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**HOW ON EARTH CAN YOU POSSIBLY
“FILE” AN ORAL COMPLAINT?:
AN ANALYSIS OF THE BOUNDARIES OF
§ 215(A)(3) OF THE FAIR LABOR
STANDARDS ACT**

SCOTT C. ROSS[†]

INTRODUCTION

The Fair Labor Standards Act (“FLSA” or the “Act”) requires most employers to pay minimum wages and overtime to employees working more than forty hours per week.¹ To protect employees from retaliation by their employer if they “file any complaint” with regard to FLSA-related issues, Congress enacted § 215(a)(3).² Despite the seemingly plain and clear meaning of the phrase “filed any complaint,” courts are split over how to interpret this language. Specifically, the courts of appeals are divided on the question of whether § 215(a)(3) protects employees who make informal oral complaints—for example, oral complaints made at work to a supervisor.³ The strict view is that the plain language of this provision limits the causes of action.⁴

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¹ Fair Labor Standards Act, 29 U.S.C.A. §§ 206, 207, 212 (West 2011).

² Section 215(a)(3) provides 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 or instituted or caused to be instituted any proceeding . . . or has testified or is about to testify in any such proceeding.” *Id.* § 215(a)(3).

³ THE FAIR LABOR STANDARDS ACT: 2009 CUMULATIVE SUPPLEMENT 950–51 (Amy P. Maloney et al. eds., Supp. 2009). Throughout this Note, a “formal” complaint, written or verbal, implies that the complaint was externally made to a regulatory agency, such as the Department of Labor. An “informal” complaint, written or verbal, refers to a complaint internally made in the workplace.

⁴ See *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993); see also *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 840 (7th Cir. 2009) (noting that an expansive interpretation of § 215(a)(3) may be warranted because of the remedial nature of the FLSA, but “reading words out of a statute” is something else), *cert. granted*, 130 S. Ct. 1890 (2010) (No. 09-834).

The broad interpretation protects oral complaints because § 215(a)(3) was meant to address employee fears of retaliation for raising complaints.⁵

As the split between the circuits grows and the number of retaliatory complaints increases,⁶ resolution of the inter-circuit dispute becomes increasingly important.⁷ While the goal of the FLSA is to protect employees, an interpretation of § 215(a)(3) that protects any oral complaint made in the workplace—*informal* oral complaints—would put employers at a disadvantage. First, the FLSA is already deferential to employees. But if an expansive approach is adopted, the employer will have to disprove that the employee verbally complained, a much more difficult task than if the employee had to follow a more formal procedure, particularly during discovery.⁸ Second, protecting oral complaints opens the courts up to frivolous lawsuits where an employee “manufacture[s] a retaliation claim” after being fired.⁹ Third, as a result of frivolous lawsuits, employers will be subject to significant

⁵ See *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc). These circuits emphasize that employer compliance with the provisions of the FLSA is without federal oversight and is maintained by a system in which employees should be free to voice grievances without the fear of economic retaliation. See *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

⁶ Since 1997, the number of retaliatory charges brought to the Equal Employment Opportunity Commission (“EEOC”) has steadily increased, from 18,198, which was 22.6% of all complaints in 1997, to 22,768, which was 27.0% of all EEOC complaints in 2002, to 33,613, which was 36.0% of all EEOC complaints in 2009. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, CHARGE STATISTICS FY 1997 THROUGH FY 2010, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 4, 2011). While these statistics cover the retaliatory charges of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act, “[s]uch a dramatic increase in retaliation charges arguably is not confined [just to those statutes], but extends to the FLSA as well.” Jennifer Lynne Redmond, *Are You Breaking Some Sort of Law?: Protecting an Employee’s Informal Complaints Under the Fair Labor Standards Act’s Anti-Retaliation Provision*, 42 WM. & MARY L. REV. 319, 319 n.1 (2000).

⁷ “As the number of retaliation charges continues to increase, it becomes more important to understand the statutory provisions governing retaliation so that they may be applied consistently.” Redmond, *supra* note 6, at 319–20.

⁸ See *infra* notes 75–79 and accompanying text; see also *infra* notes 31–34 and accompanying text (discussing the burden-shifting scheme).

⁹ See *Kelly v. City of Mount Vernon*, 344 F. Supp. 2d 395, 406 (S.D.N.Y. 2004).

penalties if the employee is successful.¹⁰ An employer may even be forced to settle with an undeserving employee so as to avoid litigation costs and potential liability.

This Note argues that it is necessary to find a balance between the liberal and strict approaches when interpreting the anti-retaliatory provision of the FLSA. Part I of this Note provides background on the FLSA, its retaliatory provision, and a proposed amendment to the retaliatory provision currently before the Senate and House of Representatives. Part II addresses the various arguments the courts of appeals consider to arrive at their conclusion on how to interpret § 215(a)(3), including abiding by the plain language, examining the purpose of the Act, and comparing it to similar anti-retaliation provisions. Though the language is unambiguous, Part III argues that the policy and purpose of § 215(a)(3) requires courts to look past its clear language. However, this Note concludes that it would be improper for courts to protect informally made oral complaints from retaliation. As a matter of best practice, an employee should be required to put his complaint in writing in order to be covered by § 215(a)(3).¹¹

I. THE HISTORY AND BACKGROUND OF THE FLSA AND ITS RETALIATORY PROVISION

The history and background of the FLSA is important to understand before examining its retaliation scheme. This background understanding describes what Congress did, and did not, intend when creating § 215(a)(3). In addition, while the anti-retaliation provision has not changed for seventy-two years, there are proposed amendments to § 215(a)(3) currently pending before the Senate and House of Representatives.¹²

¹⁰ Employers who violate § 215(a)(3) may have to reinstate or promote the injured employee. *See* 29 U.S.C.A. § 216(b) (West 2011).

¹¹ *See* *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 839 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010) (No. 09-834).

¹² *See* Fair Pay Act, S. 904, 111th Cong. § 4 (2009); Paycheck Fairness Act, H.R. 11, 111th Cong. § 203 (2009).

A. *The FLSA Was Enacted as a Means of Protecting Employees*

The FLSA was passed by Congress and signed by President Franklin D. Roosevelt on June 25, 1938 in the heart of the Great Depression.¹³ President Roosevelt declared that it was perhaps “the most far-reaching, . . . far-sighted program for the benefit of workers ever adopted.”¹⁴ The central aim of the act was to achieve certain minimum labor standards.¹⁵ The Supreme Court has stated that the “remedial and humanitarian” provisions of the FLSA as a whole are not to be applied in a “narrow, grudging manner.”¹⁶ Despite numerous amendments to the Act and periodic technical corrections because of changing judicial interpretations, the basic framework of the Act has remained intact. While there have been periodic technical corrections to the Act because of changing judicial interpretations, as well as numerous amendments to it, its basic framework has not changed.¹⁷

The FLSA has established itself as a law that serves fundamental national interests by providing a greater quality of life for employees.¹⁸ Individual employees¹⁹ are covered under the FLSA but not white collar employees.²⁰ Employers are

¹³ See THE FAIR LABOR STANDARDS ACT 2, 15 (Ellen C. Kearns et al. eds., 1999).

¹⁴ President Franklin D. Roosevelt, Address of the President Delivered by Radio from the White House (June 24, 1938), available at <http://www.mhrcc.org/fdr/chat13.html>.

¹⁵ See *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

¹⁶ See *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944). The courts that argue for a broad enough interpretation of § 215(a)(3) so as to protect verbal complaints from employer retaliation often use this Supreme Court quote as a basis for their position. See, e.g., *Lambert v. Ackerly*, 180 F.3d 997, 1003 (9th Cir. 1999) (en banc).

¹⁷ See generally THE FAIR LABOR STANDARDS ACT, *supra* note 13, at 15–36. The most notable amendment was the 1963 addition of the Equal Pay Act (“EPA”). See *id.* at 27.

¹⁸ *Id.* at 3.

¹⁹ This is the traditional manner in which employees are covered only if they are “engaged in commerce” or in “production of goods for commerce.” Fair Labor Standards Act, 29 U.S.C.A. §§ 206(a), 207(a) (West 2011). For example, an autoworker at a car parts manufacturer would be covered by § 215(a)(3). See, e.g., 1 MARK ROTHSTEIN ET AL., EMPLOYMENT LAW 627–28 (4th ed. 2009).

²⁰ See 29 U.S.C. § 213(a)(1) (2006). This includes the general class of executive, administrative, and professional employees. See *id.* There are several other exempt groups of individuals. See generally *id.* § 213(a)(3), (5)–(8), (10), (12), (15)–(17). However, white collar employees are not exempt under the EPA. See REBECCA HANNER WHITE, EMPLOYMENT LAW AND EMPLOYMENT DISCRIMINATION: ESSENTIAL TERMS AND CONCEPTS 168 (1998).

required to pay these employees minimum wages²¹ and overtime²² and to avoid the use of oppressive child labor.²³ In 1963, the FLSA was amended when the Equal Pay Act (“EPA”) was added to prohibit employers from providing disparate salaries to employees based on their sex when the work is equal.²⁴

The U.S. Department of Labor (“DOL”) is empowered by Congress to enforce the various provisions of the FLSA.²⁵ However, there is no requirement to exhaust administrative remedies before bringing a FLSA claim before a court.²⁶

B. The FLSA Prohibits Retaliation Against Employees Who “File any Complaint”

It is not unusual for an anti-discrimination statute to contain an anti-retaliation provision, as these provisions ensure that employees are protected when they assert their rights under that statute.²⁷ Section 215(a)(3) of the FLSA provides that it shall be unlawful for “any person” to engage in retaliatory conduct.²⁸ This person may not “discharge or in any other manner discriminate”²⁹ against any employee because such employee has filed any complaint or instituted or caused to be instituted any

²¹ See 29 U.S.C.A. § 206.

²² See *id.* § 207.

²³ See 29 U.S.C. § 212.

²⁴ See generally 29 U.S.C.A. §§ 206–09; see also THE FAIR LABOR STANDARDS ACT, *supra* note 13, at 27.

²⁵ See THE FAIR LABOR STANDARDS ACT, *supra* note 13, at 40. However, the Equal Employment Opportunity Commission is charged with enforcement of the EPA. See WHITE, *supra* note 20, at 167. There is no requirement under any portion of the FLSA to exhaust administrative remedies before bringing an FLSA claim before a court.

²⁶ See WHITE, *supra* note 20, at 167–68.

²⁷ See THE FAIR LABOR STANDARDS ACT, *supra* note 13, at 867.

²⁸ 29 U.S.C. § 215(a)(3). The definition of “any person” who, under this Act, may not engage in retaliatory conduct includes “an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.” *Id.* § 203(a).

²⁹ “The most common retaliatory act is discharge.” THE FAIR LABOR STANDARDS ACT, *supra* note 13, at 896. Discriminatory acts include on-the-job harassment, wage reductions, and post-discharge blacklisting or disparagement. See *Cartwright v. Tacala, Inc.*, No. CIV A 99-W-663-N, 2000 WL 33287445, at *1 (M.D. Ala. Nov. 1, 2000); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 103 F. Supp. 2d 1180, 1185 (N.D. Cal. 2000).

proceeding . . . or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."³⁰

To prove a prima facie case of retaliation, a plaintiff must show that: (1) he engaged in statutorily protected conduct under § 215(a)(3); (2) he suffered some adverse employment action; and (3) there is a "causal link . . . between the plaintiff's conduct and the employment action."³¹ Once the plaintiff has made a prima facie showing of retaliation, the burden shifts to the employer to articulate a legitimate, nondiscriminatory motive.³² To defeat the employer's showing of a legitimate, nondiscriminatory reason for discharge, the employee must show that the employer's reason was a pretext for retaliation.³³ If an employee can prove that the employer was partially motivated by the employee's protected conduct, the employee will prevail.³⁴

An employer's violation of § 215(a)(3) may entitle the employee to damages and equitable relief.³⁵ Such relief includes, but is not limited to, employment, reinstatement, promotion, and the payment of wages lost.³⁶ Reinstatement is generally the preferred remedy, unless there are compelling reasons why the employment relationship cannot continue.³⁷

³⁰ 29 U.S.C. § 215(a)(3).

³¹ THE FAIR LABOR STANDARDS ACT, *supra* note 13, at 910. The plaintiff can establish causation by showing that the protected activity preceded the adverse action and that the employer was aware of the plaintiff's protected activity before taking the adverse action. *See id.* at 912.

³² *See* THE FAIR LABOR STANDARDS ACT: 2009 CUMULATIVE SUPPLEMENT, *supra* note 3, at 987. Legitimate, nonretaliatory reasons for discharge have included excessive lateness in violation of company policy, *see* *Cross v. Bally's Health & Tennis Corp.*, 945 F. Supp. 883, 889 (D. Md. 1996), unacceptable job performance, *see* *Chyma v. Trackers, Inc.*, No. 2-293/91-1266, 1992 WL 464328 (Iowa Ct. App. Nov. 30, 1992), and violating a company policy that prohibits accepting gifts from vendors and lying to company officials charged with investigating the incident, *see* *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1393 (10th Cir. 1997).

³³ *See* THE FAIR LABOR STANDARDS ACT: 2009 CUMULATIVE SUPPLEMENT, *supra* note 3, at 987.

³⁴ *See* THE FAIR LABOR STANDARDS ACT, *supra* note 13, at 915.

³⁵ 29 U.S.C.A. § 216(b) (West 2011).

³⁶ *Id.* In fact, several circuits award compensatory, punitive, and emotional distress damages. *See* *Lai v. Eastpoint Int'l, Inc.*, No. 99 CIV 2095, 2002 WL 265148, at *1 (S.D.N.Y. 2002) (observing that the Seventh and Ninth Circuits "have interpreted the relief to include compensatory, punitive, and emotional distress damages," but the Second is silent on the issue).

³⁷ *See* *Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152, 156 (5th Cir. 1962).

Federal oversight to ensure cooperation with the FLSA has taken a back seat to a self-regulatory system, whereby the government relies on receiving complaints from employees rather than supervising employers itself.³⁸ The idea is that effective enforcement can only be expected if employees feel free to approach officials with their grievances.³⁹ If retaliation were permitted to go unremedied, it would have a “chilling effect upon the willingness of individuals to speak out against employment discrimination.”⁴⁰ This would cause employees to fear being retaliated against, resulting in aggrieved employees quietly accepting substandard conditions.⁴¹

C. Proposed Legislation To Amend the Anti-Retaliation Provision of the FLSA

For seventy-two years, the wording of § 215(a)(3) has remained unchanged.⁴² However, a proposed amendment to § 215(a) has recently been approved by the House of Representatives,⁴³ and a different version of the proposed amendment is currently sitting unresolved before the Senate Committee on Health, Education, Labor, and Pensions.⁴⁴ The version approved by the House of Representatives strikes the language of § 215(a)(3) and replaces it with language that protects employees from retaliation if they made a “charge or filed any complaint or instituted or caused to be instituted any investigation . . . or ha[d] testified or is planning to testify . . . or ha[d] inquired about, discussed or disclosed the wages of the employee or another employee.”⁴⁵ Thus, an employee would be entitled to protection from retaliation whenever he discusses wages, formally or informally, with his employer.

³⁸ See *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“For weighty practical and other reasons, 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.”).

³⁹ See *id.*

⁴⁰ See EEOC Compl. Man. (BNA) § 8-I (1998), available at <http://www.eeoc.gov/policy/docs/retal.html>.

⁴¹ See *Mitchell*, 361 U.S. at 292.

⁴² See generally THE FAIR LABOR STANDARDS ACT, *supra* note 13, at 15–36.

⁴³ See Paycheck Fairness Act, H.R. 11, 111th Cong. § 203(b) (2009).

⁴⁴ See Fair Pay Act of 2009, S. 904, 111th Cong. § 4 (2009).

⁴⁵ H.R. 11, § 203(b).

The proposed legislation sitting before the Senate Subcommittee also carves out an exception to § 215(a)(3) but is very different than the version approved by the House of Representatives. This version first adds a new category of protected activity, § 6(h), which is an extension of the Equal Pay Act, whereby an employer may not discriminate against employees “on the basis of sex, race, or national origin by paying [lower] wages.”⁴⁶ Further, without striking § 215(a)(3), the proposed legislation states that an employer may not “discriminate against any individual because such individual has opposed any act or practice made unlawful by [§] 6(h).”⁴⁷ It goes on to state that an employer may not retaliate against any “employee [who has] inquired about . . . [his] wages or the wages of any other employee, or because the employee exercised . . . any right granted or protected by [§] 6(h).”⁴⁸ Therefore, under the proposed legislation, any complaint about wages or wage discrimination would fall under this much broader language, but the “filed any complaint” language would still apply to grievances about other statutorily enumerated issues, such as child labor or overtime hours.

II. THERE IS NO INTER-CIRCUIT UNIFORMITY IN THE INTERPRETATION OF § 215(A)(3)

Federal courts are divided as to whether § 215(a)(3) should protect employees who make informal verbal complaints to their employer from retaliation. A broad reading of the statute accepts all sorts of oral complaints as being “filed,” whereas a strict reading tends to limit complaints “filed” to informally made written grievances or formally lodged ones.

As a result of this circuit split, similarly situated employees are being treated differently depending on their jurisdiction. An employee in a circuit that broadly construes § 215(a)(3) is completely protected from retaliation if he makes an oral complaint to his supervisor. However, in a circuit that strictly

⁴⁶ S. 904, § 3. However, unlike the Equal Pay Act, this only applies to jobs that are “dominated by employees of a particular sex, race, or national origin” where employees are paid “at a rate less than the rate at which the employer pays wages to employees in such establishment in another job that is dominated by employees of the opposite sex or of a different race or national origin, respectively, for work on equivalent jobs.” *Id.*

⁴⁷ *Id.* § 4.

⁴⁸ *Id.*

construes § 215(a)(3), this same employee would not be protected and could very well be unemployed as a result. Without clarity, this varying treatment frustrates the overall purpose of the FLSA, which is to ensure that all employees obtain a decent standard of living.⁴⁹

The courts of appeals rely on several different arguments to determine the degree of protection afforded to employees under § 215(a)(3). In general, the courts balance the language of § 215(a)(3) against the policy governing its enforcement.⁵⁰ They sometimes supplement these arguments with comparisons to similar retaliation provisions to justify their interpretation.⁵¹

A. Arguments on Whether “Filed any Complaint” Is Ambiguous

Because the legislative history of § 215(a)(3) does not clearly express a legislative intent as to the statute’s scope,⁵² courts that are charged with interpreting § 215(a)(3) begin by simply examining what the plain meaning of the text suggests.⁵³

Some courts find that despite the “remedial lens” that the FLSA should be read through,⁵⁴ the unambiguous language of § 215(a)(3) does not allow for the protection of oral complaints.⁵⁵ For example, in *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Seventh Circuit found that an employee who was terminated after verbally complaining to his supervisor about billable time at work was not protected under § 215(a)(3).⁵⁶ The court concluded that while § 215(a)(3) should be given an expansive reading, it still requires an employee to “submit some sort of writing” because it is impossible to “‘file’ an oral complaint.”⁵⁷ Similarly, in *Bartis v. John Bommarito*

⁴⁹ See *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 59 (N.D. Ga. 1986).

⁵⁰ See, e.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 839–40 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010) (No. 09-834).

⁵¹ See, e.g., *id.* at 840.

⁵² See *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 42 (1st Cir. 1999) (noting that the legislative history of the FLSA provides no guidance as to the intended scope of § 215(a)(3)).

⁵³ See *Kasten*, 570 F.3d at 837–38 (“[A]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” (quoting *Sapperstein v. Hager*, 188 F.3d 852, 857 (7th Cir. 1999))).

⁵⁴ See *infra* notes 75–79 and accompanying text.

⁵⁵ See *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000).

⁵⁶ See *Kasten*, 570 F.3d at 836.

⁵⁷ *Id.* at 838, 840. The court did, however, leave open the possibility that informal written documents could be protected. See *id.*

Oldsmobile-Cadillac, Inc.,⁵⁸ a district court within the Eighth Circuit found that an employee who was fired after he verbally complained to his boss about a new timesheet policy was not entitled to § 215(a)(3) protection.⁵⁹ While the court stated that there was some room for a broad interpretation, it concluded that “the statute cannot be construed so broadly as to depart from its plain and clear language” by protecting oral complaints.⁶⁰ As such, these courts generally require a more “verifiable activity” than an oral complaint.⁶¹

Some courts will not even look past the language of the statute because Congress’s obvious intent is evident in its plain language.⁶² For example, in *Lambert v. Genesee Hospital*,⁶³ the Second Circuit held that a female employee who verbally complained to her supervisor about a wage disparity between herself and a similarly situated male employee was not entitled to § 215(a)(3) protection.⁶⁴ The court limited the causes of action in a § 215(a)(3) case to three enumerated types of conduct: filing a formal complaint with the Department of Labor, instituting a proceeding, or testifying.⁶⁵ Since the intent of Congress was clear according to this court, there was no need to look beyond the language of the statute.⁶⁶ As a result, district courts within the Second Circuit have eliminated all informal workplace complaints from the scope of protection afforded by § 215(a)(3).⁶⁷

⁵⁸ 626 F. Supp. 2d 994 (E.D. Mo. 2009).

⁵⁹ *See id.* at 997, 1001.

⁶⁰ *Id.* at 999.

⁶¹ *Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp. 2d 322, 324 (W.D. Va. 1999).

⁶² *See Redmond, supra* note 6, at 334 (citing HERMAN A. WECHT, WAGE-HOUR LAW: COVERAGE 29 (1951)).

⁶³ 10 F.3d 46 (2d Cir. 1993).

⁶⁴ *See id.* at 50–52, 56.

⁶⁵ *See id.* at 55 (citing *EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 990 (6th Cir. 1992) (Suhrheinrich, J., concurring in part and dissenting in part)). Not only does this interpretation not protect informal oral complaints, it does not protect a written memorandum given to a supervisor. *See Kelly v. City of Mount Vernon*, 344 F. Supp. 2d 395, 405–06 (S.D.N.Y. 2004).

⁶⁶ *See Lambert*, 10 F.3d at 55. The *Lambert* Court concluded that there was no need to defer to the opinion stated in the EEOC Compliance Manual, which states that FLSA retaliation protection should “encompass informal workplace complaints” since the “intent of Congress [was] clear, that [was] the end of the matter.” *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984)).

⁶⁷ *See Kelly*, 344 F. Supp. 2d at 405–06 (holding that a written complaint to a supervisor was not protected from employer retaliation since it was not formally made to the DOL).

The courts that argue for a broad interpretation of § 215(a)(3) generally find that its language is somewhat vague, leaving open the possibility that certain types of oral complaints may trigger FLSA protection. For example, after using a dictionary to interpret the phrase “filed any complaint,” the First Circuit concluded that an employee who sent a letter to her supervisor stating that she was entitled to overtime pay was protected from retaliation by § 215(a)(3).⁶⁸ The court concluded that its language was sufficiently ambiguous to protect most informally made complaints.⁶⁹ However, the court stated that “not all abstract grumblings will suffice to constitute the filing of a complaint with one’s employer”⁷⁰ and advised all courts within the circuit to determine an employee’s protection under § 215(a)(3) on a case-by-case basis.⁷¹ Courts in the Ninth Circuit apply a similar rule, in that “not all amorphous expressions of discontent related to wages and hours constitute complaints filed within the meaning of § 215(a)(3).”⁷² It just needs to be clear that the “employee communicates [orally or written] the *substance* of his allegations to the employer.”⁷³ Some courts apply an even broader standard and read § 215(a)(3) to protect any claim under the Act. For example, the Sixth Circuit held that a school custodian who verbally told her supervisor that the school was “breaking some sort of law” by not paying male and female employees equally was a sufficient assertion of her statutory rights.⁷⁴ The court came to this conclusion without imposing any of the qualifications discussed in *Valerio v. Putnam Assocs., Inc.*

⁶⁸ *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 45 (1st Cir. 1999).

⁶⁹ *See id.* at 41–42. The court determined that by using the word “any” in the phrase “filed any complaint,” Congress left open the possibility that it could relate to less formal expressions. *Id.* at 42. Similarly, the court found that if the phrase “filed any complaint” was limited to formally filed complaints, the additional language, “or instituted or caused to be instituted any proceeding,” becomes superfluous. *Id.*

⁷⁰ *Id.* at 44. Requiring more than “abstract grumblings” is important because “[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer’s act or omission does not elevate that act or omission to the level of a materially adverse employment action.” *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996).

⁷¹ *See Valerio*, 173 F.3d at 45.

⁷² *Lambert v. Ackerley*, 180 F.3d 997, 1007 (9th Cir. 1999) (en banc).

⁷³ *Id.* at 1008.

⁷⁴ *EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 989–90 (6th Cir. 1992) (internal quotation marks omitted).

B. Analyzing the Purpose of the FLSA To Clarify any Remaining Ambiguity

After reading the language of § 215(a)(3), courts look to the purpose of the Act to determine whether to protect informal complaints. The courts that broadly interpret § 215(a)(3) harp on the Supreme Court's view that the FLSA has "remedial and humanitarian"⁷⁵ purposes to ensure that "all employees may obtain a decent standard of living."⁷⁶ Congress chose to rely on employees to secure their rights under the statute by voicing their grievances without the fear of retaliation that may, without federal oversight, induce aggrieved employees to quietly accept substandard conditions.⁷⁷ These courts argue that a broad interpretation of § 215(a)(3) will promote this "animating spirit" by prohibiting employer intimidation.⁷⁸ Therefore, the broad view suggests that a construction of § 215(a)(3) that protects only formally made complaints "would do violence to the statute's goals."⁷⁹

In contrast, some courts of appeals will not even look beyond the language of the statute to the policy governing the Act.⁸⁰ These courts find that the plain language of § 215(a)(3) is "paramount to any purpose, remedial or otherwise."⁸¹ That said, other courts applying a strict interpretation of § 215(a)(3) consider the purpose of the Act as a factor in their

⁷⁵ *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (stating that the "remedial and humanitarian" provisions of the Act are, in general, not to be applied in a "narrow, grudging manner").

⁷⁶ *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 59 (N.D. Ga. 1985).

⁷⁷ See *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960); *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987). "For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather [Congress relies] on information and complaints received from employees seeking to vindicate rights claimed to have been denied. . . . [E]ffective enforcement could thus only be expected if employees [feel] free to approach officials with their grievances. . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." *Mitchell*, 361 U.S. at 292.

⁷⁸ *Brock*, 812 F.2d at 124.

⁷⁹ *Daniel*, 611 F. Supp. at 59.

⁸⁰ "[W]here Congress has made the public policy decision and expressed it clearly, as in § 215(a)(3)'s plain and unambiguous language, it is not open to courts to trump or change this decision in the name of statutory interpretation" to reach, what the court deems, a more sensible result. *O'Neill v. Allendale Mut. Ins. Co.*, 956 F. Supp. 661, 664 n.6 (E.D. Va. 1997).

⁸¹ Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 553 (2001).

determination.⁸² For example, the Seventh Circuit recognizes that the remedial nature of § 215(a)(3) warrants an expansive interpretation but not a reading so expansive as to protect oral complaints.⁸³

C. Comparisons Between § 215(a)(3) and Other Anti-Retaliation Provisions

Many courts find helpful analogies from similar anti-retaliatory provisions to either support or reject an argument that the anti-retaliatory provision of the FLSA protects informally made oral complaints.⁸⁴ In general, courts look at the anti-retaliation provisions of the Age Discrimination and Employment Act (“ADEA”),⁸⁵ Title VII of the Civil Rights Act of 1964 (“Title VII”),⁸⁶ and the National Labor Relations Act (“NLRA”).⁸⁷

Courts that strictly interpret § 215(a)(3) distinguish the Act with the anti-retaliation language of the ADEA, which was originally enacted by Congress as part of the FLSA.⁸⁸ The ADEA “forbid[s] employers from retaliating against any employee who ‘has opposed any practice’ that is unlawful under the statutes.”⁸⁹ The Seventh Circuit found it “significant” that Congress chose the narrower phrase “filed any complaint” when enacting § 215(a)(3) of the FLSA.⁹⁰ By finding that the “cause of action for

⁸² See *supra* notes 76–79 and accompanying text.

⁸³ See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 840 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010) (No. 09-834).

⁸⁴ Compare *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) (contrasting the broadly construed Title VII retaliation provision with § 215(a)(3)), with *Lambert v. Ackerley*, 180 F.3d 997, 1006–07 (9th Cir. 1998) (en banc) (relying on courts that compared nonretaliatory policies of other statutes to establish that a broad interpretation of § 215(a)(3) was proper).

⁸⁵ Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621–34 (West 2011).

⁸⁶ Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2006).

⁸⁷ National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006).

⁸⁸ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C.A. §§ 621–34). Therefore, “much of the extensive ADEA jurisprudence is directly relevant to FLSA questions.” *THE FAIR LABOR STANDARDS ACT*, *supra* note 13, at 27. In 1979, all aspects of the administration of the ADEA were transferred over to the EEOC. See 29 U.S.C. § 625; 29 U.S.C.A. § 626(a)–(b); see also 29 U.S.C. §§ 209, 211.

⁸⁹ *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 840 (7th Cir. 2009) (quoting 29 U.S.C. § 623(d)), *cert. granted*, 130 S. Ct. 1890 (2010) (No. 09-834). This prohibition has been interpreted to protect verbal complaints. See *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 65 (2d Cir. 1992).

⁹⁰ *Kasten*, 570 F.3d at 840.

retaliation under the FLSA is much more circumscribed⁹¹ than under the ADEA, the Seventh Circuit concluded that a strict interpretation of the phrase “filed any complaint” is proper because “Congress could have, but did not, use broader language in the FLSA’s retaliation provision.”⁹²

Both the strict and the broad groups compare and contrast the anti-retaliation provision of Title VII to § 215(a)(3). Title VII protects employees who “oppose[] any practice made an unlawful employment practice.”⁹³ This retaliation provision encompasses any method of complaint, formal or informal, that could reasonably be interpreted by the employer as opposition to discrimination.⁹⁴

The strict camp distinguishes the language of § 215(a)(3) from the language of the anti-retaliation provision of Title VII. For example, a district court decided that “oppose any practice” is far broader than the protection found in the narrow limitations of the FLSA.⁹⁵ This broad “opposition clause” brings informal protests and oral complaints within the ambit of protected activity.⁹⁶ Therefore, the court concluded that the scope of the FLSA anti-retaliation provision is much more limited and “does not extend to activities that fall outside its clear text.”⁹⁷ In addition, the Fourth Circuit found that the anti-retaliation language of the FLSA is “much more circumscribed” than the

⁹¹ *Id.* (quoting *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000)).

⁹² *Id.*

⁹³ Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2006). Title VII prohibits discrimination of an employee because of an individual’s race, color, religion, sex, or national origin. *Id.* § 2000e-2.

⁹⁴ See EEOC Compl. Man., *supra* note 40, § 8-II(B)(2), (3)(b); see also Redmond, *supra* note 6, at 343. The EEOC maintains that the theory behind the Title VII retaliation scheme is that “Title VII’s protections against workplace discrimination mean little if retaliation discourages people from filing charges in the first place.” Marilee L. Miller, *The Employer Strikes Back: The Case for a Broad Reading of Title VII’s Bar on Retaliation*, 2006 UTAH L. REV. 505, 520.

⁹⁵ See *Bartis v. John Bommarito Oldsmobile-Cadillac, Inc.*, 626 F. Supp. 2d 994, 999 (E.D. Mo. 2009).

⁹⁶ See *Jackson v. Advantage Commc’ns, Inc.*, No. 4:08CV00353 SWW, 2009 WL 2508210, at *6 (E.D. Ark. Aug. 14, 2009). Given the similarities between the proposed amendment of § 215(a)(3) pending before the Senate and the ADEA and Title VII anti-retaliation provisions, oral complaints related to wage discrimination would be protected activity under the new FLSA provision, if enacted. See *supra* notes 42–48 and accompanying text.

⁹⁷ *Bartis*, 626 F. Supp. 2d at 1000.

anti-retaliation language of Title VII.⁹⁸ While the court did not condone retaliatory conduct, all it could feasibly do was invite Congress to change the language of § 215(a)(3) to be more like the nonretaliatory language of Title VII.⁹⁹

On the other hand, the broad camp gives no credence to the comparison between the anti-retaliation provision of Title VII and that of the FLSA. This group argues that the FLSA was written seventy-two years ago, when statutes were far less detailed and written simpler.¹⁰⁰ It goes on to conclude, “[t]he 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.”¹⁰¹

Some courts also compare the anti-retaliation provision of the NLRA to § 215(a)(3). The NLRA makes it unlawful to “discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.”¹⁰² The Supreme Court has found that given the policy and objective of the NLRA to protect employees from employer intimidation, there is enough ambiguity in the language of the provision to afford broader protection to the employee.¹⁰³ Proponents of the broad interpretation generally

⁹⁸ *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000); *see also Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) (citing *EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 990 (6th Cir. 1992) (Suhrheinrich, J., concurring in part and dissenting in part)) (noting that § 215(a)(3) on its face prohibits retaliation based on “three expressly enumerated types of conduct,” in contrast to the much broader retaliation wording in Title VII).

⁹⁹ *See Ball*, 228 F.3d at 364–65. The court stated that if the employer did retaliate against the employee, it “would provide an example of why Congress found it necessary in other contexts to enact broader anti-retaliation provisions. . . . But this moral judgment does not justify a conclusion—contrary to the plain language of the FLSA . . .” *Id.* at 365. Congress is currently considering whether to accept that invitation to amend § 215(a)(3) to be more like Title VII or the ADEA. *See supra* notes 42–48 and accompanying text.

¹⁰⁰ *See Lambert v. Ackerly*, 180 F.3d 997, 1005 (9th Cir. 1998) (en banc).

¹⁰¹ *Id.*

¹⁰² National Labor Relations Act, 29 U.S.C. § 158(a)(4) (2006). The NLRA protects employees’ right to form, join, or assist labor unions; to bargain collectively with their employers; and to engage in other forms of concerted activity. *See id.* § 157.

¹⁰³ *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (noting that “the presence of the preceding words ‘to discharge or otherwise discriminate’ reveals . . . particularly by the word ‘otherwise,’ an intent on the part of Congress to afford broad rather than narrow protection”). However, this case only answered the question of whether a sworn written statement to a field examiner constituted a protected activity and did

conclude that the language of the anti-retaliation provision of the NLRA is just as inclusive.¹⁰⁴ Therefore, when applying the broad construction of the anti-retaliation provision of the NLRA to § 215(a)(3), one court found that an employee's oral and written complaints to her supervisor entitled her to protection under the Act.¹⁰⁵

III. ANALYZING THE LANGUAGE, PURPOSE, AND POLICY OF § 215(A)(3)

Although the similar retaliation provisions do not provide significant guidance on how to interpret § 215(a)(3), the balance between the plain language of § 215(a)(3), its purpose, and the potential costs if informal oral complaints were to be protected weighs in favor of a construction of § 215(a)(3) that does not protect verbal complaints. Requiring an employee to put his complaint in writing, whether formally made to a government agency or informally made to an employer, furthers the purposes of § 215(a)(3).

A. *There Is Limited Guidance Provided by the Similar Anti-Retaliation Provisions*

Of the three retaliation provisions discussed, only the ADEA should guide the courts on how to interpret § 215(a)(3). Although the ADEA was originally enacted as part of the FLSA, Congress chose to write its anti-retaliation provision in a much less "circumscribed" fashion.¹⁰⁶ Because "a judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation,"¹⁰⁷ it cannot be presumed that Congress intended "filed any complaint" and "opposed any practice" to be interpreted the same way. This suggests that § 215(a)(3), unlike the ADEA, does not protect oral complaints.

not address the question of whether informal verbal complaints were covered within the scope of the NLRA. *Id.* at 121.

¹⁰⁴ See *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 60 (N.D. Ga. 1986).

¹⁰⁵ See *id.* at 63.

¹⁰⁶ See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 840 (7th Cir. 2009) (quoting *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2009)), *cert. granted*, 130 S. Ct. 1890 (2010) (No. 09-834).

¹⁰⁷ See *FBI v. Abramson*, 456 U.S. 615, 635 (1982) (O'Connor, J., dissenting).

Scholars have argued that the policies shaping the EEOC Compliance Manual's broad interpretation of the anti-retaliation provision of Title VII should apply equally to § 215(a)(3).¹⁰⁸ However, there is no need for the FLSA to defer to EEOC interpretations. The reasons that the EEOC policies are not compelling are numerous. First, courts generally do not defer to the EEOC view of what constitutes an adverse employment action because many believe that the EEOC lacks substantive rulemaking authority under Title VII.¹⁰⁹ Second, the Department of Labor has sole administrative control over the FLSA, not the EEOC.¹¹⁰ Third, the EEOC, in its Compliance Manual, bases its broad interpretation merely on its reading of judicial precedent, as opposed to the agency's own interpretation; therefore, its statements are not binding on courts.¹¹¹ Thus, Title VII provides no guidance on how to interpret § 215(a)(3) of the FLSA.

Similarly, although the Supreme Court adopted a liberal construction of the NLRA anti-retaliation provision, the Court did so only with regard to the question of whether sworn written statements were within the scope of protected activity.¹¹² The Court never suggested that oral complaints made to the employer

¹⁰⁸ See, e.g., Redmond, *supra* note 6, at 339–40.

¹⁰⁹ Miller, *supra* note 94, at 523. Courts must afford high levels of deference to agencies' interpretations "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). However, as the Court emphasized in *Skidmore v. Swift & Co.*, "a high degree of deference is simply not appropriate in all cases." Miller, *supra* note 94, at 524 (citing *Skidmore*, 323 U.S. at 140). "[A]n agency's opinion is rewarded with high deference only when the agency provided for formal procedures—including notice and comment or formal adjudication—in forming those opinions." *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)). Therefore the EEOC's authority in regard to interpretations of substantive issues is not very clear. See *id.* at 525; see also *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n.6 (2002) ("The EEOC's interpretive guidelines do not receive *Chevron* deference... Such interpretations are 'entitled to respect'... but only to the extent that those interpretations have the 'power to persuade.'" (internal citations omitted)).

¹¹⁰ See THE FAIR LABOR STANDARDS ACT, *supra* note 13, at 40. The Department of Labor has not issued its opinion on the meaning of "filed any complaint" within § 215(a)(3) of the FLSA.

¹¹¹ See *Hodgson & Sons, Inc. v. Fed. Energy Regulatory Comm'n*, 49 F.3d 822, 826 (1st Cir. 1995).

¹¹² See *NLRB v. Scrivener*, 405 U.S. 117, 125 (1972).

were protected activity.¹¹³ Therefore, the anti-retaliation provision of the NLRA should not provide guidance to courts in their analysis of § 215(a)(3).

B. A Plain Reading of § 215(a)(3)

Courts, in construing the language of a statute, are instructed to begin with “the language of the statute itself.”¹¹⁴ “Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”¹¹⁵ Because there is no legislative history on point, the language of § 215(a)(3) is where to begin the analysis.¹¹⁶

By “giving effect to the normal, everyday usage of the words” of the statute, § 215(a)(3) excludes oral complaints from protection.¹¹⁷ Combining “filed” with “any complaint” does not create a phrase that is “susceptible to many different interpretations” when it comes to protecting oral complaints.¹¹⁸ For example, the First Circuit used a dictionary to define “complaint” but concluded that the definition was ambiguous.¹¹⁹ However, while the definition of complaint includes “the act or action of expressing protest, censure, or resentment: expression of injustice,”¹²⁰ all of which may be done informally, Congress put the word “filed,” a verb, before “any complaint” for a reason. “Filed,” when used as a verb, means “[t]o *deliver* (a paper or instrument) to the proper officer so that it is received by him to

¹¹³ *See id.*

¹¹⁴ *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

¹¹⁵ *Id.*

¹¹⁶ *Cf. Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 45 (1st Cir. 1999) (noting that the legislative history of the FLSA provides no guidance as to the intended scope of § 215(a)(3)).

¹¹⁷ *See Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (“If the statute is clear and unambiguous that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress[,] . . . [that is,] the plain meaning of the statute” (quoting *K mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291–92 (1988)) (internal quotation marks omitted)).

¹¹⁸ *Redmond*, *supra* note 6, at 332.

¹¹⁹ *See Valerio*, 173 F.3d at 41. The court found that “[b]y failing to specify that the filing of any complaint need to 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, censure, resentment, or injustice conveyed to an employer.” *Id.*

¹²⁰ *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 464 (1971)).

[be] kept on file, or among the records of his office.”¹²¹ Thus, “filed” formalizes the procedure of making a complaint. One court asserts that congressional intent is unclear because the use of the word “any” creates the possibility that Congress intended the provision to apply to any type of complaint, including informal complaints.¹²² However, “any complaint” is modified by “filed.” Therefore, while one may file an expression of protest, censure, resentment, or injustice in writing, one cannot file said expression orally.¹²³

Furthermore, if Congress enacts the proposed amendments to the anti-retaliation provision of the FLSA, it will demonstrate its belief that “filed any complaint” should be strictly construed. By broadening the language of § 215(a)(3) with respect to wage-based complaints,¹²⁴ but not for other types of FLSA-related complaints, Congress would be implying that “filed any complaint” means something different than what is being proposed. Because opposing or inquiring about wage-related issues¹²⁵ would undoubtedly protect informally made oral complaints, it would render the amendments superfluous if “filed any complaint” were to be construed in the same way with regard to non-wage-based issues.¹²⁶

Moreover, the plain meaning approach to interpreting § 215(a)(3) is justified by democratic considerations. Adhering to the plain meaning of a statute, in general, promotes democratic values in lawmaking and deference to our representatives since Congress votes on the language of a bill.¹²⁷ As one commentator

¹²¹ See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 838 (7th Cir. 2009) (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 945 (2d ed. 1958)) (emphasis added), *cert. granted*, 130 S. Ct. 1890 (2010) (No. 09-834).

¹²² See *id.* (citing *Valerio*, 173 F.3d at 42); *Redmond*, *supra* note 6, at 333.

¹²³ *Kasten*, 570 F.3d at 839.

¹²⁴ The proposed amendment would generally protect an employee who opposed or inquired about wage-related issues. See *supra* notes 42–48 and accompanying text.

¹²⁵ See *supra* notes 42–48 and accompanying text (discussing the new possible language of the anti-retaliation provision of the FLSA).

¹²⁶ When construing a statute, courts should avoid rendering parts of it superfluous. See *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

¹²⁷ See Katherine A. Rocco, *Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure: In the Interest of Full Disclosure?*, 76 FORDHAM L. REV. 2227, 2243 (2008) (citing Robert S. Summers, *Judge Richard Posner’s Jurisprudence*, 89 MICH. L. REV. 1302, 1320 (1991) (book review)).

argues, the plain meaning of language allows citizens to rely on published law.¹²⁸ This creates a “zone of certainty” because the language of the statute means what it says and is thus safe to rely on.¹²⁹ Subjecting citizens to a special meaning contrary to the clear statutory language operates to “jerk the rug from beneath them.”¹³⁰ Furthermore, adhering to the clear language of a statute supports formal equality since the law will be the same for everyone and applied in the same way.¹³¹ Therefore, by following a plain meaning approach to interpreting § 215(a)(3), all employees will be treated equally and all employers can rely on established law in making the business decision to no longer retain an employee.

C. *The Purpose of the FLSA*

Even if the court looks behind the clear and unambiguous language of § 215(a)(3), the history and purpose of the Act do not mandate protection for informal verbal complaints. The FLSA is a remedial statute that was enacted to address long-festering labor issues culminating in the Great Depression.¹³² The broad camp argues that the provision was designed to encourage employees to report substantive violations without fear of retaliation.¹³³ Thus, this group argues that a narrow construction of the anti-retaliation provision creates an atmosphere of intimidation and defeats the Act's goal of preventing employees' attempts to secure their rights from being a “calculated risk.”¹³⁴

¹²⁸ See *id.* (citing Summers, *supra* note 127, at 1321).

¹²⁹ See Ruth Sullivan, Legal Drafting: The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation, http://aix1.uottawa.ca/~resulliv/legdr/pmr.html#N_1 (last visited Feb. 4, 2011). This emphasis on the text ensures that the law is certain and that the public has fair notice, both of which are prerequisites for effective law. See *id.*

¹³⁰ Rocco, *supra* note 127, at 2243 (quoting Summers, *supra* note 127, at 1321).

¹³¹ Sullivan, *supra* note 129.

¹³² See *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

¹³³ See *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“[F]ear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”).

¹³⁴ See, e.g., *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 43 (1st Cir. 1999) (quoting *Mitchell*, 361 U.S. at 293).

While allowing employees to pursue informal internal remedies benefits both the employee and the employer,¹³⁵ there must be limits, given the language of the statute. It is true that Congress chose, in enacting its remedial statute, to prevent an environment in which employees choose silence over unemployment.¹³⁶ However, this does not mean that Congress chose to have its carefully designed statute read completely outside its wording.¹³⁷ Given the high burden that must be met to justify interpreting a statute beyond its clear and unambiguous language, the legislative purpose, while compelling, does not validate changing the defined meaning of “filed.”¹³⁸ Congress made its policy decision in its clear word choice; therefore, it is not open for courts to trump this determination in the name of statutory interpretation or for the purpose of reaching a more sensible result.¹³⁹

D. Effect on an Employer’s Business

A consideration of the costs imposed on employers if informal oral complaints are protected shows why they should not come within the ambit of § 215(a)(3) protection. First, as a result of universally broad protection, there would be an “increase [in] the number of retaliation lawsuits filed, thus increasing the amount of money employers need to devote to defending the claims.”¹⁴⁰ This would inevitably lead to a reduction in salaries and shareholder dividends as litigation expenses would rise. Alternatively, this increase in expenses could be passed on to consumers in the form of increased costs.

¹³⁵ Redmond, *supra* note 6, at 335 (citing Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor, 992 F.2d 474, 478–79 (3d Cir. 1993)). “A construction of the statute requiring an employee to file a formal external complaint denies the employer an opportunity to resolve the situation quietly and promptly.” *Id.* at 335–36 (citing Clean Harbors Env’tl. Servs., Inc. v. Herman, 146 F.3d 12, 21 (1st Cir. 1998)).

¹³⁶ See *Mitchell*, 361 U.S. at 292.

¹³⁷ It took three congressional hearings and more than a year to get this bill passed into law. THE FAIR LABOR STANDARDS ACT, *supra* note 13, at 14–15.

¹³⁸ See *United States v. Sabri*, 326 F.3d 937, 943 (8th Cir. 2003) (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)).

¹³⁹ See *O’Neill v. Allendale Mut. Ins. Co.*, 956 F. Supp. 661, 664 n.6 (E.D. Va. 1997).

¹⁴⁰ Redmond, *supra* note 6, at 338–39 (citing David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 76–78 (1999)).

Second, an increase in the number of lawsuits would force employers to settle claims without regard to the merits of each case.¹⁴¹ It is easy to imagine a situation in which an employee who was fired for poor workmanship manufactures a retaliation claim after the fact by asserting that he was fired for verbally complaining to his boss.¹⁴² Given the deference to the employee under the remedial provisions of the FLSA, the employer would have difficulty defending itself because of a lack of compelling evidence in its favor.¹⁴³ This unnecessarily puts the burden on the employer to decide whether it is worthwhile to try to defend itself in court.¹⁴⁴ Requiring an employee to put his complaint in writing establishes a record that allows the employer to properly investigate an employee's claim to determine whether settlement or litigation should be the next step. Demanding "some sort of a writing"¹⁴⁵ from the employee increases the authority of proof and puts the employer and employee on equal footing in terms of discovery and litigation.

Shifting the burden to the employer to file all orally-made complaints does not put the parties on equal ground. For example, the First Circuit expects employers to place employee complaints on file among the employer's official records.¹⁴⁶ While this would solve the problem of disadvantaging an employer during litigation since every complaint would be accounted for, it is an unrealistic expectation. Assuming that all complaints, whether or not they are related to statutorily-enumerated protected conduct, will be placed on a company's official records puts a substantial burden on supervisors and managers. This would require the company to prepare a formal memorandum every time a complaint is raised or would require the company to add staff dedicated to this process. The end result would be increased operating costs and either salary cuts or increased costs to consumers. Putting the light burden on an employee to

¹⁴¹ See Sherwyn, *supra* note 140, at 81.

¹⁴² See generally Kelly v. City of Mount Vernon, 344 F. Supp. 2d 395, 405–06 (S.D.N.Y. 2004).

¹⁴³ See *supra* notes 76–79 and accompanying text; see also *supra* notes 31–34 and accompanying text (discussing the burden-shifting scheme).

¹⁴⁴ Settlements are advantageous to an employer since "they eliminate the uncertainty and cost of protracted litigation." Pierce v. Atchison Topeka & Santa Fe Ry. Co., 110 F.3d 431, 437 (7th Cir. 1997).

¹⁴⁵ See Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 840 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010) (No. 09-834).

¹⁴⁶ See Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 41–42 (1st Cir. 1999).

write a letter when he or she has a complaint would not frustrate the purpose of the statute since the employee would still be protected.¹⁴⁷ Further, it encourages the employee to think about his complaint and consider its merits before giving the employer a record of it.

E. Awaiting the Supreme Interpretation

The Supreme Court granted certiorari in *Kasten v. Saint-Gobain Performance Plastics Corp.* to determine whether oral complaints are protected from retaliation under the FLSA.¹⁴⁸ Although there has been no decision rendered yet, it seems likely from the context of the October 2010 oral argument that a win for employers is on the horizon.¹⁴⁹

Justice Alito, for example, stated that the word “filing” usually indicates that there is a written document and further suggested that if an oral complaint is protected from retaliation, then anybody could claim he or she was retaliated against and have his or her story corroborated by colleagues, whether true or not.¹⁵⁰ Along the same lines, Justice Sotomayor was concerned that if an oral complaint comes within the umbrella of filing a complaint, then an employee at a cocktail party who says something in passing to his or her boss could make a retaliation charge if he or she was later fired.¹⁵¹ Similarly, in response to the plaintiff’s counsel’s claim that he was “filing” a complaint with the Supreme Court as he was making his oral argument, Justice Scalia said that such an assertion was “absurd” and that “people don’t talk like that.”¹⁵² Justice Kennedy implied which way he was leaning when he jokingly stated, “I would like to go back to the question Justice Scalia filed just earlier,” which was followed by laughter.¹⁵³ Justice Roberts also seems to fall on the side of a strict interpretation, as indicated by his questioning of

¹⁴⁷ The proposed amendments to the statute would further reduce the burden on the employee, since the only time he would have to produce a written document would be with respect to overtime or hours complaints, not wage-based complaints. See *supra* notes 42–48 and accompanying text.

¹⁴⁸ *Kasten*, 130 S. Ct. at 1890.

¹⁴⁹ Justice Kagan recused herself from this decision.

¹⁵⁰ See Transcript of Oral Argument at 6–7, *Kasten*, 570 F.3d 834 (No. 09-834) [hereinafter Oral Argument], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-834.pdf.

¹⁵¹ See *id.* at 5.

¹⁵² *Id.* at 13.

¹⁵³ *Id.*

how a boss could know whether someone is asserting his or her statutory rights when the employee makes a verbal complaint.¹⁵⁴ Although Justice Thomas did not say anything during oral argument, he is a noted textualist and will likely fall on the side of a strict interpretation.¹⁵⁵

On the other hand, Justice Ginsburg suggested that the law, as written, does not mandate that a complaint must be in writing and that Congress may have had illiterate people and immigrants in mind when it crafted the FLSA in the 1930s.¹⁵⁶ Similarly, Justice Breyer indicated that an oral complaint should be protected if it were formally made, thus eliminating the potential for someone filing an oral complaint if made in an informal environment, such as at a cocktail party or on the cafeteria line.¹⁵⁷

CONCLUSION

The balance between the costs, policy implications, and statutory construction weighs more heavily in favor of a interpretation of § 215(a)(3) that does not protect verbal complaints made in the workplace. It would stand in stark contrast to the language of § 215(a)(3) to allow oral complaints to be protected since it is impossible to “‘file’ an oral complaint.”¹⁵⁸ All other informally made complaints in writing, which can be “filed” by the employer,¹⁵⁹ can be protected without the employee feeling as if he or she is taking a “calculated risk” by complaining.¹⁶⁰ The proposed construction allows for courts to interpret the language of § 215(a)(3) through its remedial lens without throwing the language of § 215(a)(3) by the wayside and

¹⁵⁴ *Id.* at 24.

¹⁵⁵ *See, e.g.*, John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 430 (2010) (noting that Justice Scalia and Justice Thomas are the “[Supreme] Court’s textualists”).

¹⁵⁶ Oral Argument, *supra* note 150, at 31.

¹⁵⁷ *See id.* at 8.

¹⁵⁸ *Kasten*, 570 F.3d at 838, *cert. granted*, 130 S. Ct. 1890 (2010) (No. 09-834).

¹⁵⁹ *See generally* Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 44–45 (1st Cir. 1999). Anything written includes, but is not limited to, e-mails, text messages, BBMs, and tweets since these are all “verifiable.” *See* Clevinger v. Motel Sleepers, Inc., 36 F. Supp. 2d 322, 324 (W.D. Va. 1999). Also, under this approach, the language “instituted any proceeding” would not be rendered superfluous because filing a written complaint with an employer is not the same as instituting a proceeding. *See* Clemons, *supra* note 81, at 552.

¹⁶⁰ *See Valerio*, 173 F.3d at 43.

without putting the expense and risk completely on the employer. While some may find that this interpretation could lead to “morally unacceptable” results, it would be unfaithful to the clear language of the statute if it were given a more expansive reading.¹⁶¹ “Congress knows how to afford broad protection against retaliation when it wants,”¹⁶² as evidenced by its decision to write broader anti-retaliation language in the ADEA. Should Congress decide to amend § 215(a)(3) with regard to wage-related issues but not others, it would further show its intent to construe “file any complaint” narrowly.

A proper construction of § 215(a)(3) takes pieces of the various arguments for strict and liberal constructions. This presents an interpretation of § 215(a)(3) that accords with the language of the statute, without doing “violence”¹⁶³ to the purpose of the FLSA. A proper construction of § 215(a)(3) would protect employees who, in good faith, produce “some sort of writing”¹⁶⁴ asserting their statutory rights under FLSA with “*substance*”¹⁶⁵ as long as the assertion is more than an “abstract grumbling[].”¹⁶⁶ These requirements ensure that the employee is serious about his complaint and that there is a record of the complaint, so as to put the employer and employee on equal footing in terms of litigation. All indications are that the Supreme Court is leaning toward a narrow interpretation of § 215(a)(3) that will likely comport with the interpretation laid out in this Note. If Congress wants to afford greater protection to employees, it should adopt the proposed amendment to the anti-retaliation provision of the FLSA.¹⁶⁷

¹⁶¹ See *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000).

¹⁶² *Bartis v. John Bommarito Oldsmobile-Cadillac, Inc.*, 626 F. Supp. 2d 994, 1000 (E.D. Mo. 2009).

¹⁶³ See *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 59 (N.D. Ga. 1985).

¹⁶⁴ *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 840 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 1890 (2010) (No. 09-834).

¹⁶⁵ *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999) (en banc).

¹⁶⁶ *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 44 (1st Cir. 1999).

¹⁶⁷ See *supra* notes 42–48 and accompanying text.