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ESOPs

Sixth Circuit: ERISA Section 510 Requires Employee Action Within Formal Proceeding

BNA Snapshot

Sexton v. Panel Processing, Inc., 2014 BL 129865, 6th Cir., No. 13-1604, 5/9/14

Key Holding: ERISA Section 510 doesn't protect an employee from retaliation for informal e-mail threatening to expose violations of the statute.

Key Takeaway: Sixth Circuit joins Second, Third and Fourth Circuits in finding that anti-retaliation provision of ERISA Section 510 requires a formal inquiry or proceeding to protect employee action.

By Matthew Loughran

May 9 — A single unsolicited complaint to an employer about alleged violations of the Employee Retirement Income Security Act doesn't give rise to retaliation claims under Section 510 after the complainant is terminated from employment, the U.S. Court of Appeals for the Sixth Circuit ruled (*Sexton v. Panel Processing, Inc.,* 2014 BL 129865, 6th Cir., No. 13-1604, 5/9/14).

In a May 9 split decision, Judge Jeffrey S. Sutton affirmed the ruling of the U.S. District Court for the Eastern District of Michigan, which granted summary judgment to the employer, finding that a single e-mail to the employer's board chairman threatening to report violations of ERISA by the chairman in his handling of board elections didn't qualify as an inquiry or proceeding that would raise the anti-retaliation protections of Section 510 after he was removed as a trustee from the company's employee stock ownership plan and subsequently fired for sending that e-mail (212 PBD, 11/2/12; 39 BPR 2112, 11/6/12)(55 EBC 2211).

In so ruling, the court addressed arguments by the employee and the secretary of labor—who appeared as an amicus curiae—that Section 510 should apply to all complaints regarding violations of the statute. The court found this argument ignored the wording of the provision that required that the employee testify or give information “in any inquiry or proceeding relating to” ERISA.

In a dissent, Judge Helene N. White argued that the statute was sufficiently vague such that it should be resolved in favor of protecting the employee and follow what she sees as interpretive guidance from the U.S. Supreme Court in *Kasten v. St. Gobain Performance Plastics Corp.*, 2011 BL 73733, 131 S. Ct. 1325 U.S. (2011).

William Pfeifer, owner of Isackson, Wallace & Pfeifer PC in Alpena, Mich., and counsel for Brian Sexton, the employee in the case, noted that the Sixth Circuit's decision added to a split in interpreting this particular provision of ERISA between the U.S. Courts of Appeals.

“With the U.S. Circuit Court split of authority on the issue and the Sixth Circuit 2 to 1 decision it appears that this issue is ripe for a Writ of Certiorari to the U.S. Supreme Court and their review hopefully,” he told Bloomberg BNA on May 9.

Counsel for Panel Processing Inc., the employer, and the U.S. Department of Labor didn't respond to Bloomberg BNA requests for comment.

Circuit Split

As noted by Pfeifer, with this decision the Sixth Circuit joins the Second, Third and Fourth Circuits in finding that an unsolicited

complaint isn't protected by Section 510. The other side of the split is occupied by decisions in the Fifth, Seventh and Ninth Circuits.

The Sixth Circuit majority refused to acknowledge that two cases on the other side of the split actually held that an unsolicited complaint was protected by Section 510, instead focusing on the fact that the holdings of each case involved ERISA preemption.

The court said that the respective holdings in the decisions by the Fifth Circuit in *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 17 EBC 2113 (5th Cir. 1994), and the Ninth Circuit in *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 16 EBC 2751 (9th Cir. 1993), simply addressed whether ERISA preempted the state claims that were originally brought in both cases

The majority acknowledged that the Seventh Circuit in *George v. Junior Achievement of Cent. Ind., Inc.*, 2012 BL 225686, 53 EBC 2838 (7th Cir. 2012) did hold that Section 510 protects informal complaints but tempers that protection with the requirement that the complaint either ask or answer a question. According to the majority, Sexton's complaint did neither.

The dissent, however, argued that all cases on both sides of the split except the Seventh Circuit case pre-date the Supreme Court's decision in *Kasten*, a case interpreting the anti-retaliation provision of the Fair Labor Standards Act, but which Judge White argued provides guidance for interpreting anti-retaliation statutes in general.

Application of Kasten

In *Kasten*, the high court examined the text of the FLSA to determine the meaning of “filed any complaint” within the anti-retaliation provision of that statute. Not finding a clear answer, the court focused on the functional considerations of the law, including the importance of oral complaints to the legal scheme introduced by the FLSA, to find that such complaints are protected by the statute.

According to the majority in this case, the *Kasten* case emphasizes the supremacy of the statutory text in interpretation and bolsters the opinion that if the provision is clear then it should be enforced as written.

The dissent, however, finds that *Kasten* counsels the court to examine the purpose and functions of the law when interpreting an arguably ambiguous provision. In this case, the dissent would have found that an informal internal complaint was protected by the statute and that the employee couldn't be fired in retaliation for making such a complaint.

Opposition or Participation Clauses

At issue in the instant case was whether Section 510 unambiguously required a formal proceeding or inquiry for a complaint about ERISA violations to be protected activity.

In affirming the district court, the majority relies heavily on what it refers to as the two types of anti-retaliation clauses present in federal law.

The first the court refers to it as an “opposition” clause and protects individuals who in any way oppose violations of the law. The court cites the Consumer Financial Protection Act, Fair Labor Standards Act and Title VII of the Civil Rights Act of 1964 as statutes that contain such a clause.

The second type of anti-retaliation clause is referred to by the court as a “participation” clause and requires that the protected individual be participating in a proceeding or hearing in order to garner the protection of the statute. Examples of such statutes include the Affordable Care Act, Family and Medical Leave Act and the Americans with Disabilities Act.

The court found that ERISA's anti-retaliation protection consisted of only the second type of clause and required a proceeding or hearing in order to be effective.

In the instant case, the court found that the employee's e-mail didn't come about as a result of an inquiry or proceeding and thus wasn't protected activity under the statute.

Judge David W. McKeague joined the opinion of the court.

Pfeifer of Isackson, Wallace & Pfeifer PC in Alpena, Mich. represented Sexton.

Steven Joel Fishman, David Allen Malinowski and Donald H. Scharg of Bodman PLC in Troy Mich., represented Panel

Processing Inc.

Stephen A. Silverman of the U.S. Department of Labor in Washington represented the secretary of labor.

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For More Information

Text of the opinion is at http://www.bloomberglaw.com/public/document/BRIAN_SEXTON_PlaintiffAppellant_v_PANEL_PROCESSING_INC_and_PANEL_.