

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November 10, 2022

Christopher M. Wolpert
Clerk of Court

BRANDON FRESQUEZ,

Plaintiff - Appellee,

v.

No. 21-1118

BNSF RAILWAY CO.,

Defendant - Appellant.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:17-CV-00844-WJM-SKC)

Bryan P. Neal, Holland & Knight LLP, Dallas, Texas (Keith M. Goman, Hall & Evans, LLC, Denver, Colorado, with him on the briefs), appearing for Appellant.

Adam W. Hansen, Apollo Law LLC, Minneapolis, Minnesota (Nicholas D. Thompson, Casey Jones Law, Appleton, Wisconsin, Jonathan L. Stone, Moody Law Firm, Portsmouth, Virginia, Eleanor E. Frisch, Apollo Law LLC, Minneapolis, Minnesota, and Colin R. Reeves, Apollo Law LLC, Brooklyn, New York, with him on the brief), appearing for Appellee.

Before **TYMKOVICH**, **BRISCOE**, and **PHILLIPS**, Circuit Judges.

BRISCOE, Circuit Judge.

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Introduction

Plaintiff Brandon Fresquez filed this action against his former employer, defendant BNSF Railway Company (BNSF), claiming that BNSF violated the Federal Railroad Safety Act (FRSA) by terminating his employment in retaliation for him engaging in certain activities that are expressly protected under the FRSA. The case proceeded to a jury trial. The jury found in favor of Fresquez on his claim of retaliation under the FRSA, and it awarded him \$800,000 in compensatory damages and \$250,000 in punitive damages. Following the trial, Fresquez moved for an award of back and front pay. The district court granted that motion in part and awarded Fresquez a total of \$696,173 in back and front pay, bringing the total judgment to \$1,746,173, plus interest from the date of entry of judgment.

BNSF now appeals. BNSF argues that it is entitled to judgment as a matter of law on the merits of Fresquez's claims, and, alternatively, judgment as a matter of law on the issue of punitive damages. BNSF further argues that it is entitled to a new trial on the merits of Fresquez's claims based on the district court's admission of character and other prejudicial evidence. BNSF also argues that it is entitled to a new trial on the issue of compensatory damages. Lastly, BNSF argues that the district court abused its discretion by awarding Fresquez ten years' worth of front pay.

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reject BNSF's arguments and affirm the district court's judgment.

I. Factual background¹

BNSF is a Texas-based freight transportation company that operates an extensive interstate railroad network. BNSF is designated as a Class I freight railroad by the federal government.

Fresquez, a Colorado resident, began working for BNSF's Maintenance of Way Department in November 2005. Between 2006 and May 2016, Fresquez worked primarily as a track inspector. The track inspector position requires extensive training, including a week-long community college class, and regular certification testing.

A track inspector's job is to identify and report track defects, which are deviations from BNSF's or the Federal Railroad Administration's (FRA) track safety standards. FRA regulations set forth a specific schedule for track inspections. 49 C.F.R. § 213.233(c). Fresquez monitored and inspected the railroad tracks in his assigned geographic area, which covered in part the Denver metropolitan area, to make sure they complied with BNSF and FRA standards.

When a track inspector discovers a track defect, he or she must take one of three remedial actions, depending on the severity and classification of the defect. Some types of track defects require the inspector to take the track out of service immediately, which means that the track cannot be used until the defect is repaired. Other types of defects, in

¹ Because the jury found in favor of Fresquez on his FRSA claim, we recount the facts that were presented to the jury in the light most favorable to Fresquez. *See Tudor v. Se. Okla. Univ.*, 13 F.4th 1019, 1025 n.1 (10th Cir. 2021).

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