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On the Waterfront: Dissecting the Scope of ERISA Section 510

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INTRODUCTION

This article addresses whether the anti-retaliation provision of the Employee Retirement Income Security Act (hereinafter "ERISA"),[1] 29 U.S.C. § 1140 [Section 510], permits an employer to discharge an employee for making unsolicited internal complaints regarding violations of the statute.

ERISA Section 510 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. 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. In the case of a multiemployer plan, it shall be unlawful for the plan sponsor or any other person to discriminate against any contributing employer for exercising rights under this chapter or for giving information or

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1. *See* Employee Retirement Income Security Act of 1974 (ERISA) § 302, 29 U.S.C. § 1001(b) (2018).

> testifying in an inquiry or proceeding relating to this chapter before Congress. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.[2]

The federal circuits have split as to the interpretation of Section 510, specifically given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA]."[3] The circuits that have narrowly construed the statute employ a textualist approach.[4] "Textualism posits that courts 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."[5] The circuits that have broadly construed the statute employ focus on the "give information" language of Section 510. Moreover, said circuits have also pointed to *Kasten v. Saint–Gobain Performance Plastics Corp.*, where the U.S. Supreme Court held that "filed" should be broadly construed.[6]

This article asserts that Section 510 does not protects an employee's unsolicited internal complaints to management, and therefore permits an employer to discharge an employee for making unsolicited internal complaints regarding violations of the statute. Courts that have employed a broad interpretation of Section 510 have done so by selectively choosing language from the statute, rather than interpreting the statute as a whole.[7] Forbye, said courts have not asserted a canon of construction for which they are basing their interpretation.[8] Rather, they consistently state some variation of "employee made an unsolicited internal complaint, and thereby was 'giving information' as per what is proscribed by the statute."[9] This violates statutory interpretation:[10]

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2. 29 U.S.C. § 1140 (2018).

3. *See* Sexton v. Panel Processing, Inc., 754 F.3d 332, 333 (6th Cir. 2014). Judge White dissented, explaining the circuit split:

> The question whether section 510 protects unsolicited employee complaints has split the circuits. The Fifth, Seventh, and Ninth Circuits have interpreted § 510 to protect an employee's "unsolicited internal complaint." In contrast, the Second, Third, and Fourth Circuits have interpreted § 510 as only protecting employees when the employer asks the first question/initiates the inquiry.

See id. at 342.

4. *See infra* Part I.A.

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

6. *See* Kasten v. Saint–Gobain Performance Plastics Corp., 563 U.S. 1, 11, 14 (2011).

7. *See* Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 328 (2d Cir. 2005).

8. *See* Max Birmingham, *Whistle While You Work: Interpreting Retaliation Remedies Available to Whistleblowers in the Dodd-Frank Act*, 13 FLA. A & M U. L. REV. 1, 1 (2017) ("Courts engage in judicial activism when they interpret laws without regards to a canon of construction.").

9. *See infra* Part I.B.

10. *See* Harrington v. Smith, 28 Wis. 43, 59 (1871) (stating example of how statutes should be interpreted).

> *The true rule for the construction of statutes is to look at the whole and every part of the statute*, and the apparent intention derived from the whole, to the subject matter, to the effects and consequences, and to the reason and spirit of the law; and thus to ascertain the *true* meaning of the legislature, though the meaning so ascertained may sometimes conflict with the literal sense of the words.[11]

"When courts rely on non-textualism, interpretations are much more susceptible to manipulation as courts are enabled to foist their own subjective views on the law."[12]

This argument proceeds as follows. Part I analyzes case law and how the federal circuits have interpreted the statute.[13] Part II explores the misconception that several courts have promulgated, which is that Section 510 is a remedial statute, and therefore in order to bring forth a claim under the statute there needs to be standing under ERISA Section 502.[14] Part III identifies public policy purposes as a reason for why courts should construe the statute narrowly.[15] Part IV analogizes interpretations of other whistleblower statutes to demonstrate why Section 510 should be narrowly interpreted.[16] Part V identifies that a broad interpretation of Section 510 would lead to *reductio ab adsurdum*.[17]

I. CURRENT STATE OF THE LAW

A. Courts Which Narrowly Interpret Section 510 of ERISA

1. United States Court of Appeals for the Second Circuit

In *Nicolaou v. Horizon Media, Inc.*, the Second Circuit held that an employee who made an unsolicited internal complaint to management is not a formal proceeding, and is therefore not a protected activity.[18] However, the court narrowed its decision with contradictory and inconsistent syllogism. The court stated that "[t]he meeting with Koenigsberg was something less than a formal proceeding, but we believe it was sufficient to constitute an "inquiry" within the meaning of Section

11. *Id.* (emphasis added).
12. *See* Birmingham, *supra* note 8, at 42.
13. *See infra* Part I.
14. *See infra* Part II.
15. *See infra* Part III.
16. *See infra* Part IV.
17. *See infra* Part V.
18. Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 329 (2d Cir. 2005).

510."[19] The court then explained that "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.'"[20] If the meeting at issue is sufficient to constitute an "inquiry," as the court alleged, then it should have ruled in favor of Nicolaou.[21] Furthermore, the court does not explain why formality or informality of the circumstances does not factor into its analysis even though it is looking at "circumstances."[22] The court did not elaborate on what circumstances it was scrutinizing.[23]

In July 1998, Chrystina Nicolaou was hired at Horizon Media, Inc. (hereinafter "Horizon") as its Director of Human Resources and Administration.[24] One of her responsibilities was to serve as a fiduciary trustee of Horizon's 401(k) employee benefits plan.[25] Soon after her tenure began, Nicolaou "discovered a serious payroll discrepancy involving underpayment of overtime to all non-exempt employees of the [New York City] and Los Angeles offices."[26] Nicolaou notified Jerry Riley, the Chief Financial Officer ("CFO") of Horizon, about this matter.[27] Riley advised Nicolaou to drop the matter.[28] Then, on two separate occasions Nicolaou contacted Stewart Linder, the Controller of Horizon, regarding this matter.[29] Both times Linder declined to address the matter.[30] Nicolaou next turned to Mark Silverman, an attorney for Horizon.[31] Silverman looked into the matter and confirmed that there was a payroll discrepancy.[32] Nicolaou and Silverman proceeded to meet with

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19. *Id.* at 330.

20. *Id.* The court then explained its view of what constitutes an inquiry:

> In any event, as we have explained, 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." Nicolaou's meeting with Koenigsberg regarding possible violations of ERISA—a meeting that was initiated at Silverman's behest—falls within the definition of an "inquiry" and, therefore, the protection of Section 510.

See id.

21. *Id.* at 329.
22. *Id.* at 330.
23. *Id.*
24. *Id.* at 326.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

William Koenigsberg, the President of Horizon.[33] According to Nicolaou, Koenigsberg was vexed that this issue was being brought to his attention.[34] Shortly thereafter, Koenigsberg announced that a new human resources professional would be brought onboard to take over for Nicolaou because she was demoted to "Office Manager."[35] Horizon hired two individuals to take over Nicolaou's former responsibilities.[36] Subsequently, Horizon terminated Nicolaou's employment in November 2000.[37] Nicolaou filed suit alleging that alleging that the termination violated the anti-retaliation provision of ERISA as well as Sections 15 and 16 of the Fair Labor Standards Act (hereinafter "FLSA").[38]

The *Nicolaou* court did not properly interpret the statute. The antiretaliation provision of ERISA prohibits an employer from discriminating against an employee who has "given information or has testified or is about to testify in any *inquiry* or *proceeding* relating to [ERISA.]"[39] Black's Law Dictionary defines inquiry as "[a] request for information."[40] Black's Law Dictionary defines proceeding as:

> 1. The regular and orderly progression of a lawsuit, including all acts and evens between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a court of other official body; a hearing 5. *Bankruptcy*. A particular dispute or matter arising within a case – as opposed to the case as a whole.[41]

While the Second Circuit came to the same conclusion as the Fourth Circuit, it disagreed with the Fourth Circuit in its basis for the decision.[42] The Second Circuit states that "*We note that the amended complaint does not specify by whom this meeting was arranged.*"[43] It is clearly alleged, however, that in addition to informing him of the existence of the payroll

33. *Id.*
34. *See id.*
35. *See id.*
36. *Id.* at 326-27.
37. *Id.* at 327.
38. *See id.*
39. *See* 29 U.S.C. § 1140 (2018).
40. *See Nicolaou*, 402 F.3d at 329; *see also Inquiry*, BLACK'S LAW DICTIONARY (11th ed. 2019).
41. *See Proceeding*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Nicolaou*, 402 F.3d at 329.
42. *See Nicolaou*, 402 F.3d at 330 (citing King v. Marriott Int'l, Inc., 337 F.3d 421, 427 (4th Cir. 2003)).
43. *Id.* at 326 (emphasis added).

discrepancy, Silverman urged Koenigsberg to see that the problem would be promptly rectified."[44] The Second Circuit's analysis is spurious, as it opined that Nicolaou would be protected under Section 510 if it could be demonstrated that Koenigsberg contacted her about the plan's underfunding.[45] In a contradiction, the court proclaims that "[t]he meeting with Koenigsberg was something less than a formal proceeding, but we believe it was sufficient to constitute an 'inquiry' within the meaning of Section 510."[46] The court is completely ignoring the language of the statute,[47] and fixated on the definition of inquiry by an unqualified interpretation of "request."[48] The whole-text canon holds that "[t]he text must be construed as a whole."[49] The relevant part of Section 510 states an employer is prohibited from discriminating against an employee who has "given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA]."[50] Here, the court is completely ignoring the "has testified or is about to testify" part in its analysis.[51] Nicolaou is giving information to Koenigsberg in a meeting, and not in a situation where she has testified or was about to testify.[52] Thus, under these facts, even if Koenigsberg contacted Nicolaou about the plan's underfunding, it would be still be a protected activity.[53]

In a concurring opinion, Judge Pooler offered reasoning that is a legal argument insomuch as she is making an *argumentum ad consequentiam* (argument to the consequences).[54] Judge Pooler argues that if a fiduciary uncovers possible breaches of ERISA, a narrow interpretation of Section 510 would result in one of the following options, and proclaims that "[t]his is surely a result to be avoided."[55] Judge Pooler states a fiduciary's options as:

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44. *Id.*

45. *See id.* at 330 ("Certainly, if Nicolaou can 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.").

46. *Id.*

47. 29 U.S.C. § 1140 (2018).

48. *See Nicolaou*, 402 F.3d at 329 (displaying the court's view of the relationship between a request and an inquiry).

49. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012).

50. 29 U.S.C. § 1140 (2018).

51. *See Nicolaou*, 402 F.3d at 329 (displaying the court's analysis regarding Section 510).

52. *Id.* at 329-30.

53. *See id.* at 329 (detailing the broad range of situations the court believes to be covered under Section 510).

54. *See id.* at 330-32 (Pooler, J., concurring).

55. *Id.* at 332 (Pooler, J., concurring).

> (1) do nothing and face possible co-fiduciary liability under ERISA Section 405; (2) make her own inquiries among her superiors and face a retaliatory response; (3) bring the matter to the attention of a regulatory agency and hope that doing so is not discovered by her superiors, at least until the agency begins its own inquiry; or (4) take upon herself the burden, and the uncertain prospects, of filing a suit under the provision of ERISA which allows fiduciaries to seek "to enjoin any act or practice that violates" the statute.[56]

With regard to the first option, it is misleading. A fiduciary could file a complaint, and would be afforded protection under FLSA Section 15(a)(3).[57] Furthermore, Judge Pooler does not specify under what theory, let alone duty, a plaintiff would have standing under to bring forth against a defendant in Nicolaou's position.[58] To reiterate, Judge Pooler is using the threatening tone of lawsuit liability to reinforce her message, rather than frame her reasoning in legal analysis.[59]

With regard to the second option, it is subject to *circulus in demonstrando*[60] (circular reasoning). Judge Pooler admits that if the fiduciary makes their own inquiries (i.e. "unsolicited"), then they would be outside the scope of Section 510.[61] Nevertheless, Judge Pooler is argues that a fiduciary, acting outside the scope of 510, should be afforded the protections of Section 510.[62] Moreover, this example is overstated as it pertains to the case before the court.[63] Nicolaou did not face a retaliatory response for making her own inquiries.[64] Nicolaou was told to drop the matter by Linder, the Controller, on two separate occasions.[65]

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56. *Id.* at 331 (Pooler, J., concurring).

57. *See* Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a) (2012); *see also* Christopher Theodorou, *A Facial Reconstruction of Settlements: Analyzing the* Cheeks *Decision on FLSA Settlements*, 35 HOFSTRA LAB. & EMP. L.J. 209, 213-16 (2017) (providing a brief overview of the FLSA).

58. *See generally Nicolaou*, 402 F.3d at 331 (concurring opinion not indicating what theory a plaintiff could establish standing or duty).

59. *See id.* at 331-32 (Pooler, J., concurring).

60. *See* DOUGLAS N. WALTON, PLAUSIBLE ARGUMENT IN EVERYDAY CONVERSATION 206 (1992) ("Wellington is in New Zealand. Therefore, Wellington is in New Zealand.").

61. *See Nicolaou*, 402 F.3d at 331 (Pooler, J., concurring) (discussing option two where a fiduciary would "make her own inquiries among her superiors and face a retaliatory response").

62. *See id.* at 330 (Pooler, J., concurring) (focusing analysis on Nicolaou's fiduciary status).

63. *See id.* at 332 (Pooler, J., concurring) (asserting that if fiduciaries do not receive such protection during initial stages of an investigation from retaliation, they may be hesitant to fulfill their duties and functions); *but see id.* at 326 (describing how Nicolaou was only advised to let the matter drop without any retaliatory action for her inquiries).

64. *See id.* at 330 (concluding that the retaliation complaint, without supplemental information from the oral arguments made on appeal about a subsequent meeting's purpose and role in the termination, is ambiguous).

65. *Id.* at 326.

Nevertheless, she persisted on pursuing the matter.[66] Perhaps Horizon Media thought that Nicolaou was being insubordinate, disobedient, could not respect chain-of-command, or was not a cultural fit because she defied Linder.[67]

With regard to the third option, this would place said fiduciary within the scope of Section 510.[68] If said fiduciary brings the matter to the attention of a regulatory agency, they would likely, at some point, give information in an inquiry before the regulatory agency would decide as to whether it should proceed with a lawsuit.[69] Notwithstanding, the proscribed activity of 'giving information in an inquiry' would be met, and said fiduciary would be afforded protection under Section 510.[70] Also, this is a very unusual option as the Ninth Circuit observed that an employee would normally notify management before contacting an outside agency.[71]

With regard to the fourth option, this would place said fiduciary within the scope of Section 510.[72] If said fiduciary files a suit, then they will testify or be about to testify in a proceeding regarding ERISA.[73]

Noticeably, Judge Pooler does not provide a canon of construction for a broader view of the statute.[74] Judge Pooler argued that since Nicolaou was a fiduciary, she should have been afforded protection from the moment she began her investigation into the funding situation, and not because she had a meeting with Koenigsberg.[75] This protection greatly exceeds the interpretation of courts that have broadly interpreted Section

66. *See id.*

67. *See generally id.* at 326 (discussing the various steps Nicolaou took after being told to drop the matter).

68. *See id.* at 331 (bringing the matter to the attention of a regulatory agency as discussed in the third option would most likely lead to an inquiry by the agency).

69. *See id.* (stating that at some point the regulatory agency would likely bring its own inquiry).

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

71. *See* Hashimoto v. Bank of Hawaii, 999 F.2d 408, 411 (9th Cir. 1993). Stating that:

> The normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan. If one is then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown.

See id.

72. *See Nicolaou*, 402 F.3d at 331 (Pooler, J., concurring) (stating that the fourth option means filing a suit under the provision of ERISA to enjoin a violation of the statute).

73. *See id.* at 327, 329.

74. *See* Birmingham, *supra* note 8, at 1 ("Courts engage in judicial activism when they interpret laws without regards to a canon of construction.").

75. *See Nicolaou*, 402 F.3d at 332 (Pooler, J., concurring).

510.[76] The moment Nicolaou investigated the funding situation, she had not yet "given information" to anybody.[77] Judge Pooler is trying to legislate from the bench. If Section 510 should be worded in broader terms, that is an issue for Congress.[78]

2. United States Court of Appeals for the Third Circuit

In *Edwards v. A.H. Cornell & Son, Inc.*, the Third Circuit correctly held that unsolicited internal complaints are outside of the scope of Section 510 protection.[79] Plaintiff Shirley Edwards was employed in the capacity of Director of Human Resources at A.H. Cornell & Son, Inc. ("A.H. Cornell").[80] Edwards filed suit alleging that A.H. Cornell terminated her after she made complaints to management about ERISA violations.[81] Specifically, Edwards found out that A.H. Cornell was "administering the group health plan on a discriminatory basis, misrepresenting to . . . employees the cost of group health coverage in an effort to dissuade employees from opting into benefits, and enrolling non-citizens in its ERISA plans . . . ."[82] The Federal District Court relied on the Second Circuit's decision in *Nicolaou*, and dismissed Edwards's suit because no one requested information from Edwards, and therefore she was not involved in an "inquiry or proceeding" when she was terminated.[83] The Third Circuit affirmed the Federal District Court's decision.[84]

The Third Circuit examined the language of the statute,[85] and blazoning that the Fifth Circuit and Ninth Circuit failed to "examine[] the statutory language of Section 510 in detail."[86] The court held that the plain

76. Anderson v. Elec. Data Sys. Corp., 11 F.3d 1311, 1313-14 (5th Cir. 1994) (contrasting Fifth Circuit case which interprets Section 510 broadly by asserting a federal cause of action where the plaintiff did not plead one).

77. *See id.* at 327, 329 (displaying Nicolaou's actions taken did not equate to an investigation under the statute).

78. *See id.* at 329 (holding that Congress intended the language to be interpreted with its plain meaning and that no language was superfluous regarding the scope of protection).

79. *See* Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 225 (3d Cir. 2010).

80. *Id.* at 218.

81. *Id.*

82. *Id.* at 219.

83. *See id.*

84. *Id.* at 226.

85. *Id.* at 222-24 (Section "C. The Plain Meaning of Section 510").

86. *Id.* at 223 ("Finally, we agree with the Fourth Circuit that the Ninth and Fifth Circuit opinions in *Hashimoto* and *Anderson*, respectively, are not compelling. Neither court examined the statutory language of Section 510 in detail: the Fifth Circuit gave the issue cursory

language of Section 510 is unambiguous.[87] In accordance with the Second Circuit and Fourth Circuit, the Third Circuit interpreted "proceeding" as part of a formal proceeding.[88] While acknowledging that Edwards has 'given information,' the court's analysis turns on whether this has taken place within the context of an 'inquiry or proceeding.'[89]

The *Edwards* court then looked to the definition of "inquiry" and ruled that since Plaintiff made unsolicited internal complaints, her 'given information' was not in the context of an 'inquiry' and therefore unprotected by Section 510.[90] The court then noted that Section 510 states, in part, "employees that have 'given information' and not employees who 'received information.'"[91] Thus, the statute only refers to "inquiries made of an employee, not inquires made by an employee."[92] This explanation is faulty. Here, Edwards was not "receiving information."[93] Rather, she was "giving information" as she made the complaint, and A.H. Cornell was "receiving" the information.[94] Furthermore, the court should have focused on the definition of "information."[95] Black's Law Dictionary defines "information" as "[a] formal criminal charge made by a prosecutor without a grand-jury indictment."[96] What Edwards did does not meet the criteria of "give information" according to a plain meaning interpretation of Section 510.[97] Interestingly, numerous Federal Appellate Courts focus on the definitions of "inquiry" and "proceeding" but none examined the definition of "information."[98]

The court was unpersuaded by the argument that the complaints made by Edwards, by their very nature, met the definition of "inquiry."[99] The court reasoned that the complaints were statements, and not questions seeking answers.[100] In an amicus brief, the Secretary of Labor implored

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treatment, *see Anderson*, 11 F.3d at 1314, and the Ninth Circuit appeared to focus its analysis on the adoption of a "fair" interpretation, *see Hashimoto*, 999 F.2d at 411. *See also King*, 337 F.3d at 428.").

87. *Id.* at 223-24; *cf.* Wolk v. UNUM Life Ins. of Am., 186 F.3d 352, 356 (3d Cir. 1999).

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

89. *Id.*

90. *Id.* at 223; *see also* Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 329 (2d Cir. 2005).

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

92. *Id.*

93. *Id.* at 219.

94. *Id.* at 222.

95. *Id.* (stating that Section 510 of ERISA applies to "any person [who] has given information.").

96. *Information*, Black's Law Dictionary (11th ed. 2019).

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

98. *Id.*

99. *Id.* at 223.

100. *Id.*

the court that "inquiry" should be broadly interpreted, and thus include unsolicited internal complaints in its sweep.[101]

The Secretary of Labor and Edwards further made a facially invalid argument when stating that since Section 510 is a remedial statute, it should be liberally construed.[102] It is a "false notion that remedial statutes should be liberally construed."[103] The U.S. Supreme Court has declared that broadly construing a remedial statute is the "last redoubt of losing causes."[104] There is no basis in law to theorize that Congress means more (or less) than it says in a statute, simply because the legislation might be described as "remedial."[105] The Secretary of Labor and Edwards did not identify what constitutes a remedial statute, and how Section 510 is one.[106] Indeed, "there is not the slightest agreement on what . . . the phrase 'remedial statutes'" means.[107]

The *Edwards* court also distinguished this matter from a previous Third Circuit decision which proclaimed that "ERISA 'should be liberally construed in favor of protecting the participants in employee benefit plans.'"[108] The liberal construction canon is flawed because it is "indeterminate, as to both when it applies and what it achieves."[109] The liberal construction canon purports that Congress intends statutes to extend as far as possible in order to achieve a single objective.[110] However, "no legislation pursues its purposes at all costs."[111] The court ruled that ERISA provisions should only be "liberally construed" if there is ambiguous language.[112] The liberal-construction canon is

101. *Id.* at 222-24.

102. *Id.* at 222-23 ("The Secretary of Labor argues, in its brief as amicus curiae, that '[b]roadly but naturally construed, "any inquiry or proceeding" encompasses plan participants' complaints to management or plan officials about wrongdoing, and the process by which that information is considered, however informal.' (Secretary Br. at 16.) We disagree."); *cf.* Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 155 n.54 (D.C. Cir. 1983); Kross v. W. Electric Co., 701 F.2d 1238, 1242-43 (7th Cir. 1983).

103. SCALIA & GARNER, *supra* note 49, at 364-66.

104. OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 135 (1995).

105. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 586 (1990).

106. *Edwards*, 610 F.3d at 223-24.

107. *See* Scalia, *supra* note 105, at 583.

108. *Edwards*, 610 F.3d at 223 (citing IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118, 127 (3d Cir.1986)).

109. *See* Scalia, *supra* note 105, at 586.

110. Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808-09 (1983) (The liberal construction canon "goes wrong by being unrealistic about legislative objectives.").

111. Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (per curiam).

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

unsupportable because it is "indeterminate, as to both when it applies and what it achieves."[113] The *Edwards* court held that Section 510 is unambiguous, therefore the statute should not be broadly interpreted.[114] In a dissenting opinion, Judge Cowen opined that Section 510's language is ambiguous, and the majority's interpretation is contrary to Congressional intent.[115] Judge Cowen goes on to pose a hypothetical when he asks:

> For instance, suppose an employee like Edwards complains to her superior, the superior asks some follow-up questions, and the employee responds to these questions. Are the informal responses to some impromptu questions to be regarded as protected because they evidently were made as part of an "inquiry?" In turn, why should such responses be protected while, at the same time, an employer is essentially permitted (and perhaps, in essence, encouraged) to fire an employee immediately after she makes an informal complaint instead of conducting an investigation of some sort?[116]

The fatal flaw with Judge Cowen's hypothetical is that does not address the majority's position on the definition of "inquiry."[117] Judge Cowen's hypothetical is that it alleges that someone who makes an informal complaint is a whistleblower.[118] The majority noted that "[t]he fact that Edwards's complaints may have eventually "culminat[ed]" in an inquiry (*see* Secretary Br. at 17) underscores the fact that the complaints themselves, without more, do not constitute an inquiry."[119] The majority opinion alleges that "inquiry" is less formal than a proceeding, but it is above the level of an informal complaint. [120] This may include "an investigation of some sort."[121] Judge Cowen fails to explain why an informal complaint rises to the level of "inquiry."[122]

Judge Cowen does not point to any evidence to support his claim that the majority's view is contrary to Congressional intent.[123] Rather, he is

113. *See* Scalia, *supra* note 105, at 586.

114. *Edwards*, 610 F.3d at 223-24; *cf.* Wolk v. UNUM Life Ins. of Am., 186 F.3d 352, 356 (3d Cir. 1999); *see* POSNER, *supra* note 110 and accompanying text.

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

116. *Id.* at 228.

117. *Id.* at 226-31.

118. *Id.* at 228.

119. *Id.* at 223.

120. *Id.*

121. *Id.* at 228 (Cowen, J., dissenting).

122. *Id.*

123. *Id.* at 226.

projecting his view of the statute onto what he alleges Congressional intent is.[124] With regard to legislative history, it should be used with extreme caution in determining Congressional intent. One jurist analogized it as one going to a cocktail party and then looking for their friends.[125] In addition, Judge Cowen does not analyze the statute and propound any canons of construction to advance his interpretation.[126]

3. United States Court of Appeals for the Fourth Circuit

In *King v. Marriott International, Inc.*, the Fourth Circuit held that Section 510 only protects "formal" complaints.[127] However, the reasoning that the court outlined could be susceptible after the U.S. Supreme Court's ruling in *Kasten v. Saint–Gobain Performance Plastics Corp.*[128]

Plaintiff Karen King alleged that her termination was in retaliation for making complaints about ERISA violations, as well as refusing to commit ERISA violations.[129] King worked in the benefits department of Marriott International, Inc. ("Marriott") for many years, and was considered to be an excellent employee.[130] King claimed that in late 1998 or early 1999, Senior Vice President of Compensation and Benefits Karl I. Fredericks implored her to "transfer millions of dollars from its medical plan into its general corporate reserve account."[131] King expressed reservations about executing this transaction.[132] In late 1999, Fredericks gave King a promotion, which included the responsibility of overseeing benefit plan finances.[133] After King was promoted she discovered that the transfer of funds from the medical plan into the general corporate reserve account was once again under consideration.[134] Upon discovering this, King notified Fredericks as well as two in-house attorneys that she objected to the transaction.[135] She also requested that one of the in-house

124. *Id.*
125. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).
126. *Edwards*, 610 F.3d at 226 (Cowen, J., dissenting).
127. King v. Marriott Int'l, Inc., 337 F.3d 421, 427 (4th Cir. 2003).
128. Kasten v. Saint-Gobain Performance Plastics, 563 U.S. 1 (2011).
129. *King*, 337 F.3d at 423.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*

attorneys provide an opinion letter.[136] In September 1999, Fredericks restructured the benefits department and gave King another promotion, elevating her to Vice President of Benefit Resources.[137] King shared her responsibilities with another employee.[138] King feuded with the other employee with whom she shared responsibilities.[139] The feud was significant enough that it caused several employees in the benefits department to seek transfers.[140] In early 2000, Marriott again considered the transferring funds from the medical plan into the general corporate reserve account.[141] King objected again, both verbally and in writing this time, to Fredericks.[142] Shortly thereafter, King was fired.[143] Fredericks claimed that King was terminated over the feud.[144]

King initially filed her complaint in state court, alleging that her termination violated Maryland's public policy exception to the at-will employment doctrine.[145] Marriott removed the case to federal court by arguing that Section 510 of ERISA preempted the state's wrongful discharge claim.[146] The Federal District Court denied King's motion to remand the case, and granted summary judgment to Marriott on all claims.[147]

The court should not have compared Section 510 with another statute.[148] This is asseverated with the U.S. Supreme Court's ruling that the term "filed" in the FLSA whistleblower statute should be interpreted broadly.[149] The FLSA whistleblower statute states that an employer is prohibited from terminating an employee who has "*filed* any complaint or *instituted* or caused to be instituted any proceeding under or related to [the FLSA], or has testified or is about to testify in any such proceeding."[150] In *Kasten*, the Court notes, "[t]he phrase central to the outcome here is

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 423-24.
148. Kasten v. Saint-Gobain Performance Plastics, 563 U.S. 1, 1-2 (2011).
149. *Id.* at 9-14.
150. 29 U.S.C. § 215(a)(3) (2012) (emphasis added).

'filed any complaint.'"[151] The Court ruled that "filed" includes oral and written complaints.[152]

Citing a previous case, *Ball v. Memphis Bar-B-Q Co.*, the Fourth Circuit declared that the term "proceedings" under the FLSA whistleblower statute means "procedures conducted in judicial or administrative tribunals."[153] The court also held that "the term 'instituted' connotes" a level of formality that is not reached by making an "oral complaint to [a] supervisor."[154] The opinion in *Memphis Bar-B-Q Co.* concluded that the FLSA did not intend to protect employees who make unsolicited internal complaints.[155] The court relied upon this to surmise that the phrase "inquir[ies] or proceeding[s]" in Section 510 means "legal or administrative, or at least to something more formal than *written or oral complaints* made to a supervisor."[156] This is contradicted by *Kasten*.[157] While *Kasten* did not mention solicitation (solicited or unsolicited), the Court ultimately ruled that the FLSA prohibits retaliation against workers for complaining about violations of the Act even if the complaint is oral rather than written.[158] Under this reasoning, it is likely the Court would hold that Section 510 includes unsolicited internal complaints.[159] However, there are caveats. First, *Kasten* was decided narrowly, and if more Conservatives are appointed to the Court, it could be overturned.[160] Second, it could have compared Section 510 with a whistleblower statute that is plain, such as the anti-retaliation provision of

151. *Kasten*, 563 U.S. at 18.

152. *Id.* at 4 ("We must decide whether the statutory term 'filed any complaint' includes oral as well as written complaints within its scope. We conclude that it does.").

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

154. *Id.*

155. *Id.*

156. King v. Marriott Int'l, Inc., 337 F.3d 421, 427 (4th Cir. 2003) (emphasis added).

157. *Kasten*, 563 U.S. at 4.

158. *Id.* at 4, 17.

159. *Id.* at 17.

160. *See generally* Andrew Chung, *Supreme Court's Business-Friendly Reputation Takes a Hit*, REUTERS (June 26, 2019), https://www.reuters.com/article/us-usa-court-business/supreme-courts-business-friendly-reputation-takes-a-hit-idUSKCN1TR302 ("Overall, the court's rulings helped the business community more than they hurt, a regular feature under conservative Chief Justice John Roberts."); Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), https://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html; *see also* Theodorou, supra note 57, at 219 (discussing how the legislative process of the FLSA indicates that is intended to be narrowly construed). "In the case of the Fair Labor Standards Act of 1937, broad discretionary power had been placed in the hands of the Fair Labor Standards Board in accordance with Landis' theory. 'As the bill progressed, the discretion became more and more narrow and the specific exemptions became larger and larger.'" *Id.*

the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.[161]

The *King* court maintained that Section 510 and the FLSA provision both include the phrase "testified or is about to testify."[162] The court should have relied on this plain language rather than try to justify its holding based upon an interpretation of a similar statute. "Testified or is about to testify" clearly indicates a formal proceeding.[163]

The Fourth Circuit acknowledged that its interpretation of Section 510 is narrower than that of the interpretations of the statute by the Fifth Circuit and Ninth Circuit.[164] It called the Fifth Circuit's decision "unpersuasive."[165] The court identified that there is a "*facial inapplicability* of section 510 to intra-office complaints."[166] The Fourth Circuit declared that the Ninth Circuit's decision is grounded in the public policy of protecting whistleblowers.[167] The court pointed out that the Ninth Circuit lacked statutory interpretation in its opinion.[168] Observing that Section 510 is plain, it cannot be "fairly construed" to cover unsolicited internal complaints.[169]

4. United States Court of Appeals for the Sixth Circuit

In *Sexton v. Panel Processing, Inc.*,[170] the Sixth Circuit accurately held that unsolicited internal complaints are not protected by Section 510.[171] The court descries that an unsolicited internal complaint, an email in this case, does not rise to the level of "inquiry" which means either an official investigation or a request for information.[172] Citing that other federal statutes have language prohibiting retaliation against employees who complain about or oppose unlawful practices, the court emphasizes

161. 15 U.S.C. § 78u-6(a)(6) (effective July 22, 2010). The U.S. Supreme Court held that this statute is plain, and gave a 9–0 "pro-business" ruling. *See* Digital Realty Trust v. Somers, 138 S.Ct. 767, 770, 772-73, 778, 781-82 (2018).

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

163. *Id.* (citing Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 363 (4th Cir. 2000)).

164. *Id.* at 428; *see generally infra* Part I.B.1 (discussing the holding in *Anderson*); *see generally supra* Part I.A.3 (discussing the holding in *Hashimoto*).

165. *King*, 337 F.3d at 428.

166. *Id.*

167. *Id.* n.4.

168. *Id.* at 428.

169. *Id.*

170. Sexton v. Panel Processing, Inc., 754 F.3d 332 (6th Cir. 2014).

171. *Id.* at 333-34 ("When Brian Sexton made a one-time unsolicited complaint to his employer about alleged violations of the Act, did that amount to 'giv[ing] information . . . in any inquiry?' We think not and hence affirm.").

172. *Id.* at 335.

that said language is absent in Section 510 and evidences that Congress did not intend for it to be extended as such.[173]

In 2011, Brian Sexton (a general manager and trustee of Panel Processing's employee retirement plan) and another employee, Robert Karsten, campaigned for two employees to be on the board of directors.[174] The employees won the election, but the board refused to seat them, claiming that it would violate company bylaws which limit the number of insider directors.[175] The board also removed Sexton and Karsten as trustees of the retirement plan.[176] In response, Sexton sent the following email to the chairman of the board:

> I believe that your actions . . . in refusing to seat [the employees] as directors of the company and removing Rob Karsten and me as Trustees of the [retirement plan] are violations of ERISA and the Michigan Corporations Business Act and other state and federal laws. I plan to bring these violations to the attention of the U.S. Department of Labor and Michigan Department of Licensing and Regulatory Affairs unless they are immediately remedied.[177]

No one, including the chairman, replied to Sexton's email.[178] Despite claiming that he would contact government agencies, Sexton did not take any further action.[179] Approximately six months later, Panel Processing fired Sexton.[180]

Plaintiff made a tactical error, which the court touches upon in a stealthy manner.[181] Sexton originally filed suit in state court, alleging violation of the State's Whistleblower Protection Act and for breach of his employment contract.[182] Panel Processing removed the case to federal court on the basis of the whistleblower claim being an ERISA claim.[183] "Once in federal court, Sexton did not challenge the company's removal of the case or its use of complete preemption. Sexton and Panel Processing instead litigated the case as though Sexton had raised a claim under

173. *Id.* at 342.
174. *Id.* at 334.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 332-33.
183. *Id.* at 334.

ERISA."[184] Had Sexton argued his case in state court, perhaps the decision may have turned out differently.[185]

The Sixth Circuit provides incongruent reasoning when stating that "we are satisfied, just as the parties and the district court were satisfied, that the company properly invoked the doctrine here."[186] The court characterized Sexton's email as a complaint and a threat.[187] If Sexton did not "give information," as the court discerns, and he clearly cited two different statutes ("violations of ERISA *and* the Michigan Corporations Business Act"), then there is a strong argument that the preemption doctrine was not properly invoked.[188] In this instance, ERISA cannot preempt the Michigan Corporations Business Act and the Michigan Corporations Business Act cannot preempt ERISA.[189]

The court then elucidates that there are statutes which include two types of clauses: "The first protects employees who oppose, report or complain about unlawful practices[190]; [t]he second protects employees who participate, testify or give information in inquiries, investigations, proceedings or hearings."[191] While ERISA does not have the first type of

184. *Id.*

185. MICH COMP. LAWS § 15.362 (1980) ("An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.").

186. *Sexton*, 754 F.3d at 334 ("On appeal, Sexton does not contest the district court's application of complete preemption to Sexton's claim or otherwise attempt to resurrect his claim under Michigan's Whistleblower Protection Act. Under our case law, true enough, the doctrine of complete preemption goes to the subject matter jurisdiction of the court.").

187. *Id.* at 335 ("As the text of the email confirms, this was nothing more than a complaint accompanied by a threat: Sexton demanded that the company change course and threatened action if it did not. The email neither asks nor answers a question. That is not 'giv[ing] information . . . in any inquiry.'").

188. *See generally id.* at 334-36 (explaining that because Sexton did not give information and in enacting that specific provision of ERISA, Congress only meant to protect people giving information or testifying in inquiries, the preemption doctrine is not invoked since that only converts state law claims falling within ERISA's scope into federal claims).

189. *Id.* at 340-41.

190. *Id.* at 335 ("*See, e.g.*, 29 U.S.C. § 218c(a) (Consumer Financial Protection Act) ("provided . . . information relating to any violation"); *id.* § 215(a) (Fair Labor Standards Act) ("filed any complaint"); 42 U.S.C. § 2000e-3(a) (Title VII) ("opposed any . . . unlawful employment practice").").

191. *Id.* ("*See, e.g.*, 29 U.S.C. § 218c(a) (Patient Protection and Affordable Care Act) ("assisted or participated . . . in . . . a proceeding"); *id.* § 2615(b) (Family and Medical Leave Act) ("given . . . any information in connection with any inquiry or proceeding"); 42 U.S.C. § 12203(a) (Americans with Disabilities Act) ("participated in any manner in an investigation, proceeding, or hearing").

clause, the Michigan Corporations Business Act does have the first type of clause.[192] Furthermore, the court explicates that Sexton did not disclose violations of the law and that Section 510 does not protect employees who complain about violations of the law.[193] The Michigan Corporations Business Act states, in part, "employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule."[194] Sexton, an employee of Panel Processing at the time, made a report in writing (the email), in which he identified a suspected violation of laws (ERISA and the Michigan Corporations Business Act).[195]

The Sixth Circuit reluctantly seems to acknowledge that preemption may not have been properly invoked, despite contradicting this by explicitly stating the opposite.[196] The court admits "Sexton sued the company in Michigan state court for violating the State's Whistleblower Protection Act and for breaching his employment contract. "One might think that, when a Michigan plaintiff sues a Michigan defendant under Michigan law in a Michigan court, the case would stay there."[197] However, since Sexton did not object to the preemption argument made by Panel Processing, the Sixth Circuit was correct in showing judicial restraint.[198]

B. Courts Which Broadly Interpret Section 510 of ERISA

1. United States Court of Appeals for the Fifth Circuit

In an absolutely stunning display of judicial activism,[199] the Fifth Circuit asserted causes of action on behalf of the plaintiff in *Anderson v. Electronic Data Systems Corp.*[200] Plaintiff George Anderson originally brought forth suit in state court, where he alleged wrongful discharge among other state common law claims, against Electronic Data Systems

192. *Id.* at 333; MICH COMP. LAWS § 15.362 (1980).

193. *See Sexton*, 754 F.3d at 338; *see also* Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 218 (3d Cir. 2010) (explaining that employees' complaints that are not part of an inquiry or proceeding are not protected under Section 510).

194. MICH COMP. LAWS § 15.362 (1980).

195. *See Sexton*, 754 F.3d at 334.

196. *See id.*

197. *Id.*

198. *Id.*

199. *Judicial Activism*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions.").

200. Anderson v. Elec. Data Sys. Corp., 11 F.3d 1311, 1313, 1315 (5th Cir. 1994).

(hereinafter "EDS").[201] EDS removed the case to Federal District Court, where it was granted summary judgment because it was determined that the court did not have subject matter jurisdiction on the wrongful discharge claim.[202]

The Fifth Circuit considered whether the federal court had subject matter jurisdiction over the state law wrongful discharge claim.[203] While the court acknowledged that ERISA preempts state law claims, it held that preemption does not end the court's analysis because preemption is a defense and "federal question jurisdiction is determined by the well-pleaded complaint rule."[204] This is richly ironic, as "*Anderson filed an amended complaint deleting all references to ERISA.*"[205] Nevertheless, the Fifth Circuit centered its opinion on ERISA.[206] The Fifth Circuit freely admitted that plaintiff Anderson never asserted a federal cause of action.[207] Anderson alleged that, on two separate occasions, a supervisor beseeched him to approve or pay invoices using funds retained by another employee without the approval of the pension fund's board of trustees.[208] Additionally, Anderson claimed that he was asked to write up minutes for meetings regarding a retirement plan even though he was not in attendance.[209] Anderson stated that he refused to comply, and as a result EDS terminated him.[210] Since Anderson never asserted a whistleblower cause of action, it is fair to say that he did not characterize himself as a whistleblower despite the Fifth Circuit doing so.[211] Moreover, Anderson did not allege that his termination was in "retaliation," which is what Section 510 prohibits.[212] Rather, Anderson alleged that his termination was "wrongful."[213] Anderson's state wrongful termination claim is premised upon his refusal to commit a criminal act.[214]

201. *Id.* at 1312.
202. *Id.* at 1313.
203. *Id.* at 1315.
204. *Id.* at 1314-15.
205. *Id.* at 1313 (emphasis added).
206. *Id.* at 1315.
207. *Id.* at 1313 ("The state court petition did not allege any federal causes of action.").
208. *Id.* at 1312.
209. *Id.*
210. *Id.* at 1313.
211. *Id.* at 1315.
212. *See* 29 U.S.C. § 1140 (2018).
213. *Wrongful*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("(2) Contrary to law; unlawful <wrongful termination>.").
214. *See* Anderson, 11 F.3d at 1313.

Of significance, Anderson does not confirm whether the alleged wrongful acts he was implored to commit were in fact committed.[215] If these alleged wrongful acts never took place, then there is no concrete injury to blow the whistle on.[216] Accordingly, Anderson's claim does not "fall squarely within the ambit" of Section 510, despite the Fifth Circuit's insistence that it does.[217] This is precisely why Anderson filed a wrong termination lawsuit under a state common law claim rather than ERISA.[218]

In an attempt to cloak its judicial activism, the court offered no statutory interpretation of Section 510.[219] Statutory interpretation begins with "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[220] The court held that Section 502 enforces Section 510, which "broadly prohibits"[221] an employer from terminating participants, beneficiaries, or fiduciaries for giving information or has testified or is about to testify in any inquiry or proceeding relating to ERISA.[222] Section 502 provides a cause of action for a participant or beneficiary to recover benefits due to him, or if any act or practice violates any provision of this subchapter.[223] Here, Anderson never argued that EDS denied benefits due to him.[224] Further, Anderson did not claim that he "gave information" or "testified or was about to

215. *See generally id.* (containing no confirmation by Anderson that his coworker actually followed through with the acts).

216. *Id.* at 1315 (holding that all claims under ERISA must be linked to an actual breach by a fiduciary).

217. *Id.* at 1314; *see also Wrongful Discharge*, TEX. WORKFORCE COMM'N., https://www.twc.state.tx.us/news/efte/wrongful_discharge.html ("(2) common law exceptions (i.e., exceptions found in court decisions) a. public policy: it is illegal to discharge an employee for refusing to commit a criminal act") (last visited Apr. 11, 2021).

218. *Anderson*, 11 F.3d at 1312.

219. *See* Birmingham, *supra* note 8 and accompanying text.

220. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

221. *Anderson*, 11 F.3d at 1315-16.

222. *Id.*

223. ERISA 29 U.S.C. § 1132(a)(1)(B) (2018) (providing in relevant part: 'A civil action may be brought – (1) by a participant or beneficiary- . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]'); ERISA 29 U.S.C. § 1132(a)(3) (1982) (providing in relevant part 'A civil action may be brought–. . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]').

224. *See Anderson*, 11 F. 3d 1311.

testify."[225] Rather, Anderson states that he was wrongful terminated because he refused to comply with unlawful acts.[226]

Moreover, the court confesses that Anderson alleged other reasons for his termination, such as violating laws and regulations enforced by the Securities and Exchange Commission.[227] Section 510 is limited to ERISA.[228] Ergo, the Fifth Circuit's judicial activism fails on its face. Anderson, according to his complaint, was terminated for reasons other than ERISA whistleblowing.[229] Therefore, Anderson's termination is outside the scope of Section 510.[230]

2. United States Court of Appeals for the Seventh Circuit

The Seventh Circuit has legislated from the bench with regard to Section 510.[231] In *George v. Junior Achievement of Central Indiana, Inc.*, the court used a tortured definition of statutory interpretation to hold that Section 510 does not permit an employer to discharge an employee for making unsolicited internal complaints.[232] In *George*, plaintiff Victor George alleged that he was terminated in retaliation for raising the issue of discrepancies with regard to his ERISA plan.[233] In the summer of 2009, Plaintiff George noticed that money was being withheld from his paychecks and it was not being deposited into his retirement account and health savings account.[234] Unsolicited, he complained to some of the company's accountants and executives, including Jennifer Burk, the President and CEO.[235] In October 2009, after contacting board members about his grievance, this issue was remedied when he received checks to make up for the missed deposit, including interest.[236]

In January 2010, Junior Achievement of Central Indiana, Inc. (hereinafter "Junior Achievement") noticed that George accessed funds in his account which contained deferred compensation.[237] Burk believed

225. *Id.* at 1314 n.2.
226. *Id.* at 1313.
227. *Id.* at 1315 (holding that "the allegations of these other wrongful acts does not alter our analysis").
228. *Id.* at 1314.
229. *Id.* at 1312-1313.
230. *Id.* at 1314.
231. George v. Junior Achievement of Cent. Ind., Inc., 694 F.3d 812, 817 (7th Cir. 2012).
232. *Id.* at 817.
233. *Id.* at 813-14.
234. *Id.* at 813.
235. *Id.*
236. *Id.*
237. *Id.*

that George acted prematurely by drawing down on these funds.[238] To boot, "George was contemplating retirement."[239] "His employment agreement ran until June 30, 2010, but in late 2009 he had discussions with Burk and others about retiring in April 2010."[240] "On January 4, 2010, Burk told George not to come to work the next day."[241] An attorney for Junior Achievement notified George that he was terminated effective as of December 31, 2009, and demanded that George restore the funds in his deferred compensation account.[242] Junior Achievement may have thought that George was inappropriately drawing down on his deferred compensation.[243] With his previous discussions of retiring only a few months away, it is plausible that Junior Achievement thought that is why he was taking the funds out.[244] However, that is not a defense for George prematurely withdrawing the funds.[245] Nevertheless, the aforementioned would be a reason for terminating George that is outside the scope of Section 510.[246]

The court completely overlooks the issue of statutory interpretation of Section 510 when it observes that George did not file a written complaint, although he did notify the United States Department of Labor (hereinafter "DOL").[247] The issue is whether the complaint is solicited or unsolicited. Whether George filed a written complaint or not does not impact the analysis of this case. If George had "given information or has testified or is about to testify in any inquiry or proceeding" to the United States Department of Labor and then was terminated, he would have a much stronger argument that his employer violated Section 510.[248] "Statutory interpretation begins with the plain meaning rule, which says that all other relevant information about statutory interpretation is not considered when the statutory text is plain or unambiguous."[249] The Seventh Circuit ignored the plain meaning rule by offering up a tortured explanation that the language is ambiguous.[250] In a richly ironic

238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 814.
246. *Id.*
247. *Id.* at 813.
248. 29 U.S.C. § 1140 (2018).
249. Max Birmingham, *Up in the Air: Analyzing Whether the Clean Air Act Preempts State Common Law Claims*, 14 LIBERTY U. L. REV. 55, 83 (2019).
250. *George*, 694 F.3d at 814-15.

statement, the court claimed the statute is ambiguous yet it also conceded that it must "enforce the text as enacted, without the additions."[251] If the court were to "enforce the text as enacted, without additions" then it would have to enforce the statute under the plain meaning rule.[252] Thus, if the court were to "enforce the text as enacted, without additions" then the statute would be unambiguous. If the statute is ambiguous, as the court alleges, then it has to look at different interpretations and different canons of construction.[253]

The Seventh Circuit focuses on the word "in" which is a preposition in the context of Section 510. According to the court, "Section 510 can be parsed this way:[254] ((has given information) or (has testified or is about to testify)) in (any ((inquiry) *or* (proceeding))).[255] Likewise we can group the actions and settings based on formality: "((has given information) in (any inquiry)) or ((has testified or is about to testify) in (any proceeding))."[256] This parsing is puzzling, to say the least. The court selectively chooses part of the statute to parse, and then compares it with a different part. Moreover, the court does not cite any canons of construction in its interpretation of the parsing.[257] Here are some canons of construction applied to parsing the statute: "Series-Qualifier Canon:[258] (given information) or ((has testified or is about to testify in any inquiry or proceeding relating to [ERISA.]))."[259] Under this canon of construction, "testified or is about to testify" qualifies "inquiry or proceeding." As George did not testify or was about to testify, he is outside the scope of Section 510. General/Specific Canon[260] ((given information or has testified or is about to testify)) (in any inquiry or proceeding relating to [ERISA.].). Under this canon of construction, "testified or is about to testify" qualifies "given information" as it is more specific. Black's Law Dictionary defines "testify" as "[t]o give evidences as a witness <she testified that the Ford Bronco was at the defendant's

251. *Id.* at 815.

252. *Id.*

253. *See id.* at 814.

254. *Id.* at 815.

255. *Id.*

256. *Id.*

257. *Id.*

258. *See* SCALIA & GARNER, *supra* note 49, at 147 (explaining the Series-Qualifier Canon: "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.").

259. *George*, 694 F.3d at 814-15.

260. *See* SCALIA & GARNER, *supra* note 49, at 183 (arguing that "if there is a conflict between a general provision and a specific provision, the specific provision prevails (*generalia specialibus non derogant*).").

home at the critical time>."[261] Black's Law Dictionary does not define "give information." Additionally, "give information" is a very specific term. The statute does not specifically state to whom the "give information" applies to, or the setting in which it takes place.[262]

The court also focused on the multiple definitions of "inquiry." The court rejected the analogy of "inquiry" to "question."[263] The court held that if "inquiry" is a synonym for "question," then the statute only affords protection to questions "asked *of* the employee but not questions asked *by* an employee."[264] Black's Law Dictionary defines "inquiry" as "[a] request for information."[265] Black's Law Dictionary defines "question" as "a query directed to a witness."[266] Black's Law Dictionary defines "witness" as "[s]omeone who gives testimony under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit."[267] These definitions and the relevant part of Section 510—"has *testified* or is about to *testify* in any inquiry or proceeding relating to [ERISA]"—give rise to the argument that "question" is a suitable analogy to "inquiry" in this context. Moreover, the aforementioned definitions and the above part of Section 510 give rise to the argument that the statute does not protect unsolicited internal complaints regarding ERISA, and thereby permits an employer to discharge an employee for doing so.[268] Interestingly, the Seventh Circuit used the Oxford English Dictionary, but not Black's Law Dictionary.[269] Expounding on the definition of "inquiry," Black's Law Dictionary defines "request" as "[t]o ask for something or for permission or authority to do, see, hear, etc., something; to *solicit*; and is synonymous with beg, entreat, and beseech.[270] The definition employed by the court does not speak to whether the "inquiry" was solicited or unsolicited.[271]

The Seventh Circuit's opinion alleges to be grounded in statutory interpretation, yet it offered no canon of construction. Moreover, it parsed the statute but not did not adequately explain how it supports its finding

261. *Testify*, BLACK'S LAW DICTIONARY (11th ed. 2019).

262. *See* 29 U.S.C. § 1140 (2018).

263. *George*, 694 F.3d at 815.

264. *See id.* (this holding is in direct conflict with rejecting the Third Circuit's decision in Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 223 (3d Cir. 2010)).

265. *Inquiry*, BLACK'S LAW DICTIONARY (11th ed. 2019).

266. *Question*, BLACK'S LAW DICTIONARY (11th ed. 2019).

267. *Witness*, BLACK'S LAW DICTIONARY (11th ed. 2019).

268. Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 223 (3d Cir. 2010).

269. *See George*, 694 F.3d at 815.

270. *Request*, BLACK'S LAW DICTIONARY (4th ed. 1968).

271. *See George*, 694 F.3d at 815.

that Section 510 should be broadly interpreted.[272] The argument that "inquiry" is analogous to "question" is precisely the argument as to why Section 510 permits an employer to discharge an employee for making unsolicited internal complaints regarding violations of the statute.

3. United States Court of Appeals for the Ninth Circuit

Akin to the Fifth Circuit,[273] the Ninth Circuit engaged in judicial activism[274] in its handling of determining whether Section 510 permits an employer to discharge an employee for making unsolicited internal complaints regarding violations of the statute.[275] The Ninth Circuit employed its "takeover of the appeal" customary practice.[276]

In *Hashimoto v. Bank of Hawaii*, Jessica Hashimoto originally filed suit in state court, alleging that her termination was retaliation and in violation of Hawaii Whistle Blowers' Protection Act.[277] In her complaint, Hashimoto alleged her employer terminated her for making unsolicited internal complaints about ERISA violations.[278] In the first instance, Hashimoto alleged that a supervisor directed her to reimburse a former employee for taxes from a profit-sharing plan, even though the taxes were properly withheld.[279] In the second instance, Hashimoto alleged that another supervisor instructed her to recalculate a former employee's pension plan benefit using final pay rather than final average pay.[280] Bank of Hawaii removed the case to Federal District Court, where it was granted summary judgment because it was determined that Hashimoto's state law claim was preempted by ERISA.[281]

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272. *See id.*

273. *See supra* Part I.B.1.

274. *See Judicial Activism*, *supra* note 202 and accompanying text.

275. Hashimoto v. Bank of Hawaii, 999 F.2d 408, 409 (9th Cir. 1993) (citing Hawaii Whistle Blowers' Protection Act). Section 378-62 states: "An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because: (1) [t]he employee, or a person acting on behalf of the employee, reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of (A) [a] law, rule, ordinance, or regulation, adopted pursuant to law of this State, or the United States; or (B) [a] contract executed by the State, a political subdivision of this State, or the United States, unless the employee knows that the report is false." HAW. REV. STAT. § 378-62.

276. United States v. Sineneng–Smith, 140 S. Ct. 1575, 1581 (2020).

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

278. *Id.* at 410.

279. *Id.*

280. *Id.*

281. *Id.* at 410.

The Ninth Circuit did not apply any canon of construction in its analysis of Section 510. Moreover, the court's reasoning that offered an explanation which is *petitio principii* (a circular argument sometimes known as begging the question)[282] as to why Hashimoto is protected by the statute. The court stated that "*[t]his statute is clearly meant to protect whistle blowers*."[283] "It 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."[284] Judge Aldisert illustrated *petitio principii* with a dialogue between Socrates and Crito:

> Soc.: Is there federal jurisdiction?
>
> Cr.: Yes, there is federal jurisdiction.
>
> Soc.:How is there federal jurisdiction?
>
> Cr.: There is federal jurisdiction because factual impossibility of performing a conspiracy is no defense to a charge of conspiracy which may be brought when there is federal jurisdiction.[285]

Here, the court's syllogism was that the statute protects whistleblowers, and it protected Hashimoto because she was a whistleblower. The court failed to examine the language of the statute. The court's analysis should have first looked to the relevant part of the statute – "given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA]"[286]—and then articulated how it pertains to Hashimoto. Furthermore, the court undercuts its argument as to why Hashimoto should be afforded protection under Section 510. The court stated if Section 510 is "clearly meant" to protect whistleblowers, then there should be no need for it to be "fairly construed" to protect whistleblowers.[287] The court went on to surreptitiously acknowledge that Hashimoto may have been fired for a reason or reasons other than making

282. *Petitio Principii*, BLACK'S LAW DICTIONARY (10th ed. 2014) (explaining that the logical fallacy *petitio principii* is sometimes known as begging the question. This logical fallacy attempts to support a claim with a premise that itself presupposes the claim).

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

284. *Id.* (emphasis added).

285. United States v. Jannotti, 673 F.2d 578, 626 (3d Cir. 1982) (Aldisert, J., dissenting).

286. *See* 29 U.S.C. § 1140 (2018).

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

an unsolicited internal complaints regarding ERISA.[288] If Hashimoto was fired for a reason or reasons other than making an unsolicited internal complaints regarding ERISA, then she is not a whistleblower. Henceforth, she would not be afforded protection under Section 510.

The court stated a bare conclusion and held that Hashimoto was entitled to bring an action under Section 510 because Section 502 allowed her standing as an ERISA fiduciary.[289] This is erroneous as there is no standing requirement under Section 510. Moreover, Section 510[290] and Section 502[291] are two different sections, and a cause of action may be asserted under either Section.

Withal, Hashimoto never asserted that the Bank of Hawaii EDS benefits due to her. Accordingly, Hashimoto does not have a cause of action under Section 502.[292] The court's conclusion promotes a broad interpretation of the statute, but its explanation suggests a narrow interpretation. The court hedged its decision by avoiding the question as to whether Section 510 permits an employer to discharge an employee for making unsolicited internal complaints regarding violations of the statute.

II. THE MISCONCEPTION THAT ERISA SECTION 502 PROVIDES STANDING FOR AN ERISA SECTION 510 CLAIM

There is a misconception that ERISA Section 502 provides standing for an ERISA Section 510 claim.[293] This is based upon the false premise that "Section 510 does not contain an enforcement or remedial provision, so courts generally look to ERISA Section 502[] to determine standing."[294] Courts should interpret Section 510, and Section 502 for that matter, according to the plain meaning rule.

In *Metropolitan Life Insurance Co. v. Taylor*, the U.S. Supreme Court declared that state law causes of action that came within the scope

288. *Id.* ("It 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.") (emphasis added).

289. *Id.* ("Hashimoto is still entitled to bring the action because as a fiduciary she is empowered to bring a civil action under § 1132 [Section 510] to enforce § 1140 [Section 502], ERISA's whistle blower provision."); *see also* 29 U.S.C. § 1132 (2018).

290. *See* 29 U.S.C. § 1140 (2018).

291. *See id.* § 1132 (2018).

292. *See id.* § 1132(a)(1)(B) (2018).

293. William E. Altman & Danielle C. Lester, *Demystifying the Complexities of ERISA Claims Litigation*, 92 MICH. B. J., 29, 31 (Jan. 2013) ("*ERISA Section 510 does not contain an enforcement or remedial provision. Accordingly, courts generally look to ERISA Section 502(a)(3) to determine standing.*") (emphasis added).

294. *Id.*

of Section 502 are removable to federal court.[295] In *Pilot Life Ins. Co. v. Dedeaux*, the U.S. Supreme Court clarified that Section 502 is not to be supplemented by state law remedies.[296] Courts have then misinterpreted this by holding that Section 502 enforces Section 510.[297] To ingeminate, Section 502 is a separate claim from Section 510. Whether Section 502 claims are not to be supplemented by state law remedies is of no affect upon Section 510 claims.

Moreover, the U.S. Supreme Court has definitively held that Section 502 "does not provide a remedy for *individual injuries* distinct from plan injuries."[298] To bring forth a claim under Section 502, a plaintiff must show that they suffered an injury in their individual account as a result of a fiduciary breach.[299] No court that claims Section 502 allows a plaintiff to bring forth a claim under Section 502 discussed how said plaintiff suffered an injury in their individual account as a result of a fiduciary breach.[300]

Judge Pooler's concurring opinion in *Nicolaou* relies on flawed reasoning from the United States District Court for the District of Minnesota in holding that Section 502 provides standing for an ERISA Section 510 claim:

> ERISA affords plaintiff the right to sue to enjoin any act or practice which violates ERISA. 29 U.S.C. § 1132(a)(3) [Section 502]. Plaintiff clearly would have recourse under § 510 had she been discharged in retaliation for commencing a legal action against defendant to correct what she perceived to be violations of ERISA. In view of the express

295. *See* Metro. Life Ins. v. Taylor, 481 U.S. 58-67 (1987).

296. *See* Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 57 (1987) (citing Metro. Life Ins. v. Massachusetts, 471 U.S. 724, 746 (1987)); *but see* Luke Kalamas, *Piecing Together the Puzzle: Analyzing the Collision of the ACA and ERISA*, 33 HOFSTRA LAB. & EMP. L.J. 241, 273 (2016) (noting the perils of ERISA preempting state causes of action. "However ERISA's preemption is often a double-edged sword; it will preempt state causes of action without providing adequate remedies under the act itself, as was discussed under the section regarding section 502(a)(1)(B) remedies.").

297. *See* Zipf v. Am. Tel. & Tel., 799 F.2d 889, 892 (3d Cir. 1986); *see also* Sandberg v. KPMG Peat Marwick, L.L.P., 111 F.3d 331, 333 (2d Cir. 1997) ("Section 510 may be enforced by an action under section 502(a)(3) to protect employees from actions designed to prevent the vesting of pension rights."); *see also* Millsap v. McDonnell Douglas Corp., 368 F.3d 1246, 1247 (10th Cir. 2004) ("Section 502(a)(3) of ERISA provides the plan participant with his exclusive remedies for a §510 violation.").

298. *See* LaRue v. DeWolff, Boberg & Assoc., 552 U.S. 248, 256 (2008) ("We therefore hold that although § 502(a)(2) does not provide a remedy for *individual injuries* distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.").

299. *See id.* at 254.

300. *See, e.g.*, Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 332 (2nd Cir. 2005).

> authorization which plaintiff possesses under ERISA to sue to remedy violations of ERISA, the court finds it logical to infer that plaintiff also possesses the right to inform plan administrators of suspected violations of ERISA. The opposite conclusion would provide a strong incentive to plan participants to institute litigation without first attempting to resolve the issue informally.[301]

According to the above cited passage by Judge Pooler, if the plaintiff alleged she was discharged in retaliation for commencing a legal action against defendant to correct what she perceived to be violations of ERISA, she could bring an action under Section 510.[302] However, Judge Pooler does not cite how she interpreted the statute to determine that "*plaintiff also possesses the right* to inform plan administrators of suspected violations of ERISA."[303] This right is not found in the text of ERISA.[304] Section 502 does not state that there is a standing requirement needed for causes of action.[305] Section 502(a)(3) provides, in part, a civil action may be brought "by a participant, beneficiary, or fiduciary (A) *to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan.*"[306] If Section 510 already provides the act or practice which is prohibited, then there is no need for another section to be required for standing.[307] Moreover, it is qualified by "participant, beneficiary, or fiduciary."[308] If a person is terminated because they have testified in a proceeding relating to ERISA, but they are not a participant, beneficiary, or fiduciary, they would have no recourse if Section 502 is needed for standing to bring a claim under Section 510.[309] A person could be employed at a company and be privy to some aspects of their ERISA plans (i.e., benefits, retirement) and be subpoenaed to testify.[310] Section 502 is not to be supplemented by state law remedies.[311] Thus, a person would

301. *Id.* at 332 (citing McLean v. Carlson Co., 777 F.Supp. 1480, 1484 (D. Minn. 1991)).
302. *See id.*
303. *See id.*
304. *See* 29 U.S.C. § 1140 (2018).
305. *See id.*
306. *Id.* § 1132(a)(3)(A) (emphasis added).
307. *See id.* § 1140.
308. *Id.* § 1132(a)(3).
309. *See id.*
310. *See* 29 U.S.C. § 1140 (2018).
311. Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 56 (1987) ("The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the LMRA, would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws.").

have no legal recourse to seek remedy, either in federal court or state court.[312]

In *Edwards*, the Seventh Circuit mistakenly suggested that a broad interpretation of Section 510 would undermine the purpose of the provision, which is to "proscribe interference with rights protected by ERISA."[313] Of note, Edwards was a participant in the company's group health plan.[314] It is not clear as to whether she was a fiduciary.[315] Edwards did not raise a claim that she suffered an injury in her individual account as a result of a fiduciary breach, let alone that any of her rights were violated.[316]

Assuming arguendo that Section 510 is a remedial statute, then the plaintiffs in *Nicoloau* and *Edwards* would not have standing to bring forth their claims because Section 502 "does not provide a remedy for *individual injuries* distinct from plan injuries."[317] Additionally, under this framework, it is not clear that any person could ever bring forth a claim of retaliation under Section 510 if Section 502 is a requirement for standing.[318] Retaliation for being fired is not part of a "plan" so there would not be an injury.[319] And since Section 510 is a remedial statute, a claim cannot be brought under the statute by itself.[320]

Courts have misinterpreted part of Section 510 to conclude that Section 502 is needed for standing.[321] Section 510 states, in part, "[t]he provisions of section 1132 of this title shall be applicable in the enforcement of this section."[322] Instead of interpreting this as a standing requirement, another interpretation is that it should be prohibited to retaliate against a participant, beneficiary, or fiduciary if they have "given information or [have] testified or [are] about to testify in any inquiry or proceeding"[323] with regard to "[recovering] benefits due to him under the terms of his plan, to [enforcing] his rights under the terms of the plan, or to [clarifying] his rights to future benefits under the terms of the plan."[324]

312. *See id.* at 56.

313. Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 220 (3d Cir. 2010) (citing Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990)).

314. *Id.* at 218.

315. *See id.*

316. *See id.* at 219.

317. LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 256 (2008).

318. *See* Altman, *supra* note 293, at 31.

319. *See LaRue*, 552 U.S. at 254.

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

321. *See* Altman, *supra* note 293, at 31.

322. 29 U.S.C. § 1140 (2018).

323. *Id.*

324. *Id.* § 1132(a)(1)(B).

Section 503 of ERISA[325] provides participants and beneficiaries with a cause of action against plans and plan administrators.[326] Section 503 does not contain the language of "the provisions of section 1132 . . ."[327] and courts have not looked at Section 502 for standing to bring forth claims.[328] Accordingly, courts should cease to look at Section 502 for standing to bring forth Section 510 claims.[329]

III. PUBLIC POLICY

Employment protection is a double–edged sword. While it provides security to incumbent workers, it does make employers reluctant to hire, which creates a less flexible labor market as well as potentially lowering wages.[330] We need to only look at Europe during the 1980s and 1990s, a period known as "Eurosclerosis,"[331] in which European economies experienced economic stagnation due to the protections given to workers.[332] It would be naïve to pontificate that this phenomenon has not, is not, or will not occur in the U.S.[333]

As the federal government has increased its mandate on benefits and worker protections, business formation and job creation has been negatively affected.[334] As employers are compelled to offer more and more benefits and worker protections, workers are adversely impacted by receiving lower real wages.[335] As employers face the burden of rising nonwage labor costs, they usually respond with layoffs, and seek hiring

325. *Id.* § 1133.

326. *Id.* § 1133(2).

327. *Id.* §§ 1140, 1133.

328. *See* John J. Conway, *The Private Resolution of Employee Benefits Disputes, Section 503 and the Meaning of "Evidentiary Minds" in ERISA Cases*, 95 MICH. BAR J. 44, 45 (2016) (suggesting that Section 503 and the guidelines in *Wilkins* create a framework for private resolution, that if unresolved makes cases "ripe for judicial review").

329. *See generally* 29 U.S.C. §§ 1140, 1132(a)(1)(B) (2018) (since Section 510 already prohibits acts, there is no need to require standing under Section 502).

330. *See* Paul Krugman, Opinion, *Centrists, Progressives, and Europhobia*, N.Y. TIMES (Nov. 7, 2019) https://www.nytimes.com/2019/11/07/opinion/europe-economy.html.pdf.

331. *See id.*

332. *See* Edward P. Lazear, *Job Security Provisions and Employment*, 105 Q.J. OF ECON. 699, 700 (1990); *see also* Olivier Blanchard & Justin Wolfers, *The Role of Shocks and Institutions in the Rise of European Unemployment: The Aggregate Evidence*, 110 THE ECON. J. C1, C1-C2 (2000).

333. *See* Krugman, *supra* note 330 (comparing European economic policies to "[m]edicare for all" and other progressive ideas advocated in American politics).

334. *See* Olivia S. Mitchell, *The Effects of Mandating Benefits Packages* 21 (Nat'l Bureau of Econ. Rsch., Working Paper No. 3260, 1990).

335. *See* Jonathan Gruber & Alan B. Krueger, *The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance* 28 (Nat'l Bureau of Econ. Rsch., Working Paper No. 3557, 1990).

workers in a part–time, temporary, and contract capacities instead of full–time.[336]

The "at will" employment doctrine allows employers to terminate employees "be they many or few, for good cause, for no cause or even for cause morally wrong, without thereby being guilty of legal wrong."[337] During the 1970s and 1980s, many states began to carve out three broad exceptions to the at-will doctrine: the implied–contract;[338] public policy;[339] and good–faith.[340] These exceptions have come at a heavy price.[341] Research shows that wrongful termination laws are economically equivalent to a ten percent tax to employers.[342] Additionally, the three aforementioned exceptions lead to reductions in aggregate employment.[343] The implied–contract exception suffers a four to five percent decline in aggregate employment.[344] The public policy and good–faith exceptions experience a two percent decline in aggregate employment.[345]

Whistleblowers will face adversity, and are perhaps even committing "career suicide."[346] To be blunt, this is because whistleblowers are seen as disloyal.[347] Employers will often see whistleblowers in this harsh light,

336. Mark Wilson & Rebecca Lukens, *How to Close Down the Department of Labor*, THE HERITAGE FOUND. (Oct. 19, 1995), http://thf_media.s3.amazonaws.com/1995/pdf/bg1058.pdf (citing Jack A. Meyer, *The Impact of Employee Benefit Costs on Future Job Growth*, MFG. ALL. POL'Y REV., Mar. 1995).

337. Payne v. Western & Atl. R.R. Co., 81 Tenn. (1 Heisk.) 507, 519-20 (Tenn. 1884).

338. *See* J. Peter Shapiro & James F. Tune, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 351 (1974).

339. *See* Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (holding for the first time, by its own subjective viewpoint, that the right to terminate an at will employee could be limited by statute or by "considerations of public policy"); *see also* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 891 (Mich. 1980).

340. *See* Cleary v. Am. Airlines, 168 Cal. Rptr. 722, 728-29 (Cal. Ct. App. 1980), *overruled in part by* Guz v. Bechtel Nat'l Inc., 8 P.3d 1089, 1110-11 (Cal. 2000); *contra* Wilmington Coal Mining & Mfg. Co. v. Barr, 2 Ill. App. 84, 87 (1878) ("IV. Any employee may be discharged at any time without previous notice, and any employee wishing in good faith to leave the company's service may do so at any time without giving previous notice.") (internal citations omitted).

341. JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY 62 (1992), Inst. of Civ. Just.

342. *See id.* at 63.

343. *Id.* at 62.

344. *Id.* at 51.

345. *Id.*

346. S. REP. NO. 111-176, at 111 (2010) ("Recognizing that whistleblowers often face the difficult choice between telling the truth and the risk of committing 'career suicide.'") (internal citations omitted).

347. Jukka Varelius, *Is Whistle-blowing Compatible with Employee Loyalty?*, 85 J. OF BUS. ETHICS 263, 266, 272 (2009) ("whether or not they are ultimately good for the employer or morally acceptable, Mary's whistle-blowing can be criticized for expressing *disloyalty to her employer*.").

even if they do agree that the whistleblowers acted morally.[348] Consequently, whistleblowers will often not find meaningful employment.[349] In a famous example, Jeffrey Wigand blew the whistle on his employer, Brown & Williamson, and the tobacco industry.[350] Seeing the writing on the wall, Wigand knew that blowing the whistle would put him at risk of losing his job, where he was making $300,000 a year, and put him in a precarious position of finding difficulties in providing for his family.[351] Wigand's whistleblowing led to him getting a divorce, taking a ninety percent pay cut to making "$30,000 teaching at a high school when he was 'cast as a turncoat for spilling company secrets.'"[352] In an obscure example, Abar Rouse was an assistant basketball coach at Baylor University who secretly taped the head coach who wanted to put a false narrative regarding a player who was tragically killed by a teammate.[353] Rouse is in financial distress and has since had an offer to be an assistant coach at a school for $8,000 per year.[354] "If one of my assistants would tape every one of my conversations with me not knowing it, there's no way he would be on my staff," said Mike Krzyzewski, Duke University head basketball Coach.[355]

Without question, whistleblowers who endure hardship for trying to cure an unjust situation deserve compassion.[356] Nevertheless, there is a clear distinction between compassion and whether a person is legally entitled to relief.[357] With regard to the matter at hand, courts that have interpretated Section 510 broadly have done so due to their personal beliefs that it is in the interest of "public policy" without fully examining public policy.[358] As an aside, this is one of the great perils when courts

348. *Id.* at 265-66.

349. *See, e.g.*, Marie Brenner, *The Man Who Knew Too Much*, VANITY FAIR, May 1996, at 170, 180.

350. *Id.* at 171-72.

351. 142 CONG. REC. S17, 1155-56 (daily ed. Feb. 7, 1996) (statement of Dr. Wigand).

352. Rick Lyman, *A Tobacco Whistle-Blower's Life is Transformed*, N.Y. TIMES (Oct. 15, 1999), http://www.nytimes.com/1999/10/15/us/a-tobaccowhistle-blower-s-life-is-transformed.html.

353. Dana O'Neil, *Rouse in Oblivion Five Years After Baylor Scandal*, ESPN (May 7, 2008), https://www.espn.com/mens-college-basketball/columns/story?columnist=oneil_dana&id=3371852 (last visited Apr. 13, 2021).

354. *Id.*

355. *Id.*

356. *See id.* (describing Rouse's struggle to explain his situation while applying for jobs and also expressing that Rouse is a more desirable hire because of his actions).

357. *See generally* S. REP. NO. 111-176, at 110-12 (2010) (discussing legal requirements, definitions, and rewards for whistleblowers and the entitlement of whistleblower protection).

358. *See* Sexton v. Panel Processing, Inc., 754 F.3d. 332 (6th Cir. 2014); *see also* Varelius, *supra* note 347 (discussing the moral concerns of whistleblowing and employer loyalty).

interpret laws beyond their plain meaning.[359] Black's Law Dictionary defines public policy as broadly "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society."[360] We have seen that the more that employers are compelled to offer more and more benefits and worker protections, employees as a whole experience deleterious effects such as: lower aggregate employment opportunities; less full–time positions and more part–time, temporary, and contract capacities; and lower wages.[361] If a court were to truly explore public policy regarding whistleblower retaliation laws, it would consider the aforementioned as it is a "concern to the state and the whole of society."[362] Unfortunately, most courts citing public policy in this context do not take the concern to the state and the whole of society, but rather focus specifically on legislating from the bench because they are sympathetic with a party.[363] When this occurs, employees in the whole of society are harmed.[364]

IV. INTERPRETATION OF SIMILAR STATUTES

A. Courts Which Narrowly Interpret Section 510 of ERISA

The Sixth Circuit compared and contrasted Section 510 with other anti–retaliation provisions, commenting "they tend to include two distinct types of prohibitions."[365] The first "protects employees who oppose, report or complain about unlawful practices."[366] "The second protects employees who participate, testify or give information in inquiries, investigations, proceedings or hearings."[367] "Most anti-retaliation laws

359. *See generally* Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2010) (expanding the meaning of "file any complaint" under the Fair Labor Standards Act to include oral and written complaints).

360. *Public Policy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

361. *See* Gruber & Krueger, *supra* note 335, *cf.* Drew Gonshorowski & Rachel Greszler, *The Impact of Additional Unemployment Insurance Benefits on Employment and Economic Recover: How the $600-per-Week Bonus Could Backfire*, THE HERITAGE FOUND. (Apr. 29, 2020), https://www.heritage.org/jobs-and-labor/report/the-impact-additional-unemployment-insurance-benefits-employment-and-economic (outlining negative, unanticipated consequences of increasing employee benefits, specifically unemployment insurance).

362. *Public Policy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

363. *See* Sexton v. Panel Processing, Inc., 754 F.3d 332, 335, 338 (6th Cir. 2014).

364. *See* Gonshorowshi & Greszler, *supra* note 361.

365. *See Sexton*, 754 F.3d at 335.

366. *Id.*

367. *Id.*

include both types of clauses."[368] "By contrast, a few laws include only the first type of clause, the sort that protects employees who report unlawful practices."[369] The court avers that Section 510 does not contain the first type of prohibition.[370]

The Sixth Circuit even acknowledged that the FLSA anti–retaliation statute contains the phrase "filed any complaint," which places it with prohibitions in both the aforementioned first and second protections.[371] The court broadens its interpretation of this statute by also including the phrase "any complaint" instead of just focusing on "filed."[372] The court reasons that this phrase leaves the statute open to limitless scenarios, whereas the phrase "testified or is about to testify" in Section 510 significantly narrows the scope.[373]

B. Courts Which Broadly Interpret Section 510 of ERISA

Arguments in favor of a broad interpretation almost always analogize the FLSA anti–retaliation statute to Section 510.[374] The basis of Judge

368. *Id.* at 335-36 ("*See, e.g.*, National Transit Systems Security Act, 6 U.S.C. § 1142(a); Commodity Exchange Act, 7 U.S.C. § 26; Securities Exchange Act, 15 U.S.C. § 78u-6(h)(1)(A); Consumer Product Safety Act, 15 U.S.C. § 78u-6(h)(1)(A) § 2087(a); Fair Labor Standards Act, 29 U.S.C. § 215(a); Patient Protection and Affordable Care Act, 29 U.S.C. § 218c(a); Age Discrimination in Employment Act, 29 U.S.C. § 623(d); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1); Family and Medical Leave Act, 29 U.S.C. § 2615(b); Federal Mine Safety and Health Act, 30 U.S.C. § 815(c); Americans with Disabilities Act, 42 U.S.C. § 12203(a); Title VII, 42 U.S.C. § 2000e-3(a); Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105(a); Pipeline Safety Improvement Act, 49 U.S.C. § 60129(a). Many of these laws were in existence before 1974, when Congress enacted ERISA. *See* the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Occupational Safety and Health Act, and Title VII.").

369. *Id.* at 336 (*See, e.g.*, 15 U.S.C. § 2651 (Asbestos Hazard Emergency Response Act); 46 U.S.C. § 80507(a) (International Safe Container Act)). A few laws include only the second type of clause, which is the sort that protects employees who participate in inquiries, proceedings or hearings. *See, e.g.*, Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 948a; *see e.g.*, Clean Air Act, 42 U.S.C. § 7622(a).

370. *Sexton*, 754 F.3d at 336 ("In enacting this provision of ERISA, Congress included only a clause protecting people who give information or testify in inquiries or proceedings. Unlike most of the other laws just cited, ERISA thus does not contain a clause protecting people who oppose, report or complain about unlawful practices.").

371. *Id.* at 335.

372. *Id.* at 339-40.

373. *Cf. id.* at 339 (explaining that broadening the anti-retaliation rule will result in more litigation).

374. *Compare* George v. Junior Achievement of Cent. Ind., Inc., 694 F.3d 812, 812 (7th Cir. 2012) (interpreting "inquiry or proceeding" in the anti-retaliation provision under ERISA), *with Sexton*, F.3d at 333-34 (limiting their interpretation of the anti-retaliation provision under the FSLA to not include an employee's one-time unsolicited complaint to his employer about alleged violations under ERISA) (internal citations omitted).

Helene White's dissenting opinion in *Sexton* is that after *Kasten*, all whistleblower statutes should be resolved in favor of employees.[375] Judge White attempts to obfuscate this reasoning by alleging that Section 510 is ambiguous.[376] Judge White's perspective is that the ambiguity lies with the parsing of the statute proffered by the Seventh Circuit.[377] As noted *supra*, the Seventh Circuit's parsing is perplexing and does not adequately argue why Section 510 should be interpreted broadly.[378]

The *Kasten* decision is frighteningly disturbing.[379] The U.S. Supreme Court did not use statutory interpretation as the basis for its reasoning, but rather relied on its own intuition that plaintiff was telling the truth and defendant was not, without any corroborating evidence.[380]

> This activity, Kasten concludes, led the company to discipline him and, in December 2006, to dismiss him. *Saint-Gobain presents a different version of events*. It denies that Kasten made any significant complaint about the timeclock location. And it Says that it dismissed Kasten simply because Kasten, after being repeatedly warned, failed to record his comings and goings on the timeclock. *For present purposes we accept Kasten's version of these contested events as valid.*[381]

This is the underlying purpose as to why *Kasten* was decided.[382]

In *Kasten*, the U.S. Supreme Court broadly interpreted the word "filed" to include both written and oral complaints, but seemed skeptical of it at oral argument.[383] Justice Sotomayor posited,

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375. *Sexton*, F.3d at 342-52 (the two most recent Supreme Court decisions demonstrate a trend of the Court interpreting anti-retaliation provisions to afford broad protection of employees) (citing Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011) and Crawford v. Metro. Govn't of Nashville & Davidson Cty., Tenn., 555 U.S. 271 (2009)).

376. *Id.* at 347, 352 ("*George* followed *Kasten* in deciding that '[w]hen dealing with ambiguous anti-retaliation provisions,' a court must 'resolve the ambiguity in favor of protecting employees.' 694 F.3d at 814 (citing *Kasten*, 131 S.Ct. at 1333-35) . . . I would follow *George*, the only circuit court decision issued after *Kasten*. 694 F.3d at 814 ('When dealing with ambiguous anti-retaliation provisions, we are supposed to resolve the ambiguity in favor of protecting employees.' (citing *Kasten*, 131 S.Ct. at 1333-35)).").

377. *Id.* at 342-43.

378. *See* Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 17 (2011) ("Seventh Circuit erred in determining that oral complaints cannot fall within the scope of the phrase 'filed any complaint' in the Act's antiretaliation provision.").

379. Eric Schnapper, *Review of Labor and Employment Law Decisions From the United States Supreme Court's 2010-2011 Term*, 27 A.B.A J. LAB. & EMP. L. 329, 352-53 (2012).

380. *See Kasten*, 563 U.S. at 7-16.

381. *See id.* at 6.

382. *See* Schnapper, *supra* note 379.

383. *See Kasten*, 563 U.S. at 9-10; *see also* Transcript of Oral Argument at 4-5, Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011) (No. 09-834).

> So you mean that if the Government says you've got to file a complaint with us by either calling us or submitting something in writing, and at a cocktail party a worker goes up to a Government employee in that agency, and says, you know, my company is violating the law. That that's enough?[384]

Justice Sotomayor goes on to say "Well, at a cocktail party that employee may be there on personal time, but when he goes back to work the next morning he could do something. Is that enough?"[385] In this line of questioning, Justice Sotomayor notes that this decision will ultimately come back before the U.S. Supreme Court in some capacity, perhaps under another statute, and likely to end up with a different result.[386]

> So what you are doing is he is estopping the Government from saying, the only way that you can file a complaint with us is to do it in writing. We are now forcing the Government to adopt an oral procedure even if it chose not to? Even if it thought an oral procedure would create havoc, et cetera, et cetera?[387]

Justice Sotomayor alludes to the fact that an employee who makes an oral complaint can just as easily make a written complaint, and this would eliminate the "he said, she said" part of the situation, as it pertains to the matter before the Court.[388] A broad interpretation of Section 510 will undoubtedly lead to "he said, she said" claims.[389] "[F]requently 'he said, she said' trials in which the jury must reach a unanimous verdict based solely upon two diametrically different versions of an event, unaided by any physical, scientific, or other corroborative evidence."[390] Justice Sotomayor, who ruled in favor of a broad interpretation of the FLSA anti–retaliation statute, foreshadowed the danger of the ruling.[391]

384. Transcript of Oral Argument, *supra* note 383, at 4-5.

385. *Id.* at 5.

386. *Cf. Id.*

387. *Id.* at 6.

388. *Cf. Id.* at 6, 19 (explaining that when a complaint is oral and too informal, there may not be enough evidence to support that it was made).

389. Hammer v. State, 296 S.W.3d 555, 561-62 (Tex. Crim. App. 2009); Transcript of Oral Argument, *supra* note 383, at 7, 19.

390. *Hammer*, 296 S.W.3d at 561-2.

391. *See Kasten*, 563 U.S. at 3-4, 14.

V. REDUCTIO AD ABSURDUM

A. Protect the Inquiry

A broad interpretation of Section 510 is subject to *reductio ad absurdum* ("reduction to absurdity").[392] To exemplify, suppose Employee A and Employee B are poor employees.[393] "[T]hey were often absent from work and were reprimanded many times for insubordination and incompetence."[394] The company which Employee A and Employee B work for are moving to terminate them.[395] Employee A makes an unsolicited internal complaint, stating that "there are violations of ERISA, I plan to bring these violations to the attention of the U.S. Department of Labor unless they are immediately remedied." Employee B does not make an unsolicited internal complaint. Shortly thereafter, the company terminates Employee A and Employee B. Under a broad interpretation of Section 510, Employee A would be protected from being terminated but Employee B would not be simply because the latter made a vague reference about violations of ERISA.[396] In this scenario, Employee A did not even specify said violations. Nevertheless, Employee A cleverly exploited a broad interpretation of Section 510 to insulate himself from termination under this line of reasoning by simply alleging violations of ERISA.[397]

In another instance, suppose Employee C is one of several trustees of the company's ERISA plan.[398] The trustees decide to set up a directed trust, which takes investment authority out of the control of the trustees and places it in the control of an investment manager.[399] Employee C

392. *Reductio Ad Absurdum*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[I]n logic, disproof of an argument by showing that it leads to a ridiculous conclusion.").

393. *See generally* Tundo v. Cnty. of Passaic, 923 F.3d 283 (3rd Cir. 2019) (holding New Jersey's Civil Service Commission did not violate a Constitutional property right after using its discretion to not rehire employees who were fired for poor performance).

394. *Id.* at 286.

395. *Id.*

396. *See Kasten*, 563 U.S. at 3-4, 14; *see also* Transcript of Oral Argument, *supra* note 383, at 4-6, 18 (Employee A stating the existence of a violation may constitute the notice to the employer required by the Fair Labor Standards Act of 1938).

397. *See Kasten*, 563 U.S. at 3-4, 14; *see also* Transcript of Oral Argument, *supra* note 383, at 4-6, 18.

398. *See supra* Part V.A. (outlining a hypothetical example); *see also* 29 U.S.C. § 1103(a)(1) (1994) (section 403 establishes fiduciary duties under ERISA); RESTATEMENT (SECOND) OF TRUSTS, § 185 (1959) (here comment c, provides that "[a] power given to some third person . . . to control the trustee in disposing of or acquiring trust investments, would ordinarily be a power for the benefit of the beneficiaries of the trust.").

399. *See* sources cited *supra* note 398.

discovers that the directed trust is stealing funds. In order to conceal this, the directed trust offers Employee C a cut of the ill-gotten gains. After some time, Employee C senses that the directed trust will be caught. Subsequently, Employee C alerts the company and the other trustees about his ill-gotten gains, and has "given information" under a broad interpretation of Section 510.[400] Thus, Employee C would then have immunity from being terminated.[401] Employee C would also be unjustly enriched.[402] In a spin on this scenario, some trustees have agreements which exonerate them from liability.[403] If Employee C would have such an agreement, he would have immunity from liability, as well as from termination.[404] In *Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp.*,[405] the First Circuit held that mismanagement does not factor into the computations as to whether there is a funding deficiency.[406] "Under the Court's reasoning, employers could face limitless liability for trustee mismanagement."[407]

Congress had its reasons in not expanding Section 510.[408] Courts that have utilized a broad interpretation of whistleblower statutes have done so with a presumption that public policy dictates it.[409] With regards to Section 510, courts that broadly interpret the statute have failed to appreciate that this reading could compromise the "inquiries or

400. *See* 29 U.S.C. § 1140 (2018).

401. *See id.*

402. *See generally Unjust Enrichment*, CORNELL L. SCH., https://www.law.cornell.edu/wex/unjust_enrichment (last visited Apr. 13, 2021) (explaining that "[u]njust enrichment occurs when Party A confers a benefit upon Party B without Party A receiving the proper restitution required by law.").

403. *See, e.g.*, Morrissey v. Curran, 351 F. Supp. 775, 782 (S.D.N.Y. 1972); *see* Rippey v. Denver United States Nat'l Bank, 273 F. Supp. 718, 736-37 (D. Colo. 1967); *see* Newhouse v. Canal Nat'l Bank of Portland, 124 F. Supp. 239, 249 (S.D. Me. 1954).

404. *See Morrissey*, 351 F. Supp. at 782; *see Rippey*, 273 F. Supp. at 736-37; *see Newhouse*, 124 F. Supp. at 249.

405. Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp., 617 F.3d 54, 54 (1st Cir. 2010).

406. *Id.*

407. Max Birmingham, *The Paper Chase: Should the Principles of Contract Law Govern ERISA Section 302?*, 37 HOFSTRA LAB. & EMP. L.J. 293, 325 (2020).

408. *See generally* Sexton v. Panel Processing, Inc., 754 F.3d. 332, 336 (6th Cir. 2014) (analyzing the statutory language of 29 U.S.C.A. § 1140 [Section 510] in order to understand Congress's intent and what actions are to be protected).

409. *See generally* Somers v. Digital Realty Trust, Inc., 119 F. Supp. 3d 1088, 1104 (N.D. Cal. 2015), *vacated*, 138 S. Ct. 767 (2018) ("Because this Court believes that the language of the DFA whistleblower-protection provision is at least somewhat in conflict, it is relevant to observe that the Fifth Circuit's resolution of that conflict — *reading subsection (iii) narrowly to require a report to the Commission — seems at odds with public policy underlying the DFA.*") (emphasis added).

proceedings."[410] "Keep in mind, moreover, that Congress may have enacted this provision not so much to protect the jobs of whistleblowers as to protect the integrity of inquiries. Section 1140's reference to 'inquir[ies] or proceeding[s]' suggests that Congress had the latter objective in mind."[411]

B. Argumentum Ad Lapidem

The Sixth Circuit makes an *argumentum ad lapidem* ("appeal to the stone")[412] by dismissing the argument for a broad interpretation of Section 510 as absurd without demonstrating proof for its absurdity.[413] The Sixth Circuit remarked that extending the protection of Section 510 to unsolicited internal complaints:

> As shown, Congress opted to protect employees in many ways in the context of investigations and unprompted complaints, some that may appear underinclusive and some that may appear overinclusive. When Congress picks one approach or the other in a given statute, that does not give a court license to rewrite the law—here by crossing "in any inquiry or proceeding" out of § 1140 [Section 510]. Denying this point means condemning as *absurd* dozens of federal anti-retaliation clauses that limit their attention to inquiries, proceedings or investigations.[414]

The court did not fully explain how a broad interpretation of Section 510 would lead to absurd results.[415] The court is stating that a broad interpretation of Section 510 necessitates eliminating "inquiry or proceeding" from interpreting the statute, as well as including language in the statute which is not present, and argues that this is absurd.[416] Notwithstanding, the court does not hold that this would lead to absurd results under Section 510.[417] Instead, the court concludes that a broad interpretation of Section 510 would lead to absurd results for other federal

410. *See supra* Part I.B.

411. *Sexton*, 754 F.3d. at 338.

412. *See Argumentum ad lapidem – Appeal to the stone*, COGNITIVE-LIBERTY.ONLINE, https://cognitive-liberty.online/argumentum-ad-lapidem-appeal-to-the-stone/ (last visited Apr. 13, 2021) (translating argumentum ad lapidem from Latin to English as "appeal to the stone." This phrase refers to the "logical fallacy that consists in dismissing a statement as absurd without giving proof of its absurdity.").

413. *Sexton*, 754 F.3d at 337.

414. *Id.*

415. *See id.*

416. *Id.* at 336 ("Subtracting words from the law is bad enough, but Sexton's theory also requires us to add words in their place.").

417. *Id.* at 337.

anti-retaliation clauses.[418] The court even acknowledges that it should focus on Section 510 rather than other anti-retaliation statutes when it professes "[f]or what it is worth, our decision has few if any consequences beyond this Act."[419]

The court needed to expand on its claim by encapsulating that a broad interpretation of Section 510 would lead to absurd results because eliminating "inquiry or proceeding" from the statute would leave open the possibility of employees "giving information" in limitless scenarios.[420] A person can say they have 'given information' by telling, *inter alia*, a coworker, friends, or family.[421] By eliminating "inquiry or proceeding" from the statute there are no boundaries as to where and to whom the information is given.[422] Thus, if an employee "gives information" without limit, it cannot be reasonably asserted that the employer retaliated against said employee if the employer did not know about the given information.[423]

CONCLUSION

The "inquiry or proceeding" language in Section 510 evidences that Congress intended to protect the integrity of the aforementioned, rather than protect whistleblowers.[424] The courts that broadly interpret the statute attempt to evade this by projecting their own views as to what public policy dictates for anti–retaliation provisions.[425] Courts that narrowly interpret Section 510 and hold that "giving information" gives unfettered discretion, furtively hide their judicial activism by alleging that the statute is ambiguous.[426] However, "[t]hey do not prove it."[427] The courts that narrowly interpret Section 510 generally point to *Kasten*, and even there the U.S. Supreme Court is reticent about their decision.[428] At

418. *Id.*

419. *Id.* at 342.

420. *See id.* at 335

421. *See* Employee Retirement Income Security Act (ERISA) of 1974 § 302, 29 U.S.C. § 1001(b) (2018).

422. *See id.*

423. *See* Transcript of Oral Argument, *supra* note 383, at 18 (Justice Ginsburg questions whether an employer will have notice of a complaint if an employee tells a coworker – instead of their employer – that a violation exists).

424. *Id.* at 18.

425. *See supra* Section I.B.

426. *Cf. Sexton*, 754 F.3d at 341 ("No less importantly, disagreements between judges at most suggest ambiguity.").

427. *Id.*

428. *See supra* Section I.A.

oral argument, Justice Alito even asked counsel "Are you filing your comments right now?"[429] Counsel responded, "I think I am, Your Honor."[430] Justice Alito retorted "You are? Really?"[431] Perhaps the U.S. Supreme Court was sympathetic with the plaintiff, and a reason why they accepted his position of the contested events.[432] The phrase "filed" was interpreted broadly by the subsequent "any"[433] which in turn broadens "complaint."[434] There is no such broad language in Section 510.[435]

429. *See* Transcript of Oral Argument, *supra* note 383, at 6.

430. *Id.* at 6.

431. *Id.*

432. *Cf. id.*

433. *Cf. id.* at 12 ("Mr. Kaster: Your Honor, I'm just looking at the statutory language—file "any complaint." It's important—the word "any" has a particular meaning. I would not that if - -").

434. *Cf. id.* at 27 ("Justice Sotomayor: This is the - - this was the Lochner era where they weren't even sure they could do this. *But why should we read their language with a narrow reading of any complaint?*") (emphasis added).

435. Sexton v. Panel Processing, Inc., 754 F.3d 332, 336 (6th Cir. 2014). ("[W]here words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)).