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DISCRIMINATION IN THE WORKPLACE: THE TIGHTROPE OF LIABILITY

"Mixed-Motive" Cases

What happens when an employer makes an adverse employment decision where there is arguably both legitimate and discriminatory reasons for the decision? This is often referred to as a "mixed-motive" case. This type of case can be a tightrope for both the employee and the employer. The employee will want to prove there is a discriminatory reason for the adverse decision but will not want to acknowledge that the employer also had a legitimate basis for the adverse action. The employer will want to show there was a legitimate rationale for the adverse action without conceding there may have been an improper reason also. When the facts suggest both legitimate and discriminatory reasons for an employment action, you need to carefully consider your strategy.

Evolution of Title VII "Mixed-Motive" Liability

Title VII was enacted as part of the Civil Rights Act of 1964. Title VII made it illegal for employers to discriminate against an individual . . . "because of such individual's race, color, religion, sex or national origin." For years, courts have struggled with the statute's "because of" language and it sparked debate in federal courts around the nation. In 1973, the U.S. Supreme Court decided *McDowell Douglas Corp. v. Grain*, 411 U.S. 792 (1973). This decision established the familiar burden shifting framework whereby the

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ENTERING INTO OR RENEWING A RAIL LINE LEASE UNDER A LEASE-CREDIT AGREEMENT?

If the answer is YES — you'll need to comply with additional Surface Transportation Board (STB) paperwork requirements directed at "paper barriers" -- the STB calls them "interchange commitments" -- or more plainly known as contractual arrangements limiting or preventing a short line from interchanging traffic with a carrier other than the one that has leased or sold the railroad line to it. Of course, the STB's "paper barrier" disclosure requirements aren't hot-off-the press news. The regulations have been in place for over a year. Likewise, the STB's declaration that lease-credit arrangements can discourage a short line from interchanging with 3rd party railroads isn't really news either. **So what is new?** *(Continued on page 5)*

(*Discrimination* Continued from page 1) employee bears the initial burden of showing his or her employer discriminated based on a protected trait. The burden then shifts to the employer to articulate a legitimate, non-discriminatory basis for the action. If the employer successfully rebuts the presumption, the burden shifts back to the employee to show, by the preponderance of the evidence, that the employer's non-discriminatory reason is the pretext for discrimination. Under the *McDowell Douglas* framework, we assumed that the "because of" language required the employer's action to be the result of solely a discriminatory motive.

Fast forward a decade. In 1989, the Supreme Court revisited the statutory language in *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989). For the first time, the Court established the "mixed-motive" framework, holding that an employee could meet the "because of" standard by showing that the employee's protected trait—race, color, religion, sex or national origin—was a "motivating" or "substantial" factor in the employer's decision. In other words, an employer could still be held liable for discrimination even if it had a legitimate reason for its decision, as long as the employer also considered a protected trait.

Just two years later, Congress made the motivating or substantial factor analysis law in the Civil Rights Act of 1991 (the "Act"). The new framework expanded employer liability -- but limited available damages where the employer establishes it would have made the same employment decision notwithstanding the illegal motivating factor. The Act specifies that an "unlawful employment practice is established when the complaining party demonstrates that [a protected trait] was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. §2000e-2 (m). The Act goes on to provide that "on a claim in which an individual proves a violation under §2000 e-2(m) of this Title and a respondent demonstrates that a respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)) and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under §2000e-2(m) of this Title." 42 U.S.C. §§2000e-5(g)(2). While on the one hand, the Act clearly outlined the burdens that fall to the plaintiff and defendant, it left ambiguity as to which party must establish mixed-motive and makes no mention of the evidence a party asserting a "mixed-motive" case must have to meet its burden.

For almost 14 years after the *PriceWaterhouse*, many courts followed Justice O'Connor's concurring opinion and required plaintiffs to establish discrimination through direct evidence in mixed-motive cases. The 9th Circuit, however, departed from this approach in *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002), holding that a plaintiff may establish mixed-motive through either direct or circumstantial evidence. The U. S. Supreme Court agreed. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). The court reasoned that the statute's silence on the issue was telling. Regardless of Congressional and Supreme Court efforts to clarify the mixed-motive analysis, the issue remains confusing for courts and practitioners alike.

So How Do You Plead A "Mixed Motive" Case?

The ultimate issue in an employment discrimination case is whether the plaintiff can prove an adverse employment decision was motivated, at least in part, by a discriminatory reason. *Fields v. N.Y. State Office of Mental Retardation and Development Disabilities*, 115 F.3d 116, 119 (2d Cir. 1997). A plaintiff can meet this burden by using mixed-motive analysis or by proving pretext. *Stratton v. Dept. of the Aging for City of New York*, 132 F.3d 869, 878 (2d Cir. 1997). Court will apply a mixed-motive analysis when plaintiff gives notice of such a claim. *Spees v. James Murane*, 617 F.3d 380, 390 (6th Cir. 2010).

Notice of a "mixed-motive" claim can be express, by invoking the mixed-motive analysis, or implied, through use of the motivating factor test in the complaint or responsive pleading. *Stratton at* 390 (plaintiff gave adequate notice of mixed-motive claim by alleging pregnancy as motivating factor and specifying she was bringing mixed-motive claims in a footnote in her motion for summary judgment). Thus, a plaintiff "need not expressly allege in the complaint that the action is either a pretext or mixed-motive case" and may "ultimately decide to proceed under both theories of liability." *Ponce v. Billington*, 679 F.3d 840, 845 (D.C. Cir. 2012).

The employer, on the other hand, may allege "mixed-motive" as a defense: "the employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff." *Desert Palace, Inc.*, 539 U.S. at 94. To use this affirmative defense, an employer must "demonstrat[e] [it] would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. §2000e-5(g)(2)(B). (*Continued on page 3*)

(**Discrimination** *Continued from page 2)* An employer may be able to escape damages, including an order of reinstatement, hiring or promotion, but could still be liable for attorney's fees and possibly face an order prohibiting future discriminatory actions.

In the end, labels matter! How plaintiffs and defendants label their cases will affect how courts interpret them and which standard—pretext, mixed-motive or both—they choose to apply. If the parties mention mixed-motive in their pleadings, then courts should apply the mixed-motive analysis. But what if they have not? Generally, a party must raise the issue in its motion for summary judgment for courts to consider it. *See Ginger v. District of Columbia*, 527 F.3d 1340, 1344-46 (D.C. Cir. 2008) (holding that plaintiffs needed to have argued at summary judgment that the case involved mixed-motives to benefit from that framework). However, some courts will address the single-motive and mixed-motive frameworks in the alternative. In the case of *Fye v. Okla. Corp. Comm.'n*, 516 F.3d 1217, 1226 (10th Cir. 2008) (analyzing a claim under both frameworks because the plaintiff argued in the alternative). Finally, some courts will only apply one standard. Thus, it is important to know how a particular court will approach this issue prior to raising it on summary judgment.

What About Jury Instructions?

A mixed-motive jury instruction relieves plaintiffs from having to prove pretext and allows defendants to limit their damages. But when does it apply? Certain courts have developed instructions that tell the jury it must find a defendant liable -- but cannot award damages -- if a plaintiff proves that a discriminatory animus motivated an adverse action but the defendant demonstrates it would have taken the action anyway. *See* 7th Circuit Pattern Jury Instruction Section 3.01 Comments D and C. Several circuits provide a mixed-motive instruction in all Title VII cases. See 8th Circuit Model Civil Jury Instruction Section 5.0; 9th Cir. Model Civil Jury Instruction Section 10.1 and Comments; 11th Cir. Pattern Jury Instructions(civil cases) Section 4.5. Still others provide a mixed-motive instruction only when the case presents mixed-motives . Either party may request a mixed-motive jury instruction—but evidence must have been presented in support of the instruction before it will be allowed. In the end, there are tactical reasons either to pursue or not to pursue a mixed-motive instruction:

> A jury given both a mixed-motive and a but-for instruction may, after weighing the evidence, decide to split the baby and determine that although discrimination was an internal 'motivating factor' the employer 'would have taken the same action in the absence of the impermissible motivating factor.' By contrast, a party who proceeds solely under a but-for theory gives the jury an all-or-nothing choice: either find for the plaintiff, in which case the remedy would include monetary damages, as well as injunctive and declaratory; or find against the plaintiff, in which case the plaintiff would receive nothing. *Ponce v. Billington*, 679 F.3d 840, 845 (D.C. Cir. 2012).

How About "Mixed-Motive" in Other Employment Contexts?

"Mixed-motive" liability is not viable in all types of employment claims. In fact, The U.S. Supreme Court has excluded "mixed-motive" in several key areas of employment law. In *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), the Court held "mixed-motive" is not viable in Title VII retaliation claims. Likewise, in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009), the Court held "mixed-motive" is not available in discrimination cases brought under the Age Discrimination & Employment Act ("ADEA"), finding that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act," and therefore, "the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action." *Gross*, 577 U.S. at 177. The same analysis has been found to apply to the Americans with Disability Act ("ADA"). See *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 318 (6th Cir. 2012). Lastly, a "mixed-motive" analysis does not apply to a hostile work environment claim because an employer can never have a legitimate reason for creating a hostile work environment. *(Continued on page 4)*

(**Discrimination** *Continued from page 3)* See *Stacks v. S.W. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 (8th Cir. 1994).

What About Damages in "Mixed-Motive" Cases?

While damages in a single-motive case generally include reinstatement, back pay, compensatory and punitive damages, equitable relief and attorney's fees and costs, damages in "mixed-motive" cases are limited to declaratory relief, injunctive relief, and attorney's fees and costs. 42 U.S.C. § 2000e-5. Courts are specifically prohibited from awarding damages or issuing orders "requiring any admission, reinstatement, hiring, promotion, or payment" in "mixed-motive" cases. 42 U.S.C. § 2000e-5(g)(ii). Compensatory and punitive damages alone can amount to hundreds of thousands of dollars, depending on the number of employees involved. As a result, an employer can avoid significant damages if the employer successfully establishes that, despite its impermissible consideration, it would have made the same decision.

As to attorney's fees, courts have interpreted the statute's use of the word "may" to mean that a court has discretion in awarding attorney's fees and costs. *Norris v. Sysco Corp.*, 191 F.3d 1043, 1052 (9th Cir. 1999). But in "mixed-motive" cases who is the "prevailing party?" Courts have determined that "defendants should receive fees in Title VII cases only in fairly extreme circumstances." *See Akrabawi v. Carnes Co.*, 152 F.3d 688, 695 -96 (7th Cir. 1998). Indeed, the Supreme Court has held that a prevailing defendant is only entitled to fees when a court has ruled that a plaintiff's case was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). In contrast, without special circumstances, a prevailing plaintiff ordinarily is entitled to attorney's fees. *Id.*

BOTTOM LINE: "Mixed-motive" cases offer the employer a means to limit damages, but also may mean possibly admitting to some wrongdoing. Whether or not to proceed under this theory requires an analysis of the law, how best to present the theory to a judge and a jury and an understanding of the damages that have traditionally been awarded by the specific court or judges involved.

For further information, contact Chloé Pedersen at (312) 252-1510 or cpedersen@fletcher-sippel.com.

FOOD FOR THOUGHT:
Can the Affordable Care Act (ACA) Limit your Damages for Future Medical Expenses?

Courts will be answering this question over the next year or so. However, you should be aware of the arguments.

So what's the theory: Injured plaintiffs, if they prevail, are entitled to compensation for future medical expenses. However, health care coverage has dramatically changed with the passage of the ACA. The Act grants access to health insurance, regardless of health or financial circumstances. In fact, it mandates insurance. The "guaranteed issue" and the "individual mandate" allow injured plaintiffs to handle their future health needs by purchasing a qualified health insurance plan, which must by law cover the plaintiff's minimal essential health benefits. These benefits include a vast array of needs normally itemized in a plaintiff's claim for future medical expenses and do not exclude for preexisting health conditions. As such, more and more defendants will be arguing that any damage award for future medical expenditures must be capped at the ACA maximum of $6,350 per year plus premiums paid on the insurance plan.

And what about the traditional rationale behind the collateral source rule? The ACA challenges the fundamental purposes behind the collateral source rule. The collateral source rule bars evidence of benefits received by an injured party from a source independent of, and collateral to, the wrongdoer. One of the main purposes behind the collateral source rule--to prevent the jury from learning that plaintiff has and maybe influencing the damage award--is now eroded. Under the ACA, a jury may now reasonably conclude that all injured plaintiffs are (or should be) covered by at least the minimum essential health benefits required by law. Moreover, another rationale behind the collateral source rule—that a wrongdoer should not benefit from the injured party's voluntary decision to purchase health insurance – is also out the window with mandatory insurance. There is no longer an unexpected windfall to the defendant because plaintiff chose to have insurance coverage.

Here are a few affirmative steps to consider:

- Add the ACA as an affirmative defense in your Answers.
- Add the ACA to your line of questioning in depositions and other discovery.
- Impeach a life care planning expert witness who does not use the ACA in calculating future medical expenses.
- Ask the court to preclude plaintiff from introducing evidence or testimony that his or her future medical expenses will exceed the ACA's annual out-of-pocket limit plus premiums.

For further information, contact Stephen Rynn at (312)-252-1539 or srynn@fletcher-sippel.com.

(*Lease Credit Agreement* Continued from page 1) In a recent decision, *Piedmont & Atlantic Railroad Co., Inc., d/b/a Yadkin Valley Railroad Company – Lease Exemption Containing Interchange Commitment – Norfolk Southern Railway Company*, STB Docket No. FD 35841 (STB served Sept. 18, 2014), the STB clarified that short lines must comply with the STB's barrier disclosure requirements where the parties use a lease-credit form of rental, even if interchange with another carrier is impracticable due to the physical distance between the short line and the alternative line-haul connection.

The *Yadkin Valley* case involved a short line's renewal of a lease arrangement with NS, albeit under slightly different terms. (The fact that a lease renewal triggered an STB proceeding is significant in and of itself – see discussion below). As with the original lease, the short line and NS used a lease-credit contract. The problem, however, was that the STB previously had said that all lease-credit transactions are presumed to impose a paper barrier. The railroads explained that the use of the lease-credit mechanism in this case was purely economic and had nothing to do with restricting the short line's ability to interchange traffic with other railroads. The short line did not physically connect with anyone other than NS. Moreover, the distance between the short line and an NS alternative was such that routing traffic away from NS was infeasible. Thus, the railroads argued, the STB ought to rule that its paper barrier disclosure requirements are inapplicable in such circumstances.

The STB was unpersuaded. In a 2-to-1 decision, the STB ruled that **all rail line lease transactions employing a lease-credit mechanism involve a paper barrier** – even if the short line involved had little, if any, chance of ever connecting with a second line-haul carrier. As such, the short line must comply with the agency's paper barrier disclosure requirements. The STB's concern (or at least the concern of 2 members) was that the potential anticompetitive threat of a lease-credit mechanism is real since one can never rule out the possibility that circumstances could change over time such that the short line might later gain a feasible outlet to a 2nd line-haul option.

Commissioner Begeman's dissent in *Yadkin Valley* reveals her fundamental distaste for the STB's paper barrier disclosure requirements. She chides the majority for giving too little credence to the facts of the case, and instead applying a "you never know" philosophy to lease-credit transactions in the face of uncontested evidence that the short line's prospects for ever gaining a connection with a carrier other than NS were virtually nonexistent. **In light of *Yadkin Valley*, parties to lease transactions involving a lease-credit mechanism must include in their STB filings all of the agency's paper barrier disclosure information!**

..... and now let's return to the fact that the agreement between the short line and NS was a renewal (under modified terms) of an existing leasehold arrangement in the first place.

The prevailing view is that parties to a rail line lease must return to the STB when they elect to renew or extend the lease beyond its original term. And it is becoming clear from cases such as *Yadkin Valley* that the STB expects the leasing carrier to "renew" it's rail line lease authority in such situations. That said, I suspect that the vast majority of lease renewals in the past couple of decades haven't been presented to the STB, so it could be argued that the STB's regulatory expectations have been honored in the breach. However, Class I railroads are becoming more cautious about lease renewals, and they are beginning to require their short line partners to return to the STB for "supplemental" STB authorization in the event of a lease renewal.

But the STB's lease renewal requirements are peculiar. After all, once a carrier obtains STB authorization to lease and operate over a line of railroad, longstanding precedent makes absolutely clear the leasehold operator remains obligated to provide common carrier service unless or until formally excused of that obligation by way of abandonment, discontinuance, or a voluntary change of operators on the line. So, since the leasehold short line's STB-authorized common carrier authority is good indefinitely (which is legally correct), and since the STB doesn't review and approve the lease terms themselves, then why the need to go back to the STB when extending or altering the lease terms? Good question. My answer: Regulations don't always make sense, but when seen from the regulator's viewpoint, the regulations force parties to paper barrier lease transactions to periodically admit such an allegedly anticompetitive arrangement exists.

For further information contact Robert Wimbish at (312) 252-1504 or rwimbish@fletcher-sippel.com

SURVEILLANCE DO'S AND DON'TS

Surveillance is something you probably all have used or considered using when an employee claims he or she was injured on the job and can no longer perform certain functions of the job. Surveillance can consist of a lot of things but usually involves monitoring an employee's activities by photographing or videoing his or her activities. Surveillance can be a very useful defense tool, particularly where the employee's activities demonstrate that he or she is overstating the claimed limitations — either to the medical providers or the employer or both. But surveillance can backfire and when it does, the employer can appear sinister and uncaring to a jury. Surveillance should only be used with care – and after you have the knowledge you need to make an intelligent decision. Here are some tips:

KNOW THE LAW IN YOUR STATE:

Whether you have to turn over surveillance materials to the plaintiff can vary from state to state. Know the discovery rules ahead of time! Jurisdictions will vary on the treatment of surveillance depending on whether it was requested by your defense attorney or conducted without any attorney privilege attached. Some jurisdictions consider photographs and videos of plaintiff a "statement" of plaintiff that must be produced with written discovery. In such a jurisdiction, you should be conservative in doing surveillance. Other jurisdictions permit you to withhold the surveillance until after plaintiff's deposition to allow you to explore what the plaintiff says under oath about his or her limitations before disclosing what you know. Some jurisdictions (if the surveillance was done by your attorney) treat it as attorney work product which does not have to be produced unless you are going to use it at trial. The availability of this privilege is particularly helpful where you have the risk that surveillance may actually be beneficial to the plaintiff. Hopefully, if you follow the suggestions below, that should rarely happen but, remember, once surveillance notes, photographs, or video are given to plaintiff's attorney, there are few restrictions on their use.

MAKE SURE YOUR SURVEILLANCE FIRM CAN CLEARLY IDENTIFY THE PLAINTIFF:

Not being able to properly identify the plaintiff is only humorous in retrospect and if you are successful regardless of the surveillance!! I once had a case where the surveillance company was ask to cover a plaintiff who had knee surgery and purportedly had great difficulty walking post-surgery. The surveillance crew did an excellent job of videotaping a well-built gentleman using a hand mower to mow a rather large yard, including ditches. At the end of the video, however, another man appeared. This gentleman had his knee in a brace, was using a walker, appeared to be in pain, and moved at a snail's pace. Guess which one was the plaintiff! Give the surveillance firm as much information as you can about the plaintiff, including photographs, a physical description, age, habits, etc. If the surveillance company is in doubt, instruct them to take a photograph and confirm the identity with you before videotaping.

MAKE SURE YOUR SURVEILLANCE COMPANY KNOWS YOUR OBJECTIVES:

As with any profession, the quality of surveillance companies can vary. Use a company with experience and good ethics. A good surveillance company knows when videoing is appropriate and when it is not, both as to the quality of the videoing and the ethics. Not only should your company know when not to create evidence, they should understand the local trespass laws and respect what is truly plaintiff's privacy. It's one thing to video what a person is doing in plain view of anyone who may happen to walk by, but it is quite another to follow a person into church to video the person kneeling while he or she prays. Be sure you clearly communicate your objectives so the surveillance company so they know what to watch for , they can make an early evaluation as to whether surveillance should continue and they know when to quit. It does no good to video hours of a claimant walking because you forgot to tell the company the employee has no restrictions on walking or videoing an employee carrying a small bag of groceries who has a 25 pound lifting restriction. In contrast, a video of the same employee lifting 50 lb bags of rock into the bed of a pickup truck is worth its weight in gold!

KNOW WHEN TO STOP:

Remember – jurors, in general, don't like the thought of people spying on them. So while surveillance may develop great evidence to impeach a plaintiff, it may also confirm the plaintiff's story. That may still be perfectly fine if the surveillance allows you to assess the case more accurately. But continuing surveillance when it has become clear that plaintiff is not misrepresenting his or her conditions or extensive videoing of benign activities, with the hope of finding some golden nugget, could be harmful. The surveillance can end up being the plaintiff's best evidence in painting you as an overly paranoid employer. If you continue to conduct surveillance to find the golden nugget, you may find you instead found fool's gold! It does not particularly help the defense when you have 42 hours of surveillance that produces a 10 second clip of plaintiff with a 25 pound lifting restriction placing a 40 pound bag of soil into a wheelbarrow. If I were in a jurisdiction where I didn't have to produce this surveillance , I wouldn't because I know plaintiff's attorney will use it in closing...."Ladies and gentlemen, they watched Mr. Smith for 42 HOURS, and all they found was a 10 second minor violation of his restrictions." For further information, contact Jim Helenhouse at (312) 252-1501 or email at jhelenhouse@fletcher-sippel.com.

OSHA UPDATE

Medical Interference and Off-Duty Injuries: Another Look

In 2013, the OSHA Administrative Review Board (ARB) found that FRSA Section 20109(c)(2) — Medical Interference — applied to off-duty as well as on-duty injuries. *See, Bala v. The Port Authority Trans-Hudson Corp ("PATH")*. But PATH has not given up and has asked the 3rd Circuit Court of Appeals to reverse the ARB's holding.

To refresh the facts in the case: Mr. Bala had a poor attendance record. He sustained an off-duty injury on June 22, 2008 and was out of work recovering through November of that year. PATH reviewed his employment history in total and conducted a hearing pursuant to the applicable collective bargaining agreement. PATH then suspended Bala for 6-days for his poor attendance record. Bala's suspension was upheld by the National Railroad Adjustment Board (NRAB), but he filed an OSHA complaint alleging PATH violated FRSA section 20109(c)(2) by disciplining him for—in part—following the orders of a physician regarding his off-duty injury.

In its brief on appeal, PATH argues that the ARB's ruling should be overruled because: (1) the text and legislative history of the FRSA shows FRSA was intended to apply only to on-duty injuries, (2) the ARB misapplied rules of statutory interpretation, and (3) from a policy perspective, the ruling, as applied, could impracticably grant employees unlimited sick days. Oral argument in this matter is being set. Given its potential impact, we, along with many others in the industry, are keeping an eye on the outcome!

There May Be Hope for Carriers After All: BNSF Victory in 8th Circuit!

The 8th Circuit Court of Appeals [covering federal courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota] has started what we hope will be a trend to tighten the proof needed to establish "protected activity" in whistleblower cases. In the appeal of *Kuduk v. BNSF Railway*, 980 F. Supp. 2d 1092 (D. Minn. 2013), the 8th Circuit affirmed summary judgment for BNSF finding the employee failed to establish the necessary requirements of its case. It also found BNSF satisfactorily demonstrated it would have taken the same action regardless of whether the employee had engaged in any protected activity. (8th Cir. Oct. 7, 2014). This result has several hopeful signs:

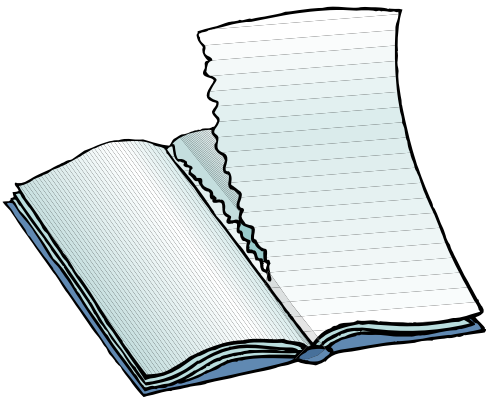
(1) **Temporal proximity**: The 8th Circuit held that an employee must rely on more than temporal proximity between the alleged protected activity and an adverse action in order to show discrimination. Showing more than temporal proximity is especially important where, as was the case for Kuduk, the employee had prior discipline for a rule violation.

(2) **Retaliation**: In Kudak, the employee relied on an earlier decision (the *Araujo* case) which held that, in FRSA Section 20109 cases, an employee need not demonstrate the existence of a retaliatory motive in order to link the employee's protected activity as a contributing factor to the adverse action. The 8th Circuit rejected this analysis and found that, in order to show retaliation, an employee **must show** that a railroad intentionally discriminated against him or her, and that such a showing requires proof of "'discriminatory animus..'" The employee must show that the employer engaged in "intentional retaliation prompted by the employee engaging in protected activity."

(3) **Non-Discriminatory Reason**: Lastly, the 8th Circuit outlined the steps a carrier Should take to satisfy the FRSA's burden-shifting test. The Court found the railroad had thoroughly investigated the charge that plaintiff had violated a safety rule. Moreover, plaintiff had previously violated a rule and was thus subject to the company's policy of dismissal upon a second serious violation within a twelve month period. The evidence obtained from the hearing was referred to a disinterested manager who's decision was then approved by others in senior management. Finally, plaintiff was allowed to appeal the decision. Of particular import — the Court emphasized the fact that the carrier presented uncontroverted evidence it consistently enforced its policy. The employer had discharged two other employees, one of whom had committed a violation similar to the violation committed by plaintiff. *(Continued on page 8)*

(**OSHA Updates** *Continued from page 7)*

Congress Mandated Two Bites at the Apple —So ...Is It Ever Too Late for Removal?



Under §20109(d)(3) of the FRSA an entirely new (de novo) review of an employee's complaint is permitted in U.S. District Court if a final decision on a complaint filed with OSHA has not been issued within 210 days after the complaint was filed, provided delay is not the result of bad faith on the part of the complaining party. If bad faith on the part of the complainant did not delay the final decision, ALJs have consistently found the FRSA allows the matter to be removed to the appropriate U.S. District Court.

In June of 2014, in *Gunderson v BNSF Railway Co.*, No. 14-vcv-223(D.Minn. June 30, 2014)(2014 WL 2945762), plaintiff filed an FRSA lawsuit in federal district court 9 business days after the ALJ issued his opinion. BNSF filed a motion to dismiss arguing that, although Plaintiff "acquired the right to file a federal lawsuit on the 211th day [pursuant to 49 U.S.C. § 20109(d)(3)], he waived that right by continuing to participate in the administrative process." Slip op. at 5. Despite having sympathy for the Defendant's argument, the Court found that the plain language of the statute, and the weight of the case law interpreting the provision at issue, left it with no choice but to hold that Plaintiff did not waive his right to bring the FRSA lawsuit. The court was not swayed by Defendant's unique use of the concept of waiver. No matter how the issue was framed "courts have repeatedly and unanimously rejected the idea that Congress did not intend for litigants to be able to file a lawsuit even after obtaining a merits decision from an ALJ." Id. at 7.

In another case shortly after *Gunderson,* ,ALJ was informed two days after the matter was to proceed for hearing that Complainant no longer wished to proceed before the ALJ and, over the railroad's objection, found that jurisdiction for further action on the complaint under the FRSA had been removed to the U.S. District Court for Montana (citing *Gunderson).* The ALJ dismissed the complaint upholding the removal. See *Brewer v. BNSF,* 2014 FRS 0001.

For further information, contact Chloé Pedersen at (312) 252-1510 or cpedersen@fletcher-sippel.com

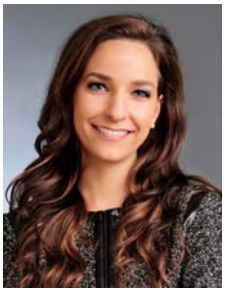
Upcoming Events

Midwest Association of Rail Shippers — Winter Meeting — January 14 & 15, 2015
Hilton's Oak Brook Hills Resort—Oak Brook, IL

ASLRRA Annual Meeting—March 28-31, 2015

Hilton Orlando—Orlando, FL

New Face at Fletcher & Sippel!



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THERE'S MORE TO LIFE THAN THE LAW….

Last issue we began a new feature….letting you get to know the lawyers at F&S for more than just their life with the law. This issue we feature…..JIM HELENHOUSE

Jim enjoys playing bass guitar in two bands one is "Hard Coupling" — a group of fellow railroad attorneys from around the country that recently performed at the NARTC Annual conference and the AAR General Claims Conference. The other is "Rough Grooved Surface, " a group formed back in Jim's college days at North Central College in Naperville. When not nursing an injury, Jim enjoys swimming and running, but lately he has turned his attention to coaching and cheering on his daughter Annsley in swimming and running cross-country. He enjoys cooking with his youngest daughter ,Delilah, and finding good recipes to experiment with her.

Another passion for Jim is high school football. Jim's stepson, Tyler, plays on the Varsity Glenbard West Hitters, a team currently ranked second in Illinois. Jim not only follows Tyler's team but writes a blog critiquing each game. He enjoys analyzing future games and opining on what adjustments need to be made when facing future opponents. Jim and Colleen, also a lawyer, have been married for eleven years. They enjoy talking about law, spending time at their lake home with the family, and dabbling in minor house projects on the weekends.

With the holiday season fast approaching us, everyone at Fletcher & Sippel wishes all of you a safe and happy holiday season.

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