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2007-08: A Good Year for Retaliation Claims?

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2007-08: A GOOD YEAR FOR RETALIATION CLAIMS?

I. NEW DEVELOPMENTS.

A. Congressional Legislation.

1. New Whistleblower Protections for Public Transportation Employees.

Last year, Congress enacted a new 6 U.S.C. § 1142, which was § 1413 of the Implementing Recommendations of the 9/11 Commissions Act of 2007, P.L. 110-53. This new section is attached to the end of this paper. The key provisions are as follows:

- It prohibits retaliation by a “public transportation agency, a contractor or a subcontractor of such agency, or an officer or employee of such agency” against an “employee.” The word “employee” is not defined. Presumably it shall cover not only employees of public transportation agencies, but also employees of those agencies’ contractors and subcontractors.
- This new statute covers two categories of protected conduct. The first, in subsection (a), covers an employee’s “lawful, good faith act done or perceived by the employer to have been done or about to be done” in one of five separate categories. Those categories are:
 - The disclosure of information about alleged violations of federal law, rules or regulations relating to public transportation safety or to fraud, waste or abuse of federal funds intended to be used for public transportation safety or security to law enforcement agencies, to Congress or to a person with supervisory authority over the employee or a person with authority to investigate, discover or terminate the conduct;
 - Refusal “to violate or assist in the violation of any Federal law, rule, or regulation relating to public transportation safety or security;
 - Filing a complaint, causing to be brought or testifying as a witness in an enforcement proceeding under that new statute;

- Cooperating with a safety or security investigation by the U.S. Department of Transportation, Department of Homeland Security or NTSB; and
- Furnishing information to any of those agencies or to state or local law enforcement agencies “as to the facts relating to “any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with public transportation.”
- The second category, in subsection (b), covers “hazardous safety and security conditions.” It protects three categories of employee conduct:
 - “[R]eporting a hazardous safety or security condition”;
 - “[R]efusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties” under certain circumstances, which are summarized below; and
 - “[R]efusing to authorize the use of any safety- or security-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition” under certain circumstances, which are summarized below.
 - Those circumstances require good faith by the employee and the absence of reasonable alternatives to the refusal; a requirement that a reasonable person in those circumstances would conclude that “the hazardous condition presents an imminent danger of death or serious injury”; and prior notice to the public transportation agency “where possible.”
 - Only the first category of subsection (b) applies to security personnel.
- Enforcement is through the filing of a complaint with the U.S. Department of Labor. The deadline for filing a complaint is 180 days after the alleged retaliation.
- The Department of Labor, after an investigation and based on a finding of probable cause, can issue a preliminary order, which can include reinstatement. The employer can avoid that preliminary order if it establishes, by clear and convincing evidence, that it would have taken the same “unfavorable personnel action” in the absence of the employee’s protected conduct.
- After a hearing, the Department of Labor can dismiss a complaint or order relief.
- The remedies that can be ordered by the Department of Labor include affirmative action to abate the violation; reinstatement without loss of seniority; back pay with interest; compensatory damages “including compensation for any special damages sustained as a result of the discrimination, including litigation costs,

-3-

expert witness fees, and reasonable attorney fees”; and punitive damages not to exceed \$250,000.

- If the Department of Labor finds that a complaint frivolous or brought in bad faith, it can award attorney fees to the employer in an amount not to exceed \$1,000.
- Any appeal from a preliminary or final order by the Department of Labor can appeal that order to the court of appeals for the circuit in which the alleged violation occurred or in which the complainant resided at the time of the alleged violation.
- Either the Department of Labor or a party to a proceeding under that new statute can file an enforcement action in the United States district court. The venue for an enforcement action by the Department is the district in which the violation was found to have occurred. There is no express venue provision for private-party enforcement, other than to state that it is in the “appropriate” district court.
- This new statute requires an election of remedies between those it provides and those under “another provision of law for the same allegedly unlawful act of the public transportation agency.” However, it also contains a non-preemption provision and a provision stating that it does not diminish the employee’s rights under a collective bargaining agreement or under any federal or state law. In addition, it contains a broadly worded non-waiver provision.

2. New Whistleblower Protections for Employees of Defense Contractors.

The National Defense Authorization Act for Fiscal Year 2008 (H.R. 4986) included, in § 846 of that statute, amendments to 10 U.S.C. § 2409. That section, as amended, now contains the following provisions:

(a) Prohibition of reprisals.--An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress, a representative of a committee of Congress, an Inspector General, the Government Accountability Office, a Department of Defense employee responsible for contract oversight or management, or an authorized official of an agency or the Department of Justice information that the employee reasonably believes is evidence of gross mismanagement of a Department of Defense contract or grant, a gross waste of Department of Defense funds, a substantial and specific danger to public health or safety, or a violation of law related to a Department of Defense contract (including the competition for or negotiation of a contract) or grant.

(b) Investigation of complaints.--(1) A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the Department of Defense, or the Inspector General