

**HOW MANY GRUMBLINGS DOES IT TAKE
TO GET TO A PROTECTED COMPLAINT?
THE WORLD MAY NEVER KNOW: A
CRITICAL LOOK AT *KASTEN V. SAINT-
GOBAIN PERFORMANCE PLASTICS CORP.***

“The law of citizen employees has evolved by so many separate roads that it remains without any sure center or model. The result is incomplete coverage, thwarted sharing of experience across jurisdictions and regulatory schemes, and impeded development of coherent and widely shared principles.”¹

I. INTRODUCTION

The Fair Labor Standards Act (FLSA) was enacted in 1938 with the noble intentions of providing overworked and underpaid laborers with a basic level of comfort on the job.² Proper functioning of the FLSA relies primarily on an employee-enforcement scheme. Thus, it is essential that employees feel free to file complaints and protected from retaliation.³ To that end, the FLSA provides an anti-retaliation clause to provide employees with this necessary protection.⁴

The federal circuit courts of appeals have met considerable difficulty in interpreting the Act’s anti-retaliation clause, and prior to the Supreme Court’s decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*, the courts inconsistently interpreted that clause.⁵ Many circuits adopted a pro-employee

1. Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237, 281 (2009).

2. 29 U.S.C.A. § 202 (West 2010).

3. Lauren A. Heischmidt, *Do Verbal Complaints Constitute Protected Activity Under the Fair Labor Standards Act? An Examination of Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th Cir. 2009), 35 S. ILL. U. L.J. 187, 187 (2010).

4. 29 U.S.C.A. § 215(a)(3) (West 2012).

5. 131 S. Ct. 1325 (2011); see generally Randy M. Sutton, *Application of Retaliation Provision of Fair Labor Standards Act (29 U.S.C.A. § 215(a)(3)) to Informal Complaints by Employee to Employer Concerning Wage and Hour Violations*, 49 A.L.R. Fed. 2d 183 (2010).

interpretation and held that informal, oral complaints were protected under the “animating spirit” of the anti-retaliation clause.⁶ Other circuits, however, adopted a more pro-employer interpretation by holding that only written complaints were protected.⁷ Furthermore, courts struggled to decide whether the anti-retaliation clause protected complaints made to an employer, an agency, or both. Some courts treated this as a separate issue on which they could rule broadly or narrowly, and other courts simply ignored it.⁸ As a result, under the old regime, neither employees nor employers knew what conduct would guarantee a judgment in their favor, and thus the FLSA could not function at its optimal level.⁹

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the United States Supreme Court had the opportunity to resolve these inconsistencies. But, as this Note discusses, the Supreme Court resolved only half of the problem and, in doing so, left this area of law vulnerable to future discord. Through a critical review and analysis of *Kasten*, this Note tracks the national impact of one plaintiff–employee’s complaint all the way from a Wisconsin plastics factory, through the Seventh Circuit, to the United States Supreme Court.

Section II of this Note lays out the crucial facts and decisions leading up to *Kasten*. Section III further explores the FLSA and prior circuit splits. Section IV details the Supreme Court’s majority opinion and dissent. Finally, Section V critically analyzes the majority opinion’s deficiencies and predicts the impact that the decision will have on future FLSA litigation.

II. FACTS AND HOLDING

In December 2007, Kevin Kasten filed suit in the United States District Court for the Western District of Wisconsin alleging that his employer, Saint-Gobain Performance Plastics Corporation, violated the anti-retaliation clause of the FLSA¹⁰ by

6. See *infra* Section III.B.

7. Sutton, *supra* note 5, at § 11. See *infra* Section III.B.

8. See generally Sutton, *supra* note 5. See *infra* Section III.B.

9. Jennifer Lynne Redmond, *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, 319 (2000).

10. Title 29, § 215(a)(3) of the United States Code states that it is unlawful “to discharge or in any other manner discriminate against any employee because such

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terminating him a year earlier.¹¹ Kasten claimed that he was entitled to a remedy under the FLSA because his employer discharged him after he (1) *orally* complained to his employer that the location of its time clocks illegally deprived workers of hourly pay for the time spent changing in and out of protective work gear and (2) *orally* threatened to file suit.¹² Saint-Gobain contended that no such complaints were ever made and that Kasten was terminated because he repeatedly violated company policy by improperly clocking in and out of work.¹³ The defendant moved for summary judgment, claiming that even if the plaintiff had complained, oral complaints are not protected under the FLSA's anti-retaliation clause.¹⁴ The district court granted the defendant's motion, stating that although the plain language of the anti-retaliation clause does protect internal complaints made to the employer, it does not protect oral complaints.¹⁵

Kasten appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit agreed with the district court that it was unnecessary to

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." 29 U.S.C. § 215(a)(3) (2006) (emphasis added).

11. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 619 F. Supp. 2d 608, 611 (W.D. Wis. 2008), *aff'd*, 570 F.3d 834 (7th Cir. 2009), *vacated and remanded*, 131 S. Ct. 1325 (2011).

12. The plaintiff claimed that: (1) he orally complained to his supervisor in September or October 2006 that the location of the clocks were illegal; (2) he told the Human Resource Generalist that the defendant would lose if challenged on the legality of the clocks in court; (3) in the end of 2006, he told another supervisor multiple times that the clocks were illegal and mentioned that he was considering filing a lawsuit on the issue; and (4) that during a meeting about his suspension from work, he orally complained about the legality of the clocks and that the defendant would lose if challenged in court. *Kasten*, 619 F. Supp. 2d at 611.

13. The defendant had a record of the following warnings made to the plaintiff: (1) on February 13, 2006, plaintiff received a oral warning; (2) after a second violation of policy, plaintiff received a written warning on August 31, 2006 indicating that another violation within a 12 month period could end in termination; (3) on November 10, 2006, plaintiff received another written warning and a one-day suspension; (4) on December 6, 2006, plaintiff was suspended; and (5) on December 11, 2006, defendant informed him he was terminated, and a December 19th letter confirmed this. Defendant claims that the plaintiff never complained of the clocks' location. *Id.* at 610-12.

14. *Id.* at 611.

15. The district court reasoned that the phrase "*filed* any complaint" indicates a certain degree of formality in that the complaint is written and given to the employer. *Id.* at 610-12.

go beyond the plain meaning of the statute, holding “that the FLSA’s use of the phrase ‘filed any complaint’ requires a plaintiff employee to submit some sort of writing.”¹⁶

Kasten requested both a rehearing and a rehearing *en banc* by the Seventh Circuit; both requests were denied.¹⁷ The United States Supreme Court then granted certiorari.¹⁸ The Court vacated the circuit court’s ruling and held that the FLSA term “filed any complaint” should be broadly interpreted to include both oral and written complaints made by an employee.¹⁹

III. BACKGROUND

A. THE FAIR LABOR STANDARDS ACT

Congress passed the FLSA in 1938 to regulate labor conditions and promote a minimum level of general well-being, health, and efficiency among workers.²⁰ The Act established three main policies: (1) the prohibition of child labor; (2) a guarantee of minimum wage for most workers; and (3) a guarantee of overtime pay.²¹ The Act was remedial in nature and aimed to quickly correct the substandard working conditions that plagued many working Americans.²²

Congress chose to rely heavily on employee reports of violations rather than enact expansive federal oversight.²³ Thus, the Act granted both individual employees and the Secretary of Labor a right of action against an employer.²⁴

16. The Seventh Circuit noted in its opinion that it had never dealt with this specific issue, acknowledged that there was a circuit split, and ultimately chose to follow a middle of the road interpretation. *Kasten*, 570 F.3d at 840.

17. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 585 F.3d 310 (7th Cir. 2009).

18. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 130 S. Ct. 1890 (2010).

19. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011).

20. 29 U.S.C. § 202(a) (2006), *cited in Kasten*, 131 S. Ct at 1333.

21. Madeline Engel, *Defiling the Retaliation Doctrine: Kasten v. Saint-Gobain and the Anti-Retaliation Provision of the Fair Labor Standards Act*, 86 CHI.-KENT L. REV. 351, 353 (2011).

22. 29 U.S.C. § 202(b) (2006).

23. *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 292 (1960), *cited in Kasten*, 131 S. Ct. at 1333 (listing the employee’s fear of retaliation as one of the “weighty practical” reasons that Congress chose to rely on an employee enforcement scheme for the FLSA).

24. 29 U.S.C. § 216 (2006).

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1. THE ANTI-RETALIATION CLAUSE

Due to the FLSA's reliance on employee complaints, an anti-retaliation clause was necessary to protect complaining employees from the retaliatory acts of their employers.²⁵ The FLSA's anti-retaliation clause curtails employer retaliation by making it a violation

... 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.²⁶

In 1977, Congress expanded the FLSA by giving employees a right of action when an employer violates the anti-retaliation clause.²⁷ Prior to this expansion, only the Administrator of the Wage and Hour Division (the top-ranking official of the Wage and Hour Division of the Department of Labor who is charged with enforcing several federal employment statutes, such as FLSA, FMLA) had a right of action; however, after the amendment, employees could independently enforce this provision.²⁸

2. REMEDIES

An employer who violates the FLSA's minimum wage or overtime policies by failing to pay an employee for either is liable to that employee for unpaid wages or overtime, as well as for an equal amount in liquidated damages.²⁹ An employer who violates

25. Redmond, *supra* note 9, at 336-37; Brief for Petitioner at 46-47, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (No. 09-834), 2010 WL 2481867 (stating that the FLSA's anti-retaliation provision is essential to assuring compliance with the substantive requirements of the FLSA, and 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).

26. 29 U.S.C. § 215 (2006).

27. Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151 § 1091 Stat. 1245, 1552 (1977).

28. Brief for Respondent at 24, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (No. 09-834), 2010 WL 3251632; *Major Laws Administered, Enforced*, U.S. Dept. of Labor, <http://www.dol.gov/whd/regs/statutes/summary.htm>; *Wage and Hour Division Organizational Chart*, U.S. Dept. of Labor, <http://www.dol.gov/whd/about/org/whdchart.htm>.

29. 29 U.S.C. § 216(a) (2006).

the anti-retaliation clause will be liable for “legal or equitable relief as may be appropriate to effectuate the purposes of” the anti-retaliation provision.³⁰ The Act lists several possible remedies for a violation of the anti-retaliation clause, including reinstatement, payment of lost wages and liquidated damages, or promotion.³¹ The remedy granted is highly dependent on the facts of the case.³² And repeated violations could result in fines of up to \$10,000, or even imprisonment.³³

B. INTERPRETING THE ANTI-RETALIATION CLAUSE

Without a consistent and balanced interpretation of the anti-retaliation clause, the FLSA will not function as intended.³⁴ The application of the anti-retaliation clause must be clear and firm so that employees reporting a violation will know they are protected.³⁵ For many employees, filing a complaint about working conditions would not be a risk worth taking if it meant their employment might be terminated indefinitely.³⁶ Conversely, if the anti-retaliation clause is applied too broadly, employers will be left to decide which statements are protected complaints and which statements are merely angry grumblings, potentially leading to an extremely litigious and hostile work environment.³⁷

This subsection explores how courts struggled to find the proper balance between the extremes. The anti-retaliation clause states, in pertinent part, that it is unlawful “to discharge or in any other manner discriminate against any employee because such employee has *filed any complaint*.”³⁸ Although the language

30. 29 U.S.C. § 216(a) (2006).

31. *Id.*

32. *Id.*

33. *Id.*

34. Redmond, *supra* note 9, at 336-37.

35. *Id.*

36. Mitchell v. Robert DeMario Jewelry, 361 U.S. 288, 292-93 (1960), *cited in* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1333 (2011) (stating that an underlying fear of discharge interferes with the entire purpose of the FLSA).

37. Valerio v. Putnam Assoc., 173 F.3d 35, 44 (1st Cir. 1999) (stating in dicta that “affording protection to employees who lodge purely intracorporate complaints ‘unhelpfully leaves employers in the dark’ as to what types of assertions will rise to the level of protected activity by their employees.”) *See also* Clean Harbors Environ. Serv., v. Herman, 146, F.3d 12, 21 (1st Cir. 1998).

38. 29 U.S.C. § 215(a)(3) (2006).

appears straightforward, a circuit split arose with the courts reaching at least six different interpretations of the same language.³⁹ Some courts relied on the plain language of the statute, which led to a narrow application of the provision, while other courts looked beyond the plain language to the spirit of the law to reach a broad application.⁴⁰ Among the circuits that adopted a broad interpretation, varying levels of acceptance emerged. Some circuits accepted nearly any complaint—oral or written, formally made to a government agency or informally made to the employer.⁴¹ Other circuits accepted most complaints, but drew a blurry line between “complaints” and “informal grumblings.”⁴² Yet another circuit held that internal complaints were protected if in writing.⁴³ Finally, some circuits protected oral or written complaints as long as they were filed with the proper agency, not merely with the employer.⁴⁴ These varying interpretations are discussed below.

1. BROAD INTERPRETATION

The Third, Sixth, Eighth, and Eleventh Circuits ruled the most broadly on this issue. In *EEOC v. Romeo County Schools*, the Sixth Circuit held that an internal, oral complaint to the employer satisfied the anti-retaliation clause because it is not the *filing* of the complaint that triggers the anti-retaliation clause, but rather the *assertion* of statutory rights.⁴⁵ Therefore, because it is the assertion of rights that is protected, not the complaint itself, an assertion of rights need not be in writing or formally made to an agency.⁴⁶ The Eleventh Circuit agreed with the Sixth

39. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330 (2011). See also, Sutton, *supra* note 5.

40. Sutton, *supra*, note 5, at § 4.

41. See *EEOC v. Romeo Cnty. Sch.*, 976 F.2d 985, 989 (6th Cir. 1992).

42. See *Valerio*, 173 F.3d at 44; *Lambert v. Ackerley*, 180 F.3d 997, 1007 (9th Cir. 1999), cited in *Kasten*, 131 S. Ct. at 1330. In *Lambert*, the Ninth Circuit originally held that § 215(a)(3) did not protect informal, oral complaints to supervisors. *Lambert v. Ackerley*, 156 F.3d 1018, 1022 (9th Cir. 1998). However, the Ninth Circuit granted a rehearing en banc and reversed this decision. *Lambert*, 180 F.3d 997.

43. See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 834 (7th Cir. 2009). See also Sutton, *supra* note 5, § 5.

44. Sutton, *supra* note 5, § 4.

45. *EEOC v. Romeo Cnty. Sch.*, 976 F.2d at 989 (holding that the defendant violated § 215(a)(3) when it terminated an employee for orally complaining that the defendant was “breaking some sort of law” by paying her lower wages than male counterparts) (emphasis added).

46. *Id.*

Circuit in *EEOC v. White & Sons Enterprises*.⁴⁷

The Third and Eighth Circuits went so far as to rule that the anti-retaliation clause is triggered even when the employer retaliated based on a mistaken belief that the employee filed a complaint.⁴⁸ In both *Brock v. Richardson* and *Saffels v. Rice*, the employees never asserted any kind of statutory right, nor did they file any sort of complaint, but they were fired because their superiors *thought* they had complained.⁴⁹ Both circuits found that the employers violated the anti-retaliation clause, reasoning that in interpreting the anti-retaliation clause, courts must consider its “animating spirit in applying it to activities that might not have been explicitly covered by the language.”⁵⁰ Thus, when considering the background and objective of the anti-retaliation clause—which is to create an atmosphere where employees do not fear making complaints—the courts determined that it was appropriate to sanction the defendants’ behaviors.⁵¹

2. MODERATE INTERPRETATION

The First and Ninth Circuits agreed with the majority of circuits, holding that informal complaints to an employer *may* be protected.⁵² However, they qualified this by holding that mere “grumblings” made by disgruntled employees cannot be protected under the anti-retaliation clause.⁵³ These circuits reasoned that to allow such protection would leave employers vulnerable and confused about whether employees are blowing off steam or threatening to file a complaint.⁵⁴ These courts preferred to take

47. *EEOC v. White & Sons Enter.*, 881 F.2d 1006, 1011 (11th Cir. 1989), *cited in* *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (holding that the employees’ oral complaints to the owner were protected by the FLSA). After a group of female employees asked to speak to the company’s owners about receiving the same raise that their male counterparts had received, the owner told them there would be no raise and that they could “take it or leave it.” *Id.* He then instructed his secretary to draw up the employee’s final checks, which they took and left with. *Id.*

48. *Brock v. Richardson*, 812 F.2d 121,126 (3d Cir. 1987); *Saffels v. Rice*, 40 F.3d 1546, 1549 (8th Cir. 1994).

49. *Id.*

50. *Brock*, 812 F.2d at 124.

51. *Id.*

52. *Valerio*, 173 F.3d at 41; *Lambert*, 180 F.3d at 1003.

53. *Valerio*, 173 F.3d at 44 (holding that the employee’s oral complaint was protected, but that not “all amorphous complaints” are protected); the Ninth Circuit ruled that an employee’s written complaint to her employers was protected. *Lambert*, 180 F.3d at 1007.

54. *Valerio*, 173 F.3d at 44.

the complaints on a case-by-case basis so that they could review the facts of each complaint and rule accordingly.⁵⁵

Similarly, the Fifth and Tenth Circuits generally agree that informal complaints to an employer were sufficient to trigger the anti-retaliation clause.⁵⁶ However, they slightly expanded upon what is necessary to be protected, noting that an

... employee must step outside of his or her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA.⁵⁷

When the Seventh Circuit heard *Kasten v. Saint-Gobain Performance Plastics Corp.*, the court ruled moderately, but for different reasons than the other circuits.⁵⁸ The court considered the phrase “filed any complaint” in two parts—“filed” and “any complaint.”⁵⁹ It held that “any complaint” is written broadly, and the plain meaning allows protection for both internal complaints to the employer and formal complaints to the government.⁶⁰ However, the Seventh Circuit found that the word “filed” connotes a more formal action and, thus, restricts the anti-retaliation clause’s protection to written complaints.⁶¹

3. STRICT INTERPRETATION

The Second Circuit departed from the majority of courts by interpreting the anti-retaliation clause according to only its plain language.⁶² The Second Circuit based its interpretation on a

55. *Valerio v. Putnam Assoc.*, 173 F.3d 35, 45 (1st Cir. 1999).

56. *Conner v. Schnuck Mkts.*, 121 F.3d 1390, 1394 (10th Cir. 1997); *Love v. RE/MAX of Am.*, 738 F.2d 383, 387 (10th Cir. 1984); *Hagan v. EchoStar Satellite*, 529 F.3d 617, 626 (5th Cir. 2008), *cited in Kasten*, 131 S. Ct. at 1330.

57. In the Tenth Circuit case, the plaintiff was a personnel director who informed her superiors that they were in danger of having FLSA violations filed against them. *McKenzie v. Renberg’s*, 94 F.3d 1478, 1486-87 (10th Cir. 1996). *See also Hagan*, 529 F.3d at 626.

58. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 840 (7th Cir. 2009) (holding that the plaintiff’s complaint was unprotected because it was not formally filed in writing rather than because it was informally made to a supervisor).

59. *Id.* at 838.

60. *Id.*

61. *Id.* at 838-39.

62. *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) (holding that only

comparison between the FLSA's anti-retaliation clause and Title VII's anti-retaliation clause.⁶³ The Second Circuit distinguished the two clauses by showing that Title VII's provision protects employees who have "opposed any practice," whereas the FLSA's anti-retaliation clause protects only those employees who have "filed any complaint."⁶⁴ For the Second Circuit this distinction sufficiently proved that Congress intended the anti-retaliation clause to protect only formal complaints and thus made it unnecessary to go beyond the plain language.⁶⁵

The Fourth Circuit also ruled narrowly on this issue. In *Ball v. Memphis Bar-B-Q Co.*, the court that due to the plain language of the statute, they "would not be faithful to the language of the testimony clause of the FLSA's anti-retaliation provision if [they] were to expand its applicability to intra-company complaints."⁶⁶ At the district level, in *O'Neill v. Allendale Mutual Insurance*, a court held that the anti-retaliation clause "could scarcely be clearer" in enumerating three specific situations that are protected, none of which cover informal complaints to a supervisor.⁶⁷ In *Clevinger v. Motel Sleepers, Inc.*, another district court acknowledged that there are good policy reasons to adopt a broad interpretation but eventually adopted a narrow interpretation using the Second Circuit's comparison to the Title VII provision.⁶⁸

In several decisions coming from the Eighth Circuit, the court curiously adopted the same view as the Second and Fourth Circuits, holding that, in general, only the three specific activities

formal, written complaints are protected by the FLSA).

63. *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993).

64. *Id.*

65. *Id.* (citing *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) as authority for restricting the interpretation to the plain language when the intent of Congress is already clear).

66. *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000).

67. *O'Neill v. Allendale Mut. Ins.*, 956 F. Supp. 661, 663-64 (E.D. Va. 1997). The court pointed out that § 215 is only triggered when an employee has (1) "filed any complaint or instituted or caused to be instituted any proceedings" under the FLSA; (2) "testified or is about to testify in any [FLSA] proceeding"; or (3) "served or is about to serve on an industry committee." *Id.* Thus, the court denied the claims of an employee who claimed that he repeatedly complained to his employer (similarly to the plaintiff in the *Kasten*).

68. *Clevinger v. Motel Sleepers*, 36 F. Supp. 2d 322, 324 (W.D. Va. 1999). The opinion referred to Congress' decision not to use broad language in the statute as their reason for ruling narrowly on this issue. *Id.*

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enumerated in the anti-retaliation clause are protected.⁶⁹ This is a noteworthy divergence from the Eighth Circuit's broad interpretations in cases like *Saffels v. Rice*.⁷⁰

IV. THE SUPREME COURT'S DECISION

This Section breaks down the Supreme Court's opinion, which is a relatively short and uncomplicated opinion composed of a majority opinion and one dissent. *Kasten* was decided by a 6–2 margin in favor of protecting oral complaints under the FLSA.⁷¹ This following first highlights the main points of the majority opinion, authored by Justice Breyer, and then moves to the strongly worded and well-reasoned dissent, written by Justice Scalia.⁷²

A. THE MAJORITY OPINION

The majority began by identifying the issue as whether the term “filed any complaint” includes both oral and written complaints.⁷³ Further in the opinion, the Court declined to consider another issue raised by the defendant concerning whether the anti-retaliation clause protects informal, internal complaints to the employer, due to the fact that defendant did not raise the issue in its petition for certiorari.⁷⁴

To resolve the issue in this case, the Court first dissected the text of the statute.⁷⁵ It determined that both dictionary and accepted legal definitions of the word “file” do not necessarily

69. *Grey v. Oak Grove, Mo.*, 396 F.3d 1031, 1034 (8th Cir. 2005); *Bartis v. John Bommarito Oldsmobile-Cadillac, Inc.*, 626 F. Supp. 2d 994, 999 (E.D. Mo. 2009) (distinguishing *Bartis* as a case only involving an informal complaint from another Eighth Circuit case, *Brennan*, in which an oral assertion of rights was protected because it was part of an ongoing Labor Department proceeding, thus falling under one of the three enumerated protected activities in § 215(a)(3)).

70. *See supra* Section III.B.1; *see also Bartis*, 626 F. Supp. 2d at 999 (seeming to indicate that the decision in *Saffels* was merely an exception that was made for plaintiffs in an extreme situation).

71. Justice Kagan did not participate in the decision. *Kasten*, 131 S. Ct. at 1328.

72. Justice Thomas joined in all of the dissent except for footnote number 6, which has very little to do with *Kasten*, and instead expressed Justice Scalia's frustration with a doctrine raised by the plaintiff known as *Skidmore* deference. *Kasten*, 131 S. Ct. at 1336, 1340 n.6.

73. *Kasten*, 131 S. Ct. at 1330.

74. *Id.* at 1335.

75. *Id.* at 1331.

exclude oral complaints.⁷⁶ The Court then noted that when “file” is joined with “any” in “filed any complaint,” the meaning becomes even less clear, making it impossible to tell Congress’s intention from the text alone.⁷⁷

Because the text alone could not resolve the issue, the Court analyzed the phrase in a functional setting.⁷⁸ It relied on a 1944 Supreme Court decision that said the provisions of the

... Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.⁷⁹

Therefore, the Court reasoned that it would seem odd to interpret Congress’s intentions to limit the anti-retaliation clause to written complaints, especially considering the fact that, at the time of the FLSA’s passage in 1938, many of the employees were illiterate and, thus, incapable of filing written complaints.⁸⁰ Furthermore, even if the modern workforce is more educated, the Court indicated that a narrow interpretation would impede modern enforcement methods, such as complaint hotlines.⁸¹

Next, the Court compared the anti-retaliation clause to the

76. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011) (noting that “[o]ne can, for example, file an oral statement that enters a matter into ‘the order of business.’” 1 Funk & Wagnalls, *New Standard Dictionary of the English Language* 920 (rev. ed. 1938) (def. 2) (to file is to ‘present in the regular way, as to a judicial or legislative body, so that it shall go upon the records or into the order of business’)). *Id.* The Court also pointed out that many state statutes describe “oral filings.” *Id.*

77. *Kasten*, 131 S. Ct. at 1332.

78. *Id.*

79. *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944), *cited in Kasten*, 131 S. Ct. at 1335 (stating that declaratory action to determine whether travel to and from mines was labor that mine workers were to be compensated for under FLSA provisions and holding that they were to be paid for this work, reasoning that the language of the FLSA should be construed broadly rather than in a narrow, grudging manner).

80. *Kasten*, 131 S. Ct. at 1334-35. The Court discussed illiteracy statistics noting that 20.8% of laborers in 1940 has less than five years of education, and points out that the FLSA was enacted to help these specific people. *Id.*

81. *Id.*

National Labor Relations Act's anti-retaliation provision, noting that it had previously interpreted the latter broadly to protect behaviors that were not expressly listed in the text of the provision.⁸² Given the fact that the two acts have similar goals, the Court found it logical to construe the FLSA broadly as well.⁸³ The Court also gave weight to the views of the Secretary of Labor and the EEOC, both of whom have consistently interpreted "filed any complaint" to include oral complaints.⁸⁴

Next, in response to the defendant's argument that allowing oral complaints deprives employers of an acceptable level of certainty about whether an employee is *filing a complaint* or simply *complaining*, the Court created a standard against which the sufficiency of an employee's complaint can be measured.⁸⁵ The Court provided that "to fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an *assertion of rights* protected by the statute and a call for their protection."⁸⁶ This standard, the Court said, does not automatically exclude oral complaints.⁸⁷ Based on the aforementioned sources and the newly created standard, the Court vacated the Seventh Circuit's holding that oral complaints are not protected by the FLSA's anti-retaliation clause and remanded the case to determine whether Kasten's complaints sufficiently met the newly created standard.⁸⁸

82. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1334 (2011) (specifically stating that "[g]iven the need for effective enforcement of the National Labor Relations Act (NLRA), this Court has broadly interpreted the language of the NLRA's anti-retaliation provision—'filed charges or given testimony,' 29 U.S.C. § 158(a)(4)—as protecting workers who *neither* filed charges *nor* were 'called *formally* to testify' but simply 'participate[d] in a [National Labor Relations] Board investigation.'). See also *NLRB v. Scrivener*, 405 U.S. 117, *cited in Kasten*, 131 S. Ct. at 1335.

83. *Kasten*, 131 S. Ct. at 1334.

84. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), *cited in Kasten*, 131 S. Ct. at 1336. The *Kasten* Court points out that these agencies are experts on the topic, thus giving them weight is proper under the *Skidmore* decision. *Kasten*, 131 S. Ct. at 1336; see also *Babbitt v. Sweet Home Chapter, Cmities. for Great Ore.*, 515 U.S. 687, 703-04 (1995), *cited in Kasten*, 131 S. Ct. at 1337 (stating that the views of these agencies are reasonable and consistent with the Act, and thus, it is proper to defer to them when trying to decipher an ambiguous provision).

85. *Kasten*, 131 S. Ct. at 1336.

86. *Id.* (emphasis added).

87. *Id.*

88. *Id.* at 1339.

B. THE DISSENT

The dissent began by identifying the defendant's two-pronged argument, which stated that to be protected, complaints must be (1) written and (2) made to judicial or administrative bodies.⁸⁹ The dissent focused on its disapproval of the majority's decision to reject consideration of the second issue because it was not included in the petition for certiorari.⁹⁰ Thus, the dissent explored a question that the majority declined to address—whether internal workplace complaints, either oral or written, are protected by the FLSA.⁹¹ The dissent decided that internal workplace complaints are not protected.⁹² To support its position, the dissent explored the plain meaning of the term “filed any complaint” and the context in which the term appears.⁹³

The dissent pointed to four contextual reasons that the anti-retaliation clause should be construed narrowly. First, the word “complaint” must not be taken in isolation, but rather in its legal context, which connotes a more formal charge against a party rather than a mere expression of dissatisfaction.⁹⁴ Thus, the dissent reasoned that the coupling of the words “file” and “complaint” signifies a formal process.⁹⁵ Second, the dissent noted that common legal expressions should be interpreted in their familiar sense, and in the legal profession, the word “file” clearly means to file a document or claim to the appropriate agency.⁹⁶ Third, the dissent pointed out that in the rest of the FLSA, the word complaint is used in this specialized context, thus it should be applied within the same context in all provisions of

89. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1341 (2011). Justice Scalia authored the dissent, and Justice Thomas joined.

90. *Kasten*, 131 S. Ct. at 1340-41. The Court *may* consider the issue waived; however if dealing with the issue is “predicate to an intelligent resolution of the question presented,” the Court may resolve the issue as well. *Id.* at 1341. In this case, the dissent found that the internal complaint issue is so intertwined in the oral and written issue that it should be determined as well. *Id.* Furthermore, it notes that it is unnecessary to even resolve the oral and written issue if it is determined that internal complaints to the employer are not protected. *Id.*

91. *Id.* at 1337.

92. *Id.*

93. *Kasten*, 131 S. Ct. at 1341.

94. *Id.* (noting that the word “complaint” in every other part of the Act refers an official filing with the government).

95. *Id.* at 1337-38.

96. *Henry v. U.S.*, 251 U.S. 393, 395 (1920), *cited in Kasten*, 131 S. Ct. at 1338.

the Act.⁹⁷ Fourth, the dissent noted that items in a list generally share common attributes.⁹⁸ Therefore, because “filed any complaint” is found in a list of two other protected activities, both of which involve formal action, it should be interpreted as sharing that attribute and requiring a formal complaint.⁹⁹

The dissent also compared the FLSA to the Mine Health and Safety Act (MHSA).¹⁰⁰ The MHSA “did not use ‘filed’ alone, but supplemented that with ‘or made’—and to boot specified ‘including a complaint notifying the [mine] operator . . . of an alleged danger or safety or health violation’”¹⁰¹ The dissent maintained that the anti-retaliation clause in the MHSA includes more detail in its wording, clearly expressing that internal complaints to the employer are protected.¹⁰² Therefore, the fact that Congress chose to say “file” rather than “made” when drafting the anti-retaliation clause indicates that it intended to restrict protection to formal complaints.¹⁰³

Finally, the dissent contended that the majority erred in deferring to the Department of Labor and the EEOC because deference is only appropriate when Congress has given the agency the authority to make rules carrying the force of law, and the Secretary of Labor has no such authority in regards to the anti-retaliation provision.¹⁰⁴ Therefore, based on the sources discussed above, the dissent would have affirmed the Seventh Circuit’s decision that the plaintiff’s complaints were not protected because they were not formally made to the

97. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005), *cited in Kasten*, 131 S. Ct. at 1338 (holding that identical words used in different parts of a statute are presumed to have the same meaning absent a contrary indication).

98. *Kasten*, 131 S. Ct. at 1338; *Beecham v. U.S.*, 511 U.S. 368, 371 (1994), *cited in Kasten*, 131 S. Ct. at 1338.

99. *Kasten*, 131 S. Ct. at 1338; *See also O’Neill v. Allendale Mut. Ins.*, 956 F. Supp. 661, 663-64 (E.D. Va. 1997) (holding that the anti-retaliation clause clearly enumerates three specific situation in which protection is granted: (1) where the employee “filed any complaint or instituted or caused to be instituted any proceedings”; or (2) “testified or is about to testify in any [FLSA] proceeding”; or (3) “served or is about to serve on an industry committee”).

100. *Kasten*, 131 S. Ct. at 1338.

101. *Id.* (citing 30 U.S.C.A. § 815(c)(1) (West 2011)).

102. *Kasten*, 131 S. Ct. at 1338.

103. *Id.*

104. *Id.* at 1339 (reasoning that these agencies have the authority to issue regulations concerning the FLSA, but do not have the authority to interpret the provisions of the Act).

government.¹⁰⁵

V. ANALYSIS

The Supreme Court's decision allows two major conclusions: (1) oral complaints that put the employer on notice of the employee's assertion of statutory rights are protected by FLSA's anti-retaliation clause; and (2) informal complaints to the employer may or may not be covered, depending on the jurisdiction, because the Supreme Court did not rule on that issue. In light of the opinions that construed the anti-retaliation clause prior to the Supreme Court's decision in *Kasten*, it is no surprise that the Court ruled in favor of broadly interpreting the provision to include oral complaints.¹⁰⁶ Even though some circuits strictly construed the provision to protect employers, the vast majority favor a broader interpretation.¹⁰⁷ It is surprising, however, that the Supreme Court left the question regarding the sufficiency of informal complaints to an employer unanswered.

This Section first argues that the Court erred in its decision by ruling too broadly on the oral complaint issue. A more critical look at the phrase "filed any complaint" that exhausts all available interpretative canons shows that it was unnecessary to move beyond the text of the statute. Next, because the issue of whether or not informal complaints are protected under the FLSA is part and parcel of the oral complaint issue, this Section argues that the majority's refusal to resolve this issue was an error. Finally, this Section suggests an answer to the unresolved issue and explores the many complications that may follow.

A. A NARROW INTERPRETATION OF THE ANTI-RETALIATION CLAUSE

The main difference between the broad interpretation espoused by the majority and the strict interpretation espoused by the dissent rests in the method of statutory interpretation.¹⁰⁸

105. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1337 (2011).

106. *Kasten*, 131 S. Ct. at 1329.

107. *Brock v. Richardson*, 812 F.2d 121,126 (3d Cir. 1987); *Saffels v. Rice*, 40 F.3d 1546, 1549 (8th Cir. 1994); *EEOC v. White & Sons Enter.*, 881 F.2d 1006, 1011 (11th Cir. 1989), *cited in Kasten*, 131 S. Ct. 1325; *EEOC v. Romeo Cnty. Sch.*, 976 F.2d 985, 989 (1992).

108. *See generally* Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535 (2001).

Those favoring a strict interpretation employ a textualist approach and find no reason to move beyond the plain meaning of the statute.¹⁰⁹ Conversely, proponents of broad interpretation find the plain meaning ambiguous and look to other agencies, such as the spirit of the law, to reach their conclusions.¹¹⁰ The dissent in *Kasten* presented a strong case for the textualists, and this Note suggests that it was correct in its interpretation.¹¹¹

Proponents of both sides of this debate begin at the same place: “statutory interpretation begins with ‘the language of the statute itself [and] [a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.’”¹¹² They disagree, however, on where the analysis can stop.¹¹³ The majority opinion in *Kasten* found that the analysis could not stop at the statutory text and painstakingly listed numerous known definitions of the words at issue in an attempt to illustrate the anti-retaliation clause’s ambiguity. In contrast, the dissent pointedly indicated that the majority overlooked several useful interpretative tools and that the use of such tools negates the need to look outside of the statute.¹¹⁴

The first overlooked interpretative tool states that specialized terms should be interpreted using their specialized meaning.¹¹⁵ One proponent of broad interpretation pointed out

109. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1339 (2011); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 838 (7th Cir. 2009).

110. *Kasten*, 131 S. Ct. at 1327.

111. *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 617 (1944) (“To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another . . . it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.”); *see also* Brief for Respondent at 43, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (No. 09-834), 2010 WL 3251632.

112. *Sapperstein v. Hager*, 188 F.3d 852, 857 (7th Cir. 1999), *cited in Kasten*, 570 F.3d at 837-38.

113. *Kasten*, 131 S. Ct. at 1339 (Scalia, J., dissenting) (“The meaning of the phrase ‘filed any complaint’ is clear in light of its context, and there is accordingly no need to rely on abstractions of congressional purpose.”).

114. *Kasten*, 131 S. Ct. at 1337, 1331.

115. *Sullivan v. Strop*, 496 U.S. 478, 483 (1990), *cited in Kasten*, 131 S. Ct. at 1337 (Scalia, J., dissenting) (“Where a phrase in a statute appears to have become a term of art . . . any attempt to break down the term into its constituent words is not apt to illuminate its meaning.”).

that “complaint” has six meanings, and the textualists arbitrarily rest their argument on one specific definition.¹¹⁶ However, the dissent properly pointed out that the word “complaint” has a specialized, legal meaning.¹¹⁷ It is true that, in its common sense, the word “complaint” has multiple meanings, all of which generally mean “an expression of discontent.”¹¹⁸ Nonetheless, most people would recognize that this word has a specific meaning in the legal context.¹¹⁹ When an individual would like to assert his legal rights, he does not vindicate himself by “expressing dissatisfaction” to a judge over dinner; rather, he formally makes his complaint known to the proper authority through the proper procedure. Additionally, it is the majority that reminds us that interpretation of a statutory phrase entails a “reading of the whole statutory text, considering the purpose and context of the statutes.”¹²⁰ Looking at the legal context of the statute as a whole, it is clear that “complaint” has a specialized legal meaning. Because the legal field generally recognizes the word “complaint” as a formal grievance, that meaning should apply when interpreting the statute.¹²¹

Furthermore, when one considers the phrase “file any complaint” in its entirety, it takes on a well-recognized legal meaning to which the latter method of interpretation can apply.¹²² The dissent uses this interpretive tool to conclude that the well-recognized meaning of “filing a complaint” clearly means filing a complaint with a court or an agency, not an employer.¹²³ This interpretive tool, however, can be taken a step further to aid in determining whether a writing is needed. As other courts noted, the act of “filing a complaint” generally connotes a level of

116. Heischmidt, *supra* note 3, at 197.

117. *Kasten*, 131 S. Ct. at 1337.

118. Heischmidt, *supra* note 3, at 197.

119. See generally *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 837-38 (7th Cir. 2009); *Kasten*, 131 S. Ct. at 1338. In the dissent, Justice Scalia writes: “It is one thing to expand the meaning of ‘complaint’ in § 215(a)(3) to include complaints filed with an agency instead of a court; it is quite something else to wrench it from the legal context entirely, to include an employee’s objection to an employer.” *Id.* at 1337 (Scalia, J., dissenting).

120. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006), cited in *Kasten*, 131 S. Ct. at 1331; Heischmidt, *supra* note 3, at 197.

121. *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990); see also *Henry v. United States*, 251 U.S. 393, 395 (1920).

122. *Kasten*, 131 S. Ct. at 1338.

123. *Id.*

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formality, such as a writing.¹²⁴ When employees set out to file a complaint, they generally do so in writing, not by orally complaining to the proper authority. Therefore, by using the phrase “filed a complaint,” Congress may have intended to require not only a filing with an agency as the dissent concluded, but also the filing of a writing.

The statutes that the majority opinion lists in its discussion further emphasize the general understanding of this phrase.¹²⁵ Many of these statutes refer to the filing of complaint—both in writing and orally.¹²⁶ The majority relied on this to show that the text is ambiguous; however, these same statutes should be relied upon to show that the common understanding of the phrase “file a complaint” is so well known to mean a formal proceeding that the legislators who drafted the enumerated statutes needed to expressly list oral complaints as protected in order to overcome this general understanding. Proponents of a broad interpretation point out that “the language of the statute does not indicate whether Congress intended to exclude informal complaints.”¹²⁷ Yet it is equally important to note that Congress did not indicate whether it intended to *include* verbal complaints. By not expressly including verbal complaints in the statute, Congress allows the conclusion that they did not intend to protect informal, oral complaints. Thus, the meaning of “file any complaint” does not appear to be ambiguous, and the majority opinion unnecessarily moved beyond the plain meaning of the statute.

B. THE UNANSWERED QUESTION

The Seventh Circuit addressed two questions: (1) whether oral complaints are protected; and (2) whether internal

124. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 619 F. Supp. 2d 608, 611 (W.D. Wis. 2008).

125. *Kasten*, 131 S. Ct. at 1332-33.

126. The Court provides the following examples: in a whistleblower’s subsection, the language says “provided . . . to the employer . . . information” (15 U.S.C.A. § 2087(a)(1) (West 2008), *cited in Kasten*, 131 S. Ct. at 1333); in the Equal Employment subchapter of Civil Rights section of the U.S.C.: “opposed any practice” (42 U.S.C. § 2000(e-3) (West), *cited in Kasten*, 131 S. Ct. at 1333); in an aviation subsection, the anti-retaliation provision says: “notified employer” (49 U.S.C. § 42121(a)(1) (West 2000), *cited in Kasten*, 131 S. Ct. at 1333); in the Mine Health and Safety Act: “filed or made a complaint” 30 U.S.C. § 815(c)(1) (West), *cited in Kasten*, 131 S. Ct. at 1333.

127. *Redmond*, *supra* note 9, at 333.

complaints are protected.¹²⁸ It held that complaints to the employer are protected under the FLSA.¹²⁹ When this case reached the Supreme Court, the majority left the second question unanswered. The majority's decision to overlook the internal complaint issue leaves a widely debated issue unanswered and keeps employers uncertain as to whether some complaints are protected.

The majority maintained that it is not general practice to consider issues that are left out of the petition for certiorari.¹³⁰ However, as the dissent noted, the rule that it cites is permissive, and the Court often considers these types of issues.¹³¹ Furthermore, rules of the Supreme Court state that "the statement of any question presented is deemed to comprise every subsidiary question fairly included therein."¹³² Additionally, the Court may consider questions that are "predicate to an intelligent resolution" of the issue to which the Court granted certiorari.¹³³ Finally, the Court's general practice is to allow the review of issues that were reviewed in the lower courts even if the issue is not explicitly raised in certiorari.¹³⁴ For example, one of the issues in *Caterpillar, Inc. v. Lewis*, which the majority cites as authority for its refusal to analyze this issue, was decided even though the issue was left out of the petition for certiorari.¹³⁵ The Court in *Caterpillar* ruled that, even though the respondent's brief in opposition of the petition for certiorari did not address the one-year limitation on removal, it would consider the issue because it was "predicate to an intelligible resolution" of the diversity issue.¹³⁶

128. Heischmidt, *supra* note 3, at 187.

129. *Kasten*, 619 F. Supp. 2d at 613 ("[T]he FLSA's anti-retaliation provision protects more informal complaints, including those made to employers, so long as they are in writing and are filed.").

130. *Kasten*, 131 S. Ct. at 1337.

131. *Id.* at 1340 ("Any objection to consideration of a question presented based on what occurred in the proceedings below . . . may be deemed waived unless called to the Court's attention in the brief in opposition.").

132. SUP. CT. R. 14.

133. *Ohio v. Robinette*, 519 U.S. 33, 38 (1996), *cited in Kasten*, 131 S. Ct. 1325 at 1340.

134. *LeBron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (holding that the Court's practice "permit[s] review of an issue not pressed so long as it has been passed upon").

135. *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 (1996).

136. *Id.*

The Court granted certiorari to answer the following question: “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)?”¹³⁷ This issue begs a related question: “To whom must the oral complaint be made?” Therefore, deciding whether the complaint must be made to the employer or an agency, or even both, is necessary for an “intelligent resolution” of the issue.¹³⁸ Additionally, the parties briefed this issue and it was decided in the lower courts.¹³⁹ Thus the Court could have, and should have, considered it.

C. A RESPONSE TO THE UNANSWERED QUESTION

The answer to this remaining question seems simple—if the verbal complaint issue was interpreted broadly, then the internal complaint issue should also be interpreted broadly so as to protect internal complaints. However, the answer may not come so easily. When resolving this question, proponents of broad interpretation contend that when two different terms are used in situations where they did not need to differ, those terms are intended to have different, particular meanings.¹⁴⁰ Using this interpretive tool, they maintain that narrowly interpreting “file any complaint” to mean filing a formal complaint with an agency would render the second term of the anti-retaliation clause—“instituted or caused to be instituted any proceeding”—useless and identical in meaning. Consequently, the phrase “file any complaint” must be construed broadly.¹⁴¹

This interpretation goes too far. Filing any complaint does not necessarily mean a person is filing a *claim* that would commence a *proceeding*.¹⁴² A complaint about unfair practices at work does not necessarily become a proceeding, as it may be determined that the complaint is not a matter worth pursuing.

137. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1341 (2011).

138. *Id.* (“Surely the word ‘complaint’ in this question must be assigned an implied addressee. It presumably does not include a complaint to Judge Judy. And the only plausible addressee, given the facts of this case, is the employer.”).

139. Brief for Respondent at 15, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (No. 09-834), 2010 WL 3251632; Reply Brief for Petitioner at 13, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (No. 09-834), 2010 WL 3251632.

140. Redmond, *supra* note 9, at 319.

141. *Id.*; *Valerio v. Putnam Assoc. Inc.*, 173 F.3d 35, 44 (1st Cir. 1999).

142. *Kasten*, 131 S. Ct. at 1338 n.3.

Ruling this strictly would allow employers to fire any employee who complained but did not become involved in a lawsuit, which is in direct contravention with the spirit of the anti-retaliation clause.

Proponents of strict construction do not endorse this reading, but rather recognize that “any complaint” may still be interpreted broadly to include mere complaints. The crux of the strict construction argument rests on the assertion that, when paired with “filed,” the phrase is given a more formal connotation. So, it need not go as far as meaning a formal legal proceeding, but it may imply that a writing, or at least a more formal oral complaint, is necessary to trigger the anti-retaliation clause. This interpretation is bolstered by the fact that until 1977, there was no private action for anti-retaliation suits; rather, all complaints were made to the Department of Labor.¹⁴³ Thus, the anti-retaliation clause was not originally meant to cover internal complaints from the employee to the employer, so it seems an anomaly to protect these complaints now.¹⁴⁴

D. *KASTEN*'S EFFECT ON PUBLIC POLICY

The public policy ramifications of this decision are significant. As far as oral complaints are concerned, the Supreme Court's decision is a triumph for employees as it expands their rights under the FLSA to an unprecedented level. On the other hand, the decision leaves employers in a murky situation. Employers must be increasingly wary of their employees' oral complaints because those complaints may constitute sufficient grounds for an anti-retaliation suit.¹⁴⁵ Take, for example, an employee who continually complains about his working conditions, but takes no action. Neither the employer nor the employee knew that the conditions were unlawful. The employer may decide to terminate the employee simply because he brings

143. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1338 (2011).

144. *Id.*; Brief for Respondent at 24, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (No. 09-834), 2010 WL 3251632 (“In light of § 215(a)(3)'s information-sharing purpose, it makes perfect sense for Congress to have limited protection to complaints to governmental authorities—complaints communicated only to employers do not enhance the government's knowledge of employers' compliance with the law or aid the government's enforcement efforts. Indeed, encouraging employees to complain only to their employers would be directly at odds with Congress's purpose.”).

145. *Essential Facts: Employment* § 4:14 (West 2011).

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employee morale down with his incessant complaints. The other employees may even be pleased with his absence. Disgruntled by his termination, that may decide to seek remedies under the anti-retaliation clause. Under *Kasten's* holding, the employer is likely liable.

Had the Court confined the protection of oral complaints to those made to a government agency, the situation would not be so stark for employers. All that the employee would have had to do was report his complaint to an agency. An oral complaint to a government agency is a fairly regulated activity that does not expose the employer to an unfair amount of surprise. The agency will still have to inform the employer that a complaint has been made, and the employer can then operate as it sees fit. They are free to research the problem, and possibly even correct the behavior. This is a much more regulated and fair system for every party involved. While access to government agencies may have been problematic in 1937 when the FLSA was enacted, it is far less of a problem in the age where everyone has access to the Internet, telephones, fax machines, the mail system, etc. However, the Court's refusal to rule on this issue created the possibility that informal complaints to the employer, not only a government agency, could be grounds for an anti-retaliation suit if the employee is subsequently fired, and that creates a level of uncertainty that prejudices the employer.¹⁴⁶

Finally, in the wake of the employee's expansion of rights and the unanswered question about formal complaints, it is possible that employers will soon be exposed to an unnecessary increase of anti-retaliation claims as employees try to take advantage of this broad ruling. In fact, the litigation has already commenced at the district level. In *Hyunmi Son v. Reina Bijoux, Inc.*, the plaintiff tried to have the Second Circuit's rule that does not protect informal complaints to employers overturned by using *Kasten*.¹⁴⁷ She was unsuccessful in her pursuit, however. Citing

146. Essential Facts: Employment § 4:14 (West 2011). ("Although the Court declined to consider whether an oral complaint made to a private employer rather than to the government qualifies as protected activity, the majority's decision leaves open that possibility, and places employers in uncertain territory.")

147. *Hyunmi Son v. Reina Bijoux, Inc.*, 11 Civ. 2315 (SAS), 2011 WL 4716344, at *1 (S.D.N.Y. Oct. 7, 2011) (where the plaintiff alleged that she was fired because she orally complained to her employers about their expectation that she work overtime without being compensated, so she filed a claim under the FLSA's anti-retaliation clause).

to the Second Circuit's narrow precedent on this issue, the district court granted the defendant's motion for summary judgment on the plaintiff's FLSA anti-retaliation claim on the grounds that the plaintiff did not make a formal complaint to a governmental authority.¹⁴⁸ The plaintiff argued that the holding in *Kasten* overruled this precedent, but the court disagreed, stating that the plaintiff

... mischaracterizes the holding in *Kasten*. There, the Supreme Court held that oral complaints to a government agency constitute protected activity under the FLSA, which courts had previously interpreted as applying only to written complaints made to a government agency. The Court *specifically refrained* from deciding whether the FLSA protects either oral or written complaints made informally to an employer.¹⁴⁹

Thus, at least at the district level, it is clear that the Second Circuit will not deviate from its precedent unless the Supreme Court specifically rules on this issue, and the inconsistencies and circuit splits will continue.

VI. CONCLUSION

In refusing to decide the second issue, the Supreme Court left the door open for continued litigation on this issue. Both employers and employees will now try to take advantage of this weakness and continue to challenge this provision by presenting countless arguments, only one of which is discussed above. This weakness, combined with the well-reasoned dissent and growing number of circuits willing to accept a narrow interpretation, bodes ill for consistent interpretation of the FLSA.

Kasten's main deficiency is not that the Court interpreted the provision incorrectly, which this Note suggests. It is that the majority interpreted the provision incompletely. By going further with its analysis, the majority could have easily resolved all the issues. Though some parties may have disagreed with the broad interpretation of both issues, dissention among scholars and judges is preferable to an unpredictable and inconsistent enforcement of the anti-retaliation clause—which prejudices

148. *Hyunmi Son v. Reina Bijoux, Inc.*, 11 Civ. 2315 (SAS), 2011 WL 4716344, at *4 (S.D.N.Y. Oct. 7, 2011).

149. *Id.* (emphasis added).

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everybody. Even though the reasoning of the Court hints at what its answer may be on this issue, the fact that it is not officially answered means that inconsistencies in interpretation will endure and the anti-retaliation clause will continue to plague employers and employees attempting to assert or defend their rights until another Supreme Court decision is rendered.¹⁵⁰

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150. The discrepancies have already started as district courts begin to grapple with *Kasten*. See *Perez v. Brands Mart Serv. Corp.*, 10-61203-CIV, 2011 WL 3236022, at *8-10 (S.D. Fla. July 28, 2011) (granting the defendant's motion for summary judgment and stating that the plaintiff's oral complaints to human resources about his wages (which were above minimum wage) did not assert any statutory rights, thus were not protected under the standard promulgated in *Kasten*); but see *Truckenmiller v. Burgess Health*, C 10-4066-MWB, 2011 WL 4526047, at *12-*14 (N.D. Iowa, Sept. 30, 2011) (where an Iowa district court ruled that there was an issue of material fact as to whether an employee's oral complaints about unfair wages that were asserted at the end of a meeting while everyone was packing up were protected).