

U.S. SUPREME COURT HOLDS VERBAL COMPLAINTS ARE PROTECTED BY FLSA ANTI-RETALIATION PROVISIONS

The Supreme Court ruled last month that workers who complain about wage violations to their employer are protected from retaliation under the Fair Labor Standards Act (FLSA), regardless of whether those complaints are oral or written. Prior to this ruling in *Kasten v. Saint-Gobain Performance Plastics*, the question of whether verbal complaints were sufficient to support a FLSA retaliation claim was unsettled law.

The issue began when Plaintiff Kasten, who had worked at the Wisconsin manufacturing plant of Saint-Gobain Performance Plastics Corporation, verbally complained to his shift supervisor and managers about the location of the time clocks that recorded his working hours. Kasten pointed out that the clocks were placed in an area far from the dressing room where the employees usually changed in and out of their protective gear, resulting in a loss of recorded time and wages. Kasten submitted his verbal complaint through the company's formal grievance procedure. When he was later fired for allegedly unrelated reasons, he claimed that his termination had actually been an act of retaliation. The lawsuit, however, was dismissed when the district court judge ruled that FLSA anti-retaliation provisions did not cover oral complaints. On appeal, the Seventh Circuit U.S. Court of Appeals in Chicago agreed.

The Supreme Court reversed, holding that oral complaints do fall within the scope of the FLSA's anti-retaliation provisions, which forbid employers "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint..." Writing for the majority, Justice Breyer noted that the word "filed" sometimes includes complaints submitted verbally. While not all oral complaints may count, Breyer explained that a valid complaint from an employee—whether verbal or written—is one that is "sufficiently clear and detailed for a reasonable employer to understand it ... as an assertion of rights protected by the statute and a call for their protection." The Court reasoned

that narrowing the interpretation of the provision to exclude oral complaints would undermine the effectiveness of the FLSA, the enforcement of which relies heavily on whistleblowing employees rather than "continuing detailed federal supervision or inspection of payrolls."

In light of this Supreme Court ruling on the validity of oral complaints, the burgeoning number of anti-retaliation lawsuits in recent years is certain to continue and will likely increase. This case further underscores the need for employers to have the mechanisms and supervisory training in place to effectively address employee complaints, whether verbal or written.

NEWSBITES

Two California Jury Verdicts Underscore Proliferation of Retaliation Suits

Two multi-million jury verdicts from the Superior Court of Los Angeles County demonstrate the explosion of retaliation lawsuits in recent years. In both cases, the jury awarded significant damages on retaliation claims despite finding no merit in the plaintiffs' underlying allegations of wrongdoing. In *Selwyn Lord Young v. Los Angeles City College, et al.*, a fired college coach sued his employer for racial discrimination, sexual harassment and retaliation, alleging that he was terminated after reporting the wrongdoing by school officials. The jury did not find racial discrimination or sexual harassment, but it awarded plaintiff \$1,126,114 in damages on his retaliation claim. In *Michael Winston v. Countrywide Financial Corporation*, a former officer at Countrywide Financial alleged that he had been fraudulently induced into joining Countrywide and then fired after refusing to falsify a report on Countrywide's mortgage loan practices to a bond-rating firm and complaining about noxious fumes in his office. While finding no liability on the fraudulent inducement claims, the jury awarded him \$3,828,166 in past and future economic damages on the retaliation claim.

Defendant’s “Overwhelming Evidence” of Poor Performance Defeats ADA Claim

In *Whitfield v. State of Tennessee*, the Sixth Circuit Court of Appeals (Cincinnati) upheld judgment for an employer who had presented “overwhelming evidence” that performance problems, as opposed to her status as a disabled person, caused her termination. Plaintiff was blind in one eye and had cerebral palsy. During her first six months in an administrative job, her work product was plagued with bad grammar, serious spelling mistakes, and difficulty filing documents alphabetically. Although training classes were offered, Plaintiff did not attend. Upon being fired, she filed a complaint in federal court alleging she was fired on the basis of her disability in violation of the ADA. Citing the “overwhelming evidence” proffered by the defendant demonstrating that the plaintiff had done a poor job, the Court held that plaintiff had not satisfied her burden to establish a prima facie case of disability discrimination. This case serves as an important reminder to employers to observe and carefully document all instances of poor performance by employees, especially in dealing with “thorny” ADA disability claims.

Court Refuses to Recognize Hostile Work Environment and Harassment Claims under USERRA

In *Carder v. Continental Airlines, Inc.*, the Fifth Circuit Court of Appeals (New Orleans) held that there is no cause of action for hostile work environment or harassment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which prohibits discrimination against employees who serve in the uniformed services. Plaintiffs, a group of Continental pilots who were also members of the Air National Guard and the Reserves, brought suit against the airline alleging they had been subjected to a hostile work environment and harassment because of their military service obligations. They claimed that Continental managers had made derisive comments to them relating to their military status. The Fifth Circuit, in refusing to recognize a hostile work environment or harassment claim under USERRA, reasoned that the text of the statute does not expressly provide for such claims and that its language is quite different than other non-discrimination laws, such as Title VII

and the ADA, under which claims for hostile work environment are actionable. Although this was the first federal appellate decision to address the issue, several federal district courts have come out the other way. It is therefore important that employers carefully consider the law in their own particular state when faced with such claims.

Ninth Circuit Upholds One-Strike Rule for Drug Testing Against ADA and FEHA Challenge

In *Lopez v. Pacific Maritime Associates*, the employee plaintiff challenged a union’s one-strike rule, which provided that one positive drug or alcohol test during pre-employment testing permanently prohibited the hiring of the applicant. When plaintiff first applied to be a longshoreman in 1997, he was denied employment upon testing positive for marijuana, a result of a drug addiction for which he later sought treatment. Several years later, after becoming sober, he applied again for the longshoreman job but was rejected based on his prior drug testing. He filed a lawsuit challenging the one-strike policy and alleging that it unlawfully discriminated against him on the basis of his protected status as a recovering drug addict. The Ninth Circuit Court of Appeals (San Francisco) rejected his argument, reasoning that the one-strike policy was based upon legitimate business need, and there was insufficient evidence of a discriminatory intent.

Employer’s Swift and Serious Response to Initial Complaint of Discrimination Pays Off

A recently issued decision by the First Circuit Court of Appeals (Boston), *Wilson v. Moulison North Corporation*, provides an excellent example of how employers can avoid liability for harassment through preventive measures and follow-through. Plaintiff, an African-American employee, brought a Title VII action against his employer alleging race-based hostile work environment and retaliation. After receiving racial slurs and racially derogatory statements from his co-workers during his first week of employment, the plaintiff telephoned Moulison, the company’s owner and chief executive, and told him what had happened. The next day, Moulison went to the job site himself and confronted the offending employees. He informed

them that any further incidents of harassment would result in immediate termination, apologized to the plaintiff for the behavior of his co-workers, and asked him to immediately report any future problems. Despite Moulison's warning, the offensive behavior unfortunately continued, but plaintiff never reported it to Moulison or any other higher-ups at the company. Explaining that the company's response to the plaintiff's initial complaint had been "both swift and appropriate," the Court held that the company could not be held liable for the subsequent behavior by plaintiff's co-workers—as offensive as it may be—because the company had no reason to know that it had continued after Moulison's intervention.

California Appellate Court Ruling on Seventh Day Premium Pay

In *Seymore v. Metson Marine*, a California appellate court held that it was not permissible for an employer to artificially designate the beginning of the work week in such a way as to circumvent the statutory requirement to pay overtime rates for the seventh consecutive day worked. Plaintiffs, employed as crew members on Metson's ships, worked 14-day shifts on the ships that started on a Tuesday at noon, and ended 14 days later. Plaintiffs contended that they should be paid overtime for the seventh and fourteenth day worked, in accordance with California Labor Code section 510. The employer, however, calculated overtime on the premise that the work week began at 12:00 a.m. on Monday and ended at 11:59 p.m. the following Sunday. Under this workweek schedule, the employer viewed plaintiffs as working six days on the first week, seven days on the second, and two days in the third week—thereby entitling them to just one day of overtime pay. While the trial court agreed with the employer, the appellate court reversed, ruling that any workweek the employer selects for the purpose of calculating overtime must correspond to the workweek actually observed by its employees.

Washington Appellate Court Rejects Individual Liability of Managers in Unpaid Wages Case

In *Zimmerman v. W8less Products*, the company, after offering plaintiff a position of vice president of marketing/business development, subsequently rescinded the offer before the parties ever agreed to the specific terms of an employment contract. Plaintiff sued the company and the two managers who had recruited him alleging, among other claims, willful withholding of wages. The trial court granted summary judgment, holding the two managers personally liable for plaintiff's unpaid wages. The appellate court reversed, finding that the trial court should not have granted summary judgment because genuine issues of fact existed as to whether an employment relationship existed "and the amount, if any, owed to [plaintiff] under any employment relationship that may have arisen."

EEOC Issues Final Regulations Implementing ADA Amendments Act

On March 24, the EEOC issued its Final Regulations ("Regulations") implementing Congress's Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"). Although the definition of "disability" remains unchanged under the ADAAA—"a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having a disability"—the new Regulations provide guidance on interpreting these terms. For example, the Regulations provide nine rules of construction that must be applied in determining whether an impairment "substantially limits" a major life activity. These Regulations, available on the [Federal Register website](#), go into effect on May 24, 2011. Employers should review their policies and employee handbooks to ensure they are consistent with the ADAAA.

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