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ACTION SPEAKS LOUDER THAN FORM:
THE CASE FOR PROTECTING ORAL COMPLAINTS UNDER THE FLSA

CAROLINE B. PARK

“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.”¹

I. INTRODUCTION AND BACKGROUND

A. *Kasten v. Saint-Gobain Performance Plastics*²

Saint-Gobain Performance Plastics Corporation manufactures a variety of high-performance polymer products.³ Kevin Kasten worked there for about three years as an hourly manufacturing and production worker.⁴ Saint-Gobain required manufacturing and production workers—including Mr. Kasten—to don protective gear, sanitize their hands, and clean their shoes before going to their workstations.⁵ The location of the time clocks meant that workers clocked in after donning the required gear, and clocked out before doffing the gear. Employees like Mr. Kasten were not compensated for the time it took to don and doff.

Saint-Gobain had a Code of Ethics requiring employees to report, “known or suspected violations of the Code or any applicable law.”⁶ Saint-Gobain had an Employee Policy Handbook that “encouraged employees to report complaints to their supervisors and to the Human Resources Manager if the matter was not resolved.”⁷ Following this protocol, Mr. Kasten complained orally to several supervisors about the location of the time clocks, and his

¹ Brock v. Richardson, 812 F.2d 121, 123–124 (3rd Cir. 1987).

² 570 F.3d 834 (7th Cir. 2009).

³ Kasten v. Saint-Gobain Performance Plastics Corp., 619 F.Supp.2d 608, 609 (W.D. Wis. 2008).

⁴ *Id.*

⁵ Brief of Plaintiff-Appellant at 2, Kasten v. Saint-Gobain Performance Plastics, No. 08-2820 (7th Cir. Oct. 6, 2008).

⁶ *Id.* at 3.

⁷ *Id.*

belief that the locations of the time clocks were illegal.⁸ Saint-Gobain terminated Mr. Kasten in December of 2006.

Kasten filed suit, alleging that his complaints were protected activity and that he was improperly terminated in violation of the anti-retaliation provision of the Fair Labor Standards Act (“FLSA”),⁹ which guards employees who engage in protected activity from reprisal. The district court granted summary judgment for Saint-Gobain, finding that Mr. Kasten was not protected from retaliation because his oral complaint was not protected activity.¹⁰

The location of the time clocks was illegal.¹¹ Mr. Kasten complained about a legitimate violation, followed the employee handbook to the letter, and yet was still terminated. There is no doubt that this scenario is concerning. This paper will argue that employees like Mr. Kasten should have a remedy under the anti-retaliation provision of the Fair Labor Standards Act. The form the complaint takes should not be the dispositive factor in the analysis of a retaliation claim. Any discharge following an employee’s sufficient assertion of statutory rights is discriminatory and in violation of § 215(3)(a).

The circuit courts are split over the interpretation of § 215(3)(a), and the Supreme Court has granted certiorari of the *Kasten* case to decide if the anti-retaliation provision of the FLSA, which prohibits firing an employee because he has “filed any complaint,” requires a written complaint.¹² *Kasten* declared that those circuits that had protected oral complaints were not

⁸ Defendant Saint-Gobain denied that Mr. Kasten made these complaints. Defendant moved for summary judgment, so the facts were taken in the light most favorable to Mr. Kasten.

⁹ 29 U.S.C. §§ 201–219 (2006).

¹⁰ *Kasten*, 619 F.Supp.2d at 611.

¹¹ Mr. Kasten’s case was originally consolidated with a FLSA collective action brought by other Saint-Gobain employees seeking compensation for time spent donning and doffing. Mr. Kasten’s action was severed. The district court granted partial summary judgment to the collective action, finding that their donning and doffing time was compensable. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F.Supp.2d 941, 955–56 (W.D. Wis. 2008).

¹² *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th Cir. 2009), *cert granted* (U.S. March 22, 2010) (No. 08-2820).

useful, because their holdings did “not specifically state whether the complaint in question was written or purely verbal, and none discuss[ed] the statute’s use of the verb to ‘to file’ and whether it requires a writing.”¹³ This Note will argue that the decisions *Kasten* criticized have embraced the most suitable interpretation of the anti-retaliation provision. Those circuits evaluated the complaints in question based on their substance and sufficiency and not their form. This approach is the one best suited to fulfilling the purposes of the anti-retaliation provision, and it is this author’s hope that the Supreme Court will reverse the Seventh Circuit’s troubling decision.

Part I.B of this paper will give background information on the Fair Labor Standards Act (FLSA), and Part I.C will address retaliation provisions and a prima facie case of retaliation. Part II identifies the recurring arguments courts use in assessing claims under § 215(a)(3). Part II.A addresses the arguments under the related issue of the protection of internal complaints. Part II.B focuses on the arguments made regarding informal complaints specifically. Part III uses the traditional tools courts use to construe statutes to argue that the correct interpretation is one that protects informal complaints. Finally, Part IV proposes the standard that courts should apply when considering an informal complaint.

B. *The Fair Labor Standards Act*

The FLSA was enacted in 1938, largely in response to the Great Depression when “the scarcity of jobs was perceived as an invitation to wage abuses by employers. . . .”¹⁴ The purpose of the FLSA when enacted was to improve “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of

¹³ *Kasten*, 570 F.3d at 840.

¹⁴ JOSEPH E. KALET, PRIMER ON FLSA & OTHER WAGE & HOUR LAWS 3 (1994).

workers.”¹⁵ Congress hoped the legislation would guarantee a fair minimum wage and reasonable working hours in industries in which workers likely had unequal bargaining power.¹⁶

The primary obligations of employers under the Act are in the areas of minimum wage, overtime pay, and child labor.¹⁷ Section 206 establishes a minimum wage owed to employees covered by the Act.¹⁸ The Act also regulates the workweek by requiring compensation of one and one-half times the regular rate for a workweek longer than 40 hours.¹⁹

There are—of course—enforcement mechanisms in place. To ensure compliance with these regulations, Congress “chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied.”²⁰ The anti-retaliation provision of the Act facilitates enforcement by declaring it unlawful to retaliate against an employee for filing a complaint, instituting a proceeding, or testifying regarding a violation of the minimum wage, overtime, or other provisions of the FLSA.²¹ By offering protection, “[t]he anti-retaliation provision facilitates the enforcement of the FLSA’s standards by fostering an environment in which employees’ ‘fear of economic retaliation’ will not cause them ‘quietly to accept substandard conditions.’”²²

To further these obligations, the FLSA offers remedies for violations of the regulations. Section 216 lays out the penalties available for those who willfully violate the provisions of §

¹⁵ 29 U.S.C. § 202(a) (2006).

¹⁶ Senate Comm. on Education and Labor, *Fair Labor Standards Act of 1937: Joint Hearings Before the Senate Committee on Education and Labor, and House Committee on Labor*, 75th Cong., 1st Sess., 177 (1938).

¹⁷ JOSEPH E. KALET, *supra* note 13, at 3.

¹⁸ 29 U.S.C. § 206 (2006).

¹⁹ 29 U.S.C. § 207 (2006).

²⁰ *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

²¹ Section 215(a)(3) of the FLSA provides, in relevant part:

[I]t shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding[.]

29 U.S.C. §215(a)(3) (2006).

²² *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 364 (4th Cir. 2000) (citing *Mitchell*, 361 U.S. at 292). *See also* Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 539 (2001).

215. An employee may file suit in court, or the Secretary of Labor may file suit on an employee's behalf.²³ An employer who violates § 215(a)(3) can be liable for legal or equitable relief, "including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."²⁴

C. Retaliation in General

1. Retaliation Provisions

Virtually all federal anti-discrimination statutes have anti-retaliation provisions that protect employees who complain about their employers' practices.²⁵ The anti-retaliation provision of the Fair Labor Standards Act, however, is slightly different from the provisions in other statutes, as it does not contain a specific "opposition" clause.²⁶ Courts and commentators often use other retaliation provisions to bolster their arguments on how the FLSA's provision should or should not be interpreted. This technique will be further discussed in Part III.E.1.

2. Prima Facie Case of Retaliation

Courts apply the shifting burden of proof scheme, initially articulated in *McDonnell Douglas Corp. v. Green*.²⁷ A prima facie case of retaliation under the FLSA requires a demonstration by the employee of the following: (1) he or she engaged in activity protected under the Act; (2) he or she subsequently suffered an adverse employment action by the

²³ 29 U.S.C. §216(b-c) (2006).

²⁴ 29 U.S.C. §216(b) (2006).

²⁵ See, e.g., Americans with Disabilities Act (ADA), 42 U.S.C. §12203 (2006); Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623 (2006); Civil Rights Act of 1964 (Title VII), 42 U.S.C. §2000e-3 (2006); Vocational Rehabilitation Act, 29 U.S.C. §§793, 794 (2006); Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1140 (2006); Fair Labor Standards Act (FLSA), 29 U.S.C. §§215(a), 216(b) (2006); Family Medical Leave Act (FMLA), 29 U.S.C. §2614(a) (2006); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §948(a) (2006); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §1855 (2006); National Labor Relations Act (NLRA), 29 U.S.C. §158 (2006), Occupational Safety and Health Act (OSHA), 29 U.S.C. §660(c) (2006); Railroad Employers Act, 45 U.S.C. §60 (2006).

²⁶ See, e.g., 42 U.S.C. §2000e-3(a) (2006) (prohibiting employer retaliation because an employee has "opposed any practice made unlawful 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").

²⁷ 413 U.S. 792 (1973). See, e.g., *Richmond v. ONEOK Inc.*, 120 F.3d 205, 208-09 (10th Cir. 1997).

employer; and (3) a causal connection existed between the employee’s activity and the adverse action. Successfully establishing a prima facie case of retaliation creates a rebuttable presumption that the employer unlawfully retaliated against the employee.²⁸

Once a plaintiff establishes a prima facie case, the burden of production then shifts to the employer to offer a legitimate reason for the plaintiff’s termination.²⁹ If the employer articulates a legitimate, non-retaliatory reason for the challenged conduct, the presumption of retaliation established by the prima facie showing “drops out of the picture.”³⁰ In order to survive summary judgment at this stage, the employee must offer evidence tending to show that the employer’s proffered reason is pretextual.³¹ This Note analyzes the first element of the prima facie case—that the employee engaged in activity protected by the FLSA.

II. THE RECURRING THEMES IN THE DEBATE OVER § 215(A)(3)

The language of § 215(a)(3) is subject to varying interpretations. Section 215(a)(3) of the FLSA provides, in relevant part:

[I]t shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding[.]³²

Circuit courts differ in their willingness to read the provision broadly, which has resulted in disparate levels of protection afforded to employees. The courts essentially “dispute the degree of formality with which an employee complaint must be made in order for the employee to gain protection under the statute.”³³ The first split in the courts is over the protection of complaints made directly to one’s employer. Some circuits require a formal complaint with the Department

²⁸ *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 506–08 (1993).

²⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973); *St. Mary’s Honor Center*, 509 U.S. at 506–08.

³⁰ *St. Mary’s Honor Center*, 509 U.S. at 511.

³¹ *McDonnell Douglas Corp.*, 411 U.S. at 793 (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)).

³² 29 U.S.C. § 215(a)(3)(2006).

³³ Jennifer Clemons, *supra* note 21, at 536.

of Labor,³⁴ while other circuits protect internal complaints. Part II.A will address the circuit split over internal complaints. Though a clear majority of circuits protect internal complaints, there is a wide discrepancy in the way courts have approached them. There are recurring themes that reappear in the arguments for and against the protection of informal complaints. Part II.B will identify the types of arguments and tests employed by the courts.

A. *Internal Complaints as distinguished from External Complaints*

The first obstacle to the interpretation of § 215(a)(3) is to determine if the language of the provision protects complaints made directly to an employer, instead of filed with the Department of Labor or in court. A majority of appellate courts have construed the language of the provision to protect complaints made directly to management, so called “internal” complaints.³⁵ Courts have engaged in a detailed statutory analysis to reach their conclusions on the matter.

1. Internal Complaints Protected

The Ninth Circuit reasoned that in order for the anti-retaliation provision to serve its purpose, “it must protect employees who complain about violations to their employers, as well as

³⁴ Lambert v. Genesee Hospital, 10 F.3d 46, 54–55 (2d Cir. 1993); Whitten v. City of Easley, 62 Fed. Appx. 477 (4th Cir. 2003).

³⁵ See *Kasten v. Saint Gobain Performance Plastics* 570 F.3d 834, 838 (7th Cir. 2009), cert granted (U.S. March 22, 2010) (No. 08-2820) (concluding that “the plain language of § 215(a)(3) includes internal complaints as protected activity). See also *Hagan v. Echostar*, 529 F.3d 617, 626 (5th Cir. 2008) (allowing an internal complaint to constitute protected activity under § 215(a)(3)); *Moore v. Freeman*, 355 F.3d 558, 562 (6th Cir. 2004) (protecting an employee who protested his unequal pay to his supervisor); *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (holding that the anti-retaliation provision must protect employees who complain about violations to their employers to achieve the purposes of the FLSA); *Valerio v. Putnam Assoc. Inc.* 173 F.3d 35, 43 (1st Cir. 1999) (concluding “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 complaint”); *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 989 (6th Cir. 1992) (protecting an employee who complained to her employer about her pay); *EEOC v. White & Son Enter.* 881 F.2d 1006, 1011 (11th Cir. 1989) (finding that complaints expressed to an employer about unequal pay constitutes an assertion of rights protected under the FLSA); *Love v. RE/MAX*, 738 F.2d 383, 387 (10th Cir. 1984) (finding that the FLSA applies to the assertion of rights through complaints at work); *Brennan v. Maxey’s Yamaha*, 513 F.2d 179, 181 (8th Cir. 1975) (protecting an employee for complaining to employer about returning back wages). *But see* *Ball v. Memphis Bar-B-Q Co. Inc.*, 228 F.3d 360, 364 (4th Cir. 2000) (finding that the FLSA does not prohibit retaliation “for an employee’s voicing of a position on working conditions in opposition to an employer”); *Lambert v. Genesee Hospital*, 10 F.3d 46, 55 (2d Cir. 1993) (“The plain language of this provision limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying but does not encompass complaints made to a supervisor.”).

employees who turn to the Labor Department of the courts for a remedy.”³⁶ In reaching this conclusion, the court parsed the language of § 215(a)(3). First, the court reasoned that the sweeping implication of “file *any* complaint” means that the provision extends to complaints made to employers.³⁷

The court then went on to address the implications of the verb “file.” The court found support for its contention that “file” includes the filing of complaints with employers based on common workplace practices. The court found it reasonable to assume that Congress drafted this language with knowledge of the common practice, both in union and non-union workplaces, of requiring employees to “file” grievances with their union or employer before pursuing any further proceedings.³⁸

The Seventh Circuit also concluded that the plain language of § 215(a)(3) includes internal complaints as protected activity.³⁹ For this court, the convincing argument centered on the word “any” modifying “complaint.”⁴⁰ The statute does not otherwise limit the types of complaints, “[t]hus, the language of the statute would seem to include internal, intra-company complaints as protected activity.”⁴¹

2. External Complaints Required

While a clear majority of courts protect internal complaints,⁴² the Second and Fourth Circuits interpret the anti-retaliation provision strictly, and require a formal, external complaint.⁴³ In *Lambert v. Genesee Hospital*, the Second Circuit based its reasoning on the anti-

³⁶ *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1998).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Kasten*, 570 F.3d at 838.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *supra* note 34 (cataloguing cases protecting internal complaints).

⁴³ See *Whitten v. City of Easley*, 62 Fed. Appx. 477, 480–481 (4th Cir. 2003); *Ball v. Memphis Bar-B-Q Company, Inc.*, 228 F.3d 360, 364 (4th Cir. 2000); *Lambert v. Genesee Hospital*, 10 F.3d 46, 55 (2nd Cir. 1993).

retaliation provision of Title VII.⁴⁴ Title VII has a broader provision, protecting those who “oppose any practice.”⁴⁵ The Second Circuit inferred that since the FLSA provision does not have an opposition clause, it was not written to protect employees who make informal complaints. The court based its reasoning on the plain language of the statute. It found that the anti-retaliation provision explicitly laid out three protected types of behavior (filing a complaint, instituting a proceeding, or testifying), “but does not encompass complaints made to a supervisor.”⁴⁶ Though it noted that a number of circuits had held to the contrary, the Second Circuit found that the plain language of the statute left no room for ambiguity.⁴⁷

The Fourth Circuit agreed, finding that it would be “unfaithful to the language of the . . . FLSA’s anti-retaliation provisions . . . to expand its applicability to intra-company complaints.”⁴⁸ It held in 2003 that a firefighter who complained to management could not prove a prima facie case of retaliation because the anti-retaliation provisions did not extend to internal complaints.⁴⁹

B. *The Debate Over Informal Complaints*

If internal complaints are protected, the next issue the courts had to address is how formal an employee’s complaint must be to warrant protection. Before *Kasten*, no appellate court that had recognized internal complaints covered under the anti-retaliation provision had held that oral

⁴⁴ *Genesee Hospital*, 10 F.3d at 55. In response to this, the Ninth Circuit refused to use Title VII’s anti-retaliation provision as a basis for interpreting the anti-retaliation provision of the FLSA. The Ninth Circuit pointed to the differences in statutory drafting in 1938, when the FLSA was drafted, and in 1964, when Title VII was drafted. “In short, we find the view. . . that Congress’ choice of words in 1964 can resolve the meaning of words chosen in 1937. . . to be unpersuasive.” *Ackerley*, 180 F.3d at 1005.

⁴⁵ 42 U.S.C. §2000e-3(a) (2006).

⁴⁶ *Genesee*, 10 F.3d at 55 (citing *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 990 (6th Cir. 1992)(Suhrehrinrich, J. concurring in part and dissenting in part)).

⁴⁷ *Id.*

⁴⁸ *Ball*, 228 F.3d at 364.

⁴⁹ *Whitten*, 62 Fed.Appx. at 480.

complaints are not protected.⁵⁰ Even courts that agree that informal, internal complaints should be protected have used myriad arguments to arrive at the same conclusion. Parts II.B.1 and II.B.2 will address the dominant themes in the circuit courts' reasonings.

1. Thematic Analysis Against the Protection of Oral Complaints

The circuits refusing to protect informal complaints are the same as those requiring external complaints, with the addition of the Seventh Circuit, as per its holding in *Kasten*. The Second and Fourth Circuits have demonstrated the same strict construction in their interpretation of both issues, which is logical and consistent. They have refused to impute any additional meaning on the provision beyond what is explicitly stated in the statute. The Seventh Circuit has taken a different approach, and is the only one to have done so. The Seventh Circuit was willing to “read into” the provision the protection of internal complaints, but not the protection of oral complaints. This section will categorize and analyze the rationales typically employed by the courts finding that oral or informal complaints should not be protected.

a. What Would Webster Do? The Dictionary as Binding Authority⁵¹

The courts have often turned to the dictionary in this debate. Congress did not include definitions for the terms “file” and “complaint” in the anti-retaliation provision, so many courts, have used dictionary to define the terms. In *Kasten*, for example, the district court and the Court of Appeals focused heavily on the definition of “file.”⁵² The district court reasoned that the verb “to file” requires a writing, because “[o]ne cannot ‘file’ an oral complaint; there is no document, such as a paper or record, to deliver to someone who can put it in its proper place.”⁵³ Based on

⁵⁰ Brief for the Secretary of Labor at 14 as Amicus Curiae Supporting Plaintiff-Appellant, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (2008)(No. 08-2820).

⁵¹ *Kasten* argued in his appellate brief that “*Webster’s Dictionary* is not controlling authority in the Seventh Circuit.” Brief of Plaintiff-Appellant at 2, *Kasten v. Saint-Gobain Performance Plastics*, No. 08-2920. He argued that the court overlooked many of the other possible definitions of “file” and blindly chose one. *Id.* at 12.

⁵² *Kasten v. Saint-Gobain*, 619 F.Supp. 608, 613 (W.D. Wisc. 2008); *Kasten*, 570 F.3d at 839.

⁵³ *Kasten*, 619 F.Supp. at 613.

this finding, the district court concluded that an employee’s complaint must be documented in some form.⁵⁴

On appeal to the Seventh Circuit Court of Appeals, the plaintiff, and the Secretary of Labor as amicus, argued that “to file” can mean “to submit.” The Court rejected that definition and found no ambiguity at all in the term.⁵⁵ Instead, the court relied on the first entry in Webster’s dictionary, and found that it connotes a writing.⁵⁶ It found that the “natural understanding of the phrase ‘file any complaint’ requires the submission of some writing to an employer, court, or administrative body.”⁵⁷

b. Comparing to Title VII

Both the Seventh and Second Circuits have used the anti-retaliation provision of Title VII as a way of proving the limited nature of § 215(a)(3).⁵⁸ The anti-retaliation provision of Title VII is broader, forbidding employers from retaliating against any employee that “has opposed any practice” that is unlawful under the statute.⁵⁹ The Seventh Circuit used Title VII to demonstrate that “Congress could have, but did not, use broader language in the FLSA’s retaliation provision.”⁶⁰ It found unquestionably that the anti-retaliation provision of Title VII protects oral complaints, and therefore that Congress’s selection of the term “file any complaint” is a significant one.⁶¹

The other argument based on Title VII’s anti-retaliation provision is that § 215(a)(3) enumerates three types of conduct, while Title VII does not. Judge Suhrheinrich made that

⁵⁴ *Id.*

⁵⁵ *Kasten*, 570 F.3d at 839.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ For the counterveiling argument regarding dictionary definitions, see *infra* Part II.B.2.a.

⁵⁹ 42 U.S.C. § 2000e-3(a) (2006).

⁶⁰ *Id.*

⁶¹ *Kasten*, 570 F.3d at 840.

argument in his oft-cited dissent in *EEOC v. Romeo Community Schools*.⁶² In that case the employee had protested to Romeo Community Schools that by paying male and female custodians differently they were “breaking some kind of law.”⁶³ Judge Suhrheinrich distinguished between the two anti-retaliation provisions and found that if this were a Title VII action, he would agree with the majority that Romeo had unlawfully retaliated.⁶⁴ He refused to read the broad “opposition clause” of Title VII into the FLSA.

c. Plain Language Analysis

Occasionally courts, without reference to the meaning of the words in § 215(a)(3) or Title VII, hold simply that the plain language of the statute bars protection of oral complaints. The Second Circuit used this plain language argument to find that external complaints are required and informal complaints not protected. The Second Circuit represents the narrowest construction of the statute. In *Lambert v. Genesee Hospital*, the court refused to impute any meaning onto the provision beyond what is facially protected, regardless of the redundancy created as a result.⁶⁵ It found that “[t]he plain language [of § 215(a)(3)] 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.”⁶⁶

Another example of this type of reasoning is Judge Suhrheinrich’s dissenting opinion in *EEOC v. Romeo Community Schools*.⁶⁷ In addition to comparing to Title VII, he argued that the anti-retaliation provision has three specifically enumerated behaviors, and that “list comprises

⁶² *EEOC v. Romeo Community Sch.*, 976 F.2d 985 (6th Cir. 1992) For more on this dissenting opinion, see *infra* Part II.B.1.c.

⁶³ *Romeo Community Schools*, 976 F.2d at 989.

⁶⁴ 976 F.2d 985, 990 (6th Cir. 1992) (Suhrheinrich, J., concurring in part and dissenting in part).

⁶⁵ See *infra* Part III.E.2 for a discussion of the consequence of redundancy in statutory interpretation.

⁶⁶ *Genesee*, 10 F.3d at 55.

⁶⁷ 976 F.2d 985, 990 (6th Cir. 1992) (Suhrheinrich, J., concurring in part and dissenting in part).

the entire scope of complaints sufficient to fall under the statute.”⁶⁸ The plain language of the anti-retaliation provision “does not prohibit employers from taking adverse employment action, that is, retaliating, against employees generally.”⁶⁹

2. Thematic Arguments Protecting Oral Complaints

The circuits that have protected oral complaints, or those that have indicated that they will, often use a test relying on the substance of the complaint rather than the form. Often, the decisions do not focus at all on the form of the complaint, instead analyzing the substance entirely.⁷⁰ This position “protects complaints made to an employer, but restricts the type of complaints protected to those where the employee has made some assertion of statutory rights.”⁷¹ Here there is yet another split—those circuits who find ambiguity in the provision and engage in detailed statutory analysis, and those who find simply that a statutory assertion of rights triggers protection.

a. The Dictionary as a Source of Ambiguity

In contrast to the circuits that find the language of § 215(a)(3) unambiguous, the courts in this category find ambiguity in the provision, and find that consulting a dictionary only compounds that ambiguity. These courts “argue that the phrase is ambiguous because it is susceptible to many different interpretations.”⁷² Noting that the statute does not have definitions for the pertinent terms “file” and “complaint,” the courts turn to the dictionary to demonstrate the many definitions available. Instead of using the dictionary to settle the matter as the courts

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *Kasten*, 570 F.3d at 839–840.

⁷¹ Jennifer Clemons, *supra* note 21, at 536.

⁷² Jennifer Lynne Redmond, *Are You Breaking Some Kind of Law?: Protecting an Employee’s Internal Complaints under the Fair Labor Standards Act’s Anti-Retaliation Provision*, 42 WM. & MARY L. REV. 319, 332 (2000-2001).

described in Part II.B.1.a did, these courts use the dictionary as a way to show that varied definitions exist.

The First Circuit, for example, found the word “complaint” especially vague. Turning to the dictionary, the court found that complaint has dual meanings. While a complaint can be an expression of protest, it can also be a formal allegation or charge.⁷³ Based on these alternate meanings, the court noted that “[b]y failing to specify that the filing of any complaint need be with a court or an agency, and by using the word any, Congress left open the possibility that it intended complaint to relate to less formal expressions . . . conveyed to an employer.”⁷⁴ The First Circuit then turned to the possible meanings of “file.” The court found the definition of file “sufficiently elastic to encompass” informal complaints.⁷⁵

b. The Remedial Purpose of the Fair Labor Standards Act

Courts have sometimes eschewed a detailed analysis in favor of a broader policy argument. The Fifth Circuit protected an informal complaint, but did not engage in detailed statutory analysis. Instead, in *Hagan v. Echostar*, the court announced that informal complaints should be protected under § 215(a)(3) because “it better captures the anti-retaliation goals of that section.”⁷⁶ However, the court articulated limitations on the informal complaints to be protected. The court required the complaint to concern a violation of law.⁷⁷ If the employee is a manager voicing the concerns of his or her subordinates, the manager must step outside the role of manager and “make clear to the employer that the employee was taking a position adverse to the employer.”⁷⁸ Though it recognized that the purpose of the anti-retaliation provision necessitates

⁷³ *Valerio*, 173 F.3d at 41 (citing WEBSTER’S THIRD NEW INT’L DICTIONARY 464 (1971)). Note that Justice Scalia has objected to use of Webster’s Third, finding it too colloquial. See *MCI v. AT&T*, 512 U.S. 218, 227–28 (1994).

⁷⁴ *Id.*

⁷⁵ *Id.* at 42.

⁷⁶ *Hagan v. Echostar Satellite, LLC*, 529 F.3d 617, 626 (5th Cir. 2008).

⁷⁷ *Id.* at 626.

⁷⁸ *Id.* at 628.

a broad reading, the Fifth Circuit found that the employee in *Hagan* did not do enough to make clear to her employer she was taking a position adverse to the employer.⁷⁹

In *EEOC v. White & Son*, the Eleventh Circuit also used the purpose of the FLSA as the basis for its reasoning. A group of female employees asked their employer why they did not receive raises when their male coworkers did. Their boss told them to “take it or leave it,” so the women left the premises. The court found that this was a discharge in retaliation for the women’s opposition to the unfair practice. It found that a broad construction of the provision would best further the purpose of preventing fear of economic retaliation against employees who voiced grievances.⁸⁰ Guided by that principle, the court found the discharge of the women to be retaliatory in nature and protected under § 215(a)(3).

The Eighth Circuit in *Brennan v. Maxey’s Yamaha* also protected an employee’s assertion of rights.⁸¹ The employee in that case protested what she believed to be the unlawful conduct of her employer. The court found that her belief that the conduct was unlawful was reasonable, and that “her lawful assertion of rights based on that belief must be protected.”⁸² This finding was based on the purpose of the Act, and the court did not engage in a parsing of the statute. Instead, it simply found that not protecting the activity in this case would violate the

⁷⁹ This particular aspect of *Hagan* is beyond the scope of this paper. The employee in *Hagan* was a manager, which presents additional issues, as managers are often responsible for passing along the complaints and concerns of their subordinates to other supervisors. Therefore, for a manager to be protected under § 215(a)(3), he or she must “somehow step out of his normal job role.” *Hagan*, 529 F.3d at 627. “In order to engage in protected activity under § 215(a)(3), the employee must step outside his or her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA.” *Id.*

⁸⁰ *EEOC v. White & Son Enter.*, 881 F.2d 1006, 1011 (11th Cir. 1989).

⁸¹ *Maxey’s Yamaha*, 513 F.2d at 181.

⁸² *Id.* at 181.

purpose of the statute “of preventing employees’ attempts to secure their rights under the Act from taking on the character of ‘a calculated risk.’”⁸³

c. Comparing to Title VII

The Ninth Circuit engaged in detailed comparative analysis, rejecting the defendants’ argument that a comparison to Title VII urges the conclusion that Congress did not intend to include informal internal complaints in the FLSA’s provision.⁸⁴ The court found that the breadth of Title VII’s anti-retaliation provision could not dictate the appropriate construction of the FLSA’s provision.⁸⁵ The FLSA was enacted in 1938, and Title VII was enacted in 1964. The court noted that in 1938 “statutes were far shorter and less detailed, and were written in more general and simpler terms.”⁸⁶ It was completely unpersuaded by the argument that “Congress’ choice of words in 1964 can resolve the meaning of words chosen in 1937.”⁸⁷

d. Avoiding Statutory Redundancy

While definitions of “file” and “complaint” are often the bellwethers of a court’s holding on this issue, some courts find significance (and additional ambiguity) in the final part of the provision. Section 215(a)(3) protects employees who file complaints “under or related to this chapter.”⁸⁸ The Ninth Circuit rejected the argument that the anti-retaliation provision only applies to formal complaints filed with an employer because such a construction “would render the ‘or related to’ language superfluous.”⁸⁹ Therefore, complaints “under” the FLSA are those

⁸³ *Id.* (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 293 (1960)).

⁸⁴ *Ackerley*, 180 F.3d at 1005. However, the court does go on to use cases interpreting the anti-retaliation provisions of other legislation to make its point, including the Federal Mine Health and Safety Act, the Federal Railroad Safety Act, and the Clean Water Act. *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 29 U.S.C. § 215(a)(3) (2006).

⁸⁹ *Ackerley*, 180 F.3d at 1004.

filed in court and with the Department of Labor, and those that are “related to” the Act are those complaints filed with an employer and relating to the subject matter of the FLSA.⁹⁰

The First Circuit dismissed another argument with the reasoning that such a construction would create a redundancy. While this paper focuses on the first type of protected activity, the filing of a complaint, the second type of protected activity is “institu[ing] or caus[ing] to be instituted any proceeding under or related to this chapter.”⁹¹ If the phrase “filed any complaint” was read to require a formal filing, the additional clause protecting the initiation of a proceeding becomes superfluous.⁹² The First Circuit, invoking a traditional canon of construction, found that for each term to have a particular, nonsuperfluous meaning, the phrase “file a complaint” must be read to protect informal complaints.⁹³

e. Assertion of Rights as the Basic Test

The Tenth Circuit, unlike many other circuits, engaged in no statutory analysis whatsoever. In *Love v. RE/MAX*, the court found simply that the FLSA applies to the unofficial assertion of rights through complaints at work.⁹⁴ In that case a female employee wrote a memorandum to the president of her company requesting a raise after learning that male employees in similar positions were given raises.⁹⁵ Attached to her memo was a copy of the Equal Pay Act.⁹⁶ Love was promptly fired. Using, in part, the purpose of the FLSA for guidance, the court found her discharge retaliatory both under Title VII and the FLSA because

⁹⁰ *Id.* at 1005. The First Circuit also found that a reading of “file” that requires formal external filings would make “under or related to” redundant.

⁹¹ 29 U.S.C. § 215 (a)(3) (2006).

⁹² *Valerio v. Putnam Associates, Inc.*, 173 F.3d 35, 42 (1st Cir. 1999).

⁹³ *Id.* at 42.

⁹⁴ *Love v. RE/MAX*, 738 F.2d 383, 387 (10th Cir. 1984).

⁹⁵ *Id.* at 384.

⁹⁶ *Id.*

the immediate cause of the employee's discharge was her unofficial assertion of rights to her employer.⁹⁷

The Sixth Circuit reached a similar holding in *EEOC v. Romeo Community Schools*. Citing *Love v. RE/MAX*, the court held that an assertion of statutory rights triggers protection under the provision, not just the filing of a formal complaint. In that case, the employee, a school custodian, complained to the school district about her unequal pay and expressed her belief that they were “breaking some sort of law” by paying her lower wages than previously paid to male temporary custodians.⁹⁸ Following her protests, she suffered adverse employment actions. The court found that the plaintiff had effectively set forth a claim of retaliation because it is the assertion of rights that triggers the protection of § 215(a)(3), not the filing of a formal complaint.⁹⁹

Likewise, the Eighth Circuit in *Brennan v. Maxey's Yamaha* began its analysis of the facts with the conclusion that “[t]he Act prohibits discrimination against an employee who asserts or threatens to assert his or her FLSA rights.”¹⁰⁰ In *Maxey's* an employee was fired for refusing to participate in what she believed to be an unlawful scheme following a Department of Labor investigation. The court found that the employee's “lawful assertion of rights based on that belief must be protected.”¹⁰¹ The employee's termination was retaliatory in nature since she had asserted her rights on a good faith belief that her employer's conduct was unlawful. Therefore, she should have been protected by § 215(a)(3).

⁹⁷ “In this section, 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.’” *Id.* at 387 (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

⁹⁸ *Romeo Community Schools*, 976 F.3d at 989.

⁹⁹ *Id.* at 989–990.

¹⁰⁰ *Maxey's Yamaha*, 513 F.2d at 180.

¹⁰¹ *Id.* at 181.

III. THE CASE FOR A BROAD CONSTRUCTION

Part III will analyze the various methods of construction discussed in Part II. Part III.A begins with a brief explanation of how remedial statutes are generally approached. Beginning with Part III.B, the remaining sections are structured in the order that courts typically turn to these methods of interpretation.

A. Remedial Statutes

The FLSA is remedial in nature, and as a result, should be liberally construed. It is a general policy that remedial statutes are interpreted broadly to best achieve the purpose the statute was enacted for.¹⁰² A liberal construction can make a statute applicable in more situations than a strict construction might allow for.¹⁰³ “A court may interpret a remedial statute to apply in circumstances not specifically considered by the legislature so long as those circumstances are within the ambit of the legislative purposes.”¹⁰⁴

Sometimes public values are employed as a justification for not using a strict statutory construction. Public policy considerations, to the chagrin of some, exert a significant influence in the process of judicial statutory interpretation.¹⁰⁵ When a public interest is affected, courts are likely to interpret a statute in a way that favors the public.¹⁰⁶ Courts sometimes reject narrow constructions that “undermine the public policy sought to be served,”¹⁰⁷ especially “where a narrow construction discourages rather than encourages the specific action the legislature has sought to foster and promulgate.”¹⁰⁸

¹⁰² 2A Sutherland, *Statutes and Statutory Construction* §60:1 (7th ed. 2009, Norman Singer & J.D. Shambie Singer, eds.).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at §60:2.

¹⁰⁵ *Id.* at §56:1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Sutherland, *supra* note 101, at §56:1.

B. *Plain Meaning*

When interpreting a statute, the first place to start is—of course—the statute itself. Plain meaning is the default rule in statutory interpretation, and in most cases, the plain meaning of a statute will answer the question.¹⁰⁹

Proponents of a literal construction of § 215(a)(3) first argue that the plain meaning of the words “file any complaint” requires writing.¹¹⁰ The conclusion to this argument is based on the principle of *expressio unius est exclusio alterius*—by articulating three types of protected activity, the inclusion of a fourth unwritten activity is expressly prohibited by traditional canons of construction. However, numerous circuit courts have made persuasive arguments that the plain meaning of the phrase “file any complaint” does not, in fact, require writing.

American courts commonly use dictionaries to ascertain the “plain meaning” of statutory terms.¹¹¹ Of course, there are multiple reputable dictionaries, and often there are multiple definitions for a word. Additionally, the accepted definitions for words may change over time.¹¹² The terms “file” and “complaint” have multiple possible meanings.¹¹³ Dictionary definitions appear with regularity in the opinions and briefs of cases interpreting § 215(a)(3).

First, the verb, “to file.” The First Circuit noted that “file” encompasses two types of actions. The first is “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

¹⁰⁹ WILLIAM N. ESKRIDGE ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 223 (2000).

¹¹⁰ The expression “plain meaning” refers to “meanings of a statutory text that are apparent from the text alone . . . without reference to external sources or interpretative aids.” CHRISTIAN M. MAMMEN, *USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION* 12 (2002).

¹¹¹ See CHRISTIAN E. MAMMEN, *supra* note 109, at 15.

¹¹² The Supreme Court has held indicated a preference for the dictionary definition of a term at the time of enactment of the statute. See, e.g. *Perrin v. United States*, 444 U.S. 37, 42–45 (1979) (“A fundamental canon of construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Therefore, we look to the ordinary meaning of the term ‘bribery’ at the time Congress enacted the statute in 1961.”).

¹¹³ Brief for the Secretary of Labor at 17 as Amicus Curiae Supporting Plaintiff-Appellant, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (2008)(No. 08-2820).

the records of his office.’”¹¹⁴ The court did not entertain any idea that this definition of file supports a broad reading of the provision. The second definition, however, the court found to be “sufficiently elastic to encompass” a broad construction. This definition is “to place (as a paper or instrument) on file among the legal or official records of an office esp[ecially] by formally receiving, endorsing, and entering.”¹¹⁵

The Ninth Circuit based its reasoning on contextual use of the term “file,” stating that “[g]iven the widespread use of the term ‘file’ to include the filing of complaints with employers, it is therefore reasonable to assume that Congress intended that the term be as used in § 215 (a)(3) to include the filing of such complaints.”¹¹⁶

Next, the noun, “complaint.” The First Circuit again cited two definitions. It found that “complaint” could be defined as “either ‘the act or action of expression protest, censure or resentment: expression of injustice’ . . . or as a formal allegation or charge against a party made or presented to the appropriate court or officer.”¹¹⁷ Therefore, complaint has meaning both as a term of art in the legal system, and a general meaning. The First Circuit also that Congress’s failure to specify that the complaint had to be made to a court or agency, “Congress left open the possibility that it intended ‘complaint’ to relate to less formal expressions of protest . . . conveyed to an employer.”¹¹⁸

Despite the concise nature of the plain meaning analysis, it does not resolve the question. Using a plain meaning analysis, circuit courts have arrived at two very different conclusions. The Second and the Fourth circuits found that the plain meaning of the statute precludes the

¹¹⁴ *Valerio*, 173 F.3d at 41.

¹¹⁵ *Id.*

¹¹⁶ *Ackerley*, 180 F.3d at 1004.

¹¹⁷ *Valerio*, 173 F.3d at 41.

¹¹⁸ *Id.*

protection of complaints made internally, to one’s employer.¹¹⁹ Yet other circuits, interpreting the same text, concluded that internal complaints are protected activity under the provision.¹²⁰

The above demonstrates the inadequacy of the textualist approach to statutory interpretation in this instance—“[w]hat the words of a statute say and what they mean are often entirely different.”¹²¹ The central problem with textualism is that statutory language can be ambiguous or vague.¹²² The varied meanings of the two words provide many possible interpretations. The issue is that “the meaning of words (whether ‘plain’ or not) depends on both culture and context. Statutory terms are not self-defining, and words have no meaning before or without interpretation.”¹²³

An analysis focused solely on the meaning of the words “file any complaint” creates more questions than it answers. When the plain meaning of a statute does not answer the question, courts turn to other sources for help. Additionally, it is not unheard of for a court to come to a conclusion at odds with the plain meaning of a statute.¹²⁴

C. Agency Interpretations

Since 1984, when the Supreme Court decided the seminal case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹²⁵ the role of agencies has increased. If the text of a statute is ambiguous, courts look to relevant agency interpretations.¹²⁶ If the agency

¹¹⁹ *Lambert v. Genesee Hospital*, 10 F.3d 46, 55 (1993) (“The plain language of this provision limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor.”); *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 364 (2000) (“[T]he statutory language clearly place limits on the range of retaliation proscribed by the Act. [The FLSA] prohibits retaliation for testimony given or about to be given but not for an employee’s voicing of a position on working conditions in opposition to any employer.”).

¹²⁰ See *supra* footnote 34.

¹²¹ Sutherland, *supra* note 101, at §56a:1.

¹²² Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARVARD LAW REVIEW 418 (1989).

¹²³ *Id.* at 416.

¹²⁴ See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

¹²⁵ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹²⁶ *Id.* at 842–43.

interpretations are permissible constructions of the statutory language, then those interpretations are given controlling effect.¹²⁷

Recently, the Supreme Court reaffirmed an older standard as the “deference standard for most administrative interpretations” when statutes are ambiguous.¹²⁸ *Skidmore v. Swift & Co.*¹²⁹ was a FLSA dispute over the “on call” time of fire-fighting employees at a plant, and the issue was whether their “on call” time was compensable. A Department of Labor Administrator issued informal rulings, in the form of an opinion letter, advocating a case-by-case approach to such cases. The lower courts did not defer to the Administrator’s interpretation, and instead found that the on call time was not compensable, working time.¹³⁰

When the Supreme Court heard the case, it remanded it to the lower court, and issued a standard by which such cases should be decided. The Court said that an agency’s interpretations would be given deference according to the persuasiveness of the interpretation. That determination will be based on four factors—“the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹³¹ *Skidmore* deference applies to less formal modes of adjudication and rulemaking, while *Chevron* deference is still applied to formal agency adjudication and notice-and-comment rulemaking.¹³²

The Secretary of Labor, as amicus in *Kasten*, argued that the Department of Labor’s construction of § 215(a)(3) was entitled to *Skidmore* deference because it was a reasonable

¹²⁷ *Id.*

¹²⁸ Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1245 (2007). *See also* United States v. Mead Corp., 533 U.S. 218, 230–33 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

¹²⁹ 323 U.S. 134 (1944).

¹³⁰ Kristen E. Hickman & Matthew D. Krueger, *supra* note 127, at 1240.

¹³¹ *Skidmore*, 323 U.S. at 140.

¹³² *Christensen*, 529 U.S. at 587.

interpretation.¹³³ The Seventh Circuit rejected this argument, because it found that the Secretary’s interpretation of the provision was a litigating position, not a “Department of Labor regulation, ruling, or administrative practice.”¹³⁴ The court relied on a 1996 Supreme Court decision, *Smiley v. Citibank*.¹³⁵ It is true that *Chevron* does not require deference to agency litigating positions.¹³⁶ This is partly “because the agency is not exercising delegating authority when it takes litigating positions and in part because of the fairness concerns that the agency as advocate will not develop interpretations solely through the use of neutral expertise.”¹³⁷

The Secretary of Labor is authorized to administer the FLSA.¹³⁸ Through the Wage and Hour Division of the Department of Labor, the Secretary investigates employment practices to determine FLSA violations.¹³⁹ “[T]he Secretary of Labor has consistently interpreted the phrase ‘file any complaint’ to include protection for employees who orally complain to their employers.”¹⁴⁰ The Secretary argued that this is demonstrated by the enforcement actions the Department of Labor takes on behalf of employees.¹⁴¹ This interpretation is more than a litigating position—it is a repeated administrative practice.

While the Secretary’s position is not controlling, it should certainly be considered by courts for guidance when construing the anti-retaliation provision. In *Skidmore*, the lower courts did not take into account an interpretation of several FLSA provisions from the Administrator of

¹³³ Brief for the Secretary of Labor at 13 as Amicus Curiae Supporting Plaintiff-Appellant, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (2008)(No. 08-2820) (“The Secretary’s consistent, reasonable interpretation of section 15(a)(3) is entitled to deference under *Skidmore v. Swift & Co.* . . . because it reflects the agency’s fair and considered judgment.”).

¹³⁴ *Kasten*, 570 F.3d at 839, footnote 2.

¹³⁵ 517 U.S. 735, 741 (1996). That case relied on *Chevron* deference, and does not reflect the revived *Skidmore* standard for less formal agency interpretations. The Secretary of Labor in *Kasten* urged that the court use *Skidmore* deference, reflecting a shift in deferential standards since *Mead* and *Christensen*.

¹³⁶ Eskridge, *supra* note 108, at 321–22.

¹³⁷ *Id.* at 322.

¹³⁸ 29 U.S.C. § 204(a) (2006).

¹³⁹ 29 U.S.C. § 211(a) (2006).

¹⁴⁰ Brief for the Secretary of Labor at 15 as Amicus Curiae Supporting Plaintiff-Appellant, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (2008)(No. 08-2820).

¹⁴¹ *Id.* at 15.

the Wage and Hour Division of the Department of Labor.¹⁴² The Supreme Court ruled that its interpretations were entitled to “respect” and it was reversible error not to take them into account.¹⁴³ Agency rulings, interpretations, and opinions “constitute a body of experience and informed judgments to which courts and litigants may properly resort for guidance.”¹⁴⁴ The Secretary’s interpretation of the anti-retaliation provision, as demonstrated in its amicus briefs is consistent and thorough. The court in *Kasten* did not evaluate the Secretary’s interpretation for indications of validity or persuasiveness.

D. *Legislative History*

When there is ambiguity in a statute, legislative history is often used to guide interpretation and shed light on possible meanings or purposes. While the purpose of the FLSA generally is well known, there is a lacuna of legislative history concerning Congress’s intent for the scope of § 215(a)(3). “The provision was not the subject of congressional debate or explained in the relevant reports.”¹⁴⁵ There was one general statement made that the provision makes it unlawful “to do certain acts which violate provisions of the Act or obstruct its administration.”¹⁴⁶ Legislative history is a tool that is essentially unavailable to those interpreting the anti-retaliation provision.

E. *Canons of Construction*

The canons of construction or interpretation are a “hazily defined bunch of rules, maxims, or homilies that courts can invoke to resolve interpretative problems.”¹⁴⁷ Although the

¹⁴² *Skidmore v. Swift & Co.*, 323 U.S. 134, 136, 140 (1944).

¹⁴³ *Id.* at 140.

¹⁴⁴ *Id.*

¹⁴⁵ Informal Brief for the Secretary of Labor at footnote 2 as Amicus Curiae Supporting Plaintiff-Appellant, *Jafari v. Old Dominion Transit Mgmt. Co.*, 2008 WL 5102010 (2009) (No. 09-1004).

¹⁴⁶ H.R. Conf. Rep. No. 75-2738, 33 (1938).

¹⁴⁷ CHRISTIAN E. MAMMEN, *supra* note 109, at 25.

traditional canons of construction may be prone to manipulation,¹⁴⁸ they are still often used and cited to. Part III will analyze the thematic arguments discussed in Part II and compare them to the accepted or common canons of construction. “[S]tatutory construction is an exercise of practical reason, in which text, history, and purpose interact with background understandings in the legal culture.”¹⁴⁹

1. Comparison to Other Statutes

As detailed above, many courts compare the language of the retaliatory provision of Title VII to the equivalent provision in the FLSA.¹⁵⁰ Similar statutes are often an extrinsic source used in statutory interpretation. In this approach to statutory interpretation, the courts “compare[] the wording of comparable statutory provisions elsewhere . . . The conclusions to be drawn from such comparisons are either that the provision at issue means the same thing as the other provision, or that the provision at issue cannot mean the same thing as the other provision.”¹⁵¹

One similar approach to statutory interpretation is called the doctrine of *in pari materia*. Statutes are “*in pari materia* when they relate to the same person or thing, to the same class of persons or things, or which have the same purpose or object.”¹⁵² Similar statutes should be interpreted similarly. The two anti-retaliation provisions, while they may serve similar purposes of discouraging retaliation, are arguably not *in pari materia*.¹⁵³ The purpose of Title VII

¹⁴⁸ See, e.g. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950).

¹⁴⁹ Cass R. Sunstein, *supra* note 121, at 498.

¹⁵⁰ See *supra* Part II.B.1.b and Part II.B.2.c (discussing courts that mention Title VII in their analyses of the § 215(a)(3)).

¹⁵¹ CHRISTIAN E. MAMMEN, *supra* note 109, at 14.

¹⁵² Sutherland, *supra* note 101, at §51:3.

¹⁵³ For an example of a court finding two statutes to be *in pari materia*, see *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). The Court used Title VII to guide an interpretation of the Age Discrimination in Employment Act, finding that “[s]ince the ADEA and Title VII share a common purpose . . . we may properly conclude that Congress intended that the construction of § 14(b) [of the ADEA] should follow that of § 706(c) [of Title VII].” *Id.*

generally is to eliminate discrimination in the workplace, and the purpose of the FLSA is to regulate working hours and wages.

Even when statutes are not found to be in *pari materia*, “construing statutes by reference to others advances [the] values of harmony and consistency.”¹⁵⁴ An ambiguous statute may be construed using the language of other statutes “which are not particularly related, but which apply to similar persons, things, or relationships.”¹⁵⁵ Of course, there are limitations to this tool of statutory interpretation. “The interpretation of one statute by reference to an analogous but unrelated statute is considered an unreliable means to discern legislative intent.”¹⁵⁶

The Second Circuit, in its resolute holding that informal complaints are not protected, used Title VII for comparison.¹⁵⁷ The court found meaning in the fact that the FLSA provision has expressly enumerated types of conduct, in contrast to the broader language of the Title VII provision. The Seventh Circuit confirmed the conclusion it reached that oral complaints are not protected activity by noting that “Congress could have, but did not, use broader language in the FLSA’s retaliation provision.”¹⁵⁸ It cited Title VII’s retaliation provision as evidence of a case when Congress did chose broader language, and decided that there must be significance in the fact that Congress chose more narrow language for the FLSA.

Though the statutes are not in *para materia*, some courts continue to rely on comparison to Title VII as a definitive construction of the statute. This is a misguided use of this method of statutory interpretation. While an analogy to Title VII could certainly guide the analysis, it

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at §53:3.

¹⁵⁶ *Id.* at §53:5. Though interpretation by analogy is an unreliable tool for interpretation, it is worth noting that there are many statutes that can be used as analogies for the protection of internal and informal complaints. *See, e.g.,* Passaic Valley Sewerage Comm’rs v. Dept. of Labor, 992 F.2d 474, 478 (3d Cir. 1993) (protecting employees who complain to their employer even though the statute did not expressly cover internal complaints).

¹⁵⁷ Lambert v. Genesee Hospital, 10 F.3d 46, 55 (2d Cir. 1993). *See supra* Part II.B.1.b for a discussion of Judge Suhrheinrich’s dissenting opinion in *EEOC v. Romeo Community Sch.*

¹⁵⁸ Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 840 (7th Cir. 2009) Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. 2009), *cert granted* (U.S. March 22, 2010) (No. 08-2820).

should not be the dispositive factor in the interpretation of § 215(a)(3). The Ninth Circuit, as addressed above,¹⁵⁹ rejected the argument that the anti-retaliation provision of Title VII should be used as a tool for interpreting the FLSA.¹⁶⁰ Given the decades that passed between the enacting of each statute, the comparison is a weak one, and does not enlighten the analysis the way the proponents of this argument suggest it does.

2. Avoiding Statutory Redundancy

It is a traditional canon of construction that every term in a statute must be given effect, so that nothing in the statute is surplusage.¹⁶¹ Part II.B.2.d discussed those courts that construed “filed any complaint” liberally because to read it otherwise would render parts of the provision redundant. It is a common canon of interpretation that “one part of a statute may not be construed so as to render another part nugatory or of no effect.”¹⁶²

The First Circuit reasoned, “courts may ‘assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.’”¹⁶³ In the case of the FLSA’s anti-retaliation provision, this means that “filed any complaint” cannot mean a formal filing with a court or government agency. If it did, then the additional language “instituted or caused to be instituted any proceeding under or related to this chapter” would be meaningless and unnecessary. If there is an alternative way of construing a provision that does not render another part of it meaningless, that is the interpretation that should be applied.

¹⁵⁹ See supra Part II.B.2.c.

¹⁶⁰ Lambert v. Ackerley, 180 F.3d 997, 1005 (9th Cir. 1999).

¹⁶¹ See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 404 (1950) (“Every word and clause must be given effect.” (citing Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* § 60 (2d ed. 1911) and John Lewis, J. G. Sutherland’s *Statutes and Statutory Construction* § 380 (2d ed. 1904)).

¹⁶² 73 AM. JUR. 2d *Statutes* § 164 (2009).

¹⁶³ Valerio v. Putnam Associates, 173 F.3d 35, 42 (1st Cir. 1999) (quoting Bailey v. United States, 516 U.S. 137, 146 (1995)).

3. Legislative Intent

Courts may also use the intent of a statute as a tool for construing it.¹⁶⁴ “A plain meaning can be overcome by compelling evidence of a contrary legislative intent.”¹⁶⁵ Courts may interpret a statute in a way that extends or restricts the language of the statute “by noting that ‘the spirit of a statute governs the letter.’”¹⁶⁶ “Where the purposes of a statute can be achieved only by extending the operation of its language to its most inclusive meaning, even beyond its common meaning, courts will do so.”¹⁶⁷ An extended interpretation may be used when a “statute is ambiguous or capable of a range of literal meanings”¹⁶⁸ or when “another interpretation would make for absurdity or injustice.”¹⁶⁹ The Supreme Court has used this approach.¹⁷⁰ This theory “renders statutory interpretation adaptable to new circumstances.”¹⁷¹

So what is the spirit of this statute that should be kept in mind when construing it? The Supreme Court has interpreted the purpose of the FLSA as to achieve certain minimum labor standards for covered employees.¹⁷² To achieve compliance, Congress “sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.”¹⁷³ The Supreme Court has “made clear that the key to interpreting the anti-retaliation provision is the need to prevent employees’ ‘fear of economic retaliation’ for voicing grievances about substandard conditions.”¹⁷⁴ The retaliation provisions are “remedial and humanitarian in

¹⁶⁴ Sutherland, *supra* note 101, at § 54:3.

¹⁶⁵ Eskridge, *supra* note 108, at 224 (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982)).

¹⁶⁶ Sutherland, *supra* note 101, at § 54:3 (citing *Taylor v. U.S.*, 260 U.S. 178, 194 (1907)).

¹⁶⁷ *Id.* at §54:4.

¹⁶⁸ *Id.* at §54:5.

¹⁶⁹ *Id.*

¹⁷⁰ *See, e.g., United Steelworkers v. Weber* 443 U.S. 193 (1979) (relying on Congress’s general intent or purpose in enacting Title VII to allow affirmative action).

¹⁷¹ Eskridge, *supra* note 108, at 221.

¹⁷² *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

¹⁷³ *Id.*

¹⁷⁴ *Brock v. Richardson*, 812 F.2d 121, 124 (3rd Cir. 1987).

purpose.”¹⁷⁵ Following the spirit of the statute, an extended interpretation of the literal terms should be applied. “[A]s the FLSA was designed to encourage employees to report their employer’s violations, the amount of protection afforded will directly affect the ultimate success of this design.”¹⁷⁶

Extended interpretations that are guided by the spirit of the statute are appropriate when the “statute is ambiguous or capable of a range of literal meanings.”¹⁷⁷ The terms of the anti-retaliation provision are ambiguous, and the phrase “file any complaint” is subject to several varied interpretations. Much of this paper has focused on the various sources of ambiguity and confusion of § 215(a)(3). Courts time and time again have written on the varied meanings that can be imputed from the phrase “file any complaint.” An extended interpretation is suitable to achieve the purpose of § 215(a)(3)—to foster an environment in which employees are able to voice grievances about working conditions without fear. To successfully create such an environment, and achieve the purpose of the provision, it is imperative that the distinction between oral and written complaints be abandoned.

One canon of construction also allows for reliance on the spirit of the statute when “another interpretation would make for absurdity or injustice.”¹⁷⁸ The facts of the *Kasten* case demonstrate the injustice that can result when oral complaints are distinguished from written complaints and not protected.¹⁷⁹ Elevating form over substance to this degree is absurd. The provision is intended to make employees feel secure enough to come forward with grievances about working standards. Mr. Kasten followed the grievance procedure articulated by his employer, and complained about a legitimate wage and hour violation. The adverse employment

¹⁷⁵ *Id.*

¹⁷⁶ Jennifer Clemons, *supra* note 21, at 535.

¹⁷⁷ Sutherland, *supra* note 101, at §54:5.

¹⁷⁸ *Id.*

¹⁷⁹ *See supra* Part I.A. (explaining the facts of the *Kasten* case).

actions taken against Mr. Kasten will no doubt discourage his former co-workers from coming forward with complaints. This decision is directly contrary to the purpose of the anti-retaliation provision.

The absurdity is especially clear for employees in industries who most commonly communicate with their supervisors orally. Employees with complaints may hesitate to communicate those complaints in written form for fear that the gesture may, ironically, instigate repudiation where an informal complaint might not. The Secretary of Labor has offered an illustrative example of the outcome of this distinction: “[A]n employee who telephones the human resources department asserting FLSA rights could be subject to discharge without receiving the protection of section 15 (a)(3), while an employee who raises the same issue in writing would be protected.”¹⁸⁰ It is unjust to not protect employees who make valid, sufficient complaints.¹⁸¹ The distinction between oral and written complaints creates an illogical system, and nothing in the statute suggests that such a distinction was intended.

IV. PROPOSAL

No single method of statutory interpretation controls. Attorneys arguing for a certain interpretation of a statute should take a cumulative approach, “taking the most convincing pieces of whatever approaches best fit their side of the case.”¹⁸² This author supports an interpretation of the anti-retaliation provision that is a more dynamic approach than a plain meaning approach. There a number of different conventional ways the terms “file” and “complaint” are used. As Eskridge wrote, discussing the same conundrum of various definitions the Supreme Court faced

¹⁸⁰ Brief for the Secretary of Labor at 18 as Amicus Curiae Supporting Plaintiff-Appellant, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (2008)(No. 08-2820).

¹⁸¹ See *infra* Part IV for a suggestion on what constitutes valid, sufficient complaints.

¹⁸² Eskridge, *supra* note 108, at 9.

in *United Steelworkers v. Weber* and *Holy Trinity Church*, “Upon what basis can we say that one of them is morally more natural than the others?”¹⁸³

“File” and “complaint” should be interpreted in light of the purposes the provision was intended to serve. When assessing an employee’s activity, courts should engage in a somewhat fact intensive analysis. In the circuits with more liberal standards, the test is often phrased as the assertion of statutory rights.¹⁸⁴ What factors should be considered in determining if an employee’s conduct is an assertion of statutory rights?

Courts should protect communications that are assertions of statutory rights, but there are limitations on the activities that should be protected as informal, internal complaints. A complaint must be specific enough to inform the employer of the alleged violation. The First Circuit, holding that the FLSA’s anti-retaliation provision protects an employee who has filed a sufficient complaint with an employer, also recognized the need for boundaries on the protection afforded employees—

[N]ot all abstract grumblings will suffice to constitute the filing of a complaint with one’s employer . . . “[T]here is a point at which an employee’s concerns and comments are too generalized and informal to constitute complaints that are filed with an employer within the meaning of the [statute].”¹⁸⁵

While a specific statute need not be named, it would be appropriate to require an employee to specifically mention the activity that he or she believed to be unlawful.

¹⁸³ *Id.* at 238.

¹⁸⁴ *See, e.g.*, *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 989 (6th Cir. 1992) (holding that plaintiff had effectively set forth a claim of retaliation because adverse employment actions followed her protests that her employers were “breaking some sort of law.”); *EEOC v. White & Sons. Enter.*, 881 F.2d 1006, 1011 (11th Cir. 1989) ([T]he unofficial complaints expressed by the women to their employer about unequal pay constitute an assertion of rights protected under the statute. The FLSA is remedial in nature.”); *Brock v. Richardson*, 812 F.2d 121, 124 (3rd Cir. 1987) (finding the FLSA “protect[s] employees who have protested Fair Labor Standards Act violations to their employers.”); *Brennan v. Maxey’s Yamaha, Inc.*, 513 F.2d 179, 180 (8th Cir. 1975) (“The Act prohibits discrimination against an employee who asserts or threatens to assert his or her FLSA rights.”).

¹⁸⁵ *Valerio v. Putnam Associates Inc.*, 173 F.3d 35, 44 (1999) (third alteration in original) (quoting *Clean Harbors Environmental Services, Inc. v. Herman* 146 F.3d 12, 22 (1st Cir. 1998)).

Courts should not require that employees mention the statute by name. A common theme in these cases is employees who express their belief that their employers' conduct is illegal. They may not know what statute grants them rights. Requiring such knowledge of employees is unfair and burdensome. It is not unfair, however, to continue to look for language from employees reflecting a good faith belief that the employer's conduct is illegal. These requirements distinguish an assertion of rights from an ordinary complaint. For example, a complaint about an overtime policy that did not include any notion that the employee believed the policy unlawful may not come under the provision.

The following are examples of complaints that meet these criteria, modeled after employees' activities in real cases. First, an employee who tells human resources personnel "I believe the location of the time clocks is illegal."¹⁸⁶ Second, an employee who tells her employer "You are breaking some sort of law by paying me lower wages than the men."¹⁸⁷ These types of complaints express a belief in the illegality of the conduct, and mention specific practices.

V. CONCLUSION

Saint-Gobain Performance Plastics escaped from a directive intended to prohibit its conduct. When interpreting the anti-retaliation provision, courts should be mindful of the purpose § 215(a)(3) and the FLSA generally. When the Supreme Court hears the *Kasten* case, it is this author's hope that the Court protects oral complaints. If the Court does not, Congress should act to protect what can only be described as the most socially responsible behavior—employees attempting to hold their employers to the standards Congress has chosen to hold them to. This holding is not anti-employer, but supports law-abiding employers. A literal reading of

¹⁸⁶ See Brief of Plaintiff-Appellant at 2, *Kasten v. Saint-Gobain Performance Plastics*, No. 08-2820 (7th Cir. Oct. 6, 2008).

¹⁸⁷ See *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 989 (6th Cir. 1992).

“file any complaint” with restrictive definitions of the phrase creates redundancies in the statute and is not cohesive with the goal of the statute. It allows for a misinterpretation to create the exact injustice that §215(a)(3) was intended to eliminate.