

Flights of Fancy: The Supreme Court Delineates What Complaints the FLSA Protects

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PRACTICES Labor and Employment

According to an old Russian Proverb, "A spoken word is not a sparrow. Once it flies out, you can't catch it." Applying this to the employment context, if an employee verbally complains that his employer is violating the FLSA, is the employee protected from retaliation? Deciding a split among the circuit courts, the Supreme Court answered the question affirmatively, eliminating the need for a net: the FLSA protects employees who file oral complaints. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. ____ (March 22, 2011).

Kasten turned on the meaning of the FLSA anti-retaliation provision phrase "filed any complaint." In that case, the plaintiff alleged he made oral complaints that the employer's placement of the time clock violated the FLSA. Concluding that "oral" complaints do not trigger the anti-retaliation provision's protection, the district court granted summary judgment for the employer and the Seventh Circuit affirmed. The Supreme Court reversed.

The FLSA's Original Purpose Persuades the Court

In reaching its conclusion, the Supreme Court's analysis included dictionary definitions, legislative, administrative and judicial interpretations, agency regulations, judicial usage when the FLSA was passed, other sections of the FLSA, other statutory anti-retaliation provisions and agency interpretations. The Court was most persuaded by functional considerations, focusing specifically on employees whom the FLSA was originally designed to protect, namely, individuals who were frequently illiterate and could not make a written complaint. Thus, if the FLSA anti-retaliation provision is limited to written complaints, the very employees that the FLSA was designed to protect would generally remain unprotected from retaliation. The Court further observed that requiring written complaints would remove flexibility from those charged with enforcing the FLSA because the government could not use "hotlines, interviews, and other oral methods of receiving complaints" and "it would discourage the use of desirable informal workplace grievance procedures to secure compliance with the Act."

A Degree of Formality is Still Required

Understanding that the FLSA covers oral complaints, however, does not end the inquiry. The Court emphasized that the phrase "filed any complaint" does not refer to any comment that could touch on wage and hour issues. Rather, the phrase "contemplates some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns." Specifically, the Court found that "[t]o fall within the scope of the antiretaliation 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 protection." Thus, employers are not on the hook for all vague references to wage and hour violations or, as the Fifth Circuit has explained, for an employee's "abstract grumblings or vague expressions of discontent." *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 626 (5th Cir. 2008). Rather,

employees can only assert FLSA retaliation claims if they have made "clear and detailed" oral or written reports and an employer would reasonably understand the report to be both an assertion of their FLSA rights and a call for protection from action in violation of those rights.

Whether Internal Complaints are Covered Remains an Open Question

Perhaps not all sparrows can be caught. Significantly, the Court left unanswered the question of whether the FLSA only protects reports filed with the government or whether it also protects complaints filed with employers. Although the opinion's analysis suggests that the FLSA applies to internal complaints, in a dissenting opinion, Justice Scalia (joined by Justice Thomas) concluded that the FLSA "does not cover complaints to employers at all." With the majority's refusal to reach the issue and Justice Scalia's dissent, a window remains open for arguments that the FLSA does not apply to internal complaints.

If you have any questions regarding *Kasten* or its application, please visit the Haynes Boone [Labor and Employment Practice](#) page of our website or contact one of the attorneys listed below. **You may also view the alert in the PDF linked below.**

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