

DEFILING THE RETALIATION DOCTRINE: *KASTEN V. SAINT-GOBAIN* AND THE ANTI-RETALIATION PROVISION OF THE FAIR LABOR STANDARDS ACT

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INTRODUCTION

Kevin Kasten was sure that the time clocks at the plant where he worked were in the wrong place.¹ He thought they should be at the entrance, rather than the exit, of the locker room in which he “gowned” before starting work.² Kasten was so sure that he and his co-workers were entitled to be paid for their time spent in the locker room that in the span of three months, he told two supervisors and a human resources generalist on five separate occasions that the location of the clocks was illegal.³ On December 11, 2006, roughly three months after Kasten’s initial complaint, his employer moved the time clocks to the entrance of the locker room.⁴ Kasten was fired the same day.⁵

Kasten sued, claiming that his termination violated the anti-retaliation provision of the Fair Labor Standards Act (FLSA).⁶ On appeal from an order granting the defendant-employer’s motion for summary judgment, Kasten’s claim provided the Seventh Circuit an opportunity to declare its position on a circuit split centered around the use of the word “filed” in the

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1. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 836 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (Mar. 22, 2010) (No. 09-834).

2. *Id.*

3. *Id.* These are the facts as pleaded by Kasten; defendant Saint-Gobain denied having received a single complaint from Kasten regarding the location of the time clocks. *Id.* Defendant Saint-Gobain has since admitted that this “gowning” time, which takes place at the beginning and end of all shifts, is in fact compensable under the Fair Labor Standards Act, 29 U.S.C. § 201, *et. seq.* (2006). Brief and Required Short Appendix of Petitioner-Appellant, Kevin Kasten at 3, *Kasten*, 570 F.3d 834 (No. 08-2820).

4. Brief and Required Short Appendix of Petitioner-Appellant, Kevin Kasten, *supra* note 3, at 6.

5. *Id.*

6. *Kasten*, 570 F.3d at 837; *see also* 29 U.S.C. § 215(a)(3) (2006) (the “anti-retaliation provision” of the FLSA). This note will use “anti-retaliation provision” and “§ 215(a)(3)” interchangeably to refer to 29 U.S.C. § 215(a)(3).

anti-retaliation provision of the FLSA.⁷ At issue was whether employees who internally and informally complain to their employers of FLSA violations, but never reduce their complaints to writing, may properly claim to have “filed any complaint,” as that phrase is used in the anti-retaliation provision of the FLSA.⁸ Although the Seventh Circuit agreed with Kasten and the Secretary of Labor⁹ that a remedial statute such as the FLSA demands broad interpretation, the court ultimately held that—even broadly interpreted—the terms of the FLSA lead to the inescapable conclusion that one simply cannot “file” a verbal complaint.¹⁰ It then affirmed the lower court’s entry of summary judgment in favor of the defendant-employer, Saint-Gobain.¹¹

This note will explore the reasoning and policy concerns that are implicated in determining whether an employee’s verbal complaint of an FLSA violation to an employer should qualify as a protected activity under § 215(a)(3) of the Act.¹² This section, also known as the anti-retaliation provision, provides in relevant part 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.¹³

Part I will examine the history of the Fair Labor Standards Act and its evolution since it was enacted in 1938. Part II will present existing guidance in the form of Supreme Court precedent, then move on to explore the development of the circuit split as it stands presently. Part III will present the Seventh Circuit’s reasoning in *Kasten v. Saint-Gobain*. Part IV will

7. *Kasten*, 570 F.3d at 838–39. The court actually analyzed the claim as two issues: (1) whether internal and informal complaints fall under the purview of the anti-retaliation provision, which the court answered in the affirmative; and (2) whether such an internal and informal complaint must be in writing in order to qualify as protected activity under the FLSA. *Id.* at 837. It is the second question that has generated a circuit split. *Id.* at 838–39.

8. *Id.* at 837. Section 215(a)(3) provides in relevant part that “it shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint . . . under or related to this chapter.” 29 U.S.C. § 215(a)(3).

9. *Kasten*, 570 F.3d at 837 (noting that the U.S. Secretary of Labor, having filed a brief as *amicus curiae*, supported Kasten in his argument that unwritten complaints should be deemed protected activity under the statute).

10. *Id.* at 840.

11. *Id.*

12. 29 U.S.C. § 215(a)(3).

13. *Id.* The statute lists four protected activities that an employee must take as a prerequisite to stating a claim under the anti-retaliation provision. *See, e.g., Kasten*, 570 F.3d at 837. This note will refer to the “filed any complaint” language as the “complaint clause” and to the “testified or about to testify” language as the “testimony clause.”

argue that both Supreme Court and prior Seventh Circuit precedent demand the opposite result of the one reached in *Kasten*, as well as explain how *Kasten*'s analysis relies on inapposite case law. Part IV will conclude by explaining why adherence to the policies embodied by the FLSA command the opposite result from that reached by the Seventh Circuit in *Kasten v. Saint-Gobain*: Specifically, that courts should read § 215(a)(3) in a manner that protects both verbal and written internal complaints by employees.¹⁴

I. THE HISTORY AND EVOLUTION OF THE FLSA

On May 24, 1937, President Roosevelt sent the bill to Congress with a message that America should be able to give “all our able bodied working men and women a fair day’s pay for a fair day’s work . . . [a] self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers’ wages or stretching workers’ hours.”¹⁵

The Fair Labor Standards Act of 1938 delivered on Roosevelt’s 1936 election campaign promise to protect American workers from substandard labor conditions.¹⁶ The stated policy of the FLSA is “to correct . . . and eliminate”¹⁷ working conditions that are “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”¹⁸ The statute effectuates this policy primarily by (1) prohibiting child labor,¹⁹ (2) instituting a federal minimum wage,²⁰ and (3) requiring employers to pay employees one and one-half their regular rate of pay for any time worked in excess of forty hours per workweek.²¹ While the Act’s requirements may be less than revolutionary by modern standards, the judicial context in which the Roosevelt administration presented the FLSA to Congress gave rise to considerable doubt as to whether it would pass and, if it did, whether it would survive the challenges to its constitutionality that were sure to follow.²²

14. See 570 F.3d at 840; 29 U.S.C. § 215(a)(3).

15. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 25 (1978) (quoting FRANKLIN ROOSEVELT, PUBLIC PAPERS AND ADDRESSES, VOLUME VI 209–14 (Random House 1937)).

16. *Id.* at 23.

17. 29 U.S.C. § 202(b).

18. *Id.* § 202(a).

19. *Id.* §§ 203(l), 212.

20. *Id.* § 206.

21. *Id.* § 207.

22. FRANCES PERKINS, THE ROOSEVELT I KNEW 248–53 (Viking Press 1946). The Supreme Court had established a pattern of invalidating both federal and state labor laws on constitutional grounds. See, e.g., *Morehead v. Tiplado*, 298 U.S. 587, 609, 618 (1936) (applying *Adkins* to invalidate a New York law establishing a minimum wage for women); *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 539, 545, 561–62 (1923) (invalidating a District of Columbia law enacting a minimum wage for women and

Now over seventy years old, the three substantive obligations of the FLSA continue to govern the manner in which covered employers hire and compensate employees. The Act has been amended several times; these amendments typically serve to expand, rather than to restrict, both the scope of the Act's coverage and the nature of remedies available in the event of a violation.²³ The Equal Pay Act of 1963²⁴ came in the form of an amendment to the FLSA, continuing to fulfill the Act's promise to protect the "general well-being of workers."²⁵ Another example of the expansion of the Act's protection was a 1977 amendment that allows a court to assess previously unavailable compensatory and punitive damages against an employer who violates the Act's anti-retaliation provision.²⁶ In sum, history subsequent to the passage of the Fair Labor Standards Act has remained faithful to and expanded upon Roosevelt's initial promise to protect American workers.

II. THE SUPREME COURT ON THE FLSA AND THE CIRCUIT SPLIT ON PROTECTED ACTIVITY UNDER § 215(a)(3)

The Supreme Court has not spoken directly to the question of what constitutes a "filed" complaint in the context of § 215(a)(3).²⁷ However, the absence of a definitive ruling on one particular word among the thousands in the statute does not leave the courts of appeals without guidance from the Supreme Court. The lower courts can and should look not only to Supreme Court cases parsing the language of the FLSA, but also to those examining the language in the anti-retaliation provisions of other federal legislation, as well as to the case law propounding certain canons of statutory interpretation.

A. *The Supreme Court on the FLSA and Retaliation*

As discussed above, the presentation and passage of the FLSA prompted significant concerns about and challenges to its constitutionality-

children as an unconstitutional violation of the liberty of contract); *Hammer v. Dagenhart*, 247 U.S. 251, 269, 277 (1918) (holding that a federal law prohibiting child labor amounted to an unconstitutional exercise of Congress' commerce power). One such challenge to the constitutionality of the FLSA came in *United States v. Darby*, 312 U.S. 100 (1940), discussed *infra* Part II-A.

23. For a brief discussion of one exception to the expansive nature of FLSA amendments, see *infra* note 45 on the Portal-to-Portal Act of 1947, 29 U.S.C. § 254(a)(2).

24. 29 U.S.C. § 206(d).

25. *Id.* § 202(a).

26. *Id.* § 216(b); see also *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 551 (7th Cir. 1991) (explaining that, prior to the 1977 amendment, the only available remedies for a violation of § 215(a)(3) were lost wages and liquidated damages).

27. 29 U.S.C. § 215(a)(3).

ty.²⁸ The Supreme Court allayed those concerns in 1940, when it issued its opinion in *United States v. Darby*.²⁹ In upholding the Act against the constitutional challenge of an employer indicted for having violated the statute,³⁰ *Darby* marked the first, but certainly not the last, occasion on which the Court relied fairly heavily on the policy concerns underlying the Act to bolster its analysis.³¹ To that end, the Court found that the FLSA's primary policy goals were to eliminate both "[working] conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being" and "[the] spreading and perpetuating [of] such substandard labor conditions" across the country.³²

Underscoring the point that the best approach to interpreting the FLSA is one that focuses on the Act's greater societal goals, the *Darby* Court declared that "legislation aimed at a whole embraces all its parts."³³ To animate this concept, the Court first declared that Congress could constitutionally prohibit the interstate shipment of goods produced in violation of the Act.³⁴ Then, finding that the manufacture of such goods constitutes one part of the prohibited interstate shipment even if the manufacture does not cross state lines, the Court held that Congress could prohibit the non-compliant, intrastate manufacture.³⁵ The Court also made clear that a violation of the FLSA in the course of even small-scale production similarly contributes to the whole "evil aimed at by the Act," and was prohibited just as any other violation.³⁶ Ultimately, if an employer's practices could reasonably result in the interstate shipment of goods produced in a manner that violated the FLSA, those practices contributed to the spread of unacceptable working conditions targeted by the Act. Such practices are therefore prohibited as well, as the FLSA "embrace[s]" them as one part of the whole prohibition on interstate shipments.³⁷

Four years after *Darby*, the Court heard a case that presented an ideal opportunity to reanimate the concept of "embrac[ing]" each part of legislation as sweeping as the FLSA.³⁸ *Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123* presented the question of whether miners

28. See *supra* note 22 and accompanying text.

29. 312 U.S. 100 (1940).

30. *Id.* at 108, 125–26.

31. See *id.* at 115.

32. *Id.* at 109–10.

33. *Id.* at 123.

34. *Id.* at 115.

35. *Id.* at 123.

36. *Id.* at 122–23.

37. *Id.* at 115, 122–23.

38. See *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944).

undertook “work” or “employment,” as those terms are used in the statute, when they traveled to and from the site at which they mined iron ore.³⁹ Confronted with the task of interpreting the language at issue without any applicable statutory definitions, the Court demonstrated that when defining particular language in the Act, the interpretation must remain faithful to the statute’s purposes.⁴⁰ Before beginning its analysis, the Court made explicit that it could properly define the terms in question “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 them the fruits of their toil and exertion.”⁴¹

With this principle in mind, the Court mandated that the FLSA “not be interpreted in a narrow, grudging manner,” because only a broad application of the statute could animate the legislation’s “remedial and humanitarian purpose.”⁴² Having clarified the great degree of protection the FLSA must afford to workers who fall within its ambit, the Court then gave the terms at issue their colloquial meaning.⁴³ Writing for the majority, Justice Murphy held that the travel time at issue did constitute “work,” thus requiring that the employers compensate employees for such time.⁴⁴ In so doing, Justice Murphy underscored that the purpose of the statute compelled this reading because only by so broadly defining “work” would the miners receive “the just remuneration guaranteed them by the Act for contributing their time, liberty and strength primarily for the benefit of others.”⁴⁵

39. *Id.* at 591–92.

40. *Id.* at 591–92, 597.

41. *Id.* at 592.

42. *Id.* at 598.

43. *Id.*

44. *Id.* at 603.

45. *Id.* The holding in *Tennessee Coal* that travel time from the mine entrance to the working face constituted “work” under the Act was superseded three years later when Congress amended the FLSA by passing the Portal-to-Portal Act of 1947. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25–26 (2005) (citing Portal-to-Portal Act of 1947, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251–62 (2006))). *Tennessee Coal* was the first case in what has been called the “Supreme Court Portal-to-Portal trilogy”; both subsequent Supreme Court cases and commentators assert that the last of the cases in the trilogy was truly the trigger for the enactment of the Portal-to-Portal Act. *See, e.g., id.* (explaining that the newly emerging definition of “work” had effectively voided “long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liability, immense in amount and retroactive in operation”); *see also* Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 *BUFF. L. REV.* 53, 96 (1991) (noting that *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946), was unique from the first two cases in the trilogy because of the “ordinariness” of the factory in which the plaintiff-employees worked and the risk that the “near-universality” of the defendant-company’s practices would open the door to litigation potentially resulting in “billions of dollars in retroactive payments and liquidated damages”). Accordingly, the passage of the Portal-to-Portal Act does not reflect disapproval or the correction of the *Tennessee Coal* mandate that lower courts interpret the FLSA broadly. It was not a misinterpretation of the term “work” that brought about the amendment, but a desire to stem a flood of related litigation, which, at an economically sensitive time, “threaten[ed] the very existence of thousands of business[es].” *Id.* at 133–34 (quoting *Portal to*

The *Tennessee Coal* case, and its command that the Act not receive a “narrow, grudging interpretation,”⁴⁶ did not completely eliminate the difficulty of interpreting what was, at that time, unfamiliarly liberal and sweeping legislation. The lack of a singular, clear approach to interpreting this New Deal legislation resulted in confusion among the courts and parties litigating FLSA claims; such claims often presented surprisingly unfamiliar territory, even where the issue was one of applying a term as seemingly straightforward as “employee.”⁴⁷

If the people and companies falling under the coverage of the Fair Labor Standards Act retained any notion following *Darby* and *Tennessee Coal* that the statute was meant to apply in a strict, prescribed manner, Justice Reed’s 1947 opinion for the Court in *Rutherford Food Corp v. McComb* dispelled any such notion.⁴⁸ The issue in *Rutherford Food* was distinct from that in *Tennessee Coal* to the extent that the FLSA does define an employee, which was the term at issue in *Rutherford Food*.⁴⁹ The statute’s definition, however, did not shed any light on the question of who qualifies as an employee under the Act, as the statute circularly defined an employee as “any individual employed by an employer.”⁵⁰ As a result, the Supreme Court found itself in a situation similar to that in *Tennessee Coal*, and it again called on the Act’s remedial purpose as its primary source of guidance.⁵¹

The defendant in *Rutherford Food* operated a slaughterhouse in Missouri and had contracted with several individuals who were to bone the beef that came through the slaughterhouse.⁵² The workers furnished their own tools and equipment, and they were not members of the union to which all of the other slaughterhouse employees belonged.⁵³ The district court held that these factors, among others, led to the conclusion that the workers were independent contractors, rather than “employees” as defined under the Act.⁵⁴ The district court’s holding accorded with the common

Portal Wages: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary, 80th Cong. 17 (1947)).

46. 321 U.S. at 597.

47. See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727–28 (1947).

48. See *id.* at 730; *Tenn. Coal*, 321 U.S. at 597; *Darby*, 312 U.S. at 122–23.

49. Compare *Rutherford Food Corp.*, 331 U.S. at 728 n.6 (quoting statute’s definition of “Employee” as “any individual employed by an employer”), with *Tenn. Coal*, 321 U.S. at 597 (noting the absence of any statutory definition of the terms at issue).

50. *Rutherford Food Corp.*, 331 U.S. at 728 n.6 (reprinting the then-current definition of “employee”).

51. *Id.* at 726–27, 730; *Tenn. Coal*, 321 U.S. at 597.

52. *Rutherford Food Corp.*, 331 U.S. at 724–25.

53. *Id.*

54. *Id.* at 726.

law test of control, which was a popular method of determining whether a particular class of workers qualified as employees, as opposed to independent contractors.⁵⁵

The Supreme Court did not agree that the common law test of control was the appropriate way to determine coverage under the FLSA.⁵⁶ The Court did not claim that applying the right-to-control test would have defeated the plain meaning of the word “employee”; rather, the Court did not assert that *any* plain meaning could be ascribed to the undefined—yet essential—terms of the statute.⁵⁷ Presented with the opportunity to define a term so vital to the statute’s proper coverage, the unanimous Court reanimated its earlier pronouncement that the application of the Act, and consequently the definitions therein, must be expansive.⁵⁸ The Court so broadly interpreted the term “employee” that the FLSA came to protect “many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.”⁵⁹ In holding that the workers in question were “employees” under the statute, the Supreme Court adopted the lower court’s conclusion that “underlying economic realities” must dictate the interpretation of the FLSA.⁶⁰ In fact, these “economic realities” are so essential to the proper application of the FLSA that they simply override even the longstanding, commonly used definitions of terms as integral to the Act as “employee.”⁶¹

Perhaps more akin to the present issue than those before the Court in *Darby*, *Tennessee Coal*, and *Rutherford Food*, the Supreme Court has addressed the anti-retaliation provision of the FLSA, albeit in a context distinct from that in which the Seventh Circuit decided *Kasten*.⁶² In *Mitchell v. Robert De Mario Jewelry, Inc.*, the issue before the Court stemmed from a provision found in § 217 of the Fair Labor Standards Act, which at that time prohibited the district courts from “order[ing] the payment . . . of unpaid minimum wages or unpaid overtime compensation or an additional

55. *Walling v. Rutherford Food Corp.*, 156 F.2d 513, 516–17 (10th Cir. 1946).

56. *Rutherford Food Corp.*, 331 U.S. at 726–27, 730.

57. *Id.* at 728–30.

58. *Id.* at 730.

59. *Id.* at 729 (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947)).

60. *Id.* at 726–27 (quoting *Walling*, 156 F.2d at 516–17).

61. *Id.* at 726–27, 731.

62. *Compare Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 289 (1960) (addressing whether a federal district court has jurisdiction under the FLSA to order an employer to reimburse wages lost as a result of a violation of § 215(a)(3)), *with Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 837 (7th Cir. 2009) (addressing whether (1) informal, internal complaints and (2) unwritten, verbal complaints enjoy the protection of the anti-retaliation provision of the FLSA).

equal amount as liquidated damages” in an action brought under § 215.⁶³ The Court of Appeals for the Fifth Circuit earlier found that this language clearly denied the district court jurisdiction to order reimbursement of wages lost because of an employer’s § 215(a)(3) violation.⁶⁴ Three dissenting Justices agreed with the Fifth Circuit, relying on the section’s seemingly explicit language denying the district court jurisdiction.⁶⁵

Writing for the majority, however, Justice Harlan applied a line of reasoning rife with the same principles expounded in *Rutherford Food* thirteen years earlier.⁶⁶ The *Mitchell* majority refused to turn a blind eye to the public interest inherently implicated in the FLSA in favor of a quick and dirty plain-text assessment; instead, the *Mitchell* majority reaffirmed that the only proper analysis of the Fair Labor Standards Act’s language is one that gives full effect to Congress’ intent to “foster a climate in which compliance with the substantive provisions of the Act would be enhanced.”⁶⁷ Rather than consider itself bound by the text, the *Mitchell* majority looked to the policies underlying the anti-retaliation provision and the FLSA generally.⁶⁸

Expanding on its finding that Congress intended that the FLSA be enforced through the “information and complaints”⁶⁹ of covered employees, the Court then determined what effect, if any, the denial of district court jurisdiction to order payment of wages might have on the undeterred functioning of the Act.⁷⁰ The *Mitchell* Court acknowledged the reality that “fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”⁷¹ As such, an employee might prefer not to complain of an FLSA violation at all if the provision at issue permitted an employer to withhold wages and drag out litigation, leaving the employee without pay until a final judgment is entered.⁷² The *Mitchell* majority refused to allow an employee’s choice to exercise her rights under the FLSA to constitute a “calculated risk.”⁷³ Because forcing an employee to choose between reporting a perceived FLSA violation and potentially

63. *Mitchell*, 361 U.S. at 289 (quoting the then-current version of 29 U.S.C. § 217). This section of the FLSA has since been amended and now accords with the Court’s holding in *Mitchell*. Compare 29 U.S.C. § 217 (2006), with *Mitchell*, 361 U.S. at 296.

64. *Mitchell*, 361 U.S. at 290.

65. *Id.* at 297 (Whittaker, Black & Clark, JJ., dissenting).

66. *Id.* at 289–97; see generally *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

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

68. *Id.* at 292–93.

69. *Id.* at 292.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 293.

facing the indefinite withholding of her wages may lead a covered worker to “decide that matters had best be left as they are,”⁷⁴ the Court again adopted an extremely broad reading of the statute, allowing the Act to function with optimal efficiency.⁷⁵

While the *Mitchell* holding itself is of little import today given the change in the statute’s language,⁷⁶ many of the courts of appeals have gleaned significant guidance from the reasoning propounded in *Mitchell* in determining where to draw the line between protected and unprotected activity under the anti-retaliation provision of the FLSA.⁷⁷ Furthermore, Supreme Court case law interpreting the FLSA is not the only source of guidance to which the courts of appeals can turn. Because so many federal statutes have explicit or implied anti-retaliation provisions,⁷⁸ there are a number of cases outside of the FLSA context that expound the principles of properly applying anti-retaliation statutes.

An example of this came as recently as 2008, when the Court decided *CBOCS West, Inc. v. Humphries*.⁷⁹ *CBOCS* presented the question of whether a plaintiff could properly state a retaliation claim under 42 U.S.C. § 1981.⁸⁰ Although the statute contains no explicit anti-retaliation provision, the *CBOCS* Court found that the prohibitions of § 1981 itself must extend to retaliation against individuals who seek to exercise the rights explicitly granted by the statute.⁸¹ The majority found that permitting retaliatory actions would ultimately perpetuate the very sort of discrimination that the statute was designed to eliminate, regardless of the fact that § 1981 contains no anti-retaliation provision.⁸²

The manner in which the Supreme Court has interpreted the FLSA evinces a clear pattern. Rather than applying preconceived notions of what any single provision or term means, courts must instead seek out the interpretation that best effectuates the underlying purposes of the Act.⁸³ It is

74. *Id.* at 292.

75. *See id.* at 296.

76. *See* sources cited *supra* note 63.

77. *See, e.g.,* *Saffels v. Rice*, 40 F.3d 1546, 1549 (8th Cir. 1994); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987); *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir. 1984).

78. *See, e.g.,* 42 U.S.C. § 2000e-3(a) (2006) (explicit anti-retaliation provision of Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 623(d) (explicit anti-retaliation provision of Age Discrimination in Employment Act); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008) (finding implied anti-retaliation provision in 42 U.S.C. § 1981).

79. 553 U.S. 442.

80. *Id.* at 445.

81. *Id.* at 452.

82. *Id.*

83. *See, e.g.,* *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

true that such an approach may result in a reading of the statute that does not place great weight on a plain meaning assessment.⁸⁴ Nonetheless, this technique has been repeated consistently in the Court's opinions on the FLSA, and the Court has even gone so far as to find anti-retaliation provisions where none exist; it follows that where lower courts refuse to broadly interpret § 215(a)(3) of the FLSA, such courts contravene binding Supreme Court precedent.⁸⁵

B. *The Circuit Split on Protected Activity Under FLSA § 215(a)(3)*⁸⁶

1. Circuits Finding Oral Complaints to be Protected Under § 215(a)(3)

Kasten v. Saint-Gobain references four opinions handed down by three courts of appeals, all of which granted the protection of the anti-retaliation provision to employees who verbally complained of FLSA violations.⁸⁷ Three of these four cases have in common that they reference the Supreme Court's reasoning in *Mitchell v. Robert De Mario Jewelry*;⁸⁸ the fourth case cites to the reasoning utilized by the other three, specifically pointing to the parts of those three opinions which incorporate language from *Mitchell*.⁸⁹ A survey of the factual situations from which these opinions arose animates the broad applicability of the Supreme Court's reasoning in *Mitchell*.

Before the circuit split on the issue developed, the Eighth Circuit addressed the question of whether verbal protests of FLSA violations were protected under the anti-retaliation provision when it decided *Brennan v. Maxey's Yamaha, Inc.*⁹⁰ The action, brought by the Secretary of Labor, alleged that an investigation by the Department of Labor revealed that the defendant-employer had violated certain provisions of the FLSA.⁹¹ Upon

84. See, e.g., *id.* at 292–93.

85. See *CBOCS, Inc.*, 553 U.S. at 452; *Mitchell*, 361 U.S. at 292, 296; *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729(1947); *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602–03 (1944).

86. The circuit split is presented here as the Seventh Circuit presented it in *Kasten*. For a general overview of the circuit split on retaliation under the Fair Labor Standards Act, see Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535 (2001).

87. 570 F.3d at 839–40 (citing *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989–90 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987); *Brennan v. Maxey's Yamaha*, 513 F.2d 179, 183 (8th Cir. 1975)).

88. *White & Son Enters.*, 881 F.2d at 1011 (citing *Mitchell*, 361 U.S. at 292); *Richardson*, 812 F.2d at 124 (citing *Mitchell*, 361 U.S. at 292); *Maxey's Yamaha*, 513 F.2d at 181 (citing *Mitchell*, 361 U.S. at 293).

89. *Romeo Cmty. Sch.*, 976 F.2d at 989 (citing *Maxey's Yamaha*, 513 F.2d at 181; *White & Son Enters.*, 881 F.2d at 1011; *Richardson*, 812 F.2d at 124–25).

90. 513 F.2d 179.

91. *Id.* at 180.

learning of the violation, the defendant “promptly agreed” to pay its employees the back wages they were due under the Act.⁹² However, instead of simply delivering the checks for the wages owed, the employer not only asked its employees to endorse the checks back to Maxey’s, but also asked that the employees sign a wage receipt form confirming that they had received their back wages.⁹³ Judith Holman, an employee, refused to participate, as she correctly believed that this “scheme” violated the FLSA.⁹⁴ In response, her supervisor gave her two options: She could either endorse the check back to the company and sign the receipt, or she could be fired.⁹⁵ Refusing to acquiesce to her supervisor’s demands, Holman ultimately took the check, refused to endorse it back or sign for its receipt, and was terminated.⁹⁶

The lower court entered judgment for the defendant-employer on the FLSA retaliation claim at the close of trial.⁹⁷ The district court reached its conclusion based on evidence that the defendant did not intend to indefinitely deprive its employees of their back wages; rather, the company allegedly had insufficient funds to cover the checks for the employees’ back wages and wished to treat the endorsement of the checks as a loan to the company, which it would later repay to the employees.⁹⁸ The district court then reasoned that since the defendant had not intended to engage in any illegal scheme to permanently deprive the employees of their backpay, Holman was not protesting an actual violation of the Act and, therefore, could not claim the protection of the anti-retaliation provision.⁹⁹

The Court of Appeals for the Eighth Circuit reversed, finding clear error in the lower court’s reasoning and holding.¹⁰⁰ The appellate court acknowledged that the defendant did not intend to deprive the employees indefinitely of the wages they were due and therefore had not technically violated the FLSA, but the absence of a clear violation did not end the matter.¹⁰¹ The court found that above all, it was obliged to protect an employee’s decision to lawfully assert her rights under the FLSA when she reasonably believed those rights to be in jeopardy, regardless of whether

92. *Id.*

93. *Id.*

94. *Id.* at 180–81.

95. *Id.* at 181–82.

96. *Id.*

97. *Id.* at 180.

98. *Id.* at 182–83.

99. *Id.*

100. *Id.* at 183.

101. *Id.* at 182–83.

the employer violated the Act.¹⁰² Such a holding was necessary to avoid the unsavory choice, which *Mitchell* sought to prohibit, between asserting one's rights and enjoying the protection of § 215(a)(3) on the one hand, or choosing not to complain out of fear that § 215(a)(3) might not actually serve to protect a complaining employee on the other.¹⁰³ Any other result would defeat the anti-retaliation provision's purpose "of preventing employees' attempts to secure their rights under the Act from taking on the character of a 'calculated risk.'"¹⁰⁴

Eight years later, the Third Circuit decided *Brock v. Richardson*, an action instituted by the Secretary of Labor on behalf of George Banyas; the facts of the case were analogous to those in *Maxey's Yamaha* to the extent that the anti-retaliation provision did not literally extend to the factual circumstances before the court.¹⁰⁵ In *Richardson*, however, the defendant-employer mistakenly believed that Banyas had contacted the Department of Labor to complain of overtime violations when in fact another of Richardson's employees had contacted the Department.¹⁰⁶ After terminating Banyas, the defendant made several statements indicating that the reason for the termination was its belief that Banyas had complained to the Department of Labor.¹⁰⁷ On appeal to the Third Circuit, the defendant argued that, since it only *believed* that Banyas had engaged in protected activity, Banyas could not claim the protection of the anti-retaliation provision.¹⁰⁸ This argument seems to follow from the plain language of § 215(a)(3), since the anti-retaliation provision affords protection based on an employee's actions, rather than on what actions an employer believes the employee has taken.¹⁰⁹

The Third Circuit in *Richardson*, much like the Eighth Circuit in *Maxey's Yamaha*, opted to conduct its analysis by considering the potential effects of its holding on the proper functioning of the statute as a whole, rather than by parsing out the language of the anti-retaliation provision.¹¹⁰ Quoting heavily from both *Tennessee Coal* and *Mitchell*, the court concluded that the reach of § 215(a)(3) must first account for "the need to pre-

102. *Id.* at 181.

103. See *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 293 (1960).

104. *Maxey's Yamaha*, 513 F.2d at 181 (quoting *Mitchell*, 361 U.S. at 293).

105. See *Brock v. Richardson*, 812 F.2d 121, 122–23 (3d Cir. 1987) (where the employer mistakenly believed the employee had engaged in a protected activity and terminated him in retaliation); *Maxey's Yamaha*, 513 F.2d at 182 (where the employee mistakenly believed an FLSA violation was taking place, protested the violation, and was terminated in retaliation for the protest).

106. *Richardson*, 812 F.2d at 122.

107. *Id.* at 122–23.

108. *Id.* at 123.

109. 29 U.S.C. § 215(a)(3) (2006).

110. See *Richardson*, 812 F.2d at 123–24; *Maxey's Yamaha*, 513 F.2d at 181.

vent employees' 'fear of economic retaliation' for voicing grievances about substandard conditions."¹¹¹ Finding that Richardson's discharge of Banyas created the same "atmosphere of intimidation" that the discharge would have created had Banyas actually complained, the court affirmed the judgment finding the defendant liable under the anti-retaliation provision.¹¹²

Unlike the factual circumstances of *Maxey's Yamaha* and *Richardson*, in *EEOC v. White & Son Enterprises* there was no misunderstanding as to whether the employer's practices violated the FLSA, nor was there any question as to whether the employer properly identified the employees who wished to complain of a violation.¹¹³ In *White & Son*, the defendant-employer had been warned that some of the company's female employees had discovered they were being paid less than their male coworkers, and that the female employees wished to discuss the pay disparity with the defendant the following morning.¹¹⁴ The next day, the defendant entered the room in which the women were waiting to speak to him and told them, "I ain't going to give you no raise."¹¹⁵ He then left the room and instructed his secretary to issue the women's final paychecks.¹¹⁶

On appeal, the defendant argued that the terminated female employees had not explicitly carried out any of the actions listed in the anti-retaliation provision and, therefore, could not properly state a claim under that section.¹¹⁷ The Eleventh Circuit, much like the Eighth Circuit in *Maxey's Yamaha* and the Third Circuit in *Richardson*, did not allow the statutory language to dictate its holding.¹¹⁸ Instead, it reached its holding based upon what would best animate the remedial purposes of the FLSA, as explained in *Tennessee Coal*, and upon consideration of how essential the anti-retaliation provision is to the proper functioning of the Act, as explained in *Mitchell*.¹¹⁹ Specifically, the court recognized that the purpose of § 215(a)(3) was to ensure that employees feel free to protest FLSA violations, since such protests are the primary reporting mechanism of FLSA

111. *Richardson*, 812 F.2d. at 124 (quoting *Mitchell*, 361 U.S. at 292).

112. *Id.* at 125.

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

114. *Id.* at 1007; *see also infra* note 123 and accompanying text.

115. *White & Son Enters.*, 881 F.2 at 1011.

116. *Id.* at 1008.

117. *Id.* at 1011.

118. *See id.*; *Brock v. Richardson*, 812 F.2d 121, 123–24 (3d Cir. 1987); *Brennan v. Maxey's Yamaha*, 513 F.2d 179, 181 (8th Cir. 1975).

119. *See White & Sons Enters.*, 881 F.2d at 1011 (citing *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960); *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)).

violations, which in turn ensure compliance with the Act.¹²⁰ Guided by these principles, the court held that “unofficial complaints . . . constitute an assertion of rights protected under the statute.”¹²¹

The last case to which *Kasten* refers is the Sixth Circuit’s opinion in *EEOC v. Romeo Community Schools*.¹²² In *Romeo Community Schools*, the defendant-employer was paying a female custodian over one dollar less per hour than her male counterparts.¹²³ The female employee complained of the disparity, informing the defendant that she believed the school’s practice of paying her less than the male custodians was “breaking some sort of law.”¹²⁴ Following this complaint, but before any formal proceedings had been initiated, the defendant-employer stopped calling the female custodian in for temporary work, and began hiring less senior custodians for permanent positions.¹²⁵

The district court had granted summary judgment in favor of the defendant-employer on the retaliation claim, adopting the defendant’s position that the court must construe § 215(a)(3) narrowly, such that no retaliation claim will lie unless the complaining employee has initiated formal proceedings, either in court or with a government agency.¹²⁶ The Sixth Circuit had little trouble in reversing the entry of summary judgment, finding clear error in the district court’s reasoning and narrow construction of § 215(a)(3).¹²⁷ Rather than requiring the filing of any formal proceedings, the court stated that an employee need only *assert* the protection of the Act in order to enjoy the protections of the anti-retaliation provision; a formal filing is not determinative.¹²⁸ The Sixth Circuit found support for this proposition in *Maxey’s Yamaha, Richardson, and White & Son*.¹²⁹

120. *Id.* (quoting *Mitchell*, 361 U.S. at 292) (stating that “[f]or . . . practical and other reasons,’ Congress sought to secure compliance with the substantive provisions of the labor statute by having ‘employees seeking to vindicate rights claimed to have been denied’ lodge complaints or supply information to officials regarding allegedly substandard employment practices and conditions”).

121. *Id.*

122. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 840 (7th Cir. 2009) (citing *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989–90 (6th Cir. 1992)).

123. 976 F.2d at 986. This claim arose under the Equal Pay Act, 29 U.S.C. § 206(d), which is an amendment to the FLSA. Due to its inclusion as part of the FLSA, retaliation claims under the Equal Pay Act are governed by § 215(a)(3). See *Romeo Cmty. Sch.*, 976 F.2d at 986–89.

124. *Romeo Cmty. Sch.*, 976 F.2d at 989.

125. *Id.* at 987.

126. *Id.* at 989.

127. *Id.*

128. *Id.*

129. See *supra* note 89 and accompanying text. The court also cited *Love v. RE/MAX of America, Inc.*, which construed the anti-retaliation provision to apply to “the unofficial assertion [of] rights through complaints at work.” *Romeo Cmty. Sch.*, 976 F.2d at 989 (quoting *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir. 1984)).

The approaches of the Third, Eighth, and Eleventh Circuits in these cases have the common goal of reaching a result that effectuates the purposes of the FLSA and allowing the statute to function properly.¹³⁰ All three rulings send a clear message to employers that it is unlawful under the FLSA to retaliate against an employee who asserts her rights under the Act, and that loopholes which defeat liability under § 215(a)(3), even when seemingly apparent in the text itself, are scarce.¹³¹ Given the Supreme Court case law discussed in Part II-A, demonstrating that “examination of purpose is a staple of statutory interpretation,” this common thread in the courts of appeals’ reasoning is entirely sound both in method and result.¹³²

2. Circuits Finding Oral Complaints Not to be Protected Under § 215(a)(3), According to *Kasten*

The first case the Seventh Circuit points to in support of its holding in *Kasten* is *Ball v. Memphis Bar-B-Q, Inc.*¹³³ In *Ball*, an employee intended to file a lawsuit under the FLSA; the employee informed his manager, plaintiff Peter Ball, of his plans to sue the employer.¹³⁴ Upon revealing this information to the president of the company, the plaintiff-manager made clear that if he were called to testify in any such lawsuit he would testify truthfully, rather than recount a presumably fabricated version of events that the president suggested.¹³⁵ Ball was terminated a few days following the conversation in which he apparently refused to perjure himself.¹³⁶ At issue in *Ball*, then, was the proper application of the testimony clause of § 215(a)(3), which provides in relevant part that “it shall be unlawful . . . to discharge or in any other manner discriminate against any employee because such employee . . . has testified or is about to testify in any . . . proceeding [instituted under or related to this chapter].”¹³⁷

Specifically, the Fourth Circuit framed the issue as whether an employee can claim to be “about to testify,” within the meaning of § 215(a)(3), when no one has initiated the proceeding at which the em-

130. See *Romeo Cmty Sch.*, 976 F.2d at 989; *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121, 124–25 (3d Cir. 1987); *Brennan v. Maxey’s Yamaha*, 513 F.2d 179, 181 (8th Cir. 1975).

131. See *Romeo Cmty Sch.*, 976 F.2d at 989; *White & Son Enters.*, 881 F.2d at 1011; *Richardson*, 812 F.2d at 124–25; *Maxey’s Yamaha*, 513 F.2d at 181.

132. *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 861 (2005).

133. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 839 (7th Cir. 2009) (citing *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000)).

134. *Ball*, 228 F.3d at 362.

135. *Id.*

136. *Id.*

137. *Id.* (emphasis added) (quoting 29 U.S.C. § 215(a)(3) (2006)).

ployee would testify.¹³⁸ The court first found that, because the type of “proceeding” the Act contemplates must be “instituted” and must provide an opportunity to testify, the proceeding must be a formal one.¹³⁹ Taking this reasoning one step further, the court concluded that because the proceeding must have been “instituted” in order to qualify as a proceeding encompassed by the statute, the testimony clause only protects an employee after an individual initiates a formal proceeding.¹⁴⁰ The court then affirmed the dismissal of the plaintiff’s retaliation claim because an intention to testify in a not-yet-instituted formal proceeding is not the same as an employee who actually does “testify or is about to testify” in an ongoing proceeding.¹⁴¹ The Fourth Circuit arrived at this holding grudgingly, taking the time to characterize the defendant’s conduct as “morally unacceptable” and “offensive.”¹⁴²

The second case from which the *Kasten* court purports to gain support is the Second Circuit’s opinion in *Lambert v. Genesee Hospital*.¹⁴³ In *Genesee Hospital*, the three female plaintiffs, Eva Baker, Tami Foster and Janine Lambert, worked in the defendant’s duplicating services department.¹⁴⁴ When the plaintiffs’ supervisor assigned a male to a temporary supervisor position, Baker and Lambert complained that because Baker effectively had the same position, she should receive the same, higher rate of pay as the newly assigned male.¹⁴⁵ Roughly one year later, the supervisor assignment was permanently assigned to the same male; the plaintiffs alleged that in permanently assigning the male to the supervisor position, the employer was retaliating against Baker and Lambert for having earlier complained of unequal pay.¹⁴⁶

A jury found for all three plaintiffs on their FLSA retaliation claim, finding that the complaint regarding the difference in pay between the male supervisor and Baker caused the defendant to permanently assign the male to the supervisor position.¹⁴⁷ The district court, however, granted the defendant’s motion for judgment notwithstanding the verdict and ordered a

138. *Id.* at 363.

139. *Id.* at 364.

140. *Id.*

141. *Id.* at 362 (quoting 29 U.S.C. § 215(a)(3)).

142. *Id.* at 364–65.

143. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 839 (7th Cir. 2009) (citing *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993)).

144. *Genesee Hosp.*, 10 F.3d at 50.

145. *Id.* at 51.

146. *Id.*

147. *Id.* at 51–52.

new trial on the retaliation claim.¹⁴⁸ The plaintiffs then appealed to the Second Circuit, with the grounds for appeal resting entirely on procedural questions regarding the district court's grant of the defendant's motion for judgment notwithstanding the verdict.¹⁴⁹

The Second Circuit quickly determined that the district court had erred both in granting the defendant's motion for judgment notwithstanding the verdict and in ordering a new trial on the FLSA retaliation claims.¹⁵⁰ Rather than reinstating the jury verdict in favor of the plaintiffs, however, the court instead issued judgment for the defendants.¹⁵¹ The holding sprung from a *sua sponte* determination that the plaintiffs had failed to state a claim of retaliation under the FLSA as a matter of law, "due to the different threshold requirements of [an FLSA] retaliation claim as compared with a Title VII retaliation claim."¹⁵²

The Second Circuit first pointed out that Title VII's anti-retaliation provision is broader, protecting an employee who "has opposed any practice,"¹⁵³ whereas the FLSA's anti-retaliation provision protects an employee only after they have either (1) "filed any complaint," (2) instituted a proceeding, or (3) testified or intended to testify in a proceeding.¹⁵⁴ Leaving the Title VII comparison behind, the court then simply declared that the provision's plain language allows a cause of action for retaliation when an employee has filed a formal complaint, "but does not encompass complaints made to a supervisor."¹⁵⁵

Interestingly, the court proceeded to evaluate the strength of the plaintiffs' retaliation claim, noting that, when plaintiffs Baker and Lambert complained that Baker should receive wages equal to those of her male counterpart, neither plaintiff mentioned her belief that the pay disparity was the result of gender discrimination; the plaintiffs stated simply that it was "not fair."¹⁵⁶ Although the line of reasoning is stilted, moving from a com-

148. *Id.* at 52.

149. *Id.* at 50

150. *Id.* at 53–54.

151. *Id.* at 54.

152. *Id.* at 54, 56. In contrast to the language of § 215(a)(3), the anti-retaliation provision of Title VII makes it "an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by the subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (2006).

153. 42 U.S.C. § 2000e-3(a).

154. *Genesee Hosp.*, 10 F.3d at 55 (citing 29 U.S.C. § 215(a)(3)). The Second Circuit's characterization of § 215(a)(3) omits a fourth type of protected activity: service or an intention to serve on an industry committee. 29 U.S.C. § 215(a)(3).

155. *Genesee Hosp.*, 10 F.3d at 55.

156. *Id.* (characterizing the complaints at issue as "simply oral complaints to a supervisor that an employee was being paid less than the complainant thought she should have been").

parison of the FLSA and Title VII to a plain language assessment of § 215(a)(3) to an analysis of the facts, the court ultimately held that the failure to file any formal complaint was fatal to the plaintiffs' § 215(a)(3) claim.¹⁵⁷

III. KASTEN V. SAINT-GOBAIN PERFORMANCE PLASTICS CORP.

In *Kasten v. Saint-Gobain*, the Seventh Circuit addressed two issues: first, whether intra-company complaints constitute protected activity under the complaint clause of § 215(a)(3); and, second, whether unwritten, verbal complaints constitute protected activity under the same provision.¹⁵⁸ The court disposed of the first issue fairly quickly, finding that the inclusion of the word “any” in the complaint clause clearly expands the scope of the type of complaint so as to include complaints made to an employer; thus, it held that intra-company, informal complaints do fall within the complaint clause.¹⁵⁹ This result, the court noted, was in accordance with the “vast majority” of circuit courts to have addressed the issue of intra-company complaints.¹⁶⁰ The second question regarding the propriety of verbal, unwritten complaints under the section, however, called for a more thorough analysis.¹⁶¹

The Seventh Circuit approached the second question by first isolating the language at issue in order to determine its plain meaning.¹⁶² Purporting to look “only at the language of the statute,” the court summarily stated that the word “file,” in its verb form, “connotes a writing.”¹⁶³ Immediately following this conclusion, the opinion goes on to quote a dictionary definition which “accord[s] with what [the court] believe[s] to be the common understanding” of the verb “to file.”¹⁶⁴ The lower court had also referred to a dictionary in order to support its belief that it is impossible to “file” a verbal complaint; the appellate court approvingly recounted that portion of the lower court’s opinion.¹⁶⁵

After determining that a verbal complaint does not constitute protected activity under the complaint clause, the *Kasten* opinion addresses the cir-

157. *Id.* at 54–56, 58.

158. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 837 (7th Cir. 2009).

159. *Id.* at 838.

160. *Id.*

161. *See id.* at 838–40.

162. *Id.* at 839.

163. *Id.*

164. *Id.*

165. *Id.* at 838 (quoting *Kasten v. Saint-Gobain Performance Plastics Corp.*, 619 F. Supp. 2d 608, 612 (W.D. Wis. 2008)).

cuit split on the issue.¹⁶⁶ The Seventh Circuit quoted heavily from the Fourth Circuit's opinion in *Ball* in support of its own holding; the court included the holding from *Genesee Hospital* to support its own holding as well.¹⁶⁷ The court then acknowledged some of the cases that reached the opposite result of that reached in *Kasten*, but found that they do not offer any guidance, as none of those cases addressed the specific question of whether one can "file" a verbal complaint.¹⁶⁸

Kasten responded to the circuits which protect verbal complaints by pointing to the anti-retaliation provisions of other employment statutes, noting that the range of protected activity is broader in both Title VII and the Age Discrimination in Employment Act, both of which protect an employee who has "opposed any practice" made illegal by the other provisions of those laws.¹⁶⁹ The Seventh Circuit used the broader language of these other employment statutes to dictate the breadth of the coverage of the FLSA's anti-retaliation provision.¹⁷⁰ The court did acknowledge that the language of the FLSA demands "expansive interpretation"; ultimately, though, because the anti-retaliation provision of the FLSA uses narrower language than other anti-retaliation provisions, and because the plain meaning of the word "file" connotes a writing, the court found that to include verbal complaints as protected activity would be to "read[] words out of the statute," an act it refused to carry out.¹⁷¹

IV. *KASTEN* V. *SAINT-GOBAIN* DEFEATED THE PURPOSE OF THE ANTI-RETALIATION PROVISION OF THE FLSA

A. *Kasten Reaches its Result by Departing from its Own Precedent and by Disregarding Supreme Court Precedent*

Before it issued its opinion in *Kasten*, the Seventh Circuit's FLSA jurisprudence evinced a pattern of broadly interpreting the Act.¹⁷² These

166. *Id.* at 839–40.

167. *Id.* at 840.

168. *Id.* at 839–40.

169. *Id.* at 840 (citing 42 U.S.C. § 2000e-3(a) (2006); 29 U.S.C. § 623(d) (2006)).

170. *Id.*

171. *Id.*

172. See *Scott v. Sunrise Healthcare Corp.*, 195 F.3d 938, 940 (7th Cir. 1999) (characterizing § 215(a)(3) as prohibiting retaliation for "asserting" a claim under the FLSA); *Sapperstein v. Hager*, 188 F.3d 852, 856–57 (7th Cir. 1999) (characterizing the language of the FLSA's anti-retaliation provision as "very broad[,] . . . warrant[ing] an expansive interpretation" and stemming from an "[evident] policy rationale"); *Shea v. Galaxie Lumber & Constr. Co., Ltd.*, 152 F.3d 729, 734–36 (7th Cir. 1998) (reinstating a jury verdict of \$9,100 in punitive damages against an employer found to have violated § 215(a)(3) where the jury had awarded no compensatory damages on the same claim); *Crowley v. Pace Suburban Bus Div. of the Reg'l Transp. Auth.*, 938 F.2d 797, 799–800 (7th Cir. 1991) (reasoning that

broad interpretations indicated a desire to proceed with an eye toward animating the statute's "humanitarian purpose," true to the principles first announced by the Supreme Court in *Tennessee Coal*.¹⁷³ The earlier opinions also demonstrated great fidelity to some of the more basic canons of statutory interpretation, particularly where discrete statutory language of the FLSA was at issue.¹⁷⁴ Against the backdrop of its prior FLSA decisions, *Kasten* demonstrated a significant departure from the Seventh Circuit's methods of interpreting the Act in a manner that accorded with the Supreme Court's interpretive approach.¹⁷⁵

It is only by ignoring one of the simplest methods of statutory interpretation that the *Kasten* court arrived at its decision refusing to protect verbal complaints under the FLSA. Supreme Court case law on statutory interpretation requires that an inquiry into the true meaning of statutory language begin with an examination of (1) the language itself and (2) "the language and design of the statute as a whole."¹⁷⁶ Yet, in addressing the issue of whether verbal complaints constitute protected activity, the Seventh Circuit looked no further than the plain language of one portion of one subsection of the Act before rejecting the plaintiff's argument that "to file" a complaint, when defined broadly, means "to submit" a complaint.¹⁷⁷ Instead, the court summarily determined that the plain meaning of "to file" so clearly demands a writing that any further analysis was unnecessary.¹⁷⁸

This approach by the court is puzzling. In fact, the Seventh Circuit itself quoted and applied the two-step method of statutory interpretation in an earlier case requiring it to determine what statute of limitations applied to a § 215(a)(3) action, where the statute itself was completely silent on the issue.¹⁷⁹ Without explanation, however, the *Kasten* court excused itself from following this previously acknowledged Supreme Court precedent when it failed to carry out the second of these most basic steps of statutory

the language of the FLSA must receive "an expansive interpretation" and declining to find the statute's plain language as persuasive).

173. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944); *see also* sources cited *supra* note 172.

174. *See, e.g., Crowley*, 938 F.2d at 798 (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291–92 (1988)) (noting that determining the meaning of a statute's plain language requires reference to "the language and design of the statute as a whole").

175. *See generally Kasten*, 570 F.3d 834; *see also* sources cited *supra* note 172.

176. *K Mart Corp.*, 486 U.S. at 291 (citing *Bethesda Hosp. Ass'n v. Bowen*, 486 U.S. 399, 403–05 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221–22 (1986)).

177. *Kasten*, 570 F.3d at 838–39.

178. *Id.*

179. *Crowley*, 938 F.2d at 798 (citing *K Mart Corp.*, 486 U.S. at 291).

interpretation by ignoring the “language and design” of the entire Fair Labor Standards Act.¹⁸⁰

A survey of the entire FLSA demonstrates exactly why the comprehensive, two-pronged technique of statutory interpretation urged by the Supreme Court in *K Mart Corp. v. Cartier, Inc.*¹⁸¹ is so valuable. The thrust of the Seventh Circuit’s reasoning in *Kasten* is that Congress intended to require employees to submit a written instrument when it chose the word “file” in § 215(a)(3).¹⁸² As an initial matter, this argument loses much of its force in light of the three separate provisions of the FLSA, one of which appears in § 215 itself, that explicitly require a writing.¹⁸³ Two provisions demand that “consent [be] *in writing*,”¹⁸⁴ while a third allows an exemption for a purchaser who acquired goods manufactured in violation of the Act, as long as the purchaser received “*written assurance*” from the producer that the goods in question were manufactured in compliance with the Act.¹⁸⁵ Clearly, then, when the drafters of the FLSA wished to require a writing to satisfy the Act’s requirements, they said so explicitly.

Taking the inverse of the rule declared in *Kasten*, the holding would imply that, where the FLSA requires a person to submit a writing of any sort, the act of submitting such a writing would be referred to as “filing.”¹⁸⁶ This interpretation, however, is far more formalistic than the FLSA itself. The Act requires that certain reports be submitted or transmitted, but not filed,¹⁸⁷ and that an action for a violation of the Act may be brought, commenced, or maintained, but not filed.¹⁸⁸ And of the provisions that do refer to a filing, two specify that the document to be filed must be in writing.¹⁸⁹ That Congress was less than deliberate in the verbs it chose to denote the act of submitting a document is clear in § 215 itself, which prohibits employers from falsifying “any statement, report, or record filed or kept” pursuant to the Act’s extensive recordkeeping requirements.¹⁹⁰ If

180. *Kasten*, 570 F.3d at 839. The court states that it is looking “only at the language of the statute,” but its analysis does not look beyond the word “filed,” except to include an excerpt from a dictionary which supports its position. *Id.* (citing WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1983)).

181. *K Mart Corp.*, 486 U.S. at 291.

182. *Kasten*, 570 F.3d at 839.

183. 29 U.S.C. §§ 214(c)(5)(A), 215(a)(1), 216(b) (2006).

184. *Id.* (emphasis added).

185. *Id.* § 215(a)(1) (emphasis added).

186. *Kasten*, 570 F.3d at 839 (stating that “the natural understanding of the phrase ‘file any complaint’ requires the submission of some writing to an employer, court, or administrative body”).

187. 29 U.S.C. §§ 204(d), 213(c)(5)(C)(i).

188. *Id.* §§ 214(c)(5)(G), 216(b), 216(c), 216(d)(3)(B), 216(d)(3)(C).

189. *Id.* §§ 214(c)(5)(A), 216(b).

190. *Id.* § 215(a)(5).

the FLSA truly intended to mean that only written instruments can be filed, the inclusion of “statements” in this provision is difficult to explain.¹⁹¹

Ultimately, such a detailed survey of the entire statute is only one method of analyzing the proper application of the “filed any complaint” provision. Although that technique arguably sheds the most light on the intentions of the statute’s drafters, an equally helpful, yet more efficient, approach would have been to expand the scope of the analysis at least to the entire text of § 215(a)(3). Ultimately, the *Kasten* court’s failure to place the language at issue in its true context relieved the court of having to justify a truly puzzling result.

In addition to refusing to comprehensively analyze the Act’s language, the Seventh Circuit fails to rationalize its sudden departure from its previous opinions applying § 215(a)(3). The *Kasten* opinion itself noted earlier Seventh Circuit cases that not only upheld compensatory and punitive damages awards, but also affirmed findings of employer liability under § 215(a)(3) where retaliatory acts followed an employee’s internal, verbal complaint.¹⁹² The court explained its departure from these older cases by pointing out that, in the earlier cases, the issue of whether verbal complaints are protected under § 215(a)(3) had never been argued by the parties.¹⁹³ While it naturally would be less inclined to rule on the issue without the parties having presented it, the Seventh Circuit did have at its disposal in all of those cases the same tool utilized by the Second Circuit in *Genesee Hospital*; namely, it could have dismissed some or all of those suits *sua sponte* for a lack of subject matter jurisdiction.¹⁹⁴ For if submitting a verbal complaint does not constitute “filing a complaint” under the FLSA, then an employee who complains verbally has not engaged in protected activity, and may not state a retaliation claim.¹⁹⁵ While the failure to dismiss for lack of subject matter jurisdiction in the earlier cases is not noteworthy in and of itself, the assuredness with which the Seventh Circuit arrived at its holding in *Kasten* runs contrary to any concept of *stare decisis*.¹⁹⁶

191. This gives rise to the question of whether, under the FLSA’s reporting requirements, the employer should be obligated to document statements regarding the Act’s potential violation, such as the statements *Kasten* made regarding the location of the time clocks. No such obligation currently exists. See 29 C.F.R. § 516.2 (2009).

192. *Kasten*, 570 F.3d at 837–38 (citing *Sapperstein v. Hager*, 188 F.3d 852, 857 (7th Cir. 1999); *Scott v. Sunrise Healthcare Corp.*, 195 F.3d 938, 940–41 (7th Cir. 1999); *Shea v. Galaxie Lumber Constr. Co.*, 152 F.3d 729, 731 (7th Cir. 1998)).

193. *Id.* at 837 n.1.

194. See *Lambert v. Genesee Hosp.*, 10 F.3d 46, 56 (2d Cir. 1993).

195. See *id.*

196. See source cited *supra* note 172; see also *Reich v. Davis*, 50 F.3d 962, 965–56 (11th Cir. 1995) (stating that part of the basis for its holding was its previous interpretations of § 215(a)(3)).

One noteworthy example of the previously broad interpretation the Seventh Circuit awarded the anti-retaliation provision came in *Crowley v. Pace Suburban Bus*.¹⁹⁷ In *Crowley*, the defendant-employer terminated the plaintiff after the latter refused to attend a meeting upon being told that he would not be compensated for his attendance.¹⁹⁸ The issue on appeal was whether the plaintiff's retaliation claim was barred by the statute of limitations; if the statute of limitations under the FLSA applied, the claim would be barred, but if the analogous state law statute of limitations applied, the claim would be timely.¹⁹⁹ The Act's statute of limitations provision lists the sections to which it applies, but it does not name § 215(a)(3) among those sections.²⁰⁰

The court declared at the outset that the task before it was *not* "simply to read [the FLSA's statute of limitations provision] in isolation from the rest of the statute, [which] would be simple."²⁰¹ Underscoring that point, the *Crowley* court dismissed as "unpersuasive" the holding of another court on the same issue, where that court used just such an isolated reading.²⁰² Instead, the court went beyond the language in the statute of limitations provision, and examined closely the "structure and wording of the entire statute."²⁰³ The *Crowley* court concluded that, while the statute of limitations provision made no reference whatever to the anti-retaliation provision, the former provision was clearly intended to encompass claims arising out of the latter.²⁰⁴ The holding stemmed in part from the court's finding that many of the words in the FLSA "had not been given their ordinary meaning by Congress," a fact that led the court to broadly interpret the Act.²⁰⁵

The *Kasten* opinion did more than sharply depart from previous Seventh Circuit jurisprudence on the FLSA, and on § 215(a)(3) in particular; the holding completely ignored the Supreme Court's repeated pronounce-

197. 938 F.2d 797 (7th Cir. 1991).

198. *Id.* at 798. Interestingly, this type of employee protest is precisely the sort to which the *Kasten* decision denies protection, given the verbal nature of the complaint. *Kasten*, 570 F.3d at 840; *Crowley*, 938 F.2d at 798. In *Crowley* itself, though, the court acknowledged in a footnote the uncertainty as to whether the anti-retaliation provision would apply to *Crowley*'s verbal refusal to perform work without receiving pay; the court quickly dismissed the question, however, stating that "§ 215(a)(3) has been construed broadly to include retaliation by the employer for an employee's *assertion* of rights protected under the FLSA." *Crowley*, 938 F.2d at 798 n.3 (emphasis added).

199. *Crowley*, 938 F.2d at 798.

200. *See id.* (citing 29 U.S.C. § 255).

201. *Id.*

202. *Id.* at 801.

203. *Id.* at 799.

204. *Id.* at 801.

205. *Id.* at 799.

ments that considerations of *stare decisis* must be especially forceful in matters of statutory interpretation.²⁰⁶ In fact, the Second Circuit's opinion in *Genesee Hospital* included the Seventh Circuit's *Crowley* opinion in its references to other courts of appeals which did protect employee's purely verbal complaints to supervisors under § 215(a)(3).²⁰⁷ The great importance of allowing individuals to rely on a court's prior precedent is underscored by the facts of *Kasten* itself, where the plaintiff's knowledge of the applicable law was sophisticated enough such that his complaint arose out of a lesser-known provision of the FLSA, rather than the more commonly known minimum-wage and maximum hours requirements.²⁰⁸

B. Kasten Reaches its Result by Relying on Inapposite Case Law and by Mischaracterizing the Circuit Split

The Seventh Circuit asserts in *Kasten* that in refusing to give full effect to the anti-retaliation provision of the FLSA, it merely joined two of its sister circuits on the more restrictive side of the split.²⁰⁹ In fact, the result reached in *Kasten* is not consistent with the reasoning used by either the Fourth Circuit or the Second Circuit in the decisions on which it claims to rely.²¹⁰ While courts often support their reasoning by citing analogous cases of the circuits on one side of a split when joining that constituency,²¹¹ the *Kasten* court uses this technique to excuse itself from justifying the consequences of its holding. Once stripped of the improper reliance it places on clearly distinguishable reasoning, *Kasten* ultimately rests solely on the fact that, in all other employment-related legislation, there exists a more expansive retaliation provision.

While the Seventh Circuit relied on both *Ball* and *Genesee Hospital*, the greater focus is on the former case, which *Kasten* quotes heavily.²¹² While the portions of the *Ball* opinion that the *Kasten* court selectively recounts seem to lend significant support to *Kasten*'s reasoning, placing the *Ball* passages in the proper context reveals that any reliance on the *Ball*

206. See, e.g., *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

207. *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) (citing *Crowley*, 938 F.2d at 798 n.3).

208. See *Kasten*, 570 F.3d at 836.

209. *Id.* at 839–40 (summarizing the reasoning used by the Fourth Circuit in *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000), and that used by the Second Circuit in *Genesee Hospital*, 10 F.3d at 55, and going on to find the reasoning on the other side of the circuit split “difficult to draw guidance from”).

210. See generally *Kasten*, 570 F.3d 834.

211. See, e.g., *United States v. Oplinger*, 150 F.3d 1061, 1067 (9th Cir. 1998).

212. *Kasten*, 570 F.3d at 839 (quoting *Ball*, 228 F.3d at 364).

opinion is both misplaced and misleading.²¹³ The analysis that the Fourth Circuit undertook in *Ball* was not of a claim under the “filed any complaint” provision of § 215(a)(3); rather, the issue centered around when a plaintiff could properly claim to be “about to testify” in an FLSA proceeding.²¹⁴

Thus, while the Seventh Circuit does, in passing, acknowledge that the issue in *Ball* arose in the context of the testimony clause, it brushes with deceptively broad strokes in stating that *Ball* held that “a faithful interpretation of the statute did not recognize mere statements to a supervisor as protected activity.”²¹⁵ The effect of this statement in its proper context, however, is that a “mere statement” about an intention to testify in a potential FLSA proceeding is not the same as actually testifying or preparing to testify in an already-initiated proceeding.²¹⁶ In fact, the Fourth Circuit pointed out in a footnote that *Ball* never invoked the protection of the complaint clause of § 215(a)(3) because he never actually complained but recounted to a supervisor the complaint of another employee; *Ball* merely refused to testify to a presumably false account of events.²¹⁷ The classification of *Ball* as part of the circuit split as to the proper interpretation of the “filed any complaint” language is misleading at best; the manner in which the Seventh Circuit referenced it in *Kasten* makes this abundantly clear.²¹⁸

The other case on which *Kasten* relied was *Genesee Hospital*.²¹⁹ In placing reliance on that case, however, the Seventh Circuit overlooked two significant factors that make *Genesee Hospital* easily distinguishable from *Kasten*. In holding that only formal complaints filed *outside* the company are protected under § 215(a)(3), the Second Circuit rendered as surplusage the “instituted any proceeding” provision of § 215(a)(3); when one files a formal complaint with an agency or court, she has clearly instituted a proceeding.²²⁰ This interpretation runs directly contrary to the Supreme

213. Compare *id.* at 837 (analyzing proper scope of the complaint clause of § 215(a)(3)), with *Ball*, 228 F.3d at 364 (analyzing proper scope of the testimony clause of § 215(a)(3)).

214. *Ball*, 228 F.3d at 364 (“[W]e would not be faithful to the language of the *testimony clause* . . . if we were to expand its applicability to intra-company complaints or to potential testimony in a future-but-not-yet-filed court proceeding”) (emphasis added).

215. *Kasten*, 570 F.3d at 839 (citing *Ball*, 228 F.3d at 364) (emphasis added).

216. See *Ball*, 228 F.3d at 364.

217. *Id.* at 363 n.* (citing *Rayner v. Smirl*, 873 F.2d 60 (4th Cir. 1989)). In fact, the *Ball* court cited to another of its cases, which held that, under a statute with an anti-retaliation provision analogous to the FLSA, “filed any complaint” *does* include intra-company complaints. *Id.*

218. See *Kasten*, 570 F.3d at 839 (citing *Ball*, 228 F.3d at 364).

219. *Kasten*, 570 F.3d at 839 (citing *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993)).

220. See *Genesee Hospital*, 10 F.3d at 55.

Court's repeated warnings against reading statutory text in a way that creates redundancy among two or more separate provisions.²²¹

The other puzzling aspect of *Kasten's* reference to *Genesee Hospital* is that the latter's holding is directly contrary to the first part of the *Kasten* decision. While *Genesee Hospital* denies protection to internal complaints, *Kasten* wasted no time in determining that the word "any" in "filed any complaint" encompasses both informal and formal employee complaints.²²² The Seventh Circuit's willingness to rely on the Second Circuit for a proposition that the Seventh Circuit expressly disapproves earlier in the *Kasten* opinion makes the reference to *Genesee Hospital* both unpersuasive and deceptive.²²³

Stripped of the guise that its decision in *Kasten* is merely the result of the Seventh Circuit's decision to adopt its sister circuits' well-reasoned and applicable interpretations of the anti-retaliation provision of the FLSA, the remaining reasoning runs directly contrary to the binding Supreme Court precedent established in *Darby*, *Tennessee Coal*, *Mitchell*, and *Rutherford Food Corp.*²²⁴ In fact, the language at issue in *Kasten* is much more susceptible to varying interpretations than the clear denial of jurisdiction in *Mitchell* and the terms at issue in *Tennessee Coal* and *Rutherford Food Corp.*²²⁵ What the denial of this protection amounts to, then, is the court's decision to "make a fortress out of the dictionary,"²²⁶ rather than grapple with the previously acknowledged reality that the language of the FLSA often requires the court to overlook an apparently plain meaning.²²⁷

221. See, e.g., *Nat'l Assn. of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007) (citing *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

222. *Kasten*, 570 F.3d at 838; *Genesee Hospital*, 10 F.3d at 55, 58.

223. See *Kasten*, 570 F.3d at 838; *Genesee Hospital*, 10 F.3d at 55, 58; see also *Kasten v. Saint-Gobain Performance Plastics Corp.*, 585 F.3d 310, 311–12 (7th Cir. 2009) (Rovner, J., dissenting from denial of petition for rehearing en banc).

224. *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944); *United States v. Darby*, 312 U.S. 100 (1941).

225. See *Mitchell*, 361 U.S. at 289; *Rutherford Food Corp.*, 331 U.S. at 727–28; *Tenn. Coal*, 321 U.S. at 592.

226. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

227. *Crowley v. Pace Suburban Bus Div. of the Reg'l Transp. Auth.*, 938 F.2d 797, 799 (7th Cir. 1991); see also Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1451, 1453 (suggesting that reliance on dictionaries in statutory interpretation may lead to strange results and that to remedy this, courts should consider the entire statutory context, "whether the contextual investigation involves only the structure and content of the statute itself or a broader inquiry into history and intent," prior to turning to dictionaries as interpretive aids).

C. *Refusing to Recognize Verbal Complaints as Protected Activity Undermines the Precise Policy Concerns that the FLSA Attempts to Correct*

More than a century ago, Justice Holmes explained that “[o]ne of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return.”²²⁸ The *Tennessee Coal* Court referenced this conflict in the course of its decision, making clear that a primary purpose of the FLSA is to alleviate the burden placed on employees by virtue of an unavoidable and inherently lopsided power struggle between them and their employers.²²⁹ Given this background, the importance of ensuring that employers do not exercise their superiority through retaliation is clear. Any removal of the protection against retaliation makes room for the re-emergence of the conflict explained by Justice Holmes, which the entire Act is intended to eliminate.

The holding in *Kasten*, then, could easily serve to encourage employers to exploit the loophole that previously existed only in the Second Circuit.²³⁰ In the wake of this case, there is nothing to keep employers from promulgating internal policies that require employees to first report any suspected FLSA violations verbally and internally. Under *Kasten*, these employees could then be fired immediately, leaving them with no cause of action under § 215(a)(3). The need for employers to comply with FLSA regulations has decreased significantly; employers in the Seventh Circuit could nearly eliminate the possibility of having any FLSA violations discovered, since compliance with the statute is achieved primarily through employee reports.²³¹ The factual circumstances in which claims arise under § 215(a)(3) make it all too clear that many employers are totally undeterred from retaliating against employees who complain of FLSA violations.²³² While it is one matter for employers to engage in retaliation even when such action is clearly prohibited by the plain text of § 215(a)(3), it is another matter for the Seventh Circuit in *Kasten* to implicitly allow retaliation as long as employers time their retaliatory action properly. This result is made more unsavory upon consideration of the fact that many employees may seek to broach the subject of an FLSA violation in a minimally confrontational manner in order to avoid the appearance of disloyalty and, conse-

228. *Vegeahn v. Guntner*, 167 Mass. 97, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting).

229. 312 U.S. at 592, 597.

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

231. *Mitchell*, 361 U.S. at 292; *Richardson*, 812 F.2d at 123.

232. *See, e.g., Love*, 738 F.2d at 384 (recounting that two hours after a female employee left a memo complaining of a pay disparity attached to a copy of the Equal Pay Act on her supervisor's desk, the supervisor entered the female employee's office with the memo in his hand and terminated her).

quently, the likelihood that they are exposing themselves to retaliation. Following *Kasten*, however, such an employee will be forced to immediately resort to more formal, time-consuming, and costly measures; this itself may serve as a deterrent to employee reports, and, consequently, decreased FLSA compliance.

CONCLUSION

The holding that the Seventh Circuit reached in *Kasten v. Saint-Gobain* results from the court's choice to ignore binding precedent on both the FLSA and the rules of statutory interpretation, the court's misapplication of existing courts of appeals opinions, and the court's heavy reliance on the plain meaning of a single word in a statute that is not to be interpreted by reference to a dictionary, but by reference to the actual consequences the interpretation will have on the statute's underlying policies. The combination of these factors, and the unjustifiably narrow holding to which they lead, has created a circumstance in which an employee's decision to report an FLSA violation—and the manner in which she makes such a report—amounts to precisely the sort of “calculated risk”²³³ clearly prohibited by the Supreme Court. The anti-retaliation provision of the FLSA, as well as the FLSA itself, will only regain its proper, protective function within the Seventh Circuit if and when *Kasten* is overruled.

233. *Mitchell*, 361 U.S. at 293.