

2011

## Blow the Whistle at Your Own Risk: ERISA's Retaliation Provision and the Dilemma of the "Unsolicited Internal Complaint"

Michael C. Ross  
mross20@slu.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

---

### Recommended Citation

Michael C. Ross, *Blow the Whistle at Your Own Risk: ERISA's Retaliation Provision and the Dilemma of the "Unsolicited Internal Complaint"*, 56 St. Louis U. L.J. (2011).

Available at: <https://scholarship.law.slu.edu/lj/vol56/iss1/12>

This Comment is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**BLOW THE WHISTLE AT YOUR OWN RISK: ERISA'S  
RETALIATION PROVISION AND THE DILEMMA OF THE  
"UNSOLICITED INTERNAL COMPLAINT"**

INTRODUCTION

The first decade of the new millennium was witness to a plethora of corporate scandals that shook consumer confidence in big business. Beginning with the Enron scandal in 2001 and culminating with the "Great Recession" in 2008, companies and banks that generated an enormous amount of wealth during the 1990s became intoxicated by their success and that hubris led to their eventual downfall. Critics claimed they were undone by their own irresponsibility and greed, as they were obsessed with the amount of wealth they had generated during the Internet boom.<sup>1</sup> A common theme among these scandals, however, is that whistleblowers played a pivotal role by shedding light on the corruption that had taken root within their respective companies. *Forbes* magazine noted that the first two years of the new millennium saw an "avalanche of corporate accounting scandals," documenting more than twenty companies that were exposed, often by whistleblowers, for accounting fraud alone.<sup>2</sup> With confidence in these institutions shattered, these whistleblowers were viewed as white knights doing their civic duty by exposing corporate malfeasance. In the wake of their success, they were hailed by many for their virtue and lauded for their courage by putting their careers on the line by doing what they believed was right.<sup>3</sup>

In fact, whistleblowers have become so valued that in the aftermath of the Ponzi schemes of Bernie Madoff and Allen Stanford,<sup>4</sup> the Securities and Exchange Commission is looking outside of the agency and actively consulting

---

1. See WAYNE VISSER, *THE AGE OF RESPONSIBILITY: CSR 2.0 AND THE NEW DNA OF BUSINESS* 32 (2011).

2. Penelope Patsuris, *The Corporate Scandal Sheet*, FORBES.COM (Aug. 26, 2002, 5:30 PM), <http://www.forbes.com/2002/07/25/accountingtracker.html>. *Time* magazine recognized "The Whistleblowers," Cynthia Cooper, Coleen Rowley, and Sherron Watkins, as their "Persons of the Year 2002" for their role in revealing corruption at WorldCom, the FBI, and Enron respectively. Richard Lacayo & Amanda Ripley, *Persons of the Year: Cynthia Cooper, Coleen Rowley and Sherron Watkins*, TIME, Dec. 30, 2002, at 30.

3. Lacayo & Ripley, *supra* note 2.

4. See Zachary A. Goldfarb & Anita Kumar, *Billionaire Stanford Charged With Running \$7 Billion Ponzi Scheme*, WASH. POST, Jun. 20, 2009, at A11; Martha Graybow, *Madoff Mysteries Remain As He Nears Guilty Plea*, REUTERS, Mar. 11, 2009, <http://www.reuters.com/article/2009/03/11/us-madoff-idUSTRE52A5JK20090311>.

with whistleblowers in order to root out instances of fraud.<sup>5</sup> Congress has been proactive as well, passing the Public Company Accounting Reform and Corporate Responsibility Act,<sup>6</sup> colloquially known as Sarbanes-Oxley, which includes a provision aimed at protecting whistleblowers.<sup>7</sup> Section 806(a) of this act, entitled “Whistleblower Protection for Employees of Publicly Traded Companies,” prevents an employer from “discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing] against an employee in the terms and conditions of employment because of any lawful act done by the employee . . . .”<sup>8</sup> With these provisions, Congress has recognized that retaliation can have a “devastating ‘chilling’ effect” on those who might come forward to blow the whistle<sup>9</sup> which, as the SEC also realized, is often the most effective and necessary way to ensure that these laws are enforced.<sup>10</sup>

While corporate scandal served as the impetus to embody whistleblower protection in Sarbanes-Oxley, this was not the first or last time that Congress would seek to prevent employees from blowing the whistle on the impropriety of their employers. Embodied in the Employee Retirement Income Security Act of 1974 (“ERISA”) is Section 510, which is colloquially known as ERISA’s anti-retaliation provision.<sup>11</sup> It states:

It shall be unlawful for any person to discharge . . . a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, [or] this subchapter . . . . It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act.<sup>12</sup>

---

5. Robert Chew, *Calling All Whistleblowers! The SEC Wants You*, TIME, Feb. 24, 2009, <http://www.time.com/time/business/article/0,8599,1881318,00.html>; Press Release, SEC, SEC Revamping Process for Reviewing Whistleblower Complaints and Enforcement Tips (Mar. 5, 2009).

6. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201–7266 (2006)).

7. See 18 U.S.C. § 1514A.

8. *Id.*

9. See Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 75 (2007).

10. Richard Moberly, *The Supreme Court’s Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 437 (2010).

11. See Cristin Schmitz, *No ERISA Whistleblower Protection for Unsolicited Internal Complaints*, INSIDE COUNSEL, Sept. 2010, at 74.

12. 29 U.S.C. § 1140 (2006).

The purpose of ERISA is to protect employee benefit plans, including pension plans and welfare plans, and ensure that plan fiduciaries do not misuse plan assets.<sup>13</sup> Currently, however, federal courts are divided over whether Section 510 protects an employee's unsolicited complaints regarding whether or not a plan governed by ERISA is being mismanaged.<sup>14</sup> The controversy stems from the language of the act, which states that it is unlawful to retaliate against an employee "because he has given information or has testified or is about to testify in any *inquiry or proceeding*."<sup>15</sup> The Second, Third, and Fourth Circuits have read the statute narrowly so that an employee who takes the initiative and tries to blow the whistle by complaining to his or her employer about possible ERISA violations has not participated in an "inquiry or proceeding" and is therefore not protected from retaliation.<sup>16</sup> Meanwhile, the Fifth and Ninth Circuits have read the provision much more broadly to extend protection to these individuals.<sup>17</sup> In light of the value that our society and government place on these individuals, it is strange that Congress would draft a provision that affects so many millions of people and yet fails to provide adequate protection to whistleblowers. This is an issue with enormous public policy implications that may very well find its way to the Supreme Court because of the millions of Americans who are affected by ERISA.<sup>18</sup>

In Part I of this Article, I will provide a brief summary of the purpose and functions of ERISA, followed by an analysis of how the five courts in question have ruled on this issue in Part II. In Part III, I will examine how the outcome of a judicial inquiry into the matter will vary depending upon whether one employs a textualist or purposivist analysis. Finally in Part IV, I will examine how the Supreme Court may address this issue when, and if, they are confronted with it based on their current makeup and their past decisions involving retaliation cases. I conclude by arguing that the Court should affirm the decisions of the Fifth and Ninth Circuits and read into the statute broader protection for whistleblowers. Furthermore, it is quite likely that the Court

---

13. Andrew M. Campbell, Annotation, *Construction and Application of Employee Retirement Income Security Act of 1974 (29 U.S.C.A. §§ 1001 et seq.) by United States Supreme Court*, 150 A.L.R. FED. 441, 455, 459 (1998).

14. Schmitz, *supra* note 11, at 74.

15. 29 U.S.C. § 1140 (emphasis added).

16. See *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005) (holding a meeting, called by the company's attorney, between the whistleblower and the president of the company was protected and noting that the holding was not contrary to *King v. Marriott International, Inc.*); *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003); *infra* Part II.A–B.

17. See *Anderson v. Elec. Data Sys. Corp.*, 11 F.2d 1311, 1315 (5th Cir. 1994); *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993).

18. The Supreme Court refused to address this issue in March of 2011 when it denied a petition for writ of certiorari in the *Edwards* case. See *Edwards v. A.H. Cornell & Son, Inc.*, 131 S. Ct. 1604 (2011) (mem.).

will rule this way because of its longstanding adherence to what Richard Moberly calls the “anti-retaliation” principle.<sup>19</sup> This may seem to be a rather controversial position because the Roberts Court’s record on employee rights can only be described as “mixed” at best.<sup>20</sup> Nevertheless, it will become clear that in retaliation cases, the Court generally takes a purposivist approach in order to provide adequate protection for whistleblowers, who it views as playing a critical role in the enforcement of the nation’s laws.<sup>21</sup>

### I. ERISA AND EMPLOYEE BENEFITS

ERISA is an enormous piece of legislation and several law schools offer entire classes dedicated to unraveling its prolixity.<sup>22</sup> Quite simply, it was Congress’s attempt to “devise a comprehensive regulatory program to protect millions of American workers who looked to private pension plans for financial support in their retirement years.”<sup>23</sup> According to the Supreme Court in *Shaw v. Delta Air Lines*, “[ERISA] imposes participation, funding, and vesting requirements on pension plans. It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans.”<sup>24</sup> As a result of its various requirements, ERISA has been described as “landmark legislation” that “recast the federal government’s role in the private pension system.”<sup>25</sup> Before ERISA, federal law only indirectly affected pension plans through tax and labor laws, and treated pensions as merely a tool for managing workers.<sup>26</sup> ERISA, however, reflected an ideological shift to the “worker-security theory,” in which the “purpose of a pension plan is to promote employee welfare.”<sup>27</sup> To accomplish this, Congress devised minimum standards in order to ensure that workers’

---

19. See Moberly, *supra* note 10, at 380.

20. *Id.* at 380.

21. See *id.* at 378–79.

22. For example, Saint Louis University School of Law regularly offers a seminar devoted to examining ERISA. *Certificate in Employment Law*, SAINT LOUIS UNIVERSITY SCHOOL OF LAW, <http://law.slu.edu/emplaw/certificate.html> (last visited June 28, 2011). Harvard Law School offers a course entitled “Executive Compensation, ERISA, and Related Topics,” and Boston University School of Law offers a course entitled “Employee Benefits (ERISA).” *Executive Compensation, ERISA, and Related Topics*, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/academics/courses/2009-10/?id=7037> (last visited June 28, 2011); *JD790 Employee Benefit Plans*, BOSTON UNIVERSITY SCHOOL OF LAW, <http://www.bu.edu/law/courses/jd790.shtml> (last visited June 28, 2011).

23. JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 1* (2004).

24. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (internal citations omitted).

25. WOOTEN, *supra* note 23, at 1, 3.

26. *Id.* at 4.

27. *Id.*

pension and health plans were not mishandled by their employer.<sup>28</sup> These include minimum vesting standards that guarantee an employee's right to the benefits of his or her pension after a "statutorily specified period of service," as well as minimum funding standards that require the employer to ensure that the plans are properly funded.<sup>29</sup>

To better understand how ERISA functions, it is important to identify the primary actors governed by the law. These include the plan participants and beneficiaries, the plan sponsor, plan administrator, and the plan fiduciary.<sup>30</sup> The participants consist of employees or former employees,<sup>31</sup> while the beneficiaries include non-employees, designated by the participants, who may be entitled to a benefit.<sup>32</sup> The plan sponsor, generally the employer, is responsible for ensuring that the plan remains adequately funded by making contributions of amounts at least equal to the pension liabilities.<sup>33</sup> Next, the plan administrator is tasked with executing the formalities of the plan.<sup>34</sup> His or her responsibilities include, but are not limited to, complying with statutory disclosure requirements and providing information to plan participants and beneficiaries.<sup>35</sup> The plan administrator is usually specifically designated under the "terms of the instrument," though if such person is not designated, the plan sponsor typically becomes the administrator.<sup>36</sup> Finally, there is the plan fiduciary who is defined in Section (21)(A),<sup>37</sup> and who is tasked with managing the assets in the plan.<sup>38</sup> There are three categories of fiduciary functions under this section: (1) persons who have discretionary authority over administration and management of the plan; (2) persons who have authority over assets of the plan; and (3) persons who render investment advice concerning assets held by the plan for compensation.<sup>39</sup>

Once the roles these individuals play has been established, their basic functions are clearly defined. Section 402(a) asserts that the plan must be established in a plan document or "written instrument" so that an employee is aware of his rights and obligations as well as the roles that the plan sponsor

---

28. *Id.* at 5.

29. *Id.*

30. 29 U.S.C. §§ 1002(16), 1102(a)(2) (2006).

31. *Id.* § 1002(7).

32. *Id.* § 1002(8).

33. Emily Adams, *Protecting America's Financial Future: Why Courts Should Enforce ERISA's Duties of Prudence and Disclosure*, 26 A.B.A. J. LAB. & EMP. L. 345, 348 (2011).

34. 29 U.S.C. § 1002(16)(A).

35. Adams, *supra* note 33, at 350.

36. 29 U.S.C. § 1002(16)(A).

37. *Id.* § 1002(21)(A).

38. See *Meeting Your Fiduciary Responsibilities*, U.S. DEP'T OF LABOR, <http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html> (last visited July 20, 2011).

39. 29 U.S.C. § 1002(21)(A).

and administrator perform.<sup>40</sup> Moreover, Section 103(a) requires the plan sponsor to prepare and file with the Department of Labor an annual report for each employee benefit plan that is subject to ERISA, as well as a summary annual report (“SAR”) which includes a basic financial statement, a description of the minimum funding standards for the plan, and a statement of the participant’s right to additional information.<sup>41</sup> Finally, Section 105 requires the plan administrator to provide a periodic benefit statement to each participant describing the value of his or her total accrued benefit under the pension plan and the non-forfeitable portion of that benefit.<sup>42</sup>

Controversy arises because the employer often wears multiple hats and serves as both the plan administrator and fiduciary. This is best illustrated by *Firestone Tire & Rubber Co. v. Bruch*, a 1989 Supreme Court case in which employees of Firestone brought suit against their employer for severance benefits under ERISA.<sup>43</sup> In that case, the employer not only administered the benefit plan, but also evaluated claims and paid for benefits.<sup>44</sup> While this is completely legal, it still creates numerous problems, as the Third Circuit noted when it was confronted with the *Firestone* case.<sup>45</sup> In the court’s words, “every dollar provided in benefits is a dollar spent by . . . the employer; and every dollar saved . . . is a dollar in [the employer’s] pocket.”<sup>46</sup> It is clear then that the employer often does not have the proper incentives to ensure that the plan is properly funded and maintained.

Meanwhile, the Supreme Court touched on this issue more recently in the 2008 case of *Metropolitan Life Insurance Company v. Glenn*.<sup>47</sup> The case involved Wanda Glenn, a plan participant, who brought suit against Metropolitan Life Insurance (“MetLife”), the plan administrator, for terminating her long-term disability benefits on the grounds that she was no longer totally disabled.<sup>48</sup> The Court held that when determining whether the plan administrator has abused its discretion in denying benefits, a reviewing court must consider the conflict of interest arising from the dual role of an entity as an ERISA plan administrator and as a payer of plan benefits.<sup>49</sup> In particular the Court noted that:

The employer’s fiduciary interest may counsel in favor of granting a borderline claim while its immediate financial interest counsels to the contrary. Thus, the

---

40. 29 U.S.C. § 1102.

41. *Id.* § 1023.

42. *Id.* § 1025.

43. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 105 (1989).

44. *Id.*

45. *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 136 (3d Cir. 1987).

46. *Id.* at 144.

47. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108 (2008).

48. *Id.* at 109–10.

49. *Id.* at 111–12.

employer has an “interest . . . conflicting with that of the beneficiaries,” the type of conflict that judges must take into account when they review the discretionary acts of a trustee of a common-law trust.<sup>50</sup>

In light of the fact that the employer often has a conflict of interest and does not necessarily put the concerns of his employees first, Section 510, the retaliation provision, takes on a greater importance. Justice O’Connor, writing for the majority in *Inter-Modal Rail Employees Association v. Atchison, Topeka, & Santa Fe Railway Co.* was also sensitive to the fact that an employer might not always have the employee’s best interests in mind when she wrote that employers “are free to reduce benefits should economic conditions sour.”<sup>51</sup> Section 510, however, by protecting an employee from an employer who unlawfully interferes with his or her rights, “helps to make [an employer’s] promises [under ERISA] credible.”<sup>52</sup> In one sense, Section 510 is the glue that holds the legislation together. It establishes a “shifting burden analysis,” which requires the plaintiff to “first establish a *prima facie* case by showing: 1) prohibited employer conduct, *i.e.*, discharge, fine, suspension, expulsion, discipline or discrimination, 2) taken for the purpose of interfering 3) with the attainment of any right to which the employee may become entitled 4) under the provisions of an ERISA employee benefit plan.”<sup>53</sup> If the plaintiff satisfies this burden, the employer must then “articulate a legitimate, nondiscriminatory reason for the adverse employment action” in order to avoid liability.<sup>54</sup> If the employer is able to carry its burden, “the plaintiff then must persuade the court by a preponderance of the evidence that the employer’s legitimate reason is pretextual.”<sup>55</sup> The problem originates in the last clause of the statute, which 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.”<sup>56</sup> The question that the Supreme Court may eventually be confronted with is what constitutes an “inquiry or proceeding” and whether or not an employee actually participated in one.

---

50. *Id.* at 112.

51. *Inter-Modal Rail Emps. Ass’n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997).

52. *Id.* (citing *Heath v. Varsity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995)).

53. Kenni B. Merritt, *Interference with ERISA-Protected Rights: Making a Federal Case Out of a Wrongful Discharge Action*, 77 OKLA. B.J. 873, 874 (2006).

54. *Id.*

55. *Id.*

56. 29 U.S.C. § 1140 (2006).



## II. THE CIRCUIT SPLIT

As previously noted, five circuits have ruled on whether or not Section 510 protects from retaliation those employees who make “unsolicited internal complaints,” or in other words, those employees who “blow the whistle” by notifying their employer of a potential ERISA violation on their own accord.<sup>57</sup> The three circuits that have ruled in the negative have adhered closely to the meaning of the text and construed it narrowly so that an employee who comes forward on his or her own is not engaging in protected activity.<sup>58</sup> Meanwhile, the three circuits that held that unsolicited complaints are protected were more concerned with the policy ramifications and considered how Section 510 would be eviscerated if whistleblowers were not given sanctuary under the law.<sup>59</sup>

### A. *The Fourth and Second Circuits Hold Unsolicited Internal Complaints are Not Protected by Section 510*

*King v. Marriott International, Inc.*, decided by the Fourth Circuit in 2003, was the first time in which a court ruled that an employee’s unsolicited internal complaints were not protected by Section 510, though it would not be the last.<sup>60</sup> In that case, Karen King, a long time employee of Marriott who worked in their benefits department, became cognizant of several possible ERISA violations by management.<sup>61</sup> In 1999, she became aware of the fact that Karl I. Fredericks, Senior Vice President of Compensation and Benefits, recommended that the company transfer millions of dollars from its medical plan into the general corporate reserve account in violation of ERISA regulations.<sup>62</sup> At that time, King voiced her concern to Fredericks and nothing came of his proposal.<sup>63</sup> Later in the year, King was promoted by Fredericks and was put in charge of benefit plan finances.<sup>64</sup> When Fredericks again proposed the transfer of the funds, she again complained to him as well as to two in-house attorneys.<sup>65</sup> Finally, the following year the company proposed

---

57. *See supra* notes 16–17 and accompanying text.

58. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 218 (3d Cir. 2010); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005) (holding that a meeting, called by the company’s attorney, between the whistleblower and the president of the company was protected and noting that the holding was not contrary to *King v. Marriott International, Inc.*); *King v. Marriott Int’l, Inc.*, 337 F.3d 421, 427–28 (4th Cir. 2003).

59. *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1314 (5th Cir. 1994); *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993).

60. *King*, 337 F.3d at 427–28; *see, e.g., Edwards*, 610 F.3d at 218.

61. *King*, 337 F.3d at 423.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

another transfer of funds from the medical plan and King blew the whistle by objecting verbally and in writing to Fredericks.<sup>66</sup> He responded by terminating her employment claiming that it was due to her inability to coexist and share responsibilities with another co-worker.<sup>67</sup>

King brought suit in Maryland state court alleging that her termination was in violation of Section 510, but the district court granted summary judgment to Marriott.<sup>68</sup> On appeal, the Fourth Circuit turned to the issue of whether or not Section 510 protected the unsolicited internal complaints made by King.<sup>69</sup> The court began its analysis by turning to the statute and determining that the only relevant provision applicable to King was the portion that read, “[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.”<sup>70</sup>

The principle issue for the court was determining the appropriate scope of the phrase “inquiry or proceeding.”<sup>71</sup> In order to solve this problem, the court turned to its decision in *Ball v. Memphis Bar-B-Q Co.*, which involved an interpretation of the retaliation provision in the Fair Labor Standards Act.<sup>72</sup> In that case, the primary issue also hinged on the meaning of the term “proceeding.”<sup>73</sup> The Fourth Circuit concluded that “proceeding” in the context of the Fair Labor Standards Act “referred only to administrative or legal proceedings, and not to the making of an intra-company complaint.”<sup>74</sup> Furthermore, the court examined the phrase “testified or is about to testify” and determined that it suggests that the phrase “inquir[y] or proceeding[.]” “is limited to the legal or administrative, or at least to something more formal than written or oral complaints made to a supervisor.”<sup>75</sup> As a result, the court easily disposed of King’s claim because her complaints never occurred in the context of a legal or administrative proceeding.<sup>76</sup> Therefore, they concluded that Section 510 did not protect her unsolicited internal complaint.<sup>77</sup>

Two years later, the Second Circuit was faced with the same issue in *Nicolaou v. Horizon Media, Inc.*<sup>78</sup> In that case, the plaintiff, Chrystina

---

66. *King*, 337 F.3d at 423.

67. *Id.*

68. *Id.* at 423–24.

69. *Id.* at 426–27.

70. *Id.* at 427 (quoting 29 U.S.C. § 1140).

71. *King*, 337 F.3d at 427.

72. *Id.* (citing *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000)).

73. *Id.* (citing *Ball*, 228 F.3d at 364).

74. *Id.* (citing *Ball*, 228 F.3d at 364).

75. *Id.*

76. *King*, 337 F.3d at 427–28.

77. *Id.* at 428.

78. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 328–30 (2d Cir. 2005).

Nicolaou, was hired by Horizon Media, Inc. to serve as its Director of Human Resources and Administration.<sup>79</sup> As part of her duties she served as the fiduciary and trustee of Horizon's 401(k) employee benefits plan.<sup>80</sup> Nicolaou soon found out that the 401(k) was being mismanaged and "discovered a serious payroll discrepancy involving underpayment of overtime to all non-exempt employees of the [New York City] and Los Angeles offices."<sup>81</sup> Nicolaou attempted to blow the whistle by registering a complaint with Horizon's Chief Financial Officer, Jerry Riley.<sup>82</sup> When he refused to take action, she turned to Stewart Linder, Horizon's Controller, who also dismissed her complaint.<sup>83</sup> Nicolaou did not yield, however, and contacted Mark Silverman, an attorney for Horizon.<sup>84</sup> After looking into the matter, he also found that there was a massive payroll discrepancy.<sup>85</sup> Nicolaou and Silverman proceeded to meet with William Koenigsberg, the President of Horizon, to implore him to rectify the problem.<sup>86</sup> Shortly thereafter, Nicolaou was demoted to Office Manager by Koenigsberg and eventually terminated.<sup>87</sup> Nicolaou sued Horizon alleging her termination was in violation of Section 510 of ERISA, but the district court granted Horizon's motion to dismiss contending that Section 510 "does not protect an employee who participates in an internal inquiry."<sup>88</sup>

Like the Fourth Circuit before it, the Second Circuit focused on the language of Section 510 and whether or not Nicolaou participated in an "inquiry or proceeding" when she met with Koenigsberg.<sup>89</sup> The Second Circuit also looked at the plain meaning of the statute and applied the *Black's Law Dictionary* definition of the terms "inquiry" and "proceeding."<sup>90</sup> Accordingly, an "inquiry" was determined to be "any request for information"<sup>91</sup> while a "proceeding" referred to the "progression of a lawsuit or other business before a court, agency, or other official body."<sup>92</sup> The Second Circuit's analysis varied from the Fourth Circuit's, however, by including an "informal gathering of information" within the umbrella of an "inquiry."<sup>93</sup> As

---

79. *Id.* at 326.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Nicolaou*, 402 F.3d at 326.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 326–27.

88. *Nicolaou*, 402 F.3d at 327.

89. *Id.* at 328.

90. *Id.* at 329.

91. *Id.*

92. *Id.*

93. *Nicolaou*, 402 F.3d at 329.

a result, their standard for what constituted an inquiry was broader, and an oral complaint, like the one Nicolaou made to Koenigsberg, qualified as a “request for information.”<sup>94</sup> This put the court slightly at odds with the Fourth Circuit which had defined “inquiry” as reaching only “the legal or administrative, or at least . . . something more formal than written or oral complaints made to a supervisor.”<sup>95</sup> Nevertheless, the court stated that its holding was not contrary to the Fourth Circuit’s decision,<sup>96</sup> suggesting that when confronted with an unsolicited complaint, as in *King*, the Second Circuit would follow suit and find an unsolicited complaint outside the statutory meaning of “inquiry.” Thus, if “Nicolaou [could] demonstrate that she was contacted to meet with Koenigsberg in order to give information about the alleged underfunding of the Plan, her actions would fall within the protection of Section 510.”<sup>97</sup> On remand, this left Nicolaou with the burden of proving that her complaint was solicited by management.<sup>98</sup>

#### B. *The Third Circuit’s Decision*

Most recently, in 2010, the Third Circuit was confronted with this issue in *Edwards v. A.H. Cornell & Son, Inc.* when it concurred with the Second and Fourth Circuits.<sup>99</sup> This is, perhaps, the most important of the three opinions to hold that unsolicited internal complaints are not protected because the court provided the most extensive analysis. It also contains a spirited dissent that perfectly encapsulates how the majority’s reading eviscerates the purpose of the retaliation provision.<sup>100</sup>

In 2006, Shirley Edwards was hired to run the human resources department for A.H. Cornell and Son, Inc., a family owned business.<sup>101</sup> Like many other employees at the company, Edwards participated in a group health insurance plan which was provided by her employer and governed by ERISA.<sup>102</sup> By early 2009, Edwards became aware of the fact that her employer had been mismanaging the health insurance plan.<sup>103</sup> Edwards, in an attempt to blow the whistle, approached management and informed them of the numerous violations, including: administering the group health plan on a discriminatory basis, misrepresenting to some employees the cost of insurance to dissuade them from opting in, and even enrolling non-citizens in its ERISA plans by

---

94. *Id.* at 329–30.

95. *King v. Marriott Int’l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003).

96. *Nicolaou*, 402 F.3d at 330.

97. *Id.*

98. *Id.*

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

100. *Id.* at 226 (Cowen, J., dissenting).

101. *Id.* at 218.

102. *Id.*

103. *Id.* at 219.

providing false social security numbers to its insurer.<sup>104</sup> Shortly thereafter Edwards was terminated.<sup>105</sup> She promptly filed suit against A.H. Cornell in the United States District Court for the Eastern District of Pennsylvania, alleging an anti-retaliation claim under Section 510 of ERISA and a common law wrongful discharge claim.<sup>106</sup> However, the defendant's motion to dismiss was granted, because Edwards's "objections and/or complaints to management were not part of an 'inquiry or proceeding.'"<sup>107</sup> The court stated:

Plaintiff does not allege that anyone requested information from her or initiated contact with her in any way regarding the alleged ERISA violations. Nor does she allege that she was involved in any type of formal or informal gathering of information. She states merely that she objected to or complained about certain conduct by Defendants.<sup>108</sup>

On appeal, the Third Circuit affirmed the trial court by a 2-1 vote.<sup>109</sup> The court began its analysis by examining the plain meaning of the statute's text.<sup>110</sup> By applying this textual approach, the court noted that "absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."<sup>111</sup> The court agreed that Edwards "undoubtedly [gave] information by objecting and/or complaining to management," so the only issue was whether or not it was part of an "inquiry or proceeding."<sup>112</sup> Like the Second Circuit before it, the court applied the *Black's Law Dictionary* definition of "inquiry"—a request for information—and held that no one approached Edwards requesting information regarding ERISA violations in this case.<sup>113</sup> The court also determined that Edwards's actions were not part of a "proceeding."<sup>114</sup> Again turning to the dictionary definition, they found that a "proceeding" is "the regular and orderly progression of a lawsuit" or the "procedural means for seeking redress from a tribunal or agency."<sup>115</sup> The court concluded that "there is no suggestion that any such formal action ha[d] occurred."<sup>116</sup> As a result, the court dispensed with the case by finding that Section 510 does not protect unsolicited internal complaints because the text is

---

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

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Schmitz, *supra* note 11, at 74.

110. *Edwards*, 610 F.3d at 222.

111. *Id.* (quoting *Wolk v. Unum Life Ins. of Am.*, 186 F.3d 352, 355 (3d Cir. 1999)).

112. *Id.*

113. *Id.* at 223.

114. *Id.*

115. *Edwards*, 610 F.3d at 223 (citing BLACK'S LAW DICTIONARY 1324 (9th ed. 2009)).

116. *Id.*

plain and unambiguous in its assertion that a complaint must occur within an “inquiry or proceeding.”<sup>117</sup>

Judge Cowen, writing for the dissent, made a vigorous argument that “ERISA’s anti-retaliation provision does indeed protect ‘an employee’s unsolicited internal complaints to management’” and that the majority’s interpretation eviscerated many of the protections afforded by the statute.<sup>118</sup> Moreover, he argued that it was “difficult to believe that Congress could have ever intended to exclude from the protection of its remedial anti-retaliation provision employees who are terminated because they bring an ERISA-related problem to the attention of their superiors.”<sup>119</sup> Thus, he dissented from their narrow interpretation of the statute.<sup>120</sup>

Judge Cowen began his dissent by agreeing that an interpretation of the statute must begin with the statutory language and a determination as to whether the language has “a plain and unambiguous meaning.”<sup>121</sup> This is where Judge Cowen parted with his colleagues, however, as he did not concur in their conclusion that the language was plain and unambiguous. Citing relevant Pennsylvania case law, Judge Cowen deftly argued that the term “proceeding” is indeed ambiguous.<sup>122</sup> He relied on *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, which held that “the statutory term ‘proceeding’ . . . is ‘ambiguous’ because it ‘may reasonably be invoked to encompass a range of complaint activity of varying degrees of formal legal status.’”<sup>123</sup> Moreover, Judge Cowen also believed that the majority interpreted the word “inquiry” too narrowly and that it was also open to ambiguity.<sup>124</sup> Often, the first step in an “inquiry” is the unsolicited complaint made by a whistleblower. As Judge Cowen noted, “an internal workplace complaint would quite naturally constitute a preliminary step before a formal or informal inquiry is launched (and such a complaint may even have been necessary to trigger the investigation in the first place).”<sup>125</sup> Thus, by construing the statute narrowly, Section 510 would leave this “crucial ‘first step’ unprotected.”<sup>126</sup>

Judge Cowen concluded the issue of ambiguity by arguing that it can be incredibly difficult to draw the line between this initial first step and protected

---

117. *Id.*

118. *Id.* at 226 (Cowen, J., dissenting).

119. *Id.* at 227 (Cowen, J., dissenting).

120. *Edwards*, 610 F.3d at 226 (Cowen, J., dissenting).

121. *Id.* (Cowen, J., dissenting).

122. *Id.* at 228–29 (Cowen, J., dissenting).

123. *Id.* at 229 (Cowens, J., dissenting) (quoting *Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor*, 992 F.2d 474, 478 (3d Cir. 1993)).

124. *Id.* at 227 (Cowens, J., dissenting).

125. *Edwards*, 610 F.3d at 227–28 (Cowens, J., dissenting).

126. *Id.* at 227 (Cowens, J., dissenting).

statements that are actually made as a part of an official inquiry.<sup>127</sup> To illustrate this point, Judge Cowen posed the hypothetical situation of an employee that complains to his or her supervisor, who then responds with follow-up questions.<sup>128</sup> The question then is whether or not this informal conversation rises to the level of an “inquiry” so that the statements are protected.<sup>129</sup> Finally, he noted that the majority’s interpretation only protects employees who give information as part of an inquiry and not those who conduct the inquiry and “thereby ‘receive[] information.’”<sup>130</sup> Therefore, according to Judge Cowen, the majority’s application essentially renders the bulk of the statute impotent as it no longer applies to employees who complain to management on their own volition, as well as those in charge of soliciting information in a proceeding or inquiry.<sup>131</sup>

*C. The Fifth and Ninth Circuits Hold that Unsolicited Internal Complaints are Protected by Section 510*

The first court to hold that an employee’s unsolicited internal complaints are protected by ERISA’s anti-retaliation provision was the Ninth Circuit Court of Appeals in the 1993 case of *Hashimoto v. Bank of Hawaii*.<sup>132</sup> Jessica Hashimoto was an employee at the Bank of Hawaii when she complained to her supervisors about possible “violations by the Bank of the reporting and disclosure requirements and fiduciary standards of ERISA.”<sup>133</sup> The same supervisors had requested that she “reimburse a former employee from a profit-sharing plan for taxes that [she] ‘had properly withheld’” from the employee’s account.<sup>134</sup> She also contended that she was told “to recalculate a former employee’s pension plan benefit and to use final pay, not final average pay,” which was a violation of ERISA.<sup>135</sup> Hashimoto refused and was terminated shortly thereafter.<sup>136</sup> She filed suit in Hawaii state court alleging wrongful termination in violation of the Hawaii Whistle Blower’s Protection Act.<sup>137</sup> The case was removed to the United States District Court for the District of Hawaii where summary judgment was entered in favor of her employer because her claims were preempted by ERISA.<sup>138</sup> On appeal,

127. *Id.* at 227–28 (Cowens, J., dissenting).

128. *Id.* at 228 (Cowens, J., dissenting).

129. *Id.* (Cowens, J., dissenting).

130. *Edwards*, 610 F.3d at 228 (Cowens, J., dissenting).

131. *Id.* (Cowens, J., dissenting).

132. *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 412 (9th Cir. 1993).

133. *Id.* at 409.

134. *Id.* at 410.

135. *Id.*

136. *Id.*

137. *Hashimoto*, 999 F.2d at 409.

138. *Id.* at 410.

Hashimoto contended that her discharge was in retaliation for the complaints she made as to possible ERISA violations involving the bank's profit-sharing plan, pension plan, and severance plan.<sup>139</sup>

The Ninth Circuit began its analysis by examining the language of the retaliation provision and then quickly moving beyond it to examine the purpose of the legislation.<sup>140</sup> Noting that ERISA "provides a remedy for a fiduciary who is discharged because she 'has given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA],'" the court stated that the purpose of the statute is "clearly meant to protect whistle blowers."<sup>141</sup> Moreover, the court determined that the provision "may be fairly construed to protect a person in Hashimoto's position."<sup>142</sup> Unlike the Second, Third and Fourth Circuits, the Ninth Circuit seemed to be acutely aware of the role that whistleblowers play in exposing ERISA violations. Where the previous courts stopped short at the text of the statute, the Ninth Circuit examined the role that the plaintiff performed and how her interests could be promoted by the statute.<sup>143</sup> The court viewed the plaintiff not as a lone employee who happened to stumble upon an isolated instance of corruption, but as a member of a larger fraternity of whistleblowers whose rights needed to be vindicated.<sup>144</sup> Thus, the court paid more attention to the purpose of the act and how its goals could best be achieved. This is not to say, however, that it completely ignored the text of the statute. It, too, examined the terms "inquiry and proceeding" but also felt it was necessary to read between the lines.<sup>145</sup> For example, the court agreed with Judge Cowen that "[t]he 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."<sup>146</sup> Therefore, the court interpreted the statute broadly in order to come to the conclusion that an employee who lodges unsolicited complaints is protected by the statute.<sup>147</sup> This furthered the interest of the employee as a whistleblower and seemed to be in accord with the statute's goal of preventing retaliation.

A year later, the Fifth Circuit joined the Ninth Circuit by also holding that Section 510 protects an employee's unsolicited internal complaints in the case of *Anderson v. Electronic Data Systems Corp.*<sup>148</sup> This case involved an

---

139. *Id.*

140. *Id.* at 411.

141. *Id.*

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

143. *Id.*

144. *See id.*

145. *Id.*

146. *Id.*

147. *Hashimoto*, 999 F.2d at 411–12.

148. *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1314–15 (5th Cir. 1994).



employee of Electronic Data Systems (“EDS”) who worked as a manger in the Domestic Treasury Department.<sup>149</sup> The plaintiff contended that he was demoted and discharged for refusing to commit illegal acts, several of which were in violation of ERISA.<sup>150</sup> He was not only asked to approve payment invoices on behalf of pension portfolios under his management and supervision without the approval of the pension trustees, but was also asked to draft minutes of meetings relating to the EDS Retirement Plan of which he was not present.<sup>151</sup>

In its discussion, the court did not delve into the same kind of in-depth analysis as to whether Anderson was protected by the retaliation provision. In fact, it did not even devote an entire paragraph to the retaliation issue, nor did it even touch on the language of the statute like every other circuit that has ruled on this issue.<sup>152</sup> The court simply noted that Section 510 “broadly prohibits the termination or other adverse treatment of participants.”<sup>153</sup> By its silence, however, one can infer that the court shared the sentiments of the *Hashimoto* court in that it did not feel the text of the statute was as crucial as its purpose, and thus it did not even warrant an examination. Essentially, the *Anderson* court reached the same decision as the Ninth Circuit in *Hashimoto* by resting its conclusion on the fact that since the purpose of Section 510 was to protect employees from retaliation, then it should naturally be construed to protect the plaintiff, irrespective of whether or not his complaints were solicited.<sup>154</sup>

### III. ANALYSIS OF THE COURTS’ DECISIONS

With an almost even split among the circuits as to whether or not Section 510 protects employees who lodge unsolicited internal complaints, this issue is ripe for Supreme Court review. At first glance, it seems foolish that Congress would draft a provision meant to protect employees from retaliation, and yet purposely intend for it not to protect an entire class of individuals who make unsolicited complaints. Judge Cowen was of a similar opinion when he wrote in his dissent in *Edwards* that he found it “difficult to believe that Congress could have ever intended to exclude from the protection of its remedial anti-retaliation provision employees who are terminated because they bring an ERISA-related problem to the attention of their superiors.”<sup>155</sup> After a close reading of the language of the statute as well as a comparison to other

---

149. *Id.* at 1312.

150. *Id.*

151. *Id.*

152. *Id.* at 1315.

153. *Anderson*, 11 F.3d at 1315.

154. *See id.*

155. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 227 (3d Cir. 2010).

retaliation provisions, one can easily see how courts have reached this conclusion. For example, Section 215(a)(3) of the Fair Labor Standards Act (FLSA) makes it unlawful for an employer:

[T]o 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, or has served or is about to serve on an industry committee.<sup>156</sup>

Here it is readily apparent that Congress intended to give whistleblowers broad protection. It does not limit itself to cases in which an employee “has given information” or “has testified” in an “inquiry or proceeding.”<sup>157</sup> Instead, any employee who “has filed any complaint or instituted or caused to be instituted any proceeding” is covered by the statute.<sup>158</sup> Certainly, employees who initiate a complaint fall under the umbrella of the law.

Meanwhile, Title VII’s retaliation provision is also substantially broader than Section 510. Section 2000e-3, entitled “Other unlawful employment practices,” states that:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>159</sup>

Unlike ERISA, Congress seemed to have made a good faith attempt to cover its bases with Title VII by providing for almost every possible scenario in which an employee could lodge a complaint. Section 2000e-3 covers employees who “opposed any practice made an unlawful employment practice.”<sup>160</sup> It then goes on to delineate the circumstances in which they can oppose a practice, which include making a charge, testifying, assisting, or participating in “an investigation, proceeding, or hearing under this subchapter.”<sup>161</sup> Thus, when one compares ERISA with Title VII and FLSA, it seems that Congress made a concerted effort to exclude certain behavior from

---

156. Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 215(a)(3) (2006).

157. See 29 U.S.C. § 1140.

158. 29 U.S.C. § 215(a)(3).

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

160. *Id.*

161. *Id.*

the protection of the law, especially when one considers that previous legislation can serve as a template. Nevertheless, just because Section 510 is much more narrowly drafted than its counterparts in the FLSA and Title VII does not mean that the analysis is complete.

In order to better understand how the courts that have ruled on this matter came to their decision, it is helpful to examine the language of the statute using both textualist and purposivist interpretations. How one reconciles the language of ERISA's retaliation provision with its cousins in Title VII and FLSA, for example, depends upon the type of interpretation used. Based strictly on a comparison of the text of the statutes, it would seem that Section 510 is indeed far narrower and only protects complaints made as part of an "inquiry or proceeding."<sup>162</sup> Nevertheless, others would argue that this undermines the purpose of the legislation. As a result, it is necessary to determine how the outcome of any analysis varies based on the type of analysis that one employs.

#### A *Textualist and Purposivist Readings*

Courts have long been divided when it comes to the interpretation of statutes. On the one hand, there is the rigid formalist theory known as textualism in which its adherents believe they "are bound by a statute's plain meaning, and that consideration of legislative history, spirit, or purpose is inappropriate in attempting to discern statutory meaning."<sup>163</sup> The roots of this theory stretch into the nineteenth century where it grew out of the "plain meaning" school of interpretation.<sup>164</sup> This theory dictates that if a writing or provision "appears to be unambiguous on its face, its meaning must be determined from the writing itself without resort to any extrinsic evidence."<sup>165</sup> Adherents to the modern textualism movement believe that they are "faithful agents of Congress" who treat "the language of the statute as the legislative instructions that they are bound to follow" as opposed to a code that is meant to evolve over time.<sup>166</sup> For example, when it comes to the Constitution, leading textualists such as the Supreme Court's Antonin Scalia, deride those who describe the Constitution as a "Living Constitution" that changes with the times.<sup>167</sup> Justice Scalia claims that the idea that the Constitution is a "morphing" document in which a judge must consider what "it ought to mean" is inherently flawed because it results in a process in which the Constitution is

---

162. 29 U.S.C. § 1140 (2006).

163. Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1886 (2008).

164. *Id.*

165. BLACK'S LAW DICTIONARY 1267 (9th ed. 2009).

166. Smith, *supra* note 163, at 1887.

167. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 47 (1997).

written “anew.”<sup>168</sup> More problematically, when judges are selected and confirmed based on their views of what the Constitution “ought to mean,” the Constitution risks being rewritten to reflect the majority view.<sup>169</sup> As Scalia notes, the Bill of Rights will be hijacked and bent to serve the will of the majority, which is the very group it was meant to protect against.<sup>170</sup> This theory extends far beyond analyzing the Constitution. Justice Scalia declares that the rule of law is a “law of *rules*” and that where the text of any statute embodies a rule, judges are to simply apply it as law.<sup>171</sup> There is no further inquiry into what Congress intended for the statute to mean or what the judge believes it “*ought* to mean.”<sup>172</sup>

Textualism, then, appears to be the primary form of legal analysis that the Second, Third, and Fourth Circuits employed when they ruled that ERISA did not protect an employee’s unsolicited internal complaints. In *King*, the court began its analysis by going straight to the text of the statute in order to determine if it was ambiguous.<sup>173</sup> It concluded that the phrase “inquiry or proceeding” was plain and unambiguous and that the plaintiff had never lodged her complaints in a formal setting.<sup>174</sup> As a result, the *King* court had no trouble disposing of her complaint.<sup>175</sup> The court did not care to examine why Congress would pass a piece of legislation in the first place that did not protect whistleblowers, nor did they consider the policy ramifications of their decision and how it would result in a gap in the legislation that would leave an entire class of individuals unprotected.

The Second Circuit in *Nicolaou* also neglected to consider Congress’s overarching purpose in enacting the statute. Like the Fourth Circuit, the court heavily emphasized the text of the statute.<sup>176</sup> It began by comparing the language of Section 510 with the “analogous whistleblower protections” of the Fair Labor Standards Act and Title VII of the Civil Rights Act of 1964 which the district court had relied upon in holding that Nicolaou’s activity did not qualify as protected activity.<sup>177</sup> While the court did discuss Congress’s intent, this was in regard to the language that Congress included in the text of the statute. It stated that Congress sought to protect those involved in the

---

168. *Id.*

169. *Id.*

170. *Id.*

171. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183, 1187 (1989).

172. See SCALIA, *supra* note 167, at 39.

173. See *King v. Marriott Int’l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003).

174. *Id.* at 427–28.

175. *Id.* at 428.

176. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 327–28 (2d Cir. 2005) (“Our conclusion is based upon the plain language of ERISA Section 510 . . .”).

177. *Id.*

“informal gathering of information,” and that “Congress manifested such an intent when it chose . . . to conjoin to the term ‘proceeding’ . . . the additional term ‘inquiry.’”<sup>178</sup> As a result, the court found that the language of Section 510 was significantly broader than its counterparts because of the inclusion of the word “inquiry” and reversed the lower court’s decision.<sup>179</sup> The court ended its analysis here, however, and did not go further and inquire why Congress drafted the statute and the purpose that it was meant to serve.

The Third Circuit’s analysis in *Edwards* essentially followed the same formula. The *Edwards* court began by examining the existing split of authority, as well as analogous decisions from its prior case law.<sup>180</sup> It even went as far as to acknowledge that remedial statutes “should be liberally construed in favor of protecting the participants in employee benefit plans.”<sup>181</sup> Nevertheless, the court bypassed a weighty analysis of the purpose of the legislation, as well as the policy ramifications of its decision. To the court, these issues were almost entirely irrelevant.<sup>182</sup> The only thing that mattered was the plain meaning of the language of the text and whether or not it was ambiguous.<sup>183</sup> As a result, like the Second Circuit, it also applied the plain meaning of the text as found in *Black’s Law Dictionary* and found that it was unambiguous.<sup>184</sup> As a result, the court was quick to determine that Edwards did not participate in a proceeding or inquiry in accord with the plain meaning of these terms and quickly disposed of the case from there, finding that her termination was not protected by Section 510.<sup>185</sup>

The common thread tying all three of these cases together is that they seem to abide by Justice Scalia’s belief that the rule of law is a “law of rules.”<sup>186</sup> These courts examined the language of the statute, defined terms that may have had ambiguous meanings, and determined whether or not, as written, it protected a whistleblower who made an unsolicited complaint. They were hardly interested in Congress’s possible intent or public policy concerns unless they were explicitly embedded in language of the statute. Moreover, they clearly did not share the concern of Judge Cowen who believed that by not extending protection to employees who lodged unsolicited complaints, they

---

178. *Id.* at 328–29.

179. *Id.* at 329–30.

180. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 220–22, 224–25 (3d Cir. 2010).

181. *Id.* at 223 (quoting *IUE AFL–CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir. 1986)).

182. *Id.* at 224 (stating that in light of the plain meaning of the statutory language there was no need to investigate congressional intent).

183. *Id.*

184. *Id.* at 223.

185. *Edwards*, 610 F.3d at 225–26.

186. *See* Scalia, *supra* note 171, at 1187.

were eviscerating Congress's legislative intent.<sup>187</sup> Judge Cowen seemed to view the issue through an entirely different lens in which he examined the spirit of the law.<sup>188</sup> This method of statutory interpretation is known as purposivism.<sup>189</sup>

Purposivists, like textualists, view themselves as "faithful agents of Congress" though they believe they have a more aggressive mandate.<sup>190</sup> While textualists believe that statutes are akin to binding legislative instructions, purposivists generally seek to ascertain and enforce Congress's intent as accurately as possible.<sup>191</sup> Moreover, they believe that finding one true meaning of a statute is impossible and that the way a statute is interpreted will change over time.<sup>192</sup> For example, William Eskridge, a leading critic of textualism, believes it is impossible to regard a statute as a static text.<sup>193</sup> He explains that the notion that a statute should be interpreted in a similar manner as when it was originally enacted is a "dubious description of practical reality" and "dreary aspiration for our polity."<sup>194</sup> Eskridge makes the point that in our system of government in which there is a separation of powers, the statutory interpreter is necessarily a different person from the author of a statute, and he will not interpret a statute in a vacuum, but will bring with it his beliefs and worldly experiences.<sup>195</sup> Thus, it is not only impractical but also impossible for judges to determine that a statute only has one correct meaning or purpose.<sup>196</sup> Nevertheless, while Eskridge rails against what he views as the fallibility of textualism, he believes in dynamic statutory interpretation as opposed to a full blown purposive analysis.<sup>197</sup> The difference is that the former recognizes a statute will be interpreted differently depending on who reads the statute,<sup>198</sup> while purposivism takes it one step further and insists that statutes must be construed to best promote the purpose they were enacted to serve.<sup>199</sup> Manning states that purposivists subscribe to the notion that:

---

187. See *Edwards*, 610 F.3d at 228 (Cowen, J., dissenting).

188. See John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 71 (2006) (noting that for a period in history the Supreme Court was a more purposivist Court and looked to the "spirit" of a law in order to help interpret the text).

189. *Id.*

190. *Id.* at 71–72.

191. *Id.* at 72–73.

192. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 9 (1994).

193. *Id.*

194. *Id.*

195. *Id.* at 49.

196. See *id.* at 9.

197. ESKRIDGE, *supra* note 192, at 10.

198. *Id.* at 11.

199. *Id.* at 25–26.

Sometimes . . . the text of a particular provision will seem incongruous with the statutory purpose reflected in various *contextual* cues—such as the overall tenor of the statute, patterns of policy judgments made in related legislation, the “evil” that inspired Congress to act, or express statements found in the legislative history.<sup>200</sup>

Moreover, purposivists assume that when a statute appears to be incongruous with its purpose, Congress must have misstated its intended meaning and that “a judicial faithful agent could properly adjust the enacted text to capture what Congress would have intended had it expressly confronted the apparent mismatch between text and purpose.”<sup>201</sup> This theory has its flaws as well. As Eskridge notes, it is often impossible to decipher one true purpose behind a statute just as it is impossible to find one true meaning.<sup>202</sup> For example, he notes that legislators often have multiple purposes and a final piece of legislation is often a compromise between competing interests.<sup>203</sup>

Nevertheless, the Fifth and Ninth Circuits, as well as Judge Cowen in his dissent, certainly believed that Congress’s true purpose could be divined with regard to Section 510.<sup>204</sup> Since the statute is meant to protect individuals against retaliation, they concluded that any individual who brings a possible violation to the attention of their employer should be protected.<sup>205</sup> While the legislation does not specifically reveal Congress’s intent, the courts could infer from related legislation, such as FLSA and Title VII, that Congress intended Section 510 of ERISA to extend to unsolicited internal complaints. Their decisions demonstrate that they subscribe to the notion that the “‘letter’ (text) of a statute must yield to its ‘spirit’ (purpose) when the two conflict[.]”<sup>206</sup> Judge Cowen, in particular, was driven by his belief that the majority’s ruling that the statute was unambiguous was flawed.<sup>207</sup> Quoting Third Circuit precedent that held the court must “avoid constructions that produce ‘odd’ or ‘absurd results’ or that are ‘inconsistent with common sense,’”<sup>208</sup> he found it “difficult to believe” that Congress actively chose to exclude employees who are terminated because they bring an ERISA-related problem to their

---

200. Manning, *supra* note 188, at 71.

201. *Id.* at 72.

202. ESKRIDGE, *supra* note 192, at 27.

203. *Id.*

204. See *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 227 (3d Cir. 2010) (Cowen, J., dissenting); *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir. 1994); *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993).

205. *Edwards*, 610 F.3d at 227; *Anderson*, 11 F.3d at 1315; *Hashimoto*, 999 F.2d at 411.

206. Manning, *supra* note 188, at 71.

207. *Edwards*, 610 F.3d at 226 (Cowen, J., dissenting).

208. *Id.* (quoting *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008)); see also 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:12 (7th ed. 2007).

supervisor's attention.<sup>209</sup> Thus for Judge Cowen, construing Section 510 broadly was the only way to carry out Congress's true purpose and prevent the "evil" of retaliation that inspired them to act in the first place.

One can argue that the Ninth Circuit, in *Hashimoto*, confronted this problem in the same way by examining what they believed was the overarching purpose of the statute. The court stated that Section 510 "is clearly meant to protect whistle blowers" and that "[i]t may be fairly construed to protect a person in Hashimoto's position if, in fact, she was fired because she was protesting a violation of law in connection with an ERISA plan."<sup>210</sup> The court seemed content to rest its holding on the mere fact that since Section 510 is a statute that protects whistleblowers, it should therefore protect Hashimoto, regardless of whether or not her complaints were solicited by her employer.<sup>211</sup> Moreover, unlike each of the courts that ruled Section 510 does not protect unsolicited internal complaints, the court refused to focus on the text of the statute, lending more credence to the fact that the court applied a purposivist approach that led them to reach the opposite conclusion.

The Fifth Circuit reached the same conclusion by approaching the situation through the lens of a purposivist. To the Fifth Circuit in *Anderson*, the text of the statute was almost irrelevant. The court stated that "ERISA § 510 broadly prohibits the termination or other adverse treatment of participants and beneficiaries . . . ."<sup>212</sup> This completely contradicts the Second, Third, and Fourth Circuits, which construed the statute narrowly and determined that an employee was immune from retaliation only if they participated in an "inquiry or proceeding."<sup>213</sup>

What has resulted is an even circuit split in which the courts have come to opposite conclusions by applying different, competing types of legal analyses. On the one hand, the text of the statute limits protection to those employees who participated in an "inquiry or proceeding."<sup>214</sup> On the other hand, there is the overarching purpose of the statute, which reflects Congress's intent to eradicate the "evil" of employer retaliation. Thus, there is an incongruity that is ripe for Supreme Court review. The question then is how the Court, when eventually confronted with this issue, will resolve this dispute.

### *B The Current Court's Makeup and How it Might Rule on This Issue*

Since Chief Justice Roberts ascended to the bench in 2005, the Court has been known for being strongly conservative and composed of self-proclaimed

---

209. *Edwards*, 610 F.3d at 227 (Cowen, J., dissenting).

210. *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993).

211. *Id.*

212. *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir. 1994).

213. *See* 29 U.S.C. § 1140 (2006); *supra* note 16 and accompanying text.

214. 29 U.S.C. § 1140.



textualists such as Justice Scalia, and Justices Thomas and Kennedy who have indicated their inclination toward textualist interpretations.<sup>215</sup> Justice Alito has also been described as an adherent to “newer textualism” in which the text of the statute still reigns supreme but is put into its proper context by considering its legislative history.<sup>216</sup> Moreover, some scholars consider the Chief Justice to be an adherent to the textualist school of judicial interpretation because of his tendency to join in opinions with the Court’s more outspoken textualists.<sup>217</sup>

When it comes to predicting how the Court may rule on this issue, it would seem to be a cut and dried case on the surface. The Roberts Court is widely regarded as being pro-employer, and with up to five possible textualists on the Court, it would seem highly likely that they would simply construe the retaliation provision narrowly and affirm the decisions of Second, Third, and Fourth Circuits and therefore hold that the law does not protect unsolicited internal complaints.<sup>218</sup> Nevertheless, when one looks at the Court’s recent retaliation cases, there appears to be an anomaly. While their record on employee rights can be best described as “mixed,” the Court takes a much more favorable view toward employees when it comes to retaliation cases.<sup>219</sup> Richard Moberly explains that the Court takes a different approach with these cases because of its long-standing adherence to what he describes as the “Antiretaliation Principle,” which dates back more than fifty years.<sup>220</sup>

The anti-retaliation principle rests on three assumptions: “(1) employees are in the best position to know about illegal conduct by their employer or other employees; (2) employees will report this information if the law protects them from employer retaliation; and (3) employee reports about misconduct will improve law enforcement.”<sup>221</sup> This last assumption is the most critical, as Moberly contends that “for a law to be enforced . . . retaliation against those who report violations must be prevented.”<sup>222</sup> Thus “law enforcement depends on employees blowing the whistle on illegal conduct.”<sup>223</sup> To best effectuate

---

215. See Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 528 (1997–98) (stating that recent Justices, including Scalia, Thomas, and Kennedy, “have overused clear-statement rules”). For further discussion of how Justice Scalia views textualism, see SCALIA, *supra* note 167, at 23–25.

216. Elliott M. Davis, Note, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 HARV. J.L. & PUB. POL’Y 983, 984 (2007).

217. Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1888 n.14 (2008).

218. See Moberly, *supra* note 10, at 413–415 (discussing an opinion of the Robert’s Court that limits an employee’s constitutional protection from retaliation).

219. *Id.* at 377.

220. *Id.* at 380.

221. *Id.* at 380–81.

222. *Id.* at 426.

223. Moberly, *supra* note 10, at 421–22.

this, the Court has made it easier for plaintiffs to bring retaliation lawsuits because it has recognized “the devastating ‘chilling’ effect retaliation can have on” a person’s willingness to report illegal conduct.<sup>224</sup> In order to understand how the Roberts Court has applied this principle in recent years, it is important to understand its statutory precedent.

The 1960 case of *Mitchell v. Robert De Mario Jewelry, Inc.*<sup>225</sup> dealt with Section 17 of FLSA, which gave the federal courts jurisdiction to enjoin violations of the FLSA’s anti-retaliation provision.<sup>226</sup> The primary issue was whether courts could go further and compel an employer to “pay damages to employees who were retaliated against in violation of the [a]ct.”<sup>227</sup> While the language of the statute seemed to clearly limit a court to injunctive relief, the Supreme Court noted that it had implied, equitable powers “to provide complete relief in the light of the statutory purposes.”<sup>228</sup> As a result, the Court explicitly took a purposivist position and held that an award of back pay was proper even though the statute did not expressly authorize it.<sup>229</sup> Twelve years later, the Court interpreted the National Labor Relations Act in a similar manner in *NLRB v. Scrivener*, where it held that employees who gave sworn statements to the NLRB field examiner were protected from retaliation, even though the law only considered protection to those employees who filed formal charges or testified at a formal hearing.<sup>230</sup> The Court again applied a purposivist interpretation of the law as Moberly noted that “[l]imiting the statute’s protections to a narrow reading of the provision’s text . . . would undermine the [law’s] purpose of encouraging ‘all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board.’”<sup>231</sup> Finally, the cases of *Brock v. Roadway Express, Inc.*<sup>232</sup> and *Sullivan v. Little Hunting Park, Inc.*<sup>233</sup> are two of the clearest examples in which the Court adhered to the anti-retaliation principle. In the former case, the Court upheld the Surface Transportation Assistance Act of 1982, which permitted an administrative agency to temporarily reinstate a fired whistleblower because “the eventual recovery of backpay may not alone provide sufficient protection to encourage reports of safety violations.”<sup>234</sup> The Court explained that this was crucial since “Congress recognized that

---

224. *Id.* at 437.

225. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960).

226. 29 U.S.C. § 217 (2006); Moberly, *supra* note 10, at 383.

227. Moberly, *supra* note 10, at 383; *see Mitchell*, 361 U.S. at 289.

228. *Mitchell*, 361 U.S. at 291–92; Moberly, *supra* note 10, at 383.

229. *Mitchell*, 361 U.S. at 296.

230. *NLRB v. Scrivener*, 405 U.S. 117, 125 (1972); Moberly, *supra* note 10, at 384.

231. Moberly, *supra* note 10, at 384 (quoting *Scrivener*, 405 U.S. at 121).

232. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

233. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

234. *Brock*, 481 U.S. at 259; Moberly, *supra* note 10, at 385.

employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations.”<sup>235</sup> Again, the Court was of the position that the law would not be properly enforced unless whistleblowers were given adequate protection. Meanwhile, in *Sullivan*, the Court dealt with 42 U.S.C. § 1982, which states that “[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.”<sup>236</sup> In that case, the Court “upheld a retaliation claim by a white landowner who was retaliated against for leasing a house to a black man.”<sup>237</sup> The Court went out of its way to imply a cause of action for retaliation even though 42 U.S.C. § 1982 did not contain any retaliation language whatsoever.<sup>238</sup> It stated that “[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies.”<sup>239</sup> Moreover, the Court noted that if the landowner was punished for trying to vindicate the rights of minorities, then “[s]uch a sanction would give impetus to the perpetuation of racial restrictions on property.”<sup>240</sup>

These cases repeatedly display the Court’s belief that protecting employees from retaliation is necessary to ensure that these laws are properly enforced.<sup>241</sup> As previously noted, Justice O’Connor echoed this sentiment in *Inter-Modal* when she noted that Section 510 “helps to make [an employer’s] promises [under ERISA] credible.”<sup>242</sup> In other words, if an employee does not feel free to report a violation of the law, then the “promises” that the law stood for are illusory because they will not be effectively enforced.

The anti-retaliation principle endures today and continues to explain why the current Court, which is generally pro-employer, takes a softer stance towards employees when confronted with a retaliation case. This is best exemplified by the cases of *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>243</sup> *Jackson v. Birmingham Board of Education*,<sup>244</sup> and *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*.<sup>245</sup> In *Burlington*, an employee of the defendant railroad brought suit under Title VII

---

235. *Brock*, 481 U.S. at 258.

236. 42 U.S.C. § 1982 (2006).

237. Moberly, *supra* note 10, at 386–87; *see Sullivan*, 392 U.S. at 234–35.

238. *Sullivan*, 392 U.S. at 239; Moberly, *supra* note 10, at 386.

239. *Sullivan*, 392 U.S. at 239.

240. *Id.* at 237; Moberly, *supra* note 10, at 387.

241. Moberly, *supra* note 10, at 392.

242. *Inter-Modal Rail Emps. Ass’n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997).

243. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

244. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

245. *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846 (2009).

alleging that she was retaliated against under 42 U.S.C. § 2000e-3(a) for filing a gender discrimination complaint with the EEOC.<sup>246</sup> This statute forbids employer actions that “discriminate against” an employee (or job applicant) because he has “opposed” a practice that Title VII forbids or has “made a charge, testified, assisted, or participated in” a Title VII “investigation, proceeding, or hearing.”<sup>247</sup> The Court, in a unanimous opinion, ruled in favor of the employee and held that the application of the statute should not be limited to an employer’s “conduct that ‘affects the employee’s compensation, terms, conditions, or privileges of employment.’”<sup>248</sup> As with *Mitchell, Scrivener, Brock, and Sullivan*, the Court once again rested its conclusion on a purposivist interpretation of the statute.<sup>249</sup> The Court stated that “a limited construction would fail to fully achieve the antiretaliation provision’s ‘primary purpose,’ namely, ‘[m]aintaining unfettered access to statutory remedial mechanisms.’”<sup>250</sup> Therefore, in order to truly protect an employee from retaliation and encourage him to come forward and report a violation of the statute, the Court interpreted the statute broadly to protect an employee from retaliation in the form of gender discrimination even though it could not be described as a “workplace-related or employment-related retaliatory act[.]”<sup>251</sup>

Meanwhile in *Jackson*, a high school basketball coach sued the Birmingham Board of Education alleging that they retaliated against him in violation of Title IX for complaining about gender discrimination in the school’s athletic program.<sup>252</sup> In that case, the Court went out of its way to disagree with the Eleventh Circuit Court of Appeals, which held that Title IX did not create a private right of action for retaliation because the language of the statute lacked a specific provision prohibiting retaliation.<sup>253</sup> Instead, the Court implied a claim for retaliation under Title IX claiming that “[d]iscrimination” included a “wide range of intentional unequal treatment.”<sup>254</sup> As Moberly notes, “retaliation *is* discrimination ““on the basis of sex” because it is an intentional response to the nature of the complaint.”<sup>255</sup> As a result, the Court was able to construe the statute to protect individuals from retaliation even though it was silent on the matter.

---

246. *Burlington*, 548 U.S. at 59.

247. 42 U.S.C. § 2000e-3(a) (2006).

248. *Burlington*, 548 U.S. at 61 (quoting Brief for United States as *Amicus Curiae* Supporting Respondent at 13, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (No. 05-259) (internal quotation marks omitted)).

249. *Id.* at 64.

250. *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

251. *See id.* at 67; Moberly, *supra* note 10, at 409.

252. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171–72 (2005).

253. *Id.* at 172, 174.

254. *Id.* at 175; Moberly, *supra* note 10, at 400–01.

255. Moberly, *supra* note 10, at 401 (quoting *Jackson*, 544 U.S. at 174).

Finally, in *Crawford*, an employee who participated in her employer's internal investigation of a sexual harassment complaint was denied protection under Title VII's retaliation provision by the Sixth Circuit, which held the "opposition clause" required "active, consistent, 'opposing' activities to warrant . . . protection against retaliation."<sup>256</sup> While the Sixth Circuit did not believe answering questions as part of an investigation qualified as "opposing," the Supreme Court reversed on appeal noting that "'[o]ppose' goes beyond 'active, consistent' behavior in ordinary discourse."<sup>257</sup> The Court therefore rejected the more stringent definition of "oppose" which required "active" and "consistent" opposition because it was too constrictive.<sup>258</sup> The Court stated that:

There is, then, no reason to doubt that a person can "oppose" by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.<sup>259</sup>

According to the Court, the purpose of the retaliation provision was "to protect any form of communication to the employer in which the employee communicates [his or her] belief that the employer has violated Title VII" and offering protection only to those employees who initiated a complaint on their own would violate the spirit of the law.<sup>260</sup> Thus, *Crawford* is apposite because it mirrors the dispute concerning Section 510 in that the Court noted it would be "freakish" if the rule protected an "employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."<sup>261</sup> This is the reverse of the Section 510 dispute in which courts have held an employee is not protected when coming forward on his own initiative but is protected when his complaints are solicited.<sup>262</sup> Thus, it is quite likely that the Court will find the decisions of the Fifth and Ninth Circuits as creating a "freakish rule" as well.

Furthermore, the Court has continued its adherence to the anti-retaliation principle in the recently decided case of *Thompson v. North American Stainless, LP*.<sup>263</sup> The petitioner alleged that he was fired because his fiancé

---

256. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 850 (2009) (quoting *Bell v. Safety Grooving & Grinding, LP*, 107 Fed. App'x 607, 610 (6th Cir. 2004)).

257. *Id.* at 851.

258. *Id.*

259. *Id.*

260. Moberly, *supra* note 10, at 412–13; *see Crawford*, 129 S. Ct. at 851–52.

261. *Crawford*, 129 S. Ct. at 851.

262. *See, e.g., Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 225–26 (3d Cir. 2010).

263. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011).

engaged in protected activity under Title VII's retaliation provision.<sup>264</sup> The decision, authored by Justice Scalia no less, held that "Title VII prohibits retaliation against an employee by 'inflicting reprisals' on a third-party who is closely related to the employee."<sup>265</sup> Scalia acknowledged that Title VII's anti-retaliation provision had previously been interpreted broadly in *Burlington* and that it is "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé [sic] would be fired."<sup>266</sup> Though the Court does not explicitly acknowledge the "anti-retaliation principle" like it has in some of its past jurisprudence, it appears that the Court's adherence to it continues.

As a result, the simple assumption that the pro-employer Roberts Court would automatically be hostile to a broad interpretation of ERISA Section 510 is incorrect. This point is brought home by the fact that the Court's leading textualist even acknowledges that anti-retaliation statutes must be interpreted broadly.<sup>267</sup> For over fifty years, the Court has repeatedly shown that it believes protecting whistleblowers from retaliation is crucial in upholding the nation's laws.<sup>268</sup> As we have seen, from *Mitchell* through the Roberts Court's recent decisions in *Burlington*, *Jackson*, and *Crawford*, the Court has abandoned textualist interpretations in favor of a purposivist approach that places the legislative purpose of the law above the plain meaning of the text. While this seems hard to fathom for a court regarded as very conservative and textualist, the proof is in its decisions. In both *Burlington* and *Thompson*, the Court unanimously held that Title VII must be interpreted broadly to effectively prevent against retaliation.<sup>269</sup> When one analyzes the Court's decisions in terms of strong law enforcement, it no longer seems inherently contradictory for a Court known as pro-employer to reverse course and protect the employee in these cases. The Court clearly recognizes the importance of the whistleblower in American society and, quite simply, promotion of the anti-retaliation principle is the best way to ensure that these individuals will continue to come forward and help ensure that rule of law is properly enforced.

As a result, the Court should affirm the decisions of the Fifth and Ninth Circuits and hold that Section 510 of ERISA protects unsolicited internal complaints. The Court has already demonstrated in *Burlington*, *Jackson*, *Crawford*, and now *Thompson* that they are willing to interpret a statute broadly, if necessary, when the situation warrants it. More importantly, the

---

264. *Id.* at 867; Moberly, *supra* note 10, at 431.

265. Moberly, *supra* note 10, at 431; *see Thompson*, 131 S. Ct. at 868.

266. *Thompson*, 131 S. Ct. at 868.

267. *Id.*

268. Moberly, *supra* note 10, at 392.

269. *See Thompson*, 131 S. Ct. at 868; *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006).

Court can find solid precedent upon which to rest this conclusion. In *Scrivener*, for example, the Court provided whistleblower protection to employees who gave sworn statements to the NLRB, even though the law only considered protection to those employees who filed formal charges or testified at a formal hearing.<sup>270</sup> Moreover, in *Crawford* the Court believed that simply answering questions regarding possible Title VII violations by an employer warranted protection against retaliation.<sup>271</sup> The Court clearly had no problem reading these statutes in far broader terms than the plain meaning suggested, and the Court should do the same here. Nevertheless, this does not guarantee that the Court will actually rule this way in regard to Section 510. Ultimately, Section 510 is far narrower than Title VII. For example, it does not protect an employee who simply “opposes” a practice.<sup>272</sup> As a result, it may be too difficult for the Court’s textualists to construe it so broadly. Additionally, because the Court’s retaliation jurisprudence does not deal with ERISA at all, it is difficult to predict exactly how they might rule. Nevertheless, anything less than a broad purposivist interpretation of the statute would eviscerate the protections of the statute, and as Justice O’Connor wrote in *Inter-Modal*, would fail to “make [an employer’s] promises [under ERISA] credible.”<sup>273</sup> Moreover, it is the only way to ensure that whistleblowers who play a key role in enforcing the nation’s laws will continue to come forward and report possible violations.

#### CONCLUSION

The importance of Section 510 cannot be overstated. With millions of Americans participating in pension and welfare programs that are governed by ERISA,<sup>274</sup> a strong retaliation provision is necessary to ensure that the law as a whole functions properly. As the Supreme Court noted, “Congress included various safeguards to preclude abuse.”<sup>275</sup> Section 510 is perhaps the most important because “without it, employers would be able to circumvent the provision of promised benefits.”<sup>276</sup> While Section 510 is decidedly narrower

---

270. NLRB v. *Scrivener*, 405 U.S. 117, 125 (1972).

271. *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty.*, Tenn., 129 S. Ct. 846, 851 (2009).

272. See 42 U.S.C. § 2000e-3(a) (2006).

273. *Inter-Modal Rail Emps. Ass’n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997).

274. See Curtis D. Rooney, *The States, Congress, or the Courts: Who Will be the First to Reform ERISA Remedies?*, 7 *Annals Health L.* 73, 79 n.33 (1998) (discussing a Government Accountability Office study that found that 54% of the American population is covered by a health plan that is governed by ERISA).

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

276. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 227 (3d Cir. 2010) (Cowen, J., dissenting) (quoting *Ingersoll-Rand*, 498 U.S. at 143).

than its counterparts in Title VII and FLSA, it does not mean that whistleblowers are not protected under it. With an almost even circuit split, the Supreme Court should make the final determination once and for all. Through a purposivist interpretation in which the Court considers the overarching purpose of the provision, the Court should ensure that Section 510 protects unsolicited internal complaints. This is not an argument endorsing purposivism as the best or only manner of statutory interpretation. It is simply the most suitable way in which the Court can give real teeth to Section 510 and make up for Congress's failings when it drafted a law that disregarded an entire class of employees. Thus, purposivism is the mechanism by which the "whistleblower" provision, as it is colloquially known, can actually be construed to protect whistleblowers.

MICHAEL C. ROSS\*

---

\* J.D. Candidate, Saint Louis University School of Law, 2012; B.A. DePauw University. I am most gracious to the Editorial Board of the Saint Louis University Law Journal for letting me contribute to this issue. I would also like to thank Professor Matthew Bodie, as this article would not have gotten off the ground without his help, as well as my family for their support and encouragement, especially my parents Bob and Vicki and my brother Stephen.



