Supreme Court UPDATE

Oral Complaints: Casual Workplace Banter or Properly Filed Wage and Hour Claim?

By Timothy Ramsey, CAPLAW

You're walking through the office and one of your staff members complains about not being paid for all the hours she worked. No big deal, right? After all, the employee hasn't filed a written complaint with your human resources department. Think again! A recent U.S. Supreme Court decision establishes that an employer may be found liable for retaliating against an employee who orally complains about a possible violation of the Fair Labor Standards Act (FLSA). The anti-retaliation provision of the FLSA at issue in *Kasten v. Saint-Gobain Performance Plastics Corp.* protects employees who have "filed any complaint" with their employer from unlawful discharge or discrimination because of their complaint.[1]

In the past, it was unclear whether oral complaints were considered "filed" in the same way as written complaints were. It has generally been accepted that written complaints provide employers with "fair notice" — i.e., notice to an employer that an employee is asserting some right under the FLSA. Because written complaints are tangible documents presented to an employer, it is usually easy to conclude that a complaint is filed, thus triggering protection against unlawful retaliation by the employer. However, until *Kasten*, courts reached varied conclusions on oral complaints.

The Facts and Arguments

In *Kasten*, the employer, Saint-Gobain Performance Plastics Corp., terminated its employee of three months, Kevin Kasten, after issuing him four disciplinary warnings for repeated failure to properly clock in and out of work. In response, Kasten filed a lawsuit alleging that Saint-Gobain wrongfully discharged him in retaliation for his oral complaint to his supervisor and other personnel that the location of the of time clocks prevented employees from receiving credit, and being paid, as required by the FLSA, for time spent putting on and taking off work-related protective gear. Kasten claimed that he repeatedly brought this problem to his employer's attention, to no avail. Specifically, Kasten informed a shift supervisor and other personnel on numerous occassions that "it was illegal for the time clocks to be where they were." He also informed Saint-Gobain's human resources manger and operations manager that if he were to go to court over the issue he would win. These actions, Kasten alleged, caused the company to discipline and eventually terminate him.

Saint-Gobain, on the other hand, argued that Kasten was terminated because he failed to properly clock in and out and never "filed any complaint" as required by the FLSA to establish a retaliation claim. Saint-Gobain contended that it would be unfair to be held liable, since unlike written complaints, oral complaints fail to provide employers with fair notice that an employee is asserting a claim under the Act.

The Supreme Court Opinion

The Supreme Court held that the anti-retaliation provision of the FLSA provides protection to employees against retaliation for oral complaints of a violation of the Act. The FLSA provision at issue makes it unlawful for employers:

> 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.[2]

The Court determined that oral complaints can satisfy the "filed any complaint" language required by the anti-retaliation provision, so long as they provide fair notice to employers. In reaching its conclusion, the Court determined that the plain meaning of the phrase "filed any complaint" is subject to competing interpretations and turned to the original intent of the Act.

The Court reasoned that limiting the anti-retaliation provision to written communications would undermine the FLSA's basic objectives. The anti-retaliation provision was designed to provide employees with protection from employers retaliating against them for filing a complaint, ensuring that employees do not "quietly accept substandard conditions." The Court, looking to the time period when the FLSA was adopted (the late 1930s), reasoned that a

(continued on page 14)

Oral Complaints

(Continued from page 4)

narrow interpretation of the Act would be incompatible with the purposes for which it was enacted, namely to protect illiterate, less educated, and overworked employees. Illiteracy rates were particularly high among employees at the time, and to require them to reduce their complaints to written communications would have been a substantial hardship. To provide further support for its original intent analysis, the Court examined interpretations of the anti-retaliation provision from other federal administrative agencies, specifically the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC). Both agencies interpret the anti-retaliation provisions as providing protection for oral complaints.

The Court also addressed the concern raised by Saint-Gobain that oral complaints do not provide employers with fair notice about whether an employee is actually making a complaint under the Act, or simply speaking from frustration. The Court adopted a "reasonableness standard" to determine if an employer has received fair notice of any complaint, written or oral. As long as the oral complaint is "sufficiently clear and detailed" for a reasonable employer to understand that the employee is asserting some protected right under the Act, it will be considered to have been "filed."

Implications for CAAs

Post-*Kasten*, it is clear that oral complaints are protected under the anti-retaliation provision of the FLSA, as long as they provide fair notice to the employer that the employee is asserting rights under the Act. Oral complaints, because they are often difficult to discern, require special attention from employers. As a result, to ensure compliance with the FLSA, employers should consider:

- Implementing a reliable policy and process for documenting and investigating oral complaints. By doing so, if an employer is sued by a current or former employee for retaliation under the FLSA, the employer will have some record or database to search to determine the specific details of the complaint.

- Training supervisors and managers in the complaint process. It is essential that all supervisors and managers become familiar with the entire complaint process and learn to properly identify and document authentic oral complaints. As *Kasten* demonstrates, an employee informing a supervisor or manager that a particular practice is illegal may constitute a valid oral complaint.

- Regularly educating all employees about the complaint process. Employees should receive information explaining how a complaint can be filed orally or in writing. Furthermore, all employees should be constantly informed of any updates to the complaint policy.

Following these suggestions will afford employers additional protection against potential lawsuits. Often, litigation is a battle of credibility between disputing parties and adopting and implementing a sound complaint policy will strengthen an employer's ability to prove that actions were taken for lawful, non-retaliatory reasons.

See end notes on page 19.

USERRA

(Continued from page 5)

Proctor, on the other hand, argued that an employer is not liable under USERRA unless the actual decision maker acted for a discriminatory purpose.

The Supreme Court Opinion

The Court held that under USERRA an employer is liable for employment discrimination based on the biased actions of supervisors and other company officials even if the ultimate decision maker was not biased himself. USERRA specifically provides that:

> A person who is a member of…or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership… or obligation.[2]

USERRA further provides that an employer is liable for unlawful discrimination if the individual's protected status is a "motivating factor in the employer's action."[3] This language is also in other federal anti-discrimination laws, such as Title VII.[4]

In *Staub*, the central issue was how to construe the phrase "motivating factor." Prior to *Staub*, it was unclear whether the discriminatory actions of non-decision makers that resulted in the termination of an employee could be classified as motivating factors in the employer's action. However, in its *Staub* decision, the Court, relying on the cat's paw liability theory, clarified the phrase by creating three requirements for liability.