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)

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I. INTRODUCTION

In the early part of the last century the Supreme Court blocked the implementation of pro-worker labor laws.[1] President Roosevelt, an advocate for fair labor laws remarked, "[a] self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiselling workers' wages or stretching workers' hours."[2] On June 25, 1938, President Roosevelt signed the Fair Labor Standards Act (FLSA) to be implemented on October 24, 1938.[3] "Congress enacted the [FLSA] of 1938 . . . as a remedial and humanitarian measure to stabilize the economy and protect the common labor force in response to the post depression predominance of poverty and the fear of an ever-increasing decline in the economy."[4] At this time, unemployment, long working hours and low wages were widespread problems in the United States and Congress was eager to find a solution.[5] The FLSA sets forth labor standards for overtime pay, minimum wage, and child labor for people working in interstate commerce.[6] This Act, however, has proven to be controversial. Recently, on September 10, 2009, a United States District Court in Arkansas held that an employee who makes an internal complaint

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1. *See* Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding a federal child-labor law unconstitutional); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (nullifying a Washington D.C. law that required minimum wages for women).
2. FRANKLIN DELANO ROOSEVELT, *Message to Congress Recommending Legislation Establishing Minimum Wages and Maximum Hours* (May 24, 1937), in NOTHING TO FEAR: THE SELECTED ADDRESSES OF FRANKLIN DELANO ROOSEVELT, 1932–1945, at 104 (B.D. Zevin, ed., 1946).
3. FRANKLIN ROOSEVELT, PUBLIC PAPERS AND ADDRESS, VI 214–16 (1937).
4. Ann K. Wooster, Annotation, *Validity, Construction, and Application of Fair Labor Standards Act–Supreme Court Cases*, 196 A.L.R. Fed. 507, 522–23 (2004).
5. JOSEPH E. KALET, PRIMER ON WAGES AND HOUR LAWS 13 (2d ed. 1990).
6. 29 U.S.C. § 206 (2006).

to an employer is protected under the anti-retaliation provision of the Fair Labor Standards Act.[7] Specifically, the court determined that an employee's verbal complaint to an employer constituted a protected activity under § 215(a)(3) of the FLSA.[8] By contrast, less than two weeks later, a United States District Court in Illinois held that internal complaints must be in writing to fall under the scope of the anti-retaliation provision of the FLSA.[9] This very conflict is at issue in *Kasten v. Saint-Gobain Performance Plastics Corp.* In that case, the Seventh Circuit determined that employees must reduce internal complaints to writing to be protected by the anti-retaliation provision of the FLSA.

This Casenote will outline the repercussions of *Kasten v. Saint-Gobain Performance Plastics Corp.* on workers, employers, and the national welfare. Before examining *Kasten*, it is important to understand the background of the FLSA. Section II summarizes the general Congressional purpose in enacting the FLSA and the Congressional intent behind the anti-retaliation provision of the Act. A brief overview of relevant precedent is also discussed. Next, Section III sets forth the facts and the court's opinion in *Kasten*. Finally, Section IV focuses on the legal and societal implications of the *Kasten* decision. The specific theme of the analysis is that the *Kasten* court was incorrect in its decision and reasoning because the court construed the FLSA to be narrow and pro-employer. The FLSA was designed to be a pro-worker statute and therefore should be construed as a broad and remedial statute that protects workers.

II. BACKGROUND

A summary of the purpose and history of the Fair Labor Standards Act and the anti-retaliatory provision is necessary to understand the consequences of *Kasten*. The vast majority of circuits that have considered whether the FLSA's statutory language, "any complaint," includes internal complaints have determined that it does.[10] Courts are divided on the issue

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7. Wolf v. Clear Title, L.L.C., 654 F. Supp. 2d 929, 934 (E.D. Ark. 2009).
8. *Id.*
9. Lizak v. Great Masonry, Inc., No. 08-C-1930 2009 WL 3065396, at *8 (N.D. Ill. Sept. 22, 2009).
10. *See, e.g.*, Hagan v. Echostar Satellite, LLC, 529 F.3d 617, 625 (5th Cir. 2008) (holding protected activity includes internal complaints); Moore v. Freeman, 355 F.3d 558, 562 (6th Cir. 2004) (holding informal complaints are within the scope of protected activity); Lambert v. Ackerly, 180 F.3d 997, 1004 (9th Cir. 1999) (holding that section 215(a)(3) covers "employees who complain about violations to their employers"); Valerio v. Putnam Assoc., Inc., 173 F.3d 35, 41 (1st Cir. 1999) ("By failing to specify that the filing of any complaint need to be with a court or an agency, and by using the word 'any,' Congress left open the possibility that it intended 'complaint' to relate to less formal expressions of protest . . . conveyed to an employer."); E.E.O.C. v. White & Son Enter., 881 F.2d 1006, 1011 (11th Cir. 1989) (holding that employees' internal complaints to management concerning unequal pay was a claim of rights under the Equal Pay Act, a portion of

of whether unwritten, strictly verbal complaints are protected under the provision.[11] Some courts adhere to a strict "textualist" method of statutory interpretation and have found that an oral complaint will not suffice because the language of the anti-retaliation provision is unambiguous.[12] Other courts have determined that the language of the anti-retaliation provision is subject to several interpretations and includes oral complaints.[13]

A. The FLSA

Congress's primary concern in enacting the FLSA was to protect certain factions of the population from substandard wages and excessive hours that would jeopardize the national welfare and the stream of goods in interstate commerce.[14] The foremost intention of the FLSA was to help the vulnerable and lowest paid segment of the nation's population, namely employees who lack the bargaining power necessary to ensure an adequate minimum wage for themselves.[15] Simply put, the FLSA was implemented to ensure that each worker covered by the statute would be compensated fairly "and would be protected from 'the evil of overwork as well as underpay.'"[16] In 1963 the FLSA was amended to include the Equal Pay Act which prohibits pay discrimination based on gender.[17] An effective way to achieve the goal of the FLSA was compliance under these statutes, and Congress depended on employees to report violations.[18]

The FLSA's anti-retaliation provision has been interpreted to not only give rights to complaining employees, but to also promote an atmosphere where complaining parties may air their grievances without apprehension of retaliation.[19] The anti-retaliation provision of the FLSA states in relevant part:

> [I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has

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the FLSA); Love v. RE/MAX of Am., Inc., 738 F.2d 383, 837 (10th Cir. 1984) (same); *but see* Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 363–65 (4th Cir. 2000) (holding that the anti-retaliation provision of the FLSA does not protect internal complaints).

11. Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 839 (7th Cir. 2009).
12. Clevinger v. Motel Sleepers, Inc., 36 F. Supp. 2d 322, 323 (W.D. Va. 1999).
13. *See* E.E.O.C v. Romeo Cmty. Sch., 976 F.2d 985 (6th Cir. 1992); Brock v. Richardson, 812 F.2d 121 (3d Cir. 1987); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179 (8th Cir. 1975); E.E.O.C. v. White and Son Enter., 881 F.2d 1006 (11th Cir. 1989).
14. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945).
15. *Id.*
16. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981).
17. 29 U.S.C. § 206(d) (2006).
18. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).
19. Saffels v. Rice, 40 F.3d 1546, 1549 (8th Cir. 1994).

> 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.[20]

B. Cases Interpreting the Anti-Retaliation Provision of the FLSA

1. Courts Refusing to Protect Verbal Complaints Under the FLSA

The Fourth Circuit adopted a textualist view in addressing the issue of whether an employee's refusal to testify in a forthcoming FLSA suit for his employer constitutes protected activity.[21] In *Ball v. Memphis Bar-B-Q Co., Inc.*, Peter Ball was a manager at one of Memphis Bar-B-Q's restaurants.[22] One of the waiters, Marc Linton, suspected that the company had denied him pay for time he had worked by "turning back the clock"[23] on the timekeeping system that kept track of employee hours.[24] Linton told Ball that he had hired an attorney and was planning to file suit against Memphis Bar-B-Q under the FLSA.[25] Ball notified David Sorin, the president of Memphis Bar-B-Q, that Linton had planned on taking legal action against the company.[26] Later, Sorin asked Ball "how he would testify if he were deposed as part of a lawsuit."[27]

During this conversation, Sorin recommended facts that Ball would testify to, but Ball insisted that he "could not testify to the version of events as suggested by Sorin."[28] A few days later, Ball was discharged from his employment at Memphis Bar-B-Q.[29] Ball alleged he was terminated because he refused to testify to Sorin's version of facts.[30] At issue was whether the word "proceeding" in the FLSA anti-retaliation provision meant a formal judicial or administrative proceeding, or a more informal proceeding within the company.[31] The court interpreted "proceeding" to mean an administrative or judicial proceeding.[32] The Fourth Circuit determined although the alleged conduct was morally improper retaliatory

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20. Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2006).
21. Ball v. Memphis Bar-B-Q Co., Inc., 228 F.3d 360 (4th. Cir. 2000).
22. *Id.* at 362.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 364.
32. *Id.*

conduct, it would be contrary to the language of the testimony clause of the FLSA's anti-retaliatory provision to inflate its scope to include future testimony in a court proceeding that had not yet been filed.[33]

The Second Circuit has also held that § 215(a)(3) requires a narrow interpretation.[34] In *Lambert v. Genesee Hospital*, the court based its conclusion on the plain language of the provision.[35] In *Lambert*, female employees of the hospital's printing services department brought suit against the hospital, a male employee who was promoted to manager of the department, and their supervisor.[36] The female employees sought relief for alleged discriminatory practices in violation of Title VII, the FLSA, Equal Pay Act, and New York State Human Rights Law.[37] Specifically, they claimed they had been denied promotions because they filed complaints with the EEOC alleging unfair pay and gender discrimination.[38] The court denied the women's claim regarding the anti-retaliation provision of the FLSA because they filed their complaints with the EEOC after they were denied the promotion; they had only complained to supervisors about discrimination before they were denied the promotion.[39] The court determined that the language of the FLSA's anti-retaliation provision "limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor."[40] The court's reasoning relied heavily on the dissenting opinion in *EEOC v. Romeo Community Schools* which urged that § 215(a)(3) only protects three specific categories of behavior: "those who have (1) filed [an FLSA] complaint, (2) instituted an FLSA proceeding, or (3) testified in an FLSA proceeding."[41]

2. *Courts Protecting Verbal Complaints under the FLSA*

The Sixth Circuit has ruled that the instigating factor for a retaliation claim is the assertion of statutory rights under the FLSA, not the filing of a formal complaint.[42] In *EEOC v. Romeo Community Schools*, Sharon Gomes, the plaintiff, was employed as a temporary janitor for the school

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33. *Id.*
34. Lambert v. Genesse Hosp., 10 F.3d 46 (2d Cir. 1993).
35. *Id.* at 55.
36. *Id.* at 50–52.
37. *Id.*
38. *Id.* at 51.
39. *Id.* at 55.
40. *Id.*
41. *Id.* *See also* EEOC v. Romeo Cmty. Sch., 976 F.2d 985, 990 (6th Cir. 1992) (Surheinrich J., dissenting) (distinguishing from the broader retaliation protection available under Title VII).
42. *Id.*

district.[43] She made verbal complaints to the school district regarding a pay disparity between the male and female custodians.[44] Specifically, Gomes told the school district that she thought it was "breaking some sort of law" by paying her less than it had paid male custodians in the past.[45] The court found that because Gomes was fired after she had complained, she presented a valid retaliation claim.[46] The Third, Eighth, and Eleventh Circuits have all agreed with this interpretation; however, their opinions include no discussion of the distinction between verbal complaints and written complaints.[47]

III. EXPOSITION OF THE CASE

In the case of *Kasten v. Saint-Gobain Performance Plastics Corp.*, the United States Court of Appeals for the Seventh Circuit dealt with the issue of whether "unwritten, purely verbal complaints are . . . protected activity under the [FLSA]."[48] Agreeing with the Second and Fourth Circuits, the Seventh Circuit concluded that "unwritten, purely verbal complaints are not protected activity under the [FLSA]."[49]

A. Facts and Procedural History

Saint-Gobain is a corporation that produces high-performance plastic products at various plants around the country.[50] Kevin Kasten worked in Saint-Gobain's facility located in Portage, Wisconsin from October 2003 to December 2006.[51] Saint-Gobain had a policy of requiring hourly employees to use a time card to swipe in and out of an on-site Kronos time clock.[52] Employees had to do this to receive their weekly paychecks.[53]

While Kasten was employed, Saint-Gobain required its production and manufacturing employees to participate in a "gowning" process, where

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43. Romeo Cmty. Sch., 976 F.2d at 986.
44. *Id.* at 989.
45. *Id.*
46. *Id.* at 989–90.
47. *See* Brock v. Richardson, 812 F.2d 121, 124–25 (3d Cir. 1987) (holding a formal filing of a complaint is not necessary to bring an employee under the protections of the FLSA); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 181 (8th Cir. 1975) (employee was terminated after asserting statutory right at work); EEOC v. White & Son Enters., 881 F.2d 1006, 1011 (11th Cir. 1989) (holding that a termination can be retaliation even if the employee has not filed formal charges yet).
48. Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 838 (7th Cir. 2009).
49. *Id.*
50. *Id.* at 836.
51. *Id.*
52. *Id.*
53. *Id.*

they put on protective gear, washed their hands, and sanitized their shoes before going to their appropriate work stations.[54] The production and manufacturing workers were not paid for their time spent donning and doffing the protective clothing because Saint-Gobain required them to clock-in on time clocks after donning the gear and to clock-out before doffing the required gear.[55] This practice was necessary because the time clocks were located past the locker rooms near the production areas.[56]

On February 13, 2006, Kasten received a verbal warning from Saint-Gobain regarding his failure to swipe in and out of the time clocks.[57] This notice warned Kasten that if he committed another violation in the following twelve months from the date of the notice, a written warning may be issued to him.[58] Kasten acknowledged that he had read and understood the notice by signing it.[59] On August 31, 2006, Saint-Gobain issued a written warning to Kasten for his failure to swipe in and out of the time clocks.[60] This warning stated that "[i]f the same or any other violation occurs in the subsequent 12-month period from this date [sic] will result in further disciplinary action up to and including termination."[61] On November 10, 2006, Saint-Gobain issued yet another written warning to Kasten for his failure to swipe in and out on the Kronos time clock.[62] He was also suspended for one day.[63] This warning notified Kasten that this was the last step in the disciplinary procedure and that any other violation could result in his termination.[64] Kasten signed the warning, signaling that he read and understood it.[65]

It is Kasten's assertion that from October 2006 to December 2006, he verbally complained about the legality of the location of the Kronos time clocks.[66] He states that he told supervisors the location of the time clocks were illegal because it prevented employees from being paid for time spent putting on and taking off their protective gear.[67] Kasten states that he told his shift supervisor, a Lead Operator, and a Human Resources generalist

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54. Brief and Required Short Appendix of Plaintiff-Appellant, Kevin Kasten at 2, Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. 2009) (No. 08-2820).
55. *Id.*
56. *Id.*
57. *Kasten*, 570 F.3d at 836.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*

that the location of the time clocks was illegal.[68] He also claimed that he told the Lead Operator that he was contemplating filing a lawsuit against Saint-Gobain regarding the placement of the time clocks.[69] Saint-Gobain claimed that Kasten never told any of his supervisors or any human resource personnel that he believed the location of the time clocks was illegal.[70] On December 6, 2006, Kasten was suspended for violating the time clock policy for the fourth time.[71] Kasten stated that at a meeting about his suspension he again verbally told his supervisors that he believed the location of the time clocks was illegal and that if he challenged the company in court regarding the location of the time clocks, the company would lose.[72] On December 11, 2006, the Human Resource Manager notified Kasten by phone that he had been terminated as an employee at Saint-Gobain.[73] On that same day, Saint-Gobain moved the time clocks from their location past the locker rooms to an area near the employee entrance to the plant.[74] Saint-Gobain acknowledges that workers are entitled to compensation for time spent donning and doffing required protective gear.[75]

Kasten had also been disciplined over ten times for violating various policies during his employment at Saint-Gobain.[76] Saint-Gobain's Code of Ethics stated in relevant part that "every employee has the responsibility to report known or suspected violations of the Code or any applicable law which he or she becomes aware."[77] The corporation's Problem Resolution Procedure, which is part of its Employee Policy Handbook, similarly urges workers to report complaints to their supervisors and to Human Resource Management if the issue is not resolved.[78]

Originally, this case was consolidated with a collective action brought by employees of Saint-Gobain under the Fair Labor Standards Act seeking compensation for time spent donning and doffing the required protective gear.[79] Kasten filed suit under the Fair Labor Standards Act, alleging he

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68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. Brief and Required Short Appendix of Plaintiff-Appellant, Kevin Kasten at 2, Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. 2009) (No. 08-2820).
75. *Id.*
76. Brief for Defendant-Appellee Saint-Gobain Performance Plastics Corporation at 4, Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. 2009) (No. 08-2820).
77. Brief and Required Short Appendix for Plaintiff-Appellant, Kevin Kasten at 2, Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. 2009) (No. 08-2820).
78. *Id.*
79. Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant at 4, Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. 2009) (No. 08-2820).

was terminated in retaliation for his verbal complaints concerning the location of the time clocks.[80] The trial court granted summary judgment to Saint-Gobain holding that Kasten had not engaged in protected activity because he had not filed any complaint about the allegedly illegal location of the time clocks.[81] On appeal, Kasten argued, along with a supporting amicus brief filed by the United States Secretary of Labor, that the portion of the district court's ruling that unwritten complaints are not protected activity under the statute should be reversed.[82] Kasten and the Secretary of Labor claim that the FLSA retaliation provision should be read broadly to protect workers who make only internal, unwritten objections to their employers.[83] The Seventh Circuit Court of Appeals held that internal complaints are protected activity under the retaliation provision of the FLSA, but unwritten, purely verbal complaints are not protected activity under the FLSA.[84]

B. Opinion of the Seventh Circuit

The issues presented are first, whether internal complaints which are not formally filed with any administrative or judicial body are protected activity; and second, whether purely verbal complaints are protected activity.[85] The FLSA provides remedies to employees who have suffered from retaliation from their employers as a result of engaging in certain protected activities.[86] Section 215(a)(3) states in relevant part:

> [I]t shall be unlawful for any person … 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.[87]

Kasten's claim for retaliation was based only on his allegation that he "filed complaints" with Saint-Gobain about the location of the time clocks.[88] The court determined that the plain language of the statute protects internal complaints because the statute states that it is "unlawful for

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80. *Kasten*, 570 F.3d at 837.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 838.
85. *Id.* at 837.
86. *Id.* at 838.
87. Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2006).
88. *Kasten*, 570 F.3d at 837.

any person to discharge . . . any employee because such employee has filed any complaint."[89] The statute does not limit the kinds of complaints.[90] This is further evidenced by the fact that the word "complaint" is modified by the word "any."[91]

To determine whether verbal complaints are protected, the court again looked to the language of the statute.[92] The FLSA's retaliation statute prohibits "discharg[ing] . . . any employee because such employee has filed any complaint . . . ."[93] Kasten argued that the phrase "to file" is subject to broad interpretation, and that it has several meanings including "to submit."[94] The court reasoned that making a verbal complaint is not the same as filing a complaint because the use of the phrase "to file" connotes the use of written documents, and the plain understanding of the phrase "to file a complaint" requires the submission of some writing or documents to an employer, administrative body, or court.[95] The court further insisted "[o]ne cannot 'file' an oral complaint" because there is no tangible thing to deliver to a person who could "put it in its proper place."[96] The court rests the decision on the absence of "broader language in the FLSA's retaliation provision," such as the language used in Title VII and the Age Discrimination in Employment Act.[97] The statutory language used in these acts bars an employer from "retaliating against an employee who 'has opposed any practice' that is unlawful under the statutes."[98] The court found Congress' choice of the narrower "file any complaint" phrase to be important because Congress had drafted broader retaliation statutes in other areas.[99]

IV. ANALYSIS

The decision of the *Kasten* court furthers the split among circuits on the issue of whether verbal complaints are protected under the FLSA's anti-retaliation provision. Part A of this section sets forth alternative interpretations of the FLSA's anti-retaliation provision. Part B discusses why the holding and reasoning of the *Kasten* court are improper. Part C explores the public policy implications the *Kasten* decision will have on

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89. *Id.* at 838.
90. *Id.*
91. *Id.*
92. *Id.*
93. Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2006).
94. *Kasten*, 570 F.3d at 838–39.
95. *Id.* at 839.
96. *Id.*
97. *Id.* at 840.
98. *Id.*
99. *Id.*

employers, employees and the economy. Finally, Part D proposes the language of the FLSA's anti-retaliation provision be amended to be more in line with the statutory scheme of the FLSA and other similar statutes.

A. Interpreting the FLSA Anti-Retaliation Provision to Include Verbal Complaints

When interpreting a statute, one must begin with the language of the statute itself.[100] This principle is the "plain meaning rule," which means "if the language of the statute is clear, there is no need to look outside the statute to its legislative history in order to ascertain the statute's meaning."[101] An important rule of statutory interpretation is that a statute should be read as a whole, so that its numerous parts are interpreted in a fashion consistent with the broad purpose of the statute.[102] One of many canons of construction is to look to the ordinary meaning of a word, which can be determined by finding the definition in a dictionary.[103]

The phrase at issue, "has filed any complaint" is subject to multiple interpretations. The phrase, as well as the word complaint, is fairly ambiguous. Webster's Dictionary defines a complaint first as "a cry or loud utterance or series of utterances of pain, rage, or sorrow."[104] Another definition of complaint is "the act or action of expressing protect, censure, or resentment: expression of injustice."[105] Only the fourth definition characterizes a complaint as a "formal allegation or charge against a party."[106] While the word complaint is ambiguous, only one of six definitions suggests that it must be formal. It is troubling that courts have relied on only one definition in one dictionary when interpreting verbal complaints to be outside of the scope of the anti-retaliation provision of the FLSA.

Congress's silence on a place to file a complaint can be interpreted to mean that legislators did not intend for employees seeking protection under the FLSA to have to physically file a complaint with a court or agency. Congressional silence can signal an expectation that nothing else needs to be said for the provision to be effectuated.[107] If the intent of Congress was

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100. YULE KIM, CONGRESSIONAL RESEARCH SERVICE, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008), *available at* http://www.fas.org/sgp/crs/misc/97-589.pdf.

101. *Id.*

102. *Id.*

103. *Id.* at 6 (citing FDIC v. Meyer, 510 U.S. 471, 476 (1994) ("In the absence of a statutory definition, 'we construe a statutory term in accordance with its ordinary or natural meaning.'").

104. WEBSTER'S THIRD NEW INT'L DICTIONARY 464 (1981).

105. *Id.*

106. *Id.*

107. KIM, *supra* note 100, at 16.

to require employees seeking protection under the FLSA to file a formal written complaint it would have specified an administrative body or court in which to do so.

The word "file" is subject to interpretation as well. Webster's defines "file" as "to place (as a paper or an instrument) on file among . . . records of an office."[108] This definition could conceivably include verbal complaints because an employee could expect or intend for their oral complaint to be recorded and kept with the employer's records. In addition, if the phrase "filed any complaint" were interpreted to include only complaints filed with a court or government body, the additional statutory language "or instituted or caused to be instituted any proceeding under or related to this chapter" would be unnecessary because the latter phrase is superfluous if the former phrase refers only to the filing of complaints with a court or government agency. Another rule of statutory interpretation states that courts can "assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."[109] If Congress had intended to exclude verbal complaints, it would have used language other than "filed any complaint."

The usage of the word "any" in the statute is key because it means "one, some, or all indiscriminately of whatever quantity."[110] "Any" includes all kinds of complaints that would be filed with an employer, even verbal complaints. Furthermore, it is significant that the anti-retaliation provision does not include the words "writing" or "written." Again, congressional silence on an issue signals an expectation that nothing more is needed for the provision to be implemented.[111]

B. The *Kasten* Decision is Improper

Unfortunately there is very limited legislative history regarding the intended scope of the anti-retaliation provision of the FLSA. The broad purpose of the FLSA, interpreted by the Supreme Court is of some aid.[112]

> [T]he Fair Labor Standards Act [is] 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 profits of others. Those are the rights

108. WEBSTER'S THIRD INT'L DICTIONARY 849 (1981).
109. Bailey v. United States, 516 U.S. 137, 146 (1995).
110. WEBSTER'S THIRD INT'L DICTIONARY 97 (1981).
111. *Bailey*, 516 U.S. at 146.
112. Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944).

> that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.[113]

Specifically, the Supreme Court has interpreted the anti-retaliation provision to be a vehicle for aggrieved employees to seek help and protection.

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payroll. Rather it chose to rely on information and complaints received from employees 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 grievances. This ends the prohibition of § 15(a)(3) against discharges and other discriminatory practices [*sic*] was designed to serve.[114]

When a statute is subject to more than one interpretation, as in this instance, courts should defer to the administrative body responsible for the implementation of the statute.[115] The Equal Employment Opportunity Commission's (EEOC) Compliance Manual states in relevant part, "[t]he prohibition against retaliation extends . . . to an employee even if the employee has not filed a complaint or instituted a proceeding."[116] The courts should allow the EEOC to interpret this provision of the FLSA.

C. The Effect on Public Policy After *Kasten*

Interpreting the anti-retaliation provision of the FLSA to extend only to written complaints makes the statute under-inclusive. The effect of this under-inclusiveness is that an employee with a valid grievance will be unprotected simply because her complaint is oral and not written on paper. This interpretation places higher value on the form of the complaint and lower value on the substance. *Kasten's* interpretation leaves vulnerable the very individuals the provision was designed to protect; those employees who are afraid to cause controversy in the workplace, but who need relief from unjust employment practices. Further, the interpretation entices an employer to discharge an employee who has made an oral complaint immediately before the employee can make a written complaint so as to prevent any trouble for itself.

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113. *Id.*
114. Mitchell v. Robert DeMario Jewelry, 361 U.S. 288, 292 (1960).
115. Chevron v. Natural Res. Def. Council, 467 U.S. 837, 843–44 (1984).
116. Valerio v. Putnam Assoc., Inc., 173 F.3d 35, 43 (1st Cir. 1999).

The exclusion of oral complaints from the scope of the anti-retaliation provision discourages negotiation between employees and employers. If an employee fears that he will have no recourse if he is discharged for verbally complaining to an employer, he will be certain to keep his complaints to himself. If the employee keeps these grievances secret the employer will be unaware of the predicament until the employee lodges a formal complaint, if he does at all. As a result, an early and cordial negotiation is unlikely. This is bad for both the employee and the employer as it encourages conflict and promotes animosity. Time, resources, and money are wasted if the employee and employer are forced to engage in a lengthy legal battle over something that in all likelihood could be resolved in a meeting or through negotiation.

D. The Language of the FLSA Anti-Retaliation Provision Should Be Changed

Because the language of the anti-retaliation provision of the FLSA is ambiguous, it should be changed to clarify Congress's intent regarding oral complaints. Specifically, the language should be changed to reflect Congress's intent that the FLSA be a broadly remedial statute.[117] For instance, Title VII of the 1964 Civil Rights Act contains a provision similar to § 215(a)(3) of the FLSA.[118] The anti-retaliation provision of Title VII states,

> It shall be an unlawful employment practice for any employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a change, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[119]

The Supreme Court has determined that the anti-retaliation provision has a different purpose than the anti-discrimination provision.[120] "The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-

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117. Ann K. Wooster, Annotation, *Validity, Construction, and Application of Fair Labor Standards Act–Supreme Court Cases*, 196 A.L.R. Fed. 507, 522–23 (2004) ("Congress enacted the [FLSA] of 1938 as a remedial and humanitarian measure to stabilize the economy and protect the common labor force in response to the post depression predominance of poverty and the fear of an ever-increasing decline in the economy").

118. *Compare* Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2006) *with* 42 U.S.C. § 2000e-3(a) (2006).

119. 42 U.S.C. § 2000e-3(a).

120. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006).

based status."[121] "The [anti-retaliation] provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."[122]

Since the purpose of the Title VII anti-retaliation provision is similar to the purpose of the FLSA anti-retaliation provision, Congress could look to the wording of the Title VII provision for direction in redrafting the FLSA provision. Section 215(a)(3) of the FLSA would be clarified if the words "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"[123] were replaced with the more broad words and phrases from the Title VII provision, which protect an employee who has "opposed any [unlawful] practice," "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the provision]."[124] Such changes would make sure judicial interpretation of the statute was in line with Congress' intent.

Another statute that could aid Congress in reconstructing the statutory language of the FLSA anti-retaliation provision is the Family and Medical Leave Act (FMLA). The FMLA in relevant part states,

> It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual (1) has filed any charge, or has instituted or caused to be instituted any proceeding . . . (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.[125]

The FMLA uses some language similar to the language used in § 215(a)(3), namely the first and third part of the quoted language.[126] If Congress would include language in the FLSA anti-retaliation provision similar to the language in the second part of the quoted language of the FMLA, not only would the statute be more clear but it would prevent

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121. *Id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800–801 (1973)).
122. *Burlington*, 548 U.S. at 63.
123. Fair Labor Standards Act, 29 U.S.C. § 215(a)(3).
124. 42 U.S.C. § 2000e-3(a).
125. Family and Medical Leave Act, 29 U.S.C. § 2615(b) (2006).
126. *Compare* Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) *and* Family and Medical Leave Act, 29 U.S.C. § 2615(b).

employers from discharging employees because they have been informed of an employee's grievance verbally.

V. CONCLUSION

The Seventh Circuit's decision in Kasten furthers the split among circuits on the issue regarding whether verbal complaints are protected activity under the FLSA's anti-retaliation provision. The language of the provision is ambiguous and should be construed to give effect to the purpose of the statute as a whole, which is to protect workers who assert their rights under the statute from retaliatory discharge. The best solution would be for Congress to look to similar statutes to aid in redrafting the anti-retaliation provision, so as to ensure judicial interpretation of the provision is in line with the purpose of the statute.