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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 BRENT MCFARLAND,

8 Plaintiff,

9 v.

10 BNSF RAILWAY COMPANY,

11 Defendant.

No. 4:16-CV-05024-EFS

**ORDER DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

12
13 Before the Court is Defendant BNSF Railway Company's Motion for
14 Summary Judgment and for Partial Summary Judgment, ECF No. 40.
15 Plaintiff Brent McFarland claims that BNSF wrongfully discharged him in
16 retaliation for hiring an attorney and bringing a lawsuit under the
17 Federal Employers Liability Act (FELA). See ECF No. 17. BNSF seeks
18 summary judgment, arguing that Mr. McFarland was not discharged for
19 filing a FELA claim, and was instead removed from the seniority roster
20 pursuant to Rule 16(f) of the Brotherhood Railway Carmen Collective
21 Bargaining Agreement (BRC CBA) because he worked for another employer
22 while on a leave of absence. ECF No. 40. BNSF also argues that Mr.
23 McFarland lacks any similarly situated comparator, and asks – as
24 alternative relief – for partial summary judgment as to “the portion of
25 plaintiff's claim that relies on alleged disparate treatment.” ECF No.
26 40 at 10. Mr. McFarland counters that a jury could find that dismissal

1 under Rule 16(f) was pretext, or that his FELA lawsuit was nevertheless
2 a substantial factor in BNSF's decision, and that his claim is not
3 dependent on proving disparate treatment. ECF No. 48. After reviewing
4 the record and relevant legal authority, for the reasons set forth
5 below, the Court finds there are genuine issues of material fact and
6 therefore denies BNSF's Motion.

7 **I. FACTS AND ALLEGATIONS**

8 Mr. McFarland worked for BNSF for over 15 years as a carman,
9 starting in 1994 and terminating in 2013. Ex. 54, ECF No. 51-1 at 43.
10 The BRC CBA, which governed Mr. McFarland's employment relationship with
11 BNSF, prohibited other employment during a leave of absence:

12 Employees accepting other compensated employment while on
13 leave of absence without first obtaining permission from the
14 officer in charge and approved by the General Chairman shall
be considered out of service, and their names shall be removed
from the seniority roster.¹

15 CBA Rule 16(f), Ex. 1, ECF No. 46-1 at 16. Nonetheless, throughout his
16 employment with BNSF, Mr. McFarland also worked for his father's
17 company, RJ Mac, including during periods when he had taken a leave of
18 absence from BNSF. See, e.g., Ex. 4, ECF No. 42-1 at 3-4.

19 According to Mr. McFarland, "[p]robably 95 percent of all of the
20 foremans [sic] knew" that he worked for RJ Mac while on a leave of
21 absence. Ex. 52, ECF No. 51-1 at 19. BNSF denies this, and three of
22 Mr. McFarland's supervisors have provided affidavits stating that they
23 were unaware of Mr. McFarland's employment with RJ Mac while on leave,
24 and that if they had known, they would have informed Mr. McFarland that

25
26 ¹ Though this BRC CBA only became effective in February 2006, the predecessor
agreement contained the same restrictions. See Ex. 14, ECF No. 55-1 at 23.

1 such employment was prohibited or they would have reported the
2 violation. Exs. 16-18, ECF No. 55-1 at 34-35, 39-43, 48-49. Yet, BNSF
3 did not take any proactive steps to discover Rule 16(f) violations, had
4 no written policies on how to handle allegations of Rule 16(f)
5 violations, and in ten years – across the country – had discharged only
6 three employees under Rule 16(f). Ex. 68, ECF No. 51-1 at 151-152;
7 Ex. 70, ECF No. 51-1 at 160.

8 In December 2009, Mr. McFarland injured his right shoulder. See
9 ECF No. 17 at 3. In 2012, after trying unsuccessfully to obtain
10 compensation from BNSF, Mr. McFarland filed a FELA lawsuit, alleging
11 BNSF committed negligence that had caused him to suffer an on-the-job
12 injury. Ex. 57, ECF No. 51-1 at 53-57. In August 2013, during the
13 resulting trial, Mr. McFarland's testimony included statements that he
14 had worked for RJ Mac while on leaves of absence from BNSF in 2003 and
15 2004. Ex. 59, ECF No. 51-1 at 75-77. Ultimately, the jury found in
16 BNSF's favor on Mr. McFarland's FELA claim, and the trial court entered
17 its last ruling – denying Mr. McFarland's motion for new trial – on
18 October 22, 2013. Ex. 61, ECF No. 51-1 at 106.

19 On November 6, 2013, Mr. McFarland and his union representative,
20 Bert Barnes, were called into Ryan Risdon's office. Ex. 52, ECF No. 51-
21 1 at 109. Mr. Risdon presented a letter bearing his signature to Mr.
22 McFarland, which indicated that Mr. McFarland was being removed from
23 the seniority roster for violating Rule 16(f) of the BRC CBA. Ex. 60,
24 ECF No. 51-1 at 95-96. Mr. McFarland avers that upon reading the letter,
25 he confronted Mr. Risdon, saying, "This is retaliation for my lawsuit."
26 And Mr. Risdon's response was something to the effect of: "What do you

1 expect? You sued the railroad." Ex. 52, ECF No. 51-1 at 24-28. During
2 a deposition, Mr. Barnes likewise paraphrased Mr. Risdon's statement
3 as: "What did you think would happen if [you] sued the railroad[?]"
4 Exhibit 62, ECF No. 51-1 at 111. But BNSF denies that Mr. Risdon made
5 such a statement, and asserts that Mr. Risdon merely said the matter
6 was outside his control and explained the origins of the evidence used
7 to find a Rule 16(f) violation. Ex. 12, ECF No. 55-1 at 4.

8 The union initially challenged Mr. McFarland's discharge, but
9 later informed him that it would not be pursuing the grievance because
10 it did not believe it could prevail in arbitration. See Ex. 11, ECF
11 No. 43-1 at 43. Mr. McFarland then filed this lawsuit, alleging that
12 BNSF's proffered reason for terminating him - Rule 16(f) - was merely
13 a pretext for the true basis for his termination, which was in
14 retaliation for filing a grievance and FELA lawsuit seeking to recover
15 for his worksite injury. ECF No. 17.

16 II. APPLICABLE LEGAL STANDARDS

17 A. **Summary Judgment**

18 A motion for summary judgment will only be granted if "the
19 pleadings, the discovery and disclosure materials on file, and any
20 affidavits show that there is no genuine issue as to any material fact
21 and that the movant is entitled to judgment as a matter of law." Fed.
22 R. Civ. P. 56(c). A party seeking summary judgment bears the initial
23 burden of providing the basis for its motion and must identify those
24 portions of the pleadings and discovery responses that demonstrate the
25 absence of a genuine issue of material fact. See *Celotex Corp. v.*
26 *Catrett*, 477 U.S. 317, 323 (1986). The substantive law identifies which

1 facts are material, and only disputes over facts that might affect the
2 outcome under that governing law will preclude the entry of summary
3 judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
4 Therefore, to prevail on summary judgment, a defendant must
5 affirmatively demonstrate an absence of evidence to support the
6 plaintiff's case such that no reasonable trier of fact could find other
7 than in the defendant's favor. *See Celotex Corp.*, 477 U.S. at 323. If
8 the defendant meets this initial burden, the plaintiff must then provide
9 "specific facts showing that there is a genuine issue for trial."
10 *Liberty Lobby*, 477 U.S. at 250.

11 When deciding whether to enter summary judgment, the Court makes
12 no credibility determinations and does not weigh conflicting evidence.
13 Instead, it must construe the evidence – and draw all reasonable
14 inferences therefrom – in the light most favorable to the nonmoving
15 party. *See Liberty Lobby*, 477 U.S. at 255; *T.W. Elec. Serv., Inc. v.*
16 *Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987).
17 Nonetheless, evidence presented by the parties must be admissible, Fed.
18 R. Civ. P. 56(e)(1), and conclusory or speculative statements are
19 insufficient to raise genuine issues of fact and defeat summary
20 judgment, *see Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738
21 (9th Cir. 1979).

22 **B. Wrongful Discharge in Washington State**

23 Under Washington State law, the tort of wrongful discharge in
24 violation of public policy is an exception to the at-will employment
25 doctrine, and is narrowly drawn to further the goal of preventing
26 employers from using the at-will doctrine to subvert those who seek to

1 promote public policy. See *Thompson v. St. Regis Paper Co.*, 685 P.2d
2 1081, 1088-89 (Wash. 1984). The Washington State Supreme Court
3 recognizes the tort of wrongful discharge as extending to claims of
4 employer retaliation for whistleblowing activity, *Dicomes v. State*, 782
5 P.2d 1002, 1007 (Wash. 1989), as well as for obtaining legal assistance
6 to confront the employer's unlawful discrimination, *Bennett v. Hardy*,
7 784 P.2d 1258, 1264 (Wash. 1990). And when analyzing a claim that falls
8 within a such a recognized category, Washington courts apply a three-
9 step, burden-shifting test taken from *McDonnell Douglas Corp. v. Green*,
10 411 U.S. 792, (1973).² See, e.g., *Scrivener v. Clark Coll.*, 334 P.3d 541
11 (Wash. 2014) (applying the *McDonnell Douglas* framework in the employment
12 discrimination context).

13 The first step is for the plaintiff to make out a prima facie case
14 for retaliatory discharge. See *Wilmot v. Kaiser Aluminum & Chem. Corp.*,
15 821 P.2d 18, 28-29 (Wash. 1991). To do so, the plaintiff "need not
16 attempt to prove the employer's sole motivation was retaliation."
17 *Wilmot*, 821 P.2d at 30. Rather, the plaintiff need only produce evidence
18 - even if circumstantial - that his actions, which were in furtherance
19 of public policy, were "a cause of the firing." *Wilmot*, 821 P.2d at 30;
20 see also, *Rickman v. Premera Blue Cross*, 358 P.3d 1153, 1160 (Wash.
21 2015).

22
23 ² As Mr. McFarland's claims fit within common and previously-recognized wrongful
24 discharge scenarios, the Court need not apply the four-factor "Perritt
25 analysis" to determine whether Mr. McFarland has alleged a violation of public
26 policy that warrants recovery. Cf. *Gardner v. Loomis Armored Inc.*, 913 P.2d
377, 382 (Wash. 1996) ("Because this situation does not involve the common
retaliatory discharge scenario, it demands a more refined analysis than has
been conducted in previous cases." (citing Henry H Perritt, Jr, *Workplace
Torts: Rights and Liabilities* § 3.7 (1991))).

1 At the second step, the burden of production shifts to the
2 employer, who must articulate a legitimate, non-retaliatory reason for
3 the discharge. *Wilmot*, 821 P.2d at 29. "The employer must produce
4 relevant admissible evidence of another motivation, but need not do so
5 by the preponderance of evidence necessary to sustain the burden of
6 persuasion, because the employer does not have that burden[.]" *Id.*

7 The third step requires that the plaintiff respond to the
8 employer's proffered reason by showing either (1) the employer's
9 articulated reason is pretext, or (2) even if the employer's stated
10 reason is legitimate, retaliation for protected conduct was nevertheless
11 a substantial motivating factor. *Wilmot*, 821 P.2d at 31. For summary
12 judgment purposes, this is a burden of production, not persuasion, and
13 the plaintiff need only offer sufficient evidence to create a genuine
14 issue of material fact. See *Scrivener*, 334 P.3d at 546.

15 **III. ANALYSIS**

16 **A. Summary Judgment: Application of *McDonnell Douglas***

17 Here, the Court finds that Mr. McFarland has satisfied step one
18 of the *McDonnell Douglas* analysis. During his deposition, Mr. McFarland
19 stated that his supervisors had long been aware that he worked for RJ
20 Mac while on leaves of absence, but he was not terminated until his FELA
21 case reached final resolution. Mr. McFarland also provided evidence
22 that Mr. Risdon essentially admitted that Mr. McFarland was being
23 removed from the seniority roster because he had sued the railroad.
24 Such evidence, when assumed to be genuine and accurate, is more than
25 sufficient to show a prima facie case of wrongful termination.

1 At step two, the Court finds that BNSF has articulated a legitimate
2 reason for terminating Mr. McFarland, namely his violation of Rule
3 16(f).

4 It is step three, therefore, upon which summary judgment hinges.
5 And at this third step, the Court finds Mr. McFarland has demonstrated
6 that a genuine issue of material fact exists as to whether BNSF's
7 decision to discharge him under Rule 16(f) was either pretext or
8 substantially motivated by retaliation.

9 1. BNSF's Arguments Supporting Discharge Under Rule 16(f)

10 BNSF makes cogent arguments for why Mr. McFarland's discharge
11 under Rule 16(f) was not pretext. Primarily, BNSF argues that there is
12 no evidence of a retaliatory motive because: (1) the decision to remove
13 Mr. McFarland from the seniority roster was within the sole discretion
14 of Ollie Wick, the General Director of Labor Relations at BNSF; (2) in
15 arriving at his decision, Mr. Wick relied exclusively on Mr. McFarland's
16 own sworn testimony and the terms of the BRC CBA; and (3) the clear
17 terms of the BRC CBA show Rule 16(f) is self-executing, meaning Mr.
18 McFarland's removal from the seniority roster was both mandatory and
19 automatic. See ECF No. 44. Indeed, Mr. Wick averred that he alone made
20 the decision to remove Mr. McFarland from the seniority roster, and that
21 he was not aware of – let alone motivated by – Mr. McFarland's FELA
22 lawsuit. Ex. 13, ECF No. 55-1 at 10-11.

23 In BNSF's view, Mr. Wick's role in Mr. McFarland's removal not
24 only illustrates a lack of retaliatory intent, but also proves that
25 others at BNSF did not use Mr. Wick as a "cat's paw" to retaliate against
26 Mr. McFarland. See ECF No. 40. BNSF cites to *Staub v. Proctor Hospital*,

1 562 U.S. 411 (2011), as supportive of its argument that Mr. Wick's
2 "independent" review and sole discretion shields BNSF from liability
3 because Mr. Wick did not rely on any "biased" representations, and
4 instead looked to Mr. McFarland's own sworn statements. See ECF No. 40
5 at 7-9. Although some of the language in *Staub* can be read to support
6 BNSF's position, and the case addressed similar issues, that case dealt
7 with statutory language and discrimination rather than common law and
8 retaliation. More importantly, when read as a whole, *Staub* is not
9 helpful to BNSF.

10 2. *Staub v. Proctor Hospital*

11 In *Staub*, the United States Supreme Court addressed the issue of
12 what circumstances must exist for an employer to be held liable for
13 employment discrimination based on the animus of an employee who
14 "influenced, but did not make, the ultimate employment decision." 562
15 U.S. at 413. There, the Court analyzed the text of the Uniformed
16 Services Employment and Reemployment Rights Act of 1994, 38 U.S.C.
17 § 4301 et seq., which prohibits adverse employment action if
18 discrimination is "a motivating factor." The Supreme Court concluded
19 that even if the decision to terminate an employee was based in part on
20 a report that was prompted by discrimination, such discrimination was
21 not a motivating factor so long as the decision maker had no unlawful
22 animus and was unaware of the report's discriminatory origins. *Staub*,
23 562 U.S. at 418-19. However, the Supreme Court also noted,

24 An employer's authority to reward, punish, or dismiss is
25 often allocated among multiple agents. . . . [Defendant's]
26 view would have the improbable consequence that if an
employer isolates a personnel official from an employee's
supervisors, vests the decision to take adverse employment

1 actions in that official, and asks that official to review
2 the employee's personnel file before taking the adverse
3 action, then the employer will be effectively shielded from
4 discriminatory acts and recommendations of supervisors that
5 were designed and intended to produce the adverse action.
6 That seems to us an implausible meaning of the text, and one
7 that is not compelled by its words.

8 *Staub*, 562 U.S. at 420. Thus, *Staub* is consistent with the principle
9 that an employer cannot escape liability for wrongful discharge simply
10 by pointing to a selectively enforced, but otherwise "valid" policy.
11 See *Wilmot*, 821 P.2d at 31-32 (stating that if an absenteeism policy is
12 not evenly applied, "or if it is applied where an employee's absence is
13 relatively brief, an employee may use those circumstances as tending to
14 show the absenteeism policy was a pretext for discharge").

15 3. Evidence of Unlawful Motivation or Pretext

16 If Mr. McFarland's evidence is accepted as accurate, and all
17 reasonable inferences are drawn in his favor, a juror could reasonably
18 believe that BNSF discharged Mr. McFarland in retaliation for his FELA
19 lawsuit. As previously noted, if BNSF supervisors knew for over a
20 decade that he worked for RJ Mac during leaves of absence, the fact that
21 BNSF only terminated Mr. McFarland after his FELA case had concluded is
22 circumstantial evidence of retaliation. The rarity with which BNSF
23 enforces Rule 16(f) lends further support, and - for the purposes of
24 summary judgment - one must assume that Mr. Risdon really did make
25 statements tying Mr. McFarland's discharge to his lawsuit. Given such
26 evidence, a reasonable juror could infer that BNSF employees would not
have brought Mr. McFarland's Rule 16(f) violations to the attention of
Mr. Wick in the first place if Mr. McFarland had not sued BNSF.
Moreover, given that it was the transcript from Mr. McFarland's FELA

1 case that Mr. Wick received, reviewed, and relied upon in making his
2 determination, a juror might reasonably infer that – despite his
3 statements to the contrary – Mr. Wick did know about Mr. McFarland’s
4 lawsuit against BNSF. In either scenario, a reasonable juror could
5 question BNSF’s motives for invoking Rule 16(f), meaning summary
6 judgment would be inappropriate.

7 **B. Summary Judgment as to “Comparator Claim”**

8 BNSF asks, in the alternative, that the Court “grant partial
9 summary judgment dismissing plaintiff’s ‘comparator’ claim, on the
10 ground that none of the alleged comparators is similarly situated to
11 plaintiff.” ECF No. 40 at 2. BNSF provided evidence that Thomas Kinghorn
12 was not subject to the same CBA, let alone a provision analogous to Rule
13 16(f). ECF No. 46 at 9. Neither was Greg Coronado, who had stopped
14 working after signing an “out of service” settlement agreement, but was
15 able to keep certain benefits for a time. See Ex. 3, ECF No. 41-1 at
16 11. Hal Smith apparently resigned in order to operate a tool business
17 after being informed that he could not work for another employer while
18 on leave. ECF No. 46 at 94-95. And none of them had the same supervisors
19 as Mr. McFarland. ECF No. 46 at 10-11.

20 Generally, plaintiffs must be able to point to valid comparators
21 when bringing a disparate treatment claim under Title VII, Washington
22 Law Against Discrimination (WLAD), and 42 U.S.C. § 1981. See, e.g.,
23 *Alonso v. Qwest Commc'ns Co.*, 315 P.3d 610 (Wash. App. 2013) (noting
24 that under WLAD, disparate treatment occurs when employers treat certain
25 employees “less favorably” than others because of race, color, or other
26 protected status). Here, however, Mr. McFarland is not alleging

1 discrimination, he is alleging that BNSF retaliated against him for
2 reporting employer misconduct and/or exercising a legal right or
3 privilege; his sole cause of action is for wrongful discharge in
4 violation of public policy. See ECF No. 38.

5 BNSF correctly points out that Mr. McFarland's pleadings alleged
6 that other employees had similarly worked for RJ Mac, but were not
7 terminated because they did not bring a lawsuit against BNSF. ECF No. 17
8 at 8; ECF No. 54 at 3. Naturally, comparator evidence that verified
9 this type of allegation would tend to show pretext on the part of BNSF,
10 whereas comparator evidence showing consistent application of Rule 16(f)
11 would tend to undermine Mr. McFarland's claim. The potential
12 significance and importance of this kind of comparator evidence,
13 however, does not somehow transform Mr. McFarland's wrongful discharge
14 claim into a "comparator claim," or otherwise split the issues such that
15 partial summary judgment is appropriate. Instead, any proffered
16 comparator evidence will be governed by the usual principles and rules
17 of evidence.

18 IV. CONCLUSION

19 The record contains competing representations of fact from which
20 a jury could find either that Mr. McFarland was wrongfully terminated
21 or that he was terminated for a legitimate, non-retaliatory reason.
22 Both Mr. McFarland and BNSF Railway met their preliminary evidentiary
23 burdens, and what evidence is to be believed is a matter for the jury.
24 See *Scrivener*, 334 P.3d at 545 ("When the record contains reasonable
25 but competing inferences of both discrimination and nondiscrimination,
26 the trier of fact must determine the true motivation."). Further, there

1 is no separate comparator claim or issue that would warrant partial
2 summary judgment.

3 For reasons set forth above, **IT IS HEREBY ORDERED**, Defendant BNSF
4 Railway Company's Motion for Summary Judgment and for Partial Summary
5 Judgment, **ECF No. 40**, is **DENIED**.

6 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
7 Order and provide copies to all counsel.

8 **DATED** this 2nd day of February 2017.

9
10 s/Edward F. Shea
EDWARD F. SHEA
11 Senior United States District Judge
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