IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KEVIN KASTEN,

OPINION AND ORDER

Plaintiff,

07-cv-686-bbc

v.

SAINT-GOBAIN PERFORMANCE
PLASTICS CORPORATION,

Defendant.

- -

In December 2007, plaintiff Kevin Kasten filed this civil action alleging that defendant Saint-Gobain Performance Plastics Corporation's decision to terminate his employment was retaliation against him in violation of the Fair Labor Standards Act. 29 U.S.C. § 215(a)(3). Jurisdiction is present. 28 U.S.C. § 1331. On June 18, 2008, the court granted defendant's motion for summary judgment on the ground that oral complaints were not protected activity under § 215(a)(3). Plaintiff appealed to the Court of Appeals for the Seventh Circuit, which affirmed this court's order granting summary judgment. Plaintiff then appealed to the United States Supreme Court.

On March 22, 2011, the Supreme Court vacated and remanded the court of appeals'

decision. Kasten v. Saint-Gobain Performance Plastics Corporation, 563 U.S. --, 131 S. Ct. 1325, 1336 (2011). The Supreme Court addressed only the issue whether oral complaints can be protected activity under the FLSA's anti-retaliation provision and held that they are so long as they provide an employer "fair notice" that the employee is asserting rights under the FLSA. Id. at 1334-35. The case was remanded to this court to decide whether plaintiff's oral complaints provided fair notice to defendant. Id. at 1336.

The case is now before the court on defendant's motion for summary judgment. Defendant contends that plaintiff's complaints are not protected activity under the FLSA because they failed to provide defendant with fair notice that he was asserting his rights under the Act. Specifically, defendant argues, plaintiff never stated clearly that the location of defendant's time clocks illegally prevented him from being paid for time spent donning and doffing as required by the FLSA. Additionally, defendant contends that even if plaintiff engaged in a protected activity, he cannot prove that defendant retaliated against him.

I conclude that plaintiff has adduced sufficient evidence from which a jury could find that he engaged in protected activity under the FLSA. However, I conclude also that plaintiff has failed to adduce evidence sufficient to create a genuine factual dispute regarding whether defendant retaliated against him because he engaged in protected activity. Therefore, I am granting defendant's motion for summary judgment.

From the parties' proposed findings of fact and the record, I find that the following

facts are material and undisputed.

UNDISPUTED FACTS

A. The Parties

Defendant Saint-Gobain Performance Plastics Corporation manufactures a variety of high-performance polymer products. It maintains and operates a manufacturing and production facility in Portage, Wisconsin.

Plaintiff Kevin Kasten worked for defendant at its Portage facility from October 2003 until December 2006. During that time, plaintiff held multiple positions as an hourly manufacturing and production employee.

B. Defendant's Employee Policies

As an hourly employee, plaintiff was required to punch in and out of defendant's time clocks to receive a weekly paycheck. Defendant's employee policy handbook included a corrective action program that provided for disciplinary action up to and including termination for employees who failed to punch in and out accurately. Defendant's corrective action program created a progressive disciplinary procedure that typically began with a verbal reminder, progressed to written warnings and ended with termination. Under the corrective action program, an employee could be terminated after receiving four disciplinary actions

within a twelve-month period.

Defendant's employee policy handbook also included a separate attendance policy that applied to unexcused absences and tardiness. The attendance policy was distinct from the corrective action program. For example, if an employee punched in late because he arrived at work late, that employee would have violated the attendance policy. On the other hand, if an employee arrived at work on time and simply forgot to punch in, that employee would have violated the time clock policy and would be subject to the corrective action program. Under the attendance policy, an employee would accrue a point for every two violations. If an employee accrued seven points under the attendance policy within a twelve-month period, he or she could be terminated. Plaintiff was not terminated under the attendance policy.

C. Plaintiff's Employment

During plaintiff's 39 months of employment, he received the following overall ratings on his performance appraisals: "Very Good" on March 19, 2003; "Good" on May 5, 2003; "Good" on December 8, 2003; "Good" on May 3, 2004; and "Good" on March 30, 2005. Defendant formally disciplined plaintiff for violations of its employee policies on eleven occasions during plaintiff's employment.

On December 30, 2003, February 13, 2004 and January 20, 2006, defendant issued

plaintiff disciplinary action warning notices for violations of its attendance policy. On April 5, 2004, June 1, 2004, September 28, 2006 and October 31, 2006, defendant issued plaintiff disciplinary action warning notices for violations of its safety and accountability policies.

On February 13, 2006, plaintiff received a "disciplinary action warning notice—verbal counseling warning" from defendant because of several "issues" plaintiff had during January 2006 regarding punching in and out on the time clocks. (The parties do not propose facts explaining the exact nature of plaintiff's "issues.") The notice stated that "[i]f the same or any other violation occurs in the subsequent 12-month period from this date of verbal reminder, a written warning may be issued."

On August 31, 2006, plaintiff received a "disciplinary action warning notice—step 2 policy violation—written warning" from defendant, again related to problems punching in and out on the time clocks. The notice stated in part that "[i]f the same or any other violation occurs in the subsequent 12-month period from this date [it] will result in further disciplinary action up to and including termination."

The parties dispute whether plaintiff told his supervisors that the location of defendant's time clocks was illegal after he received these first two formal disciplinary warnings. Plaintiff alleges that on several occasions he complained that the location of the time clocks was illegal and caused him to miss punches. In particular, plaintiff alleges that

in September or October 2006, he told his shift supervisor Dennis Woolverton that he believed the location of defendant's time clocks was illegal. Also, plaintiff alleges that on three or four occasions between September and December 2006, he told third shift lead operator April Luther that the location of the time clocks was illegal and that he was considering starting a lawsuit about the location of defendant's time clocks. Defendant acknowledges that plaintiff blamed his repeated violations of the time clock policy on the inconvenient location of the time clocks. However, defendant maintains that plaintiff's complaints regarding the location of the time clocks focused on the inconvenience of their location and not on the "legality" of their location.

Defendant's management had internal discussions about the legality of the time clock location. Specifically, on September 29, 2006, human resources manager Dennis Brown emailed plant manager Daniel Tolles, human resources generalist Lani Williams and plant engineer Lance DeLaney regarding defendant's time clocks. Brown wrote in part,

> [a]s you know we need to move our Kronos clocks to ensure that we are in compliance with Wage and Hour law which states that employees are to be paid for the time used to gown/prepare for work. Lani and I walked out to review our current set-up and to determine what we should do to become compliant.

On November 10, 2006, plaintiff received a "disciplinary action warning notice—step 3 policy violation—written warning" and a one-day disciplinary suspension for his failure to clock in and out on the time clocks on October 31, 2006. The notice stated in part that "if

the same or any other violation occurs in the subsequent 12-month period from this date [it] will result in further disciplinary action up to and including termination." Plaintiff served his one-day disciplinary suspension on November 16, 2006.

On or around November 18, 2006, plaintiff forgot to punch in after returning from his lunch break. Soon thereafter, plaintiff asked April Luther about having a potluck meal at work, saying he was probably going to be fired over his most recent missed punch.

On December 6, 2006, defendant suspended plaintiff on the ground that he had violated defendant's policy regarding time clock punches for a fourth time. Plaintiff alleges, and defendant denies, that before the meeting regarding his suspension, Dennis Woolverton stopped him and said, "Just lay down and tell them what they want to hear, [they] can probably save your job." At the meeting, plaintiff asked whether the location of the time clocks was a "legal issue" for the company. Plaintiff alleges that at the meeting he told Dennis Brown and operations manager Steven Stanford that he believed the location of defendant's time clocks was illegal and that defendant would lose if it was challenged in court. Defendant denies that plaintiff said this.

Plaintiff alleges that on December 8, 2006, he had a phone conversation with Lani Williams in which he told her that he thought the location of defendant's time clocks was illegal and that "if they were challenged in court, they would lose." Also on December 8, April Luther emailed Dennis Brown regarding plaintiff, stating that "he made the comment

to me that if he does get fired his name will be widely known as he has many things in the works." On December 9, plaintiff called shift supervisor Mary Riley and asked whether she had read any articles about a class action suit and time clock punches.

On December 11, 2006, Dennis Brown told plaintiff over the phone that defendant had decided to terminate plaintiff's employment. Defendant acknowledges that when deciding whether to terminate plaintiff, it is likely that management personnel discussed plaintiff's contention that the inconvenient location of the time clock caused him to miss punches. (Although plaintiff alleges that management personnel also discussed plaintiff's threat of a potential lawsuit related to the location of the time clocks, plaintiff has adduced no evidence of this.) On December 19, 2006, Lani Williams wrote plaintiff a letter confirming his termination and explaining that plaintiff's termination was in response to his repeated violation of the time clock policy. On the same day that plaintiff was terminated, defendant moved the time clocks to a new location.

Defendant has terminated numerous employees for violating the time clock policy, including James Poole, Dave Schultz, Sharon Wetherall, Kevin Bethke, Theresa Knackert, Johnny Wright, Cindy Lautherbach and Rigoberto Soto. (Plaintiff alleges that defendant did not terminate two employees that had more time clock violations that he did, namely, Shawn McCune and Joyce Montcufel. However, defendant terminated Shawn McCune on January 15, 2007 for violating the time clock policy, after McCune had received discipline

through defendant's progressive discipline policy. Joyce Montcufel received three disciplinary warnings for missing punches under the same time clock policy applicable to plaintiff. The time clock policy changed in May 2007. Montcufel missed a number of punches after May 2007 and was disciplined according to the new policy.)

On September 12, 2007, plaintiff filed a wage and hour complaint against defendant with the Equal Rights Division of the Wisconsin Department of Workforce Development, alleging that defendant had wrongfully terminated him. On December 5, 2007, plaintiff filed this lawsuit, contending that defendant had terminated his employment in violation of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3).

D. Class Action Lawsuit

On August 15, 2007, plaintiff and others filed a class action lawsuit against defendant for violations of the FLSA, including failure to pay hourly workers at the Portage plant for time spent donning and doffing. On June 2, 2008, this court granted summary judgment to the class action plaintiffs, concluding as a matter of law that defendant had violated the FLSA as a matter of law. The lawsuit was subsequently settled on behalf of 156 opt-in collective class members and 768 Rule 23 class members.

OPINION

Plaintiff brought this action against defendant under the Fair Labor Standard Act's anti-retaliation provision. 29 U.S.C. § 215(a)(3). Under that provision, it is unlawful for an employer to discharge an employee "because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter." Id. Plaintiff contends that his oral complaints were protected activity under § 215(a)(3) and that defendant terminated his employment in retaliation for these complaints, not because he violated the time clock policy.

An employee's oral complaints to an employer regarding wage and hour issues are considered protected activity under § 215(a)(3) as long as they provide an employer with "fair notice" that the employee is asserting rights protected by the FLSA and "call[ing] for their protection." Kasten, 131 S. Ct. at 1335. Defendant contends that summary judgment is appropriate because plaintiff did not provide defendant with fair notice and thus did not engage in any protected activity under § 215(a)(3). Additionally, defendant argues that even if plaintiff engaged in protected activity under the FLSA, plaintiff has failed to adduce evidence necessary to support his retaliation claim.

A. Fair Notice

The initial issue is whether plaintiff engaged in protected activity under § 215(a)(3).

In Kasten, 131 S. Ct. at 1334-35, the Court reaffirmed that the FLSA must be interpreted to provide broad, rather than narrow, protection to the employee. Thus, oral complaints are not categorically denied protection under § 215(a)(3). Nevertheless, the Court explained that the statute protects only those complaints that provide an employer fair notice that the employee is invoking rights under the FLSA. Id. at 1334. The Court reasoned that it would be difficult to imagine an employer discriminating against an employee *because* of a complaint, if the employer does not know that the employee made a complaint. Id. at 1335.

The Supreme Court outlined an objective standard to determine whether an employee's oral or written complaints provided an employer with fair notice under § 215(a)(3). In particular, "[t]o fall within the scope of the antiretaliation provision, 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 and a call for their protection." Id. This standard does not require a plaintiff to prove that his employer actually understood plaintiff's complaints as assertions of his rights under the FLSA. Rather, the question is whether an employer in defendant's circumstance and with defendant's knowledge of relevant context would understand plaintiff's oral complaints as assertions of rights protected by the FLSA. Under the Court's fair notice standard, neither "abstract grumbling[s]," Valerio v. Putnam Associates Inc., 173 F.3d 35, 44 (1st Cir. 1999), nor "amorphous expression[s] of discontent," that fail to provide a reasonable employer with

fair notice are protected activity under § 215(a)(3). Lambert v. Ackerly, 180 F.3d 997, 1007 (9th Cir. 1999).

It is a close question whether plaintiff's oral complaints provided defendant notice that he was asserting rights protected by the FLSA. On one hand, plaintiff never stated explicitly that the location of the time clocks denied him and other employees minimum wage or overtime pay protected by the FLSA. Additionally, because his complaints were in response to disciplinary violations, defendant had some reason to believe that plaintiff was simply making excuses for his time clock violations, rather than asserting his protected rights.

On the other hand, plaintiff alleges that he complained to defendant about the legality of the time clock location on at least five separate occasions. Also, plaintiff told his supervisors that he was thinking of starting a lawsuit regarding the location of the time clocks and he asked his supervisor whether she was familiar with similar class action lawsuits. At this stage of the case, I must accept these allegations as true. Standing alone, these allegations may not be enough to provide notice to defendant that plaintiff was asserting rights under the FLSA. However, the Supreme Court framed the need for fair notice as whether under the circumstances and in the context of the particular situation, a "reasonable employer" would understand a particular complaint to be an assertion of rights under the FLSA. Kasten, 131 S. Ct. at 1335. During the period of time that plaintiff complained

about the time clock location, defendant's management was having internal discussions regarding the legality of the time clock location and had acknowledged in emails that it might need to move time clocks in order to insure compliance with wage and hour laws and compensate employees for time spent donning and doffing protective gear. In this context, defendant should have understood that plaintiff's complaints about the illegal location of its time clocks were assertions of rights protected under the FLSA. Therefore, I will assume for the purpose of this motion that plaintiff's complaints were protected by the FLSA.

B. Retaliation

The next question is whether plaintiff has adduced sufficient evidence to allow a reasonable jury to find that he was terminated because he engaged in protected activity. Under the FLSA's anti-retaliation provision, an employer may not terminate an employee because the employee has filed a complaint or otherwise engaged in protected activity. 29 U.S.C. § 215(a)(3); Cichon v. Excelon Generation Company, L.L.C., 401 F.3d 803, 805, n.1 (7th Cir. 2005).

A plaintiff may prove retaliation through either the direct or indirect method of proof. Cichon, 401 F.3d at 810. Under the direct method, plaintiff must demonstrate that (1) he engaged in a statutorily protected activity; (2) he suffered a materially adverse employment action by his employer; and (3) a causal connection exists between the two. Id.; Scott v.

Sunrise Heathcare Corporation, 195 F.3d 938, 940 (7th Cir. 1999). To prove causation, plaintiff must ultimately establish that his oral complaints were a "but-for" cause of his discharge. Stone v. City of Indianapolis Public Utility Division, 281 F.3d 640, 643 (7th Cir. 2002); Serwatka v. Rockwell Automation Inc., 591 F.3d 957, 961-63 (7th Cir. 2010) (citing Fairley v. Andrews, 578 F.3d 518, 525-26 (7th Cir. 2009), citing in turn Gross v. FLB Financial Services, Inc., 557 U.S. 167, ____ (2009) for proposition that unless statute provides otherwise, demonstrating but-for causation is part of plaintiff's burden in all discrimination suits under federal law).

Under the indirect method, the first two elements of proving plaintiff's retaliatory discharge claim are the same, but instead of proving a direct causal link, plaintiff must show that he was performing his job satisfactorily and that he was terminated while a similarly situated employee who did not complain was not terminated. Cichon, 401 F.3d at 812 (citing Stone, 281 F.3d at 644). If plaintiff establishes a prima facie case of retaliatory discharge under the McDonnell Douglas framework, the burden shifts to defendant to put forth a reason for the discharge. Id. After defendant proffers a reason, plaintiff has an opportunity to show that defendant's reason for terminating him was a pretext. Id. If plaintiff cannot make that showing, leaving defendant's "evidence of a noninvidious reason for the adverse action" unrebutted, then defendant is entitled to summary judgment. Id.

Plaintiff contends that he has adduced sufficient evidence to establish a prima facie

case under both the direct and indirect methods. To prove causation under the direct method, plaintiff relies largely on circumstantial evidence, contending that a jury could infer that he was terminated as a result of his complaints. First, plaintiff points to the evidence showing that defendant was concerned that its time clocks were not compliant with the FLSA and that defendant moved the clocks on the same day that plaintiff was terminated. However, plaintiff does not explain why defendant's concern for FLSA compliance would cause defendant to terminate plaintiff. Additionally, although plaintiff relies on defendant's admission that management probably discussed plaintiff's complaints about the time clocks when deciding whether to terminate him, the admission is insufficient to show causation. Plaintiff admits that he used the location of the time clocks as an excuse for failing to punch in. It would have been strange for defendant not to have discussed plaintiff's excuses for his violations of the time clock policy at the time defendant was deciding whether to terminate him under that policy.

Plaintiff's additional arguments in support of causation are either too vague, too undeveloped or not persuasive. In particular, plaintiff contends that his positive performance evaluations prove that he was performing his job in a satisfactory manner. However, plaintiff received the cited evaluations before any of his violations of the time clock policy. Plaintiff also contends that he was disciplined more often and more severely after he complained about the time clock location. However, the evidence shows that

plaintiff was disciplined several times before his initial complaints. Further, the reason the disciplinary action was more severe was because defendant's corrective discipline system called for increasingly severe disciplinary action for time clock violations. Plaintiff also contends that defendant had "shifting reasons" for plaintiff's termination, but the evidence does not support this. Rather, the evidence demonstrates that plaintiff's violations of the time clock policy subjected him to the corrective action program and that it was under this program that he was terminated.

Plaintiff also points to the discussion he had with Dennis Woolverton before the December 6, 2006 meeting regarding his suspension, in which Woolverton allegedly told plaintiff to "just lay down and tell them what they want to hear; [they] can probably save your job." Even assuming that Woolverton made this statement, it is too vague to support a conclusion that defendant fired plaintiff because of his protected activity. It is not clear from the statement what Woolverton meant. Finally, plaintiff does not dispute that on November 18, 2006 he made a statement to the effect that he was probably going to be fired because he had violated defendant's time clock policy for a fourth time.

This leaves only the timing between plaintiff's complaints and his termination, which can be circumstantial evidence of a causal relationship. Troupe v. May Stores, 20 F.3d 734, 736 (7th Cir. 1994). In this case, however, the timing between plaintiff's complaints and his termination is not enough to satisfy the causation requirement. Plaintiff's first two

violations of defendant's time clock policy occurred before he ever complained about the time clocks. As explained above, plaintiff has adduced no evidence that defendant applied its time clock policy more forcefully after plaintiff complained. Rather, defendant followed its corrective action system and issued plaintiff progressively more serious disciplinary notices and consequences. Plaintiff's formal discipline began with a verbal warning, progressed to written warnings and suspensions and ended with his termination. Thus, although defendant terminated plaintiff just days after he made his final complaints regarding the time clocks, the timing is not suspicious when viewed in light of defendant's progressive disciplinary policy. Moreover, the court of appeals "has held repeatedly that temporal proximity alone is not sufficient to withstand summary judgment" on a retaliation claim. Daugherty v. Wabash Center, Inc., 577 F.3d 747, 751 (7th Cir. 2009).

Plaintiff also cannot establish causation under the indirect method of proof. Plaintiff has pointed to no similarly situated employees who did not complain about the location of the time clock and who were not fired under the progressive discipline policy. In fact, defendant has submitted evidence showing that it has fired several employees for failing to comply with the policy. Thus, defendant has provided unrebutted evidence of a reason to terminate plaintiff under its corrective action program for repeated violations of the time clock policy. Plaintiff has no evidence showing that defendant's proffered reason for terminating plaintiff was a pretext.

Because plaintiff has failed to adduce sufficient evidence of causation, plaintiff has failed to make a prima facie case for retaliation under § 215(a)(3). Accordingly, I will grant defendant's motion for summary judgment.

ORDER

IT IS ORDERED that

1. Defendant Saint-Gobain Performance Plastics Corporation's motion for summary judgment, dkt. #209, is GRANTED.

2. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 6th day of March, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge