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May 4, 2011

Stephen L. Knowles

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Supreme Court Holds Anti-Retaliation Provision of the Fair Labor Standards Act Covers Oral Complaints

By Stephen L. Knowles

The Fair Labor Standards Act ("FLSA" or "Act") forbids a covered employer from retaliating against an employee because the employee has "filed any complaint." Does the phrase "filed any complaint" include oral complaints? Yes, said the U.S. Supreme Court in *Kasten v. Saint-Gobain Performance Plastics Corp.*[1] An employer who has fair notice of an oral complaint of an FLSA violation and who disciplines or discharges the employee who made it may now be subject to a retaliation claim.

Background of the *Kasten* Case

Kevin Kasten was employed in Portage, Wisconsin, by the Saint-Gobain Performance Plastics Corporation. He repeatedly complained to Saint-Gobain officials that the location of the company's timeclocks prevented him and other non-exempt employees from being properly credited for "donning and doffing" time, i.e., the time spent putting on and taking off work-related protective clothing. These complaints were made under the company's grievance procedure but were oral rather than written. According to Kasten, the complaints led to discipline and eventually resulted in the termination of his employment.

Kasten sued under the FLSA's anti-retaliation provision, 29 U.S.C. § 215(a)(3), which forbids an employer "to 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] . . . ." Saint-Gobain denied that Kasten had made any significant complaint about the location of its timeclocks. Its position was that Kasten had been terminated because of his failure, despite repeated warnings, to record his time properly.

The District Court dismissed Kasten's complaint on summary judgment, ruling that the phrase "filed any complaint" in Section 215(a)(3) did not cover oral complaints. The Court of Appeals for the Seventh Circuit agreed. The Supreme Court accepted Kasten's petition to review the question of whether an oral complaint of an FLSA violation is protected conduct under Section 215(a)(3). For purposes of analysis, the Court assumed the truth of Kasten's position.

Supreme Court's Opinion

By a 6-to-2 vote, the Supreme Court vacated the Seventh Circuit's judgment and remanded the case for further proceedings. Justice Breyer wrote the opinion of the Court; Justice Kagan did not participate.

The Court began by examining the statutory text of Section 215 (a)(3). Based on various dictionary definitions, the Court concluded that the word "filed" did not always connote a written document. The Court also reviewed statutes and regulations that allow complaints to be "filed" orally. The Court finally considered other provisions of the FLSA and the anti-retaliation provisions of other federal statutes. Based on its textual analysis, the Court concluded that the phrase "filed any complaint" was ambiguous. The phrase could be read to be limited to written complaints, but it could also be read to include oral complaints.

Taking into account functional considerations, however, the Court did not hesitate to rule that Section 215(a)(3) was intended to cover oral complaints. The purpose of the FLSA is to protect workers by establishing requirements as to wages and overtime. These requirements are largely enforced based on complaints by workers that their rights have been denied. The anti-retaliation provision facilitates the Act's enforcement by protecting workers who complain from economic retaliation. Limiting the protection of Section 215(a)(3) to written complaints would undermine the Act's enforcement. The Court reasoned that Congress could not have intended "to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers[.]"

The Court noted that its interpretation of the anti-retaliation language was consistent with the views of the Department of Labor and the Equal Employment Opportunity Commission. Limiting Section 215(a)(3)'s protections to written complaints could prevent governmental agencies from making use of complaints made via hotlines and interviews, the Court reasoned. Such a limitation could also discourage the use of informal complaint methods established

by employers.

While oral complaints may support a claim of retaliation under Section 215(a)(3), the "filing" of such a complaint "is a serious occasion, rather than a triviality." The phrase "file any complaint," the Court noted, "contemplates some degree of formality," and an employer must be "given fair notice that a grievance has been lodged . . . ." At the same time, "a fair notice requirement does not necessarily mean that notice must be in writing."

The Court refused to consider the question of whether Kasten's complaints were insufficient because they had been made only to his employer rather than to governmental officials. Saint-Gobain advanced the argument that the protection of Section 215(a)(3) applies only to complaints made to the government. Without expressing a view on the merits of this argument, the Court refused to decide the issue because it was technically outside the scope of the question presented for its consideration. "[W]e can decide the oral/written question separately - on its own," the Court said, "And we have done so." Thus, the Court's holding was simply that the statutory phrase "filed any complaint" could include oral as well as written complaints, and it left the question of whether Saint-Gobain had "fair notice" of Kasten's complaints to be dealt with on remand.

What the *Kasten* Case Means for Employers

The *Kasten* case reaffirms the principle that retaliating against an employee who has complained about a perceived violation of an employment-related law is never a good idea. Employees have the right to complain, whether orally or in writing, or whether internally or to a governmental agency. Even though the Court did not decide the issue, no employer should assume that the protection of Section 215(a)(3) will be confined to complaints made to governmental agencies.

All of the employment laws protect workers from retaliation because they have complained that their employer has somehow violated the law. Employer policies must therefore prohibit retaliation based on such complaints, and management and human resources personnel must be prepared to respond when such complaints are received, conducting appropriate investigations and preparing necessary documentation. If an employee has made complaints, management must assess the potential retaliation issue in advance of a discipline or discharge decision and must be ready to establish that the discipline or discharge action was taken based only on legitimate reasons.

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[1]No. 09-834, decided March 22, 2011.

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