O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

U.S. SUPREME COURT TO DECIDE WHETHER EMPLOYEES' VERBAL COMPLAINTS ARE PROTECTED UNDER FLSA

The United States Supreme Court has decided to review a Fair Labor Standards Act ("FLSA") case in which the U.S Court of Appeals for the Seventh Circuit held that an employee could not maintain an action for retaliation under the FLSA for his termination based upon his verbal complaints to his employer that the time clock was improperly placed to provide for accurate punch-ins and punch-outs. The U.S. Court of Appeals for the Seventh Circuit oversees the federal district courts in Illinois, Indiana, and Wisconsin.

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, an employee alleged that his employer violated the FLSA's anti-retaliation provisions when it terminated his employment following verbal complaints to his supervisors that the location of the time clock was illegal because it did not allow workers to be paid for time spent putting on and removing protective clothing needed for duties of their jobs. The employer, on the other hand, maintained that the employee's termination was based upon the employee's repeated failure to comply with the company's time clock policies.

The U.S. Court of Appeals for the Seventh Circuit agreed with the lower federal district court that the FLSA does not protect against retaliation for employees' verbal complaints. The district court ruled that an employee's oral complaint is not protected activity under the FLSA's anti-retaliation provision as the FLSA only protects an employee who has "filed any complaint or instituted or caused to be instituted any proceeding." Given the specific language of the statute, the federal district court held that a verbal complaint does not fall within the FLSA's anti-retaliation protections. While the federal district court noted that a complaint need not necessarily be filed with a labor agency or court in order to fall under the FLSA's "protected activity" purview, it concluded that the FLSA still requires that a complaint be "committed to document form" in order to garner such FLSA protections.

If the U.S. Court of Appeals for the Seventh Circuit's decision is upheld, it affords employers some protections against retaliatory discharge claims under the FLSA based solely on verbal complaints. However, if the Supreme Court reverses this decision, it will signal a need for employers to train their supervisors to be very sensitive to all complaints levied by their employees in any form. Employers must always be mindful of an employee's recent

complaints that might qualify as “protected activity” when making any disciplinary or discharge decision and make sure that any such decision is based upon legitimate and articulable business interests.