Stop, Look and Listen: Your Employee May Be Engaging in Protected Conduct!

By Lira A. Johnson

Internal Oral Comments amount to Protected Activity

Earlier this year, the Supreme Court surprised many employers by ruling that an employee’s internal, verbal complaint was covered by the federal law that protects employees from retaliation who have “filed any complaint or instituted . . . any proceeding” related to the Fair Labor Standards Act (“FLSA”). See Kasten v. Saint-Gobain Performance Plastics Corp., ___ U.S. ___, 131 S.Ct. 1325 (2011). Kevin Kasten sued his former employer, Saint-Gobain Performance Plastics Corporation, after it discharged him for the stated reason that he failed to accurately record his time worked on the company time clock. Kasten’s lawsuit claimed that the company unlawfully discharged him in retaliation for complaining about time keeping and the time clock. Kasten admitted that he had not filed any written complaints with the company or a governmental agency prior to discharge, but maintained that he complained orally to his shift supervisor about his “concern” that “it was illegal for the time clocks to be where they were” because it excluded “the time you come in and start doing stuff.” He also alleged that he told a human resources employee that “if they were to get challenged on the location in court, they would lose.”

Kasten’s retaliation claim was initially dismissed because it was only an internal, oral complaint. The Supreme Court disagreed and reinstated his case.

No Bright-Line Test for Determining Protected Activity

The Supreme Court acknowledged that an employer is entitled to “fair notice” that an employee is lodging a grievance, but found that notice does not require that the complaint be in writing. The Court noted that not all verbal comments would amount to a protected complaint, but provided no bright-line test for determining when an employee’s statement would be protected conduct. The Court stated only that an employee’s comments should 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.”

Kasten v Saint-Gobain, 131 S.Ct. 1335.

Given the nature of Kasten’s comments, it seems that the “reasonable employer” is expected to interpret complaints about time-keeping as “an assertion of rights.”

After Saint-Gobain, what constitutes an assertion of rights protected by the FLSA? The simple answer: the employer won’t know until a judge reviews all of the circumstances and decides. In some cases, district courts have applied the Saint-Gobain decision in circumstances where an employee’s comments do not appear to be a clear “assertion of rights protected by the statute and a call for their protection.” Other courts have refused to find protected activity even after specific complaints about payment of wages. The following examples illustrate the wide variance.

Complaints about Failure to Pay Overtime Are Protected . . .

Within a week of the Saint-Gobain decision, two courts followed it and allowed claims for retaliation based on employee comments. The United States District Court for the Southern District of Texas (Houston) allowed a claim for retaliation where the employee alleged only oral complaints about failure to pay overtime. Palmer v. PSC Industrial Outsourcing L.P., 2011 U.S. Dist. LEXIS 33613 (March 30, 2011). Elois Palmer, a dispatcher, alleged that throughout the year preceding her discharge, she complained to her supervisor and two general managers that she was not paid overtime for hours worked during the week and that she told her account manager that the company was violating the FLSA by not paying her overtime. Palmer maintains that her managers agreed to “look into it.” The court found her comments were protected complaints. The employer maintained that Palmer was discharged as part of a reduction-in-force due to a downturn in business caused by Hurricane Ike. Palmer convinced the court that this explanation may only be a pretext for retaliation, since she contended that the company posted an opening for a similar job at a different location just prior to her discharge.

The United State District Court for the Eastern District of Pennsylvania allowed a former employee to file a claim for retaliation in violation of the FLSA based on the allegation that he met with two managers to discuss why his time entry data was altered. Deeley v. Genesis Healthcare Corp., 2011 U.S. Dist. LEXIS 32123 (March 25, 2011). Ronald Deeley, a nursing supervisor, alleged that his hours were reduced and that he eventually transferred to another facility under a different manager after he made an internal complaint about failure to pay overtime and, in response, received payment of some back wages from the employer. The court allowed Deeley to file the retaliation claim as an amendment to his initial complaint, comparing it to other cases with “informal assertions of rights” that had also been allowed in that district.
The United States District Court for the Northern District of Texas (Dallas) found protected conduct when an employee complained internally that his initial job offer promised him an hourly wage, rather than salary. Coberly v. Christus Health, 2011 U.S. Dist. LEXIS 127609 (Nov. 3, 2011). Scott Coberly maintained that he verbally complained to his supervisors at least four times about not being compensated for time he worked in excess of 40 hours a week. The court concluded that Coberly had been sufficiently specific about his concerns to assert a right to overtime protected under the FLSA, although he did not use the words “overtime” or “Fair Labor Standards Act” or “FLSA.” The court ultimately held that the employer had a legitimate, non-retaliatory reason for discharging Coberly, but only after establishing that he had engaged in protected conduct.

The United States District Court for the Northern District of Indiana (South Bend) allowed a pro se litigant to proceed to trial on a claim that his former employer retaliated against him by discharging him after he complained orally to the owner/employer that he “wanted to be paid for [his] overtime pay.” John- son v. Mikolajewski & Assoc., 2011 U.S. Dist. LEXIS 84918 (Aug. 1, 2011).

. . . OR Complaints about Failure to Pay Overtime or Unequal Wages Are NOT Protected

The United States District Court for the Northern District of Illinois (Eastern Division) found no statutorily-protected conduct where an office manager met with her supervising doctor and reported, both orally and in writing, that the office’s payroll practices were illegal and violated federal law. Mousavi v. Parkside Obstetrics, Gynecology & Infertility, S.C. et al., 2011 U.S. Dist. LEXIS 91105 (August 16, 2011). When she began work for Parkside, Debra Mousavi was trained to handle payroll by giving employees “banked” time rather than time-and-a-half for hours worked over 40 during a workweek. She met with the supervising doctor and explained that she believed that in order to comply with federal regulations, the practice should pay overtime to employees who worked more than 40 hours in a week, giving an example of a specific employee who had 14 hours of “banked” time for overtime worked. The doctor responded that Parkside did not pay overtime. Some four months later, Mousavi sent an email to the doctor again complaining about the “no overtime” policy and saying that she was entitled to pay for certain days. She threatened to file a lawsuit if she was not compensated. She was discharged three days after sending the email. The court granted summary judgment to the employer, holding that Mousavi’s meeting to complain about illegal payroll practices were done in her role as office manager and “could not reasonably have been perceived by [the doctor] as the assertion of Mousavi’s, or [the specific employee’s] rights under the FLSA.”

Similarly, a judge in the United States District Court for the Northern District of Indiana (South Bend) found no protected activity when a female employee complained that the men on the floor made more money than the two females. Promptly after the complaint, the two female employees met with their manager, a group leader and a foreman to discuss a plan for cross-training, increasing their hours and sharing in an equal portion of the more lucrative work performed by male employees. The following week, the female employees were both selected for lay-off, along with two men. The court did not find protected activity, holding that the statement that “the guys in our group were making 3 to 400 dollars more a week than we were” was not a sufficiently clear assertion of rights protected by statute.” Hawks et al. v. Forest River, Inc., 2011 U.S. Dist. LEXIS 129891 (Nov. 8, 2011).

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