UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

COULBOURNE RADER, *Plaintiff*, v. NORFOLK SOUTHERN RAILWAY COMPANY and NORFOLK SOUTHERN CORPORATION, *Defendants*.	Case No. 1:13-cv-298 Judge Travis R. McDonough Magistrate Judge Christopher H. Steger

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MEMORANDUM OPINION

Before the Court is Norfolk Southern Railway Company's ("NSRC") and Norfolk Southern Corporation's ("NSC") (NSRC and NSC are referred to collectively as "Defendants") Motion for Summary Judgment on Plaintiff's FRSA Claim ("Motion for Summary Judgment"). (Doc. 34.) Also before the Court is Plaintiff Coulbourne Rader's Motion to Strike Defendants' Supplemental Brief or Alternatively Motion for Leave to Respond ("Motion to Strike"). (Doc. 50.) For the reasons stated hereafter, Defendants' Motion for Summary Judgment will be **DENIED**, and Plaintiff's Motion to Strike will be **DENIED**.

I. BACKGROUND

For the purposes of summary judgment, the Court will view the facts in the light most favorable to Plaintiff. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

With the exception of a couple of brief furloughs, Plaintiff has worked as a carman for NSRC since he was hired in 1978. (Doc. 35-1, at 3; Doc. 36-2, at 6, 8.) On June 13, 2011,

Plaintiff reported to his direct supervisor, Senior General Foreman Aaron Watkins, that he twisted his knee when he tripped over a rabbit cable after dismounting from a tank car. (Doc. 35-1, at 4–6; Doc. 35-3; Doc. 36-2, at 15–18, 34–36.) Watkins responded to Plaintiff, "[Y]ou're just back off vacation. You can't be hurt." (Doc. 36-2, at 33–34.) Later that day, Plaintiff requested medical attention and was examined by a Workforce Corporate Health physician who determined that he had a "left knee strain and probable torn meniscus." (Doc. 35-4, at 3.) Two days after the incident, Dr. Mark Sumida evaluated Plaintiff and removed 18cc of fluid from his knee, prescribed an MRI, and diagnosed him with a torn medial meniscus. (Doc. 35-1, at 10; Doc. 35-5.) Plaintiff underwent surgery to repair his knee on July 8, 2011. (Doc. 35-6, at 2–4.)

Plaintiff returned to Dr. Sumida for a follow-up appointment on August 15, 2011. (Doc. 35-7.) In a progress report Plaintiff gave to Watkins, Dr. Sumida explained that Plaintiff had a good range of motion and no instability. He estimated that Plaintiff could return to work in approximately two weeks, but that he may have issues with crawling and would have to wear a neoprene sleeve on his knee. (Doc. 35-7; Doc. 36-2, at 23.) On August 18, 2011, NSRC's medical department sent a letter to Dr. Sumida acknowledging that he released Plaintiff to return to work with no restrictions on August 29, 2011, and requesting that Dr. Sumida provide additional information regarding Plaintiff, including completing a medical questionnaire. (Doc. 35-8, at 1–2.) On August 19, 2011, Dr. Sumida returned the questionnaire, which provided that Plaintiff "is medically able to safely perform the job duties of Carman as described with respect to his left knee condition," but that he would need to wear a "[l]eft knee brace while working." (*Id.* at 3.)

Upon receiving Dr. Sumida's questionnaire response, NSRC's Medical Department e-mailed Division Manager, Kevin Krull, stating that the Medical Department "is in receipt of a

full duty release with no restrictions" and that Dr. Sumida has "advised against the likelihood of risk of aggravation or re-injury." (Doc. 36-8.) The e-mail also requested that Krull arrange for a return-to-work physical examination of Plaintiff's left knee and, upon passing the physical, to allow him "to return to service without delay." (*Id.*) On August 22, 2011, Krull e-mailed Senior General Forman Watkins and asked him to arrange for Plaintiff to have a return-to-work physical on his left knee. (Doc. 36-9.) In response, Watkins informed Krull that "[l]ast week Mr. Rader came into my office and handed me the attached doctor's note clearing him to return-to-work in two weeks . . . ." (*Id.*) NSRC scheduled a return-to-work physical for August 29, 2011. (Doc. 35-9.) On August 31, 2011, after Plaintiff's return-to-work physical and a subsequent eye examination, Medical Case Manager John Knecht e-mailed Krull and Watkins and informed them that Plaintiff could return to work "at your first convenience." (Doc. 35-10.) That same day, Krull forwarded Knecht's e-mail to his direct supervisor, NSRC General Manager Calvin Cox, noting that "medical has qualified Rader for full duty with no restrictions effective 8/31/11 but also indicates a 'Neoprene Sleeve to be worn while at work.'" (Doc. 35-10, at 2.) Knecht's e-mail to Krull and Walkins also made its way to Linda Kurzenberger, a district claim agent for NRSC. (Doc. 35-12.) Kurzenberger responded directly to Krull, stating: "if you have any concerns regarding the 'left Neoprene Sleeve' please contact Dr. Prible. As it stands Mr. Rader should be permitted to return to work." (Doc. 35-12.)

Plaintiff attempted to report for work on September 1, 2011, but, when he arrived, his immediate supervisor, Robert Steed, informed him that Senior General Forman Watkins ordered him not to let Plaintiff work. (Doc. 36-2, at 26.) Later that day, Plaintiff asked Watkins why he could not return to work since the medical department had cleared him. (*Id.* at 26, 36–37.) Plaintiff and Watkins have differing accounts of the conversation that followed.

According to Plaintiff, Watkins responded by telling him to get off the property, and when Plaintiff asked for union representation, Watkins told him that if he did not leave, Norfolk Southern police would be called to remove him. (*Id.*) Plaintiff also recalls that Watkins told him "I'll call you when I want you to come back" and that Watkins did not provide any explanation why he could not return to work.[1] (*Id.* at 26, 30, 36–37.) Plaintiff characterized Watkins's demeanor during this conversation as "bucked up" and "pretty mean acting." (*Id.* at 36–37.)

Conversely, Watkins remembers explaining to Plaintiff he was waiting on "clarification from the Norfolk Southern medical department" and that Plaintiff responded "with some statement about how he had this many years of seniority and I was holding him up from his job." (Doc. 36-3, at 30.) Watkins then asked Plaintiff to leave, and Plaintiff asked for union representation. (*Id.*) Watkins also recalls Plaintiff making a comment that "the NS police would have to get him out of there." (*Id.*) According to Watkins, Plaintiff left only after he reminded Plaintiff that he was his supervisor and that he was instructing him to leave the property.[2] (*Id.*)

On September 8, 2011, General Manager Cox e-mailed Dr. Ray Prible in the NSRC Medical Department expressing concerns about returning an employee to work who is required to wear a neoprene sleeve:

> Ray,
>
> Concerning the below, I am concerned about returning an employee to work who must use a neoprene sleeve while at work. Wearing the neoprene sleeve is a restriction by itself so I can't see that employee being returned with no restrictions. If the employee was to feel pain in his knee, isn't the neoprene

[1] Plaintiff called the NS medical department three times in September 2011 to find out why he was not permitted to return to work. (Doc. 36-2, at 27.) Each time, the medical department told him that he was not on medical hold and that the only thing he could do was contact his union representative. (*Id.*)

[2] Watkins also testified that he had a telephone conversation with Plaintiff the night before in which he instructed Plaintiff not to report for work because he "was getting clarification from the Norfolk Southern medical department." (Doc. 36-3, at 29.)

sleeve providing immobilization that would then make the report a reportable injury?

Calvin

(Doc. 35-10.) Dr. Prible did not immediately respond to Cox's e-mail. (*See id.*)

On September 27, 2011, Dr. Sumida conducted a follow-up appointment with Plaintiff and determined that he no longer needed to wear the neoprene sleeve when he returned to work. (Doc. 35-14.) Dr. Sumida's return-to-work note stated that Plaintiff could return with no restrictions. (*Id.*) On October 5, 2011, after receiving Dr. Sumida's return-to-work note, Knecht asked Krull to schedule another return-to-work physical.[3] (Doc. 35-15.) Plaintiff passed his return-to-work physical on October 11, 2011, and returned to work the next day. (Doc. 35-1, at 13–14; Doc. 35-11, at 4–5; Doc. 35-16.)

Dr. Prible did not respond to Cox's September 8, 2011 e-mail until October 10, 2011—the day before Plaintiff's second return-to-work physical. (Doc. 35-10.) When Dr. Prible responded, he stated that since "the neoprene sleeve requirement has been lifted by [Plaintiff's] doctor . . . he should be permitted to [return to work] or, if out longer than 90 days, scheduled for a [return-to-work] physical." (*Id.*) Dr. Prible explained that the one-month delay in responding to Cox's e-mail was "because of [his] schedule" and that "[b]y the time [he] did have an opportunity to look into the matter, the question was moot because the sleeve restriction had already been removed by Dr. Sumida." (Doc. 35-17, at 4.)

Plaintiff initiated this action on September 10, 2013, asserting claims against Defendants for negligence pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, and for

[3] Not knowing that NSRC was in the process of scheduling another return-to-work examination for Plaintiff, counsel for Plaintiff sent a letter to claim agent Linda Kurzenberger on October 6, 2011, informing her that he represented Plaintiff regarding claims for personal injury and violations of the FRSA. (Doc. 36-10.) Later that day, Watkins contacted Plaintiff and asked him if he was ready to come back to work. (Doc. 36-2, at 27.)

retaliation under the Federal Railroad Safety Act ("FRSA"), 49 U.S.C §§ 20101 *et seq.* (Doc. 1.) With regard to his retaliation claim under the FRSA, Plaintiff contends Defendants unlawfully retaliated against him for reporting his work-related injury by delaying his return to work even though his doctor and Defendants' Medical Department cleared him to return to work. On March 31, 2015, Defendants filed the instant motion for summary judgment on Plaintiff's retaliation claim under the FRSA. (Doc. 35.)

II. STANDARD OF REVIEW

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court views the evidence in the light most favorable to the nonmoving party and makes all reasonable inferences in favor of the nonmoving party. *Matsushita*, 475 U.S. at 587; *Nat'l Satellite Sports, Inc. v. Eliadis Inc.*, 253 F.3d 900, 907 (6th Cir. 2001).

The moving party bears the burden of demonstrating that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Leary v. Daeschner*, 349 F.3d 888, 897 (6th Cir. 2003). The moving party may meet this burden either by affirmatively producing evidence establishing that there is no genuine issue of material fact or by pointing out the absence of support in the record for the nonmoving party's case. *Celotex Corp.*, 477 U.S. at 325. Once the movant has discharged this burden, the nonmoving party can no longer rest upon the allegations in the pleadings; rather, it must point to specific facts supported by evidence in the record demonstrating that there is a genuine issue for trial. *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir. 2002).

At summary judgment, the Court may not weigh the evidence; its role is limited to determining whether the record contains sufficient evidence from which a jury could reasonably

find for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). A mere scintilla of evidence is not enough; the Court must determine whether a fair-minded jury could return a verdict in favor of the non-movant based on the record. *Id.* at 251–52; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994). If not, the Court must grant summary judgment. *Celotex*, 477 U.S. at 323.

III. ANALYSIS

The purpose of the FRSA is to "promote safety in every area of railroad operations and reduce rail-road-related accidents and incidents." 49 U.S.C. § 20101. Under the FRSA, a railroad carrier is prohibited from retaliating against an employee for reporting a work-related injury. 49 U.S.C. § 20109(a). Specifically, the FRSA provides:

> A railroad carrier engaged in interstate or foreign commerce . . . 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 lawful, good faith act done or about to be done . . . to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee.

49 U.S.C. § 20109(a)(4). The FRSA incorporates by reference the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, under which an employee must show that (1) he engaged in protected activity; (2) the employer knew that he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *Consol. Rail Corp. v. U.S. Dep't of Labor*, 567 F. App'x 334, 337 (6th Cir. 2014) (citing *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013)). "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." *Araujo*, 708 F.3d at 157; *see also*

29 C.F.R. § 1982.104(e)(3)–(4) (adopting this burden-shifting standard to FRSA complaints filed with the Department of Labor). As compared to the *McDonnell Douglas* framework, the FRSA burden-shifting framework "is much more protective of plaintiff-employees." *Araujo*, 708 F.3d at 157. "For employers, this is a tough standard, and not by accident." *Id.* (quoting *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997)).

Defendants argue they are entitled to summary judgment on Plaintiff's FRSA retaliation for two reasons. First, Defendants contend that Plaintiff fails to establish that his reporting of a work-related injury was a contributing factor in his delayed return to work.[4] Second, Defendants contend that, even if Plaintiff can establish that his reporting of a work-related injury was a contributing factor in his delayed return to work, his FRSA claim still fails, because the undisputed evidence establishes that NSRC would have delayed his return to work whether or not he engaged in a protected activity. Defendants also argue that, even if Plaintiff's FRSA retaliation claim survives summary judgment, they are entitled to summary judgment on his claim for punitive damages because Plaintiff cannot establish Defendants acted with reckless or callous disregard for Plaintiff's rights under the FRSA.

A. Contributing Factor

Defendants contend that Plaintiff's FRSA retaliation claim fails because the undisputed facts demonstrate that his reporting of a work-related injury was not a "contributing factor" in his delayed return to work. The phrase "contributing factor" is a term of art meaning "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the

[4] Defendants do not argue that Plaintiff cannot demonstrate the other elements for retaliation under the FRSA, namely that Plaintiff engaged in a protected activity, that Defendants knew Plaintiff engaged in a protected activity, or that Defendants took an adverse employment action against Plaintiff. Accordingly, the Court will assume, for the purposes of ruling on Defendants' motion, that Plaintiff has established these requisite elements.

decision." *Consol. Rail Corp*, 567 F. App'x at 338 (citing *Araujo*, 708 F.3d at 158). Plaintiff need not show that engaging in protected activity was the "sole or even predominant cause" of the adverse employment action. *Araujo*, 708 F.3d at 158. Plaintiff need only produce evidence from which a reasonable jury could conclude that "intentional retaliation prompted by the employee engaging in protected activity" contributed to the adverse employment action. *See Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014); *Consol. Rail Corp*, 567 F. App'x at 338; *see also Ind. Mich. Power Co. v. U.S. Dep't of Labor*, 278 F. App'x 597, 604 (6th Cir. 2008) (noting that a plaintiff can satisfy the contributing factor prong using circumstantial evidence to infer improper motive).

Plaintiff's evidence meets this very permissive threshold. Beginning on or around August 15, 2011, Dr. Sumida and Plaintiff notified Defendants that he could return to work in approximately two weeks and that he would have to wear a neoprene sleeve on his knee. (Doc. 35-7; Doc. 36-2, at 23.) After some follow-up with Dr. Sumida, NSRC's Medical Department, Krull, and Watkins arranged for Plaintiff to have a return-to-work physical on his left knee. (Doc. 36-9.) After Plaintiff passed his return-to-work physical, Knecht e-mailed Krull and Watkins and informed them that Plaintiff could return to work "at your first convenience." (Doc. 35-10.) Claim manager Kurzenberger, also instructed Krull that, even if he had concerns about the neoprene sleeve, "Mr. Rader should be permitted to return to work." (Doc. 35-12.) According to Plaintiff, when he attempted to report for work on September 1, 2011, he was met with hostility from Senior General Foreman Watkins, culminating in Watkins ordering him off the property and threatening to have him removed by Norfolk Southern police after he asked for union representation—all without an explanation as to why he was not permitted to return to work after receiving his medical clearance. (Doc. 36-2, at 26, 36–37.)

Viewing this evidence in the light most favorable to Plaintiff and drawing all reasonable inferences in Plaintiff's favor, the Court finds that Plaintiff's August 2011 medical clearance, the instructions from Knecht and Kurzenberger that Plaintiff should return to work, and Watkins's hostile reaction when Plaintiff attempted to return to work despite Plaintiff's medical clearance, constitute sufficient evidence from which a reasonable jury could conclude that retaliation for engaging in a protected activity was a "contributing factor" to Defendants' delay in returning Plaintiff to work. *See Consol. Rail Corp*, 567 F. App'x at 338. Defendants' competing evidence of Watkins's reaction and explanation for Plaintiff's delayed return fact must be resolved by a jury, not by the Court.

B. Whether Defendants Would Have Taken the Same Action Without Plaintiff's Protected Activity

"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." *Araujo*, 708 F.3d at 157. Defendants argue that Plaintiff's retaliation claim fails because undisputed evidence demonstrates Plaintiff would have experienced a delay whether or not he reported his work-related injury. Specifically, Defendants argue that it is "unfortunately common for delays to emanate from the Medical Department" and that they receive more complaints regarding delays in returning to work in non-work-related injury situations than in situations involving work-related injuries. (Doc. 35, at 16.) Defendants contend these delays in non-work-related injury situations demonstrate that that they are "neutral with respect to returning employees to work after work-related injuries" and that Plaintiff "has no basis upon which to differentiate his delayed return to work from any one of the dozen

instances in which NSRC employees have suffered non-work-related injuries and felt they were not permitted to return to work with sufficient speed." (Doc. 35, at 15–16.)

Defendants' evidence that employees routinely experience delays in returning to work due to the Medical Department is insufficient to establish that Plaintiff would have experienced a delay in returning to work even if he had not reported a work-related injury. The delay at issue was caused, at least in significant part, by Plaintiff's direct supervisor's decision not to act on the Medical Department's clearance, not on the Medical Department's failure to issue a clearance. Again, Defendants' Medical Department cleared Plaintiff to return to work as early as August 31, 2011, and Defendants' claim agent instructed that Plaintiff should be permitted to return to work even if there were concerns about his neoprene sleeve. (Doc. 35-10; Doc. 35-12.) Evidence that Defendants' own employees were of the opinion that Plaintiff should be permitted to return to work and that these opinions were communicated to employees who ultimately controlled whether Plaintiff returned to work directly undercuts Defendants' argument that Plaintiff would have experienced a forty-three day delay in returning to work even if he did not engage in protected activity by reporting his work-related injury. Defendants' argument that delays often emanate from the Medical Department is undercut by the fact that the Medical Department cleared Plaintiff to return to work as early as August 31, 2011. (*See* Doc. 35-10.)

Viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could conclude that retaliation for engaging in a protected activity was a "contributing factor" to Defendants' delay in returning Plaintiff to work and that Plaintiff would not have experienced his delay in returning to work absent his reporting of a work-related injury. Accordingly, Defendants' Motion for Summary Judgment on Plaintiff's FRSA claim will be **DENIED**.

C. Punitive Damages

Finally, Defendants argue that, even if Plaintiff's FRSA retaliation claim survives summary judgment, they are entitled to summary judgment on his claim for punitive damages under the FRSA. An award of punitive damages is available for violations of the FRSA where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Cain v. BNSF Ry. Co.*, ARB Case No. 13-006, 2014 WL 4966163, at *7 (Dep't of Labor Sept. 18, 2014); 49 U.S.C. § 20109(e). Although Defendants can offer a reasonable explanation for their actions and the timing of those actions, the Court finds that a reasonable jury could conclude, if it believed Plaintiff's version of the facts, that Defendants' conduct in delaying Plaintiff's return to work was in "reckless or callous disregard" for Plaintiff's rights or an "intentional violation[] of federal law." Accordingly, because there are genuine issues of material fact regarding Plaintiff's punitive damages claim, Defendants' Motion for Summary Judgment regarding punitive damages under the FRSA will be **DENIED.**

D. Plaintiff's Motion to Strike

On December 23, 2015, Defendants filed a Notice of Supplemental Authority in Support of their Motion for Summary Judgment ("Notice of Supplemental Authority"), in which Defendants identified and discussed three district court cases interpreting claims for retaliation under the FRSA decided after briefing closed on Defendants' Motion for Summary Judgment. (Doc. 49.) Plaintiff filed a motion to strike Defendants' Notice of Supplemental Authority or, alternatively, for leave to file responsive briefing, arguing that Defendants' Notice of Supplemental Authority fails to comply with Local Rule 7.1(d). Because Defendants' Notice of Supplemental Authority does not change the Court's analysis as it relates to Defendants' Motion

for Summary Judgment, additional briefing from Plaintiff is unnecessary. Accordingly, Plaintiff's Motion to Strike will be **DENIED**.

IV. CONCLUSION

For the reasons stated herein, Defendants' Motion for Summary Judgment (Doc. 34) is hereby **DENIED**, and Plaintiff's Motion to Strike (Doc. 50) is hereby **DENIED**.

/s/ Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE