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How the Affordable Care Act Can Cut a Life-Care Plan In Half

In our Fall 2014 Newsletter, we reported on several new and exciting arguments now available to defendants to limit medical damages. To briefly summarize, under the Affordable Care Act ("ACA") individuals must maintain health insurance, insurance companies must provide an array of benefits, and they cannot deny coverage for pre-existing conditions. Therefore, rather than paying for every single item outlined for a plaintiff's future treatment, a more accurate estimate of -his or her damages is the maximum out-of-pocket expenditures allowed and the insurance plan premium payments.

Recently Jim Helenhouse and Stephen Rynn were able to use the ACA to argue in mediation that all of the future medical treatment in plaintiff's $1.2 million life care plan was covered under the ACA's minimum essential health benefits. Therefore, a more accurate estimate of plaintiff's future treatment was approximately $300,000, which covered his premiums and maximum out-of-pocket expenses.*(Continued on page 3)*

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IS AMTRAK CONSTITUTIONAL?

A Very Interesting Outcome from a Very Recent Case

This month the Supreme Court addressed a seemingly technical question of how Amtrak and the FRA adopt "metrics and standards" to govern performance of freight railroads hosting Amtrak passenger trains. In so doing, however, the Supreme Court raised questions that go to the heart of whether Amtrak itself was created and organized in a Constitutional manner! See page 4.

FMLA: TO BE OR NOT TO BE

We are all familiar with the Family Medical Leave Act ("FMLA"), the federal law that allows eligible employees to take up to a maximum of 12 weeks away from work to handle certain family or medical needs. FMLA regulations apply to an employer if the employer is a private business employing 50 or more employees for 20 or more weeks in the current or prior calendar year.

A common complaint from employees is that their right to take FMLA leave was interfered with, or they were retaliated against when taking FMLA. The common thought is that many employers don't like being required to hold a position open for someone who may be away from work for as long as 12 weeks. However, every once in a while, the question arises whether an employer can force an employee to take FMLA leave.

An employer can force an employee to take FMLA leave, for example, when the employee may qualify for FMLA but opts to use some other leave, paid time off, or vacation time. Or the employer might chose to obligate an employee

(Continued on page 2)

FMLA *(Continued from page 1)*

to use FMLA leave where applicable so it can limit the total amount of time an employee is off work.

While forcing an employee to take FMLA involuntarily has generally been found to be permitted, circuit courts have placed restrictions on an employer's ability to do so and have criticized employer's motives while generally discouraging the practice. *Wysong v. Dow Chemical Co.*, 503 F.3d 441, 449 (6th Cir.2007); *Hicks v. Leroy's Jewelers, Inc.*, No. 98–6596, 2000 WL 1033029 (6th Cir. July 17, 2000). An employer's actions in attempting to impose FMLA on an employee can be viewed as FMLA interference if not properly administered.

In *Walker v. Trinity Marine Products, Inc.*, 721 F.3d 542 (8th Cir. 2013), the 8th Circuit considered the question of whether an employer, who has a good faith belief that an employee may have a serious health condition, and thus qualify for FMLA, can be forced to take FMLA until the employee obtains a doctor's certification allowing him or her to return to work.

The plaintiff in *Walker* was a welder. She was informed by her employer that, in its opinion, she had a serious health condition. The employer involuntarily placed her on FMLA leave. Walker was required to remain on leave until she obtained a doctor's certificate saying she was fit for work. Walker saw a doctor, obtained the necessary certificate, and provided it to the employer. However, the employer refused to accept the certificate and told Walker to get a second opinion. Walker got a second opinion and was again cleared to return to work. The employer again refused to allow Walker to return to work and instructed her to go to a specific doctor. This third doctor also cleared Walker to return to work. However, when Walker finally presented her certificate to the employer, she was told she had exhausted her FMLA leave and was terminated.

Of course, Walker sued. Importantly, however, Walker only asserted claims against the employer for interference with her rights under the FMLA and FMLA retaliation as it related to her termination. Analyzing Walker's claim, the District Court found that (1) the employer had not yet interfered with her FMLA rights and (2) she could not assert a claim for FMLA retaliation because she could not show that she had actually engaged in "protected activity." In retrospect, she would have had greater success had she filed a disability discrimination claim, which covers perceived disabilities even when there is no real disability. *See Butler v. State, Louisiana Dep't of Pub. Safety & Corr.*, No. CIV.A. 12-00420-BAJ-, 2014 WL 6959940, at 9 (M.D. La. Dec. 4, 2014)*; see also Vorgias v. Mem'l Health Sys., Inc., No.* 2:12-CV-218-RLM-PRC, 2012 WL 5947773, at 6 (N.D. Ind. Nov. 27, 2012)(Court finds that Plaintiff's ADA discrimination and failure to accommodate claims share a common core of operative facts with the FMLA claims originally pled.).

On appeal, Walker argued that because the employer forced her to take FMLA when she did not need it, it interfered with her ability to take FMLA when she actually did need it. Walker cited the highly criticized Sixth Circuit case, *Wysong v. Dow Chemical Co.*, in support of her position. As for Walker's retaliatory termination claim, she argued that because she had utilized FMLA, she had "engaged in a protected activity" within the meaning of the FMLA.

The Court found against Walker on each of her arguments. First, the court clarified *Wysong*, stating that, because Walker was not actually denied FMLA leave, her claim for interference was not ripe:

> [t]he Sixth Circuit emphasized that [a claim for interference based on forced leave] "ripens only when and if the employee seeks FMLA leave at a later date, and such leave is not available because the employee was wrongfully forced to use FMLA leave in the past." *Wysong*, 503 F.3d at 449. ... In our view, if forced leave can amount to interference with a right provided under the FMLA, it can do so only if the employer's action prevents the employee from using benefits to which she is entitled.

As for Walker's retaliatory termination claim, the Court quickly dismissed it, finding that, because Walker admitted she never suffered from a serious health condition, she was not covered by the FMLA and was, therefore, not entitled to its anti-retaliation protections.*(Continued on page 3)*

Cut Life Care In Half *(Continued from page 1)*

The case Fletcher & Sippel handled involved an employee who suffered an upper-extremity amputation.. Prior to mediation, plaintiff submitted a life care plan that included approximately $700,000 for prostheses and maintenance, medication, diagnostic imaging and additional medical treatment and therapy. Working with a life-care planner of their own, Jim and Stephen were able to confirm that all of plaintiff's proposed treatment -- including an optional and more expensive prosthesis that was not included in plaintiff's own plan -- would be covered under the ACA. Although plaintiff's attorney downplayed the argument, plaintiff and his wife were excited to hear that plaintiff's medical treatment would be covered by insurance and that he could not be denied coverage based on a pre-existing condition. Ultimately the case settled for far less than the final demand at mediation.

If you have any questions regarding the ACA, please feel free to contact Jim Helenhouse or Stephen Rynn at (312) 252-1500.

FMLA *(Continued from page 2)*

While Walker represents a success for the employer, had the attorneys for Walker explored what was actually motivating the employer, the outcome may have been much different. What if, for example, the employer, in forcing the employee to take FMLA, is motivated by bad faith? That is, the employer knows the employee may not qualify for FMLA but forces him or her to take leave in any event as a means of discriminating against the employee . The employer thus creates a situation where the employer merely needs to wait out the employee's FMLA before terminating them. As *Walker* demonstrates, a non-eligible employee usually cannot maintain a claim for FMLA interference unless the interference actually (as opposed to hypothetically) interferes with the employee's ability to utilize FMLA leave later on. However, if an employer forces someone to take FMLA for a discriminatory purpose — let's say to get rid of someone in a protected class — that employee might have a claim for discrimination. And, as discussed above, because an employer must effectively perceive that the employee has a disability in order to force an employee onto FMLA, you've also opened yourself up to potential liability under the ADA.

In the end, the risk may not be worth the reward.

Contact Chloé Pedersen at 312-252-1510 or cpedersen@fletcher-sippel.com for questions regarding your application of FMLA, application of involuntary FMLA leave or for an evaluation of how to effectively run FMLA concurrently with any other available leave.

CONGRATS TO CHLOÉ!!!

F & S congratulates Chloé on her selection as a 2015 Super Lawyer – Rising Star for her excellence in the practice of law. The 2015 issue of Illinois Super Lawyers Magazine was published in conjunction with Chicago Magazine.

FAILURE TO PROVIDE REASONABLE NOTICE CAN DEFEAT AN INDEMNITY CLAIM

APPELLATE COURT AFFIRMS TRIAL VICTORY

In *Williams v. BNSF*, the Illinois First District Appellate court recently upheld a jury verdict obtained by Fletcher & Sippel defeating an indemnity claim. At trial and on appeal, the primary issue centered on whether reasonable notice of the claim had been provided as required by contract. The appellate court held that a nearly 4 year delay in providing notice was not reasonable and affirmed the jury's verdict.

Fletcher & Sippel argued that the court should apply legal precedent applicable to notice provisions found in insurance contracts including a decision of the Illinois Supreme Court has held that notice provisions are valid prerequisites to coverage. The Appellate Court agreed and held that reasonable notice as required by contract is a necessary pre-condition to recovery on a claim for indemnification. In other words, the failure to provide reasonable notice will defeat a claim for indemnification.

This decision is notable because there are very few cases that directly addresses to the question of what constitutes reasonable notice in the context of a contractual indemnification claim. This suit arose out of an FELA lawsuit and reinforces the importance of performing a thorough evaluation of any incident as soon as possible, this includes identification of all potential parties and a review of all contracts to check for indemnification or insurance coverage and to ensure compliance with any applicable notice provision(s). Delay in providing notice could all the difference in the world as to who paying settlement or judgment.

If you would like more information, please contact Peter McLeod at pmcleod@fletcher-sippel.com.

DOES AMTRAK HAVE A CONSTITUTIONAL PROBLEM?

On March 9, the U.S. Supreme Court issued a decision in *Department of Transportation v. Association of American Railroads* addressing the "metrics and standards" adopted by the FRA and Amtrak to govern the performance of freight railroads that host Amtrak passenger trains. The freight railroads claimed that, as an assertedly private entity, Amtrak should not be able to both write and benefit from regulations that governed Amtrak's business partners. Amtrak could issue such regulations if it were a governmental entity, but a Federal statute specifically provides that Amtrak "is *not* a department, agency, or instrumentality of the United States Government" (emphasis added).

Notwithstanding the statute, the Supreme Court unanimously found that Amtrak is a governmental entity, not a private one, reversing a lower court's finding to the contrary and instructing the lower court on remand to address any remaining issues "properly preserved and before it."

However, two members of the Court, Justices Alito and Thomas, each wrote separately to explain at some length what they thought those issues were: given that Amtrak was a governmental entity, its structure and composition didn't seem to comport with the Constitutional requirements for such entities. Amtrak's President, for example, is not appointed by the President and confirmed by the Senate as is required for "principal officers" of the Government. Amtrak board members do not take an oath of office, as the Constitution would otherwise provide. And Amtrak's board may not have constitutional authority to appoint inferior officers. Justice Alito ended his concurrence by openly questioning whether "the present structure of Amtrak is consistent with the Constitution."

What all of this actually means for Amtrak is unclear. Stay tuned!

FELA CASE DISMISSED WITH PREJUDICE

On November 13, 2014, Fletcher & Sippel obtained a favorable ruling in a Federal Employer Liability Act ("FELA") case in Cook County, Illinois that resulted in a dismissal with prejudice. A unique procedural history involving several missteps by the plaintiff's attorneys and the application of favorable federal and Illinois FELA case law resulted in the unconventional disposition of this case.

The plaintiff filed suit in December of 2011, alleging he had contracted lung cancer as a result of his exposure to diesel exhaust while employed as a railroad machinist. Throughout the course of litigation, the plaintiff had been primarily represented by an out-of-state attorney. In July of 2013, after the plaintiff's local counsel withdrew from the case, the court granted leave for an Illinois-licensed colleague of the primary attorney to appear. The court ordered both attorneys to appear at all future court hearings. Despite this, neither attorney appeared when the case was up for trial call. The court thus dismissed the case for want of prosecution. Because neither of plaintiff's attorneys had properly entered their appearances, they did not receive the court's written notification of the dismissal.

On September 16, 2014, more than 6 weeks after dismissal, plaintiff filed a motion to reinstate pursuant to 735 ILCS 5/2-1301, which provides that a court may set aside a final order or judgment on motion filed within 30 days. The plaintiff argued, in the alternative, that the court should grant him relief from judgment pursuant to 735 ILCS 5/2-1401 and find that the FELA's 3 year statute of limitations, which had expired by the date of filing, had been tolled during the pendency of the case. Fletcher & Sippel opposed the motion, arguing that section 2-1301 did not apply because plaintiff filed his motion more than 30 days after the dismissal. F&S then argued the plaintiff was not entitled to section 2-1401 relief because section 2-1401 is a state "savings statute" that does not apply in FELA cases. As the United States Supreme Court noted in its 1965 decision in *Burnett v. New York Central Railroad Company*, allowing different rules regarding the limitations period—a material element in FELA cases—would destroy uniformity.

Illinois courts have relied on the *Burnett* decision in reaching the same conclusion on numerous occasions, including cases where the plaintiff sought relief pursuant to section 2-1401. Indeed, one Illinois appellate case, *Kulhavy v. Burlington Northern Santa Fe R.R.*, involved nearly identical facts. The court dismissed the case for want of prosecution when plaintiff and his counsel failed to appear at a court hearing, and then proceeded to seek relief pursuant to section 2-1301 or section 2-1401 more than 30 days after the dismissal. There, the court reached the same conclusions F&S argued here--that section 2-1301 relief was inappropriate because plaintiff filed his petition more than 30 days after the dismissal. Further, plaintiff was not entitled to relief because section 2-1401 is a state savings statute that did not protect a plaintiff's right to refile an action after the expiration of the FELA's three year limitations period.

F&S further argued in its case that, even if the court did have the authority to reinstate the case, it should decline to do so because plaintiff failed to show he had been diligent in prosecuting his case, which is a prerequisite to obtaining section 2-1401 relief. In making this argument, F&S highlighted the numerous instances where plaintiff's counsel disregarded applicable court rules and orders and that his counsel's conduct in failing to properly monitor and track the status of the case led to the dismissal and the failure to remedy it in a timely manner.

On November 13, 2014, after oral argument, the trial court unequivocally agreed with F&S's arguments and entered an order denying plaintiff's motion. In its order, the court stated it based its ruling on the arguments in the briefs, the case-law cited therein, including *Kulhavy*, as well as oral argument. The matter is currently pending on appeal.

F&S attorneys Colleen Konicek and Liza Bryant assisted in drafting the opposition to plaintiff's motion to reinstate. For more information, please contact Liza Bryant at 312-252-1547 or ebryant@fletcher-sippel.com.

Your Duty To Preserve Evidence

When--What--How

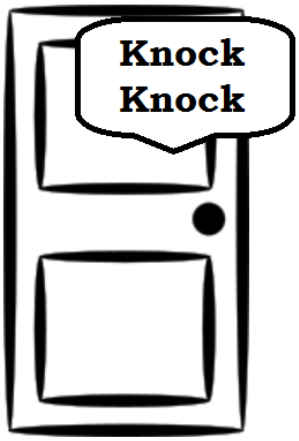
Your Duty to Preserve Evidence: Once there is an incident where litigation is reasonably anticipated, you have a duty to preserve relevant evidence (documents and materials). "Reasonably anticipated" can be when you receive a lien letter from an attorney representing a party against you or when an accident resulting in serious personal injury occurs, whether a lien letter is received or a lawsuit has been filed or not. When you "reasonably anticipate" litigation, the company should send out what is known as a "litigation hold letter" to all employees who may have possession or control of relevant evidence. The duty to preserve documents and materials that are potentially related to a claim applies to tangible information of any kind, whether electronically stored or in paper copy. However, it is electronically stored information ("ESI") that poses the greatest challenge to preservation of evidence.

What Must Be Preserved?: All documents and data related to the pending or threatened litigation must be retained regardless of how old it may be or when it was created. Types of documents or data to preserve include: emails, letters, memoranda, calendars, records of meetings, faxes, charts, manuals, payments or invoices, contracts, data downloads from event recorders or like devices, databases, video recordings, voicemails, instant messages, spreadsheets, internet usage files, audio recordings or backup tapes, handheld devices, etc. There is also a duty to preserve electronic processing systems, which may include materials such as hard drives, USB flash drives, shared network drives, etc. Given the scope of the ESI involved, it is crucial that your Company's Information Technology Department get involved immediately. The IT Department will need to suspend all ordinary-course deletion of relevant electronic documents or data, as well as document retention/destruction policies related to those documents.

How Do I Implement Preservation?: First, your company should adopt a document retention and litigation hold policy to assist employees involved to know what to preserve and how to do it. When the duty to preserve evidence arises, the following actions will help to satisfy your duty as to ESI: 1) suspend backup tape rotation, 2) suspend defragmentation, 3) suspend retention policies that involve purging emails or other ESI, 4) modify user privilege settings on systems/networks to avoid the creation or deletion of relevant data/documents, 5) restrict activity that may irreparably alter file metadata, and 6) preserve relevant individual hard drives. Additional specialized measures may be helpful to avoid "spoliation" (the legal term used to refer to failure to preserve relevant evidence or destruction of documents when the filing of a lawsuit was reasonably anticipated). As matter of course, your Company should be in the habit of timely issuing to employees a litigation hold letter each time it reasonably anticipates litigation in a matter. The letter should include specific instructions for what documents and materials should be retained and where they should be retained or to whom they should be forwarded for safe keeping.

If you would like more information, please contact Carly Comerouski at ccomerouski@fletcher-sippel.com

When the NTSB Comes Knocking on Your Door....



We all have some experience with FRA accident investigations. But what do you do if the National Transportation Surface Board ("NTSB") decides to investigate? This may sound far-fetched but the NTSB has broad jurisdiction to investigate any railroad accident in which there is a fatality or substantial property damage, or any accident involving a passenger train.

If the NTSB shows up at your incident, don't make the mistake of assuming the NTSB will do things the same way as the FRA. While there are obvious similarities in the investigative approach -- like taking witness statements and assembling the pertinent documents -- there are significant differences to keep in mind. Some of those differences include:

- The very public nature of an NTSB investigation;
- Your company's ability to participate in the investigation; and
- The limitations placed on your lawyer's role in the investigation;

Public Nature of STB Investigations. You should assume every document you produce and every statement made will be open to disclosure. It will post transcripts of witness interviews, reports, and company documents on its website for anyone to download. The NTSB even has the authority to publicly disclose proprietary information. Generally, the NTSB is required to engage in consultation with the submitting company but there is an exception where a delay in disclosure would be detrimental to public health and safety. In addition, company personnel can be required to answer questions in a public hearing. Thus, an NTSB investigation opens up your company to more public scrutiny than is typically found in an FRA investigation.

Ability to Participate in the Investigation. Unlike an FRA investigation, your company has the ability to participate directly in, and possibly influence, the outcome of an NTSB investigation. If the NTSB decides to investigate an accident, your company will be asked to participate as a "party." Parties to an investigation have the opportunity to review the investigator's field notes and reports, participate in public hearings, and submit proposed analysis and findings of facts of their own. Thus, participation affords your company the opportunity to identify and correct errors or mischaracterizations as well as the opportunity to get its version of the incident on the record. A company may decline to participate but with so much at stake, any decision to forego party status should only be made after very careful consideration.

Limitations on Role of Legal Counsel. In an NTSB investigation, the role of counsel for the company is limited. Under the NTSB's rules, attorneys representing injured parties or potential defendants are prohibited from participating in any aspect of the investigative process. This means that the company's attorneys won't be able to serve as company representatives in the investigation, but attorneys are still able to advise the company during the process, including representation of witnesses during interviews. Just keep in mind there may be conflict issues with that representation.

Conclusions--PLAN AHEAD. As the saying goes...The best defense is a good offense. Since any railroad can some day face an NTSB investigation, the best way to prepare is to spend some time beforehand reviewing the NTSB process and putting together a response plan. At a minimum, the plan should provide a detailed description of NTSB procedures, identify the individual(s) who will be in charge of the investigation for your organization as well as those individuals who could serve as representatives or technical specialists, and list the types of documents that may be requested and their custodian.

If you have any questions regarding NTSB investigations, please contact Peter McLeod, pmcleod@fletcher-sippel.com.

The Surface Transportation Board: Two out of Three Ain't Bad?

As of January 1, 2015, Daniel Elliot's holdover term as Chairman of the Surface Transportation Board ("STB") ended. As a consequence, the STB – the much-slimmed-down successor to the country's oldest regulatory agency, the Interstate Commerce Commission – has operated since with 2 Board members, rather than the usual three. The STB has soldiered on with less than 3 Board members before. The agency has functioned with 2 Board members roughly 25% of the time since the STB's inception in 1996, and the STB functioned under then -Chairman Roger Nober alone for over a year roughly a decade ago. With no clear indication as to when or whether the Senate will act favorably upon a lame duck nomination to fill Elliot's spot (possibly by re-appointing Elliott himself), STB practitioners are left to question the logic of classic rocker Meatloaf's ballad in an STB context: Is it true that "two out of three ain't bad?"

STB practitioners and their clients find themselves in interesting circumstances. The STB is currently headed by Acting Chairman Deb Miller, a former Kansas Secretary of Transportation, a Democratic appointee, and a relative newcomer with less than 1 year of direct STB experience. She is joined on the Board by Ann Begeman, a 2011 Republican appointee and long-time Capitol Hill staffer with South Dakota ties. It's not entirely clear the extent to which these STB's leaders share common views and regulatory philosophies, but recent STB decisions, including several cases acted upon during the twilight of former Chairman Elliott's tenure, suggest that Ms. Miller and Ms. Begeman could disagree more frequently than has been the case under other STB leadership in years past.

This not to suggest that STB Board member dissent is the norm. It isn't. In fact, the vast majority of "Entire Board" decisions – those substantive decisions reserved for the Board members themselves – reflect strong agency consensus on a number of regulatory issues. However, Ann Begeman has penned significantly more dissents per year (on average) during her STB service than has any Board member before her. Her rate of dissent accelerated during the final month of Chairman Elliot's term, a potentially significant consideration given Miller's presence at the STB at that time.

Begeman has been a frequent dissenter in STB decisions supported by Democratic appointee majorities (first, under voting majorities comprised of Board members Elliott and Frank Mulvey, and later Elliot and Miller). Moreover, Begeman isn't reserved in expressing her "minority" viewpoint, often registering dissents reminiscent of those of outspoken U.S. Supreme Court Justice Antonin Scalia. While Begeman's dissents might occasionally be attributed to political party considerations, the STB traditionally is rather apolitical in its decision making and Begeman's dissents more often reflect non-partisan policy differences among the voting Board members. If indeed past is prologue, then, whether publicly-disclosed or not, Miller and Begeman will periodically reach an impasse. Perhaps Elliot's departure will foster more consistent harmony between the 2, but the STB already has released 1 post-Elliot decision in which Miller and Begeman have disagreed.

The question, of course, is: If Miller and Begeman reach an impasse on a matter, what becomes of the case? To begin with, a final 1-to-1 vote means that whatever the request pending before the STB, the requested action would be denied for lack of a majority. A split vote, in essence, equals no action at all – the *status quo* stands. That would be a more probable outcome if Begeman endorses the "no-action" result. But if Miller does not want a "no action" result, then it's possible Miller – who currently controls the STB's docket as its Acting Chairman – could exercise her discretion to withhold a vote on a matter when she is not under a procedural decision deadline prescribed by federal law.

Again, STB decisions generally reflect consensus among the Board members. But those monitoring the STB are keeping a close eye in the coming months on Deb Miller's regulatory philosophy, particularly how she distinguishes herself from former Chairman Elliott. It will be interesting to see where Miller and Begeman share common ground, identify where the two differ, and see to what extent certain their disagreements affect STB decision making and the pace at which it handles its cases.

Two out of three ain't bad? We'll see. It may depend upon what you'd like to see happen . . . or, more to the point, not happen.

If you would like more information, please contact Robert Wimbish at rwimbish@fletcher-sippel.com.

OSHA UPDATE

Affirmative Defense: Plaintiff would have been Disciplined Regardless of the Injury

In *Koziara v. BNSF Ry. Co.*, No. 13-CV-834 JDP, 2015 WL 137272, at *11-12 (W.D. Wis. Jan. 9, 2015), BNSF sought to avail itself of the only available affirmative defense it had, arguing that, even if the plaintiff could prove his prima facie case, BNSF would have taken the same disciplinary action regardless of whether the plaintiff had reported his injury. BNSF claimed it suspended, and later terminated, Koziara because he violated workplace safety rules and was found to have engaged in theft of company property.

Even if BNSF's justification appeared legitimate on its face, BNSF could lose its summary judgment motion if the record suggests that discriminatory animus crept into its disciplinary decisions. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 163 (3d Cir.2013) ("While the facts may show that [the employee] was technically in violation of written rules, they do not shed any light on whether [the company's] decision to file disciplinary charges was retaliatory."). On the other hand, if BNSF could prove its contention by clear and convincing evidence, then Koziara's retaliation claim would fail as a matter of law. *See* § 42121(b)(2)(B)(ii); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 726 (7th Cir.2009).

To prevail, Koziara must create a genuine dispute of fact as to whether his injury report motivated BNSF to retaliate. *See Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir.2014) ("FRSA provides that a rail carrier may not discharge or in any other way *discriminate* against an employee for engaging in protected activity.... As the [Supreme] Court explained in *Staub*, the essence of this intentional tort is 'discriminatory animus.' "). Koziara could, therefore, withstand summary judgment by identifying evidence that BNSF selectively enforced its rules, investigated him for the purpose of manufacturing a rule violation, or otherwise discriminated against him in retaliation for his injury report. Of course, this is exactly what Koziara did.

Koziara pointed to precise instances where BNSF had selectively enforced its rules against him. Specifically, with regard to Koziara's suspension, BNSF admitted it never disciplined the co-worker who was standing next to Koziara when he was injured. Although the co-worker was apparently uninjured—and so did not file an injury report—he was standing just as close to the front-end loader as Koziara was, and presumably, he violated the same rules. BNSF contended it found that Koziara violated safety rules by standing too close to the front-end loader and, unlike the other employee, he was a foreman. In dismissing this argument, the court noted a jury could accept BNSF's response--but could just as easily reject it, and find discriminatory animus motivated BNSF's actions.

Evidence of inconsistent application of the workplace rules also precluded BNSF from showing it would have terminated Koziara for his theft regardless of his injury report. If BNSF had supported its motion for summary judgment with evidence that employee theft inevitably resulted in severe discipline, the company might have succeeded. But BNSF was only able to identify one employee who stole scrap metal and was terminated. In contrast, Koziara produced evidence suggesting that BNSF employees often took, or saw others take, used ties for personal use. Specifically, Koziara pointed to exhibits submitted during his disciplinary hearings and to deposition testimony from witnesses in the case showing that many employees never asked BNSF's permission because they did not think they needed it, and others apparently took company property without consequences.

Based on the above, the court concluded a jury might find that BNSF selectively enforced its rules against Koziara, or investigated him just to find a reason to terminate him. Hence, BNSF did not meet its burden of showing by clear and convincing evidence that it would have terminated Koziara even if he had not reported an injury.

If you have any questions regarding OSHA updates, please contact Chloé Pedersen, cpedersen@fletcher-sippel.com.

ICCTA Preemption and Local Regulation of Shipper Facilities: the *SEA-3* Case

Generally speaking, the Surface Transportation Board ("STB") has taken what most would regard as a rather expansive view of federal preemption under the ICC Termination Act of 1995 ("ICCTA")....until the very recent case of *SEA-3, Inc. – Petition for Declaratory Order*, FD 35853 (March 17, 2015). In that case, the STB placed limits on ICCTA preemption of local land use regulation when applied to the proposed expansion of an industry seeking to increase its railroad shipments, provided the local land use oversight is not a subterfuge for regulating railroad.

SEA-3, Inc. is a liquid propane gas ("LPG") distributer in Newington, NH. SEA-3 proposed to expand its distribution facility by constructing 5 new rail berths on land it leased from Pan Am Railways. SEA-3 already received regular rail service from Pan Am. SEA-3 claimed that the additional rail berths are necessary to respond to propane market changes under which SEA-3 would procure more LPG by rail from domestic sources rather than by ship from traditional overseas sources.

Newington's Planning Board approved the plant expansion, but the nearby community of Portsmouth, NH, through which Pan Am's Newington Branch passes, filed an appeal with the Newington Zoning Board of Adjustment. Portsmouth later filed a petition with the New Hampshire Superior Court to overturn the Newington Planning Board's decision.

SEA-3, joined by Pan Am, NS, CSXT, and the Propane Gas Association of New England (collectively, the "SEA-3 Team") argued that Portsmouth's claims were driven by Portsmouth's desire to block additional rail-borne LPG tank car traffic moving through its community. Portsmouth insisted it was only concerned with ensuring that SEA-3's facility expansion plans would be assessed under a locally-mandated safety and hazard study. Portsmouth pointed out that SEA-3 had, in the case of past facility expansion, agreed to such safety studies as part of the Newington permitting processes.

The SEA-3 Team's ICCTA preemption argument relied extensively upon *Boston & Maine Corp.—Petition for Declaratory Order* ("*Winchester*"), FD 35749 (STB served July 19, 2013). In *Winchester*, the STB ruled that ICCTA preempted a local ordinance that would have regulated the provision of rail service over industry-owned track. The municipality in that case (Winchester, MA) defended its ordinance claiming the regulation applied only to private industrial track beyond the scope of the STB's jurisdiction and only incidentally affected the rail service provider's (Pan Am, once again) operations. The STB, however, viewed the ordinance as thwarting the customer's receipt of rail common carrier service and, thus, indirectly attempting to regulate rail common carrier operations.

Portsmouth responded that it was attempting no such indirect railroad regulation. It was focused exclusively upon the SEA-3 facility. Moreover, it was not attempting to have Newington include Pan Am's operations within the scope of the safety analysis.

The STB was unpersuaded by the SEA-3 Team's preemption argument, distinguishing *Winchester*'s facts from those at issue here. As the STB explained, SEA-3 is not a rail carrier, and there was insufficient evidence to support the proposition that Portsmouth was attempting to regulate Pan Am's service to SEA-3. Portsmouth's stated efforts, per the STB, were focused on local "permitting of the expansion of SEA-3's facility" (as opposed to the facilities or operations of a rail carrier) and "it appears that the only regulatory action at issue in this case is a local government's participation in zoning litigation over the expansion of a non-carrier facility."

But the STB left the ICCTA preemption door ajar. It noted, "If Portsmouth or any other state or local entity were to take actions as part of a proposed safety/hazard study, or otherwise, that interfere unduly with Pan Am's common carrier operations, those actions would be preempted." Such language suggests that the safety/hazard study could not result in either of the involved municipalities placing limits upon Pan Am's rail operations nor could the study be the vehicle by which either Portsmouth or Newington attempt to impose preconditions upon Pan Am regarding increased LPG flows.

(Continued on page 6)

SEA-3*(Continued from page 5)*

The *SEA-3* decision appears to hinge upon two considerations: (1) The STB accepted Portsmouth's claim that it was not seeking a safety study of Pan Am's railroad operations, but rather was focused upon SEA-3's distribution site and (2) the commodity in question is hazardous, giving local police power concerns more weight. In fact, the nature of the commodity in question might have affected the STB's reasoning more than if this case had involved lumber, salt or corn syrup.

If you would like more information, please contact Robert Wimbish at rwimbish@fletcher-sippel.com.

Upcoming Events

March 28-31: **ASLRRA Annual Meeting**, Orlando, FL - Panel: Hot! Hot! Hot! - Legal—Steven Rynn https://member.aslrra.org/aslrra/aslrra2015connections

April 30-May 1: **Midwest Claims Conference**, Bloomington, MN https://www.eventbrite.com/e/midwest-claims-conference

May 27-28: **National Association of Rail Shippers (NARS),** Chicago, IL—https://www.railshippers.com/upcoming_meetings.asp

June 27-30: **Annual Meeting of the Association of Transportation Law Professionals**, http://www.atlp.org/index

July 13-14: **Midwest Association of Rail Shippers,** Lake Geneva, WI https://mwrailshippers.com/upcoming_meetings.asp

APPELLATE COURT AFFIRMS DISMISSAL OF BREACH OF CONTRACT CLAIM

Only One Bite at the Apple

The First District Appellate Court of Illinois recently affirmed the dismissal of a breach of contract claim obtained by Fletcher & Sippel on behalf of Quality Terminal Services, LLC ("QTS"). In the trial court, BNSF filed a complaint against QTS alleging it had breached the agreement between the parties by failing to procure an appropriate insurance policy. QTS moved to dismiss the claim based on *res judicata* because BNSF had previously pursued a breach of contract claim against QTS in a separate action. The trial court dismissed BNSF's claim with prejudice and BNSF appealed.

On appeal, BNSF argued its claim arose from a different set of facts than the previous case and was thus properly asserted as a new claim. Counsel for QTS was able to convincingly show that BNSF had, in fact, pursued a breach of contract claim in the related action. Further, BNSF had represented to the trial court in that case that it believed it had a breach claim based on a failure to procure an appropriate insurance policy. Based on those facts, the appellate court affirmed the dismissal of BNSF's claim.

If you would like more information, please contact Peter McLeod at pmcleod@fletcher-sippel.com.

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