**Shooting the Messenger:**
**How Enforcement of FLSA and ERISA Is Thwarted by**
**Courts' Interpretations of the Statutes' Anti-Retaliation and Remedies Provisions**

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## I. INTRODUCTION

Two pillars of employment law[1] – the Fair Labor Standards Act (FLSA) and the Employee Retirement Income Security Act (ERISA) – rely on employee complaints to detect and cure violations by employers.[2] To encourage employer compliance, FLSA protects employees who file complaints about their employer's FLSA violations by providing victims of retaliation with compensatory and sometimes even punitive damages. However, in the last decade, some courts have constricted FLSA's anti-retaliation provision by refusing to protect either all internal complaints[3] or at least internal complaints filed by employees with personnel duties.[4] This narrow construction of FLSA has recently metastasized to ERISA because courts rely on their circuits' interpretation of FLSA to delineate the scope of ERISA protection. The problem is compounded by some circuits' denial of any monetary remedy under ERISA even when they hold that the statute *does* protect an employee from retaliation. Ultimately, these circuit splits over FLSA and ERISA protection, in tandem with ERISA's lack of monetary remedies, undermine both statutes' enforcement by placing supervisors and human resource employees in an untenable position: while their job duties require them to report FLSA and ERISA violations, they are often not protected when fulfilling these duties.

To illustrate this problem, imagine that a human resources employee, Felicia, discovers that her employer has failed to pay overtime to its employees for many years, a likely a violation of FLSA. At the same time, another human resources employee, Erica, learns that this failure to pay overtime has resulted in her employer under-funding employees' retirement plans, a likely violation of ERISA. In an effort to save their employer from a class action lawsuit by injured employees, Felicia and Erica each email the president of the company to inform him of their

respective discoveries of FLSA and ERISA violations. These emails constitute internal complaints. The President responds by immediately terminating both Felicia and Erica.

Given that FLSA[5] and ERISA[6] each include anti-retaliation provisions that protect employees who report violations of the respective statute, Felicia and Erica might expect that they would have a cause of action against their former employer for retaliation. However, because of circuit splits over the scope of FLSA's and ERISA's anti-retaliation provisions and the remedies available under ERISA, the recourse available to Felicia and Erica depends upon the state in which they bring their claims and the statutory violation each reported. For example, claims brought in New York, California, and Texas would result in three disparate outcomes.

Suppose that Felicia and Erica have the misfortune of being fired in New York. Neither one has a federal cause of action because the Second Circuit has held that their type of internal complaint is not protected under either FLSA's[7] or ERISA's[8] anti-retaliation provisions. Because they also do not have viable state law claims, Felicia and Erica have no remedy.[9]

The result would be different if Felicia and Erica were fired in California. There, both employees would likely have a federal claim; Felicia would be protected by FLSA's anti-retaliation provision[10] and Erica by ERISA's anti-retaliation provision.[11] Both employees would also be able to allege facts that establish a state law claim for retaliation.[12] But while Erica suffered from a lack of protection under ERISA in New York, she suffers from an overabundance of protection in California. Erica's state law claim entitles her to significantly greater remedies – including compensatory and punitive damages – than those available under ERISA.[13] Yet the Ninth Circuit has held that ERISA completely preempts Erica's state law claim for retaliation.[14] Thus she can receive only the limited remedies available under ERISA's anti-retaliation provision, which may be little more than the privilege of being reinstated at her

former position, with no backpay.[15] Without a monetary remedy, Erica would likely be discouraged from bringing a retaliation claim. Felicia, in contrast, need not worry about preemption because her claim for retaliation under FLSA entitles her to damages similar to those provided under state law, including compensatory and punitive damages.[16]

Finally, imagine that Felicia and Erica were fired in Texas. Neither one would have a state law claim.[17] Felicia would also lack a federal claim because the Fifth Circuit recently adopted the *McKenzie* doctrine, which effectively excludes employees with personnel duties from FLSA protection.[18] The Fifth Circuit held that an employee is not protected under FLSA when her duties require her to report FLSA violations because, in reporting the violations, she fails to "step outside" her role as an employee and "tak[e] a position adverse to the employer."[19] Thus, Felicia would have no remedy in Texas; she has no federal claim because her duties *required* her to report FLSA violations and no state law claim because Texas does not recognize one. In contrast, Erica would likely be protected under ERISA because the Fifth Circuit has held that ERISA's anti-retaliation provision encompasses internal complaints and the Fifth Circuit has not yet extended the *McKenzie* doctrine to ERISA.[20] Unlike in California, Erica would have no Texas state law claim, so she would welcome federal protection under ERISA.

The current state of the law creates several inequities. The Second and Fifth Circuit's holdings undermine FLSA's and ERISA's enforcement by interpreting their anti-retaliation provisions so narrowly that they fail to protect employees with personnel duties who make internal complaints. Yet, even in jurisdictions such as the Ninth Circuit, which interpret FLSA's and ERISA's anti-retaliation provisions broadly, ERISA enforcement may be weakened by inadequate remedies. Finally, although Felicia and Erica engaged in the *same* activity – filing

complaints – the extent of statutory protection and remedies available to each plaintiff varies greatly depending on the statutory violation each reported.

Given these incongruities in the law, some scholars have suggested broadening FLSA's anti-retaliation provision.[21] However, scholars have yet to examine the corresponding circuit split over ERISA's anti-retaliation provision, analyze how resolution of the FLSA circuit split will impact ERISA, or contend that victims of retaliation can obtain backpay under ERISA through the legal theory this article proposes: equitable restitution.[22]

This article fills the void by proposing a broad interpretation of FLSA that protects internal complaints made by employees with personnel duties. It then argues that an expansion of FLSA will lead to a similar expansion of ERISA. But because this solution forces employees who report ERISA violations to suffer the complete preemption of their state law remedies, expansion of ERISA protection is not enough. To make such protection meaningful, this article posits a legal theory under which ERISA remedies can be expanded to include backpay.

Part II explains the state of the law. Subsection (a) explores the FLSA circuit split over internal complaints filed by employees with personnel duties. Subsection (b) discusses how the circuit split over the scope of FLSA's anti-retaliation provision has metastasized to a circuit split over ERISA's anti-retaliation provision, resulting in some courts refusing to protect internal complaints under ERISA. Subsection (c) explores the circuit split over whether backpay is a remedy available under ERISA and how the lack of monetary remedies under ERISA, combined with ERISA's preemption of state law, leaves some plaintiffs with little remedy for retaliation.

Part III describes how the resolution of the circuit split over FLSA's anti-retaliation provision will impact the circuit split over ERISA's anti-retaliation provision. Given that courts rely on their circuit's interpretation of FLSA's anti-retaliation provision to inform the scope of

ERISA's provision, a resolution of the FLSA circuit split will lead to the same result under ERISA. This subsection concludes that a broad interpretation of FLSA's anti-retaliation provision would be an unmitigated good for employees who file complaints *about FLSA violations* because their FLSA claims will entitle them to remedies equivalent to or greater than those available under state law. However, an expansion of ERISA protection will be a Pyrrhic victory for plaintiffs unless ERISA is interpreted to provide a monetary remedy. Nonetheless, the expansion of FLSA and ERISA protection would foster the detection and curing of violations better than the alternative: a narrow interpretation of both statutes to deny a federal claim under either statute, but which would still likely allow ERISA to preempt plaintiffs' state law claims.

Part IV asks whether an employee with personnel duties who files an internal complaint should be protected from retaliation under FLSA and ERISA. Subsection (a) examines the text of FLSA's anti-retaliation provision, concluding that the text is at least open to an interpretation that internal complaints are protected and that the *McKenzie* doctrine is contrary to the text. Subsection (b) applies a similar analysis to the text of ERISA's anti-retaliation provision and concludes that ERISA's text is at least open to the protection of internal complaints. Subsection (c) explores whether a broad or narrow interpretation of FLSA's and ERISA's anti-retaliation provisions is consistent with the statutes' purposes. Section (d) concludes that an employee with personnel duties who files an internal complaint should have a cause of action under FLSA and ERISA because only a broad interpretation is consistent with the statutes' text and purposes.

Part V asks whether ERISA should provide a monetary remedy to an employee fired for filing a complaint. Subsection (a) explores the text of ERISA's remedies provision and recent Supreme Court cases, concluding that both are at least open to an interpretation that ERISA provides backpay. Subsection (b) explores whether the award or denial of backpay is consistent

with ERISA's purpose. Subsection (c) concludes that backpay should be available because it is consistent with both ERISA's text and purpose. Finally, Part VI concludes this article.

## II. THE STATE OF THE LAW: THREE CIRCUIT SPLITS

The circuit splits over the scope of FLSA's and ERISA's anti-retaliation provisions and ERISA's remedies reflect competing textualist and pragmatist methods of statutory interpretation. Circuits that adopt a textualist approach reason that the language of the statutes is unambiguous and thus their meaning must be discerned solely from the text.[23] Pragmatists argue that that the text is ambiguous and thus turn to legislative history to decipher meaning.[24] More extreme pragmatists adopt positions contrary to the text, reading into the statutes *limitations* that serve a practical purpose[25] or *protections* that give effect to their remedial nature.[26]

### a. The Scope of FLSA's Anti-Retaliation Provision

FLSA's anti-retaliation provision, Section 215(a)(3), states that is unlawful "to discharge . . . any employee because such employee has *filed any complaint* or instituted or caused to be instituted any proceeding . . . related to [FLSA], or has testified or is about to testify in any such proceeding."[27] The circuits disagree over whether the phrase "filed any complaint," referred to as the "Complaint Clause," includes internal complaints. Two circuits adopt a narrow view, alternately holding that FLSA does not protect *any* internal complaints or at least does not protect an employee's internal verification of the facts of another employee's lawsuit. Eight circuits adopt a broad interpretation that protects internal complaints. However, three of these circuits create an exception that excludes employees with personnel duties from protection.

#### i. Textualists' Narrow Interpretation Denies Protection to Internal Complaints

Two circuits adopt a narrow interpretation that limits the scope of FLSA protection by restricting *to whom* a complaint may be made or *by whom* it can be verified.

In *Lambert v. Genesee Hospital*, the Second Circuit held that the text of Section 215(a)(3) was "plain and unambiguous" in excluding internal complaints from its protection.[28] The court reached this conclusion by contrasting FLSA's Complaint Clause with broader language in another employment discrimination statute, Title VII, which protects internal complaints.[29]

In *Ball v. Memphis Bar-B-Q Company*, the Fourth Circuit held that FLSA's phrase "about to testify in any . . . proceeding" does not protect plaintiffs who are about to testify in a lawsuit that has *not yet been filed*.[30] The court reasoned that the combination of the words "testimony" and "proceeding" unambiguously indicated that "proceeding" referred to a *filed* lawsuit.[31] The Fourth Circuit's textualist logic would become critical in its later interpretation of a similar phrase in ERISA regarding internal complaints.

ii. Pragmatists' Broad Interpretation Protects Internal Complaints

Eight circuits adopt a pragmatic approach to explicitly protect internal complaints under FLSA Section 215(a)(3).[32] When these circuits do engage the text, they conclude that the Complaint Clause is ambiguous and thus look to FLSA's remedial purpose for guidance.[33] Alternatively, several circuits ignore the text and simply reason that a broad interpretation is necessary because "to hold otherwise would defeat the Act's purpose."[34] These circuits balance the statute's remedial purpose against practical concerns about whether the plaintiff's activity is sufficiently expressive to trigger protection. While "not all amorphous expressions of discontent related to wages and hours constitute complaints filed," an employee will be protected if he "communicates the *substance* of his allegations to the employer."[35]

More extreme pragmatists adopt a broader interpretation that protects "conduct not expressly covered" by FLSA to give effect to its remedial purpose, even when the text "would seem clear enough."[36] These circuits protect a plaintiff who is terminated due to an employer's

*mistaken belief* that the plaintiff filed a complaint, even if the plaintiff did not engage in any activity protected under FLSA Section 215(a)(3).[37] These circuits look solely to the *employer's motivation* to determine if the plaintiff is protected. These extreme pragmatists reason that a termination based on an employer's mistaken belief deserves protection because the employer's actions "create the same atmosphere of intimidation" that FLSA sought to prevent by barring employers from retaliating against employees who engaged in protected activity.[38]

iii. Some Pragmatists Deny Protection to Internal Complaints Filed by Employees with Personnel Duties Under the *McKenzie* Doctrine

Three circuits that interpret FLSA to protect internal complaints also adopt the *McKenzie* doctrine, which effectively exempts employees with personnel duties from FLSA protection.[39] *McKenzie* excludes from FLSA protection an employee who files a complaint in such a manner that she fails to "step outside" her employee role and take a position "adverse to" her employer.[40] Courts invoke *McKenzie* to leave a plaintiff with personnel duties unprotected when she either: (1) internally complains about the violation of FLSA rights of *other employees* who have not themselves complained;[41] or (2) internally *relays* complaints filed by *other employees*.[42] While no circuit has expressly rejected *McKenzie*, at least one circuit has protected a non-supervisor plaintiff when she relayed to coworkers an external complaint filed by another employee.[43]

Adopting a pragmatic approach, the circuits that apply the *McKenzie* doctrine do not engage FLSA's text. Instead, they justify the *McKenzie* doctrine on practical grounds, reasoning that without such an exception "nearly every activity in the normal course of a manager's job would potentially be protected," resulting in "whole groups of employees . . . being difficult to discharge without fear of a lawsuit."[44]

b. The Scope of ERISA's Anti-Retaliation Provision

The relevant part of ERISA's anti-retaliation provision, Section 510, states that it is unlawful "to discharge . . . any person because he has *given information* or *has testified or is about to testify* in any *inquiry or proceeding* relating to" ERISA.[45] In construing the scope of this provision, courts look to the scope of similarly-worded statutes, especially FLSA. Thus, the circuit split over FLSA's anti-retaliation provision has metastasized to a circuit split over ERISA's anti-retaliation provision, resulting in internal complaints being protected under ERISA in two circuits and not in two others. As with FLSA, courts that adopt a textualist approach construe ERISA narrowly and those that adopt a pragmatic approach construe it broadly.

i. Textualists' Narrow Interpretation Denies Protection to Internal Complaints

Two circuits adopt a narrow interpretation of ERISA's anti-retaliation provision to exclude either all internal complaints or at least those which do not respond to a third party's inquiry. Analogizing to FLSA's anti-retaliation provision, these circuits contend that ERISA's text is unambiguous, yet they reach different conclusions regarding the text's meaning.

The Fourth Circuit adopts the narrowest interpretation, concluding in *King v. Marriott International, Inc.,* that internal complaints are not protected under ERISA Section 510 by comparing it with FLSA Section 215(a)(3).[46] The Fourth Circuit reasoned that, because it had previously interpreted the word "proceeding" in FLSA to *not* refer to internal complaints,[47] ERISA's reference to a "proceeding" was similarly narrow.[48] Applying the same textualist logic it used on FLSA, the court concluded that the ERISA clause "testified or is about to testify" limits the following phrase, "inquiry or proceeding," to only a "legal or administrative" inquiry or proceeding, not an internal complaint.[49] Finally, the court dismissed ERISA's clause that protects an employee who has "given information" about a violation – a clause present in ERISA but not in FLSA – as referring only to "non-testimonial information" such as documents.[50]

The Second Circuit protects slightly more activity than *King*, concluding in *Nicolaou v. Horizon Media, Inc.*, that ERISA protects internal complaints when they are made in response to a third party's inquiry.[51] The centerpiece of the court's reasoning was a comparison of ERISA and FLSA: whereas ERISA's anti-retaliation provision protects anyone who has "*given information* or has testified . . . *in any inquiry* or proceeding," FLSA lacks the words "given information" and "inquiry."[52] Because the "plain language" of ERISA's anti-retaliation provision was "unambiguously broader in scope than" FLSA's,[53] the Second Circuit reasoned that its previous holding[54] that FLSA did not protect internal complaints was not "decisive." Instead, the court turned to a dictionary to define the word "inquiry" as a "request for information."[55] Applying this definition of "inquiry" to the case, the Second Circuit held that if the plaintiff could show she was "contacted" *by another party* to meet with her employer about violations, then she had indeed responded to an "inquiry" and thus was protected by ERISA.[56]

ii. Pragmatists' Broad Interpretation Protects Internal Complaints

Two circuits adopt a broad interpretation of ERISA Section 510 that protects internal complaints.[57] Neither circuit engages the text of the statute. Instead, their pragmatic justification echoes that of other circuits regarding FLSA's anti-retaliation provision.[58] The Ninth Circuit, for example, notes that ERISA Section 510 "is clearly meant to protect whistle blowers" and reasons that internal complaints are protected because they are often a "first step" in whistle blowing.[59]

c. The Circuit Split Over Backpay As An ERISA Remedy for Retaliation

Ultimately, even if an employee is protected by statute, she is unlikely to bring a retaliation claim under FLSA or ERISA if she cannot recover a monetary remedy. Unlike FLSA, which provides plaintiffs with double wages[60] and, in some jurisdictions, even punitive damages,[61] courts have interpreted ERISA Section 502(a)(3) to provide no compensatory or

punitive damages.[62] Instead, the relevant[63] ERISA remedies provision, Section 502(a)(3), provides that a civil action may be brought: "(A) to enjoin any act . . . which violates any provision of this title . . . or (B) to obtain other *appropriate equitable relief* . . . to redress such violations . . . ."[64] The Supreme Court has construed ERISA's phrase "appropriate equitable relief" to provide only certain types of equitable remedies. A circuit split has evolved as courts try to divine whether the Supreme Court's definition of "equitable relief" includes backpay.

i. The Supreme Court's Definition of "Equitable Relief"

The Supreme Court has limited the definition of "equitable relief" under ERISA 502(a)(3) through two pivotal cases, *Mertens v. Hewitt Associates*[65] and *Great-West Life & Annuity Insurance Co. v. Knudson*.[66] However, the Court has recently expanded "equitable relief" in *Sereboff v. Mid Atlantic Medical Services, Inc*.[67]

In *Mertens*, a bare majority of the Court held that "equitable relief" under Section 502(a)(3) was limited to "typically" equitable relief,[68] citing "restitution" as an example of such relief.[69] While the Court did not define "typically" equitable, it did *reject* a historical definition in which "typically" equitable relief would mean relief available in a court of equity. The Court reasoned that the modifier "equitable" would be rendered "superfluous" if it meant *all* relief that a court sitting in equity could have granted for the plaintiff's claim – a breach of trust – because the courts of equity could grant *both* legal *and* equitable relief for a breach of trust.[70] Thus, the Court implied that its test for "typically" equitable relief is any relief that does not render superfluous the word "equitable" – that is, a definition that *limits* relief in some way.

Then, in *Great-West*, the Court backpedaled on its statement in *Mertens* that "restitution" constituted "typically" equitable relief, holding instead that only "equitable restitution" qualified as such relief and devising a test to distinguish equitable from legal restitution.[71] The Court

provided new guidelines to determine if relief is equitable or legal, instructing jurists to consult "standard current works such as [treatises by] Dobbs . . . and the Restatements"[72] to discern if "the basis for [the plaintiff's] claim and the nature of the underlying remedies sought" were equitable.[73] Relying on Restatements and treatises, the Court distinguished equitable from legal restitution based on whether the defendant *possesses* the funds with which he has been unjustly enriched. Restitution is equitable when a defendant *possesses* funds belonging to the plaintiff[74] and legal when a defendant does *not possess* the funds, such as when it is bankrupt.[75] The Court then held that the plaintiffs sought only legal restitution because the defendants *did not possess* the plaintiffs' funds, and thus the plaintiffs could not recover under Section 502(a)(3).[76]

Lastly, in *Sereboff*, the Court affirmed that the distinction between equitable and legal restitution turns *not* on whether the remedy can be characterized as legal relief, but rather on whether a defendant *possesses* the plaintiff's funds.[77] The Court held that the plaintiff in *Sereboff* could recover under 502(a)(3) because the defendants *possessed* the funds sought, even though the funds were monetary remedies – which *Mertens* had described as "the classic form of legal relief"[78] – and for a breach of contract – a claim that is usually considered legal.[79]

While these three cases inform lower courts' interpretations of "equitable relief" under ERISA Section 502(a)(3), they leave open whether backpay is available under ERISA.[80] Prior to *Mertens* and *Great-West*, several lower courts awarded backpay under 502(a)(3) as "equitable relief" for victims of Section 510 retaliation.[81] Even after *Mertens*, but prior to *Great-West*, one circuit held that backpay was available under Section 502(a)(3) as restitution, but without applying *Great-West*'s definition of *equitable* restitution. However, after *Great-West*, two circuits have concluded that backpay is not available for a Section 510 violation. Most district

courts have followed these circuits,[82] although none have addressed the impact of *Sereboff* on these two circuit's holdings or whether backpay could be characterized as equitable restitution.

ii. A Narrow Interpretation of "Equitable Relief" that Excludes Backpay

In *Millsap v. McDonnell Douglas Corporation*, the Tenth Circuit interpreted *Mertens* and *Great-West* to hold that backpay was not "typically" equitable relief and thus not available under ERISA Section 502(a)(3) for a Section 510 violation.[83] The court reached this conclusion by creating a dichotomy between legal and equitable relief: it first found that backpay was a legal remedy, and then reasoned that, because the "plain language" of Section 502(a)(3) authorized only *equitable* relief, backpay was unavailable.[84] Following *Mertens*, the court asked whether backpay was *typically* available in courts of equity, but it was stymied by the problem that "backpay did not exist at common law" in *either* courts of equity or law.[85] Fishing for an analogous remedy, the court likened backpay to personal injury claims for lost wages or contract claims for past wages, arguing that backpay is similarly "compensatory."[86] The court then concluded that backpay was legal because compensation is "a purpose 'traditionally associated with legal relief.'"[87] The court also reasoned that backpay is "money damages," which are "the *traditional* form" of legal relief.[88] Finally, the court noted in dicta[89] that plaintiffs could not characterize backpay as equitable restitution because restitution measures the remedy according to the defendant's gain, whereas the plaintiffs calculated the remedy based on the amount of their loss. Based on these arguments, the court concluded that the statute's text unambiguously barred backpay and ignored ERISA's legislative history that would suggest a different result.[90]

In *Eichorn v. AT&T Corporation*, the Third Circuit followed *Millsap* to conclude that backpay is not available under Section 502(a)(3).[91] The court reasoned that backpay claims

under ERISA are not restitution because a wrongfully discharged plaintiff has not *earned* the pay by working for the defendant, and thus the defendant is not unjustly enriched.[92]

iii. A Broad Interpretation of "Equitable Relief" that Includes Backpay

In contrast, in *Schwartz v. Gregori*, the Sixth Circuit upheld an award of backpay under Section 502(a)(3) against an employer who was liable for retaliation under Section 510.[93] The court recognized that *Mertens* limited the definition of "equitable relief" in Section 502(a)(3) to relief "typically available in equity."[94] However, the court also observed that *Mertens* expressly mentioned restitution as such a "typical" form of equitable relief.[95] Adopting reasoning similar to that which the Supreme Court would apply years later in *Great-West*,[96] the Sixth Circuit reconciled Supreme Court precedent which had held that backpay was alternately equitable and legal. The Sixth Circuit reasoned that the Supreme Court has characterized backpay as legal where a defendant did *not possess* the plaintiff's funds,[97] but as equitable and as restitution where the defendant was an *employer* – and thus implicitly possessed the plaintiff's funds.[98]

iv. ERISA Preemption of State Law Remedies

The availability of monetary remedies under ERISA is critical because ERISA preempts all state laws that "relate to" an ERISA benefit plan, thus eliminating all state law remedies.[99] The Supreme Court has interpreted the phrase "relate to" expansively,[100] holding that a state law "relates to" ERISA – and thus is preempted – when the state law either conflicts with ERISA or offers "alternative enforcement mechanisms" to those in Section 502(a).[101]

Some scholars[102] and district courts[103] contend that state law wrongful discharge claims arising from complaints of ERISA violations are too tenuously related to ERISA to be preempted. However, the few circuits that have addressed the issue have concluded that ERISA preempts these types of state law claims.[104] Furthermore, although the Supreme Court has not

addressed whether ERISA preempts such claims, it has held that ERISA preempts an analogous action: a state law claim alleging wrongful discharge to prevent payment of pension benefits. The Court reasoned that the state law claim was preempted because the existence of the ERISA benefit plan was a "critical factor" in establishing the state law claim[105] and the state law claim conflicted with the cause of action provided by ERISA Sections 510 and 502(a).[106]

While plaintiffs generally dislike preemption because it extinguishes more generous state law remedies, the various forms of preemption have different deleterious effects on plaintiffs' ability to recover any remedy. *Complete preemption* transforms a state law claim into an exclusively ERISA claim with only ERISA remedies; it applies when the facts buttressing the state law claim would also support a claim under ERISA.[107] The transformed ERISA claim is then removable to federal court, a venue less familiar to many plaintiff-side employment lawyers in states where state law remedies are more generous than federal laws.[108] In contrast, other forms of preemption extinguish a plaintiffs' state law claim, without necessarily providing any cause of action under ERISA. Such invidious preemption bars any remedy under *either* ERISA *or* state law.[109] For example, the Sixth Circuit has concluded that ERISA preempts a plaintiff's state law claim of retaliation for his internal complaint about ERISA violations[110] without considering whether ERISA itself afforded the plaintiff an alternative cause of action.[111]

## III. How Resolution of the FLSA Circuit Split Impacts the ERISA Circuit Splits

Part II laid out the interlocking parts of the law – the circuit splits over whether FLSA's and ERISA's anti-retaliation provisions protect internal complaints and whether any monetary remedy is available under ERISA given its preemption of state law remedies. This section now demonstrates how these parts work together.

Given that courts rely on their circuit's interpretation of FLSA's anti-retaliation provision to inform the scope of ERISA's anti-retaliation provision, a resolution of the FLSA circuit split will lead to the same result under ERISA.[112] An expansion of FLSA to include internal complaints and eliminate the *McKenzie* doctrine will lead to a corresponding expansion of ERISA protection. However, some circuits' denial of FLSA protection to internal complaints filed by employees with personnel duties bodes ill for their future protection under ERISA.

A broad interpretation of FLSA's anti-retaliation provision would be an unmitigated good for employees who make internal, unwritten complaints *about FLSA violations*. A federal claim would benefit victims of retaliation in states, such as New York or Texas, that provide no state law cause of action. Alternatively, in states that recognize a state claim, such as California, FLSA would provide remedies equivalent to or greater than those available under state law.[113]

In contrast, an expansion of FLSA would result in a corresponding expansion of ERISA to protect complaints *about ERISA violations* – but this expansion of ERISA protection may be a Pyrrhic victory for plaintiffs. ERISA protection will result in complete preemption of state law claims arising from retaliation for complaints about ERISA.[114] Because complete preemption extinguishes the state law claim, victims of retaliation will receive only ERISA remedies, which leaves plaintiffs with no monetary remedy unless ERISA is interpreted to provide backpay.

Yet, the expansion of FLSA and ERISA protection would foster detection and curing of violations better than the alternative: a narrow interpretation of both statutes' anti-retaliation provisions that eliminates a cause of action under both statutes. A narrow interpretation leaves employees with no remedy in states that lack a state law retaliation claim. In addition, it is likely that courts would still find that ERISA preempts state law claims arising from complaints of ERISA violations given precedent,[115] the Supreme Court's favorable view of preemption,[116]and

the legislative history of ERISA's preemption clause.[117] Thus, although a few outlier courts hold that ERISA does not preempt state law retaliation claims, the only two options likely available to employees who file internal complaints of ERISA violations is either complete preemption, with its limited remedies, or another form of preemption, which would provide no remedy.

Given this choice, this article concludes that the lesser evil is a broad interpretation of FLSA that protects internal complaints by employees with personnel duties, which will lead to their protection under ERISA as well. Part IV analyzes the doctrinal and policy arguments for and against such an expansion. However, because ERISA protection has little utility unless it also affords a monetary remedy, Part V posits a legal theory to provide backpay under ERISA.

## IV. SHOULD AN EMPLOYEE WITH PERSONNEL DUTIES WHO FILES AN INTERNAL COMPLAINT BE PROTECTED UNDER FLSA AND ERISA FROM RETALIATION?

This section explores whether an employee with personnel duties who files an internal complaint should be protected from retaliation under FLSA and ERISA. It first examines the text of FLSA's and ERISA's anti-retaliation provisions, concluding that the text is at least open to a broad interpretation of FLSA and ERISA that protects such internal complaints. The section then explores whether a narrow or broad interpretation of FLSA's and ERISA's anti-retaliation provisions advances the statutes' purposes, concluding that only a broad interpretation does so.

### a. The Text of FLSA's Anti-Retaliation Provision

Because FLSA's purpose and legislative history would dictate expansive protection, the textualists' battle is fought over whether FLSA's anti-retaliation provision is unambiguous. This section argues that FLSA Section 215(a)(3), which protects "*any* employee" who "filed *any* complaint," can be read to protect internal complaints by employees with personnel duties.[118]

#### i. Internal Complaints

In *Lambert v. Genesee Hospital*, the Second Circuit became the only circuit to hold that FLSA Section 215(a)(3) did not protect internal complaints.[119] This section examines the court's arguments that FLSA's language is "plain and unambiguous" in excluding internal complaints.[120]

The centerpiece of *Genesee Hospital*'s reasoning was a contrast between FLSA's Complaint Clause and the language of another employment statute, Title VII.[121] Title VII prohibits an employer from discriminating against an employee who "opposed any practice" made unlawful by Title VII.[122] The court correctly noted that Title VII protects internal complaints about violations of Title VII because they constitute an employee's "opposition" to an employer's practice.[123] The court then reasoned that *because* Title VII protects internal complaints *and* uses broader language to define protected activity than FLSA, *therefore* FLSA must not protect internal complaints.[124] However, the fact that internal complaints *are* protected by Title VII says nothing about whether they *are not* protected by FLSA; internal complaints could be protected by *both* statutes. To illustrate the court's specious logic, imagine that Title VII is Illinois, and FLSA is Chicago. The fact that internal complaints are *within* Illinois (Title VII) tells us nothing about whether they are *outside* Chicago (FLSA).

In fact, the court ignored statutes that have been construed by other circuits to protect internal complaints and that have language similar or identical to FLSA. For example, the anti-retaliation provision of the Federal Railroad Safety Act[125] (FRSA) has language identical to FLSA.[126] In concluding that the FRSA protected internal complaints, the Fourth Circuit reasoned that "the distinction between intra-corporate complaints and those made to outside agencies is . . . an artificial one" because "[b]oth serve to promote rail safety."[127] Similarly, the Clean Water Act (CWA) bars discharging an employee who "caused to be filed or instituted any proceeding," a phrase that echoes FLSA's anti-retaliation provision.[128] While the term

"proceeding" could arguably be construed as referring to formal activity, such as an agency proceeding or lawsuit, the Third Circuit has held that the CWA protects internal complaints.[129]

Finally, *Genesee Hospital* erred when it perfunctorily concluded that the "plain language" applies only to "retaliation for filing *formal* complaints" but not internal complaints.[130] To reach its conclusion, the textualist court had to alter FLSA's actual text – "filed any complaint" – by inserting the word "formal" and deleting the word "any." Yet, the word "any," combined with the statute's silence regarding *who* must receive of the complaint, creates at least an ambiguity about whether the statute protects internal complaints.[131] Furthermore, a narrow interpretation of FLSA would render protection for an employee who has "instituted . . . any proceeding" superfluous because the verb "instituted" already encompasses complaints filed with the Department of Labor or a federal court, but arguably not with an employer.[132]

In sum, the court erred by: (1) using faulty logic to distinguish FLSA from Title VII; (2) ignoring statutes with wording more analogous to FLSA; and (3) failing to consider the impact of other words on the statute's meaning. Thus, as the majority of circuits which considered the issue have concluded, FLSA is not unambiguous regarding whether it protects internal complaints; it is at least open to the interpretation that they are protected.

ii. The *McKenzie* Doctrine

The *McKenzie* doctrine denies FLSA protection if an employee: (1) has job duties that include ensuring the employers' compliance with the law; and (2) files a complaint about violations of *other employees'* FLSA rights in such a manner that she fails to "step outside" her role as an employee and take a position "adverse to" her employer.[133] Yet FLSA Section 215(a)(3) explicitly prohibits retaliation "against *any* employee because such employee has filed

*any* complaint."[134] The *McKenzie* doctrine appears irreconcilable with the FLSA's text, which may explain why none of the courts which adopt the doctrine justify it based on the text.

First, the phrase "any employee" indicates that FLSA does not exclude an employee based on her "role" within the organization. In contrast to this expansive protection of "any employee" against retaliation, FLSA has several provisions that *expressly exempt* from its minimum wage and overtime pay requirements certain employees based on job duties, that is, based on their role.[135] Thus, if Congress had intended to exclude from FLSA's anti-retaliation provision certain employees based on their role, it would have done so explicitly.

Second, the FLSA phrase "*any* complaint" imposes no requirement that a complaint be about a violation of the complaining employee's FLSA rights. If Congress had intended this meaning, it would have barred retaliation against an employee who "filed *a* complaint *on his own behalf*." Even the *McKenzie* court conceded that FLSA "does not explicitly require" an employee to make an "assertion of his or her *own* statutory rights."[136] Thus, no textual basis exists to bar protection of internal complaints about violations of *other employees'* FLSA rights.

b. The Text of ERISA's Anti-Retaliation Provision

In *King v. Marriott International, Inc.*, the Fourth Circuit held that ERISA Section 510 does not protect internal complaints, relying on its interpretation of similar language in FLSA's anti-retaliation provision.[137] In contrast, in *Nicolaou v. Horizon Media*, the Second Circuit concluded that the "plain language" of Section 510 was "unambiguously broader in scope than" FLSA's anti-retaliation provision.[138] Lower courts have recognized that, by protecting plaintiffs' responses to inquiries from third parties, *Nicolaou* affords slightly more protection than *King*.[139] However, it would be misleading to read *Nicolaou* as a rejection of *King*.[140] As some courts have noted, both *Nicolaou* and *King* have interpreted Section 510 very narrowly.[141]

Both circuits interpreted ERISA to be coextensive with[142] or protect slightly more activity[143] than FLSA. Both circuits had previously adopted a narrow interpretation of FLSA that denied protection to internal complaints.[144] Thus, the errors in construing FLSA were repeated in these circuits' interpretation of ERISA; had these circuits recognized that FLSA protected internal complaints, they would have held that ERISA did so as well.

First, *King* interpreted ERISA Section 510 based on its previous interpretation in *Ball v. Memphis Bar-B-Q Company*[145] of a virtually identical phrase in FLSA. FLSA protects an employee who "testified or is about to testify in any *such* proceeding," while ERISA uses the phrase "testified or is about to testify in any *inquiry or* proceeding."[146] In *Ball*, the Fourth Circuit held that "proceeding" referred only to a legal or administrative proceeding.[147] In *King*, the Fourth Circuit reasoned that "proceeding" had the same meaning – only a legal or administrative proceeding. Reasoning that "proceeding" modified the word "inquiry," the court then concluded that "inquiry" was similarly limited to only a legal or administrative inquiry.[148]

Yet, even if the Fourth Circuit's interpretation of "proceeding" is correct in the context of FLSA, the court's conclusion renders redundant ERISA's additional word, "inquiry." After all, a party's inquiry during a lawsuit (a "legal" inquiry) or an inquiry during a government agency's investigation (an "administrative" inquiry) would either initiate or result from a legal or administrative proceeding.[149] Furthermore, regardless of the formality implied by the word "proceeding" in FLSA or ERISA, "the use of the somewhat less formal term 'inquiry' in ERISA" indicates "protection for those involved in the informal gathering of information."[150]

Next, although ERISA protects "*any* employee [who] has given information . . . in *any* inquiry," the Second Circuit in *Nicolaou* relied on a dictionary to conclude that an "inquiry"

cannot be initiated by the *same* employee who gives information.[151] This conclusion reads into ERISA the limiting phrase "any inquiry *which the employee herself has not initiated*."

Even if a dictionary should be a judge's sole analytical tool, the very definition adopted by the Second Circuit places no such limit upon word "inquiry." The court defined the word "inquiry" as encompassing "*any* request for information," even an "informal gathering of information."[152] This definition could easily encompass a "request for information" initiated by a human resources manager who then passes that information on to her supervisor – indeed, that is precisely how human resource departments are supposed to function.

In short, both courts narrowly construed ERISA Section 510 by relying on their circuit's interpretation of FLSA; had they adopted a broad interpretation of FLSA, they would have adopted a broad interpretation of ERISA. In addition, *King* erred in interpreting ERISA so as to render redundant the word "inquiry," a term not present in FLSA. *Nicolaou* erred by reading additional limits into the word "inquiry" that did not follow from the court's own definition. Given these errors, it is at least ambiguous whether ERISA protects internal complaints.

c. Pragmatic Resolution of the Dueling Interpretations of FLSA's and ERISA's Text

As Parts II(a) and (b) have demonstrated, FLSA's and ERISA's anti-retaliation provisions are at least ambiguous regarding whether internal complaints are protected. The next subsection seeks to resolve this ambiguity by evaluating whether a broad or narrow interpretation of these statutes' anti-retaliation provisions is consistent with Congressional intent, as evinced by the statutes' purposes and legislative history. This pragmatic approach leads to the conclusion that Congressional intent is furthered only by adopting a broad interpretation of FLSA's and ERISA's anti-retaliation provisions and the elimination of the *McKenzie* doctrine.

i. The Purposes of FLSA and Its Anti-Retaliation Provision

The Supreme Court has held that FLSA's "remedial and humanitarian . . . purpose" requires that it "not be interpreted or applied in a narrow, grudging manner."[153] One of several New Deal reforms, Congress enacted FLSA in 1938 to establish national standards for minimum wages, overtime, and child labor so as to prevent employers from participating in a race to the bottom in working conditions.[154] FLSA also sought to curb labor unrest resulting from poor working conditions by providing victims of employer abuses with an alternative dispute resolution mechanism: access to courts and judicial remedies.[155] Congress expanded FLSA in 1963 by adding the Equal Pay Act, which prohibits employment discrimination based on sex, to prevent employers from engaging in a similar race to the bottom by threatening to replace male workers with lesser-paid females and thus depressing wages of both groups.

Congress created FLSA's anti-retaliation provision to provide a self-regulating enforcement mechanism that did not require extensive governmental oversight.[156] The Supreme Court has spoken decisively on the purpose of Section 215(a)(3), describing the crucial role that employee complaints play in ensuring "effective enforcement" by "foster[ing] a climate [of] compliance."[157] Noting that "fear of economic retaliation" could make filing a complaint a "calculated risk," the Court rejected any reading of Section 215(a)(3) that would leave employees with only a "Hobson's choice" between risking employer retaliation and "quietly . . . accept[ing] substandard conditions."[158] Following this logic, lower courts have concluded that FLSA seeks to prevent retaliation not only because it harms the complaining employee, but also because it discourages non-complaining employees who might otherwise raise concerns.[159]

ii. The Purposes of ERISA and Its Anti-Retaliation and Remedies Provisions

Just as FLSA was passed in response to egregious employer abuses, Congress enacted ERISA in 1974 in response to several high-profile scandals regarding pension fund

mismanagement that led to unpaid obligations and the termination of employees to avoid paying benefits.[160] Thus, the purpose of ERISA was to prevent wrongful terminations and fund mismanagement by imposing duties on plan fiduciaries akin to those governing common law trusts[161] and to provide victims of such abuses with remedies and access to courts.[162] Courts have also held that a secondary goal of ERISA was "to encourage the growth of employer-sponsored benefit plans by avoiding undue administrative burdens," such as litigation.[163]

Like FLSA's anti-retaliation provision, ERISA's anti-retaliation provision was designed to ensure that employees could realize the rights guaranteed in ERISA. As the Supreme Court has recognized, "Congress viewed § 510 as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits."[164] As articulated in Congressional discussions, ERISA Section 510 was modeled on the anti-retaliation provisions in the National Labor Relations Act and Title VII,[165] and the sponsors of ERISA intended Section 510 to provide a "remedy" like that "provided for a person discriminated against because of race or sex."[166] To accomplish this goal, ERISA Section 510 is entwined with Section 502, ERISA's remedies provision, which was intended to provide "broad remedies" to plaintiffs, including the "full range" of remedies available under state and federal law at the time ERISA was enacted.[167]

iii. Internal Complaints' Protection Furthers Both Statutes' Remedial Purpose

The only interpretation that advances the remedial purposes of FLSA, ERISA, and their respective anti-retaliation provisions is a broad interpretation that protects internal complaints. Courts should follow the pragmatic interpretation adopted by the Third and Eighth Circuits, which focuses on whether the employer had a retaliatory *motivation*, not *to whom* the employee's complaint is made.[168] By ensuring that employees are protected from retaliation for internal complaints, a broad interpretation "foster[s] a climate [of] compliance," a purpose of FLSA's

anti-retaliation provision,[169] and prevents employers from "circumvent[ing] the provision of promised benefits," a purpose of ERISA's anti-retaliation provision.[170] By encouraging employees to report complaints, a broad interpretation encourages the primary purpose of both FLSA's and ERISA's anti-retaliation statutes: the detection and curing of violations.

Proponents of a narrow interpretation may contend that internal complaints do not give an employer adequate notice that it has committed a violation and that it will be liable if it retaliates against the complaining employee. Proponents may be concerned that employers who fire employees for non-retaliatory reasons may be deluged with meritless retaliation claims. However, notice is already an implied element of a prima facie case for retaliation. Under FLSA or ERISA, a plaintiff must show that the employer retaliated *because* the plaintiff complained about a violation.[171] By requiring a plaintiff to prove the employer's *motivation*, a prima facie case requires a plaintiff to show that an employer was *on notice* about the violation.

Furthermore, a narrow interpretation defeats the purposes of FLSA's and ERISA's retaliation provisions, which is precisely why courts that adopt this position do not argue that it is consistent with the statutes' purposes. First, a narrow interpretation has the perverse effect of providing the worst offenders – employers who are *deliberately* violating the law – with a tool to conceal their violations: the ability to punish employees based on *to whom* their complaint is made, even if its merit is undeniable.[172] Second, a narrow interpretation requires employees to be as competent as attorneys in statutory interpretation. Given that even judges do not agree about the scope of FLSA's and ERISA's protection, this interpretation transforms the decision to complain into "a calculated risk,"[173] where employees must weigh their confidence in their reading of the law against the possibility of economic retaliation. Given this calculus, employees may refrain from making internal complaints, leaving even well-meaning employers unaware

that they are violating FLSA or ERISA and thus unable to correct this innocent mistake. Finally, a narrow interpretation exposes employers to more litigation. If internal complaints are unprotected, employees have "a strong incentive . . . to institute litigation without first attempting to resolve the issue informally."[174] Because litigation in turn discourages employers from offering ERISA plans, a narrow interpretation is contrary to ERISA's purpose.

In sum, only a broad interpretation of FLSA's and ERISA's retaliation provisions gives effect to the statutes' purposes. Given that a narrow interpretation does little to advance these statutes' goals but does much to frustrate their enforcement, it should be abandoned.

iv. *McKenzie* Thwarts FLSA's Purpose and Should Be Quarantined from ERISA

This section argues that the *McKenzie* doctrine is contrary to FLSA's purpose because it discourages the statute's enforcement and that expansion of the doctrine to ERISA would force employees with personnel duties to make a Hobson's choice between personal liability for concealing violations and retaliation for revealing them. The *McKenzie* doctrine limits protected activity under FLSA to acts where an employee "step[s] outside his or her role of representing the company" and takes a position "adverse" to her employer.[175] Courts invoke the *McKenzie* doctrine to leave a plaintiff with personnel duties unprotected when she either: (1) complains to the employer about violations of the FLSA rights of other employees who themselves have not complained; or (2) *relays* to management complaints filed by other employees.[176]

Proponents argue that, without the *McKenzie* doctrine, "fear of a lawsuit" will discourage employers from discharging employees with personnel duties.[177] Proponents are concerned that plaintiffs who anticipate being fired may complain of a fabricated violation and, in an ensuing law suit, would survive summary judgment based upon circumstantial evidence of retaliation.

However, this argument fails to account for the burden in a prima facie case for retaliation and the availability of defenses. To be protected from retaliation under FLSA, a plaintiff must have a good faith belief that conduct of which she complained violated the law.[178] Thus, a plaintiff who simply fabricates a complaint to avoid being fired cannot survive summary judgment. Second, a plaintiff would lose on summary judgment if she could not rebut an employer defense that it had non-retaliatory reasons for terminating the plaintiff.[179] Thus, an employer will have a valid self defense if it can show that it had already planned to fire the plaintiff and did indeed fire the plaintiff for that non-retaliatory reason.

Rather than limit frivolous claims, the *McKenzie* doctrine eviscerates FLSA's self-regulatory mechanism. It does so by discouraging employees with personnel duties from doing their job – ensuring employers' compliance with the law – in three ways.

First, although *McKenzie* posited that a plaintiff could step outside her role if she were to "actively assist other employees in asserting FLSA rights," in practice courts so narrowly define such active assistance that no circuit that relies on *McKenzie* has found a plaintiff's activity to be protected.[180] Courts have invoked the *McKenzie* doctrine to justify firing an employee because the employee helped a coworker obtain overtime pay by verifying the hours worked,[181] reported violations to fellow employees, employer's counsel, and the president,[182] and relayed to management the supervisees' explicit doubts about the legality of reduced overtime.[183] In short, courts apply *McKenzie* to exclude internal complaints filed by employees with personnel duties.

Second, the *McKenzie* doctrine creates a Catch-22 by requiring a plaintiff to take a position "adverse" to her employer, but also denying FLSA protection when plaintiffs' actions are *too* adverse. In *Claudio-Gotay v. Becton Dickinson Caribe*, for example, the plaintiff's job duties included approving security guards' invoices.[184] Upon discovering that the guards were

not being compensated properly for overtime, the plaintiff wrote to his employer about this violation and explained that it was the plaintiffs' "intention by bringing out this important issue, [to] avoid potential liability of" the employer.[185] In a meeting in response to the plaintiff's letter, the employer's lawyer informed the plaintiff that the employer's contractor, not the employer, was "responsible" for the guards overtime pay and that the lawyer would inform the contractor of these "potential FLSA violations."[186] At the end of the meeting, the employer ordered the plaintiff to sign the invoices and, when the plaintiff refused to do so, fired him.[187]

Adopting the *McKenzie* doctrine, *Claudio-Gotay* held that *neither* of the plaintiff's actions qualified as protected activity. The court held that the letter was not protected activity because it demonstrated that the plaintiff was "concerned with protecting" the employer and thus was not taking a position adverse to the employer.[188] Yet, the court also held that the plaintiff was not protected when he refused to sign invoices because this position was adverse to the employer's "legitimate" demand – a demand to engage in potentially illegal activity.[189]

Finally, the circuits that adopt the *McKenzie* doctrine have created an ineffectual internal complaint system by holding that FLSA *protects* employees who file complaints with their supervisors or human resource personnel, yet does *not protect* supervisors and human resource personnel when they inform management about the complaint – that is, when they seek to *cure the violation*. Four harms result from this failure to protect an employee with personnel duties from detecting and curing violations. First, that employee may diligently avoid detecting complaints in order to preserve her job. Second, she may avoid reporting violations she discovers on her own, and thus these violations will go uncured. Third, if other employees file their complaints with supervisors or human resource personnel, who then do not report these complaints for fear of retaliation, the complaining employees will lose faith in the internal

complaint system and simply resort to litigation. Finally, if employees with personnel duties are fired for relaying other employee's complaints to the employer, all employees are discouraged from engaging in protected activity. After all, only a very brave or naïve employee would continue to pursue a complaint after learning that the person with whom she filed it was punished for trying to remedy it. Thus, a lack of protection for employees with personnel duties converts *all* employees' decision to complain into exactly the "calculated risk" FLSA sought to prevent.[190]

An expansion of the *McKenzie* doctrine to ERISA would be even more harmful to employees with personnel duties because it would impose a Hobson's choice between personal liability for concealing violations and retaliation for revealing them. While employees with personnel duties are likely not personally liable under FLSA for failing to report violations,[191] they would almost certainly be under ERISA.[192] Even if they were not found liable, their failure to report would be grounds for termination. Thus, the "great peril" of personal liability, combined with the risk of retaliation for reporting violations, would leave an employee with personnel duties "nothing but unattractive options when she discovers possible breaches."[193]

In short, the *McKenzie* doctrine's practical concern – that protecting employees with personnel duties will prevent employers from firing them for non-retaliatory reasons – are unfounded given plaintiffs' burdens in a prima facie case and employers' defenses. In addition *McKenzie* thwarts the purpose of FLSA's anti-retaliation provision, which is to ensure that employee complaints foster the detection and curing of employer violations, by frustrating FLSA's enforcement. Finally, if expanded to ERISA, the *McKenzie* doctrine would create a Hobson's choice between retaliation and personal liability. Given these infirmities, the *McKenzie* doctrine should be eliminated from FLSA jurisprudence and quarantined from ERISA.

d. Employees Should Be Protected under FLSA and ERISA from Retaliation

The text of FLSA's and ERISA's anti-retaliation provisions is at least ambiguous regarding whether the statutes protect internal complaints by employees with personnel duties. Thus courts should interpret these statutes by looking to their purpose and legislative intent. This pragmatic approach leads to the conclusion that only a broad interpretation of FLSA and ERISA and elimination of the *McKenzie* doctrine are consistent with the statutes' purposes. Given this conclusion, the next section examines what remedies ERISA should offer victims of retaliation.

## V. SHOULD ERISA AWARD A MONETARY REMEDY TO VICTIMS OF RETALIATION?

Statutory protection without a remedy does little to safeguard employees' ability to report violations of ERISA. Yet ERISA's complete preemption of state law remedies, in tandem with a circuit split over whether backpay is available as "equitable relief" under ERISA's remedies provision, Section 502(a)(3), has left some victims of retaliation without any remedy.

The Supreme Court has fueled lower courts' interpretation of ERISA as excluding backpay by holding in *Mertens v. Hewitt Associates* that Section 502(a)(3) provides only "typically" equitable relief.[194] *Mertens* engendered confusion by failing to provide a clear definition of "typically" equitable relief, holding only that the word "equitable" must *limit* relief in some way, and by appearing to create a dichotomy between legal and equitable relief.[195] In *Great-West Life & Annuity Insurance Co. v. Knudson*, the court sought to alleviate this confusion by holding that Section 502(a)(3) encompasses at least equitable restitution and by providing a bright-line distinction between equitable and legal restitution based on the defendant's *possession* of the plaintiff's funds.[196] However, confusion still lingers, evinced by the failure of some lower courts to recognize that money can still be "typically" equitable relief, despite the Court's award of monetary relief in *Sereboff v. Mid Atlantic Medical Services, Inc*.[197] Rather than repeat scholars' criticisms of the Court's historically inaccurate definition of "typically"

equitable relief,[198] this section argues that, under the Court's definition of equitable restitution, backpay is available as a remedy for retaliation for complaints about ERISA violations.

a. The Text of ERISA's Remedies Provision

In *Millsap v. McDonnell Douglas Corp*, the Tenth Circuit advanced several arguments to hold that the "plain language"[199] of Section 502(a)(3) precluded backpay for plaintiffs whose employer violated ERISA Section 510 by terminating them to prevent paying ERISA plan benefits.[200] Given that most lower courts have since relied on *Millsap* to deny backpay under ERISA, this subsection focuses on *Millsap*'s arguments and contends that it erred by misapplying Supreme Court precedent and overstating arguments against backpay as restitution.

i. Misapplying and Ignoring Supreme Court Precedent

In *Great-West*, the Court provided guidelines for determining if relief is equitable; jurists should discern if "the basis for [the plaintiff's] claim and the nature of the underlying remedies sought" is equitable[201] by consulting "current works such as [treatises by] Dobbs . . . and the Restatements."[202] *Millsap* misapplied the *Great-West* framework and *Mertens* in three ways.

First, regarding the nature of the plaintiffs' claim, *Millsap* misapplied *Mertens* when reasoning that, because an ERISA Section 510 claim *can* be analogized to legal claims, it *cannot* be analogized to an equitable claim.[203] However, *Mertens* limited relief in Section 502(a)(3) to only that which was *typically* equitable, *not* to that which was *exclusively* equitable.[204] In fact, *Mertens* twice specified injunction as a "typically" equitable form of relief available under 502(3)(a);[205] injunction was available in *both* courts of law *and* equity.[206] Thus, *even if* a Section 510 violation is analogous to legal relief, the analogy does not end the inquiry. Instead, the court must conclude that backpay *cannot* be characterized as equitable relief.

Second, regarding the nature of the remedy, *Millsap* misconstrued *Mertens* as holding that all monetary relief is legal relief, and thus unavailable under ERISA Section 502(a)(3).[207] . A few lower courts have also used this logic to deny backpay and benefits under ERISA Section 502(a)(3), relying on the misleading observation in *Mertens* that the monetary relief sought by plaintiffs was "[m]oney damages . . . the classic form of legal relief."[208] The Court explicitly rejected this logic in *Sereboff*, where it explained that monetary remedies *can* be equitable and, in fact, awarded the plaintiff monetary relief under ERISA Section 502(a)(3).[209]

Finally, while *Millsap* ostensibly followed the Supreme Court's instruction to consult treatises such as Dan Dobb's *Law of Remedies,*[210] *Millsap*'s analogy of an ERISA Section 510 claim to personal injury and contract claims was based on selective quotation that obscured several ambiguities.[211] *Millsap* based its analogy on attributing to Dobbs the observation that backpay claims are an "ordinary damages claim" and "do not differ remedially from the personal injury claim for lost wages, or the contract claim for past wages due."[212] Such selective quotation stripped the source of its deliberate qualifiers. Dobbs actually states that "backpay *seems on the surface* to be an ordinary damages claim" and that "backpay *seems* to be . . . clearly legal," "[b]ut *in fact* the cases do *not* yield up to any single conclusion."[213] In addition, Dobbs explicitly states that, in the context of a wrongful discharge claim, "backpay and reinstatement remedies are usually considered equitable."[214] *Millsap*'s elision of Dobbs obscures the critical fact that backpay is characterized as equitable when it is requested under certain statutes, such as Title VII,[215] the National Labor Relations Act,[216] the Rehabilitation Act,[217] and FLSA.[218]

In sum, *Millsap* misinterpreted Section 502(a)(3) by: (1) misconstruing legal and equitable relief to be mutually exclusive; (2) overstating Supreme Court precedent to exclude

monetary relief; and (3) eliding secondary sources to obscure the critical fact that backpay has been characterized as equitable and legal in different contexts.

ii. Backpay for Retaliation as Equitable Restitution

This section argues that backpay is available under ERISA Section 502(a)(3) for a retaliation claim because backpay can be characterized as equitable restitution. First, it examines and refutes the arguments in *Millsap* that backpay is not *restitution*.[219] Next, it explores whether backpay is *equitable restitution* as defined by the Supreme Court in *Great-West*.[220]

The *Restatement of Restitution* explains that restitution's purpose is to prevent a defendant from being "unjustly enriched" by receiving a benefit from a plaintiff.[221] A plaintiff confers a benefit when he "adds to the [defendant's] security or advantage," including "where he saves the [defendant] from expense or loss."[222] Restitution is often, but not always, measured by a defendant's gain,[223] and often a defendant's benefit and plaintiff's loss are "coextensive."[224]

In *Millsap*, the Tenth Circuit concluded, in dicta, that backpay cannot be analogized to equitable restitution.[225] *Millsap* advanced arguments against backpay as *restitution*, without applying the definition of *equitable restitution* provided in *Great-West*. First, *Millsap* posited that restitution measures the remedy according to the defendant's *gain*.[226] Then, the court observed that the plaintiffs measured their award according to their *loss*.[227] The court reasoned that backpay was thus compensatory, not restitutionary, and concluded that backpay was legal because "compensation is a purpose 'traditionally associated with legal relief.'"[228]

*Millsap* erred when it let the *form* of measurement – the plaintiffs' loss – dictate its characterization of the remedy, rather than looking to the *purpose* of the remedy.[229] Simply because a restitutionary award *can* be measured in terms of the plaintiff's loss does not mean it *cannot* be measured in terms of the defendant's gain.[230] In a Section 510 claim for backpay, for

example, the plaintiff's monetary loss is *the same* as the defendant's monetary gain: the wages retained by the defendant that it would have paid to the plaintiff but for the wrongful discharge.

Next, *Millsap* argued that backpay was not restitution because backpay's *purpose*, in the abstract, was "to compensate and *not* to prevent [a defendant's] unjust enrichment,"[231] the latter being the purpose of restitution. Here, *Millsap* erred by failing to look to the *purpose* of a backpay award in the specific context of a wrongful discharge claim in violation of ERISA Section 510. The justification for characterizing an award as restitution depends on the *purpose* of the remedy and this purpose varies depending on the cause of action. As Dobbs explains, backpay is not restitution when it is "*aimed* at compensation" and not aimed at preventing unjust enrichment.[232] However, Dobbs notes that it is "more plausible" that a defendant is unjustly enriched when, for example, it discharges a plaintiff to avoid paying retirement benefits – an action that constitutes a wrongful discharge claim under ERISA Section 510.[233]

A few courts have also held that backpay claims under ERISA are not restitution because a wrongfully discharged plaintiff has not *earned* the pay by providing a benefit to the defendant, and thus the defendant is not enriched.[234] Implicit in this argument is the assumption that the *only* benefit the plaintiff can confer upon the defendant is her services as an employee.

This argument profoundly misunderstands the defendant's benefit when wrongfully discharging a plaintiff. A plaintiff confers a benefit when he "in any way adds to the [defendant's] security or advantage," including "where he saves the [defendant] from expense or loss."[235] In a Section 510 retaliation claim, the defendant has received *exactly* the benefit it sought from the plaintiff: (1) a *restraint* on the plaintiff's efforts to force the defendant to comply with the law; and (2) intimidation of other employees who might seek compliance.

Recognizing that defendants would be unjustly enriched if they were allowed to retain plaintiffs' backpay, the Supreme Court and some circuits have upheld backpay or benefits awards for wrongful termination. For example, in upholding a backpay award for retaliation in violation of FLSA Section 215(a)(3), the Supreme Court has refused to countenance the absurd results in which an employer could avoid the remedy of backpay precisely because its "own unlawful conduct . . . deprived the employees of their opportunity to render services."[236] In a case later affirmed by the Supreme Court, the Eighth Circuit similarly upheld an award of benefits lost – which it likened to an award of backpay – under ERISA Section 502(a)(3) on the principle that "[e]quity will treat that as done which ought to have been done."[237] Courts have also treated backpay as a way of returning the job to the plaintiff,[238] recognizing that restitution is achieved when the plaintiff "is restored to the position he formerly occupied either by the return of something which he formerly had or *by the receipt of its equivalent in money*."[239]

Because *Millsap* concluded that an ERISA retaliation claim for backpay was not restitution, the court did not address whether backpay could be *equitable* restitution. However, this subsection argues that backpay can be characterized as such. In *Great-West*, the Supreme Court held that ERISA Section 502(a)(3) provided a bright-line distinction between equitable and legal restitution based on the defendant's *possession* of the plaintiff's funds.[240] Restitution is legal if the defendant does *not possess* the funds – for example, if it is bankrupt.[241] Restitution is equitable, and thus available ERISA, if the defendant does *possess* the funds.[242]

The *Great-West* principle that the legal/equitable distinction should pivot on whether the defendant possesses the funds is also consistent with Supreme Court precedent holding that a backpay claim is equitable in one context and legal in another. In *Mitchell v. Robert DeMario Jewelry, Inc.*, the Court held the district court had equitable jurisdiction to award backpay

*against a defendant-employer*, as a remedy under FLSA Section 215(a)(3) for the employer's wrongful termination of the plaintiffs.[243] In contrast, in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, the Court held that backpay was neither equitable nor restitutionary where it was sought by union members *against a defendant-union* for the latter's failure to refer the plaintiffs to employers, a violation of the union's duty of fair representation.[244]

In *Mitchell*, the defendant-employer was unjustly enriched by *retaining* the pay of the wrongfully terminated employee-plaintiffs, and thus the backpay was restitutionary and the defendants' continued possession of these funds made the restitution equitable. In contrast, in *Terry*, the defendant-union was not unjustly enriched because it did *not acquire* pay that the member-plaintiffs would have earned, and thus the backpay was not restitutionary. Because the union did *not possess* funds owed to the plaintiff, the backpay was also not *equitable* restitution.

Under *Great-West*, backpay for a Section 510 claim should be characterized as equitable restitution. First, like in *Mitchell*, backpay for a Section 510 retaliation claim is restitution because it "operates to restore to the plaintiff that to which she would have enjoyed but for the employer's illegal retaliation."[245] Second, such backpay is equitable because, like in *Mitchell* and unlike in *Terry*, backpay is "awarded against the [defendant] employer rather than [against] a third party."[246] Because the defendant is an employer – the only party that could retain the plaintiffs' wages – the backpay can be traced to funds in the employer's possession.[247]

In short, *Millsap* and other courts erred in concluding that backpay is not restitution by: (1) letting the *measurement* of the remedy dictate its characterization; (2) looking to backpay's purpose only in the abstract, not as a remedy for retaliation against complaints; and (3) narrowly conceiving of the "benefit" the plaintiff confers upon a defendant in a retaliation case. Because a defendant employer possesses the backpay sought in a retaliation claim, backpay is *equitable*

restitution, a remedy available under ERISA Section 502(a)(3). Given these courts' errors and the persuasive counterarguments, it is at least ambiguous whether backpay can be characterized as equitable restitution. Thus, to resolve this ambiguity, the next section looks to the purpose of ERISA's remedies provision to determine whether an award of backpay furthers this purpose.

b. Pragmatic Resolution of the Dueling Interpretations of ERISA's Text

The only interpretation that advances the remedial purposes of ERISA, its anti-retaliation provision, and its remedies provision, is an interpretation that awards backpay for retaliation claims. Much is at stake because backpay is likely a plaintiff's *only* possible remedy other than reinstatement to her job.[248] Backpay would be available *only* when a plaintiff has shown that her employer *illegally* retaliated against her *because* she made a complaint about ERISA violations. Thus, the question is: *did Congress intend an employer who has sought to conceal its violations of ERISA to profit from this act by retaining the pay of an employee who revealed the violations*?

Only a broad interpretation of ERISA that awards backpay advances the purpose of ERISA's remedies provision, Section 502(a)(3). The legislative history shows that Congress intended victims of retaliation to receive remedies analogous to other employment discrimination statutes that also offer backpay.[249] In contrast, denial of backpay would frustrate both this Congressional intent and the purpose of ERISA's anti-retaliation provision, Section 510, which was to prevent employers from "circumvent[ing] the provision of promised benefits."[250] If plaintiffs cannot recover any monetary remedy for retaliation, they cannot take the economic risk of reporting violations; without a monetary remedy, ERISA's "protection" would be illusory.

Employer advocates may contend, as the court did in *Millsap*, that an argument that backpay is available under ERISA because it ensures compliance transforms backpay into a remedy "intended to punish or deter wrongdoers," that is, into punitive damages.[251] If backpay

was exclusively punitive, it would not be equitable and therefore not available under ERISA. However, *Millsap* conflates the purpose of the *statute* with the purpose of the *remedy*. The Supreme Court has rejected such a conflation, and the contention that backpay is punitive, in the context of retaliation claims under FLSA.[252] Furthermore, *Millsap*'s logic would transform *all* remedies that have the *effect* of deterring statutory violations into punitive damages.

Employee advocates may express the opposite concern that backpay is too meager to outweigh the economic risk of retaliation for reporting ERISA violations or to offset the cost of litigation to redress retaliation.[253] They may also argue that backpay is an ineffective deterrent of employer retaliation because it is too small a penalty relative to employers' total operations.

More robust remedies would indeed better realize ERISA's self-enforcement mechanism. However, backpay is better than the alternative: no monetary remedy under ERISA and no state law remedies due to ERISA's expansive preemption power. Furthermore, many of the state laws that ERISA preempts would not protect employees who make internal complaints.

c. ERISA Should Award Backpay to Victims of Retaliation

The text of ERISA's remedies provision is at least ambiguous regarding whether ERISA provides backpay as an equitable remedy for retaliation under ERISA, especially given Supreme Court precedent awarding backpay as an equitable remedy for retaliation under an analogous statute, FLSA. This ambiguity should be resolved so that backpay is available under ERISA, which will further its purposes and enforcement. Furthering ERISA's enforcement does not transform backpay into punitive damages and, while backpay may not wholly neutralize the risk of retaliation, it is better than the alternative: no remedy at all.

## VI. CONCLUSION

The recent circuit splits over the scope of FLSA's and ERISA's anti-retaliation provisions and ERISA's remedies provision are part of a larger battle over statutory interpretation. Textualists advocate a narrow reading that limits protection and remedies, expressing apprehension that a broader interpretation is simply legislating from the bench.[254] In contrast, pragmatists eschew building "a fortress out of the dictionary," preferring instead to create a flexible law responsive to policy and practical concerns.[255] Looking beyond the text, some pragmatists read into these statutes either *limitations* that serve a practical purpose[256] or *protections* that give effect to the remedial nature of the statutes.[257] Unfortunately, employees who discover and report their employers' violations have gotten caught in the cross fire.

This article has examined the ways in which a narrow interpretation of FLSA and ERISA allows employers to "shoot the messenger" when employees with personnel duties file internal complaints. By denying these employees FLSA and ERISA protection and by limiting the remedies available under ERISA, a narrow interpretation of these statutes renders employers' internal enforcement mechanisms ineffectual and thus undermines enforcement of the statutes. To resolve this problem, this article suggests a broad interpretation of FLSA that protects internal complaints made by employees with personnel duties. Because FLSA's and ERISA's circuit splits have become intertwined, an expansion of FLSA protection will lead to a similar expansion of ERISA protection. Yet, this article recognizes that statutory "protection" without monetary remedies does little to counter retaliation. Thus, this article also proposes a legal theory, equitable restitution, by which employees can attain a monetary remedy if they suffer retaliation when they report ERISA violations. This protection of internal complaints filed by employees with personnel duties will result in more effective enforcement under both FLSA and ERISA, which will benefit all employees – not just those who complain.

[1] FLSA and ERISA impact most United States employees; they each cover more than 130 million people and together dominate employment-related class-action litigation, resulting in billions of dollars in class-action settlements. *See* Kathleen Koster, *ERISA Class Actions Expected to Increase*, EMPLOYEE BENEFIT NEWS, Jan. 14, 2009, http://ebn.benefitnews.com/news/erisa-class-action-suits-expected-increase-2656031-1.html; WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #14: COVERAGE UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 1 (2009); WILLIAM PIERRON & PAUL FRONSTIN, EMPLOYEE BENEFIT RESEARCH INST., ERISA PRE-EMPTION: IMPLICATIONS FOR HEALTH REFORM AND COVERAGE 1 (2008).

[2] Violations include failure to pay overtime (FLSA) or retirement benefits (ERISA). *See infra* Parts IV(c)(i) and (ii).

[3] *See* Lambert v. Genesee Hosp., 10 F.3d 46 (2d Cir. 1993). An "internal complaint" is a plaintiff's communication *to another employee*, usually a supervisor, about a potential legal violation by the employer. *See, e.g.*, King v. Marriott Int'l Inc., 337 F.3d 421, 423 (4th Cir. 2003) (plaintiff "expressed her concern to co-workers" regarding legality of employer's actions). Courts also refer to these complaints as "informal" or "intracompany" complaints.

[4] *See* Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 626 (5th Cir. 2008) (holding that plaintiff, a supervisor, was not protected when he relayed *his supervisee's* complaint to employer because plaintiff's action was consistent with his supervisory job duties); McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486-87 (10th Cir. 1996) (holding that plaintiff, a personnel manager, was not protected when she informed her employer that it had violated the FLSA rights of *other* employees – who had not themselves complained – because the plaintiff's actions were "completely consistent with her duties as personnel director").

[5] 29 U.S.C. § 215(a)(3), referred to as FLSA Section 215(a)(3).

[6] 29 U.S.C. § 1140, referred to as ERISA Section 510.

[7] *Genesee Hosp*., 10 F.3d at 55 (holding that internal complaints are not protected by FLSA).

[8] Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 328-329 (2d Cir. 2005) (holding that internal complaints are protected under ERISA only if they respond to a request for information by a third party).

[9] New York does not recognize a common law wrongful discharge claim. *See* Lobosco v. N.Y. Tel. Co./NYNEX, 751 N.E.2d 462, 464 (N.Y. 2001) (refusing to recognize an exception to the employment-at-will doctrine "for firings that violate public policy such as, for example, discharge for exposing an employer's illegal activities"). Although New York has a whistleblower statute, it only protects a complaint about an employer's "violation of law . . . [that] creates . . . a *substantial and specific danger* to the *public health* or *safety* . . . ." *See* N.Y. Lab. Law 740(2)(a) (emphasis added). An employer's violations of FLSA and ERISA would likely not qualify as a "danger to the public health or safety." *See, e.g.*, Pipia v. Nassau County, 826 N.Y.S.2d 318, 320 (N.Y. App. Div. 2006) (holding that Section 740(2) did not protect a plaintiff who reported "conduct [which] relates to financial impropriety only").

[10] Lambert v. Ackerley, 180 F.3d 997, 1007-08 (9th Cir. 1999) (en banc) (holding that plaintiffs' internal complaints regarding FLSA violations were protected activity).

[11] Hashimoto v. Bank of Haw., 999 F.2d 408, 411 (9th Cir. 1993) (holding that ERISA "provides a remedy" for plaintiff's internal complaints of ERISA violation and thus plaintiff stated a federal cause of action).

[12] California recognizes a cause of action for wrongful discharge in violation of public policy. *See* Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980). The violated public policy may be delineated in federal or state statutes. *See* Green v. Ralee Eng'g Co., 960 P.2d 1046 (Cal. 1998). Thus, Felicia can likely satisfy the public policy exception by relying on FLSA's requirement that employers pay overtime, and Erica can rely on ERISA's prohibitions against under-funded pension plans, as well as each statute's respective anti-retaliation provisions.

[13] *Compare* Freund v. Nycomed Amersham, 347 F.3d 752, 756, 759-60, 765-66 (9th Cir. 2003) (holding that remedies available in California for wrongful discharge in violation of public policy include compensatory and punitive damages) *with* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144, 148 (1985) (holding that ERISA Section 502(a)(3) does not provide compensatory or punitive damages).

[14] *See Hashimoto*, 999 F.2d at 411.

[15] There is a circuit split over whether ERISA even provides backpay. *See infra* Part II(c)(ii-iii).

[16] Although the Ninth Circuit has not decided whether FLSA also provides punitive damages, it has let such damages stand and indicated in dicta that it finds "persuasive" the argument that FLSA provides such damages. *See* Lambert v. Ackerley, 180 F.3d 997, 1011 (9th Cir. 1999).

[17] Neither Felicia nor Erica would have a state claim for wrongful discharge in violation of public policy because Texas recognizes this common law exception only when an employee refuses to perform an illegal act in response to an order by her employer. *See* Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985); Laredo Med. Group Corp. v. Mireles, 155 S.W.3d 417, 421 (Tex. App. 2004); *see also* Ed Rachal Found. v. D'Unger, 207 S.W.3d 330, 331 (Tex. 2006) (rejecting "invitations to create a common-law cause of action for all whistleblowers"). As

private employees, Felicia and Erica would similarly lack protection because Texas's whistleblower statute protects only public employees. *See* Tex. Gov't Code § 554.002.

[18] This article refers to the requirement that a plaintiff "step outside" his role as an employee and adopt a position "adverse to the employer" as the *McKenzie* doctrine, first advanced at the circuit level in *McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996). *See infra* Part II(a)(iii).

[19] Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 628 (5th Cir. 2008).

[20] *See* Anderson v. Elec. Data Sys. Corp., 11 F.3d 1311 (5th Cir. 1994) (holding that plaintiff's internal complaint regarding ERISA violation stated a cause of action and thus federal jurisdiction existed and removal was proper).

[21] Two scholars considered the scope of FLSA's anti-retaliation provision at the onset of the circuit split. *See* Jennifer Clemons, Note, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 555-56 (2001) (recommending that FLSA protect internal and oral complaints but not addressing the *McKenzie* doctrine); Jennifer Lynne Redmond, Note, *Are You Breaking Some Sort of Law?: Protecting an Employee's Informal Complaints Under the Fair Labor Standards Act's Anti-Retaliation Provision*, 42 WM. & MARY L. REV. 319, 349-50 (2000) (recommending that FLSA protect some internal complaints, limited by the *McKenzie* doctrine). Parts IV(a) and (c), which address the FLSA circuit split, differ from these two articles by: (1) proposing a solution which eliminates the *McKenzie* doctrine; (2) analyzing subsequent cases which have changed the nature of the circuit split; and (3) contributing new textual and pragmatic arguments.

[22] *See* Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief under ERISA Section 502(A)(3)*, 39 J. MARSHALL L. REV. 827, 926 (2006) (proposing a new interpretation of ERISA which will allow monetary relief, including backpay, and implying that backpay is not now available under ERISA); Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 IOWA L. REV. 1, 33-41 (1995) (arguing that backpay is likely not available as restitution, but not applying the definition of equitable restitution created later by the Supreme Court in *Great-West*) [hereinafter *ERISA Remedies*].

[23] *See, e.g.*, Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 328 (2d Cir. 2005); *infra* Parts II(a)(i) and (b)(i).

[24] *See, e.g.*, Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 42 (1st Cir. 1999); *infra* Part II(a)(ii).

[25] *See, e.g.*, *McKenzie*, 94 F.3d at 1486-87; *infra* Part II(a)(iii).

[26] *See, e.g.*, Saffels v. Rice, 40 F.3d 1546, 1548 (8th Cir. 1994); *infra* Parts II(a)(ii) and (b)(ii).

[27] 29 U.S.C. § 215(a)(3) (emphasis added).

[28] 10 F.3d 46, 55-56 (2d Cir. 1993).

[29] *See infra* Part IV(a)(i) (detailing the court's textualist arguments).

[30] 228 F.3d 360, 364-65 (4th Cir. 2000) (holding plaintiff was not protected when he told his employer he "would not testify to a version of events [it] suggested" if deposed in a yet-to-be-filed lawsuit brought by another employee).

[31] *Id.*

[32] *See* Kasten v. Saint-Gobain Performance Plastics Corp. 570 F.3d 834, 839 (7th Cir. 2009) (holding that internal complaints are protected unless they are only communicated verbally); Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 626 (5th Cir. 2008) (adopting "majority" position that internal, verbal complaints are protected but holding that plaintiff's act of *relaying* his supervisee's complaint to employer did not qualify as such a complaint); Lambert v. Ackerley, 180 F.3d 997, 1001-02, 1007-08 (9th Cir. 1999) (en banc) (holding that plaintiffs' verbal and written complaints to employer were protected and noting that "less formal and detailed communications also fit the statutory definition"); Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 42 n.4, 44-45 (1st Cir. 1999) (holding that plaintiff's letter to the office manager stating that she demanded "under FLSA [to] be . . . paid for all overtime hours worked" was protected activity but leaving undecided whether oral complaints are protected); EEOC v. Romeo Cmty Schs, 976 F.2d 985, 989 (6th Cir. 1992) (holding that plaintiff's verbal statement to her employer that it was "breaking some sort of law" by paying her lower wages than those previously paid to male workers was protected activity); EEOC v. White & Son Enters., 881 F.2d 1006, 1007, 1011 (11th Cir. 1989) (plaintiffs' meeting with their supervisor "to ask why they did not receive a raise . . . and to request equal pay" to that of their male coworkers was protected); Love v. RE/MAX of Am., Inc., 738 F.2d 383, 384, 386-87 (10th Cir. 1984) (holding that FLSA protected a plaintiff who gave a written request for a pay raise to her supervisor and attached a copy of the Equal Pay Act); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 180 n.4, 180-83 (8th Cir.1975) (holding that plaintiff's verbal statement to coworker that it was "illegal" for her employer to demand that plaintiff endorse a check for back wages back to her employer was protected); *see also* Moore v. Freeman, 355 F.3d 558, 562-63 (6th Cir. 2004) (holding that plaintiff was protected when he "raised the issue" of unequal wages with management).

[33] *See Valerio*, 173 F.3d at 42.

[34] *Brennan*, 513 F.2d at 181.

[35] *See Ackerley*, 180 F.3d at 1007-08.

[36] Saffels v. Rice, 40 F.3d 1546, 1548, 1548 (8th Cir. 1994).
[37] *See Saffels*, 40 F.3d at 1548, 1550 (holding that plaintiff Saffels was protected when employer terminated him after mistakenly accusing him of filing a complaint with government agencies); Brock v. Richardson, 812 F.2d 121, 124-25 (3d Cir. 1987) (holding that plaintiff was protected when employer stated that plaintiff was fired due to employer's mistakenly belief that plaintiff had filed a complaint with government agency).
[38] *Brock*, 812 F.2d at 125.
[39] *See* Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 626 (5th Cir. 2008) (holding that manager's relaying his supervisee's complaint to employer was not protected under *McKenzie*); Claudio-Gotay v. Becton Dickinson Caribe, Ltd., 375 F.3d 99, 102 (1st Cir. 2004) (citing *McKenzie* to hold that supervisor was not protected when he informed employer of suspected overtime violations because his duties included documenting workers' hours and ensuring their correct payment, nor was he protected when he later refused to sign invoices after employer's attorney told him that employer's contractor – but not the employer – had perhaps violated FLSA); McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486-87 (10th Cir. 1996) (holding that a personnel director was not protected when she informed her employer that it had violated the FLSA rights of *other* employees – who had not themselves complained – because the plaintiff's actions were "completely consistent with her duties as personnel director").
[40] *McKenzie*, 94 F.3d at 1486-87.
[41] *See id.* at 1487.
[42] *See Hagan*, 529 F.3d at 626. In addition to these three circuits that expressly adopt *McKenzie*, the Fourth Circuit has echoed the logic of *McKenzie* when observing, in dicta, that a manager-plaintiff "correctly does not invoke [FLSA's] complaint clause" when he *relayed* a supervisee's FLSA complaint to management but "did not make a complaint" about harms to himself. Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 363 (4th Cir. 2000).
[43] Saffels v. Rice, 40 F.3d 1546, 1548, 1548, 1550 (8th Cir. 1994) (holding that plaintiff Morriss was protected when employer fired her after accusing her of informing coworkers of another employee's external complaint).
[44] Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 628 (5th Cir. 2008).
[45] 29 U.S.C. § 1140 (emphasis added).
[46] 337 F.3d 421, 428 (4th Cir. 2003).
[47] *See* Ball v. Memphis Bar-B-Q Comp., 228 F.3d 360, 364-65 (4th Cir. 2000). For a discussion of *Ball*, see *supra* text accompanying notes 31-32.
[48] *See King*, 337 F.3d at 427.
[49] *Id.*
[50] *Id.*
[51] Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 330-31 (2d Cir. 2005).
[52] *Id.* at 329 .
[53] *Id.* at 328.
[54] *See Lambert v. Genesee Hospital* 10 F.3d 46, 55 (2d Cir. 1993). For a discussion of *Genesee Hospital*, see *supra* text accompanying notes 29-30.
[55] *Nicolaou*, 402 F.3d at 329.
[56] *See id.*at 330.
[57] *See* Anderson v. Elec. Data Sys. Corp., 11 F.3d 1311, 1312-13, 1315 (5th Cir. 1994) (holding that plaintiff's internal complaint that he had been asked to violate ERISA stated a cause of action and thus federal jurisdiction existed and removal was proper); Hashimoto v. Bank of Haw., 999 F.2d 408, 411 (9th Cir. 1993) (holding that 29 U.S.C. § 1140 "provides a remedy" for plaintiff's internal complaints that she had been instructed to violate ERISA and thus she stated a federal cause of action).
[58] *See supra* text accompanying note 35.
[59] *Hashimoto*, 999 F.2d at 411.
[60] *See* 29 U.S.C. § 216(b); Benjamin I. Sachs, EMPLOYMENT LAW AS LABOR LAW, 29 CARDOZO L. REV. 2685, 2725 (2008).
[61] While there is a circuit split over whether punitive damages are available under FLSA, the plain language of the statute appears to entitle plaintiffs to such damages. *Compare* Travis v. Gary Cmty Mental Health Ctr., Inc., 921 F.2d 108, 112 (7th Cir. 1990) (Easterbrook, J.) (holding that punitive damages are available under FLSA for retaliatory discharge because its plain language "authorizes 'legal' relief, a term commonly understood to include compensatory and punitive damages") *with* Snapp v. Unlimited Concepts, Inc., 208 F.3d 928 (11th Cir. 2000) (holding that punitive damages are not available for a violation of FLSA's anti-retaliation provision).
[62] *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144, 148 (1985).

[63] If an employee is protected under ERISA's anti-retaliation provision, the only remedy available is that provided in ERISA Section 502. *See* 29 U.S.C. § 1140; *see ERISA Remedies*, *supra* note 22 at 39 ("Many commentators and courts agree that Section 502(a)(3) . . . provides the sole basis for suits alleging a violation of Section 510.").
[64] 29 U.S.C. §1132(a)(3) (emphasis added).
[65] 508 U.S. 248 (1993).
[66] 534 U.S. 204 (2002).
[67] 547 U.S. 356 (2006).
[68] 508 U.S. 248, 256 (1993).
[69] *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993) ("[Plaintiffs] do not . . . seek a remedy traditionally viewed as 'equitable,' such as injunction or restitution.").
[70] *See id.* at 258.
[71] *See* 534 U.S. at 213.
[72] *See id.* at 217.
[73] See *id.* at 213 (quoting *Reich* v. *Cont'l Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994) (Posner, J.)).
[74] The Court defined equitable restitution as "money or property identified as belonging in good conscience to the plaintiff" and which could "clearly be traced to particular funds or property in the defendant's possession." *Id.* It also described equitable restitution as "ordinarily in the form of a constructive trust or an equitable lien." *Id.*
[75] The Court defined legal restitution as when a plaintiff "*could not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him." *Id.*
[76] *Id.* at 214. The Court applied the following gloss that "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.*
[77] *See* Sereboff v. Mid Atl. Med. Servs., 547 U.S. 356, 363 (2006) (noting that *Great-West* "did not reject [the plaintiff's] suit out of hand because it alleged a breach of contract and sought money, but because [the plaintiff] did not seek to recover a particular fund from the defendant.").
[78] Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993).
[79] *See Sereboff*, 547 U.S. at 362-63.
[80] In dicta, *Great-West* explained why backpay is equitable under Title VII, *Great-West*, 534 U.S. at 218 n.4. ("Congress 'treated [backpay] as equitable' in Title VII . . . only in the narrow sense that it allowed backpay to be awarded *together with* equitable relief."). Some lower courts have exaggerated the relevance of this dicta when deciding backpay claims under ERISA Section 502(a)(3). *See* Eichorn v. AT&T Corp., 484 F.3d 644, 656 (3d Cir. 2007) (citing footnote four of *Great-West*, without explanation, for the proposition that backpay is not equitable restitution). In fact, the Court has not addressed whether backpay *under ERISA* could be characterized as equitable or legal relief and *Great-West* specifically noted that "Title VII has nothing to do with" the relief sought, which was not backpay but rather money from a subrogation clause. *See* 534 U.S. at 218 n.4. Furthermore, *Great-West* said nothing about backpay as equitable restitution. *See* Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 S.M.U.L. Rev. 1577, 1629 (2002) (noting that footnote four of *Great-West* "seems to be another iteration of the equitable clean-up doctrine," not equitable restitution).
[81] *See, e.g.*, Warner v. Buck Creek Nursery, Inc., 149 F.Supp. 2d 246, 256-57 (W.D. Va. 2001).
[82] *See, e.g.*, Michaelis v. Deluxe Fin. Servs., 446 F. Supp. 2d 1227, 1231 (D. Kan. 2006) (following *Millsap* to deny backpay); *but see* Simons v. Midwest Tel. Sales & Serv. 462 F Supp 2d 1004. (D. Minn. 2006) (following *Schwarz* to award backpay under ERISA 502(a)(3) as restitutionary equitable relief where employer had violated ERISA Section 510).
[83] *See* 368 F.3d 1246, 1256 (10th Cir. 2004). *See also infra* Part V(a) (describing textualist arguments).
[84] *id.* at 1259 n.17.
[85] *Id.* at 1251-52.
[86] *See id.* at 1252.
[87] *See id.* at 1252 (quoting City Of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710-11 (1999)).
[88] *See id.* at 1253-54 (quoting Wooddell v. Int'l Bhd of Elec. Workers, 502 U.S. 93, 97 (1991)).
[89] The plaintiffs had expressly stated they were not seeking equitable restitution. *See id.* at 1249 n.3.
[90] *id.* at 1259 n.17.
[91] *See* 484 F.3d 644, 656 (3d Cir. 2007).
[92] *See id.*; *accord* Harris v. Finch, Pruyn & Co., No. 1:05-CV-951 (FJS/RFT), 2008 LEXIS 67623 at *22 n.11 (N.D.N.Y. 2008).

[93] *See* 45 F.3d 1017, 1021-22 (6th Cir. 1995).
[94] *Id.* at 1022.
[95] *Id.*; *see also* Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993) ("[Plaintiffs] do not . . . seek a remedy traditionally viewed as 'equitable,' such as injunction or restitution.").
[96] *See supra* notes 74-76 (describing distinction between legal and equitable restitution).
[97] *See* Schwartz v. Gregori, 45 F.3d 1017, 1022 (6th Cir. 1995) (discussing Chauffeurs Local 391 v. Terry, 494 U.S. 558 (1990)).
[98] *See* id. (discussing Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960)).
[99] 29 U.S.C. § 1144. This provision is also referred to as ERISA Section 514. While ERISA's saver and deemer clauses, Sections 1144(b)(2)(A) and 1144(b)(2)(B) respectively, complicate preemption, they are not relevant to this discussion of retaliation claims.
[100] See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).
[101] N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 657-59 (1995).
[102] *See* David Angueira & David Conforto, *Without a Remedy: The Massachusetts Whistleblower's Brush with ERISA*, 39 SUFFOLK U.L. REV. 955, 979 (2006).
[103] *See* Miller v. Carelink Health Plans, 82 F. Supp. 2d 574, 577-78 (S.D.W. Va. 2000) (holding that ERISA did not preempt state retaliation claim of nurse-plaintiff who refused to assist in ERISA violation because ERISA did not provide plaintiff with a cause of action and thus no conflict existed between ERISA and state law); Donatelli v. UnumProvident Corp., No. 04-1-P-S, 2004 WL 3330000 (D. Me. Dec. 22, 2004) (holding that that ERISA did not preempt state retaliation claim of employee who refused to manipulate medical records).
[104] *See* Anderson v. Elec. Data Sys. Corp.,11 F.3d 1311, 1315 (5th Cir. 1994); Hashimoto v. Bank of Haw., 999 F.2d 408, 411 (9th Cir 1993); Authier v. Ginsberg,757 F.2d 796, 798, 800-01 (6th Cir. 1985).
[105] *Ingersoll-Rand*, at 139.
[106] *Id.* at 142-43.
[107] *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66-67 (1987).
[108] *See* Anderson v. Elec. Data Sys. Corp.,11 F.3d 1311, 1315 (5th Cir. 1994) (holding that plaintiff's internal complaint stated a cause of action under ERISA and thus ERISA completely preempted the state law claim and removal was proper); Hashimoto v. Bank of Haw., 999 F.2d 408, 411 (9th Cir 1993).
[109] *See* Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 133; Sanson v. Gen. Motors Corp., 966 F.2d 618, 625 (11th Cir. 1992) (Birch, J., dissenting) ("The combination [of an employee's] state cause of action [being] preempted by ERISA even while ERISA denies him any alternative remedy . . . is disappointingly pernicious to the very goals . . . that motivated Congress to enact pension laws . . . .").
[110] *See* Authier v. Ginsberg, 757 F.2d 796, 800-01 (6th Cir. 1985).
[111] *See id.* at 798, 801 n.9 (noting, but "not address[ing]" that plaintiff may have a cause of action under ERISA for retaliation). The court only examined whether the plaintiff's state law cause of action was "related" to ERISA, concluding that it was "related" because the plaintiff was terminated for "fulfilling his obligations" to report ERISA violations. *Id.* at 800.
[112] Circuits that interpret ERISA narrowly have concluded that it is coextensive with or protects slightly more activity than FLSA. See *supra* text accompanying notes 46-56. Similarly, circuits that construe ERISA broadly have justified their interpretation because it is "consistent with" their circuit's "broad interpretation of similar anti-retaliation provisions" in FLSA. *See* McClendon v. Hewlett-Packard Co., 2005 WL 1421395, *14 (D. Idaho 2005). Finally, in circuits that have yet to determine the scope of ERISA's anti-retaliation provision, lower courts have reasoned that their circuit's broad interpretation of FLSA's anti-retaliation provision compels a broad interpretation of ERISA. *See, e.g.*, Dunn v. Elco Enters., 2006 U.S. Dist. LEXIS 26169, *10, *13 (E.D. Mich. May 4, 2006) (recognizing that the Sixth Circuit has not yet decided whether ERISA protects internal complaints but reasoning that it likely would do so because it "has interpreted the same FLSA language as covering internal complaints"); *but see* Edwards v. A.H. Cornell, No. 09-cv-1184, 2009 LEXIS 63720, *13 (E.D. Pa. July 23, 2009) (following the Second Circuit's interpretation of ERISA based on that circuit's interpretation of FLSA, without mentioning precedent in the district court's own circuit, *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987), adopting a broader interpretation of FLSA).
[113] *See supra* text accompanying notes 13-15.
[114] *See supra* text accompanying notes 107-108.
[115] *See supra* text accompanying notes 104-106.
[116] *See* Robin S. Conrad, The Roberts Court and the Myth of a Pro-Business Bias, 49 SANTA CLARA L. REV. 997, 1013 (2009).

[117] *See* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 745 (1985) ("In the early versions of ERISA, the general pre-emption clause pre-empted only those state laws dealing with subjects regulated by ERISA.").
[118] 29 U.S.C. § 215(3)(a).
[119] 10 F.3d 46, 55-56 (2d Cir. 1993). *See also supra* Part II(a)(i).
[120] *Id.* at 55.
[121] *Id.*; *see also* Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 364-65 (4th Cir. 2000) (comparing FLSA to Title VII).
[122] *See* 42 U.S.C. § 2000e-3(a).
[123] *Genesee Hosp.*, 10 F.3d at 55-56.
[124] *Id.*
[125] 45 U.S.C. § 441(a) ("[An employer] may not discharge . . . any employee because such employee . . . (1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of [this Act] or (2) testified or is about to testify in any such proceeding.").
[126] *Compare id. with* 29 U.S.C. § 215(3)(a).
[127] Rayner v. Smirl, 873 F.2d 60, 64 (4th Cir. 1989),
[128] 33 U.S.C. § 1367(a). *Compare id. with* 29 U.S.C. § 215(3)(a).
[129] *See* Passaic Valley Sewerage Comm'rs v. Department of Labor, 992 F.2d 474, 478 (3rd Cir. 1993); *see also* Lambert v. Ackerley, 180 F.3d 997, 1006-07 (9th Cir. 1999) (en banc) (also comparing FLSA's language with the Federal Mine Health and Safety Act, Surface Transportation Act, and Energy Reorganization Act).
[130] *Genesee Hosp.*, 10 F.3d at 55 (emphasis added).
[131] *See* Kasten v. Saint-Gobain Performance Plastics Corp. 570 F.3d 834, 838 (7th Cir. 2009).
[132] *See* Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 42 (1st Cir. 1999); *accord* Lambert v. Ackerley, 180 F.3d 997, 1001-02, 1004-05 (9th Cir. 1999) (en banc) (reasoning similarly that the phrase "or related to" would be rendered superfluous).
[133] McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486-87 (10th Cir. 1996).
[134] 29 U.S.C. § 215(a)(3) (emphasis added).
[135] *See, e.g.*, 29 U.S.C. § 213; Mathew Bender, LABOR AND EMPLOYMENT LAW § 177.06.
[136] *McKenzie*, 94 F.3d at 1486 n.8.
[137] *See* 337 F.3d 421, 427 (4th Cir 2003).
[138] *See* 402 F.3d 325, 328 (2d Cir. 2005).
[139] *See, e.g.*, McKnight v. Brentwood Dental Group, Inc., 2006 LEXIS 89464, *19 n.3 (D. Neb. Dec. 7, 2006) (contrasting *Nicolaou* and *King* to argue that the "Second Circuit has held that internal complaints are protected" under ERISA Section 510 but the Fourth Circuit has held to the contrary).
[140] Indeed, the Second Circuit stated that it was not "in conflict with" but rather agreed with the Fourth Circuit that ERISA's anti-retaliation provision protects "something more formal than . . . complaints made to a supervisor." *Nicolaou*, 402 F.3d at 330 n.3 (quoting *King*, 337 F.3d at 427). This claim of consonance with the Fourth Circuit suggests that the Second Circuit sees an "inquiry" as "more formal than . . . complaints made to a supervisor."
[141] Simons v. Midwest Tel. Sales & Serv., 462 F. Supp. 2d 1004, 1008 (D. Minn. 2006) (citing *Nicolaou* and *King* to demonstrate that "the Second and Fourth Circuits [have held] that informal complaints are not protected activity under ERISA.")
[142] *See* King v. Marriott Int'l Inc., 337 F.3d 421, 427 (4th Cir. 2003).
[143] *See Nicolaou*, 402 F.3d at 328.
[144] *See supra* Part III(a)(i) and (a)(iii).
[145] *See* 228 F.3d 360, 364-65 (4th Cir. 2000).
[146] *Compare* 29 U.S.C. § 215(a)(3) (emphasis added) with 29 U.S.C. § 1140 (emphasis added).
[147] *See supra* Part III(a)(i) and (a)(iii).
[148] *King*, 337 F.3d at 427.
[149] *Cf.* Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 42 (1st Cir. 1999) (similarly reasoning that limiting FLSA's use of the word "complaint" to only external complaints would render the word redundant to "proceeding").
[150] *Nicolaou*, 402 F.3d at 329, 330 n.3 (quoting the Secretary of Labor).
[151] *See id.* at 330.
[152] *See id.* at 329 (emphasis added).
[153] Tennessee Coal, Iron & Rail. Corp. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944).
[154] *See* 29 U.S.C. § 202 (stating that it is the "policy of this chapter" to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health"); Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292 (1960) ("The central aim of [FLSA] was to achieve . . . certain minimum labor standards.").

[155] *See* 29 U.S.C. § 202(a) (noting that poor labor conditions "leads to labor disputes").
[156] *Majewski v. St. Rose Dominican Hosp*., 310 F.3d 653, 655 (9th Cir. 2002).
[157] *Mitchell*, 361 U.S. at 292 ("[C]ongress did not seek to secure compliance with [FLSA] through continuing detailed federal supervision . . . . Rather it chose to rely on . . . complaints received from employees. . . .").
[158] *Id.*
[159] *See* Saffels v. Rice, 40 F.3d 1546, 1550 (8th Cir. 1994) ("The purpose of § 15(a)(3) is not merely to vindicate the rights of complaining parties, but to foster an environment in which employees are unfettered in their decision to voice grievances without [fear of] reprisal.").
[160] Dana M. Muir, *Status As an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 398 n.59 (2000).
[161] *See* H.R. Rep. No. 533, 93d Cong., 1st Sess. 1-2 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4649 ("The fiduciary responsibility section [of ERISA] . . . codifies . . . certain principles developed in . . . the law of trusts.").
[162] 29 U.S.C. § 1001(b) ("[T]he policy of this Act [is] to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards . . . for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.").
[163] *See* Medill, *supra* note 22 at 844.
[164] Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143 (1990).
[165] *See ERISA Remedies*, *supra* note 22 at 30 (citing statements of Senators Hartke and Javits).
[166] *Id.* (quoting 119 Cong. Rec. 30,043-44 (1973) (statement of Sen. Javits, bill sponsor)).
[167] *See* Folz v. Marriott Corp., 594 F. Supp. 1007, 1015 (W.D. Mo. 1984) (quoting S. Rep. No. 93-127, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News at 4871 (emphasis added)).
[168] *See supra* Part II(a)(ii).
[169] *See* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).
[170] *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143 (1990).
[171] *See* Conner v. Schnuck Mkts., 121 F.3d 1390, 1394 (10th Cir. 1997).
[172] The Second Circuit's limited exception – protection for employees who respond to a third party's request for information about ERISA violations – does not neutralize this weapon. An employer could simply retain its right to fire employees by not explicitly requesting information about violations from its human resource employees.
[173] *See Mitchell*, 361 U.S. at 292.
[174] *See* McLean v. Carlson Cos., Inc., 777 F. Supp. 1480, 1484 (D. Minn. 1991). Litigation is an especially wasteful enterprise in the context of FLSA because "many FLSA claims involve relatively small amounts of money." Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 367 (4th Cir. 2000) (Michael, J., dissenting).
[175] *See McKenzie*, 94 F.3d at 1486-87.
[176] *See supra* Part II(a)(iii).
[177] Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 628 (5th Cir. 2008).
[178] *See* Love v. RE/MAX of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984).
[179] *See* Mallon v. U.S. Physical Therapy, Ltd., 395 F.Supp.2d 810, 818 (D. Minn. 2005).
[180] *McKenzie*, 94 F.3d at 1486-87.
[181] *See* Hicks v. Ass'n of Am. Med. Colls, 503 F. Supp. 2d 48, 50, 52 (D.D.C. 2007).
[182] *See McKenzie*, 94 F.3d at 1481-82.
[183] *See Hagan*, 529 F.3d at 623, 627.
[184] 375 F.3d 99, 101 (1st Cir. 2004).
[185] *Id.* at 101, 103 (quoting plaintiff's letter).
[186] *Id.*
[187] *Id.*
[188] *Id.* at 103.
[189] *Id.* at 103 (quoting Blackie v. Maine, 75 F.3d 716, 724 (1st Cir. 1996)).
[190] *See Mitchell*, 361 U.S. at 292.
[191] An "employer" is liable under FLSA for violations. 29 U.S.C. § 215(a). The Supreme Court includes as an "employer" an individual with "managerial responsibilities" and "substantial control of the terms and conditions of [employees'] work." *See* Falk v. Brennan, 414 U.S. 190, 195 (1973). Thus mid-level supervisors and human resource employees would likely not be liable. *Cf.* Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983).
[192] An employee who administers an employer's pension plan would qualify as a fiduciary under ERISA and thus would be personally liable under ERISA if she "has knowledge of a breach" of fiduciary responsibility by another fiduciary and does not make "reasonable efforts . . . to remedy the breach." *See* 29 U.S.C. 1105(a)(3); *ERISA*

*Remedies*, *supra* note 22 at 23 ("Courts have forced fiduciaries to repay salaries received for provision of plan services [and] held them personally liable for failure to comply with a plan's investment guidelines. . . .").
[193] *See* Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 331 (2d Cir. 2005) (Pooler, J., concurring) (noting that plaintiff, the Director of Human resources, was also an alleged fiduciary, and thus would be required to perform her duties "solely in the interests of participants and beneficiaries" and would be personally liable under ERISA, 29 U.S.C. 1105(a)(3), if she had knowledge of a breach but did not make reasonable efforts to remedy it).
[194] *See supra* Part II(c)(i).
[195] 508 U.S. 248, 261 (1993).
[196] 534 U.S. 204, 213 (2002).
[197] 547 U.S. 356 (2006).
[198] John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003) (noting that the Court's definition embraces several historical inaccuracies and advocating grounding ERISA in trust law); Murphy, *supra* note 81 (arguing that *Mertens* failed to recognize that restitution was available in courts of law and equity); Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063, 1083 (2003) (critiquing the Court's definition of restitution).
[199] *id.* at 1259 n.17.
[200] 368 F.3d 1246, 1263 (10th Cir. 2004).
[201] *Great-West*, 534 U.S. at 213 (quoting *Reich* v. *Cont'l Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994)).
[202] *Id.* at 217.
[203] *Millsap*, 368 F.3d at 1252 (analogizing to personal injury claim for lost wages and contract claim for past wages).
[204] Indeed, *Mertens* based its argument that the term "equitable" would be rendered superfluous on the premise that forms of relief available in courts of law were *also* available in equity. *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 258 (1993); *see also* Langbein, *supra* note 198 at 1350-52 (criticizing *Mertens* for appearing to create a dichotomy between legal and equitable relief when in fact the same form of relief was available in both).
[205] See *Mertens*, 508 U.S. at 255, 256.
[206] *See* Langbein, *supra* note 198 at 1353-54.
[207] *See Millsap*, 368 F.3d at 1253-54 (reasoning that backpay is "money damages," a form of legal relief).
[208] *Mertens*, 508 U.S. at 255; *see also* Medill, *supra* note 22 at 861-62 (noting lower courts "summarized" *Mertens* as "based on a single justification – that equitable relief is limited to 'injunction, mandamus, and restitution' . . . .").
[209] *See* Sereboff v. Mid Atl. Med. Servs., 547 U.S. 356, 363 (2006) (noting that *Great-West* "did not reject [the plaintiff's] suit out of hand because it alleged a breach of contract and sought money, but because [the plaintiff] did not seek to recover a particular fund from the defendant.").
[210] 2 DAN B. DOBBS, LAW OF REMEDIES (2d ed. 1993).
[211] *See Millsap*, 368 F.3d at 1252-53.
[212] *Id.* at 1252 (quoting 2 DAN B. DOBBS, LAW OF REMEDIES § 6.10(5), at 226 (2d ed. 1993)).
[213] 2 DOBBS, *supra* note 210 at § 6.10(5), at 226.
[214] *See id.* at § 6.10(1), at 193.
[215] *See* West v. Gibson, 527 U.S. 212, 224 (1999) ("[T]he specific examples given by [Title VII] of appropriate remedies – reinstatement or hiring of employees with or without backpay – are equitable in nature."); *see also* 2 DAN, *supra* note 210 at §6.10(6), at 227-29 (describing courts' holdings that backpay under Title VII is equitable).
[216] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937) (holding that a claim for backpay due to the wrongful termination of employees for their unionizing efforts in violation of the National Labor Relations Act was not legal and thus the plaintiffs were not entitled to a jury trial).
[217] Consol. Rail Corp. v. Darrone, 465 U.S. 624, 630, 631 n.10 (1984) (holding the Rehabilitation Act "authorizes . . . an equitable action for backpay" and looking to legislative history for "courts' equitable power to award backpay").
[218] *See* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) (holding that the district court had equitable jurisdiction to award backpay for wrongful termination of plaintiffs in violation of Section 215(a)(3)).
[219] 368 F.3d 1246, 1263 (10th Cir. 2004).
[220] 534 U.S. 204, 213 (2002).
[221] RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937).
[222] *Id.* at § 1 cmt. b (1937).
[223] *Id.* at § 1 cmt. a (1937) ("[T]he measure of restitution may be more or less than the loss suffered or more or less than the enrichment."); *see also* Schwartz v. Gregori, 45 F.3d 1017 (6th Cir. 1995).
[224] RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. d (1937).

[225] 368 F.3d 1246, 1263 (10th Cir. 2004). The court's discussion of equitable restitution is dicta because the plaintiffs had expressly stated they were not seeking equitable restitution. *See id.* at 1249 n.3.
[226] *See id.* at 1255 n.9.
[227] *Id.*; *see also* Eichorn v. AT&T Corp., 489 F.3d 590, 656 (3d Cir. 2007) (holding that plaintiffs' claim for backpay and benefits was not for restitution because it was measured according to their loss).
[228] *Id.* at 1253 (quoting City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710-11 (1999)).
[229] *See* Thomas, *supra* note 200 at 1083 ("Focusing on the purpose . . . of the remedy rather than on the superficial form of the relief would better preserve remedial rights of plaintiffs."); Murphy, *supra* note 81, at 1590; *cf.* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477-78 (stating that whether a claim is legal for the purposes of a right to a jury trial "cannot be made to depend upon the choice of words used in the pleadings").
[230] *See* RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. a and d (1937); Murphy, *supra* note 81, at 1582.
[231] *See Millsap*, 368 F.3d at 1255 n.9, 1253 n.5.
[232] *See* 2 DAN B. DOBBS, LAW OF REMEDIES §6.10(5), at 227 n.15 (2d ed. 1993).
[233] *See id.*; *see also* Murphy *supra* note 81, at 1633 ("[A] defendant might be viewed as having gained a benefit at the employee's expense . . . when a defendant discharges an employee to foreclose the employee's receipt of retirement benefits [and thus] backpay can be considered either damages or restitution.").
[234] *See, e.g.*, Eichorn v. AT&T Corp., 489 F.3d 590, 656 (3d Cir. 2007).
[235] RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. b (1937).
[236] Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 293 (1960).
[237] Howe v. Varity Corp., 36 F.3d 746, 756 (8th Cir. 1994), aff'd by [SCOTUS].
[238] *See* Schwartz v. Gregori, 45 F.3d 1017, 1022 (6th Cir. 1995).
[239] RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. a (1937) (emphasis added).
[240] 534 U.S. 204, 213 (2002).
[241] *Id.* (quoting RESTATEMENT (FIRST) OF RESTITUTION § 215 cmt. a).
[242] *Id.*
[243] *See* 361 U.S. 288 (1960).
[244] *See* 494 U.S. 558, 571-72 (1990); *cf.* Wooddell v. Int'l Bhd. of Elec. Workers, 502 U.S. 93, 497-98 (1991).
[245] Schwartz v. Gregori, 45 F.3d 1017, 1021 (6th Cir. 1995).
[246] *Cf. id.*
[247] Critics may argue that courts must do an in-depth analysis to "trace" the funds to the employer. However, in *Sereboff*, the Court rejected the defendants' argument that courts must apply "restitutionary tracing rules . . . to every action for an equitable lien under § 502(a)(3)"; instead, the Court concluded that the relief sought was equitable because similar relief for a similar cause of action had been awarded as equitable relief in *one* previous Supreme Court case. *See* 547 U.S. 356, 365 (2006); *see also* Medill, *supra* note 22 at 848 (noting that *Sereboff* "leaves unresolved . . . when strict compliance" with tracing rules is required). Like in *Sereboff*, at least one Supreme Court case (*Mitchell*) has awarded identical relief (backpay) for a cause of action (retaliation under FLSA) similar to the cause of action at issue here: retaliation under ERISA.
[250] *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144, 148 (1985).
[249] *Id.* (quoting 119 Cong. Rec. 30,043-44 (1973) (statement of Sen. Javits, bill sponsor)).
[250] *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143 (1990).
[251] *See* Millsap v. McDonnell Douglas Corp., 368 F.3d 1246, 1260 (10th Cir. 2004)
[252] *See* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 293 (1960).
[253] See Wayne N. Outten, Presentation, *When Good Deeds Are Punished: The Legal Landscape of Retaliation and Whistleblowing*, 37TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, 917 (2008).
[254] *See* Great-West Life & Annuity Ins. Co. v. Knudson, 122 S. Ct. 708, 717 (2002) (Scalia, J.).
[255] *See* Chappell v Markham 148F 2d 737, 739 (1945) (Hand, J.).
[256] *See, e.g., McKenzie*, 94 F.3d at 1486-87 (reasoning that extending protection to plaintiff with Human resources duties would make it difficult for employers to fire such employees); *see also supra* Part II(a)(iii).
[257] *See, e.g.*, Saffels v. Rice, 40 F.3d 1546, 1548 (8th Cir. 1994) (recognizing that courts "in an effort to further the goals of the FLSA, have extended [its] application to employee conduct not expressly covered in the act"); *see also supra* Parts II(a)(ii) and (b)(ii).