[buck research]

A Xerox Company

fyi© for your information©

Volume 34 | Issue 31 | April 8, 2011

Supreme Court Rules Oral Complaints Are Protected Under the FLSA

On March 22, 2011, the Supreme Court held that "protected activity" under the Fair Labor Standards Act's anti-retaliation provision extends to oral complaints as well as written complaints of wage-and-hour violations.

Background

The Fair Labor Standards Act of 1938 (FLSA), which sets forth wage-and-hour rules, prohibits employers from discharging or otherwise discriminating against any employee because he or she "has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the FLSA], or has testified or is about to testify in such proceeding, or has served or is about to serve on an industry committee." Both the Department of Labor (DOL) and the Equal Employment Opportunity Commission have consistently held that "filed any complaint" covers oral and written complaints alike. Although courts agree that the FLSA's broad anti-retaliation provision applies to employees' written complaints about wages, hours and overtime pay, they differ on whether the provision also protects employees' oral complaints.

Kevin Kasten was employed by Saint-Gobain Performance Plastics Corporation. The company located its time clocks, used by workers to punch in and out, between the area where employees changed into and out of their required protective gear ("donning and doffing") and the area where they worked. Kasten complained verbally to company officials, but not to the government, that the location of the time clocks prevented employees from being paid for donning and doffing their work clothes in violation of the FLSA. According to Kasten, he told the shift supervisor, lead operator, Human Resources, and operations manager that the location of the time clocks was illegal. Saint-Gobain denied that Kasten made any significant complaint about their location.

After he was fired, Kasten sued the company, claiming that Saint-Gobain discharged him in retaliation for his complaints about its time-keeping practices. The federal district court found that the FLSA protects internal complaints of alleged violations, but dismissed Kasten's claim because he had not filed a written complaint. The U.S. Court of Appeals for the Seventh Circuit agreed, ruling that "unwritten, purely verbal complaints" are not protected activity under the FLSA.

Kasten v. Saint-Gobain Performance Plastics Corp.

In *Kasten v. Saint-Gobain Performance Plastics Corp.* (No. 09-835, March 22, 2011), the Supreme Court considered whether an oral complaint of an FLSA violation is sufficient to trigger the FLSA's anti-retaliation

provision. Because the FLSA protects an employee who has "filed any complaint," the Court's analysis hinged on the interpretation of that phrase. Although the Court examined the common use of the term "filed" and its use in other FLSA provisions and other statutes, it found that the text of the anti-retaliation provision does not clarify whether the FLSA protects both oral and written complaints.

The Court then looked to the FLSA's primary objectives, including the prohibition of "labor conditions detrimental to the maintenance of the minimum standard of living necessary … for the general well-being of workers." The Court opined that a narrow interpretation of the provision would undermine those objectives, and requiring complaints to be written would strip government agencies of the flexibility needed to enforce the FLSA as, for example, through hotlines, interviews and other methods of receiving complaints.

To determine what activity Congress intended to protect, the Court looked to the scope of anti-retaliation provisions in other statutes, explicitly citing the broad interpretation afforded to the National Labor Relations Act's anti-retaliation provision. The Court also gave a "degree of weight" to the DOL's interpretation that "filed any complaint" means filed any oral or written complaint – a position the Court found reasonable and consistent with the FLSA.

> ***BUCK COMMENT.*** *Because Saint-Gobain failed to raise the issue in its certiorari briefs, the Court declined to address whether a complaint must be filed with the government to trigger the FLSA's protection. Although Justice Scalia in his dissent stated that the anti-retaliation provision "does not cover complaints to the employer at all," the Court left standing for now the Seventh Circuit's ruling that the FLSA protects internal, intra-company complaints. Until the issue is resolved, it would be prudent for employers to review and consider updating their employee complaint procedures and employee manuals to cover all internal complaints – oral or written – that could reasonably be considered FLSA complaints.*

After deciding that both written and oral complaints can constitute protected activity under the FLSA, the Court concluded that "the phrase 'filed any complaint' contemplates some degree of formality" to ensure the employer receives fair notice that a complaint has been lodged. Thus, the Court held, a complaint must be sufficiently clear in both content and context to put a reasonable employer on notice that the employee is asserting rights protected by the statute. The Court remanded the case to the lower court to determine whether Kasten's complaint was sufficient to trigger the FLSA's protection.

> ***BUCK COMMENT.*** *Although the Court appears to require more than a passing comment or vague complaint that touches on wage and hour issues, employers will have to look for further guidance from lower courts on the nature and scope of protected complaints under the FLSA.*

Conclusion

Although the Court has extended the reach of the FLSA's anti-retaliation provisions to employees who verbally complain of alleged wage-and-hour violations, it remains unclear whether complaints made only to an employer

and not to a government agency will trigger the FLSA's anti-retaliation provisions. In view of recent cases expanding employee protections against retaliation and increased DOL enforcement activity, supervisory, managerial and Human Resources personnel need to be attuned to workplace complaints and understand that what seems like common grumbling about wages and hours by an employee today may form the basis for a retaliation claim tomorrow. The Court's ruling underscores the need for employers to have in place effective policies and supervisory training on the FLSA's anti-retaliation provisions and how to recognize, promptly and thoroughly investigate, and respond appropriately to employee complaints. As always, employers should take care to clearly document their reasons for adverse employment actions.

Buck's consultants would be pleased to discuss the impact of this decision on your employment practices.