Federal court clarifies 'Protected activity' under the FLSA

The 5th Circuit Court of Appeals has issued an important ruling in a Fair Labor Standards Act (FLSA) case. It marks the first time the court has defined exactly what the FLSA means when it refers to filing a wage-and-hour "complaint."

Texas employers are covered by the 5th Circuit's decision.

The court's decision is important because it means employers that punish employees who file complaints may be liable for retaliation—even if it turns out that what the employees were complaining about wasn't actually illegal. The FLSA's retaliation provision is meant to allow employees to speak freely without fear of being illegally punished.

Recent case: Robin Hagan worked as a manager for Echostar Satellite, first as a technician and then as a field service manager.

When the company wanted to move to new schedules, it called all field service managers to a meeting and explained the new system. Essentially, technicians would go from working 10-hour shifts to working 12-hour shifts, but with fewer workdays per pay period. Before the change, technicians earned substantial overtime each pay period, and management assured the managers that the technicians' overtime payments wouldn't change.

The company asked the managers to present to their technicians a positive spin on the change. Hagan told his technicians the news, and one of them asked Hagan whether they were going to lose overtime pay and whether the schedules violated the law. Instead of reassuring the technicians that their paychecks wouldn't change and explaining that the schedule meant an extra day off every two weeks, Hagan referred the inquiring technician to the HR office.

The company fired Hagan because it was dissatisfied with the way he handled the announcement. Hagan then sued, alleging he had "complained" about wage-and-hour problems and had then been fired for doing so.

The 5th Circuit Court of Appeals dismissed his case. It announced that FLSA complaints can be informal and still constitute protected activity *(see below)*, but also concluded that Hagan didn't meet even the relaxed, informal standard.

Hagan, for example, never stepped outside his management role to complain and never had a good-faith belief that the schedule changes violated the law. (*Hagan v. Echostar Satellite,* No. 07-20191, 5th Cir., 2008)

Note: In this case, the schedule change was perfectly legal, and no one lost any overtime pay.

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Making a valid FLSA complaint

In order to be protected from retaliation, employees have to file a complaint about suspected FLSA violations. Two commonly accepted kinds of complaints involve (1) going to the U.S. Department of Labor with alleged FLSA violations and (2) providing a written complaint to the employer.

The following are additional examples of protected complaints:

- **Internal company complaint.** However, the 5th Circuit wrote “not all ‘abstract grumblings’ or vague expressions of discontent are actionable as complaints.” The informal complaint must concern some alleged violation of law.
- **Manager’s complaint.** This occurs when a manager steps out of his or her role as a manager to either complain to the company about the supposed FLSA violation or irregularity on behalf of employees or on his or her own behalf. The manager must either file or threaten to file an action adverse to the employer, actively assist other employees in asserting FLSA rights or otherwise engage in activities that reasonably could be perceived as the assertion of rights protected by the FLSA.
- **Good-faith belief.** Employees don’t have to be right about the alleged wage-and-hour violation to be protected from retaliation. All they need is a good-faith belief that the employer violated the law.