

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Wiley Y. Daniel

Civil Action No. 17-cv-00844-WYD-SKC

BRANDON FRESQUEZ,

Plaintiff,

v.

BNSF RAILWAY CO.,

Defendant.

ORDER

I. INTRODUCTION

Plaintiff, Brandon Fresquez, claims that Defendant, BNSF Railway Company (“BNSF”), retaliated against him for engaging in a protected activity in violation of the Federal Railroad Safety Act (“FRSA”). Plaintiff also claims he is entitled to punitive damages because BNSF’s alleged retaliation was intentional. BNSF seeks summary judgment on both issues. For the following reasons, BNSF’s motion for summary judgment is denied.

II. FACTUAL BACKGROUND

Plaintiff began his career with BNSF in 2005 in the Maintenance of Way Department.¹ For most of his time with BNSF, Plaintiff worked as a track inspector who

¹ I have considered all the facts and evidence cited by the parties, but I note only those facts I deem most material to my ruling. Exhibits submitted by BNSF are referenced by letter, e.g., Exhibit A. Exhibits submitted by Plaintiff are referenced by number, e.g., Exhibit 1. I have cited to the record only when the facts were disputed or where I otherwise thought it was necessary. I further note that BNSF disputes many of

was responsible for inspecting railroad tracks to determine if they complied with Federal Railroad Administration (“FRA”) regulations and BNSF track safety standards. Track inspectors must locate track defects that deviate from FRA or BNSF safety standards, remediate the defect by repairing it or protecting it, and report the defect. A track inspector protects a defect by making a report of the defect, reducing the track speed limit, or removing the track from service. Normally, the defects are reported by updating an electronic track inspection database called TIMS. Plaintiff reported track defects on a regular basis while employed as a track inspector.

Under BNSF’s employment hierarchy, track inspectors report directly to track supervisors called roadmasters. Roadmasters are authorized to manage track inspectors and instruct track inspectors to measure a track for defects and perform other job-related functions. Track inspectors are required to comply with instructions from roadmasters. (Def. Ex. A, Brandon Fresquez Dep. at 199:7-24).

BNSF has an employment policy called the Policy for Employee Performance Accountability (“PEPA”), which applies to all employees. The PEPA has three categories of employee discipline. The most severe category of discipline is “stand alone dismissible violations.” Insubordination is an example of a stand alone

Plaintiff’s factual assertions, and many, if not most, of those assertions are based on Plaintiff’s own deposition testimony. But “a party’s deposition testimony constitutes evidence which must be taken in the light most favorable to that party where she is the non-movant.” *McGowan v. Bd. of Trustees for Metro. State Univ. of Denver*, 114 F. Supp. 3d 1129, 1132 n.1 (D. Colo. 2015). BNSF also regularly opposes the credibility of Plaintiff’s testimony. But “the court may not weigh the credibility of the witnesses” which means “the court may not grant summary judgment based on its own perception that one witness is more credible than another.” *Fogarty v. Gallegos*, 523 F.3d 1147, 1165-66 (10th Cir. 2008). Therefore, I have construed the record in the light most favorable to Plaintiff without considering the credibility of the evidence.

dismissible violation. Insubordination is also prohibited in Rule 1.6 of BNSF's Maintenance of Way Operating Rules, which states that "[e]mployees must not be: . . . Insubordinate" and insubordination "is cause for dismissal."

BNSF also requires employees to follow their supervisor's instructions. Unlike insubordination, failure to follow instructions is not a stand-alone dismissible violation and can result in discipline less than termination. The difference between failure to follow instructions and insubordination is often subjective, but an employee can be charged with the former for when he or she is asked to do something and does not do it and an employee can be charged with the latter for refusing a direct order.

Any employee who violates a BNSF employment policy is not subject to immediate discipline. Instead, under a collective bargaining agreement, the employee may participate in an investigation to determine if a violation occurred and, if so, what the appropriate level of discipline should be for the violation.²

BNSF's 2016 Code of Conduct prohibits "[r]etaliation . . . against someone who reports a hazardous safety or security condition" and requires employees to report "actual and apparent violations of this prohibition." (Def. Ex. J, 2016 Code of Conduct 3; see also Def. Ex. V, Maintenance of Way Safety Rules § S-1.5.8; Def. Ex. W Corporate Policy § IV(E)). BNSF also maintains an anonymous hotline that enables employees to

² Plaintiff tries to dispute this fact, although his dispute is inadequate to raise a genuine issue of material fact. As he does with most of the facts he allegedly disputes in his response to BNSF's motion for summary judgment, Plaintiff notes that he "disputes the proposed fact insofar as it implies . . ." and then goes on to describe the implication that he disputes. (See, e.g., ECF No. 46 ¶ 19). BNSF argues this method "does not dispute" the fact but "instead only purports to dispute an implication that could follow from it." (See ECF No. 60 ¶ 10). I agree with BNSF and I deem the facts Plaintiff has "disputed" in this manner to be admitted unless noted otherwise in this order.

report behavior that conflicts with the Code of Conduct. (Def. Ex. K). The website listing the hotline reiterates that “BNSF has a no-retaliation policy for the good faith reporting of an apparent or actual violation of the law, BNSF’s Code of Conduct or any BNSF policy.” (*Id.*). Employees were instructed to call the hotline if they had concerns. (Pl. Ex. 2 David Dunn Dep. 40:14-22).

BNSF employees know that federal law prohibits them from retaliating against another employee for voicing safety concerns. (See Pl. Ex. 1, Cason Cole Dep. 84:4-16; Pl. Ex. 3, Adam Miller Dep. 131:1-3; Pl. Ex. 7, Mark Carpenter Dep. 135:2-4; Pl. Ex. 14, Michael Paz Dep. 160:11-20). Adam Miller, an upper-level manager at BNSF who decides whether employees should be dismissed for violating BNSF rules, stated that he had previously disciplined Michael Paz after Paz was accused of retaliating against another employee by attempting to covertly record a conversation with the employee. (Pl. Ex. 3, Adam Miller Dep. 135:12-137:9). For this infraction, Paz received a “needs improvement” designation on his leadership module regarding BNSF’s code of conduct. (Pl. Ex. 14 Michael Paz Dep. 145:2-11).

At some point, Plaintiff became aware that one of his roadmasters, Michael Paz, and another supervisor, Mark Carpenter, were inappropriately reporting repairs to track defects when no repair had actually been made. (See Pl. Ex. 5, Brandon Fresquez Dep. 143:13-145:11). In early May 2016, Plaintiff claims he confronted Paz over the telephone about improperly removing the track defects from TIMS. (See *id.* at 146:7-148:23). Plaintiff asserts he asked Paz to “admit you’re falsifying reports, admit you’re taking defects off and removing the slow orders” and Paz “admits to it.” (*Id.* at 148:11-13).

On the morning of May 5, 2016, Plaintiff alleges he spoke with Paz about another track defect that was severe enough to require taking the track out of service. (*Id.* at 173:16-174:4). According to Plaintiff, Paz instructed him to “falsify the report by changing the non-class defect to a class-specific defect so [Plaintiff would] not have to take the track out of service.” (Pl. Ex. 6, Internal Hearing Transcript 27:21-24). Plaintiff refused. (*Id.* at 26:22-24). Plaintiff claims he then called a field agent at FRA to ask whether the defect should be changed. (Pl. Ex. 5, Brandon Fresquez Dep. 175:5-8). After he ended his phone call with the field agent, Plaintiff spoke to Paz again about the defect. Plaintiff testified that he asked Paz again “about the falsifying of the reports and the defects” and Paz allegedly threatened to “go behind [him] and find nine missing defects . . . and fire [him].” (*Id.* at 175:9-20). Plaintiff also alleges that he told Paz that he called the FRA. (*Id.* at 180:1-7).

In the afternoon of May 5, Paz asked Plaintiff to meet him at another defect that had been identified by a geometry car, which is a vehicle that runs on the rails and identifies potential track defects. Plaintiff testified that he again told Paz he “called his friends in very high places,” referring to the FRA, and Paz responded “I have Mark Carpenter. We don’t lose.” (*Id.* at 180:9-15). Jay Herzog, a track foreman, met Plaintiff and Paz at the defect. The defect was not visible when the three of them arrived at the location of the possible defect.

The parties offer directly conflicting accounts of what happened next. According to Plaintiff, Paz said that the defect was not present based on his observation of the track. (*Id.* at 187:8-10). Plaintiff responded “you can’t just come out here and say it’s not there.” Paz replies “I don’t have to prove it’s not there. It’s your job to prove it’s

there.” (*Id.* at 189:2-7). Plaintiff claims Paz never asked him to measure the defect.

According to BNSF, Paz thought the defect should be measured and ordered Plaintiff to take his string-line to measure the track. A string-line is a tool to confirm whether there is an alignment defect in the track. Plaintiff refused, and Paz instructed Plaintiff to string-line the defect two more times. Plaintiff refused each instruction and said “there is no point.” (Def. Ex. R, Michael Paz Dep. 132).

Regardless of this conflicting account, Plaintiff ultimately climbed into his truck and drove away without ever measuring the possible defect. As Plaintiff drove away, Paz called him on his truck’s radio. The parties also dispute the content of the radio conversation. Plaintiff claims Paz asked him if he “wanted to” string-line the defect, (Pl. Ex. 5, Brandon Fresquez Dep. 190:9-13), while Paz claims he ordered Plaintiff to string-line the defect, (Pl. Ex. 6, Internal Hearing Transcript 7:18-26). Plaintiff’s responses to Paz were captured in the following audio recording:

Nah, you guys already made your decision. You got a Foreman there, and you guys have made your decision, so. . . . No, you guys already made your decision, uh, I don’t see the, the point of stringlining something when you’ve already made your decision with the Foreman. . . . My final opinion is it’s, uh, kind of pointless to stringline something if you’ve already made your decision. . . . I didn’t say no.³

Plaintiff eventually returned to the site of the defect to find Paz and Herzog measuring the track with a string-line.

³ Only Plaintiff’s side of the conversation is recorded. The ellipses demonstrate where Paz spoke to Plaintiff. Plaintiff disputes this version of his side of the conversation by inventing a scenario whereby a BNSF hearing officer intentionally altered the transcript of the recording. (ECF No. 46 ¶ 54). I find this argument to be farfetched and unsupported by fact. I have nonetheless reviewed the actual audio recording and I agree the transcript appears to accurately reflect Plaintiff’s statements. (See Pl. Ex. 18, Audio Recording).

Paz reported his version of events to his supervisor, Mark Carpenter. Paz believes that he told Carpenter Plaintiff was insubordinate, but if he did not use the word “insubordinate,” he at least told Carpenter Plaintiff refused an instruction. (Pl. Ex. 7, Mark Carpenter Dep. 90:19-22; Pl. Ex. 14, Michael Paz Dep. 129:6-10). Carpenter removed Plaintiff from service pending an investigation. Based on his conversation with Paz, Carpenter decided to charge Plaintiff with violating BNSF’s policy prohibiting insubordination. (Pl. Ex. 7, Mark Carpenter Dep. 91:12-16). He also issued an investigation notice to prompt disciplinary action.

In response to the notice, BNSF performed an investigatory hearing regarding Plaintiff’s alleged insubordination on May 13, 2016. Ned Percival, a manager in the transportation department, conducted the hearing. Paz testified at the hearing to his version of the events that occurred on May 5, 2016. Plaintiff was represented by his union chairman during the hearing and testified to his side of the story. Notably, Plaintiff testified that Paz “trie[d] to convince [him] to falsify the report by changing the non-class defect to a class-specific defect so [he] would not have to take the track out of service,” and that Paz tried to falsify track defect reports against Plaintiff’s objections. (Pl. Ex. 6, Internal Hearing Transcript at 27:15-28:20). Plaintiff also testified that he believed he was taken out of service in retaliation for confronting Paz about the defect reports. (*Id.* at 29:1-5).

Herzog did not testify during the investigatory hearing, but in his deposition, he agreed that Plaintiff’s termination was in retaliation for refusing to change the defects. Herzog stated Plaintiff was fired “due to him standing up to BNSF in regards to the FRA regulation.” (Pl. Ex. 11, Jay Herzog Dep. 156:2-8). Herzog also remembered trying to

call Plaintiff on his radio, but Paz told him not to because Plaintiff driving away was “just what [Paz] need[ed].” (*Id.* at 121:7-14). Herzog thought this was a reference to Paz finding a reason to fire of Plaintiff. (*Id.* at 174:4-175:10).

After the hearing ended, Percival sent the transcript to Stephanie Detlefsen who is on BNSF’s PEPA team. The PEPA team is a group within BNSF’s Labor Relations Department. They review investigation transcripts to determine the appropriate level of discipline to be administered against employees who have been accused of violating an employment policy. Detlefsen independently reviewed Plaintiff’s hearing transcript. She credited Paz’s testimony over Plaintiff’s because she believed Paz told Plaintiff to string-line the defect three times and Plaintiff left in his truck without measuring the defect. Detlefsen determined Plaintiff had been insubordinate and recommended dismissing him on a “stand-alone basis.” (Pl. Ex. 8 Stephanie Detlefsen Dep. 13:9-23). She also considered Plaintiff’s allegation that Paz retaliated against him for highlighting the discrepancies in the defect reports. Based on the allegation, Detlefsen consulted with BNSF’s law department to make sure BNSF was “complying with all of the laws.” (*Id.* at 20:23-24). But Detlefsen did not do anything to investigate Plaintiff’s claim that he was retaliated against. (*Id.* at 19:14-16).

Miller reviewed Detlefsen’s recommendation as well as the hearing transcript. Miller agreed that Plaintiff had been insubordinate for refusing Paz’s instruction to measure the defect. Miller testified that the Plaintiff’s initial charge was one thing that he considered when evaluating the level of discipline to impose. (Pl. Ex. 3, Adam Miller Dep. 97:7-10). In this case, Carpenter charged Plaintiff with insubordination based on Paz’s description of the incident. (*Id.* at 81:2-10). Miller concluded Plaintiff was

insubordinate, in part, based on Paz's testimony that he asked Plaintiff to measure the defect and Plaintiff refused. (*Id.* at 90:13-92:10).

Plaintiff's termination was finalized on May 27, 2016. (Pl. Ex. 35, Dismissal Letter). Plaintiff appealed his dismissal and his dismissal was upheld on appeal based on substantial evidence in the record. (Def. Ex. Y, Public Law Board No. 7585).

III. STANDARD OF REVIEW

Summary judgment may be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the . . . moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is 'genuine' 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party' on the issue." *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1283 (10th Cir. 2010) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "An issue of fact is 'material' 'if under the substantive law it is essential to the proper disposition of the claim' or defense." *Id.* (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)).

The burden of showing that no genuine issue of material fact exists is borne by the moving party. *E.E.O.C. v. Horizon/ CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000). The court must "view the evidence and draw all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000) (quotation omitted). All doubts must be resolved in favor of the existence of triable issues of fact. *Boren v. Southwestern Bell Tel. Co.*, 933 F.2d 891,

892 (10th Cir. 1991). When ruling on a motion for summary judgment, courts should recall that “[c]redibility determinations [and] the weight of the evidence” are the province of the jury. *Anderson*, 477 U.S. at 255.

IV. ANALYSIS

BNSF argues that it dismissed Plaintiff because he was insubordinate to Paz in violation of well-established company policies, and not for any retaliatory reasons. BNSF argues in the alternative that even if Plaintiff’s FRSA claim moves forward, his claim for punitive damages should be dismissed because BNSF made good-faith efforts to comply with the FRSA.

A. Federal Railroad Safety Act

The FRSA prohibits a railroad carrier and its employees from discharging an employee if such discharge is due to an employee’s lawful, good faith act done

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security . . .

[or]

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security[.]

49 U.S.C. § 20109(a)(1)-(2).

The FRSA also prohibits a railroad carrier and its employees from discharging an employee for “reporting, in good faith, a hazardous safety or security condition.” *Id.* at § 20109(b)(1)(A).

The FRSA adopts the burden-shifting framework found in 49 U.S.C. § 42121(b). 49 U.S.C. § 20109(d)(2)(A)(i). This framework imposes the initial burden on the

employee to establish a prima facie case by showing that “(1) the employee engaged in a protected activity; (2) the employer knew that the employee engaged in the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.” *Lincoln v. BNSF Ry. Co. (Lincoln I)*, 900 F.3d 1166, 1212 (10th Cir. 2018) (quoting *Conrad v. CSX Transp., Inc.*, 824 F.3d 103, 107 (4th Cir. 2016)). If an employee meets his or her threshold burden, the burden switches 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)(iv).

Plaintiff has clearly met the first three factors of a prima facie case. First, Plaintiff’s Complaint lists several activities that he alleges are protected activities, including that he “refused to reclassify a defect.” (ECF No. 1 at ¶ 35). BNSF does not challenge that this refusal is a protected activity, and Plaintiff stated he declined to reclassify a defect on May 5. See 49 U.S.C. § 20109(a)(2) (protected activity includes “refus[ing] to violate or assist in the violation of any Federal law, rule, or regulation”). Second, Detlefsen and Miller were the BNSF decisionmakers who terminated Plaintiff and they both knew about Plaintiff’s alleged protected activity because they reviewed the investigatory hearing transcript where Plaintiff testified that he refused to “chang[e] the non-class defect to a class-specific defect.” (Pl. Ex. 6, Internal Hearing Transcript at 27:21-24). BNSF implicitly admits that Detlefsen and Miller knew about this protected activity when it states in its motion for summary judgment “[o]ther than this benign exchange” between Plaintiff and Paz, “Miller and Detlefsen are not aware of *any other*

instances where Plaintiff refused to re-classify a defect.” (ECF No. 39 at 21 (emphasis added); see also *id.* at 20 (“BNSF’s decision makers did not know about all but the most innocuous of Plaintiff’s protected activity.”)). Third, it is undisputed that Plaintiff was taken out of service and eventually terminated, which are unfavorable personnel actions.

The only real dispute concerns the fourth factor. Under this factor, a “contributing factor” is “any factor, which alone or in combination with other factors, tends to affect *in any way* the outcome of the decision.” *BNSF R. Co. v. U.S. Dep’t of Labor (Cain)*, 816 F.3d 628, 638 (10th Cir. 2016) (internal quotation marks omitted). The “contributing factor” standard is “broad and forgiving.” *Id.* at 639 (internal quotation marks omitted). To satisfy this standard, an employee need not “conclusively demonstrate the employer’s retaliatory motive,” but must prove the employer’s intentional retaliation was “prompted by the employee engaging in protected activity.” *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014); see also *Lincoln I*, 900 at 1213 (citing *Koziara v. BNSF Ry. Co.*, 840 F.3d 873 (7th Cir. 2016) and noting “employee must produce evidence that unfavorable personnel action was “motivated by animus”).

Plaintiff contends there is direct evidence that shows BNSF retaliated against him because of his protected activity. But, in support of this contention he cites to paragraphs 18-21, 24, and 36 of his proposed statement of facts. (ECF No. 46 at 41). Paragraphs 18-21 do not establish direct evidence of retaliation and Plaintiff’s proposed statement of facts does not contain paragraphs 24 or 36. Thus, I find that there is no direct evidence of retaliation.

Nonetheless, an employee may rely on circumstantial evidence to establish a

retaliatory motive. See *Lincoln v. BNSF Ry. Co. (Lincoln II)*, 2017 WL 1437302 at *30 (D. Kan. Apr. 24, 2017), *aff'd in part, vacated in part, rev'd in part, Lincoln I*.

Circumstantial evidence includes evidence such as “the temporal proximity between the protected activity and the adverse action, 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).

Viewing the evidence in the light most favorable to Plaintiff, I find that the circumstantial evidence shows that Plaintiff’s protected activity may have contributed to his termination because there is temporal proximity and indications of pretext between Plaintiff’s protected activity and his termination. Trouble started brewing in early May 2016 when Plaintiff claims he demanded that Paz admit to falsifying track defect reports. Several days later, on the morning of May 5, Plaintiff allegedly refused Paz’s instruction to reclassify another defect and Paz allegedly threatened to fire Plaintiff. Then, in the afternoon, Paz called Plaintiff to investigate another defect. Plaintiff alleges he told Paz he had called his “friends in very high places,” to which Paz responded that he does not “lose.” Shortly after this exchange, Plaintiff drove away from the investigation site. That evening, Paz initiated disciplinary actions against Plaintiff by reporting him for insubordination to Carpenter, who placed Plaintiff on leave.

This history plainly establishes a temporal proximity between Plaintiff’s protected activity and his termination because Plaintiff’s protected activity and the unfavorable personnel action occurred on the same day. Within several hours of refusing to

reclassify a defect, Paz told Carpenter Plaintiff acted insubordinately. *Cf. Felix v. City and Cnty. of Denver*, 729 F. Supp. 2d 1243, 1253 (D. Colo. 2010) (“Close” temporal proximity means a period of days or a few weeks”).

I also find that there is an indication of pretext because Paz allegedly threatened to fire Plaintiff and told him he did not “lose” on the same day he reported Plaintiff to Carpenter. And Herzog, who witnessed the exchange between Paz and Plaintiff at the supposed defect on May 5, thought that Plaintiff’s termination was related to his protected activity and that Paz would use Plaintiff’s flight from the defect as an excuse to fire him. These facts allow an inference that Paz intentionally retaliated against Plaintiff for challenging him about the track defects.

BNSF contends that Plaintiff’s insubordination constitutes an intervening event that justified discharging Plaintiff. (ECF No. 39 at 23). I disagree because I find that it is impossible to divorce the timing of Plaintiff’s refusal to reclassify the defect and Paz’s comments about firing Plaintiff in the morning of May 5 from Paz reporting Plaintiff for insubordination that evening. Herzog’s testimony that Paz instructed him not to call Plaintiff back to the defect lends further support to this conclusion.

For these same reasons, I also find that BNSF has failed to show by clear and convincing evidence that it would have terminated Plaintiff absent his protected activity. Again, it is impossible to know whether Paz would have reported Plaintiff to Carpenter for insubordination if Plaintiff had not refused to reclassify the defect in the first place. There is also evidence, based on Paz’s statement that he wanted to find a reason to fire Plaintiff, that Paz told Carpenter Plaintiff was insubordinate because of his refusal to reclassify defects. *See Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d

152, 163 (3rd Cir. 2013) (reversing clear and convincing finding even though plaintiff “was technically in violation of written rules” because “they do not shed any light on whether [defendant’s] decision to file disciplinary charges was retaliatory”).

The initial conversation between Paz and Carpenter led Carpenter to formally charge Plaintiff with insubordination, instead of a possibly lower charge like failure to follow instructions. Miller stated that he relied on the charge of insubordination in determining the appropriate level of discipline. And Detlefsen and Miller both relied on Paz’s description of the May 5 incident to conclude that Plaintiff was insubordinate. Although there is certainly evidence that Plaintiff was insubordinate, especially if you believe Paz’s testimony, Plaintiff’s and Paz’s conflicting accounts of what happened on May 5 creates a genuine issue of material fact as to whether Plaintiff was insubordinate, failed to follow instructions, or was completely innocent. Due the centrality of Paz’s involvement with Plaintiff’s termination, and Plaintiff’s allegations that Paz sought a reason to fire him, I cannot conclude there is clear and convincing evidence BNSF would have terminated Plaintiff in the absence of his protected activity.

Having construed the evidence to Plaintiff’s advantage, as I must when considering a motion for summary judgment, I find that there are genuine issues of material fact as to whether Plaintiff’s protected activity was a contributing factor that led to his discharge. Accordingly, BNSF’s motion for summary judgment is denied.

B. Punitive Damages

To be entitled to punitive damages in a FRSA claim, a plaintiff must show that the employer acted with a “reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law.” *Cain*, 816 F.3d at 642. In *Kolstad v. American*

Dental Association, 527 U.S. 526 (1999), the Supreme Court held, in the Title VII context, that employers may be vicariously liable for punitive damages based on discriminatory conduct of lower level management. However, this liability does not attach where “the discriminatory employment decisions of managerial agents . . . are contrary to the employer’s good faith efforts to comply with Title VII.” *Kolstad*, 527 U.S. at 545; see also *BNSF Ry. Co. v. U.S. Dep’t of Labor Admin. Review Bd.*, 867 F.3d 942, 949 (8th Cir. 2017) (applying *Kolstad*’s “good faith” exception to FRSA claims).

To avail itself of *Kolstad*’s good-faith-compliance standard, an employer must at least 1) “adopt antidiscrimination policies;” 2) “make a good faith effort to educate its employees about these policies and the statutory prohibitions;” and 3) make “good faith efforts to enforce an antidiscrimination policy.”

McInnis v. Fairfield Cmtys., Inc., 458 F.3d 1129, 1138 (10th Cir. 2006) (quoting *Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1210 (10th Cir. 2000)).

“The question of good faith compliance is decided by the jury if there are material issues of disputed facts,” and summary judgment eliminating the claim “can only be granted if there is no genuine dispute over the relevant *Kolstad* facts.” *E.E.O.C. v. Prof’l Bureau of Collections of Maryland, Inc.*, 686 F. Supp. 2d 1151, 1154-55 (D. Colo. 2010).

BNSF does not contend that Paz is not a management-level employee, and I therefore assume (only for the purposes of this order) that Paz is such an employee for whom BNSF may be vicariously liable.⁴ See *Cain* 816 F.3d at 642 (relying on

⁴ In any event, Paz testified, for example, that he supervises approximately 20 union-level employees. (Pl. Ex. 14, Michael Paz Dep. 11:10-13). This is likely places Paz within the Supreme Court’s broad parameters for employees who have “managerial capacity.” See *Kolstad*, 527 U.S. at 543 (explaining that in reviewing whether an employee meets this description the court “should review the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished.”).

statements by two foremen to uphold award of punitive damages). Thus, the question becomes did Paz act with a “reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law”? *Id.*

To answer this question, the following facts are relevant. Paz stated that he was “aware that federal law prohibits retaliation against an employee that reports a safety concern.” (Pl. Ex. 14, Michael Paz Dep. 160:11-14). Paz initiated disciplinary action against Plaintiff by telling Carpenter that Plaintiff was insubordinate. Plaintiff and Herzog testified that Paz, and BNSF more broadly, retaliated against Plaintiff because he challenged Paz about reporting track defects. Combining these three sets of facts leads me to conclude that there is at least a dispute over whether Paz recklessly or callously disregarded Plaintiff’s rights under the FRSA and whether these violations were intentional.

But BNSF contends the *Kolstad* good-faith exception applies. The problem for BNSF is that there is a dispute over whether it has made good faith efforts to enforce its retaliation policies. Supporting BNSF’s good faith efforts is Miller’s testimony that he disciplined Paz when he retaliated against another employee. Opposing BNSF’s good faith efforts is Detlefsen testimony that that even though she reviewed the investigatory hearing transcript where Plaintiff complained of being retaliated against by Paz, she did nothing to investigate Plaintiff’s claim. Detlefsen’s failure to do any sort of factual investigation into Plaintiff’s claim is magnified by the facts that Paz had previously been disciplined for retaliation, which may have indicated the complaint was reasonable, and that part of Detlefsen’s job description is overseeing BNSF’s discipline policy.

Accordingly, BNSF’s motion for summary judgment on Plaintiff’s punitive

damages request is denied.

V. CONCLUSION

Based on the foregoing, it is

ORDERED that Defendant's Motion for Summary Judgment (ECF No. 39) is

DENIED.

Dated: October 2, 2018

BY THE COURT:

s/ Wiley Y. Daniel

Wiley Y. Daniel

Senior United States District Judge