InsideCounsel.com
BUSINESS INSIGHTS FOR LAW DEPARTMENT LEADERS
May 7, 2012
LABOR/EMPLOYMENT

Labor: Retaliation under the FLSA — Where do we stand?

Courts are likely to continue to broaden the scope of what is considered a filed complaint

WENDY K. VOSS AND E. CHANEY HALL

The Supreme Court dramatically changed how employees may file complaints with their employers under the Fair Labor Standards Act (FLSA) last year in *Kasten v. Saint-Gobain Performance Plastics Corp.* Based on the statutory language, courts previously had routinely found that an employee must file a complaint in writing to be protected by the statute's anti-retaliation provisions.

In *Kasten*, the Supreme Court held that an employee's oral complaints to his employer, in compliance with the company's internal grievance procedure, was "filed" within the meaning of the FLSA, and the complaint, therefore, entitled the employee to protection against retaliation. The court specifically declined to decide whether intra-company oral complaints, as opposed to complaints lodged with a court or government agency, are sufficient to trigger the statute's protections, as this issue was not raised in the appeal.

In the year since the *Kasten* decision, other courts have extended the rule to the private sector and grappled with the implications of the new standard for determining whether a complaint has been filed within the meaning of the statute. For example, in *Minor v. Bostwick Laboratories, Inc.*, the 4th Circuit directly addressed this question and found that intra-company complaints are protected activity for anti-retaliation purposes. Most other courts considering the issue also have extended the rule to intra-company complaints.

In *Truckenmiller v. Burgess Health Center*, the Northern District of Iowa found that an employee's comment to a supervisor, and later comment at the end of a meeting while the attendees were preparing to leave, regarding differences in titles and pay for female employees constituted notice of a complaint entitling the employee to FLSA protection, and defeated the employer's motion for summary judgment. Similarly, in *Deeley v. Genesis Healthcare Corp*, the Eastern District of Pennsylvania found that a supervisor's meeting with a director and administrator to discuss the administrator's modification of time sheets was a complaint entitling the supervisor to anti-retaliation protection.

However, the Southern District of New York has consistently held that *Kasten* does not disturb prior holdings that an employee's internal complaint to his employer does not entitle him to FLSA protection, and only external complaints to an outside agency or lawsuit are protected. Also, in a decision made under state wage law, the Florida District Court of Appeals found in *Alvarado v. Bayshore Grove Management., LLC* that an employee's oral complaint did not provide sufficient notice to invoke statutory protections when the employee told his employer that he "was not receiving the correct amount of pay since [his] time records were altered and/or falsified so as to avoid having to pay [him] overtime."

The lower courts adopting the rule also have adopted the standard set by the Supreme Court that the complaints need not be in writing or made in any particular manner, but must have "some degree of formality" and 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 statute and a call for their protection."

Following this standard, the Southern District of Florida determined in *Perez v. Brands Mart Service Corp.* that a plaintiff did not sufficiently notify the employer that his grievance was a FLSA complaint when he told his employer's human resources department that he was not sufficiently compensated for his increased job duties and "would not work for free."

In contrast, the District of Maine held in *Thayer Corp. v. Reed* that an employee's demand from his employer for a specific dollar amount of back wages was sufficient notice to constitute a FLSA complaint, even if the employee's demand did not mention any statute, and the District of New Jersey, in *Ghobrial v. Pak Manufacturing, Inc.*, held that an employee's oral complaint to his employer that he was improperly classified as an exempt, salaried employee when he should have been an hourly employee provided the employer with sufficient notice of a FLSA complaint.

Most courts are likely to continue to broaden the scope of what is considered a "filed complaint" under FLSA to include employee communications that did not previously give rise to anti-retaliation protection. Employers need to monitor this developing area of law to be certain of the prevailing position of the courts.