

WHEN IS A COMPLAINT A COMPLAINT?

14. October 2010 By Steve Palazzolo

Yesterday, the United States Supreme Court heard oral argument in the first of several employment law cases that it will hear and decide this term. In *Kasten v. Saint-Gobin Performance Plastics*, Docket No. 09-834, the Court is faced with determining if an oral internal complaint about an alleged wage-hour violation amounts to protected conduct under § 15(a)(3) of the Fair Labor Standards Act. Section 15(a)(3) of the FLSA makes it unlawful for an employer to fire or otherwise discriminate against an employee because that employee “filed a complaint” under the FLSA.

It seems Mr. Kasten lost his job with Saint-Gobin after he committed several violations of his employer’s time clock policy. Saint-Gobin followed its progressive disciplinary policy in terminating Mr. Kasten.

After his termination, Mr. Kasten filed two lawsuits against his former employer: The first was a class action wage hour suit alleging that employees were denied required pay because the time clock was placed in such a way that employees could not punch in or out until after they had “donned or doffed” required protective clothing. The case alleged that employees lost up to 20 minutes of work time each day. That case settled for approximately \$1.5 million.

The second suit filed by Mr. Kasten, the retaliation suit that ended up before the Supreme Court, alleged that Mr. Kasten had complained to his employer on several occasions about the placement of the time clock and alleged that he had even threatened to sue Saint-Gobin over the issue. Saint-Gobin denied that Mr. Kasten had made such complaints (even though there was evidence in the form of emails that Saint-Gobin management were discussing the complaints).

So, now the Supreme Court must decide if Mr. Kasten’s alleged oral complaints to management amount to “filing” a complaint under §15(a)(3) of the FLSA.

Now all of this may seem like an academic exercise that only interests lawyers and right now that may just be true. But, if the Court should decide that Mr. Kasten’s oral complaints to management are enough, retaliation suits, already on the rise, may increase even more. And, it may just be much easier for plaintiffs to get to a jury on the question of retaliation. After all, if it takes a written complaint to make out a wage-hour retaliation case, usually there is or there is not a writing. End of story. If, on the other hand, an oral complaint to management is enough, you can envision any number of “he said, he said” situations in which an employee claims they did complain and a supervisor does not remember or claims the employee did not complain.

So what can you do about all of this? Well for one, don't wait for the Court to decide. Start to deal with this now. It is not that tough. When an employee makes a complaint, even an oral complaint, don't ignore it. Document the complaint, take it seriously, and investigate it. And if the employee is right-and they sometimes are you know-fix the problem.

Could be you will save a lot of money and have happier employees. In the meantime, we will keep an eye on this case to see just what the Supreme Court decides. And a shout out to SCOTUSblog at <http://www.scotusblog.com/> for the excellent case summary.