IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL CASE NO. 1:13cv4-MR-DSC

CHARLES T. LEE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**MEMORANDUM**
	)	**DECISION AND ORDER**
NORFOLK SOUTHERN RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

THIS MATTER is before the Court on the Defendant's Motion for Summary Judgment. [Doc. 23]. This case brings to the fore one of the more often quoted sayings from a certain affable former baseball star: "it's déjà vu all over again."[1] This is the second civil action this Plaintiff has brought against this Defendant in this Court concerning his suspension from the Defendant's employ. For the reasons stated herein, the Court, for a second time, must grant the Defendant's summary judgment motion.

[1] Lawrence Peter "Yogi" Berra, Yogi Berra Museum & Learning Center, http://yogiberramuseum.org/just-for-fun/yogisms/ (last visited May 19, 2014).

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Charles T. Lee (Lee) initiated this action on January 8, 2013. [Doc. 1]. Lee alleges that he was subjected to retaliation by Defendant Norfolk Southern Railway Company (NS), in violation of the Federal Railroad Safety Act, 49 U.S.C. § 20109. In particular, Lee, who works for NS as a carman conducting safety inspections of railroad cars and locomotives, asserts he was the unwarranted recipient of a six month suspension from employment and "abusive, discriminatory, racial harassment, intimidation and threats, both by NS management and employees" as retaliation for tagging too many railroad cars with "bad order" citations thus requiring their removal from service for repair. [Doc. 1 at 2]. Sixteen months before commencing this action, Lee filed suit against NS in this Court asserting an action for employment discrimination pursuant to 42 U.S.C. § 1981. Lee v. Norfolk S. Ry., No. 1:11cv245-MR-DCK (W.D.N.C. 2012) (the "First Lawsuit"). In the First Lawsuit, Lee asserted he was discriminated against by NS based on his race. Lee is African American. Therein he alleged conduct nearly identical to that which he asserts to be wrongful in this case. He previously asserted that he was suspended from work as a result of racial discrimination. [Doc. 24-3 at 8-9].

Now, he asserts that the same suspension occurred in retaliation for his reporting safety violations. [Doc. 1 at 2]. Compare also [Doc. 24-3 at 6] ("Defendant's employees, … posted a photograph of a white girl and African American girl on his locker. Immediately adjacent to the photograph of the two children, Defendant's employees, … hung a noose. … A few months after the noose was placed on Plaintiff's locker, a grey trash bag was taped to Plaintiff's locker. When Plaintiff inquired as to what the bag was, defendant's employees … informed Plaintiff the grey bag was a body bag."), with [Doc. 1 at 2] ("Plaintiff was subjected to abusive, discriminatory, racial harassment, intimidation and threats, both by NS management and employees. Such treatment including the han[g]ing of a 'noose' on his workplace locker, the placing of a plastic 'body bag' on the same locker and the posting of a picture of a white child and an African American child on his locker. (Plaintiff, who is African-American, and his wife, who is white, have an African American child and a white child.)"). The Court granted NS's summary judgment motion in the First Lawsuit on December 12, 2012, and dismissed Lee's case. [Doc. 24-5]. Lee did not appeal the Court's dismissal order.

Lee's position as a carman for NS brings with it the responsibility to conduct safety-related functions including the inspection and repair of railroad cars and locomotives. [Doc. 1 at 2]. When a carman, like Lee, finds a railroad car in need of repair, he is to place a "bad order" tag on the car setting forth any defect which directs the car to the repair shop. Such cars are then placed in "bad order" status and removed from service. [Id.].

Lee alleges in this matter that NS management, including management at the Asheville yard where he worked, had in place unofficial "bad order" quotas and NS, therefore, did not want carmen like Lee to "bad order" cars above a certain threshold number. [Id.]. According to Lee, NS pressured him not to "bad order" cars and further that NS management and employees removed "bad order" citations from cars Lee tagged for repair. [Id.]. Lee states that NS's pressure not to exceed the "bad order" quota, had he succumbed to it, would have required him to violate federal rail safety law and regulations as well as NS's own safety rules. [Id.]. Lee asserts NS's pressure manifested itself in the following ways: hanging a "noose" on his workplace locker; placing a plastic "body bag" on the same locker; posting a picture of a white child and a black child on his locker; being threatened by co-workers with death and having his house burned

down; being denied equal pay and training; and NS failing to investigate the possession and raffling of firearms on NS property by NS employees. [Id. at 2-3].

Lee alleges he reported the foregoing acts and omissions to NS management and Equal Employment Opportunity personnel who took no action to stop or to remediate the same. [Id. at 3]. Thereafter, Lee claims NS retaliated against him, in whole or in part, because of his "bad order" tagging of cars. Lee states this retaliation resulted in NS denying him the proper pay for the work he did; failing to train him in all the duties of his craft; disciplining him for consuming alcohol (one beer) while on the clock; failing properly to address his reports and complaints with the required investigation; and suspending him without pay for six months. [Id.].

On September 21, 2011, Lee filed the First Lawsuit under 42 U.S.C. § 1981 asserting an action for employment discrimination based upon race. On November 14, 2011, Lee filed a complaint with the Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) asserting the 49 U.S.C. § 20109 safety violation that forms the basis for this present action. [Id. at 4]. On September 21, 2012, the OSHA Area Director found that NS had not committed such violation. [Id.]. Lee objected

to the OSHA Area Director's findings and requested a hearing before the DOL's Administrative Law Judge (ALJ). [Id.]. Because the Secretary of Labor, by and through his OSHA designee, had not issued a final decision within 210 days of Lee filing his OSHA complaint, Lee notified the ALJ of his intent to file this action in this Court. [Id.]. Meanwhile, the Court granted NS's summary judgment motion in the First Lawsuit on December 12, 2012, and dismissed that case. [Doc. 24-5]. Lee initiated the present action in this Court on January 8, 2013. [Doc. 1]. On January 11, 2013, Lee's OSHA complaint was dismissed by the ALJ. [Doc. 7 at 9].

STANDARD OF REVIEW

The Defendant has filed its motion for summary judgment under Federal Rule of Civil Procedure 56 wherein it contends that there are no factual issues for trial and that judgment may be rendered as a matter of law based upon the record. Summary judgment is proper "if the movant shows 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). A fact is "material" if it "might affect the outcome of the case." N&O Pub. Co. v. RDU Airport Auth., 597 F.3d 570, 576 (4th Cir. 2010). A "genuine dispute" exists "if the evidence is such that a reasonable jury could return a

verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A party asserting that a fact cannot be genuinely disputed must support its assertion with citations to the record. Fed. R. Civ. P. 56(c)(1). "Regardless of whether he may ultimately be responsible for proof and persuasion, the party seeking summary judgment bears an initial burden of demonstrating the absence of a genuine issue of material fact." Bouchat v. Baltimore Ravens Football Club, Inc., 346 F.3d 514, 522 (4th Cir. 2003). If this showing is made, the burden then shifts to the non-moving party who must convince the court that a triable issue exists. Id. Finally, in considering the Defendant's summary judgment motion, the Court must view the pleadings and materials presented in the light most favorable to the Plaintiff and must draw all reasonable inferences in the Plaintiff's favor as well. Adams v. UNC Wilmington, 640 F.3d 550, 556 (4th Cir. 2011).

DISCUSSION

Before delving into a discussion regarding the precise legal issue at stake (set forth infra at part 3), a brief overview of Congress' regulatory framework of the railway industry is in order.

1. The Railway Labor Act.

The Railway Labor Act (RLA), 45 U.S.C. § 151 et seq., was passed by Congress in 1926 to govern the relations between railroad carriers and their employees. Further, the RLA established a process for the orderly resolution of disputes between rail carriers and their employees in an effort to prevent the interruption of commerce or the carriers' operations. Norfolk S. Ry. v. Solis, 915 F.Supp.2d 32, 36 (D.D.C. 2013). The RLA mandates the creation of a collective bargaining agreement (CBA) between a railway employer and its employees to establish rates of pay, rules, and working conditions. 45 U.S.C. § 152 First; Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377-378 (1969). When employment disputes arise for railway workers, the CBAs are designed to settle these disputes as expeditiously as possible.

The RLA contemplates two categories of disputes: major and minor. A "major dispute" is one arising out of the formation of a CBA or the changes to a CBA covering rates of pay, rules, or working conditions. Elgin, J. & E. R. Co. v. Burley, 325 U.S. 711, 723 (1945). A "minor dispute," on the other hand, is one involving a CBA already formed and relates either to the meaning or proper application of a particular provision

with reference to a specific situation. Id.; Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252-53 (1994) ("Thus, major disputes seek to create contractual rights, minor disputes to enforce them."). A dispute over the assessment of an employee's discipline pursuant to the terms of a CBA, for example, is a minor dispute first handled according to the grievance procedure in the CBA. 45 U.S.C. § 153 First (i); Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen, 558 U.S. 67 (2009). Employees and carriers must exhaust these grievance procedures, which often provide for an investigation through a hearing known generally as an "on-property hearing." Id., 558 U.S. at 72–73.

If the minor dispute resolution procedures fail, binding arbitration follows administered by the National Railroad Adjustment Board ("NRAB") or a private arbitration panel. 45 U.S.C. § 153 First (*l*). An award rendered by an RLA arbitration board is final and binding by statute. 45 U.S.C. § 153 Second. The mandatory arbitration process is exclusive and extinguishes any other remedies for alleged minor violations of a CBA. Andrews v. Louisville & Nashville R.R., 406 U.S. 320, 322–26 (1972). Claims that are independent of a CBA, however, may be pursued in another forum. Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 564–65 (1987).

2. The Federal Railroad Safety Act.

The Federal Railroad Safety Act (FRSA) was passed by Congress in 1970. Pub. L. No. 910458, 84 Stat. 971, et seq. (1970). The FRSA was intended "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. After the passage of FRSA, however, Congress noted that railroad workers who complained about safety conditions often times experienced retaliation for their actions. Solis, 915 F.Supp.2d at 37. In 1980, Congress responded with amendments that prohibited rail carriers from retaliating against employees who reported violations of federal railroad safety laws or refused to work under hazardous conditions. Federal Railroad Safety Authorization Act of 1980, Pub.L. No. 96–423, § 10, 94 Stat. 1811 (1980). Following the 1980 amendments, employees who experienced such retaliation were required to seek relief through the same arbitration procedures mandated for minor CBA disputes set forth in Section 3 of the RLA (45 U.S.C. § 153.). 45 U.S.C. § 441(c); Act of 1980, 94 Stat. at 1815.

Relevant to this case, the 1980 amendments also added an election of remedies provision.[2] Id. When the FRSA was redesignated to its current

[2] The original provision stated: "Whenever an employee of a railroad is afforded protection under this section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection he must

place in Title 49 of the U.S. Code in 1994, the language of this section was changed to a version similar to its current form,[3] but the change was not intended to be substantive. Pub.L. No. 103–272, § 1(a), 108 Stat. 745 (1994) ("An Act to revise, codify, and enact *without substantive change* certain general and permanent laws[.]") (emphasis added).

In 2007, Congress amended the FRSA again, this time based upon the advice of the 9/11 Commission created following the terrorists attacks in 2001. The election of remedies provision was thus modified once more in a non-substantive manner.[4] Further, the 2007 amendments added new categories of protected conduct,[5] strengthened an employee's FRSA rights,[6] Implementing Recommendations of the 9/11 Commission Act of 2007, Pub.L. No. 110–53, § 1521, 1221 Stat. 266, 444 (2007), and

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elect either to seek relief pursuant to this section or pursuant to such other provision of law." 45 U.S.C. § 441(d), repealed by, Pub.L. 103-272, § 7(b), 108 Stat. 1379 (July 5, 1994).

[3] "Election of Remedies. – An employee of a railroad carrier may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the carrier." Pub.L. No. 103–272, § 1(d), 108 Stat. 745 (1994).

[4] The current election of remedies section states: "An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." 49 U.S.C. § 20109(f).

[5] Congress amended the retaliation provision to protect employees who filed complaints regarding work related illness or injuries. 49 U.S.C. § 20109(a)(4).

[6] Congress added two provisions to the FRSA which specify that nothing in 49 U.S.C. § 20109 preempts or diminishes other rights of employees, and that the rights provided by the FRSA cannot be waived. Id., §§ 20109(g), (h).

eliminated the previous requirement that FRSA complaints proceed through the mandatory RLA arbitration process. Id., § 1521(c), 1221 Stat. 266, 446. On this latter point, Congress ordained that the resolution of FRSA complaints should be transferred to the authority of the Secretary of Labor for the investigation and adjudication. Id.; 49 U.S.C. § 20109(d)(1). The Secretary of Labor has delegated that authority to the Assistant Secretary for OSHA. 29 C.F.R. § 1982.104. After the Assistant Secretary, or his designee, conducts an investigation and issues findings and a determination, either party may file an objection and seek a hearing before a DOL ALJ, like Lee did as described supra. 49 U.S.C. § 20109(d)(2)(A). The parties may seek further review of the ALJ's decision by the Administrative Review Board ("ARB"). 29 C.F.R. § 1982.110(a). The ARB's decision constitutes a final order of the Secretary and is subject to review in "the United States court of appeals for the circuit in which the violation … allegedly occurred." 49 U.S.C. § 20109(d)(4). In a situation such as the present case, however, where the Secretary does not issue a final decision within 210 days after the filing of an administrative FRSA complaint, the employee may bring an original action in a district court of the United States. 49 U.S.C. § 20109(d)(3).

3. Lee's Election of Remedies.

The question before the Court is whether Lee's pursuit of the First Lawsuit constitutes an "election of a remedy" as contemplated by 49 U.S.C. § 20109(f). If so, this present action is barred and must be dismissed. In all matters of statutory interpretation the Court must begin with the particular words Congress has chosen to enact. The current election of remedies section states: "An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." 49 U.S.C. § 20109(f). Broken down to its fundamental components, section (f) contains the following elements: (1) an employee (2) may not seek protection (3) under FRSA and another provision of law (4) for the same allegedly unlawful act of the railroad carrier. The first two elements, as well as the last one, are not disputed. Lee is a NS employee who sought protection by commencing both the First Lawsuit and this present action in response to NS's same alleged unlawful act of suspending him for six months. This case turns on the remaining element: whether Lee's First Lawsuit constitutes an action brought pursuant to "another provision of law."

As a threshold matter, Lee claims that NS should be estopped from raising § 20109(f) as an affirmative defense in the present action. [Doc. 31 at 6]. According to Lee, NS agreed during the discovery period of the First Lawsuit that a FRSA retaliation claim would not be litigated in the First Lawsuit. [Id.]. Lee's argument, however, is inconsistent with the language of the statute. Section 20109(f) is a limitation on what action an employee may *initiate*. An employee may only "seek protection" under the FRSA *or* under some other provision of law. It makes no difference what agreement, if any, the parties reached regarding any FRSA claim *after* Lee filed the First Lawsuit. Lee chose to pursue a racial discrimination claim under 42 U.S.C. § 1981 before seeking the protections of the FRSA. If his doing so constituted the initiation of a claim for "protection under … another provision of law," then the current action is barred, notwithstanding such agreement. This is Congress' designed framework. Lee is permitted to invoke a non-FRSA "safeguard against discrimination," § 20109(g), but in so doing, he is precluded from thereafter seeking protection under "another provision of law." 49 U.S.C. § 20109(f).

Lee's argument is dependent on the proposition that § 20109(f) does not actually mean what it says. Despite the fact that the language of the

statute prohibits the assertion of a FRSA claim once one had sought a remedy elsewhere, Lee argues that this provision must be read as a classic "election of remedies" provision. [Doc. 31 at 7] ("To 'elect' a remedy, however, requires more than the mere commencement of a suit.") (citation omitted). However, neither the language of § 20109(f) nor the context within which it was adopted support Lee's interpretation.

When Congress amended FRSA in 1980, it required any aggrieved party seeking to invoke the protections offered by the FRSA to comply with the mandatory RLA arbitration procedures established for minor CBA disputes. In 2007, Congress changed course. It amended the FRSA in a broad manner, modifying its protections in three significant ways by (1) adding new categories of protected conduct, (2) expanding some employee FRSA rights, and (3) eliminating the previous requirement that FRSA complaints proceed through the RLA arbitration process. In repealing the mandatory RLA arbitration process and requiring the parties to litigate their FRSA claims before the DOL, Congress promulgated a procedure intended to expedite a rail worker's claim. The handling of a railway worker's claim through the FRSA administrative framework makes clear Congress' intent for such claims to be handled by way of an expedited procedure. Congress

incorporated a mechanism to permit a rail worker the opportunity to bring an original FRSA action in federal district court if the Labor Secretary failed to issue a final decision within 210 days of the rail worker filing his administrative complaint. 49 U.S.C. § 20109(d)(3). To further encourage a rail worker to choose the FRSA administrative procedure, Congress made the benefits to a prevailing FRSA claimant more generous. A successful claimant can be reinstated with the same seniority and recover back pay with interest. 49 U.S.C. § 20109(e)(2)(A)-(B). He may also recover compensatory damages, special damages (litigation costs, expert witness fees, reasonable attorneys' fees), and punitive damages. Id., §§ 20109(e)(2)(C); (e)(3).

While Congress made the FRSA's administrative procedure enticing, it did not make it exclusive. In fact, the other significant 2007 amendments brought into the law two complementary provisions that explained the FRSA procedure neither preempted any other state or federal "safeguards" nor permitted the waiver of any rights or remedies the FRSA bestowed. Id., §§ 20109(g); (h). Therefore, if a claimant wished to pursue some other action based upon some allegedly unlawful act of a railroad carrier under any other provision of law, he could do so, *but he could not thereafter avail*

himself of the FRSA procedure based upon that allegedly unlawful act. Id., § 20109(f). If an employee were to bog down the expeditious FRSA process by filing other claims, the benefit of the entire FRSA paradigm would be lost. Hence, Congress did not prohibit filing claims under other provisions of law, but Congress mandated that if an employee sought redress under such other provisions of law, then the stream-lined FRSA claim process would no longer be available to him.

All of this is to say that if the election of remedies provision of § 20109(f) applies, its operation arose by reason of Lee's *filing* the First Action – by "seek[ing] protection" under 42 U.S.C. § 1981. Any agreement the parties made after that point regarding if or how Lee could litigate any FRSA claim was irrelevant to that question. For that reason, NS is not estopped from raising the § 20109(f) election of remedies provision as a defense.

Lee next argues that because the Court, in the First Lawsuit, "held that it lacked subject matter jurisdiction to consider whether Lee had a remedy for the suspension under § 1981[,]" no jury finally resolved Lee's discrimination claim and he should be free to pursue another remedy. In making this argument, Lee misconstrues both § 20109(f) and this Court's

earlier ruling. In the First Lawsuit, the Court concluded that Lee had presented no forecast of evidence that he was suspended because of his race. Rather, the forecast of evidence before the Court in the First Lawsuit showed he was suspended for having consumed alcohol while on the clock.[7] The question of a rail worker's discipline is a "minor dispute" strictly within the purview of the RLA. The Court held it had no subject matter jurisdiction over the RLA disciplinary matter. The Court, however, did have subject matter jurisdiction over, and disposed of, Lee's § 1981 action.

[7] The burden shifting standards differ markedly for FRSA claims versus 42 U.S.C. § 1981 claims. The FRSA incorporates by reference the rules and procedures applicable to Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR–21") whistleblower cases. 49 U.S.C. § 20109(d)(2)(A). Under AIR–21, an employee must show, by a preponderance of the evidence, that: (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. Allen v. Admin. Review Bd., 514 F.3d 468, 475–76 (5th Cir. 2008). Once the plaintiff makes a showing that the protected activity was a "contributing factor" to the adverse employment action, the burden shifts to the employer to demonstrate "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(ii).

Under 42 U.S.C. § 1981, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) applies as the default burden-shifting framework at summary judgment. The McDonnell Douglas framework is a three-step burden-shifting test summarized as follows: (1) plaintiff must first establish a prima facie case of discrimination, (2) the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action, and (3) if the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual. Raytheon Co. v. Hernandez, 540 U.S. 44, 49 n.3 (2003). It is worth noting that the AIR–21 burden-shifting standard applicable to FRSA claims is much easier for a plaintiff to satisfy than the McDonnell Douglas standard.

Lee also misconstrues the limitation of § 20109(f). It does not prohibit the initiation of a FRSA claim once a final judgment has been entered by some other tribunal. It bars a FRSA claim if the employee *has previously sought a remedy* for the same alleged wrong under any other provision of law. Neither § 20109(f) nor this Court's prior order say what Lee argues. Therefore, Lee's second argument is without merit.

Lee's third argument is a slight variation on the theme of his second argument. He states that if he did "elect a remedy" by "challenging the suspension" in the First Lawsuit, "this Court expressly held that Lee had to pursue this remedy through labor arbitration." [Doc. 31 at 7]. Here, again, Lee misconstrues this Court's earlier ruling. Lee filed a previous action alleging racial discrimination. He failed to present a forecast of evidence sufficient to have a jury decide whether his suspension was the result of racial bias. The forecast of evidence, however, showed that he was suspended for having consumed alcohol on the job. Therefore, NS was granted summary judgment. The section 1981 claim was decided on the merits.

In the First Lawsuit Lee filed a claim for racial discrimination. In this case, he brings a claim for violation of FRSA, § 20109. He may have had a

claim for having been improperly disciplined under the terms of the CBA, but *he never brought that claim*. Matters of discipline (such as suspension for consuming alcohol on the job) are subject to binding arbitration under the RLA pursuant to Lee's CBA as a union member. Lee correctly cites to the cases that say that if an employee seeks only redress of a matter pursuant to a CBA, that such is not "seek[ing] protection under … another provision of law." Ray v. Union Pac., 2013 WL 5297172 (S.D. Iowa 2013); Reed v. Norfolk S. Ry., 2013 WL 1791694 (N.D. Ill. 2013); Ratledge v. Norfolk S. Ry., 2013 WL 3872793 (E.D. Tenn. 2013); Mercier v. Norfolk S. Ry., 2011 WL 4915758 (A.R.B.). Such action merely invokes a contractual remedy, not a statutory one. These cases, however, are completely inapplicable here. Lee never sought redress regarding his discipline in arbitration pursuant to the RLA. In the First Lawsuit, Lee sought a judgment in this Court pursuant to a statute, 42 U.S.C. § 1981, which is "another provision of law." Thus, the present action, as a *subsequent* action pursuant to FRSA, is barred by § 20109(f). It is the prior § 1981 claim that presents the bar, not some unfiled disciplinary claim under the CBA.

Lee's fourth argument is that the terms of § 20109(f) should be construed narrowly so as not to bar this action. He argues that the word

"another" as used in § 20109(f) "implies the second provision of law should be *similar in kind* to § 20109" and that relief under § 1981 is not similar in kind to relief under § 20109. [Doc. 31 at 8]. In support of his contention, Lee cites to Ratledge v. Norfolk S. Ry., 2013 WL 3872793 (E.D. Tenn. 2013). Lee's reliance on Ratledge is misplaced.

In Ratledge, the plaintiff filed an action in federal district court alleging, inter alia, a FRSA retaliation claim.[8] The defendant argued that this claim was barred by § 20109(f) because plaintiff previously filed an administrative complaint under § 20109(d)(2). Ratledge, slip op. at 4. The court in Ratledge concluded that the "word 'another' implies the second provision of law should be similar in kind to § 20109[,]" Ratledge, slip op. at 13, just as Lee argues. Lee, however, takes that snippet of the court's opinion out of its context. As the court went on to say, "[m]ore succinctly stated, § 20109 distinguishes between legal remedies and CBA remedies." Id. at 14. Because CBA remedies are contractually based, as found by the Ratledge court, they are not similar in kind to legal remedies that can be sought under the FSRA or other statutorily defined actions. In his First Lawsuit, however, Lee sought a legal remedy under § 1981, and in this

[8] Initially, the plaintiff in Ratledge filed a FRSA administrative complaint that led the OSHA Regional Administrator to find in plaintiff's favor. Id., slip op. at 3. The defendant objected to this finding and requested a hearing before the DOL ALJ. Id. Plaintiff then notified the DOL that he intended to file suit de novo in federal court. Id.

present one, he is likewise seeking a legal remedy. Both causes of action are statutory in nature. Neither is contractual in nature. Even interpreting the language of the statute as the court did in Ratledge, Lee's claim fails.

Undeterred by the language actually employed by the Ratledge court, Lee argues that the purpose behind 42 U.S.C. § 1981 is to combat racial discrimination while 49 U.S.C. § 20109 addresses unlawful retaliation and, hence, no similarity is present. Taking Lee's argument to its logical conclusion, however, would cause § 20109(f) to fail of its essential purpose. It could never serve to bar a successive lawsuit because every cause of action necessarily targets a different wrong. Both 42 U.S.C. § 1981 and 49 U.S.C. § 20109 provide legal (as opposed to contractual) remedies "for the *same* allegedly unlawful *act* of the railroad carrier." That is all the similarity necessary to bring this matter within the purview of § 20109(f). As the operative terms are discussed in Ratledge, both 42 U.S.C. § 1981 and 49 U.S.C. § 20109 are similar in kind in the relief that they seek. For these reasons, Lee's reliance on Ratledge is misplaced.

Lee's final argument flows from his interpretation of the two new sections Congress added to the FRSA as part of the 2007 amendments. [Doc. 31 at 8-9]. Lee contends that, even if the First Lawsuit and the

present one fall within the scope of § 20109(f), then sections 20109(g)[9] and 20109(h)[10] "both expressly preserved Lee's right to ask a court to consider whether § 1981 afforded him a remedy for the suspension without barring a remedy under the FRSA." [Doc. 31 at 8-9].

In short, Lee argues that § 20109(f) impairs his ability to seek redress for his alleged racial discrimination under § 1981. The facts, however, do not support Lee's argument. Lee pursued his § 1981 case to a conclusion, and it was dismissed on the merits. He failed to present a forecast of evidence that his suspension was racially motivated or that any overtly racial actions (e.g., the noose) were attributable to NS. Section 20109(f) played no role in the failure of Lee's discrimination claim. Therefore, the preservation of Lee's anti-discrimination rights, as set out in § 20109(g) and (h), was fully effectuated.

The effect of § 20109(f) is to direct a railroad employee who asserts a safety related claim to bring that claim *first.* If the employee files some

[9] "No preemption. – Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law." 49 U.S.C. § 20109(g).

[10] "Rights retained by employee. – Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment." 49 U.S.C. § 20109(h).

other claim (e.g., a § 1981 action) first, then the § 20109 claim is deemed abandoned. There is nothing in § 20109(g) or (h) that changes this in any way.

Moreover, in his argument, Lee fails to read the two new sections of the FRSA in pari materia with the entire statute and its evolution. As previously noted, under the original FRSA enactment, railroad employees who experienced retaliation were required to seek relief exclusively through the same arbitration procedures mandated for minor CBA disputes set forth in Section 3 of the RLA (45 U.S.C. § 153.). 45 U.S.C. § 441(c); Act of 1980, 94 Stat. at 1815. Accordingly, the FRSA was originally a preemption statute. Rayner v. Smril, 873 F.2d 60, 66 n. 1 (4th Cir. 1989). The original election of remedies provision, 45 U.S.C. § 441(d), was interpreted to allow railroad employees either to bring claims for wrongful discharge for reasons other than retaliation (for example, racial or disability discrimination), or to bring a FRSA action for retaliatory discharge. Rayner, 873 F.2d at 65. Prior to the 2007 amendments to the FRSA, plaintiffs were barred from seeking to recover under common law theories of liability for some purported wrongful act of a railroad. Id. This changed with the 2007 amendments to the FRSA. By amending the FRSA in 2007 to include new sections

20109(g) and 20109(h), Congress made clear that the FRSA did not preempt other actions. Since the 2007 amendments, courts have found that plaintiffs may maintain *other railroad safety claims* side-by-side with a FRSA claim. See, e.g., Ruiz v. Union Pacific R., 2009 WL 650621, slip op. at 2 (C.D.Cal. Mar. 10, 2009) (unpublished). Plaintiff can site no case, however, where an employee has been allowed to proceed with a FRSA claim after having previously pursued any statutory claim, including one for racial discrimination. To accept Plaintiff's interpretation of subsections (g) and (h) would be to eviscerate subsection (f). Congress, however, clearly did not intend such, because it reenacted subsection (f) at the same time it adopted subsections (g) and (h), albeit with some modifications. Therefore, this argument of the Plaintiff is without merit.

The end result of Congress' work over the years in amending the FRSA is that Lee's commencement of this action, following the conclusion of his First Lawsuit, constitutes the initiation and pursuit of a claim "seek[ing] protection [under] another provision of law for the same allegedly unlawful act of the railroad carrier" in derogation of 49 U.S.C. § 20109(f). In this case and in the First Lawsuit, Lee claims that he was wrongfully disciplined when he was suspended for six months ostensibly for drinking

alcohol while on the clock. Wrongful discipline, however, must be brought as an RLA claim pursuant to the terms of the CBA. Lee never brought such a claim. Instead, he chose in the First Lawsuit to pursue a racial discrimination claim under § 1981 that he could not sustain with adequate evidence. Then, in this matter, he sought to pursue a belated safety act claim under the FRSA, another provision of law, for the same allegedly unlawful act of the railroad carrier. Accordingly, this action is barred by § 20109(f) and must therefore be dismissed.

ORDER

IT IS, THEREFORE, ORDERED that the Defendant's Motion for Summary Judgment [Doc. 23] is hereby **GRANTED** and this action is hereby **DISMISSED** in its entirety.

IT IS SO ORDERED.

Signed: May 20, 2014