Supreme Court Holds that FLSA Retaliation Claim Can Be Based on Oral Complaint

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On March 22, 2011, the U.S. Supreme Court decided that an employee's complaint alleging violations of the federal Fair Labor Standard Act ("FLSA") need not be in writing to count as "protected activity" for purposes of an FLSA retaliation claim; an oral complaint will suffice. The court did not, however, decide the related question of whether complaints to private employers, as opposed to government agencies, constitute protected activity under the FLSA. *Kasten v. Saint-Gorbain Performance Plastics Corp.*, No. 09-834 (U.S. Mar. 22, 2011).

Like many employment laws, the FLSA prohibits retaliation against employees who engage in "protected activity"—typically, opposing alleged violations of the law or participating in investigations, agency charges or lawsuits. The antiretaliation provision of the FLSA states that employers 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 a proceeding, or has served or is about to serve on an industry committee.

In the *Kasten* case, plaintiff Kevin Kasten objected that the placement of the employer's time clock deprived him and other employees of compensation for time worked at the start and the end of their shifts. He asserted that he had complained about this issue to several people, from the lead person in his work area to his shift supervisor to the employer's human resources and operations managers. Kasten alleged that he was disciplined and ultimately discharged for making these complaints.

Kasten sued under the FLSA for retaliation. The trial court dismissed his lawsuit, holding that "filed any complaint" as used in the FLSA referred to written complaints, but not oral complaints. The court of appeals affirmed the dismissal.

In the Supreme Court

The Supreme Court limited its review to the question of whether an employee's complaint has to be in writing in order to support a retaliation claim under the FLSA. The Court found that neither the text of the FLSA nor dictionary definitions of the word "filed" sufficed to answer the question. "Functional considerations," however, pointed to the conclusion that an oral complaint can constitute protected activity. Recognizing oral complaints as protected activity furthers the antiretaliation law's purpose of "preventing fear of economic retaliation from inducing workers quietly to accept substandard conditions." It also protects workers "who would find it difficult to reduce their complaints to writing" and allows regulatory agencies flexibility in enforcing the FLSA. The Court also observed that the Department of Labor favored the conclusion that oral complaints can be protected activity. A six-justice majority thus concluded that a complaint need not be in writing to constitute protected activity under the FLSA.

Significance

Earlier this year, the Supreme Court wrote that the law of retaliation "is not reducible to a comprehensive set of clear rules." *Kasten*, however, is clear, as far as it goes. A retaliation claim under the FLSA does not fail simply because the employee's complaint was not in writing.

Kasten may be equally significant for the issue that the Court did not resolve: Whether a complaint to a private employer, rather than to a government agency, amounts to "filing a complaint" under the FLSA. The majority expressed no opinion on that issue. The two dissenting justices, however, would have held that only complaints to government agencies trigger the FLSA's protections from retaliation.

It is worth noting, too, that *Kasten* suggests that not every gripe about compensation or timekeeping will amount to protected activity. Indeed, the Court did not actually hold that plaintiff Kasten's statements amounted to "filing a complaint" as that term is used in the FLSA. The Court did say that "a 'filing' is a serious occasion, rather than a triviality. As such, the phrase 'filed any complaint' contemplates some degree of formality." Thus, regarding when a complaint is a "complaint" for purposes of the FLSA, the Court wrote:

> To fall within the scope of the antiretaliation 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.

As much fun as academics and lawyers may have disputing over these open issues, however, employers would be wise not to treat them as potential loopholes in the antiretaliation laws. Several recent Supreme Court decisions (summarized here, here and here) suggest that the Court may have an expansive view of employer liability for retaliation. In the day-to-day management of employees, "don't get mad and don't get even" remain words to live by.