No. 09-834

In the
Supreme Court of the United States

Kevin Kasten,

Petitioner,

v.

Saint-Gobain Performance Plastics Corporation,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S BRIEF

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QUESTION PRESENTED FOR REVIEW

Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the anti-retaliation provision, 29 U.S.C. § 215(a)(3)?

PARTIES TO THE PROCEEDINGS

All parties to this Action are set forth in the Caption.

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The June 18, 2008, decision of the district court, which is reported at 619 F. Supp. 2d 608 (W.D. Wis. 2008), is set forth at pages 62–72 of the Petition Appendix. The panel decision of the Court of Appeals for the Seventh Circuit, which is reported at 570 F.3d 834 (7th Cir. 2009), is set forth at pages 32–43 of the Petition Appendix. The decision of the court of appeals denying rehearing and rehearing en banc, with three judges dissenting, is reported at 585 F.3d 310 (7th Cir. 2009), and is set forth at pages 1–14 of the Petition Appendix (hereinafter "P. App.").

STATEMENT OF JURISDICTION

The court of appeals issued its decision on June 29, 2009. The court of appeals denied a timely petition for rehearing and rehearing en banc on October 15, 2009. The petition for writ of certiorari was filed on January 12, 2010. This Court granted certiorari on March 22, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. § 215(a) provides in pertinent part:

> (a) . . . [I]t shall be unlawful for any person— . . .
>
> (3) to discharge or in any other manner

> discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

STATEMENT OF THE CASE

On June 29, 2009, the Seventh Circuit Court of Appeals affirmed the dismissal of Petitioner's retaliation claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3), holding that his "unwritten, purely verbal complaints are not protected activity" because "the FLSA's use of the phrase 'file any complaint' requires a plaintiff employee to submit some sort of writing." (P. App. 43.) In light of the discrepancy between the Seventh Circuit's holding and other Circuits, the Department of Labor and Equal Employment Opportunity Commission's ("EEOC's") warnings that the decision will have a negative impact on enforcement of the FLSA, Equal Pay Act (EPA), and other federal laws, and the Seventh Circuit dissenting opinion recognizing that the decision is "contrary to the understanding of Congress," Plaintiff Kevin Kasten seeks review of this decision. (P. App. 2.)

I. Factual Background.

A. Kasten's Employment at Saint-Gobain Performance Plastics Corporation.

Plaintiff Kevin Kasten worked from October 2003 to December 11, 2006, for Defendant Saint-Gobain Performance Plastics Corporation at its Portage, Wisconsin, manufacturing plant. (P. App. 81.) Because of the nature of the materials used and the production processes at the plant, Defendant requires workers to wear company-supplied personal protective equipment ("PPE") while on the job. (*Id.* at 84–85.) That PPE gave rise to a dispute under the FLSA. (*Id.* at 85.)

B. The Donning and Doffing Dispute.

Manufacturing and production workers at the Portage plant are paid on an hourly basis. (*Id.* at 81.) To keep track of their time, Defendant requires these workers to punch in at the beginning of each shift and punch out at the end of each shift on a time clock. (*Id.* at 84–85.) They also punch out before and punch in after their unpaid meal breaks. (*Id.*)

During Kasten's tenure, Defendant stationed its time clocks beyond the designated donning and doffing area of the plant, so that workers could only punch in after they donned all of their PPE and could only punch out before

they doffed all of their PPE. (*Id.*) Thus, the effect of the time clock locations was that workers were not paid for their donning and doffing activities completed at the start or end of each shift or over their meal breaks. (*Id.*) Since donning and doffing took between four and thirty minutes to complete per shift, Defendant routinely denied each individual worker between twenty minutes and 2.5 hours of pay per week, typically at overtime rates of pay. (*Id.* at 85.)

C. Kasten's Reporting Responsibilities.

Defendant maintains and enforces a Code of Ethics and Business Conduct, which declares, "[E]very employee has the responsibility to report known or suspected violations of the Code or any applicable law of which he or she becomes aware." (Dkt. # 91, Ex. 11.)

Defendant's Problem Resolution Procedure, located in its Employee Policy Handbook, sets forth the process for employees to report violations:

> At SGPPL, we . . . understand that you may have questions, complaints, and problems that need resolution. . . .
>
> When situations mentioned above occur, we suggest:

> - Contact your supervisor immediately
>
> -If you feel the situation is not resolved satisfactorily by your supervisor, you may take the issue to the next level of management
>
> - If this does not resolve the situation to your satisfaction, contact your local Human Resources Manager
>
> -If you still do not feel that your situation has been adequately resolved, contact your Regional Human Resources Manager or Headquarters Human Resources.

(*Id.*, Ex. 12 at 3.)

Defendant further explains that such complaints may be verbal:

> Company employees have the freedom to *speak* for themselves and *discuss* with all levels of management their concerns, suggestions, and problems. We . . . will continue to *listen* and respond to the concerns and needs of our employees. . . .
>
> SGPPL's long standing open-door policy is based on our . . . belief that every person should have an opportunity to *discuss* any matter with someone besides his or her immediate supervisor. This policy offers the opportunity for every individual to *discuss* ideas and problems

> with any member of management . . . .
>
> Your supervisor is there to help you in any way possible. Your supervisor is responsible for . . . the proper administration of SGPPL's Human Resources policies including . . . wage administration.

(Dkt. # 93, Ex. 25 at 3 (emphasis added).)

Defendant's Code of Ethics and Business Conduct Guidelines provide an alternative vehicle for employees to raise oral complaints regarding legal violations:

> Code of Ethics and Business Conduct Hotline
>
> 1.800.548.2088 – USA Only
> 1.508.795.2736 – Worldwide
>
> * * *
>
> The Company's Hotline was established over a decade ago as one method for employees to report known or suspected Code violations or illegal or unethical activities. The Hotline is designed to receive reports from employees who might otherwise feel uncomfortable reporting the information to a supervisor, general manager or corporate, group or division officer.
>
> Employees who make such reports in

> good faith regarding another employee's violation should not fear any retaliation.

(Dkt. # 91, Ex. 11.)

Defendant's own policies use the term "report" interchangeably with the phrase "file a complaint" to refer to these verbal methods of bringing a suspected violation of law to Defendant's attention. (Dkt. # 93, Ex. 25 at 30.)

D. Kasten's Oral Complaints of FLSA Violations and Subsequent Termination.

As a long-term employee, Kasten was well-aware of his internal reporting responsibilities and the corporate policies describing the methods of reporting legal violations. From September to December 2006, Kasten followed the Problem Resolution Procedure to fulfill his obligations under the Code of Ethics. (P. App. 24 n.4.) He repeatedly reported up the chain of command to multiple supervisors, asserting that the location of Defendant's time clocks—which caused workers to remain uncompensated for their donning and doffing time—was unlawful.[1] Specifically, Kasten alleges that: (1) he told his Shift

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[1] Kasten explained that his conclusion that the company's action was illegal was based on "hearing about Wal-Mart, Tyson chicken, similarities between lawsuits that were done." (Dkt. # 87, Ex. 5 at 119.)

Supervisor Dennis Woolverton that he believed the location of the time clocks was illegal, (Dkt. # 87, Ex. 5 at 124);[2] (2) he met with Human Resources Generalist Lani Wruck-Williams and informed her that he did not think it was legal for the time clocks to be where they were and "if they were challenged on it [in court], they would lose," (*id.* at 132–33);[3] (3) on several occasions, he informed his Lead Operator April Luther that the location of Defendant's time clocks was illegal, (*id.* at 127); (4) he also told Luther that he was considering "starting a lawsuit about the placement of the time clocks," (*id.* at 126); and (5) he told the Human Resources Manager Dennis Brown and the Operations Manager Steven Stanford that he believed the location of the time clocks was illegal and that if Defendant was challenged in court, it would "lose." (*Id.* at 130.)

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[2] Kasten explained: "I raised a concern stating how I thought it was illegal for the time clocks to be where they were. . . . It was zoned in on if it was legal or not. And he said there is a certain window of time that you have from the time you come in and start doing stuff to the time you punch in and how they were doing it wasn't illegal." (*Id.* at 124.)

[3] Wruck-Williams acknowledged that she "heard mentioning" that Kasten told someone at the company "that Saint-Gobain would lose if anyone took legal action with regard to the location of the time clocks or employees getting paid for donning and doffing time," although she denied that Kasten directly made that statement to her. (Dkt. # 87, Ex. 6 at 34.)

After Kasten issued complaints about FLSA violations to his supervisors, Defendant reprimanded him more often and more severely for infractions that were not previously problematic. (*Id.* at 163.) Before his first complaint about Defendant's FLSA violations, Kasten had no disciplinary action for almost seven months. (Dkt. # 93, Exs. 32, 33.) However, after Kasten began complaining, Defendant disciplined him six times within a span of only three months. (Dkt. # 92, Exs. 14, 15, 18, 20; Dkt. # 93, Exs. 32, 34.)

On December 6, 2006, Defendant's Operations Manager and Human Resources Manager summoned Kasten to a meeting to discuss possible disciplinary action. Shortly before the meeting, Shift Supervisor Dennis Woolverton counseled Kasten that if he would "just lay down and tell them what they want to hear, [they] can probably save [his] job." (Dkt. # 87, Ex. 5 at 111.) Kasten understood this to mean that he was at risk of being fired because he complained about Defendant's failure to pay workers for the time they spent donning and doffing PPE. (*Id.* at 147.) Kasten did not heed Woolverton's advice and instead complained yet again during the suspension meeting that the location of the clocks was "illegal and that if they were to be taken to court" they would "lose." (*Id.* at 130.)[4]

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[4] Stanford documented a portion of this conversation in

On December 8, 2006, while still on suspension, Kasten went to Defendant's Portage facility to retrieve his check, and spoke with Luther. (*Id.* at 134.) He informed her that he had "many things in the works." (*Id.*)[5] He also spoke with Wruck-Williams, and reminded her that Defendant had a "problem" with the location of the time clocks.[6] Kasten also contacted Shift Supervisor Mary Riley

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an e-mail to himself and Brown, which stated, "Kevin asked if the 'old locations' of the time clocks was a legal issue for the company. Dennis [Brown] did not answer his question but simply stated that the new location would be an improvement." (Dkt. # 92, Ex. 15.)

[5] Luther documented a portion of this conversation in an e-mail to Brown on December 8, 2006:

> Just wanted to drop a line to let you know that when Kevin Kasten came in this morning to pick up his check he made the comment to me that if he does get fired his name will be widely known as he has many things in the works. Take this for what ever [sic] it is worth but I thought you should know.

(Dkt. # 92, Ex. 16.)

[6] Wruck-Williams documented a portion of this exchange and sent it by e-mail to Brown, Plant Manager Dan Tolles, Stanford, and Human Resources Director Al Jones:

> Kevin went on to say well you know you have a problem. I said "what is my problem" he said your clocks are in the wrong spot.

(Dkt. # 92, Ex. 20.)

later that day, and asked whether she had seen any articles regarding wage and hour class action suits. (Dkt. # 87, Ex. 5 at 134.)[7] The Plant Manager, Human Resources Director, Human Resources Manager, and Human Resources Generalist were all informed of this inquiry and corresponded about Kasten's mention of a class action lawsuit just hours prior to his termination. (Dkt. # 92, Ex. 17.)

On December 11, 2006, Defendant finally placed new time clocks near the employee entrance to the plant so that workers would be paid for all of their donning and doffing time. (Dkt. # 91, Ex. 10.) That very same day, Defendant's upper-level management corresponded about Kasten's mention of a class action lawsuit and subsequently notified Kasten that his employment was terminated. (P. App. 34–35.) Although Defendant claimed that Kasten was terminated for time clock violations, other employees had the same number of time clock

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[7] Riley documented this conversation in an e-mail she sent to Brown, Wruck-Williams, and Stanford on December 9, 2006, which stated:

> Kevin Kasten called me here at work today about 3:45PM to ask me if I had read any articles here about a class action suit and punches. I told him I hadn't read anything here and said goodbye.

(Dkt. # 92, Ex. 17.)

violations or more and were not terminated. (Dkt. # 92, Exs. 21, 22.)

E. The Donning and Doffing Lawsuit.

Kasten thereafter filed an FLSA collective and Rule 23 class action lawsuit on behalf of himself and the other hourly-paid manufacturing and production workers at the Portage plant. The United States District Court for the Western District of Wisconsin granted collective and class certification, denied Defendant's motion for decertification, and granted the plaintiffs' motion for affirmative summary judgment on a number of grounds. (P. App. 112.) Significantly, the district court held that Defendant was liable as a matter of law for its violations of the FLSA, due to its failure to pay the manufacturing and production workers at the Portage plant for their donning and doffing time as a result of the time clock locations. (*Id.*)[8]

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[8] The Rule 23 class and FLSA collective action was subsequently settled on behalf of approximately 156 opt-in collective class members and 768 Rule 23 class members for $1,425,000. Joint Mot. for Prelim. Approval for Settlement, Kasten v. St. Gobain Performance Plastics Corp. (W.D. Wis. Oct. 17, 2008) (No. 07-cv-0449-bbc).

II. Proceedings Below.

A. Summary Judgment in the District Court.

On December 3, 2007, Plaintiff filed the instant case, alleging that Defendant retaliated against him in violation of the FLSA by terminating his employment because he filed oral complaints and indicated that he planned to take legal action for Defendant's violations of the FLSA. (*See id.* at 63.) Defendant moved for summary judgment, arguing that Kasten's repeated complaints were not protected conduct and that it was therefore legal for Defendant to terminate his employment for making those complaints. Defendant argued that section 215(a) does not protect any complaints made by workers to their employers and also contended that section 215(a) in any event applies only to written, but not oral, complaints regardless of the forum. The district court granted Defendant's motion on the basis of its determination that, as a matter of law, oral complaints cannot be "filed" as the statute requires because they are not "committed to document form," and thus can never constitute protected conduct within the anti-retaliation provision of the FLSA. (*Id.* at 70–72.)

B. Decision on Appeal.

On June 29, 2009, a three-judge panel at the Seventh Circuit Court of Appeals did

not give deference to Amicus Curiae Department of Labor's position and affirmed the judgment of the district court. (*Id.* at 39 n.2.) The panel held that informal intra-company complaints are protected but that unwritten oral complaints are not "filed" and therefore can never come within the protection of the FLSA anti-retaliation provision. (*Id.* at 38, 43.) The court acknowledged its disagreement with other circuits, which find that oral complaints to an employer are protected activity under the FLSA. (*Id.* at 41.) Nevertheless, the panel held: "One cannot 'file' an oral complaint; there is no document, such as a paper or record, to deliver to someone who can put it in its proper place." (*Id.* at 39.)

C. Denial of Rehearing with Three Dissenting Judges.

Kasten thereafter sought rehearing, and the Secretary of Labor and the EEOC joined Plaintiff's position as Amici Curiae. (*See id.* at 17.) On October 15, 2009, the Seventh Circuit denied the petition, but three Judges issued a lengthy dissenting opinion. (*Id.* at 1–2.) The dissent stated:

> In deeming the statutory language to reach only written and not oral complaints, the court has taken a position contrary to the longstanding view of the Department of Labor, departed from the holdings of other circuits, and interpreted the statutory

> language in a way that I believe is contrary to the understanding of Congress.

(*Id.* at 2.) The dissent recognized a long list of statutes that include similar language and have been held to encompass protection for oral complaints. (*Id.* at 2–3.) It contrasted these statutes with another lengthy list of statutes in which Congress "specifically require[s] written complaints." (*Id.* at 7.) Since the Seventh Circuit's decision has such a broad impact on a variety of anti-retaliation provisions, which "serve to protect not just the individual worker, but the means by which federal agencies become aware of unlawful labor practices," the dissent determined that further consideration was warranted. (*Id.* at 3.)

D. Issuance of a Writ of Certiorari.

On March 22, 2010, this Court granted the petition for a writ of certiorari. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 130 S. Ct. 1890 (2010).

SUMMARY OF ARGUMENT

In an effort to "eliminate[] child labor and long hours and starvation wages," which were running rampant during the Great Depression, president Roosevelt signed the FLSA into law on October 24, 1938. 5 Franklin D. Roosevelt, et al., *Public Papers*

and Addresses of Franklin D. Roosevelt 624–25 (Random House 1938) (1936); 6 Roosevelt, *supra* at 214–16. Congress assigned Fair Labor Standards Act ("FLSA") enforcement responsibilities to the Department of Labor, and "[f]or weighty practical and other reasons, Congress did not seek to secure compliance [with the FLSA] with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Because "effective enforcement could . . . only be expected if employees felt free to approach officials with their grievances," Congress included 29 U.S.C. § 215 in the Act, which prohibits retaliation against an employee who has "filed any complaint . . . under or related to" the FLSA. *Id.* In 1963, Congress passed the EPA, amending the FLSA to prohibit gender discrimination in the payment of wages. Employee complaints play a pivotal role under the Equal Pay Act ("EPA") as well, and retaliation for these complaints is also prohibited pursuant to 29 U.S.C. § 215.

More than seven decades later, the Seventh Circuit Court of Appeals issued the order in this case, stripping section 215(a)(3) of its effectiveness for a large proportion of the American workforce by limiting the application of the FLSA's anti-retaliation provision to only written complaints. The court held, contrary to

six other courts of appeals, that the word "filed" in section 215(a)(3)'s phrase "filed any complaint" mandates "some sort of writing," and does not protect oral complaints. (P. App. 43.) Unfortunately, if the Seventh Circuit's decision is allowed to stand, it will silence the voice of employees aggrieved by violations of the Act, undermine the broad remedial purposes of the FLSA, and severely truncate the Department of Labor's and Equal Employment Opportunity Commission's enforcement efforts.

The Seventh Circuit's holding rests on the erroneous presumption that the verb "filed" can only have one possible definition—one which requires a physical document to be delivered to "its proper place." (P. App. 39, 70.) However, the term "filed" has many possible meanings, one of which allows for the filing of an oral matter by submitting the matter to a decision-maker for consideration. Courts, administrative agencies, and legislatures across the country regularly use the term "file" to refer to the oral conveyance of some form of notice, including "filing" oral complaints, oral grievances, oral motions, or other matters. Both administrative agencies and corporations (including Defendant) frequently encourage employees and members of the public to file a complaint over the telephone by calling toll-free complaint hotlines. Private sector use of the term "filed" is likewise much broader than the Seventh Circuit decision acknowledges; it is regularly used in a manner synonymous with "submitted," as in the context of radio or

televised news reports. Thus, at least one possible definition of the term "filed" encompasses oral complaints.

Although the proper definition of the term "filed" may not be obvious when the word stands alone, the true meaning of the word "filed" as used in 29 U.S.C. § 215(a)(3) is apparent when it is considered in context. The textual context of section 215(a)(3) and the historical and substantive context of the FLSA as a whole make clear that the definition applicable to the term "filed" in section 215(a)(3) is the definition which contemplates the filing of oral complaints.

Congress enacted the FLSA with a broad remedial and humanitarian purpose in mind, choosing to rely on employee complaints for enforcement purposes. In so doing, Congress used the word "any" in the text of section 215(a)(3) six times to emphasize the intent to provide broad protection for individuals who were willing to come forward to report violations of the FLSA. Specifically, Congress stated that "any complaint" was protected in 29 U.S.C. § 215(a)(3), which would seem to encompass oral complaints on its face.

Additionally, Congress was aware that at the time the FLSA was enacted, the vast majority of workers were Depression-era blue collar physical laborers who were extremely unlikely to write down their complaints to hand to their supervisors or the Department of Labor,

but were far more likely to verbally convey violations. It is also highly unlikely that Congress intended to exclude from section 215(a)(3)'s protection illiterate, blind, or non-English-speaking workers who would be unable to file a written complaint. Since these are populations the FLSA was designed to protect, eliminating anti-retaliation coverage for individuals who issue oral complaints in these population groups makes enforcement efforts nearly impossible.

If employees are aware that they run the risk of termination by attempting to problem-solve with their employers informally, rather than becoming their employers' formal antagonist by filing a written complaint of FLSA violations, they will be far less likely to report violations at all faced with fear of losing their whole income in an effort to recover the portion unlawfully withheld. Employees' contacts with the Department of Labor and EEOC will also be unprotected, if they follow instructions on the federally-mandated posters on the wall in break rooms and offices across the country, which instruct workers to call a toll-free hotline to report violations. Thus, the Seventh Circuit's rendition of the word "filed" runs counter to the broad remedial purposes of the FLSA, enfeebles enforcement efforts, and discourages productive internal problem-solving between employers and employees in favor of creating an unnecessary bureaucratic enforcement nightmare.

Even if the textual, historical, and practical context of 29 U.S.C. § 215(a)(3) do not make clear that the term "filed" encompasses oral complaints, the EEOC's interpretations should be afforded deference. There is an established difference of opinion between the Seventh Circuit and the six other circuits that have evaluated whether oral complaints are protected. Either the Seventh Circuit completely missed the mark, and "filed" clearly and unambiguously encompasses oral filings, or there is some level of ambiguity. In the event that the term is ambiguous, the Department of Labor and EEOC are permitted to interpret the term consistent with the intent of Congress. These agencies are in accord that oral complaints are protected activity under 29 U.S.C. § 215(a)(3). Thus, the summary judgment decision should be reversed, and this case should be remanded for trial.

ARGUMENT

I. THE TERM "FILED" HAS MULTIPLE MEANINGS, AND MAY INCLUDE ORAL FILINGS.

The Seventh Circuit's decision rests on a single mistaken premise: that "[o]ne cannot 'file' an oral complaint; there is no document, such as a paper or record, to deliver to someone who can put it in its proper place." (P. App. 39, 70.) As a result of this interpretation, the court determined that the verb "filed" used in the phrase "filed any complaint" unambiguously

requires a writing, and therefore "any complaint" can *never* encompass oral complaints under 29 U.S.C. § 215(a)(3).[9] (P. App. 43.) The court based its narrow interpretation of section 215(a)(3) on one definition of the word "file" found in a single dictionary, and denied deference to the Secretary of Labor's longstanding interpretation on the grounds that the Secretary's chosen definition "to submit" "seems to us overbroad." (*Id.* at 39.)

In fact, the usage which the court below thought to be nonsense is quite common. "Filed" is a word with many meanings—not a term that "has some intrinsically plain meaning." *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 344 n.4 (1997); *see also Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 19 (1st Cir. 1998) (noting that the phrase "filed a complaint or begun a proceeding" in 49 U.S.C. §

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[9] There are a number of other major federal employment statutes that incorporate anti-retaliation provisions that include similar language to prohibit retaliation against a worker who "filed any complaint." *See, e.g.*, Federal Sector Labor Management Relations Program, 5 U.S.C. § 7116(a)(4); Foreign Service Labor-Management Relations, 22 U.S.C. § 4115(a)(4); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855(a); Employee Polygraph Protection Act, 29 U.S.C. § 2002(4)(A); Workforce Investment Act, 29 U.S.C. § 2934(f); Railway Labor Act, 49 U.S.C. § 20109(a)(3); Surface Transportation Assistance Act, 49 U.S.C. § 31105(a)(1)(A)(i). According to the decisions below, oral complaints under these statutes would also be no longer considered protected conduct.

31105(a)(1)(A) "is susceptible to more than one reading"). For example, "filed" can refer to the submission of something to a person or body with authority to consider and perhaps act on that submission, such as the filing of an application.[10] Alternatively, it may denote, for example, the act of a journalist in providing a story to a news organization.[11] As the Department of Labor pointed out, "file" may also mean "submit." (*See* P. App. 39.) None of these practical uses are limited to documents.

When this issue first arose half a century ago, a federal court agreed with the position of the Secretary of Labor that "filed any complaint" could include an oral complaint. *Goldberg v. Zenger*, 43 Lab. Cas. (CCH) ¶ 31,155, ¶ 40,986 (D. Utah 1961). The court explained, "in the colloquial, 'file' often is used

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[10] (P. App. 58–59 (*citing New Shorter Oxford English Dictionary* 947 (1993) (defining "file" as "[to] submit (an application for a patent, a petition for divorce, etc.) to the appropriate authority"); *Random House College Dictionary* 493 (1982) (defining "file" as "[t]o submit (an application, petition, etc."); *American Heritage Desk Dictionary* 369 (1981) (defining "file" as "to present for consideration")).)

[11] (P. App. 114); *see also American Heritage Dictionary* 658 (4th ed. 2000) (defining "files" as "3. To send or submit (copy) to a newspaper. 4. To carry out the first stage of . . ."); *American Heritage Dictionary of the English Language* 490 (1969) ("To send or submit (copy) to a newspaper or the like: especially to transmit by wireless").

interchangeably with 'lodge' and sometimes with 'communicate.'" *Id.* Since that time, courts, legislatures, and administrative agencies across the country have continued to adopt this rendition of the word.

The federal courts commonly refer to the "filing" of an oral complaint,[12] an oral motion,[13]

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[12] *Ward v. Housatonic Area Reg'l Transit Dist.*, 154 F. Supp. 2d 339, 351 (D. Conn. 2001) ("any written or oral complaints . . . were protected"); *Rallis v. Holiday Inns, Inc.*, 622 F. Supp. 63, 65 (N.D. Ill. 1985) ("Plaintiffs . . . had filed more than 20 oral and written complaints"); *Adams v. Indiana*, No. IP 82-55-C, 1983 WL 1992, at *1 (S.D. Ind. Apr. 4, 1983) ("[T]he plaintiff orally filed a supplemental complaint to which the defendant filed its oral answer."); *Marshall v. Wallace*, No. 77-693, 1978 WL 18639, at *3 (M.D. Pa. Dec. 22, 1978) ("[Workers] were discharged because they had orally filed a complaint with their employer."); *see also* (P. App. 58 (*quoting Marshall v. Power City Elec., Inc.*, No. 77-197, 1979 WL 23049, at *1–2 (E.D. Wash. Oct. 23, 1979) ("The Court further holds that the term 'filed' as used in this clause means 'lodged' and is not limited to a written form of complaint.").)

[13] *United States v. Bent*, 702 F.2d 210, 212 (11th Cir. 1983) ("appellant orally filed a motion"); *United States v. Biggs*, 419 F. Supp. 2d 1277, 1279 (D. Mont. 2006) ("the motions . . . were filed orally"); *Nat'l Football League v. Cousin Hugo's, Inc.*, 600 F. Supp. 84, 87 (E.D. Mo. 1984) ("motions to dismiss filed orally"); *United States v. McKinlay*, 543 F. Supp. 462, 463 (D. Or. 1980) ("Defendant orally filed a Rule 12.2 insanity notice and a motion for continuance . . . ."); *Tiscornia v. Sysco Corp.*, No. CIV. A. 95-3178, 1997 WL 364279, at *1 n.1 (E.D. Pa. June 23, 1997) ("plaintiff orally filed his motion"); *In re Mercado-Jimenez*, 193 B.R. 112, 114 (D.P.R. 1996) ("Debtor orally filed a motion").

and an oral grievance.[14] Judge Flaum himself, the author of the Seventh Circuit panel opinion in the instant case, referred in an earlier opinion to the filing of oral grievances. *NLRB v. Sw. Elec. Co-op., Inc.*, 794 F. 2d 276, 279 (7th Cir. 1986) (sustaining NLRB's finding that collective bargaining agreement included "the right to file oral grievances"). Only three months before the decision below, another panel of the Seventh Circuit itself observed in another case that "[the plaintiff] filed an oral report with [her supervisor], who was authorized to handle such complaints." *Harp v. Charter Commc'ns, Inc.*, 558 F. 3d 722, 725 (7th Cir. 2009). Retaliation claims based on oral complaints also arise and have been sustained by several circuits under the anti-retaliation provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105(a)(1)(A)(1), which (like section 215(a)) protects individuals who "filed a complaint." *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 228 (6th

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[14] *Buckner Corp. v. NLRB*, 401 F.2d 910, 914 (9th Cir. 1968) ("[worker] filed no oral grievances after March 3, 1965."); *Sokos v. Hilton Hotels Corp.*, 283 F. Supp. 2d 42, 53 n.6 (D.D.C. 2003) ("plaintiff . . . filed an oral grievance"); *Rodriguez v. Wolgast*, No. 85-4032-C, 1989 WL 60299, at *4 (D. Kan. May 8, 1989) ("plaintiff filed an oral grievance"); *Daiichiya-Love's Bakery v. ILWU, Local 142*, No. 84-1323, 1985 WL 5864, at *2 (D. Haw. May 3, 1985) ("The union representative then orally filed a grievance"); *Gettleman v. Werner*, 361 F. Supp. 278, 280 (W.D. Pa. 1973) ("plaintiff . . . filed an oral grievance").

Cir. 1987).

In the administrative realm, federal agencies regularly use the term "file" to refer to the oral conveyance of some form of notice. Several federal regulations provide that a person may "file" oral communications.[15] A number of federal administrative decisions also refer to the "filing" of an oral complaint,[16] an oral grievance,[17] an oral motion,[18] or other

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[15] *See, e.g.*, 14 C.F.R. § 1.1 ("flight plan . . . is filed orally or in writing with air traffic control"); 29 C.F.R. § 1626.7(b)(3) ("Oral charges filed in person or by telephone [shall be deemed filed on the d]ate of oral communication received by Commission."); 42 C.F.R. § 438.402(b)(3) (explaining that certain entities must have procedures that permit enrollee to "file a grievance orally or in writing" and to "file an appeal either orally or in writing").

[16] *Mic Bruce, Inc. v. Chiquita Brands, Inc.*, 45 Agric. Dec. 1215, 1242 (1986) ("complainant did not file an oral complaint . . . until May 11, 1983"); *Rollins v. Am. Airlines, Inc.*, Arb. No. 04-140, 2007 WL 1031362, at *3 n.11 (Apr. 3, 2007) (DOL Admin. Rev. Bd., Arb.) (claimant "filed a timely oral complaint"); *Dotson v. Anderson Heating & Cooling, Inc.*, No. 95-CAA-11, 1995 WL 870105, at *4 (DOL O.A.L.J. Oct. 2, 1995) (Di Nardi, Arb.) ("Complainant testified that he filed an oral complaint"); *Motor Convoy, Inc.*, 252 N.L.R.B. 1253, 1257 (1980) (employee "filed . . . many oral complaints"), *enforcement den. by* 673 F.2d 734 (4th Cir. 1982).

[17] *Dinndorf v. Potter*, No. 01A20506, 2003 WL 21686770, at *3 (E.E.O.C. Dec. July 10, 2003) ("oral grievances filed"); *U.S. Patent & Trademark Office*, 45 F.L.R.A. 1090, 1096 (1992) ("oral grievance filed [by complainant]"); *Fairchild Air Force Base*, 96 F.S.I.P. 44 (1996) (union proposal to "permit employees to file oral grievances"); *E.*

matters.[19] A number of federal agencies even invite members of the public to file a complaint over the telephone.[20]

Ky. Paving Corp., 293 N.L.R.B. 1132, 1133 (1989) (worker "filed an oral grievance"); *Sw. Elec. Co-op., Inc.*, 274 N.L.R.B. 922, 925 (1985) ("[union steward] filed an oral grievance").

[18] *Don Bassette Aviation, Inc.*, No. CP05GL0002, 2006 WL 728858 (D.O.T. Mar. 17, 2006) ("Respondent filed oral Motions to dismiss"); *Sec'y of Labor v. Indep. Cement Corp.*, 2 F.M.S.H.R.C. 2329 (1980) ("an oral motion to dismiss filed at hearing"); *Danuta Wincentyna Urban*, No. A077 646 888, 2009 WL 3250467, at *1 (B.I.A. Sept. 22, 2009) ("respondent filed an oral motion"); *Bethlehem Temple Learning Ctr., Inc.*, No. 9-CA-35206, 1998 WL 1985138 (N.L.R.B. Div. of Judges Aug. 26, 1998) ("Respondent's oral motion"); *Sec'y of Labor v. Haysite*, 1982 O.S.H.D. (CCH) P 25917 (Occ. Safety & Health Rev. Comm'n 1982) ("Respondent . . . filed its oral motion"); *Sec'y of Labor v. Ormet Corp.*, No. 76-4397, 1978 WL 6690 (O.S.H.D. May 18, 1978) (two motions "were filed orally at the commencement of the trial").

[19] *Seetharaman v. Stone & Webster, Inc.*, Arb. No. 06-024, 2007 WL 2573640, at *3 (Aug. 31, 2007) (D.O.L. Adm. Rev. Bd., Arb.) ("complainant filed charge orally"); *Guy v. Am. Airways, Inc.*, 4 N.T.S.B. 886, 887 n.3 (1983) ("notice of appeal was filed orally"); I.R.S., P.L.R. 8630019 (Apr. 23, 1986) ("the nurses regularly file oral . . . reports").

[20] *See, e.g.*, F.B.I., Fraud Target: Senior Citizens, http://www.fbi.gov/majcases/fraud/seniorsfam.htm (last visited June 10, 2010) ("file a complaint . . . by calling HUD's Hotline"); Fed. Motor Carrier Safety Admin., Protect Your Move—Frequently Asked Questions (FAQ), http://www.protectyourmove.gov/consumer/awareness/fa

Likewise, at the state level, there is a litany of statutes,[21] regulations,[22] and judicial

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q/faq.htm (last visited June 10, 2010) ("File a complaint . . . by dialing the TOLL FREE number"); U.S. Dep't of Hous. & Human Dev., Housing Discrimination, http://portal.hud.gov/portal/page/portal/HUD/topics/housing_discrimination (last visited June 11, 2010) ("There are several ways to file a [housing discrimination] complaint: . . . . You can call toll-free . . . ."); U.S. Dep't of Justice, Addressing Police Misconduct, http://www.justice.gov/crt/split/documents/polmis.php (last visited June 11, 2010) ("If you would like to file a complaint . . . call the Disability Rights Section's toll-free ADA Information Line . . . ."); U.S. Dep't of Treasury, OIG Hotline, http://www.ustreas.gov/inspector-general/hotline.shtml (last visited June 11, 2010) ("How to File Your Complaint . . . Telephone 1-800-359-3898."); U.S. Envtl. Prot. Agency, How to File a Complaint or Allegation, http://www.epa.gov/oig/hotline/how2file.htm (last visited June 11, 2010) ("How to File a Complaint . . . Toll-Free: 1-888-546-8740"); Fed. Reserve Sys., "Federal Reserve Consumer Help," *available at* http://www.federalreserveconsumerhelp.gov/ConsumerHelponline.pdf (last visited June 11, 2010) ("To file a complaint . . . Call us toll-free"); Ctrs. for Medicare & Medicaid Servs., "How to File a Complaint," CMS Pub. No. 11313 (May 2007), *available at* http://www.medicare.gov/Publications/Pubs/pdf/11313.pdf (last visited June 11, 2010) ("[F]ile a complaint either verbally or in writing.").

[21] Minn. Stat. Ann. § 144.4807 (West 2010) (allowing "application [to] be filed orally by telephone"); Miss. Code Ann. § 69-47-23(4) (West 2009) ("Any person . . . may file a written or oral complaint . . . ."); Nev. Rev. Stat. Ann. § 618.705 (West 2009) (imposing penalties on "[a]ny person who . . . files a false oral or written complaint"); N.J. Stat. Ann. § 30:4C-12 (West 2010) ("a written or oral complaint may be filed"); N.Y. Energy Law app. § 7904.2 (McKinney 2009) (stating action may be "initially filed orally"); Tenn.

decisions reaching back almost a century[23] that

Code Ann. § 49-6-3401(c)(4)(B) (West 2010) ("All appeals must be filed, orally or in writing").

[22]La. Admin. Code tit. 22, § 308(E)(1)(a) (2009) ("A request for accommodation may be filed orally . . . ."); 02-385-370 Me. Code R. § 2 (Weil 2007) ("Complaints may be filed orally . . . ."); Utah Admin. Code r. 477-15-4(2) (2009) ("An employee may file an oral or written complaint . . . ."); *see also* Exec. Order No. 8, 13 Del. Reg. Regs. 422 (Sept. 1, 2009) ("An informal complaint is filed with Human Resource Management by written or oral communication").

[23] *State v. Howard*, 805 So. 2d 1247, 1256 (La. Ct. App. 2002) ("defendant's motion for continuance filed orally"); *Richmond v. Newson*, 17 So. 2d 635, 636 (La. Ct. App. 1944) ("right to file oral pleadings"); *State v. Riggins*, 508 So. 2d 918, 919 (La. Ct. App. 1987) ("State filed an oral multiple bill"); *Rocky v. King*, 471 So. 2d 1006, 1007 n.2 (La. Ct. App. 1985) (regarding whether defendant should have been permitted "to file oral exception"); *Donovan v. Walsh*, No. 287326, 2005 WL 1208964, at *2 (Mass. Land Ct. May 23, 2005) ("[D]efendants filed orally a motion."); *Estate of Abdalian*, No. 44137, 1982 WL 5386, at *1 (Ohio Ct. App. May 27, 1982) ("[C]laim . . . was filed orally"); *Parks v. Farmers Ins. Co. of Or.*, 227 P.3d 1127, 1131 (Or. 2009) ("Farmers suggests that the term 'filed' strongly implies a writing. But . . . we are not persuaded . . . Certainly car and unemployment insurance claims often are 'filed' orally by telephone, as are newspaper stories and ordinary complaints to businesses and government agencies."); *Commonwealth v. Molina*, 346 A.2d 351, 354 n.4 (Pa. Super. Ct. 1976) ("writ of coram nobis could be filed orally"); *Mid-Century Ins. Co. of Tex. v. Barclay*, 880 S.W.2d 807, 810 (Tex. Ct. App. 1994) (allowing a telephone call to be a "filed" claim, because "we understand the term 'filed' to refer to . . . providing . . . whatever notice was required"); *In re McCort*, 650 A.2d 504, 506 n.1 (Vt. 1994) ("complaint . . . may be filed

use "file" to refer to oral complaints, grievances or other statements. Like their federal counterparts, a number of state government agencies also invite members of the public to file an oral complaint.[24]

The private sector's use of the term "filed" is no different. In the case of journalists, stories are "filed" orally by radio.[25] Private

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orally"); *Ashley v. Tri-State Lumber Co.*, 91 S.E. 813, 814 (W. Va. 1917) ("court permits such demurrer to be filed orally").

[24] *See, e.g.*, *Hynnek v. Indianhead Council, Boy Scouts of Am.*, No. 69-1700-8740-2 (Minn. Dep't of Human Rights Aug. 1995), *available at* http://www.oah.state.mn.us/aljBase/17008740.or.htm (last visited June 12, 2010); Tex. Dep't of Transp., Complaint Resolution Process, http://www.dot.state.tx.us/contact_us/complaints.htm (last visited June 10, 2010).

[25] For example, "[Edward R.] Murrow filed his CBS radio reports from the rooftops of London as German bombs fell." Patty Rhule, *Happy 100th Birthday, Edward R. Murrow*, Newseum (Apr. 23, 2008), *available at* http://www.newseum.org/news/2008/04/happy-100th-birthday--edward-r-murrow.html (last visited June 12, 2010); Amy's Robot, http://amysrobot.com/archives/2002/07/we_all_know_zacharias_moussaou.php (July 19, 2002 08:53) ("NPR's Nina Totenberg, maybe the best Supreme Court reporter there is, filed this story . . . .") (providing link to audio recording); *Pakistan's Musharraf Quits Amid Impeachment Threat* (NPR radio broadcast Aug. 18, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=93710946&ft=1&f=1004 ("Philip Reeves is in the capital, Islamabad. He filed this story in reaction to Mr.

organizations, including Defendant, regularly use toll-free hotlines to handle complaints filed by employees and customers. (*See, e.g.*, Dkt. # 91, Ex. 11.)

In fact, Defendant's own policies use the phrase "filed a complaint" in a manner which encompasses oral complaints. The section in Defendant's Employee Handbook on "Sexual Harassment Policy and Procedures" advises company employees that "[r]etaliation directed at an employee who has *filed a complaint* or assisted in an investigation is strictly prohibited. (Dkt. # 93, Ex. 25 at 30 (emphasis added).) Surely this does not mean that Defendant forbids retaliation only against those sexual harassment victims who complain in writing, and actually permits retaliation against victims who complain orally.[26] Thus, even Defendant uses the term "filed" in its daily business practice in a manner which encompasses oral complaints.

Musharraf's resignation.").

[26] Such a rendition would likely run afoul of the *Faragher /Ellerth* requirement that employers exercise reasonable care to prevent and promptly correct any harassment, as well as Title VII's prohibition on retaliation, which encompasses oral complaints of harassment. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Superiors, No. 915.002, 1999 WL 33305874 (June 18, 1999).

While use of the term "filed" with reference to oral matters in other contexts does not establish what the phrase "filed any complaint" means in the context of the FLSA, it does illustrate that that common usage of the term "filed" is fairly broad, and at least *can* refer to an oral statement.

II. THE TERM "FILED," AS USED IN SECTION 215(a)(3) OF THE FLSA, INCLUDES ORAL COMPLAINT FILINGS.

The Secretary's interpretation of the phrase "filed any complaint," which deems oral complaints to be protected activity under 29 U.S.C. § 215(a)(3), is the correct interpretation when the word "filed" is considered in context. A reading of the statute, which encompasses protection for employees making oral complaints, is consistent with the text of the statute itself, the broad remedial purposes of the Act, and well-established statutory rules of construction. This interpretation also effectuates the public policy considerations driving the FLSA, and makes practical application of the Act possible.

A. The Textual Context of Section 215(a)(3) Indicates that Oral Complaints Are Protected.

The meaning of the phrase "filed any complaint" in section 215(a)(3) lies in "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. Of particular import here is congressional choice to use the word "any" to modify the noun "complaint," the lack of the phrase "in writing" to modify the verb "filed," and the practical realities of the application of the Act. Since there is no indication in the text that Congress intended only written complaints to be protected, and the statutory language indicates the opposite, oral complaints should be protected under section 215(a)(3).

1. Statutory Interpretation Should Give Force and Effect to the Word "Any."

The text of section 215(a)(3) indicates that the phrase "filed any complaint" includes the filing of an oral complaint. The adjective "any" emphatically gives the broadest possible meaning to the noun "complaint." "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (*quoting Webster's Third New International Dictionary* 97 (1976)); *see also Harrison v. PPG Indus., Inc.*, 446 U.S. 578,

589 (1980) (commenting "any" is "expansive language"); *Shea v. Vialpando*, 416 U.S. 251, 260 (1974) (stating "the normal meaning of the term 'any' [allows of] no limitation"). This Court has repeatedly treated "any" as precluding limitations on the matter which it modifies.[27]

In expressly holding that an "employee may communicate . . . allegations [of FLSA violations] orally or in writing" to receive protection under section 215(a)(3), the Ninth Circuit stated the truism "'[a]ny complaint'

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[27] *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130–31 (2002) (holding that "[a]ny drug-related criminal activity" applies even to activities that were unknown at the time); *Brogan v. United States*, 522 U.S. 398, 400–01 (1998) (prohibition against "any false . . . statement[]" includes false exculpatory "no"); *Gonzalezs*, 520 U.S. at 5 (stating that "any other term of imprisonment" applies to state as well as federal sentences); *Harrison*, 446 U.S. at 588–89 (stating that provision authorizing appellate review of "any . . . final action" included action in question); *Shea*, 416 U.S. at 260 (finding statutory deduction from income for "any expenses reasonably attributable to" earnings precluded placing fixed limitation on deductions that barred expenses above that ceiling); *NAACP v. New York*, 413 U.S. 345, 353 (1973) (holding that jurisdiction over "any appeal" includes appeal by unsuccessful intervenor); *Int'l Union of Operating Eng'rs v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972) (finding that agreement to arbitrate "any difference" includes arbitration of dispute regarding laches); *Collector v. Hubbard*, 79 U.S. 1, 15 (1870) (stating that "any court" includes state courts), *abrogated on other grounds by Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 627-28, 637 (1895).

means 'any complaint.'" *Lambert v. Ackerley*, 180 F. 3d 997, 1004, 1007–08 (9th Cir. 1998); *see also Valerio v. Putnam Assocs., Inc.*, 173 F. 3d 35, 42 (1st Cir. 1999) ("[T]he word 'any' embraces all types of complaints . . . .").

Five other Courts of Appeals are in accord with *Ackerley*'s finding that "any complaint" protects any oral complaints under section 215(a)(3). (*See* P. App. 5, 18, 41, 68.) The Sixth Circuit holds that "it is the assertion of statutory rights which is the triggering factor, not the filing of a formal complaint." *EEOC v. Romeo Cmty Sch.*, 976 F. 2d 985, 989 (6th Cir. 1992); *see also Moore v. Freeman*, 355 F. 3d 558, 562 (6th Cir. 2004); *Moon v. Transp. Drivers, Inc.*, 836 F. 2d 226, 228 (6th Cir. 1987) (holding that oral complaints are protected under identical language in the STAA). The Eighth Circuit agrees, stating that an employee's oral "protest of what she believe[s] to be unlawful conduct on [the employer's] part [is] an act protected from reprisals." *Brennan v. Maxey's Yamaha, Inc.*, 513 F. 2d 179, 181 (8th Cir. 1975). The Eleventh Circuit has also held that oral complaints are protected by section 215(a)(3). *EEOC v. White & Son Enters.*, 881 F. 2d 1006, 1011 (11th Cir. 1989)

("[U]nofficial complaints . . . constitute an assertion of rights protected under the statute. . . . The anti-retaliation provision of the FLSA was designed to prevent fear of economic retaliation . . . against an employee who chose to voice such a grievance."). The Fifth Circuit

likewise recognizes that "any complaint" includes oral complaint filings. *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617 (5th Cir. 2008) ("Section 215(a)(3) speaks of an employee 'fil[ing] any complaint,' and we cannot agree that the plain language is limited to filing a formal complaint."). Finally, the Tenth Circuit protects "an employee's unofficial assertion of rights under § 215(a)(3)," including an "employee's [oral] request for overtime wages." *Pacheco v. Whiting Farms, Inc.*, 365 F. 3d 1199, 1206–07 (10th Cir. 2004); *see also Love v. RE/MAX of Am.*, 738 F.2d 383 (10th Cir. 1984) ("When the 'immediate cause or motivating factor of a discharge is the employee's *assertion* of statutory rights, the discharge is discriminatory under § 215(a)(3) . . . .'" (emphasis added) (*quoting Maxey's Yamaha*, 513 F.2d at 181)).

Having given expansive scope to the actions protected by section 215(a)(3) by using the term "any," Congress could not have intended by using the term "filed" to impose some limitation on the form of complaint that is protected by mere implication. In *United States v. Rosenwasser*, this Court held that the use of the term "any" to modify "employee" in sections 203(a) and 207(a) of the FLSA "leaves no doubt as to the congressional intention to include all employees within the scope of the Act unless specifically excluded." 323 U.S. 360, 363 (1945). There is no such "specific[] exclu[sion]" of oral complaints from the scope of section 215(a)(3).

Congress' determination to accord expansive protection in section 215(a)(3) is reiterated throughout that provision. The term "any" appears six times in 29 U.S.C. § 215(a)(3). The law forbids retaliation by "any person," protects "any employee," applies to the action of instituting or causing to be instituted "any proceeding under or related to this chapter" as well as to testifying (or being about to testify) in "any such proceeding," and forbids not only retaliatory discharges but discrimination "in any other manner." *Id.* It seems particularly unlikely that Congress, having repeatedly stated its intent to broadly protect against reprisals, could have intended the courts to read in any implied exceptions.

This Court has rejected similar arguments in the past when litigants advocated for a statutory construction that would severely limit the scope of protection for employees in the face of congressional intent to afford broad protection under an act. For example, in *NLRB v. Scrivener*, 405 U.S. 117 (1972), this Court broadly construed section 8(a)(4) of the National Labor Relations Act, which forbids an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4). Like the term "any" in this case, this Court held that the term "otherwise" demonstrated that the statute was to be broadly construed.

On textual analysis alone, the presence

> of the preceding words "to discharge or otherwise discriminate" reveals, we think, particularly by the word "otherwise," an intent on the part of Congress to afford broad rather than narrow protection to the employee.

Scrivener, 405 U.S. at 122. That argument applies with particular force here because, while the term "otherwise" in section 8(a)(4) only defined the types of retaliatory action forbidden, the term "any" in section 215(a)(3) delineates the type of conduct (filing a complaint) that the FLSA protects.

2. Statutory Interpretation Should Duly Consider the Conspicuous Absence of the Phrase "in Writing" in the Context of the Act.

Had the framers of the FLSA wished to limit section 215(a)(3) to written complaints, they would undoubtedly have said so in just those terms. Three other provisions of the FLSA itself expressly require that something be "written" or "in writing." Section 210(a) provides that judicial review of an order of the Secretary under section 208 may be obtained "by *filing* in [the specified court] a *written* petition praying that the order of the Secretary be modified or set aside in whole or in part." 29 U.S.C. § 210(a) (emphasis added). Section 214(c)(5)(A) states, regarding certain lawsuits, that "[n]o employee may be a party to any such

action unless the employee or the employee's parent or guardian gives consent *in writing* to become such a party and such consent is *filed* with the Secretary." 29 U.S.C. § 214(c)(5)(A) (emphasis added). Similarly, section 216(b) provides that "[n]o employee shall be a party plaintiff to any such [civil] action [for unpaid wages or overtime pay] unless he gives his consent *in writing* to become such a party and such consent is *filed* in the court in which such action is brought." 29 U.S.C. § 216(b) (emphasis added).

Each of these provisions contains an express requirement of a written document despite the fact that they also require that the matter be "filed," the pivotal disputed term in section 215(a)(3). If Congress had intended or understood "filed" to mean "filed in writing," it would not have included the additional requirement of a written document in sections 210(a), 214(c)(5)(A) and 216(b). If "filed" invariably meant "in writing," it would be redundant to refer to the filing of a written document; it would mean "filed in writing a written document." At the very least such duplicative language would be uncommon. If "file" indeed could only mean "file a written document," it would make no sense to refer to filing something that is oral in nature. Thus, this repeated coupling of the word "filed" with the express limitation of material "in writing" in the FLSA is highly probative of congressional intent behind the absence of the word "written" in section 215(a)(3). As the Seventh Circuit

dissent explained, "[I]t is noteworthy that Congress in many other statues has specifically required written complaints. . . . These statutes suggest that when Congress means to require that complaints take a written form, it sets forth that requirement expressly."[28] (P. App. 7.)

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[28] *E.g.*, 2 U.S.C. § 437g(a)(1) ("complaint shall be in writing"); 5 U.S.C. § 3330a(a)(2)(B) (same); 7 U.S.C. § 193(a) ("complaint in writing"); 7 U.S.C. § 228b-2(a) (same); 7 U.S.C. § 1599(a) (same); 15 U.S.C. § 80b-9(a) ("file with it a statement in writing"); 19 U.S.C. § 2561(a) (stating a federal agency may not consider a complaint unless the agency is informed "in writing"); 33 U.S.C. § 392 ("a statement of complaint, verified by oath in writing"); 38 U.S.C. § 4322(b) ("complaint shall be in writing"); 42 U.S.C. § 2000b(a) ("complaint in writing"); 42 U.S.C. § 2000c-6(a) (same); 42 U.S.C. § 3610(a)(1)(A)(ii) ("complaints shall be in writing"); 42 U.S.C. § 15512(a)(2)(C) ("[C]omplaint filed . . . shall be in writing and notarized, and signed and sworn by the person filing the complaint."); 47 U.S.C. § 554(g) ("A complaint by any such person shall be in writing, and shall be signed and sworn to by that person."); 49 U.S.C. § 46101(a)(1) ("A person may file a complaint in writing . . .").

3. Statutory Interpretation Should Comport with the FLSA's Purpose in Light of the Beneficiary Population.

The proper interpretation of "filed any complaint" becomes even more evident in light of the practical realities of *who* the potential complainants might be under 29 U.S.C. § 215(a)(3). In *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local 123*, this Court set forth guidelines for statutory interpretation of the FLSA and called for a practical and expansive interpretation of its protections.[29] 321 U.S. 590, 592 (1944). The Court determined that the meaning of the word "work" in the FLSA could "be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion." *Id.* at 591–92. The Court instructed that the provisions of the FLSA "are remedial and humanitarian in purpose," and instructed that "[s]uch a statute must not be interpreted

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[29] The Seventh Circuit's holding is also contrary in spirit to this Court's recent decisions in *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S. Ct. 846 (2009), *Gomez-Perez v. Potter*, 553 U.S. 474 (2008), and *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), which indicate that anti-retaliation provisions should be interpreted in a manner which best effectuates the broad remedial goals of the statutes in which they appear.

or applied in a narrow, grudging manner." *Id.* at 597.

Applying those principles to the instant case leads to the inevitable conclusion that oral complaints of FLSA violations are protected under section 215(a)(3). It is not uncommon for an "employee" protected under the FLSA to communicate with supervisors orally when they interact on a day-to-day basis.[30] (P. App. 59.) This is particularly true in the context of the blue-collar industry, factory, and retail employees that the FLSA was primarily adopted to protect. Workers who are illiterate also most often find hourly paid employment, and would be most likely to communicate complaints verbally.[31] In

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[30] *See, e.g.*, *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005); *Knickerbocker v. City of Stockton*, 81 F.3d 907, 912 n.3 (9th Cir. 1996); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993); *Ergo v. Int'l Merch. Servs., Inc.*, 519 F. Supp. 2d 765, 778 (N.D. Ill. 2007); *Hernandez v. City Wide Insulation of Madison, Inc.*, 508 F. Supp. 2d 682, 690 (E.D. Wis. 2007); *Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp. 2d 322, 323 (W.D. Va. 1999).

[31] The most recent data available to Congress when it enacted the FLSA was from the 1930 Census. Fifteenth Census of the United States, 1930. That census reflected the following statistics: 73% of the American workforce was employed in blue-collar labor professions; there were 63,489 individuals who were blind; there were 4,283,753 (4.3%) individuals who were illiterate; and 869,865 (7%) Caucasian individuals who were foreign-born could not read and write in English. *Id.*; Comm. on Econ. Sec., *Social Security in America*, Reports & Studies (May 16, 1935), *available at*

addition, children under the age of fourteen who have been unlawfully employed would most likely make oral complaints of FLSA violations. *See* 29 U.S.C. §§ 203(l), 212(a). Because most of these workers do not regularly work in an administrative paperwork or computer-based industry where they would have easy access to a formal written complaint-filing process, a writing requirement is unnatural and fails to reflect the realities of the typical workplace and typical worker affected by the Act.[32]

Similarly, the most common FLSA violations are simple enough to report orally, frequently even in a single sentence. For example, common complaints concern not being paid for all time worked (as in the instant case),[33] not being paid for overtime hours,[34]

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http://www.socialsecurity.gov/history/reports/ces/cesbookc17.html (last visited June 11, 2010). Congress therefore would have likely been aware of the extremely large population group that would be unlikely or unable to submit a written complaint in 1938.

[32] The workers who would most often communicate in writing, such as lawyers, doctors, and administrators, are exempt from coverage by the FLSA, and are therefore not affected by its anti-retaliation provision. *See* 29 U.S.C. § 213(a)(1).

[33] *Cellito v. Semfed Mgmt., Inc.*, No. RDB-06-1794, 2007 WL 1725442, at *1 (D. Md. June 12, 2007); *Hernandez*, 508 F. Supp. 2d at 687; *Seever v. Carrols Corp.*, 528 F. Supp. 2d 159, 166 (W.D.N.Y. 2007); *Caci v. Wiz of Lake Grove, Inc.*, 267 F. Supp. 2d 297, 298 (E.D.N.Y. 2003); *Morgan v. Future Ford Sales*, 830 F. Supp. 807, 810 (D. Del. 1993); *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F.

being asked to work without pay,[35] being paid less than the required minimum wage[36] or less than the time-and-one-half rate mandated for most overtime,[37] or being told to falsify time records.[38] Thus, based upon practical

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Supp. 57, 58 (N.D. Ga. 1985); *see also Acosta v. Yale Club of N.Y. City*, No. 94 Civ. 0888 (KTD), 1995 WL 600873, at *2 (S.D.N.Y. Oct. 12, 1995) (denial of earned tips).

[34] *Maynor v. Dow Chem. Co.*, 671 F. Supp. 2d 902, 905 (S.D. Tex. 2009); *Jafari v. Old Dominion Transit Mgmt. Co.*, No. 3:08-CV-629, 2008 WL 5102010, at *2 (E.D. Va. Nov. 28, 2008); *Barturen v. Wild Edibles, Inc.*, No. 07 Civ. 8127 (LLC), 2007 WL 4468656, at *1 (S.D.N.Y. Dec. 18, 2007); *Seever*, 528 F. Supp. 2d at 166; *Boateng v. Terminex Int'l Co Ltd.*, No. 07-617, 2007 WL 2572403, at *1 (E.D. Va. Sept. 4, 2007); *Burns v. Blackhawk Mgmt. Corp.*, 494 F. Supp. 2d 427, 430 (S.D. Miss. 2007); *Haile-Iyanu v. Cent. Parking Sys. of Va.*, No. 06-2171(EGS), 2007 WL 1954325, at *1 (D.D.C. July 5, 2007); *Hernandez*, 508 F. Supp. 2d at 687; *Hicks v. Ass'n of Am. Med. Colls.*, 503 F. Supp. 2d 48, 50 (D.D.C. 2007); *Higueros v. N.Y. State Catholic Health Plan, Inc.*, 526 F. Supp. 2d 342, 344 (E.D.N.Y. 2007).

[35] *Wilke v. Salamone*, 404 F. Supp. 2d 1040, 1044 (N.D. Ill. 2005); *Wittenberg v. Wheels, Inc.*, 963 F. Supp. 654, 656 (N.D. Ill. 1997).

[36] *Dees v. Rsight, Inc.*, No. 6:05-cv-1923-Orl-DAB, 2006 WL 3804831, at *1 (M.D. Fla. Dec. 22, 2006); *Clevinger*, 36 F. Supp. 2d at 323.

[37] *Ergo v. Int'l Merch. Servs. Inc.*, 519 F. Supp. 2d 765, 767 (N.D. Ill. 2007); *Dougherty v. Ciber, Inc.*, No. Civ. A. 1:04-CV-1682, 2005 WL 2030473, at *1 (M.D. Pa. July 26, 2005).

observations about the legislative beneficiary group, Congress would readily have been able to foresee that complaints by workers of FLSA violations would frequently be communicated orally.[39]

4. Statutory Interpretation Should Not Attempt to Derive Meaning from Subsequently Enacted Legislation that Uses Different Language.

The Seventh Circuit misinterpreted 215(a)(3) in part because it applied statutory interpretation principles applicable to subsequently enacted legislation that used different language to prohibit retaliation. The lower court erroneously reasoned that section 215(a)(3) must not include oral complaints because:

> Congress could have, but did not, use broader language [such as the] analogous provisions in other states, including Title VII and the Age Discrimination in Employment Act ["ADEA], [which] forbid employers from retaliating against any employee who "has opposed any practice" that is unlawful under the statutes.

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[38] *Bartis v. John Bommarito Oldsmobile-Cadillac, Inc.*, 626 F. Supp. 2d 994, 997 (E.D. Mo. 2009); *Meredith-Clinevell v. Dep't of Juvenile Justice*, 344 F. Supp. 2d 951, 953 (W.D. Va. 2004).

[39] *See supra*, note 31.

(P. App. 42.) But in framing the language of section 215(a), Congress was not making a "legislative choice" to reject the type of language used in Title VII or the ADEA.[40] The FLSA was enacted in 1938; it was one of the earliest federal anti-retaliation laws. The ADEA and, Title VII, on the other hand, were adopted in 1964 and 1967 respectively. The ADEA, Pub. L. No. 90-202, 81 Stat. 603 (1967) (codified as amended at 29 U.S.C. § 623(d)); Title VII, Pub. L. No. 88-352, 78 Stat. 257 (1964) (codified as

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[40] Had Congress not included the opposition clause in the Title VII anti-retaliation provision, that provision would have been much narrower than section 215(a)(3). In terms analogous to section 215(a)(3), section 704(a) of Title VII forbids retaliation against an employee because he "made a charge." 42 U.S.C. § 2000e-3(a). But because section 706(b) of Title VII requires that any charge "shall be in writing," the protection of individuals filing charges would not have applied to workers who spoke in person or by phone with EEOC officials. *See* 42 U.S.C. § 2000e-5(b). Thus, Title VII's opposition clause was necessary to ensure that the anti-retaliation provision did not deny protection for oral complainants who have not submitted a written charge. The broader language later utilized in Title VII and the ADEA was also framed to include "opposition" to statutory violations in order to reach well beyond oral complaints. For example, Title VII's "opposition clause" includes protection for silently refusing to obey an order that could violate the statute, picketing, production slow-downs, or requesting religious accommodations. *Crawford*, 129 S. Ct. at 854; 2 EEOC, *Compliance Manual* § 8-II-B(2), p. 614. An "opposition" clause is therefore not an alternative to the "file any complaint" language in the FLSA, but actually encompasses that language as only one of several forms of protected activity.

amended at 42 U.S.C. § 2000e-3(a)). Obviously, the congressional choice of language in 1938 did not represent a rejection of the wording of statutes not adopted until three decades later.[41]

Thus, the text of 29 U.S.C. § 215(a)(3) indicates that oral complaints are protected activity, and that the term "filed" should not be interpreted in a manner which would permit retaliation against employees who complain orally. The Seventh Circuit's decision therefore amounts to judicial revision of section 215(a)(3) to include the phrase "in writing" when Congress already chose to omit that language from that section, and strips the word "any" from its meaning and purpose in the statute.

B. The Purpose of Section 215(a)(3) Indicates that Oral Complaints Should be Protected.

The underlying purpose of section 215(a)(3) also supports an interpretation which encompasses oral complaints. The FLSA's anti-

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[41] The FLSA was drafted some sixty-two years ago, at a time when statutes were far shorter and less detailed, and were written in more general and simpler terms. The fact that Congress decided to include a more detailed anti-retaliation provision more than a generation later, when it drafted Title VII, tells us little about what Congress meant at the time it drafted the comparable provision of the FLSA.

Ackerley, 180 F.3d at 1005.

retaliation provision is essential to assuring compliance with the substantive requirements of the FLSA.[42] To secure an adequate flow of information to the Department of Labor to enable enforcement of the FLSA, Congress chose to rely on employee reports of violations. Particularly in off-the-clock cases like the present, employee reports are the *sole* source of information regarding FLSA violations.

As this Court explained in *Mitchell v. Robert DeMario Jewelry, Inc.*:

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed Federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees

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[42] Because of the pivotal role workers play when they come forward with information about violations of the FLSA and the EPA, the Department of Labor and the EEOC both require employers to hang posters that expressly assure workers (without distinguishing between written and oral complaints) that "[t]he law . . . prohibits discriminating against or discharging workers" who file a complaint. Dep't of Labor Wage and Hour Division, FLSA Minimum Wage Poster, http://www.dol.gov/whd/regs/compliance/posters/flsa.htm (list visited June 10, 2010); EEOC, Equal Employment Opportunity Is the Law, EEOC-P/E-1 (Nov. 2009), *available at* http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf (last visited June 12, 2010).

> seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. . . . For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.

361 U.S. at 292 (citations omitted); (*see also* P. App. 115, 123, 130–31 (containing *FLSA Amendments of 1977: Hearings Before the Subcomm. on Labor of the Comm. on Human Resources*, 95th Cong. (1977); H.R. Rep. No. 75-2738 (1938) (Conf. Rep.); H.R. Rep. No. 2738, at 10, 26 (1938) (Conf. Rep.).) Thus, protecting workers from retaliation under the FLSA is undoubtedly extremely important.

1. Protecting Oral Complaints Will Encourage Productive Internal Problem-Solving Between Employers and Employees.

Employee complaints to supervisors or other officials play a vital role in bringing about compliance with the FLSA. Higher ranking officials, including those most familiar with the requirements of the FLSA, may be unaware that practices forbidden by the law are occurring. Conversely, front-line supervisors who understand what is occurring may not have focused on the statutory requirements.

Neither may be paying sufficient attention to details well known to workers—such as the number of hours worked by an employee in a given week—which may be essential to assuring compliance with the law.

As a result, employees should be encouraged to raise concerns about FLSA violations to their employers in an effort to avoid resort to more formal mechanisms, and employers should be encouraged to attempt to resolve violations internally by promoting open communication with their employees without fear of reprisal. The value of informal internal complaints in the FLSA context is immeasurable:

> [Internal complaints provide] the employer [with] an opportunity to resolve the situation quietly and promptly. This is particularly important where the situation is the product of a misunderstanding. . . . [I]nternal complaints save[] employers the cost of litigation as well as other potential costs, such as personal liability, loss of productivity and negative publicity. It also allows an employer to correct the situation before involving an agency, which saves money[.]

J. Redmong, *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, 335–36, 339–40 (2000) (footnotes omitted).

The Seventh Circuit decision largely eviscerates the statute's protection for workers who bring violations of the Fair Labor Standards Act ("FLSA") or the Equal Protection Act ("EPA") to their employers' attention. As explained above, "in the workplace an employee is more likely to approach an employer with an oral complaint about wage and hour practices, rather than providing a written document." (P. App. 59.) Many employers, particularly smaller organizations, have no established form or procedure for written complaints, and most employers regardless of size would prefer to have suspected violations of law corrected before a written complaint submitted. Because employers and employees both often prefer to address such matters in a less formal, low-key manner in an effort to address problems while maintaining a productive working environment, employers rarely limit employee complaints to written statements, and often invite aggrieved workers to speak in person or by telephone with an appropriate official. Defendant's own Employee Policy Handbook repeatedly urges workers "to discuss" problems with management, and encourages them to call a toll-free hotline if they do not want to discuss the matter in person. (Dkt. # 91, Ex. 11; Dkt. # 93, Ex. 25 at 3.)

The lower court's narrow construction of section 215(a)(3) has the ironic effect of

punishing workers who follow company policies and orally report FLSA violations, because they seek to solve problems in the most low key, non-confrontational manner possible. The rationale behind this unfortunate ruling has previously been rejected because of these unintended consequences:

> It would be most unreasonable that an employee, not subject to discharge because he filed a paper or letter with a wage and hours officer, could be dismissed with impunity should he have the courtesy to first . . . confer with his employer concerning his complaint.

Goldberg, 43 Lab. Cas. (CCH) ¶ 40,986.

The Secretary of Labor warned that leaving employees who make oral complaints unprotected "gives an employer a perverse incentive to fire or otherwise discriminate against an employee before he or she has had an opportunity to [file a written complaint with federal officials]."[43] Brief for EEOC as Amicus Curiae Supporting Appellees at 10–11,

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[43] Employers have an especially large financial incentive to terminate employees who bring FLSA violations to their attention. Correcting and redressing a violation of the FLSA often entails substantial cost, as an employer is required to pay the full measure of compensation mandated by federal law, as well as liquidated damages. Employers often stand to save large amounts of money if they can silence employees before they file suit or persuade the Department of Labor to do so.

Lambert, 180 F.3d 997 (Nos. 96-36017, 96-36266, and 96-36267); *see also Valerio*, 173 F.3d at 43 (stating that denial of protection "would discourage prior discussion of the matter between employee and employer, and would have the bizarre effect . . . of . . . creating an incentive for the employer to fire an employee as soon as possible after learning the employee believed he was being treated illegally"); *Lundervold v. Core-Mark Int'l, Inc.*, No. Civ. 96-1542-AS, 1997 WL 907915, at *2 (D. Or. Jan. 17, 1997) (stating absence of protection creates "a perverse incentive to immediately terminate any employee who complains about wage and hour violations before the employee can [engage in protected activity]"); *Goldberg*, 43 Lab. Cas. (CCH) ¶ 40,986 ("It would be most unreasonable . . . if the employer could so summarily discharge his [employee] as to preclude formal filing."). In *Robinson v. Shell Oil Co.*, this Court declined to construe the anti-retaliation provision of Title VII in a manner which would create that type of incentive.[44]

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[44] The Court explained:

> According to the EEOC, exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims. . . . Those arguments carry persuasive force given their coherence and their consistency with

Regrettably, employees who wish to resolve an issue informally with their employers will think twice before doing so if they are aware of the potential consequences resulting from the Seventh Circuit's decision.[45] However, an interpretation that protects oral complaints will ensure that employees are able to raise concerns about FLSA violations with their employers in an attempt to cooperatively resolve the matter without the need for more formal complaint and enforcement mechanisms.

2. Protecting Oral Complaints Will Encourage Employees to Report FLSA and EPA Violations to Administrative Agencies for Enforcement Purposes.

Moreover, the Secretary of Labor's warning that "a decision . . . that internal complaints that are oral are not covered . . .

> a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms.

519 U.S. at 345, *citing Mitchell*, 361 U.S. at 292–93, 80 (interpreting the FLSA antiretaliation provision).

[45] Many workers will not be able to avoid the consequences of the Seventh Circuit's decision by circumspectly putting their complaints in writing and never mentioning them out loud. Most employees are laymen with no knowledge of case law and no on-site access to skilled counsel who might advise them to raise such matters only in documents.

would have an adverse impact upon the administration of the Department of Labor's programs" is a serious concern. (P. App. 18, 46.) Limiting the scope of section 215(a)(3) to written complaints is inconsistent with the intent of Congress to safeguard access of workers to federal officials. The dissenting judges in the court below noted that the Seventh Circuit's limited construction of section 215(a)(3) would also exclude oral complaints to officials of the Department of Labor or the Equal Employment Opportunity Commission ("EEOC") (regarding the EPA):

> [N]othing in the court's holding or rationale limits its narrow construction of the statutory language to intra-company complaints. The court's decision that only written complaints are protected presumably would apply to an employee's external contacts with regulatory officials.

(P. App. 9–10.)

Although section 215(a)(3) protects the filing of "any complaint," the FLSA does not create a procedure for the submission of complaints to the Department of Labor. The only statutory reference to contacts between the Department and employees is in section 211(a), which pertains to oral communications. That section provides: "The Administrator [of the Wage and Hour Division] or his designated representatives may . . . question such

employees . . . as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter." 29 U.S.C. § 211(a). Obviously, if representatives of the Division "question[ed] . . . employees," the employees would respond orally.[46] The most important responses would be statements describing violations of the Act (i.e., complaints). Congress could not have intended to exclude from the protections of section 215(a)(3) the only communications between the Department of Labor and employees expressly envisioned in the Act.

Because a "primary purpose of antiretaliation provisions [is m]aintaining unfettered access to statutory remedial mechanisms," employees should be afforded "complete freedom [from coercion]. . . 'to prevent the [agency's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *Robinson*, 519 U.S. at 346; *see also Scrivener*, 405 U.S. at 122 (*quoting John Hancock Mut.*

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[46] It is not unheard of for employers to terminate employees for communicating with the Department of Labor without filing a formal written complaint, although those employees have historically received protection under section 215. *See, e.g., Strickland v. MICA Info. Sys.*, 800 F. Supp. 1320 (M.D.N.C. 1992); *Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560 (W.D. Mo. 1990); *Nairne v. Manzo*, No. 86-0206, 1986 WL 12934 (E.D. Pa. Nov. 14, 1986); *Daniel*, 611 F. Supp. 57; *Marshall v. Great Lakes Recreation Co., Inc.*, No 79-73849, 1981 WL 2282 (E.D. Mich. Jan. 8, 1981).

Life Ins. Co. v. NLRB, 191 F.2d 483, 485 (D.C. Cir. 1951)). Requiring aggrieved workers to communicate with government officials only in writing would seriously hobble that access.

The Secretary of Labor has correctly pointed out that "[p]rotecting only written complaints under Section 15(a)(3) . . . would mean, for example, that an employee who places a telephone call to the Department of Labor would not be protected."[47] Telephone calls to the national and local offices of the Wage and Hour Division[48] and to the EEOC are an important source of information to federal

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[47] Brief for the Secretary of Labor as Amicus Curiae Supporting Appellant in Part, Kilpatrick v. Serv. Merch., Inc., 1998 WL 865217 (E.D. La. Dec. 14, 1998) (No. Civ. A. 98-990).

[48] *E.g.*, *Lambert*, 180 F.3d at 1001 (plaintiff telephoned Department of Labor); *Saffels v. Rice*, 40 F.3d 1546, 1547 (8th Cir. 1994) (plaintiff telephoned Wage and Hour Division); *Wigley v. W. Fla. Lighting, Inc.*, No. 8:04CV1524T27TGW, 2005 WL 3312319, at *1 (M.D. Fla. Dec. 7, 2005) (worker dismissed after she called Department of Labor); *Walker v. Washbasket Wash & Dry*, No. CIV. A. 99-4878, 2001 WL 770804, at *4 (E.D. Pa. July 5, 2001) (plaintiff com telephoned the Wage and Hour Division); *O'Brien v. Dekalb-Clinton Counties Ambulance Dist.*, No. 94-6121-CV-SJ-6, 1995 WL 694630, at *1 (W.D. Mo. Nov. 21, 1995) (plaintiff and co-worker called the Wage and Hour Division) *modified by* 1996 WL 565817 (W.D. Mo. June 24, 1996); *Morgan v. Future Ford Sales*, 830 F. Supp. 807, 810 (D. Del. 1993) (worker dismissed when he told employer that he called the Wage and Hour Division); *Daniel*, 611 F. Supp. at 58 (N.D. Ga. 1985) (plaintiff telephoned Wage and Hour Division).

officials and of guidance for concerned workers. Both agencies have posted on their websites toll-free numbers which aggrieved employees are invited to use to make complaints.[49] The FLSA poster displayed (as required by law) in millions of factories and offices across the nation also contains that telephone number for the Wage and Hour Division.[50] The flow of information by telephone would largely dry up if federal officials, at the outset of any such call, were to give callers a *Miranda*-like warning that anything they said could lawfully be used against them.

In-person communication between workers and federal officials would be similarly impeded. In Wage and Hour Division and EEOC offices across the country, officials would have to limit their contact with walk-in complainants to the mute receipt of written documents. Although federal investigators could pose questions orally, workers could safely respond only by writing out their answers, or perhaps typing them on a computer. What is worse, an official

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[49] The Wage and Hour Division call center phone number is displayed at http://www.dol.gov/whd/contact_us.htm (last visited June 10, 2010). The EEOC call center phone number is displayed at http://www.eeoc.gov/contact/index.cfm (last visited June 10, 2010).

[50] The toll free number for the Wage and Hour Division is 1-866-4-USWAGE.

explanation of such a peculiar practice, warning workers that they could lawfully be fired if they complained out loud, would doubtless deter many from dealing with the federal agency at all. This kind of procedure is completely unworkable.

It is unlikely that Congress intended to circumscribe the protections of section 215(a)(3) in a manner that workers would be unlikely to anticipate. A typical employee would not foresee that complaints to federal officials about FLSA violations could be unsafe unless made in writing.[51] "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

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[51] Defendant suggests that a worker who speaks with an official of the Department of Labor might be covered under the "instituted any proceeding" clause of section 215(a)(3). (Br. Opp. 14, 18, 19). If Defendant is correct, and an oral complaint to an official which could trigger an investigation is "institut[ing] a proceeding," it is unclear how Kasten's compliance with Defendant's formally established procedures requiring "discussion" with official company representatives for the purpose of initiating a corporate investigation of the alleged violation is any different. Thus, under Defendant's rationale, Kasten "institute[d] a proceeding" and should be protected.

3. Protecting Oral Complaints Is the Most Practical Approach to Effectuate the FLSA and the EPA.

Practical considerations further warrant an interpretation of section 215(a)(3) which incorporates protection for oral complaints. In *Mitchell*, this Court reasoned that the anti-retaliation provision of the FLSA should instead be interpreted in light of the practical realities weighing against an employee's decision to report her employer's alleged violations:

> Resort to statutory remedies might thus often take on the character of a calculated risk, with restitution of partial deficiencies in wages due for past work perhaps obtainable only at the cost of irremediable entire loss of pay for an unpredictable period. Faced with such alternatives, employees understandably might decide that matters had best be left as they are. We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice.

361 U.S. at 292.

Because the Seventh Circuit's interpretation will discourage knowledgeable employees from complaining about minimum wage and overtime violations, it undermines

the purpose and effectiveness of the FLSA. *See id.* The Seventh Circuit's decision presents employees with the "Hobson's choice" of: (1) complaining informally about FLSA violations and leaving themselves unprotected from retaliation; (2) becoming their employer's formal antagonist by documenting a formal written complaint; or (3) deciding "that matters had best be left as they are." *Id.* at 293. The decision therefore leaves unprotected precisely those employees whom it ought to benefit: those with FLSA-related concerns who do not wish to "rock the boat" with the employer any more than necessary, and who desire amicable resolutions of workplace disputes.

Moreover, the Seventh Circuit decision provides no clear standard for resolving the wide range of forms a complaint might take. The panel decision varies its proposed standard between requiring a complaint to be on "paper," memorialized on a "document" or "record," or one that is just "some sort of writing." (P. App. 38–41, 43.) As the district court conceded, these standards leave entirely unclear whether section 215(a)(3) would protect an e-mail, a form of communication that was of course unknown to the framers of the FLSA, but is becoming increasingly routine.[52] (P. App. 71.)

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[52] *See, e.g.*, *Hall v. FMR Corp.*, 667 F. Supp. 2d 185, 193 (D. Mass. 2008) ("Hall then emailed a complaint"); *Rogers v. Johnson*, No. C08-4395, 2010 WL 1688564, at *4 (N.D. Cal. Apr. 26, 2010) ("Burrow emailed a complaint"); *Colon*

What the employer sees on its computer screen is written, but it is not a paper or (as that word would have been understood in 1938) a document or record. Of course an employer might decide to print the emailed complaint on a piece of paper, but surely whether an email is protected by section 215(a)(3) cannot turn on whether the employer chose to do so. Complaints sent by texting from a cellular telephone or electronic facsimile could pose similar problems.

The Seventh Circuit's holding further presents mind-bending problems with the practical implementation of a provision providing protection only in the case of written complaints. For example, in some cases (including the instant case), a worker may only make an oral complaint, but that complaint is converted into a document (and perhaps later placed in a physical file) by the employer or by administrative officials.[53] It is unclear whether

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v. City of New York, No. 09 Civ. 3142, 2009 WL 1424169, at *2 (S.D.N.Y. May 21, 2009) ("the Prisoners' Rights Project emailed a complaint on Plaintiff's behalf"); *Kirk v. Dry Storage Corp., Logistics*, No. 4:09-CV-131-A, 2010 WL 931880, at *2 (N.D. Tex. Mar. 12, 2010) ("plaintiff emailed a complaint"); *Althouse v. Roe*, 542 F. Supp. 2d 543, 561 (E.D. Tex. 2008) ("Althouse's father emailed a complaint to the Office of the Ombudsman . . . ."). The Department of Labor website also encourages workers to "[s]end an email to the Wage and Hour Division." http://www.dol.gov/whd/contact_us.htm.

[53] *E.g., Nor-Cal Beverage Co.*, 330 N.L.R.B. 610, 615 (2000) (Hurtgen, J., dissenting) (noting that a company

the employee may receive protection in this scenario.[54] As the present case demonstrates, the Seventh Circuit decision seems to indicate that whether the employee "filed a complaint" or not must turn on whether the person who created the written record was acting on behalf of the complaining employee or only for the employer or administrative agency. The answer might be different if an employer informed workers that they could make oral complaints without fear of retaliation, with an understanding that they could later be reduced to writing.

The written-versus-oral complaint dichotomy also creates strange practical implementation problems in the context of a same-decision defense. If section 215(a)(3) protected written complaints but not oral complaints, and a worker files both, the employer could evidently avoid liability if the trier of fact concluded that the employer would have terminated the employee based solely on

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official "had an oral complaint . . . filed by a pro-[union] employee, reduced to writing"); *cf.* 29 C.F.R. § 1626.7(b)(3) (West 2010) (stating "[o]ral charges filed in person or by telephone [with the EEOC], are reduced to writing").

[54] The Seventh Circuit did not address the fact that there are multiple documents reflecting Kasten's complaints that the location of the time clocks was a legal problem for Defendant. It is therefore unclear whether the court intended to hold that an employer may not document the complaint to file it on behalf of the employee.

the unprotected oral complaint, even if the employer admitted that its termination was retaliatory. [55] *See, e.g.*, *Lundervold*, 1997 WL 907915, at *2. If an employee initially filed only a written complaint, the employer could question him about his complaint, and if the employee were foolish enough to respond by voicing a nearly identical oral complaint, the employer might lawfully be able to dismiss him for that answer. Congress could not have intended such an untoward rendition of the statute.

In sum, "[i]nterpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends." *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 67 (2006). If employees are assured protection from retaliation when they "file *any* complaint," be it oral or written, e-mailed or faxed, telegraphed or over the telephone, they are far more likely to attempt to work with their employers to resolve legal violations informally (without filing a formal, documented legal violation) or contact the Department of Labor or EEOC by telephone. An interpretation of "file any complaint" to encompass oral

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[55]In *Maynor*, the court relied on the worker's oral complaint to interpret his earlier vague written complaint. 917 F. Supp. 2d at 925; *see also Wigley*, 2005 WL 3312319, at *1 (worker both telephoned and wrote to Department of Labor).

complaints will therefore effectuate the remedial purposes of the FLSA, secure adequate reporting and enforcement mechanisms for the FLSA and EPA, encourage a productive problem-solving process between employees and employers, and provide protection and redress for the individuals that the Act was designed to protect.

III. IF IT IS UNCLEAR WHETHER THE TERM "FILED" INCLUDES ORAL COMPLAINT FILINGS, THE ADMINISTRATIVE AGENCIES MUST BE AFFORDED *SKIDMORE* DEFERENCE.

Even if the meaning of the phrase "filed any complaint" was not apparent in light of the context of section 215(a)(3), the Department of Labor and EEOC's consistent, reasonable interpretation of section 215(a)(3) is entitled to deference pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). Where the statutory language is ambiguous, deference must be afforded to interpretation of the administrative agency charged with interpreting and enforcing the Act, provided that interpretation is reasonable and is consistently enforced. *Id.*

The panel erred by not affording *Skidmore* deference on the grounds that the Secretary's position "rest[ed] solely on a litigating position." (P. App. 39 (*citing Smiley v. Citibank,* 517 U.S. 735, 741 (1996); *Bowen v.*

Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)).) The dissent disagreed, reasoning that *Skidmore* deference does not disappear solely because the agency's position is asserted in the context of a lawsuit, when that same position is advanced outside of the context of that lawsuit as well:

> In *Auer v. Robbins*, 519 U.S. 452, 462 (1997), the Supreme Court [ruled] that the Secretary's position was worthy of deference even though advanced in litigation, [and] stated "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." The Court contrasted the situation in *Bowen*, in which it rejected the Secretary of Health and Human Service's interpretation advanced in litigation because it was adopted there for the first time and was inconsistent with the Secretary's prior litigation positions.

(P. App. 26.)

In the instant case, the Department of Labor and EEOC have held the same position for decades, bringing FLSA retaliation complaints on behalf of employees who lodge oral complaints at least as far back as 1961. *Id.* There is therefore "no reason to suspect that the Secretary's interpretation 'does not reflect the agency's fair and considered

judgment'." (P. App. 26 (citing *Auer*, 519 U.S. at 462).) Thus, the Department of Labor and EEOC have adopted the correct interpretation of the phrase "filed any complaint" as used in 29 U.S.C. § 215(a)(3), which encompasses protection for oral complaints. At a minimum, their reasoned, consistent judgment should be afforded deference.

CONCLUSION

For the foregoing reasons, the phrase "filed any complaint" in 29 U.S.C. 215(a)(3) encompasses oral complaints. Summary judgment and the decision of the Seventh Circuit Court of Appeals should be reversed, and this case should be remanded to the district court for trial.

Respectfully submitted this 15th day of June, 2010.

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