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FLSA Retaliation – Verbal Complaints and Burden of Proof: Who's Listening?

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In order to demonstrate a *prima facie* case of retaliation under the anti-retaliation provision of the FLSA, a plaintiff must show: (1) she participated in a statutorily protected activity; (2) the employer took adverse employment action against her; and (3) there was a causal connection between plaintiff's statutorily protected activity and the adverse employment action. *See Ritchie v. St. Louis Jewish Light*, 630 F.3d 713, 717 (8th Cir. 2011); *Montgomery v. Havner*, 700 F.3d 1146, 1148-1149 (8th Cir. Ark. 2012); 29 U.S.C. § 215(a)(3).

The question then arises; if an employee complains only to her private employer, is that protected activity sufficient to trigger the anti-retaliation provision? In the case of *Kasten v. Saint-Gobain Performance Plastics Corp.,* the Supreme Court encountered a golden opportunity to answer this question. 131 S. Ct. 1325, 1336 (2011). However, while the *Kasten* Court held that oral complaints were adequate, the Supreme Court expressly refrained from ruling that complaints to a private employer were sufficient. *Id.* at 1334, 1336. The 8th Circuit, too, has refrained from holding that informal complaints to an employer are sufficient to trigger the FLSA's anti-retaliation provision. *Ritchie v. St. Louis Jewish* Light, 630 F.3d 713, 716 (8th Cir. 2011).

Prior to *Kasten*, the Second Circuit Court of Appeals affirmatively held that only complaints made to government authorities are protected under the FLSA. *See Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2nd Cir. 1993). Following *Kasten*, district courts in the Second Circuit found the *Kasten* holding did not alter the Second Circuit's rule found in *Lambert*. *See Son v. Reina Bijoux, Inc.*, 823 F. Supp. 2d 238, 244 (S.D.N.Y. 2011); *Liang v. Café Spice SB, Inc.*, 911 F. Supp. 2d 184, 201-02. (E.D.N.Y. 2012)(finding evidence of complaints to plaintiff's employer insufficient).

The argument follows then that since *Kasten* did not hold that complaints to an employer were sufficient to trigger the anti-retaliation provision of the FLSA; and because the statute's plain language requires a plaintiff to file a complaint, institute a proceeding, testify in any such proceeding, or serve on an industry committee, it is proper for a district court to find that oral complaints to a private employer do not suffice as protected activity. *See Brown v. L & P Industries,* LLC, No. 5:-4CV0379 JLH, 2005 U.S. Dist. LEXIS 39920 (E.D. Ark. Dec. 21, 2005); *See Ritchie v. St. Louis Jewish Light*, No. 4:09-CV-1947 CAS, 2010 U.S. Dist. LEXIS 10579, *15-16 (E.D. Mo. Feb. 8, 2010).

If your case clearly involves protected activity, however, what is the appropriate burden of proof for retaliation under the FLSA? In light of *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), there is an argument to be made that the causal connection provided by plaintiff must be the "but-for" cause of the

adverse employment action. *See McBurnie v. Prescott*, 511 Fed. Appx. 624, 2013 U.S. Dist. LEXIS 5004, *3 (9th Cir. 2013)(citing *Gross v. FBL Financial Services, Inc.* and holding the district court did not err in giving the jury a "but-for" causation instruction on plaintiff's FLSA retaliation claim). Also, the Supreme Court extended the holding in *Gross* and found that Title VII retaliation claims require proof that the desire to retaliate was the "but-for cause" of the challenged employment action. *See University of Texas Southwestern Medical Center v. Nassar*, 113 S. Ct. 2517, 2521 (2013). In doing so, the Supreme Court noted the lack of any meaningful textual difference between the text of Title VII's anti-retaliation provision and the ADEA's anti-retaliation provision. *See id.*

For example, the ADEA retaliation provision states, in relevant part, that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** such individual's age." *See* 29 U.S.C. § 623(a)(1); *Gross v. FBL Fin. Servs., supra* (emphasis added).

Likewise, the anti-retaliation provision of the FLSA states:

> (a) After the expiration of one hundred and twenty days from the date of enactment of this Act [enacted June 25, 1938], it shall be unlawful for any person--
> ****
> (3) to discharge or in any other manner discriminate against any employee **because** such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.[;]

29 USCS § 215(emphasis added).

As there is no meaningful textual difference between the text of the ADEA's/Title VII's anti-retaliation provisions and the FLSA's anti-retaliation provision, courts should apply the "but-for" causation standard to FLSA retaliation claim. This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer. *See Univ. of Tex. Southwestern Med. Ctr. v. Nassar, supra.*

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