U.S. Supreme Court Issues Third "Ones to Watch" Employment Law Decision this Year

The United States Supreme Court is not disappointing "employment law watchers" in 2011, as it issues a third employment law decision in as many months. To view our Miller & Martin alerts regarding the first two, please click here and here.

Today, the Court issued its holding in Kasten v. Saint-Gobain Performance Plastics, answering the question of "is an employee's 'oral' complaint sufficient to invoke the non-retaliation protections of the Fair Labor Standards Act (FLSA)?" in the affirmative -- YES.

Prior to this holding, some federal courts had pointed to the FLSA's use of the phrase "file any complaint" as requiring the submission of at least a written complaint to the employer if not to the Department of Labor or another agency or court (i.e., some source outside the employer). The dissent in Kasten found some merit to such positions. However, the majority of the Court found such interpretations to be inconsistent with the basic objectives of the FLSA and contrary to the typical legislative use of the word "file," which often refers to both oral and written submissions.

The majority did state that in order to "file any complaint" under the FLSA, an employee's oral or written comments must be "sufficiently clear and detailed for a reasonable person to understand them, in light of both content and context, as an assertion of rights protected by the [FLSA] and a call for their protection." [Interestingly, the Court did not rule on the question of whether making an oral complaint "to the employer" was sufficient to invoke the retaliation protections of the FLSA. The majority avoided this question by pointing out that the employer in this case had not properly introduced this issue as one before the Court on appeal in its briefs.]

In Kasten, the employee's "complaint" was that his employer's placement of time clocks violated the FLSA because it caused he and others not to be paid for time spent donning and doffing (putting on and taking off) work-related protective gear. In a separate lawsuit, the employer was in fact found in violation of the FLSA based on its failure to pay employees for this time.

The dimension of this decision which is likely to be the most troubling for employers is the fact that the basic element of a FLSA retaliatory discharge claim – "did the employee 'file any complaint'" – just became much easier for an employee to establish. In order to survive a motion to dismiss regarding this element, all an employee will have to do is say in a deposition, "Oh, I told Mr. X – my supervisor, HR, etc. – that they weren't paying us fairly, we were supposed to get overtime and didn't," in order to defeat the employer's contrary version – that either no complaint was made at all or that it did not have this now "attorney-coached" "clear FLSA-invoking" content.

This is in fact exactly what happened in the Kasten case. Mr. Kasten claimed he had "told them [both his supervisor and HR] that the location of the time clocks was a problem" and even that he was "planning to sue them over it." The employer's version was that the only discussions regarding its time clocks were in the disciplinary action meetings held with Mr. Kasten because he was refusing to clock in and out as required and that none of these involved any "concern over violations of the law."

On the flip-side, employers have been used to dealing with this same an "oral complaint is enough" standard in many other contexts, as "filing a [written] complaint" has not been deemed a requirement in order to invoke the non-retaliation protections of Title VII, the FMLA or even state workers' compensation laws, just to name a few. Merely "*opposing* a practice," "*complaining* about an unlawful practice," or even "*indicating* an intent to invoke the protections of" each these laws, respectively, is sufficient to gain the protections of their non-retaliation provisions. All this can be done orally.

As usual, an employer's best defense against such claims is a good offense. Specifically, reducing all employee complaints to writing or some other recording, so that at least if the *content* of the complaint is at issue, the employer can offer evidence (beyond merely "he said/we say") that the complaint did not meet the "sufficiently clear and detailed for a reasonable person to understand it, in light of both content and context, as an assertion of rights protected by the [FLSA] and a call for their protection."

Please feel free to contact Stacie Caraway or any other member of our Labor & Employment law department regarding this or any other "March Madness" labor and employment law issues you find yourself facing in 2011.

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