

Companies Can Safely Fire Someone Who Alleges Internal ERISA Violations

By Jewell Lim Esposito March 23, 2011



At least under ERISA and at least in some states.

Last week, the United States Supreme Court declined to review a Third Circuit decision that ERISA § 510 (which makes it illegal to fire an employee “because he has given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA]”) did not protect an HR director’s unsolicited comments to management. Specifically, the director claimed she was fired after reporting to supervisors perceived ERISA violations (including the fiduciary breach of misrepresentation) regarding the company’s group health plan. *Shirley Edwards v. A.H. Cornell and Son, Inc.*, 610 F.3d 217 (3d Cir. 2010), *cert. den.* 2011 WL 767661 (S.Ct. 2011).

An employee suspects ERISA violations and tells her boss. The company fires her. Proper under ERISA? Apparently so.

In declining to review *Edwards*, the Supreme Court leaves the Third Circuit aligned with the Second and Fourth Circuits in interpreting ERISA’s whistleblower protections narrowly, saying ERISA § 510 protects witnesses testifying in federal probes or other formal inquiries, not employees like the HR director who merely volunteers, of her own accord, alleged possibility of ERISA violations. In contrast, the Fifth Circuit, Ninth Circuit, and the U.S. Department of Labor interpret the provision more broadly and conclude ERISA § 510 protects these types of unsolicited comments, even if not subject to a formal outside probe or inquiry.

All this aside: isn’t it bad from a public relations viewpoint for a company to terminate someone -- and an HR director at that (!!) -- one who, aside from perhaps internal ERISA counsel, is a great watchdog of sorts who can sniff out possible ERISA violations on behalf of plan participants?

[Mercifully, my employment lawyer colleague Robin Shea responds and rounds out this discussion in our sister blog, Employment & Labor Insider. . .]

“Even though this type of firing apparently doesn’t violate ERISA, it’s probably still illegal under some other theory. How long do you think it would take for a good plaintiff’s lawyer to come up with a claim based on these allegations? How about a wrongful discharge/public policy claim based on her internal complaints of misrepresentation?”

CONSTANGY

BROOKS & SMITH, LLP

The Employers' Law Firm, Since 1946

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.