



## Comments

### Can You Hear Me? Will the Diminishing Scope of ERISA's Anti-Retaliation Provision Drown the Cries of Whistleblowers?

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#### I. INTRODUCTION

In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA)<sup>1</sup> to protect the retirement benefits of America's working men and women.<sup>2</sup> ERISA imposes fiduciary responsibilities upon the administrators of employee retirement plans and establishes disclosure guidelines so employees receive information about the funding and vesting provisions of their plans.<sup>3</sup> These guidelines

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1. The Employee Retirement Income Security Act, 29 U.S.C. § 1001(a) (1974).

2. See Employee Retirement Income Security Act of 1974, S. REP. No. 93-127, reprinted in 1974 U.S.C.C.A.N. 4838, 4848.

3. See 29 U.S.C. § 1001(b)-(c).

safeguard benefits and ensure employees enjoy a financially secure retirement.<sup>4</sup>

To protect the retirement rights of employees, Congress made it unlawful for an employer to interfere or discriminate against an employee for exercising the rights guaranteed under ERISA.<sup>5</sup> Nevertheless, the mishandling of employee retirement plans remains and employees are frequently denied benefits to which they are entitled.<sup>6</sup> Therefore, to detect unlawful employer behavior and provide effective enforcement of ERISA, Congress made it unlawful for employers to take adverse employment actions against employees who have “given information or [have] testified or [are] about to testify in any inquiry or proceeding relating to [ERISA].”<sup>7</sup> This provision, also known as ERISA’s whistleblower provision,<sup>8</sup> protects employees engaged in legal proceedings; however, it is unclear whether this provision extends protection to employees who voice internal workplace complaints to employers.

Currently, there is a deeply divided split among the circuit courts of appeals as to whether ERISA’s whistleblower provision extends protection to internal workplace complaints.<sup>9</sup> On March 7, 2011, the Supreme Court of the United States denied a petition for writ of certiorari to determine the exact scope of ERISA’s whistleblower provision.<sup>10</sup> With the Supreme Court’s recent denial of certiorari, the scope of ERISA’s whistleblower provision will continue to be a current and developing issue of contention among the circuit courts.

This Comment focuses on the Ninth, Fifth, Fourth, Second, and Third Circuits’ application of ERISA’s whistleblower provision to internal workplace complaints. The decisions rendered by these circuits

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4. See 1974 U.S.C.C.A.N. 4838, 4842; see also *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983) (“ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.”).

5. See 29 U.S.C. § 1140 (“It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan.”).

6. See 1974 U.S.C.C.A.N. 4838, 4839.

7. 29 U.S.C. § 1140.

8. Courts and legal scholars use the anti-retaliation and whistleblower provisions interchangeably to refer to Section 510 of ERISA. For simplicity, this Comment will mainly refer to Section 510 as ERISA’s whistleblower provision.

9. See *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005); *King v. Marriott Int’l, Inc.*, 337 F.3d 421 (4th Cir. 2003); *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311 (5th Cir. 1994); *Hashimoto v. Bank of Hawaii.*, 999 F.2d 408 (9th Cir. 1993).

10. See *Edwards*, 610 F.3d 217 (3d Cir. 2010), *cert. denied*, 2011 WL 767661 (U.S. Mar. 7, 2011) (No. 10-732); see also *Edwards*, *petition for cert. filed*, 2010 WL 4914509 (U.S. Nov. 30, 2010) (No. 10-732).

afford differing degrees of protection to employees, and the resulting implications for ERISA whistleblowers are startling.<sup>11</sup> Accordingly, Part II.A of this Comment describes the split among the Ninth, Fifth, Second, and Fourth Circuits. From there, Part II.B explores the petition for certiorari filed before the Supreme Court of the United States following the Third Circuit's restrictive view of ERISA's whistleblower provision in *Edwards v. A.H. Cornell*.<sup>12</sup>

Part III of this Comment describes the criteria the five circuit courts have used in analyzing ERISA's whistleblower provision<sup>13</sup> and focuses on the importance of affording broad protection under ERISA. Specifically, Part III.A describes Congress' intent in enacting federal whistleblower provisions and the necessity of interpreting whistleblower provisions broadly. From there, Part III.B details the methods of statutory interpretation the five circuit courts have used in determining the scope of ERISA's whistleblower provision. Part IV concludes.

## II. CURRENT STATE OF ERISA'S WHISTLEBLOWER PROVISION

ERISA's whistleblower provision 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* related to [ERISA]."<sup>14</sup> Currently, the Ninth, Fifth, Fourth, Second, and Third Circuits have analyzed the scope of ERISA's whistleblower provision.<sup>15</sup> Because Congress did not define the terms "inquiry" and "proceeding,"<sup>16</sup> the circuit courts have had considerable difficulty determining the amount of protection ERISA's whistleblower provision affords employees voicing internal workplace complaints to management regarding potential violations of ERISA. Given the differing degrees of protection the circuits afford employees under this provision, Part A of this section details the manner in which

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11. See discussion *infra* Part III.B.

12. See *Edwards*, 610 F.3d at 225 (holding ERISA's whistleblower provision does not protect an employee's unsolicited internal complaints to management).

13. See *id.* at 222-24 (focusing on the plain meaning of Section 510); *Nicolaou*, 402 F.3d at 328-30 (focusing on the fair import of the term "inquiry" and comparing the language of FLSA to ERISA); *King*, 337 F.3d at 427 (relying on FLSA's whistleblower provision); *Anderson*, 11 F.3d at 1315 (applying a fact intensive analysis in determining whether an employee's action fell within the ambit of an "inquiry or proceeding"); *Hashimoto*, 999 F.2d at 411 (applying a practical application of ERISA's language and noting that excluding internal workplace complaints would "discourage the whistle[bl]ower before the whistle is blown").

14. 29 U.S.C. § 1140 (emphasis added).

15. See *Edwards*, 610 F.3d at 217; *Nicolaou*, 402 F.3d at 325; *King*, 337 F.3d at 421; *Anderson*, 11 F.3d at 1311; *Hashimoto*, 999 F.2d at 408.

16. See 29 U.S.C. § 1002.

the Ninth, Fifth, Fourth, and Second Circuits have interpreted the scope of ERISA's whistleblower provision. From there, Part B explores the Third Circuit's interpretation of ERISA's whistleblower provision in *Edwards v. A.H. Cornell, Inc.*, a case which was recently before the Supreme Court of the United States on a petition for writ of certiorari, which the Supreme Court denied.<sup>17</sup>

#### A. *The Circuit Split*

Two interpretations have emerged from the five circuit courts that have addressed whether ERISA's whistleblower provision protects employees who voice internal workplace complaints to management for violations of ERISA.<sup>18</sup> The Ninth Circuit and the Fifth Circuit hold ERISA's whistleblower provision affords protection to internal workplace complaints,<sup>19</sup> while the Fourth Circuit and Second Circuit maintain internal workplace complaints are not protected.<sup>20</sup> Most recently, the Third Circuit joined the Fourth Circuit and the Second Circuit's narrow interpretation of ERISA's whistleblower provision.<sup>21</sup> This section will set forth the decisions from the Ninth, Fifth, Fourth, and Second Circuits.

##### 1. The Ninth Circuit

The Ninth Circuit was the first circuit to consider the scope of ERISA's whistleblower provision. In *Hashimoto v. Bank of Hawaii*,<sup>22</sup> a bank employee alleged she complained to her supervisor about "potential

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17. *Edwards*, 610 F.3d at 217, *cert. denied*, 2011 WL 767661 (U.S. Mar. 7, 2011); *see also Edwards*, 610 F.3d at 217, *petition for cert. filed*, 2010 WL 4914509 (U.S. Nov. 30, 2010) (No. 10-732).

18. *Cf. Anderson*, 11 F.3d at 1315 (applying a fact intensive analysis and extending broad interpretation to ERISA's whistleblower provision), *and Hashimoto*, 999 F.2d at 411 (applying a practical application of ERISA's language and noting that excluding internal workplace complaints would "discourage the whistle[blower] before the whistle is blown"), *with Edwards*, 610 F.3d at 225 (holding ERISA's whistleblower provision does not protect an employee's unsolicited internal complaints to management); *Nicolaou*, 402 F.3d at 330 ("The proper focus is not on the formality or informality of the circumstances under which an individual gives information, but rather on whether the circumstances can fairly be deemed to constitute an 'inquiry.'"); *and King*, 337 F.3d at 428 (limiting the language "inquiry or proceeding" solely to administrative or legal proceedings and declining to extend the statute's coverage to intra-company complaints).

19. *See Anderson*, 11 F.3d at 1315; *Hashimoto*, 999 F.2d at 411.

20. *See Nicolaou*, 402 F.3d at 330; *King*, 337 F.3d at 428.

21. *See Edwards*, 610 F.3d at 225 (holding ERISA's whistleblower provision does not protect an employee's unsolicited internal complaints to management). *See infra* Part II.B for an in depth exploration of the Third Circuit's analysis.

22. *Hashimoto*, 999 F.2d at 408.

and/or actual violations by the bank of the reporting and fiduciary standards of ERISA.”<sup>23</sup> After determining ERISA preempted the employee’s claim under Hawaii’s Whistle Blowers’ Protection Act, the Ninth Circuit turned to the application of ERISA’s whistleblower provision.<sup>24</sup> The court observed ERISA’s whistleblower provision “may be fairly construed to protect a person in [the employee’s] position if, in fact, she was fired because she was protesting a violation of law in connection with an ERISA plan.”<sup>25</sup> The court explained that presenting the violation to the managers of the retirement plan will usually be an employee’s first action.<sup>26</sup> Interpreting ERISA’s whistleblower provision to exclude internal workplace complaints, the court noted, would render the provision futile because it would “discourage the whistle[blower] before the whistle is blown.”<sup>27</sup> By determining that ERISA’s whistleblower provision should protect employees who voice internal workplace complaints to the managers of an ERISA plan, the Ninth Circuit afforded the broadest protection of the five circuits to analyze the scope of ERISA’s whistleblower provision.

## 2. The Fifth Circuit

Following *Hashimoto*, the Fifth Circuit was the next circuit to analyze the scope of ERISA’s whistleblower provision. In *Anderson v. Electronic Data Systems Corp.*,<sup>28</sup> the Fifth Circuit broadly interpreted ERISA’s whistleblower provision as prohibiting an employer from taking an adverse employment action against an employee who had provided information or given testimony involving a violation of ERISA.<sup>29</sup> In *Anderson*, an employee was asked to commit several violations of ERISA.<sup>30</sup> The employee refused to commit the ERISA

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23. *Id.* at 409. Specifically, the employee maintained her supervisors directed her to reimburse a former employee from a profit sharing plan for taxes that [she] had ‘properly withheld from a lump sum distribution’ of his account.” *Id.* at 410. Additionally, the employee asserted her supervisors instructed her “‘to recalculate a former employee’s pension plan benefit and to use final pay, not final average pay’ in violation of ERISA regulations.” *Id.*

24. *See id.* at 411.

25. *Id.* (“[ERISA] is clearly meant to protect whistleblowers.”).

26. *See id.* The court also noted an employer may be tempted, from the start, to discharge an employee who presents the problem to the responsible managers of the ERISA plan. *See id.*

27. *Id.*

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

29. *See id.* at 1315.

30. *See id.* at 1312. Specifically, the employee alleged he was asked to “sign on two separate occasions approval or payment invoices on behalf of the pension portfolios under his management and supervision who [sic] had been retained by [another

violations and reported the incidents to management.<sup>31</sup> The court determined the employee's action of reporting the incidents to management fell within the scope of ERISA's whistleblower provision for preemption purposes.<sup>32</sup> Similar to the Ninth Circuit, the Fifth Circuit embraced a broad interpretation of an "inquiry or proceeding," concluding that merely reporting an ERISA violation falls within the ambit of ERISA's whistleblower provision.<sup>33</sup>

### 3. The Fourth Circuit

In stark contrast to the Ninth Circuit and the Fifth Circuit, the Fourth Circuit limited the language "inquiry or proceeding" solely to administrative or legal proceedings and declined to extend the statute's coverage to intra-company complaints. In *King v. Marriott International, Inc.*,<sup>34</sup> the employee learned her supervisor recommended the company "transfer millions of dollars from its medical plan into its general reserve account."<sup>35</sup> Believing this transfer would violate ERISA, the employee expressed concern about the legality of the transfer to her supervisor and co-workers.<sup>36</sup> Despite her objections, the employee learned the company still planned to proceed with the transfer.<sup>37</sup> Accordingly, the employee once again objected to the transfer, registered her objection with two in-house attorneys, and requested an opinion letter from counsel.<sup>38</sup> Thereafter, the employee learned the company planned to transfer more money out of the medical fund.<sup>39</sup> After the employee objected verbally and in writing, the employee's supervisor terminated her employment.<sup>40</sup> Relying on its interpretation of a similar provision in the Fair Labor Standards Act (FLSA),<sup>41</sup> the Fourth Circuit held the legislature's use of the phrase "testify or about to testify" limits

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employee] without approval of the pension trustees." *Id.* Additionally, the employee was also asked "to write up minutes for meetings which he did not attend in connection with [a retirement plan]. *Id.*

31. *See id.* at 1313.

32. *See id.* at 1314.

33. *Id.*

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

35. *Id.* at 423.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2011).

an inquiry or proceeding to that which is “legal or administrative.”<sup>42</sup> At a bare minimum, an employee must do something more “formal” than make a written or oral complaint to a supervisor.<sup>43</sup> The Fourth Circuit’s view, therefore, provides for one of the narrowest interpretations of ERISA’s whistleblower provision.<sup>44</sup>

#### 4. The Second Circuit

Providing a middle ground between the Ninth and Fifth Circuits’ broad view and the Fourth Circuit’s narrow view, the Second Circuit provided a unique interpretation of ERISA’s whistleblower provision. In *Nicolaou v. Horizon Media, Inc.*,<sup>45</sup> the Second Circuit analyzed the definition of the term “inquiry” as applied in ERISA’s statutory language to determine the scope of ERISA’s whistleblower provision.<sup>46</sup> Presuming Congress intended ERISA’s statutory language to be read “with its plain meaning,” the court determined ERISA’s whistleblower provision extended coverage to an employee who had given information or participated in an inquiry that related to possible violations of ERISA.<sup>47</sup> Accordingly, the court held ERISA’s whistleblower provision would extend to an employee who met with the president of the corporation with whom she was employed in order to give information regarding a serious payroll discrepancy in the corporation’s 401(k) plan.<sup>48</sup> The court reasoned the term “inquiry” constituted something less than a formal proceeding.<sup>49</sup> The court believed its interpretation should

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42. *King*, 337 F.3d at 427; *see also* *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000) (noting that the term “proceeding” in FLSA does not “sweep so broadly” to encompass an intra-company complaint).

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

44. The court did cite, however, the contrary decisions of the Ninth and Fifth Circuits. *See id.* The court believed the Fifth Circuit erred in *Anderson* by merely reciting the language of ERISA without addressing the “facial inapplicability of [ERISA’s whistleblower provision] to intra-office complaints.” *Id.* The court found the Ninth Circuit’s policy analysis in *Hashimoto* to be equally problematic, arguing that ERISA’s whistleblower provision could not be “fairly construed” to extend to intra-office complaints. *Id.*

45. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005).

46. *See id.* at 329.

47. *Id.* (“[ERISA’s] protections are extended to ‘any person [who has] given information or has testified or is about to testify in any inquiry or proceeding relating to’ possible violations of ERISA.”)

48. *See id.* at 330. Here, the employee initially met with in-house counsel regarding the 401(k) plan discrepancy. *Id.* The pair proceeded to report the finding to the president of the corporation, and the employee “promised to remain available to assist or provide additional information in connection with the investigation.” *Id.* The employee was subsequently terminated. *Id.* at 327.

49. *Id.* at 330.

not focus on the formality or informality of the manner in which an employee provides information;<sup>50</sup> rather, the proper focus is whether an employee has participated in an “inquiry.”<sup>51</sup> Based upon this reasoning, the Second Circuit developed a unique analysis under ERISA’s whistleblower provision that seems to yield results similar to the Fourth Circuit.<sup>52</sup>

### B. *The Third Circuit*

The Third Circuit is the most recent circuit to analyze the scope of ERISA’s whistleblower provision. In *Edwards v. A.H. Cornell & Son, Inc.*,<sup>53</sup> the Third Circuit joined the Second and Fourth Circuit’s narrow interpretation, holding ERISA’s whistleblower provision does not protect an employee’s unsolicited internal complaints to management.<sup>54</sup> This section tracks the progression of *Edwards*, beginning with the Eastern District of Pennsylvania’s analysis and concluding with the petition for writ of certiorari filed with the Supreme Court of the United States.

#### 1. Eastern District of Pennsylvania

In March of 2006,<sup>55</sup> Defendant A.H. Cornell hired plaintiff Shirley Edwards to create a human resources department at its company.<sup>56</sup> During her employment with A.H. Cornell, Edwards asserted she learned the company was “engaging in unlawful acts.”<sup>57</sup> Specifically, Edwards

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50. *Id.* (“The proper focus is not on the formality or informality of the circumstances under which an individual gives information, but rather on whether the circumstances can fairly be deemed to constitute an ‘inquiry.’”).

51. *See id.* Here, the court believed its decision was in accordance with the Fourth Circuit’s decision in *King*, to the extent that ERISA’s whistleblower provision encompasses “something more formal than written or oral complaints made to a supervisor.” *Id.* However, the court disagreed the phrase “testify or about to testify” controls the analysis. *Id.*

52. *See id.* at 331 (Pooler, J., concurring). Judge Pooler echoed the Ninth Circuit’s policy-based concerns in *Hashimoto*, arguing limiting ERISA’s whistleblower provision to “formal, external inquir[ies] would seem to leave a prudent fiduciary with nothing but unattractive options when she discovers possible breaches of duty.” *Id.*

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

54. *Id.* at 218.

55. *See* First Am. Comp. at ¶ 13, *Edwards*, 2009 WL 2215074 (E.D. Pa. July 23, 2009) (No. 09-CV-1184).

56. *See Edwards*, 610 F.3d at 218. A.H. Cornell is a family run company that “engages in the business of performing contracting and construction services, such as excavation, paving, snow removal, recycling, and other commercial and residential construction projects.” First Am. Comp. at ¶ 7, *Edwards*, 2009 WL 2215074 (E.D. Pa. July 23, 2009) (No. 09-CV-1184). A.H. Cornell consists of approximately 55-65 employees. *Id.* at ¶ 12.

57. *Edwards*, 2009 WL 2215074 at \*1.

maintained A.H. Cornell committed numerous ERISA violations, including: (1) “administering [its] group health plan on a discriminatory basis;” (2) “misrepresenting to some employees the cost of group health coverage in an effort to dissuade employees from opting into benefits;” and (3) “enrolling non-citizens in its ERISA plans by providing false social security numbers and other fraudulent information to insurance carriers.”<sup>58</sup> In response, Edwards “‘objected to and/or complained to’ A.H. Cornell’s management about these ERISA violations.”<sup>59</sup> Defendant terminated Edwards’ employment shortly thereafter.<sup>60</sup>

After adopting the Second Circuit’s analysis in *Nicolaou*,<sup>61</sup> the Eastern District of Pennsylvania granted A.H. Cornell’s motion to dismiss Edwards’ complaint.<sup>62</sup> Because Edwards did not allege anyone “requested information from her” or “initiated contact with her,” and because she did not allege she was involved “in any type of formal or informal gathering of information,” the court found her actions did not fall within the meaning of an “inquiry.”<sup>63</sup> Accordingly, the court held an employee’s objection or complaint to management regarding an employer’s alleged ERISA violation does not constitute an inquiry or proceeding.<sup>64</sup>

## 2. Appeal to the Third Circuit

Edwards filed a timely appeal to the Third Circuit. In support of her argument that the Third Circuit should interpret ERISA’s whistleblower provision as protecting employees who voice internal workplace complaints, Edwards maintained ERISA’s whistleblower provision should be read synonymously with FLSA’s whistleblower provision.<sup>65</sup> Edwards pointed out most courts find that FLSA’s whistleblower provision, which is similar to ERISA’s, is “remedial legislation which is

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

59. *Id.* (internal citation omitted).

60. *See* First Am. Comp. at ¶ 30, *Edwards*, 2009 WL 2215074 (E.D. Pa. July 23, 2009) (No. 09-CV-1184). Specifically, Edwards alleged she “‘was directed to commit and/or to participate’ in the fraud in close proximity to her termination, which was on February 11, 2009.” *Id.* at ¶¶ 16, 30.

61. *See Edwards*, 2009 WL 2215074 at \*4 (“Upon consideration of the statutory language in the relevant provision, this Court finds the Second Circuit’s analysis in *Nicolaou* to be persuasive. Thus, we agree that the proper inquiry is whether the Plaintiff’s alleged objections and complaints to management in the present case were given as part of an inquiry.”).

62. *See id.* at \*5.

63. *See id.*

64. *See id.*

65. *See* Brief for Appellant at 10, *Edwards*, 610 F.3d 217 (3d Cir. 2010) (No. 09-3198).

to be liberally construed.”<sup>66</sup> Edwards acknowledged the Third Circuit has not ruled as to whether FLSA protects an employee who makes an informal complaint to an employer; however, she argued the Third Circuit “has noted approvingly that ‘it has been applied to protect employees who have protested [FLSA] violations to their employers.’”<sup>67</sup> Finally, Edwards argued a ruling that ERISA’s whistleblower provision does not protect an employee’s internal workplace complaint “would invalidate the anti-retaliation provision of ERISA. . . .”<sup>68</sup>

Additionally, the Secretary of Labor, who is charged with ERISA’s administration,<sup>69</sup> filed a brief in support of Edwards as *amicus curiae*. In her brief, the Secretary argued ERISA’s whistleblower provision “should be read broadly to effectuate the remedial purposes of ERISA and the intent of Congress in drafting section 510—protecting whistleblowers and securing the promises and benefits of ERISA.”<sup>70</sup> The Secretary maintained protecting unsolicited complaints and objections to management, regardless of the level of formality, “satisfies Congressional intent and enables the proper and efficient functioning of ERISA’s enforcement scheme, which relies on complaints by individuals to protect the substantive rights provided under ERISA.”<sup>71</sup>

In response to plaintiff’s arguments, defendant A.H. Cornell argued ERISA’s statutory language “is clear” as to what rises to the level of

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66. *Id.* at 11.

67. *Id.* at 10 (citing *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987)); *see also* discussion *infra* Part III.B.2.c.

68. *See* Brief for Appellant at 14. Additionally, Edwards argued any other holding “would permit an employer to terminate an employee upon the employee first notifying the employer of the ERISA violation—so long as the employer refuses to investigate the complaint or ask any follow-up questions to the [sic] determine the authenticity of the complaint.” *Id.* at 14-15.

69. *See* Brief for Sec’y of Labor at 1, *Edwards*, 610 F.3d 217 (3d Cir. 2010) (No. 09-3198); *see also* 29 U.S.C. § 1001.

70. *Id.* at 5.

71. *Id.* at 6. In furtherance of its argument, the Secretary of Labor noted:

Whether construed as giving information in a proceeding or inquiry, part of an inquiry, constituting the first step of an inquiry, or exercising rights under ERISA, an employee’s unsolicited, internal complaints and objections are protected under section 510. . . . This Circuit has interpreted the anti-retaliation provisions of other remedial statutes such as the Fair Labor Standard Act and the Clean Water Act—provisions that, on their face, are written more narrowly than section 510—in accordance with their purposes, to protect employees from retaliation for voicing complaints to management. Given the remedial purpose of ERISA and section 510’s broad language, this Court—like the Fifth and Ninth Circuits—should likewise interpret section 510 to protect from retaliation persons making unsolicited ERISA-related complaints and objections to management.

*Id.* at 5-6.

protected activity.<sup>72</sup> The terms “inquiry” and “proceeding,” defendant stated, “denote a [ ] definable event—not every employee gripe.”<sup>73</sup> Believing any other interpretation of ERISA’s whistleblower provision runs “counter” to its statutory language, defendant maintained ERISA’s whistleblower provision “must be interpreted as written” to “avoid a flood of litigation.”<sup>74</sup> In support of its position, defendant surmised “[i]f an employee is going to deputize herself as a mini Secretary of Labor to ensure ERISA compliance by her employer, at a minimum, she can be expected to properly lodge her complaint.”<sup>75</sup>

### 3. Third Circuit: Majority Opinion

Noting it was presented with an issue of first impression, the Third Circuit proceeded to determine “whether the anti-retaliation provision of Section 510 of ERISA . . . protects an employee’s unsolicited internal complaints to management.”<sup>76</sup> The Third Circuit began its analysis with an examination of the language of ERISA’s whistleblower provision.<sup>77</sup> Finding the language “to be clear,”<sup>78</sup> the court proceeded to discern whether Edwards gave information as part of an “inquiry.”<sup>79</sup> Explaining Edwards made her complaint to management “voluntarily” and “of her own accord,” the court concluded Edwards’ complaints were not inquiries; rather, they were “statements regarding potential ERISA violations, not questions seeking information.”<sup>80</sup> Furthermore, because ERISA’s whistleblower provision “protects employees that have ‘given information,’ not employees that have ‘received information,’ a plain reading of the provision indicates that ‘inquiry’ includes only inquiries made of an employee, not inquiries made by an employee.”<sup>81</sup>

In addition to finding Edwards’ actions did not constitute an inquiry, the court determined Edwards’ conduct did not rise to the level of a proceeding. The court held Edwards’ complaint to management did

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72. Brief for Appellees at 5, *Edwards*, 610 F.3d 217 (3d Cir. 2010) (No. 09-3198).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Edwards*, 610 F.3d at 218.

77. *See id.* at 222.

78. *Id.* at 224. If Section 510 were ambiguous, the court noted, “we would construe the provision in favor of plan participants.” *Id.* Although the court states, “as discussed above, we find the provision’s plain meaning to be clear,” it provides no analysis for its conclusion that Section 510 is unambiguous. *Id.*

79. *Id.* at 223.

80. *Id.*

81. *Id.* (“The fact that Edwards’s complaints may have eventually ‘culminat[ed] in an inquiry . . . underscores the fact that the complaints themselves, without more, do not constitute an inquiry.”).

not meet the necessary level of “formal action” required to constitute a proceeding; however, the court declined to elaborate on “the level of formality required for protection.”<sup>82</sup> Although the court did not define the requisite level for protection, the court noted ERISA’s whistleblower provision would protect “information given in legal and administrative proceedings.”<sup>83</sup>

In holding Edwards’ complaints to management did not fall within the ambit of an inquiry or proceeding, the Third Circuit followed the Fourth Circuit’s reasoning in *King*.<sup>84</sup> The Third Circuit found the language “testified or is about to testify” in Section 510 implies the phrase “inquiry or proceeding” is limited to “more formal actions.”<sup>85</sup> Because Congress did not employ broad language in drafting ERISA’s whistleblower provision, the court determined it was appropriate to limit the scope of protection afforded to whistleblowers.<sup>86</sup>

#### 4. Third Circuit—Dissent

Judge Cowen dissented from the majority’s restrictive application of ERISA’s whistleblower provision. While he agreed the first step in determining the scope of ERISA’s whistleblower provision is to look to the actual language of Section 510, he disagreed that ERISA’s statutory language is unambiguous.<sup>87</sup> He suggested it was “highly doubtful” Congress would have “[left] totally unprotected a certain category of conduct that this remedial statutory provision was enacted to protect in the first place.”<sup>88</sup> Finally, Judge Cowen noted previous Third Circuit decisions applied a broad interpretation to similar federal whistleblower provisions.<sup>89</sup>

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82. *Id.* n.7

83. *Id.*

84. *Id.* at 223. The court declined to adopt the reasoning of the Fifth Circuit or the Ninth Circuit. The court found the Fifth Circuit “gave the issue cursory treatment,” while the Ninth Circuit “appeared to focus its analysis on the adopt of a ‘fair’ interpretation.” *Id.*

85. *Id.*

86. *Id.*

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

88. *Id.* Moreover, Judge Cowen noted “Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits.” *Id.* (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990)).

89. *See id.* at 228-30 (discussing Third Circuit’s previous application of the whistleblower provisions in FLSA and the Clean Water Act).

### 5. Petition for Writ of Certiorari

Following the Third Circuit's ruling that ERISA's whistleblower provision does not protect an employee's unsolicited internal complaints to management, Edwards filed a motion for panel rehearing and *en banc* rehearing, which the Third Circuit denied.<sup>90</sup> On November 30, 2010, Edwards filed a petition for writ of certiorari to the Supreme Court of the United States.<sup>91</sup> Edwards framed her question presented to the Supreme Court as follows: "Does the anti-retaliation provision of [ERISA] permit an employer to discharge an employee for making unsolicited internal complaints regarding violations of the statute?"<sup>92</sup> In support of her petition, Edwards argued the circuit courts "are deeply divided" over the application of ERISA's whistleblower provision when employees make unsolicited complaints to management.<sup>93</sup> Moreover, with the sheer number of individuals who have a pension and benefit plan governed by ERISA, the scope of ERISA's whistleblower provision is frequently litigated at the district court level.<sup>94</sup> On March 7, 2011, the Supreme Court denied Edwards' petition for writ of certiorari.<sup>95</sup>

### III. THE FUTURE OF ERISA'S WHISTLEBLOWER PROVISION

As detailed in Part II of this Comment, the five circuit courts that have analyzed ERISA's whistleblower provision are divided as to whether ERISA extends protection to employees who voice internal workplace complaints. Undoubtedly, Congress's failure to define the terms "inquiry" and "proceeding"<sup>96</sup> and the numerous methods of statutory interpretation available have accounted for the inconsistent decisions among the circuits.<sup>97</sup> The inability of the courts to achieve

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90. See Appellant's Petition for Rehearing, *Edwards* 610 F.3d 217 (3d Cir. 2010) (No. 09-3198) (July 8, 2010 docket entry).

91. See *Edwards*, petition for cert. filed, 2010 WL 4914509 (U.S. Nov. 30, 2010) (No. 10-732).

92. *Edwards*, 2010 WL 4914509 at \*i.

93. *Id.* at \*7.

94. See *id.* at \*14-15 ("[ERISA] applies to pension and benefit plans that cover over 150 million people. Eighty-six million actively participate in ERISA pension plans and almost seventy percent of Americans who have health insurance receive it through an ERISA-governed plan.").

95. *Edwards*, 610 F.3d at 217; cert. denied, 2011 WL 767661 (U.S. Mar. 7, 2011).

96. See ERISA, 29 U.S.C. § 1002 (1974).

97. Cf. *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir. 1994) (applying a fact intensive analysis and extending broad interpretation to ERISA's whistleblower provision), and *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993) (applying a practical application of ERISA's language and noting that excluding internal workplace complaints would "discourage the whistle[blower] before the whistle is blown"), with *Edwards*, 610 F.3d at 225 (holding ERISA's whistleblower provision

uniform interpretation of ERISA's whistleblower provision puts employees in a precarious position. Without consistent interpretation, effective enforcement of ERISA will never be achieved.

In light of the current circuit split over the scope of ERISA's whistleblower provision and the Supreme Court's denial of certiorari in *Edwards*, this section argues courts should construe ERISA's whistleblower provision broadly. Accordingly, Part A highlights the policy reasons for broadening the scope of federal whistleblower provisions. From there, Part B of this section details the different methods of statutory interpretation the Ninth, Fifth, Fourth, Second, and Third Circuits have employed to determine the scope of ERISA's whistleblower provision<sup>98</sup> with an analysis of the degree of protection each interpretation affords whistleblowers.

#### A. *Importance of Affording Broad Protection Under ERISA*

In enacting federal whistleblower provisions, Congress intended to rely upon information and complaints gathered from employees to effectuate the broader purposes of the federal statute at issue.<sup>99</sup> However, the risks attached to bringing forth a violation of a federal statute are numerous.<sup>100</sup> While it is the public and other employees who reap the benefits sown by the whistleblower, there are dire consequences for the courageous act of blowing the whistle.<sup>101</sup> First, the security of a

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does not protect an employee's unsolicited internal complaints to management); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005) ("The proper focus is not on the formality or informality of the circumstances under which an individual gives information, but rather on whether the circumstances can fairly be deemed to constitute an 'inquiry.'"); and *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 428 (4th Cir. 2003) (limiting the language "inquiry or proceeding" solely to administrative or legal proceedings and declining to extend the statute's coverage to intra-company complaints).

98. See *Edwards*, 610 F.3d at 222-24 (focusing on the plain meaning of Section 510); *Nicolaou*, 402 F.3d at 328-30 (focusing on the fair import of the term "inquiry" and comparing the language of FLSA to ERISA); *King*, 337 F.3d at 427 (relying on FLSA's whistleblower provision); *Anderson*, 11 F.3d at 1315 (applying a fact intensive analysis in determining whether an employee's action fell within the ambit of an "inquiry or proceeding"); *Hashimoto*, 999 F.2d at 411 (applying a practical application of ERISA's language and noting that excluding internal workplace complaints would "discourage the whistle[blower] before the whistle is blown").

99. See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed [FLSA] standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied.").

100. See *id.* at 293.

101. See *id.* ("Faced with such alternatives, employees understandably might decide that matters had best be left as they are.").

whistleblower's job is at risk for voicing statutory violations.<sup>102</sup> Second, should a whistleblower suffer an adverse employment decision as a result of blowing the whistle, he or she must fund the costs of litigating in court. This decision will inevitably cause the whistleblower to endure several years litigating in court with little guarantee of success.<sup>103</sup> If justice is not served in court, then the whistleblower is left with few places to turn because many organizations are hesitant to employ a former whistleblower.<sup>104</sup> Now the jaded whistleblower's job is long gone, there is a dismal chance of finding future employment, and the once courageous whistleblower has most likely lost all faith in America's justice system. As one whistleblower stated, "[i]f I had to do it over again, I wouldn't blow the whistle for a million dollars. It ruined my life."<sup>105</sup> Are these the results Congress had in mind?

With these dire consequences attached to blowing the whistle, it is imperative that federal whistleblower provisions offer protection to the few individuals willing to report workplace violations to the appropriate authority. The societal benefits in obtaining information from whistleblowers are obvious; yet, there appears to be a stark disconnect between Congress' intention in enacting whistleblower provisions and the protection these provisions afford. ERISA's inability to afford whistleblowers uniform protection for voicing internal workplace complaints, as evidenced by the varied interpretations from the circuit courts, highlights this dichotomy.<sup>106</sup> Accordingly, it is imperative courts

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102. See C. FRED ALFORD, *WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER* 19 (Cornell University Press 2001).

103. See *id.* (arguing that whistleblowers who litigate their cases often suffer from depression and alcoholism, have lost their houses and families, and have gone bankrupt).

104. See *id.* at 20 (citing MYRON PERETZ GLAZIER AND PENINA MIGDAL GLAZIER, *THE WHISTLEBLOWERS* 228 (Basic Books 1989) ("Nobody wants to hire former whistleblowers. They are all afraid of what we would do if we were asked to tell the truth about some problem.")).

105. *Id.* at 1.

106. Cf. *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir. 1994) (applying a fact intensive analysis and extending broad interpretation to ERISA's whistleblower provision), and *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 411 (9th Cir. 1993) (applying a practical application of ERISA's language and noting that excluding internal workplace complaints would "discourage the whistle[]blower before the whistle is blown"), with *Edwards*, 610 F.3d at 225 (holding ERISA's whistleblower provision does not protect an employee's unsolicited internal complaints to management); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005) ("The proper focus is not on the formality or informality of the circumstances under which an individual gives information, but rather on whether the circumstances can fairly be deemed to constitute an 'inquiry.'"); and *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 428 (4th Cir. 2003) (limiting the language "inquiry or proceeding" solely to administrative or legal proceedings and declining to extend the statute's coverage to intra-company complaints).

are cognizant of these risks when analyzing the scope of ERISA's whistleblower provision.

*B. Statutory Interpretation of ERISA's Whistleblower Provision*

While two interpretations have emerged from the deepening circuit split surrounding the scope of ERISA's whistleblower provision, the individual analyses from the five circuit courts differ drastically. The five circuit courts that have interpreted ERISA's whistleblower provision have relied upon three methods of interpretation, including: (1) the fair import of the terms "inquiry" and "proceeding;"<sup>107</sup> (2) the synonymous statutory construction and interpretation of FLSA;<sup>108</sup> and (3) the policy ramifications of construing ERISA's whistleblower provision too broadly or too narrowly.<sup>109</sup> This section considers each method of statutory construction mechanism in turn.

1. Fair Import Analysis

A fair import analysis, also known as a formalist approach to statutory interpretation, seeks to derive statutory meaning purely through a dictionary definition of the terms at issue.<sup>110</sup> The Second Circuit and the Third Circuit employed a formalist approach in an attempt to discern meaning from the terms "inquiry" and "proceeding" contained in ERISA's whistleblower provision.<sup>111</sup> In *Nicolaou*, the Second Circuit concluded the term "proceeding" means "the progression of a lawsuit or

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107. See *Edwards*, 610 F.3d at 222-24; *Nicolaou*, 402 F.3d at 328-30.

108. See *Nicolaou*, 402 F.3d at 328-30; *King*, 337 F.3d at 427.

109. See *Anderson*, 11 F.3d at 1315; *Hashimoto*, 999 F.2d at 411.

110. See R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 PEPP. L. REV. 37, 48 (1997).

A formalist prefers clear, bright-line rules. Because inquiry into the in-fact intent of a legislature can be a messy proposition, a formalist judge is likely to be tempted to dispense with original intent in favor of asking merely what the statute's words mean. Determining the meaning of a statute's words can be done in a more mechanical fashion. Thus, the classic formalist line is perhaps best stated by the maxim that the court is not to determine legislative intent, but rather to interpret solely what the statute's words mean. In making this determination, most formalist judges will resort not only to dictionary definitions of words, but also to grammatical maxims of construction to help determine what the words mean.

*Id.* at 48-49.

111. Additionally, the Second Circuit looked to FLSA for assistance in determining the scope of ERISA's whistleblower provision. See discussion *infra* Part III.B.2.a.

other business before a court, agency, or other official body,”<sup>112</sup> while an “inquiry” refers “broadly to any request for information.”<sup>113</sup> Likewise, in *Edwards*, the Third Circuit concluded the term “proceeding” means “[t]he regular and orderly progression of a lawsuit’ or the ‘procedural means for seeking redress from a tribunal or agency,’”<sup>114</sup> while an “inquiry” is defined as “[a] request for information.”<sup>115</sup>

At first glance, the Second Circuit seems to employ a broad application of ERISA’s whistleblower provision; however, its decision does not extend full protection to future ERISA whistleblowers.<sup>116</sup> Under the Second Circuit’s analysis, ERISA’s whistleblower provision would protect an employee who met with the president of a company to give information about a violation of ERISA.<sup>117</sup> While such a meeting does not fall under the ambit of a “proceeding,” the fair import of the term “inquiry” would extend coverage to such an employee.<sup>118</sup> In contrast, however, the Second Circuit’s analysis would fail to protect a whistleblower that merely brought a potential violation of ERISA to a supervisor because this would not rise to the level of the dictionary definition of an “inquiry.”

Similar to the Second Circuit, the Third Circuit’s treatment of the terms “proceeding” and “inquiry” narrow the scope of ERISA’s whistleblower provision. The Third Circuit restricts the term “inquiry” to only inquires “made *of* an employee, not inquires made *by* an employee.”<sup>119</sup> Accordingly, a manager or supervisor must approach an

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112. *Nicolaou*, 402 F.3d at 329; see also BLACK’S LAW DICTIONARY 1241 (8th ed. 2004).

113. *Nicolaou*, 402 F.3d at 329; see also BLACK’S LAW DICTIONARY 808 (8th ed. 2004).

114. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010) (citing BLACK’S LAW DICTIONARY 1324 (9th Ed. 2009)).

115. *Edwards*, 610 F.3d at 223 (citing BLACK’S LAW DICTIONARY 864 (9th Ed. 2009)).

116. Cf. *Nicolaou*, 402 F.3d at 330 (extending the coverage of ERISA’s whistleblower provision to an employee who met with in-house counsel and the company president regarding a violation of ERISA), with *King v. Marriott Int’l, Inc.*, 337 F.3d 421, 428 (4th Cir. 2003) (concluding that ERISA’s whistleblower provision only covers activities more formal than a written or oral complaint to a supervisor).

117. See *Nicolaou*, 402 F.3d at 330 (extending the coverage of ERISA’s whistleblower provision to an employee who met with in-house counsel and the company president regarding a violation of ERISA).

118. See *id.* (holding that a meeting with the company president constituted “something less than a formal proceeding, but . . . sufficient to constitute an “inquiry” within the meaning of [ERISA’s whistleblower provision].”). It appears the Second Circuit’s decision in *Nicolaou* is limited to the facts of the case. Had the employee not met with in-house counsel, it is doubtful the employee’s actions would have risen to the level of an inquiry.

119. *Edwards*, 610 F.3d at 223 (emphasis added).

employee for information regarding an ERISA violation.<sup>120</sup> Additionally, the Third Circuit declined to determine “the level of formality” required to meet the definition of a proceeding.<sup>121</sup>

The Second and Third Circuit’s analyses of ERISA’s whistleblower provision ignore Congress’ intent in enacting whistleblower provisions and frustrate the whistleblower process in general. If employees are left unprotected for initially bringing a violation of ERISA to the attention of the appropriate authority, then employees will be discouraged from initiating the first step in the whistleblower process.<sup>122</sup> The Second and Third Circuit’s holdings require individuals with the ability to make employment or legal decisions within the company to first seek out the would-be whistleblower for information. Thus, an employee must be approached by an official within the company for his or her actions to fall under the ambit of an “inquiry” within ERISA’s whistleblower provision. Accordingly, the formalist approach fails to provide protection to an employee who initially voices an internal workplace complaint.

## 2. Synonymous Statutory Interpretation: ERISA and FLSA

Like ERISA, FLSA contains a whistleblower provision protecting employees against workplace retaliation.<sup>123</sup> The Fourth Circuit and Second Circuit have included in their statutory interpretation of ERISA’s whistleblower provision an analysis of FLSA, while the Third Circuit declined to draw such an analogy.<sup>124</sup> FLSA regulates the maximum number of hours an employee may work, overtime compensation, and employee wages.<sup>125</sup>

Although FLSA’s and ERISA’s whistleblower provisions are similar, there are two important differences between the whistleblower provisions of ERISA and FLSA. First, FLSA extends coverage to employees who have “filed any complaint,”<sup>126</sup> while ERISA’s

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120. *Id.*

121. *Id.* n.7.

122. *See* Hashimoto v. Bank of Hawaii, 999 F.2d 408, 411 (9th Cir. 1993) (“[T]he anticipatory discharge discourages the whistle[bl]ower before the whistle is blown.”).

123. *See* 29 U.S.C. § 215(a)(3) (stating, in part, that it shall be unlawful to discharge or discriminate against an 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.”).

124. *Edwards*, 610 F.3d at 225 (“[T]he conclusion that internal complaints are protected under the FLSA does not require a parallel conclusion under ERISA’s distinct statutory language.”).

125. *See* Fair Labor Standards Act, 29 U.S.C. §§ 207-208 (2011).

126. *Id.*

whistleblower provision includes the language “given information.”<sup>127</sup> Second, FLSA only extends coverage to employees who have testified or who are about to testify in any *proceeding*, while ERISA protects employees who have testified or who are about to testify in any *inquiry or proceeding*.<sup>128</sup> As explained, *infra*, the circuit courts disagree as to which statute affords more protection to whistleblowers.

a. Second Circuit

Prior to examining ERISA’s whistleblower provision in *Nicolaou*, the Second Circuit analyzed the scope of FLSA’s whistleblower provision in *Lambert v. Genesse Hospital*.<sup>129</sup> There, the court held the plain language of FLSA’s whistleblower provision is limited to the filing of formal complaints.<sup>130</sup> After noting its decision strayed from the other circuits that have considered FLSA’s provision, the court declined to extend the coverage of FLSA to informal workplace complaints.<sup>131</sup>

Over a decade later, the Second Circuit proceeded to interpret the differences in statutory language between FLSA and ERISA’s whistleblower provisions in *Nicolaou*.<sup>132</sup> In that decision, the court drew several distinctions between the statutory constructions of the two statutes.<sup>133</sup> The court concluded the term “inquiry” is much less formal than the term “proceeding.”<sup>134</sup> Because FLSA’s whistleblower provision does not contain the term “inquiry,” the court reasoned Congress intended to afford more protection under ERISA’s whistleblower provision than under FLSA’s.<sup>135</sup> Thus, according to the Second Circuit, ERISA’s scope of protection is much broader than that of FLSA and should afford more protection to whistleblowers.<sup>136</sup>

b. Fourth Circuit

The Fourth Circuit also relied upon its interpretation of FLSA’s whistleblower provision to interpret ERISA. In *Ball v. Memphis Bar-B-*

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127. See ERISA, 29 U.S.C. § 1140 (1974).

128. Cf. 29 U.S.C. § 215 (a)(3) (containing the statutory language “testified or is about to testify in any such proceeding”), with 29 U.S.C. § 1140 (containing the statutory language “testified or is about to testify in any inquiry or proceeding”).

129. *Lambert v. Genesse Hosp.*, 10 F.3d 46 (2d Cir. 1993), *abrogated by* *Kasten v. Gobain Perf. Plastics Corp.*, 2011 WL 977061, No. 09-834 (March 22, 2011).

130. See *id.* at 55.

131. See *id.*

132. See *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 329 (2d Cir. 2005).

133. See *id.* at 328-29.

134. *Id.* at 329.

135. See *id.*

136. See *id.*

*Q Co.*,<sup>137</sup> the Fourth Circuit found Congress' use of the term "proceeding" in FLSA encompassed procedures within a judicial or administrative tribunal.<sup>138</sup> Thus, the court surmised, Congress intended FLSA's whistleblower provision to encompass adverse employment actions taken against an employee *after* formal proceedings began, but not complaints made to a supervisor for a violation of FLSA.<sup>139</sup> The Fourth Circuit's analysis in *Ball* became essential to its interpretation of ERISA's whistleblower provision three years later in *King*, where the court limited the scope of ERISA's whistleblower provision to activities that were "legal or administrative."<sup>140</sup> Instead of focusing on the differences between FLSA and ERISA, the court reasoned both provisions were "much narrower" than Title VII of the Civil Rights Act of 1964's whistleblower provision;<sup>141</sup> thus, FLSA and ERISA deserved a "much more circumscribed" remedy.<sup>142</sup>

c. Third Circuit

The Third Circuit declined to utilize its treatment of FLSA's whistleblower provision in *Brock v. Richardson*<sup>143</sup> to analyze the scope of ERISA's text. In *Brock*, the Third Circuit held FLSA's whistleblower provision afforded protection to an employee who participated in an investigation with a compliance officer working for the Department of Labor.<sup>144</sup> Although the court did not determine whether FLSA protects

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

138. *See id.* at 364 (reasoning that "proceeding" in FLSA's language "refers to procedures conducted in judicial or administrative tribunals").

139. *Id.*

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

141. *See id.* ("The anti-retaliation provision in [ERISA] is much narrower than the equivalent anti-retaliation provisions in such statutes as Title VII of the Civil Rights Act of 1964.").

142. *See id.* (citing *Ball*, 228 F.3d at 364).

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

144. *See id.* at 125. In *Brock*, the employee signed a written statement with the compliance officer which placed his employer's alleged violations in writing. *See id.* at 122. The court's analysis did not focus on whether the employee's actions of signing a written statement with the compliance officer constituted a "proceeding" under FLSA; rather, the court focused on the employer's subjective state of mind. *See id.* at 125. The court concluded that because the employer believed the employee had filed a formal complaint with the Wage and Hour Division, the employee was covered by FLSA's whistleblower provision. *See id.* While the Third Circuit did not analyze the scope of the term "proceeding" under FLSA's whistleblower provision in *Brock*, the court noted that creating a barrier between employees and officials would amount to ineffective enforcement of FLSA's provisions and diminish the statute's purpose. *See id.* at 124. Rather, employees should have unfettered access to voice their grievances to officials. *See id.* (citing *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("[Congress] chose to rely on information and complaints received from employees

internal complaints, it cited to that broad approach with approval in dicta.<sup>145</sup> The Third Circuit distinguished its decision in *Brock*, stating “it concerned a different issue in the context of a different statute.”<sup>146</sup> The court noted the whistleblower provisions of ERISA and FLSA “are not identical.”<sup>147</sup> Rather, FLSA’s whistleblower provision “extends broadly to persons that have ‘filed any complaint’ without explicitly stating the level of formality required.”<sup>148</sup> Therefore, the court noted, “the conclusion that internal complaints are protected under [ ] FLSA does not require a parallel conclusion under ERISA’s distinct statutory language.”<sup>149</sup>

#### d. FLSA and ERISA—Confusion Across the Circuits

While FLSA’s whistleblower provision is similar to ERISA’s, there are important differences deserving attention.<sup>150</sup> Congress included the additional term “inquiry” within ERISA’s whistleblower provision, and, as the Second Circuit noted, this is indicative of Congress’ intention to provide more protection under ERISA.<sup>151</sup> Additionally, three circuit courts have construed the scope of protection afforded between the two statutes differently. For example, in *Nicolaou*, the Second Circuit maintained ERISA’s whistleblower provision is broader than FLSA’s,<sup>152</sup>

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seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be excepted if employees felt free to approach officials with their grievances.”)). The court cited a line of cases from other circuits, noting that courts have looked to FLSA’s purpose and have extended coverage to activities that otherwise would not be covered. *See Brock*, 812 F.2d at 124. The court explained that FLSA’s anti-retaliation provision has been extended to instances in which the employee’s activities “were considered necessary to the effective assertion of employees’ rights under the [FLSA], and thus entitled to protection”. *Id.* The court also stated that FLSA’s language has been applied for the purpose of protecting employees who have protested an employer’s violation of FLSA. *See id.*

145. *See* *Edwards v. A.H. Cornell*, 610 F.3d 217, 224 n.8 (3d. Cir. 2010).

146. *Id.* at 224.

147. *Id.*

148. *Id.*

149. *Id.* at 225. In his dissent, Judge Cowen criticized the majority’s discussion of FLSA. *See id.* at 230-31 (Cowen, J., dissenting). While agreeing FLSA differs from ERISA, Judge Cowen argued “the differences here actually weigh against the interpretation offered by the majority.” *Id.* at 230.

150. *Cf.* 29 U.S.C. § 215 (a)(3) (containing the statutory language “testified or is about to testify in any such proceeding”), *with* 29 U.S.C. § 1140 (containing the statutory language “testified or is about to testify in any inquiry or proceeding”).

151. *See Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 328-29 (2d Cir. 2005) (noting that the informality of the term “inquiry” is indicative of Congress’s intent to construe ERISA broadly).

152. *See id.* at 328 (“Section 510 . . . is unambiguously broader in scope than Section 15(a)(3) of FLSA.”).

while, in *Edwards*, the Third Circuit found FLSA is broader than ERISA.<sup>153</sup> To the contrary, in *King*, the Fourth Circuit applied the same interpretation to both ERISA and FLSA.<sup>154</sup> Adding to the confusion, even though both the Second Circuit and the Fourth Circuit relied upon their decisions in interpreting FLSA to define the scope of ERISA's whistleblower provision, the circuits differed in their analyses and outcomes.<sup>155</sup>

On March 22, 2011, the Supreme Court held in *Kasten v. Saint-Gobain Performance Plastics Corp.*<sup>156</sup> that FLSA's whistleblower provision protects oral as well as written complaints.<sup>157</sup> As noted, *supra*, however, the circuits differ in their analyses of FLSA and ERISA's whistleblower provision. Given the difference in protection the Second Circuit and the Fourth Circuit have afforded whistleblowers under ERISA after analyzing FLSA's whistleblower provision, and the Third Circuit's decision not to draw an analogous interpretation to FLSA, it is unclear whether the Supreme Court's decision in *Kasten* will provide guidance to the circuits' in the future.

### 3. Policy Interpretation of ERISA

Of the five circuit courts to interpret ERISA's whistleblower provision, only one court has relied entirely upon a policy interpretation to define its scope. In *Hashimoto*, the Ninth Circuit looked to the purpose and process of ERISA's whistleblower provision to define its scope.<sup>158</sup> The court believed construing ERISA's whistleblower

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153. See *Edwards*, 610 F.3d at 224-25 (noting that FLSA's whistleblower provision "extends broadly to persons that have 'filed any complaint,' without explicitly stating the level of formality required" while ERISA's whistleblower provision, "in contrast, extends only to persons that have 'given information or [ ] testified' in an 'inquiry or proceeding.'").

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

155. Cf. *id.* (holding that ERISA's whistleblower provision merely encompasses activities that are "legal or administrative"), with *Nicolaou*, 402 F.3d at 329 (noting that ERISA's whistleblower provision is much broader than that of FLSA.).

156. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 2011 WL 977061, No. 09-834 (March 22, 2011).

157. *Id.* at \*2.

158. See *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 411 (9th Cir. 1993). The Ninth Circuit's policy interpretation in *Hashimoto* is also consistent with its interpretation of FLSA's whistleblower provision six years later. In *Lambert v. Ackerley*, the Ninth Circuit reasoned that Congress designed FLSA's whistleblower provision so that employees need not jeopardize their employment when trying to enforce their rights under FLSA. See *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999). Construing FLSA too narrowly, the court opined, would impede the very protection Congress sought to afford employees under the Act. See *id.* Finally, the court noted that its decision was

provision too narrowly would lead to illogical results.<sup>159</sup> Moreover, the Fifth Circuit's interpretation of ERISA's whistleblower provision in *Anderson* mirrors the result of the Ninth Circuit.<sup>160</sup> Unfortunately, the analysis in *Anderson* is sparse; however, it appears the court also intended to interpret this section of ERISA broadly.<sup>161</sup>

Looking to the substance of ERISA's whistleblower provision, if the term "inquiry" is not interpreted to include employers who bring violations of ERISA to the attention of a supervisor, then the purpose of ERISA's whistleblower provision is thwarted. While courts agree employees giving information in legal proceedings are protected from employer retaliation, the failure to extend protection to employees who voice internal workplace complaints ignores the logical progression of the whistleblower process.<sup>162</sup> As the Ninth Circuit notes, if an employer can take an adverse employment action against an employee for raising a problem, then the process of bringing the violation to light is "interrupted at its start."<sup>163</sup> Accordingly, applying a policy interpretation of ERISA's whistleblower provision yields the broadest protection to whistleblowers and effectuates the purpose of ERISA's whistleblower provision.

#### IV. CONCLUSION

As detailed by this Comment, the scope of ERISA's whistleblower provision has become a point of contention among the circuit courts. Given the Supreme Court's denial of certiorari in *Edwards*, the inconsistent approaches to ERISA's whistleblower provision remain at the forefront of ERISA's jurisprudence. Additionally, the ambiguous language of ERISA's whistleblower provision and the inability of the circuit courts to interpret this language consistently significantly limits the protections extended to employees for voicing violations of ERISA.<sup>164</sup> Moreover, the Fourth, Second, and Third Circuit's analyses

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in accordance with the other circuits that had considered and applied a broad and sweeping interpretation of FLSA's whistleblower provision. *See id.*

159. *See Hashimoto*, 999 F.2d at 411 ("It would make little sense to restrict the whistle[bl]ower protection to the corporation and not extend it to the agents by which the corporation must act.").

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

161. *See id.* at 1315 ("ERISA broadly prohibits the termination or other adverse treatment. . .").

162. *See Hashimoto*, 999 F.2d at 411 ("The normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan.").

163. *Id.*

164. The Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1974).

of ERISA's whistleblower provision create precarious consequences for whistleblowers.<sup>165</sup>

Accordingly, without guidance from the Supreme Court, circuit courts analyzing the scope of ERISA's whistleblower provision as an issue of first impression should adopt a broad interpretation, similar to the Ninth Circuit's, to extend whistleblowers protection and to provide effective enforcement of ERISA. Of the five circuits to consider the scope of ERISA's whistleblower provision, the Ninth Circuit's policy interpretation yields the broadest protection to whistleblowers and allows for the most effective enforcement of ERISA.<sup>166</sup> Because employees are in the best position to detect illegal or unethical workplace conduct, it is important to encourage employees to report violations of ERISA.<sup>167</sup> Without the assistance of employees, the effectiveness of ERISA is dramatically diminished.<sup>168</sup>

Given the risks surrounding the act of whistleblowing and the need to safeguard the retirement rights of employees, America must protect its most valuable source for detecting ERISA workplace violations.<sup>169</sup> Interpreting ERISA's whistleblower provision to encompass the activity of voicing internal workplace complaints is the only way to achieve effective enforcement of ERISA. With the cries of whistleblowers sounding faintly in the distance, now is the time to make their whistles heard.

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165. See *Edwards v. A.H. Cornell*, 610 F.3d 217, 225 (holding ERISA's whistleblower provision does not protect an employee's unsolicited internal complaints to management); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 329 (noting that ERISA's whistleblower provision is much broader than that of FLSA); *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003) (holding that ERISA's whistleblower provision merely encompasses activities that are "legal or administrative").

166. See *Hashimoto*, 999 F.2d at 411.

167. See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

168. See *Hashimoto*, 999 F.2d at 411 ("It would make little sense to restrict the whistle[blower] protection to the corporation and not extend it to the agents by which the corporation must act.").

169. See *Mitchell*, 361 U.S. at 292.