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FLSA to Plaintiffs: *Put It In Writing!*

By Philip S. Holloway, Esq.

The Seventh Circuit recently made life a little easier for defendants accused of alleged Fair Labor Standards Act ("FLSA") violations. In *Kasten v. Saint-Gobain Performance Plastics Corporation*, 2009 WL 1838291 (7th Cir. 2009), the plaintiff, Kevin Kasten, was employed at Saint-Gobain Performance Plastics Corporation ("Saint-Gobain"). In order for Kasten and his fellow employees to receive their weekly paychecks, Saint-Gobain employees were required to use a time card to swipe in and out at an on-site time clock. During the period of February 13, 2006 to November 10, 2006, Kasten received two written warnings for failing to swipe in and out at the time clock and was eventually given a one-day suspension for failing to swipe his time card a third time. On December 11, 2006, Kasten was terminated after failing to swipe his time card a fourth time.

Kasten claimed that from October through December 2006, he repeatedly made verbal complaints to his supervisors and to human resources that the location of the time clock was illegal because it prevented Saint-Gobain employees from being paid for time spent putting on their required protective gear. Kasten filed suit under the FLSA, claiming that he had been terminated in retaliation for his

verbal complaints regarding the location of the time clock. The Seventh Circuit, in affirming the District Court's granting of Saint-Gobain's motion for summary judgment, held that Kasten was not retaliated against because he failed to engage in protected activity when he did not file a written complaint.

The Court analyzed Section 215(a)(3) of the FLSA, which states, in relevant part, "[It] shall be unlawful for any person...to discharge or in any manner discriminate against any employee because such employee has *filed a complaint*..." 29 U.S.C. § 215(a)(3) (emphasis supplied). The Court found that, while written internal complaints (complaints not formally filed with any judicial or administrative body) are protected activity under the "filed a complaint" language of Section 215(a)(3), verbal complaints are not protected activity. Kasten argued that the term "to file" is a broad term that has several meanings, including generally, "to submit." The Court rejected Kasten's argument, finding that the term "to file" connotes the use of a writing. In short, if Kasten had filed a formal, written complaint with his supervisor or with Saint-Gobain's human resources department, he would have been able to proceed with his FLSA retaliation claim.

Kasten v. Saint-Gobain removes from the definition of protected activity an employee's general grousing and complaining about matters relating to FLSA and, instead, reinforces that such complaints must be brought formally and in writing. This undoubtedly makes defending such claims easier for employers in the Seventh Circuit[1], but all is not so rosy for employers throughout the rest of the country. In the Sixth, Eighth and Eleventh Circuits, such verbal complaints are considered protected activity.[2]

Obviously, for plaintiffs, the moral of the story in *Kasten v. Saint-Gobain* is that those plaintiffs alleging retaliation claims under FLSA must present their complaint, whether internally or externally, in writing. But what does *Kasten v. Saint-Gobain* mean for employers? As stated above, the fact that FLSA complaints must be brought in writing makes it easier for employers (again, only employers in the Second, Fourth and Seventh Circuits) to identify a potential retaliation claim and defend against it. Employers can worry less about the efficacy of claims brought by discharged or disciplined employees who suddenly, and without warning, allege verbal complaints of FLSA violations. Such claims are easily dispensed with if the claimant has not filed a written complaint. Also, the decision underscores the need for employers in all of the federal circuits to have a clearly defined and well-communicated complaint procedure, not just for discrimination and/or harassment complaints, but for all complaints. An employer facing a claim of retaliation for verbal complaints of FLSA can point to the employee's failure to follow that procedure as factual support to further bolster its defense of the claim.

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[1] ...and in the Second and Fourth Circuits. See*Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 364 (4th Cir.2000)(in interpreting the "testimony" clause of the FLSA's retaliation provision, the Fourth Circuit held that the FLSA "prohibits retaliation for testimony given

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or about to be given *but not for an employee's voicing of a position* on working conditions in opposition to an employer); see also *Lambert v. Genesee Hospital*, 10 F.3d 46, 55 (2d Cir.1993) (The plain language of [the FLSA retaliation provision] limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor).

[2] *EEOC v. Romeo Community Schools*, 976 F.2d 985, 989-90 (6th Cir.1992) (holding that plaintiff's apparently oral complaints to supervisors were protected activity); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir.1989) (holding that plaintiffs' oral complaints were protected activity); *Brock v. Richardson*, 812 F.2d 121, 125 (8th Cir.1987) (holding that defendant's mistaken belief that plaintiff had made apparently oral complaints to supervisors was grounds for suit).