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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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ALEX GONERO,  
Plaintiff,  
v.

NO. CIV. 2:09-2009 WBS JFM

MEMORANDUM AND ORDER RE:  
MOTION TO DISMISS

UNION PACIFIC RAILROAD  
COMPANY, ANDREW RIBBING, LEO  
J. MARIN, JOHN PARKER, DENNIS  
MAGURES, and DOES 1 through  
10, inclusive,  
Defendants.

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Plaintiff Alex Gonero brought this action in state court against Union Pacific Railroad Company ("Union Pacific"), Andrew Ribbing, Leo J. Marin, John Parker, and Dennis Magures for wrongful termination and intentional infliction of emotional distress relating to his termination of employment with Union Pacific. Having removed the action to federal court, the defendants now move to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a

1 claim upon which relief can be granted.

2 I. Factual and Procedural Background

3 In 2008, plaintiff was employed by Union Pacific as a  
4 machinist in Roseville, California, and was also Local Chairman  
5 of the International Association of Machinist union for Union  
6 Pacific's Roseville facility. (Compl. ¶¶ 4-6.) On March 2,  
7 2008, plaintiff was instructed by his supervisor, Adam Nabus, to  
8 work on a train that was located on Track 6 inside the area of  
9 the repair facility known as the "house." (Id. ¶ 6.) Plaintiff  
10 alleges that before he started his assignment, he saw two other  
11 trains coming toward the house on Track 6 and noticed that two  
12 track switches were not properly set: the Track 6 derail switch  
13 was not lined with its blue flag displayed, and the track switch  
14 for trains to turn off the lead track and on to Track 6 was not  
15 lined to prevent trains from turning on to Track 6. (Id.)

16 Plaintiff alleges that both of these conditions  
17 appeared to him to pose an "imminent risk of physical harm" to  
18 him and other workers in the vicinity and to violate Union  
19 Pacific's work rules and the "Blue Flag" regulations of the  
20 Federal Railroad Administration. (Id.) Plaintiff adjusted the  
21 Track 6 derail switch, and was stopped by Nabus as he set out to  
22 adjust the lead track switch for Track 6. (Id. ¶ 8.) The two  
23 allegedly engaged in a dispute over plaintiff's safety concerns  
24 and the requirements of Union Pacific's work rules regarding  
25 safety disputes. (Id. ¶¶ 8-9.) Plaintiff alleges he requested,  
26 in his individual and official union capacities, that Nabus  
27 follow Union Pacific procedure and raise the safety concern with  
28 the mechanical officer in charge. (Id. ¶ 9.) Instead, Nabus

1 allegedly instructed plaintiff to return to work in violation of  
2 Union Pacific's work rules. (Id.) Plaintiff called Scott  
3 Manhart, the mechanical officer in charge, to report his safety  
4 complaint, and thereafter returned to his job. (Id. ¶ 10.)

5           Sometime after this incident Manhart called plaintiff  
6 to discuss plaintiff's safety complaint and disagreement with  
7 Nabus. (Id. ¶ 11.) Plaintiff alleges that he reiterated that  
8 his complaint was made in both his individual and official union  
9 capacities, and notified Manhart that as a result of the unsafe  
10 conditions he would not be able to complete his work on the train  
11 engine on time. (Id.) During this conversation, Manhart  
12 allegedly did not tell plaintiff that his response to the safety  
13 violation was improper. (Id.)

14           On March 7, 2008, Leo J. Marin charged plaintiff with  
15 violating Union Pacific's work rules and insubordination. (Id. ¶  
16 13.) On June 18, 2008, Union Pacific conducted a disciplinary  
17 investigation, during which Andrew Ribbing acted as the workplace  
18 hearing officer in charge of conducting and determining the  
19 results of the investigation. (Id.) Sometime after the hearing  
20 plaintiff received a letter dated June 25, 2008 from Dennis  
21 Magures, Director of the Roseville facility, and signed by  
22 Ribbing notifying plaintiff that his employment with Union  
23 Pacific was terminated. (Id.) The letter stated plaintiff was  
24 terminated because of his 1) refusal to comply with instructions;  
25 2) insubordination; and 3) because his acts of hostility,  
26 misconduct, or negligence affected Union Pacific's interests.  
27 (Id.)

28           Plaintiff alleges the reasons laid out in the June 25,

1 2008 letter are pretext not supported by the facts, and alleges  
2 the real reason Union Pacific terminated his employment was  
3 because it was Union Pacific's policy and custom to intimidate  
4 employees who protest unsafe or illegal working conditions. (Id.  
5 ¶ 14.)

6 On April 22, 2009, plaintiff filed a Complaint against  
7 the aforementioned parties in Placer County Superior Court  
8 alleging wrongful termination and intentional infliction of  
9 emotional distress relating to his termination of employment with  
10 Union Pacific. (See Docket No. 5.) The action was subsequently  
11 removed to this court under diversity jurisdiction on July 17,  
12 2009. (Id. No. 1.) Defendants now move to dismiss plaintiff's  
13 Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6)  
14 for failure to state a claim upon which relief can be granted.

## 16 II. Discussion

### 17 A. Legal Standard

18 On a motion to dismiss, the court must accept the  
19 allegations in the complaint as true and draw all reasonable  
20 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416  
21 U.S. 232, 236 (1974), overruled on other grounds by Davis v.  
22 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322  
23 (1972). To survive a motion to dismiss, a plaintiff needs to  
24 plead "only enough facts to state a claim to relief that is  
25 plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct.  
26 1955, 1974 (2007). This "plausibility standard," however, "asks  
27 for more than a sheer possibility that a defendant has acted  
28 unlawfully," and where a complaint pleads facts that are "merely

1 consistent with" a defendant's liability, it "stops short of the  
2 line between possibility and plausibility." Ashcroft v. Iqbal,  
3 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at  
4 556-57).

5 In general, the court may not consider materials other  
6 than the facts alleged in the complaint when ruling on a motion  
7 to dismiss. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir.  
8 1996). The court may, however, consider additional materials if  
9 the plaintiff has alleged their existence in the complaint and if  
10 their authenticity is not disputed. See Branch v. Tunnell, 14  
11 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by  
12 Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir.  
13 2002). Here, defendants have provided the court with plaintiff's  
14 complaint filed with the Department of Labor. (Request for  
15 Judicial Notice ("RJN") Ex. A.) Plaintiff has alleged the  
16 existence of these documents in his Opposition (see Opp. Mot. to  
17 Dismiss 1:21-27), and no party has questioned their authenticity.  
18 Accordingly, the court will consider these documents in deciding  
19 defendants' motions to dismiss.

20 B. Wrongful Discharge in Violation of Public Policy

21 1. Election of Remedies Under 49 U.S.C. § 20109

22 Plaintiff asserts California common law claims of  
23 wrongful termination and intentional infliction of emotional  
24 distress. (Compl. ¶¶ 15-18, 23.) Defendants contend that  
25 plaintiff's entire complaint must be dismissed pursuant to the  
26 election of remedies provision of the Federal Railroad Safety Act  
27 ("FRSA"), 49 U.S.C.A. § 20109(f) (2008). The FRSA protects  
28 railroad employees who report safety concerns from discrimination

1 and provides a mechanism for the resolution of claims of  
2 retaliation against employee whistleblowers. Id. § 20109(a)-(b),  
3 (d). Indeed, shortly after plaintiff's employment at Union  
4 Pacific was terminated, he took advantage of the FRSA's  
5 protections by filing a complaint with the Department of Labor on  
6 October 15, 2008 alleging § 20109 violations. (See RJN Ex. A.)

7           The doctrine of election of remedies precludes  
8 plaintiffs from pursuing remedies inconsistent with a previous  
9 election or conduct. See In re Reaves, 285 F.3d 1152, 1157 (9th  
10 Cir. 2002). "[W]hen, with knowledge of the facts, [a party] has  
11 clearly elected to proceed upon one [inconsistent remedy], he is  
12 thereby bound and will be estopped from invoking the other." Id.  
13 (quoting Calhoun v. Calhoun, 81 Cal. App. 2d 297, 305 (1947)).  
14 To "elect" a remedy, however, typically requires more than the  
15 mere commencement of a suit: "a plaintiff may pursue an action  
16 against an identical defendant in several courts at the same  
17 time, even though inconsistent remedies are sought. But . . .  
18 there can be only one recovery." Sears, Roebuck & Co. v.  
19 Metropolitan Engravers, Ltd., 245 F.2d 67, 69-70 (9th Cir. 1956).  
20 Generally, a conclusive election is made only where the first  
21 suit is prosecuted to a judgment or some elements of estoppel are  
22 present. See Roullard v. Rosenberg Bros. & Co., 193 Cal. 360,  
23 365 (1924). In this case, plaintiff filed a complaint with the  
24 Department of Labor alleging violations under the FRSA. This in  
25 itself, therefore, would not ordinarily be enough to invoke the  
26 doctrine of election of remedies to bar plaintiff's state law  
27 claims.

28           Furthermore, the election of remedies doctrine will bar

1 successive recoveries only where the remedies sought are  
2 inconsistent; it "has no application where a party has different  
3 remedies for the enforcement of different and distinct rights or  
4 the redress of different and distinct wrongs." Latman v.  
5 Burdette, 366 F.3d 774, 783 (9th Cir. 2004) (quoting Popp Telecom  
6 v. Am. Sharecom, Inc., 210 F.3d 928, 934 (8th Cir. 2000)). State  
7 common law wrongful termination claims are not displaced simply  
8 because Congress has also provided a statutory right against  
9 retaliation. See Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246  
10 (1994). Each right has legally independent origins and, absent  
11 Congressional intent to preempt state law claims, is equally  
12 available to an aggrieved employee. The FRSA no longer preempts  
13 state law retaliation claims. 49 U.S.C.A. § 20109(g) (2008).  
14 Therefore, plaintiff could ordinarily pursue to finality his  
15 state common law claims in addition to vindicating his statutory  
16 rights under the FRSA, and the election of remedies doctrine  
17 would not bar multiple recoveries.

18 Congress can, however, further restrict by statute the  
19 avenues of relief available to potential plaintiffs. Section  
20 20109(f) of the FRSA, titled "Election of remedies," states that:  
21 "An employee may not seek protection under both this section and  
22 another provision of law for the same allegedly unlawful act of  
23 the railroad carrier." 49 U.S.C.A. § 20109(f) (2008).  
24 Defendants contend that filing a complaint with the Department of  
25 Labor alleging § 20109 violations qualifies as "seek[ing]  
26 protection" under the FRSA and that plaintiff's state common law  
27 claims in this suit are now barred as other "provision[s] of law"  
28 under Subsection (f).

1           This court agrees that plaintiff's state common law  
2 claims constitute "another provision of law" subject to §  
3 20109(f). While a common interpretation of a "provision" of law  
4 would be "statute," See Black's Law Dictionary 1345 (8th ed.  
5 2004), the Court of Appeals for the Ninth Circuit has found that  
6 almost identical language expressed a Congressional intent "to  
7 encompass all law, whether it be statutory law, common law, or  
8 constitutional law." Shamrock Farms Co. v. Veneman, 146 F.3d  
9 1177, 1180-81 (9th Cir. 1998) (discussing "any other provision of  
10 law" language in the Farm Bill and noting it is closer to "the  
11 law" (which "describes something more general") than to "a law"  
12 (which "refers to a particular and concrete instance of a legal  
13 precept")) (internal quotation marks and citation omitted).  
14 However, an analysis of Congress's intent in drafting the  
15 election of remedies provision of the FRSA<sup>1</sup> is complicated  
16 because the FRSA was originally a preemption statute. Rayner v.  
17 Smril, 873 F.2d 60, 66 n.1 (4th Cir. 1989).

18           Original § 20109(c) provided that the Railway Labor Act  
19 ("RLA") dispute resolution process was the exclusive and  
20 mandatory means by which railroad employees could adjudicate  
21 whistleblower retaliation claims.<sup>2</sup> See Id. at 65. The election  
22 of remedies provision of original § 20109(d) was interpreted to  
23 allow railroad employees either to bring claims for wrongful  
24 discharge for reasons other than whistleblower retaliation (for  
25 example, racial or disability discrimination), or to bring a FRSA

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26  
27 <sup>1</sup> The election of remedies provision was previously  
codified at 49 U.S.C. § 20109(d)(2006).

28 <sup>2</sup> The FRSA was first codified at 45 U.S.C. § 441.

1 action for retaliatory discharge through the remedy provided in §  
2 20109(c). See, e.g., Abbott v. BNSF Ry. Co., No. 07-2441, 2008  
3 WL 4330018, at \*5 (D. Kan. Sept. 16, 2008) (analyzing FRSA's  
4 legislative history and cases involving the FRSA). The reach of  
5 original § 20109(d) encompassed the common law of the states by  
6 prohibiting plaintiffs from recovering both under nonpreempted  
7 common-law theories of liability and under the FRSA whistleblower  
8 retaliation theory for the same wrongful act of the railroad.

9 In 2007, Congress modified the FRSA to add new  
10 Subsections (g) and (h). Implementing Recommendations of the  
11 9/11 Commission Act of 2007 ("9/11 Act") § 1521, Pub. L. No. 110-  
12 53. Subsections (g) and (h) provide:

13 (g) No preemption.-Nothing in this section preempts or  
14 diminishes any other safeguards against discrimination,  
15 demotion, discharge, suspension, threats, harassment,  
16 reprimand, retaliation, or any other manner of  
17 discrimination provided by Federal or State law.

18 (h) Rights retained by employee.-Nothing in this  
19 section shall be deemed to diminish the rights,  
20 privileges, or remedies of any employee under any  
21 Federal or State law or under any collective bargaining  
22 agreement. The rights and remedies in this section may  
23 not be waived by any agreement, policy, form, or  
24 condition of employment.

25 49 U.S.C.A. § 20109(g),(h) (2008). The 9/11 Act overturned  
26 Rayner to make clear that the FRSA did not preempt other remedies  
27 related to railroad safety or whistleblower retaliation. Since  
28 the 2007 amendments, courts have found that this applies to FRSA-  
related state common law claims. See, e.g., Ruiz v. Union  
Pacific R. Co., No. 09-797, 2009 WL 650621, at \*2 (C.D. Cal. Mar.  
10, 2009). Therefore, plaintiff's California common law claims  
in this case clearly constitute other "provisions of law"  
properly subject to § 20109(f).

1           Second, even though plaintiff withdrew his complaint  
2 with the Department of Labor on September 29, 2009, defendants  
3 contend that the filing that complaint alleging § 20109  
4 violations qualifies as "seek[ing] protection" under the FRSA  
5 sufficient to constitute an "election" which bars plaintiff's  
6 state law claims. This argument ignores the clear intent  
7 expressed in the 9/11 Act amendments to the FRSA that nothing in  
8 § 20109 "preempts or diminishes any other safeguards against  
9 discrimination . . . provided by Federal or State law" or "shall  
10 be deemed to diminish the rights . . . of any employee under any  
11 Federal or State law." 49 U.S.C.A. § 20109(g), (h). The 9/11  
12 Act Amendments clarify that railroad employees do not forfeit  
13 their rights under state law when they invoke the protections of  
14 the FRSA. Subsections (g) and (h) do not prevent a railroad  
15 employee who has filed a complaint with the Department of Labor  
16 from pursuing other available state remedies. In this case,  
17 plaintiff first sought to vindicate his rights under the FRSA  
18 through the administrative process described in § 20109(d), which  
19 went nowhere. He then turned to the protections of California  
20 common law in this action.

21           The Department of Labor case of Koger v. Norfolk So.  
22 Railway Co., Case No. 2008-FRS-00003 (U.S. Dep't of Labor May 29,  
23 2009), cited by defendants, is distinguishable. In that case,  
24 Koger received a final order from the Public Law Board under the  
25 RLA before OSHA responded to Koker's appeal of his FRSA suit.  
26 Koger, No. 2008-FRS-00003, at 1-2. Only after Koger received the  
27 order directing he be fully reinstated in his position did  
28 Norfolk Southern Railway Company move to dismiss his FRSA

1 complaint on the basis of the election of remedies provision of §  
2 20109. Id. at 1. The OSHA finding that Koger "sought relief"  
3 under the RLA and was thereby barred from asserting a FRSA claim,  
4 therefore, provides no support the broader argument that the mere  
5 filing of a complaint, absent any element of estoppel,  
6 constitutes an "election."

7 Defendants also rely on the findings articulated in  
8 Rodriguez v. Burlington Northern Santa Fe Railroad Co., Case No.  
9 9-3290-09-020 (U.S. Dep't of Labor June 19, 2009). Defendants'  
10 counsel has provided the court with a copy of the opinion (Docket  
11 No. 23) which this court will address. However, Rodriguez cuts  
12 against defendants' argument that simply filing a complaint with  
13 the Department of Labor constitutes an "election" which bars  
14 other relief. In Rodriguez, the plaintiff first filed a  
15 complaint with the Department of Labor under the FRSA and later  
16 appealed his dismissal to the Public Law Board. Id. at 1. The  
17 Department of Labor then dismissed Rodriguez's complaint because  
18 it found that the later arbitration proceedings constituted an  
19 "election" that barred further relief under § 20109. Under  
20 defendants' logic, however, Rodriguez's prior Department of Labor  
21 complaint should have constituted the "election" that would bar  
22 his later arbitration proceedings. That the Department of Labor  
23 made no such finding highlights the deficiencies in defendants'  
24 argument.

25 In effect, defendants contend that potential plaintiffs  
26 are bound at the outset of litigation to irrevocably choose not  
27 only what theory of liability to argue, but also which forum—the  
28 FRSA or state common law—in which to bring their claim if they

1 decide to argue a whistleblower retaliation theory. Defendants  
2 point to the "de novo review" provision of § 20109(d)(3) as  
3 further evidence that the election of remedies provision should  
4 be interpreted to prohibit simultaneous suits under § 20109 and  
5 California common law. Section § 20109(d)(3) states that:

6 (3) De novo review.-With respect to a complaint [filed  
7 under the FRSA with the Department of Labor], if the  
8 Secretary of Labor has not issued a final decision  
9 within 210 days after the filing of the complaint and  
10 if the delay is not due to the bad faith of the  
11 employee, the employee may bring an original action at  
12 law or equity for de novo review in the appropriate  
13 district court of the United States, which shall have  
14 jurisdiction over such an action without regard to the  
15 amount in controversy, and which action shall, at the  
16 request of either party to such action, be tried by the  
17 court with a jury.

18 49 U.S.C.A. § 20109(d)(3) (2008). While § 20109(d)(3) provides a  
19 "safety valve" to ensure that claims brought with the Department  
20 of Labor are processed within a reasonable time, it is not  
21 inconsistent with also allowing plaintiffs to pursue other forms  
22 of relief. Section 20109(d)(3) ensures that administrative delay  
23 does not result in the denial of justice. Contrary to  
24 defendants' assertions, this safeguard is independently  
25 meaningful and fully compatible with an interpretation of §  
26 20109(f) that allows plaintiffs to pursue multiple claims until  
27 an element of estoppel is reached.  
28

Finally, it seems grossly inequitable to find that,  
simply because he withdrew his complaint with the Department of  
Labor after over 290 days of inaction, plaintiff is now  
absolutely barred from bringing any claim under any other  
provision of law relating to his termination. This logical  
conclusion of defendants' interpretation of § 20109 highlights

1 its absurdity. Interpreting Subsection (f) this way would  
2 clearly diminish the rights of railroad workers, and is an  
3 interpretation which the statutory language of Subsections (f)-  
4 (h) does not compel.

5 2. § 20109 does not create a private cause of  
6 action

7 Defendants also argue that plaintiff's common law  
8 claims should fail because § 20109 does not create a private  
9 cause of action. An implied cause of action analysis is  
10 appropriate where a plaintiff is suing directly under a federal  
11 statute. See Cort v. Ash, 422 U.S. 66 (1975) (implied cause of  
12 action for federal criminal statute). Here, the plaintiff is  
13 suing defendants under California common law for wrongful  
14 termination in violation of public policy as expressed in part by  
15 the FRSA. He is not suing under § 20109. The cases that  
16 defendants cite to support their implied cause of action analysis  
17 address original federal question jurisdiction under a federal  
18 statute, and are inapplicable here. See Williams v. United  
19 Airlines, 500 F.3d 1019 (9th Cir. 2007); Love v. Delta Air Lines,  
20 310 F.3d 1347 (11th Cir. 2002).

21 While the defendants do not make a federal preemption  
22 claim regarding the FRSA, the current version of FRSA does not  
23 preempt state law claims for retaliatory discharge. See 49  
24 U.S.C. § 20109(f)-(h). Furthermore, the California Supreme Court  
25 has expressly rejected the argument that common law wrongful  
26 termination claims may not be "tethered" to federal statutes that  
27 lack a private cause of action. See Green v. Ralee Engineering  
28 Co., 19 Cal. 4th 66, 87-88 (1998) (discussing Gantt v. Sentry

1 Ins., 1 Cal. 4th 1083, 1095 (1992)). Therefore, the FRSA does  
2 not present a bar to plaintiff's first cause of action.

3 3. Railway Labor Act Preemption

4 Defendants also contend that the Railway Labor Act  
5 ("RLA"), 45 U.S.C. § 151 et seq. (2006), provides a mandatory  
6 dispute resolution process that preempts plaintiff's state common  
7 law claims. (Mem. Supp. Mot. Dismiss 7.) This argument fails  
8 because plaintiff's state common law claims can be adjudicated  
9 without interpreting the collective bargaining agreement ("CBA").

10 The National Railroad Adjustment Board and the private  
11 tribunals authorized by the RLA provide a "mandatory, exclusive,  
12 and comprehensive system for resolving [railroad] grievance  
13 disputes." Brotherhood of Locomotive Engineers v. Louisville  
14 N.R., 373 U.S. 33, 38 (1963). Only those rail disputes that can  
15 be classified as "major" or "minor" under the Act are preempted  
16 by the RLA. Defendants do not contend that plaintiff raises a  
17 "major" dispute. A "minor" dispute is one that involves  
18 interpreting or applying an existing CBA. See 45 U.S.C. § 153  
19 (2006); Hawaiian Airlines, 512 U.S. at 255. The Supreme Court  
20 has held, however, that "substantive protections provided by  
21 state law, independent of whatever labor agreement might govern,  
22 are not pre-empted under the RLA." Hawaiian Airlines, Inc. v.  
23 Norris, 512 U.S. 246 (1994) (discussing Missouri Pacific R. Co.  
24 v. Norwood, 283 U.S. 249 (1931)). To determine whether  
25 plaintiff's common law wrongful termination claim is independent,  
26 it must first be established that plaintiff raises a valid state  
27 law claim.

28 California recognizes an exception to the at-will

1 employment doctrine that allows employees fired in violation of  
2 fundamental state or federal public policy to recover tort  
3 damages from employers. Tameny v. Atlantic Richfield Co., 27  
4 Cal. 3d 167, 172 (1980). A policy may support a Tameny claim  
5 only if it is "(1) delineated in either constitutional or  
6 statutory provisions; (2) 'public' in the sense that it 'inures  
7 to the benefit of the public' rather than serving merely the  
8 interests of the individual; (3) well established at the time of  
9 the discharge; and (4) 'substantial' and 'fundamental.'" Stevenson v. Superior Court, 16 Cal. 4th 880, 901-02 (1997).

11 First, a plaintiff must show that "the important public  
12 interests they seek to protect are 'tethered to fundamental  
13 policies that are delineated in constitutional or statutory  
14 provisions'" or in administrative regulations. Green v. Ralee  
15 Engineering Co., 19 Cal. 4th 66, 71 (1998) (quoting Gantt v.  
16 Sentry Ins., 1 Cal. 4th 1083, 1095 (1992) (overruled in part by  
17 Green). The plaintiff in this case alleges wrongful termination  
18 in violation of public policies expressed in the California Labor  
19 Code and the FRSA. The FRSA prohibits railroad companies from  
20 retaliating against employees who refuse to violate federal laws  
21 regarding railway safety or who refuse to work in hazardous  
22 conditions. 49 U.S.C.A. § 20109(a)(2), (b)(1)(A)-(B) (2008).  
23 Sections 6400 to 6404 of the California Labor Code establish that  
24 employers have a duty to provide a healthy and safe workplace,  
25 and Section 6311 prohibits employers from retaliating against  
26 employees who refuse to work in unsafe conditions. Cal. Labor  
27 Code §§ 6400-04, 6311 (West 2008). While defendants assert that  
28 they are not subject to the workers' compensation provisions of

1 the Labor Code, they tellingly make no such assertions regarding  
2 these provisions cited by plaintiff and contained in the "Safety  
3 in Employment" division of the code. Therefore, this condition  
4 is met.

5           Second, the policy must be "public." Not all statutes  
6 or constitutional provisions will support a Tameny claim. Green,  
7 19 Cal. 4th at 75. Employees must allege that the statute "was  
8 designed to protect the public or advance some substantial public  
9 policy goal." Id. at 90. Statutes that merely "regulate conduct  
10 between private individuals" or "affect only the employer's or  
11 employee's interest, and not the general public's interest" do  
12 not reflect a fundamental public policy on which a Tameny claim  
13 can be based. Id. at 75 (quoting Foley v. Interactive Data  
14 Corp., 47 Cal. 3d 654, 669 (1988)). While the California Labor  
15 Code and the FRSA serve to regulate the terms of the employment  
16 relationship, they also reflect a public policy in favor of  
17 promoting workplace safety. In City of Palo Alto v. Service  
18 Employees International Union, 77 Cal. App. 4th 327, 336 (1999),  
19 the court addressed a safe workplace claim brought under  
20 California Labor Code § 6400 and other statutes, concluding they  
21 "express an explicit public policy requiring employers to take  
22 reasonable steps to provide a safe and secure workplace"  
23 including preventing workplace violence. See also Franklin v.  
24 Monadnock Co., 151 Cal. App. 4th 252, 259-60 (2007)(discussing  
25 City of Palo Alto, 77 Cal. App. 4th 327).

26           Third, the policy must be "well established." The FRSA  
27 was enacted by Congress in 1970. Federal Railroad Safety Act of  
28 1970, Pub. L. 91-458, 84 Stat. 971 (codified as amended at 49

1 U.S.C.A. § 20109 (2008)). In 1980, Congress amended the FRSA to  
2 add Section 212 (then codified at 45 U.S.C. § 441) to include  
3 language almost identical to that now present in § 20109(a) and  
4 (b). Federal Railroad Safety Authorization Act of 1980, Pub. L.  
5 96-423, 94 Stat. 1811. The language of § 20109(a) and (b)  
6 referenced by plaintiff to show a public policy against  
7 retaliation and for workplace safety has been the law of the land  
8 for almost thirty years, clearly putting defendants and other  
9 railroad companies on notice of their obligations under the  
10 statute.

11 Finally, the policy must be "substantial" and  
12 "fundamental." As a whole, the wrongful termination cases touch  
13 on a broad spectrum of potential public policies. In Hawaiian  
14 Airlines and Green, the fundamental public policy articulated by  
15 the regulations was airline safety, a concern which one court has  
16 noted "ranks somewhere in pecking order between motherhood and  
17 the American flag." Anderson v. Evergreen Intern. Airlines,  
18 Inc., 886 P.2d 1068, 1073 n.8 (Or. App. 1994). Other cases also  
19 clearly reflect important social policies. See Petermann v.  
20 Int'l Brotherhood of Teamsters, 174 Cal. App. 2d 184 (1959)  
21 (refusing to perjure); Tameny, 27 Cal. 3d 167 (refusing to  
22 violate antitrust laws). Still other claims more clearly fail to  
23 rise to the level of "fundamental public policy" needed for a  
24 successful Tameny claim. See Turner v. Anheuser-Busch, Inc., 7  
25 Cal. 4th 1238 (1994)(reporting violations of internal practices  
26 and CBAs).

27 California has recognized fundamental public policy  
28 related to workplace safety under Labor Code § 6400. City of

1 Palo Alto, 77 Cal. App. 4th 327. Other elements of the  
2 employment relationship have been found to constitute fundamental  
3 public policy. In D'sa v. Playhut, 85 Cal. App. 4th 927 (2000),  
4 the court found a fundamental public policy was violated when  
5 Playhut terminated D'sa for failing to sign a covenant not to  
6 compete in violation of the California Business and Professions  
7 Code. Plaintiff here alleges defendants fired him in violation  
8 of the FRSA for reporting unsafe work conditions. This court  
9 cannot say that the policies protecting the safety of rail  
10 workers expressed in § 20109(a)(2) and (b)(A)-(B) do not also  
11 rise to the level of "substantial" and "fundamental." Defendants  
12 point to Jennings v. Marrale, 8 Cal. 4th 121 (1994), which  
13 refused to find that public policy against age discrimination  
14 extended to small employers when those employers were not subject  
15 to the age discrimination provisions of the Fair Employment and  
16 Housing Act ("FEHA"). See also Stevenson v. Superior Court, 16  
17 Cal. 4th 880 (1997) (Tameny claim for age discrimination allowed  
18 where employer is covered under the FEHA). Unlike the employer  
19 in Jennings, defendants in this case are expressly bound by the  
20 workplace safety and employee protections provisions of the FRSA.

21

22 Therefore, plaintiff asserts a valid common law claim  
23 of wrongful termination in violation of public policy which the  
24 RLA may not preempt.

25 Defendants assert that plaintiff's common law claim is  
26 not independent of the CBA and is therefore preempted by the RLA.  
27 However, Bielicke v. Terminal R.R. Ass'n, 30 F.3d 877 (7th Cir.  
28 1994), is inapposite. In Bielicke, the source of the right

1 claimed by plaintiffs was the CBA itself; plaintiffs claimed that  
2 the company abused their right under the CBA to conduct  
3 investigations and "unfairly and vindictively investigated" them  
4 when they filed injury claims under the Federal Employers  
5 Liability Act ("FELA"), 45 U.S.C. § 51 (2006). Id. at 877. The  
6 plaintiffs' claims constituted a "minor" dispute subject to RLA  
7 preemption because the sole inquiry was whether the company  
8 abused its investigatory powers granted by the CBA. Id.  
9 Plaintiff in this case alleges that he was fired in violation  
10 California and federal public policies supporting workplace and  
11 railroad safety and unions. Neither of these claims involve  
12 rights or duties that arise solely from the CBA.

13 Defendants here allege that "whether [p]laintiff was  
14 properly disciplined and/or discharged under the CBA or whether  
15 (as he alleges) the threats of discipline and/or discharge were  
16 done to intimidate him for protesting work conditions, cannot be  
17 determined without interpreting the CBA." (Mem. Supp. Mot.  
18 Dismiss 10: 4-7.) Yet the Hawaiian Airlines Court made clear  
19 that "whether the employer's actions make out the element of  
20 discharge under [state] law" was a purely factual question not  
21 preempted by the RLA. Hawaiian Airlines, 512 U.S. at 266 (citing  
22 Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988)).  
23 Therefore, defendants' claim of RLA preemption fails.

#### 24 4. Federal Employers Liability Act Preemption

25 Neither does the FELA, 45 U.S.C. § 51 et seq. (2006),  
26 preempt plaintiff's first cause of action for wrongful  
27 termination in violation of public policy. The FELA provides a  
28 federal remedy for railroad workers injured as a result of their

1 employer's or fellow employees' negligence. 45 U.S.C. § 51.  
2 Courts interpreting the FELA generally recognize it as a broad  
3 remedial statute and "have adopted a standard of liberal  
4 construction in order to accomplish [Congress's] objects."  
5 Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 562  
6 (1987) (quoting Urie v. Thompson, 337 U.S. 163, 180 (1949))  
7 (internal quotation marks omitted, substitution in Buell). A  
8 primary purpose of the FELA was to eliminate the traditional  
9 defenses to tort liability that had prevented railroad workers  
10 from recovering for their work-related injuries. See Id. at 561.

11 Section 10 of the FELA makes it illegal for an employer  
12 to retaliate against employees who report information about a  
13 workplace injury to others. 45 U.S.C. § 60 (2006). It does not,  
14 however, authorize injured railroad employees to recover damages  
15 for the aggravation of their injuries resulting from their  
16 subsequent and allegedly wrongful discharge. Lewy v. So. Pac.  
17 Transp. Co., 799 F.2d 1281 (9th Cir. 1986). Plaintiff's claim of  
18 wrongful termination in this case does not stem from any alleged  
19 physical injury. The FELA therefore does not apply.

20 C. Intentional Infliction of Emotional Distress

21 1. Supervisory Liability for IIED Claims

22 The cases defendants cite in support of their argument  
23 that the individually-named defendants in this case cannot be  
24 held personally liable for alleged intentional infliction of  
25 emotional distress ("IIED") are inapposite.<sup>3</sup> Reno v. Baird, 18

26 \_\_\_\_\_  
27 <sup>3</sup> Defendants also argue that defendants Ribbing, Marin,  
28 Parker, and Magures are fraudulently joined as to plaintiff's  
first cause of action. Plaintiff's first cause of action,  
however, only complains against Union Pacific. (Compl. 1.).

1 Cal. 4th 640 (1996), involved an employment discrimination claim  
2 under the California Fair Employment and Housing Act ("FEHA").  
3 Likewise, Miklosy v. Regents of Univ. of California, 44 Cal. 4th  
4 876 (2008) involved a claim of wrongful discharge in violation of  
5 public policy expressed in the FEHA. Plaintiff in this case is  
6 suing the individual defendants only for the second cause of  
7 action of IIED under the common law, not for employment  
8 discrimination or wrongful termination. Miklosy also found that  
9 plaintiff's IIED claim preempted by the workers' compensation  
10 system. Yet defendants in this case assert that plaintiff's  
11 claims are not subject to the workers' compensation provisions of  
12 the California Labor Code. (Reply 6:19-21.) Furthermore,  
13 whether defendants conduct was "outrageous" to support a claim  
14 for IIED is a question of fact, and therefore inappropriate for  
15 resolution at the motion to dismiss stage.

16 Even taking into account the heightened pleading  
17 standard articulated in Ashcroft v. Iqbal, 129 S. Ct. 1937  
18 (2009), plaintiff here has alleged facts sufficient to survive a  
19 motion to dismiss. In this case, plaintiff argues that  
20 defendants "knew that Plaintiff would be susceptible to injuries  
21 through mental distress because of the wrongfully imposed  
22 economic hardship resulting from" their involvement in his  
23 wrongful termination. (Compl. 7:28-8:1.) Plaintiff alleges that  
24 his immediate supervisor disregarded his concerns about railroad  
25

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26 Plaintiff correctly outlines the actions of defendants Ribbing,  
27 Marin, Parker, and Magures because they are the agents through  
28 which Union Pacific allegedly committed the tort of wrongful  
discharge. See Miklosy v. Regents of Univ. of California, 44  
Cal. 4th 876, 900 (2008).

1 safety violations, and alleges that this incident was the basis  
2 for his termination at Union Pacific. (Compl.) At the time of  
3 plaintiff's alleged wrongful termination, Ribbing, Marin, and  
4 Magures were managers at the Roseville facility.<sup>4</sup> Marin formally  
5 charged plaintiff with violating Union Pacific's work rules,  
6 Ribbing conducted an investigation as the hearing officer, and  
7 Magures drafted a letter signed by Ribbing notifying plaintiff  
8 that his employment with Union Pacific was being terminated.  
9 (Compl. ¶ 13.) Nothing more is required of plaintiff.

10                   2.    Federal Employers Liability Act

11                   The FEELA is broad enough to cover negligent infliction  
12 of emotional distress claims where the plaintiff suffered either  
13 (1) a physical injury; or (2) a physical manifestation of an  
14 emotional injury sustained while in the "zone of danger."  
15 Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 555 (1994). Other  
16 courts have likewise determined that a claim of intentional  
17 infliction of emotional distress exists under the FEELA where it  
18 is accompanied by physical contact or threat of physical contact.  
19 Higgins v. Metro-North R.R. Co., 143 F. Supp. 2d 353, 361  
20 (S.D.N.Y. 2001). Plaintiff's second cause of action for  
21 intentional infliction of emotional distress does not spring from  
22 any physical injury or contact or threat of injury. Instead,  
23 plaintiff's emotional distress was allegedly caused by  
24 retaliation for raising safety concerns at the workplace and  
25

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26                   <sup>4</sup>       Upon careful review of plaintiff's complaint the court  
27 can find no mention of, let alone any allegation of any  
28 wrongdoing against, defendant John Parker, who is named only in  
the caption. The complaint will therefore be dismissed as  
against him

1 refusing to work in unsafe conditions. Several courts have found  
2 that FELA does not reach purely emotional harms absent contact or  
3 threat of contact. See, e.g., Monarch v. So. Pac. Transp. Co.,  
4 70 Cal. App. 4th 1197, 1210 (1999) ("Thus is his case  
5 distinguishable from an intentional tort action for merely  
6 emotional harm, which is excluded from the coverage of the FELA,  
7 and was for that reason found not preempted by the federal  
8 statute in Pikop v. Burlington Northern R. Co." (citing Pikop,  
9 390 N.W.2d 743, 753-54 (Minn. 1986)). Therefore, the FELA does  
10 not bar plaintiff's emotional distress claim.

11 D. Attorney's Fees

12 Pursuant to the Erie principles, Erie Railroad Co. v.  
13 Tompkins, 304 U.S. 64, (1938), "federal courts sitting in  
14 diversity apply state substantive law and federal procedural  
15 law." In re Larry's Apartment, L.L.C., 249 F.3d 832, 837 (9th  
16 Cir. 2001) (quotation marks omitted). For Erie purposes,  
17 attorney's fees under state law are substantive when the  
18 availability of "those fees [is] connected to the substance of  
19 the case." Id. at 838 (quotation marks omitted). In "action[s]  
20 involving state law claims, [federal courts] apply the law of the  
21 forum state to determine whether a party is entitled to  
22 attorneys' fees, unless it conflicts with a valid federal statute  
23 or procedural rule." MRO Commc'ns, Inc. v. AT & T Co., 197 F.3d  
24 1276, 1282 (9th Cir. 1999).

25 Under California law, attorney's fees are allowable as  
26 costs under section 1032 of the California Code of Civil  
27 Procedure when they are authorized by either "Contract,"  
28 "Statute," or "Law." Cal. Code Civ. Proc. § 1033.5 (West 2008);

1 Santisas v. Goodin, 17 Cal. 4th 599, 606 (1998). "Thus,  
2 recoverable litigation costs do include attorney fees, but only  
3 when the party entitled to costs has a legal basis, independent  
4 of the cost statutes and grounded in an agreement, statute, or  
5 other law, upon which to claim recovery of attorney fees."  
6 Santisas, 17 Cal. 4th at 606.

7 Defendants move to strike plaintiff's claim for  
8 attorney's fees, arguing that plaintiff points to no statutes  
9 which would support the award under state law. However,  
10 plaintiff's request is supported by California Code of Civil  
11 Procedure § 1021.5 which provides:

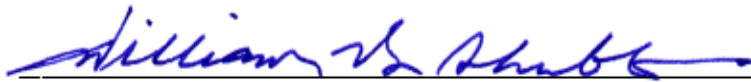
12 Upon motion, a court may award attorney's fees to a  
13 successful party against one or more opposing parties  
14 in any action which has resulted in the enforcement of  
15 an important right affecting the public interest if:  
16 (a) a significant benefit, whether pecuniary or non  
17 pecuniary, has been conferred on the general public or  
18 a large class of persons  
19 (b) the necessity and financial burden of private  
20 enforcement, or of enforcement by one public entity  
21 against another public entity, are such as to make the  
22 award appropriate, and  
23 (c) such fees should not in the interest of justice be  
24 paid out of recovery if any.

25 Cal. Code. Civ. Proc. § 1021.5 (West 2008). California has  
26 identified four conjunctive requirements for applying the  
27 exception: (1) a plaintiff must be a successful party in an  
28 action resulting in the enforcement of an important right  
affecting the public interest; (2) a significant benefit, whether  
pecuniary or nonpecuniary, must have been conferred on the  
general public or a broad class of persons, (3) the necessity and  
financial burden of private enforcement must transcend the  
litigant's personal interest in the controversy, and (4) such

1 fees should not in the interest of justice be paid out of the  
2 recovery. Vasquez v. State, 45 Cal. 4th 243, 250-51 (2008). A  
3 trial court has considerable discretion in deciding whether fees  
4 are appropriate. Id. It remains to be seen whether § 1021.5  
5 attorney fees can be proved, so this claim cannot be eliminated  
6 as a matter of law.

7 IT IS THEREFORE ORDERED that plaintiff's complaint is  
8 hereby dismissed as against defendant John Parker, and that  
9 defendant's motion to dismiss be, and the same hereby is, DENIED  
10 in all other respects.

11 DATED: October 16, 2009

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13 WILLIAM B. SHUBB  
14 UNITED STATES DISTRICT JUDGE  
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