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 AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this Brief as *amicus curiae* in support of Plaintiff-Appellant. The Secretary supports Plaintiff-Appellant's argument that the district court erred in holding that section 15(a)(3) of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 215(a)(3), does not protect an employee who makes an oral complaint to his employer alleging violations of the Act.

INTEREST OF THE SECRETARY OF LABOR

The Secretary has a substantial interest in the proper construction of section 15(a)(3) because she administers and

enforces the FLSA, *see* 29 U.S.C. 204(a), 204(b), 216(c), 217, and section 15(a)(3) is central to achieving FLSA compliance. *See Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Furthermore, the principles at issue could affect compliance under the anti-retaliation provisions of other statutes for which the Secretary has responsibility. The Department of Labor administers or enforces numerous anti-retaliation provisions, the majority of which are similar to section 15(a)(3) of the FLSA in that they do not expressly protect employees who internally complain to their employers. *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"). The Secretary has taken the position that

internal complaints to an employer, whether written or oral, are protected. Thus, a decision by this Court that internal complaints are not covered, or that internal complaints that are oral are not covered, would have an adverse impact upon the effective administration of the Department of Labor's programs.

STATEMENT OF THE ISSUE

Whether section 15(a)(3) of the FLSA protects an employee who makes an oral complaint to his employer alleging violations of the Act.

STATEMENT OF THE CASE

A. Procedural History and Statement of Facts

Kevin Kasten brought this action on December 5, 2007, against Saint-Gobain Performance Plastics Corporation ("Saint-Gobain"), a manufacturer of high-performance polymer products with a production facility in Portage, Wisconsin. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 2008 WL 2489925,*1-*2 (W.D. Wis. June 19, 2008). Kasten, who worked at Saint-Gobain's Portage facility from October 2003 until December 2006 as a manufacturing and production worker, alleged that Saint-Gobain violated section 15(a)(3) of the FLSA when it discharged him in retaliation for repeatedly complaining to his supervisors that the positioning of time clocks required employees to spend

unpaid time donning and doffing personal protective gear. *Id.*[1] Kasten contended that in the last months of 2006 he repeatedly complained to his supervisors, including Saint-Gobain's Human Resources Generalist and Human Resources Manager, that the location of Saint-Gobain's time clocks was illegal. *Id.* at *2. Kasten alleged that these complaints included orally notifying a supervisor in October 2006 that he was considering filing a lawsuit regarding the time clock issue and orally advising several supervisors on December 6, 2006, that Saint-Gobain would lose if challenged in court regarding the time clock locations. *Id.* Kasten did not contend that he made any complaints in writing.

Saint-Gobain issued several disciplinary warnings to Kasten in 2006 before finally terminating him regarding issues relating to punching in and out on the company's time clocks. *See Kasten*, 2008 WL 2489925, at *1. Saint-Gobain denied, however,

[1] This case originally was consolidated with an FLSA collective action brought by Saint-Gobain employees seeking, *inter alia*, compensation for time spent donning and doffing personal protective gear required by the employer as well as time spent walking to their work areas after they donned their gear. Kasten's section 15(a)(3) action was severed from the collective action on May 14, 2008. On June 2, 2008, the district court granted partial summary judgment to the collective action plaintiffs, concluding that their donning and doffing and walking time was compensable as hours worked under the FLSA. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 955-56 (W.D. Wis. 2008).

that Kasten told any of his supervisors that he thought the location of the time clocks resulted in uncompensated time.

Saint-Gobain moved for summary judgment on the ground that, even accepting Kasten's proposed facts as true, Kasten did not "file any complaint" under the FLSA's anti-retaliation provision and, therefore, his complaints were not protected activity. *See id.* at *2. The district court granted summary judgment to Saint-Gobain on June 19, 2008.

B. The District Court's Decision

In granting summary judgment to Saint-Gobain, the district court held that oral complaints are not protected activity covered under section 15(a)(3). *See Kasten*, 2008 WL 2489925, at *3. While recognizing a split in the circuits with respect to the form a complaint must take to be protected under the language of the FLSA, ranging from oral complaints to a supervisor to a formal complaint filed with an agency or court, the court noted that the Seventh Circuit had not directly addressed the issue. *See id*. The district court concluded that although the FLSA should be interpreted broadly, the plain language of the statute requires a "middle-of-the-road approach" in determining what constitutes the filing of a complaint. *See id.* at *4. Accordingly, the court determined that complaints to an employer are covered under section 15(a)(3), but only if such complaints are "filed." *See id.* After examining the dictionary

definition of "file," the court concluded that "[o]ne cannot file an oral complaint; there is no document, such as a paper or record, to deliver to someone who can put it in its proper place. An oral complaint can become a filed complaint only if it is committed to document form." *Id.* Finally, citing *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35 (1st Cir. 1999) and *Lambert v. Ackerley*, 180 F.3d 997, 1002-05 (9th Cir. 1999) (en banc), the court concluded that even if oral complaints were covered under section 15(a)(3), Kasten's complaints did not constitute protected activity because they could be characterized as "abstract grumbling" or an "amorphous expression of discontent." *See Kasten*, 2008 WL 2489925, *4.

ARGUMENT

SECTION 15(a)(3) OF THE FLSA PROTECTS AN EMPLOYEE WHO MAKES A COMPLAINT TO HIS EMPLOYER, EITHER ORALLY OR IN WRITING, ALLEGING VIOLATIONS OF THE ACT.

A. Section 15(a)(3) Covers Internal Complaints

When the FLSA was enacted in 1938, Congress included an anti-retaliation provision at section 15(a)(3). 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 proceeding[.]

29 U.S.C. 215(a)(3). The Supreme Court has recognized that this anti-retaliation provision is critical to ensuring effective compliance with the substantive provisions of the FLSA. *See DeMario Jewelry*, 361 U.S. at 292. Compliance with the FLSA depends on employees providing information about violations of the statute without fear of retaliation. "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." *Id*.

By contrast, any interpretation that discourages an employee from complaining to his employer about minimum wage and overtime violations would undermine the FLSA. "[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *DeMario Jewelry*, 361 U.S. at 292. By proscribing retaliation, the Court observed, "Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." *Id.; see Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 67 (2006) (citing *DeMario Jewelry*, Court states that Title VII's anti-retaliation provision seeks "to provide broad protection from

retaliation [that] helps assure the cooperation upon which accomplishment of the Act's primary objective depends").

Relying on *DeMario Jewelry* and in order to effectuate Congress's intent, a clear majority of appellate courts have broadly construed section 15(a)(3)'s language prohibiting retaliation against an employee who "has filed any complaint or instituted or caused to be instituted any proceeding" to protect "internal" complaints to management. *See Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 625 (5th Cir. 2008) (informal, internal complaint constitutes protected activity under FLSA anti-retaliation clause "because it better captures the anti-retaliation goals of that section."); *Moore v. Freeman*, 355 F.3d 558 (6th Cir. 2004) (section 15(a)(3) can be triggered by informal complaints); *Ackerley*, 180 F.3d at 1004 (section 15(a)(3) protects "employees who complain about violations to their employers"); *Valerio*, 173 F.3d at 43-45 (section 15(a)(3) protects an employee who has filed complaint with employer); *EEOC v. White & Son Enterprises*, 881 F.2d 1006, 1011 (11th Cir. 1989) (employees' unofficial internal complaints to their supervisor about unequal pay constituted assertion of rights protected under Equal Pay Act, part of the FLSA); *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) (Equal Pay Act's anti-retaliation provision "applies to the unofficial assertion of rights through complaints at work"); *see also*

Saffels v. Rice, 40 F.3d 1546 (8th Cir. 1994) (FLSA protects employees who are discharged due to employer's mistaken belief that they reported FLSA violations to authorities); *Brock v. Richardson*, 812 F.2d 121, 124-125 (3d Cir. 1987) (same); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975) (employee protected under section 15(a)(3) for complaining to employer about returning back wages following employer's settlement with the Wage and Hour Division). *But see Whitten v. The City of Easley*, 62 Fed. Appx. 477 (4th Cir. 2003) (unpublished) (concluding that *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 363-65 (4th Cir. 2000), held section 15(a)(3) does not protect internal complaints); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) (plain language of section 15(a)(3) does not encompass complaints made to a supervisor).

In construing section 15(a)(3) to cover internal complaints, courts have concluded that the statutory language "filed any complaint" is susceptible to differing interpretations. *See Ackerley*, 180 F.3d. at 1004; *Valerio*, 173 F.3d at 41. In *Ackerley*, the Ninth Circuit reasoned that read literally, section 15(a)(3) extends to "complaints" made to employers. The court also stated that it was convinced that the term "filed" includes filing complaints with employers. *See Ackerley*, 180 F.3d at 1004 ("Given the widespread use of the term 'file' to include the filing of complaints with employers,

it is therefore reasonable to assume that Congress intended that term as used in section 215(a)(3) to include the filing of such complaints.").

Similarly, after noting that the word "complaint" is ambiguous, the First Circuit in *Valerio* stated that "[b]y failing to specify that the filing of any complaint need be with a court or an agency, and by using the word 'any,' Congress left open the possibility that it intended 'complaint' to relate to less formal expressions of protest . . . conveyed to an employer." *Valerio*, 173 F.3d at 41. Previously, in interpreting similar statutory language contained in the whistleblower protection provision of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. 31105, the First Circuit ruled that "interpreting 'filed a complaint' to encompass only filings with a court or government agency would create a redundancy in the statute." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 20 (1st Cir. 1998). The court reasoned that because STAA protects employees who have 'filed a complaint' or 'begun a proceeding,' and because a court or agency filing itself begins a proceeding, the "file a complaint" language would be superfluous if it was not intended to cover

internal complaints.[2] *Id*. This reasoning is equally applicable to section 15(a)(3) of the FLSA.

Appellate courts also have affirmed decisions by the Secretary and the Administrative Review Board (to which the Secretary has delegated authority to issue final agency decisions in whistleblower cases, *see* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002)) holding that internal complaints to employers are protected under other whistleblower statutes that do not expressly cover internal complaints. *See, e.g., Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) (Clean Water Act's employee protection provision protects employees who complain to their employer); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510-1512 (10th Cir. 1985) (pre-1992 amended Energy Reorganization Act whistleblower provision covers internal complaints); *MacKowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir. 1984) (same).[3] These agency decisions interpreting

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[2] On August 3, 2007, STAA's whistleblower protection provision was amended as part of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat. 266. The provision, however, still contains language prohibiting retaliation against an employee who "has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding." *See* 49 U.S.C. 31105(a)(1)(A)(i) (2008).

[3] The Fifth Circuit initially held that the whistleblower provision of the Energy Reorganization Act, prior to its

whistleblower protection statutes with language similar to that contained in section 15(a)(3) of the FLSA as protecting internal complaints are entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *See United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) ("[A] reviewing court must accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable. A very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the ... adjudication process that produces the ... rulings for which deference is claimed.").

Although this Court has not specifically addressed whether section 15(a)(3) applies to internal complaints, it has held that filing a complaint with a state agency is protected under the FLSA. *See Sapperstein v. Hager*, 188 F.3d 852, 857 (7th Cir. 1999) (whistleblower is protected even if employer's reported conduct turns out to be lawful). Recognizing the remedial nature of the FLSA, this Court adopted an expansive

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amendment in 1992, did not cover internal complaints. *See Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1031-32 (5th Cir. 1984). However, in *Willy v. Administrative Review Bd.*, 423 F.3d 483, 489 n.11 (5th Cir. 2005), the Fifth Circuit noted that its holding in *Brown & Root* was legislatively overruled and that Congress always had intended the ERA to protect internal complaints.

interpretation of section 15(a)(3), stating that "Congress . . . wanted to encourage reporting of suspected violations by extending protection to employees who filed complaints, instituted proceedings, or indeed, testified in such proceedings, as long as these concerned the minimum wage or maximum hours laws." *Sapperstein*, 188 F.3d at 857. Moreover, giving no indication that internal complaints might not be protected activity, this Court decided a case on the merits involving an internal complaint, *see Scott v. Sunrise Health Care Corp.*, 195 F.3d 938, 940-41 (7th Cir. 1999), and reversed a denial of punitive damages to an employee discharged after complaining to the company president in *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 731, 734-36 (7th Cir. 1998).

The Secretary urges this Court to conclude, along with the majority of appellate courts, that section 15(a)(3) protects internal complaints. The Secretary's consistent, reasonable interpretation of section 15(a)(3) is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944), because it reflects the agency's fair and considered judgment. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Old Ben Coal Co. v. Director, Office of Workers' Compensation Programs*, 292 F.3d 533, 541-42, n.8 (7th Cir. 2002).

B. Oral As Well As Written Internal Complaints Are Protected

No appellate court that has recognized that internal complaints are covered under section 15(a)(3) of the FLSA has held that oral complaints are *not* protected. In *Ackerley,* the Ninth Circuit determined that both oral and written internal complaints are protected under the FLSA's anti-retaliation provision. The court stated that "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). The court also observed that "[other] circuits have held, moreover, the employee may communicate such allegations orally or in writing, and need not refer to the statute by name." *Id., citing EEOC v. Romeo Community Schools*, 976 F.2d 985, 989 (6th Cir. 1992).

In *Romeo Community Schools*, 976 F.2d at 989, the Sixth Circuit likewise held, in a case arising under the Equal Pay Act (codified as part of the FLSA), that an employee's oral complaint to her employer about being paid less than male employees was protected under section 15(a)(3). The Sixth Circuit relied on a similar conclusion reached by the Tenth Circuit in *RE/MAX of America*, 738 F.2d at 387 (quoting *Maxey's Yamaha*, 513 F.2d at 181), in which the court stated that section

15(a)(3) "applies to the unofficial assertion [of] rights through complaints at work." *See Romeo Community Schools*, 976 F.2d at 989; *see also Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-29 (6th Cir. 1987) (STAA protects oral complaints to employer).

A number of district courts, including several in this Circuit, also have concluded that section 15(a)(3) of the FLSA protects oral complaints to an employer. *See*, *e.g.*, *Hernandez v. City Wide Insulation of Madison, Inc.*, 508 F. Supp. 2d 682, 689 (E.D. Wis. 2007); *Skelton v. Am. Intercont'l Univ. Online,* 382 F. Supp. 2d 1068, 1076 (N.D. Ill. 2005); *Wittenberg v. Wheels, Inc.,* 963 F. Supp. 654, 658 (N.D. Ill. 1997); *Goldberg v. Zenger*, 43 Lab. Cas. (CCH) ¶ 31,155 (D. Utah Aug. 2, 1961). In so concluding, the court in *Zenger*, 43 CCH Lab. Cas. at 40,986, stated that "I am mindful that the word 'file' ordinarily has reference to a written document, and may connote physical delivery to an officer or other person. But in the colloquial, 'file' is often used interchangeably with 'lodge' or sometimes with 'communicate.'"

Indeed, the Secretary has consistently interpreted the phrase "file any complaint" to include protection for employees who orally complain to their employers, as demonstrated by the Department of Labor's enforcement actions on behalf of employees in such cases as *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872,

875, 879 (2d Cir. 1988), *Maxey's Yamaha, Inc.,* and *Zenger*.[4] Similarly, in *Marshall v. Power City Elec., Inc.*, No. 77-197, 1979 WL 23049, *1 (E.D. Wash. Oct. 23, 1979), the Secretary brought an action under the OSH Act alleging that the employer retaliated against employees who made oral complaints to their employer in violation of section 11(c) of the Act. As noted above (p. 2), the language contained in section 11(c) of the OSH Act mirrors that contained in section 15(a)(3) of the FLSA.[5] In rejecting the employer's argument that the employee's internal oral complaint was not protected, the court in *Power City Elec.*

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[4] The Secretary also filed a brief as *amicus curaie* with the Ninth Circuit in *Ackerley* to argue that both oral and written complaints to an employer are protected under section 15(a)(3).

[5] The Secretary also permits complaints to the agency under section 11(c) of the OSH Act to be orally "filed." *See Whistleblower Investigations Manual*, ch. 7.V.A., page 7-1 (available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3016). Notably, several states also recognize that oral complaints can be "filed." *See*, *e.g.*, Miss. Code Ann. § 69-47-23(4) (organic food certification program) ("Any person with cause to believe that any provision of this chapter has been violated may file a written or oral complaint with the department setting forth the facts of the alleged violation."); Nevada Revised Statutes 618.705 (occupational safety and health statute) ("Any person who ... (2) Knowingly files a false oral or written complaint alleging that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists"); and N.J. Stat. Ann. 30:4C-12 (child welfare) ("Whenever it shall appear that the parent or parents, guardian, or person having custody and control of any child within this State is unfit to be entrusted with the care and education of such child, or shall fail to provide such child with proper protection, maintenance and education, or shall fail to ensure the health and safety of the child, or is endangering the welfare of such child, a written or oral complaint may be filed with the division....").

stated, "[t]he statute nowhere explicitly requires a written complaint to confer protection.... The Court further holds that the term 'filed' as used in this clause means 'lodged' and is not limited to a written form of complaint." *But see Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp. 2d 322, 324 (W.D. Va. 1999) ("The word 'filed' clearly denotes a procedure other than oral.").

In interpreting the phrase "file any complaint" to protect oral complaints that are made to an employer, the Secretary is cognizant that the terms "file" and "complaint" have several meanings. *See*, *e.g.*, *The New Shorter Oxford English Dictionary* 459, 947 (1993) (defining "complaint" as "an expression of grievance or injustice suffered" and "file" as "[to] submit (an application for a patent, a petition for divorce, etc.) to the appropriate authority"); *The Random House College Dictionary* 493 (1982) (defining "file" as "[t]o submit (an application, petition, etc.)"; *The American Heritage Desk Dictionary* 369 (1981) (defining "file" as "to present for consideration"); and *Webster's Third New Int'l Dictionary* 464 (1986) (defining "complaint" as an "act or action of expressing protest, censure, or resentment"). *But see, e.g.*, *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (in discussing when a state-court postconviction relief application is properly "filed," Court stated that "filed" means delivered to and accepted by the appropriate court or officer

for placement on the official record). Thus, while the terms "file" and "complaint" may have a narrow meaning when referring only to a formal document that institutes a lawsuit, when the terms are used more generally, they have broader meanings that are not restricted to formal, written documents. As it is not clear from the phrase "file any complaint" that a complaint must be in writing, the Secretary's reasonable interpretation that both oral and written complaints are protected is entitled to *Skidmore* deference. *See Old Ben Coal Co.*, 292 F.3d at 542, n.8; *AFGE v. Rumsfeld*, 262 F.3d 649, 656 (7th Cir. 2001).[6]

Protecting only written complaints would elevate form over substance, because in the workplace an employee is more likely to approach an employer with an oral complaint about wage and hour practices, rather than providing a written document. For example, unless the decision of the court below is reversed, an employee who telephones the human resources department asserting FLSA rights could be subject to discharge or retaliation without receiving the protection of section 15(a)(3), while an employee

[6] Not all expressions of discontent constitute complaints. These dictionary definitions of "file" encompass a "submission," *i.e.*, a clear intent to complain, rather than an offhand remark. *See*, *e.g.*, *Ackerley*, 180 F.3d at 1007 ("not all amorphous expressions of discontent about wages and hours constitute complaints filed...."). Whether an employee's statement to his or her supervisor constitutes a complaint, rather than abstract grumbling, is a fact-specific inquiry. The Secretary takes no position whether under the facts of this case Kasten's comments to his supervisors constituted a complaint.

who raises the same issue in writing would be protected. Nothing in the statutory language suggests that such a distinction was intended. Indeed, "the [Supreme] Court has made clear that the key to interpreting the anti-retaliation provision is the need to prevent employees' 'fear of economic retaliation' for voicing grievances about substandard conditions." *Richardson*, 812 F.2d at 124 (citing *DeMario Jewelry*, 361 U.S. at 292). Any form of prior, specific notification to an employer of violative conduct should be encouraged. As the Third Circuit stated in *Passaic Valley*, 992 F.2d at 478-79, in determining that internal complaints are covered under the Clean Water Act's whistleblower protection provision, "[e]mployees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith allegations.... [I]t is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, so as to facilitate prompt voluntary remediation and compliance with the Clean Water Act."

In sum, this Court should uphold as reasonable the Secretary's interpretation of section 15(a)(3) as providing

protection to employees who orally complain to their employers about FLSA violations.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's ruling in this case that section 15(a)(3) does not cover internal oral complaints.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of this Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant have been served on the following counsel of record by first class mail, postage prepaid, this 18th day of November, 2008:

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