

Straight Track - A Hoey & Farina Newsletter

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The Hoey & Farina

RAILROAD RETALIATION REPORT

Part 9: NEW FEDERAL LAW PROTECTS LOCAL REMEDIES

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When the law in a state provides stronger protection for railroad employees, the railroad will often argue that the state law is **preempted** by a Federal law or regulation. That means the weaker Federal law displaces the stronger state statute. This kind of displacement of state law is called **Federal preemption**.

An important question under Section 20109 of the Federal Rail Safety Act is whether this revised federal law preempts state remedies for what is called **retaliatory-discharge**.

Most states have judicial decisions or statutes that protect non-railroad employees from being fired in retaliation for filing claims under state workers' compensation statutes. Under state workers' compensation cases, an employee who is injured on the job gets a pre-set but small amount of benefits - even if the employer was **not** negligent. Workers compensation laws also typically say it is illegal for an employer to fire an employee in retaliation for filing a workers' compensation case. The reason is that if employers could get away with firing an employee in retaliation for filing a workers' compensation case, then employers could prevent employees from exercising their statutory rights. Thus, a non-railroad worker is protected by state law from **retaliatory-discharge**.

Of course, injured railroad employees do not get workers' compensation benefits. Instead, injured railroad employees are entitled to sue their employer in state or federal court for negligence under the Federal Employers' Liability Act ("FELA"). And, lawyers representing railroad employees have argued that state retaliatory-discharge laws should also apply to protect railroad employees who are fired in retaliation for filing a complaint under the FELA. The results have been mixed.

In 2005, for example, the Kansas Supreme Court ruled that a railroad employee who was fired for filing an FELA complaint is entitled to sue for retaliatory discharge. *Hysten v. Burlington Northern Santa Fe Ry. Co.* <http://www.kscourts.org/cases-and-opinions/opinions/supct/2004/20040319/90730.htm>

However, railroad employees who are injured in Illinois do not have the same protection as Kansas railroaders. In Illinois, a non-railroad employee can sue for retaliatory-discharge if he or she was fired for filing a workers' compensation claim. And, significantly, Illinois judges have ruled that a non-railroad employee can sue for retaliatory discharge even if he or she is a union member who can attack the firing in grievance proceedings.

It makes sense, then, that Illinois judges should also permit a railroad employee to sue for retaliatory discharge if he or she is fired for filing an FELA claim. But last year, in a very disappointing decision, the Illinois Appellate Court ruled that a railroad employee **cannot** sue for retaliatory discharge if he or she

was fired for filing an FELA complaint. *Izziarry v. Illinois Central*. <http://www.state.il.us/court/Opinions/AppellateCourt/2007/1stDistrict/November/1061453.pdf>

Vermont and Louisiana, on the other hand, have wonderful statutes that protect railroad employees if they are fired for filing a personal injury case under the FELA. In Louisiana, a statute provides: "No person shall discharge an employee from employment because of said employee having asserted a claim for benefits under the provisions of [the Louisiana workers' compensation statute] **or under the law of any state or of the United States.**" *Louisiana Revised Statutes, Title 23, Section 1362.*

Similarly, a Vermont law states: "No person shall discharge or discriminate against an employee from employment because such employee asserted a claim for benefits under [the Vermont workers' compensation statute] **or under the law of any state or under the United States.**" *Vermont Statutes, Title 21, Section 710.*

This means that in Kansas, Louisiana or Vermont, a railroad employee can sue for retaliatory-discharge if he or she was fired for filing an FELA complaint. But, as you can probably guess, this means that railroads will want to claim Federal preemption. So, the key question is: Does the new version of Section 20109 of the Federal Rail Safety Act **preempt** state laws that protect railroad employees who are fired for engaging in protected activities? The answer is simple. Section 20109(f) states: "**Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.**"

This means that if you are a resident of Kansas, Vermont or Louisiana, then you can still sue your employer for retaliatory discharge - under State law - if you are fired for filing an FELA complaint. For railroad employees who are residents in a state such as Illinois, where the judges have - so far - refused to follow *Hysten*, the focus should be on trying to get state legislators to enact the same kind of strong statutory protection provided in Vermont and Louisiana.