UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

BERNARDO MATTA,	§	
	§	
Plaintiff,	§	
	§	
V.	§	**CIVIL ACTION NO. 5:20-CV-48**
	§	
	§	
KANSAS CITY SOUTHERN RAILWAY COMPANY,	§	
	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

Before the Court is the Kansas City Railway Company's Motion for Summary Judgment. (Dkt. No. 28). The motion has been fully briefed. (Dkt. Nos. 32, 33, 44, 45). For the reasons set forth below, the motion will be granted in part and denied in part.

I. Background

Plaintiff Bernardo Matta ("Matta") filed this action against the Kansas City Southern Railway Company ("KCSR") pursuant to the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109. (Dkt. Nos. 1, 20).[1] Matta alleges that he was suspended from service for 25 days on November 19, 2018, and, after an investigation for a subsequent incident, was fired on May 16, 2019, by KCSR in retaliation for what he claims were protected activities. (Dkt. No. 20 at 2–5).

The events at issue took place on September 22, 2018. The parties agree that Matta had been employed by KCSR since October 26, 2009, and on September 22, 2018, he was working overtime as a carman assigned to replace the truck mounted slack adjusters on a railcar on the "RIP track,"[2] together with another employee, Luis Guerra

[1] When citing to the page numbers of any document in the record, the Court will cite to the page numbering of the Court's internal CM/ECF docket system, and not to the page numbers in the underlying documents.

[2] An RIP track, or repair in place track, is a siding, or short track at the side of and opening onto a railroad line, on which railroad cars are given minor repairs. *See* Merriam-Webster, "Rip track," https://www.merriam-webster.com/dictionary/rip%20track (last visited March 30, 2022).

("Guerra"). (Dkt. Nos. 28 at 3, 32 at 6). During this shift, Matta had a telephonic conversation with his supervisor, Jorge Ortiz ("Ortiz"), but the substance of their phone call is disputed. Matta claims that Ortiz told him to change the slack adjusters and release the railcar without conducting a mandatory air test, and that Matta had to convince Ortiz to let him conduct the mandatory air test. (Dkt. No. 32 at 7). KCSR, on the other hand, claims that Ortiz believed that an air test had already been conducted, but that when Matta told him otherwise, Ortiz told him to get it done. (Dkt. No. 28 at 3–4).

Matta and Guerra then began to replace the slack adjusters, but by 8:00 p.m., they began experiencing problems, and Matta got frustrated. (Dkt. Nos. 28 at 4, 32 at 7). He called Ortiz back to talk about the problems they were experiencing. (Dkt. Nos. 28 at 4, 32 at 7). It was during this call that Matta claims he told his supervisor he was feeling "exhausted, fatigued, and disoriented," and he asked if he could go home. (Dkt. No. 32 at 8). Ortiz asked to call him back, and when he did—Matta emphasizes that Ortiz spoke in English rather than Spanish on this second call—asked Matta if "he was taking it upon yourself that you want to go home?" (*Id.*). Matta claims that Ortiz eventually gave him permission to leave, (*id.* at 9), but KCSR claims Matta walked off the job without permission. (Dkt. No. 28 at 4). Matta left the yard, called his union representative because he was worried that he was going to get in trouble for asking to leave, and drove home. (*Id.* at 5).

Two days later, on September 24, 2019, Ortiz told Matta he was being pulled from service, and by September 27, 2018, KCSR issued two notices for two disciplinary investigations for failing to follow instructions, failing to protect his job, and failing to properly repair the railcar. (*Id.* at 5–6, Dkt. No. 32 at 10). After a disciplinary hearing on November 9, 2018, KCSR suspended Matta from service. (Dkt. No. 28 at 5–6). Then, after a formal disciplinary investigation relating to a different incident on March 25, 2019, KCSR terminated Matta's employment on May 16, 2019. (*Id.* at 6).

Matta filed an initial complaint with the Occupational Safety and Health Administration ("OSHA") on May 6, 2019, and then brought an action in federal court, filing his Original Complaint asserting claims under the FRSA on March 31, 2020. (*See* Dkt. No. 1). In his Amended Complaint, (Dkt. No, 20), Matta seeks reinstatement and a

variety of damages for KCSR's actions against him. (*Id.* at 6).

II. Legal Standard

Summary judgment is proper when the record reflects 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). Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material if "its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quoting *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000)). There is a genuine dispute of material fact under Rule 56 "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Seacor Holdings, Inc. v. Commonwealth Ins. Co.*, 635 F.3d 675, 680 (5th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

In ruling on motions for summary judgment, the Court must view the evidence in the light most favorable to the nonmovant. *HEI Res. E. OMG, Joint Venture v. Evans*, 413 F. App'x 712, 715 (5th Cir. 2011) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). However, the nonmovant cannot preclude summary judgment by raising "some metaphysical doubt as to the material facts, conclusory allegations, unsubstantiated assertions, or by only a scintilla of evidence." *Avina v. JP Morgan Chase Bank, N.A.*, 413 F. App'x 764, 767 (5th Cir. 2011) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)). The movant may satisfy the initial burden of showing that there is no genuine fact issue by pointing out the absence of evidence supporting the nonmovant's case. *Celotex*, 477 U.S. at 322–23.

"If the burden at trial rests on the non-movant, the movant must merely demonstrate an absence of evidentiary support in the record for the non-movant's case" in order to make a make a properly supported motion for summary judgment. *Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 355 (5th Cir. 2010) (quoting *Miss. River Basin Alliance v. Westphal,* 230 F.3d 170, 174 (5th Cir. 2000)). "Once a movant who does not have the

burden of proof at trial makes a properly supported motion" for summary judgment, "the burden shifts to the nonmovant to show that [the motion] should not be granted." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). To do so, the nonmovant must "identify specific evidence in the record and . . . articulate the precise manner in which that evidence supports his or her claim." *Id*. The Court does not have a duty to "sift through the record in search of evidence to support" the nonmovant's opposition to summary judgment. *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994) (quoting *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 n.7 (5th Cir. 1992)).

Allegations in a plaintiff's complaint are not evidence. *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) (internal citation and quotation marks omitted) ("[P]leadings are not summary judgment evidence."); *Johnston v. City of Houston*, 14 F.3d 1056, 1060 (5th Cir. 1994) (quoting *Solo Serve Corp. v. Westowne Assoc.*, 929 F.2d 160, 164 (5th Cir. 1991)) (for the party opposing the motion for summary judgment, "'only evidence—not argument, not facts in the complaint—will satisfy' the burden."). Likewise, unsubstantiated assertions, conclusory allegations, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *Forsyth,* 19 F.3d at 1533.

III. Discussion

During the hearing on the summary judgment motion, (*see* Min. Entry Nov. 23, 2021), Plaintiff's counsel clarified that Matta is bringing claims under only two sections of the FRSA, 49 U.S.C. §§ 20109(a)(4) and 20109(b)(1)(A). Plaintiff's counsel clarified that the protected activity which Matta claims makes the basis for his claim under (a)(4) is that he notified his manager of a personal illness consisting of feeling fatigued, exhausted, and disoriented. He further stated that the basis for his claim under (b)(1)(A) includes both (1) the same report of a personal illness and (2) when he refused to release a railcar that had not been properly tested after he reported to his supervisor that an airbrake test had not been conducted. After the hearing, the Court gave KCSR the opportunity to submit further briefing to address both of these claims. (Dkt. No. 44).

Before addressing Matta's substantive claims under the FRSA, the Court will first address KCSR's procedural argument that Matta has failed to properly plead a claim under (a)(4).

a. Matta has pled a claim under (a)(4).

KCSR argues that Matta failed to plead a claim under (a)(4). (Dkt. No. 33 at 7; Dkt. No. 44 at 2). KCSR's argument hinges on the fact that Matta's complaint does not explicitly refer to (a)(4) within the section of his First Amended Complaint entitled, "FRSA Cause of Action." (Dkt. No. 20 at 4). KCSR does not argue that "Matta failed to exhaust his administrative remedies," therefore conceding that Matta has met the requirements of 49 USC § 20109(d)(3).[3] Instead, KCSR posits that under Fifth Circuit case law, Matta should not be allowed to pursue a claim under (a)(4) because he has raised this claim for the first time in his summary judgment response.

Longstanding precedent in the Fifth Circuit provides that "a claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court." *Cutrera v. Board of Supervisors of Louisiana State University*, 429 F.3d 108, 113 (5th Cir. 2005) (citing *Fisher v. Metropolitan Life Ins. Co.,* 895 F.2d 1073, 1078 (5th Cir. 1990). Therefore, a plaintiff's claim must be contained in the live complaint, and a "properly pleaded complaint must give 'fair notice of what the claim is and the grounds upon which it rests.'" *De Franceschi v. BAC Home Loans Servicing, L.P.*, 477 F. App'x. 200, 204 (5th Cir. 2012) (citing *Ashcroft v. Iqbal,* 556 U.S. 662, 698–99 (2009)). Thus, the Court must analyze whether Matta's live pleading gives KCSR fair notice of Matta's (a)(4) claim.

In his First Amended Complaint, Matta alleges:

> Mr. Matta engaged in protected activity under the FRSA when he refused to release a rail car that had not been properly tested and when he reported unsafe working conditions due to excessive fatigue and lack of manpower on September 22, 2018.

[3] Under the FRSA, a railroad employee must first seek relief by filing a complaint with the Secretary of Labor. 49 USC § 20109(d)(1). However, the statute provides that "if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint"—and this delay is not a result of bad faith on the part of the employee—"the employee may bring an original action at law or equity for de novo review in the appropriate district court." § 20109(d)(3). This is the procedural mechanism through which Matta first brought his case in this federal court. (Dkt. Nos. 1 at 2, 20 at 2).

> . . .
> The KCSR Railroad took adverse or unfavorable actions against Mr. Matta, in whole or in part due to his protected activities, when it pulled Matta from service and suspended him for twenty-five (25) days.

(*Id.* at 4–5). First, although Matta neglects to explicitly cite (a)(4), Matta does reference the FRSA generally, and lays out what protected activity Matta allegedly engaged in and specifies that he suffered an adverse employment action because of this activity. Second, the Court must read Matta's First Amended Complaint in the procedural context in which it was filed. KCSR emphasizes the Fifth Circuit's decision in *Solferini v. Corradi USA, Inc.*, where the Court affirmed the district court's grant of summary in favor of the defendant because the plaintiff failed to raise a particular section of the Texas Business & Commercial in his complaint. No. 20-40645, 2021 WL 3619905, at *2 (5th Cir. Aug. 13, 2021). The case before the Court is distinguishable because in *Solferini* no prior administrative proceedings had taken place. *Id.* at *1. Here, KCSR presents the Court with Matta's original OSHA complaint as an exhibit to its own motion for summary judgment, which does explicitly state that Matta is bringing a claim under (a)(4). (Dkt. No. 28-5 at 3). Matta also notes that he could not have brought a claim under (a)(4) in federal court unless that claim had been pled in his administrative complaint—and as recounted *supra*, KCSR does not argue that Matta is improperly in federal court. The Court thus determines that KCSR had fair notice of the substance of Matta's claims against it. Finally, Matta raises no new factual theory in his summary judgment response and does not argue outside of the legal claims or facts asserted in the administrative stage of his case. Therefore, the Court finds that Matta has properly plead a claim under (a)(4) and denies KCSR's summary judgment on this ground. The Court now turns to KCSR's substantive arguments regarding Matta's claims.

b. Requirements for a prima facie claim under the FRSA

The Court must now consider the proper legal framework to determine whether Matta's claims under (a)(4) and (b)(1)(A) survive summary judgment. The FRSA provides that a railroad carrier "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part" to the employee's engagement in any of the protected activities enumerated in the

statute. 49 U.S. Code § 20109(a). There are seven protected activities listed in the statute, §§ 20109(a)(1)–(7), and two additional provisions prohibiting retaliation for actions related to safety or security conditions or for seeking and receiving medical attention, §§ 20109(b), (c).

An action brought to enforce these whistleblower protections of the FRSA are governed by the legal burdens of proof set forth in § 42121(b). *Yowell* v. *Admin Rev. Bd.*, 993 F.3d 418, 421 (5th Cir. 2021) (quoting § 20109(d)(2)(A)(i)).[4] This is a burden shifting framework, where the plaintiff-employee must first make out a prima facie case by establishing the following elements by a preponderance of the evidence: (1) the employee had been involved in a protected activity; (2) the employer was aware that the employee had been involved in such an activity; (3) the employee was subjected to an unfavorable personnel action; and (4) the protected activity was a "contributing factor" in that unfavorable personnel action. *Yowell,* 993 F.3d at 421. Once an employee makes out his or her prima facie claim, the burden then shifts to the employer to show by clear and convincing evidence that it would have taken the same unfavorable employment action even if the employee had not engaged in the protected activity. *Id.* at 422.

c. Matta's claim under (a)(4): whether Matta reported his work-related illness in good faith

Section 20109(a)(4) protects railroad employees from retaliation for any act or attempt to notify the railroad carrier of a work-related personal injury or work-related illness. 49 U.S.C. § 20109(a)(4). The protected activity Matta alleges as the basis of his claim under (a)(4) is that he notified his manager of a personal illness consisting of feeling fatigued, exhausted, and disoriented. (Dkt. No. 20 at 3–4). KCSR does not dispute that it was aware of the activity, or that it took an adverse personnel action against Matta. Instead, KCSR challenges the first element of Matta's prima facie case by arguing that "the undisputed sequence of events from the night in question establishes Matta did not

[4] The FRSA thus incorporates the procedures in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), 49 U.S.C. § 42121, which governs whistleblower claims in the aviation industry. Bowman, "Whistleblower Protections of the Federal Rail Safety Act: An Overview," 8 Wm. Mitchell J.L. & Prac. 1 (2015). Another federal anti-retaliation statutory scheme that incorporates AIR-21 burdens of proof is the Sarbanes–Oxley Act of 2002, codified as 18 U.S.C. § 1514A(a), among others. *See Lawson v. FMR LLC*, 571 U.S. 429, 457 n.19 (2014).

report his alleged work-related illness in good faith." (Dkt. No. 44 at 5). KCSR cites to no case law in support of this proposition but instead bases its argument on an interpretation of the facts, relying on Matta's deposition testimony. (*Id.*). KCSR maintains that on the day Matta allegedly reported his illness, he called his supervisor to ask for help with a problem with the railcar he was working on and only asked to go home because he was frustrated with the task in front of him—and that this on its face shows Matta did not make a report in good faith. (*Id.* at 6). Unsurprisingly, Matta disagrees with KCSR's interpretation and argues that a question of fact exists as to whether his reporting was in good faith. (Dkt. No. 45 at 6).

"Good faith" has been defined to mean "honestly and frankly, without any intent to defraud." *Monohon v. BNSF Ry. Co.*, 17 F.4th 773, 780 (8th Cir. 2021) (citing *Acting in Good Faith, Black's Law Dictionary* (11th ed. 2019). Matta testified that he and Guerra called their supervisor, Ortiz, to ask for a suggestion about how to fix the railcar brakes, (Dkt. No. 28-1 at 28), and Matta agreed that he was feeling both "moody" and "frustrated" at the time of the call because they could not come up with a solution. (*Id.* at 30). After discussing other unsuccessful potential solutions, Matta told his supervisor, "I mean, George, I can't think straight anymore, man. I mean, I feel exhausted, fatigued, and disoriented, George. You know what, can I go home. I'm feeling bad." (*Id.* at 28). He repeatedly told his supervisor during this call that he felt fatigued, exhausted, and disoriented. (*Id.* at 28–29).

KCSR argues that because Matta's stated purpose for calling his supervisor was to discuss solutions to the problem with the railcar brakes—and not to report that he was feeling ill—Matta did not make a good faith report of his illness as a matter of law. (Dkt. No. 44 at 6). KCSR appears to ask the Court to interpret Matta's testimony to mean that he only reported feeling ill because he was frustrated and wanted to go home so he would not have to deal with a difficult work issue. However, in order to adopt KCSR's interpretation of Matta's testimony, the Court would have to engage in "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts," which are jury functions, not those for the judge at the summary judgment stage. *Anderson*, 477 U.S. 242 at 255. The summary judgment evidence establishes that Matta repeatedly told his supervisor that he felt "fatigued, exhausted,

and disoriented," that he felt bad, and that he wanted to go home for that reason. The fact that he made these statements and the request to go home in the context of dealing with a frustrating work issue certainly *weighs* on Matta's motive for making those statements, but the Court cannot find as a matter of law that Matta made the report of an illness dishonestly or with intent to defraud. Matta's intent and motivation for making the statements is a disputed issue of fact for the jury to resolve. Therefore, considering the facts in the light most favorable to the non-movant, the Court finds that there is a genuine dispute of material fact as to whether Matta engaged in protected activity in the form of reporting a work-related illness in good faith and denies summary judgment on this ground.

d. Matta's claim under (b)(1)(A)

Section 20109(b)(1)(A) provides that a railroad carrier, including its officers and employees, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for reporting, in good faith, a hazardous safety or security condition. 49 U.S.C. § 20109(b)(1)(A). At the hearing on the motion for summary judgment, Plaintiff's counsel clarified that the protected activity forming the basis of Matta's claim under (b)(1)(A) is that (1) he refused to release a rail car that had not been properly tested and (2) he reported his excessive fatigue, which constituted a report of an unsafe working condition. KCSR maintains that Matta's (b)(1)(A) claim fails for multiple reasons: (1) Matta could not have refused to violate a safety rule or regulation because he was never instructed to release a railcar without a necessary air-brake test; (2) Matta's purported personal illness does not constitute a "hazardous safety or security condition"; (3) Matta never reported a lack of manpower; (4) even if Matta engaged in protected activity, he cannot show objective or subjective good faith; (5) Matta should have brought his claim as a refusal to work claim governed by the requirements of (b)(2), rather than a report of a hazardous security or safety condition. (*See* Dkt. No. 28 at 8–15). The Court will address each of these arguments in turn.

1. Whether Matta was instructed to violate a safety rule or regulation.

KCSR challenges the "protected activity" element of Matta's prima facie case under (b)(1)(A) by making a factual argument that Matta was never instructed to violate a safety rule or regulation and thus could not have refused to violate a safety rule in the first place.[5] KCSR urges the Court to determine that the record shows, as a matter of law, that Matta was never instructed to violate a safety rule or regulation based on Matta's own testimony. (Dkt. No. 28 at 8). In doing so, KCSR asks the Court to adopt the explanation that during the conversation in which Matta was supposedly told to release a railcar without first conducting an air brake test, Matta's supervisor Ortiz was simply misinformed, as he thought an airbrake test had already been completed. (*Id.* at 9). Thus, when Matta clarified to Ortiz that an airbrake test had *not* yet been completed, Ortiz told him to complete the necessary test. (*Id.*). KCSR emphasizes the following portion of Matta's deposition testimony:

> Q: So there was never a conversation where you were told not to complete an air test?
> A: Not complete? Yes, sir.
> Q: That — That's an accurate statement?
> A: Yeah, what is there, yes. That's what he told me, to go ahead and complete the air test and whatever I had to fix.

(Dkt. No. 28-1 at 22).

However, there is additional summary judgment evidence that the Court must consider, including additional deposition testimony and the transcript of Matta's statements made during an investigation at KCSR that took place on November 9, 2018. (*See* Dkt. No. 32-1). During the investigation hearing, Matta characterized his conversation with his supervisor Ortiz regarding the airbrake test as follows:

> I told him "They're already putting—we have to put in only the B end slack adjuster and then we just have to do the air test." That's when he told me that I don't have to do the air test. Because the air test was already done. And that's when I told him the—"So you want me to do an air test on it or

[5] In their initial motion for summary judgment, KCSR directed this argument against Matta's claim made under § 20109(a)(2). (Dkt. No. 28 at 8–9). However, as stated, Matta has clarified that he is not bringing a claim under (a)(2) and that his refusal to release a railcar without completing a brake test is a basis for his claim under (b)(1)(A). Therefore, in fairness to KCSR, the Court will apply KCSR's argument to Matta's (b)(1)(A) claim.

> not?" And he said, "No." "Okay, Jorge. So who's going to release the car?" And he said, "No, you're going to bill it and you're going to release it." And I told him, "Jorge, how do you want me to release a car when the air test—have not done the air test, Jorge? I cannot charge for that air test and I don't know who passed that air test because you're telling me that the slack adjusters are bad and you don't want me to do an air test, so how did they passed[sic] that air test?" And then that's when he told me, "Oh, well, go ahead and do the air test and do whatever you can but I just need that car billed and released.

(Dkt. No. 32-1 at 44). In his deposition, during a back and forth with counsel, Matta similarly states about his call with Ortiz:

> I don't know if the air test is done. You're saying this stuff, but there is no way it can be done when you have problems with the brake system. How can you say that. Now, you want me to release the car. Okay. I'll release the car. But I have to do a proper air test and a proper walk around on the car just to verify that everything is good because I don't want something happening down the line, and then you're going to come and blame me for it. Just — just complete whatever you have to do; just release the car and tell me when you're going to release it.

(Dkt. No. 28-1 at 21).

Despite KCSR's interpretation of Matta's testimony that Ortiz simply misunderstood whether an air brake test had been completed, it is also plausible, based on Matta's statements referenced above, that Matta had to argue against his supervisor's insistence that an airbrake test had already been done—and that this constitutes protected activity under the FRSA. Based on Matta's statements, construing the facts in a light most favorable to the non-movant, the Court finds that Matta has presented sufficient evidence to create a genuine dispute of material fact as to whether Matta engaged in protected activity under (b)(1)(A) when he refused to release the rail car without conducting an air brake test. Thus, summary judgment on this ground is denied.

2. Matta's personal illness does not constitute a "hazardous safety or security condition."

KCSR argues that Matta's report of work-related excessive fatigue[6] cannot constitute a report of a "hazardous safety or security condition," under (b)(1)(A) as this provision of the FRSA refers to conditions that are within the railroad's control. (Dkt. No.

[6] KCSR does not challenge that Matta's illness was work-related. Therefore, the Court will assume for the purposes of its analysis that Matta's reported illness was work-related.

28 at 9–10). The Fifth Circuit has not addressed this question. Matta points the Court to two decisions by the Administrative Review Board ("ARB") of the United States Department of Labor. In *Cieslicki*, the ARB held that (b)(1)(A) did apply to an employee's report of personal impairment because preventing an impaired employee operating a train or train equipment is "a hazardous condition within the railroad's control." *Cieslicki v. Soo Line R.R. Co.*, ARB No. 2019-0065, ALJ No. 2018-FRS-00039, at *4 n.5 (ARB June 4, 2020). Then in *Ingrodi*, the ARB again held that an employee's report of personal illness is a protected activity under (b)(1)(A) explaining, "The goal of ensuring safety is promoted and applies equally whether a hazardous condition arises from equipment, or from the impaired or diminished physical condition of the person working on or operating it." *Ingrodi v. CSX Transp.*, ARB No. 2020-0030, ALJ No. 2019-FRS-00046, at *4 (ARB Mar. 31, 2021).

Yet, if the intent of (b)(1)(A) is to include an employee's self-report of a work-related illness, then it would make other sections of the FRSA superfluous, including (a)(4) which explicitly identifies an employee's self-report of a work-related illness as a protected activity. The court in *Williams v. Illinois Central Railroad Company,* No. 3:16-CV-00838, 2017 WL 2602996 (S.D. Miss. June 15, 2017) addressed this specific concern. In *Williams*, the court reasoned that the text and 2007 amendment of § 20109 itself dictates that the phrase "hazardous safety or security conditions" in (b)(1)(A) does not cover self-reported illness. *Id.* at *2. The provisions of § 20109(b) do not include a specific reference to work-related illness, whereas § 20109(c)[7] and § 20109(a)(4) explicitly do. Additionally, Congress amended the FRSA to add § 20109(c), which supports the inference that protection of the treatment of workplace injury or illness was not previously contemplated by the other provisions of the statute. *Id.*

It is a basic rule of statutory interpretation that no provision of a statute should be construed to render another portion superfluous. *Latiolais v Huntington Ingalls, Inc.*, 951 F.3d 286, 294 (5th Cir. 2020) (citing *Corley v. United States*, 556 U.S. 303, 314 (2009))

[7] 49 U.S.C. 20109(c) provides that "a railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment . . . ," § 20109(c)(1), and that "a railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician . . ." § 20109(c)(2).

("One of the most basic interpretive canons is that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citations omitted). As the Supreme Court has noted,

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law . . .

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'n, Ltd., 484 U.S. 365, 371 (1988) (internal citations omitted).

In *Weber v. BNSF Railway Company*, the district court also addressed the issue of whether a self-reported personal illness constitutes the report of a hazardous safety or security condition under (b)(1)(A), noting,

> Self-reporting an illness is not mentioned in subsection (b). Instead, other provisions deal with self-reporting illness and injury. *See* (a)(4). Subsection (c)(2) prohibits a railroad carrier from disciplining an employee who requests medical treatment or follows the orders of a treating physician. Reading protection for self-reported infirmities into subsection (b) would make some of the statute's other text superfluous.

No. 4:18-cv-00367, 2019 WL 9100375, at *8 (N.D. Tex. Dec. 6, 2019) (citations omitted). This Court agrees that to interpret (b)(1)(A) to include a report of a work-related illness would make the language of (a)(4) superfluous. Furthermore, it does not undermine the safety goals of the FRSA to interpret (b)(1)(A) as not including self-reports of work-related illness because that activity is protected by (a)(4). In conclusion, given the construction of the statute, the Court agrees with KCSR that Matta's self-report of a work-related illness does not constitute a report of a hazardous safety or security condition under (b)(1)(A). KCSR's motion for summary judgment is granted on this ground.

3. Matta's report of a lack of manpower

KCSR argues that Matta cannot succeed in establishing the first element of his prima facie claim under (b)(1)(A) based on a report of a lack of manpower.[8] First, KCSR

[8] In Matta's First Amended Complaint, he writes that he engaged in protected activity when he "when he refused to release a rail car that had not been properly tested and when he reported unsafe working conditions due to excessive fatigue and **lack of manpower**." (Dkt. No. 20 at 4) (emphasis added).

asserts that Matta never stated this ground in his initial OSHA complaint. (Dkt. No. 28 at 15). Indeed, no such report was included in this complaint. (Dkt. No. 28-5). Still, inasmuch as KCSR brings this argument to suggest to the Court that Matta failed to exhaust his administrative remedies as to a report of lack of manpower, KCSR does not explicitly state as much nor cite any case law to support this proposition. More convincingly however, KCSR argues that Matta has failed to present any evidence in support of his alleged report of lack of manpower. (Dkt. No. 28 at 15). KCSR points to Matta's deposition testimony in which he agrees that only "two people are required to replace slack adjusters" on the railcar on which he was working on September 22, 2018. (Dkt. No. 28-1 at 25). Furthermore, Matta does not address this argument in his response or surreply, and he fails to point the Court to any summary judgment evidence showing that Plaintiff made a report of a lack of manpower. Thus, so far as Matta has failed to present any summary judgment evidence to create a genuine dispute of material fact as to whether he reported a lack of manpower, the Court grants summary judgment on this ground.

4. Whether Matta engaged in protected activity in good faith

Next, KCSR argues that Matta has failed to establish a genuine dispute of material fact that he reported a hazardous safety or security condition "in good faith," as required by (b)(1)(A). As part of this ground for summary judgment, KCSR asserts that Matta is required to prove that he acted in good faith viewed both subjectively and objectively. (Dkt. No. 28 at 13). Matta responds that the statute only requires an employee to prove that he had a subjective belief that his report was made in good faith and further asserts that he has presented sufficient evidence to create a genuine dispute of material fact on this issue. (Dkt. No. 45).

The Court firsts addresses the question of whether Matta must prove that he engaged in the protected conduct from both a subjective and objective perspective. The Fifth Circuit has not addressed whether the good faith element of (b)(1)(A) contains both a subjective and objective component. However, both the Second Circuit the Eighth Circuit have held—very recently—that good faith need only be established subjectively

However, Plaintiff's counsel did not state on the record at the hearing on the motion for summary judgment that a report of a lack of manpower made the basis of any of his claims.

under (b)(1)(A), requiring only that the "reporting employee honestly believe that what she reports constitutes a hazardous safety or security condition." *Ziparo v. CSX Transp. Inc.*, 15 F.4th 153, 155 (2d Cir. 2021); *Monohon v. BNSF Railway Co.*, No. 18-3346, 2021 WL 5114271, at *5–6 (8th Cir. Nov. 4, 2021). Agreeing with the statutory interpretation upon which the Second and Eight Circuit based their holdings, this Court reaches a similar conclusion.

Initially, the Court notes that (b)(1)(A) only requires an employee to report "in good faith," which Black's Law Dictionary's defines as, "A state of mind consisting in…honesty in belief or purpose." *Black's Law Dictionary* (11th ed. 2019). Similarly, Webster's Third International Dictionary defines good faith as "a state of mind indicating honesty and lawfulness of purpose . . . ; belief that one's conduct is not unconscionable or that known circumstances to not require further investigation; absence of fraud, deceit, collusion or gross negligence." *Webster's Third New Int'l Dictionary* (3d ed. 2002). Both of these sources define good faith as something measured subjectively.

Further, in contrast to (b)(1)(A), other provisions of the FRSA specifically require that an employee's act must be done in good faith and must *also* be reasonable. Sections 20109(b)(1)(B) and (C)—which protect an employee's refusal to perform work in certain circumstances—only protect that refusal to work if:

> (A) the refusal is made in good faith and **no reasonable alternative** to the refusal is available to the employee;
>
> (B) **a reasonable individual in the circumstances** then confronting the employee would conclude that—
>
> > (i) the hazardous condition presents an imminent danger of death or serious injury; and
> > (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and
>
> (C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

49 U.S.C. §§ 20109(b)(2)(A–C) (emphases added). In contrast, (b)(1)(A) contains no such reference to a "reasonable alternative" or "a reasonable individual in [the same]

circumstances." The specific inclusion of a reasonableness requirement in subsections (b)(1)(B) and (C)—and the corresponding omission of such language in the reporting provision of (b)(1)(A)—reflects Congress's intent that there is no objective reasonableness standard for good faith reporting under (b)(1)(A). *See Monohon*, 2021 WL 5114271, at *5 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")).

A comparison of the FRSA to other federal statutory anti-retaliation schemes also supports the interpretation that the absence of the word "reasonable" from (b)(1)(A) is intentional. For example, the Sarbanes-Oxley Act protects any employee who engages in "any lawful act . . . to provide information . . . regarding any conduct which the employee *reasonably believes* constitutes a violation of any rule or regulation of the Securities and Exchange Commission . . . " 18 U.S.C. §1514A(a)(1) (emphasis added); *see Ziparo*, 15 F.4th at 160 (discussing the difference between the plain language of the Sarbanes-Oxley Act and (b)(1)(A)). Another example is the Surface Transportation Assistance Act, which offers whistleblower protections to truck drivers, and explicitly protects "employees who [refuse] to operate a vehicle because . . . the employee has a *reasonable* apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition," and further provides that an "employee's apprehension of serious injury is reasonable *only if a reasonable individual in the circumstances then confronting the employee* would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health." 49 U.S.C. §§ 31105(a)(1)(B)(ii) & (2) (emphases added). This again underlines the significant absence of an objective standard for good faith belief in the language in (b)(1)(A).

In terms of legislative intent, the purpose of the FRSA is "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. With regards to (b)(1)(A)–(C), Congress intended "this provision . . . to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers." *See Ziparo*, 15 F.4th at 161 (quoting H.R. Conf. Rep. No. 110-259, at 348 (2007)). It is consistent with legislative intent then that an employee

need only be required to sincerely believe they were reporting a hazardous safety condition to their employer under (b)(1)(A), as this would encourage employees to come forward. *See id.* At the same time, a more rigorous standard is applied if that same employee refuses to work under subsections (b)(1)(B) or (C), as this places a higher burden on the railroad employer.

Based on this analysis, the Court agrees with the holdings of the Second Circuit in *Ziparo* and the Eight Circuit in *Monohon* and determines that in order to support a claim for retaliation under (b)(1)(A), an employee need only show that the employee honestly believed that they were reporting a hazardous safety or security condition. Good faith under (b)(1)(A), is therefore to be interpreted subjectively, and not objectively.

The Court now turns to KCSR's argument that Matta has failed to create a genuine dispute of material fact that he failed to make a good faith report as an element of his claim under (b)(1)(A). The Court first notes that it has granted summary judgment *supra* on two of the three bases for Matta's (b)(1)(A) claim—a report of a work-related illness and a report of a lack of manpower. Therefore, the Court will only address Matta's remaining claim under (b)(1)(A) that he made a good faith report of a hazardous safety or security condition when he refused to release a railcar without first completing a necessary brake test.

Much of the summary judgment evidence relevant to this issue is the same evidence the Court reviewed *supra* involving the discussion between Matta and his supervisor Ortiz during a telephone conversation. Viewing the evidence in the light most favorable to the Matta—as the Court must do at this summary judgment stage—the evidence supports that Matta could have had a good faith belief that he was reporting a hazardous safety condition. Matta repeatedly told his supervisor that it was necessary to perform an air brake test on the rail car, describing his conversation with Ortiz as a back-and-forth:

> I told him "They're already putting—we have to put in only the B end slack adjuster and then we just have to do the air test." That's when he told me that I don't have to do the air test. Because the air test was already done. And that's when I told him the—"So you want me to do an air test on it or not?" And he said, "No." "Okay, Jorge. So who's going to release the car?" And he said, "No, you're going to bill it and you're going to release it." And I told him, "Jorge, how do you want me to release a car when the air test—

> have not done the air test, Jorge? I cannot charge for that air test and I don't know who passed that air test because you're telling me that the slack adjusters are bad and you don't want me to do an air test, so how did they passed that air test?" And then that's when he told me, "Oh, well, go ahead and do the air test and do whatever you can but I just need that car billed and released.

(Dkt. No. 32-1 at 44). Matta has presented sufficient evidence to create a genuine dispute of material fact as to whether he made a good faith report of a hazardous safety or security condition under (b)(1)(A) when he reported to his supervisor that an air brake test had not yet been completed. Thus, the Court denies this ground for summary judgment.

5. Matta was not required to bring a refusal to work claim invoking § 20109(b)(2)

Finally, KCSR argues to the Court that Matta's protected activity more appropriately forms the basis of a "refusal to work" claim, governed by the heightened requirements § 20109(b)(2). Both (b)(1)(B) and (b)(1)(C)—which protect "refusing to work when confronted by a hazardous safety or security condition" and "refusing to authorize the use of any safety-related equipment, track, or structures," respectively—require a plaintiff-employee to establish the four requirements laid out in (b)(2).[9] In fact, KCSR maintains that Matta brought his claim under (b)(1)(A) in order to avoid the more stringent requirements of Sections (b)(1)(B) or (b)(1)(C). (Dkt. No. 28 at 11–12). KCSR argues that if Matta is allowed to bring his claim under (b)(1)(A), then Matta would be

[9] Section 20109(b)(2) provides:

> (2) A refusal is protected under paragraph (1)(B) and (C) if—
>
> > (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;
> >
> > (B) a reasonable individual in the circumstances then confronting the employee would conclude that—
> >
> > > (i) the hazardous condition presents an imminent danger of death or serious injury; and
> > >
> > > (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and
> >
> > (C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

49 U.S.C. § 20109(b)(2).

able to undermine Congressional intent to impose special requirements specific to a refusal to work case. (*Id.* at 12).

KCSR seems to argue that because Matta's claims are based, in part, on the factual allegations that he left work and drove home after reporting excessive fatigue, he is mandated to bring those claims under (b)(1)(B) or (b)(1)(C). (*Id.* at 11–12). The Court recognizes that Matta has pled that he "engaged in protective activity . . . when he refused to release a rail car that had not been properly tested [. . .]." (Dkt. 20 at 4). But Matta's claim is entwined with the allegation that he informed his supervisor that the railcar could not be released without a brake test. To the extent that KCSR's argument is based on the fact that Matta left the workplace and went home, Matta disputes that he refused to work, asserting instead that his supervisor gave him permission to leave. Matta described his conversation with his supervisor Ortiz as containing the following exchange: "I told him, George, I feel fatigued, exhausted and disoriented. Can I please go home, George. And he said, okay. Go home." (Dkt. No. 28-1 at 29). Matta's coworker Guerra also stated during the investigation at KCSR that he heard Ortiz "in the speaker in the Company phone, and he [sic] say, "You want to go home?" And Matta say [sic], "Yes." Okay. He say [sic], "Okay, go home." And Matta tell [sic] him, "Okay, thank you." (Dkt. No. 32-1 at 52).

Based on this evidence, there is at least a disputed fact issue as to whether Matta had permission to leave his workplace. KCSR has not provided summary judgment evidence or pertinent case law in support of their contention that—as a pleading requirement—Matta is *required* to bring his claim under (b)(1)(B) or (b)(1)(C). These issues may be further clarified and addressed in the course of a trial, but at this time the Court denies this ground for summary judgment.

e. Fourth element of Matta's claims under (a)(4) and (b)(1)(A): Contributing Factor

Regarding Matta's prima facie case of retaliation under (a)(4) and (b)(1)(A), KCSR argues that Matta cannot show that his protected activity under either provision was a contributing factor in KCSR's decision to discipline him. (Dkt. No. 28 at 15–16). KCSR urges the Court to interpret the "contributing factor" element of an FRSA retaliation claim as requiring a showing of intentional retaliation. (*Id.*). In doing do, KCSR asks the

Court to adopt the Eight Circuit's reasoning in *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014). (*Id.*). KCSR points out that a district court for the Northern District of Texas has adopted *Kuduk's* holding, *see Epple v. BNSF Ry. Co.*, No. 3:16-CV-1505-C, 2018 WL 10374615, at *3 (N.D. Tex. Feb. 9, 2018), and urges this Court to decide this issue consistent with its sister court.[10] (Dkt. No. 33 at 9). Matta opposes this interpretation of "contributing factor," (Dkt. No. 32 15), arguing that the Court should define contributing factor as "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision." *See Frost v. BNSF Railway Company*, 914 F.3d 1189, 1995 (9th 2019) (citing *Rookaird v. BNSF Railway Co.*, 908 F.3d 451 (9th Cir. 2018)); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013). The Fifth Circuit has not decided the issue of whether a plaintiff must show intentional retaliation under the contributing factor element of their prima facie case.

In *Racey v. Union Pacific Railroad Company*, another sister court within the Southern District of Texas addressed the specific issue of whether a plaintiff must prove intentional retaliation to satisfy the contributing factor element of their prima facie case, and the Court finds that analysis more convincing. 2021 WL 5154792, at *2 (S.D. Tex. July 14, 2021). In *Racey*, Judge Hittner found as persuasive the Fifth Circuit's interpretation of the "contributing factor" language of a retaliation claim under the Sarbanes-Oxley Act. *Racey*, No. H-19-1171, 2021 WL 5154792, at *2 (S.D. Tex. July 14, 2021) (citing *Halliburton, Inc.* v. *Admin. Rev. Bd.*, 771 F.3d 254, 262–63 (5th Cir. 2014). In *Halliburton, Inc.* v. *Admin. Rev. Bd.,* the Fifth Circuit rejected the argument that the plaintiff needed to show a "wrongful motive" on the part of their employer under identical language in that statute. 771 F.3d 254, 262–63 (5th Cir. 2014); *see Racey*, 2021 WL 5154792, at *2. And, as noted in *Racey*, other circuit courts and at least one other district court within the Fifth Circuit have declined to require a showing of intentional retaliation or discriminatory motive in FRSA cases. *Id.* (citing *Araujo*, 708 F.3d at 158–59); *see Davis v. Union Pac. R.R. Co.*, No. 5:12-CV-2738, 2014 WL 3499228, at *8 (W.D. La. July 14, 2014).

[10] The court in *Epple* adopted *Kuduk*'s intentional retaliation requirement without analysis. *Epple*, 2018 WL 10374615, at *3.

In *Yowell v. Administrative Review Board*, the Fifth Circuit actually surveyed other courts' positions on this issue but ultimately stated, "We conclude that we need not decide whether intent is an element." 993 F.3d 418, 425 (5th Cir. 2021). The *Yowell* Court went on to state, "[W]e know that adverse employment action that is due, in whole or in part, to the employee's engaging in a protected activity is prohibited. Indeed, even the slightest influence from the protected activity will invalidate the employer's adverse action." *Id.* at 427 (cleaned up). Another sister court of the Southern District of Texas has stated that a "contributing factor" is "any factor, which alone or in combination with other factors, tends to affect the outcome of a decision in any way," and that a "contributing factor" "need not be the sole factor, a predominant factor, a substantial factor or even a significant factor." *Abbott v. BNSF Railway Company*, No. G-13-353, 2014 WL 12531115, at *2 (S.D. Tex. Nov. 12, 2014) (citing *Araujo*, 708 F.3d at 158). Given this persuasive precedent in the Fifth Circuit, the Court determines that a plaintiff need not show intentional retaliation to satisfy the requirements of the "contributing factor" element of a prima facie case of retaliation under the FRSA.

Now the Court must determine if the summary judgment record in this case creates a genuine issue of material fact as to whether Matta's protected activities—reporting a work-related illness under (a)(4) and reporting a hazardous safety or security condition under (b)(1)(A)—were a contributing factor in KCSR's decision to discipline Matta.

KCSR argues that Mr. Bernard was the ultimate decision maker at KCSR with regards to Matta's suspension and that there is no evidence that he had any discriminatory intent when he disciplined Matta. (Dkt. No. 28 at 17). A copy of the letter sent to Matta dated November 19, 2018, informing him that he would be suspended for 25 days for the actions he took on September 22, 2018, appears to be signed by Rudy Bernard, the Assistant Vice President of Car Operations for KCSR. (Dkt. No. 28-3). This letter to Matta says the disciplinary action taken was based on a review of the entire record of the investigative proceeding of November 9, 2018. (*Id.*).

Portions of the record of the administrative proceeding review by Mr. Bernard is before the Court as summary judgment evidence. (*See* Dkt. No. 32-1). That evidence reveals that Mr. Bernard would have been aware of Matta's factual assertions that he

engaged in protected activity. For example, the investigation transcript includes Matta's statement that he had the discussion with Ortiz about releasing the rail car without the brake test. (*Id.* at 44). It also includes Matta's recounting of informing Ortiz that he felt "fatigued, exhausted, disoriented," (*id.* at 45), as well as a statement from Guerra that he heard Ortiz tell Matta, "Okay, go home." (*Id.* at 52).

The letter informing Matta of his 25-day suspension says that it was determined that he violated, among other rules, "Rule 1.15 – Duty – Reporting of Absence." (Dkt. No. 28-3 at 1). If Mr. Bernard was the ultimate decisionmaker regarding Matta's disciplinary action, then it appears that the information relied on by Mr. Bernard included Matta's version of the exchanges between him and Ortiz. To this extent, Mr. Bernard was not removed from and unaware of the Matta's version of events as to what occurred between him and Ortiz on September 22. The Court finds that Matta's version of events creates a fact issue as to whether he reported a work-related illness and made a report of a hazardous safety or security condition. Thus, the Court determines that there is a genuine fact issue as to whether this information was a contributing factor of KCSR's decision to discipline Matta.

Finally, the Court notes that KCSR in this present case has not asserted as a ground for summary judgment that the evidence "demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of [Matta's protected activity]" as provided by 49 U.S.C. § 42121(b)(2)(B)(ii). Various cases KCSR cites for the proposition that courts require a showing of intentional retaliation to satisfy the element of contributing factor actually address whether the defendant in those cases met their burden under § 42121(b)(2)(B)(ii), and those cases are thus distinguishable. *See e.g.*, *Lemon & BNSF Railway v. Dept of Labor*, 958 F.3d 417, 419 (6th Cir. 2020). While addressing the contributing factor element of Matta's claim, KCSR seems to assert that the disciplinary action against Matta was based not on Matta's protected activity but on other, non-discriminatory reasons. To the extent KCSR may argue that it would have taken the same disciplinary action in the absence of Matta's protected activity as provided by § 42121(b)(2)(B)(ii), the Court determines that KCSR has failed to adequately brief and support this potential ground for summary judgment.

For the foregoing reasons, the Court denies KCSR's motion for summary judgement on the contributing factor element of Matta's prima facie case of retaliation.

f. KCSR's Affirmative Defense of Failure to Mitigate

Finally, KCSR moves for summary judgment on Matta's wage loss claim on the ground that Matta failed to make a reasonable effort to mitigate his damages. (Dkt. No. 33 at 10). According to his complaint, along with other damages, Matta seeks "[l]ost wages and/or backpay with interest," as well as "compensatory damages for economic losses due to KCSR's conduct." (Dkt. No. 20 at 6). In KCSR's answer, KCSR raised as one of its affirmative defenses that Matta "has failed to mitigate his damages and/or engaged in conduct to exacerbate his damages, and Matta's award, if any, should be reduced in accordance with that failure and/or conduct." (Dkt. No. 21 at 5).

Under the FRSA, a Matta "shall be entitled to all relief necessary to make the employee whole" and may seek damages in the form of:

> (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
>
> (B) any backpay, with interest; and
>
> (C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

49 U.S.C § 20109(e)(1)–(2). As backpay is an equitable remedy, it is "subject to a duty to mitigate damages." *Giles v. General Elec. Co.*, 245 F.3d 474, 492 (5th Cir. 2001) (citations omitted); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (recognizing an "obvious policy imported from the general theory of damages" that "a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages') (citations omitted). Although a plaintiff-employee must "use reasonable diligence to obtain substantially equivalent employment," the burden is on the defendant-employer to prove a plaintiff's failure to mitigate. *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 393 (5th Cir. 2003).[11]

[11] Districts Courts in the Fifth Circuit have recently reconsidered the question of whether, after showing an employee failed to make reasonable efforts to obtain employment, a defendant-employer must *also* prove the employee had access to available substantially equivalent employment. *See Garcia v. Harris*

KCSR asserts that "Matta has only been able to identify 7 locations he has submitted an application to in the 734 days he has been unemployed." (Dkt. No. 28 at 19). KCSR compares Matta's supposed lack of effort to obtain employment to the facts of *Sellers v. Delgado College*, in which the Fifth Circuit upheld a district court's judgment that found a plaintiff was not entitled to backpay damages for certain years of her unemployment because she had not made reasonable efforts to obtain employment over a three-year period when she averaged less than one job application per month. 902 F.2d 1189, 1195 (5th Cir. 1990). The Court notes, however, that in *Sellers*, the Court also upheld the lower court's decision to award backpay damages over an almost two-year period in which the plaintiff contacted four employment agencies and finally got a job. *Id.* at 1192.

In the instant case, as of October 9, 2020, Matta provided the following information regarding his attempts to obtain employment:

> INTERROGATORY NO. 2: Fully describe what actions you have taken to obtain employment since May 16, 2019. Please identify all entities you claim you have submitted an employment application or resume to.
>
> ANSWER: Matta has applied with Caterpillar, 7 Compression, French Ellison, and Universal Compression. Matta does not have copies of these applications as they were filled out at the potential employment location and turned in. Matta has also made online application, through Indeed, to Archrock, Holt, and three separate positions with Webb County. He has not been able to obtain any employment to date.

(Dkt. No. 28-8 at 3). In his deposition, taken January 26, 2021, Matta describes his job search as consisting of submitting applications online, trying "to go to every week at the County and the City," (Dkt. No. 32-2 at 48), "looking here, looking there, just knocking doors," (*id.* at 51), and eventually guessing he had submitted "I'm thinking about 12, 15"

County, No. H-16-2134, 2019 WL 132382, at *2 (S.D. Tex. Jan. 8, 2019). In *Sellers*, the Fifth Circuit articulated that if an employer is able to prove that an employee has not made reasonable efforts to obtain work, then that employer need not establish the availability of substantially equivalent employment. 902 F.2d at 1193. However, this standard conflicts with an earlier case, *Sparks v. Griffin*, in which the Fifth Circuit required the defendant to prove that jobs were available that the plaintiff-employees were qualified for. 460 F.2d 433, 443 (1972). It is unclear which standard controls as it is the law of this Circuit that one panel decision by the Circuit Court can only be overruled by *en banc* reconsideration or a contrary decision by the Supreme Court. *See Garcia*, 2019 WL 132382, at *2; *Lowrey v. Texas A & M University System*, 117 F.3d 242, 247 (5th Cir. 1997)—neither of which is true of *Sellers*. In the instant case, however, the parties to do not present this legal question to the Court, and therefore the Court need not decide what standard will apply. The Court will resolve the argument as to Matta's alleged failure to mitigate on factual grounds.

formal job applications since being terminated. (*Id.* at 52). Taken in its entirety Matta testified to an often word-of-mouth process of finding employment and could not readily provide formal documentation of his job search. Based on Matta's own evidence, it appears that over the course of approximately 20 months, Matta likely averaged less than one *formal* job application per month, but the Court cannot, as a matter of law, discount Matta's testimony that he sought employment through word-of-mouth and less formal means.

Therefore, although the evidence presented by Matta on this issue is relatively weak, the Court finds that Matta has presented the minimum evidence necessary to create a genuine issue of disputed fact as to whether Matta made a reasonable effort to mitigate his damages. Obviously, the Court reserves the right to revisit this decision at any time prior to or during the jury trial of this matter. At this time, KCSR's summary judgment on this ground is denied.

IV. Conclusion

Based on the foregoing, Defendant Kansas City Railway Company's Motion for Summary Judgment, (Dkt. No. 28), is **GRANTED in part** and **DENIED in part**. As to Matta's claim that reporting a work-related illness can constitute a hazardous safety or security condition under § 20109(b)(1)(A), summary judgment is **GRANTED** and that portion of Matta's claim under § 20109(b)(1)(A) is **DISMISSED**. As to Matta's report of a hazardous safety condition based on a report of a lack of manpower, summary judgment is **GRANTED** and this portion of his claim under § 20109(b)(1)(A) is also **DISMISSED**. All other grounds for summary judgment regarding Matta's claims under § 20109(a)(4) and § 20109(b)(1)(A) are **DENIED**. Summary judgment as to Matta's duty to mitigate is damages is also **DENIED**.

It is so **ORDERED**.

SIGNED on March 30, 2022.

John A. Kazen
United States Magistrate Judge