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Supreme Court Expands Antiretaliation Protection to Oral Complaints of Wage/Hour Violations

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Employers have long been aware that a failure to investigate complaints of workplace discrimination or harassment may lead to significant liability, even if those complaints are made orally or are otherwise informal. On March 22, in *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Supreme Court made clear that employers ignore wage-related complaints at their own risk, by holding that even oral complaints fall within the antiretaliation provision of the Fair Labor Standards Act (FLSA, or the Act). This decision resolves a conflict among various Courts of Appeals, some of which include oral complaints within the protections afforded by the FLSA's antiretaliation provision (the 5th and 9th Circuits, covering Texas and California, among other states) and at least one which does not (the 2nd Circuit, covering New York, Connecticut, and Vermont).

The FLSA describes various rules concerning minimum wages, maximum hours of work, and overtime pay. It also forbids employers from retaliating "against any employee because such employee has *filed any complaint*… under or related to" the Act. The sole question before the Supreme Court was whether the three words—"filed any complaint"—encompass oral as well as written complaints. The Court, in a 6-2 decision, found that they do.

In *Kasten,* the plaintiff, Kevin Kasten, complained to his employer that workers were required to punch in and out on time clocks that were located between the area where they put on and took off their work-related protective gear and the area in which they actually worked. Under the law, Mr. Kasten rightfully claimed, workers are entitled to be paid for time spent donning and doffing certain required protective gear and walking to work areas. Therefore, according to Mr. Kasten, the placement of the time clocks resulted in workers not being properly paid. After he was discharged for repeatedly failing to record his comings and goings on the time clock, he sued, claiming that he was fired in retaliation for complaining about his employer's FLSA violations.

After examining dictionary definitions of the word "file," usage of the word by legislators, administrators, and judges, and the intent of Congress when it passed the Act in 1938, the Court found that an oral complaint is "filed" for purposes of the FLSA's antiretaliation provision if it is sufficiently clear and detailed that a reasonable employer would understand that the employee was asserting his or her rights under the Act.

The Court provided no guidance as to what constitutes a "sufficiently clear and detailed" oral complaint. So what should employers do?

> First, employers should make certain that their managers, supervisors, and HR staff are well trained and understand that complaints come in all shapes and sizes and need not be in writing, use any special words, or follow any particular format. Any complaint of

unlawful or inappropriate conduct, whether made orally or in writing, should be taken seriously, and reported immediately to HR or as otherwise provided in company policies.

Second, employers should ensure that their complaint- and investigation-related policies and procedures explicitly cover complaints of wage and hour violations and other violations of law, as well as complaints of discrimination and harassment.

Third, employers should be sure to remind managers and supervisors that it is unlawful and unacceptable to retaliate against an employee who has made a complaint.

Fourth, when considering an adverse action against an employee who has made a complaint, it is important to confirm that the action is being taken for legitimate performance or other business reasons and not because the employee made a complaint. Consulting with counsel when dealing with these situations can help reduce the risk of a successful retaliation claim.

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