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LEGAL ALERT

Supreme Court Defines "Complaint" In Significant Wage-Hour Case

Sometimes cases turn on a single word or phrase, whether those pivotal words are found in a statute, regulation, rule, handbook or an email. It's a rarity that those singular expressions or phrases have as widespread an impact as the words at issue in a Supreme Court decision issued today. In a 6 -2 ruling (Justice Kagan took no part in the consideration or decision of the case), the Supreme Court clarified the meaning of the words "filed any complaint" from the Fair Labor Standards Act's (FLSA) anti-retaliation provision. *Kasten v. Saint-Gobain Performance Plastics Corp.*

While employers will not be pleased with the Court's ruling, the opinion adds some much-needed clarity to the issue of what constitutes protected activity under the FLSA's anti-retaliation provision. In the end, both employers and employees may find that Court's opinion is beneficial.

When Is A Complaint A "Complaint"?

Kevin Kasten worked in the Saint-Gobain's facility in Portage, Wisconsin from October, 2003, until December, 2006. In 2006, Kasten received several disciplinary warnings due to several "issues" he had with clocking in and out. Kasten's first disciplinary action included the following warning: "[i]f the same or any other violation occurs in the subsequent 12-month period from this date of verbal reminder, a written warning may be issued." Kasten's second disciplinary action included the following warning: "[i]f the same or any other violation occurs in the subsequent 12-month period from this date [sic] will result in further disciplinary action up to and including termination."

Kasten's third write-up contained the following warning: "[t]his is the last step of the disciplinary process" and warned that another violation could result in further discipline, including termination. In December 2006, after a fourth violation of the time clock policy, Saint-Gobain suspended Kasten, and subsequently terminated his employment for these repeated violations.

Kasten alleged that he complained to several superiors, and a Human Resources employee, regarding the placement of the time clocks from approximately October 2006 until his termination in December 2006. Specifically, Kasten alleged that the location of the time clocks was illegal and that if he [Mr. Kasten] were to challenge the company in court, the company would lose. None of Kasten's alleged complaints were made in writing.

After his termination Kasten sued Saint-Gobain, alleging retaliation under the FLSA's anti-retaliation provision, which makes it unlawful for an employer:

> to 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 this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee

Saint-Gobain asked that the suit be thrown out, focusing on the phrase "file any complaint." The company argued that Kasten's alleged intra-company oral complaints did not qualify as protected activity. The trial court found that *intra-company complaints* were protected by the anti-retaliation provision of the FLSA, but that *oral complaints* were not. This portion of the trial court's ruling was the focal point of Kasten's appeal to the U.S. Court of Appeals for the 7th Circuit.

In his appeal, Kasten argued that the word "file" from the phrase "file any complaint" is a "broad term that has several meanings, including, generally, 'to submit.'" Citing basic principles of statutory

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interpretation the 7th Circuit looked to the plain meaning of the language of the FLSA's anti-retaliation provision. The Court, citing Webster's Ninth New Collegiate Dictionary, rejected Kasten's argument for a broad application of the word "file," stating, "[t]he use of the verb "to file" connotes the use of a writing."

The Court recognized that other Circuits have found that oral complaints constitute protected activity under the FLSA but distinguished these cases, stating, "it is difficult to draw guidance from these decisions because many of them do not specifically state whether the complaint in question was written or purely verbal, and none discusses the statute's use of the verb "to file" and whether it requires a writing."

Ultimately, the 7th Circuit focused on their view that Congress, "could have, but did not, use broader language in the FLSA's retaliation provision." The Court drew attention to statutes like Title VII and the Age Discrimination in Employment Act, which include anti-retaliation provisions protecting any employee who has *opposed any practice* that is unlawful under the statutes.

The Supreme Court Adopts A Broad Interpretation Of The Word "Filed"

In 6 to 2 decision, Justice Breyer, writing for the majority, stated that the phrase "filed any complaint" is to be interpreted broadly such that oral, intra-company complaints constitute protected activity under the anti-retaliation provision of the FLSA. The Supreme Court's opinion focused largely on two areas in reaching its decision.

First, the Supreme Court examined the plain language of the statute. More specifically the Court was primarily concerned with the term "filed" as used in the FLSA anti-retaliation provision. Citing a wide range of sources which included dictionaries, judicial opinions, statutes and regulations, Justice Breyer wrote "[t]he word filed has different relevant meanings in different contexts" leading to the conclusion that even oral complaints can be "filed." In reaching this conclusion, Justice Breyer also noted that several federal administrative agencies (including the Department of Labor and the Equal Employment Opportunity Commission) allow the filing of oral complaints and noted that due to "Congress' delegation of enforcement powers to federal administrative agencies" the Supreme Court could give deference to these administrative agencies' views of the use of the term.

Finally, Justice Breyer discussed Congress' intent in originally enacting the FLSA in 1938 within the context of the employees the act was designed to protect. Justice Breyer noted that President Roosevelt, in 1937, called for the passage of a law to "help the poorest of 'those who toil in factory'" and cited to the high rate of illiteracy among those workers. These facts, coupled with the fact that Congress relies on "information and complaints received from employees" to enforce this anti-retaliation provision led the Supreme Court to conclude that Congress must have intended the term "filed any complaint" to encompass both oral and written complaints. As Justice Breyer noted, many of the employees' which the act was designed to protect would have great trouble reducing their complaints to writing.

The Supreme Court's opinion does note that employers must be provided with fair notice of any complaint under the FLSA. Justice Breyer wrote, "[t]o fall within the scope of the anti-retaliation 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."

The Significance To Employers

The Supreme Court's ruling in *Kasten v. Saint-Gobain* underscores the importance of policies and training for managers on the proper handling of complaints, of any type. Many statutes make oral complaints protected activity, and this ruling makes it clear that the FLSA falls under this umbrella. Employers need to take special care to document complaints when they come to light. One way to do this is by establishing a well-known practice of documenting and investigating complaints. In Mr. Kasten's case, he alleges that he made several oral complaints. The employer disputed his claims, but in the end the question remains one of credibility. Worse yet, the question of credibility puts the employer in a position of trying to prove a negative, i.e., "we have no records because it never happened!"

An established pattern and practice of documenting and investigating all complaints is invaluable in these situations. Take the following example: Mr. X is terminated from ABC Company. Following his termination, Mr. X files a complaint alleging that he was retaliated against for complaining about illegal practices. ABC Company has an established practice of documenting and investigating all complaints, regardless of whether the complaint was made orally or in writing. ABC Company has records showing that other employees complained about various issues and that these issues were investigated, but ABC Company has no record of any complaint by Mr. X.

At trial, ABC Company tells the jury why Mr. X was fired, and that he never made any complaints about any illegal activity. In support of its position, ABC Company provides records showing how they document and investigate complaints, including oral complaints, and that Mr. X's name does not appear in any of the complaints. This pattern and practice is not conclusive evidence, of course, but it can help swing the pendulum of credibility in the employer's favor. This swing, combined with well-documented disciplinary or performance issues (as St. Gobain had in this case) will help an employer demonstrate that their decision to demote or terminate an employee was made for legitimate reasons and not retaliatory ones.

In the end, the Supreme Court's decision in *Kasten v. Saint Gobain's* adds a layer of protection for employees when it comes to oral complaints under the FLSA. But for employers, utilizing best practices such as documenting and investigating all complaints provides the employer the best protection possible.

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