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Oral Complaint To Private Employer May Be Protected Activity Under FLSA Anti-Retaliation Provision

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A recent case from the Second Circuit joins the growing number of cases that require employers to take all the more seriously an employee's oral complaint of a violation of the Fair Labor Standards Act.

On April 20, 2015, the Second Circuit, in Greathouse v. JHS Security Inc., joined eight other circuits in holding that Section 215(a)(3) of the FLSA does not require an employee to complain to a government agency as a predicate for an FLSA retaliation claim. The FLSA prohibits discharging or discriminating against any employee because that employee complained about an FLSA violation or cooperated in an investigation of an FLSA violation. This decision follows a 2011 decision by the U.S. Supreme Court ruling that an employee's oral complaints of a violation of the Fair Labor Standards Act can constitute protected activity under the FLSA's anti-retaliation provision, but left open the question of whether an oral complaint may be made to a private employer instead of to the government. Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct. 1325 (2011).

The Plaintiff in Greathouse complained to his boss that he had not been paid in several months. His boss responded by saying that he would pay Plaintiff when he felt like it and pointing a gun at Plaintiff. Understandably, Plaintiff viewed this as the end of his employment and filed a lawsuit for unpaid wages and retaliation.

On appeal, the Second Circuit found the oral complaint to be sufficient to create an FLSA retaliation claim. The district court had rejected Plaintiff's retaliation claim because the Second Circuit had previously held that informal complaints to supervisors did not qualify as "filing a complaint" under the FLSA. The Second Circuit reversed the district court explaining that in light of Kasten the "FLSA's remedial goals counsel in favor of construing the phrase

'filed any complaint' in section 215(a)(3) broadly, to include intra-company complaints to employers."

The Court, however, took pains to emphasize that not every "oral complaint" will be enough to state an FLSA retaliation claim. The complaint must 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 [FLSA] and a call for their protection." Whether an oral complaint is protected activity depends on a "context-dependent inquiry" that requires "some degree of formality."

Courts who have considered whether an oral complaint is sufficient to trigger the protections of the FLSA focus on whether the complaint was clear to the employer. For example, in Kasten, an employee orally complained to his supervisor that the location of the time clock made it impossible for employees to clock all of their time. The Court found this sufficiently clear to invoke the protections of the FLSA.

The Fourth Circuit applies the same standard, requiring that Plaintiff show that a complaint gave notice to her employer that "a grievance [had] been lodged and [did], or should, reasonably understand that matter as part of its business concerns." Minor v. Bostwick Laboratories, Inc., 669 F. 3d 428 (2012). There, Plaintiff claimed that she complained to the COO of the company in a formal meeting that her supervisor altered employees' time sheets to keep them from receiving overtime pay. She claimed that he agreed to investigate her claims. This was clear enough to constitute a complaint under the FLSA.

Likewise, the Fifth Circuit requires proof that the employee "step[ped] outside of his normal job role so as to make clear to the employer that the employee is taking a position adverse to the employer." Lasater v. Texas A&M University-Commerce, 495 Fed.Appx. 458 (2012). The Court explained that in cases involving managerial employees who ordinarily raise concerns with management as part of their regular job duties, it must be clear when they are actually making a complaint for them to be protected under the FLSA.

If an issue raised by an employee is immediately resolved to the employee's satisfaction, it may not be clear to the employer that a complaint has been made. Montgomery v. Havner, 700 F.3d 1146 (2012). In that case, an employee had called her supervisor to ask why her time card had been docked ten minutes. The employee explained her side of the story, the supervisor agreed to return the ten minutes, and the call was ended amicably. The Court held that "[n]o reasonable jury could conclude [Plaintiff's] discussion with [her supervisor] . . . was a sufficiently clear and detailed FLSA complaint."

As these cases illustrate, the determination of whether an oral complaint is sufficiently clear and detailed to qualify for protection under the FLSA is detailed and fact specific. If you have any questions about how this decision could affect your organization, or how your organization should respond to oral complaints, please contact Scott Ohnegian , Daniel Zappo, or any member of Riker Danzig's Labor & Employment Group.

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