___. EMPLOYMENT — FEDERAL RAILWAY SAFETY ACT

___. LEGAL OVERVIEW (GENERAL)

The Federal Railway Safety Act, 49 U.S.C. § 20101 *et seq.*, (the "FRSA") was enacted in 1970 "to promote safety in every area of railroad operations and reduce railroad-related accidents." 49 U.S.C. § 20101. In 1980, the FRSA was expanded to include protections against retaliation for railroad employees engaged in protected conduct or activities, such as reporting violations of safety laws or refusing to work in hazardous conditions. *Ray v. Union Pacific RR. Co.*, 971 F.Supp.2d 869, 877 (S.D.Iowa 2013) (referring to Fed. R.R. Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1811 (1980)). In 2007, Congress again amended the FRSA to include additional categories of protected activities. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, 1221 Stat. 266, 4444 (2007). The FRSA currently states that a railroad employer: "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done ..." to, among other things, report or attempt to report a work-place injury or illness. 49 U.S.C. § 20109(a)(4).

The 2007 amendments also incorporated the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR-21"), which establishes the standards of liability and burdens of proof for administrative and civil actions. *See* 49 U.S.C. § 20109(d)(2)(A). AIR-21 employs a two-part, burden-shifting test. The plaintiff must first make a *prima facie* showing, by a preponderance of the evidence, that (1) he engaged in a protected activity; (2) the railroad employer knew or suspected—actually or constructively—that the plaintiff engaged in a protected activity; (3) the plaintiff suffered an adverse action; and (4) the protected activity was a contributing factor in the adverse action. *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157-59 (3d. 2013) (internal citation omitted). After the

plaintiff establishes a prima facie case, the burden shifts to the railroad who must prove by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. *Id.* at 159.

The Act is administered by the Occupational Safety and Health Administration (OSHA), and violations are investigated pursuant to the procedures of 49 U.S.C. § 42121 (b). 49 U.S.C. § 20109 (d) (2). Action is commenced by filing a complaint with OSHA within 180 days of the violation. 49 U.S.C. § 20109 (d) (2) (ii). At the conclusion of OSHA's investigation the Secretary of Labor, acting through the Regional Administrator of the OSHA region where the case was investigated, will issue findings and a preliminary order. Within 30 days of receipt of the findings, objections and a request for hearing before an Administrative Law Judge may be filed. Hearings before the Administrative Law Judge are governed by 49 C.F.R. Subtitle A, Part 18. Final decisions may be appealed to the United States Court of Appeals. 49 U.S.C. § 20109 (d) (4). If there has been no final decision within 210 days of the filing of the complaint, the employee may bring an original action in Federal District Court for *de novo* review. 49 U.S.C. § 20109 (d) (3).

20109 Model Jury Instructions

Verdict Directors

Discrimination Due, In Whole or In Part, to Engagement in Protected Activity

Your verdict must be for the plaintiff and against the defendant if all of the following elements of plaintiff's claim have been proved:

First, plaintiff [briefly describe the protected activity[1] plaintiff engaged in (e.g. "notified defendant of plaintiff's work-related personal injury")];

Second, defendant knew plaintiff [restate the protected activity from Paragraph First (e.g. "notified it of plaintiff's work-related personal injury")];

Third, defendant [briefly describe the discrimination at issue (e.g. "fired plaintiff")];

Fourth, defendant [restate the discrimination from Paragraph Third (e.g. "fired plaintiff")], in whole or in part due to plaintiff [restate the protected activity from Paragraph First (e.g. "having notified defendant of plaintiff's work related injury")]; and

Fifth, [restate the discrimination from Paragraph Third (e.g. "firing plaintiff")] resulted, in whole or in part, in damages to plaintiff.

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under (describe affirmative defense instruction),] then your verdict must be for defendant.

[If it has been proved that defendant's stated reason for (briefly describe the discrimination at issue [e.g. "firing plaintiff"]) is a pretext to hide retaliation, you may find that ("firing plaintiff") was due, in whole or in part, to plaintiff's [briefly describe the protected activity plaintiff engaged in (e.g. "notifying defendant of plaintiff's work-related personal injury")].

[Your verdict must be for defendant if you find in favor of the defendant under Instruction ____ (insert number of affirmative defense instruction)].

[1] From 49 U.S.C. § 20109 (a) (1-7) or (b) (1) (A-C).

Medical Attention (Denial, Delay or Interference)

Your verdict must be for the plaintiff and against the defendant if all of the following elements of plaintiff's claim have been proved:

First, plaintiff was injured during the course of his employment;

Second, defendant [(denied) (delayed) (interfered with)] [(medical treatment) (first aid treatment)] of plaintiff;

Third, defendant's [(denial of) (delaying of) (interference with)] [(medical treatment) (first aid treatment)] of plaintiff resulted, in whole or in part, in damages to plaintiff;

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under (describe affirmative defense instruction),] then your verdict must be for defendant.

[Your verdict must be for defendant if you find in favor of the defendant under Instruction ___ (insert number of affirmative defense instruction)].

Medical Attention (Discipline for Requesting I Following Medical Treatment)

Your verdict must be for the plaintiff and against the defendant if all of the following elements of plaintiff's claim have been proved by a preponderance of the evidence:

First, plaintiff [(requested medical treatment) (requested first aid treatment) (followed the [(orders) (treatment plan)] of his treating physician when he [briefly describe what the plaintiff did to follow the orders I treatment plan of his treating physician (e.g. "marked off from work to attend physical therapy")];

Second, defendant [(disciplined) (threatened to discipline)] plaintiff due in whole or in part to plaintiff [restate the protected activity from Paragraph First (e.g. "having marked off work to attend physical therapy ordered by his treating physician")];

Third, defendant's [(discipline) (threat to discipline)] plaintiff resulted, in whole or in part, in damages to plaintiff;

If any of the above elements has not been proved by a preponderance of the evidence, [or if the defendant is entitled to a verdict under (describe affirmative defense instruction),] then your verdict must be for defendant.

[If it has been proved that defendant's stated reason for ([disciplining] [threatening to discipline] plaintiff) is a pretext, you may find that defendant's ([disciplining] [threatening to discipline] plaintiff) was due, in whole or in part, to plaintiff (requesting medical treatment) (requesting first aid treatment) (following the [orders] [treatment plan] of his treating physician)].

[Your verdict must be for defendant if you find in favor of the defendant under Instruction ___ (insert number of affirmative defense instruction)].

Instruction No. ____

"Clear and convincing evidence" means that the thing to be proved is highly probable or reasonably certain.

Ray v. Union Pacific RR. Co., 2013 WL 5297172, at *15 (S.D.Iowa Sept. 13, 2013)

AFFIRMATIVE DEFENSE INSTRUCTION APPLICABLE TO ALL VERDICT DIRECTORS

Instruction No. _____

Your verdict must be for defendant if it is proven by clear and convincing evidence that it would have taken the same action of [insert action] (e.g. charging plaintiff with a rules violation and firing plaintiff) even if plaintiff had not [insert protected activity] (e.g. notified defendant of plaintiffs work-related personal injury.).

49 U.S.C. §§ 20109(d)(2)(A)(i) and 42121(b)(2)(B)(iii)(iv)
Ray v. Union Pacific RR. Co., 2013 WL 5297172, at *15 (S.D. Iowa Sept. 13, 2013)
Araujo v. New Jersey Transit Rail Operations, Inc., 708 F.3d 152, 157 (3d Cir.2013)
Kuduk v. BNSF Ry. Co., 2013 WL 5413448, at *9 (D. Minn. Sept. 26 2013)