New Test for OSHA Retaliation Claims

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Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. He has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," and C-SPAN.

Mr. Rath currently serves on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years.

He was voted by readers to Smart CEO Magazine's Readers' Choice List of Legal Elite; by fellow members to The Best Lawyers in America 2016, 2017 and 2018; selected by Super Lawyers 2016 – 2017, 2017 – 2018; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.

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Taylor Johnson is an environmental lawyer specializing in the area of environmental regulation of products, including chemical control, pesticides, energy efficiency regulation, and importantly, domestic and international transportation of hazardous materials. Mr. Johnson also advises clients on community-right-to-know laws, Proposition 65, occupational safety and health matters, and supports a wide variety of commercial tort and other litigation issues.

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Prior to joining Keller and Heckman, Mr. Johnson promoted the development of energy and environmental legislation and policy at the state level.

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Topics to be Discussed

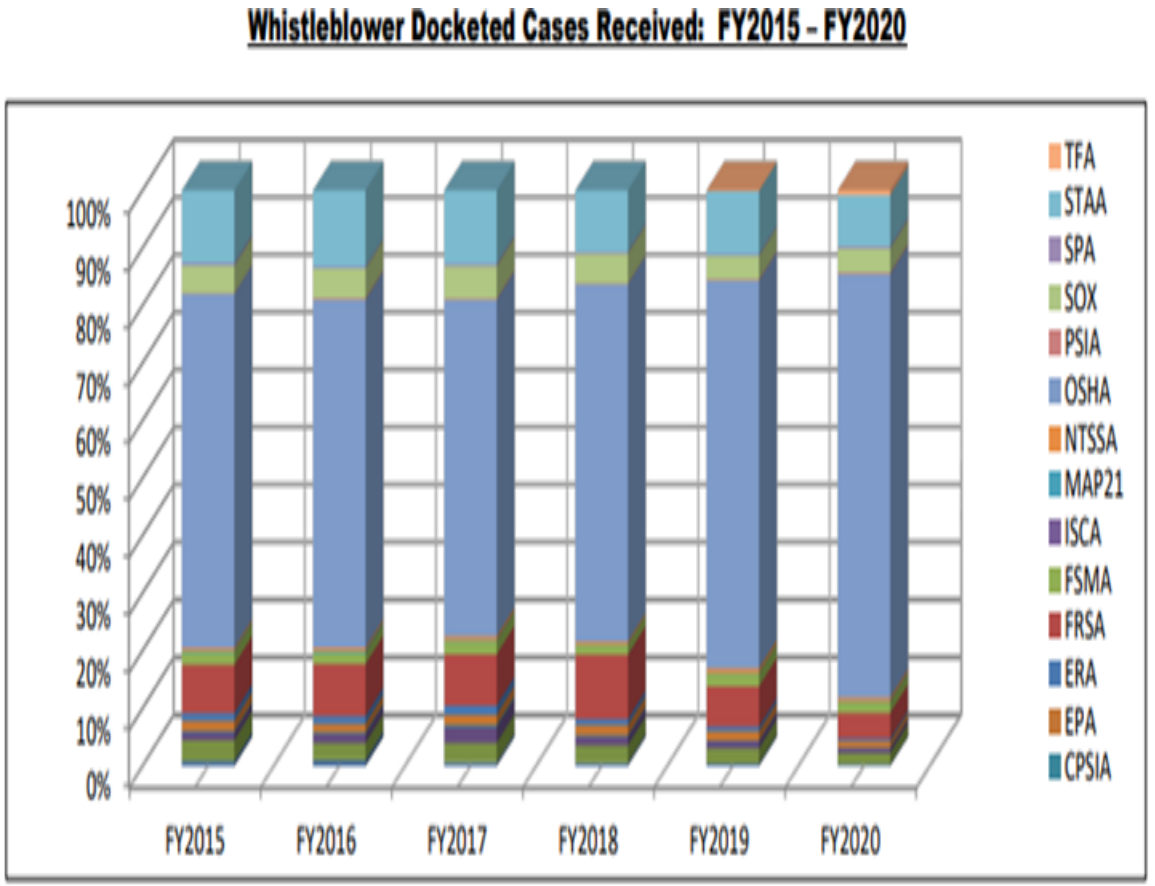
- Overview of OSH Act Provision on Retaliation
- Review of OSHA's Prior Test
- "But For" Causation Explained
- Analysis of OSHA's New Test
- Examination of Supreme Court Precedent
- Practical Takeaways for Employers
- **New section**: Off the Record Conversation for Live Participants Only

Overview of Relevant OSH Act Provision

- Section 11(c) of the OSH Act (29 U.S.C. §660(c))
- Prevents employer from retaliating against an employee "because" such employee engaged in "protected activities":
  - Files a complaint;
  - Causes an investigation;
  - Testifies in an investigation or;
  - Exercises a right related to the OSH Act

Review of OSHA's Prior Test

- Two ways for employee to establish connection between discharge or discrimination and protected activity (29 CFR 1977.6(b))
  - "Substantial reason" for the adverse action or;
  - Adverse action would not have taken place "but for" protected activity
- Substantial reason test was a lower bar for employees – did not need to be the "actual" reason for the adverse action



"But For" Causation Explained

- Test used in tort and criminal law
- "but for the protected activity," the employer "would not have carried out the adverse action."
- In retaliation claims, employee must prove that "but for" the existence of the protected activity the adverse action would not have occurred
- Higher bar than "substantial reason" test

Gross v. FBL Financial Services Inc.

- Age Discrimination in Employment Act (ADEA)
- ADEA's requirement that employer took adverse action "because of" age
- Court held that "because of" requirement equated to "but for" causation
- Burden of persuasion does not shift to employer

University of Texas Southeastern Medical Center v. Nassar

- Anti-retaliation provision of Title VII of the Civil Rights Act of 1964 – bans discrimination against employee "because" of opposition to discrimination
- Ordinary meaning of the word "because" means plaintiff must prove "but for" causation
- Court finds no meaningful difference between text in ADEA and Title VII anti-retaliation provision

Bostock v. Clayton County

- Title VII case in which the Court cites to Nassar to support holding that "because" equates to "but for" causation
- "But for" causation test "directs us to change one thing at a time and see if the outcome changes"
- Events often have multiple "but for" causes - test does not require that prohibited act be the sole or primary reason for the adverse action

Analysis of OSHA's New Test

- September 3 *Federal Register Notice* (86 Fed. Reg. 49472)
- Substantial reason test was removed from the causation test in § 1977.6(b)
- Employee must show that **but for** the protected activity the employee would not have suffered the adverse action
- Employee's engagement in protected activity need not be the sole consideration for the adverse action
- New test supported by three recent Supreme Court cases

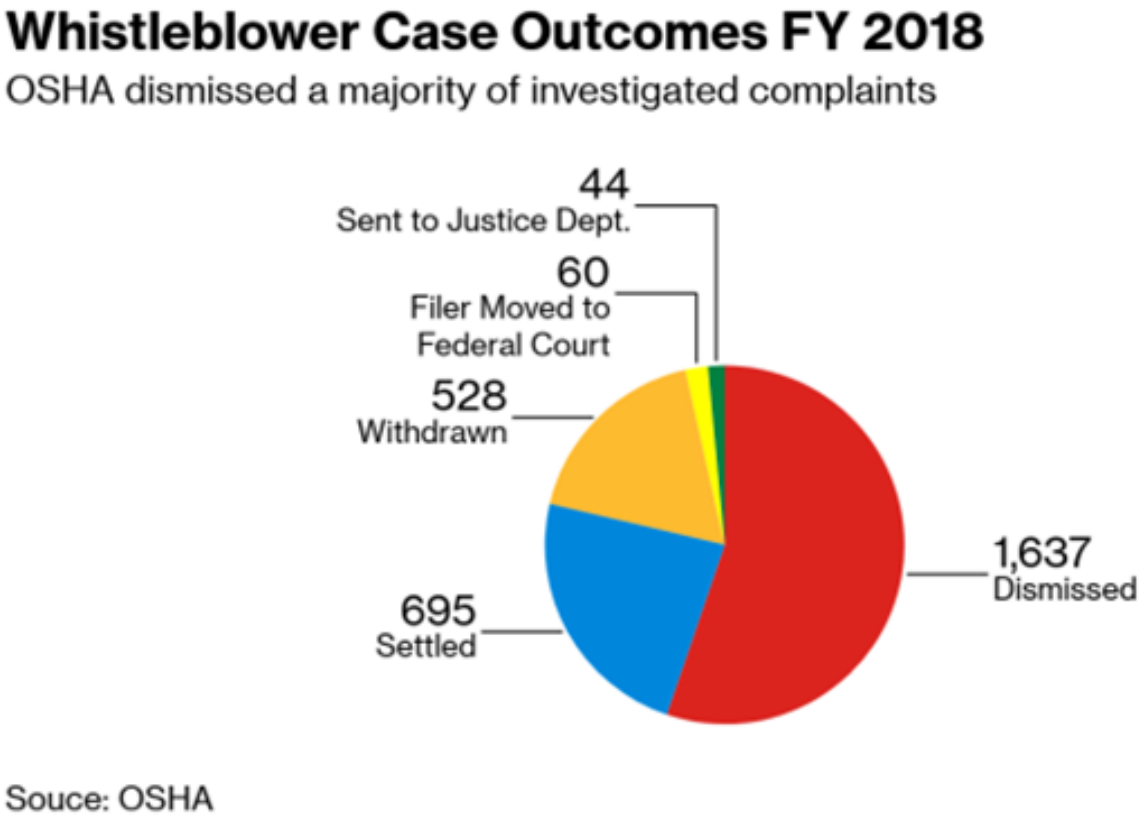
Mixed Motive Cases Under New Rule:

- OSHA need not establish that a retaliatory motive was the *only* reason for an employer's adverse action
- OSHA does not need to establish that a retaliatory motive was the *primary* motive
- This permits the agency to show that, even though an employer took an adverse action for a legitimate, non-retaliatory reason, a secondary reason may have been based on a protected activity

State Plan States

- State Plan states must implement a rule that is “at least as effective as.”
- Here, states can not further narrow causation requirement beyond “but for” causation
- States may not be obligated to implement a “but for” standard based on the state’s statutory language

Understanding Retaliation Claim Patterns



- Many retaliation claims lack merit:
  - 45 of 2,878 retaliation cases were found to have merit (2012)
  - 44 sent to Department of Justice (2018)

What Employers Should Do

- 11(c) does not insulate employee from being discharged for a legitimate cause
- Document all warnings, performance, conduct, and instances of insubordination
- Document safety and health violations
- Reasoning for adverse action must be clearly communicated and well documented

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October 27, 2021

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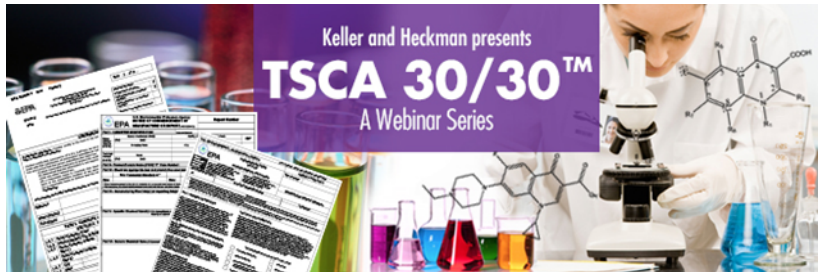

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