BNA, INC.

The United States LawWeek

◆CASE ALERT & LEGAL NEWS
◆SUPREME COURT TODAY

VOL. 79, NO. 42 A NATIONAL SURVEY OF CURRENT LEGAL DEVELOPMENTS MAY 10, 2011

Fair Labor Standards Act

Kasten v. Saint-Gobain: A Key Shift in the Application of FLSA

BY ALAN LESCHT

The question presented to the U.S. Supreme Court in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 79 U.S.L.W. 4179 (U.S. Mar. 22, 2011), was whether an employees who makes an oral complaint about what the employee perceives to be a violation of the Fair Labor Standards Act (FLSA) is protected from retaliation by the company for having made the complaint. The Supreme Court answered in the affirmative, holding that employees who make oral complaints about violations of the FLSA are entitled to be free from retaliation in the same manner as if their complaints were filed in writing.

This is an important ruling because many courts across the U.S. previously had extended anti-retaliation protection only to employees who had made written complaints. The law involved in the case, the FLSA, affects many millions of workers because it is the federal law that mandates how hourly employees are paid for regular time and overtime hours.

Disputes by employees over the number of hours worked and the wages paid for the hours worked are routine. It is common for workers to look at their paychecks, scratch their heads, and think that they worked more hours than they were paid.

Not Paid for Changing Into, Out of Workclothes. Kevin Kasten was paid hourly for his work at a Saint-Gobain Performance Plastics Corp., a Portage, W.I., plastics manufacturing plant. Each day he arrived at work, Kasten walked in the door and then entered a locker room, where he changed out of his clothes and put on his work related protective gear. Then, he exited the locker room, clocked in, and began work. He followed this sequence because of where the company placed the timeclock. It was not located at the entrance to the building or before he entered the locker room.

When his workday ended, Kasten left his work area, clocked out, entered the locker room, changed out of his work clothes, and went home. Again, he followed this sequence because of where the company placed the timeclock.

At the end of each week the company tallied his hours from the timeclock and paid his hourly wages in accordance with what his time cards stated. Missing from those time cards was the time Kasten and other

Alan Lescht has been successfully litigating employment discrimination, civil rights, and commercial litigation cases for more than 23 years. He is a founding partner of Alan Lescht & Associates PC, where he oversees the firm's employment litigation and counseling practices. More information on the firm is at http://www.dcemploymentattorney.com.

 ISSN 0148-8139

employees spent changing into, and out of, their work clothes.

The FLSA states that employees should be compensated for time spent changing into and out of their work clothes; but the company's placement of its timeclock made that impossible. That meant that Kasten and other workers in the factory who had to change into and out of protective gear, were not compensated for their additional time.

Verbal Complaint Made. Kasten determined that the timeclock's location at the factory led to workers being made to work off the clock in violation of the FLSA, and verbally complained on several occasions. However, the company later terminated his employment, contending that it fired Kasten after he did not properly record his time and attendance on the timeclock despite having been given numerous warnings about it.

This lawsuit followed, with Kasten alleging that the reason given by the company for terminating his employment was false and a pretext to mask the fact that the true reason he was fired was in retaliation for his having complained about a violation of the FLSA.

The U.S. District Court for the Western District of Wisconsin ruled in favor of the company on a motion for summary judgment. It found that the FLSA did not protect employees who made oral complaints.

Kasten appealed the decision to the U.S. Court of Appeals for the Seventh Circuit, which agreed with the district court's ruling that the FLSA did not protect oral complaints.

Kasten then filed a petition for review by the Supreme Court, which took his case because there was a division among the circuit courts of appeals in that some believed that oral complaints were protected, while others believed that anti-retaliation protection should be extended only to written complaints. Kasten argued that his oral complaint made to management should be treated the same as if he had submitted a written complaint because he put management on notice of the claimed violation of the FLSA.

Saint-Gobain argued to the Supreme Court that it should affirm the Seventh Circuit's ruling because the FLSA plainly states that employees are required to ''file'' complaints in order to gain protection from retaliation, and a complaint can only be filed if it is in writing. It argued as well that oral complaints may not give employers fair notice of the alleged violation in the manner a written complaint would, and that protecting oral complaints would discourage employees from making complaints with the federal agencies, like the Department of Labor, that are charged with enforcing the FLSA.

Justice Stephen G. Breyer delivered the opinion of the court, and was joined by Justices Anthony M. Kennedy, Ruth Bader Ginsburg, Samuel A. Alito Jr., Sonia Sotomayor, and Chief Justice John G. Roberts Jr. Justice Elena M. Kagan was recused from consideration of the case.

'File' Not Limited to Written. The Supreme Court rejected Saint-Gobain's arguments and concluded that, when Congress included the word ''file'' in the FLSA, it did not intend to limit protection from retaliation to filed written complaints. The court inquired as to the proper definition of a complaint, and what it means to file a complaint, and concluded, through a review of other employment laws and the manner in which agencies enforced those laws, that a complaint may be oral, that an oral complaint may be filed in the same manner as a written complaint, and importantly, that allowing protection of oral complaints would satisfy notions of due process and at the same time serve to further the objectives of the FLSA.

The court decided that excluding protection from oral complaints would defeat the purpose of the FLSA and hamstring federal agency employees in their efforts to be flexible in their enforcement of the FLSA. The court observed that some factory workers may not have sufficient education to file a written complaint. Ultimately, the court found no real difference between a complaint made verbally and one made in writing provided that the substance of the complaint itself be sufficient to put the company on notice of a claimed violation of the FLSA so that it may undertake an investigation and correct any violations that may have occurred.

As a practical matter, since the court was ruling on a summary judgment motion, the result of the case is to remand the matter back to the district court for it to process the case in accordance with the ruling.

The Supreme Court's decision is much in keeping with the informal nature of our workforce and desire of companies to receive feedback from their employees. There is a trend among corporations to encourage employees to bring forward comments and complaints to supervisors under an open door policy, ethics hotline, or an ombudsman program. These practices generally include a statement that those who take part will not be subject to retaliation. Just look at your company handbook. Odds are that it contains this type of a provision.

Extending anti-retaliation protection only to written disclosures would likely defeat their very purpose in the first place.

The court's decision was not unanimous. Justices Samuel Anthony Scalia and Clarence Thomas dissented. Scalia wrote that he believes that protection from retaliation should only be extended to a written complaint, and only if that written complaint is made to a court or an agency charged with enforcing the law.

What About Complaints Made Internally? The issue Scalia seized upon was mentioned by Breyer but not answered by the majority opinion because Saint-Gobain did not raise it on the appeal. The result is that it leaves a gaping hole through which management side employment lawyers will no doubt argue that complaints made internally to companies should not be protected from retaliation.

But is that argument correct? If we look to the law governing anti-retaliation provisions of other employment laws, like Title VII, we find that their protection extends to complaints of discrimination made internally and there is no requirement that the complaint be made to a court or agency. Consequently, it appears that internal oral complaints of FLSA violations should be treated the same as if they were made to a court or agency.

What About False Complaints? Another issue left unanswered by the Supreme Court is, what if the complaint that a pay practice violated the FLSA turns out to be false?

In the case of Kasten, his underlying complaint, that the placement of the timeclocks violated the FLSA, was upheld in another case. But, what if it turned out that Kasten's complaint turned out to be wrong? Would he

  LW ISSN 0148-8139

still be protected from retaliation for having raised what he in good faith believed to have been a valid complaint?

This is an issue that has been the subject of much litigation in the field of discrimination law. Generally, courts allow retaliation claims to proceed even if it turns out that the underlying complaint is found to be unfounded. Thus, juries are instructed in retaliation claims that, in order to prevail, the plaintiff need not show that the complaint of discrimination was in fact a violation of the law. All the plaintiff must show is that the plaintiff in reasonable good faith believed that the action was discriminatory at the time the complaint was made. The purpose of this principle is to encourage employees to come forward with complaints of what they believe to be discriminatory practices.

Will the same principle be applied here? That is a question for another day, but in the decision, the Supreme Court looked to other employment laws, like Title VII, for guidance on how to define the filing of a complaint, so it may be that the protection will extend to people who make complaints even when the complaints turn out to be unfounded.