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## *Rosenfield v. GlobalTranz*: Is the Manager Rule Dead? The Ninth Circuit Holds That Fair Notice Is the Appropriate Test for Whether a Managerial Employee's Activity Is Protected Under the FLSA

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# **ROSENFELD v. GLOBALTRANZ: IS THE MANAGER RULE DEAD? THE NINTH CIRCUIT HOLDS THAT FAIR NOTICE IS THE APPROPRIATE TEST FOR WHETHER A MANAGERIAL EMPLOYEE’S ACTIVITY IS PROTECTED UNDER THE FLSA**

**Abstract:** On December 14, 2015, in *Rosenfield v. GlobalTranz Enterprises, Inc.*, the U.S. Court of Appeals for the Ninth Circuit held that the proper test for when an employee’s actions constituted a protected complaint under the anti-retaliation provision of the Fair Labor Standards Act of 1938 (“FLSA”) was whether the employer had fair notice that the actions were a complaint. In holding that the employee’s managerial status did not change the analytical framework, the Ninth Circuit diverged from previous rulings in the U.S. Courts of Appeals for the First, Fifth, Sixth, and Tenth Circuits that required managerial employees to assert adverse action against their employers to receive anti-retaliation protection. This Comment argues that the Ninth Circuit’s use of a single test for both managerial and non-managerial employees is correct in that it allows for more robust enforcement of the FLSA, and is thus in keeping with Congress’ objective in passing the FLSA.

## INTRODUCTION

The Fair Labor Standards Act of 1938 (“FLSA” or “Act”) governs wage and hour standards for employees in both the public and private sectors.<sup>1</sup> Because the FLSA depends primarily on employee reporting for enforcement, it includes protections for employees who file complaints alleging violations of its provisions from retaliation by adverse employment actions.<sup>2</sup> This protection from retaliation, however, has traditionally been in-

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<sup>1</sup> 29 U.S.C. §§ 201–219 (2012) (codifying protections for certain employees); Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 22 (1978) (summarizing the functions of the Fair Labor Standards Act (“FLSA”)). President Franklin Delano Roosevelt considered wage and hour protections a critical part of the New Deal, and the FLSA was the solution after the National Industrial Recovery Act’s labor standards were struck down along with its controls on trade practices. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (striking down the industrial codes of the National Industrial Recovery Act as an “unconstitutional delegation of legislative power”); Grossman, *supra*, at 24 (discussing President Roosevelt’s opinion on labor standards and the New Deal).

<sup>2</sup> 29 U.S.C. § 215(a)(3); see *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11–12 (2011) (discussing the FLSA’s reliance on employee reports for enforcement). The ap-

applicable when the complaining employee's job responsibilities include oversight of wage and hour issues.<sup>3</sup>

In 2015, in *Rosenfield v. GlobalTranz Enterprises, Inc.*, the U.S. Court of Appeals for the Ninth Circuit declined to follow the U.S. Courts of Appeals for the First, Fifth, Sixth, and Tenth Circuits and apply a "manager rule" to determine if an employee's complaint constituted protected activity under the FLSA.<sup>4</sup> Instead, the Ninth Circuit held that the proper inquiry for whether behavior constituted protected activity under the FLSA was a "fair notice" test based on the content and context of the action allowing the employer to recognize it as a protected complaint.<sup>5</sup>

This Comment argues that the Ninth Circuit's decision highlights the tension between the FLSA's primary enforcement mechanism and its lack of protection for managers, and that it takes some steps in the right direction to reinforce the Act's purpose but still leaves room for further action.<sup>6</sup> Part I of

plicability of the FLSA's anti-retaliation protection to internal complaints in addition to those filed in court or with the Department of Labor has been litigated in multiple U.S. Courts of Appeals, though the U.S. Supreme Court has never directly ruled on the issue. *See Kasten*, 563 U.S. at 16–17 (resolving the question that oral complaints are protected under the FLSA in the context of a complaint made to an employer, but noting that whether a complaint made directly to an employer is protected was not briefed); *Greathouse v. JHS Security Inc.*, 784 F.3d 105, 114 (2d Cir. 2015) (holding complaints made to employers are protected under the FLSA); *Lambert v. Ackerley*, 180 F.3d 997, 1001 (9th Cir. 1999) (same); *Valerio v. Putnam Assoc. Inc.*, 173 F.3d 35, 41 (1st Cir. 1999) (same); *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989 (6th Cir. 1992) (same); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (same); *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987) (same); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) (same); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975) (same); Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 541–48 (2001) (discussing what constitutes an FLSA complaint in various circuits).

<sup>3</sup> *See McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486–87 (10th Cir. 1996) (holding that managers must step outside their roles as company representatives for activity to constitute a protected complaint under the FLSA); Deborah L. Brake, *Retaliation in the EEO Office*, 50 TULSA L. REV. 1, 16–17, 24 (2014) (discussing how the manager rule can bar claims brought by people acting within their assigned work responsibilities in both the FLSA and Title VII context). *But see* 29 U.S.C. § 215(a)(3) (establishing retaliation protection when employees file complaints).

<sup>4</sup> *See* John E. Sanchez & Robert D. Klausner, *Prohibited Employee Acts*, STATE & LOCAL EMPLOYMENT LIABILITY § 3:15 (2016) (identifying a circuit split between the Ninth Circuit's adoption of fair notice as established in *Kasten v. Saint-Gobain Performance Plastics Corp.*, and the First, Fifth, Sixth, and Tenth Circuits' use of the manager rule). *Compare* *Rosenfield v. GlobalTranz Enters., Inc.*, 811 F.3d 282, 287 (9th Cir. 2015) (holding that a fair notice test applies regardless of managerial status), *with* *Pettit v. Steppingstone, Ctr. for the Potentially Gifted*, 429 F. App'x 524, 530 & n.2 (6th Cir. 2011) (adopting the manager rule), *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 627–28 (5th Cir. 2008) (same), *Claudio-Gotay v. Becton Dickinson Caribe, Ltd.*, 375 F.3d 99, 102 (1st Cir. 2004) (same), *and McKenzie*, 94 F.3d at 1486–87 (establishing the manager rule for determining when a managerial employee's behavior is protected action under the FLSA's anti-retaliation provision).

<sup>5</sup> *Kasten*, 563 U.S. at 14 (establishing the fair notice test for FLSA complaints); *Rosenfield*, 811 F.3d at 287 (adopting the *Kasten* test).

<sup>6</sup> *See infra* notes 13–133 and accompanying text.

this Comment presents an overview of the FLSA, its provisions, and enforcement mechanisms.<sup>7</sup> It then reviews the development of the manager rule for identifying protected activity.<sup>8</sup> Part I also discusses the U.S. Supreme Court's establishment of the "fair notice test" used by the Ninth Circuit in *Rosenfield* and reviews the factual and procedural history of *Rosenfield*.<sup>9</sup> Part II examines and discusses the Ninth Circuit's *Rosenfield* decision and how it differs from prior decisions by the First, Fifth, Sixth, and Tenth Circuits.<sup>10</sup> Part III argues that the Ninth Circuit's decision points to the inherent tension between the FLSA's reliance on employee complaints for enforcement and its lack of protection for the very employees charged with monitoring FLSA matters.<sup>11</sup> It argues that the Ninth Circuit's decision lays the groundwork for progress to ameliorate this issue and strengthen the FLSA's primary enforcement mechanism.<sup>12</sup>

## I. THE FLSA AND MANAGERIAL COMPLAINTS

The FLSA revolutionized American labor.<sup>13</sup> It established the forty-hour workweek, set the first federal minimum wage, codified "time and a half" for certain kinds of overtime, and prohibited most child labor.<sup>14</sup> Section A of this Part presents an overview of the FLSA's protections, exemptions, and enforcement methods.<sup>15</sup> Section B examines the judicial development of the manager rule by the U.S. Court of Appeals for the Tenth Circuit.<sup>16</sup> Section C outlines the fair notice test established by the U.S. Supreme Court.<sup>17</sup> Section D discusses the factual and procedural history of *Rosenfield*.<sup>18</sup>

### A. The FLSA's Protections, Exemptions, and Enforcement

Employees covered by the FLSA may file complaints if they believe

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<sup>7</sup> See *infra* notes 13–67 and accompanying text.

<sup>8</sup> See *infra* notes 29–43 and accompanying text.

<sup>9</sup> See *infra* notes 44–67 and accompanying text.

<sup>10</sup> See *infra* notes 68–91 and accompanying text.

<sup>11</sup> See *infra* notes 92–133 and accompanying text.

<sup>12</sup> See *infra* notes 92–133 and accompanying text.

<sup>13</sup> See 29 U.S.C. §§ 201–219 (2012) (codifying protections for certain employees); Grossman, *supra* note 1, at 22, 25 (discussing labor law history prior to the FLSA and the intention that the FLSA guarantee fair pay for fair working conditions).

<sup>14</sup> See 29 U.S.C. § 206 (regulating minimum wage); *id.* § 207 (regulating maximum hours and overtime compensation); *id.* § 212 (regulating child labor in interstate commerce); *Compliance Assistance—Wages and the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LABOR, <https://www.dol.gov/whd/flsa/> [<https://perma.cc/JBP8-GKM3>] (discussing FLSA provisions).

<sup>15</sup> See *infra* notes 19–28 and accompanying text.

<sup>16</sup> See *infra* notes 29–43 and accompanying text.

<sup>17</sup> See *infra* notes 44–53 and accompanying text.

<sup>18</sup> See *infra* notes 54–67 and accompanying text.

their pay or time on the clock is being calculated incorrectly.<sup>19</sup> The FLSA protects those who file such complaints from retaliation as a result of their actions.<sup>20</sup> Retaliation includes discharge or other discrimination against the employee.<sup>21</sup>

Certain job duties are deemed exempt from the FLSA such that employees above a certain salary floor who perform these duties are not subject to the FLSA's wage and hour requirements.<sup>22</sup> Managerial duties are exempt from protection under the FLSA.<sup>23</sup> Whether a managerial employee may make an internal complaint about wage and hour issues under the FLSA and subsequently be protected from retaliation for that action is somewhat ambiguous.<sup>24</sup>

The FLSA has a variety of enforcement mechanisms, including government investigations, administrative processes, civil litigation, and criminal prosecution.<sup>25</sup> The Wage & Hour Division of the Department of Labor

<sup>19</sup> 29 U.S.C. §§ 206–207 (establishing minimum wage and maximum hours regulations).

<sup>20</sup> *Id.* § 215(a)(3). Employees who cause complaints to be filed by someone else on their behalf or who testify in proceedings about wage and hour violations are also protected. *Id.* The FLSA's protections apply to employees involved in interstate commerce or the production of goods for interstate commerce, employees who work in hospitals and schools, and most state and federal government employees. *Id.* § 203(e) (establishing who is protected by the FLSA). Certain occupations—agricultural workers and railroad workers, among others—are not covered by the FLSA but by other statutes. *Id.* § 213 (exempting certain occupations); *see id.* § 213(a)(6) (exempting agricultural workers); *id.* § 213(b)(2)–(3) (exempting railway workers); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801–1872 (2012) (providing wage and hour protections to agricultural workers); Railway Labor Act, 45 U.S.C. §§ 151–188 (2012) (governing labor relations for railroad and airline workers).

<sup>21</sup> 29 U.S.C. § 215(a)(3) (protecting employees from discharge and “any other manner [of] discriminat[ion]”).

<sup>22</sup> *Id.* § 213(a)(1) (exempting categories of employees from FLSA wage-and-hour protections).

<sup>23</sup> *See id.* (exempting “bona fide executive, administrative, or professional” employees). Exempt primary duties include “executive,” “professional,” and “administrative” activities. *Id.* “Executive” duties are management of at least some subset of the enterprise, supervision of other employees, and hiring and firing powers. 29 C.F.R. § 541.100 (2016). The Department of Labor considers “administrative” duties to be office work relating to the employer’s general business operation or customers that include exercising discretion and independent judgment for important issues. *Id.* § 541.200. “Professional” duties include work that is primarily intellectual and that requires advanced knowledge “in a field of science or learning,” where the work calls for consistent exercise of judgment and discretion. *Id.* § 541.300. The salary floor, setting the minimum point at which employees performing executive, administrative, or professional duties are exempt from the FLSA’s wage and overtime requirements, is \$913 per week. *Id.* § 541.600. Though these job duties are exempt from the FLSA’s minimum wage protections, they are still covered by the equal pay provisions in § 206(d). 29 U.S.C. §§ 206(d), 213(a).

<sup>24</sup> *See* 29 U.S.C. § 215(a)(3) (establishing retaliation protection when employees file complaints); *Rosenfield*, 811 F.3d at 286 (discussing when the same statements by managerial and non-managerial employees may not trigger the same recognition as protected complaints under § 215(a)(3)).

<sup>25</sup> *Handy Reference Guide to the Fair Labor Standards Act*, U.S. DEP’T OF LABOR, <https://www.dol.gov/whd/regs/compliance/hrq.htm> [<https://perma.cc/U5T8-LDJ9>] (discussing FLSA enforce-

employs investigators, who research company behaviors and enforce the FLSA directly, but many FLSA violations only come to light via employee complaints.<sup>26</sup> Because these violations would remain unknown to the government absent employee whistleblowing, the FLSA must offer protection from retaliation if it is to successfully depend on employee-driven compliance.<sup>27</sup> To minimize an employee's fear of economic reprisal, the anti-retaliation provision allows for compensatory and occasionally punitive damages to be awarded to harmed employees should an employer take an adverse employment action in response to a protected activity.<sup>28</sup>

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ment mechanisms). Willful FLSA violations can be criminally prosecuted; penalties include fines for a first conviction and imprisonment for a second conviction. *Enforcement*, U.S. DEP'T OF LABOR, <https://www.dol.gov/general/topic/youthlabor/enforcement> [<http://web.archive.org/web/20170225043218/https://www.dol.gov/general/topic/youthlabor/enforcement/>].

<sup>26</sup> See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (holding that Congress made a deliberate choice in establishing an enforcement process based not on detailed federal supervision but rather on employee complaints, and that FLSA enforcement can only be effective if employees are comfortable coming forward with such complaints); Jessica Barclay-Strobel, Comment, *Shooting the Messenger: How Enforcement of FLSA and ERISA Is Thwarted by Courts' Interpretations of the Statutes' Antiretaliation and Remedies Provisions*, 58 UCLA L. REV. 521, 552 (2010) (discussing the employee's role in FLSA enforcement); *Enforcement*, *supra* note 25 (explaining that willful violation of the FLSA may subject an employer to criminal as well as civil sanctions). In 2001, there were only 900 Department of Labor investigators nationwide. Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 31 (2001) (discussing FLSA investigators).

<sup>27</sup> See 29 U.S.C. § 215(a)(3) (protecting employees who bring FLSA complaints from adverse employment action); *Mitchell*, 361 U.S. at 292 (discussing the importance of employee economic stability in FLSA enforcement); Susan S. Kuo & Benjamin Means, *Collective Coercion*, 57 B.C. L. REV. 1599, 1604–05 (2016) (discussing law's purpose to protect people from coercion); Barclay-Strobel, *supra* note 26, at 523 (discussing the general reliance on employee reporting to identify employer violations and enforce the FLSA). The Court in *Mitchell v. Robert DeMario Jewelry, Inc.* viewed the anti-retaliation provision of the FLSA as a purposeful congressional effort to foster a climate in which employees did not fear economic reprisal for voicing concerns about FLSA violations, thereby furthering the power of the Act's substantive provisions. 361 U.S. at 292.

<sup>28</sup> See 29 U.S.C. § 216(a)–(c), (e) (establishing compensatory and punitive damages for violations of the FLSA anti-retaliation provision); Barclay-Strobel, *supra* note 26, at 523 (discussing employee role in FLSA enforcement). An adverse employment action typically occurs when an employer makes a “materially adverse change” to an employee's job, whether it be to wages, hours, benefits, or responsibilities. Peter M. Panken, *Retaliation: The New Tsunami in Employment Litigation*, ALI-CLE COURSE MATERIALS (section IV Adverse Employment Action) (2015), Westlaw TSWU21 ALI-CLE 71. The Supreme Court has developed a standard of materiality for Title VII anti-retaliation protection where the retaliatory action must be enough to deter a reasonable employee from filing a complaint. *Id.* Under the FLSA, retaliatory actions taken by employers have included demotion, failure to promote, transfer, and termination of employees. Clemons, *supra* note 2, at 540.

*B. Development of the “Manager Rule” in the First, Fifth, Sixth, and Tenth Circuits*

To engage in protected activity under the FLSA’s anti-retaliation provision, an employee must file a complaint alleging a violation of the Act.<sup>29</sup> The general consensus among the U.S. Courts of Appeals—and the implicit suggestion from the Supreme Court—is that complaints alleging FLSA violations may be filed either internally, with the employer, or externally in the courts or with the Department of Labor and its agencies.<sup>30</sup> For enforcement of the FLSA’s substantive provisions to be effective, and for the anti-retaliation provision to have real meaning, courts have ruled that protected complaints must include those made internally to employers as well as externally to courts or agencies.<sup>31</sup> The question then becomes whether an employee’s position within the company determines what constitutes sufficient action to register as a protected internal complaint.<sup>32</sup>

In 1996, in *McKenzie v. Renberg’s Inc.*, the United States Court of Appeals for the Tenth Circuit first developed the “manager rule” for evaluating whether activity by a managerial employee is protected under the FLSA’s anti-retaliation provision.<sup>33</sup> The Tenth Circuit held that the required hall-

<sup>29</sup> See 29 U.S.C. § 215(a)(3) (triggering anti-retaliation protection when an “employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter”).

<sup>30</sup> See *Kasten*, 563 U.S. at 17 (holding complaints made to employers valid under the FLSA); *Greathouse*, 784 F.3d at 114 (same); *Lambert*, 180 F.3d at 1001 (same); *Valerio*, 173 F.3d at 41 (same); *Romeo Cmty. Sch.*, 976 F.2d at 989 (same); *White & Son Enters.*, 881 F.2d at 1011 (same); *Brock*, 812 F.2d at 125 (same); *Love*, 738 F.2d at 387 (same); *Brennan*, 513 F.2d at 181 (same). There is some lingering debate over whether complaints to employers should be protected by the FLSA’s anti-retaliation provision, and some would prefer, based on their understanding of statutory construction, to wait for the Supreme Court to definitively rule on the question. See *Kasten*, 563 U.S. at 26 (Scalia, J., dissenting); *Greathouse*, 784 F.3d at 125–27 (Korman, J., dissenting). The Ninth Circuit has recognized internal and external complaints as entitled to FLSA protection. See *Lambert*, 180 F.3d at 1004–05 (quoting 29 U.S.C. § 215(a)(3)) (holding that the anti-retaliation provision’s protections are undermined if complaints to employers are excluded).

<sup>31</sup> See *Kasten*, 563 U.S. at 12 (holding that the FLSA’s anti-retaliation provision renders the enforcement scheme effective and that it does not make sense for Congress to undercut this by limiting complaints to those only in writing); *Lambert*, 180 F.3d at 1004 (holding that for the anti-retaliation provision to work properly, complaints made to employers must be protected).

<sup>32</sup> See *McKenzie*, 94 F.3d at 1486–87 (considering whether a personnel director’s behavior constituted a protected internal complaint and establishing the manager rule).

<sup>33</sup> *Id.* (establishing the manager rule); see *Rosenfield*, 811 F.3d at 287 (calling *McKenzie v. Renberg’s Inc.*’s approach the “manager rule”). Ms. McKenzie was employed as the personnel director, and her responsibilities included monitoring compliance with state and federal employment laws. *McKenzie*, 94 F.3d at 1481. After receiving informational material from a coworker who had attended a wage and hour seminar, Ms. McKenzie became concerned that the company was not properly compensating certain employees. *Id.* She discussed her concerns with the company’s attorney and president, and was fired sixteen days later. *Id.* At a jury trial for retaliatory discharge under the FLSA and state law, the jury returned a special interrogatory finding that her termination was retaliation for her report of potential FLSA violations. *Id.* at 1483. The district court, however,

mark of protected activity is the assertion of statutory rights by taking action that is somehow “adverse to the company.”<sup>34</sup> In *McKenzie*, the plaintiff, who was the company’s personnel director, informed the company attorney and president of possible FLSA violations.<sup>35</sup> Her actions in raising the potential violations were in keeping with her direct responsibilities to monitor company compliance with labor laws.<sup>36</sup> She did not step outside her role or threaten to file an external complaint on either her own or other employees’ behalf, so the court held that she did not engage in protected activity under the anti-retaliation provision.<sup>37</sup> To trigger the protections of § 215(a)(3), the plaintiff needed to actively assert the FLSA’s statutory rights by doing something more than just fulfilling her responsibilities as personnel director.<sup>38</sup>

The First, Fifth, and Sixth Circuits have similarly adopted this manager rule.<sup>39</sup> The Fifth Circuit explained the policy reasoning behind its adoption of the rule: it made sense for a manager to be forced to step outside his

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approved the employer’s motion for judgment as a matter of law on the FLSA retaliation claim, and Ms. McKenzie appealed. *Id.*

<sup>34</sup> *McKenzie*, 94 F.3d at 1486 (discussing when protected FLSA activity occurs). The Tenth Circuit reached this adverse action requirement by drawing from its previous decision in 1984 in *Love v. RE/MAX of Am., Inc.*, where it held that FLSA protection applied to “unofficial assertions of rights through complaints at work.” *Id.* (quoting *Love*, 738 F.2d at 387). In *Love*, the Tenth Circuit cited *Brennan v. Macey’s Yamaha, Inc.*, for the protection of good faith assertions of statutory rights, which interpreted the language of § 213(a)(3) as protecting assertions, actual or threatened, of FLSA rights. *See Love*, 738 F.2d at 387; *Brennan*, 513 F.2d at 180. The *McKenzie* court interpreted this assertion of statutory rights to require action adverse to the employer. *McKenzie*, 94 F.3d at 1486. Because the plaintiff was within her usual job responsibilities when she reported her FLSA compliance concerns to her management, she did not sufficiently assert the statutory rights necessary to trigger anti-retaliation protection. *Id.* at 1487.

<sup>35</sup> *McKenzie*, 94 F.3d at 1481 (discussing plaintiff’s actions).

<sup>36</sup> *See id.* at 1487 (finding no protected FLSA activity). Ms. McKenzie would have had to file or threaten to file a complaint directly with the Department of Labor or in court for her actions to be considered adverse and accorded anti-retaliation protection. *Id.* at 1486–87. Had an employee without responsibility for FLSA compliance gone to Ms. McKenzie’s management with the same concerns that she raised, that employee’s actions would be adverse and protected as outside their assigned responsibilities. *See id.* at 1487 (discussing the importance of Ms. McKenzie’s professional responsibilities in determining the parameters of adverse action).

<sup>37</sup> *Id.* at 1486–87. Because plaintiff as personnel director had not engaged in behavior protected by the FLSA when she raised concerns about compliance, the Tenth Circuit affirmed the district court’s grant of judgment as a matter of law in favor of the employer. *Id.*

<sup>38</sup> *Id.*; *see also* Mark J. Oberti, *New Wave of Employment Retaliation and Whistleblowing*, 38 T. MARSHALL L. REV. 43, 45–47 (2012) (discussing increasing use of the manager rule in connection with the concern about maintaining at-will employment practices for employees charged with FLSA compliance matters).

<sup>39</sup> *See Pettit*, 429 F. App’x at 530 n.2 (noting that various Sixth Circuit district courts had held that a complaint was only protected when it was outside the employee’s usual responsibilities); *Hagan*, 529 F.3d at 627–28 (agreeing with *McKenzie* that a managerial employee must assert adverse action against the employer to file a protected complaint under the anti-retaliation provision of the FLSA); *Claudio-Gotay*, 375 F.3d at 102 (holding that because the employee directly stated his intention to protect the company when he reported FLSA violations, he did not assert any rights against his employer that were entitled to anti-retaliation protection).

or her usual role to file a protected complaint, because a managerial role necessarily involved reporting the concerns of other employees.<sup>40</sup> The U.S. Court of Appeals for the Fifth Circuit was particularly concerned that allowing managerial employees to be protected from retaliation under the FLSA for raising compliance concerns within their normal job responsibilities could turn the employee's entire course of conduct into protected activity.<sup>41</sup> To differentiate between these usual job responsibilities and FLSA-protected complaints and maintain a robust concept of at-will employment, it was necessary to use a different method to analyze the behavior of managerial employees.<sup>42</sup> Under the manager rule, employees' specific work responsibilities thus determined whether their internal complaints about wage and hour issues were protected from retaliation: an employee with responsibility for FLSA matters would only be protected when asserting an action adverse to the employer, whereas an employee without such responsibilities would be protected for internally raising concerns.<sup>43</sup>

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<sup>40</sup> *Hagan*, 529 F.3d at 628 (discussing policy support for the manager rule). The court in *Hagan v. Echostar Satellite, L.L.C.* was concerned that if regular managerial behavior were enough to constitute protected action, there would be little distinction between regular employment activities and FLSA-protected ones. *Id.* The Fifth Circuit implied that the *McKenzie* manager rule's requirement of adverse action may be tied to the language of § 215(a)(3), making it unlawful to discharge someone "because such employee has filed any complaint or instituted or caused to be instituted any proceeding." *See id.* at 623 (quoting 29 U.S.C. § 215(a)(3)). Nevertheless, the court was more focused on the policy behind the rule than its statutory basis. *See id.* at 628; Barclay-Strobel, *supra* note 26, at 533 (discussing the circuit courts' focus on the manager rule's practical grounds and implications for at-will employment). The manager rule has been imported into other areas of law. *See Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) (applying managerial considerations in deciding whether employee speech was protected under the First Amendment); *Brush v. Sears Holdings Corp.*, 466 F. App'x 781, 786 (11th Cir. 2012) (applying a manager rule in a Title VII discrimination retaliation case); *Brake*, *supra* note 3, at 19–20, 24 (discussing the adoption of the manager rule in cases beyond FLSA retaliation and how its application to Title VII cases can compromise effective anti-discrimination enforcement because of the difficulty in separating adverse action from normal job performance). It has, however, begun to receive pushback in the field of Title VII jurisprudence. *See DeMasters v. Carilion Clinic*, 796 F.3d 409, 422 (4th Cir. 2015) (holding that the manager rule did not apply to Title VII cases because of its broader statutory language when compared with the FLSA).

<sup>41</sup> *Hagan*, 529 F.3d at 628.

<sup>42</sup> *See id.* (discussing the need for an at-will employee to remain dischargeable without a constant fear of litigation).

<sup>43</sup> *See McKenzie*, 94 F.3d at 1487 (discussing how the parameters of adverse and thus protected action are determined by an employee's responsibilities for wage and hour issues); Barclay-Strobel, *supra* note 26, at 525–26 (discussing the different protections accorded to managerial employees in circuits with and without the manager rule).

*C. The Supreme Court's Formulation of a "Fair Notice" Test for Protected Activity Under the FLSA*

For courts that allow FLSA protection of internal as well as external complaints, the next dispute has been how much formality is required for an internal complaint to register as such and trigger statutory anti-retaliation protection.<sup>44</sup> In 2011, in *Kasten v. Saint-Gobain Performance Plastics Corp.*, the U.S. Supreme Court addressed the formality of complaint required to trigger protection under the FLSA's anti-retaliation provision.<sup>45</sup> The Supreme Court considered whether oral as well as written complaints were covered by the FLSA's statutory language, and adopted a broad view of what constitutes protected behavior under the anti-retaliation provision.<sup>46</sup> The Supreme Court held that the Act must be interpreted to include oral as well as written complaints to avoid undermining the FLSA's essential objective to protect vulnerable employees from accepting substandard work conditions for fear of economic reprisal.<sup>47</sup>

Rather than adopting a bright-line rule for what constitutes a complaint under the FLSA, the Supreme Court held that the primary concern was whether the employer had fair notice that an action was a complaint under the FLSA.<sup>48</sup> The "content and context" of the employee's statements,

<sup>44</sup> See 29 U.S.C. § 215(a)(3) (2012) (establishing retaliation protection for employees who "file any complaint"); *Kasten*, 563 U.S. at 4 (considering whether oral as well as written complaints are protected under FLSA's anti-retaliation provision); *Greathouse*, 784 F.3d at 107 (considering whether internal complaints to employers are protected under FLSA's anti-retaliation provision).

<sup>45</sup> *Kasten*, 563 U.S. at 4.

<sup>46</sup> *Id.* (adopting a broad view of protected behavior). The Court did not address the other underlying question present in the case and subject to a circuit split before *Kasten*: whether an internal complaint counts as protected activity, or if the complaint must be made externally to the government. See *id.* at 17; Lawrence D. Rosenthal, *The Supreme Court's Interpretation of the Fair Labor Standards Act's Anti-Retaliation Provision in Kasten v. Saint-Gobain Performance Plastics Corporation: Putting Policy Over Plain Language?*, 64 MERCER L. REV. 459, 460 (2013). The Court refused to consider the internal/external complaint question because it was not raised in the certiorari briefs and because it did not consider it "predicate to the intelligent resolution" of the primary question. *Kasten*, 563 U.S. at 17. Part of the Court's rationale for why oral complaints must be included in a proper interpretation of the FLSA's anti-retaliation provision, however, was the idea that a limited reading of the statutory language would prevent the furthering of FLSA compliance through use of informal workplace reporting procedures. *Id.* at 13. This statement seems to implicitly support the idea that internal complaints are thus acceptable for the purposes of the anti-retaliation provision. See *id.* In his dissent, Justice Antonin Scalia noted that the majority's holding is nonsensical if internal complaints are not within the ambit of the anti-retaliation provision. *Id.* at 26 (Scalia, J., dissenting).

<sup>47</sup> *Kasten*, 563 U.S. at 11 (including oral as well as written complaints). Because the statute says "filed any complaint," the Court held that the FLSA is not restricted to only formal written complaints. 29 U.S.C. § 215(a)(3); *Kasten*, 563 U.S. at 10, 17.

<sup>48</sup> See *Kasten*, 563 U.S. at 14 (holding that the employer's fair notice of an FLSA complaint is the determining factor for when action constitutes a complaint with anti-retaliation protection, because the FLSA's basic objective is to protect employees); L. Camille Hébert, *The Supreme*

whether oral or written, needed to be enough for a reasonable employer to recognize the action as an “assertion of rights” under the FLSA.<sup>49</sup> The Court reached this conclusion after in-depth consideration of the FLSA’s language, which grants protection to those who have “filed any complaint,” the Congressional intent and basic objectives of the FLSA, and the Department of Labor’s historical treatment of the provision’s scope.<sup>50</sup> Requiring specific written formalities would discourage informal mechanisms designed to improve FLSA enforcement and protect workers with limited time or ability to generate written complaints, undermining the Act’s remedial purpose.<sup>51</sup> The Court found the employer’s notice of a complaint to be more important than the specific formality of its delivery because knowledge of a complaint is necessary before there can be discrimination because of it.<sup>52</sup> Though the specific question before the Court was whether oral as well as written complaints could be protected from retaliation under the FLSA, the Court’s holding established a general baseline for determining when a complaint receives anti-retaliation protection.<sup>53</sup>

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*Court’s 2010–2011 Labor and Employment Law Decisions: A Large and “Mixed Bag” for Employers and Employees*, 15 EMP. RTS. & EMP. POL’Y J. 279, 292–93 (2011) (asserting that a broad understanding of protected FLSA complaints is consistent with both the text and purpose of the FLSA).

<sup>49</sup> See *Kasten*, 563 U.S. at 14 (reasoning that fair notice is the necessary hallmark for a protected FLSA complaint because an employer without knowledge of the complaint cannot discriminate because of it). Because the district court and the Seventh Circuit granted and then affirmed summary judgment in the employer’s favor on the grounds that oral complaints were not protected by the FLSA’s anti-retaliation provision, the Supreme Court did not address whether Mr. Kasten’s actual behavior constituted a protected complaint under their construction of a fair notice test. *Id.* at 6, 17. Rather, the Court remanded the case for consideration of whether Mr. Kasten did in fact make a protected complaint. *Id.* at 17. The Court therefore did not elaborate on what considerations should be taken into account when evaluating the context or content of a complaint, implicitly leaving that determination to the lower courts as well. See *id.* at 14, 17.

<sup>50</sup> *Id.* at 7–16. The Court found that the phrase “filed any complaint” in its entirety allowed for the possibility of oral complaints, but was insufficiently definite to answer the question. *Id.* at 11. The Court further found that excluding oral complaints from anti-retaliation protection would undermine the FLSA’s basic objective to protect workers and defeat Congress’s intent for employee reporting to serve as a substantial component of FLSA enforcement, especially given literacy rates when the FLSA was passed. *Id.* at 11–12. The Court also considered the Department of Labor’s traditional inclusion of oral complaints within the phrase “filed any complaint” deserving of weight. *Id.* at 14–15.

<sup>51</sup> *Id.* at 12–13; see also Matthew T. Bodie, *The Roberts Court and the Law of Human Resources*, 34 BERKELEY J. EMP. & LAB. L. 159, 195 (2013) (discussing how the Court’s inclusion of oral complaints within anti-retaliation protection facilitates internal human resources complaint systems).

<sup>52</sup> *Kasten*, 563 U.S. at 14.

<sup>53</sup> *Id.* After establishing this baseline, the Court then stated that it could be satisfied by both written and oral complaints. *Id.*; see also Eric Schnapper, *Review of Labor and Employment Law Decisions from the United States Supreme Court’s 2010–2011 Term*, 27 A.B.A. J. LAB. & EMP. L. 329, 353 (2012) (discussing the broad test for protected complaints generated by *Kasten*).

*D. Factual and Procedural History of Rosenfield v.  
GlobalTranz Enterprises, Inc.*

In May 2011, Alla Josephine Rosenfield was employed by GlobalTranz Enterprises, Inc. as the Director of Human Resources and Corporate Training.<sup>54</sup> Ms. Rosenfield believed that she was not responsible for ensuring the company's compliance with FLSA obligations.<sup>55</sup> In the course of her assigned duties, however, she discovered FLSA violations that she then repeatedly brought to the attention of her management.<sup>56</sup>

Though her boss was frustrated by Ms. Rosenfield's insistence that GlobalTranz address these violations, he agreed to take steps to make the company legally compliant.<sup>57</sup> Ms. Rosenfield felt that he was very clear that she should not continue to pursue the matter, nor take it upon herself to ensure that GlobalTranz actually became compliant with the FLSA.<sup>58</sup>

Despite her sense that she was not expected to monitor the company's FLSA compliance, Ms. Rosenfield learned that GlobalTranz had not made the necessary changes to become FLSA compliant after conducting a required exit interview.<sup>59</sup> Shortly thereafter, Ms. Rosenfield visited a compa-

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<sup>54</sup> *Rosenfield*, 811 F.3d at 285. Ms. Rosenfield was initially hired in April 2010 as Manager of Human Resources and promoted to Director of Human Resources before assuming the role she held at her dismissal in May 2011. *Id.*

<sup>55</sup> *Id.* at 288 (discussing plaintiff's job responsibilities). Ms. Rosenfield was instructed by her management to disengage from FLSA compliance matters and avoid involvement with such issues. First Amended Complaint at 5, *Rosenfield v. GlobalTranz Enters., Inc.*, No. 2:11-CV-02327-PHX-NVW (D. Ariz. Jan. 30, 2012). Ms. Rosenfield and the court acknowledged that FLSA responsibilities are a natural job responsibility for a human resources manager, but Ms. Rosenfield understood FLSA compliance to be solely within her manager's purview. *Rosenfield*, 811 F.3d at 288.

<sup>56</sup> *Rosenfield*, 811 F.3d at 288. Ms. Rosenfield learned of these violations through information available due to her position as Manager and Director of Human Resources and through interviews with GlobalTranz employees. First Amended Complaint, *supra* note 55, at 4, 10–11. On eight separate occasions, Ms. Rosenfield made oral complaints about the FLSA violations to her management. Opening Brief of Appellants at 35, *Rosenfield*, 811 F.3d 282 (No. 13-15292). She also included the violations in her weekly summaries to upper management on at least twenty-seven occasions. *Rosenfield*, 811 F.3d at 288. These FLSA violations included misclassifying hourly employees as salaried to avoid paying overtime and failing to pay equal compensation to men and women performing the same jobs. First Amended Complaint, *supra* note 55, at 4, 6. One of the most significant amendments to the FLSA was the Equal Pay Act of 1963, which prohibits sex-based discrimination and requires employers to provide equal pay for equal work. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)).

<sup>57</sup> First Amended Complaint, *supra* note 55, at 9 (establishing the facts of the case).

<sup>58</sup> *Id.* at 5 (establishing the facts of the case). After raising her initial concerns about FLSA violations, Ms. Rosenfield was required to submit a weekly summary of her work to validate her role at the company. Opening Brief of Appellants, *supra* note 56, at 18 n.2. No other GlobalTranz employees were subject to this reporting requirement. *Id.*

<sup>59</sup> Opening Brief of Appellants, *supra* note 56, at 8–9 (establishing the facts of the case). The departing employee said he had not been paid overtime, despite management's indications that company practices had been brought in line with the FLSA's requirements. *Id.* at 8.

ny call center to investigate another employee complaint.<sup>60</sup> She learned that employees were instructed to document that they had only worked eight hours per day, when in fact they had worked longer.<sup>61</sup> Ms. Rosenfield reported this non-compliance to her boss on May 26, 2011.<sup>62</sup> Five days later, he fired her.<sup>63</sup>

In response to her termination, Ms. Rosenfield filed suit in 2011 in the U.S. District Court for the District of Arizona against GlobalTranz and its executives.<sup>64</sup> She alleged that her dismissal was a response to her complaints about the company's FLSA violations, which she considered protected activity under the FLSA, and thus a violation of the FLSA's anti-retaliation provision.<sup>65</sup> The district court acknowledged that Ms. Rosenfield had repeatedly advocated for FLSA compliance on behalf of GlobalTranz's employees, but held that her action was not protected by the FLSA's anti-retaliation provision because she had not "filed any complaint" as statutorily required.<sup>66</sup> The district court therefore granted summary judgment in GlobalTranz's favor on the FLSA retaliation claim.<sup>67</sup>

## II. THE NINTH CIRCUIT TAKES A DIFFERENT APPROACH TO MANAGERIAL ACTIVITY IN *ROSENFELD V. GLOBALTRANZ ENTERPRISES, INC.*

In 2015, in *Rosenfield v. GlobalTranz Enterprises, Inc.*, the U.S. Court of Appeals for the Ninth Circuit analyzed whether a managerial employee's activity constituted a protected FLSA complaint using the test articulated by the U.S. Supreme Court in 2011 in *Kasten v. Saint-Gobain Performance Plastics Corp.*, rather than the manager test established by other circuits.<sup>68</sup> Section A of this Part discusses the Ninth Circuit's reasoning for adopting the *Kasten* fair notice test, its preliminary application, and the de-

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<sup>60</sup> *Id.* at 9.

<sup>61</sup> *Id.* at 9–10.

<sup>62</sup> *Id.* at 10.

<sup>63</sup> *Id.*

<sup>64</sup> *Rosenfield*, 811 F.3d at 285.

<sup>65</sup> *Id.* (discussing the original claims of the case). Ms. Rosenfield also filed Arizona state law claims, which she later voluntarily dismissed. *Id.*

<sup>66</sup> *Rosenfield v. GlobalTranz Enters., Inc.*, No. 2:11-CV-02327-PHX-NVW, 2012 WL 12538605, at \*2 (D. Ariz. Nov. 7, 2012). The district court maintained that a managerial employee could not engage in protected activity under the FLSA's anti-retaliation provision while acting within her responsibilities as a manager. *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14 (2011) (establishing the fair notice rule for FLSA complaints); *Rosenfield v. GlobalTranz Enters., Inc.*, 811 F.3d 282, 287 (9th Cir. 2015) (finding that the fair notice rule preempted the manager rule).

parture from the approach of the other U.S. Courts of Appeals.<sup>69</sup> Section B of this part considers the *Rosenfield* dissent.<sup>70</sup>

### A. The U.S. Court of Appeals for the Ninth Circuit's Analysis

The primary question before the court on appeal was whether a different standard applied to determining whether a complaint is protected under the FLSA when filed by a manager as opposed to a non-managerial employee.<sup>71</sup> Rather than adopting a categorical rule based on an employee's managerial role, the Ninth Circuit analyzed the particular facts surrounding the manager's complaint under the Supreme Court's *Kasten* fair notice test.<sup>72</sup> The fair notice test states that the "content and context" of a complaint must be recognizable to a reasonable employer as an assertion of statutory FLSA rights.<sup>73</sup> Under this analysis, Ms. Rosenfield's status as a manager was an important part of the context of her action but did not require a separate analytical framework.<sup>74</sup>

The court recognized that the FLSA might offer disparate protections to wage and hour concerns raised by managerial employees and identical comments made by non-managerial employees.<sup>75</sup> If the manager making the statements was responsible for ensuring FLSA compliance, the court found that it would be perfectly reasonable for the employer not to recognize her

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<sup>69</sup> See *infra* notes 71–87 and accompanying text.

<sup>70</sup> See *infra* notes 88–91 and accompanying text.

<sup>71</sup> *Rosenfield*, 811 F.3d at 285 ("We must next consider when a manager, as opposed to a non-managerial employee, has 'filed any complaint' under § 215(a)(3)."). The Ninth Circuit first concluded that Ms. Rosenfield satisfied the statutory definition of an employee under the FLSA such that the anti-retaliation provision was applicable. *Id.* The FLSA's definition of an "employee" is broad, encompassing anyone who works for an employer without reference to managerial status or lack thereof. 29 U.S.C. § 203(e)(1) (2012); *Rosenfield*, 811 F.3d at 285.

<sup>72</sup> *Kasten*, 563 U.S. at 14 (establishing the fair notice test for FLSA complaints); *Rosenfield*, 811 F.3d at 286 (adopting *Kasten v. Saint-Gobain Performance Plastics Corp.*'s test). The Ninth Circuit had not previously considered nor applied the manager rule, and questioned whether there was in fact a real difference between the rule as applied in the First, Fifth, Sixth, and Tenth Circuits and the *Kasten* fair notice test. *Rosenfield*, 811 F.3d at 287. Believing the two approaches to be likely consistent, the Ninth Circuit found it unnecessary to definitively decide this issue because the Supreme Court opinion as to what constitutes a protected FLSA complaint controlled. *Id.*

<sup>73</sup> *Kasten*, 563 U.S. at 14. The Supreme Court's fair notice test stated "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.*

<sup>74</sup> See *Rosenfield*, 811 F.3d at 287 (situating the manager rule within fair notice analysis on the assumption that managers' responsibilities affect the recognition of their actions as FLSA complaints).

<sup>75</sup> *Id.* at 286. The Ninth Circuit specifically recognized that identical reports about wage and hour issues would be understood differently if made by an entry-level employee versus a manager responsible for FLSA compliance; the entry-level employee's report would "almost certainly" be recognized as a protected complaint but the manager's report would be seen as part of her regular work duties. *Id.*

concerns as a complaint: she would just be fulfilling her duty to the company.<sup>76</sup> The Ninth Circuit noted the *Kasten* Court's concern that the FLSA be implemented in a broadly remedial fashion to satisfy the statute's basic ameliorative purpose in a way that remains fair to employers, and viewed their fair notice test as the defining requirement for any protected complaint.<sup>77</sup> The court therefore held that whether there was fair notice to establish a protected complaint required a case-by-case analysis, including evaluation of the employee's actual responsibilities, because the *Kasten* rule calls for consideration of the content and context of a specific alleged FLSA complaint.<sup>78</sup> An employee's role as a manager was an important factor within the context deliberation, but not the only consideration.<sup>79</sup>

Because FLSA compliance was not within Ms. Rosenfield's responsibilities, the court held that her repeated statements about violations could reasonably be interpreted by a jury as protected complaints under the anti-retaliation provision.<sup>80</sup> It was not proper to say that Ms. Rosenfield's employer reasonably understood her actions as just part of her job—the evidence was sufficient for GlobalTranz to have fair notice that her actions were a protected complaint.<sup>81</sup> The court thus reversed the lower court's grant of summary judgment in favor of GlobalTranz and remanded the case for further proceedings.<sup>82</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 287–88 (determining that fair notice required a case-by-case analysis).

<sup>79</sup> *Id.* at 286 (refusing to consider employee status as the only part of context). The Ninth Circuit expressed concern that a binary application of manager status, rather than consideration of the manager role as part of the context of a purported complaint, could render the analysis insufficiently sensitive to the differences between first-line managers and higher-level managers. *Id.* at 287–88. The suggestion is that lower-level managers may receive greater protections than higher-level managers under the anti-retaliation provision. *See id.* Though the district court found that all of Ms. Rosenfield's actions to report FLSA compliance issues were within her managerial duties, the Ninth Circuit held that a reasonable jury could find her actions sufficient to be recognized by her employer as a protected complaint because her duties specifically did not include FLSA compliance. *Id.* at 288. The Ninth Circuit did not acknowledge a distinction between its conclusion and the district court's other than to note the general duties of a manager versus Ms. Rosenfield's actual duties, implying that the difference in their ultimate conclusion was based on their accurate application of the *Kasten* fair notice test as compared to the district court's lack of contextual consideration. *See id.* (discussing the district court's summary judgment decision and applying the *Kasten* fair notice test to Ms. Rosenfield's version of the facts on review); *see also* *Rosenfield v. GlobalTranz Enters., Inc.*, No. 2:11-CV-02327-PHX-NVW, 2012 WL 12538605 at \*2 (D. Ariz. Nov. 7, 2012).

<sup>80</sup> *Rosenfield*, 811 F.3d at 284 (finding plaintiff's actions could be considered fair notice).

<sup>81</sup> *Id.* at 288 (finding plaintiff's actions outside her responsibilities). The district court's grant of summary judgment in GlobalTranz's favor meant that the Ninth Circuit had to accept Ms. Rosenfield's view of the facts. *Id.* Despite holding the positions of Manager and Director of Human Resources, Ms. Rosenfield was adamant that FLSA compliance was not within her purview and she was not expected to ensure or even comment upon potential FLSA issues. *Id.*

<sup>82</sup> *Id.* at 288–89 (remanding for consideration of fair notice). The Supreme Court denied

The majority decision in *Rosenfield* presents the first decision of a U.S. Court of Appeals to address the question of whether an employee with managerial responsibilities undertook protected activity under the FLSA by considering only whether the employer had fair notice the employee was making a complaint under the FLSA.<sup>83</sup> This approach departed from decisions previously made by other circuits.<sup>84</sup>

The *Rosenfield* approach simplified matters by embracing one legal test for whether an employee's complaint constitutes protected activity, putting aside the manager rule requiring different analytical approaches based on role previously used by other circuits.<sup>85</sup> The court disclaimed decision on whether the manager rule was different from or inconsistent with *Kasten*'s fair notice rule, and claimed only to be applying the newly issued controlling precedent.<sup>86</sup> By stating that an employee's role as a manager is just one part of the

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GlobalTranz's petition for certiorari. *GlobalTranz, Inc. v. Rosenfield*, 137 S. Ct. 85 (Oct. 3, 2016) (denial of petition for certiorari).

<sup>83</sup> See *Rosenfield*, 811 F.3d at 287 (considering that the fair notice test and the manager rule are likely not inconsistent with one another and finding that the fair notice test as Supreme Court opinion controls). Compare Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525, 557–58 (2011) (finding that the *Kasten* fair notice test is consistent with the manager rule because it arguably requires adverse action to put an employer on notice that a complaint has been filed), with Sanchez & Klausner, *supra* note 4, § 3:15 (identifying a circuit split based on the Ninth Circuit's adoption of *Kasten* fair notice rather than the manager rule). The manager rule was developed by the Tenth Circuit and adopted by the First and Fifth Circuits before the Supreme Court established the *Kasten* fair notice test. See *Kasten*, 563 U.S. at 14 (establishing the fair notice test for FLSA complaints); *Hagan v. EchoStar Satellite, L.L.C.*, 529 F.3d 617, 627–28 (5th Cir. 2008) (adopting the manager rule); *Claudio-Gotay v. Becton Dickinson Caribe Ltd.*, 375 F.3d 99, 102 (1st Cir. 2004) (same); *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486–87 (10th Cir. 1996) (establishing the manager rule). A few months after *Kasten*'s establishment of the fair notice test, the Sixth Circuit decided a case on the grounds that FLSA complaints made during the performance of assigned human resources responsibilities did not constitute protected activity. See *Pettit v. Steppingstone, Ctr. for the Potentially Gifted*, 429 F. App'x 524, 530 n.2 (6th Cir. 2011) (noting that various Sixth Circuit district courts as well as the First, Fifth, and Tenth Circuits had held that complaints were only protected when outside the employee's usual responsibilities). Post-*Kasten*, district courts in various circuits continued to assume the validity of the manager rule. See, e.g., *Rodriguez v. Ready Pac Produce*, No. 13-cv-4634, 2014 WL 1875261, at \*7 (D.N.J. May 9, 2014) (using *McKenzie v. Renberg's Inc.*'s "stepping outside the role" language to define protected activity); *Southard v. City of Orongo*, No. 12-cv-5027, 2013 WL 352999, at \*4 (W.D. Mo. Jan. 29, 2013) (considering the manager rule's "stepping outside the role" requirements and finding plaintiff had stepped outside her role); *Mousavi v. Parkside Obstetrics, Gynecology & Infertility, S.C.*, No. 10-cv-4765, 2011 WL 3610080, at \*4 (N.D. Ill. Aug. 16, 2011) (applying the manager rule).

<sup>84</sup> See *Hagan*, 529 F.3d at 627–28 (adopting the manager rule); *Claudio-Gotay*, 375 F.3d at 102 (same). Compare *Rosenfield*, 811 F.3d at 287 (holding that the fair notice rule controlled), with *McKenzie*, 94 F.3d at 1486–87 (holding that a manager must step outside the managerial role to file a protected complaint).

<sup>85</sup> See *Rosenfield*, 811 F.3d at 287 (holding that fair notice rule controlled); *Pettit*, 429 F. App'x at 530 n.2 (adopting manager rule); *Hagan*, 529 F.3d at 627–28 (same); *Claudio-Gotay*, 375 F.3d at 102 (same); *McKenzie*, 94 F.3d at 1486–87 (same).

<sup>86</sup> *Rosenfield*, 811 F.3d at 287 (discussing the interplay between fair notice and the manager

context that must be evaluated, however, the Ninth Circuit effectively rejected the position that a manager's actions are only protected under the FLSA when the employee steps outside the managerial role to file a complaint.<sup>87</sup>

### *B. Judge Benson Dissents in Favor of Preserving the Manager Rule*

Judge Benson dissented from the Ninth Circuit's decision that *Kasten's* fair notice rule controlled the issue of whether a manager's complaint enjoyed protection under the FLSA's anti-retaliation provision.<sup>88</sup> He argued that because *Kasten* only addressed whether an oral complaint met the statutory definition of filing a complaint, the Supreme Court had not given guidance as to what fair notice looked like when evaluating an alleged complaint by a manager.<sup>89</sup> Judge Benson argued that, absent any showing that Ms. Rosenfield had stepped outside of her managerial role and taken a position adverse to her employer, the grant of summary judgment to GlobalTranz should be affirmed under the manager rule.<sup>90</sup> To do away with the manager rule, in his opinion, would grant more protection to upper management than to the lower-level employees that the FLSA was primarily designed to protect.<sup>91</sup>

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rule). The Ninth Circuit suggested that the manager rule and the fair notice test are likely consistent with one another, while both deliberately declining to decide this definitively and refusing to declare or adopt a formal rule for evaluating managerial behavior under the anti-retaliation provision. *Id.* at 284, 287; see Long, *supra* note 83, at 557–58 (finding the arguable adverse action requirement of the *Kasten* fair notice test consistent with the manager rule); Erin M. Snider, Note, *The FLSA Antiretaliation Provision: Defining the Outer Contours of What Constitutes an Employee Complaint*, 96 IOWA L. REV. 385, 407 (2010) (explaining the *McKenzie* formulation of the manager rule as consistent with a fair notice test and advocating for case-by-case evaluation of notice).

<sup>87</sup> See *Hagan*, 529 F.3d at 627–28 (adopting the manager rule); *Claudio-Gotay*, 375 F.3d at 102 (same). Compare *Rosenfield*, 811 F.3d at 287 (holding that the fair notice rule controlled), with *McKenzie*, 94 F.3d at 1486–87 (holding that a manager must step outside the managerial role to file a protected complaint), and *Sanchez & Klausner*, *supra* note 4, § 3:15 (identifying a circuit split based on the Ninth Circuit's holding that managers are protected from FLSA retaliation when employers have fair notice that something is a complaint).

<sup>88</sup> *Rosenfield*, 811 F.3d at 289–90 (Benson, J., dissenting) (dissenting from adoption of fair notice rule).

<sup>89</sup> *Id.* at 290 (arguing a lack of proper guidance for fair notice).

<sup>90</sup> *Id.* at 291–92 (arguing that “stepping outside” the managerial role was still required because the FLSA’s “filed any complaint” language implies an adversarial process and *Kasten's* fair notice test did not support doing away with the distinction for complaints issued by managers).

<sup>91</sup> *Id.* at 291 (arguing that the manager rule was necessary to maintain the FLSA’s calibration of protection between employers, managers, and rank-and-file employees). Judge Benson read *Kasten* to require non-managerial employees to step outside their roles and assert adverse action to trigger anti-retaliation protection, and viewed the majority’s opinion as allowing protection for managers without this adverse action requirement, thereby increasing managerial protection while decreasing non-managerial protection contrary to the FLSA’s purpose. *Id.*

### III. SOME MANAGERIAL PROTECTION IS NECESSARY TO ENSURE ENFORCEMENT OF THE FLSA

The different approaches to determining whether a managerial employee's actions constitute protected activity under the FLSA highlight the major tension between the statute's purpose, language, enforcement practices, and judicial interpretations of protected activity.<sup>92</sup> The U.S. Court of Appeals for the Ninth Circuit's 2015 decision in *Rosenfield v. GlobalTranz Enterprises, Inc.* brings these issues to the forefront, calling attention to the underlying policy question about the extent to which the FLSA protects managers.<sup>93</sup> This Part addresses the historical reasons for the FLSA's lack of managerial protection, but argues that the Ninth Circuit's decision to use a fair notice test rather than the manager rule is an important step toward ensuring that the FLSA's wage and hour requirements are enforceable.<sup>94</sup>

The choice to exempt managerial work from FLSA protection for wage and hour matters can be traced to the statute's original purpose to protect common workers.<sup>95</sup> Historically, managers have had more power and authority than common workers.<sup>96</sup> This context is built into the statute's language via the explicit exemption of employees with managerial duties from its wage and hour protection.<sup>97</sup> It is thus not unreasonable to expect that the FLSA might address those employees differently in its anti-retaliation protections.<sup>98</sup>

<sup>92</sup> See 29 U.S.C. § 215(a)(3) (2012) (establishing retaliation protection when employees file complaints); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (discussing the importance of employee-provided information to the FLSA's enforcement); *Rosenfield v. GlobalTranz Enters., Inc.*, 811 F.3d 282, 287 (9th Cir. 2015) (treating managerial responsibilities as part but not all of the context of a complaint); *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486–87 (10th Cir. 1996) (requiring managerial employees to assert adverse action against their employers to receive anti-retaliation protection under the FLSA).

<sup>93</sup> See *Rosenfield*, 811 F.3d at 286 (noting that the same comments by managerial and non-managerial employees may not be recognized equally as a protected complaint).

<sup>94</sup> See *infra* notes 95–133 and accompanying text.

<sup>95</sup> See 29 U.S.C. §§ 201–219 (establishing protections for certain employees); Grossman, *supra* note 1, at 25–26 (discussing the severe labor issues of the 1930s and President Roosevelt's goal of offering protection to children and the poorest workers); Miller, *supra* note 26, at 32–33 (discussing the conception of exempted white-collar employees in the 1930s as a small, exclusive group of highly compensated employees at the top of a corporate structure compared to the modern reality of front-line and mid-level managers who may earn less than unionized factory employees).

<sup>96</sup> See Grossman, *supra* note 1, at 23 (discussing an employer's power over employees).

<sup>97</sup> See 29 U.S.C. § 213(a)(1) (exempting certain employees from FLSA protection); Miller, *supra* note 26, at 32 (noting that white-collar employees in the 1930s were an exclusive group of mostly top-level executives and administrators not then subject to the struggles facing blue-collar workers).

<sup>98</sup> See 29 U.S.C. §§ 201–219 (establishing protections for certain employees); 29 C.F.R. § 541.100 (2016) (exempting professional employees from FLSA protection); Oberti, *supra* note 38, at 45–46 (discussing the need to maintain a viable system of at-will employment by preventing

The FLSA offers protection to workers only when it is enforced.<sup>99</sup> If an employer is not in compliance and no one within the company complains, there is little chance that the government's independent enforcement mechanisms will catch it: there are simply too many employers for comprehensive direct monitoring of every employer subject to the FLSA.<sup>100</sup> Internal regulation is thus critical to the FLSA's effectiveness.<sup>101</sup> Because the FLSA relies so heavily on employees' willingness to bring complaints, it seems illogical that the very employees charged with monitoring wage and hour issues are not granted the anti-retaliation protections offered to others.<sup>102</sup>

The original purpose for the FLSA's enactment was to protect workers who were often uneducated; workers who see a manager with FLSA responsibilities fired for reporting a wage or hour grievance are likely unaware that their direct complaints to any level of management or the Department of Labor would have greater legal protections.<sup>103</sup> The anti-

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all managerial reporting from becoming protected activity as the basis for the manager rule). Until relatively recently, "professional" employees constituted approximately 3% of the U.S. workforce; by 2008, that percentage was expected to increase to over 15%. Miller, *supra* note 26, at 34, 36. Despite the disparate treatment of complaints brought by managers in several circuits, the Department of Labor's website states that the FLSA's anti-retaliation protection applies to all employees, even when the employee's work is not covered by the FLSA. See *Wage and Hour Division—Fact Sheet*, U.S. DEP'T OF LABOR, <https://www.dol.gov/whd/regs/compliance/whdfs77a.htm> [<https://perma.cc/GNM5-CUXY>] (explaining the anti-retaliation protection provision).

<sup>99</sup> See *Kasten*, 563 U.S. at 11 (discussing the importance of employee-provided information to FLSA enforcement); Barclay-Strobel, *supra* note 26, at 552 (discussing the emphasis on the importance of employee reporting to FLSA compliance by both the Supreme Court and lower courts).

<sup>100</sup> See *Kasten*, 563 U.S. at 11 (noting the reliance of FLSA enforcement on employee-provided information); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (noting Congress's purposeful decision not to create a detailed oversight regime for FLSA enforcement); J. Bradley Medaris, *Wage and Hour Myths: Illuminating the Truth Behind Misconceptions of the Fair Labor Standards Act*, 72 ALA. LAW. 462, 463–64 (2011) (discussing the widespread frequency of FLSA violations); Miller, *supra* note 26, at 31 (noting the number of DOL investigators).

<sup>101</sup> See *Lambert v. Ackerley*, 180 F.3d 997, 1007 (9th Cir. 1999) (suggesting that it is normal for employees to seek internal solutions before escalating to external procedures); *Valerio v. Putnam Assoc. Inc.*, 173 F.3d 35, 44 (1st Cir. 1999) (discussing benefits of internal procedures); Bodie, *supra* note 51, at 162 (discussing the need for self-regulation across employment law in general to assist in enforcement).

<sup>102</sup> See *Kasten*, 563 U.S. at 11 (acknowledging the importance of employee-provided information to FLSA enforcement); Barclay-Strobel, *supra* note 26, at 526 (noting enforcement difficulties that result from not protecting employees charged with FLSA compliance); Clemons, *supra* note 2, at 555 (discussing how confusion about FLSA rights undermines the FLSA's goal of enforcement through employee reporting).

<sup>103</sup> See 29 U.S.C. §§ 201–219; *Kasten*, 563 U.S. at 12 (noting that the employees most in need of statutory protection were often those who were least educated); *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987) (noting that the importance of the anti-retaliation provision was the elimination of the fear of economic reprisal); Franklin D. Roosevelt, Message to Congress, H.R. Doc. No. 75-255, at 4 (1937) (calling for Congress to enact legislation protecting common workers, particularly in factories and on farms); see also Barclay-Strobel, *supra* note 26, at 587 (discussing

retaliation provision is meant to eliminate the fear of economic retaliation that an employee might otherwise face for notifying an employer of a wage or hour grievance.<sup>104</sup> If the employees tasked with internal FLSA compliance are not similarly protected from economic retaliation for ensuring this compliance, the anti-retaliation provision is unlikely to offer much comfort to non-managerial employees.<sup>105</sup> The anti-retaliation provision's power to enhance FLSA compliance is therefore seriously undermined when it refuses protection to managerial employees with wage and hour monitoring responsibilities.<sup>106</sup>

This raises an issue acknowledged by the Ninth Circuit in *Rosenfield*: whether there are disparate protections when managerial and non-managerial employees raise the same FLSA concern.<sup>107</sup> Ms. Rosenfield was fired after reporting FLSA violations that she discovered when sent to investigate employee concerns.<sup>108</sup> Applying the manager rule and a traditional concept of a human resource director's responsibilities, her activities would not be protected; passing along the employees' complaints would be within the purview of her employment.<sup>109</sup> Rather than constituting adverse action, raising a liability alert would protect her employer's interests.<sup>110</sup> Ms. Rosenfield would be required to show that her actual duties did not include FLSA

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the natural reluctance of employees to pursue FLSA complaints if they see their managers fired for doing the same); Snider, *supra* note 86, at 404 (discussing the chilling effect that witnessing unpunished retaliation against employees who raise FLSA complaints could have because of the role of workplace norms in setting employees' perceptions of legal action).

<sup>104</sup> See *Mitchell*, 361 U.S. at 292 (stating that the purpose of the FLSA's anti-retaliation provision was to further enforcement by eliminating fear of economic retaliation against complainants); *Brock*, 812 F.2d at 124 (addressing the enforcement roadblock presented by reliance on employee complaints if raising them risks economic stability and therefore finding retaliation based on an employer's mistaken belief that an employee engaged in protected activity was not outside the FLSA's scope of protection); U.S. EQUAL EMP. OPPORTUNITY COMM'N, 915.004, EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES (2016) (discussing the dependence of federal employment discrimination laws on employee willingness to challenge discrimination without fear of punishment).

<sup>105</sup> See *Brock*, 812 F.2d at 124 (noting the importance of eliminating economic retaliation fears as a barrier to employee reporting of FLSA grievances).

<sup>106</sup> See 29 U.S.C. § 215(a)(3); *Kasten*, 563 U.S. at 11–12 (discussing the importance of the anti-retaliation provision to effective FLSA enforcement); Barclay-Strobel, *supra* note 26, at 526 (addressing the undercutting effect of not protecting employees with FLSA compliance duties).

<sup>107</sup> See *Rosenfield*, 811 F.3d at 286 (acknowledging that the same comments by managerial and non-managerial employees may be differently recognized as protected complaints).

<sup>108</sup> Opening Brief of Appellants, *supra* note 56, at 9–10.

<sup>109</sup> See *Rosenfield*, 811 F.3d at 288 (noting that most human resources directors are responsible for FLSA compliance issues); *McKenzie*, 94 F.3d at 1487 (requiring a manager to step outside that role in order to file a protected complaint).

<sup>110</sup> See *McKenzie*, 94 F.3d at 1486 (noting that a manager is usually protecting the employer from liability when raising an alert about FLSA issues); Brake, *supra* note 3, at 8 (discussing how employees' compliance responsibilities are intended to raise issues to further their employers' interests).

compliance to prove she stepped outside her managerial role in reporting concerns.<sup>111</sup> She might still struggle to establish adverse action, however, because it is presumably better for a company to address FLSA violations preemptively, before external complaints or litigation arise.<sup>112</sup> Had the call center employees raised their wage and hour concerns directly with Ms. Rosenfield's supervisors, their actions would be protected under the FLSA.<sup>113</sup> For a statute dependent on employee complaints for effective enforcement, refusing protection to those employees tasked with ensuring compliance is a confusing policy decision that undermines the basic idea of enforcement based on internal self-regulation.<sup>114</sup>

Judicial interpretation of protected activity compounds this enforcement challenge.<sup>115</sup> In focusing on forcing managerial employees to step outside their roles and take action that is adverse to the employer, the First, Fifth, Sixth, and Tenth Circuits may have put an undue burden on a manager's ability to raise FLSA concerns without escalating immediately to an external complaint to the Department of Labor.<sup>116</sup> If a manager's duties involve FLSA wage and hour issues, then raising concerns about FLSA compliance is necessarily in the employer's interest because it heads off potential litigation by the affected employees.<sup>117</sup> Where there are valid FLSA concerns, it seems unreasonable that a manager tasked with compliance should have to take such aggressive action against their employer or risk

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<sup>111</sup> First Amended Complaint, *supra* note 55, at 5 (discussing plaintiff's job responsibilities); *see* Claudio-Gotay v. Becton Dickinson Caribe, Ltd., 365 F.3d 99, 102 (1st Cir. 2004) (finding no protection where actions were within plaintiff's job responsibilities).

<sup>112</sup> First Amended Complaint, *supra* note 55, at 5 (discussing plaintiff's job responsibilities); *see* Claudio-Gotay, 365 F.3d at 103 (finding plaintiff's actions in the company's best interest); Brake, *supra* note 3, at 8 (discussing an employer's interest in maintaining compliance procedures).

<sup>113</sup> Opening Brief of Appellants, *supra* note 56, at 8–9 (discussing the facts of the case); *see* Rosenfield, 811 F.3d at 286 (acknowledging disparate protections for different employees based on the employer's ability to recognize action as a protected FLSA complaint).

<sup>114</sup> *See* Barclay-Strobel, *supra* note 26, at 526 (noting that refusing protection to employees tasked with monitoring FLSA compliance undercuts enforcement efforts).

<sup>115</sup> *See, e.g.,* McKenzie, 94 F.3d at 1487 (evaluating whether activity was adverse to employer).

<sup>116</sup> *See, e.g.,* Valerio, 173 F.3d at 43 (noting that disallowing internal complaints under the anti-retaliation provision would discourage employees from attempting to resolve issues internally and require immediate escalation). Should managerial employees with FLSA compliance responsibilities suspect that upper management would be unresponsive to FLSA concerns, the manager rule forces them to decide whether to risk their jobs by proceeding internally or complicate their workplace relationships by going directly to court or the Department of Labor. *See* Rosenfield, 811 F.3d at 286 (discussing the different actions necessary for managerial and non-managerial employees to establish protected complaints); Barclay-Strobel, *supra* note 26, at 557 (discussing how a lack of protection for complaints within an HR manager's duties undermines FLSA enforcement by requiring those employees to take calculated risks when making complaints); Brake, *supra* note 3, at 8 (discussing the difficulties of advocating for compliance issues while maintaining a cooperative working relationship with upper management).

<sup>117</sup> *See* McKenzie, 94 F.3d at 1487 (stating that managerial concerns about FLSA violations are not adverse action against an employer).

significant consequences.<sup>118</sup> This adverse action requirement almost inevitably creates a chilling effect that is directly detrimental to actual enforcement of the FLSA.<sup>119</sup>

It is possible to view the U.S. Court of Appeals for the Tenth Circuit's adverse assertion of rights requirement in the manager rule as focused on concern about an employer's ability to recognize protected activity.<sup>120</sup> The stated policy concern behind the manager rule is that so much managerial behavior could constitute protected activity that fear of FLSA litigation would prevent valid employment decisions to fire or demote managerial employees.<sup>121</sup> To some extent, this is a manifestation of the concern over lack of notice.<sup>122</sup> Because it is contrary to the concept of at-will employment to deem the majority of an employee's responsibilities statutorily protected from retaliation, it is not reasonable to say that all comments about FLSA issues are protected complaints.<sup>123</sup>

The Ninth Circuit's decision to put aside the specific adverse action requirement for managerial employees in favor of the Supreme Court's fair

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<sup>118</sup> See *Rosenfield*, 811 F.3d at 286 (acknowledging that the same complaint made by a non-managerial employee would be recognized as protected under the anti-retaliation provision); *Brake*, *supra* note 3, at 33 (discussing the slim line between stepping outside the managerial role to assert adverse action and insubordination).

<sup>119</sup> See *Kasten*, 563 U.S. at 11–12 (discussing the importance of the anti-retaliation provision to effective FLSA enforcement); *McKenzie*, 94 F.3d at 1486–87 (discussing the need for a managerial employee to assert adverse action against the employer for behavior to be protected under the anti-retaliation provision of the FLSA).

<sup>120</sup> See *Kasten*, 563 U.S. at 14 (holding that an employer's reasonable ability to recognize a complaint as such is key); *Rosenfield*, 811 F.3d at 287 (applying the *Kasten v. Saint-Gobain Performance Plastics Corp.*'s fair notice test to managerial as well as non-managerial employees); *McKenzie*, 94 F.3d at 1487 (requiring adverse action against an employer by a managerial employee); *Clemons*, *supra* note 2, at 546 (noting that the adverse action requirement is focused on the employer's ability to distinguish protected from non-protected managerial activity).

<sup>121</sup> See *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 628 (5th Cir. 2008) (noting concerns about ramifications of FLSA protection to at-will employment). Though the court in *McKenzie v. Renberg's Inc.* made no reference to policy in establishing the manager rule, the court's rationale in *Hagan v. Echostar Satellite, L.L.C.* likely reflects their underlying concerns. See *Barclay-Strobel*, *supra* note 26, at 533 (discussing the lack of textual reliance in decisions adopting the manager rule in lieu of a focus on practical justifications).

<sup>122</sup> See *Hagan*, 529 F.3d at 628 (fearing a lack of distinction between protected and regular managerial activity). The cases applying the manager rule suggest a deep concern for distinguishing normal managerial behavior from action rising to the level of a protected complaint. See *Clemons*, *supra* note 2, at 546 (noting the focus of the adverse action requirement on an employer's ability to distinguish protected managerial activity); *Snider*, *supra* note 86, at 407 (discussing the consistency of the *McKenzie* formulation with a fair notice test and advocating for case-by-case evaluation of notice).

<sup>123</sup> See *Hagan*, 529 F.3d at 628 (stating concerns for rampant litigation in otherwise at-will employment as a result of over-protection of employee actions); *Lambert*, 180 F.3d at 1007 (noting that an employee must actually make a complaint to receive FLSA retaliation protection); *Brake*, *supra* note 3, at 34 (discussing the fundamental conflict between retaliation protection and at-will employment that compromises employment discrimination complaint procedures).

notice test takes some steps to address this concern.<sup>124</sup> If managers are not required to step outside their roles to undertake FLSA-protected activity, then whether the employer has fair notice that an action is a complaint is necessarily more important than whether the employee acted within their duties.<sup>125</sup> The Supreme Court in *Kasten* and the Ninth Circuit in *Rosenfield* both held that the phrasing “filed any complaint” suggested a broad interpretation of a complaint; it seems unreasonable to exclude managerial actions from this.<sup>126</sup>

It is reasonable to be concerned with distinguishing actual FLSA complaints from routine comments within an employee’s regular portfolio of responsibilities.<sup>127</sup> The dual context and content elements of the fair notice test, however, should provide enough information for a fact finder to make a reasonable determination about an employee’s conduct without requiring a separate analytical framework for managerial employees.<sup>128</sup> There is precedent requiring some formality to establish a recognizable complaint; any off-hand remark is not enough to trigger anti-retaliation protection.<sup>129</sup> The ability of a fact finder to identify true complaints based on content and context seems unlikely to differ dramatically based on employee role.<sup>130</sup> It may be reasonable to expect more detail before a managerial employee’s comment is a recognizable complaint as compared to the same comment by a non-managerial employee.<sup>131</sup> Where a non-managerial employee might

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<sup>124</sup> See *Kasten*, 563 U.S. at 14 (establishing a fair notice test for FLSA complaints); *Rosenfield*, 811 F.3d at 287 (adopting fair notice as the test for whether a managerial employee filed a protected complaint); *McKenzie*, 94 F.3d at 1486–87 (requiring adverse action by a managerial employee to establish a protected complaint); Ronald Turner, *Title VII, the Third-Party Retaliation Issue, and the “Plain Language” Mirage*, 5 ALA. C.R. & C.L. L. REV. 77, 93 (2013) (discussing the *Kasten* Court’s attempt to balance employer and employee interests in the fair notice test).

<sup>125</sup> See *Kasten*, 563 U.S. at 14 (establishing the employer’s fair notice as the defining requirement for a protected complaint); *McKenzie*, 94 F.3d at 1487 (requiring managerial employees to step outside their roles to file protected complaints).

<sup>126</sup> 29 U.S.C. § 215(a)(3) (2012) (providing the language “filed any complaint”); *Kasten*, 563 U.S. at 10 (noting the importance of the word “any” within the phrase “filed any complaint”); *Rosenfield*, 811 F.3d at 285–86 (accepting the Supreme Court’s broad analysis of “any”); *Brake, supra* note 3, at 22 (discussing how the manager rule can result in total exclusion from retaliation protection for employees with compliance responsibilities).

<sup>127</sup> See *Rosenfield*, 811 F.3d at 287 (adopting *Kasten* fair notice test for protected behavior).

<sup>128</sup> See *Kasten*, 563 U.S. at 14 (establishing content and context as the primary elements of fair notice for when an employee has filed a protected complaint under the FLSA).

<sup>129</sup> *Rosenfield*, 811 F.3d at 286 (noting that a complaint must be reasonably recognizable as such to the employer to receive protection under the anti-retaliation provision); *Lambert*, 180 F.3d at 1007–08 (stating that an actual complaint of some sort must be made to trigger the anti-retaliation provision, and discussing without defining factors to consider in determining whether an action constitutes a complaint).

<sup>130</sup> See *Rosenfield*, 811 F.3d at 287 (noting the requirement to conduct fair notice analysis on a case-by-case basis).

<sup>131</sup> See *Lambert*, 180 F.3d at 1007–08 (noting elements that made an employee’s letter definitively a complaint and also addressing elements not necessarily required in a complaint).

make a recognizable complaint without specific reference to the FLSA provision at issue, it may be reasonable to expect a managerial employee with FLSA responsibilities to identify a specific violation.<sup>132</sup> Applying the content and context elements this way would promote enforcement of the FLSA by the employees responsible for internal compliance, without requiring immediate escalation to external complaints to establish anti-retaliation protection through adverse action.<sup>133</sup>

### CONCLUSION

The U.S. Court of Appeals for the Ninth Circuit's decision in *Rosenfield v. GlobalTranz Enterprises, Inc.* to consider fair notice the applicable test for whether both managerial and non-managerial employees conducted protected activity under the anti-retaliation provision of the FLSA was a positive step for enhanced enforcement of the Act. Eliminating a separate track of analysis for managerial behavior and considering instead whether the content and context of a complaint suffice to give fair notice to the employer is in keeping with the statute's broad remedial purpose. The Ninth Circuit fails, however, to go quite far enough to satisfy this purpose. Given that the FLSA relies so heavily on employee-reported complaints for enforcement, refusing to provide protection to those employees actually charged with internal FLSA compliance likely undermines the statute's actual effectiveness.

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<sup>132</sup> See *id.* (noting differences between the protections afforded different employees).

<sup>133</sup> See *id.* (discussing the varying levels of protection offered to employees with different roles).