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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gary Despain, Plaintiff, v. BNSF Railway Company, Defendant.	No. CV-15-08294-PCT-NVW **ORDER**

Plaintiff Gary Despain ("Despain") brings this action against Defendant BNSF Railway Company ("BNSF Railway") for retaliatory discharge in violation of the Federal Railway Safety Act, 49 U.S.C. § 20109. Before the Court are BNSF Railway's Motion for Summary Judgment (Doc. 62), the Response, and the Reply. The Motion will be denied.

I. SUMMARY JUDGMENT STANDARD

A motion for summary judgment tests whether the opposing party has sufficient evidence to merit a trial. Summary judgment should be granted if the evidence reveals no genuine dispute about any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A material fact is one that might affect the outcome of the suit under the governing law, and a factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

It is the moving party's burden to show there are no genuine disputes of material

fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Upon such a showing, however, the burden shifts to the nonmoving party, who must then "set forth specific facts showing that there is a genuine issue for trial" without simply resting on the pleadings. *Anderson*, 477 U.S. at 256. To carry this burden, the nonmoving party must do more than simply show there is "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Id.* at 587. "A court must view the evidence 'in the light most favorable to the [nonmoving] party.'" *Tolan v. Cotton*, — U.S. —, 134 S. Ct. 1861, 1866 (2014) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). "A 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Id.* (quoting *Anderson*, 477 U.S. at 249).

II. FACTS ASSUMED TO BE TRUE

The following evidence is viewed in the light most favorable to the plaintiff, the non-moving party.

A. Despain's Eye Injury

Despain, a resident of Winslow, Arizona, began working for BNSF Railway on April 27, 1978. (Doc. 63 at ¶ 1.) Over the course of his employment, he sustained several injuries, including a puncture wound to a finger in 1987, a dislocated shoulder in 1988, and a "twisted" knee in 2008. (*Id.* at ¶¶ 4-6.) The shoulder injury resulted in Despain's missing 279 days from work. (*Id.* at ¶ 5.)

On March 27, 2010, Despain was again injured. He was working as a freight train engineer on a train travelling from Winslow, Arizona, to Needles, California. (*Id.* at ¶ 8.) The train stopped approximately five miles west of Seligman, Arizona, while the conductor fixed an air hose. (*Id.* at ¶¶ 8-9.) Despain used a paper towel from an open crew pack, located on the dash, to wipe his face. (*Id.* at ¶¶ 10-11.) His eyes became irritated within a half hour and got worse as the trip progressed. (*Id.* at ¶ 13; Doc. 62-1,

Ex. A at 76:1-4.) The sensation was akin to a "[b]urning, itching, sandpaper-type feeling" that worsened like a sunburn. (Doc. 62-1, Ex. A at 79:13-23.) At the time, Despain says, he was unaware that the paper towel may have been the cause of his injury. (Doc. 62-2, Ex. C at 69:10-22.) According to Despain, he did not immediately report his exact symptoms because he thought they were the result of his being tired, which sometimes gives him a similar "[g]ritty, sandy" feeling in his eyes. (Doc. 62-1, Ex. A at 79:5-11; Doc. 62-2, Ex. C at 96:12-19.) The conductor recalls that Despain said an hour or two into the trip that he "wasn't feeling so hot," but he also recalls that Despain did not elaborate on specific symptoms. (Doc. 62-2, Ex. C at 36:22-37:7.)

Yet when Despain awoke in Needles on the morning of March 28, 2010, he was in much more serious pain. (*Id.* at 79:24-80:6.) His eyes and the skin around them were red and inflamed. He contacted the Division Trainmaster in Needles, Chris Lott, and told him that he thought he was "going blind" and needed to go to the emergency room. (Doc. 63 at ¶ 16.) According to Lott, however, when Despain contacted him, he did not answer Lott's question about whether Despain was reporting an injury; instead, Despain told him about cold medications he was taking and said he was battling a cold. (Doc. 62-2 at 11:13-12:1.) When Despain was deposed, he admitted he might have said something about a cold but ultimately could not recall. (Doc. 62-1, Ex. A at 81:22-82:2.) He testified that he was not feeling sick that day, but he also said in his report following the incident that he had been taking cold medicine. (*Id.* at 71:24-72:2; Doc. 62-2, Ex. F at 2.) He admits that he does not indicate why he was taking the medicine. (Doc. 66 at ¶ 25.)

Despain's claim is that he did not yet know the cause of his injury and whether it occurred on duty. During Despain's March 28 visit to the emergency room in Flagstaff, Arizona, a physical exam revealed "yellowish drainage." (Doc. 63 at ¶ 18.) The physician believed that Despain was suffering from allergic conjunctivitis and treated him with an antibiotic and steroid. (*Id.* at ¶¶ 19-21.) Despain's hospital discharge instructions told him to follow up the next day with an ophthalmologist. (Doc. 62-2, Ex. E at 1.) The conjunctivitis diagnosis is explained with what appears to be boilerplate:

"The membrane that covers your eye is inflamed. Any itching, burning or irritation should go away within the next 24 hours. Conjunctivitis may be related to a particle that was in your eye. . . . Being exposed to liquid *chemicals or fumes* may also cause this reaction." (*Id.* at 2 (emphasis added).)

Despain asserts, drawing on his knowledge of more than 30 years as an employee, that he knew he had to report the incident, which he then considered an on-duty injury, to Lott. (Doc. 62-1, Ex. A at 22:10-16; 124:6-9.) He called Lott "and told him exactly what the emergency room doctor [said:] chemical exposure from a crew pack." (*Id.* at 22:17-19.) Indeed, Despain claims that the doctor told him that "some kind of chemical had to cause this, had to make contact with [his] face and eyes." (*Id.* at 86:16-18.) "[T]hrough process of elimination," it must have been the paper towel, because "[n]othing else touched [Despain's] face." (*Id.* at 86:18-19.)

The doctor's conclusion is not reflected in the record other than through Despain's testimony. But the doctor's words affected Despain's state of mind, convincing him that he was injured on the job and needed to report to his employer. To that end, Despain says that after leaving the emergency room, he went to the crew office in Winslow to file a personal injury report. (Doc. 62-1, Ex. A at 96:11-15.) No one was at the office, so he called his union griever, who told him to go to bed and handle it in the morning. (*Id.* at 96:14-24.)

According to Senior Trainmaster John Wetta, Despain called him the next day, March 29, 2010. (Doc. 62-2, Ex. C at 15:2-12.). Wetta says he made notes regarding the conversation; those notes show that Despain mentioned an allergic reaction to fumes or chemicals and the crew pack but that he did not know the cause. (*Id.*) In other words, Despain did not mention that the emergency room doctor had told him the crew pack caused his injury. Wetta says that it was not until Despain followed up after seeing the ophthalmologist[1] that he had ascertained the paper towel was the cause of the injury. (*Id.*

[1] Despain's medical expenses were $257.60 for the emergency room visit and $29.52 for the ophthalmologist. (Doc. 63 at ¶¶ 63-64.) His insurance company paid most of these bills; Despain paid only his co-pays of $25 and $15 respectively. (*Id.*)

at 15:25-16:6.)

In any event, Despain went to Flagstaff to meet Wetta and file his injury report. (Doc. 62-1, Ex. A at 66:8-24.) He recounts a strange story of their encounter, which he says was the first time the two had met. He says Wetta told him that he had lost his keys and, instead of going to the nearby Winslow office, asked to borrow Despain's pocket knife to jimmy the door open. (*Id.* at 58:20-62:3.) Despain found the situation "[r]eally odd," and he reported it to his union representative. (*Id.* at 62:18-63:2.) He also claims that, after BNSF Railway began its investigation into Despain (described below), Wetta harassed him. (*See id.* at 67:24-68:24.)

B. Despain's Alleged Wrongdoing

BNSF Railway's central claim is that, during the Flagstaff meeting, Despain improperly made an offer to Wetta not to report his injury in exchange for a paid deadhead trip. Deadhead transportation is when a railway allows a nonworking employee to ride home on a train. *See Bhd. of Locomotive Eng'rs v. Atchinson, Topeka & Santa Fe R.R. Co.*, 516 U.S. 152, 154 (1996). Deadhead trips are normally unpaid.

According to Wetta, Despain asked to be paid wages for his deadhead trip and said he would agree to "throw this out," referring to his personal injury report. (Doc. 63 at ¶ 33.) Wetta claims that Despain was hesitant about filling out a report at all and that Wetta encouraged him to do so. (Doc. 62-2, Ex. C at 28:5-7.) Despain, however, says he never even asked for a deadhead, let alone a paid trip. (Doc. 62-2, Ex. A at 63:24-25.) Wetta was the one who brought it up: "Hey, you probably want to get paid if you deadhead." (*Id.* at 122:10-11.) Despain responded, "Yeah, if you're going to pay me." (*Id.* at 122:11.) Despain claims, in plainer terms, "[A]s far as asking him for a deadhead, I never asked him. He asked me. That's how it went down." (*Id.* at 63:24-25.) Despain instead wanted to be part of a safety committee to make sure this did not happen again—a suggestion he says Wetta shunned. (*Id.* at 63:17-23.)

BNSF Railway also points to an inconsistency in Despain's report. Despain stated in the personal injury report that the paper towel incident occurred at 1:00 a.m. near

Seligman. (Doc. 63 at ¶ 28.) Yet the train's logs show that the train was in Seligman from 9:44 p.m. until 9:58 p.m. (*Id.*) Noting that he had been up all night operating the train, Despain accounts for the time discrepancy: "I was tired. . . . [W]hen I filled out the paperwork, I had no train records of any kind in my possession. I guessed at that time." (Doc. 62-2, Ex. C at 72:10-26.) And according to Despain, Wetta also told him to add more detail to the report, which is why Despain included additional information below his signature. (Doc. 62-1, Ex. A at 93:9-94:14.) For his part, Wetta says he merely "asked [Despain] if he'd like to add" details to his statement. (Doc. 62-2, Ex. C at 99:18-25.)

C. BNSF Railway's Investigation

BNSF Railway's General Code of Operating Rules ("Operating Rules") provides that employees "must not be . . . dishonest." (Doc. 63 at ¶ 31.) Operating Rule 1.6 states, "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." (*Id.*) The company's Policy for Employee Performance Accountability ("Accountability Policy") provides that the "ultimate sanction of dismissal" is available "in response to a single aggravated offense" or "in response to a series of rule violations, coupled with no sign of significant improvement in the employee's behavior." (Doc. 62-2, Ex. H at 3.) Appendix C to the Accountability Policy lists offenses serious enough to lead to dismissal after a single instance. (*See id.* at 7.) One such offense is "[g]ross dishonesty in communicating with officials of the company about any job related subject." (*Id.*)

On April 13, 2010, the company sent to Despain notice that it was investigating him for his "alleged misrepresentation of the facts surrounding [his] alleged personal injury." (Doc. 62-2, Ex. C at 4.) An internal hearing was held on April 27, 2010. (Doc. 63 at ¶ 39.) Despain's union representative served as his advocate at the hearing. (*Id.* at ¶ 40.) BNSF Railway asserts that Despain "had the opportunity to present witnesses, cross-examine adverse witnesses, and present documents." (*Id.* at ¶ 41.) Despain, however, testified that he was unable to ask questions, that he could not present his own

witnesses, and that he felt the investigating officer, William Stuhldreher, exuded a demeanor that made him uncomfortable testifying on his own behalf. In short, he believes he was unable to tell his side of the story. (Doc. 62-2, Ex. A at 69:4-71:12.)

After the hearing, Stuhldreher, who had conducted the hearing and examined the witnesses, found that Despain's testimony was not credible and that Despain had been dishonest regarding the accident. (Doc. 63 at ¶ 42.) The combination of Despain's failure to report his injury quickly and accurately and his supposed offer to Wetta to "throw the whole thing out" allegedly led Stuhldreher to believe that Despain's dishonesty was serious enough to warrant dismissal. (Doc. 62-3, Ex. I at 43:21-44:4.) Although he based his view on "the totality of the transcript[,] . . . the offer to throw out the injury in exchange for a paid trip home was the critical -- or key element of dishonesty that . . . formed [his] recommendation for dismissal." (*Id.* at 91:24-92:5.) In explaining why he believed Wetta's version of the quid-pro-quo conversation over Despain's, Stuhldreher said Wetta was an officer and noted that Despain had more to gain from lying. (*Id.* at 53:8-54:20.) Thus, Stuhldreher relied on Despain's status as employee and Wetta's status in management to conclude Despain was lying.

Stuhldreher recommended Despain's dismissal to Daryl Ness, General Manager of the Southwest Division. (Doc. 63 at ¶ 45.) Ness reviewed the hearing transcript and exhibits, including Despain's injury report. (*Id.* at ¶ 46.) Ness's usual practice in dismissal cases was to review the record and seek a recommendation from the BNSF Railway Labor Relations Department. (*Id.* at ¶ 47.) Ness concluded that Despain's termination was appropriate because he "misrepresented facts," and the Labor Relations Department concurred. (Doc. 62-4, Ex. J at 35:16-19; 58:15-59:4.) As with Stuhldreher, Ness focused on Despain's changing story about the accident but, more importantly, on "the offer to make it go away for pay." (*Id.* at 47:12-48:1.) The Regional Vice President approved of Ness's dismissal recommendation, and Despain was fired on May 11, 2010. (Doc. 63 at ¶¶ 50-51.)

Despain appealed to the Public Law Board, an arbitration board established under

the Railway Labor Act. The Public Law Board panel was composed of a neutral member, a carrier member, and a union member. (Doc. 62-4, Ex. K at 3.) Despain requested that he be reinstated and compensated for lost wages. (*Id.* at 1.) The Board found that there was sufficient evidence to support BNSF Railway's findings that Despain was dishonest. Specifically, it found that the "record reveals that [Despain] waited a long time to report the incident and, when he did, he really was not aware of what caused the problem. [He] also offered to throw out the injury report if he could just get paid for his trip home." (*Id.* at 2.) Yet given Despain's 34-year history at the company, the Board could not find that it was reasonable to terminate his employment. (*Id.* at 2-3.) It ordered him reinstated without back pay—turning his time away from the company into "a lengthy suspension for his wrongdoing." (*Id.* at 3.) Despain was suspended from the company from May 11, 2010, until around October 12, 2011. (Doc. 1 at ¶ 14.)

Despain returned to service on November 2, 2011. (Doc. 63 at ¶ 55.) The parties dispute whether he took steps to find comparable employment during the time he was not working at BNSF Railway. Despain admitted that he did not apply for any other jobs, engineer or otherwise. (Doc. 62-1, Ex. A at 108:2-12.) Despain's wife said he helped her by occasionally running the backhoe at Despain's company, Despain Environmental. (Doc. 65, Ex. 2 at 35:9-13.) He would also help with maintenance on their rental properties. (*Id.* at 35:14-17.) Still, in that light, Despain admits that he did not apply for any outside work: "Why should I? I have a lot of money, a lot of savings. My wife is employed. She has a lot of businesses. I didn't work." (Doc. 62-1, Ex. A at 107:20-108:1.) Nevertheless, Despain felt it was "not fair" to say that he was not worried about finances. (*Id.* at 108:14-17.) He says he had to spend from his savings to get by. (*Id.* at 119:2-12.)

D. Administrative Proceedings and This Action

On April 23, 2010, shortly before he was fired, Despain filed an OSHA complaint alleging retaliation. (*Id.* at ¶ 57.) Over five years passed before OSHA found, in a July

17, 2015 order, that there was reasonable cause to believe that BNSF Railway had violated the retaliation provision, 49 U.S.C. § 20109, of the Federal Railway Safety Act ("Safety Act"). (Doc. 1, Ex. 1 at 1.) According to OSHA's findings, Despain engaged in a protected activity under § 20109(a)(4) when he notified Lott on March 28, 2010, (and Wetta the next day) that he had "suffered an occupational injury or illness." (*Id.* at 3.) As the agency put it, in the Act's retaliation context, "[n]exus is shown by temporal proximity and pretext." (*Id.* at 4.) With respect to temporal proximity, BNSF Railway subjected Despain to a hearing approximately two weeks after his protected activities. (*Id.*) With respect to pretext, Despain had a good reason for changing his story: he initially believed he was simply tired, and upon the worsening of his condition, he sought medical advice, which revealed that his injury may have been work related. (*Id.*) BNSF Railway "did not seriously consider this explanation, despite the fact that [it] was logical and reasonable." (*Id.*) Thus, OSHA ordered BNSF Railway to pay Despain his lost wages, damages for medical expenses and pain and suffering, attorney's fees, and punitive damages, all of which the Safety Act authorizes. (*Id.* at 5.)

On July 22, 2015, BNSF Railway appealed OSHA's findings to the Office of Administrative Law Judges. (Doc. 63 at ¶ 59.) The parties conducted discovery, and trial was set to begin on December 16, 2015. (*Id.* at ¶ 60.) But on November 13, 2015, Despain filed a Notice of Intention to File Original Action in United States District Court. (*Id.* at ¶ 61.) 49 U.S.C. § 20109(d)(3) allows such original actions when more than 210 days have passed since the filing of the Safety Act complaint without a final decision from the Secretary of Labor.

Thus, on December 10, 2015, Despain filed suit in this Court. In his complaint, he alleges that BNSF Railway "continued a pattern of adverse or unfavorable actions against [him] following his reinstatement and return to work." (Doc. 1 at ¶ 15.) Despain also testified that, sometime after he was reinstated, a BNSF Railway manager was "yelling at [him] at the top of his lungs" and bumping into him while he used a urinal. (Doc. 62-1, Ex. A at16:13-17:17.) He also admits to having had "issues" with this manager prior to

his termination. (*Id.* at 18:4.)

III. THE FEDERAL RAILWAY SAFETY ACT CLAIM FOR RETALIATORY DISCHARGE

Distilled to its most basic form, Despain's claim is that he engaged in a protected activity—reporting an on-duty injury—and was punished for it. His cause of action is the Safety Act. *See* 49 U.S.C. § 20109.

The Act provides that "railroad carrier[s] 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 perceived to have been done) in furtherance of a protected activity. *Id.* § 20109(a). One of the Act's enumerated protected activities is notifying or attempting to notify the railroad carrier "of a work-related personal injury or work-related illness." *Id.* § 20109(a)(4).

Actions brought under the Safety Act are "governed under the rules and procedures set forth in" 49 U.S.C. § 42121(b). *Id.* § 20109(d)(2)(A). Section 42121 protects employees from air carrier retaliation. A distinct burden-shifting framework applies to § 42121(b) claims, a framework that Congress incorporated into the Safety Act. Although no Ninth Circuit case has evaluated the Safety Act framework, other circuits have covered it well. First, the employee must make a *prima facie* showing, "by a preponderance of the evidence, that (1) [he] engaged in a protected activity; (2) the employer knew that [he] engaged in the protected activity; (3) [he] suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013) (quoting *Allen v. Admin Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008)) (internal quotation marks omitted). If the employee makes such a showing, 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" the employee's protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii).

On summary judgment BNSF Railway makes two arguments. It first challenges

one element of Despain's *prima facie* case: that Despain's protected activity (complaining about safety) was a contributing factor in his discharge. Second, it argues that even if Despain has made a *prima facie* showing that his protected activity was a contributing factor in his discharge, BNSF Railway has conclusively demonstrated that it would have discharged Despain anyway—for lying about the injury.

A. There Is Evidence That Despain's Injury Report Was a Contributing Factor in His Discharge

BNSF Railway does not admit but does not dispute on summary judgment (1) that Despain engaged in a protected activity when he reported an on-the-job injury; (2) that BNSF Railway knew about the report; (3) that Despain suffered an adverse employment action in the form of a termination that turned into an unpaid suspension; and (4) that "Despain reported a work-related personal injury in good faith of which the BNSF [Railway] decision-makers had knowledge." (Doc. 62 at 8 of 22.) By not doing battle on those elements of Despain's *prima facie* case, BNSF Railway attempts a surgical strike on the last element, whether the protected injury report was a contributing factor in BNSF Railway discharging him. The short answer is that by leaving it undisputed that Despain's injury report was in good faith, BNSF Railway cannot discharge him for a dishonest injury report. The long answer is the same, as follows.

The burden-shifting framework of the Safety Act "is much more protective of plaintiff-employees than the [Title VII] *McDonnell Douglas* framework." *Araujo*, 708 F.3d at 708. The Act bears this "tough" standard for employers by design, as Congress saw underreporting of railroad employee injuries as a serious, longstanding problem. *See id.* at 159-60 (recounting relevant legislative history).

Thus, "[t]he plaintiff-employee need only show that his protected activity was a 'contributing factor' in the retaliation discharge or discrimination, not the sole or even predominant cause." *Id.* at 158. As the *Araujo* court explained, "contributing factor is a term of art." *Id.* It refers to "any factor [that], alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Id.* (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)) (emphasis removed). Further, a *prima facie*

"case does not require that the employee conclusively demonstrate the employer's retaliatory motive." *Id.* at 158-59 (quoting *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010)). What the Safety Act requires is evidence connecting the protected activity, at least in part, to the adverse employment action—some discriminatory animus on the part of the employer. *See Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014). *See also Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 877-78 (7th Cir. 2016) (conceptualizing the issue as one of proximate causation).

Such evidence may be circumstantial. Temporal proximity of the adverse employment action is probative, although it is insufficient on its own to establish a *prima facie* case. *Kuduk*, 768 F.3d at 792. Other possibilities include "indications of pretext such as inconsistent application of policies and shifting explanations, antagonism or hostility toward protected activity, the relation between the discipline and the protected activity, and the presence of intervening events that independently justify discharge." *Loos v. BNSF Ry. Co.*, 865 F.3d 1106, 1112-13 (8th Cir. 2017).

1. Retaliatory animus is inferable from the weakness of BNSF Railway's assertion that the injury claim was dishonest.

Despain needs only present evidence that his injury report was, in part, a legal cause of his adverse employment action. BNSF Railway argues that his subsequent offer of a minor benefit for a minor injury was evidence of lying about the injury, evidence sufficient to justify Despain's termination. BNSF Railway also says that it was not believable that Despain did not realize more quickly that the paper towel caused his injury. In the company's view, Despain concocted the story so that he could have a paid deadhead. As Ness put it, "These guys make a lot of money. So when they don't work, . . . it's definitely something that would benefit [them]." (Doc. 62-4, Ex. J at 47:23-48:1.) It was Despain's dishonesty that gave the railroad cause to fire him.

Yet a trier of fact could conclude that Despain was not "dishonest" at all. The time discrepancy between Despain's injury report and the train's logs is not necessarily dishonesty. Despain consistently asserts that he did not know the cause of his injury until after he had seen his doctors. When he found out, he says, he immediately attempted to

file his report; when he could not because no one was around to receive the report, he filed it the next day. BNSF Railway fails to explain how he could have reported the true cause of his injury any faster than he did, other than by asserting that it is improbable he would not have discovered it sooner.

Despain's supposed offer for a quid pro quo is squarely disputed and no basis for summary judgment. Even if Despain did make the offer, a modest compromise over a modest claim does not necessarily suggest a false claim.

The weakness of BNSF Railway's assertion of dishonesty suggests it may be pretext for something else. It could well be pretext for telling the truth. The jury can say.

2. Other circumstances support an inference that Despain's injury report was a "contributing factor" and that BNSF Railway demonstrated animus.

In *Ray v. Union Pacific Railroad Co.*, 971 F. Supp. 2d 869 (S.D. Iowa 2013), the plaintiff was terminated for dishonesty after the employer-railroad concluded that he had changed his story about whether his injury was sustained on the job. *Id.* at 573-74. The court found that the plaintiff had met his *prima facie* burden under the Safety Act for two reasons: (1) the timing of the investigation, which was only five days after the injury report, and (2) the fact that the injury report was "inextricably intertwined with the adverse employment action"—i.e., that had the plaintiff "not reported the alleged work-related injury, [the defendant] would not have undertaken its investigation" into his honesty or timeliness. *Id.* at 888.

Despain's injury occurred on March 27, 2010, and he tried to report it the next day. On March 29, 2010, he succeeded in so reporting. BNSF Railway sent him notice of its investigation on April 13, 2010. The short time (two weeks) between the report and the investigation is circumstantial evidence of retaliatory intent. But again, that evidence is insufficient on its own.

The manner in which BNSF Railway investigated provides Despain with more circumstantial ammunition. (Indeed, BNSF Railway is simply incorrect in saying that Despain needs direct proof that "the decision-makers lied about the reason for the

dismissal." (Doc. 62 at 10 of 22.) *See Araujo*, 708 F.3d at 158-59.) The company's hearing was inquisitorial in nature, where the decision maker, Stuhldreher, also served a quasi-prosecutorial function. A reasonable juror could agree with Despain that the investigation was biased or flawed. For example, Stuhldreher's proffered basis for believing Wetta over Despain—that Wetta was an officer and that Despain had more to gain from lying—is biased on its face.

Further, BNSF Railway falsely states that "Despain testified that he took no steps to fill out the requisite personal injury report." (Doc. 62 at 11 of 22.) In fact, Despain said he went to the crew office after leaving the emergency room but no one was there to take his report. (Doc. 62-1, Ex. A at 96:11-15.) BNSF Railway complains that Despain did not tell the company this during its initial investigation and suggests that he changed his story four years after the fact. (Doc. 67 at 5.) Again, even assuming this were so, it is a credibility determination for the jury.

BNSF Railway did not retaliate against Despain for reporting a more serious and undisputable injury in the past. A dislocated shoulder, however, is different from a chemical burn of debatable origin that worsens over time.

Despain's evidence is assailable, but that does not stop his action from proceeding. *See Araujo*, 708 F.3d at 160 ("While . . . the evidence that [the plaintiff] proffers is certainly not overwhelming, we . . . hold that it is sufficient to assert a *prima facie* case."). The Safety Act sets a low bar for plaintiffs. A jury must ultimately decide whether Despain's injury report was a contributing factor in his termination. A reasonable juror could find BNSF Railway's reasons for firing Despain were pretextual and motivated by retaliatory animus. Despain has made a *prima facie* case that his report was a factor that contributed to his termination.

B. It Is at Least a Disputable Fact Whether BNSF Railway Would Have Terminated Despain Anyway

Because Despain has made a *prima facie* case, the burden shifts to BNSF Railway to demonstrate, "by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of" the employee's protected activity. 49

U.S.C. § 42121(b)(2)(B)(ii). The clear-and-convincing standard is an intermediate burden between "preponderance of the evidence" and "beyond a reasonable doubt." *Addington v. Texas*, 441 U.S. 418, 425 (1979). To meet this intermediate standard, BNSF Railway must show that "the truth of its factual contentions [is] highly probable." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (internal quotation marks omitted). In other words, the proof it offers must "instantly tilt[ ] the evidentiary scales" in its favor when weighed against the evidence that Despain offers. *Id*.

BNSF Railway does not show conclusively that it would still have disciplined Despain absent his injury report, however one may characterize the strength of the evidence on BNSF Railway's side of the dispute. As a threshold matter, BNSF Railway says that filing the report was not even a but-for cause, let alone a proximate cause, of Despain's termination. (*See* Doc. 62 at 15 of 22.) But of course it was a but-for cause. Without an injury report, Despain could not have been dishonest about this report. The company cannot seriously say it would have fired Despain regardless of whether he made the injury report.

The comparator information from BNSF Railway's Director of Labor Relations, Kathleen Maglisceau, is unhelpful. She says that from 2009 through 2011 there were 145 injuries in Despain's division. (Doc. 62-4, Ex. P at ¶¶ 1, 2.) "Of those 145 injuries, only eleven employees (7.5%) were disciplined within the following six months for *any* reason whatsoever." (*Id.* at ¶ 2 (emphasis in original).) This is not evidence that BNSF Railway never retaliated for injury claims or that it did not retaliate against Despain. Also unhelpful is the context-free statement that 35 employees were dismissed for "untruthful conduct" in both 2010 and 2011. (*Id.* at ¶ 3.)

Finally, BNSF Railway makes much of the fact that the Public Law Board found "sufficient evidence in the record to support" a finding that Despain was dishonest. (Doc. 62 at 14 of 22.) The Board did not, however, state that it was finding that Despain *had been* dishonest. (*See* Doc. 62-4, Ex. K at 2.) OSHA obviously disagreed. In any event, the Safety Act provides for *de novo* actions in the federal district courts. *See* 49 U.S.C.

§ 20109(d)(3). This Court's duty on summary judgment is to determine whether there is conflicting evidence or inferences from evidence. Summary judgment must be denied.

C. Failure to Mitigate Damages and Other Grounds for Summary Judgment Fail

BNSF Railway seeks partial summary judgment on other procedural and damage issues related to the sole count of Despain's complaint. It argues that (1) Despain broadened his complaint and thus failed to exhaust his administrative remedies on the new claims; (2) he failed to mitigate his damages and therefore cannot receive compensatory damages; (3) he is not entitled to "lost benefits with interest" because he did not show he paid his medical bills during his suspension; and (4) he cannot have punitive damages because he failed to prove BNSF Railway exhibited a reckless disregard for his rights. All of these arguments fail on summary judgment.

BNSF Railway claims that Despain broadened his complaint to this Court beyond what he complained about to OSHA. In particular, the company points to two supposedly new claims: (1) that Despain was retaliated against for reporting "unsafe workplace conditions," in addition to his on-duty injury, and (2) that Despain's supervisors mistreated him upon his reinstatement. (Doc. 62 at 16 of 22.) BNSF Railway argues that Despain has, therefore, failed to exhaust his administrative remedies, as required by the Safety Act, on these new claims. *See* 49 U.S.C. § 20109(d)(2)(A)(ii). But the company does not provide the Court with Despain's original OSHA complaint or any amendments that he may have made to it. It is impossible to evaluate the merits of the company's arguments, and the Court must deny them as not substantiated by the record.

BNSF Railway also contends that this Court should hold as a matter of law that Despain is not entitled to compensatory damages or lost benefits with interest. The Safety Act provides for certain remedies. A prevailing employee is "entitled to all relief to make the employee whole." 49 U.S.C. § 20109(e)(1). Relief includes "reinstatement with the same seniority status that the employee would have had, but for the discrimination;" "any backpay, with interest;" and "compensatory damages, including

compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." *Id.* § 20109(e)(2). Punitive damages, not to exceed $250,000, are also available. *Id.* § 20109(e)(3).

In *Sangster v. United Air Lines, Inc.*, 633 F.2d 864 (9th Cir. 1980), the court explained that "[a]s a broad proposition, injured parties are expected to mitigate the damage they suffer." *Id.* at 867. Yet *Sangster* was also a Title VII case, and that statute requires plaintiffs to exercise reasonable diligence in finding comparable employment. *Id.* (quoting 42 U.S.C. § 2000e-5(g)). The Safety Act does not explicitly have such a requirement written into the statute. As the *Sangster* court noted, the duty to mitigate is indeed "a broad proposition." Despain does not contest the applicability of the duty.

In the Title VII context, the Ninth Circuit has explained that the employer bears the burden of proving that suitable employment is available. *See Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1497 (9th Cir. 1995). The employer must prove "that, based on undisputed facts in the record, during the time in question there were substantially equivalent jobs available, which [the plaintiff] could have obtained, *and* that [the plaintiff] failed to use reasonable diligence in seeking one." *Id.* (quoting *EEOC v. Farmer Bros. Co.*, 31 F.3d 896, 906 (9th Cir. 1994)). "Substantially equivalent employment is that which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from which the . . . claimant has been discriminatorily terminated." *Sellers v. Delgado Coll.*, 902 F.2d 1189, 1193 (5th Cir. 1990) (internal quotation marks omitted). *See also Hughes v. Mayoral*, 721 F. Supp. 2d 947, 967-68 (D. Haw. 2010).

The record is too incomplete and too murky to say on summary judgment that "substantially equivalent" employment was available. The record is also inadequate to say whether Despain's failure to get any paying employment bars compensatory wage damages. True, Despain collected unemployment and earned no wages in the years he was away from the company. Failure to make any attempt to mitigate damages may bar

such damages in the Second Circuit. *See Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 54 (2d Cir. 1998). But it appears not to be categorically so in the Ninth Circuit. *See Haeuser v. Dep't of Law*, 368 F.3d 1091, 1100 n.9 (9th Cir. 2004) (noting the conflict between the two circuits). *But see Delima v. Home Depot U.S.A., Inc.*, 616 F. Supp. 2d 1055, 1093 (D. Or. 2008); *Wurts v. City of Lakewood*, No. C14-5113 BHS, 2015 WL 1954663, at *9 (W.D. Wash. Apr. 29, 2015). How those rules may play out will turn on the context at trial.

In any event, a trial will be necessary for emotional distress damages. *See Barati v. Metro-North R.R. Co.*, 939 F. Supp. 2d 143, 150-52 (D. Conn. 2013). BNSF Railway conceded at oral argument that such damages are compensable.

Despain also proved medical expenses during his time away from BNSF Railway. BNSF Railway admits that Despain produced medical bills but states that "he provides no proof the invoices were paid." (Doc. 67 at 9.) Whether he paid the bills, which he claims he did, does not matter. He incurred expenses that would likely have been covered in part by his employer-provided health insurance. To the extent that BNSF Railway suggests otherwise (*see* Doc. 62 at 13-14), it offers no evidence.

The Safety Act allows for punitive damages. *See* 48 U.S.C. § 20109(e)(3). In the § 1983 context, punitive damages are appropriate "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). Administrative law judges have applied that standard in Safety Act cases, and at least one circuit has approved of it. *See BNSF Ry. Co. v. U.S. Dep't of Labor*, 816 F.3d 628, 641-42 (10th Cir. 2016) ("In reviewing the ALJ's decision to award punitive damages, the Board considered whether BNSF had acted with a reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." (internal quotation marks omitted)). The parties do not dispute that this standard is appropriate.

As explained above, a reasonable juror could conclude that BNSF Railway

terminated Despain based on a pretext of dishonesty. Animus can be inferred from pretext. In light of the strong evidence of pretext, an inference of recklessness cannot be excluded on summary judgment.

IT IS THEREFORE ORDERED that Defendant BNSF Railway Company's Motion for Summary Judgment (Doc. 62) is denied.

Dated this 20th day of February, 2018.

Neil V. Wake
Senior United States District Judge