No. 09-834

IN THE

Supreme Court of the United States

KEVIN KASTEN,
Petitioner,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION,
Respondent.

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

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

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August 2010

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The Equal Employment Advisory Council, National Association of Manufacturers and the National Federation of Independent Business Small Business Legal Center respectfully submit this brief as *amici curiae*. The brief supports the position of Respondent before this Court in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is

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other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Amici's members are all employers subject to the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and other federal and state employment statutes and regulations. As potential defendants to individual and collective actions brought under the FLSA and the EPA, *amici's* members have a direct and ongoing interest in the issue before this Court regarding the scope of Section 215(a)(3), the FLSA's anti-retaliation clause. The court below correctly held that verbal complaints made to a company supervisor regarding alleged FLSA violations do not constitute protected activity under Section 215(a)(3).

Because of their interest in the application of the nation's fair employment laws, EEAC, NAM and/or NFIB Small Business Legal Center have filed *amicus curiae* briefs in a number of cases before this Court and the courts of appeals involving the breadth and scope of various federal anti-retaliation laws.[2] Given

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[2] *See, e.g., Crawford v. Metro. Gov't*, 129 S. Ct. 846 (2009) (discussing scope of Title VII's anti-retaliation provision); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (construing anti-

their significant experience, *amici* are well-situated to brief this Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner was employed by Respondent Saint-Gobain Performance Plastics Corporation, a manufacturer of high-performance polymer products, in its Portage, Wisconsin facility from October 2003 to December 2006. Pet. App. 81. Pursuant to Respondent's time and attendance policies, Petitioner was required to record his time by swiping in and out of a time clock located at the facility. *Id.* at 84-85. He received four progressively serious disciplinary notices over an eight month period for failing to do so, and was issued a final warning on November 10, 2006. Petitioner eventually was discharged on December 11, 2006. *Id.* at 34-35.

Petitioner claims that from October through his termination in December, he verbally complained to supervisors about the location of the facility's time clock. *Id.* at 34. He contended that the location of the time clock "prevented employees from being paid for time spent donning and doffing their required protective gear" in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq*. *Id.* It is undisputed that Petitioner never submitted any written complaint to Respondent regarding potential

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retaliation protections under Section 1981); *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006) (interpreting adverse action); *Thompson v. North American Stainless, LP*, 567 F.3d 804 (6th Cir. 2009) (*en banc*) (third party retaliation protection under Title VII), *cert. granted*, 79 U.S.L.W. 3007 (U.S. June 29, 2010).

FLSA violations associated with the location of the time clocks.

In December 2007, Petitioner filed an action in the U.S. District Court for the Western District of Wisconsin alleging that he was discharged in retaliation for his verbal complaints, in violation of Section 215(a)(3) of the FLSA. *Id.* at 35. Respondent moved for summary judgment, arguing that Petitioner's verbal complaints were insufficient, as a matter of law, to constitute protected activity under Section 215(a)(3). *Id.*

The district court agreed, concluding that an informal complaint of FLSA violations is protected under the statute only if it is reduced to writing and is "filed" with the employer. It observed:

> [Plaintiff] [t]elling his supervisors that he believed that the locations of defendant's time clocks were illegal or even that he was thinking about starting a lawsuit regarding time clock location would not fulfill the requirement of filing a complaint under the FLSA's anti-retaliation provision. At most, plaintiff's oral complaining was "abstract grumbling," or an "amorphous expression of discontent" regarding the location of defendant's time clocks.

Pet. App. 71 (citations omitted). On appeal, the Seventh Circuit affirmed. Regarding the question whether an internal company complaint can ever constitute "protected activity" under the FLSA, it responded in the affirmative, noting that the plain language of the FLSA's anti-retaliation provision makes it unlawful for an employer "to discharge . . . any employee because such employee has *filed any* complaint . . . ." Pet. App. 38 (first emphasis added).

As to what form such a complaint should take, the Seventh Circuit concluded that in order to constitute protected activity under Section 215(a)(3), an employee's complaint must be in writing, noting that the common meaning of the phrase "file any complaint" as it is used in Section 215(a)(3) strongly supports such an interpretation. *Id.* at 39-40. Furthermore, it observed, the FLSA's anti-retaliation provision is not as broad as others, such as that found in Title VII of the Civil Rights Act of 1964 (Title VII), which provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . 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].

42 U.S.C. § 2000e-3(a). Therefore, it concluded that the scope of Section 215(a)(3) protected activity is narrower, and simply does not extend to purely verbal complaints. *Id.* at 42. Petitioner filed a petition for a writ of certiorari, which this Court granted on March 22, 2010.

SUMMARY OF ARGUMENT

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended, prescribes certain minimum wage and overtime pay requirements for workers employed by covered businesses. Like the majority of other federal workplace protection laws, the FLSA contains an anti-retaliation provision, which makes it unlawful for any person to:

> [D]ischarge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3) (citations omitted). Section 215(a)(3) enumerates only three types of conduct that constitute legally protected activity under the FLSA: (1) filing a complaint; (2) instituting or testifying in an FLSA proceeding; and (3) serving on an industry committee. *Id.* In that regard, Section 215(a)(3) is much narrower in scope than many other federal civil rights statutes, such as Title VII of the Civil Rights Act of 1964, which prohibits retaliation against an individual "because he has opposed any practice made an unlawful employment practice" or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the Act. 42 U.S.C. § 2000e-3(a).

Because Section 215(a)(3) prohibits retaliation based on the *filing* of a complaint – not, as is the case under Title VII, based on an individual's mere "opposition" to discriminatory employment practices – the Seventh Circuit below was correct in concluding that verbal protestations to a company supervisor regarding alleged FLSA violations that are never reduced to writing do not constitute protected activity under the Act.

Interpreting Section 215(a)(3) to protect from retaliation those who file written complaints with their employers, but not those who lodge purely verbal grievances, adheres to the actual text of the statute while also supporting Section 215(a)(3)'s policy objec-

tives. An employee who seeks to complain about a perceived FLSA violation remains free to do so, but that individual will not be able to claim the benefit of Section 215(a)(3)'s anti-retaliation protection unless he or she actually reduces the grievance to a writing that sufficiently describes the claim – whether by handwritten letter, email, or other form of more formal written communication. Because Section 215(a)(3) already provides sufficient protection for employees who engage in certain activities in protest of perceived FLSA violations, there is no sound basis for further expanding it in the manner urged by Petitioner.

Extending Section 215(a)(3) to encompass purely verbal complaints, however informal, would undermine the ability of employers to effectively manage their workforces and enforce legitimate workplace rules. But requiring employees to make written complaints of potential FLSA violations not only would facilitate swift resolution of the dispute, but also would discourage employees from making false or frivolous complaints that stem more from idle "grumblings" than from legitimate workplace concerns.

Expanding Section 215(a)(3) in such a manner also likely would have the practical effect of creating a cause of action for an entire class of anonymous objectors who, for example, might report a suspected violation using a workplace grievance "hotline" without ever having to identify him or herself. At least two members of the Court seemed to question the wisdom of such an interpretation, even under Title VII's considerably broader "opposition" clause language. *See Crawford v. Metro. Gov't*, 129 S. Ct. 846, 855 (2009) (Alito, J. [joined by Thomas, J.], concur-

ring) ("The question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case; the answer to that question is far from clear; and I do not understand the Court's holding to reach that issue here").

ARGUMENT

I. UNLIKE OTHER FEDERAL STATUTES, SECTION 215(a)(3) ESTABLISHES ONLY THREE TYPES OF CONDUCT THAT CONSTITUTE LEGALLY PROTECTED ACTIVITY, NONE OF WHICH INCLUDES THE AIRING OF PURELY VERBAL GRIEVANCES

Section 15 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215 (Section 215), makes it unlawful for employers to retaliate against an employee because that 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." 29 U.S.C. § 215(a)(3). Section 215 "does not prohibit employers from taking adverse employment action, that is, retaliating, against employees generally. Rather, section 215(a)(3) protects from retaliation only those employees who engage in three expressly enumerated types of conduct." *EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 990 (6th Cir. 1992) (Suhrheinrich, J., dissenting).

In contrast, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et. seq.*, as amended, which prohibits discrimination on the basis of race, color, religion, sex or national origin, contains a considerably broader anti-retaliation provision that makes it unlawful for an employer to discriminate

against an employee or applicant for employment "because he has opposed any practice made an unlawful employment practice" or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the Act. 42 U.S.C. § 2000e-3(a).[3] Thus unlike Section 215(a)(3), Title VII protects from retaliation those who "oppose" discriminatory employment practices, as well as those who file discrimination charges or otherwise "participate" in Title VII investigations, proceedings, or hearings.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) (quoting *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004)). As the Seventh Circuit below observed, because Congress could have elected to, but did not, incorporate into the FLSA Title VII's broader "opposed" or "participated" language, the former necessarily must be construed more narrowly than other anti-retaliation provisions such as Title VII. Indeed, "the cause of action for retaliation under the FLSA is much more circumscribed." *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000).

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[3] Both the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*, as amended, which prohibits discrimination against individuals with disabilities and whose remedial scheme is patterned after Title VII, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, as amended, which prohibits discrimination because of age, contain similar anti-retaliation provisions. 42 U.S.C. § 12203(a); 29 U.S.C. § 623(d).

Petitioner dramatically declares that the decision below "largely eviscerates the statute's protection for workers who bring violations [under the FLSA or the EPA] to their employers' attention," Pet. Brief at 50, an argument that seems to lose sight of the Seventh Circuit's actual holding, which simply declines to extend Section 215(a)(3)'s protections to include purely verbal, rather than written, employee complaints. As this Court long has observed, Section 215(a)(3) is designed to enable employees to freely report suspected violations to their employers without the fear of economic reprisal. *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292-93 (1960). That purpose is in no way frustrated, however, by placing reasonable limitations, consistent with the plain text of the statute, on the type and quality of "complaint" deemed sufficient to constitute protected activity under Section 215(a)(3).

Construing the phrase "file any complaint" to include formal, internal employee complaints that are committed to writing, but not purely verbal protestations that are never actually memorialized, supports the Act's broad remedial purposes while at the same time adhering to the narrower construction called for by the text of Section 215(a)(3) itself. As the court below pointed out, "[e]xpansive interpretation is one thing; reading words out of a statute is quite another." Pet. App. 42-43.

Petitioner points to this Court's recent decisions in *Gomez-Perez v. Potter*, 553 U.S. 474, 128 S. Ct. 1931 (2008), and *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), as further justification for an expansive interpretation of Section 215(a)(3). But those cases involve different facts and, more importantly, address concerns about victims of alleged workplace retal-

iation who, unlike Petitioner, appear to have had *no* legal protections under the particular laws in question; in both cases, the Court was faced with civil rights statutes that did not contain any express anti-retaliation provision at all.

At issue in *Gomez-Perez* were the provisions of the ADEA applicable to federal sector employees. While the private sector nondiscrimination provisions contain an express anti-retaliation clause, Congress saw fit not to include similar language in the federal sector provisions. The plaintiff alleged that she was subjected to retaliation by her employer, the U.S. Postal Service, after she filed a complaint of age discrimination. Both the district court and the appeals court dismissed the retaliation claim, concluding that the differences between the federal sector and private sector provisions compel the conclusion that Congress did not intend to provide federal employees with a private right of action for retaliation under the ADEA.

This Court reversed. Writing for the majority, Justice Alito acknowledged that the federal sector ADEA provisions at issue do not expressly contain a retaliation clause, but also pointed out that those provisions were patterned directly after a similar federal sector provision of Title VII, which contains a "broad prohibition of 'discrimination,'" and thus should be treated similarly. *Gomez-Perez*, 128 S. Ct. at 1940.

In *CBOCS West*, the question before the Court was whether Section 1981 of the Civil Rights Act of 1866 (Section 1981), 42 U.S.C. § 1981, which also does not contain an express anti-retaliation provision, impliedly allows for such a claim by one person who has complained about the violation of another's "contract-

related right." In extending anti-retaliation protection to Section 1981 plaintiffs, the Court concluded that to the extent that it previously has recognized a retaliation cause of action under statutes very similar to Section 1981, *stare decisis* requires that it treat Section 1981 in a consistent manner.

Unlike the statutes at issue in *Gomez-Perez* and *CBOCS West*, Section 215 actually *does* contain an express anti-retaliation provision, the scope of which is plain on its face. As the Seventh Circuit below pointed out, Congress's choice of the term "to file" in Section 215 "connotes the use of a writing" and thus necessarily excludes from coverage purely verbal complaints to a company supervisor. Pet. App. 39.

By way of comparison, Title VII's anti-retaliation provision protects workers not only who "file" charges – which, by definition, must be "in writing" and submitted "under oath or affirmation," 42 U.S.C. § 2000e-5(b) – but also who "oppose" discriminatory employment practices. 42 U.S.C. § 2000e-3(a). In the Title VII context, "when an employee communicates to her employer a belief that the employer has engaged in a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity." *Crawford v. Metro. Gov't.*, 129 S. Ct. 846, 851 (2009) (quotations and citations omitted).

In addition to prescribing certain minimum wage and overtime pay requirements, the FLSA, like Title VII, also expressly prohibits sex-based compensation discrimination. Specifically, the Equal Pay Act of 1963, 29 U.S.C. § 206(d), prevents employers from paying men and women located in the same location and performing the same or substantially the same job a different wage. The EPA preceded Title VII,

which also proscribes sex-based pay discrimination, but is much broader in scope and available remedies.

Thus, contrary to Petitioner's assertions, EPA plaintiffs are not likely to be left "unprotected" under the Seventh Circuit's interpretation of Section 215, because they will continue to have Title VII at their disposal. Furthermore, under the Seventh Circuit's interpretation below, EPA plaintiffs who complain *in writing* of suspected discriminatory wage disparities will remain fully protected from retaliation under Section 215.

II. EXTENDING SECTION 215(a)(3) BROADLY TO ENCOMPASS PURELY VERBAL COMPLAINTS, HOWEVER INFORMAL, WOULD UNDERMINE THE ABILITY OF EMPLOYERS TO EFFECTIVELY MANAGE THEIR WORKFORCES AND ENFORCE LEGITIMATE WORKPLACE RULES

Protecting those who do not come forward and take advantage of the means available to them to formally complain about suspected unlawful conduct undermines employers' ongoing efforts to expeditiously and successfully resolve workplace issues, efforts which obviously benefit both the employer as well as the employee. This is especially true in the case of a potential wage and hour violation, where failure to promptly make an affected worker whole only compounds the employer's ultimate liability for actual damages, as well as increases greatly the potential that it will be found to have willfully violated the law, thus exposing it to other serious penalties.[4] Respon-

[4] Liability for violations of Section 215(a)(3) is more expansive than for other violations of the FLSA. Section 216 provides that "[a]ny employer who violates the provisions of [Section 215(a)(3)

sible employers are not looking for the opportunity to retaliate against their employees. But even in situations in which there may be the threat or opportunity for retaliation, the potential for substantial liability under Section 215 provides a strong incentive to avoid any such opportunity.

An employee who is willing to reduce to writing his accusations of FLSA violations deserves to be fully protected from unlawful reprisal as a result of that protected activity. Such an interpretation is consistent with Section 215(a)(3)'s "file" a complaint language and comports well with the mechanisms developed by many employers to encourage swift resolution of disputes through internal channels. It also dissuades the making of false or frivolous complaints by workers more interested in idle "grumblings" than in resolving a legitimate concern over a perceived violation.

Many companies permit workers to anonymously report workplace issues through telephone "hotlines." *See, e.g., Whiting v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 23552 (E.D. Mich. Mar. 15, 2010); *Moorhouse v. Billington*, 2006 U.S. Dist. LEXIS 90922 (D.D.C. Dec. 15, 2006); *Stevens v. Deluxe Fin. Servs., Inc.*, 199 F. Supp. 2d 1128, 1139 (D. Kan. 2002). When an employee voices a specific concern or potential policy violation through the hotline, that information typically is referred to a human resources official for appropriate action. *See Stevens*, 199 F. Supp. 2d at 1139 n.30 ("When a hotline call contains allegations

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of this title] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section [215(a)(3) of this title], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

of discrimination, the transcription is routed to human resources in Minnesota, which refers the information to the local HR person").

These hotlines operate to enable the employer to quickly address potential policy violations that if left uninvestigated could lead to legal liability or other unfortunate consequences, even if a specific victim or complainant is not identified. An employee might use a hotline, for instance, to report a suspected leave violation that he or she believes occurred, but may not personally have experienced or observed. *See Moorhouse*, 2006 U.S. Dist. LEXIS 90922, at *5 (anonymous hotline complaint urging defendant to "'investigate Gayle Moorhouse's [sic]-HR Time-she is absent and does not use leave-unusual (or not) for someone in payroll?'"). Congress could not have intended to extend FLSA anti-retaliation protection to every anonymous hotline complainer who, though admittedly performing an important service on behalf of the company, has not even gone so far as to personally identify him or herself, much less lodge a formal complaint. *See Whiting*, 2010 U.S. Dist. LEXIS 23552, at *9 (plaintiff "called anonymously and refused to give specific details that would reveal his identity because he did not want anyone to know that he had made the complaint").

Extending Section 215(a)(3)'s anti-retaliation protections in the manner suggested by Petitioner could very well have the practical effect of creating a cause of action for an entire class of such anonymous objectors, the wisdom of which at least two members of the Court seemed to question even under Title VII's considerably broader "opposition" clause language. *See Crawford*, 129 S. Ct. at 855 (Alito, J. [joined by Thomas, J.], concurring) ("The question

whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case; the answer to that question is far from clear; and I do not understand the Court's holding to reach that issue here").

Oral complaints are much more susceptible to misinterpretation and error and thus may be more difficult to investigate and resolve. Yet under the approach endorsed by Petitioner, even the thinnest suggestion of a potential violation – here, the propinquity of Respondent's time clocks – could be used as both a shield from legitimate disciplinary action as well as a sword against the employer. Indeed, an employer might very well hesitate to act against a poor performer or a discipline problem for fear of being accused of retaliation based on the *possibility* that the problem employee *may* have aired a wage-related grievance to some member of management at any point in the recent past. The practical problems associated with such a broad interpretation are particularly troubling to large companies with multiple layers of supervision where numerous opportunities exist for workers to make random, verbal complaints that later could be claimed to constitute "protected activity" under Section 215(a)(3).

Extending the scope of Section 215's protections to include verbal complaints also would place a substantial and unfair burden on employers by requiring them to act on every charge, however frivolous, to ensure that no action is taken that might be construed (or later conveniently claimed) by the complainant as constituting unlawful retaliation. Given the significant increase in both FLSA and retaliation litigation, such an employer would be placed at great

risk – not necessarily of liability in every instance, but of having to expend precious time and substantial financial resources simply to defend itself before an administrative agency or in court.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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August 2010