03-9186

United States Court of Appeals

for the

Second Circuit

CHRYSTINA NICOLAOU,

Plaintiff-Appellant,

-against-

HORIZON MEDIA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

HOWARD M. RADZELY
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Special Litigation

GAIL ANN PERRY
Trial Attorney
U.S. Department of Labor
Office of the Solicitor, Room N-4611
Plan Benefits Security Division
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5600
Attorneys for the Secretary of Labor

TABLE OF CONTENTS

QUESTION PRESENTED....1

INTEREST OF THE SECRETARY....1

STATEMENT OF THE CASE....2

I. Facts....2

II. Procedural Background....3

SUMMARY OF ARGUMENT....5

ARGUMENT....6

I. By Its Terms, ERISA Section 510 Broadly Protects Those Who Give Information In Any Inquiry, And Is Distinguishable From The FLSA's Anti-Retaliation Language....6

II. The Ninth Circuit Has Correctly Read Section 510 to Protect Claimants Who Initiate or Participate In Internal Inquiries, While The Fourth Circuit Has Misinterpreted This Provision....12

III. Strong Policy Considerations Support Reading Section 510 to Protect Internal Inquiries....15

CONCLUSION....18

TABLE OF AUTHORITIES

CASES

Anderson v. Electronic Data Systems Corp.,
11 F.3d 1311 (5th Cir. 1994) 13

Authier v. Ginsberg,
757 F.2d 796 (6th Cir. 1985) 13

Bechtel Construction Company v. Secretary of Labor,
50 F.3d 926 (11th Cir. 1995) 14

Bick v. The City of New York,
1997 WL 381801 (S.D.N.Y. July 10, 1997) 4

Blackburn v. Reich,
79 F.3d 1375 (4th Cir. 1996) 15

Brennan v. Maxey's Yamaha, Inc.,
513 F.2d 179 (8th Cir. 1975) 8

Brock v. Casey Truck Sales, Inc.,
839 F.2d 872 (2nd Cir. 1988) 8

Brock v. Richardson,
812 F.2d 121 (3rd Cir. 1987) 8

Brogan v. United States,
522 U.S. 398 (1998) 7

Brown & Root v. Donovan,
747 F.2d 1029 (5th Cir. 1984) 14

Central States, Southeast & Southwest Areas Pension
Fund v. Central Transport, Inc.,
472 U.S. 559 (1985) 10

Clean Harbors Environmental Services, Inc. v. Herman,
146 F.3d 12 (1st Cir. 1998) 14, 15

Consolidated Edison of New York, Inc. v. Donovan,
673 F.2d 61 (2nd Cir. 1982) 14

Couty v. Dole,
886 F.2d 147 (8th Cir. 1989) 14

Coyle v. Madden,
2003 WL 22999222 (E.D.Pa. Dec. 17, 2003), ... 8

Crowley v. Pace Suburban Business Division of Regional Transport Authority,
938 F.2d 797 (7th Cir. 1991) 8

Department of Housing and Urban Development v. Rucker,
535 U.S. 125 (2002) 7

EEOC v. Romeo Community Schools,
976 F.2d 985 (6th Cir. 1992) 8

EEOC v. White & Son Enterprises,
881 F.2d 1006 (11th Cir. 1989) 8

Griffen v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982) 16

Haley v. Retsinas,
138 F.3d 1245 (8th Cir. 1998) 14

Hashimoto v. Bank of Hawaii,
999 F.2d 408 (9th Cir. 1993) 12, 13, 14

International Union of Operating Engineers v. Flair Builders, Inc.,
406 U.S. 487 (1972) 7

King v. Marriott International, Inc.,
337 F.3d 421 (4th Cir. 2003) 13, 14

Kotcher v. Rosa and Sullivan Appliance Center,
957 F.2d 59 (2nd Cir. 1992) 9

Lambert v. Ackerly,
180 F.3d 997 (9th Cir. 1999) 8

Lambert v. Genesee,
10 F.3d 46 (2nd Cir. 1993) 4, 8, 9

Love v. RE/MAX of America, Inc.,
738 F.2d 383 (10th Cir. 1984) 8

Massachusetts Mutual Life Insurance Co. v. Russell,
473 U.S. 134 (1985) 16

McLean v. Carlson Companies, Inc.,
777 F.Supp. 1480 (D. Minn. 1991) 13, 14

Mertens v. Hewitt,
508 U.S. 248 (1993) 16

Nicolaou v. Horizon Media, Inc.,
2003 WL 22208356 (S.D.N.Y. Sept. 23, 2003) 4

Nicolaou v. Horizon Media, Inc.,
2003 WL 22852680 (S.D.N.Y. Oct. 15, 2003) 4, 10, 11

Passaic Valley Sewerage Comm'rs v. U.S. Department of Labor,
992 F.2d 474 (3rd Cir. 1993) 14, 15

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 6

Secretary of Labor v. Fitzsimmons,
805 F.2d 682 (7th Cir. 1986) (en banc) 1

United States v. Gonzales,
520 U.S. 1 (1997) 7

Valerio v. Putnam Associates Inc.,
173 F.3d 35 (1st Cir. 1999) 8

Vasquez v. Zenith Travel,
2000 WL 1532953 (S.D.N.Y. Oct. 16, 2000) 4, 13, 14

Yellow Freight Systems, Inc. v. Reich,
38 F.3d 76 (2d. Cir. 1994) 14

STATUTES

Employee Retirement Income Security Act (ERISA)
29 U.S.C. § 1001, et seq 1
29 U.S.C. §§ 1104, 1105, 1106, and 1109 16
Section 510, 29 U.S.C. § 1140 .... passim
Section 502(a)(3), 29 U.S.C. 1132(a)(3) 3

Sarbanes-Oxley Act
18 U.S.C. § 1514A 2

Fair Labor Standards Act (FLSA)
29 U.S.C. § 215 3
29 U.S.C. § 15(a)(3) 3-4, 7-8
29 U.S.C. § 215(a)(3) 7, 8, 9

Title VII 4, 8, 9, 11
42 U.S.C. § 2000e-3(a) 9

Occupational Safety and Health Act
29 U.S.C. § 660(c) 1-2

Migrant and Seasonal Agricultural Worker Protection Act
29 U.S.C. § 1855(a) 2

Clean Water Act
33 U.S.C. § 1367(a) 2, 14

Surface Transportation Assistance Act
49 U.S.C. § 31105(a) 2, 14

Fed. R. Civ. P. 11(b) 10

Fed. R. Civ. P. 26(g) 10

Hawaii Whistle Blowers' Protection Act, Haw. Rev.
Stat. §§ 378-61 et seq 12

Energy Reorganization Act (ERA) 14

Safety Transportation Assistance Act 14

Federal Deposit Insurance Act 14

Atomic Energy Act 14

OTHER AUTHORITIES

119 Cong. Rec. 30044 (1973) 11

H.R. No. 93-453, reprinted in 1974 U.S.C.C.A.N. 4639, 4655 11

S. Rep. No. 93-127, reprinted in 1974 U.S.C.C.A.N.4838, 4871 11

QUESTION PRESENTED

Whether section 510 of ERISA, 29 U.S.C. § 1140, protects from retaliation a plan participant and fiduciary who complains to management concerning possible ERISA violations.

INTEREST OF THE SECRETARY

The Secretary of Labor has primary enforcement authority for Title I of the Employee Retirement Income Security Act ("ERISA"), 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. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc).

ERISA section 510, 29 U.S.C. § 1140, protects participants against retaliation for exercising rights granted to them by ERISA or their plan and for giving information in proceedings related to ERISA. At issue in this case is whether the protection of section 510 of ERISA for "any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act" applies to a participant and fiduciary of an ERISA-covered plan who initiates or takes part in an internal, informal investigation of possible ERISA violations.

The district court held that section 510's protections extend only to those who make formal, external inquiries. The Secretary has a significant interest in ensuring that ERISA section 510 is interpreted broadly to protect participants and fiduciaries who uncover and attempt to remedy statutory violations. In addition, the Court's decision here may affect the interpretation of the numerous other anti-retaliation provisions that the Secretary administers. See, e.g., 29 U.S.C. § 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); 18 U.S.C. § 1514A (Sarbanes-Oxley Act).

STATEMENT OF THE CASE

I. Facts

On July 22, 1998, Horizon Media, Inc. (Horizon or Appellee), hired Appellant Chrystina Nicolaou as Director of Human Resources and Administration. [JA-8] The complaint [JA-1] alleges that, as HR Director, Nicolaou served as a discretionary trustee and thus as a fiduciary to Horizon's 401(k) plan. [JA-8] Nicolaou was also a plan participant. Initially, Nicolaou reported to Jerry Riley, the company's chief financial officer (CFO). In October 1998, Nicolaou began reporting to William Koenigsberg, the president of the company and to Stewart Linder, the controller. [JA-8]

Sometime after commencing her employment, Nicolaou discovered payroll discrepancies involving the underpayment of overtime to certain employees. [JA-8] Nicolaou also discovered that Horizon had been underpaying these employees for approximately ten years, which caused the Horizon 401(k) plan to be underfunded. [JA-9]

When she first discovered the payroll underpayment issue, Nicolaou advised CFO Riley of the payroll discrepancy, but he took no action. [JA-8 – JA-9] In January or February 1999 and again in August 1999, Nicolaou raised the underpayment payroll issue with Controller Linder, who, like Riley, took no action. [JA-9] Convinced by then that she had not received an adequate response, Nicolaou contacted Mark Silverman, counsel for Horizon, to request an investigation of the illegal payroll practice. [JA-9] Nicolaou emphasized to Silverman, as she had to both Riley and Linder, that the failure to pay

overtime also resulted in underfunding of the 401(k) plan. [JA-9] Nicolaou contends that by initiating an investigation of Horizon's underfunding of the 401(k) plan, she was acting in her capacity as fiduciary of the 401(k) plan. [JA-9 – JA-10]

Shortly after her meeting with Horizon's attorney, Silverman confirmed Nicolaou's findings regarding the payroll issue. [Ja-10] In November 1999, both Silverman and Nicolaou met with Horizon President, Koenigsberg. At the November 1999 meeting, Silverman described the payroll discrepancy and the under-funding of the 401(k) pension plan. Silverman stressed the need for immediate resolution of the violations. [JA-10] Within a few days of the November meeting, Ms. Nicolaou was demoted from Director of Human Services and Administration to Office Manager. [JA-10 – JA-11] Horizon hired two additional people to assume all the duties of the Director position. [JA-11] On November 7, 2000, Ms. Nicolaou was terminated. [JA-12]

II. Procedural Background

Appellant filed her complaint against Horizon alleging that Horizon violated the anti-retaliation provision in ERISA section 510, as well as the similar provision in section 15 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215. [JA-1] Nicolaou brought her ERISA claim pursuant to ERISA section 502(a)(3), which allows a plan participant, beneficiary or fiduciary to sue for "appropriate equitable relief" to remedy a violation of the Act. 29 U.S.C. 1132(a)(3). Horizon moved to dismiss for failure to state a claim. In an opinion dated September 19, 2003, the district court granted Horizon's motion, dismissing both the ERISA and FLSA claims. In dismissing the ERISA claim, the court reasoned that the plaintiff had not sought equitable relief within the meaning of section 502(a)(3). The court did not, however, decide whether Nicolaou had stated a viable

claim under ERISA section 510. Nicolaou v. Horizon Media, Inc., 2003 WL 22208356 (S.D.N.Y. Sept. 23, 2003). [JA-23]

On reconsideration, the district court found that Plaintiff was, in fact, seeking an equitable remedy. The court nevertheless affirmed its decision dismissing the ERISA claim, concluding that ERISA's anti-retaliation provision only applies to formal, external investigations or proceedings relating to the statute. Nicolaou v. Horizon Media, Inc., 2003 WL 22852680 (S.D.N.Y. Oct. 15, 2003). [JA-32] The court reasoned that the relevant language in section 510 cannot be distinguished from language in the anti-retaliation provisions in the FLSA and Title VII, which the Second Circuit had construed not to apply to informal, internal complaints. Lambert v. Genesee, 10 F.3d 46 (2d Cir. 1993) (holding that the plain language of FLSA section 15(a)(3) did not provide a cause of action for retaliation for an informal complaint to a supervisor). [JA-36] The district court also relied on another decision from the Southern District of New York construing a similar phrase in Title VII as limited to formal complaints, although the court there ultimately concluded that Title VII does protect internal complaints because that Act contains additional broad language protecting those who "oppose" illegal employment practices. Bick v. The City of New York, 1997 WL 381801 (S.D.N.Y. July 10, 1997). [JA-35] The court below rejected, as unreasoned, the district court's holding in Vasquez v. Zenith Travel, 2000 WL 1532953 (S.D.N.Y. Oct. 16, 2000), that "formative inquiries" about discrepancies in a participant's plan account were a protected activities under section 510. [JA-37 – JA-38, footnote 3] Finding no basis to distinguish ERISA section 510 from the provision at issue in Genesee, the district court rejected plaintiff's claim that

her participation in an internal inquiry regarding possible ERISA violations was protected under section 510. [JA-38]

After the district court denied her motion for reconsideration, Nicolaou filed the instant appeal on November 7, 2003. [JA-40] Nicolaou challenges the district court's dismissal of her claim under ERISA section 510, but does not here challenge the court's dismissal of her FLSA claim.

SUMMARY OF ARGUMENT

This Court has not addressed the question whether internal inquiry into alleged ERISA violations is statutorily protected activity under ERISA section 510. The broadly-worded anti-retaliation provision in section 510 can and should be interpreted to protect internal inquiries relating to possible ERISA violations. Although the Second Circuit has held that the anti-retaliation provision in the FLSA does not protect internal complaints, the language of ERISA 510 distinguishes it from the FLSA whistleblower provision. Given this broad language, the Secretary agrees with the Ninth Circuit that section 510 protects from retaliation employees who complain to company management, and disagrees with the Fourth Circuit's more cramped reading of the scope of this provision. Furthermore, strong policy considerations favor a broad interpretation of the statutory language to include informal, internal inquiries or proceedings, particularly where, as here, the complainant is a fiduciary charged with the critical duty to protect the interests of participants and the plan's financial soundness.

ARGUMENT

I. By Its Terms, ERISA Section 510 Broadly Protects Those Who Give Information In Any Inquiry, And Is Distinguishable From The FLSA's Anti-Retaliation Language

As in any case involving statutory interpretation, to determine whether section 510 prohibits an employer from taking adverse action against someone who participates in an internal corporate investigation or inquiry relating to ERISA, "the starting point must be the language employed by Congress." Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979). In pertinent part, section 510 provides:

> 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 Act or the Welfare and Pension Disclosure Act. The provisions of section 502 shall be applicable in the enforcement of this section.

29 U.S.C. § 1140 (emphasis added). By its terms, section 510 extends protection in any of three situations: (1) when a person has given information in any inquiry or proceeding relating to ERISA; (2) when a person has testified in any inquiry or proceeding relating to ERISA; or (3) when a person is about to testify in any such inquiry or proceeding.

The text of ERISA section 510 is broad and most naturally read to encompass retaliation for providing information in both informal, internal inquiries and formal, external investigations and court proceedings. A person who, like respondent, has provided information about possible ERISA violations in an informal inquiry internal to the company that sponsors the ERISA plan has "given information . . . in any inquiry . . . relating to [ERISA]" within the meaning of this provision. The terms "information" and "inquiry" are both extremely broad in scope, and they are not naturally understood as

limited to formal submissions in official, external proceedings. The breadth of those terms is reinforced by their juxtaposition with the narrower terms "testify" and "proceeding," which may connote more formal submissions. By using not only the term "testify" but also the term "give[] information," and by using not only the term "proceedings" but also the term "inquiry," Congress made clear that it intended to protect all provision of information in all kinds of investigations – whether formal or informal, internal or external. The use of the modifier "any" before the word "inquiry" provides further indication that Congress did not intend to limit the kinds of investigations that are covered by the anti-retaliation provision. See Department of Housing and Urban Development 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); accord Brogan v. United States, 522 U.S. 398, 400 (1998); International Union of Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 491 (1972).

In interpreting ERISA section 510, the district court here looked to Second Circuit law interpreting the scope of the anti-retaliation provision in the FLSA. Section 15(a)(3) of FLSA, provides that "it is unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted any proceeding under or related to [FLSA], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3). Most courts have interpreted this language to cover plaintiffs who lodge informal complaints with employers, and hold that an informal assertion of rights under the FLSA to an employer triggers protection under the language of section

15(a)(3). See Lambert v. Ackerly, 180 F.3d 997 (9th Cir. 1999); Valerio v. Putnam Assocs. Inc., 173 F.3d 35 (1st Cir. 1999); EEOC v. Romeo Community Schools, 976 F.2d 985, 989 (6th Cir. 1992); Crowley v. Pace Suburban Bus. Div. of Reg'l Transp. Auth., 938 F.2d 797 (7th Cir. 1991); EEOC v. White & Son Enterprises, 881 F.2d 1006, 1011 (11th Cir. 1989); Brock v. Richardson, 812 F.2d 121, 124-25 (3d Cir. 1987); Love v. RE/MAX of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 181 (8th Cir. 1975); Coyle v. Madden, 2003 WL 22999222, *3 (E.D. Pa. Dec. 17, 2003). The Secretary agrees with these decisions and believes that this Court erred to the extent it held that the "plain language of [FLSA section 15(a)(3)] 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." Genesee, 10 F.3d at 55.

It is possible, however, to read Genesee somewhat more narrowly than this broad language would suggest.[1] But even if the Second Circuit reads Genesee to foreclose FLSA whistleblower protection for all internal complaints related to that statute, the language of section 510 is significantly different and broader than the language in the FLSA and is more akin, though by no means identical, to language in Title VII that the

[1] In an earlier Second Circuit decision, the court extended FLSA's whistleblower protections to employees who were fired for refusing to waive their rights to receive overtime pay. Brock v. Casey Truck Sales, Inc., 839 F.2d 872 (2d Cir. 1988). The Genesee court distinguished Casey Trucks on the basis that the Genesee plaintiffs were not expressly asserting rights under the statute, as were the plaintiffs in Casey Trucks, but instead were simply making "oral complaints to a supervisor that an employee was being paid less than the complainants thought she should have been." Genesee, 10 F.3d at 56. Thus, it is possible to construe Genesee to hold only that the FLSA anti-retaliation provision does not apply where there is neither a formal proceeding nor an informal complaint that expressly invokes the FLSA.

Second Circuit has recognized encompasses internal complaints. See Kotcher v. Rosa and Sullivan Appliance Center, 957 F.2d 59, 64 (2d Cir. 1992).

Under its terms, the protections of the FLSA whistleblower provision are triggered only by: (1) filing a complaint; (2) instituting any proceeding under or related to FLSA; or (3) serving on an industry committee. 29 U.S.C. § 215(a)(3). Title VII's anti-retaliation provision, on the other hand, makes it an "illegal employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice under this section, or because he had 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). Although the Genesee decision focused on Title VII's "opposition" language (forbidding retaliation for opposing any unlawful employment practice) in concluding that Title VII could be distinguished from the FLSA, 10 F.3d at 55, we believe that it is also significant that Title VII, like ERISA but unlike the FLSA, also broadly accords protection to participants with respect to "any inquiry."

Thus, although ERISA section 510 does not contain an "opposition" clause similar to Title VII's provision, its expansive language likewise distinguishes it from the FLSA provision. Section 510 protects from retaliation any person who " has given information or has testified or is about to testify in any inquiry or proceeding relating to" ERISA. Webster's Dictionary defines "inquiry" primarily as "a request for information," and secondarily as "a systematic investigation often of a matter of public interest." While the second definition's use of the term "systematic" does connote a certain level of formality, it does not imply an external setting. Moreover, the primary definition – "a

request for information" – is exceedingly broad and open-ended. This contrasts with the term "proceeding," which is defined by Webster's as "an official record of things said or done" (emphasis added), which presumably connotes a somewhat more formal undertaking. Thus, as one would expect, in choosing to use two different words – "inquiry" and "proceeding" – Congress appears to have meant two somewhat different things. Whatever level of formality is implied by the term "proceeding, by using the term "inquiry," Congress made clear its intent to ensure protection for those involved in the informal gathering of information or investigation.

Nor does the Secretary agree with the district court that the fact that the Secretary can conduct investigations changes the analysis. Nicolaou, 2003 WL 22852680, *2. While it is true that the term "inquiry" could connote an investigation by the Secretary of Labor, as the court below suggested, there is no reason based on the language or structure of the statute, or its legislative history as discussed below, to limit the term to such a situation. Cf. Fed. R. Civ. P. 11(b), 26(g) (requiring reasonable inquiry by attorney or party before signing pleadings). Indeed, the Act clearly contemplates what history has borne out: that private litigants will be the primary enforcers of ERISA's requirements and duties. Thus, reading the term "inquiries" to apply only to Secretarial investigations is a very cramped interpretation of the term, which makes the protection for "inquiries" rather illusory in the great majority of situations. See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985) (upholding plan trustees' authority to audit employers to ensure they contributed required amounts to the plan).

Nothing in ERISA's legislative history indicates that Congress used the term "inquiry" to denote a formal, external setting. The district court relies on an irrelevant passage of legislative history, not related to section 510, where Congress used the word "inquiry" synonymously with the term "investigations" and "proceedings." 2003 WL 22852680, *2. There is, in fact, no legislative history directly on point. The little legislative history concerning section 510 indicates that Congress intended plaintiffs to possess the same broad protection available under Title VII. During the debates leading to the passage of ERISA, Senator Javits of New York 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). Senator Javits reemphasized that section 510 "gives the employee the same right[s]" as a person discriminated against on the basis of race or sex discrimination. Id. Still other evidence indicates that Congress intended section 510 plaintiffs to possess the same broad equitable remedies that are available under Title VII. In enacting section 510, both houses of Congress specifically noted: "The enforcement provisions have been designed specifically to provide beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts[.]" H.R. No. 93-453, reprinted in 1974 U.S.C.C.A.N. 4639, 4655; S. Rep. No. 93-127, reprinted in 1974 U.S.C.C.A.N. 4838, 4871.

II. The Ninth Circuit Has Correctly Read Section 510 To Protect Claimants Who Initiate or Participate In Internal Inquiries, While The Fourth Circuit Has Misinterpreted This Provision

The Ninth Circuit has addressed the need to broadly interpret ERISA's anti-retaliation provision, and concluded that section 510 protects employees who report violations to their employers. Hashimoto v. Bank of Hawaii, 999 F.2d 408, 411 (9th Cir. 1993). In Hashimoto, the plaintiff was fired because she complained to her superiors of "potential and/or actual violations by the Bank of the reporting and disclosure requirements and fiduciary standards of ERISA." Id. at 409. Plaintiff originally filed her claim in state court alleging a violation of the Hawaii Whistle Blowers' Protection Act, Haw. Rev. Stat. §§ 378-61 et seq. 999 F.2d at 411. The defendant removed to federal district court and subsequently moved for summary judgment, arguing that ERISA preempted the Hawaii whistleblower statute. Id. at 410. The district court granted defendant's motion, and dismissed the claim. On appeal, the Ninth Circuit agreed that ERISA preempted plaintiff's state law claim, but concluded that the plaintiff's claim should be recharacterized and tried as a claim under ERISA section 510. Id. at 409.

In holding that the plaintiff had a claim under section 510 and that her state law claim was thus preempted, the Ninth Circuit concluded that an employee who complains about an alleged violation in connection with an ERISA plan is protected by section 510 even if the complaint is not part of a formal inquiry. 999 F.2d at 411. The court reasoned that such employees should receive protection at every step of the process. "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." Id. at 411.

At least two district courts have applied similar reasoning and likewise have concluded that section 510 protects those who make internal complaints. See Vasquez , 2000 WL 1532953, at *4 ("Although the body of 'whistleblower' cases under section 510 is far from voluminous, I find that even plaintiff's formative inquiries as to a discrepancy in her account would be considered 'protected activities' under ERISA."); McLean v. Carlson Companies, Inc., 777 F. Supp. 1480, 1484 (D. Minn. 1991) (reasoning that because the plaintiff would be protected if she had actually filed a suit against her employer, she should be protected when informing her supervisors of violations).[2]

The Fourth Circuit, on the other hand, has held that section 510 does not extend its protection to an employee who complained both orally and in writing to other employees or her supervisor. King v. Marriott International, Inc. 337 F.3d 421, 426-27 (4th Cir. 2003). The court of appeals concluded that ERISA's anti-retaliation provision, although more expansive than FLSA's participation provision, is nonetheless limited to a legal or administrative inquiry or proceeding. Id. at 427. The court reasoned that "the use of the phrase 'testify or is about to testify' does suggest that the phrase 'inquir[ies] or proceeding[s]' referenced in section 510 is limited to the legal or administrative, or at least to something more formal than written or oral complaints made to a supervisor. The

---

[2] See also Anderson v. Electronic Data Systems Corp., 11 F.3d 1311, 1314 (5th Cir. 1994) (ERISA preempts a state law wrongful discharge claim that is based on an employee's refusal to violate ERISA and his reporting of violations to management because of a conflict with Section 510); Authier v. Ginsberg, 757 F.2d 796, 802 (6th Cir. 1985) (similar).

phrase 'given information' does no more than insure that even the provision of non-testimonial information (such as incriminating documents) in a inquiry or proceeding would be covered." Id. at 427.

The Secretary disagrees with the Fourth Circuit's cramped reading of the statute, which fails to account in a satisfactory manner for the use of the term "inquiry" in section 510, and runs contrary to the prophylactic purposes of section 510, which we discuss in the next section. The Secretary agrees instead with the reasoning asserted in the Hashimoto, Vasquez, and McLean decisions and would urge this Circuit likewise to extend the protections of section 510 to cover internal, informal inquiries/complaints.[3]

---

[3] Many courts have interpreted variously-worded whistleblower provisions in other statutes to extend protection to employees who make informal and/or internal complaints. See, e.g., Consolidated Edison of New York, Inc. v. Donovan, 673 F.2d 61 (2d Cir. 1982) (employee received statutory protection under the Energy Reorganization Act (ERA) for complaining about nuclear safety hazards in the workplace); Clean Harbors Envtl. Servs., Inc. v. Herman, 146 F.3d 12 (1st Cir 1998) (employee protected under Safety Transportation Assistance Act for reporting violations to supervisors and corporate compliance personnel); Haley v. Retsinas, 138 F.3d 1245 (8th Cir. 1998) (employee memorandum containing "information regarding any possible violation of law" or information regarding an "abuse of authority," was protected by Federal Deposit Insurance Act's whistleblower provision); Bechtel Constr. Company v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995) (employee's actions that questioned supervisors instructions on safety procedures and raised particular, repeated concerns about safety procedures was tantamount to a "complaint" under the ERA); Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor, 992 F.2d 474 (3d Cir. 1993) (agreeing with the Department's interpretation of the Clean Water Act as applying to intracorporate complaints); and Couty v. Dole, 886 F.2d 147 (8th Cir. 1989) (temporal proximity between employee's discharge and his threats to bring safety complaints to attention of Nuclear Regulatory Commission was sufficient to establish inference of retaliatory motive for engaging in protected activity under Atomic Energy Act); but see e.g., Brown & Root v. Donovan, 747 F.2d 1029 (5th Cir. 1984) (holding that the Energy Reorganization Act was not broad enough to protect the activity of filing purely internal quality reports); cf. Yellow Freight Systems, Inc. v. Reich, 38 F.3d 76 (2d Cir. 1994) (reading Surface Transportation Assistance Act to protect driver who was fired for refusing to drive truck he alleged to be unsafe).

III. Strong Policy Considerations Support Reading Section 510 To Protect Internal Inquiries

Here, as we have shown, there is a strong textual basis for concluding that Congress meant to protect internal inquiries as well as formal complaints brought in court or before the Secretary of Labor. But even if the Secretary's interpretation were not supported by the more natural reading of the statutory language, there are a number of significant policy considerations that warrant a broad construction of the statute in favor of protecting the whistleblower. Blackburn v. Reich, 79 F.3d 1375, 1378 (4th Cir. 1996) ("the overall purpose of the statute – the protection of whistleblowers – militates against an interpretation that would make anti-retaliation actions more difficult").

First and foremost, of course, is the fact that anti-retaliation provisions such as section 510 are designed to encourage employees to report illegal activity. Passaic Valley Sewerage Comm'r v. U.S. Dep't of Labor, 992 F.2d 474, 478 (3d Cir. 1993). Given the number of plan participants covered by ERISA, the Secretary simply does not have the resources to monitor all alleged ERISA violations. Instead, she must rely on employees, particularly plan fiduciaries, to police their own plans, a task they could not (or would not) perform without protection from retaliation throughout the process. By protecting informal inquiries or proceedings, provisions such as section 510 help avoid the chilling effect of preemptive retaliation, where an employee is fired before she has the chance to initiate a formal proceeding. Clean Harbors Envtl. Servs., Inc. v. Herman, 146 F.3d 12, 21 (1st Cir. 1998); Passaic Valley, 992 F.2d at 478-79. A contrary result undermines the palliative effects of the anti-retaliation provision, without serving any apparent countervailing interest. Clearly this is the case under ERISA, where the internal

resolution of problems at an early stage is in everyone's interests, not only because this avoids resort to costly litigation, but also because many plan funding and investment problems can be minimized if addressed at the outset.

Furthermore, plan fiduciaries operate under exacting fiduciary obligations of duty and loyalty with regard to the plan and its participants. "Fiduciaries are assigned a number of detailed duties and responsibilities, which include the 'proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interests.'" Mertens v. Hewitt, 508 U.S. 248, 251-252 (1993) (citing Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142-143 (1985); see also 29 U.S.C. §§ 1104, 1105, 1106, and 1109. In this case, as in many, the fiduciaries are employees appointed by the employer. If such fiduciaries do not receive section 510's protection during the initial stages of an internal investigation, and have reason to fear that they may lose their jobs if they raise or attempt to address concerns about the plan, they may be hesitant to vigorously carry out these essential and mandated fiduciary functions. It would seem an absurd result to hold a fiduciary to a high standard of loyalty and prudence, and to impose personal liability on the fiduciary who fails to live up to these standards, but not to extend section 510's protections to the fiduciary who does so. See Griffen v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available").

If informal 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 before they can make a formal complaint. Equally troublesome, such a result discourages 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 more adversarial proceedings. Moreover, under such a reading of section 510, fiduciaries who are also employees will 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 displease their superiors.

Indeed, Nicolaou presents a compelling case for section 510's protections. Acting as a plan fiduciary to her company's pension plan, she discovered an employer practice that adversely affected the funding of the plan. Although she quite properly raised and attempted to address the problem first with her supervisors, and ultimately with the company president, she was rebuffed and ultimately demoted and then terminated. The Secretary urges this Court to view Nicolaou's persistence in raising her concerns up the company chain of command as an appropriate precursor to requesting an investigation by the Department of Labor or to filing, as a fiduciary to the plan, a lawsuit against the company. Appellant's internal actions should be protected not only in order to ensure that those charged with protecting plans are able to carry out their duties, but also in order to encourage resolution at the corporate level, rather than creating a situation in which protecting whistleblowers from retaliation requires a formal legal proceeding, the use of limited government resources, and the depletion of plan assets.

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court reverse the district court's decision and conclude that ERISA's anti-retaliation provision extends its protection to internal inquiries or investigations.

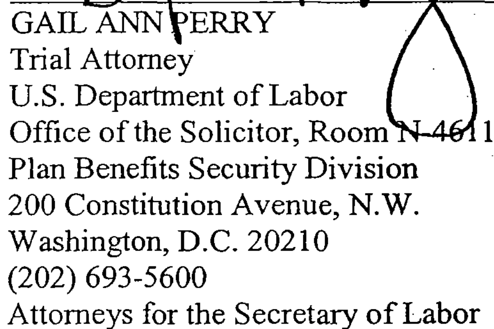
Dated: March 12th, 2004

Respectfully Submitted

HOWARD M. RADZELY
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Special Litigation

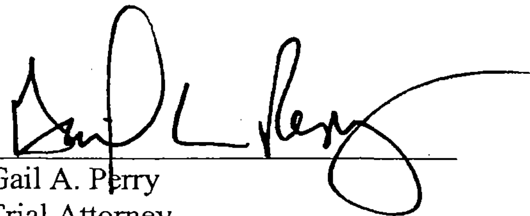


GAIL ANN PERRY
Trial Attorney
U.S. Department of Labor
Office of the Solicitor, Room N-4611
Plan Benefits Security Division
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5600
Attorneys for the Secretary of Labor

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 32(a)(7)(B) and (C), Fed. R. App. P., I certify that this _amicus_ brief uses a mono-spaced typeface of 10 characters per inch and contains four thousand, six hundred and one (4,601) words.

Dated: March 12th, 2004



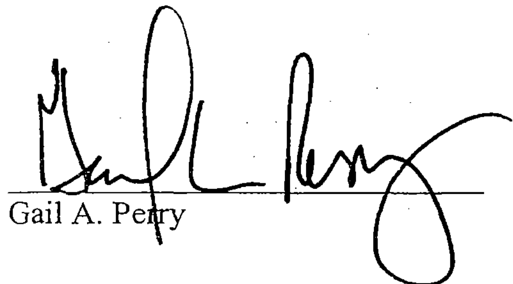
Gail A. Perry
Trial Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
P.O. Box 1914
Washington, D.C. 20013
(202) 693-5600

CERTIFICATE OF SERVICE

I hereby certify that on 12th day of March, 2004, true and correct copies of the foregoing Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal were served upon all counsel of record by Federal Express, prepaid, for next day delivery, to the following at the addresses set forth below:

Daniel J. Kaiser, Esq.
Kaiser Saurborn & Mair, P.C.
20 Exchange Place
New York, N.Y. 10005
(212) 338-9100
(212) 338-9088 (Fax)

Laura H. Allen, Esq.
Sidley Austin Brown & Wood
787 Seventh Avenue
New York, NY 10019
(212) 839-5300
(212) 839-5599 (Fax)



Gail A. Perry