Goad v. BNSF Ry. Co.

United States District Court for the Western District of Missouri, Western Division

March 2, 2016, Decided; March 2, 2016, Filed

Case No. 15-00650-CV-W-HFS

Reporter
2016 U.S. Dist. LEXIS 178444 *

MICHAEL GOAD, Plaintiff, v. BNSF RAILWAY COMPANY, Defendant.

Counsel: [*1] For Michael Goad, Plaintiff: Steven Lee Groves, Groves Powers, LLC, St. Louis, MO.

For BNSF Railway Company, Defendant: Angela Lee Angotti, LEAD ATTORNEY, Overland Park, KS.

Judges: HOWARD F. SACHS, UNITED STATES DISTRICT JUDGE.

Opinion by: HOWARD F. SACHS

Opinion

ORDER

Defendant, BNSF Railway Company, has filed a motion to dismiss pursuant to *Fed.R.Civ.P. 12(b)(6)*. BNSF provides railroad transportation and is considered a railroad carrier within the meaning of *49 U.S.C. § 20109* and *49 U.S.C. § 21102*.

Factual and Procedural Background

Plaintiff, Michael Goad, was employed by BNSF as a conductor at the Argentine Yard in Kansas City, Kansas. (Complaint: ¶ 4). Plaintiff claims that he suffers from chronic hives and anxiety, and receives treatment from his medical doctor. (Id: ¶ 7). As far as plaintiff knows, the medical conditions are not job related, but "from time to time," prevented him from safely working and his doctor would advise him to remain off work. (Id: ¶¶ 7-8).

An investigative hearing was held on July 24, 2014 regarding attendance issues for the prior 3 month period, and on or about August 18, 2014, plaintiff received a Standard Formal Reprimand and a 1 year period review. (Id: ¶ 9).

An investigational hearing was held on October 9, 2014 regarding attendance issues, [*2] and on or about October 21, 2014, plaintiff received a Level S, 30 day record suspension and a 3 year period review. (Id).

On or about November 18, 2014, plaintiff filed a complaint with the United States Department of Labor's Regional Occupational Safety and Health Whistleblower Office alleging retaliatory action by defendant. (Id: ¶ 10). After completion of the investigation, on February 18, 2015, OSHA found no reasonable cause of a violation by BNSF. (Id: ¶ 11). On or about March 9, 2015, plaintiff requested a review of OSHA's determination and a hearing before an Administrative Law Judge. (Id: ¶ 12). On or about July 27, 2015, plaintiff gave notice of intent to file an action in federal court. (Id: ¶ 13).[1]

---

[1] An employee who believes his employer has violated *§ 20109* may file a complaint with the Secretary of Labor within 180 days of the violation. Gunderson v. BNSF Ry. Co., *20109(d)(1)-(2)*. Initially, the Secretary undertakes an investigation and issues a written finding as to whether there is reasonable cause to believe that the employer violated *§ 20109*. *29 C.F.R. §§ 1982.104-105*. Id. A party may obtain review of the Secretary's finding by filing an objection, *29 C.F.R. § 1982.106*, and an administrative law judge then conducts a hearing and issues findings of fact and conclusions of law. *29 C.F.R. §§ 1982.107*, *1982.109*.

The parties may petition for review of the ALJ's decision before the Administrative Review Board *29 C.F.R. § 1982.110(a)*, and if neither party petitions for review or if the ARB declines to accept the petition, then the ALJ's decision becomes the final order of the Secretary. *29 C.F.R. § 1982.110(a)*. In the event of an unfavorable review by the ARB of the ALJ's decision, the parties may appeal the final order to the United States Court of Appeals for the circuit in which the violation allegedly occurred. *49 U.S.C. § 20109(d)(4)*; *29 C.F.R. § 1982.112*.

Under circumstances, as here, employees have the right to abandon the administrative process and file an original action in federal district court. *Gunderson, at 1260*. In particular, if the Secretary fails to issue a final decision within 210 days after the administrative complaint was filed, and if the delay was not due to bad faith on the employee's part, then the employee may bring an original action for de novo review in federal district court. *49 U.S.C. § 20109(d)(3)*.

Discussion

Standard of Review

When ruling on a motion to dismiss under *Fed.R.Civ.P. 12(b)(6)*, the court must accept as true all of the factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *Gunderson v. BNSF Ry. Co., 29 F.Supp.3d 1259, 1261 (D.Minn. 2014)*; citing, *Aten v. Scottsdale Ins. Co., 511 F.3d 818 (8th Cir. 2008)*. Accepting the plaintiff's allegations of fact as true and affirming only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Aten, at 820*.

The FRSA is intended to promote safety [*3] in every area of railroad operations. *Stokes v. Southeastern Pennsylvania Transportation Authority, 2015 U.S. Dist. LEXIS 114356, 2015 WL 5093114 *2 (E.D.Pa.)*. To that end, in 2007 Congress substantially amended the law to provide railroad employees significant protections from retaliation due to whistleblowing or other acts furthering railroad safety. Id. The statute provides a number of specific protected activities for which a railroad employee may not be disciplined. Id.

Although not expressly stated in the complaint, in his opposing suggestions to the instant motion plaintiff claims he engaged in a protected activity when he "occasionally" was absent from work pursuant to orders of his treating physician. Thus, he claims protection from retaliatory conduct from BNSF under *49 U.S.C. § 20109*, particularly *subsection (c)(2)*. (Opposing Suggestions: pg. 3-4).

49 U.S.C. § 20109(c) reads:

> (c) Prompt medical attention
>
> (1) Prohibition — A railroad carrier or person covered under this action may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive [*4] safe and appropriate medical care.
>
> (2) Discipline — A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall nor be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

Admittedly, there is no case law within this circuit directly on point, and plaintiff provides no direct authority, regarding whether *subsection (c)(2)* under the FRSA provides protection from discipline when following a physician treatment plan for a non-work related illness. However, persuasive legal guidance may be found in *Port Authority Trans-Hudson Corp. v. Secretary, U.S. Dept. of Labor, 776 F.3d 157 (2015)*, where [*5] the Third Circuit provided a detailed analysis on the question.

In that case, a railroad employee was suspended for excessive absenteeism after sustaining injury to his back while moving boxes while at *home*. *Port Authority Trans-Hudson, at 159-60*. The question before the court was whether the defendant railroad employer violated the anti-retaliation provision in *subsection (c)(2)*. The court noted that while the Administrative Review Board "ARB" upheld a finding by an ALJ that *subsection (c)(2)* applied regardless of where an employee was injured in *Bala v. Port Authority Trans-Hudson Corp., ARB Case No. 12-048, 2013 DOL Ad. Rev. Bd. LEXIS 88, 2013 WL 5872050 (Sept. 27, 2013)*, a different ARB panel (albeit comprised of two of the same three members) made a contrary finding several months prior to that ruling in *Santiago v. Metro-North Commuter Railroad Co., ARB Case No. 10-147, 2012 DOL Ad. Rev. Bd. LEXIS 70, 2012 WL 3255136 (July 25, 2012)*.

The court noted that prior to amendment, *49 U.S.C. § 20109* was exclusively an anti-retaliation provision, and the amendment inserted a new *subsection (c)*, containing both an anti-retaliation provision in *subsection (c)(2)*, and a more direct worker safety provision in *subsection (c)(1)*. *Port Authority Trans-Hudson, at 161*. The court reasoned that *subsection (c)(1)* entitled "Prohibition" is a substantive provision, while *subsection (c)(2)* entitled "Discipline" is an anti-retaliation provision. *Id, at 163*. And, generally, an anti-retaliation provision seeks to secure the primary objective advanced by the substantive provision. *Id, at 163*; citing, *Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)* (analyzing the

relationship between *§§ 703* and *704 of Title VII*).[2]

The court [*6] further reasoned that the plain text of *subsection (c)(1)*, which covers an "employee who is injured during the course of employment," makes clear that its primary objective is to ensure that railroad employees are able to obtain medical attention for injuries sustained on-duty. *Port Authority Trans-Hudson, at 163*. *Subsection (c)(2)* furthers that objective by encouraging employees to take advantage of the medical attention protected by *subsection (c)(1)*, without facing reprisal. Id. Interpreting *subsection (c)(2)* to also cover off-duty injuries would not further the purposes of *subsection (c)(1)* which is explicitly limited to on-duty injuries. Id. The statute as drafted simply avoids repeating words unnecessarily.

Further reasoning included review of Congress' actual intention as it relates to *subsection (c)(2)*, as analyzed by the ARB in Bala which focused on an extension of the Supreme Court's decision in *Russello v. United States, 464 U.S. 16, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)*. In Russello, a case brought under a provision of the Racketeer Influenced and Corrupt Organization "RICO," the Court set out a canon of interpretation that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *Port Authority Trans-Hudson, at 164*; citing, *Russello, at 23*. The ARB in *Bala [*7]* , in reliance on Russello, held that because *subsection (c)(1)* is explicitly limited to injuries during the course of employment and *subsection (c)(2)* does not contain such language, Congress clearly intended *subsection (c)(2)* to apply without such limitation. *Port Authority Trans-Hudson, at 164*.

Nevertheless, the Court in Port Authority Trans-Hudson determined that the Russello presumption only applies when two provisions are sufficiently distinct that they do not — either explicitly or implicitly — incorporate language from the other provision. Id. Thus, while recognizing some similarity between the two cases, the Court found the similarity to be superficial and of little help in the case at hand. Id.[3] Similarly here, while conceding that to his knowledge his medical condition is not job related, plaintiff encourages a reading of *subsection (c)(2)* that would provide him the right to remain off work pursuant to the order of a treating physician without incurring discipline. Plaintiff's interpretation of *subsection (c)(2)* is contrary to the thorough analysis set forth by the court in Port Authority Trans-Hudson, and he fails to allege sufficient facts in the complaint to establish that he could plausibly be entitled to relief under this subsection.

Plaintiff also claims that when [*8] he notified BNSF that he was medically unfit to perform his duties he was reporting a "hazardous safety condition" which provided protection under *subsection (b)(1)(A) of the FRSA*. (Opposing Suggestions: pg. 4).

According to plaintiff, protection is also afforded to him under *subsection (b)(1)(A)* which provides:

> Hazardous safety or security conditions, - (1) A railroad carrier engaged in interstate or foreign commerce, or an officer, or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for —
> (A) reporting, in good faith, a hazardous safety or security condition;

Plaintiff contends that when an employee notifies the railroad that they are medically unfit to perform their duties, they are engaging in another form of protected activity defined in *subsection (b)(1)(A)* as a "hazardous safety condition." Contrary to plaintiff's contention, after careful review of the purpose of the entirety of the FRSA, the Third Circuit concluded that *subsection (b)(1)(A)* must also be read as having at least some work-related limitation even though no such limitation appears on the face of the statute. *Port Authority Trans-Hudson Corp., 776 F.3d, at 166*. The court reasoned that similar to the work related limitation required for employee protection [*9] under *subsection (c)(2)*, it would be consistent to also apply a work-related limitation to *subsection (b)(1)(A)*. Id; see also, *Stokes v. Southeastern Pennsylvania Transportation Authority, 2015 U.S. Dist. LEXIS 114356, 2015 WL 7273469 *3 (E.D.Pa.)*. Although plaintiff claims an FRSA violation based on alleged retaliatory action against him for engaging in a purported protected activity, the factual content of the complaint does

[2] It has also been held within the context of the *Fair Labor Standards Act* that the anti-retaliation provision is included in the Act, not as a freestanding protection ... but rather as an effort to foster a climate in which compliance with the substantive provisions of the Act would be enhanced. *Port Authority Trans-Hudson, at 163*; citing, *Dellinger v. Sci. Applications Int'l. Corp., 649 F.3d 226, 230 (4th Cir. 2011)*; quoting, *Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 293, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960)*.

[3] The court also noted that the Russello presumption is based on statutory context and a hypothesis of careful draftsmanship, but that the hypothesis is at least partially eroded by numerous examples of inexact drafting in *§ 20109*. *Port Authority Trans-Hudson, at 165*; citing, *City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 435-36, 122 S. Ct. 2226, 153 L. Ed. 2d 430 (2002)* (not following the Russello presumption).

not permit a reasonable inference that BNSF is liable for the alleged misconduct.[4]

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss (ECF doc. 7) is GRANTED.

/s/ Howard F. Sachs

HOWARD F. SACHS

UNITED STATES DISTRICT JUDGE

March 2, 2016

Kansas City, Missouri

End of Document

[4] Plaintiff's rationale for increasing statutory protection is not here criticized.