Supreme Court Clarifies FRSA Causation

Some recent decisions by the ARB and the 6th, 7th, and 8th Circuits have muddled the causation standard for FRSA whistleblower retaliation cases. This past week's United States Supreme Court's landmark decision in *Bostock v. Clayton County,* 2020 U.S. LEXIS 3252 (June 15, 2020), illuminates the error of those decisions.

Here is the Title VII statutory language interpreted by the Supreme Court in *Bostock:*

> it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate against any individua*l with respect to his . . . employment, *because of* such individual's [statutorily protected characteristic, such as sex]" [emphasis added]

And here is the FRSA Section 20109 statutory language to be interpreted:

> a railroad "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 [one of the protected activities listed, including the good faith reporting a work-related injury or a safety hazard] " 49 USC 20109 [emphasis added]

The operative causation language of those two statutes is the same. The Merriam Webster Dictionary definition of "due to" is: "as a result of, because of." So both statutes use the same causation language: "because of" = "due to", and "otherwise discriminate against any individual" = "or in any other way discriminate against an employee."

Keeping this in mind, here are the levels of causation, from the strictest to the most forgiving:

Proximate Cause

Proximate cause is the strictest causation test: "proximate cause. A cause that directly produces an event and without which the event would not have occurred." Black's Law Dictionary (7th ed. 1999). This “direct or proximate cause” test normally is applied in

negligence based personal injury cases[1]. And as the *Bostock* decision makes clear, the Supreme Court does not apply this test to employment discrimination retaliation claims.

But-For Causation:

Here is the Supreme Court's description of but-for causation:

> That form of causation is established whenever a particular outcome would not have happened 'but for' the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause. . . . When it comes to Title VII [employment discrimination cases falling under the "because of" language], the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex [i.e. statutorily protected status] was one but-for cause of that decision, that is enough to trigger the law.

Bostock, pgs. *14-15, citations omitted. *See also* the Black's Law Dictionary definition of a but-for cause: "The cause without which the event could not have occurred." Black's Law Dictionary (7th ed. 1999), The but-for test simply asks, "but for the existence of X, would Y have occurred?" If the answer is yes, then factor X is a but-for cause.

The Supreme Court stressed that while an event may have many but-for causes, an employer is liable if just one of those but-causes was the employee's protected status. That is because the

> but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex [i.e. protected activity] was one but-for cause of that decision, that is enough to trigger the law.

Bostock at p.*15.

Motivating Factor Test:

In *Bostock*, the Supreme Court noted how in 1991 Congress supplemented Title VII

[1] Although not in railroad employee personal injury cases brought under the FELA's "in whole or in part" causation standard--see the discussion of *Rogers* and *McBride* below.

> to allow a plaintiff to prevail merely by showing that a protected trait like sex was a 'motivating factor' in a defendant's challenged employment practice. Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision.

Bostock at pgs.*15-16, citations omitted.

The Supreme Court went on to note that relief under Title VII can result from the application of either the "traditional but-for causation standard" or the more forgiving "motivating factor test." *Id*.

Contributory Factor Test:

This is the causation test in the AIR-21 whistleblower retaliation statute, 49 USC 42121(b)(2)(B)(iii), that is specifically incorporated by reference into the FRSA's Section 20109 whistleblower protection statute. 49 USC 20109(d).

Congress itself took pains to confirm the meaning of the term "contributing factor" in the context of whistleblower actions: "The words 'a contributing factor' . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." 135 Cong. Rec. 5033 (1989), quoted in *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). In *Marano*, the Federal Circuit Court stressed that the "contributing factor" standard does not require proof the employer acted with a retaliatory motive:

> though evidence of a retaliatory motive would still suffice to establish a violation of [Complainant's] rights . . . a whistleblower need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action: "Regardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing." S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1989) (accompanying S. 508).

Marano, supra, at 1141.

FRSA Section 20109's statutory causation language --namely, that all a railroad employee need prove is that the "discrimination is due, in whole or in part, to the employee's" protected activity--is fully consistent with the contributory factor standard

(“any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision”).

And it is worth noting Congress imported the FELA's "in whole or in part" causation language, 45 U.S.C. 50, into the Section 20109 railroad whistleblower protection statute. In the railroad industry, "in whole or in part" is a term of art the Supreme Court has repeatedly confirmed means causation "in whole or in part, even to the slightest degree." *Rogers v. Missouri Pacific R. Co*., 352 U.S. 500,506 (1957) ("Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."); *CSX Transportation Inc. v. McBride*, 564 U.S. 685,131 S. Ct. 2630, 2634 (2011).

So even if many factors are involved in a railroad's decision to take the adverse action, the railroad still is liable if the employee's protected activity played just one part, even to the slightest degree.

It necessarily follows that, if a railroad employee satisfies the most stringent but-for test, he or she also satisfies the more forgiving motivation factor and contributory factor tests. But of course it is not necessary for a rail employee to satisfy the but-for or motivating tests--if he or she satisfies the more forgiving contributory factor test alone, the railroad is liable.

Clearing Up the Confusion

Recent decisions by the ARB and the 6th, 7th, and 8th Circuit Courts have sown confusion by overruling the long accepted "inextricably intertwined" and "chain of events" causation analyses and substituting the “direct or proximate cause” test instead. But the Supreme Court's *Bostock* decision exposes the plain error of those decisions.

Inextricably Intertwined Test and Chain of Events Test

Numerous ARB and federal court decisions have applied the inextricably intertwined test, holding: “the protected activity and the adverse action are inextricably intertwined if the basis for the adverse action cannot be explained without discussing the protected activity.” And “if the protected activity and the adverse action are inextricably

intertwined, there exists a presumptive inference of causation." This is sometimes also referred to as a "chain of events" analysis.

A finding that an employee's protected activity and the adverse action are inextricably intertwined by a chain of events is just one way of satisfying the but-for causation test described by the Supreme Court in *Bostock*. And such a finding also satisfies the even less restrictive contributory factor test.

But the ARB recently overturned its longstanding inextricably intertwined precedent and put the proximate cause test in its place. *Thorstenson v. BNSF Railway Co*, 2019 DOL Ad. Rev. Bd. LEXIS 100, *10-12, (ARB Nov. 25, 2019) ("In overturning our rule of 'inextricably intertwined' and 'chain of events' causation" the ARB ruled an employee "must explain how the protected activity is a proximate cause of the adverse action, not merely an initiating event."); *Yowell v. Fort Worth & Western RR*, 2020 DOL Ad. Rev. Bd. LEXIS 18 (ARB Feb 5, 2020) ("the ARB no longer requires that ALJs apply the 'inextricably intertwined' or 'chain of events' analysis.").

In so doing, the ARB followed decisions from the 6th, 7th, and 8th Circuits that erroneously replaced the FRSA's contributory factor standard with proximate cause: *Koziara v. BNSF Ry. Co*., 840 F.3d 873, 877 (7th Cir. 2016) (dismissing case because the district court "failed to distinguish between causation and proximate causation."); *Gunderson v. BNSF Ry. Co.,* 850 F.3d 962, 969-70 (8th Cir. 2017); *Heim v. BNSF Ry. Co.,* 849 F.3d 723, 727 (8th Cir. 2017) (expressly rejecting that an inextricably intertwined showing is "sufficient to establish the contributing factor element."); *BNSF Ry. v. U.S. Dep't of Labor Admin. Review Bd. (Carter)*, 867 F.3d 942, 945-46 (8th Cir. 2017) (holding the "chain of events theory of causation is contrary to judicial precedent."); *Dakota, Minn. & E. R.R. Corp., v. U.S. Dep't of Labor Admin. Review Bd. (Riley*), 2020 U.S. App. LEXIS 2978, *11-14 (8th Cir. Jan. 30, 2020) (rejecting inextricably intertwined and chain of events analysis); *Lemon v. Norfolk Southern Ry.,* 2020 U.S. App. LEXIS 13927 (6th Cir. April 30, 2020) (rejecting chain of events analysis).

The Supreme Court's decision in *Bostock* illuminates the plain error of all those decisions. The direct or proximate cause test simply has no place in FRSA causation analysis. The but-for causation test is less restrictive than the direct or proximate cause test, and if a railroad employee satisfies the but-for test the railroad is liable. However,

that is not the only way for an employee to prevail. The employee also can prevail simply by satisfying the contributory factor test, the most forgiving test of all. And in the words of Congress, a contributory factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."

Bottom line? Use the Supreme Court's clarification of the correct causation test to dispel the confusion once and for all. Use *Bostock* to make sure all judges understand why it is reversible error to apply the direct or proximate cause standard in FRSA whistleblower retaliation cases.

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Charles C. Goetsch
Charles Goetsch Law Offices LLC
405 Orange St.
New Haven, CT 06511
charlie@gowhistleblower.com
203-672-1370 office
203-776-3965 fax
203-376-0526 cell