

Retaliation Protections Strengthened by U.S. Supreme Court

By Glenn Israel and Andrea Johnstone | March 29, 2011

The U.S. Supreme Court recently clarified the scope of a provision of the Fair Labor Standards Act (“FLSA”) that protects workers who report suspected FLSA violations from retaliation by their employers. The FLSA provision at issue forbids employers “to discharge ... any employee because such employee has filed any complaint alleging a violation under the Act.” Historically, this provision has been interpreted as protecting workers who file formal FLSA complaints with the United States Department of Labor (“DOL”).

In the recent U.S. Supreme Court decision, *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Court held that the scope of the statutory term “filed any complaint” includes both oral and written complaints. The Court did not rule on the question of whether the FLSA’s anti-retaliation protections apply only to complaints made to the DOL or another official body, or whether a complaint by an employee to his or her employer is sufficient. Significantly for employers, however, the Court signaled in its ruling that the FLSA protects workers who make internal FLSA complaints, whether written or verbal, directly to their employers without the involvement of the DOL.

What does this mean for employers? This decision makes it easier for employees to bring FLSA retaliation claims. Now that verbal complaints indisputably trigger anti-retaliation protections, employers will need to be more vigilant about listening to, reviewing and responding to informal complaints. Companies will want to be sure that managers are trained to escalate verbal complaints to Human Resources or the appropriate manager responsible for internal complaints and alleged compliance issues.

When taking adverse employment actions employers will need to consider whether the affected employee has made any oral or written complaints and the vulnerability, if any, of the employer to a claim of retaliation. Sensitizing managers to this termination pitfall is advisable.

Wage and hour issues should be included among the list of topics that are subject to internal complaint and investigation policies and procedures. Employees should also be made aware of the applicability of these policies and procedures to FLSA complaints. This approach serves two purposes. It provides a means for employers to become aware of alleged FLSA violations and correct them, if needed, and it also provides a potential defense to an FLSA retaliation claim based upon the existence of the employer’s complaint and investigation procedures. Ensuring that the complainant receives a timely, substantive response to his/her complaint also is critical.

Employers are encouraged to review existing internal complaint policies and for those that do not have such policies in place, they are strongly encouraged to adopt one. Such policies need to be carefully drafted and implemented to avoid unintended consequences. Supervisor and employee training are also recommended.

If you need assistance drafting or modifying your internal complaint and investigation policies and procedures, or if you have any questions about the FLSA, contact Glenn Israel (207 774-1200 or gisrael@bernsteinshur.com) or Andrea Johnstone (603 623-8700 or ajohnstone@bernsteinshur.com), co-chairs of the Bernstein Shur Labor and Employment Practice Group.