Supreme Court, U.S.
FILED
FEB 12 2010
OFFICE OF THE CLERK

No. 09-834

IN THE

Supreme Court of the United States

KEVIN KASTEN,

Petitioner,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

THOMAS P. GODAR
Counsel of Record
JEFFREY A. MCINTYRE
ANTHONY J. SIEVERT
RICHARD J. LEWANDOWSKI
WHYTE HIRSCHBOECK DUDEK SC
33 E. Main Street, Suite 300
Madison, WI 53703
(608) 255-4440

Attorneys for Respondent

228109

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Blank Page

QUESTION PRESENTED FOR REVIEW

Has an employee alleging solely that he orally asserted objections to his employer regarding the location of time clocks "filed any complaint" within the meaning of Section 215(a)(3) of the Fair Labor Standards Act?

CORPORATE DISCLOSURE STATEMENT

Respondent Saint-Gobain Performance Plastics Corporation ("Saint-Gobain") is a wholly owned subsidiary of Saint-Gobain Ceramics & Plastics, Inc., which is in turn a wholly owned subsidiary of Saint-Gobain Abrasives, Inc. which is a wholly owned subsidiary of Saint-Gobain Delaware, which is a wholly owned subsidiary of Saint-Gobain Corporation, which is an indirect subsidiary of Compagnie de Saint-Gobain, a Paris-based corporation which is publicly owned and traded on the French Bourse.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

Statutes:

Cited Authorities

Blank Page

COUNTER-STATEMENT OF THE CASE

The Fair Labor Standards Act ("the Act"), 29 U.S.C. § 215(a)(3), provides private remedies for employees who have suffered adverse employment actions as a result of engaging in certain specific protected activities. In relevant part, the statute provides that:

> [I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this 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).

Between October 2003 and December 2006, Kevin Kasten was employed in various manufacturing and production capacities by Saint-Gobain. Petitioner's Appendix ("Pet. App.") 64. Throughout 2006, Mr. Kasten was subject to Saint-Gobain's progressive Corrective Action Program because of a series of missed time clock punches, in violation of the company's time and attendance policies. Pet. App. 64-66. This progressive discipline culminated in a final warning. On November 10, 2006, Mr. Kasten was informed that "if the same or any other violation occurs in the subsequent 12-month period from this date [sic] will result in further disciplinary action up to and including termination." Pet. App. 65. On December 11, 2006, Saint-Gobain

informed Mr. Kasten that his employment was terminated because of another failure to punch the time clock. *Id.*

Nine months later, on September 12, 2007, Mr. Kasten filed a wage and hour complaint with the Equal Rights Division of the Wisconsin Department of Workforce Development. Pet. App. 64. On December 5, 2007, Mr. Kasten filed this lawsuit alleging that Saint-Gobain terminated his employment in retaliation for oral statements he had allegedly made to supervisors in the months before his termination. Pet. App. 64. Specifically, Mr. Kasten alleged that before his termination, he had made certain comments to supervisors and other employees regarding potential legal and efficiency implications of the location of the company's time clocks. Mr. Kasten admitted that he did not submit any writing to Saint-Gobain, that he did not contact any government agency either orally or in writing, and that he did not file a lawsuit prior to the termination of his employment. Pet. App. 70.

On June 19, 2008, the District Court granted summary judgment to Saint-Gobain and dismissed Mr. Kasten's claim. Pet. App. 63-72. The District Court reasoned that Mr. Kasten had not engaged in protected activity under the Act, because his internal, oral objections did not satisfy the requirements of Section 215(a)(3), as they were not "filed." Pet. App. 70. Further, the District Court held that Mr. Kasten's objections were at most "abstract grumbling or amorphous expression[s] of discontent," and therefore were not protected even under a view of Section 215(a)(3) that encompasses oral, internal complaints. Pet. App. 70.

Mr. Kasten appealed, and in an opinion authored by Judge Joel Flaum, a three-judge panel of the United States Court of Appeals for the Seventh Circuit unanimously held that Mr. Kasten's oral, internal statements did not constitute protected activity. Pet. App. 32-43. The court concluded that while the Act protects complaints made internally to employers, the statutory term "filed" requires that complaints be made in writing. Pet. App. 43. Mr. Kasten petitioned for rehearing and rehearing *en banc*, which the Seventh Circuit denied. Pet. App. 1-14.

REASONS FOR DENYING THE PETITION

This case involves the interpretation of a solitary, straightforward phrase in a single federal statute. The facts, taken as true for purposes of this Opposition are straightforward. An employee alleged that on several occasions he made oral comments to his supervisors to the effect that the location of time clocks at his employer's facility were unlawful and inefficient. Specifically, he asserted that he orally stated to his supervisors that employees were required to spend time off the clock donning and doffing protective garments because the time clocks were located within clean room areas. The District Court granted summary judgment to the employer, a unanimous panel of the United States Court of Appeals for the Seventh Circuit affirmed, and seven of ten judges voted to deny rehearing *en banc*. Mr. Kasten seeks further review, claiming that a mature split among the circuits exists on the question of whether his internal, oral grievances constitute complaints that were "filed" within the meaning of the Fair Labor Standards Act.

The Petition presents no sound basis for the Court to exercise jurisdiction. Contrary to Mr. Kasten's argument, the Seventh Circuit's decision did not "create[ ] a clear disagreement among the circuits" requiring resolution. Pet. 16. Rather, the Seventh Circuit is the only federal court of appeals that has expressly analyzed the statutory term "filed" when presented with an oral, internal complaint. The Second and Fourth Circuits have concluded that internal complaints, whether written or oral, are not statutorily protected activity. The First, Ninth and Tenth Circuits have held that internal, written complaints are protected. Outside of dicta, only the Fifth, Sixth, Eighth, and Eleventh Circuits have permitted claims by plaintiffs who alleged only oral, internal complaints. However, in their opinions, these four courts did not expressly analyze the statutory term "filed," and the distinction between written and oral complaints. Neither the Seventh Circuit nor any other federal court of appeals has held that an employee who is terminated because he or she commences a governmental investigation or files and serves a lawsuit has no protection from retaliation under the Act.

In its decision, the Seventh Circuit thoroughly examined the plain language of the phrase "filed any complaint," harmonized it with the Act's other statutory terms and provided reasoned bases for its holding. Accordingly, Saint-Gobain respectfully submits that the Court should permit the federal courts to review and examine this reasoning, and that the question presented does not require this Court's attention or the parties' further resources.

I. THE DECISION BELOW CORRECTLY INTERPRETS THE PLAIN LANGUAGE OF THE FAIR LABOR STANDARDS ACT.

The Seventh Circuit properly interpreted the statutory term "filed" in holding that Mr. Kasten's oral complaints to his supervisors did not constitute activity protected by the Act. Section 215(a)(3) applies only in enumerated circumstances, including those where an "employee has *filed* any complaint or *instituted or caused to be instituted* any proceeding under or related to" the statute. 29 U.S.C. § 215(a)(3) (emphasis added). The sole issue in this case is the scope of the statute's protection of an employee who "has filed any complaint" under its provisions. Based upon the language of the statute, both courts below concluded that the phrase "filed any complaint" is sufficiently clear in the context of this statute to require the submission of a written document. Pet. App. 43, 70.

The plain language of the statute demonstrates that the intent of Congress in enacting Section 215(a)(3) is clear and unambiguous. It is axiomatic that the "'starting point [in statutory interpretation] must be the language employed by Congress.'" *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citation omitted); *Mallard v. U.S. Dist. Court for S. Dist. Of Iowa*, 490 U.S. 296, 300 (1989) ("Interpretation of a statute must begin with the statute's language"); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). By its terms, Section 215(a)(3) "prohibits retaliation based on three expressly enumerated types of conduct." *See Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994) (citing

E.E.O.C. v. Romeo Cmty. Schs., 976 F.2d 985, 990 (6th Cir. 1992) (Suehrenreich, J., dissenting).

The Seventh Circuit held that purely oral, unwritten complaints were not "filed" within the common understanding of the statutory term. Pet. App. 43. In concluding that the term "filed" requires that the employee submit a writing, the court's plain language interpretation follows Webster's Ninth New Collegiate Dictionary, which defines the verb "to file" as

> 1. to arrange in order for preservation and reference <"file letters"> 2. a: to place among official records as prescribed by law <"file a mortgage"> b: to perform the first act of (as a lawsuit) <"threatened to file charges against him">

Pet. App. 39.

Further, the Seventh Circuit compared Section 215(a)(3) with the language of other, broader anti-retaliation statutes. Pet. App. 38. Specifically, Title VII and the Age Discrimination in Employment Act forbid retaliation by employers against any employee who "has opposed any practice" those statutes make unlawful.[1] 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); *see also Genesee Hosp.*, 10 F.3d at 55 (comparing Section

1 Other statutes offer broader protection to employees who "participate in any manner . . . in any other action to carry out the purposes" of a statute. *See, e.g.*, 42 U.S.C. § 5851(a)(1)(F) (nuclear facilities), 42 U.S.C. § 7622(a)(3) (air pollution); 29 U.S.C. § 1140(a) (ERISA); 29 U.S.C. § 1855(a) (Migrant and Seasonal Agricultural Protection Act).

215(a)(3) with other statutes). By enacting this distinct statutory language in these instances, Congress made legislative choices establishing different statutory triggers for employee protection than under the Fair Labor Standards Act.

While failing to address this disparity in language chosen by Congress, Mr. Kasten proposes an interpretation that would require an identical reading of the different statutory phrases "filed any complaint," "opposed any practice," and "participate in any manner." Similarly, Mr. Kasten attempts to conflate the term "file" with "submit." Pet. 24. However, of the various other dictionary definitions of the verb "file" relied upon by Mr. Kasten, all but one contemplate a written document, such as "copy" to a newspaper, "an application for a patent, a petition for divorce," and "an application, petition." *Id.* (citing Pet. App. 58-59, 114). Consistent with the Seventh Circuit's interpretation, each of these examples refers to the submission of a writing, not mere oral statement.

Having found no definitional support in standard references, Mr. Kasten offers his own alternative "idiomatic meaning" of the word "filed"; that is, "to make a complaint known to the responsible party." Pet. 25. To bolster this interpretation, Mr. Kasten raises two arguments. First, he asserts that because a number of other statutes specify that complaints thereunder be "in writing," Section 215(a)(3) must not be read to contain this requirement. Pet. 27. However, uses of the term "in writing" to modify the word "complaint" offer no real insight into the meaning of the verb at issue – "to file." But many of the statutes cited by Mr. Kasten do not

include any variation on the word "filed."[2] Mr. Kasten cites other statutes specifying a number of explicit procedural and formal requirements of a proper complaint, including that it be in writing.[3] In each case,

---

2 *See* 7 U.S.C. § 228b-2(a) (Packers and Stockyards Act) ("cause a complaint in writing to be served"); 7 U.S.C. § 193(a) (same); 7 U.S.C. § 1599(a) (Federal Seed Act) (same); 15 U.S.C. § 80b-9(a)("informs the agency concerned in writing"); 33 U.S.C. § 392 (Clean Water Act) ("presented to the court"); 42 U.S.C. § 2000(b)(a) (Civil Rights Act) ("receives a complaint in writing"); 42 U.S.C. § 2000c-6(a)(same).

3 *See* 2 U.S.C. § 437g(a)(a) (Federal Election Campaign Act) ("Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury"); 5 U.S.C. § 3330a(a)(2)(B) (Veterans Employment Opportunities Act) ("Such complaint shall be in writing, be in such form as the Secretary may prescribe, specify the agency against which the complaint is filed, and contain a summary of the allegations that form the basis for the complaint"); 38 U.S.C. § 4322(b) (Uniformed Services Employment and Reemployment Act) ("Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint"); 15 U.S.C. § 80b-9(a) (Investment Company Act) ("statement in writing, under oath or otherwise, as to all the facts and circumstances relevant to such violation"); 42 U.S.C. § 3610(a)(1)(A)(ii) (Fair Housing Act) ("Such complaints shall be in writing and shall contain such information and be in such form as the Secretary requires"); 42 U.S.C. § 15512(a)(2)(C) (Help America Vote Act) ("shall be in writing and notarized, and signed and sworn by the person filing the complaint"). 15 U.S.C. § 80b-9(a) ("file with it a statement in writing, under oath or otherwise, as to all the facts and circumstances relevant to such violation"). Only one cited statute uses the phrase "file a complaint in writing" without including further modifiers. *See* 49 U.S.C. § 31105(a) (Surface Transportation Assistance Act).

these terms modify the word "complaint," not the term "filed." The statutes merely set forth the various characteristics of a legitimate complaint under the respective provisions.

Second, Mr. Kasten cites a number of inapposite administrative agency decisions, and state court statutes, regulations and judicial decisions that, without context or explanation, describe motions or grievances "filed orally." Pet. 25-26. But Mr. Kasten's selective reliance on random instances of imprecise use of language among the countless statutes, regulations and decisions cannot overcome the common understanding that "to file" requires the submission of a writing. Indeed, Mr. Kasten has failed to cite a single reported federal judicial opinion referring to an "oral filing." Nor has he cited a single federal statute in which the "filing" of an "oral" complaint is expressly permitted.

Finally, Mr. Kasten appeals to the "remedial and humanitarian purpose" of the Act to support a reading of its language beyond its terms. Pet. 23. Notwithstanding Mr. Kasten's heavy reliance on Congressional intent, he fails to quote any specific aspect of the legislative history of Section 215(a)(3) that would support a conclusion that the term "filed" was intended to mean anything other than the submission of a written document. Mr. Kasten points to *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960), stating only that enforcement of the statute required that "employees felt free to *approach officials* [not employers] with their grievances," an objective which can equally, if not more effectively, be accomplished by "institut[ing] a proceeding." But the record is devoid of

any evidence from which the Court could decipher that Congress intended Section 215(a)(3) to apply to unwritten grievances presented orally to employers.

Further, because the Act's language is clear, its modification on policy grounds is solely the province of Congress. For example, in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 626 (2007), the Court concluded that the phrase "employment practice" referred to a discrete act or occurrence for purposes of calculating Title VII's statute of limitations. Addressing Ms. Ledbetter's policy arguments calling for special treatment of pay claims to effect Title VII's "broad remedial purpose," the Court stated: "we are not in a position to evaluate Ledbetter's policy arguments, and it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the prompt processing of all charges of employment discrimination . . . and the interest in repose." *Id.* at 641 (internal quotation omitted). In enacting the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, superceding *Ledbetter*, Congress recalibrated this balancing of interests through legislation. *See Ledbetter*, 550 U.S. at 637 (Ginsburg, J., dissenting) ("[T]he Legislature may act to correct this Court's parsimonious reading of Title VII.").

Although this Court has not addressed the scope of Section 215(a)(3), Mr. Kasten contends that evidence of Congressional intent may be gleaned from this Court's application of an amorphous canon of "expansive" statutory interpretation. Citing *Tenn. Coal, Iron and R.R. Co. v. Muscoda Local 123*, 321 U.S. 590 (1944),

Mr. Kasten incorrectly asserts that the Seventh Circuit "failed to confer any weight" to the statute's remedial purpose. Pet. 23. To the contrary, the court properly stated that "expansive interpretation is one thing; reading words out of a statute is quite another." Pet. App. 36. After considering the statutory language, the court concluded that it could not be stretched to encompass Mr. Kasten's claim. In so doing, the Seventh Circuit declined to substitute its policy preferences and relied upon this Court's guidance that it is "most impermissibl[e]" for a court to "rel[y] on its understanding of the broad purposes" of a statute in order to extend the meaning of statutory terms when those terms are "sufficiently clear in . . . context." *Rodriguez v. U.S.*, 480 U.S. 522, 525-26 (1987) (internal quotation marks omitted); *Union Bank v. Wolas*, 502 U.S. 151, 158, 162 (1991). Indeed, this Court assumes "'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Am. Tobacco*, 456 U.S. at 68 (citation omitted); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). For this reason, "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." *Am. Tobacco*, 456 U.S. at 75 (citation omitted).

Even if the Court were inclined to disregard the plain language of Section 215(a)(3) in favor of a vaguely stated conception of Congressional intent, the Act's post-enactment legislative history provides a better and

more specific guide than this Court set forth sixty-six years ago in *Tenn. Coal.* In 1985, Congress enacted a temporary statute broadening the scope of Section 215(a)(3). *See* Fair Labor Standards Act Amendments of 1985, Pub. L. No. 99-150, § 8, 99 Stat. 791 (1985). In language reminiscent of the broader scope of Title VII, the Age Discrimination in Employment Act and other statutes, it afforded protection to certain federal employees who "asserted [the Act's] coverage" to their employer. *Id.* This broader language did not require the filing of a complaint, as described in Section 215(a)(3). After this Court upheld application of the Act to state and local government employees in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), Congress enacted this broader protection for such employees during the initial period of adjustment to Act requirements. According to the plain language of that law, after it expired in August 1986, protection against retaliation would apply "only" to "an employee who takes an action described in" Section 215(a)(3). *Id.* If the statutory phrases "filed any complaint" and "asserted [the Act's] coverage" had identical meaning, activities like those alleged by Mr. Kasten were already within the purview of Section 215(a)(3), and the temporary enactment would have been meaningless and wholly unnecessary. This "[subsequent legislation] declaring" Congress's clear understanding of the limits of Section 215(a)(3) "is entitled to great weight." *Loving v. U.S.*, 517 U.S. 748, 770 (1996). As the language of the Act is clear on its face, there is no need to go beyond the statute in an attempt to create a contrary meaning.

II. NEITHER THE STATE OF LAW IN OTHER FEDERAL COURTS NOR ANY OTHER PRUDENTIAL CONSIDERATION COUNSELS IN FAVOR OF REVIEW.

A. The Seventh Circuit Decision is Squarely Within the Reasoned Holdings of Other Federal Courts.

Laboring to establish a basis for this Court's review, Mr. Kasten incorrectly contends that the Seventh Circuit's decision "conflicts with the decisions of all other Federal Courts of Appeals to have considered the issue and conflicts with the instructions of this Court. . . ." Pet. 8. With respect to the question presented, this statement is plainly inaccurate. Indeed, while the Seventh Circuit for the first time explicitly analyzed the question of whether oral complaints to employers are protected, the decision below is reasonable in light of the previous, reasoned holdings of federal circuit courts throughout the country.

Mr. Kasten exaggerates the distinctions among prior circuit court decisions in an effort to establish a mature conflict requiring this Court's attention. Contrary to Mr. Kasten's assertion, the decision below falls within the holdings of five circuit courts on the question presented. The Second and Fourth Circuits have also concluded that oral complaints to employers do not constitute statutorily protected activity. In *Genesee Hosp.*, 10 F.3d at 55, female plaintiffs claimed that they had orally complained to their supervisors that their lower pay as compared to male colleagues as "unfair." The Second Circuit concluded

that "[t]he plain language of [Section 215(a)(3)] limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor.". This holding is in accord with that reached by the Fourth Circuit in *Ball v. Memphis Bar-B-Q Co., Inc.*, excluding oral statements to a supervisor from statutory protection. *See* 228 F.3d 360, 364 (4th Cir. 2000) (interpreting the statute's "testimony" clause).

Moreover, in line with the Seventh Circuit, the First, Ninth and Tenth Circuits have held that written complaints to employers are protected, without reaching binding holdings as to oral complaints. In *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000), employees not only presented written requests for overtime pay supported by the applicable statutes and regulations to their employer, but also complained directly to the Department of Labor. The Ninth Circuit was not called upon to address the status of oral complaints, and in any event, the plaintiffs' initiation of contact with the Department of Labor would have "instituted a proceeding" under the Act. Accordingly, as the Seventh Circuit recognized, the language in *Ackerley* concerning oral complaints to employers was no more than dicta. Pet. App. 14, n.3. Similarly, in *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984), the employee did not make an oral complaint, but rather attached a copy of the Equal Pay Act to a written complaint to her employer. In *Valerio v. Putnam Associates, Inc.*, 173 F.3d 35, 42, n.4 (1st Cir. 1999), the First Circuit explicitly recognized the oral/written distinction, and properly declined to address the protected status of oral, internal complaints. Indeed,

the *Valerio* court implied that a purely oral complaint would be insufficient, stating that "[w]e may question how far one may go to permit a written complaint to be augmented orally. We leave for another day whether combined oral and written complaints, or alleged complaints of a wholly oral nature, allow invocation of the protections of § 215(a)(3)." *Id.*

Relying heavily on a liberal interpretation and expansive reading, and without discussing the distinction between oral and written complaints, the Fifth, Sixth, Eighth and Eleventh Circuits have permitted claims to proceed where plaintiffs alleged that they made only oral, internal complaints. *See Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975) (concerning an internal, oral complaint after a DOL investigation and agreement by employer to pay back wages, without analysis as to the scope of Section 215(a)(3)); *E.E.O.C. v. White and Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (concerning an internal, oral complaint of gender discrimination, but noting that the charging parties "did not perform an act that is explicitly listed in the FLSA's anti-retaliation provision"); *Romeo Cmty. Sch.*, 976 F.2d at 989 (concerning an internal, oral complaint of gender discrimination under the Equal Pay Act, over a dissent); *Hagan v. Echostar Satellite, LLC*, 529 F.3d 617, 626 (5th Cir. 2008) (concerning internal oral complaints only where employee "steps outside the role" as employee and engages in something more than "abstract grumblings").[4] Not one of these opinions

4. Mr. Kasten further relies upon *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987), in which the plaintiff employee contended that his believed participation in a Department of (Cont'd)

expressly analyzed the term "to file" as used in the statute.

Even assuming that a true and mature divergence among reasoned opinions of the circuit courts exists, these decisions have existed in harmony for years without difficulty. Indeed, when this Court has had occasion to grant certiorari on the question presented, it has declined. As early as 1993, the Second Circuit held in *Genesee Hosp.*, 10 F.3d at 55, that employees' internal complaints to their supervisors do not constitute protected activity. This Court denied certiorari in that case, and again when the issue was raised in *Ackerley*, 180 F.3d 997, *cert. denied*, 528 U.S. 1116 (2000). Nothing in the record reflects that any variance in these decisions has yielded "national legal confusion," or proven "unworkable," as Mr. Kasten asserts. Pet. 16. Indeed, a review of the cases cited by the parties reveals only that the issue has arisen so infrequently over the years that it could not be deemed one demanding this Court's attention. Having analyzed the term "to file" explicitly in statutory context for the first time, the Seventh Circuit opinion provides a reasoned interpretation that other courts may follow without this Court's intervention.

(Cont'd)

Labor investigation constituted protected activity. Because it does not involve the question presented, *Brock* is inapposite. Indeed, the court based its holding on the policy of ensuring that employees are "free to *approach officials* with their grievances." *Id.* at 124 (emphasis added).

B. The Petition Presents No Question of Exceptional Importance.

Faced with an ordinary matter of statutory interpretation, Mr. Kasten struggles to identify a reason to justify this Court's review. Each of Mr. Kasten's arguments relies almost exclusively upon his view that the Seventh Circuit decision does not accommodate his preferred policy outcomes. First, Mr. Kasten contends that the decision below "poses a serious obstacle to administration of the law in the Seventh Circuit." Pet. 8. To the contrary, the court's holding states a clear rule of law: employees seeking to base an Act claim upon an internal grievance to a supervisor must do so in writing. Pet. App. 45. No evidence in the record confirms Mr. Kasten's speculation that an employee is "more likely" to approach an employer with an oral complaint, rather than a written document. Pet. 18. This is particularly true, now that the law in the Seventh Circuit has been plainly stated for the first time so that employees may understand it. If anything, a requirement that an employee submit his complaint in writing furthers the courts' legitimate interest in ensuring that an easily verifiable, protectable complaint was in fact made. Although the conclusion reached by the Seventh Circuit does not advance Mr. Kasten's policy preferences, he offers no support for an argument that it cannot be effectively administered.

Second, Mr. Kasten contends in another burst of rhetoric that the holding below "eviscerates the statute's protection for workers who bring violations . . . to their employer's attention." Pet. 18. While the Seventh Circuit did not adopt Mr. Kasten's all-encompassing interpretation of the Act, employees who complain to their employers in

writing are protected under its holding. Similarly, employees who file lawsuits against their employers, or initiate administrative investigations or other governmental proceedings, may avail themselves of the Act's statutory protections.

For the same reason, contrary to Mr. Kasten's assertion, the Seventh Circuit decision has no impact on the "flow of information to the Department of Labor." Pet. 17. According to Mr. Kasten, employees contacting federal agencies to inform them of an employer's unlawful conduct would be without legal recourse in the event of retaliation. Pet. 20. These arguments again conflate the statutory language in yet another way. To the extent that such activity constitutes "instituting a proceeding," it is protected separately by a clause not at issue in this case. The Seventh Circuit did not construe, and its decision did not limit, the statutory protection for employees who "institute a proceeding" with a government agency. Rather, it addressed the circumstances under which a grievance to an employer may constitute statutorily protected activity.

Even if the Seventh Circuit's construction of the term "filed any complaint" implicated communications to federal agencies, Mr. Kasten's argument that the court's decision would somehow create "confusion" is unsupported. Pet. 20. He cites two websites through which employees may contact the Department of Labor and the Equal Employment Opportunities Commission, though neither states that a complaint may be "filed" through this method or through a telephone call.[5] Ultimately, Mr. Kasten's

5. *See* Pet. 20, n.18 citing *www.dol.gov/whd/contact_us. htm* and *www.eeoc.gov/contact/index.cfm.*

professed concerns that the Seventh Circuit opinion will have a "tremendous chilling effect" on employee reporting and "nearly obliterate the viability of enforcement mechanisms" are unfounded. Pet. 21. Employees approaching federal agencies to "institute a proceeding" are protected under the statute regardless of the interpretation of the phrase "filed any complaint," and no prudential consideration supports an exercise of this Court's discretion to further review this matter.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

THOMAS P. GODAR
Counsel of Record
JEFFREY A. MCINTYRE
ANTHONY J. SIEVERT
RICHARD J. LEWANDOWSKI
WHYTE HIRSCHBOECK DUDEK SC
33 E. Main Street, Suite 300
Madison, WI 53703
(608) 255-4440

Attorneys for Respondent

Blank Page