

No. 08-2820

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KEVIN KASTEN,

Plaintiff-Appellant,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Wisconsin

BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION AS *AMICI CURIAE* IN SUPPORT
OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING AND
REHEARING *EN BANC*

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OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING AND
REHEARING *EN BANC*

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") and the Equal Employment Opportunity Commission ("EEOC") submit this brief as *amici curiae* in support of Plaintiff-Appellant's petition for panel rehearing and rehearing *en banc* on the issue whether oral internal complaints are protected under section 15(a)(3) of the Fair Labor Standards Act of 1938 ("FLSA" or "Act"), 29 U.S.C. 215(a)(3). Specifically, the Secretary and the EEOC support Plaintiff-Appellant's argument that "file[d] any complaint" within the context of the anti-retaliation provision of the FLSA

encompasses orally communicating a complaint to an employer. While the panel correctly held that the plain meaning of 29 U.S.C. 215(a)(3) protects internal complaints to an employer, the panel misapprehended the statutory language by requiring that such complaints be in writing. Therefore, the Secretary and the EEOC believe that panel rehearing is appropriate. See Fed. R. App. P. 40(a)(2).

Should panel rehearing be denied, rehearing *en banc* is appropriate in this case because the panel opinion "presents a question of exceptional importance." See Fed. R. App. P. 35(b)(1)(B). As the panel acknowledged, its decision conflicts with conclusions of the Sixth, Eighth, and Eleventh Circuits that internal complaints are protected, even when communicated orally. See, e.g., *EEOC v. Romeo Community Schools*, 976 F.2d 985 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006 (11th Cir. 1989); *Brennan v. Maxey's Yamaha*, 513 F.2d 179 (8th Cir. 1975); see also *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (*en banc*) (panel acknowledged it contains language "favorable" to this position). Moreover, the panel's decision rejects the longstanding position of the Secretary and the EEOC that employees who file oral complaints are protected from retaliation under the FLSA and analogous employee protection provisions of other statutes administered and enforced by the agencies.

STATEMENT OF INTEREST

The Secretary is responsible for administering and enforcing the FLSA, see 29 U.S.C. 204(a), 204(b), 216(c), 217, and 215(a)(3), and the EEOC is charged by Congress with the interpretation, enforcement, and administration of the Equal Pay Act of 1963, 29 U.S.C. 206(d), which is codified as part of the FLSA and incorporates the section 15(a)(3) protections. These agencies have a substantial interest in the correct interpretation of section 15(a)(3), the FLSA's anti-retaliation provision. The panel interpreted the language, "filed any complaint," to encompass internal, intra-company complaints, but required such complaints to be in writing.

The panel erred in its interpretation of the statute. Section 15(a)(3) does not specify that a complaint must be in writing, nor should the word "file" be construed narrowly in the context of the FLSA. If allowed to stand, the panel's decision would undermine the enforcement of the FLSA by discouraging employees from approaching their employers with information about violations of the Act. Furthermore, the decision could affect the construction of anti-retaliation provisions in other statutes that the Department of Labor ("Department") administers or enforces, many of which are similar to section 15(a)(3) of

the FLSA in that they do not expressly protect employees who orally complain to their employers.¹

ARGUMENT

THE PANEL ERRED IN CONCLUDING THAT THE PLAIN LANGUAGE OF 29 U.S.C. 215(a)(3) ONLY PROTECTS EMPLOYEES WHO COMPLAIN TO THEIR EMPLOYERS IN WRITING.

The panel correctly held that "the plain language of the statute indicates that internal, intra-company complaints are protected." *Kasten v. Saint-Gobain Performance Plastics Corp.*, --- F.3d ---, 2009 WL 1838291, at *3 (7th Cir. June 29, 2009). The panel erred, however, in holding that a complaint to an employer must be in writing. *Id.*, 2009 WL 1838291, at *4.

Section 15(a)(3) of the FLSA provides, in relevant part:

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

¹ See, e.g., section 11(c) of the Occupational Safety and Health Act ("the OSH Act"), 29 U.S.C. 660(c)(1) (prohibiting retaliation 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..."); section 505 of the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. 1855(a) (prohibiting retaliation against worker who 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 testify in any such proceeding"); and section 2 of the Solid Waste Disposal Act, 42 U.S.C. 6971(a) (prohibiting retaliation against any employee who "has filed, instituted, or caused to be filed or instituted any proceeding under this chapter").

proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. 215(a)(3) (emphasis added). In determining that an oral complaint is not protected, the panel placed great emphasis on the word "file," reasoning that the word is commonly understood to require the submission of something in writing. *Kasten*, 2009 WL 1838291, at *4.² There is nothing in the plain language of the statute to support such a requirement. To the contrary, a broader meaning of "file," within the context of the FLSA, is commended by common sense and consistent with an expansive construction of the anti-retaliation provision. See *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied."); see also *Sapperstein v. Hager*, 188 F.3d 852 (7th Cir. 1999).

The panel's decision requiring internal complaints to be in writing conflicts with decisions of the Sixth, Eighth, and Eleventh Circuits that have concluded that internal complaints

² The panel relied upon Webster's Ninth New Collegiate Dictionary definition of the verb "to file." See 2009 WL 1838291, at *4. That definition includes the following: "to perform the first act of (as a lawsuit)." *Id.* The "first act" of seeking relief from an employer certainly can include an oral communication.

are protected, even when communicated orally. See, e.g., *EEOC v. Romeo Community Schools*, 976 F.2d 985 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121 (8th Cir. 1987); *Brennan v. Maxey's Yamaha*, 513 F.2d 179 (8th Cir. 1975); see also *Lambert v. Ackerley*, *supra*. Indeed, the Department is aware of no other court that has held that internal complaints are protected under the FLSA, but only if they are in writing. *But cf. Lambert v. Genesee Hosp.*, 10 F.3d 46 (2d Cir. 1993) (internal complaints are not protected).

While the panel acknowledged that under the FLSA "other courts have found oral complaints to be protected activity," it considered those decisions unpersuasive "because many of them do not specifically state whether the complaint in question was written or purely verbal" and they do not discuss the statute's use of the verb "to file." *Kasten*, 2009 WL 1838291, *5. It is clear from the facts of each of the above-referenced cases, however, that the complaints at issue were oral. In *Romeo Community Schools*, the employee had complained to the school district and "told them she believed they were 'breaking some sort of law' by paying her lower wages than previously paid to male temporary custodians." 976 F.2d at 989. In *White And Son Enters.*, several female employees "met with Ricky White and the foreman to ask why they did not receive a raise as did the men

and to request equal pay." 881 F.2d at 1007. The employee in *Maxey's Yamaha* was protected from retaliation after she "voiced her disapproval" to her employer about returning back wages and refused to sign a receipt unless she received her compensation, following a settlement between the employer and the Department of Labor. 513 F.2d at 182. In *Richardson*, the employee was discharged after his employer mistakenly thought that he had complained orally to supervisors. 812 F.2d at 125. See also *Moore v. Freeman*, 355 F.3d 558, 561 (6th Cir. 2004) (employee who orally complained about unequal pay in staff meeting had a claim for retaliation under the FLSA).³

Protecting only written complaints under section 15(a)(3) elevates form over substance to the detriment of unwitting employees. It would mean, for example, that an employee who

³ District courts within this Circuit have frequently held that oral complaints are protected under the FLSA. See, e.g., *Hernandez v. City Wide Insulation of Madison*, 508 F. Supp. 2d 682 (E.D. Wis. 2007) (employees who regularly complained orally to employer about failure to pay overtime were protected under 15(a)(3)); *Skelton v. American Intercont'l Univ. Online*, 382 F. Supp. 2d 1068 (N.D. Ill. 2005) (employees who orally complained to head of human resources at meeting about overtime pay violations were protected from retaliation); *DeGrange v. Richard Wolf Medical Instruments Corp.*, No. 99-3614, 2000 WL 1368043 (N.D. Ill. Sept. 15, 2000) (employee who orally complained to human resource manager that he was entitled to pay for the day after Thanksgiving was protected); *Wittenberg v. Wheels, Inc.*, 963 F. Supp. 654 (N.D. Ill. 1997) (employee who orally told employer she would not work extra hours unless paid overtime was protected); *Chisholm v. Foothill Capital Corp.*, 940 F. Supp. 1273 (N.D. Ill. 1996) (employee who complained orally about unequal pay stated cause of action against employer).

places a telephone call to the employer's human resources or payroll department asserting FLSA rights would not be protected from discharge or other retaliation, but the employee who reduces his concerns to writing (even in an e-mail, for instance) would be protected. Because it is much more likely that an employee will complain orally to his employer about being improperly paid minimum wage or overtime compensation, it is doubtful that Congress would have intended the panel's cramped reading of the word "file."

Of course, not every "abstract grumbling" or "amorphous expression of discontent" is sufficient. See *Valerio v. Putnam Assoc. Inc.*, 173 F.3d 35, 44 (1st Cir. 1999); *Ackerley*, 180 F.3d at 1007. Rather, "it is clear that so long as an employee communicates the *substance* of his allegations to the employer (e.g., that the employer has failed to pay adequate overtime, or has failed to pay the minimum wage), he is protected by section 215(a)(3)." *Ackerley*, 180 F.3d at 1008 (emphasis in original).

In support of its interpretation, the panel observed that Congress could have used broader language in the FLSA's retaliation provision. *Kasten*, 2009 WL 1838291, at *5. As examples of statutes with broader anti-retaliation provisions, the panel cited Title VII and the Age Discrimination in Employment Act ("ADEA"). The panel's comparison of the language of these statutes with that of the FLSA does not support its

conclusion that oral complaints are not protected under section 15(a)(3), because Title VII and the ADEA were enacted many years after the FLSA. As the Ninth Circuit observed in its *en banc* decision in *Ackerley*, "The fact that Congress decided to include a more detailed anti-retaliation provision more than a generation later, when it drafted Title VII, tells us little about what Congress meant at the time it drafted the comparable provision of the FLSA." 180 F.3d at 1005. Rather, it is reasonable to assume that when enacting the FLSA, Congress was aware that employees in many union and non-union workplaces are required to "file" grievances and complaints with their union or employer before instituting any further internal or external proceedings. *Ackerley* 180 F.2d at 1004.⁴ Indeed, as the Plaintiff-Appellant notes in his petition for panel rehearing and rehearing *en banc* (Pet. Reh'g 10 n.1), citing numerous statutes, "[w]hen Congress intends to require written complaints, it does so expressly." See, e.g., 38 U.S.C. 4322(b) ("Such complaint shall be in writing...."); 2 U.S.C. 437g(a) ("Any person who believes a violation of this Act ... has occurred, may file a complaint ... Such complaint shall be in writing....").

⁴ Significantly, Plaintiff-Appellant states that under the employment policies of the Defendant-Appellee, employees are encouraged to report complaints to their supervisors and to the Human Resources Manager if the matter is not resolved (Pet. Reh'g at 2-3) (citing Employee Policy Handbook, App. 77).

The panel's reliance on the decision in *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360 (4th Cir. 2000), to support its conclusion that complaints must be written to be protected is misplaced. The issue in *Memphis Bar-B-Q* was whether the employee's statement to his employer, that he would be unable to testify the way the employer suggested in a yet to be filed lawsuit, was protected under the anti-retaliation provision "because [he was] about to testify in any ... proceeding [instituted under or related to the FLSA]." The Fourth Circuit analyzed the meaning of "proceeding" and concluded that it refers to procedures conducted in judicial or administrative tribunals, not the making of an intra-company complaint. The court also concluded that a proceeding must be "instituted" and it must provide for "testimony." Furthermore, the Fourth Circuit determined that the terms "testify" and "institute" both connote "a formality that does not attend an employee's oral complaint to his supervisor." *Memphis Bar-B-Q*, 228 F.3d at 364. However, the Fourth Circuit did not consider the "file any complaint" prong at issue here. To the contrary, the Fourth Circuit specifically noted, 228 F.3d at 363, n.*, that in *Rayner v. Smirl*, 873 F.2d 60, 63-64 (4th Cir. 1989), it had construed language similar to the FLSA's complaint clause as covering intra-corporate complaints.⁵ Although the nature of the internal

⁵ *Rayner* involved the anti-retaliation provision of the Federal

complaints in *Rayner* was not at issue, there is nothing to indicate that they were written. *See id.* at 62. Because the Fourth Circuit based its analysis on the testimonial prong of the anti-retaliation provision, the panel erred in relying on *Memphis Bar-B-Q* to support its interpretation of the complaint prong.

In her *amicus* brief before the panel, the Secretary argued that her interpretation of section 15(a)(3) was entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944). The panel, however, citing to *Smiley v. Citibank*, 517 U.S. 735, 741 (1996) and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988), determined that the Secretary's position was not entitled to any deference because it "rests solely on a litigating position." *Kasten*, 2009 WL 1838291, *6 n.2. The panel's reliance on *Smiley* and *Bowen* was misplaced.

In *Auer v. Robbins*, 519 U.S. 452, 462 (1997), the Supreme Court deferred to an interpretation that the Secretary of Labor advanced in an *amicus* brief. Ruling that the Secretary's

Railroad Safety Act ("FRSA"), which at the time protected any covered employee who "(1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws; or (2) testified or is about to testify in any such proceeding." 45 U.S.C. 441 (1989). FRSA's anti-retaliation provision was amended on August 3, 2007, by section 1521 of the Implementing Regulations of the 9/11 Commission Act of 2007, Pub. L. 110-53, section 1521, 121 Stat. 266, 444-45 (codified as amended at 49 U.S.C. 20109) (2008).

position was worthy of deference even though advanced in litigation, the Court stated "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* The Court contrasted the situation in *Bowen*, in which it rejected the Secretary of Health and Human Service's interpretation advanced in litigation because it was adopted there for the first time and was inconsistent with the Secretary's prior litigation positions. The Secretary's position here was not adopted for the first time in her *amicus* brief. Nor is the position inconsistent with the Secretary's prior litigating positions. Indeed, the Department has held the position since at least 1961 when it brought a section 15(a)(3) action on behalf of an employee who lodged an oral complaint. See *Goldberg v. Zenger*, 43 Lab. Cas. (CCH) ¶ 31, 155, at 40, 986 (D. Utah Aug. 2, 1961). Furthermore, the Secretary filed an *amicus* brief in the Ninth Circuit in *Ackerley* arguing that both oral and written complaints to an employer are protected under section 15(a)(3). Accordingly, there is no reason to suspect that the Secretary's interpretation "does not reflect the agency's fair and considered judgment." *Auer*, 519 U.S. at 462.⁶

⁶ The EEOC treats retaliation under the EPA in the same manner that it treats retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), the Age Discrimination in Employment Act, 29 U.S.C. 623(d), and the Americans with

In sum, the purpose of the FLSA is to protect employees by imposing minimum labor standards on covered employers, including the payment of a specified minimum wage and overtime pay. See 29 U.S.C. sections 202, 206, 207; *DeMario Jewelry, Inc.*, 361 U.S. at 292. To secure compliance with the substantive provisions of the FLSA, Congress "chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Id.* The anti-retaliation provision facilitates the enforcement of the FLSA's standards by fostering an environment in which employees' "fear of economic retaliation" will not cause them "quietly to accept substandard conditions." *Id.* The Supreme Court has instructed for over 60 years that the FLSA "must not be interpreted or applied in a narrow, grudging manner." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944). Thus, this Court should interpret the anti-retaliation provision broadly in light of the Act's remedial purpose by holding that complaints to employers asserting violations of the FLSA are protected, whether oral or written.

Disabilities Act, 42 U.S.C. 12203(a), all of which contain "opposition" clauses prohibiting retaliation against individuals who oppose any practice made unlawful by those Acts. See EEOC Compliance Manual section 8-I(A) & n.12, found at <http://www.eeoc.gov/policy/docs/retal.html>; see also *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, ---U.S.---, 129 S. Ct. 846, 849 (2009).

CONCLUSION

For the forgoing reasons, the Secretary and the EEOC support a panel rehearing in the first instance. Should the panel deny rehearing, the Secretary and the EEOC believe that rehearing *en banc* is warranted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify the following with respect to the foregoing Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as *Amici Curiae* in Support of Plaintiff-Appellant's Petition for Panel Rehearing and Rehearing *En Banc*:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,117 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Office Word 2003, with 10.5 characters per inch and Courier New 12 point type style.

7/23/09

/s/

DATE

MARY J. RIESER
Attorney

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for the Secretary of Labor and the Equal Employment Opportunity Commission As *Amici Curiae* In Support Of Plaintiff-Appellant's Petition For Panel Rehearing and Rehearing *En Banc* have been served using Federal Express, this 23rd day of July 2009, on the following counsel:

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