IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RICARDO MONTES,	)	Civil No.: 3:17-cv-00964-JE
	)	
Plaintiff,	)	FINDINGS AND
	)	RECOMMENDATION
v.	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
a Delaware Corporation; CRAIG SMITH,	)	
LUKE TRAPP, and JOSE GIL,	)	
	)	
Defendants.	)	
___________________________________	)	

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JELDERKS, Magistrate Judge:

Plaintiff Ricardo Montes brings this action against Defendants Union Pacific Railroad (UP), Craig Smith, Luke Trapp, and Jose Gil alleging violations of the whistleblower protection provisions of the Federal Railroad Safety Act (FRSA). 49 U.S.C. §20109.

Currently before the Court is Defendants' motion for summary judgment or, in the alternative, partial summary judgment. For the reasons set forth below, Defendants' motion for partial summary judgment as to Defendant Gil should be granted. Defendants' motion for summary judgment dismissing all Plaintiff's claims should be denied.

Background

Plaintiff has been employed by UP at their Hermiston/Hinkle, Oregon facility since June 16, 1998 and works as a freight car repairman ("carman"). Montes. Decl. ¶ 2. All carmen at the location are members of the TCU/IAM union and, in 2011, Plaintiff was elected as the union's Local Chairman. Id. Defendant Craig Smith was employed by UP as the Director of Mechanical Operations in Hermiston, Oregon until his retirement in October 2015. Smith Decl. ¶ 2. During 2015, Defendant Luke Trapp worked as the Manager of Mechanical Maintenance II for UP. Defendant Jose Gil was employed by UP as the Manager of Mechanical Maintenance II in Salt Lake City, Utah from December 4, 2013 to January 14, 2016. Gil Decl. ¶ 2. He was employed by

UP as the Manager of Maintenance I in Hinkle, Oregon from January 15, 2016 to September 14, 2017. Id. ¶ 3.

Between August 2012 and April 2015, while acting as the Local Chairman, Plaintiff made numerous oral and written reports to UP and the Federal Railroad Administration (FRA) concerning working conditions he believed were unsafe and in violation of federal regulations. Montes Decl. ¶ 2; Compl. ¶¶ 6,7.

Carmen at the Hermiston location are required to clock in when they arrive to work and clock out when they leave. Montes Decl. ¶5. However, the carmen's supervisors enter the employees' time into the UP timekeeping system used to calculate pay. Id. Under the collective bargaining agreement (CBA) between UP and the union, UP must pay overtime for any day on which a carman works more than eight hours or for any week in which he or she works more than 40 hours. Montes. Decl. ¶ 6; Montes Dep. pp. 77-78.

In April of 2015, Union Pacific invited Plaintiff to travel to Omaha, Nebraska to attend the Mechanical Department's Union Pacific Way and Total Safety Culture Conference. Belnavis Decl. Ex. 1, pp. 22-27; Montes Dep. 58-64. Plaintiff flew from Pasco, Washington to Omaha on Monday, April 20, 2015, arriving at 12:44pm CST. Belnavis Decl. Ex. 1, pp. 29-31. The one-day conference lasted from 7am until 5pm on April 21st. Montes Dep. p. 59; Belnavis Decl. Ex. 1, pp. 22-27. Plaintiff returned to Pasco on April 22nd. Id. He did not report to work on Thursday, April 23rd but returned on the 24th. Montes Dep. pp. 64, 75. Plaintiff's timesheet for that week, however, reflected 8 hours worked each of the five days from April 20, 2015 to April 24, 2015. Montes Dep. p. 78; Belnavis Decl. Ex. 1, p. 23; Montes Decl. ¶ 7. Plaintiff asserts, and Defendants do not dispute, that Plaintiff's supervisor, John McNeal, recorded Plaintiff's time for the week. Montes Decl. ¶ 7; Montes Dep. pp. 66-68.

Defendants Trapp and Smith met with Plaintiff regarding the April 23rd time entry. Trapp Decl. ¶ 6, Smith Decl. ¶ 5. According to Trapp and Smith, at the meeting Plaintiff told them that the conference ran late, there was a two-hour delay in his return flight and that he was entitled to 8 hours of pay for travel time. Id. Smith and Trapp reviewed Plaintiff's hours for the week with him on a whiteboard, explaining that Plaintiff was not entitled to 8 hours of extra pay. Id. Smith and Trapp subsequently learned that the conference had not ended late and there had been only a 27-minute flight delay in Plaintiff's return flight arrival time. Smith Decl. ¶ 7; Trapp Decl. ¶ 7; Belnavis Decl. Ex. 1, pp. 16, 31.

Trapp sent Plaintiff a Notice of Investigation letter dated May 6, 2015 that instructed Plaintiff to appear for an investigation and hearing on May 15, 2015. Belnavis Decl. Ex. 1, p. 18. The letter charged Plaintiff as follows:

> While employed as a Mechanical Carman, at Hermiston, Oregon . . . at approximately 0770 hours, on April 23, 2015, you allegedly failed to report for duty. Subsequently, at approximately 0700 hours on April 24, 2015, you allegedly dishonestly reported time for April 23, 2015 as a travel day when no travel was conducted. In addition, you allegedly were dishonest when reporting your time worked/spent at an out of town meeting during the dates of April 20, 21, 22, 2015. Furthermore, you were allegedly dishonest and provided false information to your Director when being interviewed regarding the proper reporting of your time. These allegations, if substantiated, would constitute a violation of 1.6 Conduct (4) Dishonest and the part reading "Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or the performance of duty will not be tolerated." As contained in the General Code of Operating Rules . . . and the Union Pacific Ethics and Business Conduct policy . . ..

Id. The letter informed Plaintiff that being found in violation of this charge would result in his permanent dismissal. Id.

After Plaintiff notified his union's National Representative and General Chairman, Kevin Loftin, of the charges, Loftin spoke with UP managers. Loftin Decl. ¶ 5. A Leniency Agreement was offered in lieu of an investigation and hearing. Smith Decl. ¶ 10; Loftin Decl. ¶ 5; Montes

Dep. p. 130. Under the terms of the Leniency Agreement, Plaintiff, upon signing the agreement, would be returned to service on a probationary basis with seniority and vacation rights restored unimpaired but without compensation for time lost while out of service. Belnavis Decl. Ex. 1, pp. 44-45. The probationary period would last for 24 months. Id. The agreement also contained the condition that "Any and all claims filed on Mr. Montes' behalf regarding this incident will be withdrawn and dismissed in their entirety." Id. p. 45.

Although not contained in the written agreement, Loftin conveyed to Plaintiff that leniency was also conditioned upon Plaintiff stepping down as Local Chairman of the union. Montes Decl. ¶ 8; Montes Dep. p. 130; Loftin Decl. ¶ 5, Smith Decl. ¶ 10. Montes and Loftin both signed the leniency agreement on June 17, 2015. Belnavis Decl. Ex. 1, p. 46. Plaintiff submitted his resignation as Local Chairman by letter dated that same day. Id. p. 50.

Defendants do not dispute that in June of 2017, Defendant Gil instructed Plaintiff not to conduct union business while at work. Montes Decl. ¶ 10. Gil was employed by UP as the Manager of Mechanical Maintenance in Salt Lake City, Utah from December 4, 2013 to January 14, 2016. Gil Decl. ¶ 2. He was the Manager for Mechanical Maintenance in Hinkle, with responsibility for managing Plaintiff, from January 15, 2016 to September 14, 2017. Gil Decl. ¶ 3. Plaintiff did not work with Gil between 2013 and 2015, Montes Dep. p. 173-174; there was no overlap between the Service Units that cover Hinkle and Salt Lake City, Gil Decl. ¶ 4; and Gil was not involved in and had no knowledge at the time of Plaintiff's 2015 discipline. Gil Decl. ¶ 5.

On May 28, 2015, prior to entering into the Leniency Agreement, Plaintiff filed a complaint under FRSA with the U.S. Department of Labor (DOL) and OSHA. Bovarnick Decl. Ex. A. Plaintiff alleged UP retaliated against him for reporting safety concerns and had

disciplined/suspended him under the guise of charges of theft and dishonesty. Id. OSHA completed an investigation and then issued its findings on March 29, 2017. Belnavis Decl. Ex. 1, pp. 51-52. OSHA determined that Plaintiff had not established that he was retaliated against in violation of FRSA. Id. The Findings stated that "[t]he evidence did not support that Complainant was disciplined for alleged protected activities. To the contrary, the evidence indicates that Respondent disciplined him for claiming a day of pay on a day that he did not work." Id.

Plaintiff initiated an administrative appeal of OSHA's findings on May 2, 2017. Bovarnick Decl. ISO Supp. Briefing, Ex. 2. Plaintiff filed the present action with federal district court on June 20, 2017. Dkt. #1. On August 1, 2017, DOL Administrative Law Judge Christopher Larsen issued an Order recognizing the jurisdiction of the United States District Court and dismissing the administrative action. Bovarnick Decl. ISO Supp. Briefing, Ex. 5.

Claims

Plaintiff alleges that Defendants disciplined him and "coerced him into resigning his position as local [union] chairman" and that Defendant Gil, specifically, withdrew permission for Plaintiff to represent union members in retaliation for:

> a. Plaintiff providing information to the Federal Railroad Administration and persons with supervisory authority over his employment information regarding conduct which Plaintiff reasonably believed constituted a violation of Federal, law rule or regulation; and
>
> b. Plaintiff reporting, in good faith, a hazardous safety condition.

Compl. ¶ 10-12.

Plaintiff seeks economic damages for lost wages in the amount of $18,200; compensatory damages in the amount of $250,000; and punitive damages in the amount of $250,000. Compl. p.4. Plaintiff also asks the court to direct UP to expunge from his employment records all

mention of the discipline relating to the events at issue here and to prohibit Defendants from interfering with Plaintiff's union representative activities and from retaliating further against him. Id.

Evaluating Motions for Summary Judgment

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548 (1986). The moving party may discharge this burden by showing that there is an absence of evidence to support the nonmoving party's case. *Id.* When the moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and show that there is a genuine issue for trial. *Id.*

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987). Reasonable doubts concerning the existence of a factual issue should be resolved against the moving party. *Id.* at 630–31. The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505 (1986). No genuine issue for trial exists, however, where the record as a whole could not lead the trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348 (1986).

Discussion

Defendants move for summary judgment on the grounds that Plaintiff waived his right to

bring this action by signing a Leniency Agreement; that Plaintiff failed to exhaust administrative remedies as to the claim involving Defendant Gil; and that Plaintiff cannot establish causation.

I. Jurisdiction

The FRSA's primary enforcement mechanism is through administrative proceedings before the DOL (here OSHA), as set out in 49 U.S.C. § 20109(d) and its attendant regulations. However, if the Secretary fails to issue a final decision within 210 days of the filing of the complaint and the delay is not due to the employee's bad faith, the employee has the option to bring an "original action" in federal district court for "de novo review" of the issues raised in the complaint filed with the DOL. 49 U.S.C. § 20109(d)(3). If the agency issues a final decision before removal, the employee must pursue judicial review in the federal court of appeals, not through a new action in federal district court. 49 U.S.C. § 20109(d)(4).

The record that was before this Court prior to oral argument contained Findings issued by OSHA dated March 29, 2017. Belnavis Decl. Ex. 1, p. 51-52. With no evidence in the record indicating that this decision did not constitute a final decision of the agency, the Court brought the question of jurisdiction to counsel's attention at oral argument. Based on counsel's responses, the Court requested that the parties file supplemental briefing on the jurisdictional issue. Dkt. # 39.

In support of his supplemental briefing, Plaintiff submitted evidence indicating that the Secretary's Findings dated March 29, 2017 were received by Plaintiff, through his attorney, on April 3, 2017. Bovarnick Decl. ISO Supp. Briefing, Ex. 1. The letter states that "Respondent and Complainant have 30 days from the receipt of these Findings to file objections and request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these findings will become final and not subject to court review." Id. Plaintiff also submitted evidence of a May 2,

2017 letter written to the DOL's Office of Administrative Law Judges objecting to OSHA's findings and requesting a hearing. Id. Ex. 2. In response, the DOL issued a Notice of Hearing and Pre-Hearing Schedule dated June 8, 2017. Id. Ex. 3.

Based on the record, the Court concludes that Plaintiff timely filed objections to OSHA's Findings, thereby precluding those Findings from becoming the final agency decision. Plaintiff then filed the present action in federal district court prior to any final agency decision. Accordingly, jurisdiction over this controversy rests with the district court.

II. Exhaustion of Remedies

Defendants move for summary judgment on Plaintiff's claim involving alleged retaliatory conduct by Defendant Gil based on the argument that Plaintiff failed to exhaust his administrative remedies with respect to this claim. Defendants assert that it is undisputed that Gil was not involved in Plaintiff's 2015 discipline and that the alleged adverse employment action upon which Plaintiff relies for his claim against Gil did not occur until June of 2017. Gil's alleged conduct, therefore, occurred more than two years after Plaintiff filed his OSHA complaint and three months after OSHA closed its investigation and issued its Findings.

Plaintiff argues that Gil's conduct constituted a "continuing course of conduct" and that Plaintiff was not required to file a new complaint after every incident of retaliatory conduct.

Both parties cite to the district court decision in *Rookaird v. BNSF* as setting out the requirements for exhaustion under the FRSA. *Rookaird v. BNSF Ry. Co.*, 2015 WL 6626069 (W.D. Wash. Oct. 29, 2015), *vacated on other grounds*, 908 F.3d 451 (9th Cir. 2018).

> Before seeking review of an FRSA claim in a district court, the plaintiff must first file a complaint with OSHA. *See* 49 U.S.C. § 20109(d); [citations omitted]. The purpose of an OSHA complaint is to "afford OSHA the opportunity to resolve the plaintiff's allegations through the administrative process." [Citations omitted] . . . . Generally, the permissible scope of a district court's review of an administrative decision is limited to the plaintiff's administrative complaint, the investigation that

> followed, or the scope of an investigation that reasonably could have been expected to follow the charges in the complaint. [Citations omitted].

Rookaird, 2015 WL 6626069, at *2.

Relying on the *Rookaird* court's statement that "[f]or a protected activity to be properly raised on summary judgment, it must have been raised before this stage of litigation;" *id.* at *7-8; Plaintiff argues that the FRSA exhaustion requirement "focuses on the timing of the allegation of the protected activity [and] not the timing of a railroad's retaliatory response to that activity." Pl. Response at 7. However, Plaintiff interprets the court's statement too narrowly. With this statement the court was reiterating the long-held principle that summary judgment is not the stage at which to introduce or flesh out claims that have not been previously pled. *Rookaird*, 2015 WL 6626069 at *3 (citing *Navajo Nation v. U.S. Forest Serv.,* 535 F.3d 1058, 1080 (9th Cir.2008); *Wasco Prods., Inc. v. Southwall Techs., Inc.,* 435 F.3d 989, 992 (9th Cir.2006)) Furthermore, the district court was facing the specific question of which of the plaintiff's protected activities were properly at issue. *Id.*at *2 ("For a protected activity to be properly raised in this case, Rookaird must have exhausted his administrative remedies with respect to that activity.") To require that protected activities are included in a plaintiff's administrative complaint in order to fall within the scope of the court's review does not preclude the requirement that alleged retaliatory activities are also properly exhausted.

Case law is clear that "[t]he purpose of an OSHA complaint is to 'afford OSHA the opportunity to resolve the plaintiff's allegations through the administrative process,'" *id.* (citations and internal quotations omitted); and that the court's review is limited to the administrative complaint, the investigation, or the scope of an investigation that could have reasonably followed." *Id*.

Here, Plaintiff's complaint to OSHA alleged that in 2015 he had faced discipline and suspension in retaliation for his reporting activity. Bovarnick Decl., Ex. A. During OSHA's subsequent investigation, Plaintiff reported that he had been required to step down from his union position. Id. Ex. B. OSHA then closed its investigation and issued its Findings on March 29, 2017. Belnavis Decl. Ex. 1, p. 51. Thus, the administrative complaint and the investigation that followed did not include the allegation that in June 2017, Defendant Gil did not allow Plaintiff to perform union duties while at work. Furthermore, the scope of an OSHA investigation that could reasonably be expected to follow the charges in the complaint could in no way have included the allegations against Gil because he was not involved in the 2015 suspension and discipline of Plaintiff, Gil's alleged retaliatory conduct was different in nature than that alleged in the administrative complaint, and the investigation had concluded before the alleged activity even occurred. OSHA neither investigated nor could have investigated Gil's alleged adverse actions and, thus, had no "opportunity to resolve the plaintiff's allegations [against Defendant Gil] through the administrative process." *Id.* Therefore, Plaintiff failed to exhaust his administrative remedies with regard to Defendant Gil and Defendant Gil should be dismissed from this case.

III. Waiver

Defendants argue that they are entitled to summary judgment because Plaintiff waived his right to bring this action when he signed a Leniency Agreement negotiated by UP and Plaintiff's union. Plaintiff asserts that, by its terms, the FRSA prohibits such a waiver. I agree.

As noted above, one of the terms of the Leniency Agreement was that "Any and all claims filed on Mr. Montes' behalf regarding this incident will be withdrawn and dismissed in their entirety." Belnavis Decl. Ex. 1, p. 45, ¶ 6. Under different circumstances, the Court would

find more persuasive Defendants' argument that because Plaintiff knowingly and willingly entered into the agreement and received the benefits of that agreement that he is bound by the term releasing his claims regarding the incident in question. However, in this situation the FRSA applies and thus preempts otherwise customary principles of contract and employment law. 49 U.S.C. § 20109(h) sets forth that

> **Rights retained by employee.**--Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. <u>The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.</u>

49 U.S.C.A. § 20109(h)(emphasis added). Neither party has cited nor has this Court found caselaw that interprets subsection (h) with regard to the specific issue faced here. However, "[T]here is no canon against using common sense in construing laws as saying what they obviously mean." *Rochen v. Ward*, 279 U.S. 337 (1929) (Holmes, J.). The statute is clear that an employee may not waive by agreement the rights and remedies provided by § 20109. One of the rights explicitly provided for in §20109 is the right to seek relief by filing a complaint with the Secretary of Labor and pursuing de novo review in the district court when a final decision is not issued within 210 days of the filing of the complaint. 49 U.S.C. § 20109(d). Therefore, Plaintiff, under the terms of the statute could not and has not waived his right to bring his Complaint.

Furthermore, decisions of the DOL have held that waivers under a collective bargaining agreement, signed by an employee for the conduct which forms the basis of his complaint, do not bar an FRSA claim. *See, e.g., Petersen v. Union Pacific R.R. Co.*, 2011-FRS-00017 at pp. 23-24 (ALJ Aug. 7, 2013) ("Leniency Agreement was not a formal settlement and did not in any way affect [Complainant's] rights under the FRSA.") *aff'd*, ARB No. 13-090 (ARB Nov. 20, 2014). While not binding, these decisions are persuasive and are in accord with the concept that the

2007 amendments that included the addition of subsection (h) are designed to prevent railroads from creating barriers to the protections provided by the statute. *See Norfolk S. Ry. Co. v. Solis,* 915 F. Supp. 2d 32, 38 (D.D.C. 2013)(2007 amendments an attempt "to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers.")(quoting H.R.Rep. No. 110–259 at 348 (2007) (Conf. Rep.), 2007 U.S.C.C.A.N. 119, 180–181). Accordingly, I conclude that Plaintiff did not waive his right to bring this action by signing the Leniency Agreement.

IV. Causation

Defendants move for summary judgment on the grounds that Plaintiff cannot establish causation. Defendants assert there is no direct or circumstantial evidence that Plaintiff's protected activities were a "contributing factor" in his discipline and, in any event, Defendants would have taken the same action in the absence of Plaintiff's protected activities.

A. Standards

A claim for unlawful retaliation under the FRSA has two distinct stages: the prima facie stage and the substantive stage. *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 460-461 (9th Cir. 2018)(citations omitted). In order to state a claim for unlawful retaliation under the FRSA, a plaintiff must make a prima facie showing, that (1) the employee engaged in a protected activity; (2) the employer knew or suspected that the employee engaged in the protected activity; (3) the employee suffered an adverse action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action. *Id.*at 460 (citing 29 C.F.R. § 1982.104(e)(2)).

To establish his claim at the substantive stage, the plaintiff must prove, by a preponderance of the evidence, that his protected conduct "was a contributing factor in the

unfavorable personnel action alleged in the complaint." *Id.* at 460 (citing 49 U.S.C. § 42121(b)(2)(B)(iii)). A contributing factor is "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Id.* at 461 (internal quotation marks omitted). "Contributing factors may be quite modest" and a plaintiff may be entitled to relief even if his protected activity played "only a very small role" in the employer's decision-making process. *Frost v. BNSF Ry. Co.*, 2019 WL 361436, at *4 (9th Cir. Jan. 30, 2019)(citing *Rookaird,* 908 F.3d at 461)(internal quotation marks omitted).

At either stage, an employer can defeat the retaliation claim "if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity]." *Rookaird,* 908 F.3d at 460 (citing 49 U.S.C. § 42121(b)(2)(B)).

There is no dispute between the parties as to the first, second or third element of Plaintiff's claim. Therefore, summary judgment here hinges on whether Plaintiff's protected conduct was a contributing factor to the adverse employment action and whether Defendants would have taken the same action absent that protected conduct.

B. Analysis

Defendants argue that Plaintiff has no direct evidence of causation, that there is no nexus between Plaintiff's protected activity and the disciplinary action; that the temporal proximity between Plaintiff's safety complaints and discipline detracts from, rather than supports, any inference of causation; and that Plaintiff's fraudulent time claim and dishonesty constitutes an intervening event that independently justified the adverse employment action. Defendants assert that even if Plaintiff makes a prima facie showing, Defendants are entitled to summary judgment because they would have taken the same action absent Plaintiff's protected activities.

Plaintiff argues that his Declaration contains direct evidence of retaliatory intent. Plaintiff also argues that the temporal proximity of his protected activities to the discipline and differing treatment of another employee who engaged in the same conduct constitute circumstantial evidence sufficient to support causation.

"That a protected activity was a contributing factor may be shown by direct or circumstantial evidence, including temporal proximity, indications of pretext, and a change in the employer's attitude toward the employee after he engages in protected activity." *Rookaird.*, 2015 WL 6626069, at *5 (citing *DeFrancesco v. Union Pac. R.R. Co.,* ARB No. 10–114, 2012 WL 694502, at *3 (Feb. 29, 2012)). As direct evidence, Plaintiff points to his Declaration, in which he states, "[i]n 2012, Craig Smith told me that if I did not stop complaining to the FRA he would use any means at his disposal to get rid of me." Montes Decl. ¶ 4.[1]

Plaintiff also points to the temporal proximity of his protected activities to his discipline. Plaintiff's safety reports to both UP and the FRA spanned from October 2012 to April 2015. Plaintiff was disciplined in May 2015. Compl. ¶¶ 6-8; Montes Decl. ¶ 3; Belnavis Decl. Ex. 1, p. 18. Defendants, however, argue that temporal proximity alone is insufficient to establish causation. In addition, Defendants assert that the three-year span of time in which Plaintiff made his complaints without any corresponding retaliation defeats, rather than supports, any inference of causation.

Defendants have produced evidence showing that Plaintiff, even if not personally responsible for entering his time, was at least complicit in the misreporting of his hours. Defendants have also produced evidence that Plaintiff subsequently lied to his supervisors when

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[1] Plaintiff also attributes additional comments to "supervisors" who told him "on many occasions" that management was looking for a way to discipline him. Montes. Decl. ¶ 4. However, absent a showing that these individuals were management themselves, I agree with Defendants that such statements are hearsay. *See* FRE 802.

questioned about why he claimed the additional hours even after supervisors had explained why he wasn't entitled to them. Relying on *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792 (8th Cir. 2014) and a number of decisions by the DOL's Administrative Review Board, Defendants argue that because Plaintiff's safety reports were "completely unrelated" to the activity that formed the basis of the disciplinary decision and because Plaintiff's dishonesty was an "intervening event" that independently could have supported the adverse action, there can be no reasonable inference of causation. Defendants' MSJ at pp. 14-15. However, binding precedent in the Ninth Circuit is clear that a plaintiff need not show that his protected activity was the only reason for or that no other factors influenced Defendants' decision to discipline him. *Frost,* 914 F.3d at 1196–97. Instead, Plaintiff's safety reports need only be a factor which "tends to affect in any way the outcome of the decision." *Id.* at 1197 (quoting *Rookaird,* 908 F.3d at 461)(internal quotation marks omitted)(emphasis added).

Viewed in a light most favorable to Plaintiff, the evidence above is sufficient to create an issue of fact on causation. As discussed above, at the prima facie stage, Plaintiff bears only a very low burden of showing that "the circumstances were sufficient to raise the inference that the protected activity ... was a contributing factor," *Rookaird*, 908 F.3d at 461 (citing 29 C.F.R. § 1982.104(e)(2)(iv)). Notwithstanding Defendants' evidence, a reasonable juror could conclude based on Smith's statement to Plaintiff, Plaintiff's three-year history of safety complaints that continued up until the month before his discipline, and the requirement that Plaintiff step down from his union position, that the adverse employment decision was motivated, at least in part, by Plaintiff's protected activity. Accordingly, Defendants motion for summary judgment as to Plaintiff's prima facie case should be denied.

C. "Same Action" Defense

To rebut Plaintiff's case, Defendants must show, by clear and convincing evidence, that the same discipline would have been imposed with or without Plaintiff's safety reports. *See* 49 U.S.C. § 42121(b)(2)(B); *Rookaird*, 908 F.3d at 460. *Frost*, 2019 WL 361436 at *5. Defendants argue that they are entitled to summary judgment because they meet this burden as a matter of law.

As discussed above, Defendants have presented undisputed evidence of Plaintiff's misconduct and that the violations with which Plaintiff was charged were terminable offenses. Defendants also point to evidence that other employees who violated Rule 1.6 were dismissed and thus Plaintiff was actually treated more favorably than similarly situated employees. Belnavis Decl. Ex. 2. However, Plaintiff disputes that the employees to whom Defendants refer were similarly situated. Montes. Decl. ¶¶ 11-12. At the least, there is a question as to the consistency with which Defendants enforced their rules. Furthermore, because of the Leniency Agreement, there was no formal hearing or investigation by Defendants or the union. In addition, Plaintiff's discipline involved resignation from his union position and there are questions of fact as to the circumstances surrounding that requirement. Smith Decl. ¶ 10; Loftin Decl. ¶ 5; Belnavis Decl. Ex. 1, p. 47.

In light of these factors, along with those discussed above, Defendants have not, for purposes of summary judgment, met their burden of establishing by clear and convincing evidence that they would have disciplined Plaintiff absent his protected conduct. This Court is also aware and agrees that this particular affirmative defense is not necessarily appropriate for resolution at the summary judgment stage. *See Kuduk,* 768 F.3d at 793; *Thomas v. Union Pac. R.R. Co.,* 3:15-cv-01375-HZ, 203 F. Supp. 3d 1111, 1126 (D. Or. 2016). In this case, it is the job

of the factfinder to determine what inferences to draw from the totality of the evidence. Accordingly, Defendants motion for summary judgment should be denied.

Conclusion

For the reasons set forth above, Defendants motion for partial summary judgment (Dkt. #21-A) should be GRANTED and Defendant Gil should be DISMISSED from this action. Defendants motion for summary judgment as to all remaining claims (Dkt. #21-B) should be DENIED.

Scheduling Order

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due June 13, 2019. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 30th day of May, 2019.

/s/ John Jelderks
John Jelderks
U.S. Magistrate Judge