Oral Complaints: More Than a Case of Semantics

By Sue M. Bendavid

In the past few months, the U.S. Supreme Court issued three opinions expanding employee rights to pursue retaliation claims.

In Thompson v. North American Stainless, the Supreme Court ruled in favor of an employee who accused his employer of terminating him because his fiancée filed a gender discrimination claim against the employer.

On March 1, the Court ruled in favor of an Army reservist who claimed Proctor Hospital terminated his employment because of his military obligations.

And now, the Court has decided in favor of Kevin Kasten's retaliation claim against his employer, Saint-Gobain Performance Plastics. Kasten claimed his employer terminated him for verbally objecting to the placement of a time clock. Saint-Gobain had placed the clock in between where workers put on and took off work related protective gear, and where they were expected to work. Kasten argued this prevented employees from receiving wages for time spent donning and doffing required protective gear and walking to work areas, and that this violated the Fair Labor Standards Act (FLSA) for failure to fully-compensate time worked.

Kasten informed his shift supervisor, his lead operator, a human resources manager and the operations manager that the time clock location was unlawful and that if he sued, the company would lose. Kasten argues these complaints resulted in discipline and eventually, his termination.

Saint-Gobain argued that Kasten did not make significant complaints about the time clock and that he was terminated after being repeatedly warned about the failure to record his time.

The district court entered summary judgment in favor of Saint-Gobain and concluded the FLSA did not protect workers who made *oral* complaints. The 7th U.S. Circuit Court of Appeals affirmed.

Sue M. Bendavid exclusively represents employers as chair of the Employment Law Department at Lewitt, Hackman, Shapiro, Marshall & Harlan in Encino. Please visit www.lewitthackman.com for more information.

The issue before the U.S. Supreme Court was whether *oral* grievances about a violation of the FLSA are protected under the law's anti-retaliation provision, which forbids employers "to discharge or in any other manner discriminate against any employee because such employee has *filed any complaint*..."

> In the past few months, the U.S. Supreme Court issued three opinions expanding employee rights to pursue retaliation claims.

The justices first consulted dictionaries, breaking down the word "filed." The definitions, however, did not fully address the question because "filed" implies a written complaint, whereas "any complaint" implies broader usage. The justices also unsuccessfully sought guidance in other statutes containing anti-retaliation provision. "The bottom line is that the text, taken alone, cannot provide a conclusive answer to our interpretive question. The phrase 'filed any complaint' might, or might not, encompass oral complaints. We must look further." wrote Justice Stephen G. Breyer, who authored the majority's opinion

Analyzing further, the justices determined that Congress intended the anti-retaliation provision to cover oral complaints as early as 1938; as did the Equal Opportunity Employment Commission and the U.S. Department of Labor. The Court noted, "[i]n the years prior to the passage of the [FLSA], illiteracy rates were particularly high among the poor." Justice Breyer continued, "[w]hy would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the [FLSA's] complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly the illiterate, less-educated, or overworked workers who were most in need of the [FLSA's] help at time of passage? President Franklin Roosevelt pointed out at the time that these were the workers most in need of the Act's help."

In response, Saint-Gobain argued that employers must have "fair notice" of employee filed claims, which could subject employers to retaliation claims. It explained that employers may have trouble determining when an employee is "just letting off steam," or when the employee is actually lodging a formal complaint.

The Court agreed that employers should have fair notice. The "filing is a serious occasion, rather than a triviality," Breyer wrote, and the phrase "'filed any complaint' contemplates some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns." The Court found this element met when "a reasonable, objective person would have understood the employee to have put the employer on notice the employee is asserting statutory rights under the [FLSA]."

Ultimately, the Court ruled that "a complaint 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 to call for their protection. This standard can be met, however, by oral complaints, as well as by written ones."

Based on this ruling, attorneys representing employers should take notice: Employee procedures for filing formal complaints should be clearly defined, whether they be oral or written. And, more than ever, employers should document steps in responding to complaints, and ensure termination and discipline decisions are non-retaliatory.