Split Circuits: Are Informal Complaints Protected Activity Under the FLSA Retaliation Provision?

By Howard S. Lavin and Elizabeth E. DiMichele

Are informal complaints considered “protected activity” and, therefore, entitled to protection from retaliation under the Fair Labor Standards Act (FLSA)? Most circuit courts have held that informal complaints of alleged FLSA violations are protected activity and some circuits have found that even purely verbal complaints to an employer are sufficient to trigger retaliation protection under the FLSA. The Second and Fourth Circuits, however, have held that the statute requires the filing of a formal complaint with an agency or court, and that an informal complaint to an employer does not provide a basis for a retaliation claim. The Seventh Circuit, in Kasten v. Saint-Gobain Performance Plastics Corp., has split the difference between the circuits, holding that informal, internal complaints are protected activity under the FLSA, but that “unwritten, purely verbal complaints” are not protected activity.

The United States Supreme Court has granted certiorari in Kasten.

Statutory Background

The FLSA prohibits, among other things, retaliation by employers against employees for asserting their rights under the FLSA. Specifically, the FLSA provides that “it shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint . . . .” (Emphasis added.)

The issue underlying this circuit split is twofold: (1) do the words “any complaint” encompass informal complaints to an employer or are they limited to formal complaints filed with an agency or a court; and (2) does the word “filed” require a writing, or is an oral complaint to a supervisor, that puts the employer on notice that the employee is asserting his or her FLSA rights, sufficient.
Circuit Court Decisions Finding Protected Activity

The Sixth, Eighth, and Eleventh Circuits have found oral complaints sufficient to constitute protected activity under the FLSA. For example, in *EEOC v. White and Son Enterprises*, the female employees learned that the male employees, who performed identical functions, were earning $.50 per hour more than their female counterparts. Upon learning of the pay disparity, the female employees met with the co-owner and their immediate supervisor to request that their pay be equal to that of the male employees. The co-owner indicated he would discuss the issue with his partner that same day. The following day, the female employees waited for the partner to arrive and, upon his arrival, were asked if they had a problem. When the female employees responded, yes, the partner stated that they would not be getting a raise; they could “take [their salary] or leave it.” The female employees picked up their final paychecks and left the company immediately.

The Eleventh Circuit found that these verbal complaints were sufficient to constitute protected activity, noting that the employees had complained about unequal pay to their immediate supervisor and the co-owner and, when they met with the other partner it was obvious from his reaction that he was clearly aware of why the female employees were waiting to speak with him. Specifically, the court stated that even though “[t]he charging parties did not perform an act that is explicitly listed in the FLSA’s anti-retaliation provision . . . the unofficial complaints expressed by the women to their employer about unequal pay constitute an assertion of rights protected under the statute.”

The Supreme Court has recognized that the anti-retaliation provision of the FLSA was designed to prevent “fear of economic retaliation” by an employer against an employee who chooses to voice such a grievance. Accordingly, the Sixth and Eighth Circuits also have construed the anti-retaliation provision broadly to promote the purpose of the FLSA and, thus, have found oral complaints to the employer sufficient to constitute protected activity.

The First, Fifth, Ninth, and Tenth Circuits also have ruled that “an informal, internal complaint [can] constitute protected activity under Section 215(a)(3), because [this interpretation] better captures the anti-retaliation goals of that section.” However, not one of these circuits has addressed the distinction between written and oral complaints. Likewise, the Third Circuit has cited the majority approach with approval, but has not directly ruled on the issue of internal or purely oral complaints.

Decisions of the Second and Fourth Circuits

The Second and Fourth Circuits have taken the opposite view, holding that the FLSA retaliation provision does not apply to actions taken in response to internal complaints, as opposed to retaliation occurring after an employee has cooperated with an investigation brought by a regulatory agency.

In *Lambert v. Genese*, three female employees brought an action against their employer alleging, among other things, retaliation for complaining about discriminatory practices in violation of the FLSA. At least one of the plaintiffs had complained to the employee-affairs department that she was being paid less than a male employee performing essentially the same function. The district court entered judgment for the employer on the plaintiffs’ FLSA retaliation claims, and the Fourth Circuit affirmed. Specifically, the Fourth Circuit stated that “[t]he plain language of [the FLSA’s retaliation] provision limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor.”
Similarly, in Ball v. Memphis Bar-B-Q Co., the plaintiff told his employer that “if he were deposed in a yet-to-be filed lawsuit under the Fair Labor Standards Act that was threatened against the company, he would not testify to a version of events suggested by the president.” A few days later, the plaintiff was fired. The plaintiff asserted that he was terminated “in retaliation for his anticipated refusal to testify in a threatened lawsuit as his employer wished, in violation of the anti-retaliation provision of the FLSA.” The Fourth Circuit held that “the statutory language [of the FLSA] clearly places limits on the range of retaliation proscribed by the Act,” and, accordingly, “an employee’s voicing of a position on working conditions in opposition to an employer,” is not protected activity. Specifically, the court held that “the existence of a proceeding is essential to the statutory circumstance,” and that “the ‘proceeding’ necessary for liability under the FLSA refers to procedures conducted in judicial or administrative tribunals.” The Fourth Circuit chose not to expand the applicability of the FLSA’s anti-retaliation provision to intra-company complaints.

The Seventh Circuit’s Kasten Decision

In Kasten, the Seventh Circuit effectively crafted a compromise between the decisions of its sister circuits. The plaintiff in Kasten alleged that he had verbally complained on several occasions to his supervisors regarding the location of time clocks. According to the plaintiff, the location of the clocks “prevented employees from being paid for time spent donning and doffing,” in violation of the FLSA. After making these complaints, the plaintiff was suspended. As a result of this suspension, the plaintiff filed suit under the FLSA claiming retaliation for his verbal complaints. The Seventh Circuit affirmed the district court’s finding that internal complaints made to an employer are protected activity under the FLSA. In this regard, the Seventh Circuit is in alignment with the majority of the circuit courts. The Seventh Circuit also found, however, that purely oral complaints are not protected activity. The court based this determination on the plain language of the FLSA, stating that “[t]he use of the verb ‘to file’ connotes the use of a writing.” The Seventh Circuit further noted that, had Congress intended a broader interpretation, it could have used broader language as it did in Title VII and the Age Discrimination in Employment Act, which both prohibit employers from retaliating against employees who “oppose [ ] any practice” that is unlawful under the statute.

Looking Ahead

It remains to be seen how the Supreme Court will rule with regard to informal complaints or, more specifically, purely verbal complaints. A clear majority of circuit courts have held, based on the Supreme Court’s interpretation of the purpose of the FLSA, that the anti-retaliation provision protects not only formal complaints filed with a court or administrative agency, but informal complaints, as well. Given this reality, it is likely the Supreme Court will agree with the majority position regarding internal complaints. What is less clear is where the Supreme Court will come out with regard to purely verbal complaints. In the interim, employers not in the Second (CT, NY, and VT) and Fourth (MD, NC, SC, VA, and WV) Circuits should consider themselves to be on notice that an employee is asserting his or her rights under the FLSA whether such assertion is made verbally or in writing.

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Notes

1. 570 F.3d 834 (7th Cir. 2009), rehearing en banc denied, 585 F.3d 310 (7th Cir. 2009).
2. Id. at 838, 840.
3. 130 S. Ct. 1890 (2010).
5. Id.
6. 881 F.2d 1006 (11th Cir. 1989).
7. Id. at 1007.
8. Id.
9. Id. at 1008.
10. Id.
11. Id. at 1011.
12. Id.
14. See Brennan v. Maxey’s Yamaha, Inc., 513 F.2d 179, 181 (8th Cir. 1975) (finding that an employee’s outburst following what she thought was a violation of the FLSA “was an act protected from reprisals and rendered her firing discriminatory . . .”); EEOC v. Romeo Community Schools, 976 F.2d 985, 989 (6th Cir. 1992) (reversing District Court’s grant of summary judgment in favor of defendant where employee “had [orally] complained to the [employer] of unlawful sex discrimination and had told them she believed they were ‘breaking some sort of law’ by paying her lower wages than previously paid to male [employees in the same position];” because the employee’s verbal protests were allegedly followed by adverse employment actions, the employee had “effectively set forth a claim of retaliation”).
16. See Love v. Re/Max of America, Inc., 738 F.2d 383, 387 (10th Cir. 1984) (holding an employee was discriminatorily discharged in retaliation for writing a memo to her employer requesting a raise and attaching a copy of the Equal Pay Act, as “[Section 215(a)(3)] applies to the unofficial assertion of rights through complaints at work”); Valero v. Putnam Assoc. Inc., 173 F.3d 35, 44 (1st Cir. 1999) (holding that the “FLSA’s anti-retaliation provision will protect an employee who has filed a sufficient complaint with an employer” but expressly excluding oral complaints from their analysis as the complaint at issue took the form of a written letter); Lambert v. Ackerly, 180 F. Supp. 997, 1005 (9th Cir. 1999) (holding that an employee who complained orally to her employer about the failure to pay overtime wages, contacted the Department of Labor for more information and notified the employer in writing of the specific FLSA violation engaged in protected activity and further concluding that the phrase “any complaint” encompasses complaints made to employers and that “the statutory term ‘filed’ includes the filing of complaints with employers”).
17. Brock v. Richardson, 812 F.2d 121, 124 (3rd Cir. 1987) (“[T]he Supreme Court has made clear that the key to interpreting the [FLSA’s] anti-retaliation provision is the need to prevent employees’ ‘fear of economic retaliation’ for voicing grievances about substandard conditions. It follows that courts interpreting the anti-retaliation provision have looked to its animating spirit in applying it to activities that might not have been explicitly covered by the language.”).
18. 10 F.3d 46 (2d Cir. 1993).
19. Id. at 51.
20. Id.
21. Id. at 55.
22. 228 F.3d 360 (4th Cir. 2000).
23. Id. at 362.
24. Id. at 363.
25. Id. at 364.
26. Id.
27. Id.
28. 570 F.3d at 836.
29. Id.
30. Id. at 838.
31. Id. at 839.
32. Id. at 840.