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labor and employment alert

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March 2011

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Complaint or Not Complaint: That is the Question

Like most, if not all, employment statutes, the Fair Labor Standards Act (the federal law that prescribes minimum wage, maximum hour, and overtime pay requirements), makes it unlawful for employers to retaliate against employees who engage in certain activities. Thus, the FLSA, like Title VII, forbids employers from discriminating against employees who initiate or participate in proceedings before the administrative agency charged with enforcing the law. The FLSA also provides that an employer may not discharge or discriminate against any employee "because such employee has filed any complaint" alleging a violation of the law. In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Supreme Court considered whether the protection afforded by the FLSA for filing a complaint extends to oral complaints as well as written complaints. In a remarkably narrow decision issued on March 22, the Supreme Court answered yes to this question.

The case involved a claim by Kasten that he was fired after complaining to Saint-Gobain officials that the location of employee time clocks prevented workers from receiving credit for the time they spent putting on and taking off their work clothes, allegedly in violation of the FLSA requirement to compensate employees for time spent "donning and doffing" certain required protective gear and walking to work areas. Kasten contended that he repeatedly called the issue to Saint-Gobain's attention and told an HR representative, among other things, that he was thinking about starting a lawsuit about the placement of the time clocks, a lawsuit which he opined the Company would (and in a separate but related lawsuit did) lose. The trial court granted summary judgment to Saint-Gobain and dismissed Kasten's lawsuit, not because Kasten had not filed a complaint, but because it concluded the FLSA did not protect oral complaints so that there had not been illegal retaliation. The U.S. Court of Appeals for the Seventh Circuit agreed with the district court.
Kasten petitioned the Supreme Court to consider his case, which agreed to do so to resolve the conflict among the federal Circuit Courts of Appeal regarding whether an oral complaint is protected under the FLSA.

The only question considered by the Supreme Court was whether an oral complaint alleging a violation of the FLSA is protected conduct under the FLSA's anti-retaliation provisions. According to the Court, the protection afforded by the FLSA to employees who have "filed any complaint" was unclear because the word "filed" means different things in different contexts. Indeed, even after reviewing related statutes, regulations promulgated by administrative agencies, and contemporaneous judicial usage of the word "filed," the Court found the language of the FLSA was inconclusive: "The phrase 'filed any complaint' might, or might not, encompass oral complaints." Nevertheless, considering the language in light of the basic remedial objectives of the FLSA and its reliance on information about possible violations received from sometimes "illiterate, less educated, or overworked" employees, the Court concluded that a liberal interpretation of the word "filed" which included oral complaints was appropriate.

Responding to Saint-Gobain's contention that virtually any utterance or off-hand remark will be transformed into the talisman of a "complaint" by employees seeking to avoid discipline or discharge, the Court balanced its expanded interpretation by acknowledging that an employer must have fair notice that an employee is making a complaint that could subject the employer to a later claim of retaliation. Consequently, the Court stated that, to be protected, an expression of concern about pay issues by an employee, whether written or oral, must be sufficiently clear and detailed that a reasonable employer would understand it to actually be a complaint protected by the FLSA.

Although this ruling might seem to vastly expand the scope of protected activity, the Court's holding is actually exceptionally narrow. In particular, the Court took pains to point out that it did not consider or decide the question of whether an internal complaint to an employer, as opposed to an outside administrative agency, is protected, declining to do so on grounds relating to the Court's procedural rules.
The Court's decision thus only defines what constitutes a complaint, not whether the complaint is protected activity. Nevertheless, the Court's decision does provide several instructive points for employers:

- Because a majority of the federal Courts of Appeal already hold that an oral complaint is protected, the specific holding of the Court is unlikely to wreak havoc among employers. Indeed, cautious employers, consistent with an approach typically taken under other federal statutes such as Title VII, should carefully consider any complaint, whether oral or written, as potentially protected. Pending resolution of the status of internal complaints by the Court, cautious employers should treat even internal complaints as protected. Obviously, such complaints should be investigated and resolved in order to minimize potential liability should the complaint have merit.

- Consistent with the requirement that employees complaining under other statutes such as Title VII usually must exhaust internal remedies, employers should consider formalizing complaint procedures and

educating employees on how to articulate their concerns. In addition to better assuring that the employer actually receives fair notice of any real complaints, the failure of an employee to take advantage of existing avenues of relief may afford a prudent employer a defense in any subsequent charge or litigation.

- Employers should continue to ensure that their policies are effectively communicated to employees and that all employment decisions are consistent with those policies and based on legitimate, nondiscriminatory and nonretaliatory grounds.

For additional information, you are invited to contact the authors or any of their colleagues in Venable's Labor and Employment Law Practice Group.
