Retaliation Claims In the Transit System Context

Having just finished what we believe is the first jury trial under the National Transit Systems Security Act (NTSSA), 6 U.S.C. §1142,[1] we are impelled to comment, for the benefit of those who may come after, on the problems that this obscure statute presents to litigants.

The NTSSA, enacted in 2007, is one of many federal whistleblower statutes. How it happened that someone woke up thinking that public transportation systems needed a whistleblower statute, we do not know.[2] The Act seems to be the product of someone's all night cut and paste job. And, it has virtually no legislative history. Lawyers and judges have to navigate here pretty much in the dark.

What does the NTSSA forbid? Essentially the statute has two prohibitions:

Subsection (a), captioned "In General," prohibits discrimination against a public transit employee due in whole or in part to the employee's "lawful" and "good faith" actions in providing information in an investigation of either (i) transit safety or security, or (ii) fraud, waste or abuse in the use of public transit funds. This subsection also prohibits discrimination against a transit employee who refuses to violate a federal law relating to public transportation, or who files a complaint to enforce "this section" of the statute (referring, presumably, to subsection (a)), or who furnishes information to a federal regulatory agency concerning transit safety and security issues.

Subsection (b), captioned "Hazardous Safety or Security Conditions," bars discrimination against an employee for "reporting a hazardous safety condition," or for refusing to work in a hazardous condition or to operate equipment that is in such a condition. A refusal is protected if made in good faith; "no reasonable alternative" is available to the employee, and the hazardous condition presents "imminent danger of death or serious injury" plus the "urgency of the situation" does not allow time to eliminate the danger, plus the employee "where possible" has notified the transit agency of the danger.

With the glaring exception discussed below, both sections of the statute are hedged with good faith and reasonable reasonableness requirements, affording the transit employer grounds on which to defend many employee charges. The glaring exception is the making of a safety report: an employee who makes a safety report is protected from retaliation regardless of whether the employee has acted reasonably or in good faith. This affords the "preemptive striker" (the employee who uses the word "retaliation" to off stave criticisim of his or her job performance) a golden opportunity: if the employee makes what passes for a safety report, he or she may argue that any subsequent job criticism or adverse action is payback for having engaged in this protected activity. And, because whether the safety report contributed to the subsequent criticism or adverse action is likely to be a question of fact, the employee may be entitled to a jury trial on

[1] Nichik v. New York City Transit Authority et al., 10 Civ. 5600 (S.D.N.Y.)

[2] Airline employees have their own Federal whistleblower law, 49 U.S.C. §42121 (b)(2)(B), known as AIR 21.

the issue of retalilation even if there is solid evidence of failure to meet job performance requirements.

Also, while the NTSSA applies to public transit employees generally, it does not apply to security personnel, including transit police. The likely reason for this exception is security employees, who presumably have inside knowledge of a range of problems that it is their job to remedy, might be tempted to use their job knowledge to obtain personal benefit by making claims under the Act. This exclusion may also reflect the Supreme Court's distinction in Garcetti v. Ceballos, 547 U.S. 410 (2006) between public employees generally, whose First Amendment rights to speak out on matters of public concern are protected, and employees whose speech is considered to be part of their job duties and who are accordingly not protected by the First Amendment under Garcetti.

Again, the carveout for security employees in the NTSSA does not apply to employees who make a safety or security report: all employees, including security employees, are protected from retaliation by the NTSSA for making safety reports. In our recent case, the trial court dismissed a First Amendment claim under 42 U.S.C. §1983 at the close of the plaintiff's case based on evidence which established that the plaintiff, a subway superintendent, was responsible for safety in a number of stations and made his safety report after his superior directed him to explain a concern he had raised with a safety director. The trial court concluded, on this record, that the First Amendment claim should be dismissed because making the report was part of the plaintiff's job. Plaintiff's NTSSA retaliation claim, however, went to the jury for determination.

Enforcement Traps For the Unwary

A person seeking to invoke the protection of the NTSSA must file a complaint, within 180 days of the alleged violation, with the Secretary of Labor. NTSSA complaints are processed by OSHA in the manner set forth on the OSHA whistleblower web site. The Secretary is to move the complaint forward if the complainant makes a "prima facie showing" that protected activity was a "contributing factor" to unfavorable personnel action. The Secretary is not to proceed, however, if the employer makes a "clear and convincing" showing that "the employer would have taken the same unfavorable personnel action in the absence of" that (protected) behavior.

The NTSSA provides for a determination by the Secretary of Labor within 120 days of a hearing, which is supposed to take place within 60 days after the filing of a complaint. The prevailing complainant is entitled to statutory remedies (see below) plus attorney's fees and expert fees. The Secretary may also award the employer, if the complaint is determined to have been frivolous, "reasonable attorney's fees not exceeding $1,000."

As with most whistleblower statutes, and as with Title VII, the NTSSA's administrative relief provisions are of no practical significance in many cases. This is because the statute contains a further provision that, if the Secretary of Labor does not make a determination within 210 days after filing of the complaint, the complainant may bring a federal district court action for a jury determination of his claim. In our case, and probably in most cases, the complainant

waits for the time to run and goes to court rather than expending effort on obtaining an administrative determination.

Relief Issues

Under the NTSSA a prevailing plaintiff is entitled to be made whole. The statute specifies that "Relief in an action under [the statute] shall include…reinstatement with the same seniority status that the employee would have had but for the discrimination," plus back pay with interest and "compensatory damages, including compensation for any special damages sustained as a result of the discrimination," which means attorneys' fees and other legal expenses. (emphasis added).

What makes this relief provision different from Title VII and other statutes is that, usually, reinstatement is an equitable remedy and is determined by the court. In the NTSSA, however, reinstatement appears to be mandatory rather than in the court's discretion.[3] An issue then arises as to whether the jury should be instructed that, if liability is found, the plaintiff will be reinstated to his former position. If the jury is not so advised, the risk arises that the plaintiff would receive a damage award based on the basis of a mistaken assumption that he or she has lost the job. Judge Gleeson in the Eastern District of New York resolved this issue in our recent case by charging the jury that back pay and reinstatement were for the court and that the jury was to award compensatory damages for emotional distress only, plus punitive damages. (The NTSSA specifies that relief in any action under its provisions may include punitive damages, but these are capped at $250,000.)

The NTSSA also contains an election of remedies provision that bars an individual from seeking relief under its provisions as well as well as under another provision of law for the same allegedly unlawful act. This provision, as applied in our case, barred plaintiff from maintaining a New York Civil Service Law §75-B claim deemed duplicative of his NTSSA claim. His § 1983 claim, however, was not barred by the election of remedies provision.

Open Water

The NTSSA is silent on whether liability may be imposed on officers and employees of a transit agency in their individual capacities as well as on the transit employer. A good argument can be made, based on the language of the statute, that Congress did not intend to impose individual liability, essentially on the same analysis as the Second Circuit used in Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995), to reach the conclusion that individuals are not included in the word "employer" under Title VII. For example, reinstatement is remedy under NTSSA, but only the transit agency employer could be ordered to reinstate an employee---individuals could not be required to provide this remedy. On the other hand, the NTSSA resembles other federal whistleblower statutes that have been held to support individual liability.

[3] It seems likely that an NTSSA plaintiff could, as in Title VII cases, elect not to seek reinstatement and ask for a front pay award instead.

In our case, the court reserved decision on the individual liability issue. At the charge conference, plaintiff, even though he had vigorously pursued the case against several individuals, reversed course and dropped these claims when the case was about to go to the jury. This was a consequence of the verdict form, which asked the jury to determine the liability of the defendant transit agency as well as the several individual defendants. The verdict form raised the possibility that the jury might find liability on the part of individuals but not the transit agency. If that happened, the plaintiff would lose his remedy of reinstatement because only the agency, and not the individuals, could provide this remedy. Faced with this risk, the plaintiff opted to drop his claims against the individuals and to ask the jury to determine only whether the transit agency defendant was liable to him. Thus the legal issue of whether individuals can be held liable under the NTSSA remains to be resolved another day.

The jury returned a verdict for the defendant transit agency in our case.