No. 10-732

IN THE

Supreme Court of the United States

SHIRLEY EDWARDS,

Petitioner,

v.

A.H. CORNELL AND SON, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**BRIEF *AMICUS CURIAE* OF AARP
IN SUPPORT OF PETITION FOR *CERTIORARI***

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January 3, 2011

MOTION OF AARP FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

AARP moves for leave to file the accompanying brief *amicus curiae* in support of the Petitioner for a writ of certiorari to United States Court of Appeals for the Third Circuit.

Pursuant to Supreme Court Rule 37.6, the undersigned requested consent of the parties to the filing of the brief through counsel. Counsel for the petitioner gave consent, but as of the date of preparation of this motion counsel for the respondents did not respond to the request.

INTEREST OF *AMICUS CURIAE*

AARP is a non-partisan, non-profit organization dedicated to representing the needs and interests of people age fifty and older. Nearly half of AARP's members are employed full- or part-time, with many working for employers which provide pension and welfare plans covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. AARP is greatly concerned about retaliatory practices by employers, many of which disproportionately harm older people. AARP thus supports laws and public policies designed to protect employees from such harmful employer practices and to preserve the legal means for them to grieve questionable employer conduct.

REASONS FOR GRANTING THE MOTION

The decision of the court of appeals poses a serious obstacle to the administration of ERISA in the Third Circuit. The Third Circuit's decision to legalize retaliation against employees who attempt to secure protected rights under ERISA absent the filing of legal proceedings conflicts with the decisions of two other Federal Courts of Appeals that have considered the issue, and conflicts with the teachings of this Court on principles applicable to retaliation claims under other Federal law schemes. The Court has viewed the scope of protection against retaliation for employees who exercise their statutory rights under employment-related statutory schemes as worthy of special attention. National uniformity on this issue is vital if the administration of employee benefit plans is to be conducted with integrity. *Amicus curiae* therefore respectfully requests this Court to review the judgment of the Third Circuit Court of Appeals.

This case presents the Court with the opportunity to carry out a Congressional legislative initiative sufficiently clear in its purpose to protect the tens of millions of employees in the nation who participate in employee benefit plans. The decision will have a direct bearing on the economic and health security of those employees, including members of AARP. In light of the significance of the issue presented, AARP requests that the Court grant this motion to file its brief *amicus curiae.*

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

AARP is a non-partisan, non-profit organization dedicated to representing the needs and interests of people age fifty and older. Nearly half of AARP's members are employed full- or part-time, with many working for employers which provide pension and welfare plans covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. AARP is greatly concerned about retaliatory practices by employers, many of which disproportionately harm older people. AARP thus supports laws and public policies designed to protect employees from such harmful employer practices and to preserve the legal means for them to grieve questionable employer conduct.

The resolution of this case will have a significant impact on the integrity of the administration of all employee benefit plans, including retirement plans, health care plans, etc. The issue in this case will have a direct impact on employees' abilities to participate in benefit programs which will foster their economic security. Participants and beneficiaries in private, employer-sponsored benefit plans rely on ERISA to protect their rights under those plans. In particular,

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[1] In accordance with this Court's Rule 37.6, no party's counsel wrote this brief in whole or in part and no person other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record for all parties received notice at least 1`0 days prior to the due date of the *amicus curiae's* intention to file this brief. The petitioner's letter consenting to the filing of this brief has been lodged with the Clerk of the Court. Counsel for *amicus* has contacted respondent's counsel of record in the Court of Appeals requesting respondent's consent for *amicus* to file. As of the date of the preparation of this brief, no response has been received.

ERISA's protections, and the ability to enforce these protections, are of vital concern to older workers, since the quality of their lives depends heavily on maintenance of their employment and their resulting eligibility to participate in pension and welfare benefits programs. Thus, the protection of employees' rights to stand up for their benefits without fear of retaliation in the form of job termination is of paramount importance.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case to resolve a question of exceptional importance. The decision of the court of appeals poses a serious obstacle to the administration of ERISA in the Third Circuit. The Third Circuit's decision to legalize retaliation against employees who attempt to secure protected rights under ERISA absent the filing of legal proceedings conflicts with the decisions of two other Federal Courts of Appeals that have considered the issue, and conflicts with the teachings of this Court on principles applicable to retaliation claims under other Federal law schemes. The Court has viewed the scope of protection against retaliation for employees who exercise their statutory rights under employment-related statutory schemes as worthy of special attention. National uniformity on this issue is vital if the administration of employee benefit plans is to be conducted with integrity. *Amicus curiae* therefore respectfully requests this Court to review the judgment of the Third Circuit Court of Appeals.

I. THE THIRD CIRCUIT'S INTERPRETAION OF ERISA SECTION 510[2] SUBVERTS CONGRESSIONAL INTENT TO PROTECT ERISA PLAN PARTICIPANTS FROM ADVERSE EMPLOYMENT ACTION ON ACCOUNT OF HAVING SPOKEN UP ABOUT ERISA VIOLATIONS.

D. The Fifth And Ninth Circuits Have Held Section 510 Applicable To Unsolicited Internal Complaints While The Decisions Of The Fourth Circuit And Now The Third Circuit Stand In Stark Conflict To The Holdings Of Those Circuits.

As the Petition for *Certiorari* points out, the Fifth and Ninth Circuits have construed Section 510 to protect unsolicited internal complaints. Petition for Writ of Certiorari at 9-10, *Edwards v. A. H. Cornell & Son, Inc.* (No. 10-732). The Department of Labor agrees with the Petition's analysis of this conflict as well as the Petition's interpretation of the law. *See* DOL C.A. Br. 5-6.

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[2] 29 U.S.C. § 1140. Throughout the brief, the ERISA anti-retaliation statute will be referred to as ERISA Section 510 or simply Section 510.

B. The Third Circuit's Decision Largely Eviscerates Section 510's Protection For Workers Who Informally Bring ERISA Violations To Their Employer's Attention.

As has been recognized by the Secretary of Labor, work place violations are commonly brought to the attention of the employer orally and without formality. In countenancing employer retaliation against employees who follow this common practice, the Third Circuit has crafted a road map for employers in the circuit to practice pre-emptive retaliatory terminations so as to operate below the legal radar and avoid accountability for actions that Congress clearly intended to sanction by Section 510. It cannot be doubted that, because ERISA preemption doctrine precludes recourse under state law for employees who are terminated in retaliation for grievances related to ERISA violations, a savvy employer in the Third Circuit who terminates a complaining employee early in the game gets a free pass with respect to its action.

The critical element to be safeguarded by anti-retaliation statutes is the freedom to stand up and be heard for the rights at issue without fear of economic reprisal, such as adverse consequences on the job. The holding below gives license to employers to visit adverse consequences, here job termination, upon an employee who is determined to exercise rights under ERISA. And the irony should not be lost on the Court that in this case it was the

company's human resources director that brought to the employer's attention claimed ERISA violations; in other words, it was the company employee likely responsible for lawful and proper implementation of ERISA's requirements that bore the brunt of the employer's termination decision on account of her fulfilling her job responsibility. It may be gleaned from the record that the Petitioner's grievances expressed to the employer involved essentially claims that pertained to other employees' rights to ERISA benefits rather than to the complaining employee herself. This fact is not a matter of dispute. Thus, this case in particular points up several problems with the Third Circuit's view of Section 510. For at the end of the day the decision legitimizes employer retaliation against employees who press for enforcement of ERISA's statutorily protected rights.

The Third Circuit's decision on the scope of Section 510's protection not only make for bad law; it also sets the stage for undesirable perverse employment practices in general, inasmuch as the company officer presumably responsible for employer compliance with ERISA's eligibility rules, in order to protect herself, must rat on the company in a formal setting, *i.e.*, federal agency complaint, prior to making every reasonable attempt to advocate for internal compliance aimed at avoidance of agency enforcement action. In short, the circuit court's interpretation strikes at the employee's loyalty to the employer **in the first instance** of the employee's observation of questionable employer practices so as to lessen the opportunity and

likelihood of voluntary employer action to correct a problem with statutory compliance. Surely Congress could not have intended to drive a wedge between the employee and the employer in such a manner.

It is significant that the record reveals no requirement on the part of the respondent for its employees to file written grievances in order to air a complaint with company practices. Arguably, even a narrow reading of the court of appeals decision essentially reads such a minimal requirement into every employer's policies, whether expressed by the employer or not. While it must be granted that the Third Circuit's decision does not stand alone among the circuits, there is ample ground to analyze whether the court below actually intended to fashion such a hard-wired rule. Moreover, it is impossible to reconcile the Third Circuit's holding with the neutral observation that in persisting to press the assertion of ERISA's statutory commands petitioner was performing the obligatory details of the duty she owed to her employer as human resources director.

In view of the Secretary of Labor's assertion that private action and enforcement are critical elements of the administration of ERISA's protective provisions, CITE it is apparent that Petitioner raises a serious argument that Congress's intentions in granting protection through Section 510 to complaining employees are frustrated by the Third Circuit's decision. The Court should grant the Petition and facilitate clarification of the law with respect to the scope of ERISA's anti-retaliation provision.

C. Unlike Certain Statutes Requiring Written Complaints to Vindicate Statutorily Protected Rights, ERISA Section 510 Does Not.

Congress has in many statutes required complaints to be formal in order to be recognized. *See, e.g.,* 2 U.S.C. § 437 g(a)(1) (Federal Election Campaign Act); 5 U.S.C. §§ 3330a(a)(1)(A) & (a)(2)(B) (Veterans Employment Opportunities Act); 7 U.S.C. § 193(a) (Packers and Stockyards Act); 19 U.S.C. § 2561(a) (Trade Agreements Act); 38 U.S.C. §§ 4322(a) & (b) (Uniformed Services Employment and Reemployment Act); 42 U.S.C. § 2000(a) (Civil Rights Act of 1964); 42 U.S.C. §§ 3610(a)(1)(A)(i) & (ii) (Fair Housing Act); 42 U.S.C. § 15512(a)(2)(C) (Help America Vote Act); 47 U.S.C. § 554(g) (Cable Communications Policy Act); 49 U.S.C. § 46101(a)(1) (Federal Aviation Act). It is common practice for Congress to require explicit formalities in connection with the statement of a grievance in order to invoke federal statutory protection, particularly in the employment setting. In so doing, however, Congress has left little doubt as to the elements that are required.

Structurally, Section 510 far more closely resembles the statutory schemes that the Court has held to require the grievant simply to communicate to the employer or other authorized recipient the substance of the complaint. Not even the statutory basis of the complaint is required to be articulated if the substance sufficiently invokes statutory protection. *NLRB v. Scrivener*, 405 U.S. 117, 121,

123-124 (1972); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

It is essential to a clear understanding in the lower courts as to the application of anti-retaliation statutes in general and ERISA Section 510 in particular that the Court offer practical guidance by reconciling the conflict among the Circuits that is evident on the remedial scope of Section 510.

CONCLUSION

For all of the foregoing reasons, the Court should grant the Petition for Certiorari.

Respectfully submitted,

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