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The Expanding Frontier in Employment Law: Novel Retaliation Cases Find a Friend in the Supreme Court

The year 2011 was notable because of the development of employee protections related to unlawful retaliation. The U.S. Supreme Court decided two key cases related to the issue. In January, the Court held that third parties may have a cause of action under Title VII of the Civil Rights Act of 1964 based on unlawful retaliation. In March, the Court held that oral complaints about the violation of the Fair Labor Standards Act of 1938 (FLSA) are sufficient to trigger the law's anti-retaliation protections. In both opinions, the Supreme Court made it clear that both statutes were enacted with the intent to protect employees from all forms of retaliation and construed the applicable provisions broadly.

Third Parties May Have a Cause of Action Under Anti-Retaliation Protections of Title VII

On Jan. 24, 2011, the U.S. Supreme Court decided *Thompson v. North American Stainless LP*, holding that Title VII permits third parties within the zone of interests of Title VII with a cause of action for retaliation.[1] The case involved Eric Thompson, who was employed by North American Stainless (NAS), as was his fiancée, Miriam Regaldo. Three weeks after Regaldo filed a sex discrimination charge with the Equal Employment Opportunity Commission (EEOC) against NAS, the company fired Thompson in order to punish Regaldo for filing her charge. Thompson filed his own charge with the EEOC as well as a subsequent lawsuit. The Sixth Circuit Court of Appeals held that Thompson, a third party to Regaldo's charge, did not engage in any activity that was protected under Title VII.

Title VII prohibits discrimination against an individual for making a charge of discrimination.[2] A civil action may be brought by "a person claiming to be aggrieved … by the unlawful employment practice."[3] The parties did not dispute that Regalado's filing of her charge with the EEOC was protected under Title VII. Further, for purposes of its review, the Court assumed that NAS fired Thompson in retaliation for Regalado's discrimination charge.

In light of its 2006 decision in *Burlington N. & S.F.R. Co.* that Title VII's anti-retaliation provision must be construed broadly, the Supreme Court had "little difficulty" finding that NAS had violated Title VII in terminating Thompson because of Regalado's charge.[4] The Court noted that Title VII is intended to protect an employee from an action taken by an employer to dissuade an employee from making or supporting a discrimination charge. Accordingly, in this case, the Court found it "obvious" that a reasonable worker might be dissuaded from filing a discrimination charge if the worker knew her fiancé would be terminated as a result of her charge.[5]

It is important to note that the Court was unwilling to draw any line with respect to the types of relationships entitled to protection under Title VII. The Court held that the standard for judging harm must be objective and cannot be based on a plaintiff's "unusual subjective feelings."[6] However, the Court noted, without generalizing, that termination of a close family member will "almost always" meet the *Burlington* standard, whereas mild retaliation by an acquaintance will "almost never" meet the *Burlington* standard.[7]

The second question the Court addressed was whether Thompson had standing under Title VII to sue NAS for its alleged violation of the anti-retaliation provision of Title VII. Title VII allows a civil action to be brought by "the person claiming to be aggrieved."[8] The Court held that someone aggrieved under Title VII needs more than basic Article III standing, because this would give a cause of action to those "whose interests are unrelated to the statutory prohibitions in Title VII" (such as a shareholder whose stock value decreased as a result of a termination of an employee based on discrimination).[9] Rather, the Court found that the term "aggrieved" had to be construed narrowly, and the person had to fall within the "zone of interests" that Title VII is meant to protect.[10] Thus, the Court held that, because Thompson was an employee of NAS and Title VII is intended to protect employees from an employer's unlawful actions such as retaliatory termination, Thompson was within the zone of interests that is protected by Title VII and is thus an aggrieved person with standing to sue NAS.

Justice Scalia authored the Court's opinion and was joined by all other justices, except Justice Kagan, who did not take part in the consideration of the case or the decision that was reached. Justice Ginsburg filed a concurring opinion, joined by Justice Breyer (not-

ing that the decision was consistent with the EEOC's long-standing view that retaliation can be challenged by both the protected individual and his or her relatives when both are employees).

Oral Complaints Are Sufficient Under the Anti-Retaliation Protections of the FLSA

On March 22, 2011, the U.S. Supreme Court handed down its decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*, in which the Court agreed with the Fifth Circuit and Ninth Circuit that oral complaints are protected under the Fair Labor Standards Act.[11] This case was brought by Kevin Kasten, who had prevailed in a suit against his former employer, Saint-Gobain Performance Plastics Corp., for violation of the FLSA, based on the location of time clocks in the workplace that prevented employees from receiving compensation for the time they spent donning and doffing personal protective equipment and walking to their respective work areas.[12] In addition, Kasten brought this related suit against Saint-Gobain for retaliatory discharge based on oral complaints he had made to Saint-Gobain officials regarding the location of the time clocks.

The FLSA's anti-retaliation provision provides that it is 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 [the FLSA], or has testified or is about to testify in such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3) (emphasis added). Overturning the Seventh Circuit, the Supreme Court held that the scope of the retaliation provision—particularly its phrase "filed any complaint"—includes not only written complaints but also oral ones. The Sixth, Eighth, Tenth, and Eleventh Circuits also held (without detailed analysis) that oral complaints were protected acts, but the Second Circuit had ruled otherwise.[13]

In this case, Saint-Gobain's employee handbook included an internal grievance procedure in that instructed employees to contact their supervisors immediately with any questions, complaints, and problems. In addition, the company's ethics and business code of conduct required employees to report suspected violations of laws. Accordingly, Kasten argued that he had "raised a concern" with his shift supervisor, verbally stating that it was illegal for the time clocks to be located where employees could come in and work. He also claimed that he had informed an employee in the Human Resources Department that he thought the locations of the time clocks were unlawful and he was thinking of filing a lawsuit. Thereafter, Kasten was disciplined and eventually discharged. Saint-Gobain stated that Kasten was disciplined and discharged not because of his oral complaints but because Kasten, after repeated warnings, had failed to use the time clock as required.

In opining that an oral complaint of a violation of the FLSA is protected conduct under its anti-retaliation provision, the Court acknowledged that the term "filed" was open to differing opinions. However, upon reviewing the purpose and context of the FLSA, the Court held that the only permissible interpretation is that "filed" refers to both verbal and written statements.[14] To this end, the Court noted that several state statutes specifically contemplate oral "filings." In addition, various federal regulations permit filing a claim "orally or in writing" as well as judicial usage of the term to reflect events such as filing an oral motion to quash.

Although the Court acknowledged that "filings" may more often be in writing and the term alone may suggest a narrow interpretation of that which is written, the term "any complaint" provides for a broad interpretation. The Court noted that the three terms used together are unlike those found in other statutes that contain anti-retaliation provisions, such as Title VII of the Civil Rights Act (which protects employees who "opposed any [unlawful] practice").

Thus, the Court looked to Congress' intent in enacting the anti-retaliation provision of the FLSA, noting that "illiterate, less educated, or overworked workers" may find it difficult to put complaints in writing as well as President Franklin Roosevelt's acknowledgment that these types of workers need the FLSA's help the most. The Court also noted that limiting FLSA complaints to written complaints may prevent the government from using hotlines and interviews to receive complaints.

Employers should note, however, that the Court specifically did not decide whether an oral complaint made to an employer (using internal grievance procedures) fulfills the FLSA's notice provision, and Saint-Gobain did not properly bring that issue before the Court. However, the Court acknowledged that the FLSA does require "fair notice" and cautioned that oral complaints will often leave employers with uncertainty about whether an employee is unusually angry at the moment and blowing off steam or lodging a complaint about a violation of the FLSA. Accordingly, the Court acknowledged the following:

> a "filing" is a serious occasion, rather than a triviality. As such, 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. Moreover, the statute prohibits employers from discriminating against an employee "*because* such employee has filed any complaint." § 215(a)(3) (emphasis added).[15]

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And it is difficult to see how an employer who does not (or should not) know an employee has made a complaint could discriminate because of that complaint.

The Court held that an oral complaint is filed when a "'reasonable, objective person would have understood the employee' to have 'put the employer on notice that [the] employee is asserting statutory rights under the [FLSA].'"[16] Thus, an oral complaint must, in order to be protected under the anti-retaliation provision, be "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, and as an assertion of rights protected by the statute and a call for their protection."[17] However, when an oral complaint is filed within that meaning, it is protected under the FLSA.

Justice Breyer authored the Court's opinion and was joined by Chief Justice Roberts, Justice Kennedy, Justice Ginsburg, Justice Alito, and Justice Sotomayor. Justice Scalia filed a dissent, joined by Justice Thomas (except n.6). Justice Kagan did not take part in the consideration of the case or in the decision that was handed down.

Conclusion

Even though the U.S. Supreme Court has interpreted the coverage of Title VII and the FLSA's anti-retaliation provisions broadly in favor of protection, employees still have thresholds they must meet. For example, the Court noted in *Thompson* that the standard for judging harm under Title VII must be objective and cannot merely rely on a plaintiff's subjective feelings. Further, the Court distinguished Thompson from an accidental victim of retaliation (collateral damage). As to oral complaints under the FLSA, the Court held in *Kasten* that the employee must still make a statutorily protected complaint, and it must be made such that a reasonable, objective person would understand that the employee is putting the employer on fair notice of an alleged violation of the FLSA. In addition, the Court declined to consider whether a private, internal complaint was statutorily protected conduct or if the complaint must be made to the government. The Court noted Saint-Gobain's argument that internal oral complaints will leave employers in a state of uncertainty over whether a complaint is made or an employee is letting off steam or unusually angry at the moment. Thus, the Court held that fair notice requires "a degree of formality." The dissent stated the Court should not issue such an advisory opinion, hinting that, if the matter were to come properly before the Court the majority would be likely to hold that informal, internal oral complaints would not be sufficient fair notice. **TFL**

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Endnotes

[1]*Thompson v. North American Stainless, LP*, 131 S. Ct. 863; 178 L. E. 2d 694, 563 U.S. ___ (2011); Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000e et. seq.

[2]42 U.S.C. § 2000e-3(a).

[3]*Id.,* § 2000e-5(b), (f)(1).

[4]*Thompson*, 131 S. Ct. at 867–68; *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53 (2006).

[5]*Thompson*, 131 S. Ct. at 868.

[6]*Id.* at 868-69, citing *Burlington*, 548 U.S. 68–69.

[7]*Id.*

[8]*Id.* at 869; 42 U.S.C. § 2000e-5(f)(1).

[9]*Id.* at 870.

[10]*Id.* at 870, citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990).

[11]*Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. ___; 131 S. Ct. 1325; 179 L. E. 2d. 379 (2011).

[12]*Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 954 (W.D. Wisc. 2008).

[13]*See Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 625–26 (5th Cir. 2008) (oral complaints protected); *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199, 1206 (10th Cir. 2004) (unofficial assertion of rights protected); *Moore v. Freeman*, 355 F.3d 558, 562–63 (6th Cir. 2004) (assuming oral complaints are protected); *Lambert v. Ackerley*, 180 F.3d 997, 1007 (9th Cir. 1999) (en banc) (oral complaints protected); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55–56 (2nd Cir. 1993) (informal complaints to supervisors not protected); *EEOC v. White & Son Enterprises*, 881 F.2d 1006, 1011–12 (11th Cir. 1989) (unofficial assertion of rights protected); and *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975) (assuming oral complaints are protected).

[14]The Court noted that in its interpretation of the FLSA's statutory language, its meaning of a phrase within that statute "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Kasten,* 563 U.S. ___; 131 S. Ct. 1325, 1330; 179 L. E. 2d 379 (2011).

[15]*Id.* at 131 S. Ct. 1334.

[16]*Id.* at 1335.

[17]*Id.*