

The FLSA Antiretaliation Provision: Defining the Outer Contours of What Constitutes an Employee Complaint

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ABSTRACT: A recent Seventh Circuit case addressed the question of whether an employee who orally complained to his supervisor had engaged in a protected activity under the antiretaliation provision of the Fair Labor Standards Act (“FLSA”). The court agreed with a majority of the circuit courts that internal complaints are a protected activity; however, the court departed from the majority approach by reading the antiretaliation provision as limiting protection to written complaints. The U.S. Supreme Court recently granted certiorari in the case and will hear arguments in the 2010 Term. This Note argues that the Seventh Circuit approach is not compelled by the statutory language, ignores the remedial nature of the FLSA, undermines the antiretaliation provision’s purpose, and departs from established administrative interpretation. Rather than focusing on the form of the complaint, courts should employ a totality-of-the-circumstances test to assess whether the substance of the employee’s complaint would put a reasonable employer on notice that the employee was asserting his or her FLSA rights.

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I. INTRODUCTION

When Kevin Kasten believed that his employer failed to compensate him for all the time he worked, he did what many U.S. workers would be inclined to do: he spoke to his supervisor.¹ When he was subsequently fired, he sued his employer for unlawful retaliation.² In *Kasten v. Saint-Gobain Performance Plastics Corp.*, however, the Seventh Circuit held that Kasten acted at his own peril—Saint-Gobain Performance Plastics could freely retaliate against him for complaining about the company’s illegal conduct.³

The Fair Labor Standards Act (“FLSA”), which regulates wages and hours, includes an antiretaliation provision that protects employees who complain that their employer is violating the Act’s substantive provisions. Circuit courts disagree as to whom employees may complain and what form complaints must take. While one circuit has held that an employee must file a complaint with an outside agency or court, the majority of circuits have held that the antiretaliation provision protects an employee’s complaint to his or her supervisor—referred to as an “internal complaint.” Within the majority approach, courts have struggled to determine what constitutes an internal complaint. Most circuits have held that the focus of the inquiry is on the substance of the employee’s complaint.

In *Kasten*, the Seventh Circuit weighed in on this debate. The court took a decidedly different stance by holding that, while internal complaints are protected, such complaints must be written.⁴ Thus, Kasten’s act of orally complaining to his supervisor did not fall within the ambit of the FLSA antiretaliation provision.⁵

In an act likely to settle the current split among the circuits, the U.S. Supreme Court granted certiorari in the *Kasten* case and will hear arguments in the 2010 Term. The Court’s decision will likely have far-reaching effects in the employment-law field⁶—a discussion beyond the scope of this Note. Rather, this Note will explore the Seventh Circuit’s reasoning in *Kasten* and will ultimately argue that the Seventh Circuit’s approach of limiting protection to written complaints is arbitrary. Instead, courts should focus on

1. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 836 (7th Cir.), *reh’g en banc denied*, 585 F.3d 310 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010). The facts of the *Kasten* case are further discussed in Part III.

2. *Id.* at 837.

3. *Id.* at 840.

4. *Id.*

5. *Id.*

6. Molly DiBianca, *Retaliation and the FLSA: U.S. Supreme Court Grants Cert*, DEL. EMP. L. BLOG (Mar. 25, 2010), http://www.delawareemploymentlawblog.com/2010/03/retaliation_and_the_flsa_us_su.html (“The Supreme Court’s decision could redirect the course of FLSA litigation, either expanding the types of suits commonly brought to include retaliation claims—or by preventing retaliation claims from becoming the next-big-thing in employment-law litigation.”).

substance rather than form when determining whether an employee complaint is protected under the FLSA antiretaliation provision.

Part II of this Note begins by examining the disagreement that has developed in the circuit courts over the reach of the FLSA's antiretaliation provision. Part III sets forth the Seventh Circuit's analysis in *Kasten*. Part IV argues that the Seventh Circuit approach is an unnecessarily restrictive and problematic reading of the statutory language. Finally, Part V of this Note elaborates on a totality-of-the-circumstances test that courts should use when determining whether an employee's complaint falls within the meaning of the FLSA antiretaliation provision.

II. COURTS ARE SPLIT ON HOW TO INTERPRET THE FLSA ANTIRETALIATION PROVISION

Before discussing the *Kasten* case, it is useful to explore the statute at issue and the case law leading up to the Seventh Circuit's decision. This Part briefly discusses the FLSA, its antiretaliation provision, and the two approaches that have developed regarding internal complaints.

A. THE FAIR LABOR STANDARDS ACT

Congress passed the FLSA in 1938 to combat "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."⁷ The Act, hailed as being "unquestionably . . . the most important American statute dealing with wages and hours,"⁸ sets a minimum wage,⁹ maximum hours (beyond which overtime payment is required),¹⁰ and restricts child labor.¹¹ In 1963, Congress amended the FLSA to include the Equal Pay Act, which prohibits employers from discriminating on the basis of sex when setting wages.¹² The Supreme Court has stated that because the FLSA is a piece of "remedial and humanitarian" legislation, it "must not be

7. ch. 676, § 2(a), 52 Stat. 1060, 1060 (codified as amended at 29 U.S.C. § 202(a) (2006)); see also Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 537 (2001) ("[T]he time period and the context in which the Act arose points to its concomitant purpose of reducing unemployment by spreading work to a greater number of employees.").

8. STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 399 (Robert F. Koretz ed., 1970). The FLSA represented a victory for the Roosevelt Administration after a long battle with the Supreme Court over the constitutionality of the federal government setting wage and hour standards. John S. Forsythe, Note, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 464-66 (1939).

9. 29 U.S.C. § 206.

10. *Id.* § 207.

11. *Id.* § 212.

12. Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)).

interpreted or applied in a narrow, grudging manner.”¹³ One provision that has raised interpretation issues is the antiretaliation provision.

B. THE ANTIRETALIATION PROVISION

The FLSA’s antiretaliation provision, codified at § 215(a)(3), provides that it is unlawful for an employer:

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.¹⁴

This provision protects three distinct types of employee activities: (1) filing any complaint; (2) instituting a proceeding; and (3) testifying in a proceeding.¹⁵ Through this antiretaliation provision, Congress sought to ensure employer compliance with the FLSA by promoting an environment in which employees could vindicate their rights and air their grievances without fear of “economic retaliation.”¹⁶ Thus, the provision protects employees who engage in one of the listed activities and thereby encourages employees to police employers, who will in turn be more apt to comply with FLSA requirements.

A plaintiff must establish three elements to make out a prima facie case of FLSA retaliation: (1) the plaintiff must have engaged in a “statutorily protected activity”; (2) the plaintiff must have suffered an “adverse employment action”; and (3) the plaintiff must establish a causal connection between the plaintiff’s conduct and the subsequent adverse employment action.¹⁷ Of primary importance in this Note is the first element of the prima facie retaliation claim—engagement in a protected activity. To satisfy this element, a plaintiff must show that he or she engaged in one of the three types of activities listed in the statute: (1) filing any complaint; (2)

13. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944), *superseded by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251–262).

14. 29 U.S.C. § 215(a)(3).

15. *Clemons*, *supra* note 7, at 539; *see also* *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 363 (4th Cir. 2000) (distinguishing “testimony” clause from “complaint” clause).

16. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

17. *Blackie v. Maine*, 75 F.3d 716, 722–23 (1st Cir. 1996). As the court in *Blackie* noted, “[T]he framework for proving that an employer took an eye for an eye can vary depending upon the evidence available to show retaliatory animus.” *Id.* at 722. For more information about proving retaliation, including the distinction between the direct method and the *McDonnell Douglas*, burden-shifting framework, see cases cited in Reply Brief of Plaintiff-Appellant, Kevin Kasten at 5–6, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th Cir.) (No. 08-2820), 2009 WL 900101, *reh’g en banc denied*, 585 F.3d 310 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010).

instituting a proceeding; or (3) testifying in a proceeding. Absent this showing, a plaintiff cannot establish a prima facie case. Of the three types of protected activities, the complaint clause in particular has caused confusion in the courts. Due to the current circuit split, the ability of employees to recover for retaliation highly depends on the circuit in which they sue.

C. COURTS ARE SPLIT ON WHETHER AN INTERNAL COMPLAINT IS
A PROTECTED ACTIVITY

The confusion over the complaint clause centers on whether it encompasses an employee's complaint to a supervisor. While a majority of circuit courts have held that such complaints, known as "internal complaints," are protected, one circuit has held that the complaint clause only protects those employees who file formal complaints with a court or outside agency, such as the Department of Labor. This Subpart explores the rationale behind each approach.

1. Plain-Meaning Approach

Under the plain-meaning approach, the complaint clause only encompasses formal complaints lodged with a court or agency.¹⁸ The Second Circuit is the only circuit court that has adopted the plain-meaning approach.¹⁹ Although other courts have cited the Fourth Circuit as embracing this approach,²⁰ the Fourth Circuit has never definitively decided the issue and, on the contrary, even suggested that it may recognize internal complaints as a protected activity under § 215(a)(3).²¹

18. See *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) (stating that the complaint clause protects against "retaliation for filing formal complaints . . . but does not encompass complaints made to a supervisor"); *Bell-Holcombe v. Ki, LLC*, 582 F. Supp. 2d 761, 764 (E.D. Va. 2008) (stating that the complaint clause requires some "formal or official procedure").

19. See *Genesee Hosp.*, 10 F.3d at 55-56 (holding that plaintiff's oral complaint to her supervisor was not a protected activity).

20. See *Kasten*, 570 F.3d at 838 (noting that the Fourth Circuit has held that "29 U.S.C. § 215(a)(3) does not protect internal complaints" (citing *Ball*, 228 F.3d at 363-65)); *Bell-Holcombe*, 582 F. Supp. 2d at 763 ("The Fourth Circuit has consistently held that FLSA protection does not apply to an employee's internal complaint to the employer." (citing *Ball*, 228 F.3d at 364; *Whitten v. City of Easley*, 62 F. App'x 477, 480 (4th Cir. 2003))).

21. In *Ball*, the Fourth Circuit addressed the related but distinct issue of whether an employee who discussed with his supervisor how he would testify in another employee's yet-to-be-filed lawsuit was protected under the *testimony* clause of § 215(a)(3). *Ball*, 228 F.3d at 362-63. See generally *supra* text accompanying note 15 (describing the three clauses of the FLSA antiretaliation provision). The court specifically stated that the plaintiff was not invoking the complaint clause and noted that the court had interpreted language similar to the complaint clause in another statute and had held that "intra-company complaints" were protected under that statute. *Ball*, 228 F.3d at 363-64. However, in a later unpublished decision, the Fourth Circuit cited *Ball* for the proposition that an internal complaint is not a protected activity under the FLSA antiretaliation provision. *Whitten*, 62 F. App'x at 480. The precedential value of the court's unpublished decision, however, is questionable. See *Minor v. Bostwick Labs., Inc.*, 654 F.

Supporters of the plain-meaning approach offer two reasons why protection is limited to formal complaints. First, they argue that the plain language of the provision expressly contemplates a complaint made under or pursuant to the FLSA.²² Section 216(b) of the FLSA provides that employees or the Secretary of Labor may sue in “any court of competent jurisdiction” for violations of § 215(a)(3).²³ Thus, this approach holds that a complaint must be filed either in a court or with the Department of Labor.²⁴ Furthermore, plain-meaning advocates argue that the word “filing” in the complaint clause connotes a “formal or official procedure.”²⁵

Secondly, plain-meaning proponents compare the language in § 215(a)(3) to the broader language in Title VII’s antiretaliation provision.²⁶ Title VII prohibits workplace discrimination on the basis of race, color, religion, sex, or national origin.²⁷ Under Title VII’s antiretaliation provision, it is “an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has *opposed any practice* made an unlawful employment practice by this subchapter.”²⁸ Plain-meaning proponents argue that “[b]ecause Congress chose not to include

Supp. 2d 433, 438 (E.D. Va. 2009) (noting that “unpublished decisions of the Fourth Circuit are ordinarily not accorded precedential value” and finding *Whitten’s* lack of rationale for extending *Ball’s* holding to the complaint clause unpersuasive). Despite the uncertainty of the Fourth Circuit’s interpretation of the complaint clause, the trend among district courts in the Fourth Circuit is toward adopting the plain-meaning approach. *See, e.g., id.* at 438, 440 (rejecting the contention that *Ball* and *Whitten* are binding precedent, but ultimately holding that the plain meaning of the statute compels the conclusion that an employee’s oral complaint to a supervisor is not a protected activity); *Bell-Holcombe*, 582 F. Supp. 2d at 764–66 (holding that a written internal complaint is not a protected activity); *O’Neill v. Allendale Mut. Ins. Co.*, 956 F. Supp. 661, 664 (E.D. Va. 1997) (holding that “informal, unofficial protests” are not protected); *see also* Clemons, *supra* note 7, at 548 (noting that district courts in the Fourth Circuit have applied “an analysis similar to that of the Second Circuit”).

22. *See* EEOC v. Romeo Cmty. Sch., 976 F.2d 985, 990 (6th Cir. 1992) (Suhrheinrich, J., concurring in part and dissenting in part) (arguing that the complaint clause protects only those employees who “file[] a Fair Labor Standards Act (‘FLSA’) complaint” (footnote omitted)), *cited with approval in* *Genesee Hosp.*, 10 F.3d at 55.

23. 29 U.S.C. § 216(b) (2006). Although it is not clearly articulated in either *Genesee Hospital* or the dissent in *Romeo Community Schools*, the argument seems to be that the “under or related to this Act” language in § 215(a)(3) modifies not only the “instituted any proceeding” clause but also the complaint clause. Thus, plain-meaning advocates have interpreted this to mean that the complaint must be brought under § 216(b). *See supra* text accompanying note 14 (providing the language of § 215(a)(3)).

24. *Bell-Holcombe*, 582 F. Supp. 2d at 763 (noting that protection is limited to “the filing or instituting of a proceeding in a judicial or administrative forum” (citing *O’Neill*, 956 F. Supp. at 664)).

25. *Id.* at 764.

26. *See, e.g., Genesee Hosp.*, 10 F.3d at 55 (noting the difference between the FLSA and Title VII antiretaliation provisions); *Romeo Cmty. Sch.*, 976 F.2d at 990 (Suhrheinrich, J., concurring in part and dissenting in part) (same); *Bell-Holcombe*, 582 F. Supp. 2d at 764 (same).

27. 42 U.S.C. § 2000e-2(a)(2).

28. *Id.* § 2000e-3(a) (emphasis added).

an ‘opposition’ clause in § 215(a)(3), it stands to reason that Congress’ intent was for § 215(a)(3) to cover a more narrow range of employee activities than are [sic] covered by the anti-retaliation clause of Title VII.”²⁹ Because these courts conclude that the language of § 215(a)(3) is clear and unambiguous, they do not consider extrinsic evidence to further explain the statute’s meaning.³⁰

2. The Majority Approach

Under the majority approach, a complaint made to a supervisor, sometimes referred to as an “informal,” “internal,” or “intracompany” complaint, is a protected activity under the antiretaliation provision of the FLSA.³¹ In addition to the Seventh Circuit, as discussed in Part III below,³² six circuit courts have adopted this approach.³³

Supporters of the majority approach cite several reasons why the complaint clause encompasses internal complaints. First, courts have noted

29. *Bell-Holcombe*, 582 F. Supp. 2d at 764.

30. *See Genesee Hosp.*, 10 F.3d at 55 (declining to defer to EEOC interpretation because “the statute’s language is plain and unambiguous”); *O’Neill v. Allendale Mut. Ins. Co.*, 956 F. Supp. 661, 664 n.6 (E.D. Va. 1997) (“[W]here Congress has made the public policy decision and expressed it clearly, as in § 215(a)(3)’s plain and unambiguous language, it is not open to courts to trump or change this decision in the name of statutory interpretation.”).

31. *See Hagan v. EchoStar Satellite, L.L.C.*, 529 F.3d 617, 626 (5th Cir. 2008) (adopting the “majority rule” that an employee’s complaint to a supervisor constitutes a protected activity).

32. *See infra* Part III (discussing *Kasten*).

33. The First, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have explicitly adopted the majority rule. *See, e.g., Hagan*, 529 F.3d at 630 (adopting majority rule, but holding that manager who merely passed along employees’ complaints to supervisor did not engage in protected activity); *Lambert v. Ackerley*, 180 F.3d 997, 1001–02, 1004 (9th Cir. 1999) (holding that employees who complained both orally and in writing to employer regarding lack of overtime pay engaged in protected activity); *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 38, 41–44 (1st Cir. 1999) (holding that employee who wrote letter to employer complaining that she was entitled to overtime pay as a nonexempt employee engaged in protected activity); *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989–90 (6th Cir. 1992) (holding that employee who orally complained to supervisor that she was not paid as much as her male counterparts engaged in protected activity); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (same); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 384, 387 (10th Cir. 1984) (holding that employee who wrote memorandum raising equal-pay claim engaged in protected activity). In addition to those circuits that have explicitly adopted the majority rule, the Third and Eighth Circuits have also indicated that they would recognize internal complaints as a protected activity. *See Saffels v. Rice*, 40 F.3d 1546, 1548 (8th Cir. 1994) (“Courts have therefore not hesitated to apply the protection of [§ 215(a)(3)] to activities less directly connected to formal proceedings where retaliatory conduct has a similar chilling effect on employees’ assertion of rights.” (quoting *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 879 (2d Cir. 1988) (internal quotation marks omitted))); *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987) (“[C]ourts interpreting the anti-retaliation provision have looked to its animating spirit in applying it to activities that might not have been explicitly covered by the language.”); *Brennan v. Maxey’s Yamaha, Inc.*, 513 F.2d 179, 181, 183 (8th Cir. 1975) (noting that employee had a right to “protest” and “voice[] her disapproval” with employer).

that the FLSA as a whole has a broad, remedial purpose, and, pursuant to the Supreme Court's command, should be interpreted liberally.³⁴ More specifically, the antiretaliation provision is designed to encourage employees to air their grievances to promote employer compliance.³⁵ Thus, the courts reason, the provision should protect employees' internal complaints as well as complaints filed with a court or outside agency.

Second, the language of the antiretaliation provision supports a broad reading. The use of the word "any" to modify "complaint" suggests that the clause is not limited to formal court filings.³⁶ As one circuit court noted, "If 'any complaint' means 'any complaint,' then the provision extends to complaints made to employers."³⁷ Additionally, the clause provides that complaints "related to" the FLSA are protected.³⁸ Thus, the clause may be read broadly to encompass not just those claims formally filed under § 216(b), but rather, any employee's claim that his or her rights under the FLSA are being violated.³⁹ Courts have also reasoned that if the complaint clause is interpreted to mean court filings, then the subsequent "instituted any proceeding" clause would be superfluous.⁴⁰

Additionally, supporters of the majority rule note that courts have liberally interpreted similar antiretaliation provisions in other remedial statutes to include complaints made to employers.⁴¹ Supporters reject the contention that the FLSA's complaint clause should be read more narrowly than Title VII's "opposed any practice" language: "The fact that Congress

34. *Ackerley*, 180 F.3d at 1003 ("[T]he [Supreme] Court explained that because the FLSA is a remedial statute, it must be interpreted broadly." (citing *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944), *superseded by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251–262 (2006))); *Valerio*, 173 F.3d at 42 ("We find some assistance . . . in the broad purpose of the FLSA, as interpreted by the Supreme Court." (citing *Tenn. Coal*, 321 U.S. at 597)).

35. See *Valerio*, 173 F.3d at 43 (describing the purpose of the antiretaliation provision and stating that "[a] narrow construction . . . could create an atmosphere of intimidation and defeat the Act's purpose in § 215(a)(3)" (citing *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 293 (1960)); *White & Son*, 881 F.2d at 1011 ("By giving a broad construction to the anti-retaliation provision to include the form of protest engaged in here . . . its purpose will be further promoted."); see also *Hagan*, 529 F.3d at 626 (noting that the majority rule "better captures the anti-retaliation goals" of § 215(a)(3)).

36. *Ackerley*, 180 F.3d at 1004.

37. *Id.*

38. See *supra* text accompanying note 14 (providing the language of the antiretaliation provision).

39. *Ackerley*, 180 F.3d at 1004–05.

40. *Valerio*, 173 F.3d at 42.

41. See *Ackerley*, 180 F.3d at 1006–07 (explaining that courts have interpreted the antiretaliation provisions of the Federal Mine Health and Safety Act, Federal Railroad Safety Act, and Clean Water Act to include complaints made to an employer); see also Jennifer Lynne Redmond, Note, *Are You Breaking Some Sort of Law?: Protecting an Employee's Informal Complaints Under the Fair Labor Standards Act's Anti-Retaliation Provision*, 42 WM. & MARY L. REV. 319, 340–45 (2000) (comparing FLSA's antiretaliation provision to other federal statutes).

decided to include a more detailed anti-retaliation provision more than a generation later, when it drafted Title VII, tells us little about what Congress meant at the time it drafted the comparable provision of the FLSA.⁴² While an overwhelming majority of circuit courts have recognized an internal complaint as being a protected activity, the scope of what constitutes an “internal complaint” is less clear.

D. COURTS ARE STRUGGLING TO DEFINE THE OUTER CONTOURS
OF THE MAJORITY APPROACH

When determining what constitutes an “internal complaint,” courts have proposed two types of overarching limitations. First, some courts have sought to impose limitations by focusing on the *substance* of the complaint.⁴³ This approach emphasizes the need to put an employer on notice that an employee is asserting a statutory right.⁴⁴ Thus, “not all abstract grumblings will suffice to constitute the filing of a complaint with one’s employer.”⁴⁵ Courts employing this limitation have not attempted to establish a bright-line rule of what a complaint must include, but rather, have proposed a case-by-case analysis.⁴⁶ The critical inquiry, according to these courts, is whether the employee engaged in some kind of activity “that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA.”⁴⁷ Some courts have suggested an employee must specifically allege

42. *Ackerley*, 180 F.3d at 1005.

43. *See, e.g., Valerio*, 173 F.3d at 44 (“We agree that ‘[t]here is a point at which an employee’s concerns and comments are too generalized and informal to constitute “complaints” that are “filed” with an employer within the meaning of the [statute.]’” (alterations in original) (quoting *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998))); *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 626–27 (5th Cir. 2008) (noting that there are “necessary qualifications to the majority rule” and proceeding to look at the substance of the plaintiff’s complaint to his supervisor); *Ackerley*, 180 F.3d at 1007 (“We agree [with the court in *Valerio*] that not all amorphous expressions of discontent related to wages and hours constitute complaints filed within the meaning of § 215(a)(3).”).

44. *See Hagan*, 529 F.3d at 628 (“[A]n employee must do something outside of his or her job role in order to signal to the employer that he or she is engaging [sic] protected activity”); *Valerio*, 173 F.3d at 45 (noting that the “tone and overall content” of a letter an employee sent to her employer “could not have left [the employer] with any doubt that [the employee] was complaining . . . and was asserting her right to overtime pay”).

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

46. *See Ackerley*, 180 F.3d at 1008 (proposing a case-by-case analysis); *Valerio*, 173 F.3d at 45 (same).

47. *McKenzie v. Renberg’s Inc.*, 94 F.3d 1478, 1487 (10th Cir. 1996); *see also Hagan*, 529 F.3d at 627–28 (adopting the analysis used by the court in *McKenzie*); *Ackerley*, 180 F.3d at 1008 (finding that an employee must “communicate[] the *substance* of his allegations to the employer (e.g., that the employer has failed to pay adequate overtime, or has failed to pay the minimum wage)”); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) (holding that the FLSA antiretaliation provision applies to the “assertion of rights”). Both *McKenzie* and *Hagan* dealt with a situation in which a management-level employee had communicated concerns on behalf of employees working beneath him. *See Hagan*, 529 F.3d at 621; *McKenzie*, 94 F.3d at 1481. This situation raised the issue of whether the manager was engaging in a protected

that the employer violated the law,⁴⁸ although the employee need not mention the FLSA by name.⁴⁹

The second approach limits the *form* of the complaint by requiring it to be written rather than oral.⁵⁰ Proponents of this limitation look to the language of the antiretaliation provision and find that the “word ‘filed’ clearly denotes a procedure other than oral.”⁵¹ Thus, while an internal complaint will suffice, it must be in writing. Prior to *Kasten*,⁵² no circuit court had embraced this limitation.⁵³

In *Kasten*, the Seventh Circuit weighed in on this debate over the complaint clause. While the court joined the majority of circuits in holding that an internal complaint is a protected activity, it limited the scope of what constitutes an internal complaint by drawing a distinction between written and oral complaints and holding that only the former are protected.

activity, or rather, merely performing his duties as a manager in passing along employee concerns. See *Hagan*, 529 F.3d at 627–28; *McKenzie*, 94 F.3d at 1486–87. Both courts emphasized the need for such an employee to “step outside his or her role of representing the company” and take a position adverse to the company. *McKenzie*, 94 F.3d at 1486; accord *Hagan*, 529 F.3d at 627–28. Although the courts did not address it, their analyses could extend to non-management-level employees as well.

48. See *Hagan*, 529 F.3d at 626 (noting that “the informal complaint [must] concern some violation of law” and finding that the employee “did not frame *any* of his objections in terms of the potential illegality” of the employer’s conduct). At least some courts have concluded that the test, however, is not whether the employer actually violated the FLSA, but rather whether the employee *believed* that the employer violated the FLSA. See *Love*, 738 F.2d at 387 (“The section protects conduct based on a good faith, although unproven, belief that the employer’s conduct is illegal.”). However, it is not altogether clear whether an employee must specifically allege that the employer is engaging in illegal activity, or whether an employee may merely identify conduct that he or she believes is unfair (and that, in actuality, is illegal), and then request action to remedy the perceived unfairness. See *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (holding that employees’ request for equal pay and questioning of why they did not receive a pay increase like their male counterparts constituted a protected activity). As elaborated in Part V, this Note suggests that the question of whether an employee specifically alleged illegality is only one factor to be considered in a broader totality-of-the-circumstances inquiry.

49. *Ackerley*, 180 F.3d at 1008 (citing *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989 (6th Cir. 1992) (holding that employee’s allegation that employer was “breaking some sort of law” was a complaint (internal quotation marks omitted))).

50. See *Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp. 2d 322, 324 (W.D. Va. 1999) (holding that an internal, oral complaint is not a protected activity).

51. *Id.*

52. See *infra* Part III (discussing the *Kasten* opinion).

53. *But see Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 42 n.4 (1st Cir. 1999) (drawing a distinction between written and oral internal complaints and reserving judgment on whether an oral complaint constitutes a protected activity).

III. THE SEVENTH CIRCUIT APPROACH: *KASTEN V. SAINT-GOBAIN*
PERFORMANCE PLASTICS

Kasten was an “hourly manufacturing and production worker” at Saint-Gobain Performance Plastics.⁵⁴ He failed to punch in and out of the time clocks on several occasions and received warnings that his failure to do so could result in disciplinary action.⁵⁵ After the second warning, Kasten alleged that “he verbally complained to his supervisors about the legality of the location of Saint-Gobain’s time clocks” and stated that he was considering suing the company.⁵⁶ Kasten specifically alleged that the location of the time clocks was illegal because they were located such that employees were not paid for the time spent donning and doffing protective gear.⁵⁷ Saint-Gobain ultimately terminated Kasten.⁵⁸

Kasten sued, alleging that Saint-Gobain had retaliated against him for his complaints regarding the time clocks in violation of § 215(a)(3).⁵⁹ The district court granted summary judgment for Saint-Gobain on the basis that Kasten had not engaged in a protected activity.⁶⁰ The Seventh Circuit affirmed.⁶¹ It held that, while internal complaints are a protected activity, the complaint must be written.⁶² According to the court, the plain language of § 215(a)(3) “indicates that internal, intracompany complaints are protected” because “the statute does not limit the types of complaints which will suffice, and in fact modifies the word ‘complaint’ with the word ‘any.’”⁶³ However, the Seventh Circuit held that the provision’s plain meaning does not include oral complaints because the “use of the verb ‘to file’ connotes the use of a writing.”⁶⁴ Although the Secretary of Labor had argued on behalf of Kasten that “to file” could be read more broadly as meaning “to

54. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 948 (W.D. Wis. 2008).

55. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 836 (7th Cir.), *reh’g en banc denied*, 585 F.3d 310 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 837. In addition to his retaliation suit, Kasten was part of a class action against Saint-Gobain challenging the location of the time clocks. *Kasten*, 556 F. Supp. 2d 941. In that case, the district court held that Saint-Gobain violated the FLSA by failing to compensate employees for all hours worked. *Id.* at 954–55. In granting partial summary judgment for the plaintiffs, the court did not resolve the issue of how much time workers spent donning and doffing their protective gear. *Id.* The plaintiffs contended that it was anywhere between six and thirty minutes at the beginning and end of each shift, with an additional eight to twenty minutes during meal breaks. *Id.* at 950. Saint-Gobain, however, alleged that the total amount of time each day did not exceed five minutes. *Id.*

60. *Kasten*, 570 F.3d at 837.

61. *Id.* at 840.

62. *Id.*

63. *Id.* at 838.

64. *Id.* at 839.

submit,” the court rejected the argument that the Department of Labor’s interpretation was due any deference.⁶⁵ Finally, the court compared § 215(a)(3)’s language to Title VII’s broader “opposed any practice” language, which does include oral complaints, and concluded that Congress’s use of narrower language in the FLSA “appears to be significant.”⁶⁶

Kasten appealed the decision and the Supreme Court granted certiorari on March 22, 2010.⁶⁷ In the following Part, this Note evaluates the Seventh Circuit’s approach and concludes that there is no basis for distinguishing oral from written complaints.

IV. THE CASE FOR SUBSTANCE OVER FORM

Courts that have adopted the majority approach, which recognizes internal complaints, have understandably sought to limit what constitutes an internal complaint.⁶⁸ In comparison to external complaints filed with a court or outside agency, internal complaints can be more subtle and less verifiable. This Note argues that the proper balance courts should strike is valuing substance over form, rather than form over substance. The critical inquiry is whether the employer was put on fair notice that the employee was asserting a FLSA right.

The Seventh Circuit interpreted the antiretaliation provision using standard rules of statutory interpretation.⁶⁹ It found that the plain meaning of the statutory language was clear and unambiguous, and therefore, the court was not warranted in looking to other evidence of what Congress intended.⁷⁰ This Part begins by arguing that the Seventh Circuit’s rigid definition of “file” is not in accordance with the word’s common usage. Furthermore, it rejects the Seventh Circuit’s comparison to Title VII’s broader “opposed any practice” language. Instead, this Part argues that “filed any complaint” should be interpreted in light of the FLSA’s remedial purpose and with regard to the Department of Labor’s long history of interpreting § 215(a)(3) as protecting oral complaints. Finally, this Part examines two of the major concerns that may arise if courts recognize oral complaints as protected activities.

65. *Id.* at 839 & n.2.

66. *Id.* at 840.

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

68. *See supra* notes 43–53 and accompanying text (examining the two types of limitations courts have sought to impose on internal complaints).

69. *Kasten*, 570 F.3d at 837–38.

70. *Id.* (“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.” (alterations in original) (quoting *Sapperstein v. Hager*, 188 F.3d 852, 857 (7th Cir. 1999))).

A. THE STATUTORY LANGUAGE DOES NOT DEMAND WRITTEN COMPLAINTS

The language of the complaint clause is not as clear and unambiguous as the Seventh Circuit indicates. In her dissent from the court's denial of Kasten's petition for rehearing en banc, Judge Rovner stated:

Although I agree that the term "to file" often connotes (particularly for lawyers) the submission of a document, it is by no means out of the ordinary to read and hear the term used in conjunction with oral complaints; in that sense, "to file" is used more broadly to signify the making of a report or the lodging of a protest.⁷¹

This Subpart argues that, consistent with Judge Rovner's statement, the language "to file" does not compel employees to complain in writing.

Dictionary definitions of "file" do not limit it to papers or written documents. For example, *The New Oxford American Dictionary* defines "file" as "submit (a legal document, application, or charge) to be placed on record by the appropriate authority."⁷² While this definition gives examples of the types of things a person may file—legal documents, applications, and charges—the examples do not represent an exhaustive list. In fact, some dictionary definitions explicitly contemplate the "filing" of oral communications. For example, in the journalism context, "file" means "to send (newspaper copy) to a newspaper or news agency by *telephone*, telegraph, or cable."⁷³ Thus, a reporter could "file" a newspaper story by orally communicating it via telephone. Because "file" can be defined both narrowly and broadly, the next inquiry is how it is actually used by lawmakers.

Statutes use the term "file" in connection with both written and oral complaints. In its amicus curiae brief in support of Kasten, the Secretary of Labor noted several state statutory provisions that provide for the filing of oral complaints.⁷⁴ For example, a Mississippi statute establishing an organic-food-certification program provides that a person who believes that the statute has been violated "may file a written *or oral* complaint."⁷⁵

71. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 585 F.3d 310, 313 (7th Cir. 2009) (Rovner, J., dissenting), *cert. granted*, 130 S. Ct. 1890.

72. THE NEW OXFORD AMERICAN DICTIONARY 631 (2001); *see also* THE AMERICAN HERITAGE ILLUSTRATED ENCYCLOPEDIA DICTIONARY 624 (1987) (defining "file" as "to submit (a complaint or legal petition, for example) to a relevant authority").

73. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 849 (1993) (emphasis added).

74. Brief for the Sec'y of Labor as Amicus Curiae in Support of Plaintiff-Appellant at 16 n.5, *Kasten*, 570 F.3d 834 (No. 08-2820), 2008 WL 5786344.

75. *Id.* (emphasis added) (quoting MISS. CODE ANN. § 69-47-23(4)) (internal quotation marks omitted).

Furthermore, Judge Rovner cited several federal statutes that “specifically require[] written complaints.”⁷⁶ For example, the Uniformed Services Employment and Reemployment Act states that a person “may file [a] complaint” and that “[s]uch complaint shall be in writing.”⁷⁷ According to Judge Rovner, “[t]hese statutes suggest that when Congress means to require that complaints take a written form, it sets forth that requirement expressly.”⁷⁸ Thus, in this case, if Congress intended to limit the form of an employee’s complaint, such an intention would have been more clearly expressed by modifying the word “complaint.” And Congress did modify the word “complaint,” as the Seventh Circuit aptly noted when it adopted the majority position: “[T]he statute does not limit the types of complaints which will suffice, and in fact modifies the word ‘complaint’ with the word ‘any.’”⁷⁹

These definitions and statutes suggest that the word “file” does not necessarily refer to written documents. However, as plain-meaning advocates argue, it does seem to connote a “formal or official procedure.”⁸⁰ In light of its dictionary definitions, the formality that the term “filing” imposes could indicate to whom employees must lodge their complaints; that is, with the proper authority or official. Under the majority approach, “relevant authority” is construed broadly as a court, outside agency, or the employer itself.

*B. THE SUPREME COURT CONSTRUES COMPARABLE STATUTES BROADLY
IN LIGHT OF THEIR REMEDIAL PURPOSE*

In further support of its plain-meaning interpretation, the Seventh Circuit compared the FLSA antiretaliation provision to Title VII’s broader “opposed any practice” language. However, such a comparison is tenuous. As the Ninth Circuit noted, it is difficult to divine Congress’s intent in using the language “filed any complaint” in 1938 by comparing it with a statute passed in 1964.⁸¹ Furthermore, the Supreme Court has stated that inferences drawn from comparing different statutory provisions are

76. *Kasten*, 585 F.3d at 313 (Rovner, J., dissenting).

77. *Id.* at 314 (alteration in original) (quoting 38 U.S.C. § 4322(a)–(b) (2006)) (internal quotation marks omitted).

78. *Id.*

79. *Kasten*, 570 F.3d at 838.

80. *Bell-Holcombe v. Ki, LLC*, 582 F. Supp. 2d 761, 764 (E.D. Va. 2008); *see also supra* text accompanying note 51 (describing how plain-meaning advocates cite the word “file” as evidence that Congress intended the antiretaliation provision to apply to formal court or agency proceedings).

81. *Lambert v. Ackerley*, 180 F.3d 997, 1005 (9th Cir. 1999); *see also supra* text accompanying note 42 (discussing why the majority approach rejects comparison of § 215(a)(3) to Title VII).

strongest when the contrast is deliberate.⁸² In this case, there is no indication that the discrepancy between the wording of the FLSA and Title VII antiretaliation provisions was deliberate. The two statutes were passed twenty-six years apart.

A far more comparable statute is the National Labor Relations Act (“NLRA”), which was passed in 1935,⁸³ just three years before the FLSA was signed into law.⁸⁴ The NLRA antiretaliation provision uses language similar to, albeit narrower than, the FLSA: “It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under” the NLRA.⁸⁵ The provision seemingly protects only a narrow category of conduct: filing charges or testifying. However, in *NLRB v. Scrivener*, the Supreme Court interpreted the provision to include protection for employees who gave sworn statements as part of a NLRB investigation.⁸⁶ The Court found that, even though the employees had neither filed charges nor testified, Congress intended to protect employees during the “investigative stage” as well.⁸⁷ Such an interpretation, the Court concluded, was necessary to promote the provision’s purpose: to encourage employees to report employer violations.⁸⁸ Furthermore, the Court noted the importance of protecting employees’ “participation in the important developmental stages” leading up to formal charges.⁸⁹

The Court’s analysis is instructive. In *Scrivener*, the Court went *beyond* the plain meaning of the statute to include conduct that would promote the statute’s purpose.⁹⁰ In this case, the statutory language is more accommodating to an interpretation that internal oral complaints are a protected activity.⁹¹ Furthermore, an employee’s oral complaint to a supervisor may be a preliminary step to filing a more formal complaint, such

82. See, for example, cases cited in Reply Brief of Plaintiff-Appellant, *supra* note 17, at 3–4. See also *Field v. Mans*, 516 U.S. 59, 75 (1995) (“The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects.”).

83. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

84. See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 585 F.3d 310, 315–16 (7th Cir. 2009) (Rovner, J., dissenting) (comparing the FLSA with the NLRA), *cert. granted*, 130 S. Ct. 1890 (2010); Redmond, *supra* note 41, at 340–41 (same).

85. 29 U.S.C. § 158(a)(4).

86. 405 U.S. 117, 125 (1972); see also *Kasten*, 585 F.3d at 315–16 (Rovner, J., dissenting) (discussing *Scrivener* and concluding that the Court’s holding suggests that a broad interpretation of § 215(a)(3) is warranted).

87. *Scrivener*, 405 U.S. at 121–22.

88. *Id.*

89. *Id.* at 124.

90. *Kasten*, 585 F.3d at 316 (Rovner, J., dissenting).

91. See *supra* Part IV.A (arguing that the word “filed” encompasses both written and oral complaints).

as a written complaint with someone higher up in the company,⁹² with the Department of Labor, or with a court.⁹³ In light of *Scrivener's* holding that an employee's participation in such "developmental stages" is protected, an employee's oral complaint to a supervisor would also seemingly warrant protection.⁹⁴

As *Scrivener* illustrates, the Supreme Court interprets remedial statutes aimed at regulating the workplace in light of their purpose. The NLRA, FLSA, and Title VII antiretaliation provisions all serve a similar purpose: to encourage employees to report employer violations under the respective statutes and thereby aid in their enforcement.⁹⁵ To serve this remedial purpose, the Supreme Court has stated that the respective provisions should be interpreted broadly.⁹⁶ As illustrated in the next Subpart, the Seventh Circuit's rigid approach undermines the FLSA's purpose by limiting the complaint's form to written.

92. See *infra* notes 98–102 and accompanying text (describing internal-grievance procedures).

93. See *Kasten*, 585 F.3d at 316–17 (Rovner, J., dissenting) (finding that, in the context of the FLSA's antiretaliation provision, an internal complaint is "the first step toward vindication of [an employee's] rights" and "it makes 'less than complete sense' to draw a distinction between an employee's written and oral assertions of his rights").

94. *Id.* at 316 (arguing that the court "would do well to heed the logic and warnings of . . . *Scrivener* in construing the reach of FLSA"); Redmond, *supra* note 41, at 341 (comparing NLRA to FLSA and noting that "*Scrivener* is particularly helpful in analyzing section 215(a)(3)").

95. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (noting that the purpose of the Title VII antiretaliation provision is to encourage employees to "file complaints and act as witnesses" and thereby aid in enforcement); *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972) (noting that through the NLRA antiretaliation provision, Congress "made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the [National Labor Relations] Board" (quoting *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238 (1967) (internal quotation marks omitted))); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (noting that the purpose of the FLSA antiretaliation provision is to create an environment in which "employees [feel] free to approach officials with their grievances" to promote employer compliance with the substantive provisions).

96. See *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 67 ("Interpreting the [Title VII] antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends."); *Scrivener*, 405 U.S. at 124 ("The approach to [the NLRA antiretaliation provision] generally has been a liberal one in order fully to effectuate the section's remedial purpose."); *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (discussing the FLSA's "remedial and humanitarian" purpose and stating that it "must not be interpreted or applied in a narrow, grudging manner"), *superseded by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251–262 (2006)).

C. THE SEVENTH CIRCUIT APPROACH LEAVES EMPLOYEES
VULNERABLE TO RETALIATION

By excluding oral complaints, the Seventh Circuit's approach opens the door for nonactionable retaliation and may ultimately create a chilling effect. Employees are not likely to be inhibited from orally complaining for two reasons: (1) employment policies often encourage employees to orally complain to their supervisor before pursuing more formal avenues; and (2) employees do not usually know the details of, and tend to overestimate, their legal protections.

First, it is common practice—and, in some cases, proper procedure—for employees to discuss job-related concerns with their immediate supervisor. A number of companies promote open-door policies in which they encourage employees to discuss concerns with their supervisors.⁹⁷ In addition to these informal open-door policies, some companies have structured more formal grievance procedures.⁹⁸ Peter Panken and Stacey Babson, employment-law attorneys, advocate the use of formal grievance procedures, particularly in larger organizations, as a means of resolving employee–employer conflicts.⁹⁹ According to Panken and Babson, the first step in a grievance procedure should be informal communication “directly between the employee and his/her immediate supervisor.”¹⁰⁰ The informal, oral nature of this encounter allows some problems to be resolved quickly and to the satisfaction of both the supervisor and employee.¹⁰¹ It is only if

97. See JCPENNEY, STATEMENT OF BUSINESS ETHICS 37, available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDYoMzd8Q2hpbGRJRDotMXxUeXBIPtM=&t=1> (“At JCPenney, we have an Open Door Policy, which means that our management is available to every Associate at any time to express concerns or make suggestions about work related issues. Although associates can raise an issue at any level, usually the best and most effective way of resolving an issue is to meet with your immediate Supervisor or Manager.”); *Open Door*, WALMART CORPORATE, <http://walmartstores.com/AboutUs/286.aspx> (last visited Oct. 9, 2010) (“Through our ‘open door’ policy, associates (employees) are free to share suggestions, ideas and voice concerns . . .”). Additionally, Ford Motor Company requires employees to “report” (to a human-resources official or via the company’s hotline) violations of “business-related legal requirements.” FORD, CODE OF CONDUCT HANDBOOK: CORPORATE POLICIES AND DIRECTIVES 7–8 (2007), available at http://www.ford.com/doc/corporate_conduct_standards.pdf. For an explanation of open-door policies, see Peter M. Panken & Stacey B. Babson, *Creating the Personnel Paper Trail: Personnel Manuals and Grievance Procedures*, in EMPLOYMENT AND LABOR RELATIONS LAW FOR THE CORPORATE COUNSEL AND THE GENERAL PRACTITIONER 1659, 1705–06 (2008).

98. Panken & Babson, *supra* note 97, at 1702; see also Redmond, *supra* note 41, at 337. Redmond argues that the FLSA antiretaliation provision should be read broadly to promote the use of internal-grievance procedures and, consequently, “reduce the amount of litigation filed in an already overcrowded federal judiciary.” *Id.* at 338.

99. Panken & Babson, *supra* note 97, at 1706.

100. *Id.* at 1708.

101. *Id.* According to Panken and Babson, the informal nature of this initial encounter “helps supervisors better their communication skills and enhances their leadership when they are able to resolve problems without the embarrassment of the matter getting to a higher level

the problem cannot be resolved during this informal meeting that an employee is required to write out his or her grievance as part of the second step in the grievance procedure.¹⁰² The critical point here is that employers themselves are promoting, and in some cases requiring, employees to *orally* communicate job-related concerns with their immediate supervisor before pursuing more formal, *written* avenues.

Second, employees do not typically know the scope of their legal protections. Ian Eliasoph, an attorney for the Department of Labor, has noted that many employees overestimate legal protections in the workplace, which results in what he terms “phantom employment rights.”¹⁰³ He argues that while many employees are aware that the workplace is regulated, they are “not aware of the substance of such regulations” and, therefore, may supplant what the law actually is with “their own concepts of fairness and what they observe as workplace norms.”¹⁰⁴ While it is important not to conflate employees’ beliefs of what the law should be with what the law is, employees may be justified in believing that the law affords them protection when they orally complain to their supervisor, particularly when the employers themselves encourage employees to do so through open-door policies and internal-grievance procedures.¹⁰⁵

The result of these employment policies coupled with the so-called phantom employment rights is that employees are likely to continue to orally complain to their supervisors. This undermines the antiretaliation provision’s purpose in two ways. In the short-run, it leaves the door open for, and perhaps even incentivizes, retaliation. If an employee orally complains, an employer has a window of time in which it may potentially fire the employee without legal repercussions.¹⁰⁶ The First Circuit suggested that this may have the “bizarre effect” of “creating an incentive for the employer to fire an employee as soon as possible after learning the employee believed he was being treated illegally.”¹⁰⁷

of management.” *Id.* Furthermore, in cases where employees come to realize their complaint “does not seem as bad as it did before they talked about it, . . . [t]he informality of the discussion allows the employee to back off without seeming silly.” *Id.*

102. *Id.* at 1710–11.

103. Ian H. Eliasoph, *Know Your (Lack of) Rights: Reexamining the Causes and Effects of Phantom Employment Rights*, 12 EMP. RTS. & EMP. POL’Y J. 197, 201–08 (2008) (discussing several studies that found that a majority of employees overestimate their legal rights).

104. *Id.* at 223.

105. See Redmond, *supra* note 41, at 338 n.142 (“An employee should not be punished for following her employer’s policy regarding grievances.”). In *Kasten*, Kasten argued that he was following Saint-Gobain’s internal-grievance procedure by reporting his job-related concerns to his direct supervisors. Reply Brief of Plaintiff-Appellant, *supra* note 17, at 7–8.

106. Of course, state law may provide a remedy for the employee. Under the Seventh Circuit’s approach, however, there would be no remedy under the FLSA.

107. *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 43 (1st Cir. 1999).

Additionally, in the long-run, the Seventh Circuit's approach could have a chilling effect on employee complaints. Under the phantom-employment-rights analysis, employees' perception of what is legal is informed, in part, by what they observe as workplace norms. If employees observe employers retaliating against workers who complain, their perceptions of what is legal may change. While employees would be correct to believe that they are not protected if they orally complain, the danger is that they may not distinguish between oral and written complaints. Typically, employers do not divulge the details of why or under what circumstances an employee is fired, and thus other employees may be unaware that the fired employee filed an oral rather than written complaint. Furthermore, employers have little incentive to educate employees about how they can complain to maximize their legal protections.¹⁰⁸ By creating an atmosphere where employees do not want to risk losing their jobs to assert their FLSA rights, the Seventh Circuit approach undermines the antiretaliation provision's purpose and weakens the enforcement mechanism Congress established by chilling any complaint, written or oral.

*D. THE DEPARTMENT OF LABOR HAS INTERPRETED § 215(A)(3) TO
INCLUDE ORAL COMPLAINTS*

In addition to furthering the purpose of the antiretaliation provision, construing the complaint clause to include oral complaints is in accord with the Department of Labor's long-standing practice of accepting oral complaints. In *Skidmore v. Swift & Co.*, the Supreme Court held that the Department's interpretation of the FLSA is persuasive: "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."¹⁰⁹ The Supreme Court has held that *Skidmore* deference is applicable to interpretations that "lack the force of law," such as "policy statements, agency manuals, [or] enforcement guidelines."¹¹⁰ *Skidmore* deference is entirely discretionary;¹¹¹ the question is whether the agency's interpretation has the "power to persuade"—an inquiry that focuses on such factors as "the thoroughness evident in its

108. See Eliasoph, *supra* note 103, at 230 ("[I]t is not surprising that employers, generally speaking, seem content to preserve employee misinformation relating to their legal rights at work.").

109. 323 U.S. 134, 140 (1944).

110. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

111. *Skidmore*, 323 U.S. at 140 (noting that such interpretations are not "controlling upon the courts").

consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.”¹¹²

In *Kasten*, the Seventh Circuit rejected the Secretary of Labor’s argument that her interpretation of § 215(a)(3) was subject to deference.¹¹³ The court found that “the Secretary’s interpretation . . . appears to rest solely on a litigating position rather than on a Department of Labor regulation, ruling, or administrative practice, and is therefore not entitled to deference.”¹¹⁴ However, in reaching that conclusion, the court disregarded the Department of Labor’s long-standing practice of accepting oral complaints made to the agency. In the 1944–1945 *Wage and Hour Manual*, in a section called “Official Answers to Questions,” the Administrator answered the question: “Should a personal or written report be made when a person knows of a violation?”¹¹⁵ The Administrator responded, “Where and when possible complaints will be taken over the telephone.”¹¹⁶ The Department’s position has not changed in the last sixty years. The Department’s current website similarly states that complaints may be filed via telephone: “To file a complaint concerning one of these laws, contact your nearest Wage and Hour Division office or call the Department’s Toll-Free Wage and Hour Help Line at 1-866-4-US-WAGE.”¹¹⁷

There is no basis for differentiating between oral complaints made to the Department of Labor and oral complaints made to a supervisor. The language of the statute does not support such a distinction; there is a single clause (“filed any complaint”) for both internal and external complaints, and under the Seventh Circuit’s reading, the term “filed” requires a written document. Thus, presumably, the Seventh Circuit’s approach would leave oral complaints made to the Department of Labor unprotected as well as oral complaints made to a supervisor.¹¹⁸ In doing so, the court undermines the Department’s sixty-year-long practice.

112. *Id.*; see also *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (explaining that a U.S. Customs Service ruling letter may be subject to *Skidmore* deference given the complexity of the regulatory scheme and noting that “[s]uch a ruling may surely claim the merit of its writer’s thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight”).

113. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 839 n.2 (7th Cir.), *reh’g en banc denied*, 585 F.3d 310 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010).

114. *Id.*

115. 1944–1945 WAGE AND HOUR MANUAL: LAWS, RULINGS, INTERPRETATIONS IN WAGE-HOUR REGULATION 1006 (1945).

116. *Id.*

117. *The Fair Labor Standards Act (FLSA)*, U.S. DEPARTMENT LAB., <http://www.dol.gov/compliance/laws/comp-flsa.htm> (last visited Oct. 9, 2010).

118. *Kasten*, 585 F.3d at 315 (Rovner, J., dissenting) (“The court’s decision that only written complaints are protected presumably would apply to an employee’s external contacts with regulatory officials.”); Petition for Writ of Certiorari at 8, *Kasten*, 130 S. Ct. 1890 (No. 09-834), 2010 WL 146471, at *8 (“[E]mployees could legally be fired for telephoning the

E. CONCERNS RAISED BY RECOGNIZING ORAL COMPLAINTS ARE MINIMAL

As illustrated by the foregoing discussion, neither the statutory language nor sound policy compel the distinction between oral and written complaints. However, recognizing internal oral complaints as protected does, of course, raise some concerns. First, an oral complaint may be less clear or more subtle than a written complaint, which puts employers in the position of trying to distinguish between an employee just making an observation and an employee who is complaining within the meaning of the FLSA antiretaliation provision. A written complaint is undoubtedly preferential for employers. However, as discussed in the next Part, courts can impose requirements on the substance of an oral complaint that could solve this problem.¹¹⁹ Furthermore, if a cautious employer is unsure as to whether an employee is filing a complaint, the employer can simply ask the employee.

Second, oral complaints are difficult to prove, which may open employers up to false claims of retaliation by disgruntled employees, or alternatively, allow employers to falsely deny that an employee complained. However, requiring a written complaint does not necessarily solve this problem of verifiability. Nothing prevents an employer from alleging that it never received a written complaint or an employee from alleging that he or she submitted a written complaint to her supervisor. This is an issue of fact that trial courts routinely handle. Thus, requiring a written complaint does not solve the problem of “verifiability.”

Concededly, however, written complaints would be preferable for both employers and courts. But by looking at this issue in the broader context of the lawsuit as a whole, the impact of these concerns is small. Even if courts recognize an internal oral complaint as a protected activity, the plaintiff still must prove the other two elements of a prima facie case of retaliation.¹²⁰ While the plaintiff undoubtedly has satisfied the second prong (adverse employment action), the plaintiff must still establish a causal connection between engaging in the protected activity and the adverse employment action. Thus, an employer that keeps careful employee records and has legitimate reasons for firing employees is unlikely to be bombarded with frivolous retaliation claims.

While these concerns are minimal and the case for courts to recognize internal oral complaints is strong, the issue of how to define the outer contours of what constitutes an internal complaint remains. The next Part argues that courts should focus on the substance, rather than form, of an

Department of Labor or EEOC, or for speaking in person with officials of those agencies, about violations of the FLSA or the Equal Pay Act.”)

119. See *infra* Part V (proposing a test to determine the scope of what constitutes an oral complaint).

120. See *supra* note 17 and accompanying text (describing the plaintiff’s prima facie case).

employee's complaint when determining whether it falls within the protection of the FLSA antiretaliation provision.

V. COURTS SHOULD EMPLOY A CASE-BY-CASE INQUIRY FOCUSING ON
THE SUBSTANCE OF AN EMPLOYEE'S COMPLAINT

This Note proposes that courts adopt the standard of whether the complaint was such that a reasonable employer should have been aware that the employee was asserting a FLSA right.¹²¹ Consistent with other circuit courts adopting the substance limitation, this proposal envisions a case-by-case inquiry applying a totality-of-the-circumstances test.¹²² Relevant factors include, but are not limited to: (1) whether the employee explicitly stated that he or she believed the employer was breaking a law;¹²³ (2) whether the employee affirmatively stated that he or she was entitled to a specific remedy, such as overtime pay;¹²⁴ (3) whether the employee stated that he or she was planning on filing a lawsuit or contacting an outside agency;¹²⁵ (4) the number of times an employee spoke with his or her supervisor about the problem;¹²⁶ and (5) whether the complaint was written or oral.¹²⁷ By

121. This is the standard that the Tenth Circuit adopted in *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1487 (10th Cir. 1996). See also *supra* note 47 and accompanying text (noting that courts imposing substance limitation primarily focus on whether the employee asserted her FLSA rights).

122. See *supra* note 46 and accompanying text (noting that courts imposing substance limitation have adopted a case-by-case approach).

123. See *supra* notes 48–49 and accompanying text (discussing an employee's assertion that employer conduct is illegal).

124. This inquiry goes to the heart of the distinction between an employee's mere observation and assertion of rights. By framing a complaint in terms of what she is entitled to, an employee has clearly indicated that she believes that the employer acted illegally, she suffered harm as a result, and is seeking redress. Cf. *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 630 (5th Cir. 2008) (holding that manager passing along employee complaints regarding overtime pay did not engage in protected activity). The court in *Hagan* did not emphasize the fact that the manager did not request a specific remedy on behalf of the employees, but it seems relevant to the inquiry; had he framed his comments in terms of what the employees were entitled to, his position would have been adverse to the company. See *supra* note 47.

125. For example, Kasten allegedly told his supervisor that he was considering suing the company over the location of the time clocks. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 836 (7th Cir.), *reh'g en banc denied*, 585 F.3d 310 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010).

126. If an employee discusses a problem with a supervisor on numerous occasions, it should alert an employer that the employee is complaining within the meaning of the statute. For example, Kasten allegedly told several supervisors and human-resource officials over the course of three months that he believed the location of the time clocks was illegal. *Id.*

127. As Part IV.E suggests, written complaints are undoubtedly preferential for employers and courts. While this Note has argued that the reach of the FLSA antiretaliation provision should not be limited to written complaints, the fact that an employee notified an employer of a problem in writing would certainly weigh in favor of finding the employee to have complained within the meaning of the statute.

undertaking this case-by-case inquiry, courts will ensure that employers are held accountable if they retaliate against an employee who is asserting his or her FLSA rights. This will promote the antiretaliation provision's purpose by both preventing retaliation and strengthening the enforcement structure Congress envisioned.

VI. CONCLUSION

The approach the Seventh Circuit adopted in *Kasten* arbitrarily excludes an entire class of complaints. Such an approach is not demanded by the language of § 215(a)(3), nor is it consistent with the Supreme Court's emphasis on promoting the purpose of such remedial legislation. The Seventh Circuit's approach has the dual effect of opening employees up to retaliation in the short-term and causing a chilling effect that undermines the FLSA's enforcement structure in the long-term. Furthermore, it alters the Department of Labor's interpretation of § 215(a)(3)—an interpretation to which Congress has acquiesced for over sixty years.

Instead of focusing on this written–oral distinction, courts faced with defining the outer bounds of what constitutes an internal complaint should ask whether a reasonable employer would have understood that the employee was asserting a FLSA right. This totality-of-the-circumstances approach is consistent with other circuits and recognizes the multitude of forms and manners that an employee complaint can take. By focusing on substance over form, courts will promote the “remedial and humanitarian” purpose of the FLSA and ensure that employees will continue to report employer violations.