

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Chester McElveen,)	C.A. No. 4:95-1632-22JI
)	
Plaintiff,)	
)	
v.)	ORDER
)	
CSX Transportation, Inc., and J.C.)	
Tompkins,)	
)	
Defendants.)	
_____)	

This is an employment case brought by a former railway worker. Plaintiff, represented by counsel, filed an Amended Complaint January 31, 1996, asserting a race discrimination claim based on 42 U.S.C. § 1981.¹ Jurisdiction is based on federal question pursuant to 28 U.S.C. § 1331. The matter is before the court on Defendants’ Motion for Summary Judgment, filed February 29, 1996.²

¹Plaintiff’s earlier complaint attempted to assert a claim under 42 U.S.C. § 1985(3). After Defendants filed a motion to dismiss Plaintiff’s § 1985(3) claim, Plaintiff filed an Amended Complaint omitting that claim. Accordingly, the court concludes that Plaintiff has abandoned that claim.

² This is not the first time the court has considered Defendants’ argument that Plaintiff’s claims are “minor disputes” under the Railway Labor Act (RLA) and are therefore subject to mandatory binding arbitration under the collective bargaining agreement. Defendants filed a Motion to Dismiss on June 20, 1995, that pressed the same points. At a January 18, 1996, hearing, the court denied the motion on the ground that material evidence such as the collective bargaining agreement was not in the record, and that Plaintiff, who had previously been *pro se*, should be afforded an opportunity for retained counsel to file an Amended Complaint. The court gave Defendants leave to renew the motion as one for summary judgment following the filing of the amended pleadings and the taking of discovery. The present motion followed. Because the court has already heard oral argument, no further hearing is necessary.

The court has reviewed the briefs and exhibits and has studied the applicable law. For the reasons given below, the court concludes that Plaintiff's right to litigate his § 1981 civil rights claim is not foreclosed by the arbitration provisions of the Railway Labor Act (RLA), 45 U.S.C. §§ 1 *et seq.* Thus, the court concludes it has subject matter jurisdiction over Plaintiff's § 1981 race discrimination claim. However, the court agrees with Defendants that Plaintiff has failed to carry his burden under Rule 56(e), Fed. R. Civ. P., to show that there is a genuine issue for trial on the § 1981 claim. Accordingly, summary judgment is appropriate.

I. FACTUAL BACKGROUND

The following facts are drawn from the complete record including the pleadings, motions and memoranda, and exhibits. All inferences are drawn in Plaintiff's favor.

Defendant CSX Transportation, Inc. (CSX) employed Plaintiff as part of its maintenance of way work crew. On December 29, 1993, Plaintiff was working with a crew installing road ties on the main railway line in Sumter, South Carolina. CSX contends that Plaintiff walked off the job after complaining about it being too cold to work whereas Plaintiff contends his supervisor told him to go home. The December 29 incident sparked CSX's filing of insubordination charges against Plaintiff on January 5, 1994. Pursuant to the terms of a collective bargaining agreement governing the relationship between Seaboard System Railroad and the Brotherhood of Maintenance of Way Employees, CSX held a hearing on January 14, 1994, at which several of the work crew, the supervising foreman, and Plaintiff testified. By letter dated February 11, 1994, Plaintiff was advised of his dismissal. He appealed the dismissal pursuant to the collective bargaining agreement.³

³The status of Plaintiff's administrative appeal is not evident from the record. The affidavit of Noel V. Nihoul, CSX Manger of Employee Relations, notes that Plaintiff appealed his dismissal, but does not state the outcome or state that the appeal has been concluded.

Plaintiff, who is black, initially filed a *pro se* handwritten complaint on May 25, 1995, in which he alleged discriminatory dismissal on account of his race. Defendants answered on June 20, 1995, entering a general denial. They filed a Motion to Dismiss on June 20, 1995, arguing that Plaintiff's claims were subject to final binding arbitration under the Railway Labor Act of 1926 (RLA). By order filed October 23, 1995, the court ordered supplemental briefing on whether Plaintiff's civil rights claim under § 1981 was a "minor dispute" within the purview of the RLA, and the principles applicable to the claim against Tompkins. The October 23, 1995, order noted that Plaintiff's *pro se* complaint contained only bare bone allegations of racial discrimination. Because of the liberality with which *pro se* complaints are viewed, however, the court directed Plaintiff to specify more clearly the basis of his allegations of racial discharge. Plaintiff thereafter retained counsel who attempted on January 17, 1996, to file an Amended Complaint,⁴ which was superseded by a January 31, 1996, complaint, which is the current complaint.

The current complaint is a vague and rambling discourse, and contains language superfluous to Plaintiff's one submitted claim under 42 U.S.C. § 1981. The gravamen of Plaintiff's complaint is that he was wrongfully fired without just cause for racially-motivated reasons. Plaintiff disputes that he walked off the job in Sumter and claims he was reassigned to a job in Tampa, Florida. He contends that Defendants' accusation "was simply a pretext used to discharge Plaintiff because Plaintiff was seeking to advance to jobs being reserved by Defendants for White employees." Defendants deny the charge.

⁴Plaintiff's filing of the January 17, 1996, Amended Complaint was erroneous because Plaintiff's counsel had failed to secure the court's permission for an amendment at that date. At the hearing on January 18, 1996, the court vacated the filing of the January 17 complaint and directed Plaintiff to file an Amended Complaint specifying the allegations of racial prejudice. The January 31, 1996, Amended Complaint resulted, and although it abandons the previously advanced Title VII, § 1985(3), and outrage claims, it does little in terms of expounding on the racial allegations.

Defendants now move, pursuant to Rule 56, Fed. R. Civ. P., for summary judgment. First, Defendants argue that Plaintiff's claims are minor disputes subject to mandatory arbitration by the RLA. Thus, Defendants contend that this is a threshold issue of subject matter jurisdiction. Second, Defendants maintain that Plaintiff's suit against Tompkins should be dismissed because Plaintiff failed to allege any act on the part of the individual Defendant which would constitute affirmative participation in the alleged tortious act of the corporate Defendant. Because a claim seeking to impose personal liability under § 1981 must be predicated on the actor's personal involvement, *Allen v. Denver Public School Bd.*, 928 F.2d 978, 983 (10th Cir. 1991), Defendants contend Tompkins should be dismissed from the case. Finally, Defendants maintain that even if the court has jurisdiction over Plaintiff's § 1981 suit against CSX, summary judgment is appropriate because Plaintiff cannot show that his firing was motivated by anything other than the legitimate, nondiscriminatory reason that Plaintiff walked off the job.

Plaintiff opposes Defendants' motion. Although the scope of RLA preemption is a complex issue over which courts have divided, Plaintiff's two-page opposition fails to address any of the law on RLA preemption. It simply asserts that racial animus prevailed, and that "[t]his Court need not reach the question as to whether a minor dispute exists. The Plaintiff does not challenge any procedure of the RLA."

II. SUMMARY JUDGMENT STANDARD

In deciding a summary judgment motion, the court must look beyond the pleadings and determine whether there is a genuine need for trial. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 251-53 (1986). If Defendants carry their burden of showing an absence of evidence to support a claim, Plaintiff must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for Plaintiff. *Anderson*, 477 U.S. at 248. An issue of fact concerns "material" facts only if establishment of the fact might affect the outcome of the lawsuit *under* governing substantive law. *Id.* A complete failure of proof concerning an essential element of Plaintiff's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23. Moreover, production of a "mere scintilla of evidence" in support of an essential element will not forestall summary judgment. *Anderson*, 477 U.S. at 251.

III. PLAINTIFF'S § 1981 CLAIM AGAINST CSX AND TOMPKINS

A. RLA Preemption of Plaintiff's Civil Rights Claim

As a threshold matter, the court must determine if Plaintiff's claim in federal district court is precluded by the mandatory arbitration provisions of the RLA. Congress' purpose in enacting the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes. *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239, 2243 (1994). The RLA requires arbitration for all disputes "concerning rates of pay, rules or working conditions" involving covered carriers such as CSX. 45 U.S.C. § 151a. The National Railway Adjustment Board has exclusive jurisdiction over "disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." *Id.* The RLA distinguishes between two types of disputes. The first type, "major disputes," arise out of the formation or change of collective bargaining agreements covering rates of pay, rules, or working conditions. *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 562 (1987). In contrast,

“minor disputes” grow out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. *Id.* at 563. Major disputes seek to create contractual rights whereas minor disputes seek to enforce them. *Consolidated Rail Corp. v. Railway Labor Executives’ Ass’n*, 491 U.S. 299, 302 (1989). A minor dispute is subject to the railroad’s internal dispute resolution process and, if not settled there, must be settled through compulsory and binding arbitration before the National Railroad Adjustment Board. *Id.* at 303-04. Judicial review is very narrow. *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 91 (1978).

In a line of cases the United States Supreme Court has recognized that certain statutory claims are not subject to mandatory arbitration pursuant to a collective bargaining agreement. *See, e.g., Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557 (1987) (employee’s FELA action for damages not precluded by the RLA because although the RLA provides exclusive jurisdiction in arbitration for “minor disputes,” the RLA is not applicable where the employee’s claim is based on a statute designed to guarantee minimum substantive rights); *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981) (employee’s Fair Labor Standards Act claim not barred by prior submission to grievance procedures of the collective bargaining agreement because arbitration is designed to protect contractual, not statutory rights); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII race discrimination claim not foreclosed by prior submission to arbitration under collective bargaining agreement because the employee’s rights under Title VII were not part of the collective bargaining process and cannot be prospectively waived).

Where, however, an extremely broad arbitration provision under the Federal Arbitration Act (FAA) existed, which was not limited only to contract-based claims pursuant to the collective bargaining agreement, the Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), found that the employee’s ADEA claim was subject to compulsory arbitration. Although *Gilmer*

appeared to represent an expansion, the Court carefully distinguished cases involving agreements to arbitrate statutory rights subject to the FAA (*Gilmer*) from cases involving collective bargaining agreements which exclude an agreement to arbitrate statutory rights or involve the FAA (the *Gardner-Denver* case and its progeny). After *Gilmer*, considerable uncertainty prevailed as to whether certain federal and state statutory and common law claims were preempted by the RLA.

The Supreme Court later clarified the preemption analysis by adopting the “independent substantive right” test in *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239 (1994). It held that a dismissed aircraft mechanic’s state-law whistleblower claim was not preempted by the RLA’s mandatory arbitration mechanism for “minor disputes.” The Court established that the RLA’s mechanism to resolve minor disputes through arbitration does not preempt causes of action to enforce rights and obligations that exist independently of the collective bargaining agreement. *Id.* at 2246. The Court reasoned that the employer had an independent “state-law obligation not to fire [the employee] in violation of public policy or in retaliation for whistleblowing,” which was “wholly apart from any provision of the collective bargaining agreement.” *Id.*

The Fourth Circuit has not considered the scope of RLA preemption of a federal statutory cause of action, although several other circuit and district courts have considered the question in relation to Title VII claims, Americans with Disabilities Act claims, civil rights claims under 42 U.S.C. §§ 1981 and 1983, and RICO claims. The overwhelming majority of cases have found that the federal statutory claims were not “minor disputes” within the ambit of the RLA and, thus, an independent federal statutory claim could be pursued. *See, e.g., Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995) (Americans with Disabilities Act claim not subject to RLA arbitration); *Felt v. Atkinson, T. & S.F.R. Co.*, 60 F.3d 1416 (9th Cir. 1995) (Title VII religious discrimination claim not subject to RLA arbitration); *Bates v. Long Island Railroad Company*, 997

F.2d 1028 (2d Cir. 1993) (Rehabilitation Act claim not subject to RLA arbitration); *McAlester v. United Airlines*, 851 F.2d 1249 (10th Cir. 1988) (§ 1981 race claim not subject to RLA arbitration). The foregoing cases looked to the legislative purposes of the acts, and concluded that the plaintiffs had independent rights guaranteed by the federal acts. Because resolution of those claims did not require interpretation of the collective bargaining agreement, the disputes were not “minor disputes” under the RLA.

The specific question here is whether a § 1981 racial discrimination claim confers on Plaintiff independent rights under the civil rights laws. Both cases that have considered that question have answered in the affirmative. In *McAlester*, the Tenth Circuit considered the legislative history of the RLA, and concluded that the RLA was not intended to abridge any of the rights of employees under the Thirteenth Amendment. *Id.* at 1253. The court rejected the employer’s claim that a § 1981 claim was a contract claim requiring interpretation of the collective bargaining agreement, and stated that, “the § 1981 action is founded on a statute which has as its object not the enforcement of contractual obligations but the recognition of a social right of equality of opportunity of persons regardless of race.” *Id.* at 1254-55. Thus, the court reasoned the claim sounded more in tort than contract, and arose from independent rights under § 1981. *Id.* *Cf. Tillman v. Wheaton-Haven Recreation Ass’n, Inc.*, 517 F.2d 1141 (4th Cir. 1975) (§ 1981 claim is basically for redress of tort). Similarly, in *Mumford v. CSX Transportation*, 878 F. Supp. 827 (M.D.N.C. 1994), *aff’d on other grounds*, 57 F.3d 1066 (4th Cir. 1995), Judge Tilley concluded that the railroad had an independent obligation under federal law not to discriminate in contracting on the basis of race and, therefore, the plaintiff’s § 1981 claim was not a minor dispute subject to RLA preemption.

The court is persuaded by the reasoning of these cases and finds that Plaintiff’s § 1981

claim is not subject to the mandatory arbitration provisions of the RLA. Moreover, even if resolution of Plaintiff's claim implicated portions of the collective bargaining agreement, that would not be fatal because the primary consideration is whether the right to be enforced arises independently of the collective bargaining agreement. *See Bates*, 997 F.2d at 1033 (“while it is true that appellants’ discriminatory discharge claims may implicate those portions of their collective bargaining agreements that provide for physical disqualification from employment, it is not true that their exclusive remedy for their allegedly wrongful discharges is arbitration.”).

The court's conclusion that mandatory binding RLA arbitration of Plaintiff's civil rights race discrimination claim is not compelled is further supported by the collective bargaining agreement. A few provisions of the “Agreement between Seaboard System Railroad and its Maintenance of Way Employees,” are indicative. Nowhere does the agreement state that the formal grievance process outlined in Rule 40, Section 10, is the exclusive method to present claims against the employer. In fact, Rule 40, Section 4, expressly envisages that employees may pursue other legal redress:

This Agreement is not intended to deny the right of the employees to use *any other lawful action* for the settlement of claims or grievances provided such action is instituted within nine (9) months of the date of the decision of the highest designated officer of the Carrier. (emphasis added).

For the preceding reasons the court rejects Defendants' arguments that Plaintiff presents an arbitrable “minor dispute.” The court finds the minor/major dispute classification irrelevant because the court concludes that Plaintiff's claim is neither. Plaintiff's § 1981 claim to be free from race discrimination is independent of the collective bargaining agreement, derives from a statute, and was not bargained away as part of the collective bargaining agreement . Thus, his claim is not RLA preempted.

Defendants further contend that *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), compels a different result. In *Austin*, the Fourth Circuit found the terms of a collective bargaining agreement provided for final and binding arbitration of the dispute and compelled arbitration of plaintiff's Title VII and ADA claims. *Austin* is, however, a markedly distinguishable situation because there two private groups had expressly negotiated the arbitration provisions, including a specific provision providing for arbitration of gender and disability discrimination claims. In contrast, in Plaintiff's case, a separate federal Railway Labor Act defines the scope of arbitration under any agreement executed pursuant to the Act, and no evidence exists that an agreement to arbitrate race discrimination claims was ever made. In fact, as noted above, the court has construed Rule 40, Section 4, of the collective bargaining agreement to authorize the maintenance of independent legal actions ("any other lawful action") to resolve any dispute found not to be a "minor dispute" under the RLA. Accordingly, the court rejects Defendants' contention that *Austin* compels arbitration of Plaintiff's race discrimination claim.

B. Plaintiff's § 1981 suit against the individual supervisor, J. C. Tompkins

A claim imposing personal liability under § 1981 requires personal involvement on the individual's part. *Allen v. Denver Public School Bd.*, 928 F.2d 978, 983 (10th Cir. 1991). An officer or an agent is not automatically rendered personally liable for the tortious acts of a corporation. *See Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141 (4th Cir. 1975). Here Plaintiff's Amended Complaint fails, as a matter of law, to allege any action by the individual supervisor Tompkins that would constitute affirmative participation in the allegedly wrongful discriminatory acts. Accordingly, because Plaintiff has failed to allege specific misconduct by Tompkins, the court finds dismissal of that claim appropriate on the grounds of failure to state a claim, Rule 12(b)(6), Fed. R. Civ. P. *See United Black Firefighters of Norfolk v. Hirst*, 604 F.2d

844, 846 (4th Cir. 1979) (holding that complaint failed to state a claim against mayor and city council members in § 1981 claim because no personal involvement of individual defendants was alleged).

C. Plaintiff's § 1981 claim against CSX

The same burden of proof that applies in a Title VII case also applies in a § 1981 claim. *Monroe v. Burlington Indus., Ind.*, 784 F.2d 568 (4th Cir. 1986). Here Plaintiff's Amended Complaint alleges that he suffered a racially-motivated discharge and that CSX used pretext to discharge him because he was "seeking to advance to jobs being held for White employees." Amended Complaint at 2. To establish a prima facie case of discriminatory discharge under § 1981, Plaintiff must establish: (1) that he is a member of a protected class; (2) that the prohibited conduct in which he engaged was comparable in seriousness to the misconduct of employees outside the protected class; and (3) that the disciplinary measures enforced against Plaintiff were more severe than those enforced against those other employees. *Cook v. CSX Transp. Corp.*, 988 F.2d 507 (4th Cir. 1993). If Plaintiff proves a prima facie case, the burden shifts to the employer who must then articulate a non-discriminatory reason for the difference in the discipline administered. *Id.* The Plaintiff then has the burden of demonstrating that the employer's reason is a pretext for discrimination.

Here Plaintiff has failed to establish even a prima facie case because Plaintiff has put forward absolutely no evidence whatsoever of the disproportionate impact of disciplinary measures taken against him on account of his race.⁵ Because that is an essential element of a § 1981

⁵Plaintiff cannot claim to have been taken by surprise by Defendants' arguments for dismissal or summary judgment. As noted above, the instant summary judgment motion was put before this court as a motion for dismissal. The court denied that motion, and indicated that discovery should be undertaken and the motion submitted at a later point. After some discovery was concluded, Defendants renewed their motion for summary judgment and argued again that

discriminatory discharge claim, Plaintiff's claim fails and summary judgment against Plaintiff is appropriate.

III. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff's claim against Defendant Tompkins is dismissed for failure to state a claim under Rule 12(b)(6), Fed. R. Civ. P. IT IS FURTHER ORDERED that summary judgment is GRANTED to Defendant CSX on Plaintiff's claim under 42 U.S.C. § 1981.

IT IS SO ORDERED.

CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Florence, South Carolina
August __, 1996

Plaintiff had failed to make a prima facie § 1981 claim. Plaintiff filed a two-page, wholly insufficient response that did not even attempt to address the merits of Defendants' arguments. Nor did Plaintiff file an affidavit under Rule 56(f), Fed. R. Civ. P., requesting a continuance to respond to Defendants' motion because additional discovery was needed. Thus, Plaintiff has twice been confronted with the argument that he has failed to make out a prima facie case under § 1981, and has not buttressed his claim. A failure to file an affidavit under Rule 56(f) is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate. *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir. 1996). It is Plaintiff's responsibility to put up a prima facie case, and because Plaintiff has failed to put a shred of evidence in the record as to the disproportionate disciplinary measures exacted against him on account of his race the court finds he has failed to meet his burden. Even if Plaintiff had met this burden, however, the court also finds that CSX has articulated a legitimate nondiscriminatory reason for Plaintiff's discharge (that he walked off the job), and that Plaintiff cannot show that the cited reason is pretextual.