CLIENT ALERT: United States Supreme Court Finds Oral Complaints Protected Under FLSA's Anti-Retaliation Provision

On March 22, 2011, the United States Supreme Court held that the anti-retaliation provision of the Fair Labor Standards Act (the "FLSA"), which prohibits an employer from discharging or otherwise discriminating against an employee who has "filed any complaint" under or related to the Act, covers oral as well as written complaints. The Court, however, declined to address whether the anti-retaliation provision covers internal complaints made to employers.

The case involved a retaliation lawsuit brought by Kevin Kasten against his former employer, Saint-Gobain Performance Plastics Corporation. Kasten claimed that Saint-Gobain located its time-clocks in an area between where Kasten and others put on and took off their work-related protective gear and where they performed their assigned tasks. According to Kasten, because of the location of the time-clocks, workers were not compensated for time they spent "donning and doffing" their protective gear, in violation of the FLSA. Kasten claimed that he complained orally to Saint-Gobain officials that the placement of the time-clocks was illegal and that he was contemplating bringing a lawsuit about the issue. Kasten alleged that Saint-Gobain discharged him in December 2006 in retaliation for his lodging these complaints. The trial court and Seventh Circuit Court of Appeals found in favor of Saint-Gobain on the ground that the Act's anti-retaliation provision did not protect oral complaints. The Supreme Court granted Kasten's petition for certiorari to address the conflict that existed among the Circuit Courts of Appeal as to whether the Act's anti-retaliation provision covered oral complaints.

In an opinion written by Justice Breyer, joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Alito and Sotomayor, the Supreme Court found that Congress intended the anti-retaliation provision to cover oral, as well as written, complaints. First, the Court reasoned that limiting the anti-

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retaliation provision to cover only written complaints would undermine the Act's objectives, limiting the effectiveness of its enforcement scheme by inhibiting complaints from workers who would have difficulty reducing their complaints to writing, "particularly illiterate, less educated or overworked workers." Second, the Supreme Court reasoned that such a limited interpretation would take needed flexibility away from those charged with enforcing the Act. The Court noted that the Department of Labor has consistently interpreted the provision as covering oral and written complaints, and gave deference to that interpretation.

Agreeing with Saint-Gobain's contention that the Act requires fair notice to employers, the Court stated that, to 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 Court found that this standard could be met by oral as well as written complaints.

The Court refused to address Saint-Gobain's contention that the anti-retaliation provision of the FLSA only applies to complaints filed with the government. While Saint-Gobain had asserted this argument in the lower courts, it failed to raise this question in its response to Kasten's petition for certiorari. Because the Court found that the question was not "predicate to an intelligent resolution" of the question concerning the coverage of oral complaints, the Court did not consider this alternative claim.

Justice Scalia, joined by Justice Thomas, dissented from the Court's decision. Justice Scalia stated that he would affirm the judgment in favor of Saint-Gobain on the ground that the anti-retaliation provision does not cover complaints made to an employer at all. According to Justice Scalia, the plain meaning of the term "filed any complaint" and the context in which it appears "make clear that the retaliation provision contemplates an official grievance filed with a court or an agency, not oral complaints – or even formal, written complaints – from an employee to an employer." Justice Kagan did not take part in the consideration or decision of the case.

The *Kasten* decision provides a further reminder to employers to be mindful of employee complaints that are arguably protected by anti-retaliation laws. Given the broad scope of complaints that are deemed protected activity for anti-retaliation purposes, the ability of an employer to demonstrate that its

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employment decisions were made for legitimate, nondiscriminatory reasons is of vital importance in defending a retaliation claim. Employers must remain vigilant in documenting employee misconduct and performance issues, thereby building the record necessary to establish that the legitimate, nondiscriminatory reasons for its actions. In addition, to ensure that they are aware of protected employee complaints, employer should train their front-line supervisors to properly handle, document and report oral employee complaints that can arguably be deemed protected activity.

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