U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 29 May 2009

Case No.: 2008-FRS-00003

In the matter of

LARRY L. KOGER,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondent.

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

This matter arises out of a claim filed by the Complainant under the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53. The complaint alleged that the Complainant was discharged in retaliation for reporting an on the job injury. The Occupational Safety and Health Administration (OSHA), as the agent of the Secretary of Labor, investigated the complaint and reported its findings on June 3, 2008. Those findings dismissed the complaint. On June 26, 2008 the Complainant appealed the OSHA determination to the Office of Administrative Law Judges (OALJ).

On November 5, 2008 the Respondent moved to dismiss the complaint on the basis of 49 U.S.C. § 20109(e), the election of remedies provision of the FRSA. On December 29, 2008, the Complainant responded to that motion. The Respondent filed its rebuttal brief on January 14, 2009. The June 3, 2008 OSHA report did not address the issue of election of remedies. That report was based on a determination that the Complainant "failed to establish that his discharge was related to his injury on the job."

BACKGROUND

The Complainant was employed by the Respondent as a conductor. On July 29, 2007, the train on which he was serving was derailed. According to the original complaint, he was injured in the accident but was reluctant to report the injury for fear of retaliation. Because of the pain he eventually reported the injury.

On August 8, 2007, the Respondent conducted a hearing in accordance with a union collective bargaining agreement. In that hearing it was determined that the Complainant bore responsibility for the failure of the train to comply with a stop signal before it reached the site of the derailment. By letter dated August 21, 2007, the Respondent notified the Complainant that it was dismissing him from service.

The Complainant appealed this decision in accordance with the Railway Labor Act (RLA), 45 U.S.C. §151 *et seq*. The appellate body, Public Law Board Number 5944 (PLB 5944) issued an interim order on January 8, 2008, directing that the Complainant be reinstated "with seniority and other benefits unimpaired." In its final award on July 28, 2008, PLB 5944 directed that the discipline be reduced from dismissal to suspension without pay for the period from the Complainant's dismissal to the date of implementation of the interim order.

DISCUSSION

Provisions of the 9/11 Act

The 9/11 Act was the result of a Conference Report, H.R. Rep. 110-259 (July 25, 2007) (Conf. Rep.). Section 1521 of the 9/11 Act amended the FRSA by modifying the railroad carrier employee whistleblower provision. It expanded what constitutes protected activity, transferred jurisdiction over disputes to the Department of Labor, and enhanced administrative and civil remedies for employees to mirror those found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. §42121. Before the 9/11 Act took effect, disputes under Section 20109 came under the jurisdiction of the National Railroad Adjustment Board (NRAB).

In amending Section 20109 Congress made sweeping changes. The 9/11 Act altered the nature of what constitutes a violation, the remedies available, the procedural rules, and the agency responsible for adjudication. It did not, however, make any substantive change in the election of remedies provision. Before the 9/11 Act 49 U.S.C. §20109(d) read:

> **Election of Remedies.** An employee of a railroad carrier may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the carrier.

In the amended FRSA this provision (renumbered §20109(e)) reads:

> **Election of Remedies**. An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.[1]

[1] Public Law 110-432, which took effect on October 16, 2008, added a new subsection (c) to Section 20109 and redesignated the following subsections, so that the election of remedies provision is now Section 20109(f). The recent amendment does not affect the issues involved in this case. Throughout the remainder of this decision I will

While Congress was revising most of the rest of Section 20109, it made only the most minor changes to the wording of the election of remedies provision, removing the phrase "of a railroad carrier" from the beginning and adding in its place the adjective "railroad" before the word "carrier" at the end.

In construing statutes courts "will not presume that the legislature intended to change the meaning of a statute in the absence of clear evidence of such intent." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 787-88 (1981). "Where sections of a statute have been amended but certain provisions have been left unchanged, we must generally assume that the legislature intended to leave the untouched provisions' original meaning intact." *American Casualty Co. v. Nordic Leasing, Inc.* 42 F.3d 725, 732 n. 7 (2d Cir. 1994).

If Congress had merely left the election of remedies provision unchanged, this rule of statutory construction would lead very strongly to the conclusion that Congress did not intend any change in the substance of the provision. That view is, if anything, even stronger in this case. The 9/11 Act did not ignore the provision entirely, but amended it by making purely stylistic changes in language. Congress clearly did not forget about or fail to notice former Section 20109(d).

The 9/11 Commission's recommendations and their enactment by Congress in 2007 represented the results of a long and thorough examination of a devastating national trauma. In the wake of the horrifying violence of September 11, 2001, Congress made broad and sweeping changes to the rules affecting how industries and government agencies do business. In the course of such a thorough revision of the law Congress could have revised the election of remedies provision of the FRSA. However, it is clear—indeed as clear as the principles of statutory construction can make it—that Congress did not choose to do so, and that the provision therefore has the same meaning now that it had before the 9/11 Act took effect.

Doctrine of election of remedies

The term "election of remedies" has been used to describe a variety of doctrines aimed at achieving a variety of policy goals. Among the goals cited for the doctrine have been avoidance of duplicative litigation, prevention of double recoveries, and preventing plaintiffs from litigating inconsistent theories of liability. The overly broad use of the term "election of remedies" has the potential for confusing it with other doctrines such as *res judicata*, claim preclusion, or collateral estoppel.

In *Taylor v. Burlington Northern Railroad*, 787 F.2d 1309 (9th Cir., 1985), a railroad worker brought action under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq*. The railroad sought to bar recovery for remedies that had been sought in an action under the RLA, asserting that the theories in the two actions were inconsistent. The Court of Appeals, affirming the trial court's denial of the railroad's motion in limine, stated that "A plaintiff may

---

cite to the FRSA as it was amended by Public Law 110-53, which is the form in which it existed at the time of the alleged retaliation.

prosecute actions on the same set of facts against the same defendant in different courts, even though the remedies the plaintiff seeks may be inconsistent. [citations omitted]. But as soon as one of those actions reaches judgment, the other cases must be dismissed."

The employer in *Taylor* argued for application of election of remedies as a judicial doctrine to bar inconsistent theories of liability, and did so in the absence of statutory support for its position. In fact, the pertinent section of FELA expressly contemplates the possibility of actions under other statutes, stating that "[n]othing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress." 45 U.S.C. §58.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the U.S. Supreme Court considered the doctrine of election of remedies in the context of a complaint of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. After being terminated, the petitioner filed a grievance under the collective bargaining agreement between his union and the employer. While arbitration of the grievance was pending, he filed a complaint of racial discrimination with the Equal Employment Opportunity Commission (EEOC).

The arbitrator in the collective bargaining grievance ruled that the petitioner had been discharged for just cause. Later, the EEOC determined that there was not reasonable cause to believe that a violation of Title VII had occurred. The petitioner then brought action in U.S. District Court.

The District Court granted the employer's motion for summary judgment and dismissed the action. The Supreme Court reversed, holding that the trial court's reliance on the doctrine of election of remedies was misplaced. The Court described it as a doctrine "which refers to situations where an individual pursues remedies that are legally or factually inconsistent" and therefore had "no application in the present context." 415 U.S. 36, 49. The separate nature of the contractual right to arbitration and the statutory right under Title VII was "not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." 415 U.S. 36, 50.

Statutory election of remedies provisions

The Federal Labor-Management Relations Act (FLMRA), 5 U.S.C. 7101 *et seq*., provides that:

> An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as

> the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first.

5 U.S.C. §7121(d).

As a result of this provision, "a federal employee who alleges employment discrimination must elect to pursue his claim under either a statutory procedure or a union-assisted negotiated grievance procedure; he cannot pursue both avenues, and his election is irrevocable." *Vinieratos v. Department of the Air Force*, 939 F.2d 762 (9th Cir., 1991).

For actions arising under the Federal Telecommunications Act of 1996:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the [Federal Communications] Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. §207.

This provision has been held to provide that "once an election is made by either filing a complaint with the FCC or filing a complaint in federal court, a party may not thereafter file a complaint on the same issues in the alternative forum, regardless of the status of the complaint." *Premiere Network Services, Inc. v. SBC Communications, Inc.* 440 F.3d 683 (5th Cir. 2006). The Court of Appeals in *Premiere Network Services* held that this was the case even when the plaintiff had voluntarily dismissed the first complaint.

Conclusion

The doctrine of election of remedies can be harsh in its effects in limiting the options of a plaintiff. *Taylor* and *Alexander* provide examples of inappropriate applications of the doctrine. In *Taylor* it was not necessary, in order to prevent a double recovery, to take the extreme step of dismissing the employee's FELA claim. Similarly, in *Alexander,* there was no inconsistency between the petitioner's two claims and it was therefore inappropriate to apply the doctrine to dismiss his Title VII claim.

However, as noted above, there is a potential for confusion because the same term is used both for the judicially created doctrine that was rejected in *Taylor* and *Alexander* and for express statutory provisions such as those at issue in *Vinieratos, Premiere Network Services,* and the present case. When Congress says that a party can seek one or the other of two remedies but not both, it is doing far more than regulating the potential for double recoveries or inconsistent

litigation theories. It is expressly limiting the potential plaintiff's options at the very outset of the litigation.

Limiting a party's options in this way is a severe step, and one not to be taken lightly by courts acting in the absence of a statutory provision, as the *Taylor* and *Alexander* courts made clear. However, it is a step that Congress has chosen to take in several statutes, including the FRSA.

Section 20109(e) provides that "[a]n employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." The focus is unmistakably on the employer's act. Here the act was the firing of the Complainant. The Complainant sought relief for that act under another provision of law, the RLA. Accordingly, the Department of Labor lacks jurisdiction over this Federal Rail Safety Act claim.

ORDER

The Respondent's Motion to Dismiss the complaint is **GRANTED**.

A

KENNETH A. KRANTZ
Administrative Law Judge

KAK/jcb

NOTICE OF REVIEW: Review of this Recommended Decision and Order is by the Administrative Review Board pursuant to ¶¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the Federal Railroad Safety Act. Accordingly, this Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210. *See generally* 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.