



OSHA 30/30®

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Recent OSHA Action in Whistleblower Retaliation Enforcement

September 21, 2022

Manesh Rath



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



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.

Mr. Johnson has special expertise in the area of hazardous materials transport, including enforcement defense and compliance counseling. Mr. Johnson helps companies secure competent authority approvals, special permits, and letters of interpretation from regulatory authorities around the world. He has also prepared successful petitions to PHMSA on behalf of shippers seeking regulatory relief.

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

- ◆ Initial Employee Complaint and Why This Matters in OSHA Law
- ◆ Employee Termination
- ◆ Overview of Whistleblower Elements, Under Both SOX and OSH Act
- ◆ Understanding OSHA's Investigation and Order
- ◆ Critical Analysis of Wells Fargo's Response
- ◆ What Employers Should Do

Initial Employee Complaints

- ◆ Senior Bank Manager was allegedly told to “try and make it look like the credit is so bad” and “leave no paper trail” pertaining to the credit declination of a potential customer
- ◆ Employee was allegedly instructed to engage in a price fixing scheme by his superiors
- ◆ Employee filed an internal complaint with the Corporate Ethics and Fraud Internal Hotline
- ◆ His complaint was assigned to a Senior Corporate Investigator
- ◆ The Wholesale Risk Unit informed the internal investigator of its opinion that no fraud occurred
- ◆ The Corporate case was closed with no written explanation to support the Risk Unit’s findings



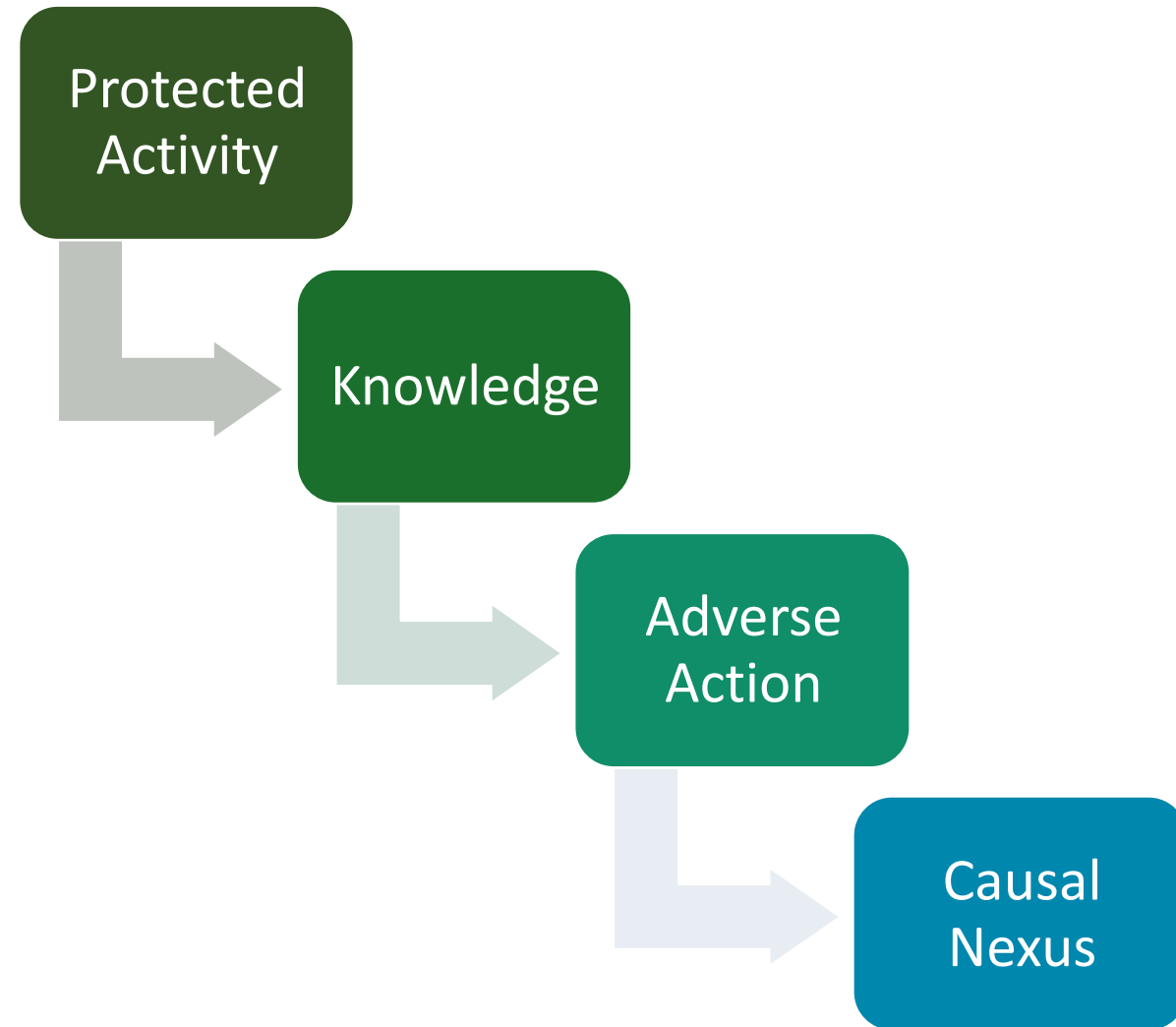
Employee Termination

- ◆ Wells Fargo changed the Employee's reporting structure to ensure the Employee's complaints would not reach higher management
- ◆ In 2018 Wells Fargo terminated the Employee
- ◆ The Employee was walked out of the office, told he was being displaced, and security was present to make sure he took nothing with him
- ◆ Company claimed termination was due to "restructuring"
- ◆ OSHA investigation uncovered lack of consistency with similar restructuring
- ◆ Other employees were given opportunities to get reassigned



Overview of Whistleblower Elements

- ◆ 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, or in this case, the SOX Act



Causal Nexus

- ◆ “But for” the existence of the protected activity the employee would have suffered the adverse action (for 11c under the OSH Act)
- ◆ For the SOX Act, OSHA looks for circumstances sufficient to raise the inference that protected activity was “a contributing factor” in the adverse action
- ◆ OSHA finds that Wells Fargo failed to show that it would have taken the same adverse action in the absence of the complaints
- ◆ “But for” the complaints (protected activity), the employee would not have been fired

OSHA's Order

- ◆ Wells Fargo ordered to pay former employee more than \$22 million - back wages, interest, lost bonuses and benefits, front pay and compensatory damages
- ◆ Reasonable attorney fees and litigation costs
- ◆ Notification to all current employees – posted in offices
- ◆ Wells Fargo was given 30 days to file objections and request a hearing before an ALJ

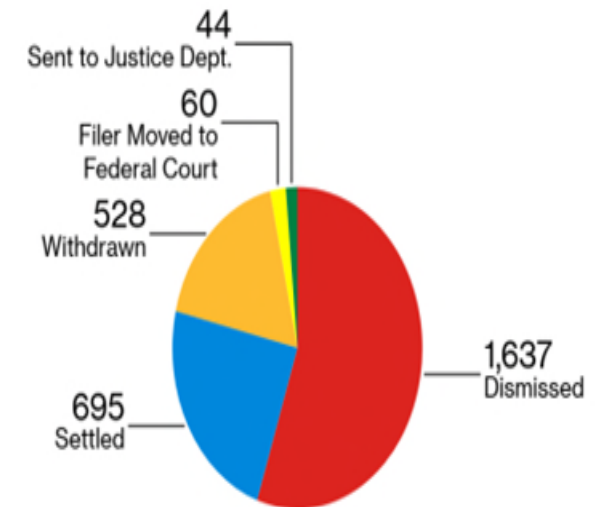


Critical Analysis of Wells Fargo's Response

- ◆ Internal memo stated that employee would “be encouraged to apply for other positions available throughout the firm” but this never happened
- ◆ Other “relocated” managers were offered other positions - inconsistency
- ◆ Evidence of animus – employee was allegedly pushed down the reporting structure after filing initial complaint
- ◆ Employee was escorted out of the office by private security and not allowed to grab belongings – this was not common practice

Whistleblower Case Outcomes FY 2018

OSHA dismissed a majority of investigated complaints



Source: OSHA

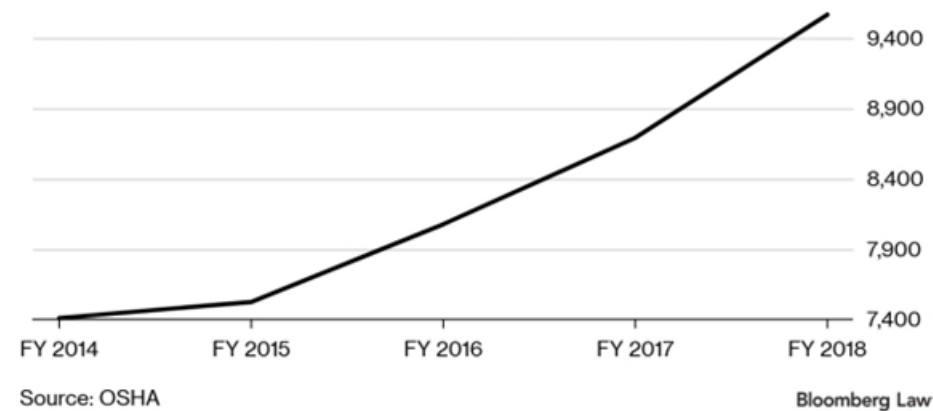
Bloomberg

What Employers Should Do

- ◆ Terminations and relocations should be evaluated independently for consistency
- ◆ Carefully evaluate any structural changes that could be viewed as demotions or moving down the reporting structure
- ◆ Document all warnings, performance, conduct, and instances of insubordination
- ◆ Reasoning for adverse action must be clearly communicated and well documented
- ◆ Whistleblower cases should be overseen by an independent consultant (like a law firm or accounting firm)

Whistleblower Complaints Filed With OSHA

Increased 29 percent from FY 2014 to FY 2018





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