UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CURTIS ROOKAIRD,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

Case No. C14-176RSL

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the Court on "Plaintiff Curtis Rookaird's First Motion For Partial Summary Judgment." Dkt. # 38. Having reviewed the memoranda and exhibits submitted by the parties, the Court finds as follows.

I. BACKGROUND

On March 19, 2010, defendant terminated plaintiff's employment for several rule violations that allegedly took place on February 23, 2010. Dkt. # 39 (Bowman Decl. Exh. A) at 6. Plaintiff and his union (the United Transportation Union, or "UTU") believed that plaintiff's termination violated the terms of the collective bargaining agreement ("CBA") between the UTU and defendant. Pursuant to the CBA, plaintiff appealed his termination to an arbitral board, Public Law Board No. 7293 ("PLB"), a Special Board of Adjustment created under and governed by the Railway Labor Act, 45 U.S.C. § 151 et seq. ("RLA"). In July 2011, the PLB

affirmed defendant's decision to terminate plaintiff's employment. Dkt. # 39 (Bowman Decl. Exh. E) at 35-36.

In July 2010, while plaintiff's appeal to the PLB was pending, plaintiff filed a complaint with the Occupational Safety and Health Administration ("OSHA") stating that his termination violated the whistleblower protections of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109. Dkt. # 39 (Bowman Decl. Exh. B) at 9-10. In September 2013, OSHA issued its findings, concluding that the railroad had violated the Act and ordering that plaintiff be reinstated. Dkt. # 39 (Bowman Decl. Exh. C) at 23-24. Both parties filed objections to the order and appealed the determination to the Office of Administrative Law Judges ("OALJ"). In December 2013, while plaintiff's OALJ appeal was pending, plaintiff sent notice of his intent to file an action in federal court, Dkt. # 39 (Bowman Decl. Exh. D) at 31; plaintiff filed the instant action in February 2014, Dkt. # 1 (Compl.).

In its Answer to the Complaint, defendant asserted the following as one of its affirmative defenses: "Plaintiff's Complaint is barred under 49 U.S.C. § 20109(f) because Plaintiff elected to pursue a remedy under another provision of law by seeking protection for the same allegedly unlawful act under the Railway Labor Act, 45 U.S.C. § 153." Dkt. # 13 (Answer) at 8. Plaintiff moves for summary judgment on this affirmative defense. Dkt. # 38.

II. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate if, viewing the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party, the moving party shows that "there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); Torres v. City of Madera, 648 F.3d 1119, 1123 (9th Cir. 2011). The moving party "bears the initial responsibility of informing the district court of the basis for its motion." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the nonmoving party will bear the burden of proof at trial, the moving party may meet its burden by "pointing

out . . . that there is an absence of evidence to support the nonmoving party's case." Id. at 325. Once the moving party has satisfied its burden, the nonmoving party must then set out "specific facts showing that there is a genuine issue for trial" in order to defeat the motion. Id. at 324. "The mere existence of a scintilla of evidence in support of the non-moving party's position" is not sufficient; this party must present probative evidence in support of its claim or defense. Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party. In re Barboza, 545 F.3d 702, 707 (9th Cir. 2008).

B. Striking an Affirmative Defense

Fed. R. Civ. P. 12(f) gives the Court the authority to strike material from pleadings that is redundant, immaterial, impertinent or scandalous. Motions to strike are generally disfavored because of the limited importance of pleading in federal practice, and because such motions are often used as a delaying tactic. Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028, 1032-33 (C.D. Cal. 2002). To strike an "insufficient" affirmative defense, a plaintiff must show that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed. Id. at 1032 (citations omitted).

III. DISCUSSION

A. Appropriate Standard

Plaintiff argues that his motion should be construed as one seeking summary judgment, and not as a motion to strike an affirmative defense under Fed. R. Civ. P. 12(f). Dkt. # 52 (Pl. Reply) at 2-3. Defendant invokes and appears to apply parts of both the Rule 56 and Rule 12(f) standards. Dkt. # 45 (Def. Resp.) at 4-5. There is very little authority analyzing whether a party may move for summary judgment on an affirmative defense. In Kerzman v. NCH Corp., 2007 WL 765202, at *7 (W.D. Wash. Mar. 9, 2007), the court held that a motion for summary

judgment on an affirmative defense was properly construed as a motion to strike. In E.E.O.C. v. Fred Meyer Stores, Inc., 954 F. Supp. 2d 1104, 1112-13 (D. Or. 2013), on reconsideration in part (Sept. 19, 2013), the court disagreed with Kerzman and held that a party could seek summary judgment on an affirmative defense. Some courts have applied the standard for granting summary judgment in ruling on motions brought under Rule 12(f) where the parties submitted evidence beyond the pleadings either supporting or challenging an affirmative defense. See Quick v. Grand Junction Lodging LLC, 2014 WL 7205417, at *3 (D. Colo. Dec. 18, 2014). Some Circuit Court authority suggests that motions for summary judgment on affirmative defenses are appropriate, although the Court has found none directly analyzing the issue. See Ackerson v. City of White Plains, 702 F.3d 15, 21 (2d Cir. 2012), as amended (Dec. 4, 2012) ("[T]he district court should have granted [plaintiff's] motion for partial summary judgment on [defendants'] probable cause affirmative defense."). As both parties here have presented evidence, argued the legal merits of the affirmative defense and cited the summary judgment standard, the Court construes the instant motion as one seeking summary judgment.

B. Merits

The election-of-remedies provision of the FRSA provides that a railroad employee "may not seek protection under both [§ 20109] and another provision of law for the same allegedly unlawful act of the railroad carrier." 49 U.S.C. § 20109(f). The parties dispute whether plaintiff's decision to seek relief under the CBA and appeal his termination to the PLB (as the RLA permits) triggered this provision and bars his suit under the FRSA. Defendant argues that issues of material fact preclude the Court from granting summary judgment on this defense. Id. at 9. Defendant fails to identify, and the Court fails to find, any material fact issue in dispute, leaving only the above question of law.

Although the Ninth Circuit has not addressed this issue, the Court finds compelling recent decisions from the Sixth and Seventh Circuits that directly oppose defendant's argument. Norfolk S. Ry. Co. v. Perez, 778 F.3d 507, 512-14 (6th Cir. 2015); Reed v. Norfolk S. Ry. Co.,

740 F.3d 420, 426 (7th Cir. 2014). This Court concurs with these Circuits that the election-of-remedies provision of the FRSA does not preclude a railroad employee from both seeking relief under the FRSA and seeking relief under a collective-bargaining agreement pursuant to the RLA. Defendant's affirmative defense fails as a matter of law, and plaintiff is entitled to summary judgment on whether it applies.

IV. CONCLUSION

For all of the foregoing reasons, plaintiff's motion for partial summary judgment is GRANTED. Dkt. # 38.

DATED this 1st day of June, 2015.

Robert S. Lasnik
United States District Judge