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NOTE

UNSOLICITED INTERNAL COMPLAINTS: THE FALSE SENSE OF PROTECTION AGAINST ANTI-RETALIATION PROVIDED BY SECTION 510 OF ERISA

TIFFANY PETERSON*

INTRODUCTION

What would you do if you discovered a statutory violation that could affect the benefits of nearly everyone at the company you work for, including yourself? Even further, what if your job required you to report such violations in order to avoid personal liability?

The Employee Retirement Income Security Act (ERISA)¹ provides a specific provision—section 510—to prevent retaliation against whistleblowers who report such violations.² Unfortunately, the Federal Circuits are split on the scope of protection section 510 provides. This Note analyzes this split and

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1. Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001–1461 (2006).

2. 29 U.S.C. §1140 (2006) (prohibiting retaliation for exercising rights given by an employee benefit plan or ERISA, testifying before a proceeding related to ERISA or testifying before Congress related to a multiemployer plan).

suggests that section 510 should be interpreted to protect employees who, without being asked, report ERISA violations internally.

Part I provides a background of ERISA overall, describing the breadth of the preemptive and remedial scope of ERISA before focusing on section 510.³ Part II considers the issue of unsolicited internal complaints and how the circuits are split. Special attention is placed on the Third Circuit's most recent holding that unsolicited internal complaints are not afforded protection by section 510.⁴ Part III argues that unsolicited internal complaints need to be protected under section 510 for at least three reasons: (1) the protection of unsolicited internal complaints is consistent with congressional intent, (2) the text of section 510, as compared to other anti-retaliation provisions in other federal statutes, supports protection of unsolicited internal complaints, and (3) section 510 reflects the view of the Secretary of Labor, whose interpretative position is coherent and attractive as a policy matter.⁵ Part IV concludes by predicting future issues with remedies associated with section 510.⁶

BACKGROUND LAW: THE HISTORY OF ERISA

The Formation and Purpose of ERISA

ERISA was enacted to regulate employee benefit plans, which in the early 1970's affected millions of people and involved billions of dollars; today ERISA affects hundreds of millions of people and trillions of dollars.⁷ ERISA defines an employee benefit plan to include both welfare and pension plans, and the type of plan determines the protection provided under ERISA.⁸ Regardless, however, of whether the subject plan is an employee welfare plan or an employee pension plan, ERISA's purpose is to allow for a "uniform regulatory regime over employee benefit plans."⁹ To achieve this purpose, Congress created a preemption provision within ERISA. Preemption was

3. See *infra* Part I (outlining the reasoning and purpose underlying the creation of ERISA and the extensive preemption provisions contained within it).

4. See *infra*, Part II (describing the treatment by various circuit courts of the levels of protection afforded to unsolicited internal complaints under ERISA § 510).

5. See *infra* Part III (arguing that by denying certiorari, the U.S. Supreme Court failed to provide important guidance on the expansive protection for unsolicited internal complaints under ERISA § 501).

6. See *infra* Part IV (declaring that even if employees are protected when making unsolicited internal complaints, they would be only entitled forms of equitable relief).

7. See 29 U.S.C. § 1001(a) (recognizing that with the size and importance of employee benefit plans, the regulation was required by the national interest and to protect the revenue of the United States).

8. 29 U.S.C. § 1002(1) (defining welfare plans as providing medical or hospital benefits; benefits in case of death, unemployment, disability, or accident; benefits for vacation, day care, or scholarship; or for prepaid legal services); § 1002(2) (defining pension plans as including any program, fund, or plan created in order to endow with retirement income to either the employee or beneficiary).

9. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

enacted within ERISA to ensure “that the administrative practices of a benefit plan will be governed by only a single set of regulations.”¹⁰

The Expansive Reach of ERISA and Preemption

In order to make sure that the provisions of ERISA are fully achieved, ERISA liberally preempts state law.¹¹ Preemption is achieved by, first, statutorily providing for preemption of almost all state laws involving employee benefit plans.¹² In particular, section 514(a) of ERISA broadly states that “the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”¹³ The intent behind section 514(a) allows for “subject[ification] to a uniform body of benefits law . . . [and prevention of] the potential for conflict in substantive law.”¹⁴

Second, ERISA preempts state law that is outside of the statute’s express preemption provisions.¹⁵ This most frequently occurs in situations where the state law claim asserted by a plaintiff enlarges or conflicts with the remedies set forth in section 502.¹⁶ Section 502(a) of ERISA allows for civil enforcement so as to achieve “a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans.”¹⁷ In doing so, Section 502(a) defines who is able to bring a civil action and what remedies will be made available to them.¹⁸ More specifically, section 502(a)(1)(B), allows for the bringing of a civil action “by a participant or beneficiary . . . 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.”¹⁹

State law causes of action that duplicate or supplement the relief available under section 502(a)(1)(B) are preempted, on the grounds that ERISA provides

10. Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 11 (1987).

11. See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523–24 (1981) (prohibiting even indirect state regulation of pension and benefit plans as an intrusion on an exclusive federal concern).

12. Gabner v. Metro. Life Ins. Co., 938 F. Supp. 1295, 1301 (E.D. Tex. 1996).

13. 29 U.S.C. § 1144 (2006) (providing exceptions for certain state laws under ERISA 1003(b)).

14. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656–57 (1995) (quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990)).

15. See King v. Marriott Int’l Inc., 337 F.3d 421, 425 (4th Cir. 2003) (outlining the doctrine of complete preemption and Congress may eliminate certain remedies by preempting state law claims).

16. See *id.* (providing that state law claims falling under ERISA § 502 convert into federal claims and may be removed to federal court).

17. Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987)).

18. 29 U.S.C. 1132(a) (2006) (allowing plan participants, beneficiaries, fiduciaries and the Secretary of Labor to bring an action seeking a variety of remedies under law and equity).

19. § 1132(a)(1)(B).

the exclusive remedy for benefit denials.²⁰ Even if ERISA fails to provide a particular or requested remedy, this does not mean that each and every state-law remedy is preserved.²¹ In other words, preemption of a state law by ERISA may leave a plaintiff with no available remedy. This provision has been described as “disappointingly pernicious to the very goals and desires that motivated Congress to enact [these] laws in the first place.”²² But it is the law.

Anti-Retaliation Protection Under ERISA Section 510

Section 510 was designed to protect whistleblowers who report ERISA violations.²³ For the purpose of this Note, the relevant part of the provision states that “[i]t shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA] or the Welfare and Pension Plans Disclosure Act.”²⁴

This essentially offers protection in the following situations: “(1) when a person has given information in any inquiry or proceeding relating to ERISA; (2) when a person has testified in any inquiry or proceeding relating to ERISA; or (3) when a person is about to testify in any such inquiry or proceeding.”²⁵ Section 510 of ERISA protects “all employees covered by a benefit plan.”²⁶ Section 510 also covers fiduciaries, which are defined under ERISA as any person that “exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or . . . has any discretionary authority or discretionary responsibility in the administration of such plan.”²⁷ A fiduciary is “personally liable to make good . . . any losses to the plan resulting from each . . . [fiduciary] breach.”²⁸

20. See, e.g., *McSharry v. Unumprovident Corp.* 237 F. Supp. 2d 875, 882 (E.D. Tenn. 2002) (holding that whether or not a specific requested remedy exists under ERISA is immaterial, rather the courts must look at whether Congress designed a mechanism to enforce the duties of ERISA entities).

21. *Id.*

22. *Sanson v. General Motors Corp.*, 966 F.2d 618, 625 (11th Cir. 1992) (Birch, J., dissenting) (disagreeing with the majority’s holding that state law claims, even in instances where no conflict with federal law exists, are barred despite a lack of remedy under federal law).

23. *Id.* (Birch, J., dissenting) (juxtaposing a judicially created cause of action in state law with the statutory cause of action in ERISA § 510).

24. 29 U.S.C. § 1140 (2006).

25. Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal at 6, *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005) (No. 03–9186) [hereinafter Brief of the Secretary of Labor for Nicolaou].

26. Terry Collingsworth, *ERISA Section 510: A Further Limitation on Arbitrary Discharges*, 10 INDUS. REL. L.J. 319, 320 (1988).

27. 29 U.S.C. § 1002(21)(A) (2006).

28. 29 U.S.C. § 1109(a) (2006).

UNSOLICITED INTERNAL COMPLAINTS AND THE CIRCUIT SPLIT

Appellate courts differ on whether and how unsolicited internal complaints qualify as “inquiries or proceedings” that fall under the protection of the anti-retaliation provision of section 510 of ERISA.²⁹ Of interest is the Third Circuit’s recent opinion in *Edwards v. A.H. Cornell & Son, Inc.* After surveying the case law of the other circuits that have directly or indirectly considered the issue, the Third Circuit determined that unsolicited internal complaints do not deserve protection under section 510.³⁰

Decisions Affording Unsolicited Internal Complaints Protection Under Section 510 of ERISA.

In *Hashimoto v. Bank of Hawaii*,³¹ Jessica Hashimoto brought a complaint under state law alleging wrongful discharge after she had discussed possible ERISA violations with the employee’s supervisor.³² The Ninth Circuit found that the Hawaii Whistle Blowers’ Protection Act (“HWBPA”)³³ was preempted by ERISA, and in so holding, noted that section 510 of ERISA “may be fairly construed to protect a person in Hashimoto’s position if, in fact, she was fired because she was protesting a violation of law in connection with an ERISA plan.”³⁴ The Third Circuit described the Ninth Circuit’s holding as a conclusion that a “failure of section 510 to protect internal complaints would . . . inhibit the effectiveness of the anti-retaliation provision.”³⁵

The Fifth Circuit next considered the issue in the case of *Anderson v. Electronic Data Systems Corp.*³⁶ Shortly after George Anderson, a manager in EDS’ Domestic Treasury Department, contacted management about activities that would violate ERISA, he was demoted and eventually fired because of what Anderson claimed was “his refusal to commit illegal activities at [another employee’s] request and because of his reporting [those] activities to [Electronic Data Systems] Management.”³⁷ Although Anderson initially brought a state wrongful discharge cause of action, the action was removed to

29. See *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 220 (3d Cir. 2010), *cert. denied*, 2011 WL 767661 (2011) (No. 10–732) (holding that section 510 of ERISA does not protect an employee’s unsolicited internal complaints to management).

30. *Id.*

31. 999 F.2d 408 (9th Cir. 1993) (determining that unsolicited internal complaints are protected under section 510).

32. *Id.* at 409–10.

33. HAW. REV. STAT. § 378–62 (West 1987). The Hawaii Whistle Blowers’ Protection Act is similar to section 510 of ERISA and states that “an employer shall not discharge, threaten, or otherwise discriminate against an employee . . . because: (1) [t]he employee . . . reports or is about to report to the employer, or reports or is about to report to a public body, verbally or in writing, a violation.”

34. *Hashimoto*, 999 F.2d at 411.

35. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 221 (3d Cir. 2010).

36. See *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1314 (5th Cir. 1994) (“Anderson’s ‘claim falls squarely within the ambit of ERISA § 510’”).

37. *Id.* at 1312–13.

federal court on complete preemption grounds.³⁸ The Fifth Circuit determined that Anderson's claim "[fell] squarely within the ambit of ERISA § 510."³⁹

B. Holdings Declining Protection For Unsolicited Internal Complaints Under Section 510 of ERISA.

In *King v. Marriott International Inc.*, the Fourth Circuit decided that an employee's unsolicited internal complaint was not protected under section 510.⁴⁰ Karen King, a Marriott's benefits department employee, filed a complaint alleging wrongful discharge under state law that was later removed to federal courts since the action was completely preempted by ERISA.⁴¹ The Fourth Circuit relied heavily on one of their prior decisions regarding the Fair Labor Standards Act ("FLSA"), where it was determined that the term "proceeding" did not relate to internal complaints.⁴² Further, it determined that "testify" relates to "a formality that does not attend an employee's oral complaint to his supervisor."⁴³ Using this prior decision, the Fourth Circuit reasoned that the words "testified or is about to testify" imply that the following words of "inquiry or proceeding" require additional formalities than those provided by a verbal or written complaint to an employee's manager.⁴⁴ Without further information stating that King had testified or was about to testify, the only solid information provided by King's complaint is that she provided an unsolicited internal complaint to her supervisor, leaving her outside of the protections provided by section 510, according to the Fourth Circuit.⁴⁵

In 2005, the Second Circuit decided *Nicolaou v. Horizon Media, Inc.*⁴⁶ Horizon originally hired Chrystina Nicolaou as their director of Human Resources and Administration, where she was also a fiduciary of the company's benefits plan.⁴⁷ Nicolaou reported an ERISA violation to the Chief Financial Officer of Horizon.⁴⁸ When the CFO failed to acknowledge the situation, she

38. *Id.* at 1314.

39. *Id.*

40. *See King v. Marriott Int'l Inc.*, 337 F.3d 421, 425 (4th Cir. 2003) (holding that ERISA did not completely preempt a state wrongful discharge claim because the employee's actions were internal unsolicited complaints not protected under section 510 of ERISA).

41. *Id.* at 423.

42. *Id.* at 427. The provision of the Fair Labor Standards Act that the Fourth Circuit was comparing to section 510 states that it is unlawful for an employer "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this act, or has testified or is about to testify in any such proceeding." 29 U.S.C. § 215(a)(3) (2006).

43. *King*, 337 F.3d at 427.

44. *Id.*

45. *Id.* at 427–28 (explaining that the narrow interpretation of section 510 has led to a "much more circumscribed" remedy).

46. *See Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 328 (2d Cir. 2005) (holding that someone other than the employee must initiate the "inquiry" to allow protection of section 510 to be applicable for internal complaints).

47. *Id.* at 326.

48. *Id.*

contacted Silverman, an attorney for Horizon.⁴⁹ Nicolaou and Silverman then had a meeting with Koenigsberg, the President of Horizon, although it was not clear whether Silverman or Nicolaou had arranged the meeting.⁵⁰ Following the meeting, Nicolaou alleged that Horizon initiated a “campaign of retaliation” against her, resulting in her termination.⁵¹

Nicolaou brought suit against Horizon alleging wrongful termination after she informed management about issues with Horizon’s benefit plan including both violations of ERISA and FLSA.⁵² The District Court dismissed her section 510 claim on the grounds that section 510 does not protect an employee against retaliation for internal inquiries.⁵³ On appeal, the Second Circuit took a slightly different approach than that of the Fourth Circuit by stating that “the proper focus is not on the formality or informality . . . under which an individual gives information, but rather on whether the circumstances can fairly be deemed to constitute an ‘inquiry.’”⁵⁴ By looking at the differences between FLSA and ERISA, the Second Circuit determined that the use of the term “inquiry” (a different word than the term “proceeding”) allows section 510 to protect information gathered in an informal situation.⁵⁵ Although “proceeding” seems to imply a formality requirement, the use of the word “inquiry” seems

49. *Id.*

50. *Id.*

51. *See id.* at 326–27 (stipulating that soon after Horizon initiated the “campaign of retaliation” against Nicolaou, Mr. “Koenigsberg announced that he was bringing a ‘real’ Human Resources professional into the organization that would report directly to him. Soon afterward, ‘Nicolaou was formally advised that she was being replaced as the Director of Human Resources’ . . . This process of what the amended complaint characterizes as ‘professional trashing’ ended with Nicolaou being terminated by Horizon on November 7, 2000.”).

52. *See id.* at 327 (identifying the initial complaint on January 31, 2001, and an amended complaint on April 24, 2001. “The amended complaint states two causes of action for illegal retaliation arising from its allegations that Horizon demoted and eventually terminated Nicolaou after she had raised concerns about Horizon’s funding of its 401(k) plan: (1) a violation of sections 15 and 16 of the Fair Labor Standards Act (‘FLSA’), 29 U.S.C. §§ 201–219. And (2) a violation of section 510 of the Employee Retirement Income Security Act (‘ERISA’), 29 U.S.C. §§ 1001–1461 ¶¶ 48, 51.”).

53. *See id.* (granting Horizon’s motion to dismiss on September 25, 2003, in accordance with Federal Rule of Civil Procedure 12(b)(6). The District Court held that “Nicolaou had no cause of action under FLSA because sections 15 and 16 do not make it illegal for a firm to retaliate against an employee for bringing complaints within the firm.”) The Court first held that Nicolaou’s first complaint failed to state the appropriate relief requested and dismissed the section 510 claim. *Id.* The second dismissal came after Nicolaou amended the claim to state the appropriate relief requested. *Id.*

54. *See id.* at 330 (finding that even though the Fourth Circuit’s decision in *King v. Marriot Int’l, Inc.* focused on whether the circumstances amounted to an “inquiry,” “we do not believe that our holding is in conflict” with this ruling.)

55. *See id.* at 328–29 (agreeing with the Secretary of Labor that Congress’s choice of the word inquiry, rather than proceeding, serves as indicative intent “to ensure protection for those involved in the informal gathering of information”).

to cover any “request for information.”⁵⁶ The Second Circuit concluded that an “inquiry” does include an informal “request for information.”⁵⁷

An apparently significant factor for the Second Circuit was whether Silverman had proposed that he and Nicolaou meet with Koenigsberg.⁵⁸ If the meeting with Koenigsberg was actually suggested by Silverman, and not Nicolaou, then even though the meeting was not of a formality such as a proceeding, it would still fit the definition of an inquiry since it would have been a request for information.⁵⁹ Under the Second Circuit’s reasoning, if an internal complaint is made that is solicited, even if informal, it qualifies for protection under section 510.⁶⁰ The Third Circuit read the opinion to stand for the converse proposition, namely that an unsolicited complaint would, under the Second Circuit’s reasoning, not be information given in response to or as part of an inquiry, and thus not be protected.⁶¹

*Edwards v. A.H. Cornell & Son, Inc. and the Third Circuit’s Decision
Against Protection for Unsolicited Internal Complaints*

In *Edwards*, the Third Circuit held that section 510 did not protect unsolicited internal complaints. A.H. Cornell hired Shirley Edwards in 2006 to create a human resources department as well as act as the Human Resources Director.⁶² Edwards found several ERISA violations being committed by A.H.

56. *See id.* at 329 (holding that the term proceeding specifically refers to “the progression of a lawsuit or business before a court, agency, or other official body.”).

57. *See id.* (comparing definitions of inquiry and proceeding as found in *Black’s Law Dictionary*, which defined inquiry as “[a] request for information” and *Webster’s Third New International Dictionary*, which defined inquiry as “the act or an instance of seeking truth, information, or knowledge about something” or “a request for information.”).

58. *See id.* (“Although the amended complaint is unclear on the matter, Nicolaou’s counsel asserted at oral argument that it was Silverman’s suggestion that they meet with Koenigsberg.”).

59. *See id.* at 330 (“If Nicolaou can demonstrate that she was contacted to meet with Koenigsberg in order to give information about the alleged underfunding of the Plan, her actions would fall within the protection of section 510.”).

60. *See id.* (finding that under the assumption that Nicolaou was solicited for the information, then even if “[t]he meeting with Koenigsberg was something less than a formal proceeding . . . we believe it was sufficient to constitute an “inquiry” within the meaning of section 510.”).

61. *See Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 222–223 (3d Cir. 2010) (holding that the court in *Nicolaou* “held that unsolicited internal complaints are not protected activities,” essentially assuming that because the Second Circuit held that a solicited complaint was protected under section 510, that an unsolicited complaint could not be protected).

62. *Id.* at 218.

Cornell, and when she informed management that she “objected to” these ERISA violations, she alleged she was fired as a result.⁶³

After her termination from A.H. Cornell, Edwards brought a complaint stating a claim arising from section 510 of ERISA.⁶⁴ The District Court dismissed the case, concluding that Edwards’ “alleged objections and/or complaints to management” were not part of an “inquiry or proceeding.”⁶⁵ Because Edwards was not approached by anyone requesting information from her concerning the alleged violations, but instead voluntarily offered the information, that did not qualify as an “inquiry or proceeding,” and therefore was not protected under the section 510 anti-retaliation provision.⁶⁶

The Third Circuit affirmed. Because Edwards was not asked for information, but instead volunteered information, the Third Circuit concluded that Edwards’ complaint was not a part of an inquiry.⁶⁷ Edwards had argued that her complaint was in fact the inquiry itself, but the Third Circuit disagreed; section 510 only covers, by its terms “inquiries *made* of an employee.”⁶⁸

The Third Circuit was unpersuaded by Edwards’ argument that ERISA’s status as a remedial statute should justify a more expansive and protective reading of section 510.⁶⁹ According to the Third Circuit, “clear statutory language” settled the issue, and, in any event, if Congress had intended to allow for unsolicited internal complaints to be protected by section 510, it would have drafted section 510 using broad language similar to that of Title

63. *See id.* at 219 (stipulating that Edwards claims she discovered several ERISA violations including “allegedly administering the group health plan on a discriminatory basis, misrepresenting to some employees the cost of group health coverage in an effort to dissuade employees from opting into benefits, and enrolling non-citizens in its ERISA plans by providing false Social Security numbers and other fraudulent information to insurance carriers.” She alleges that because of her objections to these ERISA violations, she was terminated “on or around February 11, 2009.”).

64. *See id.* (“On March 18, 2009, Edwards filed a complaint in the United States District Court for the Eastern District Court of Pennsylvania against A.H. Cornell, Cornell, and Closterman, asserting an anti-retaliation claim under section 510 of ERISA and common law wrongful discharge.”).

65. *Id.* In granting the motion to dismiss on July 23, 2009, the Court cited *Nicolaou v. Horizon Media, Inc.* as the persuasive authority supporting the court’s ruling. *See id.*

66. *See id.* (“[p]laintiff does not allege that anyone requested information from her or initiated contact with her in any way regarding the alleged ERISA violations. Nor does she allege that she was involved in any type of formal or informal gathering of information. She states merely that she objected to or complained about certain conduct by Defendants.”).

67. *Id.* Additionally, the Third Circuit states that under *Black’s Law Dictionary’s* definition of a proceeding, there was no information leading to a determination that a proceeding occurred in Edwards’ situation. *Id.* *Black’s Law Dictionary* defined proceeding as “[t]he regular and orderly progression of a lawsuit” or the “procedural means for seeking redress from a tribunal or agency.” *Id.* (citing BLACK’S LAW DICTIONARY 1324 (9th ed. 2009)).

68. *Id.* at 223 (emphasis added).

69. *Id.* at 223–224.

VII. Congress avoided doing so.⁷⁰

The Third Circuit agreed with the Fourth Circuit's reasoning in *King*. In determining that while not all statutes relating to anti-retaliation limit the protection to formal actions, the wording of ERISA using the phrase "testified or is about to testify" modifies the two relevant terms of "inquiry or proceeding" to only involve actions that are of a more formal nature than unsolicited internal complaints.⁷¹ In contrast, the Third Circuit found the *Hashimoto* and *Anderson* decisions unpersuasive because both decisions failed to look at section 510 with any "detail."⁷²

The Third Circuit here dismissed Edwards' use of two prior Third Circuit decisions, *Brock v. Richardson*⁷³ and *Passaic Valley Sewerage Commissioners v. United States Department of Labor*,⁷⁴ since neither case discussed the applicability of Section 510 of ERISA.⁷⁵ In doing so, the Third Circuit held that since the other anti-retaliation statutes were not identical to ERISA, the previous decisions regarding other anti-retaliation provisions are not

70. *See id.* at 223–224. (Holding that "[a]lthough ERISA 'should be liberally construed in favor of protecting the participants in employment benefit plans,' (citing *IUE AFL-CIO Pension Fund v. Barker & Williamson Inc.* 788 F.2d 118,127 (3d Cir.1986)) this does not entitle us to ignore clear statutory language. *See Wolk v. UNUM Life Ins. of Am.*, 186 F.3d 352, 355 (3d Cir.1999) ("[A]bsent a clearly expressed legislative intention to the contrary, [ERISA's statutory] language must ordinarily be regarded as conclusive.") (quotations and citations omitted). If section 510 were ambiguous, we would construe the provision in favor of plan participants. However, as discussed above, we find the provision's plan meaning to be clear.").

71. *Id.* at 223.

72. *See id.* (agreeing with the Fourth Circuit's opinion in *King*).

73. 812 F.2d 121 (3d Cir. 1987).

74. 992 F.2d 474 (3d Cir. 1993).

75. *Edwards*, 610 F.3d at 224. The cases cited by Edwards discussed other anti-retaliation statutes such as FLSA Section 15(a)(3) in *Brock* and the Clean Water Act (CWA) Section 507(a) in *Passaic Valley*. *Id.*

dispositive.⁷⁶

In *Brock v. Richardson*, the Third Circuit held that an employer's mistaken belief that an employee has filed a report with the Wage and Hour Division when in fact the employee has not filed a report, allows the employee to be protected against anti-retaliation under FLSA.⁷⁷ George Banyas worked for Richardson Construction as a laborer, owned and operated by Homer and Virginia Richardson, from 1977 until he was fired in October 1980.⁷⁸ During this employment, Banyas was interviewed by an officer with the Wage and Hour Division about a complaint that Richardson Construction had not been paying overtime wages.⁷⁹ Despite not filing a complaint, upon being asked, Banyas did tell the Wage and Hour Division officer that he had previously

76. The court first analyzed the comparison between the case at hand and *Brock*. *Brock* pertained to an action brought by an employee under the Federal Labor Standards Act (FLSA), alleging that the employee was discharged because his employer believed he had filed a complaint with the Wage and Hour Division of the Department of Labor, in violation of the FLSA. The court found *Brock* distinguishable from the case before it, as it concerned a different issue in the context of a different statute. We examined in *Brock* whether 'an employer's [mistaken] belief that an employee has engaged in protected activity is sufficient to trigger application of the anti-retaliation provision of the FLSA, and held in the affirmative. We did not address whether section 15(a)(3) of the FLSA protects internal complaints. However the court holds that even if the FLSA does in fact protect internal complaints, Section 15(a)(3) of the FLSA and section 510 of ERISA are not identical. Section 15(a)(3) of the FLSA extends broadly to persons that have 'filed any complaint,' without explicitly stating the level of formality required. 29 U.S.C. § 215(a)(3). Section 510 of ERISA, in contrast, extends only to persons that have 'given information or [] testified' in an 'inquiry' or 'proceeding.' 29 U.S.C. § 1140. The word complaint is not even used. Therefore, the conclusion that internal complaints are protected under the FLSA does not required a parallel conclusion under ERISA's distinct statutory language. See *id.* at 224–225 (finding that neither *Brock* nor *Passaic Valley* are dispositive in the case at hand) (internal quotations omitted).

The court then turned to its analysis of *Passaic Valley Sewerage Comm'r v. U.S. Dept. of Labor*, where the court previously examined whether intracorporate complaints are protected under section 507(a) of the [Clean Water Act]. The court held that: Although it might appear so at first glance, *Passaic Valley* is not dispositive here for a couple of reasons, not the least of which is that *Passaic Valley* addresses section 507(a) of the CWA, not section 510 of ERISA." The court also held that this case is not dispositive of the present case because "we did not state in *Passaic Valley* that the term 'proceeding' is necessarily ambiguous in all anti-retaliation provisions. Rather, we expressly stated that the term 'proceeding' is ambiguous 'within § 507(a) of the Clean Water Act[.]'" *Passaic Valley*, 992 F.2d at 478 (emphasis added). The court also distinguished *Passaic Valley* from the present case as *Passaic Valley* "gave Chevron deference to the Secretary of Labor's 'reasonably permissive construction' that 'all good faith intracorporate allegations are fully protected from retaliation under § 507(a)[.]'" *Id.* at 480. Contrary to the Secretary's suggestion here, we do not likewise owe Chevron deference to the Secretary's allegedly consistent reading of section 510. (internal quotations omitted).

77. *Brock*, 812 F.2d at 121–123 (specifying the purpose of the Fair Labor Standards Act (FLSA) was to protect certain activity and that the discharge of an employee based on mere suspicion of the employee's engagement in protected activities was impermissible under the FLSA). William E. Brock, the plaintiff, was the Secretary of Labor at the time.

78. *Id.* at 122.

79. *Id.*

not been paid for overtime hours worked at Richardson Construction.⁸⁰ Three days after Banyas talked to the Wage and Hour Division officer he was fired.⁸¹ After his termination, Banyas then filed a complaint with the Wage and Hour Division alleging discriminatory discharge and Donald Swanson was sent to investigate.⁸² Homer claims that Banyas was fired for “careless work habits, poor performance and belligerent attitude.”⁸³ However, Virginia later told the Assistant Area Director of the Wage and Hour Division that Banyas was fired “because she believed he had filed a complaint with the Wage and Hour Division.”⁸⁴

Based on these facts, the Third Circuit held that the anti-retaliation provision of FLSA applies when the employer mistakenly believes an employee filed a report and fires the employee on this belief—even though the employee never filed a report.⁸⁵ However, the Third Circuit in *Edwards* quickly dismissed the use of its prior decision in *Brock* since *Brock* was not deciding whether an internal complaint was protected under an anti-retaliation statute.⁸⁶ This is in conflict with the Third Circuit’s reliance on *King*, which directly compared and contrasted ERISA and FLSA to determine if internal complaints are protected.⁸⁷ From *Edwards* it appears that the Third Circuit only relies on interpretations of other anti-retaliation provisions when it likes the particular interpretation.

The Third Circuit additionally dismissed *Edwards*’ use of *Passaic Valley* as precedent, even though the court in *Passaic Valley* was deciding whether an employee’s consistent intracorporate complaints allowed protection under the anti-retaliation act within the Clean Water Act (“CWA”).⁸⁸ In *Passaic Valley*, Joseph Guttman, an employee of Passaic Valley, filed numerous reports to his superior stating that a system used by Passaic Valley was in violation of provisions of the CWA.⁸⁹ Passaic Valley subsequently reorganized the

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 122–123. Virginia later stated to Donald Swanson that Banyas was fired because “he was a troublemaker, had caused them problems with the government and the union, and had ruined equipment and not done jobs properly.” *Id.* at 122.

85. *Id.* at 125 (“the discharge of an employee in the mistaken belief that the employee has engaged in protected activity creates the same atmosphere of intimidation as does the discharge of an employee who did in fact complain of FLSA violations”).

86. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 224 (3d Cir. 2010) (noting *Brock* was not applicable since the *Brock* court did not determine whether internal complaints were protected under the FLSA).

87. *See id.* at 221 (focusing on the proper scope of the phrase “inquiry or proceeding” the court analogized section 510 to the anti-retaliation provision in the FLSA).

88. *Passaic Valley Sewerage Comm’r v. U.S. Dept. of Labor*, 992 F.2d 474, 475 (3d Cir. 1993) (holding the employer’s discharge of its employee violated the whistle-blower provision of the Clean Water Act).

89. *Passaic* 992 F.2d at 476. (Guttman was PVSC’s Chief of Laboratory and Stream Pollution Control and expressed concern to his supervisor and company officials about PVSC’s procedure used to monitor wastewater discharges by PVSC’s industrial customers.)

company, yet the only job eliminated in this reorganization was Guttman's.⁹⁰

In determining if Guttman was protected against anti-retaliation under the CWA, the Third Circuit determined that the term "proceeding" was ambiguous.⁹¹ Therefore, the Third Circuit looked at the purpose of the statute and its legislative history to determine that the term "proceeding" should be interpreted to encompass intracorporate complaints.⁹² However, the Third Circuit in *Edwards* found this comparison unpersuasive and subsequently dismissed Edwards' reliance on the *Passaic Valley* case.

UNSOLICITED INTERNAL COMPLAINTS COMMAND PROTECTION

In denying certiorari in *Edwards*, the United States Supreme Court has missed an important opportunity to bring uniformity to the law. The Court should have granted certiorari, and held that section 510 affords protection to unsolicited internal complaints. Such a holding would have been consistent with the underlying intent of Congress and the views of the Secretary of Labor, and would have accurately reflected the different textual construction of section 510 as compared to anti-retaliation provisions in other federal statutes.

Congressional Intent

If the Third Circuit had more thoroughly examined the intent of Congress, they would have discovered that section 510 is "viewed . . . as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits."⁹³ The use of anti-retaliation provisions is usually provided to "encourage employees to report potential violations and assure the cooperation on which accomplishment of ERISA's protective purposes depends."⁹⁴

90. *Id.* at 477 ("The termination decision was purportedly made strictly upon the fiscal needs of the PVSC and Guttman's lack of seniority, and 'had nothing to do with individual personalities.'").

91. *Id.* at 478. The relevant portion of the CWA states: "No person shall fire, or in any other way discriminate against . . . any employee . . . by reason . . . that such employee . . . has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the [Clean Water Act]." 33 U.S.C. § 1367(a) (2011).

92. *Id.* (finding that the statute's purpose is to encourage employees to report violations and to afford broad protection against anti-retaliation). If employees are required to make formal complaints, the purpose of the statute would be lost. *Id.*

93. *Inter-Modal Rail Emp. Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990)).

94. Brief for the Secretary of Labor as Amicus Curiae in Support of Appellant For Reversal at 13, *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010) (No. 09-3198).

By narrowly construing the terms of section 510 as the Third Circuit has done in *Edwards*,⁹⁵ a key objective of the provision is frustrated. Narrow interpretation of section 510 allows, and perhaps even encourages, management to intervene in the process of creating a formal complaint by the employee, which would be protected under section 510 of ERISA.⁹⁶

In determining that unsolicited internal complaints are not protected, courts are allowing employers to interrupt a complaint before it is made. This discourages employees from reporting violations. As the Ninth Circuit put it:

[t]he normal first step in giving information or testifying in any way that might tempt an employer to discharge [an employee] would be to present the problem first to the responsible managers of the ERISA plan. If [an employee] is then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistleblower before the whistle is blown.⁹⁷

While an employee may only be making a moral decision in deciding whether or not to report an ERISA violation, a fiduciary risks more than moral self-worth in deciphering if and how to report an ERISA violation. Under ERISA, if a fiduciary “has knowledge of a breach by such other fiduciary,” liability will be on the fiduciary “unless he makes reasonable efforts under the circumstances to remedy the breach.”⁹⁸ Therefore, in order for a fiduciary to avoid personal liability under ERISA, they are encouraged “to take steps to remedy perceived improprieties in plan operations.”⁹⁹ As a result, employees who are plan fiduciaries, like Nicolaou, are apparently left without protection unless an inquiry is made upon them even though it is in their own personal best interest to report the ERISA violation.¹⁰⁰ Consequently, the writing of section 510 to have no “exceptions for fiduciaries,” only exemplifies the need

95. See *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 225–226 (3d Cir. 2010) (concluding that the ERISA statutory language is distinguishable from the FLSA language and the fact that internal complaints are protected under the FLSA does not automatically render them protected under ERISA).

96. See *McLean v. Carlson Cos., Inc.*, 777 F. Supp. 1480, 1484 (D. Minn. 1991).

97. *Edwards*, 610 F.3d at 221 (quoting *Hashimoto v. Bank of Hawaii*, 999 F. 2d 408 (9th Cir. 1993)).

98. 29 U.S.C. § 1105(a)(3) (2011) (“[A] fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances: (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (2) if, by his failure to comply with section 404(a)(1) [29 U.S.C. § 1104(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.”)

99. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 331 (2d Cir. 2005) (Pooler, J., concurring).

100. *Id.* at 330 (majority opinion).

of section 510 to provide protection for unsolicited internal complaints in order to satisfy Congress's intent.¹⁰¹

In summary, allowing protection of unsolicited internal complaints under section 510 of ERISA will further Congress's ultimate goal of protecting employee benefit plans and the employees who benefit from these plans by allowing for availability of the court system and remedies.¹⁰² Therefore, when defining the terms of section 510 to determine if they are ambiguous, courts need to view and consider the intent behind those words placed by Congress in the creation of ERISA. In viewing the intent behind the words, it is clear that Congress' intent when creating ERISA demands a broader interpretation to allow protection for unsolicited internal complaints.¹⁰³

Other Anti-Retaliation Provisions Are of Limited Value in Determining if ERISA Protects Unsolicited Internal Complaints

Several courts have made comparisons regarding the language of section 510 of ERISA to various other anti-retaliation provisions, including most commonly FLSA and Title VII.¹⁰⁴ Neither of the abovementioned statutes, however, provides statutory language identical to that of section 510 of ERISA.¹⁰⁵ For the aforementioned reasons, ERISA cannot usefully be compared to other anti-retaliation provisions when a court is attempting to determine the scope of 510; instead, the courts should look to congressional intent, the dictionary, and the Secretary of Labor's interpretations to decide that it does protect unsolicited internal complaints.

For example, the Fourth Circuit wrongly compared section 510 of ERISA to the FLSA in determining that the "scope of the phrase 'inquiry or proceeding'" is limited to formalities of a greater extent than those of "written or oral complaints made to a supervisor" including legal or administrative in nature as previously determined from *Ball v. Memphis Bar-B-Q Company*.¹⁰⁶ The Fourth Circuit's comparison of ERISA and FLSA failed to account for differences in the respective statutory texts, namely ERISA's use of the word "inquiry."¹⁰⁷

101. *Id.* at 331 (Pooler, J., concurring) (explaining that fiduciaries must have protection in the initial stages of reporting to properly carry out their function).

102. *See* 29 U.S.C. §1001(b) (2006).

103. *Id.* ("It is hereby declared to be the policy of this chapter to protect interstate commerce and interests of participants in employee benefit plans and their beneficiaries . . . by providing for appropriate remedies, sanctions, and ready access to the federal courts.").

104. *See* *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 221 (3d Cir. 2010), *cert. denied*, 2011 WL 767661 (2011) (No. 10-732) (comparing the anti-retaliation provision in the Fair Labor Standards Act (FLSA) to section 510 of ERISA, arguing that the statutory language of the FLSA and section 510 are different and do not compel equivalent anti-retaliation conclusions); *King v. Marriott Int'l Inc.*, 337 F.3d 421 (4th Cir. 2003) (utilizing prior decision of the court where it held the FLSA contains narrower language than Title VII and thus does not protect intra-company complaints).

105. *Edwards*, 610 F.3d at 224.

106. *Ball v. Memphis Bar-B-Q Company*, 228 F.3d 360, 364 (4th Cir. 2000) (arguing the FLSA anti-retaliation provision protects employees only if there is a pending formal proceeding).

107. *Compare* 29 U.S.C. § 1140 (2006) *with* 29 U.S.C. § 215(A)(3) (2006).

When the Third Circuit's decision in *Edwards* turned upon the definition of the word inquiry,¹⁰⁸ the Court appeared to realize the impact of the word inquiry being used in section 510 of ERISA but not in FLSA or Title VII.¹⁰⁹ Nonetheless, it followed *King v. Marriott International, Inc.*, in deciding that "inquiry or proceeding" requires a more formal action than an internal unsolicited complaint.¹¹⁰ By the Third Circuit following the *King* holding, it accepted the Fourth Circuit's reasoning in *King* which was derived from the comparison of ERISA and FLSA when it failed to provide a different analysis reaching the same conclusion.¹¹¹ Although the Third Circuit claims it did not compare ERISA with other anti-retaliation provisions—in a way it did exactly that.

A superior approach would have been to determine the plain meaning of the word "inquiry" by using Black's Law Dictionary, which defines the term as a request for information. Moreover, if the Third Circuit had consulted the definition of inquiry provided by Webster's Third International Dictionary, which defines an inquiry as "an act or an instance of seeking truth, information or knowledge about something," it would have been clear that in "seeking [the] truth" an employee would be covered for "giving information" through an unsolicited internal complaint in order for the truth of the violation to be uncovered.¹¹²

Another reason the courts should not seek to compare and contrast ERISA with other anti-retaliation provisions is the use of the modifying word "any" before "inquiry" in section 510 of ERISA. By modifying the word inquiry by the use of any, this allows the inference that section 510 should accommodate multiple types of complaints. The Supreme Court has determined that "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"¹¹³ This stated definition of any should be applied to the following word of inquiry to indicate that there should be no discrimination as to what "given information" means in relation to an inquiry." The word any undermines the Third Circuit's conclusion that inquiry does not allow for "inquires made by an employee."¹¹⁴ In order to fulfill the expansive meaning of any, it is imperative for the courts to first apply the broader definition of inquiry, as discussed above, to include employees who are searching for the truth in addition to allowing for multiple types of inquiries to be protected, regardless of whether the employee is being inquired of or doing the inquiring. Finally, in comparing FLSA and Title VII, while the word any does appear in both FLSA and Title VII, neither provision contains the word inquiry. Therefore, the direct comparison of the use of the word any in the various anti-retaliation provisions

108. *Edwards*, 610 F.3d at 223.

109. *Id.* at 224–25.

110. *Id.* at 223.

111. *Id.*

112. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1167 (1993).

113. *Dep't of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).

114. *Edwards*, 610 F.3d at 223.

would be flawed since any would be a modification to a different term creating a different analysis.¹¹⁵

This is not to say that there is no persuasive weight in comparing ERISA to other anti-retaliation provisions. There are some similarities between ERISA and other anti-retaliation provisions, particularly between ERISA and FLSA.¹¹⁶ However, this persuasive weight is not enough for courts to rely on for two reasons. First, there will be different interpretations based on different words included or excluded from the individual anti-retaliation provision. For example, the word inquiry is included in ERISA but not in FLSA.¹¹⁷ Second, if courts rely on interpretations under FLSA to decide ERISA, they would simply be replacing one circuit split with another since similar circuit splits are occurring in determining if FLSA provides protection against anti-retaliation for internal complaints.¹¹⁸

Whether or not the court finds interpretations of other anti-retaliation provisions persuasive, it is clear that not all anti-retaliation provisions are created equally. Allowing interpretation of either FLSA or Title VII to be adopted as the correct interpretation of ERISA without providing a detailed explanation will undoubtedly increase the amount of circuit splits and add to the confusion. Section 510 of ERISA insists upon the interpretation of its terms to be decided by congressional intent and should be distinguished from various anti-retaliation provisions.

*The Secretary of Labor's Interpretations Regarding Section 510 of ERISA
Should Be Instructive to the Court.*

The Secretary of Labor has, in various amicus briefs, insightfully explained why section 510 should encompass protection for unsolicited internal complaints.¹¹⁹ The views of the Secretary of Labor should be more strongly considered by the courts for two reasons. First, the Secretary's position should be instructive because the "Secretary [of Labor] has primary enforcement and regulatory authority for Title I of ERISA" allowing the Secretary of Labor to have more expertise in dealing with section 510 of ERISA.¹²⁰ Second, section

115. See 42 U.S.C. § 2000e-3(a) (2006); see also 29 U.S.C. § 215(a)(3) (2006).

116. Compare 29 U.S.C. § 1140 (2006) with 29 U.S.C. § 215(a)(3) (2006).

117. See 29 U.S.C. § 1140 (2006); see also 29 U.S.C. § 215(a)(3) (2006).

118. *Edwards*, 610 F.3d at 224 (finding that FLSA affords protection for internal complaints are the First, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits). See *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 41 (1st Cir. 1999); *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 626 (5th Cir. 2008); *E.E.O.C. v. Romeo Cmty. Sch.*, 976 F.2d 985, 989 (6th Cir. 1992); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975); *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); *E.E.O.C. v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989). However, two circuits have held that FLSA does not afford protection for internal complaints. See *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993); *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 364 (4th Cir. 2000).

119. See generally Brief for the Secretary of Labor for *Edwards*, *supra* note 94. See also Brief of the Secretary of Labor for Nicolaou, *supra* note 25, at 6.

120. 29 U.S.C. § 1001 (2006).

510 of ERISA needs to be interpreted in such a way to allow the Secretary of Labor the ability to effectively enforce and regulate section 510 of ERISA.

In regards to the first issue, the Secretary of Labor has time after time interpreted section 510 to encompass unsolicited internal complaints without comparing ERISA to other anti-retaliation provisions.¹²¹ In light of this, the Third Circuit rejected the Secretary's analysis but did little to explain why.¹²² The Third Circuit looked to the definition of inquiry and proceeding and then simply pushed the brief aside without looking to the substantive argument provided by the Secretary of Labor.¹²³ The Third Circuit failed to fully comprehend the extent of the Secretary of Labor's argument that "the text of section 510 should be read broadly to effectuate the remedial purposes of ERISA and the intent of Congress in drafting section 510."¹²⁴ While the Third Circuit did address the argument regarding urging an expansive reading of section 510 because it is a remedial statute, the Third Circuit did not satisfactorily address if the broad interpretation argued for by the Secretary of Labor would further congressional intent.¹²⁵

Second, the Secretary of Labor is well positioned to appreciate the consequences of a judicial holding that section 510 of ERISA does not protect unsolicited internal complaints. The number of people covered by ERISA is significantly greater than the amount of resources allocated to the Secretary of Labor and the Department of Labor.¹²⁶ Therefore, the Secretary of Labor relies on employees being able to report ERISA violations internally in order to be able to provide the most efficient enforcement of ERISA.

ERISA SECTION 510 REMEDIES AND THE UNANSWERED QUESTIONS

Regrettably, even if unsolicited internal complaints are protected, this may not provide a remedy for wrongfully terminated employees. Although ERISA is a remedial statute,¹²⁷ the only remedies provided to employees who have been retaliated against pursuant to section 510 are stated under section 502(a) (3) of ERISA, which allows for "appropriate equitable relief."¹²⁸ At first glance this may seem like a positive solution; however, courts have frequently and

121. Brief For the Secretary of Labor for Edwards, *supra* note 94, at 23. Although the Secretary of Labor does not look to other anti-relation provisions to determine the breadth of ERISA section 510, the Secretary instead suggests that since the FLSA and the CWA have been interpreted to encompass their purpose of protecting employees who complain to management from retaliation, section 510 should be interpreted similarly. *Id.* at 7-8.

122. *Edwards*, 610 F.3d at 222-23.

123. *Id.* at 223.

124. *See* Brief for the Secretary of Labor for Edwards, *supra* note 94, at 7.

125. *Edwards*, 610 F.3d at 223-24.

126. *Id.*

127. *Edwards*, 610 F.3d at 223.

128. 29 U.S.C. § 1132(3) (2006).

regularly determined that this only allows for “categories of relief that were typically available in equity” and do not include “compensatory damages.”¹²⁹ Therefore, when employees have been wrongfully fired and are without a salary, they may not seek damages awarding back pay.¹³⁰ Absent the appropriate remedies, employees may once again have the incentive not to report ERISA violations.¹³¹

But, *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), opened the door for the court to provide equitable relief, especially in suits concerning a claim by a beneficiary against a plan trustee, about the terms of the plan.¹³² Reasoning that the plan beneficiary is equivalent to a trustee and the plan itself is equivalent to a trust, “this is the kind of lawsuit that, before the merger of law and equity, [] could have [been] brought [] in a court of equity[,] not a court of law.”¹³³ And, as such allows for the court to award traditional equitable remedies: injunctive remedies, mandamus and restitution.¹³⁴ By affirming the District Court’s injunction, which required the plan administrator to pay beneficiaries money owed to them under the plan, the Court was providing for an equitable monetary remedy against a trustee called a “surcharge.”¹³⁵ But, even though the Court opened the door to providing monetary relief, through a surcharge, the scope of the relief is limited. As Justice Breyer articulates “to obtain relief by surcharge . . . a plan participant or beneficiary must show that the violation injured him or her.”¹³⁶

129. *Eichorn v. AT&T Corp.*, 484 F.3d 644, 654–56 (3d Cir. 2007) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993)). The relief was typically assessed in terms of equity include, but is not limited to, restitution and injunctions. *Mertens*, 508 U.S. at 255 (1993).

130. *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1248 (10th Cir. 2004) (holding that back pay is not an appropriate equitable relief for violations of section 510 of ERISA).

131. Ultimately, the decision on how to handle remedies if section 510 is found to protect unsolicited internal complaints is still down the road and is beyond the scope of this Note. In order to determine what remedies should be provided, the Court will need to balance the need for appropriate remedies in order for employees to be willing to report ERISA violations with creating an appropriate remedy to ensure that the intent of Congress is not lost.

132. 131 S. Ct. at 1879.

133. See *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 n.4 (2008); *Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1995).

134. *Id.* (citing *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 464 (1939); Third Restatement Sec. 95, and Comment a; G. Bogert & G. Bogert, *Trust and Trustees*, Sec. 862 (rev. 2d ed. 1995); 4 *Scott & Ascher* Subsection 24.2, 24.9, at 1659-60, 1686; Second Restatement Sec. 197) (“But the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief.”)

135. 131 S. Ct. at 1881.

136. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 220 (3d Cir. 2010), *cert. denied*, 2011 WL 767661 (2011) (No. 10–732).

CONCLUSION

The Supreme Court recently passed on their opportunity to provide uniformity to the law when it denied the petition for writ of certiorari in the case of *Edwards v. A.H. Cornell & Son, Inc.*¹³⁷ Unfortunately, this leaves both employees and employers in a midst of uncertainty given the current circuit split. Additionally, this circuit split conflicts with congressional intent, as it does not provide a uniform regulation of ERISA.

In allowing protection for unsolicited internal complaints under section 510 of ERISA, the multiple intentions of Congress when creating ERISA will be upheld. By creating a more manageable amount of alleged ERISA violations that the Secretary of Labor must address, the burden placed on the shoulders of the Secretary of Labor would be lifted. This would allow employees to inform their supervisor, manager, plan fiduciary, or sponsor of the violation. Further, the incentive to retaliate against their employees for reporting ERISA violations would be taken off the table.

Although the decision to protect unsolicited internal complaints under section 510 of ERISA will create additional questions about what remedies will be made available, the first step that needs to be taken is for the courts to re-examine congressional intent to find that it warrants protecting unsolicited internal complaints. With this intent of Congress in mind, the court then needs to broaden the interpretation of the word inquiry within section 510 of ERISA to allow protection of employees who are “seeking [the] truth” when reporting violations.¹³⁸ This combination of congressional intent, an expanded interpretation of the word inquiry, and policy considerations of the Secretary of Labor and policy should allow any court to find that unsolicited internal complaints are protected under section 510 of ERISA.

137. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 220 (3d Cir. 2010), *cert. denied*, 2011 WL 767661 (2011) (No. 10–732).

138. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1167 (1993).