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Employment Law - Fair Labor Standards Act - The Seventh Circuit Holds That Oral Employee Complaints are Not Protected Activity under FLSA

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EMPLOYMENT LAW—FAIR LABOR STANDARDS ACT—THE SEVENTH CIRCUIT HOLDS THAT ORAL EMPLOYEE COMPLAINTS ARE NOT PROTECTED ACTIVITY UNDER FLSA

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THE Fair Labor Standards Act (FLSA) offers protection to the welfare of our nation's workforce, but according to a recent Seventh Circuit decision, FLSA protection is only offered to employees who put their complaints in writing.[1] Although the circuits are split regarding FLSA's anti-retaliation provision parameters, this Note argues that the Seventh Circuit's holding in *Kasten v. Saint-Gobain Performance Plastics Corp.* is too narrow and frustrates FLSA's congressional purpose.[2] The court narrowly interpreted FLSA's phrase "filed any complaint" and erroneously held that FLSA's anti-retaliation provision does not protect oral employee complaints.[3] Contrary to the Supreme Court's determination that FLSA's anti-retaliation provision avoids having "aggrieved employees quietly to accept substandard conditions,"[4] the *Kasten* court's holding effectively allows employers to retaliate against employees who literally do not keep quiet about substandard conditions, unless the aggrieved employees "quietly" put their FLSA complaints in writing.

Saint-Gobain, a polymer production company, employed Kevin Kasten as a manufacturing and production worker from October 2003 to December 2006.[5] Kasten orally complained to management about the legality of

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1. *See* 29 U.S.C. § 202(a) (2006); Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. 2009).

2. *See Kasten*, 570 F.3d at 840; *see also* Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 541-50 (2001) (discussing the circuit split).

3. *See Kasten*, 570 F.3d at 840.

4. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960) (discussing Congress's purpose in enacting FLSA's anti-retaliation provision).

5. *Kasten*, 570 F.3d at 836; Kasten v. Saint-Gobain Performance Plastics Corp., 619 F. Supp. 2d 608, 610 (W.D. Wis. 2008) (detailing the case facts).

time-clock locations.[6] Saint-Gobain placed the time clocks near employee workstations, but required employees to don protective gear before entering the work area and doff the gear in the locker room at the end of their work shift.[7] Because employees could not access time clocks without wearing required gear, this donning and doffing time, which averaged about eleven to fourteen minutes of work time per day, was unpaid.[8] Unwilling to accept what he perceived to be a substandard and unfair working condition, Kasten orally complained on numerous occasions to his supervisors and human-resources personnel between October 2006 and December 2006.[9] Unfortunately, Kasten did not regularly punch in and out as required, and Saint-Gobain ultimately terminated him for this behavior.[10] But Saint-Gobain did not escalate the disciplinary procedures for Kasten's missed punches until he began complaining about the time-clock locations in October and threatening to sue the company for pay violations.[11]

Eight months after his termination, Kasten brought suit against Saint-Gobain in federal district court alleging that Saint-Gobain violated FLSA's anti-retaliation provision by discharging him for orally complaining about time-clock locations.[12] The district court granted Saint-Gobain's summary judgment motion, finding that Kasten did not engage in protected activity under FLSA's anti-retaliation provision because he had not filed a written complaint with his employer.[13] Kasten appealed, and the Secretary of Labor filed an amicus brief in Kasten's support.[14]

The Seventh Circuit affirmed the district court's summary judgment grant, concluding that Kasten's time-clock complaints were not protected activity under FLSA.[15] In reaching this decision, the court considered: (1) the plain meaning of the statute; (2) the widely varying decisions of other circuits; and (3) Congress's actions regarding the statute.[16] FLSA's anti-retaliatory provision states "it shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee be-

6. *Kasten*, 570 F.3d at 837.

7. Brief and Required Short Appendix of Plaintiff–Appellant at 2-3, Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. 2009) (No. 08-2820).

8. Kasten v. Saint-Gobain Performance Plastics Corp., 556 F. Supp. 2d 941, 950 (W.D. Wis. 2008) (separate class action suit discussing probable amount of unpaid work time).

9. *Kasten*, 570 F.3d at 836 (stating that Saint-Gobain denied ever hearing any time-clock complaints from Kasten); Brief and Required Short Appendix of Plaintiff–Appellant, *supra* note 7, at 4-6 (noting that Saint-Gobain relocated the time clocks on the same day as Kasten's termination).

10. *Kasten*, 570 F.3d at 836.

11. *Id.*; Brief and Required Short Appendix of Plaintiff–Appellant, *supra* note 7, at 4-6.

12. *Kasten*, 570 F.3d at 837.

13. *Id.*; Kasten v. Saint-Gobain Performance Plastics Corp., 619 F. Supp. 2d 608, 613 (W.D. Wis. 2008) (explaining the district court's decision).

14. *Kasten*, 570 F.3d at 837. *See generally* Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff–Appellant, Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. 2009) (No. 08-2820).

15. *Kasten*, 570 F.3d at 840.

16. *Id.* at 838-40.

cause such employee has *filed any complaint* or instituted or caused to be instituted any proceeding under or related to this Act."[17]

First, the court focused on the plain meaning of the phrase "filed any complaint," especially the word *filed*, which led to a battle of the dictionaries.[18] Kasten and the Secretary of Labor argued that *filed* generally meant "submitted" and relied on four different dictionaries supporting this definition, interpreting the phrase to mean "submitted any complaint."[19] But the court decided this interpretation was overbroad, preferring instead definitions found in two other dictionaries that define *file* in terms of paperwork.[20] Logically deducing that "[o]ne cannot 'file' an oral complaint" without a physical document, the court determined that "[t]he use of the verb 'to file' connotes the use of a writing."[21] To rationalize this "natural understanding" of the word, the court used the following example: "If an individual told a friend that she 'filed a complaint with her employer,' we doubt the friend would understand her to possibly mean that she merely voiced displeasure to a supervisor."[22] The court held that the phrase "filed any complaint" requires an "employee to submit some sort of writing"—interestingly using the word *submit* as suggested by Kasten and the Secretary of Labor, but interpreting the phase to mean "submitted any written complaint."[23]

Next, the court looked for guidance from other circuits and acknowledged a circuit split regarding the form and degree of formality that employee complaints must take to qualify for FLSA protection.[24] Finding only one other circuit case that overtly addressed purely verbal complaints, the court noted that the Fourth Circuit in *Ball v. Memphis Bar-B-Q Co.* excluded verbal complaints from FLSA protection.[25] The court also noted that the Second Circuit in *Lambert v. Genesee Hospital* held that FLSA protects only formally filed complaints, not merely internal complaints.[26] Although the court conceded that "[o]ther courts have found oral complaints to be protected activity," the court dismissingly noted no other circuit decisions explicitly dealt with purely verbal complaints or the meaning of the word *file*.[27]

Finally, the court justified its interpretation of the phrase "filed any complaint" because Congress deliberately chose those words.[28] "[O]ur in-

17. 29 U.S.C. § 215(a)(3) (2006) (emphasis added).
18. *See Kasten*, 570 F.3d at 838-39; Brief and Required Short Appendix of Plaintiff–Appellant, *supra* note 7, at 12-13; Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff–Appellant, *supra* note 14, at 17.
19. *See Kasten*, 570 F.3d at 838-39; Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff–Appellant, *supra* note 14, at 17.
20. *Kasten*, 570 F.3d at 838-39.
21. *Id.*
22. *Id.* at 839.
23. *Id.* at 840.
24. *Id.* at 839-40.
25. *Id.* at 839 (citing Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 364 (4th Cir. 2000)).
26. *Id.* (citing Lambert v. Genesee Hosp., 10 F.3d 46, 55 (2d Cir. 1993)).
27. *Id.* at 839-40.
28. *Id.* at 840.

terpretation of the phrase 'file any complaint' is confirmed by the fact that Congress could have, but did not, use broader language in the FLSA's retaliation provision."[29] The court compared the FLSA provision to Title VII's anti-retaliation provision that protects employees who "opposed any practice," which has been interpreted to protect purely verbal employee complaints.[30] The court concluded that "Congress's selection of the narrower 'file any complaint' language in the FLSA thus appears to be significant."[31] Undeterred by the court's holding, Kasten filed a petition for certiorari in January 2010.[32]

The Seventh Circuit's holding in *Kasten* is too narrow and frustrates FLSA's congressional purpose. To borrow the dissenting language from Kasten's rehearing denial, the decision is "unique among the circuits" and "contrary to the understanding of Congress."[33] The Supreme Court attributes a "remedial and humanitarian . . . purpose" to FLSA, protecting "the rights of those who toil."[34] Thus, the "statute must not be interpreted or applied in a narrow, grudging manner."[35] Furthermore, the Supreme Court consistently construes FLSA provisions "liberally to apply to the furthest reaches consistent with congressional direction."[36] The Supreme Court also stated that Congress established FLSA to obtain "certain minimum labor standards" without "detailed federal supervision or inspection of payrolls."[37] To this end, Congress "chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances."[38] Consequently, limiting the types of employee grievances that receive FLSA protection necessarily limits Congress's effectiveness to regulate employers through employee complaints.

Despite the Supreme Court's push to apply FLSA liberally, a minority of circuits narrowly construe FLSA's anti-retaliation provision, notably the Fourth and Second Circuits.[39] Requiring a high degree of formality for employee complaints to qualify for protection, the Fourth Circuit in a majority decision in *Ball* not only excluded verbal FLSA complaints, as the Seventh Circuit correctly noted, but also excluded internal company

29. *Id.*

30. *Id.* (citing Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 65 (2d Cir. 1992)).

31. *Id.* (citing Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 364 (4th Cir. 2000) and *Lambert*, 10 F.3d at 55).

32. Petition for Writ of Certiorari, *Kasten*, 570 F.3d 834 (No. 09-834).

33. Kasten v. Saint-Gobain Performance Plastics Corp., No. 08-2820, 2009 WL 3296229, at *1 (7th Cir. Oct. 15, 2009) (seven-to-three decision) (Rovner, J., dissenting). The majority holding denies Kasten's petition for rehearing en banc.

34. Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944).

35. *Id.*

36. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296 (1985) (quoting Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211 (1959)).

37. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).

38. *Id.*

39. *See* Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 364 (4th Cir. 2000); Lambert v. Genesee Hosp., 10 F.3d 46, 55 (2d Cir. 1993).

complaints to supervisors, protecting only formally filed, written complaints with government agencies or formally instituted legal proceedings.[40] Hypothetically, if Kasten brought his case before the Fourth Circuit, and even if he complained in writing, his case would probably be dismissed because his complaint was merely internal. Similar to the Fourth Circuit's interpretation, the Second Circuit in *Lambert*—also cited favorably in *Kasten*—extended FLSA protection only to formally filed complaints, excluding internal complaints made to supervisors.[41] Kasten's complaint, regardless of being written or oral, also would not survive in the Second Circuit because it was not a formal filing. The Seventh Circuit differs from the Fourth and Second Circuits by recognizing informal complaints, but it otherwise matches their narrow interpretation.[42]

Contrary to the Seventh Circuit's holding in *Kasten*, most circuits interpret FLSA's anti-retaliation provision much more broadly.[43] The Third and Eighth Circuits issued the broadest interpretations, protecting employees who filed no complaint.[44] In separate cases of mistaken identity, employers fired employees whom the employer thought had filed formal complaints, but the fired employees never actually filed any type of complaint.[45] The Third and Eighth Circuits held that these employees qualified for protection under FLSA's anti-retaliation provision even though the employees filed no complaint.[46] With similar but slightly less broad interpretations, the Fifth, Sixth, and Eleventh Circuits upheld FLSA protection for employees whose company terminated them after lodging informal, internal, and apparently oral complaints to their immediate supervisors about potential FLSA violations.[47] Two months before the *Kasten* holding, the Eleventh Circuit recognized internal and unmistakably oral complaints.[48] Likewise, the First, Ninth, and Tenth Circuits broadly interpret FLSA's anti-retaliation provision, but offer a middle-road approach without yet differentiating between oral and written complaints.[49] For example, the Ninth Circuit recognized internal complaints

40. *Ball*, 228 F.3d at 364 (one justice dissenting); *see* Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 839 (7th Cir. 2009).

41. *Lambert*, 10 F.3d at 55; *see Kasten*, 570 F.3d at 839.

42. *Kasten*, 570 F.3d at 837-38 (holding that internal complaints are protected activity under FLSA).

43. *See* Clemons, *supra* note 2, at 541-50 (discussing the circuit split on FLSA's anti-retaliation provision).

44. *See* Saffels v. Rice, 40 F.3d 1546, 1549-50 (8th Cir. 1994); Brock v. Richardson, 812 F.2d 121, 125 (3rd Cir. 1987).

45. *Saffels*, 40 F.3d at 1549-50; *Brock*, 812 F.2d at 125.

46. *See Saffels*, 40 F.3d at 1549-50; *Brock*, 812 F.2d at 125.

47. *See* Hagan v. Echostar Satellite, 529 F.3d 617, 626 (5th Cir. 2008); EEOC v. Romeo Cmty. Schs., 976 F.2d 985, 989-90 (6th Cir. 1992); EEOC v. White & Son Enters., 881 F.2d 1006, 1011 (11th Cir. 1989).

48. Keeler v. Fla. Dep't of Health, 324 F. App'x 850, 852, 858-59 (11th Cir. 2009) (unpublished opinion) (upholding an employee's retaliation claim after she orally complained to management about unpaid overtime during a performance review meeting).

49. *See* Lambert v. Ackerly, 180 F.3d 997, 1008 (9th Cir. 1999); Valerio v. Putman Assocs., Inc., 173 F.3d 35, 45 (1st Cir. 1999); Conner v. Schnuck Mkts., Inc., 121 F.3d 1390, 1395 (10th Cir. 1997).

filed with the employer, giving deference to FLSA's congressional purpose.[50] Also, the Tenth Circuit broadly interpreted FLSA's anti-retaliation provision to protect "unofficial assertion of rights through complaints at work."[51] Finally, the First Circuit upheld protection for written internal complaints, but it specified that the complaint must be sufficient, noting that "not all abstract grumblings will suffice to constitute the filing of a complaint with one's employer."[52] Two weeks before the district court heard Kasten's retaliation case, Kasten and 157 other Saint-Gobain employees won a class action suit against the company for the illegality of the time-clock locations.[53] Thus, Kasten's complaint was not an abstract grumbling.

If the Supreme Court allows the *Kasten* decision to stand, employees in the Seventh Circuit's jurisdiction will lose statutorily protected rights that Congress intended to grant when enacting FLSA. Congress wanted to encourage employees to feel free to voice their complaints about unfair labor conditions, so limiting the types of complaints that receive FLSA protection frustrates Congress's purpose.[54] Furthermore, protecting only written complaints could lead to inconsistent and illogical results. For instance, an employee who telephones a complaint to his employer could immediately be fired without FLSA protection, but an employee who emails the same complaint would be statutorily protected. Today's technology advancements create more complexity in determining FLSA protection. What if the employee's telephone complaint is recorded on voice mail? Or what if the employee sends the employer a link to a video in which he orally complains? As the Seventh Circuit observed, one may not be able to physically file a traditional oral complaint, but digital recordings could be filed and stored like any other electronic document. Rather than split hairs about which types of complaints receive FLSA protection, the circuits should focus on FLSA's congressional purpose: to protect "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others."[55] This humanitarian purpose is the lens through which the circuits should view FLSA's statuary language.[56] Ultimately, the Supreme Court will need to resolve this growing circuit split to ensure consistent FLSA protections across the country.

50. *Ackerly*, 180 F.3d at 1008.
51. Love v. RE/MAX of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984).
52. *Valerio*, 173 F.3d at 44.
53. Kasten v. Saint-Gobain Performance Plastics Corp., 556 F. Supp. 2d 941 (W.D. Wis. 2008).
54. *See* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).
55. Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944).
56. *Id.* (stating that FLSA is "remedial and humanitarian in purpose").