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***Kasten v. Saint-Gobain Performance Plastics:* Protecting Oral Complaints at the Expense of Workplace Complaints**

IN *KASTEN V. SAINT-GOBAIN PERFORMANCE PLASTICS*,¹ THE SUPREME COURT considered whether an employee's oral complaints regarding potential violations of the Fair Labor Standards Act was a protected activity under the Act's anti-retaliation provision.² The Supreme Court held that an employee's oral complaints regarding violations of the Fair Labor Standards Act was a protected activity under the Act's retaliation provision and employers are therefore barred from retaliating against an employee who orally complains under the Act.³ However, the Court explicitly limited its holding to employees who orally complaint to a court or agency and refused to determine whether employee complaints to an employer, whether oral or written, are protected under the anti-retaliation provision of the Fair Labor Standards Act.⁴ In so holding, the Court failed to account for the more informal atmosphere that is the workplace and potentially greatly hindered an employee's ability to actually enjoy protection for internal complaints made to an employer.

I. THE CASE

A. Factual Background

Saint-Gobain Performance Plastics Corporation (Saint-Gobain) is a producer of a variety of high performance polymer products.⁵ Kevin Kasten was employed as an hourly employee by Saint-Gobain for a period of three years.⁶ Kasten worked at

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* J.D., University of Maryland Francis King Carey School of Law, May 2012; B.A., Political Science, B.A., History, University of Delaware, 2008. I would like to thank all of my journal colleagues, especially Summer Hughes Niazy for her patience throughout this process. Special thanks to my parents, Erin and Cynthia O'Donnell, for their enduring support and Miluska Triveno, my selfless companion.

1. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 131 S.Ct. 1325 (2011).

2. *Infra* Part IV.

3. *Infra* Part V.A.

4. *Infra* Part V.B.

5. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 619 F.Supp.2d 608, 610 (W.D. Wis. 2008).

6. *Id.*

Saint-Gobain's manufacturing facility in Portage, Wisconsin and was engaged in the manufacturing of silicone products.⁷ Kasten and other Saint-Gobain employees engaged in manufacturing silicone products were required to wear protective gear while working and as part of the manufacturing process in order to prevent particles from damaging the silicone products.⁸

Kasten and other Saint-Gobain hourly employees were required to use a time clock to clock in when starting a work shift and clock out when ending a work shift.⁹ The employees' wages were determined based on these clock times.¹⁰ Therefore, employees were only compensated for the time period between clocking in to begin a shift and clocking out to end a shift.¹¹ Saint-Gobain employees were required to put on their protective gear before clocking in to begin a shift.¹² Upon ending their shift, employees were required to clock out before they were able to take off the protective gear that was required to be worn in the workplace.¹³

Between February and November 2006, Saint-Gobain supervisors warned Kasten, both orally and in writing, regarding his failure to properly swipe in and out on the company's time clock.¹⁴ For each of these warnings, including the oral warning, Kasten was issued a written notice of disciplinary action and was required to sign the notice, indicating his understanding of its content.¹⁵ Kasten signed each notice, indicating that he understood why he was being warned.¹⁶

Between October and December 2006, Kasten orally complained to various Saint-Gobain supervisors that he believed the location of the company's time clocks to be unlawful.¹⁷ The crux of Kasten's complaints to supervisors was that the location of the company's time clock was unlawful because it prevented employees from being compensated for time they were required to spend putting on and taking off the protective gear that they were required to wear as part of the job.¹⁸ Kasten also advised one of the Saint-Gobain supervisors that he was contemplating filing a lawsuit against the company regarding the location of the time clocks.¹⁹

On December 6, 2006, Kasten was suspended by Saint-Gobain because he had violated the company's policy regarding punching in and out of the company's time

7. *Id.*

8. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 570 F.3d 834, 836 (7th Cir. 2009), cert. granted, 130 S. Ct. 1890 (2010).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Kasten*, 619 F.Supp.2d at 611.

13. *Id.*

14. *Kasten*, 570 F.3d at 836.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

clocks for the fourth time.²⁰ Prior to this suspension, on November 20, 2006, Kasten's second written warning stated that the second written warning was the last step of the disciplinary process and that any further violation could possibly result in termination.²¹ In a meeting regarding the suspension, Kasten again verbally complained to supervisors about the legality of the time clock placement.²² At the same meeting, Kasten also alleged that if he were to challenge the legality of the time clock placement in court he would be proven correct.²³ On December 11, 2006, Saint-Gobain's human resources manager informed Kasten via telephone that the company had elected to terminate his employment.²⁴

B. Procedural History

Following his termination from Saint-Gobain, Kasten brought suit against Saint-Gobain in the United States District Court for the Western District of Wisconsin.²⁵ Kasten claimed that Saint-Gobain failed to properly compensate him for time he was required to spend putting on and taking off protective gear as part of his employment and therefore had violated the Fair Labor Standards Act (FLSA).²⁶ Central to the issue discussed herein, Kasten also claimed that Saint-Gobain violated the FLSA anti-retaliation provision when it terminated his employment in retaliation for the verbal complaints he had made about the unlawful placement of the company time clocks.²⁷

The district court granted summary judgment to defendant Saint-Gobain on the basis that Kasten failed to state a claim.²⁸ The district court held that Kasten did not "file a complaint" to his employer as is required by the anti-retaliation provision of the statute.²⁹ Kasten appealed the district court's grant of summary judgment to Saint-Gobain to the Court of Appeals for the Seventh Circuit.³⁰ The Seventh Circuit affirmed the district court's grant of summary judgment to Saint-Gobain, holding that Kasten failed to state a claim because the statutory requirement of filing a complaint precludes protection for unwritten and wholly oral complaints made to an employer.³¹

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 619 F.Supp.2d 608, 611 (W.D. Wis. 2008).

26. *Id.*

27. *Id.*

28. *Id.* at 613.

29. *Id.*

30. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 570 F.3d 834, 835 (7th Cir. 2009), cert. granted, 130 S.Ct. 1890 (2010).

31. *Id.* at 840.

Kasten appealed the Seventh Circuit's holding to the Supreme Court of the United States.³² The Supreme Court held that an employee's oral complaints to an agency or court are protected activity under the FLSA anti-retaliation provision and remanded to the Seventh Circuit.³³

II. BACKGROUND

A. Fair Labor Standards Act

The FLSA was enacted in 1938, during the height of the Great Depression.³⁴ In *Tennessee Coal, Iron & R. Co. v. Muscado Local No. 123*,³⁵ the Supreme Court noted that, like other legislation enacted during this period, the FLSA was "remedial and humanitarian in purpose."³⁶ The main objective of the FLSA was to establish certain minimum labor standards for workers.³⁷ More specifically, Congress' professed purpose behind the FLSA was "to correct and as rapidly as practicable to eliminate [detrimental labor conditions]."³⁸ The FLSA addressed this purpose through minimum wage requirements,³⁹ overtime payment provisions,⁴⁰ and compulsory equal wages for men and women.⁴¹

Congress, in providing for the enforcement of the FLSA, instituted a system wherein employees make complaints and institute proceedings on their own behalf for rights under the statute that are denied to them by their employers.⁴² To operate effectively, this approach requires that employees be free to make complaints without fear of retaliation against them by their employers.⁴³ The FLSA anti-retaliation provision, section 215(a)(3),⁴⁴ was designed to provide employees protection against retaliatory termination and other discriminatory actions for asserting their rights under the statute.⁴⁵ Therefore, the protections guaranteed by the anti-retaliation provision are designed to foster employee participation in implementing the FLSA.⁴⁶

32. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 131 S.Ct. 1325, 1329–30 (2011).

33. *Id.* at 1336.

34. 29 U.S.C. § 201, et seq. (2006).

35. 321 U.S. 590 (1944), superseded by statute, Portal-to-Portal Act, 29 U.S.C. § 254 (2000), as recognized in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 26 (2005).

36. *Id.* at 597.

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

38. 29 U.S.C. § 202(b) (2006).

39. See *id.* 206.

40. See *id.* 207.

41. See *id.* 206(d).

42. *Mitchell*, 361 U.S. at 292.

43. *Id.*

44. 29 U.S.C. § 215(a)(3) (2006).

45. *Id.*

46. *Id.*

The anti-retaliation provision of the FLSA provides that:

*[I]t shall be unlawful for any person...to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee[.]*⁴⁷

An employee bringing a retaliation claim under this provision must make a prima facie showing that: (1) the employee was engaged in a protected activity under the statute; (2) the employee suffered an adverse employment action; and, (3) the existence of a causal link between the employee's participation in the protected activity and the adverse employment action suffered from the employer.⁴⁸ Among the protected activities under the anti-retaliation provision of the FLSA is "fil[ing] any complaint[.]"⁴⁹ An employee can engage in this protected activity by filing a formal complaint with a government agency or in a court.⁵⁰ Prior circuit decisions have also held that employees engaged in the protected activity of filing any complaint when, among other actions, they protested to a supervisor regarding unequal pay,⁵¹ submitted a letter to a supervisor asserting their statutory right to overtime pay,⁵² or complained of unlawful sex discrimination and alleged that the employer is "breaking some sort of law[.]"⁵³

If an employee satisfies the prima facie elements, the employer must then show a legitimate, nondiscriminatory reason for the adverse action.⁵⁴ The Supreme Court, in a prior decision, echoed the remedial nature of the statute and directed that the statute not be subject to "narrow, grudging" interpretations and applications.⁵⁵

B. Approach of the Circuit Courts

The circuit courts, prior to the Supreme Court's decision in *Kasten*, addressed the protections afforded by the FLSA anti-retaliation provision to employees who file complaints have reached different conclusions when addressing whether an employee who complains to an employer is protected under the FLSA.⁵⁶ The main

47. 29 U.S.C. § 215(a)(3).

48. See, e.g., *Hagan v. EchoStar Satellite, L.L.C.*, 529 F.3d 617, 624 (5th Cir. 2008).

49. 29 U.S.C. § 215(a)(3).

50. *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993).

51. *Moore v. Freeman*, 355 F.3d 558, 562–63 (6th Cir. 2004).

52. *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 45 (1st Cir. 1999).

53. *EEOC v. Romeo Community Schools*, 976 F.2d 985, 989–90 (6th Cir. 1992) (internal quotations omitted).

54. *Hagan*, 529 F.3d at 624.

55. *Tennessee Coal, Iron & R. Co. v. Muscado Local No. 123*, 321 U.S. 590, 597 (1944), superseded by statute, Portal-to-Portal Act, 29 U.S.C. § 254 (2000), as recognized in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 26 (2005).

56. *Infra* Part III.B.2.

point of divergence between the circuits was whether an employee who made an oral complaint to his or her employer has “filed any complaint” under section 215(a)(3).⁵⁷

1. Complaints to Employer Not Protected Activity

The Second and Fourth Circuits took the most restrictive approach to this issue, holding that the FLSA protected activities did not include employees making informal complaints to employers.⁵⁸ In *Lambert v. Genesee Hospital*,⁵⁹ the Second Circuit contrasted the anti-retaliation provision of the FLSA with the anti-retaliation provision of Title VII.⁶⁰ According to the Second Circuit, Title VII⁶¹ provides protection to employees who orally complain because the statute’s language is broader than the FLSA, granting protection to employees who “oppose[] any practice” by an employer that is unlawful under Title VII.⁶² In contrast, the Second Circuit held that the FLSA is more restrictive in its language, restricting protection to employees who file formal complaints with administrative agencies or courts, institute proceedings, or testify before a court or agency.⁶³

In *Ball v. Memphis Bar-B-Q Co.*,⁶⁴ the Fourth Circuit argued that the statutory language of the FLSA limits the range of retaliatory action proscribed by the anti-retaliation provision.⁶⁵ The court, addressing employee testimony, noted that Congress’ use of the language “instituted” in regard to instituting a cause of action indicated that Congress intended to limit FLSA proscribed activity to retaliatory employment actions against employees after the commencement of formal proceedings.⁶⁶ Therefore, the court held that employees who made complaints to employers about violations of the FLSA did not engage in protected activity under the statute because the employees had not instituted formal proceedings.⁶⁷

57. 29 U.S.C. § 215(a)(3).

58. See *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) (holding that protected activity consists of filing a complaint, instituting a proceeding or testifying, but does not include complaints made to an employer); *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 364–65 (4th Cir. 2000) (holding that employees must take some formal action, such as filing a complaint or instituting a proceeding with a court or administrative body, to be protected activity.)

59. 10 F.3d 46 (2d Cir. 1993).

60. *Id.* at 55.

61. 42 U.S.C. § 2000e-3(a).

62. *Lambert*, 10 F.3d at 55 (internal quotations omitted).

63. *Id.*

64. 228 F.3d 360 (4th Cir. 2000).

65. *Id.* at 364–65.

66. *Id.* at 364 (internal quotations omitted).

67. *Id.* at 365.

2. Employee Complaint to Employer May Be Protected Activity

The majority of the circuits that addressed this issue provided protection under the FLSA for employees who had informally complained to an employer.⁶⁸ The First Circuit, in *Valerio v. Putnam Assocs.*,⁶⁹ reasoned that the “animating spirit” of the FLSA is best served when employees are afforded the same protection when filing a relevant complaint with an employer as well as with a court or agency.⁷⁰ Furthermore, the Ninth Circuit, in *Lambert v. Ackerley*,⁷¹ noted that the Supreme Court’s admonition of narrow interpretations of the FLSA coupled with the intended incentive to employees to report violations of the FLSA requires a broad construction of the anti-retaliation provision.⁷²

Despite the majority approach that informal complaints to employers were protected activity under the FLSA, these circuits differed on when an informal complaint to an employer was actually a protected activity. The First Circuit held that an informal complaint to an employer is a protected activity when the complaint is submitted in writing.⁷³ Other circuits found that informal complaints communicated to an employer orally and then submitted in writing were protected activity.⁷⁴ Several circuits found that an oral complaint to an employer was protected activity when the complaint alleged some unlawful activity by the employer.⁷⁵ Some circuits also required that, to make a valid complaint under the FLSA, an employee must have stepped out of his or her role of employment in making the complaint.⁷⁶

i. Written Complaint to Employer Protected Activity

The First Circuit, in *Valerio v. Putnam Assocs.*,⁷⁷ held that an employee’s written complaint to an employer regarding the employer’s failure to properly compensate for overtime hours worked was a protected activity under the FLSA anti-retaliation

68. See *Valerio v. Putnam Assocs.*, 173 F.3d 35, 45 (1st Cir. 1999) (employee’s written complaint to employer regarding lack of overtime compensation a protected activity); *Lambert v. Ackerley*, 180 F.3d 997, 1004–5 (9th Cir. 1999) (employee’s oral assertion that employer not properly compensating for overtime followed by attorney letter a protected activity); *Grey v. City of Oak Grove, Mo.*, 396 F.3d 1031, 1035 (8th Cir. 2005) (employee’s request for overtime compensation followed by attorney letter a protected activity); *EEOC v. White & Sons Enterprises*, 881 F.2d 1006, 1011–12 (11th Cir. 1999) (verbal assertions of unequal pay protected activity); *EEOC v. Romeo Community Schools*, 976 F.2d 985, 989–90 (6th Cir. 1992) (oral complaint of unlawful sex discrimination a protected activity); *Brennan v. Maxey’s Yamaha*, 513 F.2d 179, 181 (8th Cir. 1975) (employee’s outburst in workplace and refusal to go along with unlawful scheme a protected activity).

69. 173 F.3d 35 (1st Cir. 1999).

70. *Id.* at 43.

71. 180 F.3d 997 (9th Cir. 1999).

72. *Id.* at 1003–4.

73. *Infra* Part III.B.2.i.

74. *Infra* Part III.B.2.ii.

75. *Infra* Part III.B.2.iii.

76. *Infra* Part III.B.2.iv.

77. 173 F.3d 35 (1st Cir. 1999).

provision.⁷⁸ In *Valerio*, the employee submitted a written complaint to her employer asserting that the position of receptionist is covered under the FLSA and that if the employer continued to insist that the employee perform receptionist duties she would be entitled to overtime pay under the statute.⁷⁹ In the same complaint, the employee informed the employer that she had contacted the Department of Labor, was considering filing a complaint, and that it was a violation of the FLSA to fire or discriminate against an employee for filing a complaint or participating in a proceeding under the FLSA.⁸⁰

The First Circuit held that the animating spirit of the FLSA is best realized by interpreting the anti-retaliation provision to protect those employees who file a relevant complaint with a court or agency as well as those who file a complaint with an employer.⁸¹ The court reasoned that, because Congress used the term “any” and did not specify that a complaint must be submitted to a court or agency, the anti-retaliation provision could “relate to less formal expressions of protest, censure, resentment, or injustice conveyed to an employer.”⁸² The court also reasoned that Congress’ use of the term “filed” in the anti-retaliation provision, while adding a degree of formality, could be interpreted to include internal complaints that are made to an employer with the expectation that the employer will store the complaint in the employer’s records.⁸³ The court went on to state that “not all abstract grumblings will suffice to constitute the filing of a complaint[.]”⁸⁴

In the case below, the Seventh Circuit held that an employee’s intracompany complaint is protected when written but not when presented orally. In approaching the issue, the Seventh Circuit engaged in a two-part analysis.⁸⁵ First, the court addressed whether internal complaints to an employer are protected activity under the FLSA.⁸⁶ The court held that the statutory language of the anti-retaliation provision indicated that internal complaints to employers are protected activity.⁸⁷ The court agreed with *Kasten*, in that that statute does not place a limit on the types of complaints that are subject to protection and the word “complaint” is modified with “any” indicating that internal complaints to an employer are protected.⁸⁸ The court also found that a majority of the circuit courts to address this issue have also found internal complaints to employers to be protected.⁸⁹

78. *Id.* at 44.

79. *Id.* at 38.

80. *Id.*

81. *Id.* at 43.

82. *Id.* at 41.

83. *Id.*

84. *Id.* at 44.

85. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 570 F.3d 834, 837–38 (7th Cir. 2009), cert. granted, 130 S. Ct. 1890 (2010).

86. *Id.* at 837.

87. *Id.* at 838.

88. *Id.*

89. *Id.*

The court next addressed whether unwritten, wholly oral complaints are protected activity under the anti-retaliation provision.⁹⁰ The court again started with a plain meaning analysis of the statutory language.⁹¹ The court agreed with the district court's holding that the statutory requirement of a "filed" complaint necessarily precluded oral complaints to supervisors from protection.⁹² After addressing various dictionary entries, the court held that the verb "to file" requires a submission of a complaint in some form of writing to either an employer or some administrative agency.⁹³

The court then examined the decisions of other circuit courts.⁹⁴ The court highlighted the Fourth and Second Circuit decisions that held that verbal complaints to employers are not protected activity.⁹⁵ The court then examined the various circuits whose holdings indicate that oral complaints to an employer are protected.⁹⁶ The court sought to undermine these decisions as not providing adequate guidance on the issue because the majority of the cases do not specifically hold that oral complaints as a class are protected activity and the cases do not engage in a discussion of whether the verb "to file" requires a complaint to be in writing.⁹⁷

The court then declared that despite contrary holdings by other circuits, its holding that a complaint must be in writing to be protected activity is correct due to Congress' failure to use broader language than "file any complaint."⁹⁸ The court noted that Congress did not use broader language in the FLSA despite having an opportunity as drafter to do so.⁹⁹ The court then contrasted the language of the FLSA with the broad language of the anti-retaliation provisions of Title VII and the Age Discrimination in Employment Act, which forbid retaliation against any employee who "has opposed any practice" that is unlawful under the statutes.¹⁰⁰ The court determined that Congress' use of narrower language in the FLSA was significant and indicated that claims of retaliation under the FLSA were therefore more circumscribed than other retaliation claims.¹⁰¹ The court finally determined that, despite the remedial nature of the FLSA that requires a broad interpretation and application of its provisions, a broad interpretation cannot justify reading words into a statute, which the court believed it would be doing by finding that oral complaints are protected.¹⁰²

90. *Id.*

91. *Id.*

92. *Id.* at 839.

93. *Id.*

94. *Id.* at 839–40.

95. *Id.* at 839.

96. *Id.* at 839–40.

97. *Id.*

98. *Id.* at 40 (internal quotations omitted).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

ii. Oral Complaint to Employer Accompanied with Written Complaint Protected Activity

The Eighth and Ninth Circuits have both held that an employee engaged in protected activity when the employee orally complained to an employer then followed up the oral complaint with a written complaint.¹⁰³ In *Lambert v. Ackerley*,¹⁰⁴ an employee, after consulting with the Department of Labor, orally asserted concerns to her employer that she and her coworkers were not being properly compensated for overtime hours.¹⁰⁵ The employee's lawyer then submitted a written letter to the employer regarding the overtime issue.¹⁰⁶ The Ninth Circuit held that the employee's complaint to her employer and subsequent letter submitted by her attorney was protected activity under the FLSA.¹⁰⁷

The Ninth Circuit stated that in order to realize the purpose of the FLSA anti-retaliation provision, encouraging employees to report violations by employers, the protected activity of filing a complaint must protect employees who complain to their employers about violations as well as those who turn to the Department of Labor or courts.¹⁰⁸ The court interpreted the anti-retaliation provision's use of the language "any complaint" to include complaints made to an employer.¹⁰⁹ The court also noted that the statutory language "filed" encompasses employees who file complaints with employers.¹¹⁰ The Ninth Circuit also rejected the Second Circuit argument that the broader language of the Title VII anti-retaliation provision should dictate the interpretation of the FLSA anti-retaliation provision.¹¹¹ As the Ninth Circuit noted, Title VII was drafted in 1964, nearly 30 years before the FLSA was drafted in 1937, and language used in legislation drafted nearly 30 years apart cannot be considered persuasive in determining the meaning of language in each.¹¹²

The Ninth Circuit's holding that an employee who orally complained about an employer's failure to compensate for overtime and followed that complaint up with a letter engaged in protected activity was echoed by the Eighth Circuit. In *Grey v. City of Oak Grove, Mo.*,¹¹³ an employee requested overtime compensation from his employer for work performed at home.¹¹⁴ After the employer denied the request, the employee's lawyer submitted a letter to the employer regarding the overtime

103. *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999); *Grey v. City of Oak Grove, Mo.*, 396 F.3d 1031, 1035 (8th Cir. 2005).

104. 180 F.3d 997 (9th Cir. 1999).

105. *Id.* at 1001–2.

106. *Id.*

107. *Id.* at 1005.

108. *Id.* at 1004.

109. *Id.* (internal quotations omitted).

110. *Id.* (internal quotations omitted).

111. *Id.* at 1005.

112. *Id.*

113. 396 F.3d 1031 (8th Cir. 2005).

114. *Id.* at 1032.

claim.¹¹⁵ The Eighth Circuit held that the employee's claim for overtime compensation to the employer was protected activity under the FLSA.¹¹⁶

iii. Oral Complaint to Employer Protected Activity

Several circuit courts that have held that informal complaints to employers are protected activity have also held that oral complaints to an employer are protected activity.¹¹⁷ These circuits have not held that every oral complaint is protected activity. Rather, to be protected activity, a complaint must concern some violation of the FLSA.¹¹⁸

The Eleventh Circuit, in *EEOC v. White & Sons Enterprises*,¹¹⁹ held that employees' verbal assertions of unequal pay, although not an act expressly included in the FLSA anti-retaliation provision, were protected under the anti-retaliation provision because they were assertions of rights that were protected under the FLSA.¹²⁰ In *EEOC v. Romeo Community Schools*,¹²¹ the Sixth Circuit held that an employee engaged in protected activity when the employee verbally complained to her employer of "unlawful sex discrimination" and asserted her belief that the employer was "breaking some sort of law" by paying her lower wages than previous male counterparts.¹²² The Eighth Circuit, in *Brennan v. Maxey's Yamaha*,¹²³ also found an oral complaint to an employer sufficient to constitute a protected activity under the FLSA where the employee had an outburst in the workplace after she refused to take part in what she believed to be an unlawful scheme.¹²⁴

iv. Employee Must Step Outside of His or Her Employment Role in Making an Informal Complaint to an Employer

Several of the circuits that have provided protection for informal complaints to employers have held that, to be protected under the FLSA, an employer must step outside of her or her employment role and assert an FLSA statutory right that is adverse to the employer.¹²⁵ The Fifth Circuit, in *Hagan v. Echostar Satellite, L.L.C.*,¹²⁶

115. *Id.*

116. *Id.* at 1035.

117. See *EEOC v. White & Sons Enterprises*, 881 F.2d 1006, 1011 (11th Cir. 1999) (verbal assertions of unequal pay protected activity); *EEOC v. Romeo Community Schools*, 976 F.2d 985, 989–90 (6th Cir. 1992) (oral complaint of unlawful sex discrimination a protected activity); *Brennan v. Maxey's Yamaha*, 513 F.2d 179, 183 (8th Cir. 1975) (employee's outburst in workplace and refusal to go along with unlawful scheme a protected activity).

118. *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 626 (5th Cir. 2008).

119. 881 F.2d 1006 (11th Cir. 1999).

120. *Id.* at 1011.

121. 976 F.2d 985 (6th Cir. 1992).

122. *Id.* at 989.

123. 513 F.2d 179 (8th Cir. 1975).

124. *Id.* at 181.

125. *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 629–30 (5th Cir. 2008) (employee's alerting of employer of potential unlawful payment practices not protected because employee a manager and performing job duties); *Claudio-Gotay v. Becton Dickson Caribe, Ltd.*, 375 F.3d 99, 103 (1st Cir. 2004) (employee not

held that, in order for informal complaints to be protected activity under the FLSA anti-retaliation provision, an employee must act outside of his or her role with the company “by either filing (or threatening to file) an action adverse to the employer, by actively assisting other employees in asserting FLSA rights, or by otherwise engaging in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA.”¹²⁷ The Fifth Circuit noted that this rule is best suited for management employees who are charged with addressing the concerns of both employees and the employer.¹²⁸ The court reasoned that if managers were not required to step outside their everyday duties of addressing the concerns of employees and alerting employers to potential unlawful practices nearly every action of a manager could be viewed as a protected activity.¹²⁹

In *Hagan*, the Fifth Circuit held that an employee, a manager, did not engage in protected activity under the FLSA by informing employees that a schedule change would reduce their overtime hours.¹³⁰ The manager was instructed by the employer to present the schedule change to employees and inform them that the change was due to customer satisfaction concerns. However, when asked by the employees, the manager informed them that the change would also reduce overtime hours. The court held that this was not a protected activity because the employee was not asserting an FLSA violation and therefore was not acting outside of his employment role and adverse to the employer.¹³¹

The First Circuit, in *Claudio-Gotay v. Becton Dickson Caribe, Ltd.*,¹³² also applied this standard in determining that an employee did not engage in protected activity where the employee simply reported to his employer that certain employees were not being properly compensated for overtime hours worked.¹³³ The First Circuit reasoned that the employee was simply performing the duties of his job as manager in bringing the concern to light.¹³⁴ The First Circuit noted that the hallmark of protected activity under the FLSA anti-retaliation provision is asserting statutory rights under the FLSA by taking some action that is adverse to the employer.¹³⁵

engaged in protected activity when employee a manager and performing job responsibility of informing employer of potential unlawful practices).

126. 529 F.3d 617 (5th Cir. 2008).

127. *Id.* at 627–28 (quoting *McKenzie v. Renberg’s Inc.*, 94 F.3d 1478, 1486–87 (10th Cir. 1996) (internal quotations omitted)).

128. *Id.* at 628.

129. *Id.*

130. *Id.* at 620–21.

131. *Id.* at 629–30.

132. 375 F.3d 99 (1st Cir. 2004).

133. *Id.* at 102–3.

134. *Id.* at 103.

135. *Id.* at 102 (citing *McKenzie v. Renberg’s Inc.*, 94 F.3d 1478, 1486 (10th Cir. 1996)).

III. THE COURT'S REASONING

Justice Breyer, writing for the Court, noted that Saint-Gobain had argued in the Seventh Circuit and lower courts that the anti-retaliation provision of the FLSA should be read to cover only complaints filed to the government, not to private employers.¹³⁶ The Court noted that the lower courts all held to the contrary, that the anti-retaliation provision protects complaints made by employees to the government as well as private employers.¹³⁷ However, Saint-Gobain failed to argue this point in its response to Kasten's petition for certiorari and did not bring the argument to light to the Court until filing its brief on the merits.¹³⁸ Justice Breyer noted that the Court does not usually consider a separate legal question not raised in the parties' certiorari briefs and that resolution of the oral or written complaint issue presented in the case could be reached independent of determining whether the FLSA anti-retaliation provision covered employees who complained to an employer rather than the government.¹³⁹ Therefore, the Court proceeded on the sole question of whether "an oral complaint of a violation of the Fair Labor Standards Act is protected conduct under the [Act's] retaliation provision."¹⁴⁰

The Court noted that the anti-retaliation provision of the FLSA provides protection to employees who have "filed any complaint"¹⁴¹ and that interpretation of that phrase was dependant upon "reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis[.]"¹⁴² The Court began its interpretation of the phrase "filed any complaint" by analyzing the text of the statute.¹⁴³

The Court first endeavored to determine the meaning of the word "filed."¹⁴⁴ In determining the meaning of the term "filed," the Court examined dictionary definitions, legislative and administrative usage, as well as judicial usage of the term.¹⁴⁵ The Court noted that dictionary definitions of the word "filed" were inconclusive due to varying definitions, some of which indicate a writing while other definitions contemplate uses of the word that would allow oral material to be filed.¹⁴⁶ The Court found that legislators, administrators, and judges have all used the word "filed" in the context of oral statements.¹⁴⁷ The effect being that various state statutes provide for oral filings and oral complaints may be filed pursuant to

136. *Kasten v. Saint-Gobain*, 131 S.Ct. 1325, 1336 (2011).

137. *Id.*

138. *Id.*

139. *Id.* (citing S.Ct. Rule 15.2; *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75, n. 13 (1996)).

140. *Id.* at 1330 (internal quotations omitted).

141. *Id.* (citing 29 U.S.C. § 215(a)(3)) (internal quotations omitted).

142. *Id.* (citing *Dolan v. Postal Service*, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006) (internal quotations omitted)).

143. *Id.* at 1331.

144. *Id.*

145. *Id.* at 1331–33.

146. *Id.* at 1331 (citations omitted).

147. *Id.*

certain regulations promulgated by various federal agencies.¹⁴⁸ The Court also examined judicial usage of the term “filed” and found that oral filings were a known mechanism at the time Congress drafted the anti-retaliation provision of the FLSA.¹⁴⁹

The Court conceded that filings, by their nature, are most likely to be accomplished in a writing.¹⁵⁰ However, the Court noted that the entirety of the phrase, “filed any complaint,” specifically the use of the term “any,” operated to indicate that the phrase should be interpreted broadly to include oral complaints.¹⁵¹ Despite the broad interpretation, the Court noted that the phrase itself did not provide a strong enough indication to reach a conclusion as to how the phrase should be interpreted.¹⁵²

Finally, the Court sought to interpret the term “filed” by looking to contextual indications from other appearances of the term in the FLSA as well as other statutes that contain anti-retaliation provisions.¹⁵³ The Court noted that the term “filed” or its variations appeared in numerous other provisions of the FLSA but none of these appearances operated to resolve the interpretive issue presented by the phrase “filed any complaint” as found in the anti-retaliation provision.¹⁵⁴ These other appearances involve filings that are either always in the form of a writing, specifically require a writing, or, like the anti-retaliation provision, do not indicate whether filings must be in the form of a writing or can be done orally.¹⁵⁵ Similarly, the Court’s examination of language found in anti-retaliation provisions of other statutes did not provide conclusive evidence as to the intent of Congress in drafting the particular anti-retaliation provision found in the FLSA.¹⁵⁶ The Court concluded that the text of the antiretaliation provision, taken alone, could not be interpreted to provide a definitive answer as to whether or not oral complaints were protected and therefore further analysis was required.¹⁵⁷

After the textual analysis, the Court sought evidence, independent of the language of the text, suggestive of Congress’ intent in drafting the anti-retaliation provision.¹⁵⁸ The Court highlighted several functional considerations that suggested Congress, when drafting the FLSA, intended the anti-retaliation provision to cover both oral and written complaints.¹⁵⁹ First, the Court reasoned that Congress’ basic

148. *Id.* at 1331–32 (citations omitted).

149. *Id.* at 1332 (citations ommitted).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* (citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 226 (1994)).

154. *Id.*

155. *Id.* at 1332–33.

156. *Id.*

157. *Id.* at 1333.

158. *Id.*

159. *Id.*

objectives in drafting the FLSA requires the anti-retaliation provision to be interpreted to protect oral as well as written complaints.¹⁶⁰ In drafting the FLSA, Congress sought to establish, among others, substantive wage, hour, and overtime standards to eradicate poor working conditions that negatively impacted the standard of living of workers.¹⁶¹ Enforcement of these standards is contingent upon “information and complaints received from employees seeking to vindicate rights claimed to have been denied.”¹⁶² The anti-retaliation provision was designed to ensure the effectiveness of this enforcement scheme by preventing employers from using the threat of economic retaliation to silence employees who may potentially complain.¹⁶³ The Court reasoned that reading the anti-retaliation provision to protect only complaints made in writing would undermine Congress’s enforcement mechanism because such a construction would have failed to protect those illiterate and uneducated workers that would be effectively unable to make a complaint in writing form.¹⁶⁴ According to the Court, these were the employees that the FLSA was especially meant to protect and such a result was incongruous with Congress’s intent in providing protections to employees under the FLSA.¹⁶⁵

Following this determination, the Court also noted that limiting the protections of the anti-retaliation provision to employees who complain in writing would limit needed flexibility for those entities responsible for enforcing the FLSA.¹⁶⁶ The Court noted that such an approach could potentially limit Government agencies’ abilities to learn of employer violations through the use of “hotlines, interviews, and other oral methods of receiving complaints.”¹⁶⁷ Additionally, the Court noted that a restriction of the anti-retaliation provision to complaints made in writing would discourage the use of informal grievance procedures by employers taking complaints of employees.¹⁶⁸ However, the Court was clear in noting that it would not determine whether the anti-retaliation provision protects employees who make complaints to their employer.¹⁶⁹

After the textual analysis, the Court looked to the interpretations of the anti-retaliation provision promulgated by federal agencies charged with enforcing the FLSA.¹⁷⁰ The Court noted that because Congress delegated the powers of enforcement of the FLSA to federal agencies their interpretation of the anti-

160. *Id.*

161. *Id.*

162. *Id.* (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)) (internal quotations omitted).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 1334.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1335.

retaliation provision was persuasive on the issue.¹⁷¹ These agencies have consistently considered complaints to be filed when presented orally or in writing.¹⁷²

Finally, the Court noted that the FLSA requires fair notice to employers. The Court noted that although the textual analysis did not clearly distinguish between writings and oral statements, the evidence examined suggested that a “filing” is a serious occasion and not a triviality.¹⁷³ Therefore, “filed any complaint” necessarily involves “some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns.”¹⁷⁴

The Court held that the Seventh Circuit’s determination that oral complaints cannot fit the phrase “filed any complaint” in the anti-retaliation provision was incorrect.¹⁷⁵ Rather, oral complaints can be protected under the anti-retaliation provision.¹⁷⁶ To be protected, a complaint, whether oral or in writing, “must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection.”¹⁷⁷

Justice Scalia dissented and was joined by Justice Thomas in all but footnote 6.¹⁷⁸ The dissent argued that the anti-retaliation provision does not cover complaints made to employers and therefore the judgment of the Seventh Circuit should be affirmed.¹⁷⁹ According to Justice Scalia, the plain meaning of the anti-retaliation provision as well as the context in which it appears operates to require that an employee file an official grievance with a court or an agency to be protected from employer retaliation.¹⁸⁰ Rather than focus on the word “filed,” the dissent reached this conclusion by examining the word “complaint,” its meaning at the time the FLSA was passed, as well as its meaning derived from the other words in the phrase “filed any complaint.”¹⁸¹

IV. ANALYSIS

In *Kasten*, the Supreme Court correctly held that an employee’s oral complaints are protected activity under the FLSA anti-retaliation provision. However, the Court failed to ensure adequate protections to complaining employees by explicitly refusing to determine the scope of protection under the retaliation provision to employees who complain of FLSA violations directly to an employer, whether in

171. *Id.*

172. *Id.*

173. *Id.* at 1334.

174. *Id.*

175. *Id.* at 1336.

176. *Id.* at 1335.

177. *Id.*

178. *Id.* at 1336.

179. *Id.* at 1336–37.

180. *Id.* at 1337–38.

181. *Id.*

writing or orally. The Court should have reached a definitive holding on the issue, providing that employee complaints to employers may be protected, whether orally or in writing, on the basis of a case-by-case factual analysis.

A. Court's Holding Results in Less Protections for Employees

The Supreme Court, in holding that oral complaints are protected as filing any complaint under the anti-retaliation provision of the FLSA, was consistent with its prior observations regarding the FLSA. Prior to its decision in *Kasten*, the Court stipulated that the FLSA is remedial in nature and the statute should therefore be interpreted broadly.¹⁸² Additionally, as the Court noted in *Kasten*, the purpose of the FLSA is to provide an incentive to employees to report wage and hour violations by employers.¹⁸³

In the case below, the Seventh Circuit barred all oral complaints from protection under the FLSA¹⁸⁴ and thereby undermined the remedial purpose of the FLSA by interpreting the statute in a narrow manner. As the Supreme Court pointed out, definitions of the term “filed” are not conclusive as to whether a complaint can be “filed” by being made orally.¹⁸⁵ Some dictionary definitions require a filing to be made in writing while others seemingly allow for oral filings.¹⁸⁶ The broad dictionary definitions coupled with the Court’s prior holdings that the FLSA is remedial in purpose and be interpreted broadly, the Congressional intentions in drafting the FLSA, and the approaches of agencies charged with enforcing the FLSA operate to provide strong evidence that complaints can be filed orally under the anti-retaliation provision.¹⁸⁷

Although the Court correctly determined that the FLSA anti-retaliation provision protects oral complaints, it failed to fully recognize the remedial purpose of the FLSA and ensure that the act was broadly interpreted to provide an incentive to employees to report wage and hour violations by employers. The Court, citing Saint-Gobain’s failure to properly argue the point, did not address the issue of whether an employee complaint to an employer regarding potential violations of the FLSA is protected activity.¹⁸⁸ The Court’s failure to address this point presents an important restriction on the protections provided to employees under the anti-retaliation provision and operates to restrict incentives to employees to report potential FLSA violations by employers, the core enforcement technique of the FLSA.

182. *Tennessee Coal, Iron & R. Co. v. Muscado Local No. 123*, 321 U.S. 590, 597 (1944).

183. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292–93 (1960).

184. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 570 F.3d 834, 838 (7th Cir. 2009).

185. *Kasten*, 131 S.Ct. at 1331.

186. *Id.*

187. *Id.* at 1331–36.

188. *Id.* at 1336.

The Court's failure to address employee complaints to employers jeopardizes protections for complaining employees that were in place in several circuits before the Court's holding in *Kasten*.¹⁸⁹ Of the circuits that addressed the scope of the FLSA's anti-retaliation provision, only the Second Circuit held that an employee was not protected under the anti-retaliation provision for any complaint made to an employer, whether in writing or oral.¹⁹⁰ Before *Kasten*, the majority of the circuits that addressed this issue held that an employee's complaint to an employer may be protected under the anti-retaliation provision.¹⁹¹ The majority of the circuits that determined an employee's complaint to an employer may be protected under the anti-retaliation provision engaged in a factual analysis of the complaint at issue to determine whether the complaint was subject to protection under the FLSA.¹⁹² The circuits that engaged in this type of analysis did not hold that an internal complaint is not protected solely because it was not submitted to an employer in writing.¹⁹³ Rather, the question of whether a complaint was protected turned on the content of the complaint.

Internal complaints to an employer had been found to be protected activity when the complaint concerned some violation of the FLSA,¹⁹⁴ and when the complaining employee stepped out of his or her employment role in making the complaint.¹⁹⁵ Additionally, although a complaint was required to concern a violation of the FLSA, an employee did not need to specifically cite the FLSA when asserting a violation by an employer. Oral complaints had been found to satisfy this standard when an employee verbally asserted an objection to unequal pay,¹⁹⁶ told an employer she believed the employer to be engaging in "unlawful sex discrimination" and "breaking some sort of law[,]"¹⁹⁷ and had an outburst in the workplace and refused to take part in a scheme the employee believed to be unlawful.¹⁹⁸

The facts of *Kasten* illustrate a set of circumstances that would have been found to be a valid FLSA complaint under this approach. *Kasten*, in his various complaints to supervisors, complained that he believed the location of the company's time clocks was unlawful because it caused employees to not be properly compensated.¹⁹⁹ He also advised supervisors that he was contemplating filing a lawsuit against the employer due to the location of the time clocks.²⁰⁰ In making the complaint, *Kasten* was also acting outside of his employment role. *Kasten* was

189. See *supra* Part III.B.2.

190. See *supra* Part III.B.2.i.

191. See *supra* Part III.B.2.

192. *Supra* Part III.B.2.iii; III.B.2.iv.

193. *Supra* Part III.B.2.iii.

194. *Supra* Part III.B.2.iii.

195. *Supra* Part III.B.2.iv.

196. *EEOC v. White & Sons Enterprises*, 881 F.2d 1006, 1011 (11th Cir. 1999).

197. *EEOC v. Romeo Community Schools*, 976 F.2d 985, 989 (6th Cir. 1992).

198. *Brennan v. Maxey's Yamaha*, 513 F.2d 179, 180 (8th Cir. 1975).

199. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 619 F.Supp.2d 608, 611 (W.D. Wis. 2008).

200. *Id.*

employed as a manufacturer and did not have any human resources or management duties.²⁰¹ Kasten clearly asserted his belief that the employer was acting unlawfully due to the location of the time clocks. Kasten's assertion of unlawful activity was similar to those complaints found to be protected activity by other circuits in that Kasten orally complained to his employer about activity that he believed to be unlawful.

However, the Court's failure to address whether an employee's complaint to an employer is protected under the anti-retaliation provision potentially opens the door to all employee complaints to employers regarding FLSA violations not being protected. The Court's failure to address whether complaining to an employer is a protected activity has already resulted in lower courts restricting protections available to complaining employees under the FLSA. The United States District Court for the Western District Court of New York, in *Son v. Reina Bijoux*,²⁰² recently held that the anti-retaliation provision of the FLSA does not protect an employee who complains of FLSA violations to an employer, orally or in writing, and subsequently suffers an adverse employment action by the employer.²⁰³ In *Son*, the employee complained to her employers during several meetings regarding the employers' failure to compensate her for overtime hours that she was required to work.²⁰⁴ During the last meeting, the employers terminated Son's employment.²⁰⁵

In reaching this decision, the court interpreted the Supreme Court's holding in *Kasten*,²⁰⁶ noting that the Supreme Court specifically avoided the issue of whether an employee who complains to an employer, orally or in writing, is protected under the anti-retaliation provision.²⁰⁷ Rather, as the district court noted, the Supreme Court's holding in *Kasten* merely established that an employee who complains, orally or in writing, to a government agency is protected from employer retaliation.²⁰⁸ Therefore, the district court reasoned that it was free to apply existing Second Circuit precedent regarding employee complaints to employers.²⁰⁹ The Second Circuit, prior to the Supreme Court's decision in *Kasten*, was the only circuit to specifically hold that employee complaints to employers are not protected activity under the anti-retaliation provision of the FLSA.²¹⁰ Therefore, the district court was not required to engage in any analysis to determine whether Son's complaint to her employer was a protected activity beyond determining that Son

201. *Id.* at 610.

202. 2011 WL 4716344, No. 11 Civ. 2315 (SAS) (W.D.N.Y. 2011).

203. *Id.* at *4.

204. *Id.* at *1.

205. *Id.*

206. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 131 S.Ct. 1325 (2011).

207. *Son*, 2011 WL 4716344, No. 11 Civ. 2315 (SAS) at *4

208. *Id.*

209. *Id.*

210. *See supra* Part III.B.2.i.

did in fact complain to her employers and consequently was not entitled to anti-retaliation protection under the FLSA.²¹¹

However, the Fourth Circuit has taken the opposite approach. In *Minor v. Bostwick Laboratories*,²¹² the Fourth Circuit held that an employee's oral complaint to an employer regarding potential FLSA violations was protected activity under the FLSA.²¹³ In that case, an employee met with the CEO of the company that employed her to voice concerns that the employee's direct supervisor was acting in direct violation of the FLSA.²¹⁴ Less than a week after the meeting, the CEO terminated the employee.²¹⁵

The Fourth Circuit, noting that the issue of whether an employee who lodges a complaint regarding FLSA violations with an employer is protected under the FLSA anti-retaliation provision was a matter of first impression for the circuit, looked to the Supreme Court for guidance.²¹⁶ Although the Fourth Circuit had previously indicated, in *Ball v. Memphis Bar-B-Q*,²¹⁷ that complaints to employers were not a protected activity, the Fourth Circuit noted that its decision in that case only concerned the protections for employees who testify pursuant to an FLSA claim and did not specifically determine whether an employee who lodges a complaint with an employer is protected.²¹⁸

In determining whether complaints to employers are protected, the Fourth Circuit noted that *Kasten* was not controlling because the Supreme Court had failed to determine whether an employee who complained to an employer was protected under the anti-retaliation provision of the FLSA.²¹⁹ Instead, the Fourth Circuit used the Supreme Court's reasoning in *Kasten* as persuasive and proceeded to address the issue as a matter of first impression.²²⁰ The Fourth Circuit held that the ambiguity in the plain meaning of the language of the provision, remedial nature of the FLSA, and agency interpretations of the anti-retaliation clause operate to require that intracompany complaints by employees, oral or in writing, be protected under the anti-retaliation provision.²²¹ Additionally, the Fourth Circuit echoed the Supreme Court in *Kasten*, noting that the an employer must effectively be put on notice that an employee is making a complaint meaning that a filing must

211. *Son*, 2011 WL 4716344, No. 11 Civ. 2315 (SAS) at *4.

212. 669 F.3d 428 (4th Cir. 2012).

213. *Id.* at 439.

214. *Id.* at 430.

215. *Id.*

216. *Id.* at 431–2.

217. 228 F.3d 360 (4th Cir. 2000).

218. *Minor*, 669 F.3d at 434.

219. *Id.* at 432–3.

220. *Id.* at 433.

221. *Id.* at 434–38.

be accompanied by some degree of formality.²²² Therefore, not every instance of an employee simply “blowing off steam” will be considered a protected activity.²²³

The division between these two subsequent decisions is illustrative of the Court’s failure in *Kasten* in that its holding potentially allows lower courts to avoid any analysis of whether an employee suffered retaliation for a complaint regarding FLSA violations where the employee complained to an employer. The Court’s decision to not address the issue of whether intracompany complaints are protected results in the division among circuits regarding intracompany complaints to remain virtually unchanged except that circuits that hold intracompany complaints to be protected now must hold that such complaints made orally are also protected. Therefore, as illustrated in *Son*, courts are free to continue to hold that intracompany complaints are not protected. Additionally, circuits are arguably free to determine, while *Kasten* extended FLSA protection to oral complaints to government agencies or courts, not to extend those protections to intracompany complaints.

By denying protection to a category of complaints the Supreme Court failed to provide complete protection to employees and account for the informal atmosphere of the workplace. In the workplace, an employee can voice a concern directly to an employer regarding the employer’s unlawful activity and immediately draw attention from the employer. Conversely, complaints made to administrative agencies or courts usually will not be known to an employer until after they have been formally filed.

By not granting protection to an employee who voices concerns to an employer, the Supreme Court jeopardizes the FLSA purpose of providing incentives to employees to report unlawful activity by employers. Unwitting employees who are not aware that they must submit any complaint regarding unlawful activity to an employer could be subject to termination before they are able to file a formal complaint. This problem is exacerbated by the common policies of employers that encourage open, verbal communication of ideas and concerns between employees and managers.²²⁴ Employees voicing concerns about unlawful employment practices in this setting are not guaranteed protection from retaliation by the employer under the Court’s holding in *Kasten*.

B. Proposed Inquiry for Determining Protected Activity

In order to fully realize the purpose of the FLSA anti-retaliation provision, the Supreme Court should have addressed the intracompany complaint issue and developed a standard for when intracompany complaints, oral or in writing, are protected. The Court should have engaged in a case-by-case factual analysis of the

222. *Id.* at 439 (citations omitted).

223. *Id.* (citations omitted).

224. See e.g., Open Door, Walmart Corporate, <http://walmartstores.com/AboutUs/286.aspx> (last visited Apr. 27, 2012) (“Through our ‘open door’ policy, associates (employees) are free to share suggestions, ideas and voice concerns....”).

content of a complaint. Such a case-by-case was employed by the circuits before *Kasten*. Under that analysis, to be protected activity, an employee's complaint should allege unlawful activity on the part of the employer²²⁵ and the employee must step out of his or her employment role in making the complaint.²²⁶ Additionally, an employee's complaint must be substantial enough to rise above the level of an "abstract grumbling[]" or vague expression of discontent.²²⁷

A potential standard for determining whether an employee's oral complaint to an employer could arise to protected activity under the FLSA can be found from jurisprudence of prior circuit court decisions. The various circuits that had found oral complaints to be protected activity under the FLSA did not expressly hold that all oral complaints are protected activity.²²⁸ The key factor in those cases was whether the complaining employee, in making a complaint to an employer, alleged that the employer was engaging in an activity that the employee believed to be unlawful.²²⁹ The complaining employee was also required to step out of his or her employment role and make a complaint that was adverse to the employer.²³⁰ These standards should be considered in conjunction with the Supreme Court's established standard that to be protected, a complaint, whether oral or in writing, "must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."²³¹

Applying this analysis to the facts of *Kasten*, it would be clear that the employee engaged in protected activity by complaining to his employer about the illegality of the company time clock location.²³² *Kasten* did not put forth an "abstract grumbling" or a vague expression of discontent regarding the location of the time clocks. *Kasten* repeated this allegation several times over a period of months, in accordance with the company's internal complaint mechanism, and advised the employer that he was contemplating filing a lawsuit against the employer regarding the issue.²³³

This case-by-case factual analysis presents several important considerations. A positive holding that intracompany complaints are protected, in addition to the Court's holding that oral complaints are protected, will subject employers to an increased burden to make sure that they do not take action against an employee who has informally complained, orally or in writing, that may be considered retaliatory. However, refusing to address the issue of intracompany complaints fails to realize the remedial purpose of the statute and ensure that employees are free to

225. See *supra* Part III.B.2.iii.

226. See *supra* Part III.B.2.iv.

227. Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 626 (5th Cir. 2008).

228. *Supra* Part III.B.2.iii.

229. *Supra* Part III.B.2.iii.

230. *Supra* Part III.B.2.iv.

231. *Id.*

232. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 619 F.Supp.2d 608, 611 (W.D. Wis. 2008).

233. *Kasten v. Saint-Gobain Perf. Plastics Corp.*, 131 S.Ct. 1325, 1329–30 (2011).

report violations as Congress intended. Such a categorical silence runs counter to the purpose of the FLSA and the principles set forth by the Supreme Court regarding application of the statute.²³⁴

V. CONCLUSION

By explicitly refusing to determine whether any employee complaints made directly to an employer, whether orally or in writing, are protected under the FLSA anti-retaliation provision the Court failed to properly recognize the remedial purpose of the statute and potentially categorically denied protection to employees who complain to an employer. This holding has the effect of allowing individual circuits to determine whether employee complaints made directly to an employer will be a protected activity in that circuit. The potential result is that employers will be able to retaliate against any employee who makes known their objection to unlawful activity so long as that employee has yet to complain to a court or agency. The Court's holding does not go far enough in ensuring adequate protections to employees under the FLSA anti-retaliation provision and will potentially undermine the incentive at the heart of FLSA implementation for employees to report employer activity that is unlawful and in violation of the FLSA.

234. *Tennessee Coal, Iron & R. Co. v. Muscado Local No. 123*, 321 U.S. 590, 597 (1944); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292–93 (1960).