No. 11-3291

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VICTOR GEORGE
Plaintiff-Appellant,

v.

JUNIOR ACHIEVEMENT OF CENTRAL INDIANA, INC.
Defendants-Appellees.

On Appeal from Final Judgment of the United States District Court
For the Southern District of Indiana (Stinson, J.)
Civil Action No. 1:10-cv-00220-JMS-MJD

Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Plaintiff-Appellant

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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 to management regarding possible ERISA violations.

INTEREST OF 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'y of Labor v. Fitzsimmons, 805 F.2d 682, 688-91 (7th Cir. 1986) (en banc). The Secretary, whose limited ability to enforce ERISA is greatly complemented by the independent right of participants and beneficiaries to bring their own claims, has a particular interest in protecting the rights of employees to report allegations of ERISA violations without fear of retaliation.

The district court granted the defendants' motion for summary judgment on Mr. George's ERISA section 510 claim after holding that his unsolicited complaints – both to management and to the United States Department of Labor – were not made in the context of a formal inquiry or proceeding. The Secretary's participation in this appeal is important because the issue presented is novel in the Seventh Circuit, and the courts of appeals are divided on whether the protections of

section 510 extend to unsolicited intra-corporate complaints. Compare Anderson v. Elec. Data Sys. Corp., 11 F.3d 1311 (5th Cir. 1994), and Hashimoto v. Bank of Hawaii, 999 F.2d 408 (9th Cir. 1993), with Edwards v. A.H. Cornell & Son Inc., 610 F.3d 217 (3d Cir. 2010), Nicolaou v. Horizon Media, Inc., 402 F.3d 325 (2d Cir. 2005), and King v. Marriott Int'l, Inc., 337 F.3d 421 (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

A. Procedural History and Statement of Facts[1]

Plaintiff-appellant Victor George was employed by defendant-appellee Junior Achievement of Central Indiana, Inc. ("JACI"), a non-profit organization involved in educational outreach. George began working at JACI in 1990, and became vice president in the mid-1990s. In this role he worked closely with Jeffrey Miller, who served as JACI's president and chief executive officer

[1] Unless otherwise noted, this statement of facts is based on the district court's findings of "undisputed" facts. George v. Junior Achievement of Central Ind., Inc., infra, at *2.

("CEO"). On or around July 1, 2006, George executed, through Miller, an Executive Vice President Basic Employment Agreement and Deferred Compensation Agreement ("Employment Agreement") with JACI that prescribed salary terms and created an ERISA-covered deferred compensation pension plan (the "401(k) plan") and health savings account ("HSA") specific to George. The original vesting date for the 401(k) plan was June 30, 2010, but Miller later amended the plan to have a December 1, 2009, vesting date.

Miller left JACI in December 2008, and was replaced by defendant-appellee Jennifer Burk as president and CEO. In May or June 2009, George discovered that JACI was not depositing money withheld from his paychecks into his plan accounts. He raised this problem with Milestone Advisors (JACI's outside accountants beginning in May 2009), and spoke with JACI Chief Operating Officer Sharon Lents. Following these discussions, account deposits were made to make up for the missed payments. The problem persisted, however, and proper account remittances were not made in July or August. George contacted Milestone Advisors and repeatedly discussed this deficiency with Burk in person and by e-mail. When the matter remained unresolved, George called the Indiana Department of Labor and U.S. Department of Labor in September 2009. See infra n.2. In late September or early October, George told two members of the JACI Board of Directors, including Board Chairman Mark Shaffer, that JACI's failure to fund his

401(k) and HSA was unlawful. On October 7, 2009, JACI issued George a check purporting to reimburse him for the missed HSA deposits, and on October 21, 2009, JACI deposited funds in his 401(k) account.

In September 2009, George informed Shaffer of his intention to retire in April 2010, twenty years after he first began working for JACI. In December 2009, George began negotiating the terms of his retirement with Burk and JACI Board members. A central issue during these discussions was whether JACI owed George's 401(k) account additional interest due to the late deposits. The parties were unable to reach an agreement. Also in December 2009, George liquidated the deferred compensation retirement account (totaling $26,627.71) that was established through his Employment Agreement and that had recently vested according to the amended Employment Agreement. Defendants did not learn of this withdrawal or the amended vesting date until after the fact.

On January 11, 2010, George received a letter from JACI notifying him that the company was terminating him effective December 31, 2009, and demanding that he repay the withdrawn funds. In response, George, through counsel, accused JACI by letter of violations related to the improper funding of his 401(k) and HSA accounts, and refused to return the withdrawn pension funds because, under the amended plan, they had fully vested.

In February 2010, George sued JACI in federal court in the Southern District of Indiana. As relevant here, count one of the operative amended complaint alleges that defendants violated ERISA section 510, 29 U.S.C. § 1140, the statutory anti-retaliation provision. In support of this claim, George alleges that at the time his employment was terminated he was enrolled in ERISA-governed 401(k) and HSA plans; that JACI fired him before his planned retirement date in retaliation for his complaints – to the Department of Labor, Burk, members of JACI's Board of Directors, outside accounting consultants, and fellow employees – that JACI failed to remit payments to his 401(k) and HSA plans; and that these complaints were a direct and proximate cause of his termination.

B. The District Court's Decision

The district court issued an Order dated September 28, 2011, granting defendants' motion for summary judgment on George's ERISA section 510 claim. George v. Junior Achievement of Cent. Ind., Inc., No. 1:10-cv-0220-JMS-MJD, 2011 WL 4537006 (S.D.Ind. Sept. 28, 2011). The court recognized a split in the circuits with respect to whether unsolicited internal complaints are protected activity under section 510, and noted that the Seventh Circuit had not directly addressed the issue. Id. at *5-6. Repeatedly referencing the Third Circuit's decision in Edwards, the court declared that section 510 "should be narrowly construed" and held that unsolicited complaints are not protected activity. George,

2011 WL 4537006, at *6. It reasoned that "unsolicited information given voluntarily" is not part of an "inquiry" under section 510, and that protection extends only to inquiries made of (not by) an employee. Id. The court then granted summary judgment because George did "not allege than [sic] any of his complaints, including his complaint to the DOL, Ms. Burk, members of the [JACI] Board, or outside [JACI] consultants, were solicited or were made as part of a formal inquiry or proceeding." Id. at *7. In so doing, the court did not distinguish between unsolicited complaints made internally and those made to the Department of Labor.[2]

George filed the present appeal on October 7, 2011.

SUMMARY OF ARGUMENT

The district court erred in holding that ERISA section 510 protects only complaints made in response to a request for information. As consistently construed by the Secretary (and previously held by the Fifth and Ninth Circuits), this broadly-worded provision should be interpreted to prevent retaliation against

[2] In response to a Freedom of Information Act request, the Department of Labor was unable to produce any record documenting George's contact. However, the court assumed for summary judgment purposes that George contacted the Department of Labor about JACI's failure to fund his 401(k) and HSA accounts. 2011 WL 4537006, at *3 n.2. In granting defendants' motion, the court referenced George's admission that he never told JACI about this alleged contact, but then stressed that, like the complaints made to JACI supervisors and the Board Chairman, George's contact with the Department was unsolicited. Id. at *7 (quoting allegation that "'George engaged in protected activity *by complaining*' to the DOL.") (emphasis in the original).

employees who raise complaints or give other ERISA-related information, whether to corporate management or a government agency. In particular, section 510's protection of "information" given in "any inquiry" is ambiguous, and the Secretary's permissible interpretation is entitled to deference. Indeed, only this interpretation respects Congressional intent and promotes ERISA's enforcement objectives.

Moreover, both the Supreme Court and this Circuit have interpreted the anti-retaliation provision of the Fair Labor Standards Act as protecting unsolicited employee complaints, and similar reasoning is justified when interpreting section 510's differently worded but equally protective anti-retaliation provision. Anti-retaliation provisions such as section 510 are designed to encourage employees to report potential violations, starting with the employer, and assure the cooperation on which accomplishment of ERISA's protective purposes depends. Only by protecting unsolicited employee inquiries and complaints do whistleblower protection provisions help avoid the chilling effect of preemptive retaliation, where an employee is fired or otherwise disciplined before having the chance to initiate a formal proceeding.

If unsolicited complaints or inquiries do not receive protection, employee participants and fiduciaries will inevitably be stymied in their efforts to address and resolve problems related to their employee benefit plans. Employees will be

required to await a "request for information" to be protected from punitive treatment; meanwhile, legitimate complaints and inquiries about the employees' plans and potential ERISA violations will have gone unaddressed. In the process, ERISA enforcement, which depends on employees coming forward with complaints without fear of retaliation, will likewise be stymied, contrary to Congressional intent. Thus, to avoid fostering a work environment that risks punishing employees for helping fulfill ERISA's protective purpose, and thereby frustrating effective enforcement of ERISA, this Court should interpret section 510 to protect employees from retaliation for making unsolicited complaints.

ARGUMENT

SECTION 510 OF ERISA SHOULD BE INTERPRETED TO PROTECT AN EMPLOYEE WHO RAISES UNSOLICITED COMPLAINTS TO MANAGEMENT OR THE DEPARTMENT OF LABOR

A. Section 510 Broadly Protects Both Complaints Made Internally to Management and to Government Enforcement Agencies

1. "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 Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986, 989-90 (7th Cir. 1993). "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, at 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; see Edwards, 610 F.3d at 227 (Cowen, J., dissenting) ("this anti-retaliation provision plays a very important and even essential role in the proper implementation of the whole ERISA scheme because it actually 'helps to make [ERISA's] promises credible'") (citing Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co., 520 U.S. 510, 515 (1997) (quoting Heath v. Varity Corp., 71 F.3d 256, 258 (7th Cir.1995)).

In pertinent part, section 510 provides:

> 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 Act or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. § 1140 (emphasis added).

Although the district court primarily decided that unsolicited internal complaints are not protected under this provision, the opinion indicates that the court would also not protect unsolicited complaints to the Department of Labor. George, 2011 WL 4537006, at *7. The question before this Court, therefore, is whether this constricted construction is dictated by the plain meaning of the statute, or whether it can also be permissibly read to cover unsolicited complaints, either

internally to the employer or plan management or to the Department of Labor or other government agency, as the Secretary has concluded.

In reviewing the court's interpretation of the statute, "the starting point must be the language employed by Congress." Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979). Moreover, "[w]hen interpreting statutory language, the meaning attributed to a phrase 'depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.'" River Rd. Hotel Partners, LLC v. Amalgamated Bank, 651 F.3d 642, 649 (7th Cir. 2011) (quoting Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct. 1325, 1330 (2011)).

2. Section 510 employs broad language to protect employees from retaliation, and liberally interpreting these protections is consistent with statutory construction principles. See Hashimoto, 999 F.2d at 411 (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 [through unsolicited complaints] a violation of law in connection with an ERISA plan."); cf. Sapperstein v. Hager, 188 F.3d 852, 857 (7th Cir. 1999) ("the remedial nature of [the Fair Labor Standards Act] further warrants an expansive interpretation of its provisions") (citation omitted). Broadly construed, section 510's protection for "any person" who has "given information . . . in any inquiry" encompasses a plan

participant's complaints about alleged wrongdoing to corporate or plan officials directly or indirectly responsible for plan management, or to a government agency responsible for enforcing ERISA, and, indeed, the receipt of such complaints will generally trigger a corresponding duty to investigate. It is, therefore, completely natural to interpret "information" given in an "inquiry" to include unsolicited complaints.

"[R]eading the whole statutory text, considering the purpose and context of the statute," Kasten, 131 S. Ct. at 1330, is all the more important here because ERISA does not itself define any of the key terms employed in section 510, including the pivotal statutory term – "inquiry." See River Rd. Hotel Partners, 651 F.3d at 649 (stating that "'we give words their ordinary meaning unless the context counsels otherwise'") (citation omitted). As commonly understood, however, "inquiry" encompasses any "request for information." Black's Law Dictionary 864 (9th ed. 2009); see, e.g., The American Heritage Dictionary of the English Language 679 (1976); Webster's Ninth New Collegiate Dictionary 624 (1986). This broad definition does not connote any particular level of formality, but in juxtaposition with the companion term "proceeding," and as modified by the all-encompassing term "any," it is clear that Congress intended "inquiry" to be given its broadest possible construction. See Dept. of Housing and Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) ("As we have explained, 'the word 'any' has an

expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)). Moreover, an "inquiry" of "whatever kind" necessarily includes an "inquiry" in either a governmental or non-governmental (employer or plan) setting, as the basic dictionary definition does not confine "inquiry" to any particular setting, and section 510 does not limit "any inquiry" based on any such distinction.[3]

Given the broad protection afforded under section 510, the salient question whether this provision prohibits retaliation against employees whose complaints are unsolicited should be answered in the affirmative. As discussed below, in the government inquiry context, this proposition has never been doubted until the district court did so here *sua sponte*. Section 510's lack of distinction between a governmental and non-governmental "inquiry" is highly significant because it leaves no principled basis to say that unsolicited complaints are protected when given to government officials, but not to workplace officials. And to construe unsolicited complaints to be unprotected activity in both settings would leave a gaping hole in section 510's protective scope that defies the ordinary canons of

[3] Interpreting a remedial statute to encompass and protect both internal and external complaints, without distinction, is not a novel position. See, e.g., Rayner v. Smirl, 873 F.2d 60, 64 (4th Cir. 1989) ("[I]t was Congress' intent to protect all railroad employees who report safety violations. The distinction between intra-corporate complaints and those made to outside agencies is therefore an 'artificial' one [under the Federal Railroad Safety Act]."). See also whistleblower cases cited infra, pp. 22-23.

statutory construction as well as common sense. See Pub. Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' . . . , we must search for other evidence of congressional intent to lend the term its proper scope.") (citation omitted).

There is no logical reason to suppose that Congress expected retaliation against a person who provides solicited information to be unlawful, and retaliation against a person who provides unsolicited information to be lawful. In both government and non-government contexts, information (whether in the form of a complaint, a statement of fact or opinion, or a question regarding plan interpretation or statutory rights) may be given in response to a directed request from someone in authority; but it may also be given without being asked, in anticipation of such request or because the government agency, company, or plan is presumed generally to invite such information in order to carry out their responsibilities.

To state the obvious, retaliation has the same adverse and chilling effect in both the solicited and unsolicited scenarios; and without a clear statement drawing a line between the two, someone volunteering information without being asked would reasonably expect to be afforded the same protections as someone who does the same thing after being asked. Indeed, the purported distinction in the two acts becomes completely blurred when, for instance, the

response to a request goes beyond the scope of the request, or where the standing law of the workplace encourages employees to come forward with complaints or engage in informal dispute resolution. Thus, section 510 can and should rationally be read to encompass any employee-generated request that corporate or plan management, as well as the government, take action to forestall or correct ERISA problems.

Having briefed the issue in the Nicolaou and Edwards cases, the Secretary is addressing this question in an amicus brief for the third time.[4] Here and in the prior briefs, the Secretary asserts that section 510 in this context is ambiguous, and that the question concerning prevention of retaliation against employees for their unsolicited complaints is critical to the enforcement of ERISA, which the Secretary administers. Accordingly, "Chevron provides the appropriate legal lens through which to view the legality of the [a]gency interpretation here at issue." Barnhart v. Walton, 535 U.S. 212, 222 (2002); cf. United States v. Mead Corp., 533 U.S. 218, 229-31 (2001); Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). The interpretation by the Secretary is

[4] See http://www.dol.gov/sol/media/briefs/edwards(A)-11-23-2009.htm (last visited Dec. 15, 2011), and http://www.dol.gov/sol/media/briefs/nicolaou(A)-3-12-2004.htm (last visited Dec. 15, 2011).

entitled in any event to deference under Skidmore v. Swift & Co., 323 U.S. 134 (1944), because it reasonably interprets the statutory language, avoids severe practical difficulties, and represents the Secretary's consistent position. And although the Secretary has articulated her interpretation in amicus briefs, that is a reason to grant deference, not to withhold it. See Auer v. Robbins, 519 U.S. 452, 462 (1997) (deferring to Secretary's interpretation of FLSA advanced in amicus brief because "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question"); see also Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007).

B. The Courts are Divided on Section 510's Protection of Unsolicited Complaints, but Recent Supreme Court Decisions Support Reading Whistleblower Provisions in Light of the Protective Purposes of the Statute

1. While a novel question in this Court, five courts of appeals are divided on the question presented concerning section 510's coverage of unsolicited internal complaints. It should be noted, however, that all the courts are in agreement that "inquiry" is not limited to government inquiries, and no court has, until the district court here, questioned that unsolicited complaints to the Secretary or other appropriate government agency are protected.

The Fifth and Ninth Circuits correctly concluded that Section 510 protects unsolicited internal complaints. Hashimoto, supra, involved a plaintiff who alleged she was discharged after complaining to management about alleged ERISA

violations. The complaints were not made in response to inquiries by management. In holding that section 510 "is clearly meant to protect whistle blowers" who, unsolicited, "protest[] a violation of law in connection with an ERISA plan," the Ninth Circuit stated:

> 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.

999 F.2d at 411.

In Anderson, supra, the Fifth Circuit similarly found that section 510 protects persons who make unsolicited ERISA-related complaints to management. The court determined that the plaintiff's allegation that he was discharged because he reported ERISA violations to management and refused to commit such violations fell "squarely within the ambit of ERISA § 510." 11 F.3d at 1314.

Furthermore, Judge Cowen's dissent in Edwards, 610 F.3d at 226-31 (Cowen, J., dissenting), the recent Third Circuit case addressing this issue, articulates perhaps the best judicial rationale for these holdings. Characterizing the majority's opinion that section 510's "inquiry" clause has a plain meaning precluding the protection of unsolicited internal complaints to be "questionable at best," id. at 228, Judge Cowen considered the section 510 anti-retaliation provision

to be ambiguous, in part because the majority's "unsustainable interpretation" left "totally unprotected a certain category of conduct . . . that the remedial statutory provision was enacted to protect in the first place." Id. at 226-27. He further rightly observed that the majority's ruling could permit or even encourage an employer "to fire an employee immediately after she makes an informal complaint instead of conducting an investigation." Id. at 228. Judge Cowen also concluded that the terms "given information" and "inquiry" as used in the statute "appear[] to be even broader" than other anti-retaliation statutes that courts have found to protect unsolicited complaints. Id. at 230-31 (citing the Clean Water Act and the Fair Labor Standards Act).

2. In contrast, three Circuits have taken a more restricted, and purportedly more "textual," view of section 510. For the reasons set forth above, the Secretary strongly disagrees that theirs is a necessary or better reading of the statute.

Most recently, the Third Circuit in Edwards, supra, held that unsolicited internal complaints are not protected activity under section 510. The Edwards majority (over Judge Cowen's vigorous dissent) largely relied on the Fourth Circuit's holding in King, supra, that the section 510 phrase "testified or is about to testify" supports limiting an "inquiry or proceeding" to "more formal actions." Edwards, 610 F.3d at 223 (citing King, 337 F.3d at 427). King's reasoning, however, is unpersuasive because it failed to differentiate between "inquiry" and

"proceeding," and did not adequately consider the scope of "given information" (as opposed to "testify"); cf. Nicolaou, 402 F.3d at 329, 330 & n.3 (stating that section 510's "reference to testimony is wholly irrelevant to our understanding of the language 'given information . . . in any inquiry or proceeding'"). The Second Circuit, in Nicolaou, gave section 510 a broader interpretation than the Third and Fourth Circuits and found that information given at a meeting set up by company officials was protected, but, given the facts of the case, was not required to decide whether section 510 protects entirely unsolicited complaints. None of these decisions, therefore, fully and adequately considered "the whole statutory text, considering the purpose and context of the statute and . . . any precedents or authorities that inform the analysis." Kasten, 131 S. Ct. at 1330.

3. The ERISA decisions also did not have the benefit of the recent Supreme Court Kasten decision. Kasten, 131 S.Ct. 1325, supra. Moreover, Edwards overlooked the Supreme Court's Crawford decision of the year before, which should have informed its analysis and limited the influence of the King decision on the Third Circuit's reasoning. Crawford v. Metro. Gov't of Nashville, 555 U.S. 271 (2009).

In Crawford, the Supreme Court interpreted the "opposition" clause of Title VII's anti-retaliation provision, which makes it "unlawful . . . for an employer to discriminate against any . . . employe[e] . . . because he has opposed any practice

made . . . unlawful . . . by [Title VII]." 42 U.S.C. § 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." Crawford, 555 U.S. at 277-78. Thus, while holding that "responding to someone's question" is protected "opposition" activity, the Court also indicated that "provoking the discussion" and "report[ing] discrimination on her own initiative" was also protected as opposition to unlawful activity. A similarly broad construction should be applied to ERISA's protection for "information given . . . in any inquiry," since that formulation no more suggests protecting only responses to requested information than does "opposed any practice" suggest protecting only unsolicited provocations.

Kasten, by contrast, involved the anti-retaliation provision of the Fair Labor Standards Act, which prohibits, *inter alia*, retaliation "against any employee because such employee has filed any complaint." FLSA section 15(a)(3), 29 U.S.C. § 215(a)(3). The case came to the Supreme Court from a decision of this Court, Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. 2009), holding that this language protects written, but not oral, internal

complaints.[5] On review, the Supreme Court partially reversed and vacated the court's judgment and held that section 15(a)(3) protects both oral and written complaints.[6] After concluding that the term "filed" is ambiguous, the Court rested its holding on "[s]everal functional considerations," including not wanting to undermine basic FLSA objectives or enforcement. Kasten, 131 S.Ct. at 1333. The Court observed that effective FLSA enforcement depended upon "information and complaints received from employees seeking to vindicate rights claimed to have been denied." Id. It further stressed that limiting protection to written complaints could "take needed flexibility from those charged with the Act's enforcement" by "prevent[ing] Government agencies from using hotlines, interviews, and other oral methods for receiving complaints." Id. at 1334. Finally, the Court recognized the

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[5] In so holding, the Court focused on the phrase "any complaint," and reasoned that the term "any" modified the meaning of "complaint" so as to "not limit the types of complaints which will suffice." 570 F.3d at 837-38. The Court, however, limited protection to written internal complaints based on the FLSA's use of the word "filed." Id. at 839-40.

[6] The two dissenting Justices (Scalia and Thomas, JJ.) would have held that the FLSA does not protect any internal complaints. The six-Justice majority (Breyer, J.; Kagan, J., was recused), while stating the issue did not require decision, pointedly observed that not protecting internal complaints "would discourage the use of desirable informal workplace grievance procedures to secure compliance with the Act." 131 S. Ct. at 1334 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998)); see 131 S. Ct. at 1341 (Scalia, J., dissenting) ("While claiming that it remains an open question whether intracompany complaints are covered, the opinion adopts a test for 'filed any complaint" that assumes a 'yes' answer—and that makes no sense otherwise.").

government's long-held view that the phrase "filed any complaint" protected both oral and written complaints, and granted it judicial deference. Id. at 1335 (citing Skidmore, 323 U.S. at 140).

4. Informed by fundamental policy considerations and close textual analysis, the Supreme Court has thus broadly construed the anti-retaliation provisions to two of the most important federal employment statues, Title VII and the FLSA, extending protections to internal complaints that had been denied by the lower courts. These Supreme Court decisions provide a better model to follow in the present case than this Court's ruling in Hatmaker v. Memorial Medical Center, 619 F.3d 741 (7th Cir. 2010). In Hatmaker, this Court construed the term "investigation" in the part of Title VII's anti-retaliation provision that makes it unlawful to "discriminate against any employee . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). The Court held that an employee's comments made during an internal investigation were not protected under this provision, reasoning that a "purely internal investigation" is not an "official investigation[]" because it "does not involve a 'charge,' or testimony, and neither is it a 'proceeding' or a 'hearing.'" 619 F.3d at 747. This case is distinguishable, however, because Hatmaker had no occasion to construe what giving "information" in "any inquiry" encompasses, as those terms do not appear in

Title VII. See Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C., 277 F.3d 882, 892 (7th Cir. 2001) ("borrow[ing] aspects of Title VII law to use in interpreting ERISA . . . must be done with caution, as there are significant differences between ERISA and Title VII, and there are even differences between the anti-retaliation provisions of the two statutes").[7]

Indeed, Hatmaker stands as an exception to the general trend in the courts. When interpreting a broad range of retaliation statutes, courts, including the Seventh Circuit, have repeatedly extended protection beyond external complaints and protected internal complaints. See Neal v. Honeywell Inc., 33 F.3d 860, 863-64 (7th Cir. 1994) (ruling that False Claims Act whistleblower provision protects employee "supplying information that set off an investigation") (abrogated on other grounds by Graham Cnty. Soil & Water Conservation Dist. v. United States, 545 U.S. 409 (2005); see also, e.g., Clean Harbors Envtl. Servs., Inc. v. Herman, 146 F.3d 12, 19 (1st Cir. 1998) (holding that internal oral and written complaints are protected under Safety Transportation Assistance Act, and stating that "[w]e reject company's interpretation that STAA anti-retaliation protection is available only to

[7] In addition, Hatmaker is hard to reconcile even with the Court's earlier Kasten decision, which Hatmaker does not address or even cite, much less the later-decided and more broadly protective Supreme Court decision. If "filed any complaint" under the FLSA and "participated in . . . an investigation" under Title VII require completely different analyses and lead to divergent conclusions, the meaning of "given information . . . in any inquiry" under ERISA is also not bound by this Court's reading of the Title VII "participate[] in . . . an investigation" clause.

employees who file complaints with a government agency or a court"); Bechtel Constr. Co. v. Sec'y of Labor, 50 F.3d 926 (11th Cir. 1995) (holding that internal complaints are protected activity under Energy Reorganization Act); Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974) (protecting internal complaints under Mine Safety Act).

Accordingly, in the ERISA context, not only does "reading the whole statutory text, considering the purpose and context of the statute," support the Secretary's construction that unsolicited complaints are protected by section 510 as "information given . . . in an inquiry," but "consulting any precedents or authorities that inform the analysis" also, on balance, leads to the same conclusion. Kasten, 131 S. Ct. at 1331; accord River Rd. Hotel Partners, 651 F.3d at 649.

C. ERISA Enforcement is Dependent on Employee Complaints, Making the Protection of Unsolicited Complaints under Section 510 of Critical Importance to the Purposes of the Statute as a Whole

1. The overarching purpose of ERISA is "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). Section 510 is critical to achieving the "interests of participants in employee benefit plans," as the Supreme Court has recognized. Ingersoll-Rand Co., 498 U.S. at 137. And the legislative history of this anti-retaliation provision makes clear that "[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. 93-127, at 35 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4871. The dual emphasis on prevention and redress reflects that Congress intended ERISA to encourage employees to come forward with information bearing on plan management and section 510 to protect them when they do.

Section 510's remedial goals are naturally frustrated, and prevention goals undermined, if the term "inquiry" is interpreted in a manner that forces employees to wait for employer prompting before reporting alleged violations. Participants cannot help prevent violations – and thus ERISA cannot be adequately enforced – if participants cannot bring to management their complaints and other information relating to ERISA without fear of retaliation, including termination of employment (and the non-vested employee benefits that employment entails); at a minimum, serious problems could go uncorrected while otherwise willing participants are deterred from raising legitimate complaints unless personally invited.

Even if "inquiry" is more narrowly interpreted, an employee's complaint can be viewed as the necessary first step triggering the inquiry. Hashimoto, 999 F.2d at 411. Especially where an employee makes a complaint or otherwise gives information to corporate officers or plan fiduciaries who have a duty to inquire into complaints and allegations of wrongdoing, the unsolicited information supplied by

an employee is part and parcel of the ensuing process. If "inquiry" is narrowly interpreted to exclude such initial complaints, employers could readily circumvent section 510 by postponing proceedings or disregarding complaints. Even if formal proceedings were finally instituted, the whistleblower who serves as the catalyst for the proceedings would be wholly unprotected. In many cases, that person is the most likely target of retaliation and the one in greatest need of protection.

The district court's interpretation that internal complaints are not protected creates – and encourages employers to create – a trap for unwary employees who comply with company internal complaint procedures only to find themselves facing retaliation for having initiated such procedure, or having voiced complaints more informally preliminary to using that procedure. See Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 904 (2007) (holding that statutory interpretation is "flawed" if it "creat[es] legal distinctions that operate as traps for the unwary"). Indeed, under such a cramped reading of section 510, fiduciaries who are employees would be placed in the untenable position of risking their jobs if, by fulfilling their statutory obligations to monitor plans and investigate the prudence of actions taken with respect to those plans, they provoke their employment bosses to retaliate. An interpretation of section 510 that yields these results defies commonsense, and, therefore, should be avoided. See Pub. Citizen,

491 U.S. at 454 (stating that courts avoid constructions that produce "odd" or "absurd results").

Moreover, given the vast number of plan participants covered by ERISA, the Secretary must rely on plan participants or beneficiaries to alert plan fiduciaries, plan sponsors, and the Department to potential violations – a task they could not (or would not) perform without protection from retaliation throughout the process. The Secretary simply does not have the resources to monitor all potential ERISA violations. Not surprisingly, therefore, until this case the Secretary has never had to defend the basic proposition that "inquiry," as applied to the interaction between a participant and the government, encompasses information that comes to the government unsolicited. In many if not most cases, that is how the Department learns of a possible violation and the need for an investigation. See Kasten, 131 S. Ct. at 1325 (protecting oral complaints under the FLSA); see also Tomanovich v. City of Indianapolis, 457 F.3d 656, 663 (7th Cir. 2006) (agreeing with plaintiff's assertion under Title VII that "obviously, the filing of a charge of discrimination" constitutes protected activity) (citations and quotations omitted).

Employees are encouraged to report ERISA violations to the Department of Labor. For example, in addition to a recently created web page for submitting online complaints, the Employee Benefits Security Administration (EBSA) maintains national and field offices where individuals can call concerning alleged

ERISA violations and speak with EBSA Benefit Advisors. EBSA receives thousands of phone calls each year on its toll-free hotline. Under the district court's reasoning, however, individuals calling EBSA to report violations would not be protected from retaliation because their complaints are unsolicited. By discouraging such complaints, this narrow interpretation undermines what the Supreme Court in Kasten recognized as pivotal to government enforcement generally. See Kasten, 131 S. Ct. at 1334 (relying on precedent under the National Labor Relations Act, a "related statute," to support its view that construction of the FLSA's anti-retaliation provision should be informed by its "enforcement need[]" for broad employee protection) (citing NLRB v. Scrivener, 405 U.S. 117, 123 (1972)).

Given the strong federal policy favoring both internal dispute resolution and complaint-based government enforcement, it is highly doubtful that Congress intended to take away or leave out this fundamental protection for unsolicited pre-investigation information when it chose to use the phrase "give[] information . . . in any inquiry or proceeding." Cf. Kasten, 131 S. Ct. at 1333-34 (noting the importance of employee complaints to the enforcement scheme and holding that excluding internal complaints from anti-retaliation protection would "discourage the use of desirable informal workplace grievance procedures"). Instead, section 510's legislative history emphasizes that "[t]he enforcement provisions [of section

510] have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations [of ERISA]," S. Rep. No. 93-127 (1973), and "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); see Ingersoll-Rand Co., 498 U.S. at 137 (quoting legislative history) (emphasis added) (Section 510 is intended "'to completely secure the rights and expectations brought into being by this landmark reform legislation.'"). Thus, just as the first call or letter to DOL is protected activity under section 510, so too should the first oral or written communication to management be protected, whether solicited or not.

2. The "functional considerations" that provided the ultimate basis for the Kasten ruling readily transfer to the present case. Kasten, 131 S. Ct. at 1333. George's internal complaints sought to remedy misconduct jeopardizing his own benefits. Specifically, the complaints concerned defendants' failure to fund retirement and health accounts from which he intended to draw benefits, and thus aimed "to vindicate rights claimed to have been denied." Id. Leaving his unsolicited complaints unprotected would thus undermine effective ERISA enforcement and contravene legislative intent in the very manner decried by the

Supreme Court. Id.; see Ingersoll-Rand Co., 498 U.S. at 143 ("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.").

For this reason, the Ninth Circuit's "first step" analysis is particularly appropriate in the circumstances of this case. Hashimoto, 999 F.2d at 411. The allegation here is that the defendants retaliated against George by terminating him after he complained to various JACI officials, who were in a position to exercise authority over his plans, that contributions owing to the plans, and deducted from his paycheck, had not been deposited in the plans. Complaints of this nature trigger a fiduciary duty to investigate and to take action to ensure that the plan receives promised contributions. See Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transport., Inc., 472 U.S. 559, 572 (1985) ("ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries."). And the record here indicates that the defendants did conduct such an inquiry since missing funds were credited to his account. Thus, when a participant like George complains about missed contributions, he has effectively initiated an "inquiry" within the meaning of both the statute's text and purposes. Section 510 protects such an individual from retaliation.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's decision granting defendants' motion for summary judgment on George's ERISA section 510 claim.

Respectfully submitted,

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Dated: December 16, 2011

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I hereby certify that a virus check, using McAfee Security VirusScan Enterprise 8.0, was performed on the PDF file and paper version of this brief, and no viruses were found.

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Dated: December 16, 2011

CERTIFICATE OF SERVICE

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