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ORAL COMPLAINTS OF FLSA VIOLATIONS ARE PROTECTED, SUPREME COURT SAYS

By Jim Coleman
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Can an oral complaint about an employer's compliance with the Fair Labor Standards Act trigger the retaliation protections of the Act? **The Supreme Court says yes**, in a 6-2 decision issued on March 22, 2011.

The majority opinion in *Kasten v. Saint-Gobain Performance Plastics Corp.*, written by Justice Breyer, held that if an employee's oral complaint is "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," it can trigger the anti-retaliation protections of the FLSA. Both the district court and the U.S. Court of Appeals for the Seventh Circuit, which hears appeals from federal courts in Illinois, Indiana, and Wisconsin, had previously ruled in favor of the employer, holding that only written complaints constituted FLSA-protected activity. Justice Breyer was joined by Chief Justice Roberts, and Justices Alito, Ginsburg, Kennedy, and Sotomayor.

The Court was called upon to interpret the language of Section 15(a)(3) of the FLSA (29 U.S.C. § 215(a)(3)), which provides that employers may not

. . . 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 [the FLSA], . . .

The majority opinion concluded that the language "*filed* any complaint" did not require that the complaint be in written form, provided that it was sufficiently clear.

Justice Scalia, joined by Justice Thomas, dissented:

The plain meaning of the critical phrase and the context in which it appears make clear that the retaliation provision 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.

The Court declined to address the related issue of whether strictly internal employee complaints – that is, employee complaints that are communicated only to the employer but not to a government agency or a court – trigger the FLSA's anti-retaliation protections. The circuits are divided on this issue, but because it was not timely raised in the *Kasten* case, the Supreme Court declined to address it. Prudent employers will consider purely internal complaints to be protected activity until the Supreme Court issues further guidance on this point.

As a practical matter, the *Kasten* decision may not have a dramatic effect: the Court treats

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FLSA complaints the same as complaints of discrimination, harassment, or retaliation under the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964. It is likely that many employers were already treating informal, oral complaints of FLSA violations as protected activity before *Kasten*. Moreover, this type of complaint could have been “concerted protected activity” within the meaning of the National Labor Relations Act.

However, it would have been helpful if the Court had provided more guidance on the content and context required for the protections of the FLSA to be triggered. For example, are all employee complaints to management over pay rates, salary levels, or the size of a pay increase, now FLSA-protected activity? It will be left to the lower courts in future cases to determine which employee comments rise to the level of protected complaints.

As always in the world of employment law, employers will be well-served to have clearly documented reasons for terminations, demotions, or other adverse employment actions so that they can be prepared to defend themselves in FLSA-retaliation cases. Additionally, because many pay-related complaints are made to front-line supervisors who could influence an employment decision made by someone in a more remote position, employers should take all necessary steps to avoid “cat’s paw” liability.

If you would like assistance with an FLSA-related issue, please contact any member of Constangy’s **Wage Hour Practice Group**, or the Constangy attorney of your choice.

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