No. 09-834

IN THE

Supreme Court of the United States

KEVIN KASTEN,
Petitioner,
v.
SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 56 national and international labor organizations with a total membership of approximately 11.5 million working men and women.[1] This case presents an important question concerning the extent to which the Fair Labor Standards Act protects

[1] The petitioner and the respondent have each filed a letter with the Court consenting to the filing of *amicus* briefs supporting either party. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

employees from retaliation for complaining to their employers about employment practices that violate the Act. The AFL-CIO has often filed briefs in cases concerning the enforcement of the FLSA, *see*, *e.g.*, *IBP*, *Inc. v. Alvarez*, 546 U.S. 21, 24 n. † (2005), and in cases involving other statutes with anti-retaliation provisions that track the language of the FLSA, *see*, *e.g.*, *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 3 n. * (1980) (concerning the Occupational Safety and Health Act's anti-retaliation provision).

STATEMENT

Petitioner Kevin Kasten alleges that he repeatedly verbally complained to supervisors and managers of his employer, Saint-Gobain Performance Plastics Corporation, that the company's placement of its time clocks required employees to spend unpaid time donning and doffing personal protective gear in violation of the Fair Labor Standards Act. Following these complaints, Saint-Gobain fired Kasten for the stated reason that he repeatedly failed to follow Saint-Gobain's time clock punching policy. Kasten admits that, prior to his discharge, he had not complained in writing about his employer's alleged violations of the FLSA.

After he was fired, Kasten brought both a claim for retaliation under FLSA § 15(a)(3), 29 U.S.C. §215(a)(3), and a claim, along with 156 other workers, for unpaid wages and overtime for time spent donning and doffing protective gear. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F.Supp. 2d 941 (W.D. Wisc. 2008). The district court granted Kasten and the other workers partial summary judgment on their unpaid wages and overtime claim. *Id.* at 962. In a separate opinion, the court granted summary judgment to Saint-Gobain on Kasten's individual retaliation claim on the ground that employees who make intracompany complaints are protected by

FLSA § 15(a)(3) but only if the complaint is made in writing rather than orally. Pet. App. 70-71.

The Seventh Circuit affirmed the district court's decision in Kasten's retaliation case. That court held at the threshold that "the plain language of the statute indicates that internal, intracompany complaints are protected," reasoning that "the statute does not limit the types of complaints which will suffice, and in fact modifies the word 'complaint' with the word 'any.'" Pet. App. 37. But, the Seventh Circuit agreed with the district court that "unwritten, purely verbal complaints are not protected activity." *Id.* at 39. The court based this conclusion on what it "believe[d] to be the natural understanding of the verb 'to file' . . . the submission of some writing to an employer, court, or administrative body." *Id.* at 40.

SUMMARY OF ARGUMENT

The question presented by this case is whether an employee's oral complaint to his employer of a violation of the Fair Labor Standards Act is protected by § 15(a)(3), 29 U.S.C. § 215(a)(3), the anti-retaliation provision of that statute. The plain meaning of this provision is that such complaints are protected. Section 15(a)(3) protects employees from retaliation both for having "filed any complaint . . . under or related to th[e] Act" and for having "instituted or caused to be instituted any proceeding under or related to th[e] Act." Congress's use of the word "any" to modify "complaint" indicates that the statute protects all types of complaints, both internal complaints to the employer and complaints that institute proceedings before government bodies. By protecting both the "fil[ing] of any complaint" and "institut[ing] . . . any proceeding," the statute makes clear that the sort of complaints protected are not limited to formal complaints that would "institute[] . . . a[] proceeding." Within this overall context, the phrase "filed any complaint" is most

naturally read as having "submitted" or "lodged" any complaint, both well-accepted synonyms for "filed." In normal usage, a complaint need not be in writing to be "submitted" or "lodged."

Protecting employees who verbally complain to their employers of FLSA violations also accords with workplace realities. The most commonly-accepted method for employees to register an employment-related complaint, including at Saint-Gobain, is to first raise it verbally with their immediate supervisor. In the unionized setting, multi-step grievance procedures typically provide for the presentation of verbal grievances. And as a matter of common sense, there is no reason to believe that Congress intended to protect employees who institute formal proceedings, but not employees who seek to raise and resolve FLSA complaints through face-to-face discussions with their employer.

The Department of Labor has consistently interpreted § 15(a)(3) to protect oral complaints. The Department's views are entitled to special weight in this case because for the first forty years of the FLSA's existence, the agency had exclusive authority to enforce § 15(a)(3). In addition, the Department of Labor has adopted an interpretive regulation constructing the identical terms of the Occupational Safety and Health Act's anti-retaliation provision as encompassing health and safety complaints that employees "lodge[] . . . with their employer." 29 C.F.R. § 1977.9(c). Given the identical statutory terms, if § 15(a)(3) is interpreted to leave oral complaints about FLSA violations unprotected, employees will be less likely to complain about imminently unsafe working conditions as well for fear of employer retaliation.

ARGUMENT

The question presented by this case is whether an

employee who makes an oral complaint to his employer of Fair Labor Standards Act violations is protected against discharge or other discrimination for so doing by the FLSA's anti-retaliation provision. The plain language of the FLSA's anti-retaliation provision – read as a whole – does protect employees who make oral complaints of FLSA violations to their employers. The contrary conclusion reached by the court below rests on the erroneous approach of determining the meaning of the statutory term "file" standing alone and without regard to the statutory context in which that term is used.

1. Section 15(a)(3) of the Fair Labor Standards Act provides:

> "[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 Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3).

Taken as a whole, then, § 15(a)(3) protects employees from retaliation for: i) having "filed any complaint . . . under or related to th[e] Act;" or ii) having "instituted or caused to be instituted any proceeding under or related to th[e] Act." As the court below recognized, it follows that "the plain language of the statute indicates that internal, intracompany complaints are protected." Pet. App. 37.
In the first place, as the Seventh Circuit noted, "the statute does not limit the types of complaints which will suffice, and in fact modifies the word 'complaint' with the word 'any.'" Pet. App. 37. What is more, by expressly protecting *both* "fil[ing] any complaint" *and* "institut[ing] or caus[ing] to be instituted any proceeding," the statute makes clear that the class of "complaint[s]" protected by

§ 15(a)(3) is in addition to and separate from the class of formal legal "complaint[s]" that serve to "institute[] . . . a[] proceeding."

In normal usage, the word "complaint" can mean either an "[e]xpression of dissatisfaction" or "[t]he presentation by the plaintiff in a civil action, setting forth the claim on which relief is sought." *Webster's II; New College Dictionary* 229 (1999). In the context provided by § 15(a)(3), the word "complaint" is used in the former sense to encompass the broad class of employee communications expressing dissatisfaction with employer practices that allegedly violate the FLSA, such as internal, intracompany complaints that do not rise to the level of formal legal complaints that "institute a proceeding."

2. Having correctly concluded that "internal, intracompany complaints are protected" by § 15(a)(3), the court below went on to wrongly conclude that "unwritten, purely verbal complaints are not protected activity." Pet. App. 39. This holding conflicts with the long-standing interpretation of the Department of Labor that both verbal and written complaints are protected by § 15(a)(3). *Id.* at 39-40 n. 2.

The Seventh Circuit based its conclusion that only the submission of written complaints is protected on what it "believe[d] to be the common understanding of the verb 'to file.'" Pet. App. 39. The court explained in this regard:

> "If an individual told a friend that she 'filed a complaint with her employer,' we doubt the friend would understand her to possibly mean that she merely voiced displeasure to a supervisor. Rather, the natural understanding of the phrase 'file any complaint' requires the submission of some writing to an employer, court, or administrative body." *Id.* at 39-40.

It may well be that the "natural understanding of the phrase" "filed a complaint" *standing alone* would be "the submission of some writing to an employer, court, or administrative body." Pet. App. 40. But that would be so only because, standing alone, the phrase "filed a complaint" suggests the dictionary definitions of "file" relied upon by the Seventh Circuit, *viz.*, "to place among official records as prescribed by law" or "to perform the first act of (as a lawsuit)." *Id.* at 39.

FLSA § 15(a)(3), however, protects both "fil[ing] *any* complaint" and "institut[ing] any proceeding." And that statutory context precludes the "common understanding" of the verb "file" relied upon by the Seventh Circuit. In the context provided by § 15(a)(3), the phrase "file any complaint" clearly does not use the word "complaint" in the restrictive sense to mean "[t]he presentation by the plaintiff in a civil action." *Webster's II; New College Dictionary* 229. That being so, it cannot be that that the phrase uses the word "file" in the restrictive sense of "place among official records as prescribed by law" or "perform the first act of (as a lawsuit)." For actions of that kind are separately protected as "institut[ing] or caus[ing] to be instituted any proceeding under or related to th[e] Act."

In § 15(a)(3), read as a whole, the office of the phrase "filed any complaint" is thus to protect employees who "submit" or "lodge" an "expression of dissatisfaction" regarding a violation of the FLSA's wage and hour requirements. The verbs, "file," "submit" and "lodge" are well-accepted synonyms for each other. *See The New American Roget's College Thesaurus* 142 (1958) ("submit, deliver"); *Webster's II; New College Dictionary* 644 ("lodge: . . . [t]o register (a charge) in court or with an appropriate party: FILE"). It is, therefore, common to say that someone "files or lodges" something with the appro-

priate party and to treat the two words as having the same meaning. *See*, *e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993). On this meaning of the verb "file," an employee "file[s] a[] complaint" about an FLSA violation by "submitting" or "lodging" the complaint with the employer either verbally or in writing. *See*, *e.g.*, *EEOC v. Dinuba Med. Clinic*, 222 F.3d 580, 587 (9th Cir. 2000) (plaintiffs "registered several oral complaints" with employer); *Masiello v. Metro-North Commuter Railroad*, 748 F. Supp. 199, 208 (S.D.N.Y. 1990) (plaintiff "lodge[d] oral complaints of physical abuse" with employer).

3. Congress's decision to protect employees who "file[] any complaint," including those who verbally complain to their employers of FLSA violations, in addition to employees who "institute[] or cause[] to be instituted any proceeding" seeking redress of the statutory violation, is consistent with the predominant means of handling workplace disputes involving legal claims and reflects the common sense of those dispute resolution systems.

(a) The most common method for employees to make an employment-related complaint is to first raise it verbally with their immediate supervisor. That is the means provided by Saint-Gobain's own internal complaint procedure. Pet. Br. 4-5, quoting Docket Nr. 91, Exh. 12, p. 3. Even among union-represented employees, who would have the assistance of a trained shop steward in preparing written complaints, it is common for the first step in the multi-step collectively bargained grievance procedure to provide for the presentation of verbal grievances. *See* Chamberlain & Kuhn, *Collective Bargaining* 149-53 (2d ed. 1965).

In many collective bargaining agreements, "the informal, oral presentation of a complaint to the immediate supervisor constitutes the first official step in the grievance procedure." McPherson, *Resolving Grievances: A*

Practical Approach 38 (1983). Even where that is not the case, there is almost always an "informal stage [that] precedes the first official step." *Ibid.* In either case, "the informal step usually involves the immediate supervisor or the manager at the lowest level with authority to settle the complaint and the employee, with or without a steward." *Ibid.* The practical utility of informally conferring over an employee's complaint before instituting formal proceedings is obvious:

> "The chief functions of the initial stage of the grievance procedure are confrontation and fact finding; a dispute is joined when the employee or steward and the supervisor come face to face to identify, to discuss, and hopefully to resolve a problem. Prior to the confrontation, the parties may not even realize that problem exists, much less appreciate its dimensions." *Ibid.*

Against that background, there is every reason to believe that Congress intended to protect not only employees who "institute[] or cause[] to be instituted [formal] proceeding[s] under or related to th[e] Act" but also employees who give their employers the opportunity "to identify, to discuss and hopefully to resolve [the] problem" by engaging in "face to face" discussion prior to initiating formal legal proceedings. As District Judge Christenson observed in sustaining the Department of Labor's conclusion that § 15(a)(3) protects oral complaints:

> "It would be most unreasonable that an employee, not subject to discharge because he filed a paper or letter with a wage and hours officer, could be dismissed with impunity should he have the courtesy to first write a letter to or to confer with his employer concerning his complaint and if the employer could so summarily discharge his [employee] as to preclude formal filing."

> *Goldberg v. Zenger*, 43 Labor Cases (CCH) ¶ 31, 155, 1961 U.S. Dist. LEXIS 3693, p. *3 (D. Utah, Aug. 2, 1961).

And, as we have emphasized above, the fact that the statute protects *both* "fil[ing] any complaint" *and* "institut[ing] . . . any proceeding" strongly indicates that Congress did not intend any such unreasonable result.

(b) There is, moreover, an important practical reason for the 1938 Congress's decision to protect both verbal and written complaints. As explained by the National War Labor Board – which supervised collectively bargaining in the United States during the period immediately following the enactment of the FLSA – in many workplaces of that period the presentation of written grievances would be difficult for the typical employee:

> "In many plants where there is a high degree of illiteracy, the writing of grievances by employees works a substantial hardship. In other plants where there is considerable dirt and special clothes must be worn, it is often not practicable to write up grievances during work hours." *The Termination Report of the National War Labor Board: Industrial Disputes and Wage Stabilization in Wartime, January 12, 1942 – December 31, 1945*, vol. 1, p. 122 (1947-49).

The proponents of the Fair Labor Standards Act understood that the statute "only attempts in a modest way to raise the wages of the most poorly paid workers and to reduce the hours of those most overworked." H. Rep. No. 1452, 75th Cong., 1st Sess. 9 (Aug. 6, 1937). And, in supporting the enactment of the FLSA, the President emphasized that it is precisely in those "communities in the United States where the average family income is pitifully low . . . that we find the poorest educational facilities." Address of the President of the United States, H.

Doc. No. 458, 75th Cong., 3d Sess. 4 (Jan. 3, 1938). Thus, the FLSA was intended to protect the very workers whose "high degree of illiteracy" would make "the writing of grievances . . . a substantial hardship" and who worked in conditions in which "it is often not practicable to write up grievances during work hours." *Termination Report of the National War Labor Board*, vol. 1, p. 122. That background makes it particularly unlikely "that the FLSA's use of the phrase 'file any complaint' requires a plaintiff employee to submit some sort of writing." Pet. App. 43.

4. Consistent with the statutory language and the practical realities of the workplace, the Department of Labor has, from the beginning, always interpreted FLSA § 15(a)(3) to protect oral complaints.[2]

The Department of Labor's views in this regard are entitled to special weight, because for the first forty years of the FLSA's existence, the Department had exclusive authority to enforce § 15(a)(3). *Compare* Fair Labor Standards Act of 1938, Pub. L. No. 75-718 § 16, 52 Stat. 1060, 1069, *with* Fair Labor Standards Amendments of 1977, Pub. L. 95-151 § 10, 91 Stat. 1245, 1252. Thus, the Department's successful prosecution of § 15(a)(3) retaliation claims involving verbal complaints represents "a contemporaneous construction of [the] statute by the

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[2] *See, e.g.*, *Brennan v. Maxey's Yamaha*, 513 F.2d 179, 181 (8th Cir. 1975) (suit on behalf of worker fired after orally complaining to employer about scheme of requiring employees to kick-back wage awards); *Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152, 154 (5th Cir. 1962) (suit on behalf of worker fired two days after making oral complaint to state labor agency); *Goldberg v. Zenger*, 43 Labor Cases (CCH) ¶ 31,155, 1961 U.S. Dist. LEXIS 3693 (D. Utah, Aug. 2, 1961) (suit on behalf of worker fired after orally complaining to employer that he should be paid owed wages in a lump sum rather than by installment).

men charged with the responsibility of setting its machinery in motion" and, as such, is entitled to "peculiar weight." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). *See Auer v. Robbins*, 519 U.S. 452, 462 (1997) (The Department of Labor's position "reflect[s] the agency's fair and considered judgment on the matter in question" and "is in no sense a 'post hoc rationalization' advanced by an agency seeking to defend past agency action against attack."). The fact that an interpretation of a statute "is consistent with the [agency]'s longstanding practice is persuasive evidence that it is the correct one." *New Process Steel, L.P. v. National Labor Relations Board*, No. 08-1457, Slip Op. at 8 (June 17, 2010).

The Department's consistent interpretation of "filed any complaint" in FLSA § 15(a)(3) is reinforced by its interpretative regulation giving the same construction to the identical phrase in the anti-retaliation provision of the Occupational Safety and Health Act (OSHA). OSHA § 11(c)(1) provides:

> "No person shall 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 Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." 29 U.S.C. § 660(c)(1).

The Department's interpretative regulation states that the phrase "filed any complaint" encompasses "lodging complaints about occupational safety and health matters with their employer." 29 CFR § 1977.9(c).

The Department's interpretation of the phrase "filed any complaint" in OSHA indicates both the consistency of

the agency's interpretation of this statutory phrase as well as the full breadth of what is at stake in this case. As District Judge Neill observed in holding that "the term 'filed' as used in [OSHA § 11(c)(1)] means 'lodged' and is not limited to a written form of complaint":

> "The right to make oral complaints to an employer is necessarily implicit within these sections of the chapter because safety rights could not possibly be exercised nor safety achieved without communication between employee and employer concerning workplace hazards." *Marshall v. Power City Electric, Inc.*, 1979 O.S.H.D. (CCH) ¶ 23,947, 1979 WL 23049, p. *2 (E.D. Wash. 1979).

Just as protection for oral complaints is essential to preventing occupational injury or death, the effective enforcement of the FLSA can only be achieved if employees can orally complain about their wages and hours to their employer without the "fear of economic retaliation" that might otherwise "operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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