

## **Without a Remedy: The Massachusetts Whistleblower's Brush with ERISA**

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### I. INTRODUCTION

Imagine that you are an experienced labor and employment attorney in Boston, Massachusetts and the “Erin Brokovich” of employment law walks right through your door. For the past twenty years, she has worked for Mega-Corp as the Director of Human Resources; a lofty title that matches her extensive experience in administering employee pension funds. With revenues dwindling over the past few years, Mega-Corp hired a new Chief Financial Officer (“CFO”) to lift the company’s profit margin. Things between the CFO and your client quickly went awry when she vocally opposed his “ideas” on how the employee pension fund should be managed. Knowing that what the CFO was asking her to do was illegal, she refused to implement his changes and reported the CFO’s outlandish requests to his boss, the Chief Executive Officer.

Her efforts to save the company from liability under ERISA were rewarded with termination after two decades of service—ostensibly on the grounds of “insubordination.” Your client wisely documented all her conversations and concerns about the illegality of the CFO’s desires through e-mail and internal memoranda. “Unbelievable,” you think to yourself, “there is no way Mega-Corp can get away with this!”

Think again.

While you may have a finely assembled paper trail of smoking guns on your side, Mega-Corp, ironically, has something far more powerful: the Supreme

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Judicial Court's ("SJC") ruling in *Fairney v. Savogran*.<sup>3</sup> On the defendant's motion, the Superior Court, citing *Savogran*, will hold that the Employee Retirement Income Security Act ("ERISA" or "the Act") preempts your client's state-law claims for retaliation.<sup>4</sup>

Welcome to federal court.

Upon receiving the court's order, you frantically research ERISA only to find that whistleblowers like your client have no remedy: no back-pay, no front-pay, no punitive damages, and no job reinstatement.<sup>5</sup> "This is impossible," you think to yourself. The Massachusetts District Court's ruling in *Andrews-Clarke v. Traveler's Insurance Company*,<sup>6</sup> however, confirms the bleakness of your lawsuit.<sup>7</sup>

Welcome to the reality of ERISA preemption.

## II. BACKGROUND

In 1974, Congress enacted ERISA in response to the growing need to protect the pension benefits of retired employees. In the years leading up to ERISA's

3. 664 N.E.2d 5, 8 (Mass. 1996) (holding ERISA preempts state law claims for retaliation).

4. *Id.*

5. See generally Terry Macalister, *Corporate Emperors Still Rule, Says Enron Whistleblower*, GUARDIAN UNLIMITED, Dec. 10, 2003, available at <http://www.guardian.co.uk/enron/story/0,11337,1103600,00.html>. Sherron Watkins, who joined Enron in 1993 and who alerted Kenneth Lay about "accounting regularities" before resigning in November of 2002, expressed her dislike for the term "whistleblower" because of its "pejorative" connotation. *Id.* Her sentiment appears well-justified. Watkins recalled a seminar on whistleblowing organized by a law firm entitled, "The Corporation Under Siege." *Id.*

6. 984 F. Supp. 49 (D. Mass. 1997).

7. See *id.* at 59 (declaring ERISA preemption appropriate notwithstanding its "absurd result"). Although the Federal District Court for the District of Massachusetts has yet to squarely address the issue of whether ERISA preempts a whistleblower's state law claims for retaliatory discharge, the court's rulings in other contexts do not bode well for your case. *Id.* According to the facts found by the *Andrews-Clarke* court, the defendant insurance company "repeatedly and arbitrarily refused to authorize" the appropriate medical treatment to the plaintiff, who struggled with severe bouts of alcoholism. *Id.* at 52. "As a consequence of their failure to" authorize such treatment, he "never received the treatment he so desperately required, suffered horribly, and ultimately died needlessly at age forty-one." *Id.* Notwithstanding the egregiousness of the defendant's conduct, the district court noted:

All of Diane Andrews-Clarke's cognizable state law causes of action arise out of the alleged improper processing of Clarke's claims for benefits under an ERISA employee benefit plan, and are therefore preempted. At the same time, however, it is undisputed that ERISA's civil enforcement provision does not authorize recovery for wrongful death, personal injury, or other consequential damages caused by the improper refusal of an insurer or utilization review provider to authorize treatment. Thus, the practical impact of ERISA in this case is to immunize Travelers and Greenspring from any potential liability for the consequences of their denial of benefits.

*Id.* at 54-56 (internal citations omitted); see also *infra* Part III.A.1 (revealing absence of evidence indicating congressional intent for ERISA to preempt state retaliatory discharge claims). But see *Dukes v. U.S. Healthcare*, 57 F.3d 350, 361 (3d Cir. 1995) (holding health maintenance organizations "liable for their role as the arrangers of their decedents' medical treatment.").

birth, a growing number of retirees never received the benefits of the plans that, for decades, they had funded. Many plans, for instance, were depleted through mismanagement; and where mismanagement was not the culprit, employers concocted complex and strict eligibility requirements to block retirees from receiving the fruits of their investment. Thus, at its core, “ERISA was passed . . . to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits.”<sup>8</sup>

To ensure ERISA’s success, Congress standardized the regulations with which employers had to comply in establishing and administering a pension fund.<sup>9</sup> Following ERISA’s enactment, no longer would employers need to contend with a “patchwork scheme of regulation” that resulted from differing pension fund requirements from state-to-state.<sup>10</sup> Instead, ERISA made certain that the “administrative practices of a benefit plan [were] governed by only a single set of regulations,” thus reducing inefficiencies.<sup>11</sup>

ERISA’s preemption clause makes standardization of such regulations possible. Under Section 514, ERISA preempts all state laws that “relate to” employee welfare benefit plans: “[T]he provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a).”<sup>12</sup>

As the Supreme Court has made clear, ERISA preempts three types of state laws: (1) laws that present the threat of conflicting and inconsistent regulation that would frustrate uniform national administration of ERISA plans; (2) “laws providing alternative enforcement mechanisms” to those in Section 502(a); and (3) laws that bind plan administrators to a “particular choice and thus function as a regulation of an ERISA plan itself.”<sup>13</sup> Deciphering when and articulating why the broad, sweeping preemption arms of ERISA swing into motion has produced “an avalanche of litigation in the lower courts,” leaving more questions than answers.<sup>14</sup> In Massachusetts, as in many jurisdictions, ERISA has turned a different corner to the point where it has “gone conspicuously awry from its original intent.”<sup>15</sup> Put simply, ERISA has mutated “into a shield of immunity which thwarts the legitimate claims of the very people it was

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8. *Massachusetts v. Morash*, 490 U.S. 107, 112 (1989); *see also Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983) (describing ERISA as “comprehensive” and “designed to promote the interests of employees and their beneficiaries in employee benefit plans”).

9. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9–11 (1987).

10. *Id.* at 11.

11. *Id.*

12. 29 U.S.C. § 1144(a) (2000) (emphasis added) (amending and codifying § 514 of *Pub. L. No. 93-406*, 88 Stat. 897 (1983)).

13. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-59 (1995) (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) for instances of ERISA preemption).

14. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 809 n.1 (1997).

15. *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 65 (D. Mass. 1997).

designed to protect.”<sup>16</sup>

The SJC’s ruling in *Fairney v. Savogran* is a model case that serves as just one of the many impetuses behind this sentiment. There, the SJC precluded the plaintiffs from bringing state law claims against an employer who allegedly discharged them in retaliation for trying to administer a pension fund lawfully.<sup>17</sup>

The SJC ruled in favor of preemption for three main reasons. First, the SJC reasoned that the plaintiffs’ wrongful termination claim “would introduce inconsistency into the administration of ERISA plans because not all of the States recognize, or treat uniformly, claims of retaliatory discharge.”<sup>18</sup> Second, the court stated that “[b]ecause ERISA’s civil enforcement scheme provides a remedy for persons situated as the plaintiffs were, recognition of a State law claim . . . would conflict impermissibly with ERISA’s civil enforcement scheme.”<sup>19</sup> Finally, the SJC assumed that claims for retaliatory discharge “would involve at least some inquiry at trial into the character and extent of the fiduciary duties imposed by ERISA.”<sup>20</sup>

Although the ruling in *Savogran* comports with decisions by the Ninth Circuit,<sup>21</sup> Sixth Circuit,<sup>22</sup> and Fifth Circuit,<sup>23</sup> the Fourth Circuit’s most recent decision in *King v. Marriot International*<sup>24</sup> explicitly rejects such reasoning, marking a divisive split among the circuits.<sup>25</sup> Given the active debate dividing the circuits on ERISA preemption of state retaliatory discharge claims, the First

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16. *Id.* at 56.

17. *Fairney v. Savogran*, 664 N.E.2d 5, 7-8 (Mass. 1996) (giving factual context of ERISA preemption).

18. *Id.* at 8 (citing *Authier v. Ginsberg*, 757 F.2d 796, 802 (6th Cir. 1985) as authority for preemption rationale). Similarly, this reason addresses the first prong of the three-step analysis articulated in *Travelers Insurance. Travelers Ins. Co.*, 514 U.S. at 655-58 (holding preemption warranted where state law claims frustrate uniform national administration of ERISA plans).

19. *Savogran*, 664 N.E.2d at 9. In so doing, the SJC satisfied the second prong the three-step analysis in *Travelers Insurance. Travelers Ins. Co.*, 514 U.S. at 658 (preempting state law where claims amount to “alternative enforcement mechanisms” to section 502(a) of ERISA).

20. *Savogran*, 664 N.E.2d at 8 (relying on *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993) for ERISA trial inquiry preempting state claims). While adopting the first two prongs of the *Travelers Insurance* test, the SJC departs from the Supreme Court with respect to the third prong in *Savogran* and, in doing so, drastically broadens the scope of ERISA preemption. Under the SJC’s third prong, for instance, where a state law claim requires a court to merely direct its attention to ERISA, preemption is appropriate. *Savogran*, 664 N.E.2d at 8. Such a basis for preemption was never contemplated by the Supreme Court in *Travelers Insurance. See Travelers Ins. Co.*, 514 U.S. at 659 (explaining indirect economic influence not part of ERISA regulation or basis for preemption).

21. *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 412 (9th Cir. 1993).

22. *Authier v. Ginsberg*, 757 F.2d 796, 802 (6th Cir. 1985).

23. *Anderson v. Elec. Data Sys.*, 11 F.3d 1311, 1314 (5th Cir. 1994).

24. 337 F.3d 421 (4th Cir. 2003).

25. *Compare King*, 337 F.3d at 428 (holding state wrongful termination claim not “completely preempted” and rejecting Fifth and Ninth Circuit reasoning otherwise), with *Anderson*, 11 F.3d at 1314 (holding state wrongful discharge claim based on ERISA violation preempted), and *Hashimoto*, 999 F.2d at 412 (preempting Hawaii Whistle Blowers Act with ERISA provision protecting whistle blowers), and *Authier*, 757 F.2d at 802 (concluding ERISA remedies preempt state claim for retaliatory discharge).

Circuit's eventual need to consider this issue assumes added importance.

The purpose of this article is to detail the flaws in the SJC's *Savogran* decision and, similarly, to debunk the notion that ERISA preempts state law claims for retaliatory discharge. Overall, when deciding whether ERISA should preempt state law claims of a whistleblower who sues under the status of a former employee, the reasons against preemption are many. Specifically, Part III.A addresses why allowing a former employee to pursue her state law claims would not conflict with ERISA's civil enforcement scheme. Part III.B considers whether a whistleblower's state law claims would undermine ERISA's uniformity. Part III.C analyzes whether state courts are even required to interpret ERISA when deciding a whistleblower's state law claims. Part IV discusses the various circuit splits that make this issue ripe for Supreme Court review. Finally, Part V points to emerging trends among the district courts and the opportunity for state Attorney General intervention.

### III. ANALYSIS

The Supreme Court has routinely recognized that federal preemption of state employment standards "should not be lightly inferred" since this area lies "within the traditional police power of the State."<sup>26</sup> A presumption against preemption exists where "the field that Congress is said to have preempted has been traditionally occupied by the States."<sup>27</sup> Such standards apply to employment actions since Commonwealth state courts have historically been the mediators for retaliatory discharge claims.

Keeping this presumption in mind, whether federal law preempts a state law establishing a cause of action is a question of congressional intent.<sup>28</sup> Indeed, only where there is "clear and manifest" congressional intent to supersede state law claims for retaliatory discharge should courts rule in favor of ERISA preemption.<sup>29</sup>

#### A. *ERISA Does Not Preempt State Law Claims for Retaliatory Discharge Because Such Claims Do Not Undermine ERISA's Uniformity*

##### 1. *The Legislative History of ERISA Does Not Indicate Congress' Intent to Preempt State Common Law Claims for Retaliatory Discharge*

Congress enacted ERISA in order to safeguard "the establishment, operation, and administration of [employee benefit] plans."<sup>30</sup> As discussed

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26. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987).

27. *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 715 (1985).

28. *Norris*, 512 U.S. at 252.

29. *Automated Med. Labs*, 471 U.S. at 715.

30. *Fort Halifax Packing Co.*, 482 U.S. at 15 (citing 29 U.S.C. § 1001(a) for congressional ERISA policy

above, in order to accomplish this goal, Congress sought to ease the administrative burdens that employers face in providing employee pension plans in different states.<sup>31</sup> These burdens can be substantial as they include “determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements.”<sup>32</sup> As the Supreme Court recognized, “[o]bligating the employer to satisfy the varied and perhaps conflicting requirements of particular state fair employment laws . . . would make administration of a nationwide plan more difficult.”<sup>33</sup>

Overall, Congress enacted ERISA to respond to the need to provide employers with “a uniform set of administrative procedures governed by a single set of regulations.”<sup>34</sup> Indeed, ERISA’s House subcommittee declared that “[i]n electing to deliberately preclude state authority over these plans, Congress acted to ensure uniformity of regulation with respect to their activities.”<sup>35</sup>

To accomplish this objective, ERISA was drafted to “supersede any and all State laws insofar as they . . . relate to any employee benefit plan.”<sup>36</sup> While the words “relate to” have been construed expansively, courts should rule in favor of preemption only where state common law conflicts with the *administrative procedures* set forth in ERISA.<sup>37</sup>

In *Fort Halifax v. Coyne*,<sup>38</sup> for instance, the Supreme Court held that ERISA did not preempt a Maine statute that provided a one-time severance payment to employees in the event of a plant closing.<sup>39</sup> There, the Court focused on ERISA’s legislative history to conclude “that the Maine statute in no way raises the types of concerns that prompted preemption.”<sup>40</sup> In its reasoning, the Court began by correctly recognizing that “Congress intended preemption to afford employers the advantages of a *uniform set of administrative procedures* governed by a single set of regulations.”<sup>41</sup> Next, the Court emphasized that a concern over ERISA preemption should only arise where a state law imposes an administrative burden on an employee benefit plan because such a state law

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declaration).

31. *See id.* at 11.

32. *Id.* at 9.

33. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 105 n.25 (1983).

34. *Fort Halifax Packing Co.*, 482 U.S. at 11.

35. H.R. REP. NO. 94-1785, at 46 (1977).

36. 29 U.S.C. § 1144(a) (2000) (emphasis added).

37. *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d at 357. (rejecting inclusion of benefits quality in ERISA preemption because quality standards reserved for state regulation).

38. 482 U.S. 1 (1987).

39. *Id.* at 3.

40. *Id.* at 11.

41. *Id.* (emphasis added).

would undermine the uniformity that ERISA was designed to create.<sup>42</sup> Moreover, the Court stated that a one-time severance payment does not “relate to” an employee benefit plan because the statutory obligation “differs radically in impact from a requirement that an employer pay ongoing benefits on a continuing basis.”<sup>43</sup> The Court concluded that ERISA preemption is not appropriate because the Maine statute “creates no impediment to an employer’s adoption of a uniform benefit administration scheme.”<sup>44</sup>

The same reasoning applies to employees who suffer a retaliatory discharge for ERISA violations. Indeed, allowing such employees to recover under state law for claims of retaliatory discharge would not create “the type of conflicting regulation of benefit plans that ERISA preemption was intended to prevent.”<sup>45</sup> Similar to *Fort Halifax*, a state retaliatory discharge cause of action “neither establishes, nor requires an employer to maintain, an employee benefit plan.”<sup>46</sup> Like the one-time severance payment in *Fort Halifax*, an employer found liable for retaliatory discharge would be required to make a similar lump-sum payment, which requires no administration scheme.<sup>47</sup> As the *Fort Halifax* court stated, a state law that requires an employer to make a one-time payment based on the occurrence of a contingency “simply creates no need for an ongoing administrative program for processing claims and paying benefits.”<sup>48</sup>

Thus, just as the Supreme Court ruled that ERISA preemption was not appropriate with regard to a state statute requiring employers to pay severance packages, ERISA preemption is equally inappropriate where a state law mandates an employer to compensate employees whose termination violates public policy because it was retaliatory.<sup>49</sup> In both scenarios, the uniform set of procedures that ERISA was enacted to create is in no way undermined.<sup>50</sup>

## *2. Any Increase to the Operational Costs of an ERISA Plan Due to State Common Law Retaliatory Discharge Claims Does Not Contravene Legislative Intent*

While the legislature’s intent in promulgating ERISA was to ease the costly administrative burdens associated with administering a pension plan, the possibility that state law claims may increase an employer’s operational costs does not warrant preemption.<sup>51</sup> In *Lane v. Goren*,<sup>52</sup> the Ninth Circuit precluded

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42. *See id.* at 11-12.

43. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 14 (noting Maine had no state-mandated benefit plan).

44. *Id.* at 14.

45. *See id.* (exempting Maine state law claim for one-time severance payment from ERISA preemption).

46. *Id.* at 12 (emphasis in original).

47. *Fort Halifax Packing Co.*, 482 U.S. at 12.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See Lane v. Goren*, 743 F.2d 1337, 1340 (9th Cir. 1984) (noting increase in operational costs as argument for preemption fails to withstand scrutiny).

preemption in a case involving a state law claim for employment discrimination based on race and age.<sup>53</sup> There, the defendants argued in favor of preemption on the basis that allowing such a cause of action to go forward “will affect the benefit plan by increasing the . . . costs of doing business,” thus creating an impediment to an employer’s uniform benefit administration scheme.<sup>54</sup> The *Lane* court explicitly rejected the defendants’ grounds, stating “[t]hat argument does *not* withstand scrutiny. . . . [S]tate laws and municipal ordinances regulating zoning, health, and safety [also] increase the operational costs of ERISA trusts, but no one could seriously argue that they are preempted.”<sup>55</sup>

The Second Circuit in *Rebaldo v. Cuomo*<sup>56</sup> took a stance similar to the Ninth Circuit.<sup>57</sup> The *Cuomo* court considered whether ERISA preempted a state law requiring hospitals to charge specific inpatient rates for self-insured employee benefit plans.<sup>58</sup> In rejecting preemption, the Second Circuit held:

Insofar as the regulation of hospital rates affects a plan’s cost of doing business, it also may be analogized to State labor laws that govern working conditions and labor costs, to rent control laws that determine what employee benefit plans pay or receive for rental property, and even to such minor costs as the Thruway, bridge and tunnel tolls that are charged to plans’ officers or employees.<sup>59</sup>

The same logic applies to employees who suffer a retaliatory discharge for reporting ERISA violations. For example, should defendant-employers be found liable for retaliatory discharge, it is certainly possible that this will cause the cost of administering the retirement plan to increase. However, similar to *Lane* and *Cuomo*, such a situation arises merely as a contingency. It is only if the employer is found liable for illegal conduct that the operational costs of the plan *may* increase. Secondly, as the Second and Ninth Circuits correctly acknowledged, such cost increases are too tenuous, remote, and peripheral to warrant ERISA preemption.<sup>60</sup> Thus, to allow ERISA to preempt a discharged employee’s state law claim for retaliatory discharge would lead to the dubious result of making virtually all laws subject to preemption:

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52. 743 F.2d 1337 (9th Cir. 1984).

53. *Id.* at 1338, 1340.

54. *See id.* at 1340.

55. *Id.* (emphasis added).

56. 749 F.2d 133 (2d Cir. 1984).

57. *Id.* at 138-39 (concluding increase in cost of operating employee benefit plans insufficient for ERISA preemption).

58. *Id.* at 136-37.

59. *Id.* at 138.

60. *See id.* at 138-39 (analogizing potential cost increase to other state-controlled services not preempted by ERISA); *Lane*, 743 F.2d at 1340 (citing *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21 (1983), for possible increase in costs as too tenuous to “relate to” a plan).

In short, if ERISA is held to invalidate every State action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that never was contemplated by Congress. Where . . . a State statute of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated.<sup>61</sup>

*B. ERISA Does Not Preempt State Law Claims for Retaliatory Discharge Because Such Claims Do Not Conflict with ERISA's Civil Enforcement Scheme*

*1. Congressional Silence in a Subject Area Within a Federal Statute is Not a Valid Basis for Preemption*

Where ERISA addresses the remedies available to one class of persons, its silence as to other classes cannot be used as a valid basis for preemption.<sup>62</sup> To do so would be to read into ERISA what simply does not exist—a functional equivalent to judicial lawmaking.<sup>63</sup>

The Third Circuit's ruling in *Dukes v. U.S. Healthcare*<sup>64</sup> is instructive. In a consolidated appeal, the Third Circuit considered whether ERISA preempted injuries arising from the medical malpractice of health maintenance organization ("HMO") affiliated hospitals and medical personnel.<sup>65</sup> The defendants removed to federal court, alleging that ERISA preempted the plaintiff's state law claims. The defendants specifically relied on ERISA's civil enforcement mechanism, found in Section 502(a)(1)(B), which provides that "[a] civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."<sup>66</sup>

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61. *Cuomo*, 749 F.2d at 138–39.

62. *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 357 (3d Cir. 1995) (stating policy on interpreting congressional silence). Relying on Supreme Court precedent, the Third Circuit explained that "[q]uality control of benefits, such as the health care benefits provided here, is a field traditionally occupied by state regulation and we interpret the silence of Congress as reflecting an intent that it remain such." *Id.*

63. See, e.g., *Mackay v. Lanier Collection Agency & Serv. Inc.*, 486 U.S. 825, 836–37 (1988) (refusing to "read into" ERISA § 514(a) a limitation expressly included in another ERISA provision); *Burlington N. R.R. Co. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429, 447 (1987) (declining to "read . . . into the silence of" the Railway Labor Act a limitation on union self-help); *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 662–63 (1973) (rejecting argument "reading" provision—found elsewhere in Act—into section 13 of Rivers and Harbors Act of 1899).

64. 57 F.3d 350 (3d Cir. 1995).

65. *Id.* at 351. The plaintiffs in *Dukes* "sued the HMO under a direct negligence theory, claiming, among other things, that the HMO was negligent in its selection, employment, and oversight of the medical personnel who performed the actual medical treatment." *Id.* at 353.

66. *Id.* at 353–54; see 29 U.S.C. § 1132(a)(1)(B) (2000) (amending and codifying *Pub. L. No. 93-406*, § 502, 88 Stat. 891 (1980)).

In rejecting this argument and ruling against preemption, the Third Circuit noted that “the HMOs . . . arrange[d] for the actual medical treatment for plan participants.”<sup>67</sup> In so doing, the court drew a significant distinction between “benefits due under an ERISA plan” and the “quality” of the benefits due.<sup>68</sup> Relying on the statute’s plain language, the court found that, while Section 502(a)(1)(B) preempts the former, it does not preempt the latter:

We are confident that a claim about the quality of a benefit received is not a claim under § 502(a)(1)(B) to recover benefits due . . . under the terms of [the] plan. . . . The text lends no support to U.S. Healthcare’s argument. On its face, a suit to recover benefits due . . . under the terms of [the] plan is concerned exclusively with whether or not the benefits due under the plan were actually provided. The statute simply says nothing about the quality of benefits received.<sup>69</sup>

Thus, because Section 502 only speaks to claims brought by beneficiaries to recover benefits due under his or her ERISA plans, all other claims related to the quality of those benefits fall outside of ERISA’s scope and are therefore not appropriate for preemption.<sup>70</sup> Overall, the rule is painstakingly clear: a federal statute’s silence in a particular subject area militates against preemption.<sup>71</sup>

## 2. *ERISA Is Silent as to the Type of Remedies that Are Available to Employees Who Suffer a Retaliatory Discharge for Reporting ERISA Violations*

The Third Circuit’s reasoning in *Dukes* is directly applicable to whether ERISA’s whistleblower provision should preempt a former employee’s claim for retaliatory discharge. Section 510 constitutes ERISA’s “whistleblower” provision and states, “[i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a *participant* or *beneficiary* for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . .”<sup>72</sup>

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67. *Dukes*, 57 F.3d at 361.

68. *Id.* at 357.

69. *Id.* (internal citations omitted).

70. *Id.* at 356 (explaining claims attacking benefit quality fall outside ERISA scope, making complete preemption and removal improper).

71. *See Dukes*, 57 F.3d at 357 (interpreting congressional silence on issue as congressional intent to safeguard regulation in states).

72. 29 U.S.C. § 1140 (2000) (emphasis added); *McBride v. PLM, Int’l, Inc.*, 179 F.3d 737, 743 (9th Cir. 1999) (examining ERISA sections concerning employer interference and civil enforcement mechanisms). The Ninth Circuit noted, “[s]ection 1140 forbids employers . . . from interfering with certain protected rights and is enforceable through ERISA’s civil enforcement mechanism in Section 1132.” *Id.* Section 502 acts as Section 510’s civil enforcement mechanism and allows ERISA plan participants and beneficiaries to bring civil actions “to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” 29 U.S.C. § 1132 (a)(1)(B) (2005).

As provided above,<sup>73</sup> Section 502's language is consistent with the issue in *Dukes* because it only addresses forms of recovery available to plan participants and beneficiaries.<sup>74</sup> Indeed, neither Section 502 nor 510 make any mention of claims for retaliatory discharge brought by former employees. Thus, in accordance with the Third Circuit's ruling in *Dukes*, because ERISA merely addresses the rights of plan participants and beneficiaries who sue to recover benefits, its silence as to discharged employees who bring an action to recover lost wages precludes preemption.<sup>75</sup>

The class of persons bringing a state law claim for retaliatory discharge is dispositive of ERISA preemption. While ERISA preemption may be appropriate with respect to employees who sue as plan participants or beneficiaries, the statute was neither intended nor drafted to allow for preemption with respect to whistleblowers who sue as former employees. Like the SJC in *Savogran*, the Tennessee District Court in *McSharry v. UnumProvident*<sup>76</sup> missed a vital distinction relating to the class of persons that ERISA's whistleblower provision is intended to address.<sup>77</sup> There, the plaintiff, Patrick McSharry worked as a medical director in the defendant insurance company's claims department.<sup>78</sup> Throughout his employment, UnumProvident allegedly "encouraged medical advisors to use language in their reports that could support the denial of disability insurance claims."<sup>79</sup> Where reports were worded to allow for reimbursement, McSharry was pressured "to delete or revise language in the reports so as not to compromise denial of claims."<sup>80</sup> When McSharry refused to take part in UnumProvident's illegal practices, he suffered retaliation including being "subject[] to constant criticism and ostracism," having "[h]is work . . . routed around him []", and finally being terminated from his position as Medical Director in January, 2002, "purportedly for 'disruptive behavior.'"<sup>81</sup>

McSharry brought two claims for retaliatory discharge: one under the Tennessee Public Protection Act, commonly referred to as the Tennessee "whistleblower" statute, and another under Tennessee common law on the basis that UnumProvident wrongfully discharged him in retaliation for his supporting a state public policy.<sup>82</sup> The court ultimately concluded that ERISA preempted

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73. See *supra* text accompanying note 66 (quoting section 502(a)(1)(B)).

74. See *Miller v. Carelink Health Plans*, 82 F. Supp. 2d 574, 578 (S.D. W. Va. 2000).

75. See *id.*

76. 237 F. Supp. 2d 875 (E.D. Tenn. 2002).

77. *Id.* at 878-79 (invoking ERISA preemption against claims by medical director—neither a plan participant nor beneficiary).

78. *Id.* at 877.

79. *Id.*

80. *McSharry*, 237 F. Supp. 2d at 877.

81. *Id.* at 878.

82. *Id.* at 876.

both McSharry's whistleblower and wrongful discharge claims.<sup>83</sup> In particular, the court stated:

Where rights are guaranteed by ERISA and ERISA provides a specific remedy, the remedy for such rights under ERISA is exclusive. As a general rule, the absence of a particular remedy under ERISA does not mean that state-law remedies are preserved. When Congress has designed a mechanism to enforce the rights and duties of ERISA entities, the broad preemption of ERISA prevents the application of state law.<sup>84</sup>

Given this reasoning, the court erroneously assumes that McSharry must bring his claims under the status of a plan participant, beneficiary, or fiduciary. The language embodied in Section 502 and 510, however, runs contrary to the court's assumption because McSharry is not suing as a plan participant, beneficiary, or fiduciary seeking to recover plan benefits. Rather, McSharry is suing as a former employee, which makes the issue of retirement benefits secondary. ERISA is only concerned with regulating suits brought by plan participants, beneficiaries, and fiduciaries who seek to recover benefits due under the plan.<sup>85</sup> State law causes of actions remain and ought to be preserved for all other claims, in particular those brought by former employees (who sue for, *inter alia*, lost wages).<sup>86</sup> Indeed, as the First Circuit observes, "unless congressional intent to preempt clearly appears, ERISA will not be deemed to supplant state law in areas traditionally regulated by the states."<sup>87</sup>

The District Court of West Virginia in *Miller v. Carelink Health Plans*<sup>88</sup> explicitly acknowledged the significant distinction between claims brought by *fiduciaries*, *plan participants* and *beneficiaries* and those brought by *former employees*.<sup>89</sup> There, a nurse-employee sued a health insurance provider in state court alleging that her employer discharged her in retaliation for her refusal to

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83. *Id.* at 879.

84. *McSharry v. UnumProvident Corp.*, 237 F. Supp. 2d 875, 882 (E.D. Tenn. 2002) (citations omitted).

85. 29 U.S.C. § 1132(a)(1)(B) (2000) (naming persons empowered to bring suit under ERISA and subject matter suit may cover); 29 U.S.C. § 1140 (2000) (forbidding interference with participant or beneficiary's exercise of rights under employee benefit plan).

86. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (noting Supremacy Clause rule vis-à-vis police powers of states). The Court observed, "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also id.* at 533 (Blackmun, J., concurring in part and dissenting in part) (concluding "simplest and most obvious explanation for the statutory silence: that Congress never intended to displace state common-law damages claims").

87. *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 139-40 (1st Cir. 2000).

88. 82 F. Supp. 2d 574 (S.D. W. Va. 2000).

89. *Id.* at 578 (noting Miller's former employee status distinct from plan participant, beneficiary, and fiduciary).

assist in breaching patients' employee benefit plans.<sup>90</sup> In holding that ERISA does not preempt such claims, the district court reasoned:

Relying on legislative history and Congressional intent, the Supreme Court found actions brought under the civil enforcement provisions of ERISA Section 502(a) arise under laws of the United States, and therefore, provide federal court removal jurisdiction. ERISA Section 502(a) actions, however, may be brought only by a *plan participant, beneficiary, or fiduciary*, or by the Secretary of Labor. . . . Although the parties do not dispute that her employer Carelink provides services to members of employer-sponsored ERISA plans, Miller is not suing Carelink as a *plan participant, beneficiary, or fiduciary*. She is suing as a *former employee*.<sup>91</sup>

The *Carelink* court correctly recognized that a state law claim for retaliatory discharge does not conflict with ERISA's whistleblower provision because of Section 502's silence with regard to claimants who sue as former employees.<sup>92</sup> In so doing, the court highlighted the two separate harms at issue that courts, like the SJC in *Savogran*, have failed to consider: (1) the harms incurred by participants and beneficiaries of an ERISA plan when an employer engages in illegal conduct and (2) former employees who are discharged in retaliation for reporting illegal conduct.<sup>93</sup> On the one hand, plan participants and beneficiaries, seeking redress for losses to their pension fund in the form of replenishment arising from an employer's illegal conduct, are a class of persons to which Section 510 speaks and a type of harm for which Section 502(a)(1)(B) provides a remedy.<sup>94</sup> Former employees, on the other hand, seek remuneration in the form of compensatory and punitive damages arising from a retaliatory discharge as a result of reporting an employer's illegal conduct—a class of persons over which Section 510 is silent and, thus, a type of remedy that 502(a)(1)(B) deliberately fails to consider.<sup>95</sup>

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90. *Id.* at 576.

91. *Id.* at 577-78 (emphasis added).

92. *Carelink Health Plans, Inc.*, 82 F. Supp. 2d at 578 (interpreting Section 502 as limiting potential claimants to plan participant, beneficiary, or fiduciary).

93. *See id.* at 576 n.3, 578 (observing Miller suit as championing plan participant's ERISA rights and finding former employer not preempted); *see also* Authier v. Ginsberg, 757 F.2d 796, 803 (6th Cir. 1985) (Edwards, J., dissenting) (articulating "ERISA does not expressly create a federal cause of action for wrongful discharge of a *fiduciary*") (emphasis added).

94. 29 U.S.C. § 1132(a) (2000); Authier v. Ginsberg, 757 F.2d at 803; *Carelink Health Plans, Inc.*, 82 F. Supp. 2d at 576 n.3, 578; Jorgensen v. Prudential Insurance, 852 F. Supp. 255, 264 (D. N.J. 1994) (interpreting provisions of ERISA as providing equitable relief for wrongs committed against participant or beneficiary).

95. *See Jorgensen*, 852 F. Supp. at 264 (rejecting preemption because whistleblower not participant and not provided individual remedy at law under ERISA). *But see* Hashimoto v. Bank of Haw., 999 F.2d 408, 411 (9th Cir. 1993) (holding ERISA intended to protect whistleblowers). Although the Ninth Circuit in *Hashimoto* recognized that, "ERISA itself provides a remedy for a *fiduciary* who is discharged because she 'has given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA] or the

As its language and legislative history indicate, ERISA's whistleblower provision was intended simply as a means to allow plan participants and beneficiaries to recover what their employer rightfully owed them under their pension plan:

When Congress enacted ERISA it was concerned in large part with the various mechanisms and institutions involved in the funding and payment of plan benefits. That is, Congress was concerned "that owing to the inadequacy of current minimum [financial and administrative] standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered." Thus, Congress sought to assure that promised benefits would be available when plan participants had need of them and § 502 was intended to provide each individual participant with a remedy in the event that promises made by the plan were not kept.<sup>96</sup>

Given ERISA's purpose, the fact that its whistleblower provision is completely silent as to remedies for the former employee who suffers a retaliatory discharge is telling. Indeed, such claims were intentionally left outside of ERISA's scope and left to the states. That courts have interpreted Section 502's deafening silence on the issue of whistleblowers who sue as former employees to favor preemption of state retaliatory discharge claims runs counter to basic principles of statutory construction.

*C. ERISA Does Not Preempt State Common Law Claims for Retaliatory Discharge Because Such Claims Do Not Require Courts to Interpret ERISA*

Courts have repeatedly "held that a cause of action 'relates to' an ERISA plan when a court must evaluate or interpret the terms of the ERISA-regulated plan to determine liability under the state law."<sup>97</sup> Expressed differently, a law suffers preemption where "the court's inquiry must be directed to the

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Welfare and Pension Plans Disclosure Act.' This statute is clearly meant to protect whistleblowers," it failed to recognize the distinction between whistleblowers who sue as fiduciaries to recover lost pension benefits, and those who sue as former employees to recover lost wages and other employment-related types of recovery. *Hashimoto*, 999 F.2d at 411 (emphasis added); see also *Anderson v. Elec. Data Sys.*, 11 F.3d 1311, 1314 (5th Cir. 1994) (preempting retaliatory discharge claims because they "conflict with the [ERISA] enforcement provisions of §§ 502(a) and 510."). The Fifth Circuit in *Anderson* reached the same conclusion as the Ninth Circuit based on an identical misconception that former employees suing for legal remedies are indistinguishable from fiduciaries and participants seeking equitable remedies under ERISA. *Anderson*, 11 F.3d at 1314 (treating former employee as within ambit of ERISA).

96. *Duke v. U.S. Healthcare, Inc.*, 57 F.3d 350, 357 (3d Cir. 1995) (explaining congressional concerns while enacting ERISA and using section 2, 29 U.S.C. § 1001(a) to illustrate those concerns).

97. *Hampers v. W.R. Grace & Co.*, 202 F.3d 44, 52 (1st Cir. 2000) (noting consistency with which courts apply rule for whether claim "relates to" ERISA); *Mank v. Green*, 350 F. Supp. 2d 154, 158 (D. Me. 2004) (articulating "relates to" rule); *Nicholson v. Prudential Ins. Co. of America*, 235 F. Supp. 2d 22, 25 (D. Me. 2003) (listing "relates to" rule as central question in ERISA preemption analysis).

plan . . .”<sup>98</sup>

In contrast, courts routinely deny preemption where ERISA is “not essential to the plaintiff’s cause of action,” but merely “incidental.”<sup>99</sup> Instructive on this point is the District Court of Pennsylvania’s ruling in *Greenblatt v. Budd*.<sup>100</sup> There, the plaintiff sued his employer for misrepresenting the benefits he would receive under a particular pension plan.<sup>101</sup> While acknowledging that “Congress made . . . [ERISA’s] preemption provision ‘deliberately expansive,’”<sup>102</sup> the *Greenblatt* court denied preemption because pension benefits were only ancillary to the plaintiff’s cause of action for misrepresentation.<sup>103</sup> The *Greenblatt* court explained:

That the subject of deception concerned pension benefits is only *incidental and not essential to the plaintiff’s cause of action*. Like promises for a raise in salary, a promotion, or the use of tickets to a baseball game, plaintiff’s employer promise to provide the plaintiff with certain benefits at some unknown time in the future, upon which plaintiff could reasonably rely, is the essence of the fraud alleged.<sup>104</sup>

Similarly, state law claims for retaliatory discharge do not warrant preemption because, like actions for misrepresentation, ERISA is only “incidental” and *not* “essential” to the disposition of such claims for two main reasons. First, a claim for retaliatory discharge naturally does not require a plaintiff to prove that her employer violated ERISA.<sup>105</sup> Second, when finding in favor of a plaintiff in such a scenario, courts are not required to look to ERISA to fashion a remedy.<sup>106</sup>

*1. A Plaintiff Need Not Prove that Her Employer Violated ERISA to Prevail on a Retaliatory Discharge Claim*

The SJC in *Savogran* incorrectly assumes that retaliatory discharge claims “would involve at least some inquiry at trial into the character and extent of the

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98. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990).

99. *Greenblatt v. Budd*, 666 F. Supp. 735, 742 (D. Penn. 1987); *see also* *Cuoco v. NYNEX, Inc.*, 722 F. Supp. 884, 887 (D. Mass. 1989); *Morningstar v. Meijer, Inc.*, 662 F. Supp. 555, 557 (D. Mich. 1987); *Pace v. Signal Tech. Corp.*, 628 N.E.2d 20, 22 (Mass. 1994) (noting, despite breadth of rule, some state actions too tenuous to warrant “relates to” preemption).

100. 666 F. Supp. 735 (E.D. Pa. 1987).

101. *Id.* at 739.

102. *Id.* at 741 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) for congressional intent on breadth of ERISA preemption provisions).

103. *Id.* at 742 (holding misrepresentation claim incidental to ERISA and thus not preempted).

104. *Greenblatt*, 666 F. Supp. at 742 (emphasis added).

105. *See infra* Part III.A.1.

106. *See infra* Part III.A.2.

fiduciary duties imposed by ERISA.”<sup>107</sup> The level of inquiry into ERISA required of courts for a retaliatory discharge claim, however, is tenuous at best and, thus, insufficient to warrant preemption.<sup>108</sup>

Likewise, contrary to the Ninth Circuit’s ruling in *Hashimoto v. Bank of Hawaii*,<sup>109</sup> whether or not an employer illegally administers a pension fund is merely incidental to a whistleblower’s state law claim of retaliation.<sup>110</sup> Among the factors the Ninth Circuit considered as to whether Hashimoto’s claim for retaliatory discharge should be preempted was the extent to which the court would be required to interpret ERISA.<sup>111</sup> The court explained:

[A] trial of Hashimoto’s claim would require an interpretation of the ERISA plans as to which she raised her objections about the Bank’s fulfillment of its fiduciary obligations. Even though such examination by the court would only have to proceed to the point of determining Hashimoto’s good faith, some interpretation of ERISA would probably be required.<sup>112</sup>

Such reasoning is erroneous. It is unnecessary for a court to consider whether a whistleblower was correct in reporting that the defendant acted illegally in determining liability under her state law claim for retaliation. Ironically, the SJC agreed with this notion in stating, “[t]he fact that a [plaintiff’s] complaint is later found to be unmeritorious does not preclude a retaliation claim based on the protected activity of pursuing that complaint.”<sup>113</sup> The First Circuit in *Mesnick v. General Electric, Co.*,<sup>114</sup> properly utilizes the same analysis:

The fact that the plaintiff eventually proves unable to establish that the employer violated . . . [a statute] . . . is not fatal to his prima facie case of retaliation. It is enough that the plaintiff had a reasonable, good-faith belief that a violation occurred; that he acted on it; that the employer knew of the plaintiff’s conduct; and that the employer lashed out in consequence of it.<sup>115</sup>

Since proof that the defendant violated ERISA is not required, there is no

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107. *Fairney v. Savogran*, 664 N.E.2d 5, 8 (Mass. 1996).

108. *See Pace v. Signal Tech. Corp.*, 628 N.E.2d 20, 22 (Mass. 1994) (noting ERISA preemption not so broad as to encompass every state action).

109. 999 F.2d 408 (9th Cir. 1993).

110. *Contra id.* at 411 (preempting wrongful discharge claim because trial inquiry of ERISA plan “relates” state action to ERISA).

111. *Id.*

112. *Id.*; *see also McLean v. Carlson Cos., Inc.*, 777 F. Supp. 1480, 1483 (D. Minn. 1991) (ruling in favor of preemption because claim referred to and depended upon existence of plan).

113. *Mole v. Univ. of Mass.*, 814 N.E.2d 329, 339 n.13 (Mass. 2004).

114. 950 F.2d 816 (1st Cir. 1991).

115. *Id.* at 827.

need for courts to interpret the terms of a defendant's pension fund. Thus, the violation in question—whether it be the employer's alleged failure to comply with ERISA or the Occupational Safety and Health Act—is of virtually no importance.<sup>116</sup> In either case, a whistleblower's state-law claim for retaliation stands on its own, making preemption entirely inappropriate.

2. *Courts Need Not Consider ERISA when Awarding a Remedy to a Whistleblower Who Succeeds on a Retaliatory Discharge Claim*

A whistleblower's claim for retaliatory discharge does not require the court to interpret ERISA, thus distinguishing such cases from *Ingersoll-Rand Co. v. McClendon*,<sup>117</sup> where the plaintiff's state-law claim required the existence of an ERISA plan.<sup>118</sup> There, the plaintiff sued his former employer in state court for wrongful discharge, alleging that the company terminated him to avoid making contributions to his pension fund.<sup>119</sup> The Supreme Court held the plaintiff's wrongful discharge claims preempted because "[t]he Texas cause of action makes specific reference to . . . the existence of a pension plan."<sup>120</sup> Indeed, under the Texas statute, the plaintiff was required to prove that his employer's desire to avoid contributing to the employee's pension fund was the principal reason for his termination.<sup>121</sup> In order to prevail, the Court explained, "a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment."<sup>122</sup> Overall, the goal of the Texas statute was to allow wrongfully discharged employees to seek redress for benefits owed under the pension plan.<sup>123</sup>

In *Ingersoll-Rand*, the Texas statute was premised on the existence of an ERISA plan. With regard to whistleblowers, however, claims for retaliatory discharge lack any similar relation to ERISA.<sup>124</sup> In order to successfully assert a state retaliatory discharge claim, a whistleblower must prove that she engaged in protected conduct, that she suffered some adverse action, and that there is a causal connection between the protected conduct and the adverse action.<sup>125</sup> That none of these elements refer to ERISA or ERISA plans is a significant factor that militates against ERISA preemption.<sup>126</sup> Indeed, the lack of any

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116. See *supra* notes 114-115 and accompanying text (explaining actual violation of statute not required for viable retaliation claim).

117. 498 U.S. 133 (1990).

118. *Id.* at 140 (explaining claim related to contributing to ERISA plan).

119. *Id.* at 135-36.

120. *Id.* at 140.

121. *Ingersoll-Rand Co.*, 498 U.S. at 140.

122. *Id.*

123. *Id.*

124. See *King v. Marriot Int'l*, 337 F.3d 421 (4th Cir. 2003).

125. *Mole v. Univ. of Mass.*, 814 N.E.2d 329, 338-39 (Mass. 2004) (listing prima facie elements of retaliation claim).

126. Compare *DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 815 (1997) (rejecting

reference means that courts need not consider ERISA when fashioning a remedy.<sup>127</sup>

The whistleblower's case is also different from the First Circuit's ruling in *Hampers v. W.R. Grace*.<sup>128</sup> There, the plaintiff sued his employer's former parent company under state contract law for failing to enroll him in the company's retirement plan.<sup>129</sup> The main purpose of the state law claim was to recover retirement benefits to which the plaintiff alleged he was entitled.<sup>130</sup> In deciding that ERISA preempted the plaintiff's state law claim, the Court of Appeals relied on the fact that "the relief requested by Hampers focuses primarily on [plan] benefits."<sup>131</sup> Again, a whistleblower's state law claim for retaliatory discharge is dissimilar to *Hampers* in that it seeks compensatory and punitive damages for an employer's illegal conduct rather than plan benefits.<sup>132</sup> For this reason, the concern that claims for retaliatory discharge will interfere with an employer's ability to administer pension plans in a uniform manner is unsupportable.

Finally, such cases are especially different from *Carlo v. Reed Rolled Thread Die Company*,<sup>133</sup> a case in which the court would have been required to compute damages using ERISA were the plaintiff to succeed on his state law claims.<sup>134</sup> There, the employer offered Mr. Carlo early retirement under the company's Early Retirement Plan, which was governed by ERISA.<sup>135</sup> After learning of the monthly benefits he would receive, Mr. Carlo elected to retire early.<sup>136</sup> Approximately five months later, the employer informed Mr. Carlo that his benefits had been incorrectly calculated and offered him the opportunity to continue working in the same position.<sup>137</sup> Mr. Carlo and his wife sued for breach of contract and negligent misrepresentation.<sup>138</sup>

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preemption where state statute contained no provisions expressly referring to ERISA or ERISA plans), *with* D.C. v. Greater Wash. Bd. of Trade, 506 U.S. 125, 129-30 (1992) (ruling in favor of preemption where statute specifically refers to ERISA regulated welfare benefits), *and* Mackay v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 830 (1988) (finding preemption where statute's provision explicitly refers to ERISA in scope of its application).

127. See *Mole v. Univ. of Mass.*, 814 N.E.2d 329, 338-39 (stating prima facie elements of retaliatory discharge claim). "To make out his prima facie case [for retaliatory discharge] . . . [the plaintiff must] show that he engaged in protected conduct, that he suffered some adverse action, and that a causal connection existed between the protected conduct and the adverse action." *Id.* (internal citations omitted).

128. 202 F.3d 44 (1st Cir. 2000).

129. *Id.* at 46-47 (contending exclusion from plan amounted to breach of employment agreement).

130. See *id.* at 52 (suggesting contract claim "alternative mechanism for obtaining ERISA plan benefits").

131. *Id.* at 53-54.

132. See *supra* note 95 and accompanying text (distinguishing retaliatory discharge remedy at law from equitable remedies available under ERISA).

133. 49 F.3d 790 (1st Cir. 1995).

134. *Id.* at 794.

135. *Id.* at 792.

136. *Carlo*, 49 F.2d at 792.

137. *Id.*

138. *Id.*

The First Circuit ruled that ERISA preempted the plaintiffs' claims because the court would need to rely on ERISA in fashioning an award should the plaintiff prevail.<sup>139</sup>

If the Carlos were successful in their suit, the damages would consist in part of the extra pension benefits which Reed allegedly promised him. To compute these damages would require the court to refer to the ERP [early retirement plan] as well as the misrepresentations allegedly made by Reed . . . To disregard this as a measurement of their damages would force a court to speculate on the amount of damages.<sup>140</sup>

Unlike *Carlo*, however, should a whistleblower plaintiff prevail on her state law claim for retaliatory discharge, courts are not required to calculate plan benefits in awarding damages. Rather, the remedies that a whistleblower seeks are lost wages and, where the circumstances require, punitive damages. These calculations are wholly independent of ERISA.<sup>141</sup>

A whistleblower's claim for retaliatory discharge is similar to the state law claim for misrepresentation in *Pace v. Signal Technology*,<sup>142</sup> which the SJC ruled ERISA does not preempt.<sup>143</sup> There, the plaintiff was discharged and was told by his employer that "if he accepted a six-month severance package as salary payable over six months, rather than in a lump sum as he demanded, he would continue to be covered by all insurance . . . for those six months."<sup>144</sup> Five months later, the plaintiff was diagnosed with multiple sclerosis and filed for disability benefits. The employer's insurer denied his claim stating that the plan "only covered employees who were actively employed."<sup>145</sup> The plaintiff sued his employer under a state law claim for misrepresentation.<sup>146</sup>

In ruling against ERISA preemption, the SJC began by stating that "[i]n spite of its undeniable breadth, ERISA's preemption provision does not apply to every State action that affects an employee benefit plan."<sup>147</sup> The SJC concluded that "[b]ecause Pace is not seeking benefits under a plan, and because, if he ultimately prevails, any award against . . . [his employer] would not directly affect the administration of benefits under the plan, his claims do not relate to ERISA and are not preempted."<sup>148</sup> The same reasoning applies to

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139. *Id.* at 794.

140. *Id.*

141. See *supra* note 95 and accompanying text (explaining retaliatory discharge claimants seek money damages).

142. 628 N.E.2d 20 (Mass. 1994).

143. *Id.* at 23.

144. *Id.* at 21.

145. *Id.*

146. *Pace*, 628 N.E.2d at 21.

147. *Id.* at 22.

148. *Id.* at 23 (internal citations omitted) (explaining why misrepresentation claim not preempted).

retaliatory discharge claims; any award against an employer in this context would not conflict with the administration of an ERISA plan.

Finally, a whistleblower's claim for retaliatory discharge is also similar to the state law breach of contract claim in *Morningstar v. Meijer, Inc.*,<sup>149</sup> which the District Court of Michigan did not preempt.<sup>150</sup> There, the court emphasized that the "[p]laintiff seeks to recover the value of the employment she lost," and *not* employee benefits.<sup>151</sup> While the court acknowledged that a valuation of the plaintiff's lost employment may include a valuation of lost benefits, it was quick to assert the apparent inequity in allowing ERISA preemption based on such a tenuous link.<sup>152</sup> The court explained:

It is difficult to conceive of where such preemption would stop. Any contract or tort action brought against an employer, or even against a third party, in which the plaintiff either lost a job or became unable to work, would be preempted because the jury would have to value the lost employment. It is even more difficult to conceive that Congress intended to emasculate state labor law by taking from it the authority to decide all questions of employment-at-will, civil rights in employment and torts in employment.<sup>153</sup>

As stated above, a whistleblower's state law claim hinges on her status as a former employee, and not as a plan participant or beneficiary.<sup>154</sup> Moreover, because a whistleblower's claim for damages would entail compensatory damages in the form of lost wages, and quite possibly punitive damages, ERISA preemption is wholly inappropriate. As *Pace* and *Morningstar* make clear, a court would not be required to interpret ERISA to compute a whistleblower's damages for retaliatory discharge because ERISA does not address damages to former employee-whistleblowers. This makes preemption unwarranted.

#### IV. CIRCUIT SPLITS AND THE INCREASING NEED FOR SUPREME COURT REVIEW

The circuit splits on the question of whether ERISA should preempt a former employee's state law claim for retaliatory discharge make this issue ripe for Supreme Court review. At this juncture, the Ninth Circuit, Sixth Circuit, and Fifth Circuit have ruled in favor of preemption, while the Fourth Circuit more recently has not.<sup>155</sup> Specifically, in rejecting preemption, the Fourth

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149. 662 F. Supp. 555 (D. Mich. 1987).

150. *Id.* at 557.

151. *Id.* (noting plaintiff "does not seek to force Meijer to buy her medical insurance, give her a pension and pay her benefits when she is entitled").

152. *Id.* at 557 (dismissing defendant's valuation basis for preemption).

153. *Morningstar*, 662 F. Supp. at 557.

154. *See supra* Part III.B.2.

155. *See Anderson v. Elec. Data Sys.*, 11 F.3d 1311, 1314 (5th Cir. 1994) (concluding state wrongful

Circuit in *King v. Marriott International*<sup>156</sup> held:

Two other Circuits have ruled otherwise, but we find their reasoning to be unpersuasive. In *Anderson v. Electronic Data Systems*, in reaching its contrary decision, the Fifth Circuit merely recited section 510 without even addressing the facial inapplicability of section 510 to intra-office complaints. In *Hashimoto v. Bank of Hawaii*, the Ninth Circuit at least recognized the evident inapplicability of the statute's language to intra-office complaints, but concluded that ERISA provides a remedy since the statute [was] clearly meant to protect whistleblowers and could be fairly construed to protect a person in [plaintiff's] position if, in fact, she was fired because she was protesting a violation of law in connection with an ERISA plan. We simply do not agree that the language of section 510 can be "fairly construed" to extend to such a circumstance.<sup>157</sup>

While the issue of whether ERISA should preempt state law claims for retaliatory discharge is a source of debate between employers and employees, the existence of a split between the circuits is no longer debatable. Rather, a bona fide circuit split is before us and the time for Supreme Court review has come.

#### V. EMERGING TRENDS, THE FIRST CIRCUIT AND STATE ATTORNEY GENERAL INTERVENTION

Rulings by the District Court of Minnesota of the Eighth Circuit, and the District Court of Tennessee of the Sixth Circuit, are in conflict with the Fourth Circuit's *King* decision.<sup>158</sup> In what may indicate that the tide in favor of ERISA preemption is turning, the District Court of Maine of the First Circuit recently considered whether ERISA should preempt state law claims for retaliatory discharge.<sup>159</sup> In *Donatelli v. UnumProvident*, a magistrate recommended a decision against ERISA preemption.<sup>160</sup> The plaintiff sued UnumProvident for constructive discharge after being told that his upcoming

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discharge based on refusal to violate ERISA preempted); *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 412 (9th Cir. 1993) (preempting Hawaii Whistle Blower's Act with specific ERISA provision protecting whistleblowers); *Authier v. Ginsberg*, 757 F.2d 796, 800 (6th Cir. 1985) (holding state action preempted because fiduciary duties at issue arose from and relate to ERISA); see also *King v. Marriot Int'l, Inc.*, 337 F.3d 421, 428 (4th Cir. 2003) (refusing to find state wrongful discharge claim completely preempted).

156. 337 F.3d 421 (4th Cir. 2003).

157. *Id.* at 428 (internal quotations omitted).

158. Compare *McLean v. Carlson Cos.*, 777 F. Supp. 1480, 1483 (D. Minn. 1991) (holding ERISA preempts claim for wrongful discharge), and *McSharry v. UnumProvident Corp.*, 237 F. Supp. 2d 875, 879 (E.D. Tenn. 2002) (concluding state whistleblower claim and state wrongful discharge claim completely preempted), with *King*, 337 F.3d at 428 (refusing to extend ERISA preemption to wrongful discharge claim).

159. See generally *Donatelli v. UnumProvident Corp.*, No. 04-1-P-S, 2004 WL 3330000 (D. Me. Dec. 22, 2004).

160. *Id.* at \*6.

performance review would be unfavorable due to his refusal to close claims prematurely and manipulate medical reviews.<sup>161</sup> In particular, the magistrate reasoned that preemption should not apply to the plaintiff's whistleblower claims because of the tenuous link to ERISA.<sup>162</sup> The judge explained:

There is no particular ERISA plan in "existence" that Donatelli's claim relates to and the claim does not seek to impose liability for breaching the specific provisions of any plan or obligation otherwise imposed by ERISA. . . . Moreover, ERISA has nothing to do with the regulation of large insurance companies' internal employment practices, as opposed to its fiduciary obligations to plans and their participants.<sup>163</sup>

The magistrate further addressed the current splits among the Circuit courts, and specifically espoused the Fourth Circuit's interpretation of ERISA's preemption clause.<sup>164</sup>

As the *King* court observed, unless a whistleblower plaintiff's complaint alleges that he or she testified, was about to testify, or gave information in connection with inquiries or proceedings, which are most logically limited to legal or administrative proceedings, or at least to something more formal than written or oral complaints made to a supervisor, section 1140 has no applicability. I find the *King* court's construction of Section 1140 much more compelling than that espoused in the Fifth and Ninth Circuits.<sup>165</sup>

The *Donatelli* magistrate properly recognized that state retaliatory discharge claims against employers would not disrupt ERISA's uniformity because whether Donatelli prevails, for instance, under a claim for retaliatory discharge would not change the employer's obligations imposed by ERISA.<sup>166</sup> Moreover, Chief Justice Singal of the District of Maine adopted the magistrate's reasoning and conclusion without qualification.<sup>167</sup> Although Chief Justice Singal's ruling

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161. *Id.* at \*1, \*5. Apparently, UnumProvident found no need to change its alleged practices after its "victory" in *McSharry v. UnumProvident*. *McSharry*, 237 F. Supp. 2d at 879 (holding Tennessee whistleblower claim and Tennessee wrongful discharge claim completely preempted).

162. *Donatelli*, No. 04-1-P-S, 2004 WL 3330000 at \*6.

163. *Id.*

164. *Id.* at \*7.

165. *Id.* (internal quotations omitted).

166. *Id.*

167. *Donatelli v. Unumprovident Corp.*, No. 04-01-P-S, 2005 WL 767427, \*1 (D. Me. Feb. 17, 2005). Specifically, Judge Singal concluded:

I have reviewed and considered the Magistrate Judge's Recommended Decision, together with the entire record; I have made a *de novo* determination of all matters adjudicated by the Magistrate Judge's Recommended Decision; and I concur with the recommendations of the United States Magistrate Judge for the reasons set forth in her Recommended Decision, and determine that no

is promising, the First Circuit will not have the opportunity to review *Donatelli* as the parties have since reached a settlement.<sup>168</sup>

Also promising is the District Court of Massachusetts' ruling in *Miara v. First Allmerica Financial Life Insurance Company*,<sup>169</sup> a decision that refuses to accept what has become knee-jerk reaction in favor of ERISA preemption.<sup>170</sup> In what represents the most thorough analysis of ERISA preemption across the district and circuit courts to date, the District Court of Massachusetts reasoned against preemption and certified its analysis to the First Circuit.<sup>171</sup> In carefully considering the issue of preemption, Chief Judge Young disfavored preemption as to seven state law claims: (1) promissory estoppel, (2) negligent misrepresentation, (3) malpractice, (4) breach of contract, (5) breach of guaranty, (6) breach of the covenant of good faith and fair dealing, and (7) violation of Massachusetts General Laws Chapter 93a.<sup>172</sup> Although none of these claims involves retaliatory discharge, the reasons against preemption are identical: claims under Chapter 93a or 151b neither challenge the terms of an ERISA plan nor target an employer as a plan administrator for failing to pay promised benefits.<sup>173</sup> As such, "none of the underlying purposes of ERISA preemption is served by application of the [preemption] doctrine."<sup>174</sup>

Inevitably, when this issue comes up for appellate review, plaintiffs' attorneys seeking to preserve state law claims for retaliatory discharge should enlist the support of their state's Attorney General when arguing the issue before courts.<sup>175</sup> Indeed, intervention by the Attorney General in such circumstances is specifically called for under the Massachusetts Rules of Civil Procedure:

When the constitutionality of an act of the legislature . . . is drawn in question in any action to which the Commonwealth or an officer, agency, or employee thereof is *not* a party, the party asserting the unconstitutionality of the act . . . shall notify the attorney general within sufficient time to afford him an opportunity to intervene.<sup>176</sup>

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further proceeding is necessary.

*Id.*

168. Telephone Conversation with Sumner Lipman, Esq., Attorney for the plaintiff (Oct. 11, 2005).

169. 379 F. Supp. 2d 20 (D. Mass. 2005).

170. *Id.* at 60 (holding traditional state claims not type Congress intended to preempt with ERISA).

171. *Id.* at 68 (certifying to First Circuit for "clarification" and "binding direction" on issue).

172. *Id.* at 59–65.

173. *Miara*, 379 F. Supp. 2d at 65–66.

174. *Id.* at 66.

175. See *infra* note 176 and accompanying text (noting procedural rules allowing for Attorney General intervention).

176. MASS. R. CIV. P. 24(d) (emphasis added). Similarly, federal law also calls for state Attorney General intervention when the issue of preemption arises:

Undoubtedly, Attorney General intervention in opposing ERISA preemption is a resource that gives added credibility to preserving state-law whistleblower claims. Moreover, from whistleblower statutes to environmental regulations and consumer protection laws, state Attorneys General have remained committed to preserving states' rights.<sup>177</sup> The need to preserve states' rights has also become a concern among local politicians. In a letter to Congress, Governor Mitt Romney collaborated with other Northeastern governors in "opposing any watering-down of states' authority to" pass laws regarding matters of local concern.<sup>178</sup> For example, "Governor Arnold Schwarzenegger has also pleaded for the continued rights of states to set stricter air pollution controls."<sup>179</sup>

Given that concerns over federalism have become especially pronounced in the current political climate, the likelihood of Attorney General intervention in opposing ERISA preemption of state law claims for retaliatory discharge appears promising. As Massachusetts Attorney General Tom Reilly observed:

There's a vacuum going on in the country right now, and you're seeing the states step up and take enforcement action in areas where the federal government has been unwilling or unable to do so . . . What we're seeing now is the federal government trying to preempt that action on the part of the states. It's a dangerous action. If states are not allowed to step in, the people may have no recourse.<sup>180</sup>

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In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

28 U.S.C. § 2403(b) (2000).

177. Susan Milligan, *GOP Gives More Power to Federal Government: States Blocked on Industry Rules*, BOSTON GLOBE, May 1, 2005, at A1 (noting attorneys general critical of federal power accumulation in traditionally state controlled areas). Despite his opposition to gay marriage, Senator John E. Sununu, a New Hampshire Republican, voted against the recent constitutional amendment to ban gay marriage based on the need to protect the ability of states to regulate matters of local concern without federal intervention. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* Attorney General Reilly is currently suing Simon Property Group, Inc., a mall developer, in federal district court. *Id.* At issue is whether the defendant mall developer violated a state law that requires companies to honor gift cards for at least seven years. *Id.* In contrast, the gift cards issued by Simon Property expire after one year and incur surcharges after six months. *Id.* Raising preemption, the mall developer has argued that state laws do not apply since the gift cards are issued by a federally-chartered bank. *Id.* The case is pending. *Id.*

## VI. CONCLUSION

Congress's intent in fashioning ERISA with broad federal preemption powers "was motivated by its desire to encourage employers to maintain plans in favor of employees, by eliminating the risk of inconsistent and confusing layers of regulation."<sup>181</sup> Precluding preemption of a whistleblower's state law claim for retaliatory discharge, however, would not add an inconsistent level of regulation.<sup>182</sup> Indeed, while precluding preemption would not contravene legislative intent, ruling in favor of preemption in such cases would. Allowing employers to hide behind the veil of a federal law that has morphed into an impenetrable barrier of immunity undermines ERISA's purpose. Moreover, leaving wrongfully discharged employees with no recourse or protection threatens the posterity of pension funds, thus undermining ERISA's purpose in securing the financial well-being of retired employees.

The SJC made clear its desire to adhere to ERISA's purpose of benefiting employees when it concluded in *Pace* that ERISA does not preempt an employee's state law claim for misrepresentation. Specifically, the SJC reasoned, "[t]hat a statute [ERISA] whose clear purpose was to benefit employees has become widely used as a shield to protect employers from any deceptive and wrongful acts they may have committed against their employees is an irony we find unacceptable as a governing principle of law."<sup>183</sup>

Time will tell whether the SJC adopts its own reasoning with regard to state law claims for retaliatory discharge. Reality for the whistleblower is harsh. But Congress never intended it to be.

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181. *Pace v. Signal Tech. Corp.*, 628 N.E.2d 20, 23 (Mass. 1994).

182. *See id.* (reasoning no ERISA conflict where claim not seeking plan benefits or directly affecting plan administration); *see also* 29 U.S.C. § 1132(a)(1)(B) (2000) (limiting ERISA claims regarding plan benefits and rights under plan terms); *Jorgensen v. Prudential Ins. Co. of Am.*, 852 F. Supp. 255, 267 (D. N.J. 1994) (holding whistleblower claims in no way impair consistent functioning of ERISA plans).

183. *Pace*, 628 N.E.2d at 24.