Client Alert.

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U.S. Supreme Court Opinion Leaves Open Important Questions About Which Oral Complaints Are Covered Under FLSA's Anti-Retaliation Provisions—But Many Circuits Have Already Answered Them

By Aurora Kaiser

INTRODUCTION

In *Kasten v. Saint-Gobain Performance Plastics Corporation*, the Supreme Court answered in the affirmative the question of whether oral "complaints" can serve as the basis of a Fair Labor Standards Act ("FLSA") anti-retaliation claim. 536 U.S. ____ (Mar. 22, 2011, No. 09-834) [2011 U.S. LEXIS 2417]. The Court, however, left unanswered to whom those complaints must be lodged. Will complaints to employers suffice? Justice Scalia's dissent answered that question with a definite "No." Many circuit courts have also considered the question—and have mostly concluded that informal complaints filed with employers are sufficient.

ISSUE PRESENTED IN *KASTEN*

The sole issue in *Kasten* was whether an oral complaint of a violation of the FLSA is protected conduct under the act's anti-retaliation provision. The Supreme Court answered "Yes."

OVERVIEW OF *KASTEN*

Kevin Kasten brought an anti-retaliation lawsuit after his termination. Kasten claimed he was terminated in retaliation for his repeated oral complaints to his supervisor and a human resources employee. The complaints he made were centered on the location of timeclocks, which, according to Kasten, illegally prevented the employees from receiving credit for the time spent putting on and taking off their work clothes.

The anti-retaliation provision of the FLSA provides that:

> [I]t shall be unlawful for any person . . . 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 this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

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

The Seventh Circuit considered two questions (1) whether protected complaints under the FLSA may be filed with the employer, as opposed to a government entity; and (2) whether protected complaints under the FLSA may be oral, as opposed to written. To answer the first question, the Seventh Circuit concluded that complaints to the employer are protected activity. Nonetheless the Seventh Circuit dismissed the claims because, to answer the second question, it

concluded that oral complaints cannot form the foundation of retaliation claims. Thus, the Seventh Circuit indicated that *written* complaints filed with the employer may be protected.

The Supreme Court reversed the decision on the issue of whether oral complaints are protected activity. After looking at the statutory language, legislative history, contemporaneous usage of the word "file," and considering the Department of Labor's long-held interpretation, the Court concluded that the phrase "filed any complaint" includes oral complaints.

The Court explicitly declined to answer the second question considered by the Seventh Circuit: Whether filing complaints with an employer, as opposed to with a court or administrative agency, is protected activity. By declining to answer the second question, the Court apparently left the Seventh Circuit's holding intact on this point.

SCALIA'S DISSENT

Justice Scalia, joined by Justice Thomas, dissented. Scalia argued that the Seventh Circuit's holding, if not its reasoning, should be affirmed on the basis that the FLSA "does not cover complaints to the employer at all." The anti-retaliation provision, Scalia concluded, "contemplates an official grievance filed with a court or an agency, not oral complaints—or even formal, written complaints—from an employee to an employer."

CIRCUIT COURT OPINIONS

Kasten is in accord with the majority of circuits' decisions that have considered whether oral complaints are protected activity. Of the eight circuit courts to consider the matter, only the Seventh (*Kasten*) and Second Circuits have concluded that they are not protected.[1] Clearly, the Seventh and Second Circuits' decisions have been reversed.

An even stronger majority of circuit courts have concluded that filing written and/or oral complaints with employers is protected activity. Nine circuits have considered the matter, and only the Second Circuit has come to the same conclusion as Justice Scalia.[2] Despite Scalia's customary vigor, these decisions all remain intact.

WHAT TYPES OF COMPLAINTS ARE PROTECTED

The Supreme Court indicated that not all oral complaints are protected. 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."

The Court expanded:

> 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. This standard can be met, however, by oral complaints, as well as by written ones.

It does not appear that this is a great departure from existing sentiment. Similar limiting language can be found in many

[1] *Compare Hagan v. EchoStar Satellite, LLC*, 529 F.3d 617 (5th Cir. 2008); *Moore v. Freeman*, 355 F.3d 558 (6th Cir. 2004); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975); *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (*en banc*); *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199 (10th Cir. 2004); *and EEOC v. White & Son Enters.*, 881 F.2d 1006 (11th Cir. 1989), *with Lambert v. Genesee Hosp.*, 10 F.3d 46 (2d Cir. 1993); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th Cir. 2009), *vacated and remanded*.

[2] *Compare Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35 (1st Cir. 1999); *Hagan*, 529 F.3d 617 (5th Cir.); *Moore*, 355 F.3d 558 (6th Cir.); *Kasten*, 570 F.3d 834 (7th Cir.); *Brennan.*, 513 F.2d 179 (8th Cir.); *Lambert*, 180 F.3d 997 (9th Cir.); *Pacheco*, 365 F.3d 1199 (10th Cir.); *and White & Son Enter.*, 881 F.2d 1006 (11th Cir.), *with Lambert*, 41 F.3d 46 (2d Cir.).

circuits' opinions concluding that oral and/or internal complaints are protected. The most often quoted language comes from the First Circuit, which concluded that "not all abstract grumblings will suffice to constitute the filing of a complaint with one's employer."[3] The First Circuit continued that the complaint must be considered on a case-by-case basis, and found the letter at issue was "sufficiently definite to notify [the defendant] that [the plaintiff] was asserting her statutory rights to overtime pay."

The Ninth Circuit has agreed with the First Circuit, adding that "not all amorphous expressions of discontent related to wage and hours constitute complaints filed within the meaning of § 215(a)(3)."[4] Nonetheless, the court concluded that internal oral statements can meet this standard.

Despite the express preference for more formalized complaints, employers should keep in mind that they may continue to see courts finding informal, internal complaints sufficient. For example, a complaint that the employer was "breaking some sort of law" by paying female employees lower wages than males in same position was protected.[5] Another protected complaint was the question made by an employee to the vice president inquiring whether the employees in the packaging department could get overtime.[6] Similarly, an oral complaint at a staff meeting that another employee's wages were higher was protected under the Equal Pay Act and FLSA anti-retaliation provisions, even when the jury concluded that there was no Equal Pay Act violation.[7]

Additionally, nothing in *Kasten* appears to change which individuals may receive such complaints on behalf of the employer. Courts have found complaints to direct supervisors, foremen, managers, human resources personnel, controllers and owners to be protected.[8]

EMPLOYERS' NEXT STEPS

Even though the Supreme Court did not rule on this issue, the law in most circuits is that written or oral complaints to employers can form the basis of anti-retaliation claims.

Employers should review their policies and procedures regarding complaints as follows:

- Review grievance policies and consider limiting the types of individuals authorized to hear complaints. Educate employees on such policies.
- Train supervisors and others to whom employees may make complaints about retaliation and protected activity. Require all such individuals to promptly report any complaints made, whether oral or written.
- Track complaints, and ensure that a point-person is available and qualified to promptly investigate all complaints.
- Confer with counsel before adverse action is taken where complaints about wage and hours have been lodged with the employer.

[3] *Valerio*, 173 F.3d at 44.
[4] *Lambert*, 180 F.3d at 1007-08.
[5] *EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 989 (6th Cir. 1992).
[6] *Pacheco*, 365 F.3d at 1202.
[7] *Moore*, 355 F.3d at 562. Retaliation under the EPA is governed by the same provision of the FLSA, § 215(a)(3). *Id.*
[8] *See, e.g.*, *Valerio*, 173 F.3d 35 (direct supervisor); *White & Sons Enters.*, 881 F.2d 1006 (co-owner and foreman); *Lambert*, 180 F.3d 997 (controller); *Hagan*, 529 F.3d 617 (management and human resources).

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