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Tales of the FLSA: The case of the Complaining Manager

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What can you do when your boss won't listen to you, the Manager/Director of Human Resources?

"Keep complaining," the Ninth Circuit said (not in those words).

Complaints, Complaints, and More Complaints

In *Rosenfield v. GlobalTranz Enters.*, Alla Rosenfield — a sometimes-director, sometimes-manager of Human Resources at GlobalTranz — notified her employer not once, not twice, but at least thirty-five times that the company had violated the Fair Labor Standards Act (FLSA). Ensuring GlobalTranz complied with the FLSA, however, was *not* one of her job responsibilities. Whose responsibility was it? Her boss', which is probably why her complaints fell on deaf ears. Eventually though, Rosenfield wore him down, and he agreed to take some action on the conditions that she not attempt to "determine whether the company was actually implementing those changes."

I'll bet you can guess what happens next. Rosenfield wasn't afraid to add a 36th complaint to her list, so when she checked to see whether the company was implementing changes and discovered it was not, she complained. Five days later, she was fired. Unfortunately for the company, complaint #37 was a lawsuit alleging that GlobalTranz had violated the FLSA's anti-retaliation provision when it terminated her.

What's Really a "Complaint," After All?

To succeed with a retaliation suit under the FLSA, an employee must have filed a complaint. The Supreme Court attempted to alleviate the confusion surrounding what a complaint is by establishing a "fair notice" test in a case called *Kasten*. Under that test, an employer must have fair notice that "an employee is making a complaint that could subject the employer to a later claim of retaliation." The complaint also has to 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."

The *Kasten* analysis can be simple when the employee in question is an entry-level employee. Whenever that employee complains, most employers know to take the employee seriously. But things get more complicated when a manager complains, because the manager might be complaining on his or her own behalf (which is cause for concern) or could merely be forwarding an employee's complaint up the chain (which is required of the manager). In other circuits, manager-specific standards have been created, normally requiring the manager to step outside of his or her role of representing the company to make a protected complaint.

In this case, however, the Ninth Circuit declined to adopt a manager-specific standard, finding instead that *Kasten*'s fair notice standard can be applied similarly to a manager's complaint because all complaints require an "assertion of rights protected by the FLSA." A complaining manager's position is "an important part of the 'context' that the factfinder must consider," the Ninth Circuit ruled, but is not grounds for an entirely separate standard.

In Rosenfield's case, since FLSA compliance was not part of her particular job duties, the Ninth Circuit found that her complaints to GlobalTranz were made *outside* of her role representing the company. Therefore, she was under the umbrella of protection afforded by the FLSA's anti-retaliation clause and her claim against GlobalTranz was permitted to proceed.

Not All Manager Complaints are Equal

What's the takeaway? Your managers are there to help you prevent employment discrimination, but they can still bring their own claims. Watch carefully to see whether the manager is complaining on behalf of an employee, or on behalf of him- or herself. Never dismiss complaints from a manager because voicing concerns "is just part of their job."

Additionally, especially for Ninth Circuit employers, make sure to clearly define job duties (preferably in writing and in a way that is easily accessible, like an employee handbook) so there is no confusion or complaints surrounding an employee's reporting and compliance responsibilities. This problem can be especially prevalent in larger companies, where a manager like the "Vice President of Finance" doesn't hold the same weight that it does in other industries, or smaller companies.
