NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL
RETALIATORY DISCHARGE LITIGATION

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I. Bases For Claims

There are over fifty federal laws that purport to protect employees who complain or file complaints or claims, and many more state statutes. A sampling is listed below:

- Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e), and the Age Discrimination in Employment Act (29 U.S.C. § 621 et. seq.), prohibit discrimination for opposing a practice made unlawful under those chapters (*i.e.* **complaining about harassment or discrimination based on race, national origin, religion, gender, or age**).
- The Americans With Disabilities Act (42 U.S.C. §12101 *et seq.*), protects against retaliation for **seeking accommodation for a disability or reporting discrimination or harassment based on disability, perceived disability, or a record of disability.**
- The Family and Medical Leave Act (29 U.S.C. §2601 *et seq.*), prohibits retaliation for **seeking or taking medical leave.**
- Many states also have statutory prohibitions on "**whistleblowing**" (reporting allegedly illegal acts, filing a complaint or an administrative agency claim). *See, e.g.*, Oregon Revised Statute 659A.230; New York Labor Law Section 740; Michigan Compiled Laws Chapter 15.361.
- State and Federal Occupational Safety and Health agencies have promulgated laws prohibiting retaliation against employees **for reporting allegedly unsafe or unhealthy working conditions.**
- Most states recognize a claim of common law **wrongful discharge** (**discharge in violation of public policy**), and most jurisdictions follow *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), finding a wrongful discharge claim is not pre-empted as a "minor dispute" by the Railway Labor Act (45 U.S.C. §151 *et seq.*).[1] At least one state has even asserted that a claim for wrongful discharge may be brought when there is the *possibility* of a claim under the Federal Employer's Liability Act (45 U.S.C. §151 *et seq.*) — even before such a claim has been brought. *Hysten v. Burlington N. Santa Fe. Ry. Co.*, 277 Kan. 551, 85 P.3d 1183 (Kan. 2004), *as modified by*, 277 Kan. 551, 108 P.3d 437, 443 (Kan. 2004).
- Federal Railroad Safety Act (49 U.S.C. §20101 *et seq.*), prohibits retaliation for **reporting an injury or reporting safety concerns**, cooperating in a safety investigation, or refusing to violate safety rules. (More on this below).

A few things to keep in mind:

- Pursuant to *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S. Ct. 846 (2009), **cooperating with an internal investigation qualifies as "opposing"** an action, sufficient to give rise to a claim of retaliation.
- Under many statutes, **it is not necessary that the employee opposing alleged discrimination make a correct or meritorious allegation of discrimination**;
  it is sufficient that he/she has a reasonable basis for believing unlawful discrimination or harassment has occurred. In fact, even an ulterior motive for filing a complaint (such as an attempt to distract the employer from pending discipline for misconduct) will not invalidate a retaliation claim. *See, e.g., Selby v. National Railroad Passenger Corp.*, 191 F.3d 461 (9th Cir. 1999).
- Most statutes provide for back pay, front pay, compensatory (i.e. emotional distress) damages, and attorney fees.

II. Federal Railroad Safety Act

49 U.S.C. §20109 states: "A railroad carrier,... a contractor or subcontractor of such a railroad, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand or in any other way discriminate against an employee" because the employee:[2]

1) **Reported** or assisted with an investigation or provided information to a federal, state, or local enforcement agency, or to his/her supervisor, about **"any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule or regulation relating to railroad safety or security"** or;
2) **Reported hazardous working conditions**, or;
3) **Refused to work under a hazardous condition** that "presents an imminent danger of death or serious injury," which can't be eliminated, or;

4) **Refused to violate or assist in the violation of any safety law**, or;

5) **Filed a complaint**, or testified in a proceeding, related to safety, or;

6) Notified or attempted to notify the railroad or the Secretary of Transportation of **a work-related personal injury**, or;

7) **Furnished information** to the Secretary of Transportation or any other federal, state, or local agency **regarding any accident or incident resulting in injury, death, or property damage**, or;

8) Accurately **reported hours on duty**, or;

9) (2008 Amendment) **Requested medical or first aid treatment, or followed orders or the treatment plan of a treating physician**. The amendment broadly defines "discipline" as "to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of a reprimand on an employee's record." The 2008 amendment goes on to require the railroad to provide prompt medical attention where necessary, including transportation to a hospital upon request by the employee.

The statute does permit a railroad to refuse to bring an employee back to work if he/she does not meet the Federal Railroad Administration or other applicable standards for fitness for duty, however this section may run afoul of the ADA's requirements for accommodation.

Pursuant to a 2007 amendment, a claim under this section must be brought first to the Secretary of Labor, within 180 days of the alleged incident. If the Secretary fails to make a finding within 210 days of filing, or the carrier fails to comply with a resulting order, the claimant may file suit in federal court, and has the right to a jury trial. See, e.g., *Thurston v. Burlington Northern Santa Fe Corporation*, 2008 WL 511889 (D. Colo. 2008) (dismissing for failure to exhaust administrative remedies by filing with the Secretary of Labor).

A successful litigant may be awarded **reinstatement, back pay with interest, compensatory damages, punitive damages (capped at $250,000),**[3] **and attorney fees**.

A 2007 amendment also eliminated a requirement that complaints under this section be resolved as provided in the Railway Labor Act, and asserted that the FRSA **does not preempt** any other federal or state whistleblower law protections. One small silver lining: the statute contains an **election of remedies** provision, such that a claimant cannot bring suit on the same incident under various and sundry theories.

Because the 2007 amendments granting a private right of action are not retroactive, there are no appellate dispositions on the record, so it remains to be seen how this will play out. *See, e.g.*, *Abbott v. BNSF Railway Company*, 2008 WL 4330018 (D. Kan. 2008) ("no preemption" amendment is not retroactive).

III. Cases

A. Causation

A causal connection may be established by either **direct evidence of retaliatory motive or by circumstantial evidence**, as follows: (1) **proximity in time** between [the protected activity]... and the alleged retaliation; (2) the employer's expressed opposition to [the protected activity]...; or (3) other evidence that the reasons proffered by the employer for the adverse employment action were false and pretextual. *Allen v. Iranon*, 283 F.3d 1070, 1077 (9th Cir. 2001).

B. Temporal Proximity

As noted above, an adverse employment act following closely on the heels of a protected complaint or report, may be circumstantial evidence of retaliation. *See, e.g., Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir.), *cert denied* 518 U.S. 1019 (1996) ("protected activity closely followed by adverse action may justify an inference of retaliatory motive").

This presents a unique hurdle for railroad employers, who are bound by their collective bargaining agreements to act quickly when discipline is or may be necessary.

For example, in *Hysten v. Burlington Northern Santa Fe Ry. Co.*, 530 F.3d 1260 (10th Cir. 2008), the plaintiff waited forty-six days to report an alleged injury. His supervisor would therefore have been immediately aware, upon hearing the report, that the plaintiff had filed an egregiously late report, and would be subject to discipline.[4] Nevertheless, the court affirmed a finding against the railroad based in part on the temporal proximity, noting the plaintiff received oral notice that he was being investigated for infractions "immediately after" he reported the injury, and received written notice of the investigation "within minutes" after he filled out his injury report. *Hysten*, 530 F.3d at 1270.

On the other hand, **a lack of temporal proximity** between the protected activity and the adverse employment action could be sufficient to obtain summary judgment for the employer. *See, e.g, Clark County School District v. Breeden*, 532 US 268 (2001), where the Court notes: "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close,'" and finds that "[a]ction taken (as here) 20 months later suggests, by itself, no causality at all." *Breeden*, 532 U.S. at 273-74 (internal citations omitted).

C. Burden Shifting

Under the federal anti-discrimination statutes (and many state statutes, as well), the court follows the burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

See, e.g., Kemp v. Metro-North Railroad, 2009 WL 707406 (2nd Cir. 2009):

To establish a *prima* facie case of retaliation under the ADA, "a plaintiff must establish that (1) the employee was engaged in an activity protected by the ADA, (2) the employer was aware of that activity, (3) an employment action adverse to the plaintiff occurred, and (4) there existed a causal connection between the protected activity and the adverse employment action."... Under the familiar burden-shifting framework of [*McDonnell Douglas*], **once a prima facie case has been established, the defendant must produce evidence that the adverse employment action was taken for some legitimate, non-discriminatory reason.** This rebuts the presumption raised by the *prima facie* case, at which point "**the burden shifts back to the plaintiff to prove, by a preponderance of the evidence, that the real reason for the adverse employment decision was discrimination**.

In *Kemp*, the Second Circuit upheld summary judgment for the railroad, finding that a personality clash was a legitimate, non-discriminatory reason for transfer.

See also Chambless v. Louisiana-Pacific Corp., 481 F.3d 1345 (11th Cir. 2007) (court did not need to reach the issue whether failure to properly fill out FMLA paperwork was a legitimate, non-discriminatory reason for refusing to promote the plaintiff to supervisory position, unrelated to her age or her gender, because plaintiff failed to produce evidence that her age or gender was basis of failure to promote); *Geoghan v. Long Island Railroad*, 2009 WL 982451 at *21 (E.D.N.Y. 2009) (consistently applied "up or out" policy was legitimate, non-discriminatory reason for termination of employee, sufficient to meet defendant's burden at that stage).

D. Mixed Motive

The plaintiff in a retaliation claim need only prove that retaliation was a "**substantial factor**" in the decision to terminate him/her — the plaintiff does not need to prove the retaliatory animus was *the only* cause of the allegedly retaliatory act. *See., e.g., Geoghan v. Long Island Railroad*, 2009 WL 982451 at *23 (E.D.N.Y. 2009) (where termination followed six days after request for accommodation under the ADA, and railroad failed to respond to request, plaintiff sufficiently demonstrated his request was a substantial factor to defeat summary judgment).

On the other hand, it is a defense that the railroad would have taken the same (complained of) act even in the absence of the protected activity. For instance, in *Keim v. National Railroad Passenger Corp*., 2007 WL 2155656 (E. D. Pa. 2007), the railroad argued that even if the plaintiff's use of medical leave was a factor in her termination, she would have been terminated anyway, because she had exceeded her FMLA leave.

E. No-Injury Incentives

Programs rewarding supervisors for minimizing injuries present another unique problem for railroad employers (and other employers who deal in transportation, manufacturing, or other industries where safety is paramount).

No-injury incentives are valid and may be effective, as supervisors are in an ideal position to enforce safety rules, however plaintiffs' attorneys will often try to convince a jury that, "[a]n employer's consideration of workplace injuries in evaluating its supervisors' performance-and, hence, salaries-carries the potential for supervisors to pressure employees not to report work-place injuries and to take retaliatory action against those who do." *Hysten v. Burlington Northern Santa Fe Ry. Co.*, 530 F.3d 1260, 1273 (10th Cir. 2008).

F. Continuing Violation

Normally, when an employee waits too long to claim he or she has been discriminated against or retaliated against, the statute of limitations will bar the claim.

However, in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Supreme Court clarified that, where an employee claims he or she has suffered an ongoing pattern of abuse or harassment, the statute of limitations will be extended backward from the date of the most recent incident to encompass all previous incidents — even where those incidents have been ongoing for years.

A tangible "discrete" action, such as demotion, failure to promote, or termination, will not extend the statute of limitations under the continuing violation theory. *Morgan*, 536 U.S. at 105. However, if a railroad employee harassed his subordinate over a period of time regarding an injury report or wage claim, for instance, that harassment would continue to be actionable until the statute of limitations ran on the last incident of harassment.

G. What Constitutes Actionable "Retaliation"?

In *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006), the Court clarified that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well **might have dissuaded a reasonable worker from making or supporting a charge of discrimination.**" *Burlington Northern*, 548 U.S. at 68.

The Court went on to caution that not every act is "materially adverse," noting that "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights and minor annoyances that often take place at work and that all employees experience." *Id.*

However, the Court gave examples of "materially adverse" actions that significantly broadened the scope of the concept, noting that "the significance of any given act of retaliation will often depend on the particular circumstances." *Id.* at 69. "A schedule change... may make little difference to many workers, but may matter enormously to a young mother with school age children... A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." *Id.*

H. Damages

In *Hysten v. Burlington Northern Santa Fe Ry. Co.*, 530 F.3d 1260 (10th Cir. 2008) (Kansas), the plaintiff was terminated for failure to comply with railroad rules regarding timely reporting injuries, but was reinstated (without back pay) approximately two years later, after a PLB hearing, on the theory that this long term employee should be provided "one last chance." Even though he had been reinstated, he successfully brought a claim of wrongful termination.

On appeal, the court upheld the jury award of $30,000 in back pay, $5,000 in emotional distress damages, $120,000 in punitive damages, and over $9,200 in pre-judgment interest.

1. *See, e.g., Messman v. Continental Airlines*, 335 F. Supp. 2nd 544, 552 (D.N.J. 2004) (explaining the split in jurisdictions over whether *Hawaiian Airlines* indicates the RLA does not have complete preemption over any state law claim, or simply sets forth the appropriate analysis for determining preemption).

2. The list is a summary for overview purposes only, as the relevant section of the statute contains twenty-one parts and subparts.

3. The statutory cap on punitive damages prior to 2007 was $20,000 — a significant difference!

4. According to the disciplinary notice, the plaintiff failed to report his injury for forty-six days, and was "grossly dishonest" in failing to identify the injury as occurring on the job. The court found that the plaintiff had filed an injury report within two days, but was unsure of the origin of the injury, and—at his supervisor's suggestion — listed the origin as "unknown." The court dismissed as not dispositive the fact that on at least one of his reports, the plaintiff had stated the injury occurred "off-duty."

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