SUPREME COURT OF THE UNITED STATES

No. 09–834

KEVIN KASTEN, PETITIONER *v.* SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION

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

[March 22, 2011]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins as to all but footnote 6, dissenting.

The Seventh Circuit found for the employer because it held that the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §215(a)(3), covers only written complaints to the employer. I would affirm the judgment on the ground that §215(a)(3) does not cover complaints to the employer at all.

I

The FLSA's retaliation provision states that it shall be unlawful

> "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." *Ibid.*

The phrase central to the outcome here is "filed any complaint." In the courts below, Kasten asserted a claim for retaliation based solely on allegations that he "filed" oral "complaints" with his employer; Saint-Gobain argued that the retaliation provision protects only complaints that are (1) in writing, and (2) made to judicial or administrative

bodies. I agree with at least the second part of Saint-Gobain's contention. The plain meaning of the critical phrase and the context in which appears make clear that the retaliation provision contemplates an official grievance filed with a court or an agency, not oral complaints—or even formal, written complaints—from an employee to an employer.

A

In isolation, the word "complaint" could cover Kasten's objection: It often has an expansive meaning, connoting any "[e]xpression of grief, regret, pain . . . or resentment." Webster's New International Dictionary 546 (2d ed. 1934) (hereinafter Webster's). But at the time the FLSA was passed (and still today) the word when used in a legal context has borne a specialized meaning: "[a] formal allegation or charge against a party, made or presented to the appropriate court or officer." *Ibid.* See also Cambridge Dictionary of American English 172 (2000) ("a formal statement to a government authority that you have a legal cause to complain about the way you have been treated"); 3 Oxford English Dictionary 608 (2d ed. 1989) ("[a] statement or injury or grievance laid before a court or judicial authority . . . for purposes of prosecution or of redress").

There are several reasons to think that the word bears its specialized meaning here. First, every other use of the word "complaint" in the FLSA refers to an official filing with a governmental body. Sections 216(b) and (c) both state that the right to bring particular types of actions "shall terminate upon the filing of a complaint" by the Secretary of Labor, and §216(c) clarifies that the statute of limitations begins running in actions to recover unpaid wages "on the date when the complaint is filed." These provisions unquestionably use "complaint" in the narrow legal sense. Identical words used in different parts of a statute are presumed to have the same meaning absent

contrary indication, *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34 (2005); *Sullivan* v. *Stroop*, 496 U. S. 478, 484 (1990). It is one thing to expand the meaning of "complaint" in §215(a)(3) to include complaints filed with an agency instead of a court; it is quite something else to wrench it from the legal context entirely, to include an employee's objection to an employer.

Second, the word "complaint" appears as part of the phrase "filed any complaint" and thus draws meaning from the verb with which it is connected. The choice of the word "filed" rather than a broader alternative like "made," if it does not connote (as the Seventh Circuit believed, and as I need not consider) something in writing, at least suggests a degree of formality consistent with legal action and inconsistent (at least in the less regulated work environment of 1938) with employee-to-employer complaints. It is noteworthy that every definition of the verb "filed" that the Court's opinion provides, whether it supports the inclusion of oral content or not, envisions a formal, prescribed process of delivery or submission. *Ante*, at 4–5 (comparing, for example, Webster's 945 (to file is to "deliver (a paper or instrument) to the proper officer") with 1 Funk & Wagnalls New Standard Dictionary of the English Language 920 (rev. ed. 1938) (to file is to "present in the regular way, as to a judicial or legislative body")).

Moreover, "[t]he law uses familiar legal expressions in their familiar legal sense," *Henry* v. *United States*, 251 U. S. 393, 395 (1920). It is, I suppose, possible to speak of "filing a complaint" with an employer, but that is assuredly not common usage. Thus, when the antiretaliation provision of the Mine Health and Safety Act used that phrase in a context that includes both complaints to an agency and complaints to the employer, it did not use "filed" alone, but supplemented that with "or made"—and to boot specified "including a complaint notifying the [mine] operator . . . of an alleged danger or safety or health

violation . . . ." 30 U. S. C. §815(c)(1).[1]

Third, the phrase "filed any complaint" appears alongside three other protected activities: "institut[ing] or caus[ing] to be instituted any proceeding under or related to this chapter," "testif[ying] in any such proceeding," and "serv[ing] . . . on an industry committee."[2] 29 U. S. C. §215(a)(3). Since each of these three activities involves an interaction with governmental authority, we can fairly attribute this characteristic to the phrase "filed any complaint" as well. "That several items in a list share an attribute counsel in favor of interpreting the other items as possessing that attribute as well." *Beecham* v. *United States*, 511 U. S. 368, 371 (1994).

And finally, the 1938 version of the FLSA, while creating private rights of action for other employer violations, see §16(b), 52 Stat. 1069, did not create a private right of action for retaliation. That was added in 1977, see §10, 91 Stat. 1252. Until then, only the Administrator of the Wage and Hour Division of the Department of Labor could enforce the retaliation provision. See §11(a), 52 Stat. 1066. It would seem more strange to require the employee to go to the Administrator to establish, and punish retaliation for, his intracompany complaint, than to require the Administrator-protected complaint to be filed with the

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[1] Kasten and this Court's opinion, *ante*, at 7, argue that the use of the modifier "any" in the phrase "filed *any* complaint" suggests that Congress meant to define the word "complaint" expansively. Not so. The modifier "any" does not cause a word that is in context narrow to become broad. The phrase "to cash a check at any bank" does not refer to a river bank, or even a blood bank.

[2] Section 5 of the original FLSA, which has since been repealed, charged industry committees with recommending minimum wages for certain industries to the Department of Labor. 52 Stat. 1062. In order to perform this function, industry committees were empowered, among other things, to "hear . . . witnesses" and "receive . . . evidence." §8(b), *id.,* at 1064.

Administrator in the first place.[3]

B

1

The meaning of the phrase "filed any complaint" is clear in light of its context, and there is accordingly no need to rely on abstractions of congressional purpose. Nevertheless, Kasten argues that protecting intracompany complaints best accords with the purpose of the FLSA—"to assure fair compensation to covered employees"—because such purposes are "advanced when internal complaints lead to voluntary compliance." Reply Brief for Petitioner 18. But no legislation pursues its ends at all costs. *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) *(per curiam).* Congress may not have protected intracompany complaints for the same reason it did not provide a private cause of action for retaliation against complaints: because it was unwilling to expose employers to the litigation, or to the inability to dismiss unsatisfactory workers, which that additional step would entail. Limitation of the retaliation provision to agency complaints may have been an attempt "to achieve the benefits of regulation right up to the point where the costs of further benefits exceed the value of those benefits." Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 541 (1983).

2

In deciding whether an oral complaint may be "filed," the Court's opinion examines modern state and federal statutes, which presumably cover complaints filed with an

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[3] Kasten argues that excluding intracompany complaints would make the phrases "filed any complaint" and "instituted or caused to be instituted any proceeding" redundant. That is not so. An employee may file a complaint with the Administrator that does not result in a proceeding, or has not yet done so when the employer takes its retaliatory action.

employer. The only relevance of these provisions to whether the FLSA covers such complaints is that none of them achieves that result by use of the term "filed any complaint," and all of them use language that unmistakably includes complaints to employers. See, *e.g.*, 42 U. S. C. §2000e–3(a) (prohibiting retaliation against employees who "oppos[e] any [unlawful] practice"). Any suggestion that because more recent statutes cover intracompany complaints, a provision adopted in the 1938 Act should be deemed to do so is unacceptable. While the jurisprudence of this Court has sometimes sanctioned a "living Constitution," it has never approved a living United States Code. What Congress enacted in 1938 must be applied according to its terms, and not according to what a modern Congress (or this Court) would deem desirable.[4]

3

Kasten argues that this Court should defer to the Department of Labor and Equal Employment Opportunity Commission's (EEOC) interpretations of 29 U. S. C. §215(a)(3). He claims that those agencies have construed §215(a)(3) to protect intracompany complaints "[f]or almost half a century," in litigating positions and enforcement actions. Reply Brief for Petitioner 22. He also argues that although the Department of Labor lacks the authority to issue regulations implementing §215(a)(3), it has such authority for several similarly worded provisions and has interpreted those statutes to include intracompany complaints. *Id.*, at 20.

Even were §215(a)(3) ambiguous, deference would still

[4]Moreover, if the substance of the retaliation provision of any other Act could shed light upon what Congress sought to achieve in the FLSA, it would be the relatively contemporaneous provision of the National Labor Relations Act, §8(4), 49 Stat. 453, codified at 29 U. S. C. §158(a)(4), which did not cover retaliation for employee-employer complaints. See *NLRB* v. *Scrivener*, 405 U. S. 117 (1972).

be unwarranted. If we are to apply our new jurisprudence that deference is appropriate only when Congress has given the agency authority to make rules carrying the force of law, see *Gonzales* v. *Oregon*, 546 U. S. 243, 255–256 (2006), deference is improper here. The EEOC has no such authority. Although the Secretary of Labor and his subordinates have authority to issue regulations under various provisions of the FLSA, see, *e.g.*, §203(*l*); §206(a)(2), they have no general authority to issue regulations interpreting the Act, and no specific authority to issue regulations interpreting §215(a)(3).

Presumably for this reason, the Court's opinion seems to suggest that only so-called *Skidmore* deference is appropriate, see *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).[5] This doctrine states that agencies' views are "'entitled to respect'" to the extent they have "'the power to persuade.'" *Christensen* v. *Harris County*, 529 U. S. 576, 587 (2000) (quoting *Skidmore*, *supra,* at 140).[6] For

[5] Or perhaps not. The actual quantum of deference measured out by the Court's opinion is unclear—seemingly intentionally so. The Court says that it is giving "a degree of weight" to the Secretary and EEOC's views "given Congress' delegation of enforcement powers to federal administrative agencies." *Ante*, at 12. But it never explicitly states the level of deference applied, and includes a mysterious citation of *United States* v. *Mead Corp.*, 533 U. S. 218 (2001), along with a parenthetical saying that "sometimes . . . judicial deference [is] intended even in [the] absence of rulemaking authority." *Ante*, at 13. I say this is mysterious because *Mead* clearly held that rulemaking authority was necessary for full *Chevron* deference, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). I have chosen to interpret the Court as referring to *Skidmore* deference, rather than *Chevron* deference or something in-between, in order to minimize the Court's ongoing obfuscation of this once-clear area of administrative law. See *Mead*, *supra,* at 245 (SCALIA, J., dissenting).

[6] In my view this doctrine (if it can be called that) is incoherent, both linguistically and practically. To defer is to subordinate one's own judgment to another's. If one has been persuaded by another, so that one's judgment accords with the other's, there is no room for deferral—only for agreement. Speaking of "*Skidmore* deference" to a persuasive

the reasons stated above, the agencies' views here lack the "power to persuade."

II

The Court's opinion claims that whether §215(a)(3) covers intracompany complaints is not fairly included in the question presented because the argument, although raised below, was not made in Saint-Gobain's response to Kasten's petition for certiorari. Citing this Court's Rule 15.2 and *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 75, n. 13 (1996), the opinion says that this Court does "not normally consider a separate legal question not raised in the certiorari briefs." *Ante*, at 15.

It regularly does so, however, under the circumstances that obtain here. (Curiously enough, *Caterpillar*, the case cited by the Court, was one instance.) Rule 15.2 is permissive rather than mandatory: "Any objection to consideration of a question presented based on what occurred in the proceedings below . . . *may* be deemed waived unless called to the Court's attention in the brief in opposition." (Emphasis added.) Accordingly, the Court has often permitted parties to defend a judgment on grounds not raised in the brief in opposition when doing so is "predicate to an intelligent resolution of the question presented, and therefore fairly included therein." *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996) (internal quotation marks omitted); see also *Vance* v. *Terrazas*, 444 U. S. 252, 258–259, n. 5 (1980).

Kasten's petition for certiorari phrases the question presented as follows: "Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the anti-retaliation provision, 29 U. S. C. §215(a)(3)?" Pet. for Cert. *i*. Surely the word "complaint" in this question must be assigned an implied addressee. It presumably does not include a complaint to Judge Judy. And the only plausible

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agency position does nothing but confuse.

addressee, given the facts of this case, is the employer. Saint-Gobain's rewording of the question presented in its brief in opposition is even more specific: "Has an employee alleging solely that he orally asserted objections *to his employer* . . . 'filed any complaint' within the meaning of [§215(a)(3)]." Brief in Opposition *i* (emphasis added). Moreover, under this Court's Rule 14.1(a), the question presented is "deemed to comprise every subsidiary question fairly included therein." Whether intracompany complaints are protected is at least subsidiary to Kasten's formulation (and explicitly included in Saint-Gobain's). The question was also decided by the courts below and was briefed before this Court. It is not clear what benefit additional briefing would provide.

Moreover, whether §215(a)(3) covers intracompany complaints is "predicate to an intelligent resolution of the question presented" in this case. The Court's own opinion demonstrates the point. While claiming that it remains an open question whether intracompany complaints are covered, the opinion adopts a test for "filed any complaint" that assumes a "yes" answer—and that makes no sense otherwise. An employee, the Court says, is deemed to have "filed [a] complaint" only when "'a reasonable, objective person would have understood the employee' to have 'put the employer on notice that the employee is asserting statutory rights under the [Act]." *Ante*, at 12 (quoting Tr. of Oral Arg. 23, 26). This utterly atextual standard is obviously designed to counter the argument of Saint-Gobain, that if oral complaints are allowed, "employers too often will be left in a state of uncertainty about whether an employee . . . is in fact making a complaint . . . or just letting off steam." *Ante*, at 11. Of course, if intracompany complaints were excluded, this concern would be nonexistent: Filing a complaint with a judicial or administrative body is quite obviously an unambiguous assertion of one's rights. There would be no need for lower courts to

question whether a complaint is "sufficiently clear and detailed," *ante*, at 12, carries the requisite "degree of formality," *ante*, at 11, or provides "fair notice," *ibid.*, whatever those terms may require.

The test the Court adopts amply disproves its contention that "we can decide the oral/written question separately," *ante*, at 15. And it makes little sense to consider that question *at all* in the present case if neither oral nor written complaints to employers are protected, cf. *United States* v. *Grubbs*, 547 U. S. 90, 94, n. 1 (2006). This Court should not issue an advisory opinion as to what would have been the scope of a retaliation provision covering complaints to employers if Congress had enacted such a provision.