

## Employees Win Again

***The Supreme Court's latest decision -- permitting oral complaints to be treated the same as written complaints of retaliation under the FLSA -- will probably mean more "he-said, she-said"-type scenarios, experts say. And it points out, once again, the necessity of proper policies, procedures and training for managers.***

*By Tom Starnier*

It seems employers can't catch a break when it comes to employment cases coming before the U.S. Supreme Court during the current term.

For the third straight time, the Supreme Court found in favor of employees; this time the case *Kasten vs. Saint-Gobain Performance Plastics* hinged on whether or not a verbal complaint is on equal footing with a written complaint filed under the Fair Labor Standard Act.

In a 6-2 vote, with Justices Antonin Scalia and Clarence Thomas dissenting and Justice Elena Kagan recusing herself, the Court ruled that workers can still sue if they believe they have suffered retaliation after making an oral, rather than written, complaint.

In the case, Kevin Kasten, who lost his job after four time-clock violations, said his firing violated the FLSA's anti-retaliation provision.

Kasten had complained the time clock was difficult to access and, as a result, was the reason for his time-clock problems -- an issue he had verbally reported to his manager.

The critical issue for the Supreme Court was whether Kasten's verbal complaint should be considered a legitimate complaint filed under the FLSA. Overturning federal appeals courts, the High Court ruled the FLSA does not only protect those who file written complaints.

"The Court's decision will make it easier for FLSA plaintiffs to seek protection under the anti-retaliatory protections of the Act," says Gary Minda, a professor at the Brooklyn Law School. "Most retaliatory actions are premised on oral statements."

Minda adds that, by now, it is very clear that the Roberts Court is revealing its sensitivity to the problem of retaliatory actions by employers against workers who advance their rights under federal workplace laws.

Fredric Leffler, co-head of the Employment Law Counseling and Training Group at Proskauer in New York, says the *Kasten* case is in line with previous Supreme Court opinions that deal with retaliation, and notes that the decision essentially re-affirms the Court's belief that the FLSA protects employees who file complaints, whether written or oral.

"The Court has reasoned that there is an anti-retaliation provision so workers would not fear making [wage-and-hour] complaints," Leffler says.

With this decision, he says, the Court understands "in a gut way" that many workers today have discussions with supervisors in which they raise issues and complaints, and therefore the Court felt it made no sense to limit official complaints to written complaints.

"It's simply an expansion of the Court's interpretation of anti-retaliation provisions in the FLSA," he says. "Most employers are, by now, quite used to having complaints verbally or in writing."

"I can't say I am surprised because it's in keeping with the spirit of the FLSA, and certainly consistent with the jurisprudence direction," says Joshua Zuckerberg, a partner who practices employment law at Pryor Cashman in New York. "The Court has been expanding the retaliation statutes, and the legislatures and the courts have encouraged employees to come forward. If not, it undermines the effectiveness of the law."

On the other hand, Zuckerberg says, the decision does potentially open the floodgates for a lot more "he said, she said"-type scenarios.

"Now, all you need to do is say I made a verbal complaint," he says. "It does make it easier to bring these claims, will probably create more litigation and can be a cause of some concern to some employers."

It's not just verbal complaints, either, says Dana Kravetz, chair of the Labor and Employment Law Department with Michelman & Robinson, in Encino, Calif. Employers should treat all complaints seriously, regardless of the manner in which they are made. Verbal complaints, e-mails, text messages -- all should receive a response, he says.

"An employee grumbling in the background on a daily basis might be engaging in protected activity," he says, adding that if an employee complains orally, employers should have the employee put the complaint in writing.

"This prevents employees from subsequently claiming that their complaint was not fully investigated," Kravetz explains.

Proskauer's Leffler says he believes the fallout from the decision will probably be modest, but that it is a reminder that employers need to properly train managers to listen to and investigate complaints "if they are going to have a solid case to defend and rebut this type of claim."

James Dye, an associate in the Irvine, Calif., office of Fisher & Phillips, says "employers need to take special care to document complaints when they come to light.

"The Supreme Court's decision adds a layer of protection for employees when it comes to oral complaints," he says. "But for employers, utilizing best practices such as documenting and investigating all complaints provides the employer the best protection possible."

Whether the complaint is oral or written, however, Dye says, the question remains one of credibility in the end.

With sufficient documentation, however, says Zuckerberg, employers will "have more documentation and tangible proof that your decision was non-retaliatory. This decision represents a new breed of claims, and to defend them, you need to show what you did you to prevent it from being a retaliatory situation."

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