No. 09-834 JAN 12 2010

In the Supreme Court of the United States

Kevin Kasten,

Petitioner,

v.

Saint-Gobain Performance Plastics Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the anti-retaliation provision, 29 U.S.C. § 215(a)(3)?

PARTIES TO THE PROCEEDING

All parties to this Action are set forth in the Caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner / Plaintiff Kevin Kasten respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Seventh Circuit denying the petition for rehearing and rehearing *en banc*, with three judges dissenting, is available at *Kasten v. Saint-Gobain Performance Plastics Corp.*, 585 F.3d 310 (7th Cir. 2009), and is reproduced at Petitioner's Appendix ("App.") at 1. The panel opinion of the United States Court of Appeals for the Seventh Circuit is available at *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th Cir. 2009) and is reproduced at App. 32. The district court's opinion granting summary judgment is available at *Kasten v. Saint-Gobain Performance Plastics Corp.*, 619 F. Supp. 2d 608 (W.D. Wis. 2008) and is reproduced at App. 63.

STATEMENT OF JURISDICTION

The Seventh Circuit Court of Appeals issued its Opinion and Final Judgment on June 29, 2009. The Seventh Circuit denied Petitioner's timely-filed petition for rehearing and rehearing *en banc* on October 15, 2009.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. § 215(a)(3):

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

CONCISE STATEMENT OF THE CASE

On June 29, 2009, the Seventh Circuit Court of Appeals affirmed the dismissal of Petitioner's retaliation claim under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3), holding that his "unwritten, purely verbal complaints are not protected activity" because "the FLSA's use of the phrase 'file any complaint' requires a plaintiff employee to submit some sort of writing". App. 43. In light of the discrepancy between the Seventh Circuit's holding and other Circuits, the Department of

Labor and Equal Employment Opportunity Commission's warnings that the decision will have a negative impact on enforcement of the FLSA, Equal Pay Act, and other Federal laws, and the Seventh Circuit dissenting opinion recognizing that the decision is "contrary to the understanding of Congress," this petition for a writ of certiorari follows. App. 2.

I. Factual Background

Petitioner Kevin Kasten worked at Respondent Saint-Gobain Performance Plastics Corporation's Portage, Wisconsin facility from October 2003 until December 2006 as an hourly-paid manufacturing and production worker. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 948 (W.D. Wis. 2008), App. 81.

Petitioner alleges that in late 2006, he began issuing repeated oral complaints to his supervisors, in compliance with company reporting procedures, about the legal implications of employees not clocking in during the gowning process, and therefore not being paid for their donning and doffing time. App. 24 n.4, 34. Specifically, Petitioner states that he: (1) told his Shift Supervisor that the location of Respondent's time clocks was illegal; (2) met with the Human Resources Generalist and informed her that the location of Respondent's time clocks was illegal, and that if Respondent was challenged in court regarding its time clock practices, "they would lose"; (3) informed his

Lead Operator that the location of Respondent's time clocks was illegal on three or four occasions; (4) told his Lead Operator that he was considering starting a lawsuit regarding the location of the time clocks; and (5) told the Human Resources Manager and the Director that he believed the location of the time clocks was illegal and that if Respondent was challenged in court, it would lose. App. 34-35. Respondent denies receiving these complaints. App. 34.

During the same timeframe, Petitioner received an increasing number of disciplinary warnings, a suspension, and ultimately was terminated. App. 33-35. Petitioner claims that this discipline and termination was in retaliation for his complaints of violations of the FLSA, and Respondent denies retaliation.[1] App. 35.

On August 8, 2007, Petitioner filed a Complaint in the United States District Court for the Western District of Wisconsin on behalf of himself and a collective and Rule 23 class, alleging, *inter alia*, that Respondent violated the minimum wage and overtime requirements of the FLSA, 29 U.S.C. §§ 206-207 and Wisconsin labor law by failing to pay its employees for

[1] The district court impermissibly adopted disputed facts and drew inferences against Petitioner regarding the reason for his disciplinary action, but the ultimate decision turned on whether oral complaints to the employer are protected, rather than the disputed matters.

work time spent donning and doffing. App. 73, 85. On June 2, 2008, the District Court entered partial summary judgment in the plaintiffs' favor, granted class certification, and held that Respondent was liable to the class as a matter of law for failing to compensate employees for all hours worked. App. 112.

II. Proceedings Below

A. Summary Judgment in the District Court

On December 3, 2007, Petitioner filed the instant case, alleging that Respondent retaliated against him in violation of the FLSA by terminating his employment because he filed oral complaints and indicated that he planned to take legal action for Respondent's violations of the FLSA. *See* App. 63. The District Court for the Western District of Wisconsin exercised jurisdiction pursuant to 28 U.S.C. § 1331. *Id.* Respondent moved for summary judgment, and on June 19, 2008, the District Court granted Respondent's motion on the basis of its' determination that, as a matter of law, oral complaints cannot be "filed" as the statute requires, and thus can never constitute protected conduct within the anti-retaliation provision of the FLSA. App. 71-72.

B. Decision on Appeal

On June 29, 2009, a three-judge panel at the Seventh Circuit Court of Appeals exercised

jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1294(1). App. 32. The panel refused to give deference to Amicus Curiae Department of Labor's position, and affirmed the judgment of the District Court. App. 39 n.2. The panel held that informal intra-company complaints are protected, but that unwritten oral complaints are not "filed," and therefore can never come within the protection of the FLSA anti-retaliation provision. App. 38, 43. The court acknowledged its disagreement with other Circuits, which find that oral complaints to an employer are protected activity under the FLSA. App. 41. Nevertheless, the panel confirmed the district court's holding that "[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." App. 39.

C. Denial of Rehearing with Three Dissenting Judges

Petitioner thereafter sought rehearing, and the Secretary of Labor and Equal Employment Opportunity Commission ("EEOC") joined Petitioner's position as Amici Curiae. *See* App. 17. On October 15, 2009, the Seventh Circuit denied the petition, but three Judges issued a lengthy dissenting opinion. App. 1-2. The dissent stated:

> In deeming the statutory language to reach only written and not oral complaints, the court has taken a position 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 I believe is contrary to the understanding of Congress.

App. 2. The dissent recognized a long list of statutes which include similar language, and have been held to encompass protection for oral complaints. App. 2-3. It contrasted these statutes with another lengthy list of statutes in which Congress "specifically require[s] written complaints." App. 7. Since the Seventh Circuit's decision has such a broad impact on a variety of anti-retaliation provisions, which "serve to protect not just the individual worker, but the means by which Federal agencies become aware of unlawful labor practices", the dissent determined that further consideration was warranted. App. 3.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

The Seventh Circuit adopted an unprecedented interpretation of the anti-retaliation provision of the Fair Labor Standards Act, holding that that provision does not protect a worker who complains orally - in person or by telephone - about a violation of the Act.[2] Because

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[2] The only other published decision in agreement with the Seventh Circuit in this case is at the district court level. *See, e.g., Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp. 2d

the Equal Pay Act is enforced under the provisions of the FLSA, a female employee who complains to her supervisor about a violation of the Equal Pay Act is also unprotected in the Seventh Circuit. Moreover, the panel's decision "would apply to an employee's external contacts with regulatory officials." App. 9-10. Accordingly, employees could legally be fired for telephoning the Department of Labor or EEOC, or for speaking in person with officials of those agencies, about violations of the FLSA or the Equal Pay Act.

Certiorari is warranted. The decision of the court of appeals poses a serious obstacle to the administration of the law in the Seventh Circuit. The Seventh Circuit's decision to legalize retaliation against employees who attempt to secure their rights under the FLSA verbally conflicts with the decisions of all other Federal Courts of Appeals to have considered the issue, and conflicts with the instructions of this Court on an important issue of Federal law. The scope of protection against retaliation is an issue of exceptional importance in the administration of the FLSA as well as other Federal statutes, on which national uniformity is vital. Petitioner therefore respectfully petitions for this Court to review the judgment of the Seventh Circuit Court of Appeals.

322, 324 (W.D. Va. 1999) ("The word 'filed' clearly denotes a procedure other than oral.").

I. THE APPELLATE DECISION CONFLICTS WITH THE DECISIONS OF SIX OTHER COURTS OF APPEALS.

In conflict with the six other Courts of Appeals that have considered the issue,[3] the Seventh Circuit, in a straightforward but sweeping holding, ruled that "the phrase 'file any complaint' [in section 215(a)(3) of the FLSA] requires a plaintiff employee to submit some sort of writing." App. 43. On this interpretation, section 215(a)(3) does not apply to oral complaints in the Seventh Circuit, either in person (as

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[3] The section 215(a)(3) conflict most frequently discussed relates to whether complaints must be "formally" filed with a court or administrative agency. Eight circuits hold that internal complaints to an employer are protected. *See, e.g., Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617 (5th Cir. 2008); *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1116 (2000); *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35 (1st Cir. 1999); *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383 (10th Cir. 1984); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975). Two circuits hold that complaints must be filed in courts or administrative agencies. *Whitten v. City of Easley*, 62 Fed. Appx. 477 (4th Cir. 2003) (unpublished); *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360 (4th Cir. 2000); *Lambert v. Genesee Hosp.*, 10 F.3d 46 (2d Cir. 1993) *cert. denied*, 511 U.S. 1052 (1994). Because the Seventh Circuit correctly determined that complaints to an employer are protected, the only conflict at issue is whether oral complaints are protected activity, regardless of the venue in which they are raised.

occurred in this case) or by telephone, regardless of the venue in which they are raised.

The Seventh Circuit's divergence from other Circuits on this issue is well-established. The Seventh Circuit candidly recognized that "other [Courts of Appeals] have found oral complaints to be protected activity," correctly citing such interpretations of section 215(a)(3) by the Sixth, Eighth and Eleventh Circuits. App. 41. In their dissent from the denial of rehearing en banc, several members of the Court of Appeals also noted that the panel had "rejected the multiple decisions from other circuits recognizing that oral as well as written complaints are protected by the statute." App. 5. Likewise, the district court noted that the narrow interpretation of section 215(a)(3) proposed by the Defendant, and ultimately adopted by the Seventh Circuit, conflicted with decisions in several circuits. App. 68. In their amicus brief supporting rehearing en banc, the Secretary of Labor and EEOC repeatedly pointed out that the panel decision "conflicts with conclusions of the Sixth, Eighth, and Eleventh Circuits that internal complaints are protected, even when communicated orally." App. 18.

The court below acknowledged that the Sixth Circuit holds that oral complaints are protected by section 215(a)(3). App. 41. In *EEOC v. Romeo Community Schools,* an Equal Pay Act retaliation case governed by section 215(a)(3), the employee suffered retaliation after she orally

"complained about her pay rate . . . but was told that her pay would not be raised." 976 F. 2d at 986. The employee "told [school officials] she believed they were 'breaking some sort of law' by paying her lower wages than . . . paid to male [workers]." *Id.* at 989. The Sixth Circuit held that "it is the assertion of statutory rights which is the triggering factor, not the filing of a formal complaint." *Id.* In *Moore v. Freeman*, 355 F. 3d 558 (6th Cir. 2004), the Sixth Circuit upheld a retaliation claim based on an oral complaint under the FLSA and Equal Pay Act. The plaintiff in that case had "raised the [salary] issue [with *his supervisor] at a . . . staff meeting.*" *Id.* at 561. The Sixth Circuit held:

> [The plaintiff] was clearly engaged in statutorily-protected activity, given the fact that the anti-retaliation provisions of the FLSA can be triggered by informal complaints . . . and that the defendants do not dispute that [the plaintiff] protested to [his supervisor] about his unequal pay.

355 F. 3d at 562. In *Moon v. Transport Drivers, Inc.*, the Sixth Circuit again upheld a retaliation claim involving an oral complaint, applying the anti-retaliation provision[4] of the Surface Transportation Assistance Act ("STAA"), which has language identical to section 215(a)(3). 836

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[4] The STAA forbids retaliation "because such employee . . . has filed any complaint . . . relating to a violation of [certain provisions]." 49 U.S.C. § 2305(a).

F. 2d 226, 228 (6th Cir. 1987) (plaintiff "made a number of oral complaints to . . . his supervisor . . . , thereby engaging in protected activity under the STAA.").

The Eighth Circuit also holds that internal oral complaints about FLSA violations are protected by section 215(a)(3). In *Brennan v. Maxey's Yamaha, Inc.*, 513 F. 2d 179, the dismissed employee had on two occasions voiced her objection to actions[5] that the employer was taking in violation of the FLSA.[6] The Eighth Circuit stated:

> [The employee's] protest of what she believed to be unlawful conduct on [the employer's] part was an act protected from reprisals. . . . Her discharge was a direct result of her insistence upon receiving [her rights] under the Act. . . . [H]er lawful assertion of rights based on that belief [that the employer was violating the FLSA] must be protected.

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[5] Following an agreement with the Department of Labor to pay back wages to several employees, the company president insisted that several of those workers endorse their back wage checks to the company. *Maxey's Yamaha*, 513 F. 2d at 180.

[6] The employee explained, "I told him that it was illegal, that it was wrong, and that if they happen to be caught that they would be in serious trouble, but [the company president] said to me that if I didn't say anything, no one would find out" and "I told him again that I didn't approve of the tactics he was using"). *Id.* at 182.

Id. at 181.

The Eleventh Circuit, as the panel recognized, has also held that oral complaints are protected by section 215(a)(3). App. 41. In *EEOC v. White and Son Enterprises*, 881 F. 2d 1006, several female employees twice complained verbally that they were being paid less than men doing the same work.[7] The employer argued that the actions of the women did not constitute "fil[ing] a complaint" and thus were not among "the acts specified in the FLSA." *Id.* at 1011. The Eleventh Circuit rejected that narrow interpretation of section 215(a)(3), holding that the oral complaints to management were indeed protected:

> [E]ven though the [dismissed workers] had not yet filed formal charges of discrimination [under the Equal Pay Act] with the EEOC, the discharge by appellant can still be retaliatory in nature. . . . [W]e

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[7] The court described the following:

> When the [terminated female employees] learned of the pay increase [for male co-workers], several of them met with [a co-owner of the firm] to ask why they did not receive as raise as did the men and to request equal pay. . . . The next morning, when [the other owner] arrived, the women were waiting to speak to him. [The other owner] asked the women if there was a problem, and they replied that there was. [The other owner] then stated that if it was about a raise, there would be none . . .

Id. at 1007-08, 1011.

> conclude that the unofficial complaints expressed by the women to their employer about unequal pay constitute an assertion of rights protected under the statute. . . . The anti-retaliation provision of the FLSA was designed to prevent fear of economic retaliation by an employer against an employee who chose to voice such a grievance.

Id. at 1011.

The Fifth Circuit also holds that oral statements can constitute protected activity. *Hagan*, 529 F. 3d 617. In *Hagan v. Echostar Satellite, L.L.C.*, the plaintiff was dismissed because of statements he made in two meetings - one with his supervisors and another with his subordinates - regarding a company decision that reduced certain overtime pay.[8] *Id.* The Fifth Circuit held that a worker's oral statements to superiors or subordinates could constitute protected activity. *Id.* at 626.

The interpretation of section 215(a)(3) in the Ninth Circuit also expressly includes oral complaints to supervisors.

> [S]o long as an employee communicates the *substance* of his allegations to the

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[8] The first statement was at a "December . . . 2004 . . . managers' meeting." *Id.* at 620. The second statement occurred when the plaintiff met with several subordinates "[l]ater that day." *Id.* at 620-21.

> employer (e.g., that the employer has failed to pay adequate overtime, or has failed to pay the minimum wage), he is protected by § 215(a)(3). As several circuits have held, moreover, the employee may communicate such allegations *orally* or in writing.

Ackerley, 180 F. 3d at 1007-08.

Finally, the Tenth Circuit held that an oral request for overtime pay was a protected activity under section 215(a)(3) in *Pacheco v. Whiting Farms, Inc.*, 365 F. 3d 1199 (10th Cir. 2004). The plaintiff asked the company vice-president in-person for overtime pay.[9] The Tenth Circuit held that section 215(a)(3) applied to that request:

> [W]e have held an employee's unofficial assertion of rights under § 215(a)(3) is . . . protected activity. . . . An employee's request for overtime wages is protected activity in the form of an unofficial assertion of FLSA rights. . . . In this case, Plaintiff engaged in protected activity when she requested overtime wages.

365 F. 3d at 1206-07. *See also Love*, 738 F. 2d at 387 ("[w]hen the 'immediate cause or motivating factor of a discharge is the employee's assertion of

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[9] "Plaintiff asked [the vice-president] if the 'packaging department could get overtime like shipping.' [The vice-president] appeared 'nervous and shocked' upon Plaintiff's inquiry, but informed Plaintiff he would look into the matter." *Pacheco*, 365 F. 3d at 1202.

statutory rights, the discharge is discriminatory under § 215(a)(3)'. . . The Act also applies to the unofficial assertion of rights through complaints at work.") (*quoting Maxey's Yamaha*, 513 F.2d at 181).

In sum, the Seventh Circuit's decision creates a clear disagreement among the circuits which requires resolution. The practical effect of this split is that in an organization such as Respondent's, which operates across the country, employees in the Seventh Circuit will receive protection only if they file written complaints, while employees in the Sixth, Eighth, Eleventh, Fifth, Ninth, and Tenth Circuits will receive protection for issuing oral complaints. For employees who travel, report complaints to a national headquarters office, or use complaint hotlines, the confusion among the Circuits is unworkable. This kind of national legal confusion necessitates review and clarification by the Court.

II. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE.

In the Court of Appeals, the Secretary of Labor warned that "a decision . . . that internal complaints that are oral are not covered . . . would have an adverse impact upon the administration of the Department of Labor's programs", and characterized the Seventh Circuit's decision as presenting a question of "exceptional importance." App. 18, 46. The question presented here affects not only the

implementation of the FLSA anti-retaliation provision, but will also have an enormous impact on the enforceability of the FLSA as a whole, as well as the Courts of Appeals' interpretations of a variety of other retaliation provisions in similar Federal statutes. The answer to this important question will therefore impact millions of working Americans.

To ensure an adequate flow of information to the Department of Labor in an effort to enable enforcement of the FLSA, Congress chose to rely on employee reports of violations. Particularly in off-the-clock cases like Petitioner's, employee reports are the *sole* source of information regarding FLSA violations. As this Court explained in *Mitchell v. Robert DeMario Jewelry, Inc.*:

> 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. . . . For it needs no argument to show that fear of economic retaliation might often operate to induce

> aggrieved employees quietly to accept substandard conditions.

361 U.S. 288, 292 (1960) (citations omitted). *See also* Hearings on the Fair Labor Standards Amendments of 1977, S. Comm. on Human Resources, Subcomm. on Labor, 95th Cong., 1st Sess. 17 (1977), App. 123; H.R. Conf. Rep. No. 2738, 75th Cong., 3d Sess., at 10, 26 (1938), App. 115.

However, the Seventh Circuit decision largely eviscerates the statute's protection for workers who bring violations of the FLSA or the Equal Pay Act to their employers' attention. The Secretary of Labor pointed out that "in the workplace an employee is more likely to approach an employer with an oral complaint about wage and hour practices, rather than providing a written document."[10] App. 59. However, employees who wish to resolve an issue informally with their employers will think twice before doing so if they are aware of the potential consequences in the Seventh Circuit.[11]

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[10] *See e.g., Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005); *Knickerbocker v. City of Stockton*, 81 F.3d 907 (9th Cir. 1996); *Genesee Hosp.*, 10 F.3d at 55; *Ergo v. Int'l Merch. Servs., Inc.*, 519 F. Supp. 2d 765, 778 (N.D. Ill. 2007); *Hernandez v. City Wide Insulation of Madison, Inc.*, 508 F. Supp. 2d 682, 690 (E.D. Wis. 2007); *Clevinger*, 36 F. Supp. 2d 322.

[11] Many workers in the Seventh Circuit will not be able to avoid the consequences of the Seventh Circuit's decision by

As the Department of Labor explained, "a decision . . . that internal complaints that are oral are not covered, would have an adverse impact upon the effective administration of the Department of Labor's programs", including a number of other legal schemes in addition to the FLSA. App. 46. For example, anti-retaliation provisions that use similar language to prohibit reprisals against a worker who "filed a complaint," include the Occupational Safety and Health Act,[12] the Railway Labor Act,[13] the Surface Transportation Assistance Act,[14] the Migrant and Seasonal Agricultural Worker Protection Act,[15] and the Employee Polygraph

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circumspectly putting their complaints in writing and never mentioning them out loud. Most employees are laymen with no knowledge of Seventh Circuit case law and no access to skilled counsel who might advise them to raise such matters only in documents.

[12] 29 U.S.C. § 660(c)(1) (proscribing retaliation against "any employee because such employee has filed any complaint . . . under or related to this chapter . . .").

[13] 49 U.S.C. § 20109(a)(3) (proscribing retaliation against railroad workers who "file a complaint" about certain safety issues).

[14] 49 U.S.C. § 31105(a)(1)(A)(i) (proscribing retaliation against employee because he "has filed a complaint" related to certain motor vehicle safety issues).

[15] 29 U.S.C. § 1855(a) (proscribing retaliation against worker who "has, with just cause, filed any complaint . . . under or related to this chapter").

Protection Act.[16] Oral complaints under those statutes and others[17] may no longer receive protection against retaliation in the Seventh Circuit.

The Secretary of Labor has further objected that "[p]rotecting only written complaints under Section 15(a)(3) . . . would mean, for example, that an employee who places a telephone call to the Department of Labor would not be protected." Brief for the Secretary of Labor as Amicus Curiae Supporting Appellant in Part at 14, *Kilpatrick v. Service Merchandise, Inc.*, No. 98-31423 (6th Cir. Apr. 22, 1999), *available at* 1999 WL 33729234. This is extremely problematic, because both the EEOC and the Wage and Hour Division indicate on their websites that aggrieved employees should call a toll-free number to make complaints.[18] Even the

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[16] 29 U.S.C. § 2002(4)(A) (proscribing retaliation against an employee because the employee "has filed any complaint").

[17] *See* 5 U.S.C. § 7116(a)(4) (proscribing retaliation against certain Federal employees because "the employee has filed a complaint" related to labor management relations); 22 U.S.C. § 4115(a)(4) (proscribing discrimination against a State Department employee "because the employee has filed a complaint" related to labor management relations); Workforce Investment Act, 29 U.S.C. § 2934(f) (requiring Secretary to take remedial action if a grant recipient has discriminated against an individual because such individual "has filed any complaint").

[18] The Wage and Hour Division call center phone number is displayed at www.dol.gov/whd/contact_us.htm. The EEOC

FLSA poster required to be displayed in millions of worksites across the nation contains that same number.[19] The uniquely narrow interpretation of section 215(a)(3) issued by the Seventh Circuit means that callers from Illinois, Indiana and Wisconsin, unlike callers from elsewhere in the United States, may lawfully be subject to retaliation for speaking with the Division or Commission. It would be wholly impracticable for the national call centers for these two agencies to provide different information, counsel and warnings depending on the place of employment of each particular caller.

The Seventh Circuit's opinion will no doubt have a tremendous chilling effect on employee reporting, encourage prompt retaliatory action if employers hear of the possibility of an employee questioning the propriety of wage payments, and nearly obliterate the viability of enforcement mechanisms written into not only the FLSA, but other Federal laws employing similar language. Because the question presented involves an extremely important issue of Federal law, certiorari should be granted.

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call center phone number is displayed at www.eeoc.gov/contact/index.cfm.

[19] The toll-free number for the Wage and Hour Division is 1-866-4-USWAGE.

III. THE COURT OF APPEALS' DECISION IS INCORRECT, AND RUNS CONTRARY TO THIS COURT'S PRIOR GUIDANCE ON INTERPRETING THE FLSA.

Moreover, the Seventh Circuit's decision is incorrect. The decision rests on a single mistaken premise: that the verb "file" used in the phrase "filed any complaint" necessarily requires a written document. App. 43. The court below based its narrow interpretation of section 215(a)(3) on one definition of the word "file" found in a single dictionary, and rejected the government's argument that "file" could also mean "submit," on the grounds that the alternative meaning "seems to us overbroad."[20] App. 39.

The Seventh Circuit's decision conflicts with this Court's instructions in *Tennessee Coal,*

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[20] As Justice Scalia explained in his concurring opinion in *Green v. Bock Laundry*, 490 U.S. 504, 529 (1989), when choosing among alternative available definitions of a legal term, it is most appropriate to choose the definition which does the "least violence to the text" and is most "consistent with the policy of law in general and the [Act at issue] in particular." Here, the Seventh Circuit did not explain why it rejected the definition of "to file" as "to submit", which was the option which does the least violence to the FLSA, is the most consistent with the policy of the law in general, and the FLSA's remedial purposes specifically.

Iron and Railroad Co. v. Muscoda Local 123, 321 U.S. 590 (1944), which called for an expansive and practical interpretation of the FLSA.[21] In *Tennessee Coal*, the Court set forth guidelines for statutory interpretation of the FLSA. *Id.* at 592. The Court reasoned that the meaning of the word "work" in the FLSA could "be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion." *Id.* The Court instructed that the provisions of the FLSA "are remedial and humanitarian in purpose. . . . Such a statute must not be interpreted or applied in a narrow, grudging manner." 321 U.S. at 597. However, the Seventh Circuit failed to confer any weight to the Congressional remedial and humanitarian purpose of the FLSA, and ignored the Court's instructions to resolves questions of statutory construction under the FLSA "by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings". *Id.* at 592.

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[21] The Seventh Circuit's holding is also contrary in spirit to this Court's recent decisions in *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S. Ct. 846 (2009), *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008), and *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008), which indicate that anti-retaliation provisions should be interpreted in a manner which best-effectuates the broad remedial goals of the statutes in which they appear.

Had the Seventh Circuit applied these principles in an effort to find an option that would effectuate the Congressional purpose of section 215(a)(3), it would have discovered that "file" is defined as "to submit" in other dictionaries. *American Heritage Dictionary*, at 658, (4th ed. 2000), App. 114 (defining "files" as "3. To send or submit (copy) to a newspaper. 4. To carry out the first stage of . . ."); App. 58-59 (citing *New Shorter Oxford English Dictionary*, 947 (1993) (defining "file" as "[to] submit (an application for a patent, a petition for divorce, etc.) to the appropriate authority"); *Random House College Dictionary*, 493 (1982) (defining "file" as "[t]o submit (an application, petition, etc.)"; *American Heritage Desk Dictionary*, 369 (1981) (defining "file" as "to present for consideration"). A number of lower courts have also held in other contexts that "file" can encompass an oral statement.[22]

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[22] For example, the Oregon Supreme Court explained:

> [The defendant] suggests that the term "filed" strongly implies a writing. But while that may be true with respect to *court* filings, we are not persuaded that the term carries that some connotation in the world of insurance and beyond. Certainly car and unemployment insurance claims often are "filed" orally by telephone, as are newspaper stories and ordinary complaints to businesses and government agencies.

Parks v. Farmers Ins. Co. of Or., ---P.3d--- 2009 WL 4981699, at *9 (Or. Dec. 24, 2009); *See also Mid-Century Ins. Co. v. Barclay*, 880 S.W. 2d 807, 810 (Tex. App. 1994) (term "filed" refers to "action in providing . . . whatever

The phrase "file a complaint", like the phrases "submit a complaint" and "make a complaint," has an idiomatic meaning: to make a complaint known to the responsible party. If the verb "file" were really limited to documents, then the phrase "file an oral complaint" would be nonsense. As the dissenting judges noted in this case, however, several Federal regulations and a large number of Federal judicial and administrative decisions which refer to the "filing" of an "oral complaint" or "oral grievance."[23] App. 6. At the state level there are

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notice was required"). *See also* App. 58 (quoting *Marshall v. Power City Elec., Inc.*, No. 77-197, 1979 WL 23049, at *1-2 (E.D. Wash. Oct. 23, 1979) ("The statute [§ 215(a)(3) nowhere explicitly requires a written complaint to confer protection . . . . The Court further holds that the term 'filed' as used in this clause means 'lodged' and is not limited to a written form of complaint.").

[23] *See e.g., Don Bassette Aviation, Inc.*, DMS FAA-2005-20640, DMS FAA 2005-20641, 2006 WL 728858 (Dep't Of Transp. Mar. 17, 2006) ("filed oral Motions to dismiss"); *East E. Ky. Paving Corp.*, 293 NLRB 1132, 1133 (1989) ("filed an oral grievance"); I.R.S. Priv. Ltr. Rul., PLR 8630019, 1986 WL 369778 (Apr. 23, 1986) ("the nurses regularly file oral . . . reports"); *Guy Am. Airways, Inc.*, 4 N.T.S.B. 886, 877 n.3 (May 20, 1983) ("notice of appeal was filed orally"); *Motor Convoy, Inc.*, 252 NLRB 1253, 1257 (1980) (the employee "filed . . . many oral complaints") (reversed on other grounds); *Ormet Corp.*, OSHRC Dkt. No. 76-4397, 1978 WL 6690 (Occupational Safety Health Review Comm'n May 18, 1978) (two motions " filed orally at the commencement of the trial").

also statutes, regulations,[24] and a substantial number of judicial decisions reaching back almost a century[25] which use "file" to refer to oral complaints, grievances or other statements. Public and private organizations (including the Defendant in this case) provide employees and members of the public with a toll-free number and invite them to "file a complaint."[26]

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[24] Minn. Stat. § 144.4808(2) ("may be filed orally by telephone"); Tenn. Code § 49-6-3401(c)(4)(B) ("appeals must be filed, orally or in writing"); Miss. Code § 69-47-23(4) ("may file a written or oral complaint"); Nev. Rev. Stat. § 618.705 (imposing penalties on "[a]ny person who . . . files a false oral or written complaint"); N.J. Stat. § 30:4C-12 (in certain circumstances "a written or oral complaint may be filed"); 2007 ME Reg. Text 46674 (NS) § 2(A) ("Complaints may be filed orally").

[25] *Donovan v. Walsh*, No. 287326, 2005 WL 1208964 at *2 (Mass. Land Ct. May 23, 2005) ("filed orally a motion"); *State v. Howard*, 805 So. 2d 1247, 1256 (La. Ct. App. 2002) ("motion for continuance filed orally"); *Grievance of McCort*, 650 A.2d 504, 506 n.1 (Vt. 1994) ("complaint . . . may be filed orally"); *State v. Riggins*, 508 So. 2d 918, 919 (La. Ct. App. 1987) ("The State filed an oral multiple bill of information"); *In re Estate of Shields v. Abdalian*, No. 44137, 1982 WL 5386, at *1 (Ohio Ct. App. May 27, 1982) ("claim . . . was filed orally with counsel"); *Commonwealth v. Molina*, 346 A.2d 351, n. 4 (Pa. Super. Ct. 1976) ("a writ of coram nobis could be filed orally"); *Richmond v. Newson*, 17 So. 2d 635, 636 (La. Ct. App. 1944) ("right to file oral pleadings"); *Ashley v. Tri-State Lumber Co.*, 91 S.E. 813, 814 (W. Va. 1917) ("court permits such demurrer to be filed orally").

[26] For example, the public is invited to file a complaint orally in the instructions offered on the following websites

Moreover, "it is noteworthy that Congress in many other statutes has specifically required written complaints. . . . These statutes suggest that when Congress means to require that complaints take a written form, it sets forth that requirement expressly." [27] App. 8. Because Congress did not use such language in section 215(a)(3), it seems contrary to Congressional intent to read the words "in writing" into the statutory text.

Moreover, the decision not only leaves an employee who makes an oral complaint unprotected, but it gives an employer a perverse

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for the States of Texas, www.dot.state.tx.us, Minnesota, www.oah.state.mn.us, and New York, www.ins.state.ny.us. *See also* n.18-19, *supra*.

[27] *See, e.g.*, 2 U.S.C. § 437g(a)(1) "complaint shall be in writing")(; 5 U.S.C. § 3330a(a)(2)(B) (same); 7 U.S.C. § 193(a) ("complaint in writing"); 7 U.S.C. § 228b-2(a) (same); 7 U.S.C. § 1599(a) (same); 15 U.S.C. § 80b-9(a) ("file with it a statement in writing"); 19 U.S.C. § 2561(a) (Federal agency may not consider a complaint unless the agency is informed "in writing"); 33 U.S.C. § 392 ("a statement of complaint, verified by oath in writing"); 38 U.S.C. § 4322(b) ("complaint shall be in writing . . ."); 42 U.S.C. § 2000b(a) ("complaint in writing"); 42 U.S.C. § 2000c-6(a) (same); 42 U.S.C. § 3610(a)(1)(A)(ii) ("complaints shall be in writing . . ."); 42 U.S.C. § 15512(a)(2)(C) ("complaint filed . . . shall be in writing and notarized, and signed and sworn by the person filing the complaint."); 47 U.S.C. § 554(g) ("A complaint by any such person shall be in writing, and shall be signed and sworn to by that person."); 49 U.S.C. § 46101(a)(1) ("A person may file a complaint in writing . . .").

incentive to fire or otherwise discriminate against an employee before he or she has had an opportunity to engage in activity that is protected. *See also Lundervold v. Core-Mark Int'l, Inc.*, No. Civ. 96-1542-AS, 1997 WL 907915 at * 2 (D. Or. 1997) (absence of protection creates "a perverse incentive to immediately terminate any employee who complains about wage and hour violations *before* the employee can [engage in protected activity]"). In *Mitchell*, this Court reasoned that the anti-retaliation provision of the FLSA must be interpreted in light of the practical realities weighing against an employee's decision to report her employer's alleged violations:

> Resort to statutory remedies might thus often take on the character of a calculated risk, with restitution of partial deficiencies in wages due for past work perhaps obtainable only at the cost of irremediable entire loss of pay for an unpredictable period. Faced with such alternatives, employees understandably might decide that matters had best be left as they are. We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice.

361 U.S at 292. Accordingly, any interpretation that discourages an employee from complaining to his employer about minimum wage and overtime violations undermines the FLSA. *Id.*

The Seventh Circuit's decision presents employees with a "Hobson's choice" of: 1) complaining internally about FLSA violations and leaving themselves unprotected from retaliation; 2) becoming their employer's formal antagonist by filing a formal written complaint; or 3) deciding "that matters had best be left as they are." *See id.* at 293. The decision therefore leaves unprotected precisely those employees whom it ought to benefit: those with FLSA-related concerns who do not wish to "rock the boat" with the employer any more than necessary, and who desire amicable resolutions of workplace disputes. Accordingly, the Court should grant the petition for certiorari to ensure consistent and adequate enforcement of Federal law.

CONCLUSION

For the above reasons, Petitioner respectfully requests that this petition for a writ of certiorari be granted to review the judgment and opinion of the Court of Appeals for the Seventh Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted this 11th day of January, 2010.

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