

[57] *Carparts Distribution Center v. Automotive Wholesalers*, 826 FSupp at 583 (Dist NH, 1993).

[58] *Carparts Distribution Center*, 826 FSupp at 585.

[59] The court did make it clear that plaintiff's employer was culpable for violation of the ADA's nondiscrimination mandate if it discriminated on the basis of handicap with regard to allocation of available fringe benefits. *Carparts*, 826 FSupp at 585.

statutes. For example, in *Spin v. Teachers Insurance and Annuity Ass'n,* [60] a university professor sued her pension fund on the ground that its sex-based mortality tables violated Title VII. The Court of Appeals for the Second Circuit held that even though the pension fund was not the plaintiff's direct employer, it could still be found liable under Title VII since "it is generally recognized that the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer of an aggrieved individual' as that term has generally been defined at common law. *Spin v. Teachers,* 691 F2d at 1063."

Clearly, the conception of an employer in *Sprit* is as applicable to Title VII as it is to the ADA. [61] The weight of legal authority, as well as the ADA's legislative history, suggests that a more expansive definition of employer under the ADA is warranted, one which would include ERISA funds.

Having initially determined that the Mason Tenders Welfare Fund was a covered entity under the ADA, Judge Sprizzo was next required to ascertain whether a question of fact existed regarding the Fund's allegedly discriminatory conduct. If the *Donaghey* action had been decided in accordance with the Rehabilitation Act, all the plaintiff would have the burden to show for it to succeed on summary judgment was that its decision to eliminate benefits for AIDS patients was "substantially justified." As will be discussed, however, the ADA's "subterfuge" standard varies considerably from the Rehabilitation Act's substantial justification standard.

As a result of his analysis of the ADA's statutory language, Judge Sprizzo equated the ADA's concept of subterfuge with Title VII's notion of pretext. [62] "[T]he language of the statute suggests very strongly that this issue of whether what they have done or not done is a violation of the law turns upon whether it is or is not a pretext. I think the word "subterfuge" is another way to talk about pretext, and that entails factual issues that have to be tried. The question is, have you denied them benefits on the basis of what I call *bona fide* actuarial assumptions, or have you done something which looks like actuarial assumptions and is not? When I talk about the traditional analysis being applicable, they have the burden of proving that you have acted for discriminatory reasons. They don't have to prove bad faith or specific intent, but they have to prove, either on a disparate impact theory or a disparate treatment theory, that you have, in effect, discriminated against them because of their disability. I suspect your defense will be that you did what is good for the fund, based on good actuarial assumptions. That sounds to me like a pretext argument. I think subterfuge and pretext in the context of this argument are interchangeable. You have carved out this one assumption based on actuarial assumptions, and there will have to be a trial on this issue." [63]

[60] 691 F2d 1054 (2d Cir, 1982), cert. denied 469 US 881 (1984). See Grossman v. Suffolk County District Attorney's Office, 777 FSupp 1101 (ED NY, 1991) (a state retirement system created to administer public employers' retirement benefits was considered an employer under ADEA).

[61] There do not appear to be any reported cases in which the issue whether an employee benefit plan provided or subsidized by the federal government is a covered "program or entity" under Section 794 of the Rehabilitation Act is addressed.

[62] In traditional Title VII analysis, an employee may rebut an employer's "business necessity" defense to his or her *prima facie* Title VII action by showing that the defense was merely a pretext to mask the employer's underlying discriminatory motivation. See *McDonald Douglas Corporation v. Green,* 411 US 792 (1973), a decision which first established that the burden of proof in a Title VII case shifts between plaintiff and defendant once a prima facie case was set forth.

[63] See Transcript of Oral Argument, November 19, 1993. *Mason Tenders v. Donaghey,* 93 Civ. 1154 (JES) pp. 20-21. After summary judgment was denied, the court refused plaintiff's request for an immediate appeal. See Order dated September 1, 1994, *Mason Tenders District Council Welfare Fund v. Donaghey.* The action is presently scheduled to go to trial in mid-1995.

In *Donaghey*, if the defendant is ultimately capable of showing that the fund's underlying decision to eliminate benefits was a pretext to discriminate against employees infected with the AIDS virus, then the plaintiff's conduct is violative of the ADA. If the plaintiff can demonstrate that it had a sound actuarial basis justifying the plan's modification, then no violation has occurred.

Judge Sprizzo's decision provides some guidance on what Congress intended by the ADA's "subterfuge" terminology. [64] He analyzed this concept in relation to one already established under Title VII jurisprudence: pretext. Recent case law under the Age Discrimination in Employment Act (ADEA), which until recently also contained a subterfuge requirement, [65] provides some added insight into on how courts may interpret the ADA's subterfuge requirement.

The ADEA's notion of subterfuge was reviewed by the Supreme Court in *Public Employees v. Betts*. [66] The Court considered whether a state provided welfare benefit plan which excluded disability benefits to employees who retired over the age of sixty violated the ADEA. The Court found that a restriction on retiree's disability benefits did not violate the ADEA and that a plan was not a "subterfuge" unless it discriminated in a manner forbidden by the ADEA's other substantive provisions. [67] In effect, the burden falls on the plaintiff to prove that the "discriminatory" plan provision was intended to "serve the purpose of discriminating in *some non-fringe-benefit aspect of the employment relation.*" [68] Plaintiffs' ADEA claim was rejected since they were incapable of demonstrating that the plan's limitation was somehow intended to discriminate against them in some aspect of their employment relationship other than fringe benefit entitlement. [69]

If *Betts* is considered controlling, any attempt to apply the ADA to employee benefit entitlement would be futile. Implicit in a court's decision to follow *Betts* would be a determination that the ADA did not cover employee benefit plans. This is the result advocated by the *Mason Tenders District Council Welfare Fund's* counsel. The ADA's legislative history, however, reveals that the *Betts* decision was not intended to be followed by courts presented with ADA violations. According to the House Committee on the Judiciary's Report on the ADA, its substantive terms were meant to be applied to employee benefit plans.

"While a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles, or is related to actual or reasonably anticipated experience." [70]

Furthermore, according to one of the Act's key sponsors, the ADA's "subterfuge" term was not identical to the term

[64] 492 US 158 (1989). The EEOC's Technical Assistance Manual provides some additional assistance. It defines subterfuge as a "disability-based disparate treatment that is not justified by the risks or costs associated with the disability." EEOC Technical Assistance Manual at E-2.

[65] See 29 USC Section 621-634. Until recently, the ADEA stated that an employer may "observe the terms of . . . any *bona fide* employee benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this chapter." 29 USC 623(f)(2). In 1990, Congress passed the Older Workers Benefit Protection Act (OWBPA) which deleted ADEA's subterfuge requirement and substantively modified Section 623(f).

[66] In *Betts*, the Court held that the term subterfuge should be interpreted under ADEA according to its ordinary meaning as "a scheme, plan, stratagem, or artifice of evasion." *Betts*, 492 US at 167.

[67] *Betts*, 492 US at 177

[68] See Betts, 492 US at 181.

[69] It was the *Betts* decision which prompted the OWBPA amendment which eliminated the subterfuge provision in the ADEA. See fn. 171, infra, p. 60.

[70] H.R Report 485, 101st Congress 2d Session, pt 3, at 71 (1990).

as applied in *Betts*. ADA sponsor Senator Kennedy stated during the Senate debates on the ADA that "it is important to note that the term subterfuge as used in the ADA, should not be interpreted in the manner in which the Supreme Court interpreted the term in Betts. The term subterfuge is used in the ADA to denote a means of evading the purposes of the ADA. Under its plain meaning, it does not connote that there must be some malicious or purposeful intent to evade the ADA on the part of the insurance company . . . It also does not mean that a plan is automatically shielded just because it was put into place before the ADA was passed . . . The provision regarding subterfuge Section 501(C) should not be undermined by a restrictive reading of the term 'subterfuge' as the Supreme Court did in *Betts*." [71]

The actual application of the ADA's Section 501(c) awaits the decision of cases such as *Donaghey* and *Monroe Foods, Inc.* Tentatively, it appears that the concept of subterfuge as applied in litigation under the ADEA will be found inapplicable to the ADA. Judge Sprizzo appears to have recognized this by holding that the ADA applies to ERISA plans and that an ADA subterfuge is more comparable to Title VII pretext than a subterfuge as defined in ADEA litigation.

Conclusion

The tension between the ADA and ERISA is currently awaiting a judicial resolution. However, even if *Donaghey* ultimately holds that the plaintiff's elimination of welfare benefits was in fact a subterfuge with its ultimate purpose the evasion of ADA Title I, it would not mean that receipt of welfare benefits would automatically become an employee's vested right. Under ERISA, which remains unaffected by the ADA, welfare benefits may still be causally terminated. Furthermore, an employer may modify its welfare plan to place a benefit cap on *all* high-cost medical conditions so that no one infirmity, such as AIDS, HIV infection or cancer is singled out. In this situation no single group could protest that the modification is discriminatory. As long as an employer can prove that it has a sound actuarial basis for a plan modification, and that no subterfuge was intended, the ADA will not prohibit the employer's action.

Ultimately, if employees desire that their medical benefits will become a vested entitlement, a vesting provision should be negotiated (or a legislative amendment to ERISA adopted). Additionally, the ADA should be amended so that the concept of subterfuge is made more definite. Such an amendment might provide that a plan modification will be presumed to be a subterfuge if the total cost of coverage for the excluded medical condition is less than that of other illnesses actually covered by the plan. In such an instance it can be assumed that the only rationale for the exclusion is a discriminatory one.

However, even an ERISA vesting provision will not eliminate employees' concern that they be provided with adequate health insurance. Vesting would only occur if benefits were actually provided by their employer. As we have seen, there is no requirement in ERISA mandating that welfare benefits be part of an employees' compensation. In the final analysis, only a national health insurance plan can guarantee that medical insurance is accessible to all who require it.

[The End]

[71] 136 Congressional Record. 59,697 (daily ed. July 13, 1990).