2nd Cir.: FLSA Protects Worker Who Made Informal, Oral Complaint

By Andrew G. Chase 5/14/2015

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The Fair Labor Standards Act (FLSA) prohibits retaliation against employees who make oral pay-related complaints directly to their employers, not just written complaints to governmental agencies, the 2nd U.S. Circuit Court of Appeals held.

Darnell Greathouse worked as a security guard for JHS Security Inc. During the course of his employment, Greathouse was the victim of several illegal employment practices, including nonpayment and late payment of wages.

In October 2011, Greathouse complained to Melvin Wilcox, JHS Security's president and part-owner, that he had not been paid in several months. Wilcox allegedly responded, "I'll pay you when I feel like it," and drew a gun and pointed it at Greathouse. Greathouse understood Wilcox's response as ending his employment.

Greathouse filed a lawsuit in U.S. district court in New York, alleging that JHS Security violated the FLSA and New York Labor Law by failing to pay him proper wages, and that JHS Security also violated the FLSA's anti-retaliation provision by effectively discharging him as retribution for his complaint to Wilcox.

The district court awarded Greathouse approximately $30,000 in damages on his unpaid wage claims, but dismissed his retaliation claims. In analyzing the retaliation claims, the district court looked to the 2nd Circuit's decision in *Lambert v. Genesee Hospital*, 10 F.3d 46 (2d Cir. 1993). Under *Lambert*, in order for a wage complaint to be actionable it must be made: 1) in writing, and 2) to a government agency.

The district court recognized that the first part of *Lambert*'s holding had been overturned by the U.S. Supreme Court's decision in *Kasten v. Saint–Gobain Performance Plastics Corp.,* 131 S.Ct. 1325 (2011), which held that an oral complaint may serve as a predicate for an FLSA retaliation claim. The district court also recognized, however, that the second part of *Lambert*'s holding was still binding precedent in the 2nd Circuit. Accordingly, the district court dismissed Greathouse's retaliation claims because he made his wage complaint to his employer, not to a government agency as required by *Lambert*.

On appeal, the 2nd Circuit looked to the *Kasten* case. Even though *Kasten* did not address the requirement regarding to whom a complaint must be directed, it centered around an employee who made an oral complaint to his employer, not to a government agency. Therefore, the 2nd Circuit reasoned, *Kasten* did not support the requirement that a complaint must be made to a government agency in order to serve as a basis for an FLSA retaliation claim. The 2nd Circuit also noted that the Equal Employment Opportunity Commission, the Department of Labor and nearly every other federal appeals court already recognized the protected nature of internal, oral complaints.

Accordingly, the 2nd Circuit vacated the district court's decision to dismiss Greathouse's retaliation claims; expressly overruled the remaining portion the *Lambert* holding; and held that a claim for FLSA retaliation may be premised on an employee's oral complaint made internally to a supervisor, so long as the complaint is sufficiently clear and detailed in order for a reasonable employer to understand that the employee intends it as an assertion of his or her rights under the FLSA.

Recognizing the potential ambiguity inherent in oral communications, the 2nd Circuit noted that its holding was subject to certain limitations, but declined to offer specific parameters. It stated, however, that internal oral complaints made to an employer require some degree of formality, and that the determination of whether a particular oral complaint constitutes an act protected by the FLSA is a context-dependent inquiry.

Greathouse v. JHS Sec. Inc., 2nd Cir., No. 12-4521 (Apr. 20, 2015).

Professional Pointer: The decision serves as a reminder that employers should treat seriously all complaints about wages, regardless of whether the complaint is made internally, to a government agency, in writing or verbally. Moreover, employers would be well served to educate all supervisors to respond appropriately to employee complaints regarding wages.

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