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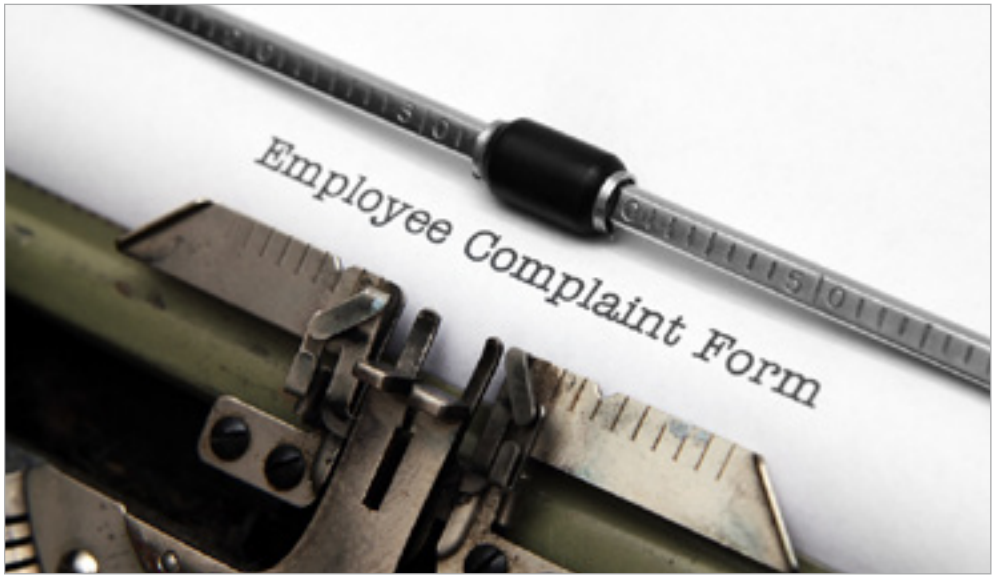

WHEN IS A COMPLAINT A COMPLAINT? AFTER *KASTEN* AND BEYOND

By Stephanie L. Fong

Employees, like a lot of people, complain. Work may be too hard, it may be too easy, and for many people work may never be quite right. As they say, the grass is always greener on the other side. But when does a passing negative comment, a momentary grumble, or perhaps a "sotto voce" sarcastic joke become a "complaint" that can form the basis of an anti-retaliation claim under the Fair Labor Standards Act ("FLSA")? With the deluge of wage and hour class actions continuing unabated, the issue should be of more than just academic concern for employers.

In March 2011, in *Kasten v. Saint-Gobain Performance Plastics Corporation*, the U.S. Supreme Court confirmed the broadening of the term "complaint" under the FLSA to encompass oral complaints by employees, thus setting a potentially very low bar for employee anti-retaliation claims.[1] While the Court answered how a complaint could be made, the Court did not answer to whom the employee must make the complaint. Over two years later, courts continue to delve

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into detailed factual analyses to determine what makes a statement a "complaint". As a result, employers continue to struggle with this question in managing their workforce, training their managers and assessing their responses to statements by employees that may or may not be sufficient to be a complaint for purposes of the FLSA.

Summary of *Kasten* and the Issues Presented[2]

Kevin Kasten sued his employer, Saint-Gobain, for retaliation after his employment was terminated. According to Saint-Gobain, Kasten's employment was terminated for failing to record his start and end times on the timeclock after repeated warnings. According to Kasten, his employment was terminated after he orally complained to Saint-Gobain officials about the location of the timeclocks, which prevented the employees from receiving credit for time spent putting on and taking off their work clothes.

The anti-retaliation provision of the FLSA provides that it is unlawful to discharge or 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."[3] The *Kasten* case raised two questions: (1) whether complaints may be filed with the employer, as opposed to a government entity, to be protected under the FLSA; and (2) whether oral, compared to written, complaints were protected under the FLSA since a complaint must be filed.

The Court declined to answer the first question regarding whether an employee must make the complaint to a government entity or whether a complaint to the employer would suffice.[4] For the second question, the Court confirmed that the phrase "filed any complaint" included oral complaints.[5]

Open Question After *Kasten*

While the Court did not address whether an employee intra-company complaint was sufficient to invoke the anti-retaliation provision of the FLSA or whether an employee must complain to a government entity, the Court's decision nonetheless had an impact on the Circuit Courts' view of this question. Prior to *Kasten*, the First, Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits had all previously found that the phrase "filed any complaint" included internal company complaints.[6] After *Kasten*, the Fourth Circuit joined in this majority viewpoint, in large part relying on the *Kasten* decision.

In *Minor v. Bostwick Labs*, plaintiff Kathy Minor filed a lawsuit alleging she had been terminated in retaliation for orally complaining that her supervisor was altering employees' timesheets to reflect that employees had not worked overtime, an alleged FLSA violation.[7] Following Fourth Circuit precedent, the lower court found that Minor's complaint was not protected under the FLSA because she had not invoked a formal, official proceeding necessary to "file a complaint".[8]

Relying on *Kasten*, the Fourth Circuit held that an intra-company oral complaint was sufficient to invoke the anti-retaliation provisions under the FLSA. The Fourth Circuit recognized that *Kasten* did not address this question and therefore did not control the outcome of the case. However, the Fourth Circuit focused on the Court's recognition in *Kasten* that "any complaint" suggests a broad interpretation under the FLSA, which combined with the remedial purposes of the FLSA, led the Fourth Circuit to overturn its prior precedent.[9]

Oral "Complaints" After *Kasten*

The question that *Kasten* did address was whether oral complaints were entitled to protection under the FLSA. While the majority of the circuits had already held this, *Kasten* confirmed that not all oral complaints are protected, and provided additional guidelines about the degree of formality required for a "complaint" to provide the basis for a retaliation claim under the FLSA:

"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."[10]

However, even with this guidance, questions remain. For example, employees frequently have questions regarding their paychecks and calculation of their wages. Every time an employee poses a question regarding his or her wages or paycheck, does it raise a potential retaliation issue? Possibly. For example, in *Alvarez v. Amb-Trans Inc.*, an employee spoke to his manager about his last two paychecks, indicating that he had not received the full amount of overtime, and that the hours on his paycheck were not accurate.[11] Another employee complained that he had not been paid for unscheduled days that he had worked. The district court in Texas found that both of these employees had complained for purposes of the FLSA because these statements were to a supervisor and concerned improper payments.[12] Similarly, in *Fulkerson v. Tompkins State Bank*, the plaintiff complained that it took her longer to complete her duties than the 30 minutes allotted and her statement that "this wasn't right" was sufficiently clear to notify her supervisors that she was asserting rights protected by the FLSA.[13]

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Moreover, how an employer responds to an employee's "complaint" may also be used by the court to determine whether the employee made a sufficient complaint and the employer was on notice. In *Stamm v. Tigertech Invs., Inc.*, plaintiff, a salaried employee, complained that his paycheck was too low and he had not received overtime.[14] The employer responded by converting plaintiff to hourly employment and paying him to settle the dispute. The court found that the employer's response to the complaint indicated that the employer was on notice that the plaintiff was exercising his rights under the FLSA.[15]

In comparison, in *Montgomery v. Havner* and *Manfield v. Alutiiq Int'l Solutions, Inc.*, both plaintiffs raised questions about the payment of wages, but neither expressed any concern regarding the legality of the employer's action in formal or informal terms. In *Montgomery*, the plaintiff called her supervisor to ask why 10 minutes had been deducted from her time card.[16] After hearing the employee's side of the story, the employer agreed to change the clock-out time and return the ten minutes and ended the call "nicely". Similarly, in *Manfield*, the plaintiff approached his supervisor to discuss discrepancies on timesheets and then contacted his supervisor a second time to determine when the pay discrepancies would be corrected.[17] In both of these cases, the courts held that plaintiffs' limited questions and informal communications were not sufficient to put their employers on notice of any intent to institute an FLSA action.

The Manager's Rule

While it is difficult to determine whether an employee is making a complaint, the analysis becomes even more complicated when the employee is a manager who is responsible for raising issues to an employer's attention. How can an employer tell whether a manager is simply doing his or her job or making a "complaint"?

In *Lasater v. Tex. A&M Univ. Commerce*, plaintiff Lasater was the Director of the Office of Financial Aid and Scholarships; and part of her responsibilities as a department head was to participate in routine audits.[18] As part of an audit, Lasater reported concerns about employee comp time. Lasater's employment was terminated and she sued under the FLSA. The court applied what has become known as the "manager's rule," which requires a management employee to take "steps outside of his normal job role" so it is clear to an "employer that the employee is taking a position adverse to the employer".[19] The court recognized that voicing concerns is what is expected of a manager and that without such a rule "nearly every activity in the normal course of a manager's job would be protected activity."[20] Since Lasater's statements about comp time were made as part of her job duties, the court found they did not constitute a complaint under the FLSA.

Advice for Employers: Better Safe than Sorry

Employers continue to struggle to determine when an employee's complaint triggers the anti-retaliation provisions of the FLSA.[21] The examples discussed above are a sampling of the cases, the different situations faced by employers and the varying outcomes that can result. Given the serious penalties at issue for employers that punish employees for making such complaints, employers should choose to be safe rather than sorry in identifying and responding to complaints. Some of the steps that employers should take include:

- Set up and/or review formal grievance procedure. By establishing a formal grievance procedure and educating your employees about it, an employer is more likely to become aware of actual complaints and may be able to better argue that an informal complaint did not provide sufficient notice to the employer.
- Train your managers. A company's managers are the first line of defense. Managers need to be able to identify complaints, even if they are informal, and report them to human resources so the statements can be properly assessed and responses provided.
- Train your manager's managers. In addition to helping the managers respond directly to a potentially complaining employee, managers need to also be able to identify when a manager is complaining.
- Investigate and document complaints and discipline. A company should investigate any potential complaints and document the investigation and result. Similarly, if the company is taking any adverse action against an employee, the company should make sure that the reasons for the adverse action are documented so it is not associated with the complaint.
- Seek advice from counsel. Before taking an adverse action against an employee who may have raised a complaint sufficient to invoke the FLSA anti-retaliation provision, an employer should be sure to seek advice from counsel.

Wage and hour class actions are often filed by terminated employees who seek counsel about their discharge. While class actions are generally the more attractive claim to the plaintiff's attorney, as the above

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examples demonstrate, it can be very easy to add a retaliation claim that can be both very expensive and add settlement value to resolving the lawsuit.

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1 131 S. Ct. 1325 (2011).

2 For a more detailed summary of *Kasten v. Saint-Gobain Performance Plastics Corporation*, please see our Client Alert dated March 28, 2011, "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."

3 29 U.S.C. § 215(a)(3) (2013)(emphasis added).

4 *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011).

5 *Id.* at 1335.

6 *Minor v. Bostwick Labs., Inc.*, 669 F.3d 428, 438 (4th Cir. 2012)(identifying the majority of circuits holding that an internal company complaint can constitute protected activity under the FLSA).

7 *Id.* at 438.

8 *Minor v. Bostwick Labs., Inc.*, 654 F. Supp. 2d 433, 434 (E.D. Va. 2009).

9 *Minor*, 669 F.3d at 435.

10 *Kasten*, 131 S. Ct. at 1335.

11 No. SA-11-CV-179-XR, 2012 U.S. Dist. LEXIS 132068 (W.D. Tex. Sept. 17, 2012).

12 *Id.* at *10-11.

13 No. 11-4031, 2012 U.S. Dist. LEXIS 141221, at *13-16 (C.D. Ill. Oct. 1, 2012).

14 No. 1:11-cv-01686-TWP-MJD, 2013 U.S. Dist. LEXIS 35925, at *28-29 (S.D. Ind. Mar. 15, 2013).

15 *Id.*

16 700 F.3d 1146 (8th Cir. 2012).

17 851 F. Supp. 2d 196 (D. Me. 2012).

18 495 Fed. Appx. 458 (5th Cir. 2012).

19 *Id.* at 462; *see also Brush v. Sears Holdings Corp.*, 466 Fed. Appx. 781, 786-787 (11th Cir. 2012)(discussing the manager's rule with regard to FLSA retaliation claims).

20 *Lasater*, 495 Fed. Appx. at 462.

21 Employers should consider taking these same compliance steps in order to comply with state law as various states have similar state law wage hour retaliation statutes which tend to follow the interpretations under the FLSA. *See e.g. See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889, 903 (2012)("In the absence of controlling or conflicting California law, California courts generally look to federal regulations under the FLSA for guidance").

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