IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3198

Shirley Edwards,
Plaintiff-Appellant

v.

A. H. Cornell and Son, Inc., et al,

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF APPELLANT FOR REVERSAL

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QUESTION PRESENTED

Whether section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140, protects from retaliation an employee who raises unsolicited complaints and objections to management or owners regarding possible ERISA violations.

INTEREST OF THE SECRETARY

The Secretary has primary enforcement and regulatory authority for Title I of ERISA. See 29 U.S.C. § 1001, et seq. The Secretary's interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit assets. Sec. of Labor v. Fitzsimmons, 805 F.2d 682, 688-91 (7th Cir. 1986) (en banc).

The Secretary, whose limited ability to bring ERISA actions is greatly complemented by the independent right of participants and beneficiaries to pursue their own administrative remedies and to bring ERISA cases in court, has a particular interest in protecting the rights of employees to bring allegations of ERISA violations to the attention of plan or corporate management without fear of retaliation. Those rights fall within the scope of ERISA Section 510, 29 U.S.C. § 1140, which protects employees from retaliation for exercising rights granted to them by ERISA or their plan, or giving information in proceedings or inquiries related to ERISA.

The district court granted the defendants' motion to dismiss Ms. Edward's ERISA 510 claim because she did not allege that someone requested information from her or initiated contact with her regarding potential ERISA violations, but only made unsolicited complaints and objections regarding certain conduct of the defendants. The Secretary's participation in this appeal is important because the courts of appeals are divided on whether and to what degree to extend the protections of section 510 to unsolicited intra-corporate complaints. Compare Anderson v. Electronic Data Systems Corp., 11 F.3d 1311 (5th Cir. 1994), and Hashimoto v. Bank of Hawaii, 999 F.2d 408, 411 (9th Cir. 1993), with Nicolaou v. Horizon Media, Inc., 402 F.3d 325 (2d Cir. 2005), and with King v. Marriott Int'l, Inc., 337 F.3d 421, 426-27 (4th Cir. 2003).

The Secretary also has an interest in amicus participation because she administers or enforces numerous other whistleblower statutes. See, e.g., 18 U.S.C. §1514A (Sarbanes Oxley Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); id. §660(c) (Occupational Safety and Health Act); id. § 1855(a) (Migrant and Seasonal Agricultural Worker Protection Act); 33 U.S.C. § 1367(a) (Clean Water Act); 49 U.S.C. § 31105(a) (Surface Transportation Assistance Act).

STATEMENT OF THE CASE

1. Facts[1]

Plaintiff Shirley Edwards was employed by defendant A.H. Cornell and Son, Inc. ("A.H. Cornell"), a corporation that provides construction and contracting services. Appendix of Appellant ("App.") 22-23. Ms. Edwards was hired by A.H. Cornell in or around March 2006 to establish a human resources department at the corporation. App. 23. Defendant Melissa Closterman managed the daily operations of A.H. Cornell, including oversight of Ms. Edwards. App. 23. Defendant Scott Cornell is an executive at A.H. Cornell and oversaw the terms and conditions of Ms. Edwards' employment. App. 23. Ms. Edwards claims that Ms. Closterman "was directly responsible for terminating [her]" and that Mr. Cornell "participated in the termination of [her] employment." App. 23.

In support of her section 510 retaliation claim, Ms. Edwards alleges that, at the time of her termination, she was enrolled in A.H. Cornell's group life and disability plans and was eligible to enroll in A.H. Cornell's health insurance plan. App. 26. In addition, Ms. Edwards alleges that the defendants committed fraud on, and directed her to provide false information to, their worker's compensation and disability insurance carriers. App. 24. She also alleges that she "objected to and/or

[1] Because defendants/appellees filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the factual allegations contained in plaintiff/appellant's Amended Complaint were accepted by the district court as true.

complained to Defendants' management about violations of ERISA, including but not limited to, the discriminatory basis on which Defendants were awarding ERISA benefits and Defendants' actions of permitting non-qualifying ERISA applicants to participate in Defendants group health plan." App. 26. Further, Ms. Edwards alleges that she "objected to and/or complained to Defendants' management and owners about their practice of intentionally misleading employees about group health plan information." App. 26. Ms. Edwards' allegations conclude that "a motivating factor in [her] termination was her aforesaid inquires [sic] objections, opposition, and/or complaints about ERISA violations." App. 27.

2. Procedural Background

Ms. Edwards filed her complaint in the Eastern District of Pennsylvania District Court on March 18, 2009, and filed the amended complaint on June 2, 2009. App. 19. Defendants moved to dismiss Ms. Edwards' amended complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. App. 30-42. Defendants argued, inter alia, that Ms. Edwards' section 510 claim should be dismissed because she did not participate in a protected activity. App. 36-38.

The district court, in a Memorandum and Opinion dated July 23, 2009, dismissed Ms. Edwards' ERISA section 510 claim.[2] App. 3. Stating that "the proper inquiry is whether the Plaintiff's alleged objections and complaints to management in the present case were given as part of an inquiry," the court found that Ms. Edwards' objections and complaints were not part of such inquiry, because "Plaintiff does not allege that anyone requested information from her or initiated contact with her in any way regarding alleged ERISA violations." App. 13. The district court also stated that Ms. Edwards did not allege that she was involved in any formal or informal information gathering, but rather, alleged only that she objected to or complained of defendants/appellants' conduct. App. 13-14.

Ms. Edwards filed this appeal on July 30, 2009. App. 1-2.

SUMMARY OF ARGUMENT

The district court erred in holding that ERISA section 510 protects only complaints and objections made in response to a request for information. In our view, 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 – protecting whistleblowers and securing the promises and benefits of ERISA. Whether construed as giving information in a proceeding or inquiry, part of an inquiry,

[2] The district court declined to exercise supplemental jurisdiction over Ms. Edwards' state-law wrongful discharge claim and dismissed it with leave to re-file in state court. App. 14.

constituting the first step of an inquiry, or exercising rights under ERISA, an employee's unsolicited, internal complaints and objections are protected under section 510. Interpreting section 510 as protecting unsolicited complaints and objections to management, however informal, satisfies Congressional intent and enables the proper and efficient functioning of ERISA's enforcement scheme, which relies on complaints by individuals to protect the substantive rights provided under ERISA. This Circuit has interpreted the anti-retaliation provisions of other remedial statutes such as the Fair Labor Standard Act and the Clean Water Act – provisions that, on their face, are written more narrowly than section 510 – in accordance with their purposes, to protect employees from retaliation for voicing complaints to management. Given the remedial purpose of ERISA and section 510's broad language, this Court – like the Fifth and Ninth Circuits – should likewise interpret section 510 to protect from retaliation persons making unsolicited ERISA-related complaints and objections to management.

ARGUMENT

Section 510 Protects An Employee Who Raises Unsolicited Complaints Or Objections To Management Or Plan Officials, Whether Or Not A Formal Inquiry or Proceeding Has Commenced

A. Section 510 and ERISA are Broadly Protective.

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit programs." Shaw v. Delta

Air Lines, Inc., 463 U.S. 85, 90 (1983); see also Jakimas v. Hoffman-La Roche, Inc., 485 F.3d 770, 784 (3d Cir. 2007); In re: Unisys Corp. Retiree Med. Benefit ERISA Litigation, 57 F.3d 1255, 1269 (3d Cir. 1995); IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118, 127 (3d Cir. 1986). Congress set forth in the statute its findings and the policy of ERISA: "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." 29 U.S.C. § 1001(b). "As part of [ERISA's] closely integrated regulatory system Congress included various safeguards to preclude abuse and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.'" Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990), quoting S.Rep. No. 93-127, p. 36 (1973). ERISA's anti-retaliation provision section 510, 29 U.S.C. § 1140, is prominent among these safeguards. Ingersoll-Rand Co., 498 U.S. at 137.

Section 510 states, in pertinent part:

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

Section 510 thus protects participants from, inter alia, interference with, or retaliation or discrimination for: a) exercising any right under the Act or an employee benefit plan, or b) giving information in any inquiry or proceeding relating to ERISA.

Section 510 is critical to preserving the benefits and protections of ERISA and acts as a crucial check upon an employer's ability to avoid or degrade those benefits and protections. Becker v. Mack Trucks, Inc., 281 F.3d 372, 381 (3d Cir. 2002). "Congress viewed [§ 510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." Ingersoll-Rand, 498 U.S. at 143. The anti-retaliation provisions of section 510 are "clearly meant to protect whistle blowers." Hashimoto, 999 F.2d at 411. "In short, § 510 helps to make [ERISA's] promises credible." Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co., 520 U.S. 510, 515 (1997).

Section 510's legislative history demonstrates Congress' intent that the provision be liberally construed to provide broad protections for participants and beneficiaries – "[t]he enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations [of ERISA]." S.Rep. No.127, 93d Cong., 1st Sess. 35 (1973). Leading sponsor Senator Javits, during the debates on the passage of ERISA, characterized section 510 as "provid[ing] a remedy for any person fired

such as is provided for a person discriminated against because of race or sex, for example." 119 Cong. Rec. 30044 (1973). Thus, "the legislative history of ERISA indicates that 'Congress viewed [the whistleblower provision] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits.'" McBride v. PLM Int'l, Inc., 179 F.3d 737, 744 (9th Cir. 1999), quoting Ingersoll-Rand Co., 498 U.S. at 143.

Because ERISA is a remedial statute, it "should be liberally construed in favor of protecting the participants in employee benefit plans." IUE AFL-CIO Pension Fund, 788 F.2d at 127. Cf. Disabled In Action of Pa. v. Southeastern Pa. Transp. Authority, 539 F.3d 199, 208 (3d Cir. 2008) (Americans with Disabilities Act is a remedial statute and, therefore, is broadly construed to achieve its purpose). When interpreting a statute, a court's "primary concern is to give effect to Congress's intent." Id. at 210. Accordingly, this Court has stated that it interprets the language of ERISA in light of "the intent of the statute." IUE AFL-CIO Pension Fund, 788 F.2d at 127.

Construing section 510 to protect employees who raise unsolicited complaints and objections to management comports with the provision's purpose and Congressional intent set forth above. Indeed, section 510 is part of "a 'carefully integrated' civil enforcement scheme that 'is one of the essential tools for accomplishing the stated purpose of ERISA.'" Ingersoll-Rand Co., 498 U.S. at 137

quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52, 54 (1987). ERISA's enforcement scheme importantly relies on complaints and objections raised by participants, beneficiaries, and fiduciaries. Anti-retaliation provisions such as section 510 are designed to encourage employees to report potential violations and assure the cooperation on which accomplishment of ERISA's protective purposes depends.

It would thwart the intent of Congress and purposes of ERISA section 510 to construe that provision as protecting only persons who provide information relating to potential ERISA wrongdoing after management "officially" initiates an internal investigation. Such an approach would permit management to retaliate against employees for complaining about ERISA violations, as long as they ignored or disdained the information or fired the whistleblower before any formal proceeding began. If that were the law, the person that first blows the whistle on serious misconduct would run the risk of termination without remedy: employers could readily manipulate the applicability of section 510 by postponing proceedings or disregarding complaints, and even if formal proceedings were finally instituted, the whistleblower who serves as the catalyst for the proceedings would be wholly unprotected.

B. Consistent With How This Court Interprets Similar Statutes, The Language Of Section 510 Supports A Construction As Broad As Its Purpose.

1. Third Circuit Construction of Similar Statutes. The Third Circuit has addressed and broadly construed whistleblower provisions in remedial statutes similar to ERISA as protecting internal, intra-corporate complaints and objections. In Passaic Valley Sewerage Commissioners v. United States Dep't of Labor, 992 F.2d 474 (3d Cir. 1993), the Court considered the anti-retaliation provision of the Clean Water Act, section 507(a), 33 U.S.C. § 1367(a). Section 507(a) states, in pertinent part:

> (a) Discrimination against persons filing, instituting, or testifying in proceedings under this chapter prohibited
>
> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative 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 this chapter.

33 U.S.C. § 1367(a). The Court found that the statutory term "proceeding" in section 507(a) was ambiguous. 992 F.2d at 478. Stating its belief that "the statute's purpose and legislative history allow, and even necessitate, extension of the term 'proceeding' to intracorporate complaints," the Court then held that it should be construed to cover intra-corporate complaints raised by an employee:

> The whistle-blower provision was enacted for the broad remedial purpose of shielding employees from retaliatory actions taken against them by

> management to discourage or to punish employee efforts to bring the corporation into compliance with the Clean Water Act's safety and quality standards. If the regulatory scheme is to effectuate its substantive goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute.

Id. at 478. See also Moore v. City of Philadelphia, 461 F.3d 331, 343 (3d Cir. 2006) (protected opposition conduct under Title VII's anti-retaliation provision includes "informal protests of discriminatory employment practices, including making complaints to management"), quoting Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc., 450 F.3d 130, 135 (3d Cir. 2006); Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176 (3d Cir. 2001)(protected activity under False Claims Act can include internal reporting and investigation). Cf. Slagle v. County of Clarion, 435 F.3d 262, 267 (3d Cir. 2006) (Title VII and its retaliation provision must be interpreted liberally); accord, Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006) ("[i]nterpreting [Title VII's] anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends").[3]

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[3] Other circuits have construed anti-retaliation provisions contained in various statutes and found that employees' internal complaints are a protected activity. See Lambert v. Ackerley, 180 F.3d 997 (9th Cir. 1999) (complaints, oral or written, to an employer that communicate the substance of the allegations are protected activities under the FLSA); United States v. Howard Univ., 153 F.3d 731 (D.C. Cir. 1998) (employee's internal complaints were a protected activity under the False Claims Act); Clean Harbor Envtl. Services, Inc. v. Herman, 146 F.3d 12 (1st

Similarly, the Third Circuit has broadly construed and liberally interpreted the Fair Labor Standards Act ("FLSA"), including the Act's anti-retaliation provision, section 15(a)(3). Section 15(a)(3) of the FLSA, 29 U.S.C. § 215(a)(3) states:

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person –
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> * * *
>
> (3) to discharge or in any 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 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.

In Brock v. Richardson, 812 F.2d 121, 122-23 (3d Cir. 1987), this Court considered whether an employer violated section 15(a)(3) when it discharged an employee it mistakenly believed had filed a complaint with the Department of Labor. The employer argued that because the employee did not in fact file a complaint and did not otherwise engage in an act specifically protected and

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Cir. 1998) (intra-corporate complaints are a protected activity under the Surface Transportation Assistance Act); Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995) (raising informal oral concerns to a foreman and supervisor are a protected activity under the Energy Reorganization Act); Equal Employment Opportunity Comm'n v. Romeo Cmty. Sch., 976 F.2d 985 (6th Cir. 1992) (internal oral complaints are a protected activity under the FLSA); Couty v. Dole, 886 F.2d 147 (8th Cir. 1989) (oral complaints to supervisor are a protected activity under the Energy Reorganization Act); Phillips v. Interior Bd. Of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974) (employee's informal oral complaints to foreman or safety committee are a protected activity under the Mine Safety and Health Act whistleblower provision).

enumerated under the statute, it could not have violated the section. First noting that the FLSA is remedial and has been liberally interpreted, the Court found that the anti-retaliation provision of section 15(a)(3) "was designed to encourage employees to report suspected wage and hour violations by their employers." Id. at 124. Citing and quoting Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292 (1960), it stated that "the [Supreme] Court has made clear that the key to interpreting the anti-retaliation provision is the need to prevent employees' 'fear of economic retaliation' for voicing grievances about substandard conditions," id., and that "'[r]ather [than rely on continuing detailed federal supervision or inspection of payrolls][Congress] chose to rely on information and complaints received from employees to vindicate rights claimed to have been denied.'" Id. The Court continued:

> It follows that courts interpreting the anti-retaliation provision have looked to its animating spirit in applying it to activities that might not have been explicitly covered by the language. For example, it has been applied to protect employees who have protested Fair Labor Standards Act violations to their employers, see Love v. RE/MAX of America, Inc., 738 F.2d 383, 387 (10th Cir. 1984). . . . In each of these instances, the employee's activities were considered necessary to the effective assertion of employee's rights under the Fair Labor Standards Act, and thus entitled to protection.

Id.[4] Recognizing that section 15(a)(3), as a remedial statute, should not be read in a wooden manner, the Court observed that "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." Id. at 125. The Court then held that a finding that an employer's mistaken belief that an employee had complained or engaged in other protected activities under section 15(a)(3) is "sufficient to bring the employer's conduct within that section." Id.

2. The Text of Section 510. The language of section 510 of ERISA is broader than the anti-retaliation provisions in many other statutes that the Third Circuit and other courts have interpreted as covering internal complaints that do not necessarily lead to formal proceedings or lawsuits. Just as in the case of the Clean Water Act ("CWA"), ERISA "allow[s], and even necessitate[s]," interpreting

[4] In Love, the plaintiff, Ms. Love, learned that male employees in comparable positions were given a substantial raise, while she was not. Ms. Love sent a memo to the president of the company requesting a raise and attaching a copy of the Equal Pay Act. She was terminated within two hours. The Tenth Circuit held that Ms. Love stated and proved a retaliation claim under section 15(a)(3), stating that "[the FLSA] also applies to the unofficial assertion of rights through complaints at work." 738 F.2d at 387.

section 510 to protect employees who raise unsolicited complaints and objections to management.[5]

Section 510's protections encompass any "information" given in "any inquiry or proceeding," as well as the exercise of other rights under ERISA. Broadly but naturally construed, "any inquiry or proceeding" encompasses plan participants' complaints to management or plan officials about wrongdoing, and the process by which that information is considered, however informal. It does not matter whether the information given was solicited or meritorious, or whether the process results in corrective ERISA action, no action, or, as allegedly happened here, retaliatory action resulting in terminating the complaining employee.

Even if "inquiry" is narrowly interpreted to refer only to an employer-initiated event, an employee's complaint can be viewed as part and parcel of a

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[5] The recent Supreme Court decision Crawford v. Metro. Gov't of Nashville and Davidson County, TN, 129 S. Ct. 846, 851 (2009), supports the Secretary's construction of the statute. Interpreting the "opposition" clause of Title VII, which makes it "unlawful . . . for an employer to discriminate against any . . . employe[e] . . . because he has opposed any practice made . . . unlawful . . . by [Title VII], § 2000e-3(a)," the Court stated that "a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question." Thus, while holding that "responding to someone's question" is protected "opposition" activity, the Court's baseline assumption was that "provoking the discussion" and "report[ing] discrimination on her own initiative" surely is.

process culminating in an inquiry. In many cases, a complaint or question (i.e., inquiry) from a participant or other interested person is the necessary first step toward a more formal investigation and inquiry or proceeding, especially where the complaint or other information is given to management, plan administrators, fiduciaries, or other personnel who have a duty to investigate and respond to complaints and allegations of wrongdoing. Even where the employer reacts negatively or indifferently, section 510 is meant to protect persons who bring forth such complaints, particularly when the information is not welcomed by management and the response is to discharge, discipline, or discriminate rather than investigate. Therefore, "any inquiry" includes the employee's complaint about ERISA plans or obligations and whatever process management undertakes in response to the complaint, whether or not the information given was solicited or meritorious, or the process results in corrective ERISA action or in terminating the complaining employee.

Interpreting section 510 to protect employees who raise unsolicited complaints and objections to management effectuates Congressional intent and achieves the purpose of the provision and ERISA. At a minimum, it is a permissible construction of the statute. In Passaic Valley, 992 F.2d at 478, this Court said, "we find the facial language of the Clean Water Act's whistle-blower protection provision to admit of more than one interpretation, and hence we are

compelled to uphold the Secretary's interpretation if it is based on a permissible construction of the statute. Chevron, USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)." The same is true for ERISA section 510, whose language is even more plainly in line with this interpretation. If a statute that facially protects only filing, instituting, or giving testimony in "any proceeding" is permissibly read as protecting unsolicited complaints, so too is one that expressly covers, in addition, all "information" given in "any inquiry." Because the Secretary has consistently read the statute this way, the Court owes the highest deference to this interpretation. Chevron U.S.A., 467 U.S. at 842-43.

C. To Further The Purposes Of The Act, The Third Circuit Should Join The Fifth And Ninth Circuits, As Well As Other Courts That Have Interpreted And Applied Section 510 To Protect Persons Making Unsolicited ERISA-Related Complaints And Objections.

The Ninth Circuit, in Hashimoto, 999 F.2d at 411, construed the language of section 510 to determine the scope of the anti-retaliation provisions protections. The court concluded that section 510 protects employees who raise informal complaints and objections to management. In Hashimoto, the plaintiff was discharged from her employment with the defendant Bank of Hawaii ("the Bank") after she complained to management about ERISA violations by the Bank and objected to directives she believed violated ERISA. Id. at 409-410. These complaints and objections were unsolicited and were not made in response to

inquiries by management. In holding that section 510 protects persons in Ms. Hashimoto's position, the Ninth Circuit stated:

> This statute [section 510] is clearly meant to protect whistle blowers. It 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. 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: anticipatory discharge discourages the whistle blower before the whistle is blown.

Id. at 411 (emphasis added.) Accordingly, the Ninth Circuit interpreted section 510 as protecting persons who raise informal, unsolicited objections and complaints of potential or actual ERISA violations to management.

The Fifth Circuit similarly found that persons who raise informal, unsolicited complaints or objections to management regarding potential ERISA violations fall within the ambit of section 510. The Fifth Circuit, in Anderson v. Electronic Data Sys. Corp., 11 F.3d 1311 (5th Cir. 1994), in the context of deciding whether a plaintiff's state law wrongful discharge claim was preempted by ERISA, considered whether section 510 protects persons who voluntarily report alleged ERISA violations to management. The plaintiff in Anderson alleged that he was demoted and discharged because he refused to commit acts he believed violated ERISA and because he reported potential ERISA violations to management. Id. at 1312-1313. The Fifth Circuit found that the plaintiff's state

law claim fell "squarely within the ambit of ERISA § 510" and concluded that "a state wrongful discharge cause of action based on a refusal to commit violations of ERISA and reporting such violations to management is preempted."[6] Id. at 1314.

Several district courts also have recognized that the protections of section 510 extend beyond formal inquiries initiated by management and protect employees who make unsolicited, informal complaints and objections. See Simons v. Midwest Tel. Sales and Serv. Inc., 462 F.Supp. 2d 1004, 1008 (D.Minn. 2006) ("although ERISA does not specifically grant employees the right to report violations to superiors or plan administrators, '[i]n view of the express authorization which plaintiff possesses to sue to remedy violations of ERISA, the court finds it logical to infer that plaintiff also possesses the right to inform plan administrators of suspected violations of ERISA'") (citation omitted); Dunn v. ELCO Enters., Inc., 2006 WL 1195867, ** 4-5 (E.D. Mich. May 4, 2006) ("the activity protected under section 510 includes internal complaints made by an employee"); McSharry v. Unumprovident Corp., 237 F.Supp. 2d 875 (E.D. Tenn. 2002) (state law whistleblower claims based on employee's refusal to participate in alleged ERISA violations and complaints to supervisors are preempted by ERISA); Klein v. Banknorth Group, Inc., 977 F.Supp. 302, 304-305 (D.Vt. 1997) (formal

[6] It should be noted that the holding does not differentiate between refusing to commit illegal acts and reporting violations as bases for section 510 protection.

inquiries and proceedings are not the full extent of section 510's protections and providing documents to counsel "may be viewed as an alternative 'first step' to complaining to one's employer, one that is especially understandable if the employee fears retaliation, and one which would be protected under § 510"); Jorgensen v. Prudential Ins. Co. of America, 852 F.Supp. 255, 262-263 (D.N.J. 1994) (section 510's protections include the "first step" of an employee raising ERISA related problems to his superiors); McLean v. Carlson Companies, Inc., 777 F.Supp. 1480, 1483-1484 (D.Minn. 1991) (section 510 protects those who report potential ERISA violations to management); cf. Ello v. Singh, 531 F.Supp. 2d 552, 573 (S.D.N.Y. 2007) (employee who sought meeting with decision-makers and those who could start a formal inquiry could make a section 510 claim).[7]

The Secretary agrees with those opinions holding that section 510 covers and protects any person, including beneficiaries, participants, and fiduciaries, who raise unsolicited complaints and objections regarding potential or actual ERISA

[7] The Second and Fourth Circuits have taken a more restricted view of section 510. See Nicolaou v. Horizon Media, Inc., supra, ("inquiry" in section 510 refers to any request for information, including informal gathering of information, but an employee must show that management requested that she provide information regarding a potential ERISA violation to avail herself of the protections of section 510); King v. Marriott Int'l. Inc., supra, ("inquiry" or "proceeding" in section 510 is limited to legal or administrative proceedings and does not protect an employee who makes complaints to her supervisors). However, these cases are inconsistent with and contrary to the Third Circuit's interpretation of similar whistleblower provisions in statutes such as the CWA and FLSA, which, as discussed above, are more narrowly written than section 510.

violations, whether or not management or any other entity has initiated an inquiry or requested information. Given the number of plan participants covered by ERISA, the Secretary simply does not have the resources to monitor all alleged ERISA violations. The Department of Labor, moreover, litigates few matters that involve a single litigant, such as an individual section 510 claimant. Instead, the Secretary must rely on employees and plan participants or beneficiaries to alert plan fiduciaries, plan sponsors, and the Secretary, a task they could not (or would not) perform without protection from retaliation throughout the process. By protecting informal employee inquiries and complaints, whistleblower protection provisions help avoid the chilling effect of preemptive retaliation, where an employee is fired, demoted, or otherwise disciplined before having the chance to initiate a formal proceeding. Passaic Valley, 992 F.2d at 478-79.

A contrary interpretation of section 510 would undermine the protective force of the whistleblower provision, without serving any apparent countervailing interest. Many plan funding and investment problems can be minimized if addressed at the outset. If informal complaints or inquiries were not protected, employee participants, beneficiaries, and fiduciaries would be stymied in their efforts to address and resolve problems related to their employee benefit plans before they make a formal complaint. Such a result would also deter employees from bringing possible ERISA violations to the attention of the company, which

can investigate and attempt to correct any problems in a far more cost-effective manner than can be achieved through litigation or other adversarial proceedings. Cf. Hutchins, 253 F.3d at 187-188 (forcing employees to report suspected False Claims Act violations outside the corporation to gain whistleblower protection damages 'corporate efforts at self-policing and make it difficult for corporations and boards of directors to discover and correct on their own false claims made by rogue employees or managers'").

Moreover, under a narrow reading of section 510, employees would be required to file formal complaints or await a "request for information" from management to be protected from punitive treatment. This perverse construction would encourage undesirable employer behavior – firing a complaining employee or ignoring the complaint rather than initiating an inquiry or proceeding – while those in the best position to identify ERISA violations, employees affected by or involved in the day to day administration of benefit plans, would be discouraged from reporting ERISA violations. An interpretation of section 510 that would yield these results would be patently absurd and defy commonsense and, therefore, should be avoided. Disabled in Action of Pa., 539 F.3d at 210, quoting Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 454 (1989) (courts "avoid constructions that produce 'odd' or 'absurd results' or that are 'inconsistent with common sense.'").

In sum, ERISA section 510, which covers, inter alia, any "information" given in "any inquiry or proceeding" and the exercise of rights under the Act or an employee benefit plan, is written even more broadly than the CWA or FLSA. The Third Circuit has broadly construed the anti-retaliation provisions of those statutes, including protecting employees who raise intra-corporate complaints. The Fifth and Ninth Circuits, as well as numerous district courts, have similarly broadly construed section 510 to protect unsolicited employee complaints to management. Accordingly, this Court should join those courts and hold that section 510 protects employees who informally raise unsolicited complaints and objections to management, whether or not the employer or plan has already initiated a formal inquiry or proceeding. Such a holding would comport with the Secretary's rational construction and achieve the goals of ERISA, effectuate the will of Congress, and be consistent with this Circuit's interpretation of similar remedial statutes.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's decision and hold that section 510, ERISA's anti-retaliation provision, protects unsolicited ERISA-related complaints and objections made by employees whether

or not management or any other entity has requested the information or initiates a follow-up investigation or proceeding.

Respectfully submitted,

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November 23, 2009

CERTIFICATE OF SERVICE UPON COUNSEL

I, Eric C. Lund, certify that I have served two (2) true and correct copies of the Brief for the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal upon Appellant's counsel and Appellees' counsel, both who are Filing Users, listed below via Federal Express and Electronic Filing by the Notice of Docket Activity:

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/s/ Eric C. Lund

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Dated: November 23, 2009

CERTIFICATE OF IDENTICAL TEXT

I, Eric C Lund, certify that the text of the electronically filed Brief for the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal is identical to the text in the paper copies of that brief.

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Dated: November 23, 2009

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I, Eric C. Lund, certify that a virus detection program has been run on the attached Brief for the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal and no virus was detected. The virus detection program used was McAfee VirusScan Enterprise Version 8.0.0.

/s/ Eric C. Lund

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