THE PASCHOS LAW UPDATE NEWSLETTER

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I. EMPLOYMENT LITIGATION

Railroad Employees Have Easier Burden When Proving Retaliatory Discrimination Against Railroad

In Araujo v. New Jersey Transit Rail Operations, Inc., --- F.3d ----, 2013 WL 600208 (3d Cir. (N.J.), February 19, 2013), plaintiff, Anthony Araujo, who worked for New Jersey Transit Rail Operations ("NJT"), witnessed a fatal accident in 2008, when a construction worker was electrocuted on the job. He reported an emotional injury and was later suspended for violation of a rule relating to the accident.

Araujo filed a complaint with the Occupational Safety & Health Administration Office of Whistleblower Protection, which issued findings in favor of Araujo, and ordered NJT to pay $569,587 in damages, to which NJT objected. Anthony Araujo filed a complaint in the United States District Court for the District of New Jersey alleging that he was disciplined by NJT in retaliation for reporting his emotional injury, an activity protected by the Federal Rail Safety Act ("FRSA"). The district court found that the discipline was not retaliatory and granted NJT summary judgment. Plaintiff appealed.

In analyzing the case, the Third Circuit noted that and under the newly amended FRSA, a railroad carrier "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 engagement in one of numerous protected activities. The protected activities are enumerated in the statute, and include notifying the railroad carrier of a work-related personal injury or a work-related illness.

The FRSA incorporates by reference the rules and procedures applicable to Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR–21") whistleblower cases. AIR–21 sets forth a two-part burden-shifting test. Prior to this case, no federal court of appeals has considered its application. Under AIR–21, an employee must show, by a preponderance of the evidence, that "(1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." Once the plaintiff makes a showing that the protected activity was a "contributing factor" to the adverse employment action, the burden shifts to the employer to demonstrate "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior."

The court held that FRSA burden-shifting is much more protective of plaintiff-employees than the McDonnell Douglas framework and that the plaintiff-employee need only show that his protected activity was a "contributing factor" in the retaliatory discharge or discrimination, not the sole cause. In other words, "a contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." The court provided, "It is worth emphasizing that the FRSA's burden-shifting framework is much easier for an employee to satisfy than the McDonnell Douglas standard." In order "to emphasize the steep burden that railroads face under the FRSA," the court pointed out that it is not enough for a railroad to "articulate a legitimate, non-discriminatory reason for the adverse action."

Further, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." The court noted:

> [T]the fact an employee need not ascribe a motive to the supervisor or manager greatly reduces the employee's burden in making a prima facie case. However, we believe this reduced burden is appropriate in FRSA cases. We note that the legislative history shows that Congress was concerned that some railroad supervisors intimidated employees from reporting injuries to the FRA.

The District Court held that Araujo "cannot establish a prima facie case of retaliation because the record lacks evidence from which a reasonable factfinder could infer that the protected activity—Araujo's reports of employee injury—was a contributing factor in NJT's decision to discipline Araujo. . . ." But, here the court noted that Araujo identifies some evidence in the record that tends to show that his decision to report a workplace injury resulted in proceedings against him. The court provided that while "the evidence that Araujo proffers is certainly not overwhelming, we part ways with the District Court, and hold that it is sufficient to assert a prima facie case."

The burden then shifted to NJT to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. The court noted that "for employers, this is a tough standard, and not by accident. . . . the standard is 'tough' because Congress intended for railroads to face a difficult time defending themselves, due to a history of harassment and retaliation in the industry." The court found that NJT did not provide the requisite evidence. Therefore, the Third Circuit reversed and overturned the dismissal of plaintiff's lawsuit.

II. INSURANCE LAW

Insurer Funding a Defense is Not a Co-Client Entitled to Privileged Documents

In CAMICO Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP, Slip Copy, 2013 WL 315716 (E.D.Pa. January 28, 2013), CAMICO Mutual Insurance Co. insured Heffler, Radetich & Saitta, L.L.P. ("Heffler") which was sued for misappropriating class action settlement proceeds. In response to the suit, Heffler selected its defense counsel, Conrad O'Brien P.C. ("O'Brien firm"), and CAMICO agreed to pay defense counsel's fees.

CAMICO filed a declaratory judgment action seeking a finding regarding the available policy limits. CAMICO sought production of certain documents related to the underlying lawsuit. Heffler refused, and CAMICO moved to compel. CAMICO argued the application of exceptions to the attorney-client privilege, which the parties agreed would have otherwise protected the documents from production.

The court considered two distinct exceptions to attorney-client privilege, the "common interest" exception and the &rdquoco-client" exception. Since CAMICO did not claim that it had separate counsel who shared information with the O'Brien firm, the court found that the "common interest" exception was not applicable in this case.

The court then addressed the "co-client" exception to attorney-client privilege, which operates where two or more clients share the same attorney, such that when former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable. CAMICO argued that the O'Brien firm "represent[ed] the joint interests of Heffler and CAMICO with respect to defense of the underlying action and that as such, the documents at issue are not privileged with respect to CAMICO." The court provided that the application of this exception turns on whether CAMICO was a co-client of the O'Brien firm in the underlying action.

There are two ways by which CAMICO may be considered a co-client with Heffler. First, the parties would be co-clients if, by virtue of an absolute rule, insured and insurer are always considered co-clients whenever the insurer pays for the defense of the insured. Second, even if an absolute rule does not apply, the parties may be co-clients if the facts of the case demonstrate that a joint representation occurred. The court addressed both issues in turn.

Regarding the absolute rule, the court noted that the Pennsylvania Supreme Court has not addressed whether an insurance carrier is always a co-client with its insured when the carrier funds the defense of the insured. The Pennsylvania state appellate courts which have considered this issue agree that a co-client relationship does not exist simply by virtue of the insurer-insured relationship. Here, the court held that where an insurer funds the defense of its insured, the insurer may be, but is not always, a co-client of the insured. The court continued:

> [t]he conclusion that an insurer which funds the defense of an insured is not uniformly considered a co-client with an insured does not preclude the possibility of a co-client relationship in this case. That is, even though an absolute rule does not apply, if the O'Brien firm in fact conducted a joint representation of Heffler and CAMICO in the underlying action, the documents at issue relating to that action would not be privileged as to CAMICO.

The court therefore examined the "circumstances ... relevant to the determination of whether two or more parties intend to create a joint-client relationship, particularly how the

parties interact with the joint attorneys and with each other." Based on the record, the court concluded that the O'Brien firm did not conduct a joint representation. Accordingly, the court held that CAMICO was not a co-client of Heffler in the underlying action, and Heffler may therefore refuse to turn over the privileged documents at issue.

II. GENERAL LITIGATION

Court Rejects Joinder of Party with no "Special Relationship" as "Fraudulent" Removal

In *In re Imprelis Herbicide Marketing, Sales Practices and Products Liability Litigation*, Slip Copy, 2013 WL 363693 (E.D.Pa., January 30, 2013), Plaintiffs Linda and James Bordas, Jr. filed this action in West Virginia's Ohio County Circuit Court against E.I. du Pont de Nemours & Co. ("DuPont"); Terry Pugh, d.b.a. St. Clair Lawn Care ("St.Clair"); and Brett Conner, seeking damages for injuries to the Bordases' property allegedly caused by DuPont's herbicide, Imprelis. DuPont and St. Clair removed the case to the U.S. District Court for the Northern District of West Virginia, claiming that the Bordases had fraudulently joined Mr. Conner to defeat diversity jurisdiction. The case was then transferred to the Eastern District Court of Pennsylvania, as part of the pending multidistrict litigation involving Imprelis. Plaintiffs moved to remand the case to West Virginia state court, claiming that Mr. Conner was not fraudulently joined. DuPont opposed Plaintiffs' motion.

According to Plaintiffs' Complaint, in October of 2004, plaintiffs purchased a parcel of land that included mature woodlands. In the spring of 2011, Mr. Conner, a lawn care professional working for plaintiffs, recommended that herbicide be applied at the property and suggested that the plaintiffs hire St. Clair for the job. In late spring 2011, St. Clair applied Imprelis to the plaintiffs' lawn. Within weeks, trees on the property began to show signs of damage, and eventually several trees died, including trees that had been planted later to take the place of dead trees.

Plaintiffs brought one claim against Mr. Conner, alleging that he was negligent because he did not ensure that only safe herbicides were used on their property, did not inform them that Imprelis is unsafe even when used in accordance with its label, did not disclose the risks of applying Imprelis, and did not use due care generally. They allege that Mr. Conner knew or should have known that plaintiffs did not have the expertise to care for their lawn appropriately and were relying on him, which created a duty to recommend only a lawn care professional who would apply safe herbicides.

Plaintiffs do not allege in their Complaint that Mr. Conner knew or should have known that St. Clair planned to use Imprelis, that he knew that St. Clair applied unsafe herbicides in the past, that he knew or should have known in the spring of 2011 that Imprelis would harm non-target vegetation, that he exercised any control or supervision over St. Clair at any time, or even that he had any relationship with St. Clair other than giving the name to the Bordases.

West Virginia law allows a negligence claim for purely economic losses when there is evidence of a "special relationship" between the plaintiff and the defendant. Thus, plaintiffs argued that their claim against Mr. Conner must not be considered to be fraudulent because they had a "special relationship" with Mr. Conner, which makes him liable for his negligence with respect to his recommendation of St. Clair. Therefore, they claim, DuPont and St. Clair improperly removed the case to federal court.

The court found that a "special relationship " did not exist between plaintiffs and Mr. Conner. As an initial matter, Plaintiffs did not suffer "purely economic losses" in this case; they suffered property damage. Further, plaintiffs relied entirely on the premise that Mr. Conner is liable because he was familiar with their lawn, he knew that use of herbicide generally may foreseeably lead to non-target vegetation damage, and he recommended that the Bordases hire St. Clair to apply herbicide. The court found that this does not resemble the type of special relationships seen in the few West Virginia cases in which such a relationship is addressed.

The court found that plaintiffs' claim appeared to be a negligent referral type of claim. However, no West Virginia court has authorized a claim for negligent referral. And the court found that even if West Virginia courts would recognize a negligent referral cause of action, the facts alleged would not state such a claim.

As such, the court held that there was no colorable claim against Mr. Conner and therefore, found that Mr. Conner was fraudulently joined, that the claim against him must be

dismissed, and that the plaintiffs' case is properly before this Court.

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