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Listen Carefully - Oral Complaints Count As Protected Conduct!

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Most companies have an "open door" policy that encourages employees to discuss questions or concerns with their supervisor or department manager. Open door meetings are often treated as informal discussions to let employees "vent." If an employee stopped by his supervisor's office and complained about the location of the time clock, most companies have no procedure for documenting that conversation, initiating an investigation, or recording resolution of the issue. In fact, most companies would not realize that the employee had just engaged in conduct protected by the federal law governing wages, the Fair Labor Standards Act. A recent United States Supreme Court decision, *Kasten v. Saint-Gobain Performance Plastics Corp.*, shows that these informal discussions can have serious legal repercussions.

Former employee Kevin Kasten sued Saint-Gobain Performance Plastics Corporation after it discharged him for the stated reason that although he had been given numerous warnings, he failed to accurately record his time worked on the time clock. Kasten claimed that the company unlawfully discharged him in retaliation for complaining about time keeping and time clocks. Federal law protects employees from retaliation who have "filed any complaint or instituted . . . any proceeding" related to the Fair Labor Standards Act. Although Kasten admitted that he had not filed any written complaints with the company or a governmental agency prior to discharge, he maintained that he complained *orally* to his shift supervisor about his "concern" that "it was illegal for the time clocks to be where they were'" because it excluded "the time you come in and start doing stuff." He also alleged that he told a human resources employee that "if they were to get challenged on the location in court, they would lose."

Saint-Gobain's employee handbook instructed employees to "contact" a supervisor "immediately" with "questions, complaints, and problems." However, Saint-Gobain had no internal procedure for documenting the details of such a complaint, the extent of its investigation, or the resolution of the matter. Although Saint-Gobain did not believe that Kasten did complain, it had no irrefutable evidence that it had documented all complaints and that Kasten's comments were different than – or missing from – the official complaint log.

Lower courts dismissed Kasten's retaliation claim because it was only an internal, oral complaint. However, the Supreme Court disagreed and reinstated his case. The Supreme Court acknowledged that an employer is entitled to "fair notice" that an employee is lodging a grievance, but found that notice does not require that the complaint be in writing. The Court determined that oral remarks like those Kasten identified were protected conduct under the Fair Labor Standards Act's anti-retaliation provision.

In the future, how can employers avoid unexpected claims by employees of oral complaints? Employers can adopt policies and procedures that require supervisors to routinely log an employee's "open door" comments and require the employee to review and either clarify the comments or acknowledge that the document accurately reflects his complaint. While the employer cannot force an employee to sign the acknowledgment, it can create a contemporaneous record of actual comments that will bolster its defenses if an employee later claims that he orally raised concerns that do not appear in the log. Logging and following up employee complaints allows upper management to review and intercede when needed and minimizes the chances that employees will falsify a history of oral complaints. The entire Saint-Gobain Supreme Court decision is

available by visiting the Supreme Court's website, http://www.supremecourt.gov, 2010 Term Slip Opinions, *Kasten v. Saint-Gobain Performance Plastics Corp*., Docket No. 09-834 (March 22, 2011).