UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSHUA CLEVELAND,

Plaintiff,

v.

LONG ISLAND RAILROAD COMPANY,

Defendant.

ECF CASE

No. 18-cv-2080-VEC

STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA

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The United States of America, by its attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submits this Statement of Interest[1] in response to the Court's Order dated March 19, 2019 (ECF No. 31). That order alerted the United States and the State of New York that the Court is considering whether the filing of a lawsuit under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*, is a protected activity for purposes of the anti-retaliation provision of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109(a), and "invite[d] the United States and the State of New York to submit their views on this question." The United States appreciates the Court's alerting it to this matter, and respectfully submits this Statement to convey the Government's understanding of FRSA's anti-retaliation provision, relevant current precedent, and circumstances in which a FELA lawsuit can constitute protected activity under FRSA. This Statement does not advocate or take a position as to any possible argument for extensions or differing possible constructions of FRSA's anti-retaliation provision.

BACKGROUND

1. The Federal Railroad Safety Act's Anti-Retaliation Provision and Relevant Enforcement Provisions Permit Both Administrative and Judicial Proceedings

The FRSA provision that is relevant here prohibits a railroad from discharging, demoting, suspending, reprimanding, or "in any other way" discriminating against an employee if such discrimination is due, "in whole or in part," to the employee's "lawful, good faith" act to "notify, or attempt to notify," the railroad of "a work-related personal injury" of an employee. 49 U.S.C. § 20109(a)(4). The intent of FRSA's anti-retaliation provision generally "is to ensure that

[1] Under the United States Code, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

employees can report their concerns without the fear of possible retaliation or discrimination from employers." H.R. Rep. No. 110-259, at 348 (2007). The FRSA itself provides that, to demonstrate unlawful retaliation in violation of this provision, an employee must prove by a preponderance of the evidence that his or her protected activity was a contributing factor to the railroad's adverse personnel action. *See* 49 U.S.C. § 20109(d)(2) (incorporating the rules, procedures, and burdens of proof set forth in 49 U.S.C. § 42121(b)). If the employee makes this showing, the railroad is liable unless it proves by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. *See id*.

An employee can file an administrative complaint with the Department of Labor alleging violations of FRSA's anti-retaliation provision. If an employee initiates administrative proceedings, the Secretary of Labor has authority to administratively adjudicate such complaints, and has delegated to the Department of Labor's Administrative Review Board ("ARB") the authority to issue final decisions on his or her behalf. *See* 49 U.S.C. § 20109(d); U.S. Dep't of Labor, Secretary's Order No. 01-2019 (Feb. 15, 2019), 84 Fed. Reg. 13,072-13,074 (Apr. 3, 2019); *see also* 29 C.F.R. Part 1982. Thus, the Department of Labor has expertise in the application of FRSA's anti-retaliation provision, and has an interest in the proper development and application of law interpreting and applying that FRSA provision.

An employee who is dissatisfied with the ARB's determination can appeal to the appropriate circuit court of appeals. *See* 49 U.S.C. § 20109(d)(4). If a final decision has not been issued within 210 days after the filing of the administrative complaint, the employee can commence a lawsuit against the railroad in the appropriate district court. *See* 49 U.S.C. § 20109(d)(3). The district court considers such complaints de novo. *See id*.

2. Plaintiff's Complaint

Plaintiff Joshua Cleveland ("Cleveland") filed a complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA") alleging that Defendant Long Island Railroad Company ("LIRR") terminated his employment in retaliation for reporting a work-related injury and for filing a FELA lawsuit. *See* Complaint (ECF No. 1) ¶ 8. The Department of Labor has informed this Office that OSHA concluded that it did not have reasonable cause to believe that LIRR violated FRSA because LIRR's termination of Cleveland's employment was "a legitimate, non-retaliatory business decision" made "[w]hen it became clear that [Cleveland] could not perform his previously held job in a safe and proper manner."

Cleveland exercised his right under FRSA, *see* 49 U.S.C. § 20109(d)(3), to initiate a de novo proceeding in this Court. *See* Complaint ¶ 11. In his complaint, Cleveland alleges that he engaged in protected activity under FRSA when he reported a work-related injury and when he filed a prior FELA lawsuit against LIRR seeking compensation for that injury. *See* Complaint ¶¶ 19-20.

3. Precedentially Relevant Administrative Decisions

The ARB first addressed whether a FELA lawsuit can be protected activity under FRSA in *LeDure v. BNSF Railway Co.*, No. 13-044, 2015 WL 4071574 (DOL ARB Jun. 2, 2015). Noting that the employee's injury report to the railroad prior to his FELA lawsuit was clearly protected activity under FRSA, the ARB stated that it saw "no reason why [earlier] protected activity would lose its protected status when it is also discussed in a FELA case," and that "[r]etaliation for later notifications of the same injury is just as unlawful as retaliation for the initial notice." *Id.* at *3. But the ARB recognized that the employee was also arguing that his

pursuit of damages in the FELA lawsuit for the extent of his injury was protected activity. *See id.* The ARB held that, although FRSA "does not expressly protect FELA litigation," the FELA lawsuit "expanded the notice provided to the [railroad] by providing more information about the extent of the employee's work-related injury" and its severity. *Id.* at *4. Because the railroad "did not discover that [the employee] claimed to be permanently disabled until the FELA litigation," the litigation "constituted more specific notification of the nature and extent of [the employee's] work-related injury." *Id.* For that reason, the ARB ruled "that the more specific notification provided during the FELA claim in this case is protected activity." *Id.*

In *Carter v. BNSF Railway, Co.*, Nos. 14-089, 15-016, 15022, 2016 WL 4238466, at *2 (DOL ARB Jun. 21, 2016), the ARB found the employee's FELA lawsuit to be protected activity under FRSA. Although the employee "apparently" did not allege that his FELA lawsuit was FRSA protected activity "in its own right," the ARB stated that it is "pure semantics to separate the report of injury from the injury itself" and ruled that his FELA litigation "undisputedly involved [his] injury and kept [his] protected report of injury fresh as the events in the case unfolded." *Id.* (quotation marks omitted). The ARB concluded that there is "no logical reason why earlier 'protected activity would lose its protected status when it is also discussed in a FELA case. Retaliation for later notifications of the same injury is just as unlawful as retaliation for the initial notice.'" *Id.* (quoting *LeDure*, 2015 WL 4071574, at *3). A concurring opinion, however, cautioned that the ARB had determined in *LeDure* that "the FELA claim in that case was protected activity based on the evidence presented in that case" and "left open for another day the question of whether FELA claims constitute protected activity as a matter of law." *Id.* at *7.[2]

[2] Subsequent to *Carter* but prior to its reversal by the Eighth Circuit, the ARB cited the relevant holding from *Carter* on two occasions. *See Powers v. Union Pacific R.R. Co.*, No. 13-034, 2017

4. Eighth Circuit's Reversal of *Carter*

The United States Court of Appeals for the Eighth Circuit reversed the ARB's decision in *Carter* and remanded for further proceedings. *See BNSF Ry. Co. v. U.S. Dep't of Labor Admin. Rev. Bd.*, 867 F.3d 942 (8th Cir. 2017). Agreeing with the concurring opinion in *Carter*, the Eighth Circuit noted that *LeDure* "held only that the FRSA protects a notice of injury made in the course of FELA litigation, not that FELA litigation is *per se* protected by the FRSA." *Id.* at 948. According to the court, the ARB in *Carter* "misstat[ed] the scope" of its decision in *LeDure* and "decided without discussion a significant issue that [the employee] failed even to allege and that has never been considered by this court or by our sister circuits." *Id*. In *Carter*, the *BNSF* court observed, the railroad decisionmaker knew of the employee's injury when it occurred, so it was "clear" that his FELA lawsuit "did not notify" the decisionmaker of the injury. *Id*. Thus, to validly base its decision on *LeDure*, the ARB in *Carter* "needed a finding that [the employee's] FELA lawsuit provided [the railroad] with 'more specific notification' of his injury report," but there was no such finding. *Id*.

Following the Eight Circuit's reversal and remand to the ARB, the ARB remanded the case to the Administrative Law Judge, and in so doing, acknowledged that there had been no factual finding that the employee's "FELA lawsuit provided [the railroad] with 'more specific notification' about [the employee's] injury report." *Carter v. BNSF Ry., Co.*, Nos. 14-089, 15-016, 15022, 2018 WL 6978215, at *1 (DOL ARB Jun. 21, 2018).[3]

WL 262014, at *17-18 (DOL ARB Jan. 6, 2017) (dissenting opinion); *Brucker v. BNSF Ry., Co.*, No. 14-071, 2016 WL 4258212, at *8 (DOL ARB Jul. 29, 2016).

[3] *See also Roop v. Kansas City Southern Ry. Co.*, No. CIV-16-413-SPS, 2017 WL 4844832, at *3-4 (E.D. Okla. Oct. 26, 2017) (denying railroad's summary judgment motion on FRSA claim; although the railroad was previously notified of the injury, fact questions remained as to whether the employee's testimony during the FELA litigation of allegedly unknown and undisclosed

DISCUSSION

As the preceding discussion shows, the existing ARB and court decisions suggest that pursuing a FELA lawsuit can constitute protected activity under FRSA's anti-retaliation provision at least where the FELA lawsuit: (1) provides the railroad with the first notification of the work-related injury, or (2) provides the railroad with more specific notification of an already-reported work-related injury.

FELA allows an employee to file a lawsuit against a railroad employer to recover for work-related injuries caused by the railroad's negligence. *See* 45 U.S.C. § 51. Considering the plain text of 49 U.S.C. § 20109(a)(4),[4] a FELA lawsuit can be a "lawful, good faith" act to "notify" or "attempt to notify" the railroad of "a work-related personal injury," and thus can be protected activity under FRSA's anti-retaliation provision in at least two circumstances.

First, an employee's FELA lawsuit can notify the railroad of the work-related personal injury under 49 U.S.C. § 20109(a)(4) if the employee has not already reported the injury to the railroad. This scenario is likely rare, however, because railroads require their employees to promptly report work-related injuries so that the railroads can comply with federal laws and regulations (*see* 49 U.S.C. § 20109; 49 C.F.R. Part 225) that require railroads to report injuries to the Department of Transportation's Federal Railroad Administration. If the employee's FELA lawsuit first notifies the railroad of the injury, the railroad may discipline the employee or terminate his or her employment for not reporting the injury earlier. If the employee asserts that

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details of the injury "constituted 'more specific notification of the nature and extent' of [the] injury") (quoting *LeDure*, 2015 WL 4071574, at *4).

[4] 49 U.S.C. § 20109(a) identifies seven categories of acts that may qualify as protected activity under FRSA's anti-retaliation provision; however, a FELA lawsuit will likely satisfy only the fourth category – acts "to notify, or attempt to notify" the railroad of "a work-related personal injury" of an employee, 49 U.S.C. § 20109(a)(4).

the discipline or termination is retaliation in violation of FRSA, the railroad may argue that the discipline or termination was because of the employee's failure to report the injury in a timely manner as required by the railroad even if the FELA lawsuit is protected activity under FRSA.[5]

Second, if an employee has already reported the injury to the railroad prior to filing a FELA lawsuit, the employee's FELA lawsuit can be protected activity if it provides the railroad with more specific notification of the injury. Informing a railroad of an injury of which it is already aware, without providing more information, does not "notify" or "attempt to notify" the railroad of the injury under 49 U.S.C. § 20109(a)(4). However, if the FELA lawsuit provides more specific information about the injury (such as that the effects of the injury are much more serious than initially reported) or informs a previously unaware railroad decisionmaker of the injury, then the FELA lawsuit can "notify" or "attempt to notify" the railroad of the injury under 49 U.S.C. § 20109(a)(4). Finally, even if the FELA lawsuit provided the railroad with more specific notification of the injury and is thus protected activity under FRSA, the ultimate success of the retaliation claim will depend on whether the parties meet their respective burdens of proof: the employee must still prove by a preponderance of the evidence that the protected activity was a contributing factor to the railroad's adverse personnel action, and the railroad will still have the opportunity to prove by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. *See*, *e.g.*, *BNSF Ry. Co.*, 867 F.3d at 945.

[5] *See*, *e.g.*, *Burton v. Ill. Cent. R.R. Co.*, No. 13-CV-00769, 2016 WL 302109, at *7-8 (N.D. Ill. Jan. 25, 2016) (railroad argued that terminating employee for failing to timely report injury was not retaliation under FRSA); *Mosby v. Kansas City Southern Ry. Co.*, No. CIV-14-472, 2015 WL 4408406, at *7 (E.D. Okla. Jul. 20, 2015) (railroad argued that suspending and terminating employee for violating its safety and timely injury reporting rules was not retaliation under FRSA).

The conclusion that an employee's FELA lawsuit can be protected activity if it provides the railroad with more specific notification of the injury is supported by the ARB's holding in *LeDure*. The ARB relied on 49 U.S.C. § 20109(a)(4) and held that the particular FELA lawsuit in that case notified the railroad that the employee claimed to be permanently disabled as a result of the injury, and thus "constituted more specific notification of the nature and extent of [the employee's] work-related injury" that accordingly was protected activity under FRSA. *LeDure*, 2015 WL 4071574, at *3-4.

The Eighth Circuit's reversal of the ARB's *Carter* decision provides additional support. In reversing *Carter*, the court faulted the ARB for "misstating the scope" of its *LeDure* decision and for not making the factual finding that it had made in *LeDure* that the "FELA lawsuit provided [the railroad] with 'more specific notification' of [the employee's] injury report." *BNSF Ry. Co.*, 867 F.3d at 948. The Eighth Circuit then remanded for further proceedings, suggesting that the court agreed, as the ARB had ruled in *LeDure*, that an employee's FELA lawsuit can be protected activity if it provides the railroad with more specific notification of the injury.

Finally, the Eastern District of Oklahoma followed *LeDure*'s "more specific notification" ruling to deny a railroad's motion for summary judgment because there were factual disputes as to whether an employee's testimony during a FELA lawsuit of allegedly unknown and undisclosed details of an injury "constituted 'more specific notification of the nature and extent' of [the] injury." *Roop*, 2017 WL 4844832, at *3-4 (citing 49 U.S.C. § 20109(a)(4) and quoting *LeDure*, 2015 WL 4071574, at *4).

CONCLUSION

The United States appreciates the Court's invitation to submit views, and hopes that the foregoing discussion assists the Court.

Dated: New York, New York
May 30, 2019

Respectfully submitted,

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