

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 JAMES T. NORVELL,

Plaintiff,

9 v.

10 BNSF RAILWAY COMPANY,

11 Defendant.

CASE NO. C17-5683 BHS

ORDER

12
13 THIS MATTER is before the Court on Plaintiff James Norvell's Federal Rule of
14 Civil Procedure 50(b) Motion for Judgment as a Matter of Law on his wrongful
15 termination in violation of public policy claim and on his alternate Rule 59 Motion for a
16 New Trial. Dkt. 222. In support of each motion, Norvell argues that the Court's jury
17 instruction on the core elements of his claim was a misstatement of the law.

18 Norvell also seeks a new trial based on the Court's jury instruction on his duty to
19 mitigate his non-economic damages, *id.* at 13; the Court's admission of Brian Heikkila's
20 rebuttal testimony, *id.* at 14; and based on counsel's informing the jury of Norvell's
21 arbitration back pay award, *id.* at 18.

22 The issues are addressed in turn.

1 **A. Instruction 13 was an accurate statement of the law.**

2 Norvell's sole claim is a state law claim for wrongful termination in violation of
3 public policy. Norvell asserts that BNSF terminated his employment for throwing his
4 locomotive's reverser to stop his train in a successful effort to save the life of his fellow
5 trainman, John Reynolds, and to avoid a potentially catastrophic accident at the small,
6 crowded, and dangerous Willbridge Yard. He claims there is a clear public policy
7 favoring taking action to save a life, even if it violates a company rule, and BNSF's
8 termination violated that public policy.

9 BNSF asserts it fired Norvell, not because acted in violation of the rules to avoid
10 an accident, but because he put himself in a position where he had to do so. It claims
11 Norvell failed to properly prepare his train by "adding" air brakes and, by going too fast,
12 created the situation where he had to throw the reverser to avoid a crash. It cited Norvell
13 with his second "Level S" violation and ultimately terminated his employment.

14 Norvell responds that no BNSF rule or policy required him to employ his air
15 brakes, and he denies that he exceeded the Yard's 10 mile-per-hour speed limit. BNSF
16 replies that in addition to specific rules, its overarching, express written policy required
17 Norvell to operate his train in a safe manner. Norvell counters that the train's brakes did
18 not work properly, and that is why he had to use the reverser. That is the gist of the case.
19 The trial involved resolving these competing factual disputes.

1 The Court informed the parties at the November 21, 2021 Pretrial Conference¹ that
2 its jury instruction would include BNSF's proposed language, bolded below:

3 Nine is the wrongful termination proposed by plaintiff, 10 is the one
4 proposed by the defendant. I find the plaintiff's simpler and adequate, and
5 am open to -- In BNSF's it has a statement, "**A company may take into
6 consideration whether an individual's actions created the potentially
7 harmful situation when determining appropriate action.**" I think that
8 sentence is a correct statement of the law. And I think it is all that BNSF
9 needs from its instruction to have an instruction from which it can argue its
10 theory of the case, its defense.

11 Again, I'm not asking for final comment here. These are preliminary
12 rulings only. Certainly the Court will be open to further discussion.

13 November 21, 2021, Pretrial Conference transcript, Dkt. 173 at 8 (emphasis added).

14 Consistent with this stated intention, the Court's Jury Instructions provided:

15 INSTRUCTION NO. 13

16 It is unlawful to terminate an employee for performing a public duty.
17 There is a public policy and duty in favor of taking swift action to save
18 human life regardless of whether such action violates a company rule. **A
19 company may take into consideration whether an individual's actions
20 created the potentially harmful situation when determining
21 appropriate action.**

22 To recover on his claim of wrongful termination in violation of
public policy, Plaintiff has the burden of proving that a substantial factor
motivating Defendant's decision to terminate his employment was his
performing a public duty. "Substantial factor" does not mean the only
factor or the main factor in the challenged act or decision.

If you find from your consideration of all of the evidence that
Plaintiff has not met this burden, then you must find for the Defendant.

If you find from your consideration of all of the evidence that
Plaintiff has met this burden, then you must find for Plaintiff.

¹ The Court is accordingly not persuaded by Norvell's additional claim that, in preparing for and presenting evidence in the trial, he relied on the draft instructions the Court had emailed to the parties three days before the Pretrial Conference and that the subject instruction was a last-minute surprise. Dkt. 222 at 13 (citing Dkt. 222-3).

1 Jury Instruction No. 13, Dkt. 204 at 15 (emphasis added).

2 In support of each of his post-trial motions, Norvell argues that this instruction
3 was a misstatement of the law and misleading. He argues that the instruction was not only
4 novel and unsupported by precedent, but it also created an “absolute defense for BNSF
5 without assigning a burden of proof or otherwise explaining how it was to be applied.”
6 Dkt. 222 at 10. Norvell claims that when the correct law is applied to the facts, he is
7 entitled to judgment as a matter of law. *Id.* at 5 (“[T]he law must be applied ‘as it should
8 be, rather than the law as it was read to the jury,’ even if the party did not object to the
9 jury instructions.” (quoting *Fisher v. San Jose*, 558 F.3d 1069, 1074 (9th Cir. 2009))).

10 Norvell argues that under the correct law applied to the facts, the “sole
11 requirement” for him to prevail was to “show that the public-policy linked conduct was a
12 ‘significant factor’ in the decision to terminate him.” *Id.* at 10 (quoting *Martin v.*
13 *Gonzaga Univ.*, 191 Wn.2d 712, 723 (2018) and citing *Wilmot v. Kaiser Aluminum &*
14 *Chem. Corp.*, 118 Wn.2d 46, 75 (1991)). He argues that under *Gardner v. Loomis*
15 *Armored Inc.*, 128 Wn.2d 931, 944 (1996),² saving a life is “easily recognized as a clear
16 public policy.” Dkt. 222 at 8.

17
18
19 ² *Gardner* explained that the tort of wrongful discharge in violation of public policy was
20 limited to four scenarios: “(1) where employees are fired for refusing to commit an illegal act;
21 (2) where employees are fired for *performing a public duty or obligation*, such as serving jury
22 duty; (3) where employees are fired for exercising a legal right or privilege, such as filing
workers’ compensation claims; and (4) where employees are fired in retaliation for reporting
employer misconduct, i.e., whistle-blowing.” 128 Wn.2d at 936 (emphasis added) (internal
citation omitted). Norvell asserts his claim under the second scenario.

1 Thus, he claims, it was error for the Court to instruct the jury on what amounts to
2 an “overriding justification” defense under the fourth element of the “Perritt” test, which
3 applies only where the claim does not “fit neatly” within one of *Gardner*’s four clear
4 categories of clear public policy. *See* Dkt. 222 at 8–10. Under the Perritt test, a plaintiff’s
5 wrongful termination in violation of public policy claim includes the element that “the
6 defendant [is] not able to offer an overriding justification for the dismissal (the absence of
7 justification element).” *Id.* at 8 n.3 (citing *Martin*, 191 Wn.2d at 723).

8 Norvell effectively argues that BNSF’s claimed reason for firing him was
9 irrelevant, that the instruction was not an accurate statement of the law, and that he is
10 entitled to judgment as a matter of law. The Court does not agree that the instruction was
11 a misstatement of law, for reasons a review of the applicable cases will show.

12 In *Gardner*, the plaintiff was an armored truck driver and guard. His employer,
13 Loomis, had a “fundamental” rule forbidding its drivers from leaving the armored
14 vehicle. While he and his partner were making a stop at a bank, Gardner observed armed
15 bank robbers taking hostages. He exited the vehicle to save a hostage and ultimately
16 helped disarm a suspect. Loomis fired him, and he sued. Loomis argued it fired him not
17 for saving the hostage, but for exiting the vehicle, which was forbidden by an important
18 company rule. *See Gardner*, 128 Wn.2d at 934–35.

19 The Washington Supreme Court held that such a termination was a violation of
20 public policy, which clearly encourages such heroic action:

21 Loomis’ work rule does not provide an overriding justification for firing
22 Gardner when his conduct directly served the public policy encouraging
citizens to save persons from serious bodily injury or death. We find that

1 Gardner’s discharge for leaving the truck and saving a woman from an
2 imminent life threatening situation violates the public policy encouraging
3 such heroic conduct Our holding merely forbids Loomis from firing
4 Gardner when he broke the rule because he saw a woman who faced
5 imminent life-threatening harm, and he reasonably believed his intervention
6 was necessary to save her life.

7 *Id.* at 949–50.

8 The facts of *Gardner* were “highly unique,” justifying the “refined analysis” of the
9 Perritt test’s fourth, overriding justification element. *Martin*, 191 Wn.2d at 724 (internal
10 quotation omitted). Loomis argued that its “do not leave the truck” rule was an overriding
11 justification for its termination; it was too important even for an exception like saving a
12 hostage.

13 But neither the undisputed facts nor the parties’ arguments in *Gardner* are akin to
14 those here. To be sure, Norvell relies on *Gardner* in support of his contention that he
15 threw the reverser to save a life and that it was therefore a violation of public policy for
16 BNSF to fire him for violating the rule against throwing the reverser and damaging the
17 train. But unlike Loomis, BNSF’s defense was *not* that its rule against throwing the
18 reverser was an overriding justification for terminating him; if it were, this case would be
19 on “all fours” with *Gardner*, and under that authority Norvell might be entitled to
20 judgment as a matter law.

21 Instead, BNSF argued—and the jury’s verdict demonstrates it agreed—that it had
22 an alternate reason to fire Norvell: operating his train in a manner that led to a situation
where he had to take emergency action to prevent an accident and save a life (and
because the resulting “Level-S” violation was his second in a month). *Gardner* did not

1 address such a situation, and neither it nor any subsequent case holds that an employer
2 cannot posit an alternate reason for terminating an employee who claims he was acting in
3 furtherance of a defined public policy.

4 The Washington State Supreme Court more recently addressed a case similarly
5 involving a claimed termination in violation of public policy and a defense based on
6 alternate reasons. *See Martin*, 191 Wn.2d at 717–22. The plaintiff in *Martin* was a
7 Gonzaga University employee. He repeatedly expressed to his employer his concern that
8 the University’s gym needed padding around the basketball court to protect students
9 playing there. Gonzaga fired him, based on what it claimed was insubordination and poor
10 job performance. He sued, arguing that he was terminated in violation of public policy for
11 whistleblowing about the gym padding. The trial court granted summary judgment in
12 Gonzaga’s favor.

13 Employing a familiar burden-shifting framework, *see McDonnell Douglas Corp.*
14 *v. Green*, 411 U.S. 792 (1973), the Washington Supreme Court held that Martin had met
15 his initial “burden to show that his discharge may have been motivated by reasons that
16 contravene a clear mandate of public policy.” *Martin*, 191 Wn.2d at 725 (internal
17 quotation omitted). It held that Martin could not satisfy his burden of showing that the
18 public-policy linked conduct was a “significant factor” in the decision to terminate him.
19 *Id.* Even if he had, however, Gonzaga showed that it terminated Martin for legitimate
20 reasons, insubordination and job performance, based on the evidence of the same in his
21 file. *Id.* at 726. The burden then shifted back to Martin to show that, despite these
22 legitimate reasons for his discharge, his whistleblowing was a significant factor in his

1 termination. *Id.* at 727. Because there was “a paucity” of evidence linking the termination
2 to the alleged whistleblowing, the Court affirmed the summary judgment in Gonzaga’s
3 favor. *Id.*

4 In this case, the Court determined that there was evidence from which a reasonable
5 jury could conclude that Norvell was terminated for throwing the reverser and that there
6 was evidence supporting BNSF’s claim that he was terminated for improper train
7 handling: for putting his train in a dangerous position in the first place. Under each of
8 these authorities, where a question of fact remains, the matter is for the jury.

9 The case that most closely tracks the parties’ positions in this case is the
10 Washington Supreme Court’s 1991 opinion in *Wilmot*, which answered Certified
11 Questions from the Eastern District, and which pre-dates *Gardner*. *See Wilmot*, 118
12 Wn.2d at 51–53. There, plaintiff Wilmot filed a workers’ compensation claim for an on-
13 the-job injury. His employer fired him, ostensibly for absenteeism. Wilmot sued, arguing
14 he was terminated for filing a worker’s compensation claim, and that his termination
15 violated public policy.

16 The Washington Supreme Court held that a plaintiff asserting a wrongful
17 discharge in violation of public policy claim must prove that his public-policy linked
18 conduct was a “substantial factor” in his termination—which remains the law today. *Id.*
19 at 71. It explained that under the substantial factor test, once a defendant articulates a
20 reason for the termination, the plaintiff can effectively respond either by “showing that
21 the reason is pretextual, or by showing that although the employer’s stated reason is
22 legitimate, the worker’s pursuit of . . . workers’ compensation benefits was nevertheless a

1 substantial factor motivating the employer to discharge the worker.” *Id.* at 73. The
2 Supreme Court then explained, by way of example, how the parties’ competing views on
3 the reasons behind the termination might be resolved:

4 [1. A]n employee may be injured on the job, file a workers’ compensation
5 claim, and then be discharged without resulting liability to the employer if
6 the reason for the discharge was the fact that the employee failed to observe
health and safety standards, even though that failure resulted in the work-
related injury for which the benefits claim was filed.

7 [2]. If that injury, resulting from failure to heed health and safety standards,
8 causes the worker to be absent from work for a period of time which
9 contravenes the employer’s policy against absenteeism, liability still may
not attach.

10 [3.] If, however, the employee can present sufficient evidence to prove that
11 the pursuit of or intent to pursue workers’ compensation benefits was also a
12 significant factor in the decision to discharge, then the employer’s stated
reasons, while constituting legitimate nonpretextual reasons for the
discharge, will not preclude liability.

13 *Id.* at 75 (paragraphs and numbering added).

14 The first of these hypotheticals tracks BNSF’s view of the case; it terminated
15 Norvell for causing the situation, not for taking emergency action to resolve it. The third
16 reflects Norvell’s view; he argues that throwing the reverser and damaging the train was a
17 substantial factor in BNSF’s decision to terminate him and that such a termination
18 violates the public policy in favor of saving human life. He denies that he put his train in
19 a bad position and disputes the veracity of BNSF’s claimed reasons for termination. The
20 veracity of these competing reasons was a question for the jury.

21 The Court’s Jury Instruction No. 13 informed the jury that it should consider and
22 resolve the parties’ competing assertions about the reasons for the termination and that

1 Jury Instruction No. 15, Dkt. 204 at 17.

2 Norvell argues that he sought only non-economic (or emotional) damages and that
3 it was error to instruct the jury that he had a duty to mitigate those damages. He claims
4 there is not a single case holding that such an instruction is proper where a plaintiff seeks
5 only non-economic damages. Dkt. 222 at 13. Norvell does not cite any case for the
6 proposition that such an instruction is error, or that he did not have a duty to mitigate his
7 emotional distress damages.

8 As an initial matter, any error was harmless because the jury did not find that
9 Norvell had no damages; rather, it found that he did not prove that his public-policy
10 linked conduct was a significant factor in BNSF's decision to terminate him. As such, the
11 jury never even reached the issue of damages. *See* Jury Verdict, Dkt. 207 (the damages
12 lines are properly blank, not "\$0," consistent with its defense verdict).

13 Secondly, as BNSF accurately points out, the bulk of the emotional distress
14 Norvell claimed to have suffered as the result of his termination related to financial
15 stress, which would have been mitigated by remaining at BNSF after he was reinstated,
16 or obtaining other, better-paying work after he left. There is no plausible argument that
17 the defense verdict was based on this instruction.

18 Norvell is not entitled to a new trial based on this instruction. His motion on this
19 basis is DENIED.

1 **C. Heikkila’s testimony does not warrant a new trial.**

2 Next, Norvell argues that he is entitled to a new trial because the Court permitted
3 Brian Heikkila to offer undisclosed testimony about Norvell’s train handling. BNSF
4 argues, persuasively, that this issue has already been resolved. Dkt. 223 at 17.

5 As BNSF argues in response, Heikkila and his opinions were disclosed in 2019,
6 well before the pandemic-delayed trial, and Norvell chose not to depose him. Heikkila’s
7 supplemental report was not inconsistent with his disclosed opinions, and the Court
8 already ruled that his testimony was “within his disclosure.” *Id.* (citing Harrison Decl.
9 Dkt. 177, Ex. B). Heikkila’s November 26, 2021 supplemental report was filed promptly
10 after Norvell’s expert’s, Jim Scott, November 19, 2021 deposition and after BNSF
11 received Scott’s supplemental report. *Id.* And, as BNSF argues, Norvell had but did not
12 take the opportunity to rebut Scott’s testimony. Norvell is not entitled to a new trial based
13 on Heikkila’s testimony. His motion for a new trial on this basis is DENIED.

14 **D. Counsel’s fleeting mention of Norvell’s back pay award does not warrant a
15 new trial.**

16 Finally, Norvell argues that he is entitled to a new trial because BNSF’s counsel
17 informed the jury³ of the amount of back pay the collective bargaining agreement
18 arbitrator awarded to Novell, notwithstanding the Court’ ruling *in limine* that the only
19 arbitrator’s award would only be used to show that he was reinstated with backpay. Dkt.

20 _____
21 ³ Counsel started to ask whether Novell got “a backpay award of \$363[.]” Dkt. 222 at 18
22 (citing rough draft of December 2, 2021 Trial Transcript at 37, which is not in the record). The
question was not answered, and the Court instructed the jury that questions and statements of
counsel are not evidence.

1 | 222 at 18. He argues that he was prejudiced because the clear implication of the
2 | testimony was that he had already been made whole. *Id.*

3 | BNSF responds that it, not Norvell, moved *in limine* to have the arbitrator's award
4 | excluded from evidence, for fear it would suggest to the jury that liability had been
5 | decided. Dkt. 223. at 20. It argues that the Court instructed the jury about the arbitration
6 | and what it did and did not mean for this case. *Id.* (citing Jury Instruction No. 9, Dkt. 204
7 | at 11). The Court did not specifically rule that the amount of the back pay award was
8 | inadmissible, and BNSF correctly points out (as it did in connection with the mitigation
9 | instruction) that Norvell and his girlfriend both testified that the reason he did not seek
10 | assistance for his emotional harm was his claimed inability to pay for it. Thus, it argues,
11 | the fact and amount of his back pay award was relevant and admissible. It did not argue
12 | that Norvell had been made whole by that award.

13 | The Court agrees that the counsel's unanswered question, and any other limited
14 | references to Norvell's pay, did not prejudice Norvell and does not warrant a new trial
15 | under Rule 59.

16 | Norvell's motion for a new trial on this basis is DENIED.

17 | ***

18 | Norvell's motion for Judgment as a Matter of Law, or in the alternative for a New
19 | Trial, Dkt. 222, is DENIED. Norvell's pending Motion to Re-Tax Costs, Dkt. 227, will
20 | be addressed in a separate Order.

21 | \\\

22 | \\\

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

IT IS SO ORDERED.

Dated this 15th day of April, 2022.



BENJAMIN H. SETTLE
United States District Judge