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MARTYRS FOR A CAUSE: HOW ERISA'S ANTI-RETALIATION PROVISION HAS BEEN MISINTERPRETED TO DISADVANTAGE THOSE WHO PROPERLY REPORT EMPLOYER WRONGDOING

*Stacey L. Wagner**

INTRODUCTION

The Employee Retirement Security Act of 1974 (hereinafter ERISA)¹ is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.² ERISA protects the interests of participants and beneficiaries in private-sector employee benefit plans.³ ERISA does not mandate that employers maintain pension or retirement plans, but it regulates those that are implemented by employers.⁴ The fiduciary standards dictated by ERISA include those related to participation, meaning who must be covered, vesting, meaning how long a person must work in order to be entitled to a pension, and funding, meaning how much must be set aside each year in order to pay future pensions.⁵ ERISA consists of four titles.⁶ Title I covers welfare benefit and pension plans established or maintained by employers in the private sector.⁷ Title II of ERISA contains and expands on the Internal Revenue Code provisions.⁸ Title III of ERISA assigns to the Departments of Labor and the Treasury the responsibilities of enforcing the provisions of ERISA.⁹ Finally, Title IV of the Act establishes the Pension Benefit Guaranty Corporation.¹⁰ The statute imposes participation, funding, and vesting requirements on pension plans.¹¹ Furthermore, it sets various uniform standards, including rules concerning reporting, disclosure,

*I would like to thank Professor Barbara Fick for her guidance and wealth of knowledge regarding the intricate world of labor and employment law. I would also like to thank Joe Callaghan for his eternal support; the ideal colleague, classmate, and future husband.

1. P. L. 93 – 406, 88 Stat. 829 (Sept. 2, 1974). (ERISA is codified at §§ 1001 to 1453 of title 29, United States Code and in §§ 401-415 and 4972-4975 in the Internal Revenue Code.)

2. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).

3. PATRICK PURCELL & JENNIFER STAMAN, SUMMARY OF THE EMPLOYEE RETIREMENT SECURITY ACT OF 1974 (ERISA), CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 7-5700. Available at www.crs.gov (2009).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 7.

8. *Id.* at 48.

9. *Id.* at 55.

10. *Id.* at 56.

11. *Id.* at 56.

and fiduciary responsibility for both pension and welfare plans.¹²

As a part of this system, “Congress included various safeguards to preclude abuse and ‘to completely secure the rights and expectations brought into being by this landmark reform legislation.’”¹³ The main safeguard ensured by ERISA is section 510, the anti-retaliation provision.¹⁴ Therein, the Act provides insulation from retaliatory measures for employees who expose the company for which they work for various violations of the ERISA statute.¹⁵ Similar statutes can be found in both the Equal Rights Act of 1964 as well as the Fair Labor Standards Act.¹⁶

In determining the proper scope of the anti-retaliation provision of ERISA, the circuit courts have developed a split as to whether or not unsolicited, internal complaints to management regarding alleged violations of the statute are protected by this provision.¹⁷ The first two circuits to tackle this interpretive issue held that such allegations are properly insulated from employer retaliation, while the final three all found that these types of complaints are not, in fact, protected by ERISA section 510.¹⁸ However, with the proper analogizing to the very similar anti-retaliation found in the Fair Labor Standards Act, taken in conjunction with the Congressional motivation for passing the Act, it is evident that the first two courts to consider the proper scope of ERISA section 510 more correctly characterized this provision.

In Part I of this essay, I will explore the Congressional motivations behind the enactment of ERISA. I will discuss the current legislation in light of the failed Welfare and Pensions Plans Disclosure Act, which served as ERISA’s predecessor. I will also examine ERISA’s anti-retaliation provision, enacted to shield employees from employer retaliation if the employee exposes the employer’s ERISA violations. In Part II, I will examine the judicial interpretation of ERISA and the resulting circuit split regarding the proper reading of the anti-retaliation provision. Finally, in Part III, I will discuss the practical implications of interpreting the anti-retaliation provision as not extending to unsolicited, internal employee complaints to management, especially when read in conjunction with the similarly-worded but conceptually separated anti-retaliation provision located in the Fair Labor Standards Act, which was augmented in 2010.¹⁹

12. *Id.* at 7.

13. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990).

14. Employee Retirement Income Security Act, 29 U.S.C. § 1140 (2006).

15. *Id.*

16. Civil Rights Act of 1964, 42 U.S.C. § 2000e -3(a) (1969); Fair Labor Standards Act, 29 U.S.C.A. § 218c (2010).

17. *See Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311 (5th Cir. 1994); *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993) (both courts holding that the anti-retaliation provisions of § 510 of the Employee Retirement Income Security Act protects employees from termination following an internal, unsolicited complaint to management regarding alleged ERISA violations); *But see King v. Marriott Int’l. Inc.*, 337 F.3d 421 (4th Cir. 2003); *Nicolau v. Horizon Media Inc.*, 402 F.3d 325 (2^d Cir. 2005); *Edwards v. A. H. Cornell & Sons, Inc.*, 610 F.3d 217 (3^d Cir. 2010) (all maintaining the opposing approach, asserting that the plain language of § 510 of ERISA only protects against retaliation following reports that were ascertained pursuant to an “inquiry” or “proceeding”).

18. *Id.*

19. Although the anti-retaliation provision that was added to the Fair Labor Standards Act in 2010 relates

I. ERISA'S HISTORY

ERISA was enacted following the failure of The Welfare and Pensions Plans Disclosure Act²⁰ wherein the Congress required public disclosure of pension plan finances. It was evident that this greater transparency did not necessarily translate to a lack of misuse of pension funds by employers when the Studebaker automobile company terminated its underfunded pension plan in 1963, leaving several thousand workers and retirees without the pensions that they had been previously promised by their employer.²¹ This revealed the necessity of Congressional protection of such pensions and employee benefits.

During the early 1970s, both the Senate and the House of Representatives drafted legislation aimed at greater regulation of the private pension system.²² The final version of ERISA passed in 1974 included elements from the Senate and the House Labor Committees, the House Ways and Means Committee, and the Senate Finance Committee, and was signed into law by President Gerald Ford on Labor Day - September 2, 1974.²³ According to the United States Department of Labor, the number of persons benefitting from ERISA has grown from 11,507,000 in 1975 to 79,849,000 in 2006.²⁴

The Anti-Retaliation Provision of ERISA

ERISA is a long and complex body of legislation, rich with opportunity for judicial interpretation. However, the section of the Act that has become the center of the most judicial controversy over the past seventeen years has been section 510: the anti-retaliation provision.²⁵ This provision is codified at 29 U.S.C. section 1140, and is entitled "Interference with protected rights."²⁶ This section provides that:

to the Patient Protection and Affordable Care Act, its placement within the Fair Labor Standards Act and the language chosen by Congress are indicative of the turning of the Congressional tides to comport with the thesis of this note.

20. P. L. 85-836, 72 Stat. 997 (Aug. 29, 1958).

21. PATRICK PURCELL & JENNIFER STAMAN, SUMMARY OF THE EMPLOYEE RETIREMENT SECURITY ACT OF 1974 (ERISA), CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 7-5700. Available at www.crs.gov (2009).

22. *Id.* at 2.

23. *Id.* at 3.

24. *Id.* at 4.

25. See *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311 (5th Cir. 1994); *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993) (both courts holding that the anti-retaliation provisions of § 510 of the Employee Retirement Income Security Act protects employees from termination following an internal, unsolicited complaint to management regarding alleged ERISA violations); *But see King v. Marriott Int'l. Inc.*, 337 F.3d 421 (4th Cir. 2003); *Nicolau v. Horizon Media Inc.*, 402 F.3d 325 (2^d Cir. 2005); *Edwards v. A. H. Cornell & Sons, Inc.*, 610 F.3d 217 (3^d Cir. 2010) (all maintaining the opposing approach, asserting that the plain language of § 510 of ERISA only protects against retaliation following reports that were ascertained pursuant to an "inquiry" or "proceeding").

26. 29 U.S.C. § 1140 (1974).

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. section 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It 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 this chapter or the Welfare and Pension Plans Disclosure Act. In the case of a multiemployer plan, it shall be unlawful for the plan sponsor or any other person to discriminate against any contributing employer for exercising rights under this chapter or for giving information or testifying in any inquiry or proceeding relating to this chapter before Congress. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.²⁷

This section was enacted in order to keep employers from punishing employees or beneficiaries for reporting violations of the Act. Without such a provision, employers would effectively be permitted to bypass any responsibility resulting from disregarding ERISA simply by discharging any employee who reports a violation. Because of ERISA section 510, employees are safeguarded to an extent. However, because this provision juxtaposes language indicating that protection is afforded for any employee who provides information regarding ERISA violations with that indicating that an employee is insulated from retaliation resulting from his or her testimony in *any inquiry or proceeding*, the courts have split on whether unsolicited, internal accounts of such violations offered to managers are protected from retaliation. The fifth and ninth circuits were the first to wrestle with this concept.²⁸ Therein, both courts determined that such unsolicited, internal complaints were protected from retaliation pursuant to section 510 of ERISA.²⁹ However, in three more recent opinions, the fourth, second, and third circuits have disagreed with this initial impression of the proper interpretation of the anti-retaliation provision of ERISA.³⁰ In those cases, the courts departed from the notion that such unsolicited, internal complaints were intended to be protected by this

27. *Id.* (emphasis added).

28. See *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311 (5th Cir. 1994); *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993) (both courts holding that the anti-retaliation provisions of § 510 of ERISA protects employees from termination following an internal, unsolicited complaint to management regarding alleged ERISA violations).

29. 29 U.S.C. § 1140 (1979).

30. *King v. Marriott Int'l. Inc.*, 337 F.3d 421 (4th Cir. 2003); *Nicolau v. Horizon Media Inc.*, 402 F.3d 325 (2d Cir. 2005); *Edwards v. A. H. Cornell & Sons, Inc.*, 610 F.3d 217 (3d Cir. 2010) (all asserting that the plain language of § 510 of ERISA only protects against retaliation following reports that were ascertained pursuant to an "inquiry" or "proceeding").

provision, given the plain language of the act affording protection from reported violations that were procured pursuant to an *inquiry or proceeding*.³¹

II. JUDICIAL INTERPRETATION OF THE ANTI-RETALIATION PROVISION OF ERISA

The language that could be interpreted to indicate that the insulation from retaliation only applies to disclosures rendered in an inquiry or proceeding initially seemed to be irrelevant based on two circuit court cases from the mid-1990s.³² Both the fifth circuit in *Anderson v. Elec. Data Sys. Corp.* and the ninth circuit in *Hashimoto v. Bank of Hawaii* determined that these types of disclosures were within the spirit and purpose of the anti-retaliation clause of ERISA.³³ Unfortunately for employees who feel compelled to report violations of ERISA without being specifically questioned or prompted, the tide turned in the following ten years, with the fourth, second, and third circuits all focusing much more heavily on the plain language of the statute, strictly constructing the meaning of “inquiry or proceeding.”³⁴

The Ninth Circuit: Hashimoto v. Bank of Hawaii (1993)

The first court to address the purpose behind the anti-retaliation provision of ERISA was the ninth circuit in 1993.³⁵ In that case, Jessica Hashimoto originally brought the action against her former employer under the Hawaii whistle-blower statute. The statute read in relevant part,

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment because: (1) The employee, or a person acting on behalf of the employee, reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false.³⁶

31. *Id.*

32. *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311 (5th Cir. 1994); *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993).

33. *Id.*

34. *King v. Marriott Int’l. Inc.*, 337 F.3d 421 (4th Cir. 2003); *Nicolau v. Horizon Media Inc.*, 402 F.3d 325 (2^d Cir. 2005); *Edwards v. A. H. Cornell & Sons, Inc.*, 610 F.3d 217 (3^d Cir. 2010).

35. *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993).

36. Hawaii Whistle-Blowers Protection Act, Haw. Rev. Stat. §§ 378-62 (2010). It is important to note that the statute under which the plaintiff initially brought this action did not delineate any difference between a person who makes such disclosures pursuant to an investigation or proceeding and those who raise such concerns internally or those who do so without being solicited for such information.

Hashimoto asserted that on several different occasions between April 1989 and October 12, 1990, she had complained to her immediate supervisor and his superior about “potential and/or actual violations by the Bank of the reporting and disclosure requirements of ERISA.”³⁷ The specific catalyst for these allegations was Hashimoto’s contention that her supervisor had directed her to reimburse a former employee from a profit-sharing plan for taxes that that Hashimoto had “properly withheld a lump sum distribution” of his account.³⁸ Furthermore, Hashimoto claimed that a different supervisor had instructed that she recalculate another employee’s pension plan benefit and to use final pay rather than final average pay, which is violative of ERISA regulations.³⁹ In sum, Hashimoto claimed that her termination was a direct result of her internal, unsolicited complaints to her two immediate supervisors that the company had engaged in violations of ERISA’s dictates regarding the Bank’s pension plan, profit-sharing plan, and severance plan.⁴⁰ The Bank asserted that this claim was preempted by ERISA, as Hashimoto brought the claim under the Hawaii whistle-blower statute, and that there were applicable portions of ERISA that were implicated by her contentions.⁴¹

The ninth circuit noted that the breadth of preemption under ERISA is extraordinarily broad. Specifically, the court stated that any time a claim “relates to” an employee benefit plan the opportunities for preemption are vast.⁴² In this case, the court determined that the state law was, in fact, preempted, as it encroached on the relationships regulated by ERISA, further noting that employee transactions carried out to avoid benefit payments are exclusively federal in nature.⁴³ Most importantly for the purposes of this essay, the court in the ninth circuit determined that the case must be remanded and considered under section 510 – the anti-retaliation provision – of ERISA.⁴⁴ The court specifically mentioned 29 U.S.C. section 1140 as providing the requisite remedies for a “whistle-blower,” asserting that “This statute was clearly meant to protect whistle-blowers.”⁴⁵ Moreover, the court posited that the anti-retaliation provision of ERISA “may be fairly construed to protect a person *in Hashimoto’s position*, in fact, she was fired because she was *protesting a violation of law in connection with an ERISA plan*.”⁴⁶

Thus, in this, the seminal case regarding the proper interpretation of the anti-retaliation provision of the ERISA statute, the court explicitly noted that the provision properly and neatly applies to someone in the position of the plaintiff,

37. Hashimoto v. Bank of Hawaii, 999 F.2d 408, 409 (9th Cir. 1993).

38. *Id.* at 410.

39. *Id.*

40. *Id.*

41. Though ultimately the case was remanded for consideration under § 510 of the ERISA statute, the defendants did not intentionally call for this remand in order to assert that the claim had no merit because it was an unsolicited, internal complaint to management rather than an allegation that came about as a result of an inquiry or proceeding, as did defendants in later matters discussed in this essay.

42. Hashimoto v. Bank of Hawaii, 999 F.2d 408, 410 – 411 (9th Cir. 1993).

43. *Id.* at 411.

44. *Id.*

45. *Id.* (29 U.S.C. § 1140 is the codification of § 510 of ERISA.)

46. *Id.* (emphasis added).

Hashimoto. More specifically, the court implicitly determined that the anti-retaliation provision applies to someone who rendered unsolicited, internal complaints of violations of ERISA regulations to his or her immediate supervisors. This disclosure was not rendered pursuant to an inquiry or proceeding, and the court in the ninth circuit did not deem this distinction important. In fact, the court decided entirely contrary to this notion, indicating that this disclosure would be specifically protected under section 510 of ERISA.⁴⁷ Most importantly, the court in Hashimoto comprehended and dictated the functional difficulties that would be associated with failing to protect unsolicited, internal complaints of ERISA violations.⁴⁸ In so doing, the court asserted that,

The normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan. If one is then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown.⁴⁹

This most aptly summarizes the functional impossibilities associated with allowing protection from retaliation only to employees who have participated in some sort of an “inquiry or proceeding” rather than those who rendered the requisite information of their own volition.

The Fifth Circuit: Anderson v. Electric Data Systems Corporation (1994)

The following year, the fifth circuit was similarly faced with an interpretive issue relating to the scope of the anti-retaliation provision of ERISA.⁵⁰ In that case, George Anderson brought an action in state court against his former employer, Electric Data Systems Corporation, alleging wrongful discharge, tortious interference with prospective business and contractual relationships, and infliction of emotional distress. This case, similar to the Hashimoto case previously discussed, was rightfully removed to federal court, as the state claims were preempted by the relevant portions of the ERISA statute.⁵¹

Anderson had been employed by Electric Data Systems Corporation from October 1984 through October 1985, serving as the company’s Cash Manager in the Treasurer’s Department where his responsibilities included management of all cash operations, short term investing, and cash forecasting.⁵² Anderson alleged that he was demoted and subsequently discharged for failing to commit illegal acts and for reporting the activities of another employee, Douglas Crow, one of Anderson’s

47. *Id.*

48. *Id.*

49. *Id.*

50. *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311 (5th Cir. 1994).

51. *Id.* at 1312.

52. *Id.*

immediate supervisors.⁵³ Two of the illegal acts that were allegedly demanded of Anderson and which implicated Crow in the ERISA violations involved Electric Data Systems Pension plans.⁵⁴ Specifically, Anderson was asked to sign off on the approval or payment invoices on behalf of the pension portfolios under his management and supervision which had been retained by Crow without the approval of the pension trustees.⁵⁵ Such action is violative of the relevant ERISA provisions governing the proper management of such pension plans.⁵⁶ Anderson further asserted that he was asked to write up minutes for meetings that he did not attend in connection with the Electric Data Systems Corp. retirement plan, which is also violative of ERISA.⁵⁷ Anderson refused to commit these acts and subsequently reported them to management.⁵⁸ Following these disclosures, Anderson was demoted and then discharged because of his “refusal to commit illegal activities at Crow’s request and because of his reporting Crow’s own illegal or irregular activities to EDS Management.”⁵⁹

The fifth circuit, in determining that the state action was preempted by the ERISA statute, noted that section 510, the anti-retaliation provision, conflicts directly with the state wrongful discharge law, due to the fact that it was “carefully crafted” to expressly provide recourse for enforcing ERISA.⁶⁰ The court went on to assert that Anderson’s claims “[fell] squarely within the ambit of ERISA section 510” because “section 510 addresses discharges for exercising ERISA rights or for the purpose of interfering with the attainment of ERISA rights, *as well as* discharges for providing information or testimony relating to ERISA.”⁶¹

Importantly, in this case the court found that the state action was preempted because Anderson’s activities fell “squarely” within the purview of section 510 without reference to the fact that Anderson had rendered these disclosures of his own volition and without any prompting or persuading. Furthermore, these allegations were not pursuant to any type of inquiry or proceeding, but rather were raised internally and were unsolicited.⁶² The court did not focus on the language of the anti-retaliation provision that discusses an “inquiry or proceeding,” but rather looked to the nature and the functional purpose of ERISA section 510.⁶³ In fact, the court explicitly stated that section 510 of ERISA “*broadly* prohibits the termination or other adverse treatment of participants and beneficiaries for exercising their ERISA rights or for the purpose of interfering with the attainment of such rights, and prohibits the discharge or other adverse treatment of any person because he has

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 1313.

59. *Id.*

60. *Id.*

61. *Id.* (emphasis added).

62. *Id.* at 1312.

63. *Id.*

given information or testimony relating to ERISA.”⁶⁴ Finally, the court concluded its analysis by asserting that the ERISA preemption provision is “deliberately expansive” and is to be construed “extremely broadly.”⁶⁵ Though that particular passage refers to the ability to preempt state law rather than the anti-retaliation provision explicitly, the idea that the ERISA statute should be interpreted broadly is one which has been echoed throughout many courts and initially dictated by the Supreme Court of the United States.⁶⁶

Unfortunately for whistle-blowers like Hashimoto or employees who feel they are doing the right thing by exposing ERISA violations such as Anderson, in the years following these two landmark decisions other circuits have departed from this expansive and inclusive understanding of the proper interpretation of section 510 of the ERISA statute in favor of a literal construction focused on one clause of the anti-retaliation provision taken in isolation.⁶⁷

The Fourth Circuit: King v. Marriott International Incorporated (2003)

In *King v. Marriott International Incorporated*, the first case to hold that the anti-retaliation provision of the ERISA statute does *not* protect against complaints of ERISA violations that are rendered outside of a structured inquiry or proceeding about such violations, Karen King, much like her predecessors Hashimoto and Anderson, brought a state claim for wrongful discharge of employment.⁶⁸ King was employed by Marriott’s benefits department for many years.⁶⁹ She was known as a very good employee until 1999 when she learned that her supervisor had recommended that Marriott transfer millions of dollars from its medical plan into its general corporate reserve account.⁷⁰ King doubted the appropriateness of this transfer and expressed her concern both to her co-workers as well as her supervisor who had ordered the transfer.⁷¹ The following year, King was put in charge of the company’s benefit plan finances.⁷² She noticed the re-emergence of the previously mentioned transfer plan and again objected, fearing that the transfer was an ERISA violation.⁷³ King registered this objection with her supervisor, the person authorizing the transfers, and even went so far as to request an opinion letter from

64. *Id.* at 1315 (emphasis added).

65. *Id. quoting* Corcoran v. United HealthCare, Inc., 965 F.2d 1321, 1328 (5th Cir. 1992).

66. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) (indicating that the preemption provisions of ERISA should be widely applied to state law. Courts interpreting this decision have noted that the Supreme Court’s intention was to widely apply the ERISA statute, without explicit reference to the preemption provisions, as is noted in the Anderson v. Elec. Data Sys. Corp. decision discussed above).

67. *See* King v. Marriott Intern. Inc., 337 F.3d 421 (4th Cir. 2003); Nicolau v. Horizon Media Inc., 402 F.3d 325 (2^d Cir. 2005); Edwards v. A. H. Cornell & Sons, Inc., 610 F.3d 217 (3^d Cir. 2010) (all maintaining that the plain language of § 510 of ERISA only protects against retaliation following reports that were ascertained pursuant to an “inquiry” or “proceeding”).

68. King v. Marriott Intern. Inc., 337 F.3d 421, 422 (4th Cir. 2003).

69. *Id.* at 423.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

one of the company's in house attorneys.⁷⁴ King protested to one last transfer of funds from the company's medical plan and was fired within three months.⁷⁵ The company claimed that this discharge was due to King's on-going feud with a fellow employee, but King was convinced that her reporting and objecting to the several transfers was the true catalyst for her termination.⁷⁶

The fourth circuit determined, as did the ninth circuit and the fifth circuit before it, that the state law claim brought by King was properly preempted by the ERISA statute and should thus be brought in federal court. However, the fourth circuit departed from the previous construction of the anti-retaliation provision of the ERISA statute. While liberally construing the preemption provisions of ERISA, the court chose to contemplate a stricter and more literal approach with regard to section 510 thereof.⁷⁷ The court correctly noted that the only portion of section 510 possibly applicable to King is the sentence barring the "discharge of any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter."⁷⁸ However, instead of determining like the ninth circuit in *Hoshimoto* that King is the type of person meant to be protected by the anti-retaliation provision of the ERISA statute, or like the fourth circuit in *Anderson* that the defendant's activities fell "squarely" within the purview of the spirit of section 510, the court in *King* asserted that "The most immediate question is the proper scope of the phrase 'inquiry or proceeding'."⁷⁹

The court in the fourth circuit determined that the proper scope of the phrase utilized in the anti-retaliation provision of ERISA was that it referred only to an administrative or legal proceeding.⁸⁰ In so determining, the court looked to its construction of a "very similar provision" found in the Fair Labor Standards Act.⁸¹ The court determined that a "proceeding" did not refer to the making of an intra-company complaint.⁸² Rather, the fourth circuit explained that "testify" and "institute" both connoted "a formality that does not attend an employee's oral complaint to his supervisor." In so determining, the court looked to its decision in *Ball v. Memphis Bar-B-Q* wherein it contemplated the language of the FLSA.⁸³ In that case, the court concluded that the language employed in the FLSA's anti-

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 424.

78. *Id.* at 426.

79. *Id.* at 427.

80. *Id.*

81. See The Fair Labor Standards Act, 29 U.S.C. § 201 (1938) ("... it shall be unlawful for any person - . . . to discharge or in any other manner discriminate against an employee because such employee has filed a complaint or caused to be initiated any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee").

82. See *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000) (in that case, the fourth circuit noted that the "proceeding" necessary for liability... refers to procedures conducted in judicial or administrative tribunals," noting that a "proceeding" in the Fair Labor Standards Act was "modified by attributes of administrative or court proceedings.")

83. *King v. Marriott Intern., Inc.*, 337 F.3d 421, 427 (4th Cir. 2003) quoting *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000).

retaliation provision was narrower than that found in the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, which the court read to counsel a narrower interpretation of the scope of the FLSA's protection against employer retaliation.⁸⁴ The court analogized the wording "testified or is about to testify" used in the Fair Labor Standards Act with the wording "inquiry or proceeding" found in ERISA.⁸⁵ Because the court had interpreted the former wording as applicable only to an administrative or legal proceeding, the court in *King* determined that the wording in section 510 of ERISA is "limited to the legal or administrative, or at least to something more formal than written or oral complaints made to a supervisor."⁸⁶ The court went on to take liberties with the phrase "given information" found in the anti-retaliation provision of ERISA, asserting that this language is present for the sole purpose of allowing non-testimonial information, such as incriminating documents, to be covered by the provision.⁸⁷ This, however, is not asserted or implied anywhere in the text of section 510 of the ERISA statute.⁸⁸

It is important to note not only the linguistic similarities, but also the important discrepancies that currently exist between the anti-retaliation provision in the FLSA and that contained in ERISA. Although the fourth circuit in *King* determined that the two were essentially identical as they read in 2003, Congress has subsequently augmented the FLSA to include a provision that more definitively conceptually separates an employee who "gives information" to his or her employer and one who testifies in an inquiry or proceeding, as well as to add language that is even more analogous to that found in ERISA.⁸⁹ The current structure of the language found in the FLSA, therefore, seems to indicate that an employee who gives information regarding an alleged violation is as insulated from retaliation as one who testifies or is about to testify in a proceeding. Subsection (2) of the FLSA explains that an employee is protected from retaliation on the part of an employer when he or she: "provided, caused to be provided or is about to provide or cause to be provided to *the employer*, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title."⁹⁰ It is not until the following subsection that the Congress mentions testimony, providing protection for any employee if he or she "testified or is about to testify in a

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. See 29 U.S.C. § 1440 (1974).

89. See The Fair Labor Standards Act, 29 U.S.C.A. § 218c (2010) ("No employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or individual acting at the request of the employee) has. . . (2) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title (or amendment made by this title); (3) testified or is about to testify in a proceeding concerning such violation; assisted or participated, or is about to assist or participate in such a proceeding. . .)

90. Fair Labor Standards Act, 29 U.S.C.A. § 218c (2) (2010) (emphasis added).

proceeding concerning such violation.”⁹¹ The court in *King* attempted to explain the difference between the two concepts by asserting that giving information relating to any violation of the FLSA means rendering physical documents that might be relevant to such violations, asserting that “The phrase ‘gives information’ does no more than to ensure that even the provision of non-testimonial information (such as incriminating documents) in an inquiry or proceeding would be covered.”⁹² However, nothing in the language or the spirit of the FLSA suggests that this is the case. If such an interpretation was intended by Congress, there would seemingly be some reference thereto, or perhaps the wording might read, “*an* information” rather than merely protecting an employee who gives information. Furthermore, the fact that the FLSA allows for protection for an employee who gives such information to his or her employer directly suggests that internal, unsolicited complaints to management regarding violations of the FLSA would, in fact, be insulated from retaliation by the employer.⁹³

While I believe that the comparison between the Fair Labor Standards Act and the Employee Retirement Income Security Act is, indeed, appropriate, I believe that the fourth circuit misinterpreted the spirit, as well as the explicit language, of the FLSA. The language used in ERISA does mirror that used in the FLSA.⁹⁴ Additionally, although the two incidents of protection are not separated into subsections in ERISA as they currently are in section 218c of the FLSA, ERISA does provide protection from employer retaliation for an employee who “. . . has given information *or* has testified or is about to testify in an inquiry or proceeding.”⁹⁵ To interpret this passage as if there is no conceptual separation between an employee who renders information and one who testifies in an inquiry or proceeding is to give a cursory understanding to the passage. Furthermore, if the linguistic analogy between the FLSA and ERISA is, indeed, appropriate, then those interpreting the anti-retaliation provision of ERISA should take notice of the fact that in the FLSA the Congress explicitly stated that an employee is protected from retaliation from an employer even if the accusatory information could have been given directly to an employer.⁹⁶ Therefore, in *King v. Marriott International Incorporated*, the fourth circuit correctly analogized ERISA and the Fair Labor Standards Act, but the court misinterpreted the scope of protection afforded by the act, while simultaneously conflating the language in the anti-retaliation provision of ERISA.⁹⁷

91. Fair Labor Standards Act, 29 U.S.C.A. § 218c (3) (2010).

92. *King v. Marriott Intern. Inc.*, 337 F.3d 421, 427 (4th Cir. 2003).

93. *See* Fair Labor Standards Act, 29 U.S.C.A. § 218c (2) (2010) (allowing for protection for someone who reports information to an employer, the Federal Government, or the attorney general of his or her State).

94. *See* Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1974) (In the anti-retaliation provision of ERISA, the Congress refers to protection for any employee who has *given information or* has testified in a proceeding) (emphasis added).

95. Employee Retirement Income Security Act, 29 U.S.C. § 1140 (2006).

96. Fair Labor Standards Act, 29 U.S.C.A. § 218c (2010).

97. This is especially clear after the amendment to the anti-retaliation provision of the FLSA which slices the language more finely to demonstrate the protection for an employee who gives information and one who testifies in an inquiry or proceeding.

The Second Circuit: Nicolaou v. Horizon Media Incorporated (2005)

In 2005, the second circuit had a similar opportunity to interpret the proper scope and meaning of the anti-retaliation provision of the ERISA statute.⁹⁸ In that case, Chrystina Nicolaou had formerly worked for Horizon Media as the director of human resources and administration.⁹⁹ In this capacity, Nicolaou served as a fiduciary trustee of Horizon's 401 (k) employee benefits plan, which is regulated by ERISA.¹⁰⁰ Shortly after Nicolaou began working for Horizon, she "discovered a serious payroll discrepancy involving underpayment of overtime to all non-exempt employees of the [New York City] and Los Angeles offices."¹⁰¹ She further noticed that this discrepancy had been in existence for nearly a decade, and in fact resulted in what amounted to a historical under funding of the company's plan.¹⁰² Nicolaou immediately brought the discrepancy to the attention of the company's Chief Financial Officer, Jerry Riley, who advised Nicolaou to let the matter drop.¹⁰³ She subsequently raised the issue on two separate occasions with Stewart Linder, the company's Controller, who refused to address the matter.¹⁰⁴

Shortly thereafter, in October of 1999, Nicolaou became convinced that Horizon was not going to attempt to remedy the discrepancies in their finances which constituted violations of the ERISA statute.¹⁰⁵ Upon coming to this realization, Nicolaou contacted one of the company's in-house attorneys in the hopes that this would cause Horizon to take the matter more seriously and rectify the problem.¹⁰⁶ The attorney who Nicolaou contacted expressed deep concern at the gravity of the matter, lending credence to Nicolaou's inclination that the activities of the company might amount to serious ERISA violations.¹⁰⁷ The company's attorney later confirmed his fears regarding the ERISA violations and further investigated the matter on his own.¹⁰⁸ In November of 1999 Nicolaou and the company's attorney met with the president of the company.¹⁰⁹ It is unclear from the amended complaint who initiated this meeting, but it was clearly arranged to discuss the existence of the payroll discrepancy, and to urge the company's president to rectify the situation.¹¹⁰ According to Nicolaou, the president of Horizon did not make any type of commitment to rectify the situation during the course of the meeting, but rather appeared disturbed that this information was being

98. Nicolaou v. Horizon Media, Inc., 402 F.3d 325 (2d Cir. 2005).

99. *Id.* at 326.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

brought to his attention.¹¹¹

Within days of this meeting, the president of the company announced that he was going to bring in a “real” human resources professional who would report directly to him.¹¹² Shortly thereafter, Nicolaou was advised that her position had been assigned to someone else and that her job title from that point on would be “office manager.”¹¹³ At that point, Horizon had not yet hired someone to replace Nicolaou, but subsequently hired two individuals to take her former position.¹¹⁴ Finally, Nicolaou was terminated from her employment with Horizon on November 7, 2000.¹¹⁵ Nicolaou filed the case in federal court, alleging that the termination violated sections 15 and 16 of the Fair Labor Standards Act along with section 510, the anti-retaliation provision of ERISA.¹¹⁶ The district court for the Southern District of New York dismissed both claims, noting with regard to the ERISA claim that section 510 of the ERISA statute does not protect an employee who participates in an internal inquiry, “[and because Nicolaou] has not alleged that she participated in a protected activity, [she] therefore has failed to state a cause of action under ERISA.”¹¹⁷

In determining the merits of the district court’s ruling denying Nicolaou’s ERISA claim, the second circuit analogized the anti-retaliation provision of the ERISA statute with a similar provision of the Fair Labor Standards Act as well as a comparable provision of Title VII of the Civil Rights Act of 1964.¹¹⁸ In formulating this determination, the second circuit did not have the benefit of the FLSA provision that separates protection for an employee who gives information regarding a violation and one who participates in an inquiry or proceeding, as this amendment was not enacted until 2010.¹¹⁹ Rather, the second circuit analogized ERISA’s anti-retaliation provision to the FLSA section 215(a)(3) which makes it unlawful “to discharge or in any other manner discriminate against an employee because such employee has filed any complaint or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding.”¹²⁰ In determining whether or not this language only applied to formal complaints, and further analogizing this meaning with the language in the anti-retaliation provision of ERISA, the second circuit looked to its decision in *Lambert v. Genesee Hospital*.¹²¹ In that case, the court held that section 15(a)(3) of

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 326-327.

115. *Id.* at 327.

116. *Id.*

117. *Id.*

118. *Id.* *But see* King v. Marriott Intern. Inc., 337 F.3d 421, 427 (4th Cir. 2003) (although this provision of the Civil Rights Act is, admittedly, similar to both the FLSA and ERISA, the second circuit accurately depicted the FLSA and ERISA to be more similar in both purpose and language than the Civil Rights Act of 1964).

119. *See* Fair Labor Standards Act, 29 U.S.C.A. § 218c (2010).

120. Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1938).

121. Lambert v. Genesee Hospital, 10 F.3d 46 (2d Cir. 1993) *as cited in* Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 327 (2d Cir. 2005).

the FLSA does not apply to retaliation taken in response to internal, unsolicited complaints to management, but rather, it only applies to retaliation taken in response to a formal testimony in some type of investigation.¹²² The central reasoning behind that contention was a comparison with section 704(a) of Title VII of the Civil Rights Act of 1964¹²³ The provision relied upon in that case states,

“It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”¹²⁴

There, the court determined that the language in the Civil Rights Act which refers to an employee who “opposed any practice” encompasses an individual’s internal complaints to management, regardless of whether he or she files a formal charge. The court contrasted that language with the language employed by the FLSA’s whistle-blower provision that, according to the court, “limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor.”¹²⁵

The district court in *Nicolaou* asserted that it could find no meaningful difference between the FLSA’s whistle blower provision and the anti-retaliation provision of the ERISA statute.¹²⁶ Following the second circuit decision in *Lambert*, therefore, the district court concluded that “the inquiry contemplated by section 510 can only be formal, external inquiry.”¹²⁷ The second circuit was not persuaded by this simplistic reading of the anti-retaliation provision of the ERISA statute.¹²⁸ Rather, the court determined that the district court focused too exclusively on the term “proceeding” in section 510 of ERISA’s phrase any “inquiry or proceeding.”¹²⁹ The second circuit did not agree with the strict analogy between the whistle blower’s provision of the FLSA affording protection for any person who “has filed a complaint or instituted or caused to be instituted any proceeding under or related to” the FLSA and ERISA’s anti-retaliation provision which applies, according to the second circuit, to any “inquiry or proceeding.”¹³⁰ Namely, the circuit court took issue with the formality that is implied by the term “proceeding,” and what the court interpreted as an oversight by the district court of

122. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 327 (2d Cir. 2005).

123. Civil Rights Act of 1964, 42 U.S.C. § 2000e -3(a) (2006).

124. *Id.*

125. *Lambert v. Genesee Hospital*, 10 F.3d 46 (2d Cir. 1993) as cited in *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 327 (2d Cir. 2005).

126. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 327 (2d Cir. 2005).

127. *Id. quoting Nicolaou v. Horizon Media, Inc.*, 2003 WL 22852680 (S.D.N.Y. 2003).

128. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 328 (2d Cir. 2005).

129. *Id.*

130. *Id.*

the fact that an “inquiry” refers to a much more informal procedure.¹³¹ The court read this use of the term “inquiry” along with the more formal “proceeding” as indicative of Congressional intent to encompass protection for those involved in an informal gathering of information.¹³² The court went on to discuss the differences in definitions between the two words.¹³³ Moreover, the court asserted that it presumed that the Congress intended that its statutory text be read in accordance with its plain meaning, further noting, “we presume that none of the language enacted by Congress is superfluous.”¹³⁴ The second circuit therefore concluded that the language of the anti-retaliation provision of ERISA goes beyond the scope of that employed in the FLSA, extending to less formal “inquiries” such as that involved in Nicolaou’s case.¹³⁵ The court, therefore, determined that if Nicolaou had been contacted to partake in the meeting with the company’s attorney and the company’s president, her actions would be insulated from any threat of retaliation under section 510 of ERISA. Thus, the court reversed the district court’s dismissal of the complaint and remanded the case for more accurate findings of fact with regard to the genesis of the meeting between Nicolaou, Horizon’s attorney, and Horizon’s president.¹³⁶

While this court did more accurately characterize the spirit of the anti-retaliation provision of ERISA in determining that the inquiry or proceeding need not be excessively formal, I believe that the court ignored the plain interpretation of “gives information” found in ERISA. Furthermore, because Congress amended the anti-retaliation provision of the FLSA in March of 2010, the court had a less than ideal portion of the FLSA with which to analogize the anti-retaliation provision of ERISA. The court correctly characterized ERISA section 510 as being broader than section 15(a)(3) of the FLSA.¹³⁷ However, since *Nicolaou*, Congress has enacted a more analogous section of the FLSA, section 218c, which clears up any lingering misunderstanding as to the meaning of the language of section 510 of ERISA. In section 218c of the FLSA, Congress separates into subsections protection for employees who provide information about a potential violation and those who testify in a proceeding regarding the allegations.¹³⁸ Similarly, the anti-retaliation provision of ERISA contains language indicating that a person is insulated from employer retaliation if he or she merely “given information” regarding an alleged violation of ERISA.¹³⁹

131. *Id.*

132. *Id.*

133. *Id.* (Noting that the Black’s Law Dictionary 1241 (8th ed.) defines “proceeding” as “the regular and orderly progression of a lawsuit,” and “[a]ny procedural measure for seeking redress from a tribunal or agency and an “inquiry” as merely a “request for information”).

134. *Id.*

135. *Id.* (Notably, this case was rendered before the 2010 amendment to the Fair Labor Standards Act, which separates the language of the anti-retaliation provision such that a person who gives information is considered as a separate subcategory from one who testifies in an inquiry or proceeding. Based on this newer separation, it is more obvious that Congress meant to protect both classes of individuals in the FLSA).

136. *Id.*

137. *Id.*

138. Fair Labor Standards Act, 29 U.S.C.A. § 218c (2010).

139. Employee Retirement Income Security Act, 29 U.S.C.A § 1140 (2006).

As the second circuit in *Nicolaou* aptly notes, the plain meaning of Congressional language should be examined when making judicial interpretations thereof.¹⁴⁰ Furthermore, no language employed by Congress should be deemed superfluous, but rather, all language employed should be examined and considered when interpreting Congressional statutes.¹⁴¹ Therefore, it is enigmatic that the second circuit failed to discuss the language immediately preceding that which discusses protection from retaliation for information disclosed in an “inquiry or proceeding” which simply states that an employee is safeguarded from retaliatory acts on the part of his or her employer any time that he or she “gives information” relating to ERISA violations.¹⁴² At the very core, Nicolaou’s reporting of ERISA violations to her supervisors is giving them information regarding such violations. Thus, regardless of the nature of the inquiry or proceeding, although I believe that the second circuit was correct to liberally interpret that phrase, Nicolaou should have been protected from retaliation based solely on the fact that she brought to the attention of her supervisors what she correctly deemed to be violations of various ERISA provisions. Furthermore, if any modern court is to analogize with an applicable section of the FLSA, the court should look to the anti-retaliation provision rather than the whistle blower provision which indicates that employees who “provided, caused to be provided, or is about to provide or cause to be provided to the employer...information relating to any violation of...[the FLSA].”¹⁴³ As in the anti-retaliation provision of the ERISA statute, the anti-retaliation provision of the FLSA, in looking at the plain meaning of the language employed by Congress, clearly indicates that any employee who brings to the attention of his or her employer a potential violation of the statute is protected from retaliation by his or her employer.¹⁴⁴

The Third Circuit: Edwards v. A. H. Cornell and Sons (2010)

The most recent opinion examining the proper interpretation of the anti-retaliation provision of ERISA occurred in June of 2010 in front of the third circuit.¹⁴⁵ The defendant in this action was a family-owned company that provided commercial and residential construction services.¹⁴⁶ The defendant hired the plaintiff, Shirley Edwards, in the March of 2006 to serve as its Director of Human Resources in order to establish a human resources department.¹⁴⁷ As an employee

140. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 328 (2d Cir. 2005).

141. *Id.*

142. Employee Retirement Income Security Act, 29 U.S.C.A § 1140 (2006).

143. Fair Labor Standards Act, 29 U.S.C.A. § 218c (2010).

144. *See* Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1974); Fair Labor Standards Act, 29 U.S.C.A. § 218c (2010) (both indicating that any employee who gives information regarding an allegation of non-compliance with the applicable statute is protected from any retaliatory measures due to this allegation. It is important to note that the FLSA explicitly states that such information can be rendered directly to the person’s employer).

145. *Edwards v. A. H. Cornell and Sons*, 610 F.3d 217 (3d Cir. 2010).

146. *Id.* at 217.

147. *Id.*

of the company, Edwards participated in a group health insurance plan which was governed by ERISA.¹⁴⁸ Edwards claimed that she discovered, during the final weeks of her employment with A. H. Cornell and Sons that A. H. Cornell was engaging in several violations of the ERISA statute.¹⁴⁹ Specifically, the company was allegedly administering the group health plan on a discriminatory basis, misrepresenting to some employees the cost of the group health coverage to dissuade employees from participating in the group health insurance as well as enrolling non-citizens into its ERISA plans by providing false social security numbers and other similarly fraudulent information to the company's insurance carriers.¹⁵⁰ Upon discovering this information, Edwards "objected to and/or complained to" management regarding these alleged ERISA violations.¹⁵¹ Allegedly as a result of these complaints to management, she was terminated from her employment with the company shortly thereafter by the people to whom she addressed her concerns.¹⁵²

Edwards brought this action in federal court alleging violations of the anti-retaliation provision of the ERISA statute.¹⁵³ The defendants filed a 12(b)(6) motion asserting that the plaintiff had not engaged in protected activity under ERISA section 510.¹⁵⁴ After examining the circuit split previously discussed in this paper, the district court determined that the reasoning in *Nicolaou v. Horizon Media, Inc.* was persuasive to its decision and held that Edwards did, in fact, fail to state a claim upon which relief could be granted due to the fact that her allegations were not part of any type of "inquiry or proceeding."¹⁵⁵ The district court mainly focused on the fact that Edwards did not allege that anyone requested the information from her regarding the alleged ERISA violations, nor was she involved in any type of formal or informal gathering of information.¹⁵⁶

In examining the merits of this decision, the third circuit noted the circuit split that forms the basis for this paper.¹⁵⁷ The court examined the merits of the *Hashimoto*¹⁵⁸ decision, especially the practical conclusions of disallowing internal, unsolicited complaints to be protected by the anti-retaliation provision of ERISA.¹⁵⁹ Notably, the court pointed out that, "The normal first step in giving information. . .[is] to present the problem first to the responsible managers of the ERISA plan."¹⁶⁰ In noting the merits of the next case to consider the scope of section 510 of ERISA, the tenth circuit explained that *Anderson* focused mainly on

148. *Id.*

149. *Id.* at 218.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993).

159. *Edwards v. A. H. Cornell and Sons*, 610 F.3d 217 (3d Cir. 2010).

160. *Id.* at 220-222. *quoting Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 411 (9th Cir. 1993).

the fact that an employee's claim of wrongful discharge falls squarely within the ambit of ERISA section 510 when the employee is discharged for "exercising ERISA rights or for the purpose of interfering with the attainment of ERISA rights, as well as discharges for providing information or testimony relating to ERISA."¹⁶¹

The court then turned to the two cases that ultimately formed the basis for the court's decision.¹⁶² In quoting *King v. Marriott International, Inc.*¹⁶³ the third circuit emphasized the strictness with which the fourth circuit had interpreted the phrase, "inquiry or proceeding" found in the anti-retaliation provision of the ERISA act.¹⁶⁴ In explaining the reasoning behind the departure from the fifth and ninth circuits, the court in *Edwards* explained that the third circuit in *King* did not believe that the previous two courts that had considered this had focused on the more "compelling interpretation of the statutory language."¹⁶⁵ The court went on to explain that the *King* court believed that the ninth circuit rejected this "more compelling" interpretation for a "fair" interpretation, and that the fifth circuit merely quoted the language of ERISA section 510 without paying apt attention to the facial inapplicability to intra-office complaints.¹⁶⁶ Finally, the third circuit examined the second circuit's decision in *Nicolaou v. Horizon Media, Inc.*,¹⁶⁷ wherein the second circuit determined that, in order to qualify as an "inquiry or proceeding," the employee must at minimum demonstrate that he or she had been contacted to meet with management to give information about an alleged ERISA violation.¹⁶⁸

The court ultimately determined that it was more persuaded by the latter school of thought; that the anti-retaliation provision of the ERISA statute does not apply to unsolicited, internal complaints to management regarding alleged violations of the statute.¹⁶⁹ In so deciding, the court did not look to the entirety of the provision, but rather simplistically noted that "Since Edwards has undoubtedly 'given information' by objecting and/or complaining to management, at issue in this appeal is whether or not he did so in an 'inquiry or proceeding.'"¹⁷⁰ Edwards argued that his complaints themselves were an inquiry, by which the court was not persuaded. Ultimately, the third circuit determined that, because the nature of Edward's complaints was informal, his activities did not fall within the purview of the anti-retaliation provision of the ERISA statute. The court explicitly borrowed this under-inclusive definition from the fourth circuit in *King v. Marriott*

161. *Id.* at 220-222. quoting *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311 (5th Cir. 1994).

162. See *King v. Marriott Intern. Inc.*, 337 F.3d 421 (4th Cir. 2003); *Nicolaou v. Horizon Media Inc.*, 402 F.3d 325 (2^d Cir. 2005); *Edwards v. A. H. Cornell & Sons, Inc.*, 610 F.3d 217 (3^d Cir. 2010) (all maintaining that the plain language of § 510 of ERISA only protects against retaliation following reports that were ascertained pursuant to an "inquiry" or "proceeding").

163. *King v. Marriott Intern., Inc.*, 337 F.3d 421 (4th Cir. 2003).

164. *Edwards v. A. H. Cornell and Sons*, 610 F.3d 217 (3^d Cir. 2010).

165. *Id.* at 220. quoting *King v. Marriott Intern. Inc.*, 337 F.3d 421 (4th Cir. 2003).

166. *Id.* at 220.

167. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, (2^d Cir. 2005).

168. *Edwards v. A. H. Cornell and Sons*, 610 F.3d 217, 223 (3^d Cir. 2010).

169. *Id.*

170. *Id.*

*International, Incorporated.*¹⁷¹

However, in so holding, the most recent circuit to examine this issue failed to discuss the most compelling interpretation for the anti-retaliation provision of the ERISA statute: that an employee who “gives information” about an allegation of an ERISA violation is a different employee from one who “testified or is about to testify in any inquiry or proceeding relating to this chapter.”¹⁷² In determining that the phrase “gives information” is modified by the phrase “inquiry or proceeding,” the third circuit only notes that other statutes, such as section 704(a) of Title VII of the Civil Rights Act of 1964¹⁷³, use “broader language.”¹⁷⁴ Specifically, the court notes that the applicable provision of that Act provides protection for any employee who has “opposed any practice made an unlawful employment practice by [Title VII]”¹⁷⁵

However, unlike the court in *King v. Marriott International, Incorporated*,¹⁷⁶ the court did not look to the more analogous anti-retaliation provision of the Fair Labor Standards Act.¹⁷⁷ Moreover, because *Edwards* was decided after the Congressional amendment to the FLSA, clearing up the language in the whistleblower provision therein, it was the first case equipped with the most applicable version of that provision with which to analogize section 510 of ERISA. In the FLSA’s newly enacted anti-retaliation provision, Congress used nearly identical language as was embodied in the anti-retaliation provision of the ERISA statute.¹⁷⁸ In both provisions, Congress grants protection for any “employee” who has provided “information” “relating to” the applicable provision of the act.¹⁷⁹ Furthermore, each of the provisions provides protection for employees who testify in a proceeding wherein the employee discusses allegations of violations of the respective Act.¹⁸⁰ The anti-retaliation provision of the FLSA provides the most

171. See *King v. Marriott Intern. Inc.*, 337 F.3d 421 (4th Cir. 2003) (holding that, in order to receive protection from employer retaliation following an allegation of an ERISA violation pursuant to § 510 of the statute, the allegation must have come about following a formal inquiry or proceeding, or at least “something more formal than written or oral complaints made to a supervisor.”)

172. See Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140 (1974) (explaining the instances in which an employee is protected from retaliation from an employer subsequent to the employee exposing the employer’s alleged ERISA violations.)

173. Civil Rights Act of 1964, 42 U.S.C. § 2000e -3(a) (1969).

174. *Edwards v. A. H. Cornell and Sons*, 610 F.3d 217, 223 (3d Cir. 2010).

175. *Id.* quoting Civil Rights Act of 1964, 42 U.S.C. § 2000e -3(a) (1969).

176. *King v. Marriott Intern. Inc.*, 337 F.3d 421 (4th Cir. 2003).

177. The Fair Labor Standards Act, 29 U.S.C.A. § 218c (a)(2) & (3) (2010).

178. Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1974).

179. See Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1974) (“It shall be unlawful to discharge, fine, suspend, expel or discriminate against any person because he has given information . . . relating to this chapter.”); The Fair Labor Standards Act, 29 U.S.C.A. § 218c (a)(2) & (3) (2010) (“No employer shall discharge or in any manner discriminate against any employee . . . because the employee has . . . provided . . . information relating to any violation of . . . any provision of this title.”)

180. See Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1974) (“It shall be unlawful to discharge, fine, suspend, expel, or discriminate against any person because he . . . has testified or is about to testify in any inquiry or proceeding relating to this chapter.”); The Fair Labor Standards Act, 29 U.S.C.A. § 218c (a)(2) & (3) (2010) (“No employer shall discharge or in any manner discriminate against any employee . . . because the employee has . . . testified or is about to testify in a proceeding concerning such violation.”)

clearly analogous provision for the purposes of properly interpreting the language employed in the anti-retaliation provision of ERISA. Therefore, the most important point to note is the fact that in the FLSA, Congress separated into subsections protection for employees who give information regarding violations of the FLSA and protection for those who testify in a proceeding regarding such allegations.¹⁸¹ Furthermore, Congress afforded, in the anti-retaliation provision of the FLSA, protection for employees who provide information about such violations *to his or her employer*.¹⁸² Although the protection from retaliation that is granted to employees who give information regarding ERISA violations and that for employees who testify in an inquiry or proceeding is not separated into subsections in ERISA section 510, the two are conceptually separated by the word “or.”¹⁸³ When viewed in conjunction with her sister provision in the FLSA, the legislative intent behind the wording in the anti-retaliation provision of ERISA becomes much more apparent. Congress physically separated the two types of protection in the FLSA, but practically, this separation is not only present, but necessary for enforcement of ERISA in the anti-retaliation provision therein. Thus, *King*, *Nicolaou*, and *Edwards* were all incorrectly decided due to the fact that King, Nicolaou, and Edwards were all insulated from retaliation merely by the fact that they “[gave] information” regarding alleged ERISA violations.¹⁸⁴ At that moment, the anti-retaliation provision should have been in effect, especially when read in conjunction with its newly-enacted sister provision in the FLSA.

III. POLICY CONSIDERATIONS REGARDING THE LACK OF CONSISTENT ENFORCEMENT AND ABILITY FOR CIRCUMVENTION OF THE ANTI-RETALIATION PROVISIONS OF ERISA

In addition to the fact that the plain language of the statute, when properly understood, allows protection for employees who merely give information to an employer regarding potential ERISA violations, the policy-based underpinnings of ERISA lend credence to the notion that the anti-retaliation provision of the ERISA statute should apply to unsolicited, internal complaints to management. According to the Congressional findings and declaration of policy dictated in the United States Code preceding ERISA, Congress enacted the ERISA provisions because:

The Congress [found] that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of

181. The Fair Labor Standards Act, 29 U.S.C.A. § 218c (a)(2) & (3) (2010).

182. The Fair Labor Standards Act, 29 U.S.C.A. § 218c (a)(2) (2010).

183. Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1974).

184. See *King v. Marriott Intern. Inc.*, 337 F.3d 421 (4th Cir. 2003); *Nicolaou v. Horizon Media Inc.*, 402 F.3d 325 (2d Cir. 2005); *Edwards v. A. H. Cornell & Sons, Inc.*, 610 F.3d 217 (3d Cir. 2010) (all maintaining that the plain language of § 510 of ERISA only protects against retaliation following reports that were ascertained pursuant to an “inquiry” or “proceeding”).

employees and their dependents [were] directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment. . . that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and *safeguards be provided with respect to the establishment, operation, and administration of such plans*; . . . that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.¹⁸⁵

These policy considerations, while noble, cannot be effectively implemented if the Act is not enforced in every applicable circumstance. The lack of consistent or effective enforcement of the Pension Plans Disclosure Act served as a catalyst for both the House and the Senate to respond to the many loopholes apparent in the previously mentioned Act.¹⁸⁶ These loopholes became glaringly apparent following the Studebaker automobile debacle, rendering thousands upon thousands of workers devoid of their hard-earned pensions and other previously promised compensation for their years on the job.¹⁸⁷ Interpreting the anti-retaliation provision in a similarly lax fashion reinstates the issues associated with ERISA's predecessor. Unequal or ineffective enforcement cannot be tolerated if this Act is to fulfill the Congressional goals of adequately safeguarding the interests of employees and their beneficiaries.¹⁸⁸ Thus, in order to effectuate the legislative purpose that marked the catalyst for the enactment of ERISA, as well as to remain faithful to the plain

185. Employee Retirement Income Security Program Protection of Employee Benefit Rights General Provisions, 29 U.S.C. §1001 (emphasis added).

186. PATRICK PURCELL & JENNIFER STAMAN, SUMMARY OF THE EMPLOYEE RETIREMENT SECURITY ACT OF 1974 (ERISA), CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 7-5700. Available at www.crs.gov (2009).

187. *Id.*

188. Employee Retirement Income Security Program Protection of Employee Benefit Rights General Provisions, 29 U.S.C. §1001.

language and the clearly analogous provision in the FLSA that Congress enacted in 2010, the anti-retaliation of ERISA must be read to include protection for employees who deliver unsolicited, internal complaints to managers and employers.