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The Supreme Court’s Interpretation of the Fair Labor Standards Act’s Anti-Retaliation Provision in *Kasten v. Saint-Gobain Performance Plastics Corporation*: Putting Policy Over Plain Language?

by Lawrence D. Rosenthal*

I. INTRODUCTION

Similar to statutes such as Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA), all of which contain anti-retaliation provisions, the Fair Labor Standards Act (FLSA), which protects employees with respect to wages and hours, also contains such

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4. Title VII’s anti-retaliation provision can be found at 42 U.S.C. § 2000e-3(a) (2006); the ADEA’s anti-retaliation provision can be found at 29 U.S.C. § 623(d) (2006); and the ADA’s anti-retaliation provision can be found at 42 U.S.C. § 12203 (2006).
a provision. Unfortunately, not all of these provisions are identical, which has led courts to interpret them differently, granting more protection under some provisions and less protection under others.

The United States Supreme Court has been active in defining the contours of Title VII's anti-retaliation provision, and the Court recently interpreted one aspect of the FLSA's anti-retaliation provision. At issue in Kasten v. Saint-Gobain Performance Plastics Corp. was whether oral complaints constituted "protected activity" under the FLSA. Before Kasten, there was a circuit split with respect to two related issues regarding the FLSA. The first issue was whether internal complaints were protected, and the second was, assuming internal complaints were protected, whether they needed to be written.

7. For example, some courts have indicated that Title VII's anti-retaliation provision provided more protection than the FLSA's anti-retaliation provision. See, e.g., Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 364 (4th Cir. 2000) (noting that "the cause of action for retaliation under the FLSA is much more circumscribed" than the same cause of action under Title VII); Lambert v. Genesee Hosp., 10 F.3d 46, 55 (2d Cir. 1993) (comparing Title VII's "broad[]" anti-retaliation provision to the FLSA's narrower anti-retaliation provision), overruled in part by Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011).
11. The meaning of the term "complaint" is an important part of this Article. The Author will use the term in its informal sense when describing the situation in which an employee "complains" to an employer about a workplace situation. The Author will, however, uses the term "complaint" in its formal, legal context toward the end of this Article, when arguing why the word should be interpreted in that manner in the FLSA's anti-retaliation provision.
12. 131 S. Ct. at 1329.
13. Compare Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 44 (1st Cir.) (holding that internal complaints are protected), amended by 5 Wage & Hour Cas. 2d (BNA) 1024 (1st Cir. 1999), with Lambert, 10 F.3d at 55 (holding that internal complaints are not protected).
14. See Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 838-39 (7th Cir. 2009) (holding that written, but not oral, internal complaints are protected), rev'd, 131
Although the Court did not squarely address the first issue, its conclusion that the FLSA covered certain types of oral complaints, along with the Court's formulation of a test to be used when determining whether certain complaints are protected, certainly suggested that internal complaints were, in fact, protected.\footnote{See Kasten, 131 S. Ct. at 1329. Justices Scalia and Thomas also agreed that the majority's opinion that oral complaints are covered suggested that \textit{all sufficiently specific} internal complaints are covered, even though the Court did not squarely address this issue. \textit{Id.} at 1341 (Scalia, J., dissenting). Specifically, when addressing the majority's claim that it was not answering the question of whether internal complaints in general are protected, Justice Scalia noted that the majority "adopts a test for 'filed any complaint' that assumes a 'yes' answer—and that makes no sense otherwise." \textit{Id.}}

While \textit{Kasten} was consistent with the goal of protecting employees who voice concerns over potential FLSA violations, it is not so clear that the decision is consistent with the language of the FLSA's anti-retaliation provision. In fact, the Court might have stretched the text of the FLSA's anti-retaliation provision just about as far as it could in order to reach what it considered to be the "right" result.\footnote{See infra section V.} This broad interpretation is consistent with how the Court has liberally construed anti-retaliation provisions found in other employment-related statutes;\footnote{The Supreme Court has given an expansive interpretation to Title VII's anti-retaliation provision. \textit{See, e.g.}, Thompson, 131 S. Ct. at 868 (holding that third-party retaliation claims are actionable under Title VII's anti-retaliation provision); Crawford, 555 U.S. at 273 (holding that an employee's responses to an employer's internal investigation of a potential Title VII violation constitute protected activity under Title VII's anti-retaliation provision); Burlington Northern, 548 U.S. at 60-61 (deciding what constitutes an "adverse employment action" under Title VII's anti-retaliation provision); and Robinson, 519 U.S. at 346 (holding that former employees can sue under Title VII's anti-retaliation provision).} however, many of those provisions are drafted much more broadly than the FLSA's anti-retaliation provision.\footnote{See infra section II.}

This Article will examine the FLSA's anti-retaliation provision, and it will focus on whether its language covers internal complaints. Section II will examine the text of the provision and compare it to other employment-related, anti-retaliation provisions.\footnote{See infra section II.} Section III will examine the circuit split regarding whether internal complaints are protected under the FLSA.\footnote{See infra section III. This Article will not focus on the issue the Court addressed in \textit{Kasten}—the distinction between written and oral complaints. Rather, the Article will focus on the distinction between internal complaints and complaints made to courts or administrative agencies.} Section IV will focus on the Court's
opinion in *Kasten* and on Justice Scalia's dissenting opinion.\(^{21}\) Finally, the Article will argue that although the Court in *Kasten* provided more protection to FLSA plaintiffs, it did so despite the FLSA's anti-retaliation provision's narrow language, which suggests that internal complaints are not protected.\(^{22}\) Did the Court put policy ahead of statutory language, or is the FLSA's anti-retaliation provision broad enough to protect internal complaints? Although most courts agree that the Court "got it right," it is possible the Court did so only by stretching the FLSA's text just about as far as it possibly could.

## II. THE FLSA'S ANTI-RETALIATION PROVISION AND OTHER EMPLOYMENT-RELATED, ANTI-RETALIATION PROVISIONS

The FLSA's anti-retaliation provision can be found at 29 U.S.C. § 215(a)(3). This provision prohibits employers from:

- discharg[ing] or in any other manner discriminat[ing] 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.\(^{23}\)

Clearly, employees are protected from retaliation only if they engage in any of the specific activities identified in this provision.\(^{24}\) Importantly, nowhere is there any protection provided for an employee who voices, expresses, or raises any FLSA concerns to his employer or for anyone who "oppos[es]" an FLSA violation.\(^{25}\) The absence of any such language

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21. *See infra* section IV.

22. Although the Author argues that the FLSA's language does not protect any internal complaints, Congress's use of the word "filed" certainly undermines the conclusion that oral complaints are covered. Even during oral argument of this case, Justice Kennedy joked about this issue when he referred to a question that Justice Scalia had just "filed" when Justice Scalia asked counsel a question. Oral Argument at 12:10, *Kasten*, 131 S. Ct. 1325 (No. 09-834), available at [http://www.oyez.org/cases/2010-2019/2010/2010-09_834/argument](http://www.oyez.org/cases/2010-2019/2010/2010-09_834/argument). Also during oral arguments, Justice Scalia expressed his belief that using the term "filed" when referring to an oral communication was a drastic stretch of the ordinary use of that word; he did this when he stated his belief that counsel for Kasten was not "filing" an argument before the Court. *Id.* at 11:48. Similarly, Justice Alito expressed his skepticism when he sarcastically asked counsel for Kasten whether he was "filing" his comments with the Court during oral argument. *Id.* at 4:07.


24. *Id.*

25. *Id.* This varies significantly from Title VII's anti-retaliation provision, which contains an opposition clause that does cover internal complaints. *Compare* 42 U.S.C. § 2000e-3(a) (2006) (prohibiting discrimination against an employee who has "opposed any practice made an unlawful employment practice by this subchapter"), *with* 29 U.S.C.
distinguishes this provision from many other anti-retaliation provisions found in other employment-related statutes.

As previously noted, many employment-related statutes contain anti-retaliation provisions; however, the language in the other federal statutes is much broader. 26 For example, Title VII's anti-retaliation provision provides the following:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 27

Under Title VII, employees are protected if they oppose what they reasonably believe to be an unlawful employment practice, 28 and they are also protected if they participate in a Title VII proceeding. 29 The Court has interpreted this provision broadly to further the goal of protecting employees; 30 however, one difference between Title VII and the FLSA is the absence of an "opposition clause" from the FLSA. 31 It is the absence of this language that caused some courts to interpret the FLSA in a more restrictive manner. 32

§ 215(a)(3) (not containing a similar provision).
26. See supra note 4.
28. Id. Although the Supreme Court has not yet squarely addressed the issue of whether a plaintiff must oppose a practice that is actually unlawful, all circuit courts of appeals have incorporated a reasonableness standard when determining whether the plaintiff must oppose a practice that is, in fact, unlawful. See Lawrence D. Rosenthal, Reading Too Much Into What the Court Doesn't Write: How Some Federal Courts Have Limited Title VII's Participation Clause's Protections After Clark County School District v. Breeden, 83 WASH. L. REV. 345, 356 (2008). The Supreme Court had an opportunity to resolve that issue in Clark County School District v. Breeden, 532 U.S. 268 (2001), but the Court decided not to answer that particular question. 532 U.S. at 270.
30. See supra note 17.
Other federal employment-related statutes also contain anti-retaliation provisions with "opposition" language, including the ADEA,\textsuperscript{33} the ADA,\textsuperscript{34} and the Family and Medical Leave Act (FMLA).\textsuperscript{35} Had all of these anti-retaliation provisions been drafted identically, their interpretation would most likely be consistent; however, because of the differences in the provisions' language, courts have not interpreted these provisions similarly. And one area where the courts differ is whether the opposition concept from Title VII and other statutes should apply to the FLSA. While most courts protect what seems to be FLSA opposition,\textsuperscript{36} some courts take a strict approach and limit the FLSA's protec-

\begin{quote}
S. Ct. 1325 (2011). \textit{See also infra} section III(B).
\end{quote}

\textsuperscript{33} The relevant text of the ADEA's anti-retaliation provision is below:

\begin{quote}
It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment \ldots because such individual \ldots has opposed any practice made unlawful by this section, or because such individual \ldots has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.
\end{quote}
\textsuperscript{29} U.S.C. \textsection 623(d) (2006) (emphasis added).

\textsuperscript{34} The relevant text of the ADA's anti-retaliation provision is below:

\begin{quote}
No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
\end{quote}
\textsuperscript{42} U.S.C. \textsection 12203(a) (2006) (emphasis added).

\textsuperscript{35} The relevant text of the FMLA's anti-retaliation provision is below:

\begin{quote}
(a) Interference with rights
(1) Exercise of rights
It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.
(2) Discrimination
It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries
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, under or related to this subchapter;
(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.
\end{quote}

\textsuperscript{36} \textit{See infra} section III.A.
tion only to those employees who file external complaints. One circuit took a middle-ground approach, concluding that internal complaints were protected so long as they were in writing. This three-way split will now be addressed.

III. THE THREE-WAY CIRCUIT SPLIT

Before Kasten v. Saint-Gobain Performance Plastics Corp., most courts agreed that an employee’s internal FLSA complaints were protected; however, courts took different routes to reach this conclusion. Some courts focused on what they believed to be the policy behind the FLSA's anti-retaliation provision and concluded that protecting only the actions specified in the provision, which do not include internal "opposition," would frustrate that policy. Other courts reached a pro-employee outcome by looking at the provision and concluding either: (1) it was clear that internal complaints were protected; or (2) that the provision was ambiguous and, therefore, the court was free to utilize other tools of statutory construction to conclude that internal complaints were protected. Regardless of how the courts determined that internal complaints were protected, that approach was the majority position before Kasten and will likely continue to be after Kasten.

37. See, e.g., Lambert, 10 F.3d at 55 (deciding not to provide protection for internal complaints); see also infra section III(B). As will be discussed later, after the Supreme Court’s opinion in Kasten, few, if any, courts will continue to deny protection for employees who complain only to their employer; but see Flick v. Am. Fin. Res., Inc., CV 10-3084, 2012 WL 5386157, at *9 (E.D.N.Y. Oct. 31, 2012), and cases cited therein (noting that Kasten did not answer the internal/external issue and sticking with Second Circuit precedent that internal complaints are not protected).


41. Id. at 626 (adopting this approach “because it better captures the anti-retaliation goals of [the FLSA]”); see also Chennisi v. Commc’ns Constr. Grp., LLC, No. 04-4826, 2005 WL 387594, at *2 (E.D. Pa. Feb. 17, 2005). The anti-retaliation provision’s purpose was not to protect employees, but rather to allow for the government to monitor employer compliance. See Brief for Respondent at 22-24, Kasten, 131 U.S. 1325 (No. 09-834), 2010 WL 3251632. Protecting internal complaints does not advance this goal, as internal complaints do nothing to inform the government of an employer’s FLSA compliance. Id.

42. See Lambert v. Ackerly, 180 F.3d 997, 1004 (9th Cir. 1999) (deciding that the statutory language supported a broad interpretation of the anti-retaliation provision); Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 41 (1st Cir.) (deciding that the statutory language was ambiguous), amended by 5 Wage & Hour Cas. 2d (BNA) 1024 (1st Cir. 1999).

43. Since Kasten, several courts have noted (or assumed) that internal complaints are protected by the FLSA's anti-retaliation provision. See Maynor v. Dow Chem. Co., 430 F.
A. The Majority Approach—Internal Complaints Are Protected

Before Kasten, most courts agreed that an employee’s internal complaints were within the scope of the FLSA’s anti-retaliation provision’s protection. This subsection of the Article will discuss those opinions and analyze how those courts reached this pro-employee outcome.

1. The First Circuit’s Opinion in Valerio. The United States Court of Appeals for the First Circuit was one of many courts of appeals that took a pro-employee position on whether internal complaints were protected under the FLSA. In Valerio v. Putnam Associates, Inc., the plaintiff claimed she was entitled to overtime pay and that she was terminated in response to her internal complaint about that issue. The lower court granted summary judgment in favor of the employer on the plaintiff’s FLSA and state-law retaliation claims, holding that the plaintiff’s internal memorandum was not protected under the FLSA or state law.

After addressing the amount of overtime pay owed to the plaintiff, the court addressed the retaliation issue. The First Circuit acknowledged that the issue was one of first impression in that circuit, and it phrased the issue as being:

[Whether [the] FLSA’s prohibition on terminating an employee who “has filed any complaint or instituted or caused to be instituted any proceeding” under or related to the FLSA protects an employee who has lodged a written internal complaint with his or her employer but has not filed a judicial or administrative complaint.]


44. Valerio, 173 F.3d at 44.
45. Id. at 37-38.
46. Id. at 37-38.
47. Id. at 38, 40.
48. Id. at 41.
After acknowledging the circuit split, and after acknowledging that this was a "close question," the court concluded that such activity was protected.

The court disagreed with the United States Court of Appeals for the Second Circuit's opinion in *Lambert v. Genesee Hospital*, which had concluded that internal complaints were not protected, and it determined that the FLSA's anti-retaliation provision was ambiguous. The court noted that the word "complaint" could include internal expressions of "protest, censure, resentment, or injustice conveyed to an employer." The court relied on *Webster's Third New International Dictionary* for the definition of "complaint," and it also noted that Congress failed to specify that the complaint needed to be filed with a court or agency; therefore, the court believed that internal complaints could have been contemplated by the word "complaint." The court also noted that Congress used the phrase "any complaint," which supported the proposition that internal complaints were protected.

The court then analyzed the word "filed." Despite noting that the word "filed" provided the "strongest case" for non-ambiguity, the court again relied on *Webster's Third New International Dictionary* and concluded that the secondary definition of "filed," "to place (as a paper or an instrument) on file among the legal or official records of an office especially by formally receiving, endorsing, and entering," allowed for an interpretation that the FLSA covered internal complaints. The court noted that the definition is "sufficiently elastic to encompass an internal complaint made to a private employer with the expectation the employer will place it on file among the employer's official records." To further support its conclusion that the statute was ambiguous, the court noted that if the statute required filings with a court or agency, the statutory language, "or instituted or caused to be instituted any proceeding under or related to [the FLSA]," would be unnecessary surplusage. Then, relying on the canon of statutory construction that

49. *Id.*
50. 10 F.3d 46 (2d Cir. 1993), overruled in part by *Kasten*, 131 S. Ct. 1325.
51. *Valerio*, 173 F.3d at 41.
52. *Id.*
53. *Id. ; see also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 464 (1971).*
54. *Valerio*, 173 F.3d at 42 (emphasis added).
55. *Id.* at 41.
56. *Id.* at 41-42 (alteration in original); *see also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 849 (1971).*
57. *Valerio*, 173 F.3d at 41-42.
58. *Id.* at 42 (noting that the language would be "surplusage" because the "instituted or caused to be instituted" language would be repeating the "filed any complaint"
courts may assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning,” the court concluded that the statute was ambiguous.59 As a result, the court looked at other tools of statutory construction.60

After noting that the FLSA’s legislative history did not provide much guidance,61 the court looked at Supreme Court case law interpreting the FLSA.62 It noted that the Court had given the FLSA a generous construction,63 and it also observed that “Congress sought to secure compliance with the substantive provision[] of the Act by having ‘employees seeking to vindicate rights claimed to have been denied’ lodge complaints or supply information to officials regarding allegedly substandard employment practices and conditions.”64 The court also noted that the Supreme Court mentioned that the FLSA “must not be interpreted in a narrow, grudging manner,” and that the FLSA’s “remedial and humanitarian” purpose would not be furthered by a narrow interpretation.65

The court next addressed more policy considerations.66 Specifically, it noted that if only formal complaints to a court or agency were protected, employers could retaliate against employees so long as the

language). During oral argument in Kasten, Justice Scalia disagreed with Petitioner’s position that the “instituted or caused to be instituted” language would be mere surplusage, noting that an individual could file a complaint with the Department of Labor that does not result in a proceeding. Oral Argument, supra note 22, at 13:29.


60. Id.

61. Id. The court then noted that it would have looked at how the federal administrative agencies have interpreted this provision; however, neither the Equal Employment Opportunity Commission nor the Department of Labor had taken a “definite stance as to the proper interpretation to give [to] § 215(a)(3).” Id. at 42 n.5. The First Circuit was also critical of how the EEOC reached its pro-employee conclusion because the EEOC simply relied on the Tenth Circuit’s opinion in Love v. RE/MAX of Am., Inc., 738 F.2d 383 (10th Cir. 1984). Valerio, 173 F.3d at 42 n.5. In Kasten, during oral argument before the Court, and also in the Respondent’s Brief on the Merits, the Respondent’s counsel pointed to the colloquy that took place during the debate which suggested that only external complaints were protected; specifically, the colloquy referred to “malicious complaints,” Oral Argument, supra note 22, at 42:42, which would apply only to an employee’s complaint to an external agency or to a court. See Brief for Respondent supra note 41, at 21.


63. Valerio, 173 F.3d at 43.

64. Id. at 42 (quoting Mitchell, 361 U.S. at 292).

65. Id. at 43 (quoting Tennessee Coal, 321 U.S. at 597).

66. Id.
employers did so prior to the employees' filing of formal complaints. A narrow interpretation of the Act would also discourage employees from bringing FLSA concerns to an employer. Additionally, the court noted that a narrow interpretation would provide "an incentive for [an] employer to fire an employee as soon as possible after learning the employee believed he was being treated illegally." Finally, the court observed that a narrow interpretation would "create an atmosphere of intimidation" and defeat the FLSA's purpose of encouraging employees to secure their FLSA rights.

The First Circuit therefore concluded that "the animating spirit of the Act is best served by a construction of [the FLSA's anti-retaliation provision] under which the filing of a relevant complaint with the employer no less than with a court or agency may give rise to a retaliation claim." Thus, by first concluding that the FLSA's language was ambiguous and then focusing on what it believed to be the FLSA's purpose, the First Circuit reached a pro-employee outcome.

2. The Approach Taken Within the Third Circuit. The United States Court of Appeals for the Third Circuit has not officially adopted the majority approach, but two opinions from that court suggest that it would do so if asked whether the FLSA protects internal complaints. Specifically, the Third Circuit in Brock v. Richardson and in Edwards v. Cornell & Son, Inc., strongly suggested that if confronted with this issue.

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67. Id. 68. Id. 69. Id. 70. Id.
71. Id. The court went on to note the similarity between the FLSA's anti-retaliating provision and the anti-retaliating provision found in the Surface Transportation Assistance Act (STAA) of 1982, 49 U.S.C. §§ 31105(a)(1)(A) (2006 & Supp. II 2008), and concluded that because the First Circuit had already decided that internal complaints were protected under the STAA, this provided additional support for the idea that internal complaints were protected under the FLSA's anti-retaliating provision. Valerio, 173 F.3d at 43-44.
72. Valerio, 173 F.3d at 44. Predictably, many district courts within the First Circuit have followed Valerio and concluded that internal complaints are protected under the FLSA. See, e.g., Gosselin v. Boralex Livermore Falls, LP, No. 08-162-P-H, 2009 WL 1421098, at *11 (D. Me. May 19, 2009). Similarly, since Kasten, at least one district court within the First Circuit decided that internal complaints are protected. See Thayer Corp., 2011 WL 2682723, at *14.
73. See Brock v. Richardson, 812 F.2d 121 (3d Cir. 1987); Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217 (3d Cir. 2010). Now, of course, after Kasten, it is even more probable that the Third Circuit would adopt the pro-employee approach with respect to this issue.
74. 812 F.2d 121 (3d Cir. 1997).
75. 610 F.3d 217 (3d Cir. 2010).
issue, it would conclude that internal complaints are protected under the FLSA.\textsuperscript{76}

In Brock, the court addressed whether an employee was protected when the employer believed the employee had engaged in one of the acts listed in the FLSA’s anti-retaliation provision, but the employee had not done so.\textsuperscript{77} According to the employer, the “mere belief” that an employee had engaged in one of the specified acts was insufficient to trigger the FLSA’s protections.\textsuperscript{78} The Third Circuit disagreed, noting that the FLSA was part of a “large body of humanitarian and remedial legislation,” and as such, it should be, and has been, construed liberally.\textsuperscript{79} The court cited to both Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123\textsuperscript{80} and Mitchell v. Robert DeMario Jewelry, Inc.\textsuperscript{81} for this broad interpretation, and it noted that other courts have “looked to [the FLSA’s] animating spirit in applying it to activities that might not have been explicitly covered by the language.”\textsuperscript{82} Finally, the court looked at case law broadly interpreting the FLSA’s anti-retaliation provision and at a similar provision in the National Labor Relations Act.

\textsuperscript{76} Brock, 812 F.2d at 124-25; Edwards, 610 F.3d at 224-25.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} 321 U.S. 590 (1944). Specifically, the court noted the following from Tennessee Coal:

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

Brock, 812 F.2d at 123-24 (quoting Tennessee Coal, 321 U.S. at 597).

\textsuperscript{81} Brock, 812 F.2d at 123-24 (quoting Tennessee Coal, 321 U.S. at 597).
\textsuperscript{82} 361 U.S. 288 (1960). Specifically, the court noted the following from Mitchell:

For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. This end the prohibition of § 15(a)(3) against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. By the proscription of retaliatory acts set forth in § 15(a)(3), and its enforcement in equity by the Secretary pursuant to § 17, Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.

Brock, 812 F.2d at 124 (citations omitted) (quoting Mitchell, 361 U.S. at 292).
\textsuperscript{82} Brock, 812 F.2d at 124 (emphasis added).
and concluded that "a finding that an employer retaliated against an employee because the employer believed the employee complained or engaged in other activity specified in section 15(a)(3) is sufficient to bring the employer's conduct within that section." Thus, the Third Circuit took an expansive view of the FLSA despite acknowledging that the anti-retaliation provision's language might not have covered the plaintiff's actions.

Twenty-three years after Brock, the Third Circuit again hinted that it would hold that the FLSA protects internal complaints. Although Edwards involved ERISA, the court suggested that it would adopt a broad interpretation of the FLSA's anti-retaliation provision. The plaintiff in Edwards alleged she was terminated after complaining to her employer about ERISA violations, and the issue on appeal was whether internal complaints were protected under ERISA. Although the Third Circuit held that internal complaints were not protected under ERISA, the opinion suggests that the court would have reached a different conclusion under the FLSA.

In an attempt to persuade the court to adopt a broad interpretation of ERISA's anti-retaliation provision, the plaintiff relied on Brock. The court noted that Brock involved the FLSA, not ERISA, and it also noted that the Third Circuit had not yet adopted a position on the issue. Although not deciding that Brock protected internal complaints, the court did note that had Brock so held, such a holding would not have applied to the ERISA claim in Edwards. The court acknowledged that the FLSA's anti-retaliation provision "extends broadly to persons that have 'filed any complaint,' without explicitly stating the level of formality required," however, because of the differences between the two anti-retaliation provisions, the pro-employee outcome from Brock

83. Id. at 124-25.
84. Id.
85. Edwards, 610 F.3d at 224-25.
87. Edwards, 610 F.3d at 224-25.
88. Id. at 218.
89. Id. at 224. Although the court ruled against the plaintiff in Edwards, as will be discussed, infra, the court did address the FLSA's anti-retaliation provision and suggested that internal complaints would be covered under that provision. Id. at 224-25.
90. Id. at 224.
91. Id.
92. Id. at 224-25.
93. Id. at 224.
does not necessarily extend to ERISA.94 As a result, the court determined that internal complaints are not covered under ERISA.95

One district court within the Third Circuit followed that court's suggestion that the FLSA should be interpreted broadly and concluded that internal complaints are protected.96 In *Chennisi v. Communications Construction Group, LLC*,97 the plaintiff alleged he was terminated after he and his former employer agreed to a settlement that came about after the plaintiff complained to his employer about overtime.98 In its motion to dismiss, the employer relied on the Second Circuit's opinion in *Lambert*; however, the United States District Court for the Eastern District of Pennsylvania rejected that argument, believing that the employer's position conflicted "with the view of the FLSA held by the . . . Third Circuit."99 Although the court acknowledged that the Third Circuit had not directly addressed this question, the court also acknowledged that the Third Circuit in *Brock* indicated that the FLSA should be read broadly.100 Relying on *Brock* and on the Supreme Court's opinion in *Tennessee Coal*, the court stated:

The reasoning for this liberal interpretation is clear. The Third Circuit has explained that, "[t]he Fair Labor Standards Act is part of the large body of humanitarian and remedial legislation enacted during the Great Depression, and has been liberally interpreted." To further the

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94. *Id.* at 224-25. Specifically, ERISA's anti-retaliation section provides the following: It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act[, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. In the case of a multiemployer plan, it shall be unlawful for the plan sponsor or any other person to discriminate against any contributing employer for exercising rights under this chapter or for giving information or testifying in any inquiry or proceeding relating to this chapter before Congress. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.


98. *Id.* at *1.

99. *Id.* at *2.

100. *Id.*
humanitarian and remedial purposes of the FLSA, the statute must not be “interpreted or applied in a narrow, grudging manner.”

Again quoting Brock, the court noted:

“[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” and held that an employer’s mere belief that an employee has engaged in a protected activity was sufficient to trigger application of [the anti-retaliation provision].

The court continued:

Reading the anti-retaliation provision of the FLSA broadly leads us to conclude that an internal complaint to an employer regarding a violation of the FLSA is a protected activity under § 215(a)(3). Our conclusion that making an internal complaint is a protected activity is necessary to achieve the FLSA’s remedial and humanitarian purpose. Holding otherwise would be contrary to the provision’s purpose of preventing fear of economic retaliation and encouraging employees to raise concerns about violations of the FLSA.

As a result, the district court denied the motion to dismiss. Once again, however, the court focused more on what it believed the purpose of the FLSA to be rather than on the FLSA’s language.

3. The Fifth Circuit’s Opinion in Hagan. The United States Court of Appeals for the Fifth Circuit also follows the majority rule, holding that internal complaints are protected under the FLSA. Unfortunately for the plaintiff, however, the Fifth Circuit determined

101. Id. (quoting Brock, 812 F.2d at 123-24) (alteration in original) (citations omitted).
102. Id. (quoting Brock, 812 F.2d at 124) (emphasis added).
103. Id. (citations omitted).
104. Id. at *3.
106. Hagan, 529 F.3d at 626. Prior to Hagan, a district court within the Fifth Circuit correctly predicted that the Fifth Circuit would conclude that internal complaints are protected under the FLSA. Burns v. Blackhawk Mgmt. Corp., 494 F. Supp. 2d 427, 432-33 (S.D. Miss. 2007). Although the plaintiff ultimately lost in Burns, the court noted that most circuits had adopted a broad approach when interpreting the anti-retaliation provision, and it correctly predicted that the Fifth Circuit “would follow the reasoning of the vast majority of courts and hold that informal complaints do constitute protected activity.” Id. at 433.
that he did not adequately voice his concerns or those of others in order to gain the statute's protection.\textsuperscript{107} In \textit{Hagan v. Echostar Satellite, LLC},\textsuperscript{108} the plaintiff was promoted to a position with supervisory authority. The plaintiff was told of a change in how the company was going to schedule its employees—a change that would reduce the amount of overtime for each employee. The plaintiff did not think the new plan violated the FLSA, but he did express concern that his employees would not be happy with the overtime reduction. When he revealed the new policy to the employees, some of them voiced concern over the policy, and they also asked whether the new policy was legal. Instead of answering, the plaintiff instructed the employees to see the Human Resources Manager. At a subsequent meeting, the employees again asked about the policy, and the plaintiff informed the employees that the policy would limit overtime opportunities. Pursuant to instructions he had received, the plaintiff emphasized that the change was implemented for efficiency purposes, not to reduce overtime.\textsuperscript{109}

Within one week of these discussions, the plaintiff's employer terminated him. The plaintiff sued, claiming that the reason for his termination was his decision to voice concerns over the policy and his decision to refer his subordinates' questions regarding it to Human Resources.\textsuperscript{110} The Fifth Circuit framed one of the issues as being whether the plaintiff's behavior constituted "filing a[ny] complaint" under the FLSA's anti-retaliation provision.\textsuperscript{111} Noting that the Fifth Circuit had not yet "addressed the exact contours of [FLSA] protected activity," the court decided to look at how other courts had resolved this issue.\textsuperscript{112} The court also noted that the district court took a broad approach to this phrase's meaning and concluded that "informal, internal complaint[s] could constitute protected activity under the FLSA."\textsuperscript{113} The Fifth Circuit, however, pointed out that the plaintiff's claim failed at the district court level because the plaintiff's actions never rose to an informal complaint because: (1) "there was 'no evidence that [the plaintiff] at any point crossed the line from acting in his appointed capacity as a field service manager [o]n behalf of the company to acting

\textsuperscript{108} 529 F.3d 617 (5th Cir. 2008).
\textsuperscript{109} \textit{Id.} at 620-21, 626.
\textsuperscript{110} \textit{Id.} at 621-23.
\textsuperscript{111} \textit{Id.} at 625.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
in an adversarial role against [the company]”; and (2) the plaintiff lacked a good faith belief that the company violated the FLSA.\textsuperscript{114}

The Fifth Circuit then addressed whether internal complaints were protected under the FLSA.\textsuperscript{115} Without much analysis of the statutory language, the Fifth Circuit agreed with the lower court and noted that it would “adopt the majority rule, which allows an informal, internal complaint to constitute protected activity under Section 215(a)(3), because it better captures the anti-retaliation goals of that section.”\textsuperscript{116} Thus, this is another example of a court failing to perform a thorough analysis of the FLSA’s language, but rather focusing on what it believed to be the anti-retaliation provision’s purpose.\textsuperscript{117} The court devoted the rest of its opinion to deciding whether the plaintiff’s actions rose to “informal complaints” and concluded that they did not.\textsuperscript{118} The court noted that the plaintiff’s decision to express his concern that the employees might receive less overtime and his decision to refer the questions to Human Resources did not constitute informal complaints sufficient to trigger the FLSA’s protection.\textsuperscript{119} The court therefore affirmed the district court’s judgment.\textsuperscript{120}

4. The Sixth Circuit’s Opinion in Romeo Community Schools. Another court that adopted the majority approach without much analysis is the United States Court of Appeals for the Sixth Circuit.\textsuperscript{121} That court was faced with a claim under the Equal Pay Act (EPA), which shares the FLSA’s anti-retaliation provision.\textsuperscript{122} In EEOC v. Romeo Cmty. Sch., 976 F.2d 985 (6th Cir. 1992), the Sixth Circuit held that an oral, internal complaint was protected activity. See Maynor v. Dow Chem. Co., 430 F. App’x 313, 313 & n.1 (5th Cir. 2011). Predictably, many district courts within the Fifth Circuit have also concluded that internal complaints are protected. See, e.g., Eyles v. Uline, Inc., No. 4:08-CV-577-A, 2009 WL 2668447, at *4 (N.D. Tex. Sept. 4, 2009), aff’d, 381 F. App’x 384 (5th Cir. 2010) (pre-Kasten). Since Kasten, this has continued. See, e.g., Coberly v. Christus Health, No. 3:10-CV-1213-L, 829 F. Supp. 2d 521, 526 (N.D. Tex. 2011), and Palmer, 2011 WL 1230206. Furthermore, the Fifth Circuit recently relied on Kasten to support the proposition that an oral, internal complaint was protected activity. See Maynor v. Dow Chem. Co., 430 F. App’x 313, 313 & n.1 (5th Cir. 2011).

\begin{thebibliography}{99}
\bibitem{114} Id. (quoting Hagan, 2007 WL 543441, at *5).
\bibitem{115} Id. at 625-27.
\bibitem{116} Id. at 626 (emphasis added). The only other “analysis” in which the court partook was when it noted that “[s]ection 215(a)(3) speaks of an employee ‘filing’ any complaint,” and we cannot agree that the plain language is limited to filing a formal complaint.” Id. (alteration in original).
\bibitem{117} Id.
\bibitem{118} Id. at 626-30.
\bibitem{119} Id. at 626.
\bibitem{120} Id. at 630. Predictably, many district courts within the Fifth Circuit have also concluded that internal complaints are protected. See, e.g., Eyles v. Uline, Inc., No. 4:08-CV-577-A, 2009 WL 2668447, at *4 (N.D. Tex. Sept. 4, 2009), aff’d, 381 F. App’x 384 (5th Cir. 2010) (pre-Kasten). Since Kasten, this has continued. See, e.g., Coberly v. Christus Health, No. 3:10-CV-1213-L, 829 F. Supp. 2d 521, 526 (N.D. Tex. 2011), and Palmer, 2011 WL 1230206. Furthermore, the Fifth Circuit recently relied on Kasten to support the proposition that an oral, internal complaint was protected activity. See Maynor v. Dow Chem. Co., 430 F. App’x 313, 313 & n.1 (5th Cir. 2011).
\bibitem{121} See EEOC v. Romeo Cmty. Sch., 976 F.2d 985 (6th Cir. 1992).
\bibitem{122} The substantive provision of the Equal Pay Act can be found at 29 U.S.C. § 206(d) (2006). The FLSA’s anti-retaliation provision applies to the Equal Pay Act. See, e.g., Lambert, 10 F.3d at 55.
\end{thebibliography}
v. Romeo Community Schools, a female employee alleged she was paid less than her male counterparts and that she experienced an adverse employment action for complaining to management about this issue. After addressing the substantive EPA claim, the court addressed the retaliation claim. The lower court had rejected this claim, holding that any complaints made prior to a filing with the EEOC were not protected.

The Sixth Circuit concluded that the lower court's decision was clearly erroneous. The court relied on precedent from other jurisdictions and did not provide much analysis. The court relied on the United States Court of Appeals for the Tenth Circuit's opinion in Love v. RE/MAX of America, Inc., for the propositions that "[t]he Act also applies to the unofficial assertion [of] rights through complaints at work" and that "it is the assertion of statutory rights which is the triggering factor, not the filing of a formal complaint." The court, therefore, adopted a broad interpretation of the FLSA without much analysis of the statute's language.

Judge Suhrheinrich dissented in part and concurred in part. He believed the plaintiff's retaliation claim should have failed because the FLSA's language only protects employees who engage in the specific activities listed in the statute. Judge Suhrheinrich believed that because the employer terminated the plaintiff before she engaged in any of those activities, the plaintiff could not have been retaliated against for engaging in any of those activities. He then noted that had this retaliation claim been brought under Title VII, which has a much broader anti-retaliation provision, he might have agreed with the outcome; however, because the FLSA's anti-retaliation provision is not

123. 976 F.2d 985 (6th Cir. 1992).
124. Id. at 987.
125. Id. at 989.
126. Id.
127. Id.
128. Id.
129. 738 F.2d 383 (10th Cir. 1984).
130. Romeo Cnty. Sch., 976 F.2d at 989 (alteration in original) (quoting Love, 738 F.2d at 387).
131. Id. at 989-90. The Sixth Circuit has reaffirmed its view that internal complaints are protected under the FLSA. See Moore v. Freeman, 355 F.3d 558, 562 (6th Cir. 2004); Cunningham v. Gibson Cnty., No. 95-6667, slip op. at 2 (6th Cir. Mar. 18, 1997).
132. Romeo Cnty. Sch., 976 F.2d at 990 (Suhrheinrich, J., concurring in part and dissenting in part).
133. Id.
134. Id.
as broad as Title VII's, he could not agree with the majority. This opinion, which actually looked at the FLSA's language, was certainly the minority view, and unfortunately for employers, the Court's opinion in Kasten has most likely made this opinion from Judge Suhrheinrich almost meaningless.

5. The Ninth Circuit's Opinion in Ackerly. Not surprisingly, the usually pro-plaintiff United States Court of Appeals for the Ninth Circuit decided that the FLSA protects internal complaints. In Lambert v. Ackerly, the plaintiffs, who had complained to their employer about overtime wages, won a multi-million-dollar judgment, and the defendants appealed the denial of their motion for judgment as a matter of law. Initially, the Ninth Circuit ruled in favor of the defendants, but the court agreed to hear the case en banc. The Ninth Circuit then affirmed the district court's judgment, concluding that the FLSA's anti-retaliation provision covers internal complaints.

The court phrased the issue as "whether the FLSA's prohibition on terminating an employee who has 'filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter' protects an employee who complains to his employer about violations of the Act." The court noted that this was an issue of first impression for that court, but that seven circuits had already held that the FLSA does cover internal complaints. The court also noted that the Second

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135. Id.
136. Although the Court in Kasten maintained that it was not answering the question of whether internal complaints were protected, as Justice Scalia pointed out, the Court's opinion essentially presumed that internal complaints were, in fact, protected. 131 S. Ct. at 1341 (Scalia, J., dissenting). Specifically, as will be discussed infra, the Court in Kasten established a test for determining what constitutes protected activity—a test which would only make sense if internal complaints were, in fact, protected. See infra sections IV(A) & (B).
137. Lambert v. Ackerly, 180 F.3d 997, 1004 (9th Cir. 1999).
138. 180 F.3d 997 (9th Cir. 1999).
139. Id. at 1002.
140. Id. The Ninth Circuit's initial panel opinion can be found at 156 F.3d 1018 (9th Cir. 1998).
141. Ackerly, 180 F.3d at 1002, 1004.
142. Id. at 1003.
143. Id. The court cited the following cases for the majority position: Valerio v. Putnam Assocs. Inc., 173 F.3d 35 (1st Cir. 1999); Brock v. Richardson, 812 F.2d 121 (5th Cir. 1987); EEOC v. Romeo Cnty. Sch., 976 F.2d 985 (6th Cir. 1992); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179 (8th Cir. 1975); Love v. RE/MAX of Am., Inc., 738 F.2d 383 (10th Cir. 1984); and EEOC v. White & Son Enters., 881 F.2d 1006 (11th Cir. 1989). Ackerly, 180 F.3d at 1003.
Second Circuit was the only court to reach the opposite conclusion.\textsuperscript{144} Relying on \textit{Tennessee Coal} and \textit{Mitchell}, the court then stated that remedial statutes must be construed broadly, and it noted that:

\begin{quote}
[The FLSA 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 . . . . Those are rights that Congress has specifically legislated to protect. \textit{Such a statute must not be interpreted or applied in a narrow, grudging manner.}
\end{quote}

Thus, by relying on Supreme Court precedent that focused on policy rather than on statutory language, the Ninth Circuit, like several other courts, relied on what it believed to be the policy behind the FLSA rather than on its language. Then, relying on \textit{Mitchell}, the Ninth Circuit emphasized that the FLSA should "provide an incentive for employees to report wage and hour violations by their employers."\textsuperscript{146} Again quoting the Supreme Court, the Ninth Circuit observed:

\begin{quote}
For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied . . . . [I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.
\end{quote}

The Ninth Circuit then quoted cases from the Third, Eleventh, and First Circuits.\textsuperscript{148} First, the court quoted \textit{Brock}: "the [Supreme] Court has made clear that the key to interpreting the [FLSA's] anti-retaliation provision is the need to prevent employees' "fear of economic retaliation" for voicing grievances about substandard conditions."\textsuperscript{149} Next, the court relied on the United States Court of Appeals for the Eleventh Circuit's opinion in \textit{EEOC v. White & Son Enterprises}\textsuperscript{150} for the idea that "[t]he anti-retaliation provision of the FLSA was designed to

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{144} \textit{Ackerly}, 180 F.3d at 1003. At the time of the opinion, the Fourth Circuit had not yet issued its decision in \textit{Ball v. Memphis Bar-B-Q Co.}, 228 F.3d 360 (4th Cir. 2000). \textit{See infra} section III(B).
\item \textsuperscript{145} \textit{Ackerly}, 180 F.3d at 1003 (alteration in original) (quoting \textit{Tennessee Coal}, 321 U.S. at 597).
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} \textit{Id.} (alteration in original) (quoting \textit{Mitchell}, 361 U.S. at 292).
\item \textsuperscript{148} \textit{Id.} at 1003-04. Specifically, the Ninth Circuit cited \textit{Valerio}, 173 F.3d 35; \textit{Brock}, 812 F.2d 121; and \textit{White & Son Enters.}, 881 F.2d 1006. \textit{Ackerly}, 180 F.3d at 1003-04.
\item \textsuperscript{149} \textit{Ackerly}, 180 F.3d at 1003 (alteration in original) (quoting \textit{Brock}, 812 F.2d at 124).
\item \textsuperscript{150} 881 F.2d 1006 (11th Cir. 1989).
\end{enumerate}
\end{footnotesize}
prevent fear of economic retaliation by an employer against an employee who chose to voice such a grievance . . . .”\textsuperscript{151} The court continued: “[b]y giving a broad construction to the anti-retaliation provision to include [informal complaints made to employers], its purpose will be further promoted.”\textsuperscript{152} Finally, the court quoted Valerio:

A narrow construction of the anti-retaliation provision could create an atmosphere of intimidation and defeat the Act's purpose in § 215(a)(3) of preventing employees' attempts to secure their rights under the Act from taking on the character of "a calculated risk." Such circumstances would fail to "foster a climate in which compliance with the substantive provisions of the Act would be enhanced." Hence we, like many of our sister circuits, conclude that the animating spirit of the Act is best served by a construction of § 215(a)(3) under which the filing of a relevant complaint with the employer no less than with a court or agency may give rise to a retaliation claim.\textsuperscript{153}

Ultimately, the Ninth Circuit decided to protect employees who lodge internal complaints.\textsuperscript{154} The Ninth Circuit concluded that this interpretation provided the most protection to employees and furthered what it believed to be the FLSA's purpose.\textsuperscript{155} The court then held the following:

We hold, therefore, that in order for the anti-retaliation provision to ensure that "fear of economic retaliation" not "operate to induce aggrieved employees quietly to accept substandard conditions," [the anti-retaliation provision] must protect employees who complain about violations to their employers, as well as employees who turn to the Labor Department or the courts for a remedy.\textsuperscript{156}

Only after looking at other courts' interpretations of the statute did the Ninth Circuit analyze the FLSA's language.\textsuperscript{157} After doing so, the court decided that its interpretation was consistent with that language.\textsuperscript{158} First, the court concluded that the phrase "any complaint" meant any complaint, whether made to an employer or to a court or agency.\textsuperscript{159} Second, the court noted that the word file could include

\textsuperscript{151} Ackerly, 180 F.3d at 1004 (alteration in original) (quoting White & Son Enters., 881 F.2d at 1011).
\textsuperscript{152} Id. (alteration in original) (quoting White & Son Enters., 881 F.2d at 1011).
\textsuperscript{153} Id. (quoting Valerio, 173 F.3d at 43).
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id. (citation omitted) (quoting Mitchell, 361 U.S. at 292).
\textsuperscript{157} Id. at 1004-05.
\textsuperscript{158} Id. at 1004.
\textsuperscript{159} Id.
complaints made to employers. Finally, the court concluded that the phrase "related to," when used in the phrase "under or related to this chapter," could refer to internal complaints. Therefore, and to its credit, the Ninth Circuit looked at the FLSA's language and concluded that it was consistent with what it determined to be the FLSA's purpose. The court, therefore, granted protection to employees who lodged internal complaints.

Next, after rejecting the Second Circuit's opinion in Lambert, the Ninth Circuit pointed to several other anti-retaliation provisions and how various courts had interpreted them to provide protection to employees who complained to their employers. After doing this, the Ninth Circuit concluded: "[b]y holding that the anti-retaliation provision of the FLSA similarly extends protection to employees who complain of alleged violations to their employers, we follow a course well tread both by our court and the other circuits." Thus, although the Ninth Circuit first looked at what it determined to be the policy behind the FLSA, it eventually looked at the statute's language to reach its pro-employee conclusion.

6. The Tenth Circuit's Opinion in Love. The Tenth Circuit is another jurisdiction where internal complaints are protected under the FLSA. Although the United States Court of Appeals for the Tenth Circuit has not directly faced this question, by ruling in favor of the plaintiff in Love, it implicitly endorsed the majority approach. In Love, upon learning that male employees were receiving higher pay than

160. Id.
161. Id. at 1004-05.
162. Id.
163. Id. at 1005.
164. Id. at 1005-07. The statutes to which the court compared the FLSA included the Federal Mine Health and Safety Act, the Federal Railroad Safety Act, and the Clean Water Act.
165. Id. at 1007. Since this opinion, the Ninth Circuit has reaffirmed its belief that the FLSA's anti-retaliation provision covers internal complaints. See Majewski v. St. Rose Dominican Hosp., 310 F.3d 653, 655 (9th Cir. 2002) (noting that anti-retaliation provisions must be construed broadly, and specifically referring to its opinion in Ackerly). See also Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1151 (9th Cir. 2000).
167. Love, 738 F.2d at 387.
168. Id.
she was, the plaintiff sent a memorandum to the company president, requesting a raise. She also attached a copy of the Equal Pay Act. Within two hours of sending this memorandum, the plaintiff was terminated. She sued under the EPA and Title VII, alleging violations of the substantive prohibitions of the acts and retaliation. The trial court found that the employer did not discriminate against the plaintiff, but it did conclude that the plaintiff proved that she was the victim of retaliation. The lower court did not specify under which statute the plaintiff proved her retaliation claim(s).

On appeal, the defendant argued that because the plaintiff was unsuccessful on her substantive claims, she could not prevail on her retaliation claim(s). The Tenth Circuit focused most of its opinion on the issue of whether a plaintiff must win the underlying Title VII claim in order to win a retaliation claim, but it eventually addressed the EPA/FLSA retaliation issue. The court quoted the FLSA's anti-retaliation provision's language and noted that "Congress 'sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced' by recognizing that 'fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.' The court then, without much analysis of the provision's language, noted that the anti-retaliation provision "also applies to the unofficial assertion of rights through complaints at work." As a result, the court affirmed the district court's judgment on the plaintiff's retaliation claim(s). Thus, this case is another example of a court focusing more on policy than on the statute's language.

7. The Eleventh Circuit's opinion in White & Son Enterprises. Another United States Court of Appeals that took a pro-employee view of the FLSA's anti-retaliation provision is the Eleventh Circuit. Although it did so over twenty years ago, that court's decision in White & Son Enterprises was recently cited with approval in Keeler v. Florida Department of Health. In White & Son Enterprises, the EEOC sued

169. Id. at 384-85.
170. Id. at 385.
171. Id. at 387.
172. Id. (quoting Mitchell, 361 U.S. at 292).
173. Id.
174. Id. Several years after Love, the Tenth Circuit re-affirmed its position that internal complaints are protected under the FLSA. Pacheco v. Whiting Farms, Inc., 365 F.3d 1199, 1206 (10th Cir. 2004).
175. White & Son Enters., 881 F.2d at 1011.
176. 324 F. App'x 850, 858 (11th Cir. 2009).
on behalf of several plaintiffs, alleging that the employer violated both the EPA and Title VII, and alleging that the employer retaliated against employees for protesting the unequal treatment they received.\textsuperscript{177} The court first addressed the substantive EPA and Title VII claims, and it ultimately concluded that the female employees were victims of discrimination.\textsuperscript{178}

The court then addressed the retaliation claims.\textsuperscript{179} One argument the employer made was that the employees "had not filed a complaint, instituted or caused to be instituted any proceeding, testified, or served on an industry committee and were not about to testify in a proceeding or serve on an industry committee."\textsuperscript{180} The employer argued that because of this, the employees had not engaged in protected activity.\textsuperscript{181} Rejecting this argument, the Eleventh Circuit decided that the complaints made to at least two people within the company constituted protected activity.\textsuperscript{182}

Despite noting that the "charging parties did not perform an act that is explicitly listed in the FLSA's anti-retaliation provision . . . ," the court concluded that "the unofficial complaints expressed by the women to their employer about unequal pay constitute an assertion of rights protected under the statute."\textsuperscript{183} Thus, the Eleventh Circuit acknowledged that internal complaints were not explicitly covered by the FLSA; nonetheless, relying on \textit{Tennessee Coal} and \textit{Mitchell}, the court noted that the FLSA should be interpreted broadly.\textsuperscript{184} The court continued: "Congress sought to secure compliance with the substantive provisions of the labor statute by having 'employees seeking to vindicate rights claimed to have been denied' lodge complaints or supply information to officials regarding allegedly substandard employment practices and conditions."\textsuperscript{185} Finally, the court noted that the FLSA's anti-retaliation provision "was designed to prevent fear of economic retaliation by an employer against an employee" who chose to express FLSA-related concerns, and that "[b]y giving a broad construction to the anti-retaliation provision to include the form of protest engaged in . . . by the charging parties, its purpose will be further promoted."\textsuperscript{186} Thus, in

\begin{itemize}
\item \textsuperscript{177} \textit{881 F.2d} at 1007.
\item \textsuperscript{178} \textit{Id.} at 1010.
\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} \textit{Id.} at 1011; see also 29 U.S.C. § 215(a)(3).
\item \textsuperscript{181} \textit{White & Son Enters.}, \textit{881 F.2d} at 1011.
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} \textit{Id.} (emphasis added).
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} \textit{Id.} (quoting \textit{Mitchell}, 361 U.S. at 292).
\item \textsuperscript{186} \textit{Id.}
\end{itemize}
reaching its decision, the court focused less on the statute's language and more on what it believed the statute's purpose to be. 187 This is how most courts that took a pro-employee interpretation of the FLSA reached that conclusion.

8. The Approach Taken Within the District of Columbia Circuit. The United States Court of Appeals for the District of Columbia Circuit has not directly answered whether internal FLSA complaints constitute protected activity. The district court within that jurisdiction has, however, decided that internal complaints are protected. 188 In Mansfield v. Billington, 189 the United States District Court for the District of Columbia reconsidered a ruling that dismissed the plaintiff's claim that her employer violated the FLSA when it terminated her for complaining to her supervisor regarding her pay. 190 In initially dismissing that claim, the lower court relied on Ball v. Memphis Bar-B-Q Co. 191 and Lambert to conclude that the FLSA's anti-retaliation provision does not cover internal complaints. 192 Specifically, in the initial opinion, the court observed:

The plain language of the EPA's retaliation provision expressly limits the scope of its application. It discusses the filing of "any complaint" in the context of formal legal actions, such as instituting proceedings, testifying, and serving on an industry committee. By way of contrast, Title VII protects employees who have "opposed any practice made an unlawful employment practice by this subchapter." The phrase "opposed any practice" is markedly more inclusive than the language of the EPA's anti-retaliation provision which protects the filing of "any complaint" in the context of specific formal actions. 193

The court initially dismissed the plaintiff's claim because she had not filed a formal complaint. Despite this ruling, the plaintiff argued that because the Supreme Court issued three opinions following the dismissal

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187. See id. In fact, as noted in the text above, when the court did address the statutory language, it acknowledged that internal complaints were not explicitly covered. Id. Predictably, district courts within the Eleventh Circuit have also concluded that internal complaints are covered under the FLSA. See, e.g., Ramos v. Collins & 74th St., Inc., No. 07-21478-CIV, 2008 WL 2804705 (S.D. Fla. July 21, 2008).


190. Id. at 12. The plaintiff also sought relief under the substantive provisions of Title VII and the EPA as well as under Title VII's anti-retaliation provision. Id.

191. 228 F.3d 360 (4th Cir. 2000).


193. Id. (alteration in original) (citations omitted) (quoting Memorandum Opinion at 14 (June 1, 2006)).
of her retaliation complaint, all of which supported an expansive view of federal anti-retaliation provisions, the court should reconsider its initial decision. The employer correctly pointed out that not one of those Supreme Court opinions addressed the EPA or the FLSA, but the court nonetheless agreed with the plaintiff. The three cases upon which the plaintiff relied were Gomez-Perez v. Potter, CBOCS West, Inc. v. Humphries, and Burlington Northern & Santa Fe Railway Co. v. White. In Gomez-Perez, the Court determined that the ADEA prohibits retaliation against federal employees even though there is no federal-sector anti-retaliation provision within the ADEA. In CBOCS West, the Court determined that despite no express prohibition against retaliation, 42 U.S.C. § 1981 provided such a cause of action. Finally, in Burlington Northern, the Court determined that Title VII's anti-retaliation provision extended beyond employment-related acts of retaliation. These opinions led the court in Mansfield to note that "[t]hese particularly expansive readings of federal employment discrimination statutes persuade the court that the Supreme Court favors an increasingly broad interpretation of statutes containing anti-retaliation provisions." The court continued: "[a]ccordingly, in light of these recent decisions, the court grants the plaintiff's motion for relief upon reconsideration." Thus, although the court in Mansfield correctly anticipated the broad interpretation the Court would soon be giving the FLSA in Kasten, it ruled in favor of the plaintiff without engaging in a thorough analysis of the FLSA's language.

194. Id. at 12, 14.
195. Id. at 14-15.
199. 553 U.S. at 477.
201. 553 U.S. at 445.
203. 669 F. Supp. 2d at 15. Since the Court's opinions in those cases, the Court has also issued pro-employee interpretations of Title VII's anti-retaliation provision in two other cases. Specifically, in Crawford v. Metropolitan Government of Nashville, 555 U.S. 271, 273 (2009), the Court decided that statements made during an internal investigation are protected under Title VII's anti-retaliation provision, and in Thompson v. North American Stainless, LP, 131 S. Ct. 863, 868 (2011), the Court decided that Title VII's anti-retaliation provision protects against third-party retaliation.
204. Mansfield, 669 F. Supp. 2d at 15.
205. Id. at 15-16.
B. The Minority Approach: Internal Complaints Are Not Protected

Most courts have concluded that a broad interpretation of the FLSA’s anti-retaliation provision is more appropriate than a narrow one.\(^\text{206}\) Nonetheless, prior to Kasten, two circuits had taken the opposite approach.\(^\text{207}\) Whether Kasten will make these opinions obsolete is now a legitimate question.\(^\text{208}\) The Court’s opinion in Kasten, along with the dissenting opinion, will be addressed later in this Article.\(^\text{209}\) First, however, it is appropriate to discuss the Second Circuit’s opinion in Lambert and the United States Court of Appeals for the Fourth Circuit’s opinion in Ball.

1. The Second Circuit’s Opinion in Lambert. The Second Circuit’s opinion in Lambert is often cited for the proposition that the FLSA’s anti-retaliation provision does not cover internal complaints.\(^\text{210}\) In Lambert, the plaintiffs sued their employer, alleging violations of Title VII, the EPA, and state law.\(^\text{211}\) There were several issues on appeal, and the Second Circuit addressed those issues before addressing whether the FLSA protects internal complaints.\(^\text{212}\) Interestingly, that issue was not brought before the district court, and the district court assumed that internal complaints were protected.\(^\text{213}\) Nonetheless, the Second Circuit observed that it had the discretion to decide “\textit{sua sponte} a dispositive issue of law that, taking a plaintiff’s factual allegations to be true, would prevent a plaintiff from recovering.”\(^\text{214}\)

The court started by comparing Title VII’s anti-retaliation provision with the FLSA’s anti-retaliation provision and correctly noted that based on its opposition clause, Title VII’s anti-retaliation provision covered internal complaints, regardless of whether the employee filed an EEOC
The court then contrasted that language with the FLSA, which does not have an "opposition clause," and it determined that the FLSA "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." The court noted that its interpretation conflicted with opinions from several circuit courts of appeals, and it also noted that it would not defer to the EEOC's position that the FLSA covers internal complaints. The court determined that because the plaintiffs did not file an external complaint prior to the retaliation, the plaintiffs did not have a cause of action under the EPA's anti-retaliation provision. Thus, its analysis of the FLSA focused predominantly on the difference between Title VII's language and the FLSA's language, and it concluded that the FLSA did not cover internal complaints. Thus, unlike the courts that found that the FLSA does cover internal complaints, the Second Circuit, which focused on the statutory language, reached the opposite conclusion.

2. The Fourth Circuit's Opinion in Ball. The Second Circuit is not the only circuit with a narrow view of the FLSA's anti-retaliation provision. The other United States Court of Appeals to adopt a narrow interpretation of the FLSA's anti-retaliation provision is the Fourth Circuit. Although the question of whether internal complaints constitute protected activity was not directly before the Fourth Circuit in Ball, many courts have interpreted Ball to stand for the proposition that such FLSA complaints are not protected.

215. Id. at 55.
216. Id. (citing Romeo Cmty. Sch., 976 F.2d at 990 (Suhrheinrich, J., concurring in part and dissenting in part)).
217. Id.
218. Id.
219. Id. at 55-56. In reaching its conclusion, the court also distinguished Brock v. Casey Truck Sales, Inc., 839 F.2d 872 (2d Cir. 1988), and claimed that although the plaintiffs prevailed in that case, the facts of that case were "easily distinguishable." Lambert, 10 F.3d at 55.
220. Lambert, 10 F.3d at 55. Predictably, prior to Kasten, district courts within the Second Circuit decided that internal complaints were not protected under the FLSA. See, e.g., Higueros v. N.Y. State Catholic Health Plan, Inc., 526 F. Supp. 2d 342, 345-46 (E.D.N.Y. 2007). Since Kasten, some courts have continued to deny protection for internal complaints. See, e.g., Flick, 2012 WL 5386157.
221. Ball, 228 F.3d at 364.
222. See, e.g., Rizzo, 2010 WL 2427434, at *3 (E.D.N.Y. May 25, 2010). As noted above, the issue in Ball was not the difference between internal and external complaints. In fact, although many courts cite Ball for the proposition that internal complaints are not protected, the court suggested in a footnote that internal complaints might be protected under the FLSA. 228 F.3d at 363 n.*. Since the time this Article was written, the Fourth
In *Ball*, the plaintiff sued his former employer, alleging that he was terminated for not being willing to testify the way the company president wanted him to testify in another employee's potential FLSA lawsuit. Once the plaintiff learned of the potential lawsuit, he told the company president, and that is when the two disagreed over how the plaintiff would testify. According to the plaintiff, it was this dispute that led to his termination.\(^{223}\) The question before the court was whether there was a “proceeding” prior to the filing of the other employee’s lawsuit; if there was a proceeding, the plaintiff would have been “about to testify”; if there was not a proceeding, the plaintiff would not have been “about to testify” and would not have been protected by the FLSA.\(^{224}\) Importantly, the court noted that this case hinged on the FLSA's anti-retaliation provision’s “testimony clause” rather than on its “complaint clause.”\(^{225}\)

While the plaintiff and the Secretary of Labor urged the court to adopt a broad interpretation of the FLSA when addressing whether the plaintiff was “‘discharge[d] . . . because [he was] about to testify in any . . . proceeding,’” the court rejected that idea.\(^{226}\) After restating several statements regarding the FLSA's broad remedial purpose (and thus leading a reader to believe the court was going to rule in the plaintiff’s favor), the Fourth Circuit then stated that despite the need to interpret this type of statute broadly, “the statutory language clearly places limits on the range of retaliation proscribed by the Act.”\(^{227}\) It then compared the FLSA with Title VII and observed that Title VII's anti-retaliation provision provided more protection.\(^{228}\) The court then addressed whether an as-of-yet-unfiled lawsuit constituted an FLSA “proceeding.”\(^{229}\) The court rejected the plaintiff's argument that a proceeding begins once an employee makes an internal complaint, noting that the term proceeding “is modified by attributes of administrative or court

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Circuit has affirmatively held that internal complaints are protected under the FLSA. Minor v. Bostwick Labs., Inc., 669 F.3d 428 (4th Cir. 2012). Also, while the Fourth Circuit has decided to protect internal complaints, some of the arguments made by district courts within the Fourth Circuit before *Minor*, although now not particularly relevant within the Fourth Circuit, still provide strong analysis why internal complaints should not be covered. *See infra* Section V.B.

223. *Ball*, 228 F.3d at 362.
224. *Id.* at 363; *see also* 29 U.S.C. § 215(a)(3).
225. *Ball*, 228 F.3d at 363 n.*.
226. *Id.* at 363, 365 (alteration in original); *see also* 29 U.S.C. § 215(a)(3).
227. *Ball*, 228 F.3d at 363-64.
228. *Id.* at 364.
229. *Id.* at 363-65.
proceedings.\textsuperscript{230} Specifically, a proceeding must be "instituted," and it also requires "testimony."\textsuperscript{231} The court then noted that the term \textit{instituted} "connotes a formality that does not attend an employee's oral complaint to a supervisor."\textsuperscript{232} Importantly, the court noted:

\begin{quote}
Testimony amounts to statements given under oath or affirmation. By referring to a proceeding that has been "instituted" and in which "testimony" can be given, Congress signaled its intent to proscribe retaliatory employment actions taken \textit{after} formal proceedings have begun, but not in the context of a complaint made by an employee to a supervisor about a violation of the FLSA.\textsuperscript{233}
\end{quote}

Although the court believed the employer's conduct was "morally unacceptable," it determined that it was bound by the FLSA's language, which required that a proceeding in either an administrative or judicial forum be started before an employee can claim FLSA protection.\textsuperscript{234} Although this case did not specifically address the issue of whether the FLSA protects internal complaints, it has been cited very often for the proposition that internal complaints are not protected.\textsuperscript{235}

\section{C. Uncertainty Within the Eighth Circuit}

While most courts of appeals have decided whether the FLSA protects internal complaints, there is some confusion about this issue within the United States Court of Appeals for the Eighth Circuit. While some courts have read the Eighth Circuit's opinion in \textit{Brennan v. Maxey's Yamaha, Inc.}\textsuperscript{236} as protecting internal complaints,\textsuperscript{237} the Eighth

\begin{itemize}
\item \textsuperscript{230} Id. at 364.
\item \textsuperscript{231} Id.
\item \textsuperscript{232} Id.
\item \textsuperscript{233} Id. (emphasis added) (citations omitted).
\item \textsuperscript{234} Id. \textit{See also} \textit{Whitten v. City of Easley}, 62 F. App'x 477, 480 (4th Cir. 2003) (per curiam) (noting that the FLSA's anti-retaliation provision does not cover internal complaints). District courts within the Fourth Circuit have also followed this approach. \textit{See}, e.g., \textit{Bell-Holcombe v. Ki}, LLC, 582 F. Supp. 2d 761, 763 (E.D. Va. 2008); \textit{O'Neill v. Allendale Mut. Ins. Co.}, 956 F. Supp. 661, 664 (E.D. Va. 1997). Of course, now that the Fourth Circuit has decided \textit{Minor}, the district court opinions within the Fourth Circuit that reached a pro-employer outcome on this issue are no longer good law within the Fourth Circuit. That does not, however, diminish the soundness of those courts' arguments regarding why internal complaints should not be protected.
\item \textsuperscript{235} \textit{See}, e.g., \textit{Ritchie}, 2010 WL 502946, at *3 n.2. District courts within the Fourth Circuit have also relied on \textit{Ball} for the proposition that the FLSA does not cover internal complaints. \textit{See}, e.g., \textit{Blevins v. Suarez}, No. 4:08CV00014, 2008 WL 4560627, at *6 (W.D. Va. Oct. 10, 2008), \textit{aff'd}, 322 F. App'x 284 (4th Cir. 2009).
\item \textsuperscript{236} 513 F.2d 179 (8th Cir. 1975).
\item \textsuperscript{237} \textit{E.g.}, \textit{Casey v. Livingston Parish Commc'n's Dist.}, No. 07-30990, 2009 WL 577756, at *5 (5th Cir. Mar. 6, 2009) (per curiam); \textit{Ackerly}, 180 F.3d at 1003; \textit{Valerio}, 173 F.3d at
\end{itemize}
Circuit has not directly addressed this issue, and this has led district courts within the Eighth Circuit to reach different conclusions. In Brennan, the Department of Labor conducted an investigation of the defendant and determined that the defendant owed back wages to many employees. The employer agreed to pay the wages, but it instructed some of the employees to sign their checks back to the company. One of the employees refused to do so and engaged in what the court described as an "outburst"; the company conceded that prior to this outburst, it had no plans of terminating her. Eventually, the court addressed the scope of protected activity under the FLSA. The court noted:

[The plaintiff's] protest of what she believed to be unlawful conduct on [the defendant's] part was an act protected from reprisals and rendered her firing discriminatory regardless of the existence of other grounds for her discharge . . . To hold otherwise would defeat the Act's purpose in § 215(a)(3) of preventing employees' attempts to secure their rights under the Act from taking on the character of "a calculated risk."

Therefore, although the Eighth Circuit was not directly confronted with the issue, the court, focusing on what it believed to be the FLSA's anti-retaliation provision's purpose, implied that internal complaints were protected. Several courts have interpreted this case as reaching that conclusion; however, other courts within the Eighth Circuit are not as convinced that Brennan stands for this proposition.

One recent opinion from within the Eighth Circuit that reached a pro-employer outcome is Ritchie v. Saint Louis Jewish Light. In Ritchie,
the plaintiff and her employer were involved in a dispute regarding overtime, and the employee, who was eventually terminated, claimed that her termination was the result of her decision to continue to record her overtime.247 The plaintiff sued, and the employer moved to dismiss.248 After noting that the Supreme Court and various other courts had interpreted the FLSA’s anti-retaliation provision broadly, the United States District Court for the Eastern District of Missouri noted that, “[o]n its face,” the statute only protected individuals who file complaints, institute proceedings, testify in proceedings, and serve on industry committees.249 The employer argued that because the plaintiff had not engaged in any of these activities, her actions were not protected.250 Relying on *Brennan* and *Grey v. City of Oak Grove, Missouri,*251 (where the court concluded that the plaintiff engaged in protected activity even though there was no indication of a formal complaint), the plaintiff argued that her conduct was protected.252

The *Ritchie* court acknowledged the circuit split, and it also noted that the Eighth Circuit had not directly addressed this issue.253 In addressing *Brennan*, the *Ritchie* court noted that the Secretary of Labor had already become involved with the case, and it also noted that the critical issue in that case was the employer’s motive in terminating the plaintiff.254 The court then observed that in a case factually similar to the one before it,255 another district judge distinguished *Brennan* by noting that because the Department of Labor had already become involved in the dispute, there was a “proceeding” under which the plaintiff’s actions were covered.256 The court in *Ritchie* then held that the statutory language did not cover internal complaints.257 The court cited district court opinions from within the Eighth Circuit that

247. *Id.* at *1. This behavior does not constitute an oral or written complaint, but rather is one way of showing opposition to what the employee believed was an unlawful practice. Nonetheless, in its opinion, the court referred to this action as an oral complaint. *Id.* at *5.

248. *Id.* at *1.

249. *Id.* at *2.

250. *Id.*

251. 396 F.3d 1031, 1035 (8th Cir. 2005).


253. *Id.* at *3.

254. *Id.*


257. *Id.* at *5.
supported this conclusion. The court then addressed the other Eighth Circuit opinion on which the plaintiff relied, but it decided that because the Eighth Circuit did not directly address whether the FLSA covers internal complaints, the court in Ritchie was not bound to follow that decision.

In the last paragraph of Ritchie, the court conceded that the plaintiff’s position was supported by the majority of courts and that her position “arguably draws some support from language in the Eighth Circuit’s Brennan and Grey decisions.” Nonetheless, the court concluded that the plaintiff’s actions were not covered:

This is because the statute’s plain language requires a plaintiff to file a complaint, institute a proceeding, testify in any such proceeding, or serve on an industry committee, and plaintiff did none of those things. Further, there is no formal proceeding in place, nor did plaintiff make a written demand or complaint of any sort, to bring herself within the circumstances present in the Brennan and Grey decisions.

This approach has not been followed by all courts within the Eighth Circuit. For example, in Wolfe v. Clear Title, LLC, the United States District Court for the Eastern District of Arkansas faced three issues: (1) whether the plaintiff was an exempt employee; (2) whether the statute of limitations barred the plaintiff’s claims; and (3) whether punitive damages were available. After addressing the first two issues, the court addressed the scope of the FLSA’s anti-retaliation provision. The court noted that most courts have protected internal complaints, and it then relied on Brennan for the proposition that the FLSA’s anti-retaliation provision prohibits retaliation against “an employee who asserts or [who] threatens to assert FLSA rights.” Although the court acknowledged that Brennan had been criticized, it

260. Id. at *4.
261. Id. at *5.
262. Id.
264. Id. at 931.
265. Id. at 934.
266. Id.
felt bound to follow it and therefore determined that the plaintiff's actions were protected.\textsuperscript{267}

It is therefore unclear where the Eighth Circuit stands on this issue. Although district courts within the Eighth Circuit are divided with respect to this issue, after Kasten, these internal complaints will now most likely be protected under the FLSA.\textsuperscript{268}

D. A Unique Approach (and one that found its way to the Supreme Court)—The Seventh Circuit's Opinion in Kasten: Written, But Not Oral, Internal Complaints Are Protected

While the cases discussed up to this point have not addressed whether there is a distinction between oral complaints and written complaints made to an employer, the United States Court of Appeals for the Seventh Circuit in Kasten made that issue the focal point of its opinion.\textsuperscript{269} Specifically, while deciding that internal complaints are covered under the FLSA, the court decided that the complaints must be written.\textsuperscript{270} Eventually, the Supreme Court decided that oral complaints were also covered under the FLSA, and the Court oddly claimed to have left open the issue of whether internal complaints are protected at all.\textsuperscript{271}

\textsuperscript{267} Id.

\textsuperscript{268} See Kasten, 131 S. Ct. 1325. Although that was not the specific question addressed in Kasten, the Court's conclusion that both written and oral complaints are covered, and its decision to formulate a test to be applied when complaints are made to employers, certainly suggest that a plaintiff can lodge these complaints with his employer. Justice Scalia assumed as much in his Kasten dissent. See id. at 1341 (Scalia, J., dissenting); see also supra note 238 and accompanying text.

\textsuperscript{269} 570 F.3d at 837. Prior to the Seventh Circuit's opinion in Kasten, at least one district court within the Seventh Circuit concluded that internal complaints to an employer are covered by the FLSA. Hernandez v. City Wide Insulation of Madison, Inc., 508 F. Supp. 2d 682, 689 (E.D. Wis. 2007). In Hernandez, the court relied on the phrases "any complaint" and "related to" to conclude that the anti-retaliation provision covers internal complaints. Id. The court also believed that a more narrow interpretation would make the statute's reference to instituting a proceeding superfluous. Id. Finally, the court criticized the Second Circuit's interpretation in Lambert as going against the FLSA's goal and purpose. Id. at 689-90.

\textsuperscript{270} Kasten, 570 F.3d at 838-40. As previously noted, prior to the Seventh Circuit's opinion in Kasten, at least one district court within the Seventh Circuit had decided that internal complaints were protected under the FLSA. Hernandez, 508 F. Supp. 2d at 689. The Seventh Circuit had the opportunity to decide the issue, but it decided not to answer the question. Crowley v. Pace Suburban Bus Div. of the Reg'l Transp. Auth., 938 F.2d 797, 798 n.3 (7th Cir. 1991).

\textsuperscript{271} Kasten, 131 S. Ct. at 1336. Although the majority claimed that it was not deciding the issue of whether internal complaints are protected, by concluding that an internal, oral complaint was protected, and by formulating a test to be used to determine whether
In *Kasten*, the plaintiff brought suit after he was terminated, allegedly for complaining about the company's time clock. The plaintiff alleged that he complained that the clock's location was unlawful because its location prevented employees from being paid for time spent putting on and taking off the protective gear they were required to wear. He claimed he told three individuals that the clock's location was illegal, and he also claimed he told one supervisor that he was considering filing a lawsuit. The court determined that there were two issues it had to address. First, it had to determine whether "intra-company complaints that are not formally filed with any judicial or administrative body are protected activity." Second, the court had to determine whether "unwritten verbal complaints are protected activity." The district court had concluded that only written internal complaints were protected, and it granted summary judgment in favor of the defendant because the plaintiff had made only oral complaints.

The Seventh Circuit noted that it had never directly answered these questions, but that it had handled two cases involving internal complaints and did not have to decide whether these complaints were protected. Unlike several courts that relied mostly on other cases and on policy considerations, the Seventh Circuit first looked at the statutory language and concluded that "the plain language of the statute indicates that internal, intracompany complaints are protected." The court reached this conclusion because of the statutory language, "filed any complaint." The court then addressed whether these complaints must be in writing. The court concluded that the statute does require this.

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272. *Kasten*, 570 F.3d at 836.
273. Id. at 837.
274. Id.
275. Id.
276. Id.
277. Id. The two cases to which the Seventh Circuit referred were *Scott v. Sunrise HealthCare Corp.*, 195 F.3d 938 (7th Cir. 1999), and *Shea v. Galaxie Lumber & Construction Co.*, 152 F.3d 729 (7th Cir. 1998).
278. See supra section III.A.
279. *Kasten*, 570 F.3d at 838.
280. Id. (emphasis added); see also 29 U.S.C. § 215(a)(3). As will be discussed later, the Author disagrees with this part of the Seventh Circuit's opinion.
281. *Kasten*, 570 F.3d at 838.
282. Id. at 839.
Again, the court focused on the statutory language, but instead of focusing on the phrase "any complaint," the court focused on the word "filed." The Seventh Circuit quoted the United States District Court for the Western District of Wisconsin below, which noted:

Expressing an oral complaint is not the same as filing a complaint. By definition, the word "file" refers to "a collection of papers, records, etc., arranged in a convenient order," Random House Webster's College Dictionary 489 (2d ed. 1999), or, when used in verb form as it is in the statute, "[t]o deliver (a paper or instrument) to the proper officer so that it is received by him to kept [sic] on file, or among the records of his office," Webster's New International Dictionary of the English Language 945 (2d ed. 1958). One cannot "file" an oral complaint; there is no document, such as a paper or record, to deliver to someone who can put it in its proper place.

Disagreeing with the plaintiff's broad interpretation of "to file," the court agreed with the lower court's analysis. The court noted that "[l]ooking only at the language of the statute, we believe that the district court correctly concluded that unwritten, purely verbal complaints are not protected activity. The use of the verb 'to file' connotes the use of a writing." The court looked to Webster's Ninth New Collegiate Dictionary and concluded that those definitions "accord[] with what [it] believe[d] to be the common understanding of the verb 'to file.'" The court rejected the plaintiff's definition, which did not require a writing, and it reiterated that "the natural understanding of the phrase 'file any complaint' requires the submission of some writing to an employer, court, or administrative body.

The court concluded by noting that its interpretation "[was] confirmed by the fact that Congress could have, but did not, use broader language in the FLSA's [anti-]retaliation provision." The court proceeded to compare the FLSA with Title VII and the ADEA, both of which contain broad language in their anti-retaliation provisions, and

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283. Id. at 838-39; see also 29 U.S.C. § 215(a)(3).
284. Kasten, 570 F.3d at 838 (alteration in original) (quoting Kasten v. Saint-Gobain Performance Plastics Corp., 619 F. Supp. 2d 608, 613 (W.D. Wis. 2008)).
285. Id. at 838-39.
286. Id. at 839.
287. Id. The court used three definitions from Webster's Ninth New Collegiate Dictionary: "to arrange in order for preservation and reference"; "to place among official records as prescribed by law"; and "to perform the first act of (as a lawsuit)." Id.
288. Id.
289. Id. at 840.
concluded that the difference in language "appears to be significant." Finally, the court acknowledged that while this type of remedial statute should be interpreted broadly, "expansive interpretation is one thing; reading words out of a statute is quite another." It then affirmed the district court's judgment.

The plaintiff petitioned for rehearing; however, the Seventh Circuit denied that request. Judge Rovner, with Judges Wood and Williams joining, dissented from the court's denial of rehearing, criticizing the Seventh Circuit for taking a position that was "contrary to the longstanding view of the Department of Labor, departed from the holdings of other circuits, and interpreted the statutory language in a way that [they] believe[d] is contrary to the understanding of Congress." The dissent first noted that the EEOC and the Department of Labor have recognized that anti-retaliation provisions contained in other statutes contain similar language, and as a result, the FLSA should be construed similarly. Believing that these anti-retaliation provisions are critical, the dissent quoted Mitchell, where the Court observed:

For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. This end the prohibition of § 15(a)(3) against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. By the proscription of retaliatory acts set forth in § 15(a)(3), and its enforcement in equity by the Secretary [of Labor] in section 17, Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.

After relying on Mitchell, the judges noted that they agreed that the anti-retaliation provision covers internal complaints. The dissent
then criticized the restriction the district court placed on these complaints: that the complaints must be in writing. The dissent believed that this conflicted with various opinions on this issue, and it also conflicted with "what ha[d] been the Department of Labor's view for nearly fifty years." Although the dissent agreed that the term "to file" often suggests a writing, "it is by no means out of the ordinary to read and hear the term... used more broadly to signify the making of a report or the lodging of a protest. The dissent then cited (1) several opinions and regulations that recognized oral "filings"; (2) several statutes in which Congress required written complaints; and (3) two previous opinions from the Seventh Circuit that "arguably reflect[ed] an understanding of the statutory language that reaches oral as well as written complaints." The three judges believed that these authorities supported their position that the FLSA covers both oral and written internal complaints.

The dissenting judges also believed that the rule adopted by the Seventh Circuit could lead to results "based on happenstance." For example, someone who is unable to meet with a company official to discuss an FLSA issue would not be protected regardless of how specific the oral complaint was, yet someone who leaves a note or sends an email about the same FLSA issue would be protected. The judges noted that the focus of this inquiry should be on "whether the complaining employee has communicated the substance of his concerns to the

300. Id. at 312-13.
301. Id. at 313.
302. Id.
303. Id. at 313-14. Specifically, the dissent relied on NLRB v. Southwest Electric Cooperative, Inc., 794 F.2d 276, 279 (7th Cir. 1986); United States v. Bent, 702 F.2d 210, 212 (11th Cir. 1983); Ward v. Housatonic Area Regional Transit District, 154 F. Supp. 2d 339, 351 (D. Conn. 2001); and Rallis v. Holiday Inns, Inc., 622 F. Supp. 63, 65 (N.D. Ill. 1985), as examples of cases where there were oral "filings"; it relied on 42 C.F.R. § 438.402(b)(3) (2012) and 14 C.F.R. § 1.1 (2012) as examples of regulations that allowed oral filings; and it contrasted these with statutes that required written complaints, such as the Federal Election Campaign Act, the Veterans Employment Opportunities Act, the Packers and Stockyards Act, the Federal Seed Act, the Trade Agreements Act, the Uniformed Services Employment and Reemployment Act, the Civil Rights Act of 1964, the Fair Housing Act, the Help America Vote Act, and the Federal Aviation Act. Kasten, 585 F.3d at 313-14 (Rovner, J., dissenting). The two Seventh Circuit cases upon which the dissent relied were Sapperstein v. Hager, 188 F.3d 852 (7th Cir. 1999), and Avitia v. Metropolitan Club of Chicago, Inc., 49 F.3d 1219 (7th Cir. 1995). Kasten, 585 F.3d at 314 (Rovner, J., dissenting).
305. Id. at 314.
306. Id.
employer rather than on whether the communication was written.\textsuperscript{307} The judges also noted that the Seventh Circuit's opinion could leave unprotected verbal complaints to outside agencies.\textsuperscript{308} It is this type of limited protection, and these types of inconsistencies, the dissenting judges found troubling:

By departing from such decisions, the court has left protected by the statute only those interactions with agency representatives that take place in written form, notwithstanding the fact that oral communications are just as essential to an employee attempting to ascertain her rights and to the Department of Labor in discovering potential violations of the FLSA, and notwithstanding the likelihood that an employer bent on keeping its practices out of view of the regulators might be just as likely to penalize an employee for her oral contacts with the agency as it would any written contacts.\textsuperscript{309}

Finally, the judges believed that the Supreme Court's opinion in \textit{NLRB v. Scrivener},\textsuperscript{310} which gave a pro-employee interpretation to the National Labor Relations Act's anti-retaliation provision, and its opinion in \textit{Mitchell}, took a better approach to further the FLSA's objectives:

This court's decision that an employee's intra-company complaint is protected by section 15(a)(3) pays appropriate homage to that role by extending the statute's reach to the earliest opportunity that an employee has to assert his statutory rights—in the workplace, with his employer. \textit{Although the employee has filed nothing} and testified to nothing at that point in time, he has nonetheless taken the first step toward the vindication of his rights. If he is penalized for taking that step, he (and his co-workers) might well take no other. That is why, as \textit{Scrivener} explains, it is necessary to construe phrases like "filed charges" or "filed any complaint" liberally to include not only those ultimate acts but all of the necessary preceding steps that culminate in those acts. And that is why, in my view, it makes "less than complete sense" to draw a distinction between an employee's written and oral assertions of his rights.\textsuperscript{311}

Although the dissenting judges were unable to convince the Seventh Circuit to hear the case \textit{en banc}, those judges were vindicated when the Supreme Court concluded that both oral and written complaints were

\begin{footnotes}
\item 307. \textit{Id.}
\item 308. \textit{Id. at 315.}
\item 309. \textit{Id.}
\item 310. 405 U.S. 117 (1972).
\item 311. \textit{Kasten}, 585 F.3d at 315-16 (emphasis added) (citations omitted). By stating that the employee has "filed nothing," the judges were acknowledging that the plain language of the statute does not cover this type of complaint. \textit{Id. at 316.}
\end{footnotes}
The Supreme Court’s opinion in Kasten will now be addressed.

IV. THE SUPREME COURT’S OPINION IN KASTEN

The Supreme Court granted certiorari in Kasten v. Saint-Gobain Performance Plastics Corp., not to answer whether internal complaints are protected, but rather to determine whether FLSA complaints must be written. While it is logical to assume that if oral and written complaints are protected, and the complaint made in Kasten was to the plaintiff’s employer, those facts necessarily answer whether internal complaints in general are protected. Although the majority considered the issue of whether internal complaints are protected activity to be an open question even after its opinion, Justice Scalia’s dissent pointed out in no uncertain terms that the Court’s opinion made it clear that by ruling that oral and written complaints are protected, and by formulating a test to determine when an employee’s complaint to his employer is protected, the issue of whether the complaint must be made to an outside entity was also answered.

A. The Majority Opinion

Six Justices decided that complaints do not have to be written to be protected under the FLSA, while Justices Scalia and Thomas dissented. The Court started its opinion by noting that the “sole question presented is whether ‘an oral complaint of a violation of the Fair Labor Standards Act’ is ‘protected conduct under the [Act’s] anti-retaliation provision.” The Court then noted that although the phrase, “filed any complaint,” when “considered in isolation” could be ambiguous, when considered with “the purpose and context [of the Act],”

312. Kasten, 131 S. Ct. at 1329. Since Kasten, there has been at least one district court opinion from within the Seventh Circuit in which the court has protected an internal, oral complaint. See Johnson v. Mikolajewski & Assocs., No. 3:09-CV-405, 2011 WL 3273560, at *2 (N.D. Ind. Aug. 1, 2011).
313. 131 S. Ct. 1325 (2011).
314. Id. at 1329-30; see also 130 S. Ct. 1890 (2010) (granting cert.). For a detailed discussion of the facts of Kasten, see supra section III(D).
315. Kasten, 131 S. Ct. at 1336.
316. Id. at 1341 (Scalia, J., dissenting).
317. Id. at 1328-29 (majority opinion).
318. Id. at 1336-41. Justice Kagan did not take part in the decision. Id. at 1336.
319. Id. at 1330 (alteration in original) (quoting Petition for Writ of Certiorari, Kasten, 131 S. Ct. 1325 (2011) (No. 09-834), 2010 WL 146471, at *i).
there was only one plausible interpretation—that oral complaints are protected.\textsuperscript{320}

The Court started with the statutory text and the definition of the word "filed."\textsuperscript{321} While acknowledging that some dictionaries' definitions could contemplate a writing, not all dictionary definitions do so.\textsuperscript{322} In acknowledging the different definitions, the Court noted that the differences were "significant because it means that dictionary meanings, even if considered alone, do not necessarily limit the scope of the statutory phrase to written complaints."\textsuperscript{323} The Court then noted that "legislators, administrators, and judges have all sometimes used the word 'file' in conjunction with oral statements."\textsuperscript{324} Further, the Court noted that various federal agency regulations and some state statutes also permit the filing of oral complaints.\textsuperscript{325} Finally, the Court noted that when the FLSA was passed, "oral filings were a known phenomenon."\textsuperscript{326}

The Court then focused on the word "any."\textsuperscript{327} While acknowledging that the word "filed" (when standing alone) "might suggest a narrow interpretation limited to writings," the Court determined that "the phrase 'any complaint' suggests a broad interpretation that would include an oral complaint."\textsuperscript{328} The Court's subsequent attempt to look at other uses of filed, or a variant thereof, proved fruitless, as the Court concluded that the instances in which that word appeared did not help resolve the word's meaning.\textsuperscript{329}

In its final attempt to analyze the phrase, "filed any complaint," the Court looked to other anti-retaliation provisions.\textsuperscript{330} Noting both that the language in those statutes was different than the FLSA's and that the other anti-retaliation provisions were drafted more broadly, the Court concluded:

\begin{itemize}
\item 320. \textit{Id.} at 1330-31 (emphasis added); see also 29 U.S.C. § 215(a)(3).
\item 321. \textit{Kasten}, 131 S. Ct. at 1331.
\item 322. \textit{Id.} The Court noted that the dictionaries that contemplate a writing include 
\textit{Webster's New International Dictionary} (2d ed. 1934), and 
\textit{Webster's Ninth New Collegiate Dictionary} (1983). The dictionary that indicated that a "filing" could be oral is 
\textit{Funk and Wagnalls New Standard Dictionary of the English Language} (rev. ed. 1938). \textit{Id.}
\item 323. \textit{Kasten}, 131 S. Ct. at 1331.
\item 324. \textit{Id.}
\item 325. \textit{Id.} at 1331-32. \textit{See, e.g., Alaska Stat.} § 47.32.090 (current through 2012 Legis.
\item 326. \textit{Kasten}, 131 S. Ct. at 1332.
\item 327. \textit{Id.}
\item 328. \textit{Id.}
\item 329. \textit{Id.}
\item 330. \textit{Id.} at 1332-33.
\end{itemize}
Some of this language is broader than the phrase before us, but, given the fact that the phrase before us lends itself linguistically to the broader, "oral" interpretation, the use of broader language elsewhere may mean (1) that Congress wanted to limit the scope of the phrase before us to writings, or (2) that Congress did not believe the different phraseology made a significant difference in this respect. The language alone does not tell us whether Congress, if intending to protect orally expressed grievances elsewhere, did or did not intend to leave those oral grievances unprotected here. The Court was therefore unable to definitively determine the meaning of "filed any complaint." As a result, it looked to other tools of statutory interpretation.

The Court then focused on what it believed to be the FLSA's purpose and concluded that a narrow interpretation would "undermine the Act's basic objectives." Relying on Mitchell v. Robert DeMario Jewelry, Inc., it noted that the Act relies not on excessive federal supervision, but rather on employees who are willing to vindicate rights they believe they have been denied. Only a broad interpretation of the FLSA would be effective in protecting employees against unfair working conditions and economic retaliation if they were to speak out against FLSA violations. The Court then noted that when the FLSA was passed, many workers were both poor and illiterate, making a written complaint both economically dangerous and difficult. Next, the Court expressed concern that not protecting oral complaints would "also take needed flexibility from those charged with the Act's enforcement." Specifically, the Court noted that not protecting oral complaints "could prevent Government agencies from using hotlines, interviews, and other oral methods of receiving complaints. And insofar as the anti-retaliation provision covers complaints made to employers (a matter we need not decide), it would discourage the use of desirable informal workplace grievance procedures to secure compliance with the Act."

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331. Id. at 1333.
332. Id.
333. Id. at 1333-34.
334. Id. at 1333.
337. Id. at 1334.
338. Id. at 1333-34.
339. Id. at 1334.
340. Id. (internal cross-reference omitted). Before moving on to address the employer's arguments, the Court compared the FLSA's anti-retaliation provision to the National Labor
The Court then addressed the employer's concern that allowing oral complaints would leave employers in "a state of uncertainty" regarding whether an employee was making an FLSA complaint. The Court agreed that an employer must have fair notice that an employee was making an FLSA complaint, and it concluded that the complaint must contain a "degree of formality." Specifically, an employee's complaint must be such that "the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns." In wrapping up this issue, the Court concluded:

To fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints, as well as by written ones.

The Court then addressed whether it should defer to the administrative agencies' interpretations of the FLSA. The Court first looked at the Secretary of Labor's interpretation. According to the Court, "the Secretary of Labor has consistently held the view that the words 'filed any complaint' cover oral, as well as written, complaints." The Court noted that the Labor Department has "acted in accordance with that view by creating a hotline to receive oral complaints." The Court then noted the EEOC has taken a similar pro-employee position in several briefs. Concluding that these interpretations were

Relations Act's anti-retaliation provision. Id. Believing that the two statutes shared a common goal, and noting that the Court had given a broad interpretation to the NLRA, the Court found additional support for a broad interpretation of the FLSA. Id.

341. Id.
342. Id.
343. Id. Within this sentence, the Court used the phrase "grievance has been lodged." Id. Congress certainly could have used this phrase, or something similar to it, if it wanted to ensure that internal complaints were protected under the FLSA.

344: Id. at 1335 (emphasis added). It is this test that proves that despite the majority's claim to the contrary, it seemingly was answering the question of whether internal complaints are protected. There would be no need to articulate this test if internal complaints were not protected; however, by setting forth how detailed an employee complaint must be in order to be considered protected activity, the Court was, in fact, telling lower courts how to handle cases involving internal FLSA complaints.

345. Id. at 1335-36.
346. Id. at 1335.
347. Id.
348. Id.
349. Id.
“reasonable,” consistent with the FLSA, and had been held for long periods of time, the Court believed it owed these interpretations deference.350

Finally, the Court addressed (or, more accurately, failed to address) the bigger question involved in FLSA retaliation claims—whether an employee’s internal complaint is protected.351 As previously noted, the Seventh Circuit in Kasten concluded that only written complaints to an employer were protected.352 The employer did not raise the internal/external issue in response to the employee’s petition for certiorari, but rather raised this issue in its brief on the merits.353 Noting that the Court does “not normally consider a separate legal question not raised in the certiorari briefs,” the Court decided that it would adhere to that policy in this case.354 The majority believed that “[r]esolution of the Government/private employer question is not a ‘predicate to an intelligent resolution’ of the oral/written question that [the Court] granted certiorari to decide” and decided not to address that important issue.355 The Court then noted that it could decide the oral/written question separately, and that it had done so, ruling in favor of the employee.356 It then stated that it expressed “no view” on whether complaints must be made to a court or government agency (as opposed to an employer) to be protected.357

350. Id. at 1335-36. After this analysis, the Court rejected the employer’s argument that the rule of lenity should be applied to this case. Id. at 1336. The Court concluded that “after engaging in traditional methods of statutory interpretation, [it] [could not] find that the statute remains sufficiently ambiguous to warrant application of the rule of lenity [in this case].” Id.
351. Id. at 1336.
352. 570 F.3d 834, 840 (7th Cir. 2009), rev’d 131 S. Ct. 1325 (2011).
353. Kasten, 131 S. Ct. at 1336.
354. Id.
355. Id. (quoting Caterpillar, Inc. v. Lewis, 519 U.S. 61, 75 n.13 (1996)); see also Sup. Ct. R. 15.2.
356. Kasten, 131 S. Ct. at 1336.
357. Id. In concluding that oral complaints were protected, and in establishing a test to determine whether an employee’s complaint to his employer was protected, it seems strange that the Court would indicate that it was not expressing an opinion on the question of whether internal complaints are protected. As a result of this decision, the employee in Kasten, who orally complained to his employer, was protected as long as the employee met the court’s standard, which strongly suggests that despite its protestations to the contrary, the Court did decide that internal complaints are protected. Justice Scalia made a similar point when he stated that “[w]hile claiming that it remains an open question whether intra[-]company complaints are covered, the opinion adopts a test for ‘filed any complaint’ that assumes a ‘yes’ answer . . . .” Id. at 1341 (Scalia, J., dissenting). See also supra note 344 and accompanying text.
B. The Dissenting Opinion

Justice Scalia wrote a dissenting opinion, which Justice Thomas joined. The main point Justice Scalia addressed was not the difference between oral and written complaints, but whether any internal complaints were protected. According to Justice Scalia, the FLSA did not protect internal complaints. Justice Scalia started by quoting the statutory language and noting that the critical phrase was "filed any complaint." While conceding that the term "complaint" could, in some cases, include the type of oral statements the plaintiff made, when used in the legal context, the term "complaint" means "[a] formal allegation or charge against a party, made or presented to the appropriate court or officer." After quoting from two other dictionaries to bolster his conclusion, Justice Scalia noted that there were "several reasons" to assume that the specialized, legal-context meaning of complaint applied to the FLSA's anti-retaliation provision. First, he noted that each time complaint is used in the FLSA, it refers to "an official filing with a governmental body." Because of this, and because "[i]dentical words used in different parts of a statute are
presumed to have the same meaning absent contrary indication," he believed that the term complaint meant a formal, written filing.  

Justice Scalia then focused on the fact that the term complaint is contained within the phrase "filed any complaint." The fact that Congress chose the word filed provided more evidence that internal grievances are not protected. Had Congress used the word "made" when referring to a complaint, the plaintiff's argument would have been stronger; however, the word filed "at least suggests a degree of formality consistent with legal action and inconsistent ... with employee-to-employer complaints." Next, he noted that because "[t]he law uses familiar legal expressions in their familiar legal sense," and that "filing a complaint" is usually used in the more formal context, the FLSA does not cover internal complaints.

He also compared the FLSA's language to the Mine Health Safety Act (MHSA) and noted that the MHSA used the phrase "filed ... or made ... a complaint" and also specifically included complaints to mine operators. Thus, the MHSA offered broader protection than the FLSA, and Congress could have used similar language in the FLSA had it wanted to do so.

There were more reasons Justice Scalia believed the term "complaint" did not cover internal complaints. First, "filed any complaint" is listed with three other activities, all of which involve "interaction with governmental authority," and when items in a list share a common attribute, all of those items should be interpreted as sharing that attribute. Because the other activities involved either a judicial or administrative body, internal complaints did not fit within that list. Second, no private right of action for retaliation existed until 1977; until that time, only the Department of Labor could enforce the anti-retaliation provision. Justice Scalia noted, because of this, that it

366. Kasten, 131 S. Ct. at 1337 (Scalia, J., dissenting).
367. Id. at 1337-38.
368. Id.
369. Id.
370. Id. (alteration in original) (quoting Henry v. United States, 251 U.S. 393, 395 (1920)). Justice Scalia also made a point of this while questioning the Respondent's counsel during oral argument. Oral Argument, supra note 22, at 10:12.
372. Kasten, 131 S. Ct. at 1338 (Scalia, J., dissenting) (emphasis added); see also 30 U.S.C. § 815(c)(1).
373. Kasten, 131 S. Ct. at 1338 (Scalia, J., dissenting).
374. Id. at 1338-39.
375. Id. at 1338.
376. Id.
377. Id.
would have been strange to require an employee to go to the Department of Labor "to establish, and punish retaliation for, his intracompany complaint, [rather] than to require the [Department of Labor]-protected complaint to be filed with the [Department of Labor] in the first place."\textsuperscript{378}

Because Justice Scalia believed that the phrase "filed any complaint" clearly did not cover internal complaints, there was no need to go beyond that language and look at congressional purpose.\textsuperscript{379} Although Kasten argued that protecting internal complaints was consistent with the FLSA's purpose, Justice Scalia suggested that internal complaints were not protected because Congress was "unwilling to expose employers to the litigation, or to the inability to dismiss unsatisfactory workers, which the additional step would entail."\textsuperscript{380} He continued: "[l]imitation of the retaliation provision to agency complaints may have been an attempt 'to achieve the benefits of regulation right up to the point where the costs of further benefits exceed the value of those benefits.'"\textsuperscript{381}

Justice Scalia then rejected Kasten's attempts to argue that because more recent anti-retaliation provisions cover internal complaints, the Court should broadly interpret the FLSA.\textsuperscript{382} He correctly pointed out that those statutes use broader language than the FLSA, and none uses the "filed any complaint" language.\textsuperscript{383} In further rejecting Kasten's argument, Justice Scalia noted that while the "Courts has sometimes sanctioned a 'living Constitution,' it has never approved a living United States Code."\textsuperscript{384} Accordingly, Justice Scalia argued, the FLSA must be interpreted according to its terms, despite the fact that the statute is over seventy years old.\textsuperscript{385}

Next, Justice Scalia addressed whether the Department of Labor and the EEOC's position on this issue was entitled to deference, and he determined that their pro-employee interpretation was not entitled to deference because it lacked "the power to persuade."\textsuperscript{386} He also noted that the EEOC does not have the authority to make rules "carrying the force of law," and that the Department of Labor does not have authority

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{378} Id.
\item \textsuperscript{379} Id. at 1339.
\item \textsuperscript{380} Id.
\item \textsuperscript{381} Id.; see also Frank H. Easterbrook, Statutes' Domains, 50 U. CHI. L. REV. 533, 541 (1983).
\item \textsuperscript{382} Kasten, 131 S. Ct. at 1339 (Scalia, J., dissenting).
\item \textsuperscript{383} Id.
\item \textsuperscript{384} Id.
\item \textsuperscript{385} Id.
\item \textsuperscript{386} Id. at 1339-40.
\end{itemize}
\end{footnotesize}
Finally, Justice Scalia addressed whether the internal/external complaint issue was properly before the Court. While the majority claimed that it was not addressing this issue, the Court's opinion, when applied to the facts of Kasten, along with the test the Court articulated for determining what constitutes protected activity, leads to the conclusion that internal complaints, whether oral or written, are protected, as those were the facts presented in Kasten. Justice Scalia pointed this out when he noted the following: "While claiming that it remains an open question whether intracompany complaints are covered, the opinion adopts a test for 'filed any complaint' that assumes a 'yes' answer . . . ." He reiterated that the two issues are inextricably linked when he criticized the majority by stating that "[t]he test the Court adopts amply disproves its contention that 'we can decide the oral/written question separately.' And it makes little sense to consider that question at all in the present case if neither oral nor written complaints to employers are protected." Thus, although the majority claimed to have left the internal/external complaint issue unresolved, Justice Scalia argued that if sufficiently specific written and oral complaints are covered, and the complaint at issue in Kasten was an internal complaint (and was possibly protected), the logical conclusion is that internal complaints are, in fact, protected. It would make no sense for the Court to hold that oral and written complaints are protected, establish a test to determine when an employee's complaint to his employer is protected, and then claim that it had not answered the question of whether a complaint must be made to an outside entity. Nevertheless, this is what the Kasten majority did.

V. DOES THE FLSA'S ANTI-RETALIATION PROVISION'S LANGUAGE PROTECT INTERNAL COMPLAINTS?

While most people would agree that employees should be protected for voicing FLSA concerns to employers, if the statute does not provide for such protection, courts should not bend over backwards to reach that
result. Based on the arguments made by the employer and Justice Scalia in Kasten v. Saint-Gobain Performance Plastics Corp., the Second Circuit’s opinion in Lambert v. Genesee Hospital, and the courts that followed Lambert, the FLSA does not protect such conduct. At the very most, the statute protects only written complaints, as no reasonable interpretation of the word filed can be said to apply to oral complaints lodged with an employer. Although most courts have concluded that oral and written internal complaints are protected, these courts did so with either little analysis of the statutory language, or, in the case of the Supreme Court, by claiming that it was not making that determination.

There are several reasons why the FLSA does not protect internal complaints. First, when comparing the text of the FLSA to the text of other employment-related, anti-retaliation provisions, it is clear that the FLSA’s provision provides less protection. Second, although Congress has been aware of this issue since at least 1993 and has amended the FLSA several times since then, it has failed to clarify this issue, despite the fact that some courts have held that internal complaints are not covered. Third, although remedial statutes such as the FLSA should be interpreted broadly, courts should not interpret statutes in a manner that conflicts with their language simply to further a particular goal. Finally, the language and the context of the phrase “filed any complaint” do not allow for an interpretation that covers internal complaints.

Although courts in a post-Kasten world will most likely protect internal complaints, those courts, as did the Supreme Court, will be putting policy ahead of the FLSA’s language.

A. The FLSA’s Anti-retaliation Provision’s Language and Other Anti-retaliation Provisions’ Language

One piece of evidence that demonstrates that internal complaints are not protected is the difference between the language found in the FLSA’s anti-retaliation provision and the language found in other statutes’ anti-retaliation provisions. Specifically, Congress used much broader

396. 10 F.3d 46 (2d Cir. 1993), overruled in part by Kasten, 131 S. Ct. 1325.
397. See Kasten, 131 S. Ct. at 1337-41; Lambert, 10 F.3d at 55-56. In fact, although only Justices Scalia and Thomas dissented, other Justices joked during the oral argument of this case regarding using the term “filed” to refer to an oral statement. See Oral Argument, supra note 22.
398. See supra sections III.A & IV.A.
399. At most, because Congress used the phrase, “filed any complaint,” only written grievances should be covered. 29 U.S.C. § 215.
400. See supra note 43.
language when drafting Title VII's anti-retaliation provision,\textsuperscript{401} the ADA's anti-retaliation provision,\textsuperscript{402} the ADEA's anti-retaliation provision,\textsuperscript{403} and the FMLA's anti-retaliation provision,\textsuperscript{404} and because of this, the statutes should not be interpreted similarly. In the above-referenced statutes, Congress included some type of "opposition clause," something completely lacking in the FLSA.\textsuperscript{405} Had Congress wanted to provide the same level of protection as it provided under the FLSA under these newer statutes, it certainly could have simply used similar language when drafting the newer statutes, or it could have amended the FLSA to include an opposition clause. However, Congress chose to include the broader "opposition" language in the newer statutes, and despite this lack of opposition language in the FLSA, many courts focused on what they believed to be the policy behind these anti-retaliation provisions and essentially (and erroneously) applied this type of opposition clause to FLSA cases.\textsuperscript{406}

Some courts have, however, acknowledged the difference between anti-retaliation provisions with an opposition clause and the FLSA's provision. The Second Circuit in \textit{Lambert} started its analysis with a comparison of Title VII and the FLSA and concluded that because the FLSA does not contain an opposition clause, internal complaints were not protected.\textsuperscript{407} Also, in \textit{Boateng v. Terminex International Co.},\textsuperscript{408} the United States District Court for the Eastern District of Virginia distinguished Title VII from the FLSA and concluded that the FLSA's lack of an opposition clause was evidence that the FLSA's provision is

\textsuperscript{402} 42 U.S.C. § 12203(a) (2006).
\textsuperscript{405} Compare 42 U.S.C. § 2000e-3(a) (protecting employees who "have opposed any practice made an unlawful employment practice by [Title VII]"); 42 U.S.C. § 12203(a) (protecting employees who "have opposed any act or practice made unlawful by [the ADA]"); and 29 U.S.C. § 623(d) (protecting employees who "have opposed any practice made unlawful by [the ADEA]"), with 29 U.S.C. § 215(a)(3) (containing no similar opposition clause).
\textsuperscript{406} See supra section III.A. Furthermore, the original purpose of the FLSA's anti-retaliation provision was to encourage employees to provide information to the Department of Labor. Brief for Respondent, supra note 41, at 22-24. Protecting intra-company complaints does not further that goal. \textit{Id.}
\textsuperscript{407} \textit{Lambert}, 10 F.3d at 55. The Fourth Circuit in \textit{Ball v. Memphis Bar-B-Q Co.} also compared the FLSA with Title VII (and the ADEA) and concluded that the difference in the statutes' language was one reason to interpret them differently. 228 F.3d 360, 364 (4th Cir. 2000).
\textsuperscript{408} No. 07-617, 2007 WL 2572403 (E.D. Va. Sept. 4, 2007).
narrower than Title VII’s. Similarly, the dissenting judge in *EEOC v. Romeo Community Schools* distinguished between Title VII and the FLSA. He concluded that had that case involved Title VII, he “might [have] agree[d]” with the majority. Specifically, he noted the following: “[i]n addition to the . . . conduct specified in [the FLSA’s anti-retaliation provision], Title VII expressly includes an opposition clause, which protects employees who protest unlawful employment practices to their employers. [The FLSA] contains no such provision and I cannot join the majority in reading one in.” Therefore, although it is the minority position, some judges have determined that the difference between the FLSA’s anti-retaliation provision and the anti-retaliation provisions with opposition clauses is one reason to provide less protection under the FLSA.

When Congress enacted these newer statutes, it knew of the FLSA’s language, yet it chose to use broader language in these statutes. One conclusion is that because Congress used different language, it meant for the new statutes to provide different levels of protection. As the United States District Court for the Eastern District of Virginia noted,

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409. *Id.* at *3. Since *Boateng*, the Fourth Circuit has affirmatively held that internal complaints are protected under the FLSA. Minor v. Bostwick Laboratories, Inc., 669 F.3d 428 (4th Cir. 2012). While the Fourth Circuit has decided to protect internal complaints, some of the arguments made by district courts within the Fourth Circuit before *Minor*, although now not particularly relevant within the Fourth Circuit, still provide strong analysis why internal complaints should not be protected.

410. 976 F.2d 985 (6th Cir. 1992).

411. *Id.* at 990 (Suhrheinrich, J., concurring in part and dissenting in part).

412. *Id.*

413. *Id.* (citation omitted). Another case from the Eastern District of Virginia expressed the same sentiment regarding the differences between Title VII and the FLSA when it noted the following:

> Congress must be held to the plain meaning of its statutes; it must be held to have said what it meant. Title VII includes an “opposition clause” and the FLSA does not. This telling difference points persuasively to the conclusion that protected activity under the FLSA is a smaller universe of conduct than the universe of protected activity under Title VII. The latter includes informal protests or complaints, the former explicitly does not.

414. *O’Neill v. Allendale Mut. Ins. Co.*, 956 F. Supp. 661, 664 (E.D. Va. 1997) (footnote omitted). *See also Bartis v. John Bommarito Oldsmobile-Cadillac, Inc.*, 626 F. Supp. 2d 994, 1000 (E.D. Mo. 2009) (noting the differences between Title VII and the FLSA and concluding that this difference was evidence that internal complaints were not protected under the FLSA); *but see supra* text accompanying notes 222, 409 (regarding the Fourth Circuit’s current view on this issue and the value of the district court opinions within the Fourth Circuit).

"Because Congress chose not to include an 'opposition' clause in [the FLSA], it stands to reason that Congress' intent was for [the FLSA] to cover a more narrow range of employee activities than are covered by the anti-retaliation clause of Title VII."

Therefore, this lack of an opposition clause, and Congress's failure to add one, is evidence that supports the conclusion that internal complaints are not covered under the FLSA. As will be discussed next, unless and until Congress adds such an opposition clause to the FLSA, courts will continue to misinterpret the FLSA and provide more protection than the statute's language allows.

B. Congress's Failure to Amend the FLSA's Anti-retaliation Provision

Another indication that internal complaints are not protected under the FLSA is that Congress has not amended the FLSA's anti-retaliation provision despite being on notice that some courts had decided that internal complaints were not protected, and despite knowing that it could have guaranteed this protection by adding an opposition clause. The case of Lambert is almost twenty years old, and Ball v. Memphis Bar-B-Q Co. was decided over ten years ago. Since then, not only has Congress failed to amend the FLSA's anti-retaliation provision, but it has amended other provisions of the FLSA. In fact, since Lambert, Congress has amended the FLSA more than ten times, yet it has not amended the narrow language contained in its anti-

415. Bell-Holcombe v. Ki, LLC, 582 F. Supp. 2d 761, 764 (E.D. Va. 2008); but see supra text accompanying notes 222, 409 (regarding the Fourth Circuit's current view on this issue and the value of the district court opinions within the Fourth Circuit); Mansfield v. Billington, 432 F. Supp. 2d 64 (D.D.C. 2006), supra section III(A)(8). The court observed that the significant difference between the EPA and Title VII (the lack of an opposition clause in the EPA) requires the conclusion that the scope of protection under these statutes is different. Mansfield, 432 F. Supp. 2d at 74.

416. The Fourth Circuit in Ball also addressed the difference between Title VII's anti-retaliation provision and the FLSA's anti-retaliation provision. 228 F.3d at 364-65. Specifically, when addressing the "testimony" clause of the anti-retaliation provision, the court noted the following:

If the allegations were proved to be true, such offensive conduct would provide an example of why Congress found it necessary in other contexts to enact broader anti-retaliation provisions. But this moral judgment does not justify a conclusion—contrary to the plain language of the FLSA—that [the plaintiff's] complaint states a cause of action under the Act.

Id. at 365 (citation omitted).

417. See Brief for Respondent, supra note 41, at 38-39. One senator did, however, attempt to amend and broaden the FLSA's anti-retaliation provision; that proposal, however, has not since been acted upon. See S.3256, 112th Cong. (2012).

418. 228 F.3d 360 (4th Cir. 2000).

retaliation provision. If Congress wanted to show its intent that the anti-retaliation provision should be interpreted broadly, it certainly could have added an opposition clause during one of the many times it amended the FLSA.

This type of issue has come up before in the employment-law context. For example, when the Supreme Court was asked to decide whether an ADEA plaintiff needed direct evidence to receive a mixed-motive jury instruction, the Court decided there was not even a mixed-motive cause of action under the ADEA. The Court reached this conclusion because while Congress amended Title VII in 1991 to include a mixed-motive cause of action, it failed to include a similar cause of action under the ADEA, despite the fact that it amended other provisions of the ADEA at that time.

Applying Gross v. FBL Financial Services, Inc. here, because Congress has amended the FLSA several times after learning that some courts had narrowly interpreted the FLSA’s anti-retaliation provision and Congress did not add an opposition clause to the Act’s anti-retaliation provision, a logical conclusion is that Congress intended for the FLSA to offer a different level of protection than anti-retaliation provisions with opposition clauses. The United States District Court for the Eastern District of Virginia noted this when it stated: “should Congress, on reflection, consider sound public policy to require a different result, it may follow the example of Title VII and amend the FLSA to add an ‘opposition clause.’” However, because Congress has chosen not to do so, internal complaints are not covered.

By not adding an opposition clause despite knowing that some courts had taken a narrow approach when applying the FLSA’s anti-retaliation provision, Congress has expressed its intent to afford plaintiffs less protection under the FLSA than under other employment-related, anti-retaliation provisions. As a result, plaintiffs should be protected under this provision only if they file external complaints.

420. Id.
425. See supra notes 408-17 and accompanying text.
426. O’Neill, 956 F. Supp. at 665; but see Minor, 669 F.3d 428 (holding that internal complaints are protected within the Fourth Circuit).
427. See supra notes 408-17.
428. See Brief for Respondent, supra note 41, at 38-39.
C. Liberally Construing a Statute Is Not the Same as Re-writing One

Although several courts have relied on what they believed to be the FLSA's purpose when deciding that internal complaints are protected, as the court noted in *Edwards v. A.H. Cornell & Son, Inc.*, simply because a statute was intended for a particular purpose, this does not allow a court to "ignore clear statutory language." This was echoed in *O'Neill v. Allendale Mutual Insurance Co.*, when the court, after acknowledging that policy might favor a broad interpretation of the FLSA's anti-retaliation provision, correctly noted:

> [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. Courts have no license or authority to disregard a statute's plain language for the purpose of reaching a result the court deems more sensible.

Similarly, the United States District Court for the Western District of Virginia in *Meredith-Clinevell v. Department of Juvenile Justice* ruled that internal complaints are not protected. The court noted that a broad interpretation was not supported by the statutory language, and that "while [the court] is instructed to read the FLSA to effect its remedial purposes, the statutory language clearly places limits on the range of retaliation proscribed by the Act." The court in *Bartis v. John Bommarito Oldsmobile-Cadillac, Inc.* also recognized the limits placed on a court in light of a statute's language when it noted that "the statute cannot be construed so broadly as to depart from its plain and clear language." Also, the Fourth Circuit in *Ball* made several statements regarding the FLSA's remedial purpose but ultimately decided that the statute's language controlled. Finally, the Seventh

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429. 610 F.3d 217 (3d Cir. 2010).
430. Id. at 223-24.
432. Id. at 664 n.6; see also supra text accompanying notes 222, 409 (regarding the Fourth Circuit's current view on this issue and the value of the district court opinions within the Fourth Circuit).
434. Id. at 955; but see supra text accompanying notes 222, 409 (regarding the Fourth Circuit's current view on this issue and the value of the district court opinions within the Fourth Circuit).
435. Id. (quoting Ball, 228 F.3d at 364).
437. Id. at 999.
438. 228 F.3d at 363-65.
Circuit in Kasten observed that “expansive interpretation is one thing; reading words out of a statute is quite another.”

Although many courts used the “remedial purpose” argument to support their conclusion that internal complaints are protected, some courts have correctly rejected that approach. Some of the courts adopting the broad interpretation have even acknowledged that the statutory language does not include internal complaints, and yet these courts violated the canon of statutory construction that a statute’s language must control its interpretation. Despite this, as the minority of courts has pointed out, because the anti-retaliation provision’s language does not cover internal complaints, the FLSA’s “remedial purpose” should take a back seat to the words Congress used when drafting the statute.

D. The Meaning and Context of “Filed Any Complaint”

When answering the question presented in this Article, the critical phrase is “filed any complaint.” It is therefore appropriate to look at the ordinary meaning and context of the words making up this phrase—“complaint” and “filed.” After doing so, it is clear that internal complaints are not covered under the FLSA’s anti-retaliation provision. At the very most, evaluating the ordinary meaning of the statute’s words (especially “filed”) leads to the conclusion that if any internal complaints are protected, only written internal complaints are protected, which is what the Seventh Circuit decided in Kasten.

In a non-legal context, and when not preceded by the word “filed,” complaint could encompass a statement made to an employer. However, as Justice Scalia noted in Kasten, “complaint” has a specialized meaning when used in the legal context, and when interpreting statutes, it is this legal meaning that controls. According to the Cambridge Dictionary of American English, one definition of complaint is “a formal statement to a government authority that you have a legal cause to

439. 570 F.3d 834, 840 (7th Cir. 2009), rev’d, 131 S. Ct. 1325 (2011).
440. See supra section III(A).
441. See supra section III(B).
442. See EEOC v. White & Son Enters., 881 F.2d 1006, 1011 (11th Cir. 1989) (“The charging parties did not perform an act that is explicitly listed in the FLSA’s anti-retaliation provision . . . .”) (emphasis added).
444. This Article will also address the third word in that phrase, “any.”
445. 570 F.3d at 840.
446. Kasten, 131 S. Ct. at 1337 (Scalia, J., dissenting); see also WEBSTER’S NEW INTERNATIONAL DICTIONARY 546 (2d ed. 1934).
447. Kasten, 131 S. Ct. at 1337 (Scalia, J., dissenting).
complain about the way you have been treated. Similarly, the Oxford English Dictionary defines complaint as “[a] statement of [f] injury or grievance laid before a court or judicial authority . . . for purposes of prosecution or of redress . . . .” Webster’s New International Dictionary defines complaint as “[a] formal allegation or charge against a party, made or presented to the appropriate court or officer . . . .” Thus, all three sources require the complaint to be made to some type of governmental or judicial authority. Finally, although not cited in either opinion in Kasten, Black’s Law Dictionary defines a complaint as “[t]he initial pleading that starts a civil action and states the basis for the court’s jurisdiction, the basis for the plaintiff’s claim, and the demand for relief.

As Justice Scalia pointed out in Kasten, it is logical to assume that Congress meant complaint to take on this specialized, legal meaning in the FLSA. First, every time Congress used complaint in the FLSA, it took on this formal, legal meaning. And, as Justice Scalia noted, a common canon of statutory construction is that when Congress uses the same words in the same statute, there is a presumption that the words should be interpreted similarly. Second, when interpreting statutes, it is important to note that “[t]he law uses familiar legal expressions in their familiar legal sense.” Applying these ideas here, it is clear that “filed any complaint” does not cover internal complaints.

Although Congress chose to modify complaint with the word any, that does not mean that the above-referenced legal definitions of complaint do not apply to the FLSA’s anti-retaliation provision. As counsel for Saint-Gobain pointed out, any must be viewed in the context of the FLSA as a whole, not in the isolated context of the phrase “filed any complaint.” When viewed in that context, it is clear that “any

449. Kasten, 131 S. Ct. at 1337 (alteration in original) (emphasis added); see also 3 OXFORD ENGLISH DICTIONARY 608 (2d ed. 1988).
450. Kasten, 131 S. Ct. at 1337 (alteration in original) (emphasis added); see also WEBSTER’S NEW INTERNATIONAL DICTIONARY 546 (2d ed. 1934).
451. Admittedly, these three dictionaries are not typically considered “legal authorities.”
452. BLACK’S LAW DICTIONARY 323 (9th ed. 2009).
453. 131 S. Ct. at 1337 (Scalia, J., dissenting).
454. Id.; see also supra note 365.
455. Kasten, 131 S. Ct. at 1337.
456. Id. at 1338 (alteration in original) (quoting Henry v. United States, 251 U.S. 393, 395 (1920)).
complaint" does not include complaints made to an employer.\textsuperscript{459} Specifically, applying the previously-mentioned rule of statutory construction that "identical words used in different parts of a statute are presumed to have the same meaning," it is critical to note that in all other places of the FLSA where Congress used the word "complaint," that word took on its more formal, legal meaning.\textsuperscript{460} Thus, by using the phrase "any complaint," Congress did not intend to include employee-to-employer grievances.\textsuperscript{461}

As is clear from the previous discussion, the term \textit{filed} is also critical to this issue. As was the case with \textit{complaint}, it is important to look at definitions to determine what the term means. And once again, these definitions demonstrate that internal grievances are not protected. Specifically, and as the employer pointed out in \textit{Kasten}, \textit{filed} can mean the following: (1) "to make an official record of [something], or to begin a legal process"; (2) "to place (a document) in due manner among the records of a court or public office"; and (3) "the formal presentation of a document to the official whose duty it will then be to place it on his file."\textsuperscript{462} When read in conjunction with the rest of the FLSA's anti-

\textsuperscript{459} \textit{Id.}

\textsuperscript{460} \textit{Kasten}, 131 S. Ct. at 1337 (Scalia, J., dissenting). \textit{See supra} note 365.

\textsuperscript{461} Counsel for Saint-Gobain also used the following argument when addressing the word "any":

\textit{Kasten} argues that Congress's use of the words "any complaint" indicates that § 215(a)(3) encompasses complaints in any form, including oral complaints. This argument wrongly treats the words "any complaint" as if they stood alone. In fact, those words are governed by the verb "filed." That choice of verb limits the range of protected "complaints" to those that can be "filed." Returning to the bank example, if a person says, "You may deposit this check in any bank," he obviously means only the type of bank in which a check can be deposited; a blood bank or an elevator bank would not do. So too here: Because an oral complaint cannot be "filed" unless it is reduced to writing, it does not fall within the plain meaning of the phrase "filed any complaint." The word "any" signifies only that the statute protects complaints about any subject related to the FLSA.

\textit{Brief for Respondent, supra} note 41, at 29.

\textsuperscript{462} \textit{Id.} at 19-20 (emphasis added); see also \textit{Cambridge Dictionary of American English} at 318; \textit{5 Oxford English Dictionary} at 904; \textit{A Dictionary of Modern American Usage} at 130-31 (1935) (emphasis added). As the First Circuit noted in \textit{Valerio v. Putnam Associates}, the term "filed" could also mean either "to deliver (as a legal paper or instrument) after complying with any condition precedent (as the payment of a fee) to the proper officer for keeping on file or among the records of his office" or "to place (as a paper or an instrument) on file among the legal or official records of an office especially by formally receiving, endorsing, and entering." 173 F.3d 35, 41 (1st Cir. 1999) (alteration in original); see also \textit{Webster's Third New International Dictionary} at 849 (1971). \textit{Black's Law Dictionary} also supports the conclusion that "to file" requires a writing. Specifically, it defines "file" as "to deliver a legal document to the court clerk or record custodian for placement into the official record"; "to commence a lawsuit"; "to record or
retaliation provision (and especially with the term "complaint"), it is clear that the phrase "filed any complaint" requires more than an exchange between an employee and his employer. Had Congress used the words "lodged" or "made" or "voiced" when referring to complaints (as it used "made" in the MHSA), the pro-employee argument on this issue would have been stronger. However, by using "filed," which connotes a more formal meaning, Congress used language that does not support the conclusion that internal complaints are protected. Counsel for Saint-Gobain made this argument in its brief when it noted that other statutes such as the National Transit Systems Security Act, the Consumer Product Safety Improvement Act, and the Asbestos Hazard Emergency Response Act (among others) provide more protection based on the much broader language used in those statutes. Further, the use of the phrase "filed any complaint" is more commonly understood to cover a legal complaint rather than a less formal exchange with an employer.

The United States District Court for the Eastern District of Virginia agreed with this more formal meaning when it noted that "[t]he concept of ‘filing’ a complaint contemplates following some form of official procedure." After making this statement, the Boateng court ruled that internal complaints are not protected. Another case from the Eastern District of Virginia reached the same conclusion about the FLSA's language when it noted that its anti-retaliation provision "could deposit something in an organized retention system or container for preservation and future reference"; and "[t]o acknowledge and deposit (a report, communication, or other document) for information and reference only without necessarily taking any substantive action." BLACK'S LAW DICTIONARY 704 (9th ed. 2009).

463. See Valerio, 173 F.3d at 41. Congress did use such language in the Mine Health Safety Act, when it used the phrase "filed or made a complaint." 30 U.S.C. § 815(c)(1) (2006) (emphasis added). This demonstrates that Congress can, when it wants to do so, provide broad protection to workers. Congress also showed this willingness to provide broad protection in other statutes such as Title VII, where it included an opposition clause in its anti-retaliation provision. See supra note 25.

467. Brief for Respondent, supra note 41, at 34-35 & n.8.
469. Boateng, 2007 WL 2372403, at *2; but see supra text accompanying notes 222, 409 (regarding the Fourth Circuit's current view on this issue and the value of the district court opinions within the Fourth Circuit).
470. Id. at *3.
scarcely be clearer." In O'Neill, the court then noted the following about the FLSA's anti-retaliation provision:

It defines in clear and unambiguous language three specific categories of conduct for which retaliation is prohibited. And it does so in terms that make unmistakably clear that the three categories of conduct comprise the complete universe of protected activity, not just an exemplary or ejusdem generis listing of such activities. It follows that the FLSA's protection against retaliation by an employer is triggered only by the specific conduct set forth in § 215(a)(3) of the Act. Thus, unless the conduct claimed to be the trigger for the retaliatory act falls within one of the three specified protected activity categories, the provision does not apply and there is no actionable retaliation under the FLSA. But the well-defined universe of protected activities does not encompass such informal, unofficial protests.

Additionally, it is important to note that "filed any complaint" is part of a list that includes other protected activities, all of which involve activity with an outside entity or a governmental/judicial entity or proceeding. This is important because it relates to the canon of statutory construction that when several items in a list share an attribute, that "'counsel[s] in favor of interpreting the other items as possessing that attribute as well.' Here, because the other protected acts all encompass outside involvement, the phrase "filed any complaint" should likewise require outside involvement. This canon of statutory construction has been used on several occasions by the Supreme Court. For example, in Beecham v. United States, the Court noted:

This interpretation is supported by the fact that the other three procedures listed in the exemption clause—pardons, expungements, and set-asides—are either always or almost always (depending on whether one considers a federal grant of habeas corpus to be a "set-aside," a question we do not now decide) done by the jurisdiction of

471. O'Neill, 956 F. Supp. at 663; but see supra text accompanying notes 222, 409 (regarding the Fourth Circuit's current view on this issue and the value of the district court opinions within the Fourth Circuit).
472. Id. at 663-64 (emphasis added).
473. Specifically, the three other protected acts are: "institut[ing] or caus[ing] to be instituted any proceeding under or related to [the FLSA]"; "testif[y]ing or [b]eing about to testify in any such proceeding"; and "serv[ing] or [b]eing about to serve on an industry committee." 29 U.S.C. § 215(a)(3).
475. Id.
conviction. That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.477

Applying that approach here, because the other acts contained in the FLSA's anti-retaliation provision include involvement with an outside entity or a governmental/judicial entity or proceeding, the "filed any complaint" language should similarly be limited in scope.

The United States District Court for the Eastern District of Virginia summed up the "plain language" argument perfectly:

The Plaintiff has not alleged that she filed a complaint or instituted or caused to be instituted any proceeding that led to her termination. The plain language of the statute and Fourth Circuit precedent both make clear that the protection of § 215(a)(3) is only triggered where an employee has either filed a complaint or instituted or caused to be instituted any proceeding under the FLSA, testified or is about to testify in any FLSA proceeding, or served or is about to serve on an industry committee. 29 U.S.C. § 215(a)(3). Because "filing" a complaint or "instituting" a proceeding under FLSA contemplates some formal or official procedure, an internal complaint does not initiate protection of the statute. Since she failed to allege protected activity satisfying the terms of the statute, the Plaintiff's claim cannot survive a Motion to Dismiss.478

This sentiment was echoed in Bartis, where the court noted that the activities listed in the FLSA's anti-retaliation provision were explicitly stated, and that those activities included "filing a complaint, instituting or testifying in a proceeding, or serving on a committee."479 The court then noted that "[w]orkplace complaints are not included [in the statutory language]. Raising informal objections with one's supervisor is not included."480

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478. Bell-Holcombe, 582 F. Supp. 2d at 764; but see Minor, 669 F.3d 428 (holding that internal complaints are protected within the Fourth Circuit); but see supra text accompanying notes 222, 409 (regarding the Fourth Circuit's current view on this issue and the value of the district court opinions within the Fourth Circuit).

479. 626 F. Supp. 2d at 999.

480. Id. For a more history-based argument regarding why internal complaints are not protected, see Respondent's Brief, supra note 41, at 20-21. Specifically, counsel for Saint-Gobain pointed out the following:

As the government notes, § 215(a)(3) was preceded by the retaliation provision of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(4), which in turn was preceded by Executive Order No. 6711 (1934). The Executive Order prohibited
Although one could argue that by using the phrase "filed any complaint" in addition to the phrase "instituted or caused to be instituted any proceeding," there was legislative redundancy, Justice Scalia correctly pointed out during oral argument that this was not the case because an employee could file a complaint with the Department of Labor and still not institute or cause to be instituted any proceeding. This would occur if the employee complained to the Labor Department, but that agency decided not to pursue the matter. Similarly, Justice Roberts used an EEOC analogy, pointing out that an employee can file a charge with the EEOC, but the EEOC might not institute or cause to be instituted any proceeding against the employer. Thus, Congress was not being redundant when it used the phrases "filed any complaint" and "instituted or caused to be instituted" any proceeding.

The phrase "filed any complaint" does not include internal complaints. The definitions of the terms "complaint" and "filed" suggest this outcome, as does the rest of the FLSA's anti-retaliation provision. Despite this, after Kasten courts will now most likely allow internal complaints to

retaliation against any employee "for making a complaint or giving evidence with respect to an alleged violation." And § 158(a)(4) prohibited retaliation against any employee "because he has filed charges or given testimony" under the NLRA. Despite the change from "making a complaint" to "filed charges," § 158(a)(4) was described in the legislative history as "merely a reiteration" of the Executive Order. The immediate statutory predecessor of § 215(a)(3) thus prohibited retaliation against any employee who "filed charges," and there is evidence that Congress understood the words "filed charges" and "making a complaint" synonymously. Contrary to the government's contention, however, this history does not support the view that § 215(a)(3) protects internal complaints. Rather, the phrase "filed charges" clearly contemplates a formal grievance filed with a governmental authority.

Moreover, the legislative history of the NLRA contains no evidence that § 158(a)(4) protected employees who "filed charges" against their employers internally (if that counterintuitive notion is even possible). The committee report on which the government relies cited three decisions of the National Labor Relations Board (NLRB) under the 1934 Executive Order that "attested" to the "need for this provision." Each decision involved retaliation for either a complaint to an agency, or testimony given in [a] judicial proceeding[]. And the colloquy the government cites between Senators Wagner and Hastings concerned the possibility that § 158(a)(4) would protect employees who "file charges maliciously,"—a concern that obviously pertained to the filing of charges with a governmental authority.

Id. at 20-21 (citations omitted).


482. Id.

483. Id. at 34:18.

constitute protected activity. Nonetheless, because the majority in Kasten claimed to have left this question open, perhaps the Court will eventually (and specifically) resolve this important issue of what, exactly, constitutes "protected activity" under the FLSA's anti-retaliation provision.

VI. CONCLUSION

Although the Supreme Court's heart might have been in the right place when it decided that oral complaints are protected under the FLSA, the result of the Court's apparent decision to cover complaints made to employers about potential FLSA violations appears to be based more on policy than on the FLSA's language. By stretching the phrase "filed any complaint" beyond its ordinary meaning, the Court provided more protection to employees, but it did so at the expense of the FLSA's text.

The FLSA's anti-retaliation provision is not worded as broadly as other anti-retaliation provisions, and any argument that the interpretation of those provisions should apply to the FLSA is without merit. Similarly, the fact that Congress has not amended the FLSA's anti-retaliation provision to include an opposition clause provides further support that internal complaints are not protected. Also, simply because a statute's policies and purposes might favor a broad interpretation, that does not give courts the right to "interpret" those statutes by ignoring their language. And finally, as Justice Scalia pointed out, applying ordinary canons of statutory construction to the FLSA's anti-retaliation provision's language and context yields the result that internal complaints are not protected. Kasten v. Saint-Gobain Performance Plastics Corp. is an example of putting policy ahead of language. It is Congress's job to make the law, and by protecting these internal complaints (despite claiming not to have done so), the Court in Kasten usurped this role.

485. See supra note 43.
486. Admittedly, the Court claimed that it was not answering the issue that is the focus of this Article; however, by concluding that the plaintiff's internal complaints could be protected, and by establishing a test to determine when complaints made to employers are protected, the logical implication is that internal complaints are, in fact, protected under the FLSA's anti-retaliation provision.
487. Kasten, 131 S. Ct. at 1337-41 (Scalia, J., dissenting).