IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM CONRAD	*	
	*	
v.	*	Civil Action No. WMN-13-3730
	*	
CSX TRANSPORTATION, INC.	*	
	*	
	*	

* * * * * * * * * * * * * * * *

MEMORANDUM

Before the Court is Defendant CSX Transportation's Motion for Summary Judgment. ECF 19. The motion is fully briefed and ripe for review. Upon a review of the papers, facts, and applicable law, the Court determines (1) that no hearing is necessary, Local Rule 105.6, and (2) the motion will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff William Conrad (Conrad) brings this action against CSX Transportation (CSX) for violations of the Federal Rail Safety Act (FRSA), 49 U.S.C. § 20109. Conrad is a conductor for CSX and has been employed by CSX since April 27, 2003. He is also a member of United Transportation Union Local 340 and served as Local Chairman from 2009 to 2012. CSX is a freight railroad operating over 20,000 miles of track in 23 states, the District of Columbia and two Canadian provinces. Conrad works mostly in the Cumberland Yard, part of CSX's

Baltimore Division, which covers territory in Maryland, Pennsylvania, Washington, D.C., and West Virginia.

Plaintiff's cause of action arises from two "serious offense" violations brought against him by CSX which, he alleges, were in retaliation for two incidents where he reported CSX safety violations and objected to his Union Members being asked to engage in what he saw as unsafe conduct. These incidents are referred to as the "Deineen Incident" and the "Demmler Yard Incident."

A. The "Deineen Incident"

In January 2011, Conductor and Local 340 member James Deineen was injured while applying a handbrake on duty. After his injury and before the end of his shift, Deineen called Conrad to ask what he should do. Conrad told him to make sure he reported his accident before clocking out for the day. Deineen took Conrad's advice, reported his accident, and ended his shift. After submitting his time card, his managers asked Deineen to return to the train-yard and recreate his accident. Deineen called Conrad again, this time inquiring as to whether he should comply with those directions. Believing that Deineen was due for a rest period as required by the Hours of Service Act, Conrad advised Deineen to not return to the yard. Afterward, Conrad reported the incident to a Federal Railroad Administration representative.

Then, in February 2011, four CSX managers were stopped along the line of road west of Cumberland in order to observe an approaching train. Conrad, the conductor of the train, stopped the train at a bow-handled switch and, before checking the switch, operated it with one hand. CSX charged Conrad with a "serious offense" for violating the safety policy requiring a conductor to check the switch before operating and then to operate the switch with two hands. Conrad requested an administrative "time out"[1] in lieu of a formal discipline procedure. The time out request was granted and the meeting – for which Conrad was paid – was held on March 3, 2011.

B. The "Demmler Yard Incident"

In August 2011, Conrad received a call from engineer and Local 340 member Scott Sechler regarding a developing situation outside of the Demmler Yard in western Pennsylvania. Sechler's train ran out of fuel near the Yard and was blocking the CSX main line. Sechler and his crew had been ordered to retrieve a locomotive from the Demmler Yard to move the train; however, Sechler was concerned that he was not qualified to enter the

[1] A "time out" is an alternative to sanction under CSX's Individual Development and Personal Accountability Policy (Policy). The time out is a meeting between the employee, Division Manager, and union leader to discuss the "root cause and corrective solution" of the offending conduct. After the time out, a note is placed in the employee's file of the occurrence of a time out and relevant follow-up actions. ECF 19-32 at 4.

yard because of its low clearances and potentially unsafe areas. Conrad, based on his knowledge of a settlement agreement between CSX and Pennsylvania Public Utilities Commission and federal regulations, forbid Sechler and his crew from entering the Demmler Yard because they were not trained in handling the low clearance conditions in the Yard. Conrad reemphasized the safety risk in conversations with Trainmaster Renner.

Later that month, Senior Road Foreman of Engines Bill Diamond and Trainmaster Ron Baer were performing operational testing in CSXT's Cumberland Yard where Conrad was operating a train. That afternoon, Diamond and Baer claim that they observed Conrad operate in the yard without his radio on, fail to use proper identification in conducting a radio check, and fail to use both hands at all times when operating a switch. CSX formally charged Conrad for these violations. There has been no hearing on that violation since Conrad has been away from work due to an injury.

Upon exhausting his administrative remedies, Conrad filed this action. The parties have engaged in discovery, and CSX has now moved for summary judgment on all counts.

II. LEGAL STANDARD

Summary judgment is appropriate if the record before the court "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); Celotex Corp. v. Catrett, 377 U.S. 317, 322-23 (1986). See also Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987) (noting that trial judges have "an affirmative obligation . . . to prevent factually unsupported claims and defenses from proceeding to trial" (internal quotation marks omitted)). A fact is material if it might "affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue of material fact, the Court "views all facts, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving party." Housley v. Holquist, 879 F. Supp. 2d 472, 479 (D. Md. 2011) (citing Pulliam Inv. Co. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987)).

III. DISCUSSION

The FRSA incorporates by reference the rules and procedures in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21). 49 U.S.C. § 20109(d)(2)(A). AIR-21 establishes a two-part burden-shifting test. First, the employee must show, by a preponderance of the evidence, that "(1) [he] engaged in 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." Feldman

v. Law Enforcement Assocs. Corp., 752 F.3d 339, 344 (4th Cir. 2014). Then, 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." Livingston v. Wyeth, Inc., 520 F.3d 344 (4th Cir. 2008). Since the FRSA has stipulated a particular burden-shifting framework, we do not apply the McDonnell-Douglas burden-shifting framework. Araujo v. New Jersey Transit Rail Operations, Inc., 708 F.3d 152, 157 (3rd Cir. 2013).

CSX argues that the discipline charges meted out to Conrad do not constitute "unfavorable personnel actions" on three grounds: first, that charging an employee with rule violations is not an unfavorable personnel action under the FRSA; second, that the discipline does not meet the Title VII[2] retaliation standard for determining an adverse employment action; and third, that the charges did not result in any consequence for Conrad. Taking each in turn, the Court finds these arguments insufficient, and that the actions taken by CSX are both covered under the FRSA and are of the type that may discourage the reasonable employee from engaging in protected activity.

The subsections of FRSA on which Conrad bases his claims, subsections (a) and (b) of 49 U.S.C. § 20109, prohibit a

[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

railroad from "discharge[ing], demot[ing], suspend[ing], reprimand[ing], or in any other way discriminat[ing] against an employee" because an employee has reported a violation of federal safety law or a hazardous condition or refuses to work in violation of the law or in confronting the condition reported. A different subsection of the FRSA also prohibits a railroad from disciplining an employee for requesting medical or first aid treatment, where discipline means "[f]or the purposes of this paragraph . . . to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand of an employee's record." Id. § 20109(c). CSX argues that, because the words "bringing charges" is contained in subsection (c) but not in (a) or (b) means that Congress intended to exclude the action of "bringing charges" from the list of employment actions prohibited in retaliation for activities protected under (a) and (b). Therefore, its actions do not fall under the umbrella of FRSA.

This argument does not hold. In its analysis, CSX relies on the cannon of statutory interpretation that stands for the proposition that if an item included in one area of the statute is not included in another, it is thereby excluded from that second provision, or as it's known in Latin, "expressio unius est exclusio alterius." "The canon expressio unius est exclusio alterius does not apply to every statutory listing or grouping;

it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003). Indeed, expressio unius "properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference." Chevron U.S.A. Inc. v. Exchazabal, 536 U.S. 73, 81 (2002) (quoting State ex rel. Curtis v. De Corps, 134 Ohio St. 295, 299 (1938)). Furthermore, in the FRSA, section (c)'s definition of "discipline" includes "reprimand," a forbidden action in the non-exhaustive list in (a) and (b). The inclusion in multiple sections, in conjunction with the similarities in common-language meaning of "discipline," "reprimand," and the like, suggest that Congress meant to cover broad categories of punitive employer conduct. The foregoing, along with the additional inclusion of the catch-all phrase in (a) and (b) that prohibits an employer from taking action that "in any other way discriminates against an employee," and the fact that "exemptions from remedial statutes are to be construed narrowly," indicates that Defendant's actions are not meant to be excluded from FRSA coverage. See Olsen v. Lake Country, Inc., 955 F.2d 203 (4th Cir. 1991).

Next, CSX argues that, under the Title VII retaliation provisions, its actions in bringing charges against Conrad do not meet the requirement of an "adverse employment action."[3] CSX provides as the relevant test whether the action "'constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" ECF 19-1 at 38 (quoting Hoyle v. Freightliner, LLC, 650 F.3d 321, 337 (4th Cir. 2011)). Title VII's anti-retaliation provisions, however, cover a much broader range of employer conduct, and instead simply require a "materially adverse" action. Lettieri v. Equant Inc., 478 F.3d 640, 650 n.2 (4th Cir. 2007) (discussing the Supreme Court's rejection of the "adverse employment action" standard when applied to retaliation cases). "The anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." Burlington Northern & Santa Fe R.R. Co. v. White, 548 U.S. 53, 64 (2006). See A Society Without a Name v. Virginia, 655 F.3d 342, 352 (4th Cir. 2011). A plaintiff must "simply allege and prove 'that a reasonable employee would have found the challenged action

[3] The FRSA uses the same standard for determining an adverse employment action as that which applies in Title VII retaliation cases. See Rudolph v. Nat'l R.R. Passenger Corp., 2013 WL 1647527, at *9 (ARB Mar. 29, 2013).

materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a discrimination charge." Davreau v. Detecon, Inc., 515 F.3d 334, 342 (4th Cir. 2008) (quoting Burlington, 548 U.S. at 64); See also Thompson v. North American Stainless, 562 U.S. 170, 131 S. Ct. 863, 868 (2011).

This standard, although broad, does not condemn all employer actions as retaliation. The court will not find a "materially adverse" action when an employee encounters "petty slights or minor annoyances that often take place at work and that all employees experience." Burlington, 584 U.S. at 68. Courts in the Fourth Circuit have found that employees are not immunized by their reporting activity from experiences such as providing additional medical documentation, Wells v. Gates, 336 Fed. App'x 278 (4th Cir. 2009), having to sit in a non-swiveling chair, Dones v. Donahoe, 987 F. Supp. 2d 659 (D. Md. 2013), or being berated in front of coworkers. Wilcoxon v. DECO Recovery Mgmt., 925 F. Supp. 2d 725 (D. Md. 2013).

While Conrad having to attend a time out may have been a "minor annoyance" on its own, when taken in context of CSX's disciplinary scheme, a jury could find that a reasonable person would have been dissuaded from engaging in FRSA-protected activity as a result of CSX's conduct. According to the Policy, the "serious offense" category subjects an employee to varying

levels of punishment, from a five-day suspension up to termination. ECF 19-32 at 3-4. The Policy indicates that having two serious offenses on your record within the past three years makes an employee vulnerable to discharge. Administrative reprieve, in the form of a time out, is only available upon the first infraction. A reasonable employee, faced with the threat of such action, may be discouraged from reporting violations of federal safety law or hazardous conditions. A reasonable employee may even feel compelled to act against his interest in bodily safety in order to avoid finding himself on the road to termination.

Based on the implications of successive serious charges under CSX policy, the Court cannot say that a reasonable worker would not be dissuaded from engaging in protected conduct by successive disciplinary charges brought by CSX. For the same reason, the Court rejects CSX's third argument that their actions are not covered in this instance because Conrad was paid to attend the time out and CSX has not been able to complete the punishment phase attached to the second citation. Because the Court interprets anti-retaliation provisions to provide broad protection from retaliation in order to assure the cooperation of employees upon which whistleblowing statutes depend, Jordan v. Alternative Resources Group, 458 F.3d 332, 352 (4th Cir. 2006), the Court finds that CSX's actions constituted a

materially adverse action sufficient to present a claim to the jury.

Conrad having established a prima facie case, the burden then shifts to CSX to show by "clear and convincing" evidence that it would have taken the "same unfavorable personnel action in the absence of the behavior." CSX has provided records demonstrating that it has issued other citations for failing to use two hands to operate a bow-handled switch. ECF 19-26. CSX also argues that Conrad's type of violation had been clearly and consistently applied throughout the disciplinary process. Conrad has countered that, from the manager's vantage point from the line of road west of Cumberland, CSX officials could not have seen whether he used one or two hands to throw the switch. ECF 23 at 7; ECF 22-5. He also has testified that he was warned by co-workers that CSX management was "watching" him. ECF 23 at 34. Since there are representations which for purposes of this motion must be taken as true and which rebut CSX's argument, CSX has not established by clear and convincing evidence that it would have taken the same course of action regardless of Conrad's protected actions. See Araujo, 708 F.3d at 163 (holding that railroad's evidence "does not shed any light on whether [railroad's] decision to file disciplinary charges was retaliatory").

IV. CONCLUSION

For the reasons stated above, the Defendant's Motion for Summary Judgment will be denied.

/s/
William M. Nickerson
Senior United States District Judge