

# D.C. Circuit Confirms that Employees Cannot Sue for OSHA Retaliation

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**Summary:** D.C. Circuit confirms that OSHA does not permit employees to sue their employers for retaliation; instead, employees are limited to filing complaints with the Department of Labor.

On March 3, 2017, the United States Court of Appeals for the District of Columbia Circuit in *Johnson v. Interstate Management Co., LLC*, addressed for the first time whether an employee who believes that his or her employer has taken action in retaliation against the employee's complaint under the Occupational Safety and Health Act can sue the employer to seek redress for the alleged retaliation. The court ruled that an employee may not file such a lawsuit, and is instead limited to filing a complaint with the Department of Labor within 30 days of the alleged retaliation, reserving to the Department of Labor the decision of whether to file suit.

Confining its review to OSHA's statutory text, the D.C. Circuit had little difficulty concluding that OSHA created no private right of action. The court noted that OSHA did not expressly grant employees the right to sue, and when it did address lawsuits it only granted that authority to the Department of Labor. Accordingly, employees are limited to the administrative remedy.

This limitation is a welcome ruling for employers. Retaliation deals not with a substantive violation of the statute (in the OSHA context, maintaining a hazardous workplace), but with the employer's treatment of the employee after the employee has complained about a perceived violation or engaged in other protected activity. In cases under Title VII and the Americans with Disabilities Act (in which an employee can sue for retaliation), retaliation was the most common type of claim asserted in 2016, with 45.9% of employee EEOC charges alleging a retaliation claim. Because, in the Title VII and ADA context, retaliation does not require that the employee prove that the employer actually engaged in discrimination, only that the employee reasonably believed that discrimination occurred, an employee's retaliation claim can in many cases create more exposure for the employer than the employee's discrimination claim.

Although the D.C. Circuit's ruling should decrease the potential for litigation, employers should always act with extreme care in disciplining or taking other adverse action against an employee who has recently complained about a violation of any employment law. Paley Rothman's Labor and Employment Group is experienced in assisting employers in undertaking such sensitive actions in a manner that will be best positioned to hold up in court or before a government administrative agency.