A Timely Analysis of Legal Developments

ASAP®

In This Issue:

March 2011

In a decision that broadens the scope of actionable retaliation in the workplace, the United States Supreme Court has ruled that the phrase "filed any complaint" in the anti-retaliation provisions of the FLSA includes oral, as well as written, complaints, but it did not rule on whether internal complaints can give rise to a retaliation claim.

The Supreme Court Holds that Oral Complaints Suffice Under the FLSA's Anti-Retaliation Provision

By Martha Keon

On March 22, 2011, the United States Supreme Court issued a decision in *Kasten v. Saint-Gobain Performance Plastics Corp*. interpreting the phrase "filed any complaint" in the anti-retaliation provision of the Fair Labor Standards Act (FLSA) as including oral, as well as written, complaints. Leading up to the Court's decision, the scope of the FLSA's anti-retaliation provision had been vigorously disputed in the federal courts. The section of the FLSA at issue provides that an employer may not:

> 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 [the Act], or has testified or is about to testify in such proceeding, or has served or is about to serve on an industry committee.[1]

Interpretation of the phrase "filed any complaint" had generated circuit splits on two issues:

First, does "filed any complaint" protect only complaints to the government or does it also include internal complaints to the employer? The majority view held by eight federal courts of appeals is that internal complaints to an employer are protected, while the minority view held by two appellate courts is that only complaints to the government are protected.[2]

Second, does "filed any complaint" mean that the complaint has to be in writing, or are oral complaints also protected? Three appellate courts had held that unwritten, oral complaints are not protected, while five appellate courts had protected oral complaints.

In light of the circuit splits, the U.S. Supreme Court granted review of the Seventh Circuit's decision in *Kasten*.

The Underlying Case

The *Kasten* case involved an oral complaint to an employer, thus implicating both of these disputed legal issues. The plaintiff worked at a Saint-Gobain manufacturing plant in Wisconsin. He claimed that, at the time of his warnings and suspension for failing to properly clock in and out, he had told his supervisors and a human resources generalist

that the location of the time clocks was illegal because it prevented employees from being paid for time spent donning and doffing their required protective gear. The plaintiff also said that he might file a lawsuit. Following his termination, he sued Saint-Gobain, claiming that his employment was terminated in violation of the FLSA in retaliation for his complaints. The Western District of Wisconsin dismissed the plaintiff's case, holding that oral complaints are not protected activity under the FLSA's anti-retaliation provision.[3] He appealed to the Seventh Circuit, which affirmed the dismissal.

The Supreme Court Reversed, Holding that Oral Complaints Are Protected

On review, the Supreme Court vacated the Seventh Circuit's decision, holding that oral complaints are protected. Writing for the Court, Justice Breyer (joined by Justices Roberts, Kennedy, Ginsburg, Alito and Sotomayor, with Justice Kagan not taking part) noted that the interpretation of the phrase "filed any complaint" depends on a reading of the whole statutory text and consideration of its purpose and context. The Court found that it was unable to resolve the question based on the statutory text alone because the term "filed" was defined in dictionaries and elsewhere in the FLSA and in other statutes, regulations and court decisions as sometimes contemplating a writing and sometimes encompassing oral material. The Court then turned to the purpose and context of the statute and concluded that the phrase "filed any complaint" should be interpreted to include oral complaints.

The Court reasoned that to hold otherwise would: (1) undermine the FLSA's enforcement scheme, as the anti-retaliation provision enables employees to report substandard conditions without fear of economic retaliation; (2) disadvantage those with difficulty making requests in writing such as the illiterate, less educated and/or overworked; (3) prevent public employers from using hotlines, interviews and other oral methods of receiving complaints; and (4) discourage private employers from using informal workplace grievance procedures to secure compliance. The Court also relied on the longstanding enforcement positions of the Department of Labor and Equal Employment Opportunity Commission (EEOC) that both oral and written complaints are protected. The Court rejected the argument that the FLSA's anti-retaliation provision should be applied more leniently given that it carries criminal penalties. The Court reasoned that the rule of leniency only applies when the statute remains sufficiently ambiguous and, relying on traditional methods of statutory interpretation, the statute was not sufficiently ambiguous.

An Oral Complaint Must Objectively Put the Employer on Notice

In order to ensure fair notice to the employer, the Court held that the phrase "filed any complaint" contemplates "some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns." The Court held that a complaint is "filed" when "a reasonable, objective person would have understood the employee to have put the employer on notice that the employee is asserting statutory rights under the Act." The complaint "must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both the content and context, as an assertion of rights protected by the statute and a call for their protection."

The Supreme Court Left Open the Issue of to Whom a Complaint Must Be Made

Surprisingly, the Court wrote that it was expressing no view on whether the FLSA protects only complaints filed with the government or whether internal complaints to an employer are also protected. The Court reasoned that while the issue was addressed by the Seventh Circuit, it was not raised by the company in its opposition to the plaintiff's petition for certiorari, and there was no need to resolve it in order to decide the oral / written issue.

In his dissent, Justice Scalia (joined by Justice Thomas), criticized the majority's approach, noting that the issue was fairly encompassed within the company's opposition to the petition for certiorari and would have been more logically addressed first. Justice Scalia would have affirmed the dismissal of the complaint on the ground that the plain meaning of "filed any complaint" and both its historical and textual context make it clear that the anti-retaliation provision contemplated an official grievance filed with a court or agency, not oral or written complaints to an employer.

Best Practices Following *Kasten*

The Court's decision likely will result in increased claims of retaliation under the FLSA. Such claims may be more difficult to dispose of on summary judgment, as disputed facts may exist as to whether an oral complaint was actually made and whether the oral complaint put the employer on notice.

Given that the Court did not decide whether internal complaints are covered by the anti-retaliation provisions of the FLSA, the most prudent course is to assume that internal company complaints regarding possible violations of the FLSA are protected. Employers should update their retaliation policies and complaint procedures as necessary and train front-line supervisors on how to spot complaints, especially oral complaints. Upon receipt of a written or oral complaint, employers should investigate and take any necessary remedial action, while protecting the complaining party from retaliation. Employers should consult with experienced legal counsel as necessary.

Martha Keon is a Shareholder in Littler Mendelson's Philadelphia office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Keon at mkeon@littler.com.

---

[1] 29 U.S.C. § 215(a)(3) (emphasis added).

[2] The majority view was adopted in: *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 44 (1st Cir. 1999); *Brock v. Richardson*, 812 F.2d 121, 124-25 (3d Cir. 1987); *EEOC v. Romeo Community Schs.*, 976 F.2d 985, 989 (6th Cir. 1992); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 838 (7th Cir. 2009), vacated on other grounds, 2011 U.S. LEXIS 2417 (Mar. 22, 2011); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975); *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); and *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989). The minority view was adopted in *Lambert v. Genesee Hosp., Inc.*, 10 F.3d 46, 55 (2d Cir. 1993), and *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000).

[3] The plaintiff pursued his donning and doffing claims in a separate suit. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941 (W.D. Wis. 2008).