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SPECIAL FEATURE

Oral Complaints Can Trigger FLSA Retaliation Protection

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Kevin Brusie Photography

The U.S. Supreme Court has ruled that mere *oral* complaints of alleged violations of the Fair Labor Standards Act may trigger the FLSA's protections against retaliation.

Consequently, employers that discipline or discharge an employee after the employee has complained orally about issues such as failure to pay the minimum wage, failure to pay for all hours worked, or failure to pay overtime may be exposed to potential liability for retaliation — even if the employer did not, in fact, violate the FLSA as alleged.

In *Kasten v. Saint-Gobain Performance Plastics Corporation*, the court decided that an oral complaint triggers the FLSA's retaliation protections when it is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the [FLSA] and a call for their protection."

The upshot of the ruling is that employers must become attuned to oral complaints about pay issues so that these complaints can be dealt with promptly and appropriately, and so that measures can be taken to ensure that any subsequent discipline or discharge of the complaining employee is founded on a clear and well-documented legitimate business reason.

In light of *Kasten*, employers that discount such oral complaints as "mere griping" — or that fail to train supervisors, managers and human resources personnel to identify oral FLSA complaints — may set themselves up for a retaliation claim if the employee later is subject to an adverse employment action.

Factual background

Kevin Kasten, an hourly employee of Saint-Gobain Performance Plastics Corp., complained to his supervisor about the location of the time clocks that employees were required to use for punching in and out of work.

The time clocks were located between the area where employees put on and took off their work-related protective gear and the area where they performed their assigned tasks. According to Kasten, that prevented workers from receiving credit for the time they spent changing in and out of their work gear and walking to and from their work areas.

Following company policy, which encouraged and required employees to internally report suspected or known legal violations, Kasten repeatedly brought the time-clock issue to Saint-Gobain's attention. Specifically, Kasten:

- "raised a concern" with his shift supervisor that "it was illegal for the time clocks to be where they were" because of Saint-Gobain's exclusion of "the time you come in and start doing stuff";
- told a human resources employee that "if they were to get challenged on" the location of the time clocks in court, "they would lose";
- told his lead operator that the location was illegal and that the he "was thinking about starting a lawsuit about the placement of the time clocks"; and
- told the human resources manager and the operations manager that he thought the location of the time clocks was illegal and that Saint-Gobain would "lose" in court.

Subsequently, Saint-Gobain disciplined Kasten and ultimately terminated his employment.

Kasten contended that the adverse employment actions were in retaliation for his complaints about the time clocks. Saint-Gobain denied that, contending that it disciplined and discharged Kasten because, after being repeatedly warned, Kasten failed to record his comings and goings on the time clocks.

Kasten's lawsuit

Kasten commenced a lawsuit against Saint-Gobain in U.S. District Court in Wisconsin, alleging that his discipline and discharge constituted unlawful retaliation under the FLSA for his complaints about Saint-Gobain's time-clock practices.

The District Court entered summary judgment in Saint-Gobain's favor, ruling that the FLSA's anti-retaliation provision does not cover *oral* complaints of wage-and-hour violations. The 7th U.S. Circuit Court of Appeals agreed.

Kasten then petitioned to the U.S. Supreme Court, which agreed to hear his appeal in order to resolve a split among the federal appeals courts on the issue.

Note: In a separate lawsuit, Kasten prevailed on his claim that Saint-Gobain violat-

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ed the FLSA by not paying workers for time spent donning and doffing their required protective gear and walking to their work areas. That ruling was not appealed.

Supreme Court's decision

The Supreme Court ruled in Kasten's favor, determining that oral complaints of alleged FLSA violations are, in fact, covered by the act's anti-retaliation provision.

The provision protects employees who have "filed any complaint" about alleged FLSA violations. Accordingly, the court's ruling, technically speaking, was that a complaint is "filed" for purposes of the provision when it is merely made orally.

The court began its analysis by focusing on the text of the anti-retaliation provision, specifically on the word "filed."

Based on a review of dictionary definitions and usage of the word "filed" in state statutes, federal regulations, judicial decisions and other sources, the court determined that "the text, taken alone, cannot provide a conclusive answer to our interpretive question," as "[t]he phrase 'filed any complaint' might, or might not, encompass oral complaints."

The court then took into account various "functional considerations." In that regard, the court determined that limiting the provision's coverage to written complaints would:

- "undermine the Act's basic objectives" by inhibiting "those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers," the very demographic determined to be "most in need of the Act's help" at the time of the FLSA's enactment;
- "take needed flexibility from those charged with the Act's enforcement," as this could "prevent Government agencies from using hotlines, interviews, and other oral methods of receiving complaints";
- "discourage the use of desirable workplace grievance procedures [by employers] to secure compliance with the Act"; and
- be inconsistent with the court's broad interpretation of the anti-retaliation provision contained in the National Labor Relations Act.

The court also noted that the U.S. Department of Labor, which generally enforces the FLSA, and the Equal Employment Opportunity Commission, which enforces the FLSA's anti-retaliation provision as part of its Equal Pay Act enforcement responsibilities, have consistently taken the position that the words "filed any complaint" cover oral, as well as written, complaints.

An employer may be found liable for retaliation even if the employee's FLSA wage complaint is without merit. Therefore, employers should take all such complaints seriously, even those that appear on their face to lack merit.

In the court's view, that interpretation is reasonable and entitled to deference.

Based on that analysis, as well as on its determination that "filing" a complaint "is a serious occasion, rather than a triviality," the court ruled as follows:

"To fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints, as well as written ones."

In turn, the court vacated the 7th Circuit's decision and remanded the case to the trial court for a decision on whether Kasten's oral complaints satisfied the standard.

Note: The court declined to rule on an argument that Saint-Gobain raised in untimely fashion, namely, whether the FLSA's anti-retaliation provision applies only to complaints filed with the government, and not to private employers.

Recommendations for employers

In light of *Kasten*, employers should take the following measures to protect themselves against FLSA retaliation claims based on oral complaints and other types of liability that may arise from similar circumstances:

- ensure that procedures are in place for documenting, investigating and responding to both oral and written FLSA complaints;
- update existing policies, procedures and guides regarding the handling of internal FLSA complaints, something that is especially important because prior to the decision, the law in some federal judicial circuits was that FLSA complaints needed to be in writing;
- review timekeeping practices for compliance with applicable wage-and-hour laws;
- train managers to be alert to oral, as well as written, FLSA complaints;
- ensure that a system is in place for confirming that any proposed employment action relative to an employee who has raised an FLSA complaint (or any other employment complaint) is based on a legitimate business reason that is clear, capable of substantiation, and, under the circumstances, sufficient to withstand a claim that it is a pretext for retaliation; and
- ensure that employment practices are actually consistent with the corresponding policies.

FLSA and wage-and-hour issues are among the most challenging issues that face employers today. This is especially true where damages resulting from wage-and-hour violations may be cost-prohibitive to continuing the employer's business.

Remember that an employer may be found liable for retaliation even if the employee's FLSA wage complaint is without merit. Therefore, employers should take all such complaints seriously, even those that appear on their face to lack merit.

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