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PURPOSE OVER FORMALITY: PUTTING AN END TO THE CATCH-22 PREVENTING WORKERS FROM SPEAKING UP ABOUT ERISA BENEFIT ABUSE

LUCAS WALKER*

“Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle. ‘That’s some catch, that catch-22,’ he observed. ‘It’s the best there is,’ Doc Daneeka agreed.”¹

I. INTRODUCTION

In March 2006, a family-owned construction company hired Shirley Edwards as its director of human resources.² Not only was Shirley brought on to head the department, she was also responsible for initially setting it up.³ Once the department was up and running, Shirley also participated in the company’s health

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1. JOSEPH HELLER, *CATCH – 22* 46 (Simon & Schuster Paperbacks 50th Anniversary Edition, 1955). This quote symbolizes the way employees may react when learning they may face their very own catch-22. In *Catch-22*, there was a rule that reasoned a man must continue to fly dangerous combat missions if he is sane, but the fact that a man was willing to fly dangerous combat missions meant he was insane. *Id.* The catch was that a person taking the proper steps to be removed from the duty of dangerous combat missions was necessarily acting sane and therefore must stay on duty. *Id.* There was basically no real way to be taken off of fighter-pilot duty once a person was participating, because while a person should be removed if they are crazy, requesting to be removed meant a person was sane and must stay on duty. *Id.* Similarly, once an employee is participating in an ERISA protected benefit plan and he discovers a mishandling of his ERISA protected benefits, he may face a catch-22. If they choose to complain about a perceived mishandling or abuse of ERISA protected benefits to their employer, they may be fired if the complaint does not adhere to an uncertain level of formality. *See King v. Marriott Int’l., Inc.*, 337 F.3d 421, 427 (4th Cir. 2003) (evidencing the conundrum that employees face when file a complaint regarding an ERISA protected benefit). However, if an employee does nothing, they risk losing benefits due to the mishandling and abuse. *See Dunn v. Elco Enter., Inc.*, 05-71801, 2006 WL 1195867, at *1-2 (E.D. Mich. May 4, 2006) (explaining that an employer was not contributing to their employee benefit plan as promised until an employee complained about the lack of funds).

2. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 218 (3d Cir. 2010).

3. *Id.*

plan.⁴ While everything was fine for a while, after nearly three years of employment, Shirley noticed some things that gave her cause for concern.⁵ Shirley noticed that the company seemed to be abusing the benefit plans in various ways.⁶

Reasonably believing that such practices should be brought to the attention of the company, Shirley complained to upper management about her findings.⁷ Shirley Edwards was fired within weeks of notifying management about what she perceived as the misadministration of benefits.⁸

Shirley brought suit against the company alleging that she was terminated because she spoke up about the alleged mishandling of benefits,⁹ and that ERISA 510 of the Employee Retirement Income Security Act of 1974 (ERISA 510) protected her from such actions.¹⁰ The district court disagreed with Shirley and held that ERISA 510 did not protect unsolicited, internal complaints by employees.¹¹ The appellate court affirmed the ruling by the district court and Shirley was left to realize that speaking up to employers about the mishandling of ERISA-covered benefit plans could cost a person his or her job.¹²

ERISA 510 is the anti-retaliation provision of ERISA, codified at 29 U.S.C. § 1140.¹³ Throughout this Comment, 29 U.S.C. § 1140 will be referred to as ERISA 510, which states:

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

4. *Id.*

5. *Id.* at 218-19.

6. *See id.* at 219 (explaining the various violations that Shirley discovered). Shirley discovered that management was violating ERISA rules by discriminating against individuals who received the health plan benefits and presenting false information as to the cost of group health coverage. *Id.* Shirley believed her employer was trying to convince employees it was a bad idea to opt into the benefits. *Id.* Shirley claimed her employer was using unlawful, fraudulent means to enroll non-citizens into the ERISA plans such as providing the insurance company with fake social security numbers. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* The court in *Edwards* broke the circuit-split tie when it ruled that ERISA 510 did not protect Shirley. *Id.* at 220. Prior to its decision, the Fifth and Ninth Circuits held that ERISA 510 does protect unsolicited, internal employee complaints and the Second and Fourth Circuits ruled that ERISA 510 does not protect unsolicited, internal employee complaints. *Id.*

12. *Id.* at 225-26.

13. *Id.* at 220. The Title 29 numbers do not line up with the actual section numbers of ERISA because when ERISA was codified there were already many labor laws in Title 29 making it impossible for the numbers to align. BENEFITS LINK, <http://benefitslink.com/erisa/crossreference.html> (last visited Apr. 8, 2011).

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, 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. . . . The provisions of Section 1132 of this title shall be applicable in the enforcement of this section.¹⁴

This Comment will address a narrow issue at the center of a current circuit split.¹⁵ The issue is whether ERISA 510 should be interpreted to protect employees from being discharged for making an unsolicited, internal complaint to their employer regarding the mishandling of their ERISA protected benefits and pension plans.¹⁶

Part II, Section A will provide a background of ERISA, including the basic legislative history and an explanation of how and why ERISA came into existence.¹⁷ Part II, Section B will discuss the benefits and protections of ERISA.¹⁸ Part II, Section C will explain the current circuit split with regards to ERISA 510.¹⁹

Part III, Section A will describe and analyze the cases and opinions finding that ERISA 510 protects an employee's

14. ERISA § 510, 29 U.S.C. § 1140 (2010). Courts will analyze the language of this statute in order to determine whether an employee's unsolicited, internal complaints to his employer regarding the mishandling of ERISA protected benefits are protected. *Edwards*, 610 F.3d at 220-22. Some courts tend to base their rulings on the original purpose of ERISA 510 and some base their rulings on an analysis of the statutory language. *Infra* Part III Section A-B. The cases involved in the circuit split are: *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311 (5th Cir. 1994) (finding that ERISA 510 does protect an employee's unsolicited, internal complaint regarding ERISA protected benefits); *Hashimoto v. Bank of Haw.*, 999 F.2d 408 (9th Cir. 1993) (finding that ERISA 510 is clearly meant to protect whistleblowers, which includes employees making an unsolicited, internal complaint to their employer regarding the mishandling of ERISA protected benefits); *Edwards*, 610 F.3d 217 (holding that ERISA 510 does not protect unsolicited, internal complaints from employees to their employers regarding the mishandling of ERISA protected benefits due to what they perceive as clear statutory language to the contrary); *King*, 337 F.3d 421 (holding that ERISA 510 does not protect unsolicited, internal complaints because the statutory language requires more formal proceedings); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005) (holding that ERISA 510 does not protect unsolicited, internal complaints from employees to employers regarding the mishandling of ERISA protected benefits because while the word "inquiry" lacks formality, more formality is required than a complaint to a supervisor).

15. *Edwards*, 610 F.3d at 220.

16. *Id.*

17. *See infra* Part II Section A (giving background of ERISA).

18. *See infra* Part II Section B (noting the benefits protected by ERISA).

19. *See infra* Part II Section C (describing the background of the circuit split).

unsolicited, internal complaints.²⁰ This section of the Comment will show that courts focus on the purpose of ERISA 510 when finding that unsolicited, internal complaints are protected.²¹

Part III, Section B will describe and analyze the cases and opinions holding that unsolicited, internal complaints by employees are not protected under ERISA 510.²² This section will highlight the deficiency of the argument that the statutory language of ERISA 510 unambiguously prevents protection for unsolicited, internal complaints.²³

Part IV, Section A will make the argument that the statutory language of ERISA 510 should be interpreted broadly to achieve its original purpose and to avoid absurd results.²⁴ This section will also point out how a broad interpretation benefits employers as well as employees.²⁵

Part IV, Section B will compare the way anti-retaliation provisions of other Acts have been interpreted.²⁶ This will help shed light on possible solutions and likely outcomes when dealing with the interpretation of ERISA 510. Specifically, there is analysis given of the U.S. Supreme Court decisions concerning Title VII of the Civil Rights Act of 1964,²⁷ and Section 215(a)(3) of the Fair Labor Standards Act (FLSA).²⁸

20. See *infra* Part III Section A (giving details on cases holding that complaints are protected).

21. *Id.* These courts tend to base their holdings on fulfilling the original purpose of ERISA 510 and do not get hung up on any intricate analysis of the statutory language. *Id.*

22. See *infra* Part III Section B (giving details on cases holding that complaints are not protected).

23. *Id.*

24. See *infra* Part IV Section A (calling for a broad interpretation of ERISA 510).

25. *Id.*

26. See *infra* Part IV Section B (comparing interpretation of other anti-retaliation statutes to the split on ERISA 510). Courts regularly compare similar provisions in order to aid in the interpretation of another provision. *Dunn*, 2006 WL 1195867, at *5 (comparing interpretations of the Fair Labor Standards Act to aid in the analysis of ERISA 510); *Edwards*, 610 F.3d at 224-25 (analyzing the court's interpretation of the anti-retaliation provision in the Fair Labor Standards Act to assist with the interpretation of ERISA 510); *King*, 337 F.3d at 427 (analyzing interpretations of the Fair Labor Standards Act and Title VII to help clarify the interpretation of ERISA 510); *Nicolaou*, 402 F.3d at 327-29 (comparing the anti-retaliation provisions of the Fair Labor Standards Act and Title VII to aid the court in the interpretation of ERISA 510).

27. *Crawford v. Metro. Gov't of Nashville*, 129 S. Ct. 846, 849 (2009). The Court expanded the interpretation of the Title VII anti-retaliation provision to allow for the word "oppose" to encompass a person responding to another person's question rather than only allowing it to encompass a person provoking a discussion. *Id.*

28. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1325 (2011). FLSA states that an employee cannot be discharged for filing a

Part IV, Sections C and D of this Comment will propose solutions that take into account the original purpose of ERISA 510.²⁹ One solution is for the U.S. Supreme Court to grant certiorari to an ERISA 510 case and hold that unsolicited, internal complaints by employees to their employers regarding ERISA regulated benefits is protected activity.³⁰ Another option is for Congress to propose and pass legislation that re-writes or amends ERISA 510 to clearly protect unsolicited, internal complaints.³¹ Both of these options would fulfill the original purpose of ERISA 510³² and put an end to the circuit-splitting arguments based upon the statutory language.³³ A similar example of congressional action that clearly shows this is a legitimate and reasonable proposal will be highlighted.³⁴

II. BACKGROUND

A. *The Origins of ERISA*

In a symbolic gesture, President Gerald Ford signed ERISA into law on Labor Day — September 2, 1974.³⁵ Senator Jacob

complaint. *Id.* at 1329. This case centers on whether verbal complaints, and not solely written complaints, can be “filed” and therefore considered protected activity under the anti-retaliation provision of the Fair Labor Standards Act. *Id.*

29. See *infra* Part IV Sections C-D (proposing solutions to the circuit split over ERISA 510).

30. See *infra* Part IV Section C (proposing that the U.S. Supreme Court grant certiorari to an ERISA 510 case). This is definitely a possibility, as evidenced by the U.S. Supreme Court previously granting certiorari to a case to expand the interpretation of Title VII. *Crawford*, 129 S. Ct. at 850.

31. See *infra* Part IV Section D (proposing that Congress amend ERISA 510).

32. See *infra* Part IV Sections C-D (proposing solutions that take into account the purpose of protecting the benefits of workers). Statutes should be interpreted in ways that fulfill the legislative intent of the statute. *Edwards*, 610 F.3d at 226 (Cowen, J., dissenting) (citing *Wolk v. UNUM Life Ins. of Am.*, 186 F.3d 352, 355 (3d Cir. 1999)). Even in the face of clear statutory language, a statute should not be interpreted in ways that produce absurd results. *Shlahitchman v. 1-800 Contacts, Inc.*, 615 F.3d 794, 798 (7th Cir. 2010) (citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004)).

33. See *infra* Part III Section B (detailing arguments based on statutory language).

34. See *infra* Part IV Section D (highlighting the Lilly Ledbetter Fair Pay Act). Congressional action altered the interpretation of the Civil Rights Act of 1964 with the passing of the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. *Lily M. Ledbetter*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/people/l/lilly_m_ledbetter/index.html (last visited Mar. 12, 2012).

35. Eric Loi, *Happy Birthday, ERISA!*, PENSION RIGHTS CENTER (Sept. 20, 2010, 10:32 PM), <http://www.pensionrights.org/blog/happy-birthday-erisa-0>. The House of Representatives passed ERISA on August 20, 1974, with a vote of 407 to 2. JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT SECURITY ACT OF

Jivits, who was an integral part of the fight for pension and benefit reform,³⁶ referred to ERISA as “the greatest development in the life of the American worker since Social Security.”³⁷

ERISA was brought about in a non-cynical attempt by Congress³⁸ to do the right thing by American voters.³⁹ For years, employee pension and benefit plans were at high risk of not being available when the worker retired, was laid off after several years of service, or changed jobs.⁴⁰

The Studebaker shutdown is considered one of the main reasons ERISA was created.⁴¹ In December 1963, the Studebaker Corporation closed its auto production plant in South Bend, Indiana.⁴² After the shutdown, Studebaker could not fulfill its pension promises to its workers.⁴³ This was either due to an inherent flaw in the pension plan itself or to pension plan funds being mishandled and used instead for new acquisitions.⁴⁴ Either

1974: A POLITICAL HISTORY 269 (Regents of the University of California, 2004). On August 22, 1974, the Senate passed ERISA 85 to 0. *Id.* President Gerald Ford actually wanted to sign ERISA into law before Labor Day, but Senator Jacob Jivits insisted on a Labor Day signing. *Id.* at 269-70.

36. WOOTEN, *supra* note 35, at 1. Senator Jivits was born in New York in 1904 and received a law degree from New York University in 1926. BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=j000064> (last visited Oct. 12, 2010). He practiced law in New York before going into politics and returned to practicing law after he retired his political aspirations. *Id.* Senator Jivits also served in World War II and was discharged as a Lieutenant Colonel in 1945. *Id.* The Senator received the Presidential Medal of Freedom on February 23, 1983. *Id.*

37. WOOTEN, *supra* note 35, at 1. Even though ERISA was heralded as great landmark legislation that would benefit the American worker, ERISA surprisingly received opposition from the labor community. *Id.* at 7-8. Some unions, including the AFL-CIO, were hesitant to make any changes to the way they handled pension plans. *Id.* Employers, less surprisingly, opposed ERISA because they would bear the burden of ensuring they were in compliance with ERISA standards. *Id.* The labor and business communities did not fully support ERISA until it became clear that the states were looking into their own pension and benefit reforms. *Id.* at 13. Neither labor nor business wanted to deal with conflicting state reforms so they both gave their support to ERISA. *Id.*

38. *Id.* at 15-16.

39. *Id.* at 11.

40. *Id.* at 3-4. The failure of the Studebaker auto plant in South Bend, Indiana is a prime example of this type of high risk coming to fruition. *See id.* at 51 (describing the ramifications of a mishandled retirement plan prior to the enactment of ERISA).

41. WOOTEN, *supra* note 35, at 51.

42. *Id.*

43. *Id.*

44. *Id.* Congressman John Dent (D-Penn.) proposed that Studebaker could not fulfill its pension promises due to using the pension funds for new business acquisitions rather than maintaining the funds for the workers. *Id.* However, another theory is that the pension plan was simply flawed in the way it was

way, the end result is the same.⁴⁵ While retirees and retirement-eligible employees over age sixty received their full pensions,⁴⁶ employees under sixty whose plans had vested were lucky to receive a mere fifteen percent of the value of their full pension promise in the form of a lump-sum payment.⁴⁷ The Studebaker workers whose benefits had not vested, including all workers under age forty, received nothing at all.⁴⁸

Following the Studebaker shutdown, there were two other events that helped spur ERISA into existence.⁴⁹ First, a presidential committee report entitled *Public Policy and Private Pension Programs* provided a framework to address the inherent risk of losing benefits in a private pension plan.⁵⁰ Second, NBC ran a special entitled “*Pensions: The Broken Promise*” that highlighted the deficiencies of private pension and benefit fulfillment and helped to put pension reform in the news while reform was being worked on in Congress.⁵¹

put together by Studebaker and the United Auto Workers. *Id.* at 51-52. Some believe that United Auto Workers intentionally left the workers in a high-risk situation knowing the funds would be insufficient in order to push pension and benefit reform to the forefront of American politics. *Id.* at 52.

45. *Id.* at 51-52. Regardless of whether the Studebaker pension plan failed to fulfill its promises due to mishandling of funds by Studebaker or due to a purposefully created flaw in the retirement plan, many workers nevertheless failed to receive their benefits, which helped push pension and benefit reform into the national spotlight. *Id.*

46. *Id.* at 76.

47. *Id.* Some of the workers who were less than sixty years old had been working for Studebaker for forty years and received only fifteen percent of their pension promise in one lump sum. *Id.*

48. *Id.* at 76-77.

49. *Id.* at 80, 184.

50. *Id.* at 80. President John F. Kennedy created the Committee on Corporate Pension Funds that drafted the report in 1962. *Id.* The report received a harsh critique from business and labor leaders who believed that the government had no place in setting vesting or funding standards or involving themselves in any way in the terms of a private employment contract. *Id.* at 81. The committee tweaked the report, but maintained the substance of its proposals. *Id.* However, the report was still shunned due to fears of it having an adverse impact on Lyndon Johnson’s election. *Id.* Henry Ford II, then the CEO of Ford Motor Company, pressured President Johnson to bury the report after the election. *Id.* The report was finally released in 1965, only four months after Studebaker shut down, but the White House refused to acknowledge it. *Id.* The report still pushed worker-security issues to the forefront of the congressional agenda and was referred to by Senator Jacob Jivits as “the bible in th[e] field” of worker security. *Id.* at 80.

51. *Id.* at 184. This NBC program was actually only the third-highest rated show in its timeslot when it aired September 12, 1972. *Id.* The next day, pension experts called it a smear against private business. *Id.* Two months after it aired, a conservative watchdog group, Accuracy in Media, attacked it as being “grotesquely distorted.” *Id.* The program featured workers who lost benefits due to the mishandling of funds by management, being laid off prior to retirement, and the shutting down of companies. *The Press: Who Decides*

*B. What's the Big Deal? Important Protections and Benefits
Provided by ERISA*

ERISA protects the benefits and pensions of workers by setting minimum funding requirements once the private employer establishes a plan.⁵² ERISA does not require private businesses to set up pension and benefit plans,⁵³ but once plans are created, ERISA steps in and regulates them with minimum standards in order to ensure that the benefits will be available for workers.⁵⁴

There are a few facts that help shed light on how important it is to protect the benefit and pension plans of the American worker.⁵⁵ First, as an income source for elder Americans, ERISA protected employer-sponsored retirement programs are second only to Social Security.⁵⁶ Second, there are approximately fifty million private-sector employees participating in retirement plans regulated by ERISA.⁵⁷ Third, ERISA governs plans of private-sector employers that provide severance pay and insurance for life, health, and disability.⁵⁸ More workers rely on these ERISA protected benefit plans than the pension plans.⁵⁹ Finally, most

Fairness?, TIME MAGAZINE (Feb. 4, 1974), available at <http://www.time.com/time/magazine/article/0,9171,908437-1,00.html>. Accuracy in Media actually filed a complaint with the F.C.C. on November 27, 1972, alleging that NBC had presented a one-sided view of private pension plans. *Nat'l Broad. Co., Inc. v. F.C.C.*, 516 F.2d 1101, 1109 (D.C. Cir. 1974). The F.C.C. claimed that the one-sided view violated the fairness doctrine, but the claim was eventually dismissed. *Id.* at 1101. The NBC program was narrated by journalist Edwin Newman and received numerous awards including an Emmy nomination, a Peabody award, a Christopher award, a National Headliner Award, and a Merit Award of the American Bar Association. *Id.* at 1105-06, 1206 n.1.

52. U.S. DEPT. OF LABOR, <http://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=225&faqsub=ERISA&faqtop=Retirement+Plans+%26+Benefits&topicid=4> (last visited Feb. 3, 2012).

53. *Id.*

54. *Id.*

55. WOOTEN, *supra* note 35, at 1-2. In addition to the pension and benefit statistics, ERISA is important because it has had a huge impact on legal practice. *Id.* at 2. ERISA goes beyond employee benefit law to impact areas such as finance, insurance, banking, marriage, real property, and more. *Id.* The ABA Journal ran an article urging lawyers to learn about ERISA because it can impact lawyers even if they do not practice employee benefits law. William T. Payne et al., *ERISA: It's More Places Than You Thought It Could Be*, A.B.A. J., Dec. 1997, at 62. The article lists areas such as business law, disability law or even tort law as being impacted by ERISA. *Id.* at 63.

56. WOOTEN, *supra* note 35, at 1-2. Other sources of income include earnings, public assistance, veterans' benefits and assets such as stocks, bonds, and certificates of deposit. *Sources of Income for Older Adults*, PENSION RIGHTS CENTER, <http://www.pensionrights.org/publications/statistic/sources-income-older-adults-0> (last visited March 30, 2012).

57. WOOTEN, *supra* note 35, at 2.

58. *Id.*

59. *Id.*

health care benefits for young working Americans are distributed through ERISA plans.⁶⁰

C. What's the Beef? Background on the ERISA 510 Circuit Split

ERISA 510 is currently at the center of a circuit split⁶¹ that may be headed to the U.S. Supreme Court.⁶² As stated earlier, ERISA 510 is the anti-retaliation provision of ERISA.⁶³ ERISA 510 is meant to protect workers from losing their benefits due to any inappropriate action by employers.⁶⁴

Employees face a type of catch-22 when it comes to ERISA 510.⁶⁵ As Shirley Edwards learned the hard way,⁶⁶ employees may not be protected from discharge under ERISA 510 if they speak up and complain to their employer about a suspected mishandling of their benefits.⁶⁷ Employees may also be required to seek a formal

60. *Id.*

61. *Edwards*, 610 F.3d at 220-22.

62. *Third Circuit Holds Internal Complaints Are Not Protected by § 510*, DECHERT ON POINT 6 (July 2010), available at http://www.dechert.com/library/Labor_Employment_26-07-10.pdf. A circuit split is thought to be the most important factor in determining the granting of certiorari. Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 726 (1993).

63. 29 U.S.C. § 1140.

64. *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 295 (7th Cir. 1998) (citing *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 127 (7th Cir. 1991)) (stating that Congress enacted ERISA 510 to prevent employers from discharging or harassing employees in an attempt to prevent the employees from obtaining their ERISA benefits); *Hashimoto*, 999 F.2d at 411 (holding that ERISA 510 is meant to protect employees that speak out about a perceived mishandling of ERISA benefits and that if the employee is fired for speaking out, then the purpose is impossible to achieve). An example of inappropriate action taken by an employer is the failure to deposit an employee's financial contributions into an IRA. *Dunn*, 2006 WL 1195867, at * 1-2.

65. *See supra* note 1 (explaining how ERISA presents employees with a catch-22).

66. *Edwards*, 610 F.3d at 219.

67. *Compare Anderson*, 11 F.3d at 1315 (finding that ERISA 510 protects an employee's unsolicited, internal complaint regarding ERISA protected benefits), and *Hashimoto*, 999 F.2d at 411 (finding that ERISA 510 is clearly meant to protect whistleblowers, which includes employees making an unsolicited, internal complaint to their employer regarding the mishandling of ERISA protected benefits), with *Edwards*, 610 F.3d at 225-26 (holding that ERISA 510 does not protect unsolicited, internal complaints by employees to their employers regarding the mishandling of ERISA protected benefits due to what they perceive as clear statutory language to the contrary), *Nicolaou*, 402 F.3d at 330 (holding that ERISA 510 does not protect unsolicited, internal complaints by employees to employers regarding the mishandling of ERISA protected benefits, because while the word "inquiry" lacks formality, more formality is required than a mere complaint to a supervisor), and *King*, 337 F.3d at 428 (holding that ERISA 510 does not protect unsolicited, internal complaints because the statutory language requires more formal proceedings).

internal or external review of their claim,⁶⁸ which can have a chilling effect on any employee action.⁶⁹ However, if the employee says nothing, they risk a loss or reduction of their benefits through the suspected mishandling.⁷⁰

Currently, the Fifth and Ninth Circuits interpret ERISA 510 to protect unsolicited, internal complaints.⁷¹ These circuits take a common sense approach in their interpretation and mainly rely on the perceived purpose of ERISA 510.⁷² The Second, Third, and Fourth Circuits have decided that ERISA 510 does not protect unsolicited, internal complaints.⁷³ The basis of these decisions tends to hinge on a rigid statutory interpretation that seems to completely ignore the purpose of ERISA 510.⁷⁴

Resolution of the circuit split is critical because ERISA regulates some of the most important benefits available to American workers.⁷⁵ ERISA 510 must be clarified as it is a significant statutory line of defense for workers seeking to avoid losing their jobs in retaliation for objecting to pension and benefit abuse by unscrupulous employers.⁷⁶

68. See *Edwards*, 610 F.3d at 223 (noting that the term "proceeding" in ERISA 510 requires a level of formality that was lacking in an employee's mere complaint to a supervisor).

69. *Passaic Valley Sewerage Comm'rs v. U.S. Dept. of Labor*, 992 F.2d 474, 479 (3d Cir. 1993).

70. *McBride v. PLM Int'l, Inc.*, 179 F.3d 737, 744 (9th Cir. 1999) (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990)). The court in *McBride* held that a former employee could sue under ERISA 510 when that employee was discharged in retaliation to his opposition to the termination of a benefit plan. *Id.* In doing so, the court made the point that, without the protection of ERISA 510, employers would be able to circumvent their obligation to provide the promised benefits. *Id.*

71. *Anderson*, 11 F.3d at 1315 (finding that ERISA 510 protects an employee's unsolicited, internal complaint regarding ERISA protected benefits); *Hashimoto*, 999 F.2d at 411 (finding that ERISA 510 is clearly meant to protect employees making an unsolicited, internal complaint to their employer regarding the mishandling of ERISA protected benefits).

72. See *infra* Part III Section A (detailing arguments based on the perceived purpose of ERISA 510).

73. See *supra* note 67 (comparing all of the cases involved in the circuit split including information regarding the holdings of the Second, Third and Fourth Circuits).

74. See *infra* Section III Part B (detailing arguments based on a rigid statutory interpretation).

75. See WOOTEN, *supra* note 35, at 1-2 (explaining that ERISA's benefits include welfare plans which include "severance pay and health, life, and disability insurance," and pension plans).

76. *Lindemann*, 141 F.3d at 295 (citing *Meredith*, 935 F.2d at 127). An example of an employer abusing benefits occurred when Marriott International allegedly told an employee to transfer millions of dollars from an ERISA employee medical benefit account to a general corporate account. *King*, 337 F.3d at 423. In another case, the Bank of Hawaii allegedly violated ERISA regulations when dealing with severance, pension and profit sharing plans. *Hashimoto*, 999 F.2d at 409-10.

III. ANALYSIS

Employees like Shirley Edwards may believe that it is only logical for ERISA 510 to protect employees from discharge for making a complaint to their employer concerning the mishandling of their ERISA benefits. Unfortunately, for employees like Shirley, the law can be a confusing and intricate web of reasoning that may result in decisions that seem to contradict one's common sense.⁷⁷ This section will clarify both sides of the circuit split by exploring and analyzing the decisions on each side. The analysis will begin by detailing the cases that have held that ERISA 510 protects an employee from being discharged for making internal, unsolicited complaints regarding ERISA violations. Then a microscope will be put to the cases falling on the other side of the circuit split that have held ERISA 510 fails to protect such complaints.

A. Protecting Whistleblowers by Protecting the Whistle: Circuits Holding that ERISA 510 Protects Unsolicited, Internal Complaints Look to the Purpose

The first appellate decision to rule that ERISA 510 protects unsolicited, internal complaints is *Hashimoto v. Bank of Hawaii*.⁷⁸ Jessica Hashimoto, an employee of the Bank of Hawaii, claimed that the Bank fired her because she had complained to management regarding ERISA violations.⁷⁹

In *Hashimoto*, the Ninth Circuit held that ERISA 510 governed the case and protected employees from being discharged for making complaints regarding ERISA violations.⁸⁰ Specifically,

77. See *supra* note 67 (comparing the different holdings from all cases involved in the circuit split). It is abundantly clear that a lay person may look at what appears to be two identical situations and find that different courts will reach different conclusions based on what can come across as confusing and convoluted reasoning that defies common sense.

78. *Hashimoto*, 999 F.2d at 411. The plaintiff employee, Jessica Hashimoto, initially brought her suit in state court claiming wrongful discharge and breach of contract. *Id.* at 410. The defendants removed the case to federal court and made a motion for summary judgment claiming that the state claims were preempted by ERISA. *Id.* The district court granted summary judgment and Jessica Hashimoto appealed. *Id.* The appellate court decided that Hashimoto's breach of contract claim was without merit because her contract with Bank of Hawaii was terminable at will. *Id.* at 410. The court then decided that the Hawaii Whistle Blower's Act, under which her wrongful discharge claim was brought, was preempted in its entirety by ERISA. *Id.* at 412.

79. *Id.* at 409-10. Hashimoto made several complaints to management about ERISA violations between April 1989 and October 1990. *Id.* Specifically, the complaints referenced requests from management that Hashimoto reimburse a former employee with improper funds and a request to use incorrect calculations in determining an employee's pension plan benefit. *Id.* at 410.

80. *Id.* at 411-12. Plaintiff, Hashimoto, also sought to reverse sanctions

the court relied on what it perceived to be ERISA 510's purpose and how the purpose would be destroyed if employees in Jessica's position are left unprotected.⁸¹

The reasoning in *Hashimoto* was succinct. If the purpose of ERISA 510 is to protect whistleblowers, it does not make sense to allow an employee who participates in an ERISA plan to be discharged for blowing the whistle on abuse.⁸² That would obviously go against the entire purpose of the statute, as seen by the court, and it is clear that the purpose of ERISA 510 was driving the opinion in *Hashimoto*.⁸³

It is interesting to note that the court describes an employee bringing ERISA violations to the attention of the managers of the ERISA plan as a "normal" first step.⁸⁴ It would seem that by using the word "normal," the court is implying that requiring other arbitrary formal procedures to be taken prior to raising an issue of benefit abuse to ensure protection from discharge would be requiring employees to behave *abnormally*. This shows that the court was seeking to interpret the scope of ERISA 510 in a way that fulfilled its purpose while attempting to avoid any overly intricate lingual interpretation that could result in impractical requirements.

Once the purpose of ERISA 510 was clearly determined, the court admittedly spent little time with the actual language of the statute.⁸⁵ However, the language was not completely ignored. The court found that the protection of an employee's unsolicited, internal complaint regarding ERISA violations aligned perfectly

awarded against her in the district court. *Id.* at 412. The court of appeals found no abuse of discretion by the district judge in awarding sanctions and therefore affirmed the sanctions. *Id.* at 412.

81. *Id.* at 411. Specifically, the court in *Hashimoto* held that the purpose of ERISA 510 was to protect whistleblowers. *Id.* The court then stated that, as a fiduciary, Hashimoto is clearly able to bring a civil action pursuant to ERISA 510. *Id.* The court pointed out that ERISA 510 says that 29 U.S.C. § 1132 is applicable in enforcing ERISA 510. *Id.* While the court refused to decide whether § 1132 limits possible plaintiffs that may bring an action under ERISA 510, it found that it explicitly allows fiduciaries to bring a civil action to enforce 29 U.S.C. § 1140 (ERISA 510). *Id.* It is important to note that 29 U.S.C. § 1132 also expressly identifies participants and beneficiaries as parties who can bring a civil action. 29 U.S.C. § 1132 (a)(1). This would also seem to indicate that employees who participate in ERISA plans could certainly bring a civil action if 29 U.S.C. § 1132 was ever found to actually *limit* possible plaintiffs who can bring a civil action under 29 U.S.C. § 1140 (ERISA 510). However, the fact that ERISA 510 refers to 29 U.S.C. § 1132 as merely "applicable" and not "limiting" would seem to indicate that it does not limit who may bring a lawsuit. *Id.* § 1140.

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

83. *Id.*

84. *Id.*

85. *See id.* (discussing the language of ERISA 510 briefly while focusing more on the purpose of the section).

with the language of ERISA 510.⁸⁶ The court reasoned that raising the issue of abuse is the necessary first step in “giving information” or “testifying” and that the normal way to do that is to approach the managers of the ERISA plan.⁸⁷ Again, the clear purpose of ERISA 510, along with real world considerations of how that purpose would be fulfilled, helped to guide the court’s interpretation of the statute.⁸⁸

The second appellate decision to hold that ERISA 510 protects unsolicited, internal complaints is *Anderson v. Electronic Data Systems Corp.*⁸⁹ The plaintiff-employee, George Anderson,⁹⁰ claimed that he was fired because he refused to commit acts that would violate ERISA and reported other illegal acts to management.⁹¹ The court held that ERISA preempted a state claim of wrongful discharge and, in doing so, held that ERISA 510 would protect employees like George from discharge when objecting or complaining to employers about ERISA violations.⁹²

The court reasoned that ERISA 510 broadly prohibited any discharge or adverse treatment of ERISA participants or

86. *Id.*

87. *Id.*

88. *Id.*

89. *Anderson*, 11 F.3d at 1315. Plaintiff Anderson initially brought suit against his former employer and four current or former employees in Texas state court. *Id.* at 1312. The charges brought in state court were wrongful discharge, tortious interference with prospective business and contractual relationships, and infliction of emotional distress. *Id.* The defendants removed the case to federal court claiming that ERISA preempted any state wrongful discharge claims that are based on a refusal to commit ERISA violations. *Id.* at 1313. Anderson filed an amended complaint that deleted all references to ERISA and voluntarily dismissed all complaints against all parties except for his former employer, Electronic Data Systems. *Id.* Anderson requested that the case be remanded to state court and the district court denied the motion. *Id.* On appeal, the court was to determine whether the claims asserted by Anderson were preempted by ERISA and therefore removable to federal court. *Id.* The court also had to determine whether ERISA preemption raised as a defense, as opposed to a complaint, still allowed for removal. *Id.* at 1315. The court held that state wrongful discharge claims based on being fired for objecting to and refusing to commit ERISA violations were preempted by ERISA. *Id.* at 1314. The court also held that the ERISA “complete preemption” doctrine allowed for removal of the case even when the ERISA preemption claim was only asserted by the defense and not as part of a well-pleaded complaint. *Id.* at 1315. The court also held that Anderson did not take away the district court’s jurisdiction when he amended the complaint to delete any references to ERISA. *Id.* at 1316.

90. *Id.* at 1312.

91. *Id.* at 1315. Anderson claimed he was told to sign off on approval and payment invoices without the approval of pension trustees and to document the minutes of meetings he did not attend. *Id.* at 1312. Both of these actions violate ERISA. *Id.*

92. *Id.* at 1315.

beneficiaries.⁹³ Discharging an employee for “giving information” to their employer about abuse of ERISA plans was found to fall in those broad prohibitions.⁹⁴

Notably, these circuit decisions did not spend very much time analyzing the statutory language of ERISA 510 but this is not to say they completely ignored the statutory language.⁹⁵ Instead, it would seem both courts simply saw the purpose and language of ERISA 510 as not being at odds with each other.⁹⁶ In contrast, the circuit court decisions on the other side of the issue spend most of their time analyzing the language of ERISA 510 and coming to conclusions that seem to raise more questions than answers.⁹⁷

*B. A Question of Formality: The Other Side of the Split Finding
ERISA 510 Does Not Protect Unsolicited, Internal Complaints*

The first circuit decision to hold that ERISA 510 does not protect unsolicited, internal complaints was *King v. Marriott International Inc.* The plaintiff-employee, Karen King, brought a suit against her employer claiming that she was fired because she complained about ERISA violations to management while also refusing to violate ERISA herself.⁹⁸ The court held that ERISA 510 does not protect complaints to management regarding ERISA violations.⁹⁹ In reaching its conclusion, the court relied on its

93. *Id.*

94. *Id.*

95. *See id.* (using the language of ERISA 510 in the court’s analysis); *Hashimoto*, 999 F.2d at 411 (referencing language from ERISA 510 in the analysis of the case).

96. *See Anderson*, 11 F.3d at 1315 (concluding that ERISA 510 protected Anderson from discharge while using the language of ERISA 510 in that analysis); *Hashimoto*, 999 F.2d at 411 (stressing the purpose of ERISA 510 while also using some of the language from ERISA 510).

97. *See infra* Part III Section B (analyzing the circuits that have found that ERISA 510 does not cover unsolicited, internal complaints).

98. *King*, 337 F.3d at 422-23. Plaintiff originally brought a cause of action for wrongful discharge in Maryland state court. *Id.* Defendants, former employer Marriott International Inc. and former immediate supervisor Karl Fredericks, removed the case to federal court. *Id.* The removal was due to ERISA preempting her state cause of action. *Id.* at 423. The district court denied King’s motion for remand and granted summary judgment in favor of defendants due to King not showing causation between her termination and her objections and complaints. *Id.* King appealed, claiming that the district court erred by holding that ERISA completely preempted her state action for wrongful discharge. *Id.*

99. *Id.* at 428. The appellate court vacated the district court’s judgment and remanded for further proceedings. *Id.* The court was basically saying that ERISA only preempted King’s state cause of action for wrongful discharge if ERISA 510 protected employee’s unsolicited, internal complaints. *Id.* Since the court found ERISA 510 did not protect an employee’s unsolicited, internal complaints, ERISA could not preempt the state wrongful discharge claim. *Id.*

interpretation of the statutory language.¹⁰⁰

The court concluded that the phrases “inquiry or proceeding” and “testified or is about to testify” in ERISA 510 serve to limit its protection to proceedings of an administrative or legal nature,¹⁰¹ and thus something more formal than a complaint to a supervisor would be needed to trigger its protection.¹⁰² This leaves an important question unanswered: what exactly is the minimum level of formality required to gain protection from discharge?

The second decision to come along, *Nicolaou v. Horizon Media, Inc.*, raised the same question. Chrystina Nicolau brought a suit against her former employer, Horizon Media, claiming that it wrongfully discharged her after she brought ERISA violations to the attention of management.¹⁰³ However, Chrystina not only informally complained to management, she brought it to the attention of Horizon’s outside counsel.¹⁰⁴ The attorney investigated the alleged violations¹⁰⁵ and, finding the complaints to be valid, then set up a meeting where he and Chrystina discussed the complaints with management.¹⁰⁶ Soon after the meeting,

100. *Id.* at 426-28.

101. *Id.* at 427.

102. *Id.*

103. *Nicolaou*, 402 F.3d at 327. Plaintiff, Nicolaou, was hired by Horizon Media in July 1998 as Director of Human Resources and Administration. *Id.* at 326. Nicolaou was fired by Horizon Media on November 7, 2000. *Id.* at 327. The violation that Nicolaou discovered was an underpayment of overtime to employees at Horizon’s New York and Los Angeles offices. *Id.* at 326. This violation had allegedly been going on for more than ten years, representing “a historical under funding of Horizon’s 401(k) plan.” *Id.* (internal citation omitted). Nicolaou filed the initial complaint on January 31, 2001, and an amended complaint on April 24, 2001. *Id.* at 327. The amended complaint contained two causes of action for illegal retaliation. *Id.* The first cause of action was for a violation of Sections 15 and 16 of the Fair Labor Standards Act (FLSA) and the second cause of action was for a violation of ERISA 510. *Id.* Horizon Media filed a motion to dismiss the complaint for failure to state a claim and the district court granted the motion on both counts. *Id.* The district court held that sections 15 and 16 of FLSA did not make it illegal for companies to retaliate against employees who bring complaints within the company. *Id.* The district court dismissed the ERISA claim because Nicolaou was seeking damages instead of equitable relief as required by 29 U.S.C. § 1132. *Id.* Nicolaou then amended her complaint to seek equitable relief in the form of reinstating her position with Horizon. *Id.* The district court reconsidered the ERISA claim and again dismissed the complaint. *Id.* This time the dismissal was because the district court held that ERISA 510 does not protect employees who “participate[] in an internal inquiry” and since Nicolaou only seems to have participated in an internal inquiry, she failed to state a claim. *Id.* Nicolaou only appealed the dismissal of the ERISA 510 ERISA claim. *Id.*

104. *Id.* at 326, 329. The attorney was named Mark Silverman. *Id.* at 326.

105. *Id.*

106. *Id.* The meeting took place in November 1999. *Id.* It consisted of Nicolaou, Silverman (attorney) and William Koenigsberg (president of Horizon Media). *Id.* During the meeting it is alleged that Silverman stressed the

Chrystina received a new job title, lost her previous work responsibilities, and was eventually fired.¹⁰⁷

The court determined that the word “inquiry” in ERISA 510 refers to an informal gathering or request for information, and that the meeting with management would fit that definition if Nicolaous’s boss requested the meeting in order to receive information about the violations.¹⁰⁸ However, even though Nicolaous’ boss did not request the meeting, the court still found the meeting constituted an “inquiry”, seemingly because outside counsel was involved.¹⁰⁹ This interpretation puts the employee in the frustrating position of either immediately initiating external legal procedures or hoping the employer somehow learns of the violations on its own and then decides to inquire about them. This would seem to protect the employer more than the employee. Is that the purpose of an anti-retaliation provision?

The court also explicitly states that the level of formality does not matter when determining what constitutes an “inquiry” under ERISA 510.¹¹⁰ However, the court then says that its decision is in line with *King*, which held that an inquiry must be more formal than a written or oral complaint to a supervisor.¹¹¹ So does formality matter or not? The court in *Nicolaou* answers by saying

importance of rectifying the ERISA violations. *Id.* Koenigsberg was allegedly acting as if he was upset that the information was being brought to his attention. *Id.*

107. *Id.* 326-27. Soon after the meeting, Nicolaous’s boss allegedly announced that he was going to hire a “real’ Human Resources professional . . . that would report directly to him.” *Id.* (internal citation omitted). Nicolaou was then told she would no longer be the “Director of Human Resources and Administration” and was given a new title of “Office Manager.” *Id.* Horizon Media then hired two people to take over Nicolaou’s previous duties. *Id.* Nicolaou described her treatment during this time as “professional trashing.” *Id.*

108. *Id.* at 329-30. The court mentions that the district court concluded that ERISA 510 and the whistleblower provision (Section 15(a)(3)) of FLSA were the same. *Id.* at 328. Therefore, the district court held that only a formal, external inquiry could be protected as an “inquiry” by ERISA 510. *Id.* The appellate court disagreed with the district court and said that the plain language of ERISA 510 is “unambiguously broader in scope” than Section 15(a)(3) of FLSA. *Id.* For purposes of clarity and comparison, the relevant text of FLSA makes it unlawful to “discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding . . .” 29 U.S.C. § 215(a)(3). The relevant text of ERISA 510 states that “[i]t shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter . . .” 29 U.S.C. § 1140.

109. *Nicolaou*, 404 F.3d at 329-30.

110. *Id.* at 330.

111. *Id.*

that formality does not matter at all as long as there is more formality than a mere complaint to a supervisor.¹¹²

The most recent and final circuit decision in this section is *Edwards v. A.H. Cornell & Son, Inc.* The plaintiff-employee, Shirley Edwards, as we know from the beginning of this Comment, brought a suit against her former employer claiming that she was wrongfully discharged after complaining to management about alleged ERISA violations.¹¹³

In the opinion, the court's analysis maneuvered around ERISA 510's purpose of protecting whistleblowers by claiming the language is clear and therefore demands a plain interpretation.¹¹⁴ The court splits the relevant portion of ERISA 510 into two distinct parts.¹¹⁵ Part one is "given information or has testified or is about to testify" and part two is "in any inquiry or proceeding."¹¹⁶ The court stated that Shirley obviously satisfied the "given information" language of part one when she complained to management regarding ERISA violations.¹¹⁷ The question left to analyze was whether she did so in any "inquiry or proceeding."

The court reasoned that an "inquiry" requires a request for information and since no one approached Shirley requesting information about ERISA violations, there was no "inquiry."¹¹⁸ The court stated that, in order to be considered a "proceeding", there must be some formal procedure such as the "progression of a lawsuit" or the "seeking [of] redress from a tribunal or agency."¹¹⁹ Shirley's complaints did not measure up to either of these definitions and, therefore, ERISA 510 did not protect her from being discharged.¹²⁰

Following this interpretation of ERISA 510, an employee would need to keep quiet about any belief that ERISA violations were taking place until they were able to hire an attorney or institute some formal legal procedure to ensure they would not be fired for speaking out.¹²¹ However, a lawsuit or formal procedure

112. *See id.* (stating that the court agrees with *King*, which held that the phrase "inquiry or proceeding" means there must be more than a written or oral complaint to a supervisor to garner protection under ERISA 510 and at the same time stating that formality does not come into play when attempting to determine if an employee's complaint constitutes an inquiry).

113. *See Edwards*, 610 F.3d at 219 (detailing Shirley Edwards' experience).

114. *Id.* at 224.

115. *See id.* at 222-23 (finding that Shirley satisfied the "giving information" requirement by complaining to her employer and skipping over any analysis of "testify or about to testify" in order to determine whether Shirley gave information in an "inquiry or proceeding").

116. *Id.*

117. *Id.* at 222.

118. *Id.* at 223.

119. *Id.*

120. *Id.*

121. *See id.* (explaining that if an employee speaks out about ERISA

would not be required to give protection from discharge if the employee was simply responding to an "inquiry."¹²² Apparently, the court finds it reasonable to believe that employers may approach workers to "inquire" about their own ERISA violations.

The choice for employees who want to ensure they cannot be fired for speaking up to their employer is clear. They may either bring a lawsuit against their employer or hope that someday they will be asked if they have any information about ERISA violations at their workplace.¹²³ Until then, it would seem best to stay quiet, stay employed, and hope for the best.

Toward the end of the opinion, the court stated that they might have found in favor of Shirley had the language of ERISA 510 been ambiguous.¹²⁴ Interestingly, the fact that several appellate courts disagreed on what the language of ERISA 510 required at the time of the *Edwards* decision lends credibility to the argument that the language is, in fact, ambiguous.¹²⁵

IV. PROPOSAL

In this section, there will first be a discussion on how ERISA 510 should be interpreted followed by an analysis of other anti-retaliation provisions. Finally, there will be a proposal suggesting that either the Supreme Court or Congress should step in and resolve the issue.

A. *Everyone Wins: ERISA 510 Should Be Interpreted Broadly to Benefit Employees and Employers*

The basic rules of interpreting a statute include first looking to the language of the statute for any plain and clear meaning.¹²⁶ Typically, the language of the statute will be conclusive if the

violations to his employer it does not represent the protected action of "giving information" in an "inquiry," but is instead the unprotected giving of information without being inquired upon).

122. *Id.*

123. *See Nicolaou*, 402 F.3d at 331 (Pooler, J., concurring) (listing options left for a fiduciary under the court's holding including: doing nothing and risking co-fiduciary liability, making an inquiry and facing retaliation, bringing the violations to the attention of an external agency and hoping company superiors do not learn of it until the agency makes the first inquiry, or taking on the burden and uncertainty of filing suit themselves).

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

125. *See id.* at 228 (Cowen, J., dissenting) (stating the statutory language in ERISA 510 is ambiguous due to other circuit's interpretations of ERISA 510 and other cases within the Third Circuit interpreting similar anti-retaliation provisions more broadly). Judge Cowen referenced how the term "proceeding" had been held to be ambiguous in a previous Third Circuit case. *Id.* at 229. The term "proceeding" had been held to encompass internal complaints when the Third Circuit was interpreting the Clean Water Act. *Id.*

126. *Id.* at 226.

words produce an unambiguous result.¹²⁷ If the words of a statute are ambiguous, then the courts should look to the legislative purpose to determine its proper interpretation.¹²⁸ However, even if the statute is not ambiguous, courts should not allow an interpretation that goes against any clearly expressed legislative purpose or one that produces an absurd result.¹²⁹

The purpose of ERISA 510 is to protect whistleblowers and to prevent employers from discharging employees in order to keep the employees from obtaining ERISA benefits.¹³⁰ This is evident not only from case law but also from legislative history where it is made clear that, “[T]he enforcement provisions [of ERISA] have been designed specifically to provide . . . participants . . . with broad remedies for redressing or preventing violations of the Act . . . [and] [T]he intent of the Committee is to provide the full range of legal and equitable remedies available”¹³¹

It would seem to go against that clear legislative purpose to find that ERISA 510 is to be narrowly interpreted in a way that does not protect employees when they try to prevent ERISA benefit abuse by inquiring internally about possible ERISA violations.¹³² Not only does that leave whistleblowers unprotected, it also makes it easier for employers to withhold ERISA benefits from employees.¹³³

ERISA is a remedial statute and it should be liberally

127. *Id.*

128. *Id.*

129. *Disabled in Action v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008) (quoting *U.S. v. Schneider*, 14 F.3d 876, 879 (3d Cir. 1994) and *Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 454 (1989)).

130. *Hashimoto*, 999 F.2d at 411 (stating that the purpose of ERISA 510 is clearly to protect whistleblowers); *Lindemann*, 141 F.3d at 295 (stating that Congress’s primary aim in constructing ERISA 510 was to prevent “unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested [ERISA] benefits.”).

131. H.R. REP NO. 93-533, at 4655 (1974) (emphasis added).

132. *Edwards*, 610 F.3d at 226 (Cowen, J., dissenting) (stating how odd it is that the majority opinion finds ERISA 510 to leave unsolicited, internal complaints unprotected when ERISA 510 was enacted to protect that type of conduct in the first place).

133. *Hashimoto*, 999 F.2d at 411 (recognizing that if employees’ internal workplace complaints are not protected by ERISA 510, then the purpose of protecting whistleblowers is destroyed). This leads to the obvious conclusion that employers would be able to withhold benefits more easily by simply firing an employee for asking questions about abuse. See generally *Edwards*, 610 F.3d at 225 (holding that ERISA does not protect an employee from discharge due to objecting internally about abuse of ERISA benefits); *Nicolaou*, 402 F.3d at 330 (recognizing that ERISA 510 allows an employer to discharge an employee if all the employee does is complain to a supervisor about ERISA benefit abuse); *King*, 337 F.3d at 428 (recognizing that an employer is not restricted from discharging an employee who complains internally about ERISA abuse).

construed in favor of protecting the participants in the ERISA plans.¹³⁴ The court in *Edwards* reasoned that the clear statutory language prevented it from liberally construing ERISA 510.¹³⁵ However, at the time, there was an even circuit split indicating the statute was ambiguous and, regardless, clear language does not allow for an absurd result.¹³⁶

Finding that an anti-retaliation provision in a remedial statute does not protect plan participants from discharge when they complain about plan violations screams absurdity. Employees will be less likely to bring any complaints if they know they have to go through some formal external procedure just to ensure they can bring suit if they are fired for complaining.¹³⁷ Not only do holdings like *Edwards* prevent the purpose of ERISA 510 from being fulfilled, they also make for a tense working environment.¹³⁸

It should be noted that narrowly interpreting ERISA 510 produces an absurd result for employers, as well. Requiring employees to jump through external hoops in order to protect themselves prevents the employer from hearing the ERISA complaint first.¹³⁹ If an employee feels comfortable speaking to his or her employer about alleged ERISA violations, the employer may be able to handle the issue internally rather than in a courtroom.¹⁴⁰ Requiring the employee to undertake unclear external procedures may make the employee err on the side of taking drastic steps to ensure protection and expose the employer to unnecessary legal action.

B. No Freakish Rules: The Interpretation of Title VII and FLSA Indicate a Trend Favoring Common Sense Protections

The U.S. Supreme Court recently interpreted the opposition clause of Title VII of the Civil Rights Act of 1964.¹⁴¹ The opposition clause prevents employers from discriminating against employees

134. *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir. 1986).

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

136. *Id.* at 220-22 (discussing the circuit split); *id.* at 226 (Cowen, J., dissenting) (quoting *Disabled*, 539 F.3d at 210) (recognizing that statutory "constructions that produce 'odd' or 'absurd results' or that are 'inconsistent with common sense'" are to be avoided).

137. *Passaic Valley*, 992 F.2d at 478.

138. *See id.* at 478 (noting that whistleblower provisions encourage a less threatening work environment for employees because they encourage employees to speak out about violations without fear of reprisal).

139. *See id.* at 478-79 (stating that requiring employees to take formal administrative or legal procedures instead of just talking to their employer directly prevents the employer from having the opportunity to simply clarify or adjust their policies without having to deal with any sort of unnecessary, formal litigation).

140. *Id.*

141. *Crawford*, 129 S. Ct. at 846.

who oppose an unlawful employment practice.¹⁴²

The Sixth Circuit held that one could only “oppose” something through active, consistent activities and that an employee must initiate a complaint to be protected.¹⁴³ The U.S. Supreme Court reversed and held that an employee could “oppose” something not only by speaking out about discrimination on his or her own initiative, but also in answering questions during an employer’s internal investigation.¹⁴⁴ In so holding, the Court looked to how the word “oppose” would naturally be used.¹⁴⁵ Interestingly, the Court referred to the previous rigid statutory interpretation as resulting in a “freakish” rule.¹⁴⁶

The U.S. Supreme Court also interpreted the scope of another anti-retaliation statute, Section 215(a)(3) of FLSA.¹⁴⁷ The Seventh Circuit previously held that the statute did not protect an employee’s oral complaints because only writings could be “filed.”¹⁴⁸

The U.S. Supreme Court vacated the Seventh Circuit’s decision and held that the statute protects a worker’s oral complaints.¹⁴⁹ In making its decision, the Court looked to the purpose of the statute and noted that FLSA is meant to protect workers and that protection relies upon a worker’s ability to file complaints with his employer regarding FLSA violations.¹⁵⁰ The very workers FLSA is meant to protect would be negatively affected if the Court held that oral complaints are not a protected form of complaint.¹⁵¹

Similarly, a rigid interpretation of ERISA 510 allowing

142. *Id.* at 848.

143. *Id.* at 850.

144. *Id.* at 849.

145. *Id.* at 851.

146. *Id.*

147. *Kasten*, 131 S. Ct. at 1329.

148. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 840 (7th Cir. 2009), *vacated*, 131 S. Ct. 1325 (2011).

149. *Kasten*, 131 S. Ct. at 1329. Oral complaints must still satisfy a notice requirement where the employer understands the employee is expressing a grievance and not simply making a trivial comment. *Id.* at 1334-35. The dissenting opinion, written by Justice Scalia and joined by Justice Thomas, raises the familiar argument that the phrase “file any complaint” requires something more formal than an unsolicited, internal complaint. *Id.* at 1336-37 (Scalia, J., dissenting).

150. *Id.* at 1333. FLSA relies on employees to report violations of FLSA instead of requiring some sort of payroll inspection or federal oversight. *Id.* Therefore it is necessary to ensure that employees are not fearful of retaliation for reporting violations. *Id.*

151. *Id.* The Court notes that FLSA was originally drafted to protect workers who were poorly educated, overworked, and illiterate. *Id.* It would be harder for these types of workers to commit their complaints to writing and President Franklin D. Roosevelt said that these types of workers were in the greatest need of protection through FLSA. *Id.*

employees to be fired for complaining about ERISA violations results in a freakish rule. This type of interpretation leaves benefits susceptible to the whims of sophisticated employers while also exposing employers to unnecessary legal action, and does not serve the interests of the workers that ERISA 510 seeks to protect.¹⁵²

C. The U.S. Supreme Court Should Grant Certiorari and Interpret ERISA 510

Similar to the granting of certiorari to interpret Title VII and Section 215(a)(3) of FLSA, the U.S. Supreme Court should grant certiorari to interpret ERISA 510. The Court could easily end the debate in the lower courts by interpreting ERISA 510 as protecting employees from discharge for making unsolicited, internal complaints; however, this solution would require a willing U.S. Supreme Court.¹⁵³

D. Congress Should Amend or Re-Write ERISA 510 to Clearly Protect Unsolicited, Internal Complaints

Congress recently amended Title VII by passing the Lilly Ledbetter Fair Pay Act in response to dissatisfaction with the result of a U.S. Supreme Court case.¹⁵⁴ Congress may also choose to amend ERISA 510 in response to a case like *Edwards*. Congress could step in and re-write ERISA 510 to clearly provide protection for unsolicited, internal complaints. For example:

152. See *supra* Part IV A (explaining that ERISA should be interpreted broadly in order to benefit employers and employees).

153. *Edwards v. A.H. Cornell & Son, Inc.*, 131 S. Ct. 1604, 1604 (2011) (denying certiorari).

154. Joanna L. Grossman, *The Lilly Ledbetter Fair Pay Act of 2009*, FINDLAW

(Feb. 13, 2009), <http://writ.news.findlaw.com/grossman/20090213.html>. The Lilly Ledbetter Act came into existence because of dissatisfaction with *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). *Id.* In *Ledbetter*, plaintiff, Lilly Ledbetter, was suing her former employer, Goodyear, alleging that she was discriminated against on account of her sex. *Ledbetter*, 550 U.S. at 618. Ledbetter alleged that she was given poor performance evaluations because of her sex, and as a result, was paid less than her male counterparts. *Id.* The district court jury found for Ledbetter but the Eleventh Circuit reversed partly because Ledbetter did not timely file her complaint. *Id.* The U.S. Supreme Court affirmed, holding that Ledbetter should have filed her suit within 180 days of the date that her employer first paid her less than her male colleagues. *Id.* at 628-29; see also Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 29, 2009, <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>. (covering the signing ceremony and other details of the legislation, including the *Ledbetter* decision it was intended to correct). The Lilly Ledbetter Fair Pay Act amended Title VII to allow for a new claim each time a person receives a discriminatory paycheck, rather than only allowing one claim within 180 days of the first discriminatory paycheck. Grossman, *supra*.

It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because such person has filed any solicited or unsolicited complaint¹⁵⁵ internally or externally, or made any inquiry, internally or externally, or given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter.

V. CONCLUSION

ERISA 510 should be interpreted broadly to protect an employee's unsolicited, internal complaints regarding ERISA violations. This would benefit both employees and employers while also serving the purpose of ERISA 510 by making it safer for employees to inquire about suspected ERISA benefit abuse. The U.S. Supreme Court should grant certiorari to the next case that comes along in order to end the confusion and inevitable forum shopping¹⁵⁶ resulting from the current circuit split. However, every day that workers are left unprotected is a day too long. Congress should act immediately to amend ERISA 510 and remove any doubt as to its proper application. It is time to end the catch-22 forcing workers to choose between losing benefits and losing a job.

155. The use of the phrase "filed any complaint" is inspired by the anti-retaliation statute of the Fair Labor Standards Act, which has been interpreted by the U.S. Supreme Court to protect internal oral complaints. *Kasten*, 131 S. Ct. at 1327.

156. See Nicholas J. Wagoner, *4 Reasons Why the Supreme Court Reviews Circuit Splits*, CIRCUIT SPLITS (Mar. 15, 2012, 5:32 AM), <http://www.circuitsplits.com/2012/03/back-in-december-i-wrote-a-series-of-posts-explaining-the-importat-role-that-circuit-splits-play-in-shaping-the-supreme-court.html> (noting that "circuit splits incentivize forum shopping.").

