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## Are You Breaking Some Sort of Law?: Protecting an Employee's Informal Complaints Under the Fair Labor Standards Act's Anti-Retaliation Provision

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## ARE YOU BREAKING SOME SORT OF LAW?: PROTECTING AN EMPLOYEE'S INFORMAL COMPLAINTS UNDER THE FAIR LABOR STANDARDS ACT'S ANTI-RETALIATION PROVISION

Discharges resulting from an employee's complaint about an employer's statutory violation are all too common. Recent statistics indicate that retaliation charges filed with the Equal Employment Opportunity Commission (EEOC) increased from 11,096 in 1992 to 19,694 in 1999.<sup>1</sup> Moreover, charges of retaliation now comprise over twenty-five percent of the EEOC's workload.<sup>2</sup> "The growth in the number of retaliation claims is especially impressive when compared with the statistics for sex and race claims, because the number of complaints for the latter has remained fairly constant over the last few years."<sup>3</sup> As the number of retaliation charges continues to increase, it becomes more important to understand the statutory

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1. See Office of Research, Info., and Planning, *Charge Statistics from the U.S. Equal Employment Opportunity Commission FY 1992 Through FY 1999* (last modified Jan. 12, 2000) <<http://www.eeoc.gov/stats/charges.html>> [hereinafter *Charge Statistics*]. These statistics include retaliation claims filed under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. III 1997), the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1994 & Supp. III 1997), the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (1994 & Supp. III 1997), and the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d) (1994). See *Charge Statistics*, *supra*. Although only the EPA claims reflect those charges filed under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (1994 & Supp. IV 1997), the total number of retaliation charges filed with the EEOC provides a useful analogy to those filed under the FLSA. Such a dramatic increase in retaliation charges arguably is not confined to Title VII, the ADEA, the ADA, and the EPA, but extends to the FLSA as well. See also Teresa L. Butler & A. Michael Weber, *Retaliation Lawsuits are Increasing Rapidly*, NAT'L L.J., Jan. 11, 1999, at B5 (stating that the number of retaliation charges filed has grown significantly in recent years).

2. See *Charge Statistics*, *supra* note 1.

3. Marisa Williams & Rhonda Rhodes, *Recent Developments in Retaliation Law and Resulting Implications for the Federal Sector*, 28-JAN. COLO. LAW. 59, 59 (1999) ("While sex and race discrimination claims still exceed the number of retaliation claims filed [in the federal and private sector], retaliation claims have surpassed every other type of discrimination claim . . . ."); see also *supra* text accompanying note 1 (stating the statistics for retaliation claims from 1992 to 1999).

provisions governing retaliation so that they may be applied consistently.

Consider the following story: From February of 1997 to May of 1998, Tessia Clevinger worked as a waitress for Motel Sleepers, Inc. (Motel).<sup>4</sup> Believing that she was not being paid fairly, Tessia complained on two separate occasions to her manager, Sue Dotson, about Motel's wage violations.<sup>5</sup> Each time Tessia complained, Dotson "chastised" her.<sup>6</sup> Tessia then contacted the Department of Labor (DOL) and made an inquiry regarding Motel's rate of pay.<sup>7</sup> The DOL told Tessia that the Fair Labor Standards Act<sup>8</sup> (FLSA) entitled her to receive the federal minimum wage for her work and that Motel owed her the difference between the minimum wage and what she had been paid.<sup>9</sup> Armed with this information, Tessia informed Motel's management that according to the DOL, Motel had violated the law in refusing to pay her minimum wage.<sup>10</sup> Motel's management reprimanded Tessia and insisted that she was wrong.<sup>11</sup> The management continued to harass Tessia until Motel fired her in May of 1998.<sup>12</sup>

Subsequent to her dismissal, Tessia brought a lawsuit against Motel charging retaliation<sup>13</sup> in violation of section 215(a)(3) of the FLSA.<sup>14</sup> Tessia argued that she had been fired in retaliation for

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

5. See *id.* at 323.

6. See *id.*

7. See *id.*

8. 29 U.S.C. §§ 201-219 (1994 & Supp. III 1997).

9. See *Clevinger*, 36 F. Supp. 2d at 323.

10. See *id.*

11. See *id.*

12. See *id.*

13. Retaliation involves the discharge of, or discrimination against, an employee because the employee engaged in a protected activity. An employee engages in a protected activity when she: 1) opposes an unlawful employment practice; or 2) participates in the statutory complaint process. See EEOC Compl. Man. (BNA) § 8 (1998). The anti-retaliation provision of the FLSA provides a list of protected activities. It allows protection for those employees who file complaints, institute proceedings or testify in proceedings. See 29 U.S.C. § 215(a)(3). This Note addresses the degree of formality that is required to constitute a complaint that is filed within the meaning of the provision.

14. See *Clevinger*, 36 F. Supp. 2d at 323. Section 215(a)(3) states:

[I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such

complaining to Motel's management and for contacting the DOL regarding her wages.<sup>15</sup> In response, Motel argued that Tessia had never filed a formal written complaint with the DOL and, as such, her charge of retaliation could not be sustained.<sup>16</sup> The district court held that the FLSA did not entitle Tessia to protection from retaliatory discharge because Tessia had not filed a lawsuit against the company or a formal charge with the DOL before her dismissal.<sup>17</sup> Accordingly, Motel had the freedom to discharge Tessia for her complaints of unlawful conduct. The district court's decision left Tessia unemployed and without recourse.

Tessia Clevinger's plight highlights a vexing question that currently splits the federal circuits,<sup>18</sup> namely, with what degree of formality must an employee's complaint be filed in order to preserve a later charge of retaliation against the employer under section 215(a)(3) of the FLSA? This Note addresses the meaning of the phrase "has filed any complaint"<sup>19</sup> and argues that the correct construction of the provision includes informal complaints made to employers. The first section looks at the goals of the FLSA and the importance of the anti-retaliation provision to achieving those goals. It also includes a brief overview of the *prima facie* case of retaliation. Section two presents the divergent approaches taken in construing the language of section 215(a)(3). Courts on one side of the issue argue that the plain language of the statute protects only those employees who file a formal complaint with a court or government agency.<sup>20</sup> Other courts reject this approach, holding that the

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proceeding, or has served or is about to serve on an industry committee.  
29 U.S.C. § 215(a)(3).

15. See *Clevinger*, 36 F. Supp. 2d at 323.

16. See *id.*

17. See *id.* at 324.

18. Compare *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (holding that the protection of the FLSA's anti-retaliation provision extends to those employees who make informal complaints to their employer), *cert. denied*, 120 S. Ct. 936 (2000), with *Lambert v. Genesee Hosp.*, 10 F.3d 46 (2d Cir. 1993) (holding that the plain language of the FLSA's anti-retaliation provision precludes protection unless an employee files a lawsuit or formal complaint with a government agency).

19. 29 U.S.C. § 215(a)(3).

20. See *Genesee Hosp.*, 10 F.3d at 55; *Booze v. Shawmut, Conn. Bank*, 62 F. Supp. 2d 593, 598 (D. Conn. 1999); *Johns v. Cianbro Corp.*, No. 3:98CV1831 (AHN), 1999 WL 200699, at \*2 (D. Conn. Mar. 29, 1999); *Clevinger*, 36 F. Supp. 2d at 324; *O'Neill v. Allendale Mut. Ins. Co.*, 956 F. Supp. 661, 663-64 (E.D. Va. 1997); *Acosta v. Yale Club*, No. 94 CIV. 0888(KTD),

provision encompasses protection for informal complaints.<sup>21</sup> Section three surveys and evaluates the competing arguments surrounding this issue and argues that the statute should be construed broadly to include informal complaints. After concluding that informal complaints fall within the anti-retaliation provision, section four examines the degree of informality permissible under the FLSA and proposes a proper construction of the provision. The final section presents a summary and concludes that the anti-retaliation provision of the FLSA must allow employees to lodge informal complaints with employers before the goals of the FLSA can be achieved.

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1995 WL 600873, at \*4 (S.D.N.Y. Oct. 12, 1995).

21. See *Ackerley*, 180 F.3d at 1007 ("The actions taken by the plaintiffs here . . . clearly constitute the filing of a complaint. . . . [T]he plaintiffs not only complained orally . . . they also contacted the Department of Labor . . . and notified their employer in writing."); *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 45 (1st Cir. 1999) (holding written complaints sufficient to fall within the statute); *Cunningham v. Gibson County, Tenn.*, Nos. 95-6665, 95-6667, 1997 WL 123750, at \*2 (6th Cir. Mar. 18, 1997) ("[I]t is the assertion of statutory rights that is the triggering factor, not the filing of a formal complaint"); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997) (protecting a plaintiff's assertion that he was owed overtime wages); *EEOC v. Romeo Community Schs.*, 976 F.2d 985, 989-90 (6th Cir. 1992) (allowing protection of an employee who complained that her employer was "breaking some sort of law"); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (holding an employee's oral complaints sufficient to fall under the statute); *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987) (protecting an employee where the employer was mistaken about the employee's participation in protected activity); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) (applying the anti-retaliation provision where the employee sent a memo to the employer and attached a copy of the EPA); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975) (protecting an employee who refused to return a back wage check); *Wittenberg v. Wheels, Inc.*, 963 F. Supp. 654, 659-60 (N.D. Ill. 1997) (allowing protection for an employee who made oral complaints to her employer); *Lundervold v. Core-Mark Int'l, Inc.*, No. Civ. 96-1542-AS, 1997 WL 907915, at \*3 (D. Or. Jan. 17, 1997) ("[Section] 215(a)(3) forbids retaliation against an employee for having asserted her rights under the statute, regardless of whether the assertion of rights was in the form of a formal complaint to a government agency or in a complaint made directly to her employer."); *Stading v. DFC Transp. Sys. Int'l, Inc.*, No. 92 C 1801, 1993 WL 338987, at \*4 (N.D. Ill. Sept. 1, 1993) (protecting an employee's oral complaints); *LeFebvre v. Rite-A-Way Indus., Inc.*, Civ. A. No. 91-1435-MLB, 1993 WL 245747, at \*4 (D. Kan. June 14, 1993) (providing coverage to an employee's conversation with the employer); *Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560, 563-64 (W.D. Mo. 1990) (protecting an employee's call to the DOL); *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 63 (N.D. Ga. 1985) (protecting an employee's complaint to her employer and call to the DOL because her "actions promoted the FLSA's purpose of protecting workers, and § 215(a)(3)'s goals of providing information to federal officials and allowing an employee to assert her rights").

AN OVERVIEW OF THE FAIR LABOR STANDARDS ACT AND  
RETALIATION LAW

The FLSA is a "remedial and humanitarian" statute,<sup>22</sup> enacted during the Great Depression and intended to achieve "certain minimum labor standards" in those industries it covers.<sup>23</sup> The FLSA governs the payment of minimum wages<sup>24</sup> and overtime compensation.<sup>25</sup> The FLSA was amended in 1963 to include the Equal Pay Act (EPA),<sup>26</sup> which forbids wage discrimination based on sex by mandating equal pay for equal work. Congress saw compliance with these provisions as a means of achieving the FLSA's main goal, which was "to correct and as rapidly as practicable to eliminate [substandard conditions]."<sup>27</sup>

Rather than ensuring compliance with the FLSA through government supervision of employers, Congress looked to employees to report violations.<sup>28</sup> Employees will not do so, however, if they believe their jobs will be jeopardized by making the report.<sup>29</sup> This fear may cause "employees quietly to accept substandard conditions,"<sup>30</sup> which defeats the FLSA's goal of eliminating such conditions. Accordingly, the goals of the FLSA can be achieved only if employees are protected from any retaliation that may result from their complaints.<sup>31</sup>

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

23. See 29 U.S.C. § 202; *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

24. See 29 U.S.C. § 206.

25. See *id.* § 207.

26. See *id.* § 206(d).

27. *Id.* § 202(b). Substandard conditions were defined as those that were "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *Id.* § 202(a).

28. See *Mitchell*, 361 U.S. at 292.

29. See *id.*; see also EEOC Compl. Man. (BNA) § 8, 8-2 (1998) ("If retaliation . . . were permitted to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination. . . ."). Cf. Dorothy E. Larkin, Note, *Participation Anxiety: Should Title VII's Participation Clause Protect Employees Participating in Internal Investigations*, 33 GA. L. REV. 1181, 1204-05 (1999) (arguing that employees are less likely to bring Title VII suits if they fear retaliation).

30. *Mitchell*, 361 U.S. at 292.

31. See *id.* ("[E]ffective enforcement could . . . only be expected if employees felt free to approach officials with their grievances.").

The FLSA specifically provides protection from retaliation in section 215(a)(3):

[I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.<sup>32</sup>

Congress intended this provision to increase compliance with the labor standards established by the FLSA,<sup>33</sup> such as the minimum wage<sup>34</sup> and overtime regulations.<sup>35</sup>

In a charge of retaliation, the employee holds the burden of establishing a prima facie case by proving that: 1) the employee engaged in an activity protected under the statute of which the employer was aware; 2) the employee was subject to adverse action by her employer; and 3) there is a causal relationship between the protected activity and the adverse action.<sup>36</sup> Once the employee establishes a prima facie case of retaliation, the burden shifts to the employer to show a legitimate nonretaliatory reason for the adverse action.<sup>37</sup> If the employer is able to do so, the burden shifts back to the employee to show the employer's nonretaliatory reason is pretextual.<sup>38</sup> This Note examines the first prong of the prima facie case to determine if an employee's informal complaint is sufficient to constitute an activity protected under the FLSA.

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32. 29 U.S.C. § 215(a)(3).

33. See *Mitchell*, 361 U.S. at 292 ("Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.").

34. See 29 U.S.C. § 206.

35. See *id.* § 207.

36. See *Richmond v. Oneok, Inc.*, 120 F.3d 205, 208-09 (10th Cir. 1997).

37. See *id.* at 208 (citing *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)). Common examples of legitimate nondiscriminatory reasons are poor job performance, see *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 37-38 (1st Cir. 1999), violation of work rules, see *Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp. 2d 322, 323 (W.D. Va. 1999), and inability to get along with coworkers, see *Booze v. Shawmut Bank, Conn.*, 62 F. Supp. 2d 593, 596 (D. Conn. 1999).

38. See *Richmond*, 120 F.3d at 208 (citing *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)). The employee may prove a proffered reason is pretextual by showing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's . . . reasons for its action," which "a reasonable factfinder could rationally find . . . unworthy of credence." *Id.* at 209.

## TWO INTERPRETATIONS OF SECTION 215(A)(3)

The controversy surrounding section 215(a)(3) of the FLSA centers around the meaning of the phrase "has filed any complaint."<sup>39</sup> The divergent approaches taken in interpreting this phrase are illustrated in *Lambert v. Genesee Hospital*<sup>40</sup> and *Lambert v. Ackerley*.<sup>41</sup> The first approach, taken in *Lambert v. Genesee Hospital*, construed the statute narrowly and held the anti-retaliation provision to its "plain language" by requiring that an employee file a formal written complaint with a court or government agency, such as the DOL or the EEOC, before invoking the protection of the FLSA.<sup>42</sup> Conversely, the Ninth Circuit rejected this reading of the provision in *Lambert v. Ackerley*.<sup>43</sup> Following the other circuit courts that had addressed the issue,<sup>44</sup> the court held informal complaints sufficient to invoke the protection of the FLSA.<sup>45</sup>

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39. 29 U.S.C. § 215(a)(3).

40. 10 F.3d 46 (2d Cir. 1993).

41. 180 F.3d 997 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 936 (2000).

42. See *Genesee Hosp.*, 10 F.3d at 55; *Booze*, 625 F. Supp. 2d at 598; *Johns v. Cianbro Corp.*, No. 3:98CV1831 (AHN), 1999 WL 200699, at \*2 (D. Conn. Mar. 29, 1999); *Clevinger*, 36 F. Supp. 2d at 324; *O'Neill v. Allendale Mut. Ins. Co.*, 956 F. Supp. 661, 663-64 (E.D. Va. 1997); *Acosta v. Yale Club*, No. 94 CIV. 0888 (KTD), 1995 WL 600873, at \*4 (S.D.N.Y. Oct. 12, 1995).

43. See *Ackerley*, 180 F.3d at 1004.

44. See *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 45 (1st Cir. 1999) (holding written complaints sufficient to fall within the statute); *Cunningham v. Gibson County, Tenn.*, Nos. 95-6665, 95-6667, 1997 WL 123750, at \*2 (6th Cir. Mar. 18, 1997) ("[I]t is the assertion of statutory rights that is the triggering factor, not the filing of a formal complaint."); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997) (protecting a plaintiff's assertion that he was owed overtime wages); *EEOC v. Romeo Community Schs.*, 976 F.2d 985, 989-90 (6th Cir. 1992) (allowing protection of an employee who complained that her employer was "breaking some sort of law"); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (holding an employee's oral complaints sufficient to fall under the statute); *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987) (protecting an employee where the employer was mistaken about the employee's participation in protected activity); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) (applying the anti-retaliation provision where the employer sent a memo to the employer and attached a copy of the EPA); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975) (protecting an employee who refused to return a back wage check).

45. See *Ackerley*, 180 F.3d at 1004.



*Lambert v. Genesee Hospital*

*Lambert v. Genesee Hospital*, the leading case supporting a narrow construction of the provision, involved a charge of retaliation that resulted from complaints alleging a violation of the EPA.<sup>46</sup> The plaintiffs prevailed at trial, but the Second Circuit reversed.<sup>47</sup> The court held that the plaintiff's informal complaints were not sufficient to constitute protected activity.<sup>48</sup>

The court supported its conclusion by looking to the "plain language" of the statute. The court argued that the plain language of section 215(a)(3) limits its scope to retaliation for filing a formal complaint with a court or government agency and does not protect complaints made to employers.<sup>49</sup> In reaching this conclusion, the court relied on Judge Suhrheinrich's dissenting opinion in *EEOC v. Romeo Community Schools*.<sup>50</sup> Judge Suhrheinrich argued that the section's prohibition of retaliation encompasses three enumerated behaviors,<sup>51</sup> "[s]pecifically, those who have (1) filed [an FLSA] complaint, (2) instituted an FLSA proceeding, or (3) testified in an FLSA

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46. See *Genesee Hosp.*, 10 F.3d at 51. The plaintiffs worked in Genesee Hospital's Duplicating Services Department. See *id.* at 50. In September of 1983, their supervisor, Tod Timmel, announced that he planned to appoint a "charge person" to act as an informal supervisor in the printing area. See *id.* at 51. Both Janine Lambert and a man in the department, Francis Dupre, applied, and Dupre received the position and a corresponding raise. See *id.* Eva Baker, who believed she supervised employees in the microfilm area, complained to Timmel and Ron Good, of the Hospital's employee-affairs department, that her position was substantially similar to Dupre's and that under the EPA, she was entitled to the same salary as Dupre. See *id.*

Accompanying Baker, Lambert complained to Good that Timmel chose Dupre for the "charge person" position because of Dupre's sex. See *id.* In September of 1984, Timmel promoted Dupre to manage the department. See *id.* The plaintiffs complained to Paul Hanson, the Hospital's president, that Timmel selected Dupre based on his sex. See *id.* In April of 1985, two of the plaintiffs resigned and, in July 1986, the plaintiffs filed suit against Genesee Hospital alleging retaliation for their complaints to Timmel, Good and Hanson regarding the denial of equal pay and sex discrimination. See *id.*

47. See *id.* at 51-52, 56.

48. See *id.* at 55.

49. See *id.*; *Booze v. Shawmut Bank*, Conn., 62 F. Supp. 2d 593, 598 (D. Conn. 1999); *Johns v. Cianbro Corp.*, No. 3:98CV1831 (AHN), 1999 WL 200699, at \*2 (D. Conn. Mar. 29, 1999); *Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp. 2d 322, 324 (W.D. Va. 1999); *O'Neill v. Allendale Mut. Ins. Co.*, 956 F. Supp. 661, 663-64 (E.D. Va. 1997); *Acosta v. Yale Club*, No. 94 CIV. 0888 (KTD), 1995 WL 600873, at \*4 (S.D.N.Y. Oct. 12, 1995).

50. 976 F.2d 985, 990 (6th Cir. 1992) (Suhrheinrich, J., concurring in part and dissenting in part); see *Genesee Hosp.*, 10 F.3d at 55.

51. See *Romeo*, 976 F.2d at 990 (Suhrheinrich, J., concurring in part and dissenting in part).

proceeding.”<sup>52</sup> This list comprises the entire scope of complaints sufficient to fall under the statute.<sup>53</sup> The *Genesee Hospital* court further argued that the statute’s unambiguous language made deference to the EEOC’s interpretation that EPA retaliation should encompass informal complaints unnecessary.<sup>54</sup>

### *Lambert v. Ackerley*

The Ninth Circuit, in *Lambert v. Ackerley*, rejected these arguments and held that the FLSA’s anti-retaliation provision does encompass an employee’s informal complaints made to an employer.<sup>55</sup> In support of that determination, the court first looked to

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52. *Id.*

53. *See id.*

54. *See Genesee Hosp.*, 10 F.3d at 55 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), in which the Supreme Court stated, “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress”). *But see* EEOC Compl. Man. *supra* note 13, § 8 at 8-3 n.12 (noting that “courts have recognized that the statute prohibits retaliation based on opposition to allegedly unlawful practices”).

55. *See Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 936 (2000). *Ackerley* involved six former ticket sales account executives (AEs) for the Seattle SuperSonics (Sonics). *See id.* at 1001. The AEs’ compensation plan provided \$2,000 per year in overtime wages, regardless of the number of overtime hours worked. *See id.* In 1993, the Sonics reduced the AEs’ work week and discontinued the overtime compensation. *See id.* In May of 1994, one AE, Laura Lambert, requested a meeting with the Sonics’ Controller, Brian Dixon, to discuss the Sonics’ failure to pay the AEs for the actual overtime hours worked. *See id.* Lambert also raised the issue with Bob Boustead, head of ticket sales, and contacted the DOL to request information regarding overtime wages. *See id.* The DOL informed Lambert that the Sonics’ overtime scheme violated the FLSA. *See id.* Lambert then went to Dixon with this information. *See id.* Dixon told Lambert that if she continued to demand overtime she would “definitely not have a job.” *Id.* In June of 1994, Lambert hired an attorney who contacted Barry Ackerley, CEO, requesting that the Sonics pay Lambert and the other AEs for their overtime hours. *See id.* at 1001-02. The overtime claims were eventually settled. *See id.* at 1002. In December 1994, however, nine of the ten AEs were discharged. *See id.* The only AE not discharged was the one AE who never complained of a violation. *See id.*

The plaintiffs filed suit for retaliation in violation of section 215(a)(3) of the FLSA and won a jury verdict. *See id.* The defendants moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial and a remittitur of damages. *See id.* The court remitted the punitive damages, denied the remaining motions, and the defendants appealed. *See id.* Relying on *Genesee Hospital*, a three-judge panel reversed on the ground that the anti-retaliation provision does not apply to complaints made to an employer. *See Lambert v. Ackerley*, 156 F.3d 1018 (9th Cir. 1998). The plaintiffs filed for a rehearing en banc, which was granted, and the panel opinion was withdrawn. *See Lambert v. Ackerley*, 169 F.3d 666 (9th Cir. 1999). After rehearing, the judgment of the district court was affirmed. *See Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 936 (2000).

the purpose of the statute.<sup>56</sup> It argued that the FLSA's remedial purpose required a broad interpretation of the Act.<sup>57</sup>

Congress intended the anti-retaliation provision of the FLSA to provide an incentive for employees to report their employer's wage and hour violations.<sup>58</sup> In support of that incentive, the anti-retaliation provision was meant to ensure that employees do not risk their jobs when asserting rights under the FLSA.<sup>59</sup> Construing the provision to require formal complaints to be filed with a court or government agency would undermine this protection and discourage employees from asserting their rights.<sup>60</sup>

The Ninth Circuit then looked to the language of the statute and rejected the argument that the language of the provision was unambiguous.<sup>61</sup> In examining the phrase "has filed any complaint,"<sup>62</sup> the court argued that the terms "any complaint" and "filed" encompassed those complaints made to an employer or supervisor.<sup>63</sup> The court further believed it reasonable to assume that when Congress enacted the FLSA, it knew about grievance procedures, which generally require an employee to complain to her employer before beginning any other proceeding.<sup>64</sup> It was therefore reasonable that Congress intended section 215(a)(3) to include those complaints made directly to employers.<sup>65</sup> Construing the statute to include informal complaints ensured that "fear of economic retaliation"

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56. See *Ackerley*, 180 F.3d at 1003.

57. See *id.*; see also *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (arguing that the statute's remedial purpose mandated that the statute "must not be interpreted or applied in a narrow, grudging manner").

58. See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

59.

To an employee considering an attempt to secure his just wage deserts under the Act, the value of such an effort may pale when set against the prospect of discharge and the total loss of wages for the indeterminate period necessary to seek and obtain reinstatement. Resort to statutory remedies might thus often take on the character of a calculated risk. . . . Faced with such alternatives, employees understandably might decide that matters had best be left as they are.

*Id.* at 292-93.

60. See *Ackerley*, 180 F.3d at 1004.

61. See *id.* at 1004-05.

62. See *id.*

63. See *id.* at 1004.

64. See *id.*; see also *infra* notes 132-42 and accompanying text (addressing grievance procedures and the effect of a narrow construction of such policies).

65. See *Ackerley*, 180 F.3d at 1004.

[would] not 'operate to induce aggrieved employees quietly to accept substandard conditions.'"<sup>66</sup> The court therefore concluded that it was reasonable to read "has filed any complaint" to include informal complaints made to employers.<sup>67</sup>

In reaching this conclusion, the Ninth Circuit noted that the construction it gave the FLSA's anti-retaliation provision was in line with the construction given to similar provisions in other federal acts.<sup>68</sup> The court compared the FLSA's anti-retaliation provision to those in the Energy Reorganization Act,<sup>69</sup> the Federal Mine Safety and Health Act,<sup>70</sup> the Federal Railroad Safety Act<sup>71</sup> and the Clean Water Act.<sup>72</sup> In construing the retaliation provisions in these acts, other federal courts allowed informal complaints by employees to fall within the acts' protection.<sup>73</sup> The court concluded that an employee's informal complaints were sufficient to receive protection under the FLSA, but it declined to define the degree of formality with which an employee must complain to receive protection.<sup>74</sup>

#### AN ANALYSIS OF THE ARGUMENTS SURROUNDING THE CONSTRUCTION OF SECTION 215(A)(3) AND AN ANALOGY TO OTHER FEDERAL ACTS

The question of the degree of formality with which an employee must complain to invoke the anti-retaliation provision of the FLSA currently splits the federal circuits.<sup>75</sup> In defining the phrase "has filed any complaint," the Second Circuit held employees to what it

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66. *Id.* (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

67. *See id.* at 1005.

68. *See id.* at 1006.

69. 42 U.S.C. § 5851(a) (1994 & Supp. III 1997); *see Ackerley*, 180 F.3d at 1005 n.3.

70. 30 U.S.C. § 815(c) (1994 & Supp. III 1997); *see Ackerley*, 180 F.3d at 1006 & n.5.

71. 45 U.S.C. § 441(a) (repealed 1994); *see Ackerley*, 180 F.3d at 1006 & n.7.

72. 33 U.S.C. § 1367(a) (1994); *see Ackerley*, 180 F.3d at 1006-07 & n.8.

73. *See infra* notes 155-77 and accompanying text.

74. *See Ackerley*, 180 F.3d at 1007 ("[N]ot all abstract grumbings will suffice to constitute the filing of a complaint with one's employer." (quoting *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 44 (1st Cir. 1999))).

75. *Compare Ackerley*, 180 F.3d at 1004 (holding that the protection of the FLSA's anti-retaliation provision extends to those employees who make informal complaints to their employer), *with Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) (holding that the plain language of the FLSA's anti-retaliation provision precludes protection unless an employee files a lawsuit or formal complaint with a government agency).

termed the "plain language" of the statute and required employees to file a formal written complaint with a government agency or court.<sup>76</sup> No other circuit court has taken this approach.<sup>77</sup> The remaining federal courts that have addressed the issue<sup>78</sup> have taken a liberal approach, allowing informal complaints to fall within the provision.<sup>79</sup> This section surveys the arguments on each side of the debate and concludes that the statute should be read broadly to protect employees who file informal complaints.

### *Competing Arguments Surrounding the Construction of the FLSA's Anti-retaliation Provision*

#### *Language*

To determine the proper construction of a statute, one must begin with the language of the statute itself.<sup>80</sup> Where the language of the statute is ambiguous and the congressional intent regarding the

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76. *See Genesee Hosp.*, 10 F.3d at 55.

77. *See Ackerley*, 180 F.3d at 1004; *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 45 (1st Cir. 1999); *Cunningham v. Gibson County, Tenn.*, Nos. 95-6665, 95-6667, 1997 WL 123750, at \*2 (6th Cir. Mar. 18, 1997); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997); *EEOC v. Romeo Community Schs.*, 976 F.2d 985, 989-90 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975). There are, however, district courts that have employed the reasoning of the Second Circuit. *See, e.g., Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp. 2d 322, 324 (W.D. Va. 1999) (holding that an employee who complained orally to management and contacted the DOL failed to "file[] any complaint" within the meaning of the statute); *O'Neill v. Allendale Mut. Ins. Co.*, 956 F. Supp. 661, 663-64 (E.D. Va. 1997) (holding an employee's oral complaints regarding the employer's failure to provide overtime pay insufficient to fall within the protection of the statute).

78. The Fourth, Fifth and Seventh Circuits have not addressed the issue, however, lower courts within these circuits have rendered opinions. *See Clevinger*, 36 F. Supp. 2d at 323-24 (holding an informal complaint insufficient to fall within the statute); *Laird v. Chamber of Commerce*, No. CIV.A.97-2813, 1998 WL 240401, at \*1 (E.D. La. May 12, 1998) (denying a motion to dismiss where an employee had contacted the DOL); *Wittenberg v. Wheels, Inc.*, 963 F. Supp. 654, 659-60 (N.D. Ill. 1997) (holding that the FLSA's anti-retaliation provision includes informal complaints).

79. *See cases cited supra* note 21.

80. *See, e.g., Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988) ("As in all cases of statutory interpretation, our starting point in determining Congress's intent must be the language of the statute itself."). *See generally* Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 227 (1999) (discussing various doctrines of statutory interpretation).

precise issue is not clear, courts must defer to the interpretation of the agency charged with enforcing the statute, provided that the agency has adopted a reasonable interpretation.<sup>81</sup>

### *Formal Complaints Required*

Those who support a narrow reading of the anti-retaliation provision<sup>82</sup> take a textualist approach,<sup>83</sup> arguing that the language of the section limits protection to employees who file formal complaints.<sup>84</sup> The narrow reading begins with the basic precept that "[i]f the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress."<sup>85</sup>

In the case of the anti-retaliation provision of the FLSA, narrow constructionists argue that the language provision is patently unambiguous.<sup>86</sup> The plain language protects employees who engage in three types of conduct: "[s]pecifically, those who have (1) filed [an FLSA] complaint, (2) instituted an FLSA proceeding, or (3) testified in an FLSA proceeding."<sup>87</sup> Construing the words in context, a number of courts have concluded that this statutory language only protects conduct that is formal in nature.<sup>88</sup> For example, in *Clevinger* the court held that the term "filed" mandated a written procedure and

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81. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

82. See, e.g., *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993); *Booze v. Shawmut Bank, Conn.*, 62 F. Supp. 2d 593, 598 (D. Conn. 1999); *Johns v. Cianbro Corp.*, No. 3:98CV1831 (AHN), 1999 WL 200699, at \*2 (D. Conn. Mar. 29, 1999); *Clevinger*, 36 F. Supp. 2d at 324; *O'Neill*, 956 F. Supp. at 663-64; *Acosta v. Yale Club*, No. 94 CIV. 0888 (KTD), 1995 WL 600873, at \*4 (S.D.N.Y. Oct. 12, 1995).

83. See generally Strauss, *supra* note 80, at 227 (defining "textualists" as those who "agree that statutory meaning is to be found in the words the legislature has used—read with sensitivity and attention to context, perhaps, but most importantly read for textual meaning uninstructed by political history or other like considerations").

84. See *Genesee Hosp.*, 10 F.3d at 55; *Booze*, 62 F. Supp. 2d at 598; *Cianbro*, 1999 WL 200699, at \*2; *Clevinger*, 36 F. Supp. 2d at 324; *O'Neill*, 956 F. Supp. at 663-64; *Acosta*, 1995 WL 600873, at \*4.

85. *Chevron*, 467 U.S. at 842-43.

86. See *Genesee Hosp.*, 10 F.3d at 55; *Booze*, 62 F. Supp. 2d at 598; *Cianbro*, 1999 WL 200699, at \*2; *Clevinger*, 36 F. Supp. 2d at 324; *O'Neill*, 956 F. Supp. at 663-64; *Acosta*, 1995 WL 600873, at \*4.

87. *EEOC v. Romeo Community Schs.*, 976 F.2d 985, 990 (1992) (Suhreheinrich, J., concurring in part and dissenting in part); see 29 U.S.C. § 215(a)(3) (1994 & Supp. III 1997).

88. See, e.g., *Clevinger*, 36 F. Supp. 2d at 324.

that the statute did not encompass oral complaints.<sup>89</sup> Courts must apply the statute as written, unless doing so would violate Congress's clear intent.<sup>90</sup> As courts that favor a narrow construction argue, a reading that includes only formal complaints is consistent with Congress's intent, as evidenced in the plain language of the provision.<sup>91</sup> Accordingly, the argument goes, the provision must be limited to formal complaints.

### *Informal Complaints Permitted*

In contrast, those supporting a broad construction of the FLSA contend that "has filed any complaint"<sup>92</sup> should be construed to include informal complaints.<sup>93</sup> They argue that the phrase is ambiguous because it is susceptible to many different interpretations.<sup>94</sup> The fact that the statute does not define the words "filed" and "complaint" compounds the provision's ambiguity.<sup>95</sup> Reading "has filed any complaint" to apply strictly to lawsuits or complaints to a government agency would cause the phrase "or instituted or caused to be instituted any proceeding under or related to this chapter"<sup>96</sup> to be meaningless because when an employee files a lawsuit or complaint with a government agency, the employee

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89. *See id.*

90. *See Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470 (1997).

91. *See Genesee Hosp.*, 10 F.3d at 55.

92. For the relevant text of section 215(a)(3), see *supra* note 14.

93. *See Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 936 (2000); *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 45 (1st Cir. 1999); *Cunningham v. Gibson County, Tenn.*, Nos. 95-6665, 95-6667, 1997 WL 123750, at \*2 (6th Cir. Mar. 18, 1997); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997); *EEOC v. Romeo Community Schs.*, 976 F.2d 985, 989-90 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975).

94. *See, e.g., Valerio*, 173 F.3d at 41. *Cf. Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 19 & n.7 (1st Cir. 1998) (concluding that the phrase "has filed a complaint" in the Safety Transportation Assistance Act is ambiguous because "the language does not say where a complaint must be filed").

95. *Cf. Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510 (10th Cir. 1985) ("The meaning of the provision is rendered unclear inasmuch as the statute does not include definitions of the pertinent terms.").

96. 29 U.S.C. § 215(a)(3) (1994 & Supp. III 1997).

causes the court or agency to begin a proceeding.<sup>97</sup> When courts interpret statutes, they may “assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”<sup>98</sup>

Furthermore, under the broad construction view, the congressional intent is not clear. The language of the statute does not indicate whether Congress intended to exclude informal complaints.<sup>99</sup> Congress did not mandate that the complaint be filed with a court or government agency and its use of the word “any” creates the possibility that Congress intended the provision to apply to informal complaints.<sup>100</sup>

If a statutory provision is ambiguous, a court would usually defer to the interpretation of the agency responsible for enforcing the Act.<sup>101</sup> Neither the DOL nor the EEOC, however, have issued guidelines regarding the proper construction of the statute.<sup>102</sup> As such, a court may look beyond the strict language of the statute to determine if the interpretation is “based on a permissible construction” of the provision.<sup>103</sup>

Although the plain language of the anti-retaliation provision presents a strong argument for limiting the provision to formal complaints,<sup>104</sup> in the final analysis, the language is simply not clear enough. The provision is not so unambiguous that a construction permitting informal complaints would run contrary to Congress’s clear intent. The lack of definitions of pertinent terms and explicit instructions regarding filing complaints make the provision

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97. *See Valerio*, 173 F.3d at 42; *Lundervold v. Core-Mark Int’l, Inc.*, No. Civ. 96-1542-AS, 1997 WL 907915, at \*1 (D. Or. Jan. 17, 1997) (“[I]f the term ‘filed any complaint’ means a ‘lawsuit,’ then it would be redundant with the words ‘or . . . instituted any proceeding’ in that same sentence. The court will not assume that Congress inserted these words for no purpose at all.”).

98. *Bailey v. United States*, 516 U.S. 137, 146 (1995).

99. *Cf. Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) (stating that the Energy Reorganization Act “does not directly address whether internal complaints are protected activity”).

100. *See Valerio*, 173 F.3d at 41.

101. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

102. *See Valerio*, 173 F.3d at 42 n.5.

103. *Bechtel*, 50 F.3d at 932 (citing *Chevron*, 467 U.S. at 843).

104. *See supra* notes 82-91 and accompanying text (arguing that the plain language of the provision requires formal complaints).



vulnerable to conflicting interpretations.<sup>105</sup> As the phrase "cause to be instituted any proceeding"<sup>106</sup> would be rendered meaningless by a narrow construction,<sup>107</sup> the stronger arguments lie in favor of including informal complaints within the provision.

### *Purpose of the Act*

#### *Formal Complaints Required*

As a remedial statute, the FLSA should not ordinarily be construed in a "narrow, grudging manner."<sup>108</sup> Those supporting the inclusion of only formal complaints within section 215(a)(3) could argue, however, that the remedial nature of the statute does not mandate an interpretation that retreats from Congress's obvious intent, which is shown in the plain language of the Act.<sup>109</sup>

The FLSA's main goal was to protect employees from poor labor standards, not solely from retaliation, and, therefore, the provision affords narrower protection than similar provisions in general discrimination statutes, such as Title VII.<sup>110</sup> Employees do not receive general protection through the provision.<sup>111</sup> Although the FLSA does not directly address the proper means of reporting violations, the appropriate channels are implicit in section 215(a)(3).<sup>112</sup> The protection extends to those who have "filed any complaint."<sup>113</sup> This language implies that the appropriate channels are formal channels.<sup>114</sup>

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105. Cf. *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 19 & n.7 (1st Cir. 1998) (concluding that the phrase "has filed a complaint" is ambiguous due to the lack of instructions as to filing); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510 (10th Cir. 1985) (stating that the absence of definitions rendered the anti-retaliation provision unclear).

106. 29 U.S.C. § 215(a)(3) (1994 & Supp. III 1997).

107. Cf. *Lundervold v. Core-Mark Int'l, Inc.*, No. Civ. 96-1542-AS, 1997 WL 907915, at \*1 (D. Or. Jan. 17, 1997) (noting that the phrase "filed any complaint" cannot mean lawsuit as such a construction would make the phrase "instituted a proceeding" meaningless).

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

109. See HERMAN A. WECHT, *WAGE-HOUR LAW: COVERAGE* 29 (1951).

110. See MARCIA P. MICELI & JANET P. NEAR, *BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES* 233-34 (1992).

111. See *id.* at 234.

112. See *id.* (discussing the way the National Labor Relations Act (NLRA) and other federal statutes generally structure retaliation provisions).

113. 29 U.S.C. § 215(a)(3) (1994 & Supp. III 1997).

114. See MICELI & NEAR, *supra* note 110, at 235.

This formal construction is supported by the original procedures outlined in the Act. Initially, all suits had to be brought by the Secretary of Labor, thus requiring employees to make complaints to the DOL.<sup>115</sup> Congress intended the provision to encompass only those employees who asserted their rights by using the tools Congress had prescribed.<sup>116</sup> As such, the argument concludes the Act's purpose and goals are served by requiring employees to file formal complaints.

### *Informal Complaints Permitted*

The FLSA is a remedial statute and part of a large body of humanitarian legislation that was enacted during the Great Depression.<sup>117</sup> Those supporting a broad construction argue that the provision was designed to encourage employees to report violations and should be interpreted in light of the fact that employees may choose not to report violations if they fear retaliation.<sup>118</sup> "A narrow construction of the anti-retaliation provision could create an atmosphere of intimidation and defeat the Act's purpose in § 215(a)(3) of preventing employees' attempts to secure their rights under the Act from taking on the character of 'a calculated risk.'"<sup>119</sup>

Allowing employees to pursue informal internal remedies benefits both the employee and the employer.<sup>120</sup> 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

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115. See LES A. SCHNEIDER & J. LARRY STINE, *WAGE & HOUR LAW: COMPLIANCE & PRACTICE* § 12:01 (1995).

116. Cf. *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (stating the purpose of the participation clause of Title VII as "protect[ing] the employee who utilizes the tools provided by Congress").

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

118. See *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987); see also *Mitchell v. Robert DeMario 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.").

119. *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 43 (1st Cir. 1999) (citing *Mitchell*, 361 U.S. at 293).

120. See *Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 478-79 (3d Cir. 1993).

promptly.<sup>121</sup> This is particularly important where the situation is the product of a misunderstanding.<sup>122</sup> A more rigid construction would discourage prior discussion.<sup>123</sup> Permitting the employee to approach the employer without fear of retaliation would allow the misunderstanding to be resolved before involving a court or government agency.<sup>124</sup> Conversely, construing the statute to require formal complaints gives the employer the incentive to fire the employee at the first sign that the employee believes there has been a violation.<sup>125</sup> This is particularly troublesome in light of the fact that most employees who file external complaints also make internal ones.<sup>126</sup>

Ultimately, the remedial purpose of the provision weighs heavily in favor of protecting informal complaints. A narrow reading would stifle the remedial nature of the Act as fear of retaliation might cause employees to choose silence over unemployment.<sup>127</sup> Such a choice is precisely what Congress sought to prevent by including the provision.<sup>128</sup> It seems counterintuitive that a provision meant to protect employees from retaliation would only encompass a very select few. Accordingly, a broad reading of the provision must be employed if the purposes of the Act are to be promoted.

## *Grievance Procedures*

### *Formal Complaints Required*

From one perspective, employer abuse of the internal grievance process supports a narrow construction requiring employees to use formal external channels. A supervisor, after hearing an employee's legitimate complaint, may discourage the employee from pursuing a claim by telling the employee the claim is frivolous or unfounded.<sup>129</sup>

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121. See *Clean Harbors Envtl. Servs., Inc., v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998).

122. See *Passaic Valley*, 992 F.2d at 479.

123. See *Valerio*, 173 F.3d at 43.

124. See *Passaic Valley*, 992 F.2d at 479.

125. See *Valerio*, 173 F.3d at 43; *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 59 (N.D. Ga. 1985).

126. See MICELI & NEAR, *supra* note 110, at 26.

127. See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

128. See *id.* at 293.

129. See generally Peter M. Panken & Stacey B. Babson, *Creating the Personnel Paper Trail: Personnel Manuals and Grievance Procedures*, SB36 ALI-ABA \*1, \*45 (1997) (stating

A construction of the provision that requires employees to file a complaint with the DOL or court may avoid this abuse because external complaints engage the assistance of unbiased individuals to review the merits of the claim.<sup>130</sup> Further, as retaliation is often extremely subtle, there is no way for an internal grievance procedure to effectively protect all employees from retaliation.<sup>131</sup> Accordingly, as the argument goes, a formal construction of the provision actually provides an employee more protection through an external investigation.

### *Informal Complaints Permitted*

Those supporting protection of informal complaints by the FLSA argue that a narrow construction would render grievance procedures wholly ineffective.<sup>132</sup> Grievance procedures allow employees a forum to voice their concerns.<sup>133</sup> Companies adopt such procedures as a structured means of resolving conflict between the company and the employee.<sup>134</sup> The first step in grievance procedures is generally an informal complaint to an employee's direct supervisor.<sup>135</sup> The second step involves a formal written complaint to higher-level management.<sup>136</sup> The final step involves a formal complaint to a personnel director, vice president or president.<sup>137</sup> Protection of employees who participate in grievance procedures is important because grievance

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that the people receiving the complaints must be fully trained before a grievance procedure can be effective).

130. An external complaint to a government agency would begin an investigation into the employer's actions by that agency. A meritless suit could, therefore, be dismissed rather quickly. Furthermore, an employee who intends to file a lawsuit will go to an attorney who will assess the claim. If the claim is wholly without merit, the attorney will advise the employee as such and the employee likely will not continue with the suit. This is true because all attorneys are bound by Rule 11 of the Federal Rules of Civil Procedure, which forbids attorneys from filing frivolous litigation. *See* FED. R. CIV. P. 11(b)(2). *See generally* Samuel J. Levine, *Seeking a Common Language for the Application of Rule 11 Sanctions: What is "Frivolous"?*, 78 NEB. L. REV. 677 (1999) (discussing the meaning of frivolous under Rule 11).

131. *See* DAVID W. EWING, *JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NONUNION WORKPLACE* 96 (1989).

132. *See generally* Valerio, 173 F.3d at 35.

133. *See* Panken & Babson, *supra* note 129, at \*43.

134. *See id.* at \*42.

135. *See id.* at \*48-50.

136. *See id.* at \*50-52.

137. *See id.* at \*52.

procedures have the potential to reduce the amount of litigation filed in an already overcrowded federal judiciary.<sup>138</sup>

A construction that requires an employee to file a lawsuit or formal charge with a government agency would not protect an employee who participated in any level of a grievance procedure.<sup>139</sup> An employee's informal complaint to a supervisor must receive protection under the FLSA; otherwise, employees have no incentive to use a grievance procedure and employers would have an incentive to fire those employees who did.<sup>140</sup>

Although some employers may attempt to abuse internal grievance procedures, the number doing so is undoubtedly small. Grievance procedures are extremely important to employers, as well as employees. These procedures enable employers to resolve disputes quickly, quietly, and efficiently.<sup>141</sup> As such, employees should be encouraged to use grievance procedures. A reading of the anti-retaliation provision that includes informal complaints is consistent with the importance of grievance procedures and therefore more appropriate because it protects those employees that a narrow reading excludes.<sup>142</sup>

## *Cost*

### *Formal Complaint Required*

Those supporting a formal construction of the Act might also argue that providing protection to those employees who make informal complaints would increase the number of retaliation lawsuits filed, thus increasing the amount of money employers need to devote to

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138. See generally Theodore O. Rogers, Jr., *Arbitration of Employment Claims*, 591 PLI/Lit \*811, \*871 (1998) (discussing the overcrowded federal courts and the contribution of employment discrimination suits to this problem).

139. Under the Second Circuit's construction of the FLSA's anti-retaliation provision, an employer could fire an employee after the employee complained to her supervisor, the first step of the grievance procedure. The employee would thus be punished for following the employer's policy regarding complaints of statutory violations.

140. See *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 43 (1st Cir. 1999).

141. See *supra* notes 132-38 and accompanying text.

142. Under a narrow construction of the provision, an employer could fire an employee after the employee took the first step in the grievance procedure, discussing the problem with her supervisor. An employee should not be punished for following her employer's policy regarding grievances.

defending the claims.<sup>143</sup> The expense of litigation makes employers more likely to settle these suits, regardless of the merits of the case.<sup>144</sup> A construction requiring employees to file charges with a government agency or court reduces the cost to employers because the government agency would dismiss the frivolous suits and the expense of a lawsuit would deter employees whose claims were not valid.

### *Informal Complaint Permitted*

According to those favoring a broad construction, including informal complaints within the language of section 215(a)(3) is more economical than a strict construction of the Act because it does not require the employee to involve a court or government agency.<sup>145</sup> Responding to a charge of retaliation costs an employer thousands of dollars in attorney's fees.<sup>146</sup> If the charge is not settled at the agency level and leads to a lawsuit, the attorneys' fees rise to more than \$50,000, regardless of the merits of the case.<sup>147</sup> Requiring an employee to file with a court or government agency does not allow an employer to resolve claims quickly and often causes employers to settle frivolous suits in order to avoid the costs of litigation or defending against an agency investigation.<sup>148</sup> Allowing internal complaints saves employers the cost of litigation as well as other potential costs, such as personal liability, loss of productivity and negative publicity.<sup>149</sup> It also allows an employer to correct the

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143. Cf. 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) (arguing that the increase in protected classes for discrimination has increased the number of lawsuits filed).

144. See *id.* at 81.

145. Cf. *Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 478-79 (stating with regard to the Clean Water Act that "it is most appropriate, both in terms of efficiency and economics . . . that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated").

146. See Sherwyn et al., *supra* note 143, at 81 (citing telephone interview with David Ritter, chair of the Labor and Employment Department at Altheimer & Grey in Chicago, Ill., and Peter Albrecht, partner at Godfrey & Kahn in Madison, Wis. (Mar. 12, 1998)).

147. See *id.*

148. See *id.*

149. See Stefan Rützel, *Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*, 14 TEMP. ENVTL. L. & TECH. J. 1, 33 (1995); Sherwyn et al., *supra* note 143, at 81.

situation before involving an agency, which saves money by avoiding agency-imposed fines.<sup>150</sup>

The argument that a broad construction of the provision would create a greater number of protected employees, which in turn would create a larger amount of litigation, appears persuasive at first glance.<sup>151</sup> When examined in light of the alternative, however, it is clear that a broad construction is more economical.<sup>152</sup> Defending against lawsuits and agency investigations is extremely costly.<sup>153</sup> Allowing protection to employees' informal complaints promotes internal discussion and, as such, reduces the costs associated with lengthy lawsuits and government inquiries.<sup>154</sup> Accordingly, the more cost-effective construction of the anti-retaliation provision includes informal complaints.

### *Drawing Guidance from Similar Provisions in Other Federal Acts*

Anti-retaliation provisions like Section 215(a)(3) of the FLSA are common in federal statutes. The construction of similar provisions in other federal acts provide helpful analogies and support the inclusion of informal complaints within the FLSA's anti-retaliation provision.<sup>155</sup>

#### *National Labor Relations Act*

In *National Labor Relations Board v. Scrivener*,<sup>156</sup> the Supreme Court considered section 8(a)(4) of the National Labor Relations

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150. See Rützel, *supra* note 149, at 33.

151. See *supra* notes 143-44 and accompanying text (arguing that a broad construction of the Act would provide a larger protected class, thus increasing the number of employees with retaliation claims, thereby creating more litigation).

152. See *supra* notes 145-50 and accompanying text (arguing that a broad construction is more economical because it encourages employees to discuss and resolve problems with their employers without involving a government agency or court).

153. See Sherwyn et al., *supra* note 143, at 81.

154. See Rützel, *supra* note 149, at 33; Sherwyn et al., *supra* note 143, at 81.

155. See *Lambert v. Ackerley*, 180 F.3d 997, 1006-07 (9th Cir. 1999) (relying on the decisions of other federal courts regarding similar anti-retaliation provisions to support a broad construction of section 215(a)(3)), *cert. denied*, 120 S. Ct. 936 (2000).

156. 405 U.S. 117 (1972).

Act (NLRA).<sup>157</sup> The Court held that the anti-retaliation provision protected an employee who made a sworn written statement.<sup>158</sup> In so concluding, the Court relied on the NLRA's remedial purpose and focused on the objective of section 8(a)(4), which the Court argued was to allow employees freedom in making complaints.<sup>159</sup> Although noting that the language of the statute could be construed narrowly, the Court stated that, "[o]n textual analysis alone, the presence of the . . . words 'to discharge or otherwise discriminate' reveals . . . an intent on the part of Congress to afford broad rather than narrow protection to the employee."<sup>160</sup> Arguing that it would not make sense to protect an employee who filed a formal charge but not one who participated in the development of the charge, the Court concluded that the statute must be approached and construed liberally.<sup>161</sup> *Scrivener* is particularly helpful in analyzing section 215(a)(3) because courts often use the NLRA as a guideline for FLSA coverage and decisions regarding the NLRA are persuasive with regard to the FLSA.<sup>162</sup>

### *Energy Reorganization Act*

In *Bechtel Construction Co. v. Secretary of Labor*,<sup>163</sup> the Eleventh Circuit held that the anti-retaliation provision of the Energy Reorganization Act<sup>164</sup> (ERA) applied to informal complaints made

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157. 29 U.S.C. §§ 151-69 (1994 & Supp. III 1997). Section 8(a)(4) provides: "It shall be an unfair labor practice for an employer—to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter." *Id.* § 158(a)(4).

158. See *Scrivener*, 405 U.S. at 121. .

159. See *id.* at 121-22.

160. *Id.* at 122.

161. See *id.* at 124.

162. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1947) ("The Fair Labor Standards Act . . . is a part of the social legislation of the 1930s of the same general character as the National Labor Relations Act. . . . Decisions that define the coverage [of a provision in the NLRA] are persuasive in the consideration of a similar [provision] under the [FLSA].").

163. 50 F.3d 926 (11th Cir. 1995).

164. 42 U.S.C. §§ 5841-51 (1994 & Supp. III 1997). The anti-retaliation provision is set forth in section 5851(a). *Bechtel* addresses the construction of the provision before its 1992 amendment, which explicitly provides protection to employees who make internal complaints. See 42 U.S.C. § 5851(a)(1)(A),(B).



to supervisors.<sup>165</sup> The court primarily relied on the legislative history of the ERA, which suggested that Congress knew courts had construed similar provisions to include informal complaints when it compared the ERA's provision to those in other acts.<sup>166</sup> In *Ackerley*, the Ninth Circuit accepted this construction, comparing the ERA to the FLSA and stating that both acts contemplate a "broad remedial purpose" and a need to "be free from the threat of retaliatory discharge" if they are to "function effectively."<sup>167</sup>

### *Mine Safety Act*

The D.C. Circuit, in *Phillips v. Interior Board of Mine Operations Appeals*,<sup>168</sup> held that section 110(b)(1) of the Mine Safety Act<sup>169</sup> protects a miner who informs his supervisor of the employer's safety violations.<sup>170</sup> The court argued that such a reading of the statute was necessary to effectuate the broad purpose of the Act.<sup>171</sup> Congress sought "to encourage the reporting of suspected violations of health and safety regulations" because "miners will not speak up if they fear retaliation."<sup>172</sup> Congress intended that employees receive the same protection under the Mine Safety Act as they would from other federal statutes, including the FLSA.<sup>173</sup>

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165. See *Bechtel*, 50 F.3d at 932.

166. See *id.*; S. REP. NO. 95-848, at 29 (1978), reprinted in 1978 U.S.C.C.A.N. 7303, 7303-04.

167. *Lambert v. Ackerley*, 180 F.3d 997, 1005 n.3 (9th Cir. 1999) (quoting *MacKowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984)).

168. 500 F.2d 772 (D.C. Cir. 1974).

169. 30 U.S.C. §§ 811-25 (1994). Prior to being amended in 1977, section 110(b)(1) prohibited discrimination against a miner because the miner:

(A) has notified the Secretary or his authorized representative of an alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

*Id.* § 820(b)(1).

170. See *Phillips*, 500 F.2d at 778.

171. See *id.* at 782.

172. 115 CONG. REC. 27948 (1969).

173. See *id.* (stating that the anti-retaliation provision "puts into the Coal Mine Health and Safety Act the same protection which we find in other legislation" and specifically naming the FLSA among the other legislation).

### *Clean Water Act*

In *Passaic Valley Sewerage Commissioners v. Department of Labor*,<sup>174</sup> the Third Circuit found "the facial language of the Clean Water Act's whistle-blower protection provision to admit of more than one interpretation" and held that the provision extended to informal complaints.<sup>175</sup> The court argued that employees must be free from fear of retaliation before they will report statutory violations.<sup>176</sup> Construing the statute to include informal complaints was necessary, the court concluded, because the provision "would be largely hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency."<sup>177</sup>

### *Title VII*

Section 704(a) of Title VII of the Civil Rights Act of 1964<sup>178</sup> (Title VII) protects employees who oppose discrimination or participate in the statutory complaint process.<sup>179</sup> The "opposition clause" of Title VII encompasses any method of complaint, formal or informal, that could reasonably be interpreted by the employer as opposition to discrimination.<sup>180</sup>

The Second Circuit refused to apply this type of broad construction to the FLSA in *Genesee Hospital*.<sup>181</sup> The court argued that the broad

174. 992 F.2d 474 (3d Cir. 1993).

175. *Id.* at 478. Section 507(a) of the Clean Water Act provides:

No person shall fire, or in any other way discriminate against, . . . any employee . . . by reason of the fact that such employee . . . has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the [Clean Water Act].

33 U.S.C. § 1367(a) (1994).

176. *See Passaic Valley*, 992 F.2d at 478.

177. *Id.*

178. 42 U.S.C. § 2000e-3(a) (1994).

179. *See id.* This section states that:

[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

*Id.*

180. *See EEOC Compl. Man.*, *supra* note 13, at § 8.

181. *See Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993).

language of Title VII mandated a narrow reading of the FLSA.<sup>182</sup> Although the FLSA does not include an explicit "opposition clause," the language of the provision is broad enough to include informal complaints.<sup>183</sup>

### *The Fair Pay Act of 1999*

The Fair Pay Act of 1999,<sup>184</sup> a bill introduced to the Senate in March of 1999, also supports a broad construction of the FLSA. The bill seeks to amend section 6 of the FLSA to prohibit paying one employee less than another based on the employee's sex, race, or national origin.<sup>185</sup> In order to further the purpose of this addition, Congress proposed an amendment to section 15.<sup>186</sup> This amendment would add an "opposition clause" that would apply to the amended portion of section 6.<sup>187</sup> If the Second Circuit's narrow reading of the statute were accepted, the proposed amendment to the FLSA would create a bizarre situation. An employee who made an informal complaint regarding section 6(h) would be protected, whereas an employee who complained informally about a violation of any other section would not be protected by the Act. This is particularly troublesome in light of the fact that the proposed amendment merely extends the EPA's concept of equal pay for equal work to race and national origin.<sup>188</sup> Therefore, this Note proposes a construction of the FLSA that mirrors that given to Title VII.

The anti-retaliation provision should be read to include informal complaints made by employees to their supervisors or employer, as this construction is supported by the language and purpose of the

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182. *See id.* at 55.

183. *See McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486-87 n.8 (10th Cir. 1996) ("While the FLSA contains no similar 'opposition' clause . . . the language of § 215(a)(3) is sufficiently broad to encompass conduct taken on behalf of others.").

184. S. 702, 106th Cong. (1999).

185. *See id.* § 3.

186. *See id.* § 4.

187. *See id.* § 4 (amending section 215(a)(3) by adding paragraph 6, which makes it unlawful "to discriminate against any individual because such individual has opposed any act or practice made unlawful by section 6(h) or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce section 6(h)").

188. *See* 29 U.S.C. § 206(d) (1994); S. 702, 106th Cong. § 3 (1999) (amending 29 U.S.C. § 206).

statute. It is more cost effective, allows employers to resolve conflict in accordance with internal policies and is consistent with the construction given analogous provisions in other federal acts. Accordingly, a broad construction of the provision is appropriate and necessary.

### *Proper Construction*

Section 215(a)(3) of the FLSA should, in light of the discussion above, be read to include informal complaints. Having reached such a conclusion, one issue remains—namely, with what degree of formality must an employee complain in order to preserve a later charge of retaliation against the employer?<sup>189</sup> This Note argues that the construction given the FLSA's anti-retaliation provision should be similar to that given the retaliation provision in Title VII.<sup>190</sup> This construction would include various degrees of informal complaints, while providing the employer a reasonable expectation of when statutory rights are being invoked.<sup>191</sup>

Admittedly, "[t]here is a point at which an employee's concerns and comments are too generalized and informal to constitute 'complaints' that are 'filed' with an employer within the meaning of the [FLSA]."<sup>192</sup> The court in *Ackerley* stated that "so long as an employee communicates the substance of his allegations to the employer . . . he is protected by § 215(a)(3). . . . [T]he employee may communicate such allegations orally or in writing, and need not refer

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189. See *Lambert v. Ackerley*, 180 F.3d 997, 1007-08 (9th Cir. 1999) (noting that it was not necessary to "describe the minimum specificity with which an employee must assert an alleged FLSA violation in order to find protection under § 215(a)(3)", *cert. denied*, 120 S. Ct. 936 (2000); *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 45 (1st Cir. 1999) ("We conclude . . . that we have little choice but to proceed on a case-by-case basis. . . .").

190. See 42 U.S.C. § 2000e-3(a) (1994). For the text of Title VII's retaliation provision, see *supra* note 179. The language in Title VII allows protection to any employee who "opposes" discrimination. This phrase has been interpreted to include any protest that "would reasonably have been interpreted as opposition to employment discrimination." EEOC Compl. Man. *supra* note 13, § 8, at 8-5.

191. See EEOC Compl. Man. *supra* note 13, § 8, at 8-3 to 8-4 (allowing protection for retaliation to an employee who opposes discrimination).

192. *Valerio*, 173 F.3d at 44 (quoting *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998)).

to the statute by name."<sup>193</sup> A protest that could reasonably be interpreted by the employer as an assertion of statutory rights, however, is consistent with the congressional intent and the goals of the FLSA.<sup>194</sup>

### *Types of Complaints Courts Have Given Protection*

In addressing this issue, courts have held varying degrees of informality sufficient to bring an employee within the anti-retaliation provision.<sup>195</sup> The holdings can be divided into four different categories: an employee's refusal to give up her statutory rights,<sup>196</sup> written complaints,<sup>197</sup> contact with the DOL,<sup>198</sup> and oral complaints.<sup>199</sup> The first, refusal to give up rights, enjoys near universal acceptance, while the remaining three have been at the center of the controversy surrounding this provision.

#### *Refusal to Give Up Rights*

An employee's refusal to give up her rights generally involves the filing of a formal complaint and disclosure of statutory violations

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193. *Ackerley*, 180 F.3d at 1008 (citing *EEOC v. Romeo Community Schs.*, 976 F.2d 985, 989 (6th Cir. 1992)) (emphasis omitted).

194. This standard is applied to retaliation cases under Title VII and is used by the EEOC for cases involving the EPA. Arguably, the language of the FLSA is broad enough to encompass this interpretation. See discussion *supra* notes 178-83 and accompanying text; see also *EEOC Compl. Man. supra* note 13, § 8, (1998) (applying such a standard to the EPA).

195. See cases cited *supra* note 21.

196. See *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 879 (3d Cir. 1987); *Brennan v. Maxey's Yamaha, Inc.* 513 F.2d 179, 181 (8th Cir. 1975).

197. See *Valerio*, 173 F.3d at 45; *Cunningham v. Gibson County, Tenn.*, Nos. 95-6665, 95-6667, 1997 WL 123750, at \*2 (6th Cir. Mar. 18, 1997); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984).

198. See *Morgan v. Future Ford Sales*, 830 F. Supp. 807, 810 (D. Del. 1993); *Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560, 563-64 (W.D. Mo. 1990).

199. See *Conner v. Schnuck Mkts.*, 121 F.3d 1390, 1394 (10th Cir. 1997); *EEOC v. Romeo Community Schs.*, 976 F.2d 985, 989-90 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989); *Wittenberg v. Wheels, Inc.*, 963 F. Supp. 654, 659-60 (N.D. Ill. 1997); *Lundervold v. Core-Mark Int'l, Inc.*, No. Civ. 96-1542-AS, 1997 WL 907915, at \*3 (D. Or. Jan. 17, 1997); *Stading v. DFC Transp. Sys. Int'l, Inc.*, No. 92C 1807, 1993 WL 338987, at \*4 (N.D. Ill. Sept. 1, 1993); *LeFebure v. Rite-A-Way Indus., Inc.*, Civ. A. No. 91-1435 MLB, 1993 WL245747, at \*4 (D. Kan. June 14, 1993); *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 63 (N.D. Ga. 1985).

resulting from a DOL investigation.<sup>200</sup> The DOL then orders the employer to provide back pay and the employer subsequently orders the employee to return the back pay awards.<sup>201</sup> When the employee refuses to do so and is terminated, courts permit the employee to invoke the FLSA's anti-retaliation provision.<sup>202</sup>

The Second Circuit, in *Genesee Hospital*, distinguished this type of case from those involving informal complaints on the basis that it "grew out of the filing of [formal] claims."<sup>203</sup> Such a situation, however, is not as easily distinguishable as the Second Circuit argues. When an employee refuses to return back pay, she is informally protesting the employer's violation of the FLSA. The same is true when an employee protests an employer's failure to pay minimum wage, overtime, or equal pay for equal work. In these situations, the employee is "complaining" about a violation of the FLSA.<sup>204</sup> "Construing the anti-retaliation provision to exclude from its protection all those employees who seek to obtain fair treatment . . . would leave employees completely unprotected . . . when they complain to their employers about violations of the Act—exactly what the anti-retaliation provision was designed to prevent."<sup>205</sup>

### *Written Complaints*

The second category involves written complaints to employers. Courts have allowed written complaints directed at individuals, ranging from an employee's direct supervisor to the president of the company, to afford the employee protection under Section

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200. See *Brennan*, 513 F.2d at 180.

201. See *id.*

202. See *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 879 (2d Cir. 1988); *Brennan*, 513 F.2d at 183.

203. *Lambert v. Genesee Hosp.*, 10 F.3d 46, 56 (2d Cir. 1993).

204. In *Genesee Hospital*, the Second Circuit stated that "[p]rotection against discrimination for instituting FLSA proceedings would be worthless if an employee could be fired for declining to give up the benefits he is due under the Act." *Id.* at 55 (quoting *Brock*, 839 F.2d at 879). Arguably, this language could apply to an informal complaint because in alleging that his rights are being violated, an employee is "declining to give up the benefits he is due under the Act." *Id.*

205. *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 936 (2000).

215(a)(3).<sup>206</sup> Although in at least one instance the employee quoted relevant statutory language,<sup>207</sup> such action is not required to hold a written complaint sufficient under the statute.<sup>208</sup> Limiting the anti-retaliation provision to written complaints, however, does not resolve all problems with interpretation.<sup>209</sup> For example, has the employee filed a complaint within the meaning of the statute if the employee calls the DOL to complain about an employer's violation?<sup>210</sup>

### *Contact with the Department of Labor*

Often an employee contacts the DOL to obtain information regarding a particular employment practice before going to the employer and alleging a violation.<sup>211</sup> Courts have granted protection to employees who contacted the DOL, regardless of whether the employee filed a formal complaint.<sup>212</sup> Congress intended employees to police employers by reporting violations, which requires information regarding the applicable law.<sup>213</sup> Such a goal requires that inquiries to the DOL be protected from retaliation.<sup>214</sup>

### *Oral Complaints*

Finally, many courts have held that an oral complaint alone constitutes protected activity within the meaning of section 215(a)(3).<sup>215</sup> Courts have not required that the employee mention the

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206. See *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35 (1st Cir. 1999); *Cunningham v. Gibson County, Tenn.*, Nos. 95-6665, 95-6667, 1997 WL 123750 (6th Cir. Mar. 18, 1997); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383 (10th Cir. 1984).

207. See *Valerio*, 173 F.3d at 38.

208. See *id.*; *Cunningham*, 1997 WL 123750, at \*2.

209. See *Lundervold v. Core-Mark Int'l, Inc.*, No. Civ. 96-1542-AS, 1997 WL 907915, at \*2 (D. Or. Jan. 17, 1997).

210. See *id.*

211. See *Laird v. Chamber of Commerce*, No. CIV. A.97-2813, 1998 WL 240401, at \*1 (E.D. La. May 12, 1998); *Morgan v. Future Ford Sales*, 830 F. Supp. 807, 810 (D. Del. 1993); *Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560 (W.D. Mo. 1990).

212. See *Laird*, 1998 WL 240401, at \*1; *Prewitt*, 747 F. Supp. at 563-64.

213. See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

214. See *Morgan*, 830 F. Supp. at 812-13.

215. See *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997); *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 989-90 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989); *Wittenberg v. Wheels, Inc.*, 963 F. Supp. 654, 659-60 (N.D. Ill. 1997); *Lundervold v. Core-Mark Int'l, Inc.*, No. Civ. 96-1542-AS, 1997 WL 907915,

FLSA or EPA when making a complaint.<sup>216</sup> The complaints have been made to individuals including supervisors, human resource personnel and owners of the company<sup>217</sup> and have ranged from detailed expressions of specific statutory violations to somewhat broad and ambiguous assertions.<sup>218</sup> Although one court has held that an employee's advice to coworkers constitutes protected activity,<sup>219</sup> employees have not been entitled to protection where the employee's position is not adverse to the company.<sup>220</sup> The protection of informal oral complaints made to employers is in accord with the goals and purpose of the FLSA.<sup>221</sup> Accordingly, the statute should be construed to include informal complaints, whether written, oral, or mere inquiries to the DOL.

In determining whether a complaint is sufficient to fall within the protection of the FLSA, a court should consider whether the employee implicitly or explicitly communicated to the employer a belief that the statute was being violated.<sup>222</sup> If the complaint is broad or ambiguous, the court must determine whether the complaint would reasonably have been interpreted by the employer as an assertion of rights.<sup>223</sup>

In order to engage in protected activity under § 215(a)(3), the employee must . . . either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA.<sup>224</sup>

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at \*3 (D. Or. Jan. 17, 1997); *LeFebvre v. Rite-A-Way Indus., Inc.*, Civ. A. No. 91-1435-MLB, 1993 WL 245747, at \*4 (D. Kan. June 14, 1993); *Stading v. DFC Transp. Sys. Int'l, Inc.*, No. 92 C 1801, 1993 WL 338987, at \*4 (N.D. Ill. Sept. 1, 1993); *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 63 (N.D. Ga. 1985).

216. See *Romeo*, 976 F.2d at 989-90; *White & Son*, 881 F.2d at 1011; *Wittenberg*, 963 F. Supp. at 657; *Stading*, 1993 WL 338987, at \*4.

217. See *White & Son*, 881 F.2d at 1011; *LeFebvre*, 1993 WL 245747, at \*4.

218. See *Conner*, 121 F.3d at 1394; *Romeo*, 976 F.2d at 989-90.

219. See *Morgan*, 830 F. Supp. at 815.

220. See *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486-87 (10th Cir. 1996).

221. See *White & Son*, 881 F.2d at 1011; *supra* notes 56-67, 107-28 and accompanying text.

222. See EEOC Compl. Man. *supra* note 13, § 8, at 8-4.

223. See *id.* at 8-5.

224. *McKenzie*, 94 F.3d at 1486-87 (footnote omitted).



Such a construction is consistent with the purpose and goals of the FLSA <sup>225</sup> as well as the construction given similar provisions in other federal acts.<sup>226</sup>

### CONCLUSION

The competing arguments surrounding the construction of the FLSA's anti-retaliation provision favor a broad construction. The language of the provision is ambiguous and broad enough to encompass informal complaints. The FLSA's purpose is furthered by this construction. Protecting informal complaints ensures employees will not be penalized for their participation in grievance procedures and provides a cost-effective means for resolving conflict. The conclusion that informal complaints should be protected under the FLSA is supported by the constructions courts have given similar provisions in other federal acts.

This Note proposes a construction of the FLSA that is similar to that given to Title VII. Any protest that the employer could reasonably interpret as an assertion of statutory rights is within the contemplation of the FLSA. As this reading supports the goals of the FLSA, the provision should include such complaints.

*Jennifer Lynne Redmond*

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225. See *supra* notes 56-67, 117-28 and accompanying text.

226. See *supra* notes 156-88 and accompanying text.