IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH

SHAWN LAVEING, Plaintiff, vs. NORFOLK SOUTHERN RAILWAY COMPANY, Defendant,	)	2:19-CV-01095-CRE

REPORT AND RECOMMENDATION

Cynthia Reed Eddy, Chief United States Magistrate Judge.

I. RECOMMENDATION

This civil action was initiated on August 29, 2019 by Plaintiff Shawn Laveing, a former employee of Defendant Norfolk Southern Railway Company ("Norfolk") alleging violations of the Family Medical Leave Act, 29 U.S.C. § 2601, *et seq*. ("FMLA") and the Federal Railroad Safety Act, 49 U.S.C. § 20109, *et seq*. ("FRSA"). This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

Presently for consideration is Norfolk's partial motion to dismiss Count II of the Amended Complaint related to Plaintiff's FRSA claim. (ECF No. 14). For the reasons that follow, it is respectfully recommended that Norfolk's partial motion to dismiss be granted.

II. REPORT

a. Background

Plaintiff was employed by Norfolk as a train conductor and engineer for thirteen years. Plaintiff experiences severe seasonal allergies that require both prescription and non-prescription medications. Plaintiff alleges that these medications cause drowsiness and interfere with his ability

to concentrate. Plaintiff would "call off" work as sick when he felt too ill to work. Specifically, Plaintiff missed work on May 22-23, May 28, June 14-15, July 3-4 and July 9-10, 2018 due to his allergies. Norfolk removed Plaintiff from service on July 10, 2018 due to what Norfolk considered excessive absences. Following an investigatory hearing, Norfolk dismissed Plaintiff from employment on August 3, 2018. This lawsuit followed.

Plaintiff's claim under the FRSA is based on two theories of liability. First, he claims that he was disciplined in retaliation for reporting an unsafe condition, namely, his own allergies, in violation of 49 U.S.C. § 20109(b)(1)(A). Second, Plaintiff claims that he was disciplined in retaliation for engaging in a protected refusal to work, in violation of 49 U.S.C. § 20109(b)(1)(B).

b. Standard of Review

The applicable inquiry under Federal Rule of Civil Procedure 12(b)(6) is well-settled. Under Federal Rule of Civil Procedure 8, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) provides that a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint that merely alleges entitlement to relief, without alleging facts that show entitlement, must be dismissed. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). This "'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary elements." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556). Nevertheless, the court need not accept as true "unsupported

conclusions and unwarranted inferences," *Doug Grant, Inc. v. Great Bay Casino Corp.*, 232 F.3d 173, 183-84 (3d Cir. 2000), or the plaintiff's "bald assertions" or "legal conclusions." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997).

Although a complaint does not need detailed factual allegations to survive a Rule 12(b)(6) motion, a complaint must provide more than labels and conclusions. *Twombly*, 550 U.S. at 555. A "formulaic recitation of the elements of a cause of action will not do." *Id*. (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to raise a right to relief above the speculative level" and "sufficient to state a claim for relief that is plausible on its face." *Twombly*, 550 U.S. at 555. Facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id*. (quoting *Twombly*, 550 U.S. at 556) (internal citations omitted).

When considering a Rule 12(b)(6) motion, the court's role is limited to determining whether a plaintiff is entitled to offer evidence in support of his claims. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The court does not consider whether a plaintiff will ultimately prevail. *Id*. A defendant bears the burden of establishing that a plaintiff's complaint fails to state a claim. *Gould Elecs. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000).

As a general rule, if a court "consider[s] matters extraneous to the pleadings" on a motion for judgment on the pleadings, the motion must be converted into one for summary judgment. *In*

re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997). However, a court may consider (1) exhibits attached to the complaint, (2) matters of public record, and (3) all documents that are integral to or explicitly relied upon in the complaint, even if they are not attached thereto, without converting the motion into one for summary judgment. *Mele v. Fed. Reserve Bank of N.Y.*, 359 F.3d 251, 256 n. 5 (3d Cir. 2004); *Pension Benefit Guaranty Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

c. Discussion

As a preliminary matter, Plaintiff withdraws his FRSA claim under 49 U.S.C. § 20109(c)(2) related to disciplining him for following orders or a treatment plan of a treating physician (ECF No. 28 at 2) and therefore that claim should be dismissed with prejudice. Plaintiffs remaining claims under 49 U.S.C. § 20109(b) will be addressed.

Norfolk argues that Plaintiff's claims fail as a matter of law because his personal illness does not constitute a hazardous safety or security condition within the meaning of the FRSA and therefore neither Plaintiff's report of allergies nor his refusal to work when experiencing the symptoms of allergies is FRSA-protected activity.

The FRSA was enacted by Congress "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. The FRSA protects railroad employees against adverse employment actions when they engage in protected activities, including reporting or refusing to work when confronted by a hazardous safety condition related to the performance of the employee's duties. 49 U.S.C. § 20101(b)(1)(A); (b)(1)(B). These provisions "were intended to insulate whistleblowers who report or refuse to work in unsafe conditions on the railroad." *Stokes v. Se. Pennsylvania Transportation Auth.*, 657 F. App'x 79, 82 (3d Cir. 2016) (not precedential). Hazardous safety conditions contemplate "conditions that are

within the railroad's control or that impact its operation." *Id*. A "personal risk due to a non-work-related event, ha[s] no bearing on the safe operation of the railroad." *Id.* (employee's refusal to work due to complications from giving birth are not hazardous conditions under the FRSA). *Accord Port Auth. Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor*, 776 F.3d 157, 166 (3d Cir. 2015) (employee's non-work-related injury not hazardous condition under FRSA).

Here, Plaintiff's side effects from taking medications to treat his severe seasonal allergies is not a hazardous condition under the FRSA, as it is a non-work-related event, has no bearing on the operation of a railroad and thus reporting of his own medical condition and refusal to appear to work is not covered under the FRSA. This is especially so when faced twice with this issue, the Court of Appeals for the Third Circuit rejected the argument that employees suffering non-work-related medical conditions who report or refuse to work are covered under the FRSA. *Port Auth. Trans-Hudson Corp.*, 776 F.3d at 166; *Stokes*, 657 F. App'x at 82.

While Plaintiff argues that Norfolk had a policy requiring employees to not report to work when their ability to work safely is impaired by a medical condition or associated medication and that policy makes his reporting and refusal to work protected under the FRSA, he cites to no legal authority that a company policy expands legislation or overturns jurisprudence. The authority on this issue is settled: An employee's medical condition sustained outside the scope of employment is not a hazardous condition under the FRSA.

Accordingly, it is respectfully recommended that Norfolk's motion to dismiss be granted and Count II of Plaintiff's amended complaint related to his FRSA claim be dismissed with prejudice.

d. Conclusion

Based on the foregoing, it is respectfully recommended that Norfolk's motion to dismiss

(ECF No. 14) be granted and Count II of Plaintiff's amended complaint be dismissed with prejudice.

Therefore, pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), Federal Rule of Civil Procedure 72, and the Local Rules for Magistrates, the parties have until **September 4, 2020** to file objections to this report and recommendation. Unless Ordered otherwise by the District Judge, responses to objections are due **September 11, 2020.** Failure to file timely objections may constitute a waiver of any appellate rights. *Brightwell v. Lehman*, 637 F.3d 187, 193 n. 7 (3d Cir. 2011).

Dated: August 21, 2020.

Respectfully submitted,
s/ Cynthia Reed Eddy
Cynthia Reed Eddy
Chief United States Magistrate Judge