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EMPLOYMENT LAW—THE THIRD CIRCUIT’S HOLDING THAT EMPLOYEES’ UNSOLICITED INTERNAL COMPLAINTS ARE NOT PROTECTED UNDER ERISA STOPS WHISTLEBLOWERS IN THEIR TRACKS

Scott W. Thomas*

IN *Edwards v. A.H. Cornell & Son, Inc.*, the United States Court of Appeals for the Third Circuit held that the anti-retaliation provision of the Employee Retirement Income Security Act of 1974 (ERISA)¹ does not protect employees’ unsolicited internal complaints.² The circuits are currently split on whether ERISA’s section 510 anti-retaliation provision covers employees’ unsolicited internal complaints.³ The court in *Edwards* erroneously concluded that section 510’s language was clear and strayed from its own precedent of broadly interpreting similar statutory anti-retaliation provisions.⁴ As a result, the court disregarded Congress’s intent in passing ERISA and failed to consider the bad public policy that will ensue from denying employees protection for their unsolicited internal complaints.

In March 2006, A.H. Cornell & Son, Inc. (A.H. Cornell), a commercial and residential construction services company, hired Shirley Edwards (Edwards) as its Director of Human Resources.⁵ After three years of

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1. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140 (2006).

2. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 225 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011).

3. *Compare* *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1314 (5th Cir. 1994) (holding that “a refusal to commit violations of ERISA and reporting such violations to management” was protected under ERISA section 510), *and* *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993) (finding ERISA was “clearly meant to protect whistle blowers”), *with* *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005) (focusing on “whether the circumstances can fairly be deemed to constitute an ‘inquiry’”), *and* *King v. Marriott Int’l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003) (reading section 510’s “testified or is about to testify” language more narrowly and finding section 510 requires “something more formal than written or oral complaints made to a supervisor”).

4. *See Edwards*, 610 F.3d at 223–25.

5. *Id.* at 218.

employment, Edwards complained to A.H. Cornell's management that the company was violating ERISA.⁶ Edwards alleged that her supervisor ordered her to make false statements to the company's workers' compensation carrier about an injured employee who continued collecting workers' compensation after returning to work.⁷ In addition, Edwards alleged that the company tried to discourage employees from opting into group health coverage by misrepresenting the cost.⁸

Edwards sued her employer in the United States District Court for the Eastern District of Pennsylvania claiming that she was fired for complaining to management about her employer's ERISA violations.⁹ The district court dismissed Edwards's suit, finding that her complaints were not protected under section 510 because they were not given as part of an inquiry.¹⁰ Edwards appealed, and the Secretary of Labor filed a brief as *amicus curiae* in support of Edwards.¹¹

On appeal, a Third Circuit panel affirmed the district court's dismissal of Edwards's suit, holding that section 510 of ERISA does not protect an employee's unsolicited internal complaints.¹² Section 510 states "[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 [Act]"¹³ While acknowledging that Edwards had "given information" by complaining to management, the Third Circuit determined that the employee's complaints were not protected under section 510's anti-retaliation provision because they were not part of an inquiry or proceeding.¹⁴

First, the court examined dictionary definitions of "inquiry" and "proceeding" and found that the plain meaning of section 510 was clear and "that the phrase 'inquiry or proceeding' is limited to more formal actions."¹⁵ Defining an inquiry as "a request for information," the court determined that Edwards's complaints to management were not part of an inquiry because she complained voluntarily without her employer requesting any information from her about the potential ERISA violations.¹⁶ Defining a proceeding as "[t]he regular and orderly progression of a lawsuit" or the "procedural means for seeking redress from a tribunal

6. *Id.* at 219.

7. *Edwards v. A.H. Cornell & Son, Inc.*, No. 09-CV-1184, 2009 U.S. Dist. LEXIS 63720, at *2-3 (E.D. Pa. July 23, 2009), *aff'd*, 610 F.3d 217 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011).

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

9. *Id.* at 218-19.

10. *Edwards*, 2009 U.S. Dist. LEXIS 63720, at *13-14.

11. *Edwards*, 610 F.3d at 219. *See generally* Brief for the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal, *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010) (No. 09-3198), 2009 U.S. 3rd Cir. Briefs LEXIS 165 [hereinafter Brief for the Secretary].

12. *Edwards*, 610 F.3d at 225-26 (2-1 decision).

13. ERISA, 29 U.S.C. § 1140 (2006).

14. *Edwards*, 610 F.3d at 222-23.

15. *Id.* at 223-24 (quoting *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003)).

16. *Id.* at 223 (quoting BLACK'S LAW DICTIONARY 864 (9th ed. 2009)).

or agency,” the court concluded that Edwards’s complaints were not part of a proceeding because no formal action had occurred at the time she was fired.¹⁷

Next, the court considered the language of other anti-retaliation statutes and rejected Edwards and the Secretary of Labor’s argument that section 510 should be interpreted broadly.¹⁸ The court deemed it unnecessary to consider Congress’s intent because it viewed the statute’s language as unambiguous, stating “had Congress been concerned with such a scenario, Congress could have used broad language mirroring the anti-retaliation provision of Title VII.”¹⁹ The court also noted that section 15(a)(3) of the Fair Labor Standards Act (FLSA) extends protection more “broadly to persons that have ‘filed any complaint,’ without explicitly stating the level of formality required,”²⁰ whereas section 510 of ERISA protects only “persons that have ‘given information or . . . testified ‘in an inquiry’ or proceeding.’”²¹

Finally, the Third Circuit declared that its decision was consistent with its own precedent regarding anti-retaliation statutes.²² The court distinguished its holding in *Passaic Valley Sewerage Commissioners v. United States Department of Labor*²³ on the ground that *Passaic Valley* addressed section 507(a) of the Clean Water Act (CWA),²⁴ not section 510 of ERISA.²⁵ In *Passaic Valley*, the Third Circuit found that the term “proceeding” within section 507(a) of the CWA was ambiguous and could “reasonably be invoked to encompass a range of complaint activity of varying degrees of formal legal status.”²⁶

In dissent, Judge Cowen argued that section 510’s language is ambiguous and the majority’s interpretation is contrary to Congress’s intent.²⁷ The dissent noted that “Congress viewed [section 510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits.”²⁸ The dissent also suggested that the majority’s “inquiry” standard may be unworkable because it would be difficult to distinguish between an internal workplace complaint that was merely an initial step of an investigation and a protected statement that was made as part of an inquiry.²⁹ Hypothetically, the dissent asked, if “an employee . . . complains to her superior, the superior asks some follow-up

17. *Id.* (quoting BLACK’S LAW DICTIONARY 1324 (9th ed. 2009)).

18. *Id.* at 223–24.

19. *Id.* at 224.

20. *Id.* (quoting Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2006)).

21. *Id.* at 224–25 (quoting ERISA, 29 U.S.C. § 1140 (2006)).

22. *Id.* at 224.

23. *Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor*, 992 F.2d 474, 477 (3d Cir. 1993).

24. Clean Water Act, 33 U.S.C. § 1251 (2006).

25. *Edwards*, 610 F.3d at 225.

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

27. *Edwards*, 610 F.3d at 226 (2–1 decision) (Cowen, J., dissenting).

28. *Id.* at 226–27 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990)).

29. *Id.* at 227–28.

questions, and the employee responds, . . . why should such responses be protected while . . . an employer is essentially permitted . . . to fire an employee immediately after she makes an informal complaint instead of conducting an investigation . . . ?”³⁰

Although section 510’s language differs slightly from other anti-retaliation provisions, the dissent argued that the court should nevertheless treat similar provisions in similar remedial federal statutes consistently.³¹ The dissent pointed out that the majority’s interpretation is inconsistent with the court’s prior holding in *Passaic Valley*, where the court held that the term “proceeding” was ambiguous in an analogous anti-retaliation provision of the CWA.³² The dissent propounded that section 510 should actually be construed more broadly than similar anti-retaliation provisions in the CWA or FLSA because section 510 protects inquiries rather than merely proceedings (as in the CWA and FLSA) and protects employees who give information rather than merely those who testify.³³ In fact, in *Nicolaou v. Horizon Media, Inc.*—the case relied on by the majority—the Second Circuit found that the language of section 510 is broader than section 15(a)(3) of FLSA.³⁴ Yet, the majority in *Edwards* came to the opposite conclusion in finding that FLSA extends protection more broadly than section 510.³⁵

The majority’s holding in *Edwards* that section 510’s language was clear and unambiguous is inconsistent with the court’s broad interpretation of anti-retaliation provisions in other remedial statutes.³⁶ In *Brock v. Richardson*, the Third Circuit did not use a dictionary to interpret a similarly worded anti-retaliation provision in the FLSA;³⁷ instead, the court “indicated a willingness to go beyond the bare language of the [statute] itself,”³⁸ stating that “courts interpreting the [FLSA’s] anti-retaliation provision have looked to its animating spirit in applying it to activities that might not have been explicitly covered by the language.”³⁹ Likewise, in *Passaic Valley*, the Third Circuit did not rely on a dictionary to define the term “proceeding” as it did in *Edwards*; instead, the court looked at the statute’s purpose and legislative history and found that the term “proceeding” could “encompass a range of complaint activity.”⁴⁰

30. *Id.* at 228.

31. *Id.*

32. *Id.* at 229.

33. *Id.* at 230 (comparing the language of section 507(a) of the CWA, 33 U.S.C. § 1367(a) (2006), with the language of section 510 of ERISA, 29 U.S.C. § 1140 (2006)).

34. *Id.* at 230–31 (quoting *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 328 (2d Cir. 2005)).

35. *Id.* at 224–25 (majority opinion); see also *supra* notes 19–20.

36. See *Edwards*, 610 F.3d at 228–31 (Cowen, J., dissenting).

37. FLSA, 29 U.S.C. § 215(a)(3) (2006) (under the FLSA, it is unlawful “to discharge . . . any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this [Act]”).

38. *Edwards*, 610 F.3d at 230 (Cowen, J., dissenting).

39. *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987).

40. Compare *Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor*, 992 F.2d 474, 478 (3d Cir. 1993), with *Edwards*, 610 F.3d at 223.

The court in *Passaic Valley* found that the term “proceeding” was ambiguous in section 507(a) of the CWA.⁴¹ Section 507(a) states that “[n]o person shall fire . . . any employee . . . by reason of the fact that such employee . . . has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the [CWA].”⁴² As the Secretary of Labor noted in the amicus brief, the court in *Passaic Valley* found that the CWA protects unsolicited internal complaints where the statute “facially protects only filing, instituting or giving testimony in ‘any proceeding;’” thus, section 510 of ERISA, which “expressly covers . . . all ‘information’ given in ‘any inquiry,’” should also protect employees’ unsolicited complaints.⁴³

Because the majority did not follow its own precedent and incorrectly concluded that section 510’s language was clear, the court failed to properly address Congress’s intent in passing ERISA.⁴⁴ “Section 510’s legislative history demonstrates Congress’s intent that the provision be liberally construed . . . ‘to provide . . . broad remedies for redressing or preventing violations [of ERISA].’”⁴⁵ ERISA’s leading sponsor, “Senator Javits, during the debates on the passage of ERISA, characterized section 510 as ‘provid[ing] a remedy for any person fired such as is provided for a person discriminated against because of race or sex, for example.’”⁴⁶ “It is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs.”⁴⁷ Had the court properly weighed Congress’s intent and liberally construed section 510, the court likely would have held that Edwards’s unsolicited internal complaints were protected under section 510 of ERISA.⁴⁸

The Third Circuit’s narrow construction of ERISA’s anti-retaliation provision discourages employees from bringing potential ERISA violations to their employer’s attention and will likely lead to bad policy.⁴⁹

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

42. CWA, 33 U.S.C. § 1367(a) (2006).

43. Brief for the Secretary, *supra* note 11, at 22–23.

44. *See Edwards*, 610 F.3d at 227 (Cowen, J., dissenting); *see also* IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118, 127 (3d Cir. 1986) (“[A] court need not rely on the literal language of ERISA in interpreting its provisions, but may also look to the intent of the statute.”) (citation omitted).

45. Brief for the Secretary, *supra* note 11, at 11 (quoting S. REP. NO. 93-127, at 35 (1973)).

46. *Id.* (quoting 119 CONG. REC. 30044 (1973)). Senator Javits’s comment suggests an intention that protection under ERISA should reach broadly like the protection against discrimination provided by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

47. S. REP. NO. 93-127, at 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4854.

48. *See Edwards*, 610 F.3d at 224 (acknowledging that if section 510 were ambiguous, the court would “construe the provision in favor of plan participants”).

49. *See* Brief for the Secretary, *supra* note 11, at 30–31 (citing *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008) (arguing that a narrow reading of section 510 should be avoided because it would lead to absurd results and defy common sense)).

Under the Third Circuit's reading of section 510, employers can ignore employees' complaints rather than initiate an inquiry or proceeding, or they can simply fire employees before they are able to begin a formal proceeding.⁵⁰ The Ninth Circuit has stated that "[t]he normal first step in giving information or testifying . . . would be to present the problem first to the responsible managers of the ERISA plan."⁵¹ If an employee is "discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown."⁵²

The problem with the Third Circuit's decision in *Edwards* is the court's reliance on dictionary definitions in interpreting section 510 of ERISA without considering Congress's intent.⁵³ The outcome of the case essentially turned on the court's decision that section 510's language is not ambiguous—the court even acknowledged that if the provision were ambiguous, it would have been construed in favor of the employee—but the court relied on a dictionary to show that the statute's language is clear.⁵⁴ The court's prior interpretation of similar anti-retaliation provisions and the current split of authority on the issue indicate that section 510's language is not absolutely clear.

Once the court erroneously decided that section 510's language is clear, it disregarded Congress's intent in passing ERISA and failed to adequately address the impact that the court's decision will have on public policy. The Third Circuit's holding undermines the efficacy of section 510 because employers can either ignore whistleblowers or fire them for making unsolicited internal complaints. Potential whistleblowers will be stopped in their tracks before they can give information or testify. Many employees would prefer to first report ERISA violations to their supervisors rather than voice their complaints through a formal inquiry or proceeding. By essentially requiring employees to go immediately to the courthouse for protection, the Third Circuit deters employees from reporting ERISA violations. Employees may elect to remain silent and even assist in their company's fraud rather than risk retaliation from their employers. The court in *Edwards* should have construed section 510 broadly, as it did with similarly worded anti-retaliation provisions in other statutes, and should have effectuated Congress's intent and furthered the policy goals of ERISA by holding that employees' unsolicited internal complaints are protected under section 510 of ERISA.⁵⁵

50. See *id.* at 29–31 (arguing that allowing companies to investigate and correct ERISA violations is more cost effective than requiring employees to file complaints through litigation or adversarial proceedings).

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

52. *Id.*

53. See *Edwards*, 610 F.3d at 223.

54. *Id.* at 223–24.

55. See Brief for the Secretary, *supra* note 11, at 32.