EPSTEIN BECKER GREEN | LABOR AND EMPLOYMENT PRACTICE

ACT NOW ADVISORY

Oral Discomfort: Supreme Court Holds That Verbal FLSA Complaints Suffice

March 25, 2011

By Frank C. Morris, Jr.

In a 6-2 decision, the Supreme Court of the United States held in *Kasten vs. Saint-Gobain Performance Plastics Corp.*, __ U.S. __ (March 22, 2011), that an employee's oral complaint of a violation of the Fair Labor Standards Act ("FLSA") constitutes protected conduct under the FLSA's anti-retaliation provision.

The case involved a complaint by Kevin Kasten alleging that he was discharged in retaliation for repeated verbal complaints to his supervisors concerning the employer's placement of time clocks. Kasten complained that the location of the time clocks prevented employees from getting paid for the time they spent changing into and out of their protective gear (commonly referred to as "donning and doffing") in violation of the FLSA. After being fired, allegedly for repeated failures to use the time clock properly, Kasten sued for retaliatory discharge. The employer, Saint-Gobain, argued that his complaint failed because the FLSA's anti-retaliation provision prohibits retaliation against an employee "because such employee has filed any complaint . . ." 29 U.S.C. § 215(a)(3), and Kasten had not "filed" a complaint, but had only complained orally. The district court agreed with Saint-Gobain and granted summary judgment. The U.S. Court of Appeals for the Seventh Circuit affirmed.

In an opinion by Justice Breyer, the Supreme Court held that an oral complaint is protected under the FLSA when it is "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 relied upon prior interpretations of the FLSA and Equal Pay Act by the Department of Labor ("DOL") and the Equal Employment Opportunity Commission, as well as the anti-retaliation language of the National Labor Relations Act.

Justice Breyer did note that an employer could not retaliate against an employee "because of" a complaint unless the employer was put on notice of the complaint.

The Supreme Court did not resolve an argument by Saint-Gobain that the FLSA anti-retaliation provision applies only to complaints filed by an employee with the government but not those made only to the employer. The lower courts had rejected this argument, but the Supreme Court said the argument had not been timely raised.

In light of the fact that the *Kasten* decision is merely the latest in an ever-growing series of cases where the Supreme Court has broadly interpreted protections against retaliation and for whistleblowers – *e.g., Thompson vs. North American Stainless* (fiancé of complainer protected from retaliation; for more information, see EpsteinBeckerGreen's *Act Now* Advisory entitled "Supreme Court Rules That Fiancé of Protester Is Protected from Retaliation"), and *Staub vs. Proctor Hospital* (employer liable under "cat's paw" theory for discriminatory intent of subordinate; for more information, see EpsteinBeckerGreen's *Act Now* Advisory entitled "Supreme Court Lets Cat's Paw 'Claw' Employers") – employers should not be optimistic that the courts would find internal complaints to be unprotected. To the contrary, the safer course is for employers to assume that internal complaints will be protected.

The *Kasten* decision is clearly important outside the FLSA context and strongly suggests support for oral complaints as protected under *any* employment or whistleblower statute. Indeed, the DOL said in a statement that the *Kasten* decision is important because it will "protect workers who make oral complaints under a variety of other whistleblower statutes administered by the Department of Labor."

The difficulty for employers after *Kasten* is that the Supreme Court gave very little guidance about the level of formality and clarity that would be necessary to put an employer on notice that an employee had made a "complaint," bringing her or him within the anti-retaliation protections of a statute. The only guidance provided by Justice Breyer was his comment that "the phrase 'filed any complaint' 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." Determining the requisite degree of formality that constitutes fair notice will be a fact-intensive inquiry about which employers, judges, and juries may well have differing views.

The *Kasten* decision emphasizes again that employers should be on notice that the Supreme Court and, therefore, the lower courts are extremely receptive to retaliation claims and unlikely to dismiss them on technical grounds. In this context, it is not at all surprising that retaliation claims are now the most commonly pursued claims. Further increases in retaliation and whistleblowing cases should be expected.

What Employers Should Do Now

1. Review and update, as necessary, your organization's anti-retaliation policies.

2. Train supervisors in the evolving specifics of retaliation law.

    a. Any such training should include sensitizing supervisors to recognizing complaints that may involve statutory rights (and, therefore, trigger retaliation protections), even when the employee's oral statement does not expressly (i) allege that your organization is violating a particular law, or (ii) threaten a claim.

    b. Train supervisors to make Human Resources and more senior management aware when employees complain about any allegedly

illegal activities or engage in whistleblowing, as such action may be the basis for a lawsuit or union organizing activity.

c. The training should also include advising supervisors not to engage in retaliatory acts (such as targeted or technical enforcement of your organization's rules) against a complaining employee.

3. Review any internal complaint procedure to make sure it encourages individuals with bona fide complaints to use the procedure, rather than making ambiguous oral complaints that may not be recognized by a supervisor or manager as an "official" complaint.

   a. Make sure that employees are aware of your organization's internal complaint procedure. Use email, employer intranets, and other vehicles to publicize it.

   b. Ensure that the complaint procedure expressly prohibits retaliation against anyone who makes a bona fide complaint or participates in the investigation of a complaint.

   c. Require appropriate documentation of the receipt and handling of complaints under the complaint procedure.

4. Remind supervisors of the importance of accurate and timely documentation of deficient performance or violation of your organization's policies.

   a. Tell supervisors that such documentation is particularly important with respect to any employee who has made a complaint in order to defend against any potential retaliation or whistleblower claim.

   b. Have Human Resources and/or legal counsel review such documentation to assure that it is properly prepared and supportive of your organization's position.

5. Confirm with decision-makers that there is no connection between any whistleblowing or complaints of illegality by an employee and any proposed adverse employment action against the employee.

For more information about this Advisory, please contact:

Frank C. Morris, Jr.
Washington, DC
202/861-1880
fmorris@ebglaw.com

Peter M. Panken
New York
212/351-4840
ppanken@ebglaw.com

Michael S. Kun
Los Angeles
310/557-9501
mkun@ebglaw.com

David L. Barron
Houston
713/750-3132
dlbarron@ebglaw.com

This Advisory has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice.

About EpsteinBeckerGreen

Epstein Becker & Green, P.C., founded in 1973, is a national law firm with approximately 300 lawyers practicing in 10 offices, in Atlanta, Boston, Chicago, Houston, Los Angeles, New York, Newark, San Francisco, Stamford, and Washington, D.C. With Washington insider knowledge and more than 35 years of experience in health care and labor and employment issues, the Firm is well prepared to guide clients through this era of reform. The Firm also provides focused services to clients in litigation, corporate services, employee benefits, and immigration. EpsteinBeckerGreen has a longstanding history of being a trusted advisor to clients in the health, financial services, hospitality, and energy industries, representing entities from small entrepreneurial ventures to large multinational corporations on a worldwide basis. For more information, visit www.ebglaw.com.