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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C. FAHEEM R. HARDEMAN,

No. C 04-03360 SI

Plaintiff,

**ORDER GRANTING IN PART
DEFENDANT’S MOTION FOR
RECONSIDERATION**

v.

AMTRAK/CALTRAIN RAILROAD,

Defendant.

Defendant Amtrak/Caltrain Railroad filed a motion for leave to file motion for reconsideration of the Court’s order granting in part defendant’s motion for summary judgment. On December 18, 2006, the Court granted in part defendant’s motion for leave to file, with respect to the issue of whether Joe Deely knew plaintiff’s race at the time he allegedly participated in the decision to terminate plaintiff. The Court ordered plaintiff to file a response to Section III(A)(2) of defendant’s [proposed] motion for reconsideration, which addresses this issue. Having considered plaintiff’s response, and for good cause shown, the Court hereby GRANTS IN PART defendant’s motion for reconsideration.

The Court previously found that evidence that Mr. Deely was a decision-maker, and evidence that he had made racist statements in the past, was sufficient evidence of pretext to defeat summary judgment on plaintiff’s discriminatory termination claim.¹ If, as defendant argues, Mr. Deely had no knowledge of plaintiff’s race at the time he allegedly made the termination decision regarding plaintiff,

¹Plaintiff’s case involves two instances of alleged disparate treatment: (1) disparate discipline in response to a 2002 “split switch” incident; and (2) disparate discipline – termination – in response to a 2003 derailment. Mr. Deely was only involved in the 2003 incident. This motion will therefore have no impact on the Court’s prior finding that plaintiff has raised a triable issue of fact with regard to plaintiff’s claim under 42 U.S.C. § 1981 for disparate discipline arising out of the 2002 incident. See July 31, 2006 Order at 3:6-16.

1 then his past statements would be irrelevant. *See DeHorney v. Bank of Amer.*, 879 F.2d 459, 468 (9th
2 Cir. 1989). Thus in order for the Court's prior ruling to stand, as issued, plaintiff must present some
3 evidence that Mr. Deely knew plaintiff's race.

4 In response to the Court's Order to Show Cause, plaintiff does not present evidence sufficient
5 to raise a triable issue as to whether Mr. Deely knew of plaintiff's race. Plaintiff presents only three
6 pieces of evidence related to Mr. Deely's knowledge of plaintiff's race: (1) that Mr. Deely signed
7 plaintiff's "Return From Discipline" form following a fifteen day suspension in January 2003; (2) that
8 Mr. Deely signed plaintiff's suspension of service form following the April 2003 derailment; and (3)
9 that plaintiff filed an internal Amtrak EEO complaint in 1993, and that Mr. Deely is informed every time
10 a discrimination complaint has been filed.

11 Plaintiff fails to explain how the first two pieces of evidence suggest that Mr. Deely knew of
12 plaintiff's race. Neither of the forms signed by Mr. Deely indicate plaintiff's race. *See Hardeman Decl.*,
13 Exs. B & C. The Court therefore does not understand how Mr. Deely's signature on these forms implies
14 that he knew of plaintiff's race.

15 The Court is similarly unpersuaded by the third piece of evidence. Even if Mr. Deely was
16 informed of plaintiff's 1993 internal EEO complaint, nothing in the complaint indicates plaintiff's race.
17 *See Hardeman Decl.*, Ex. D. The EEO complaint form allows the complainant to mark a check-box
18 indicating the "type of discrimination alleged." *See id.* Among the choices are a check-box for "Race,"
19 and a box for "Other (Specify)." On plaintiff's EEO complaint, the "Race" box is not checked; the
20 "Other (Specify)" box is. *See id.* In plaintiff's narrative description of his complaint, nowhere does he
21 suggest his race, or that race was involved in the situation giving rise to his complaint. It appears that
22 the EEO complaint involved a dispute over seniority, and nothing more. Thus, even if Mr. Deely had
23 read plaintiff's internal EEO complaint in 1993, doing so would not have given him knowledge of
24 plaintiff's race.

25 Plaintiff has thus failed to establish a triable issue as to whether Mr. Deely knew of plaintiff's
26 race at the time he allegedly participated in the decision to fire plaintiff. Absent such evidence, Mr.
27 Deely's alleged racist statements are wholly irrelevant to this case. *See DeHorney v. Bank of Amer.*, 879
28 F.2d 459, 468 (9th Cir. 1989). The Court relied on Mr. Deely's alleged racist statements in determining

1 that plaintiff had raised an issue as to the reliability of defendant's proffered non-discriminatory reason
2 for terminating plaintiff. The Court therefore must now determine whether, absent evidence of Mr.
3 Deely's statements, plaintiff provided sufficient evidence to raise a triable issue of pretext.

4 To review, a plaintiff may make a *prima facie* case of discrimination through direct or
5 circumstantial evidence. See *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1148 (9th Cir. 1997).
6 A plaintiff may also create an inference of unlawful discrimination by meeting the four requirements
7 outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Those requirements are
8 that: (1) he is a member of a protected class, (2) he was qualified for his position, (3) he experienced
9 an adverse employment action and (4) similarly situated non-class members were treated more
10 favorably. *Id.* at 802. Once a plaintiff meets this burden of production, the employer must offer a
11 legitimate, nondiscriminatory reason for the adverse employment decision. See *Reeves v. Sanderson*
12 *Plumbing Product, Inc.*, 530 U.S. 133 (2000). The plaintiff may rebut the employer's legitimate,
13 nondiscriminatory reason by showing that the proffered reason is pretextual. See *Collings v. Longview*
14 *Fiber Co.*, 63 F.3d 828, 834 (9th Cir. 1995).

15 In this circuit, to show pretext on summary judgment, plaintiff must offer "substantial evidence
16 that the employer's proffered reasons were not reliable, . . . or direct evidence of discrimination."
17 *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1219 (9th Cir. 1998); see also *Chuang v. University of*
18 *California Davis, Bd. of Trs.*, 225 F.3d 1115, 1127 (9th Cir. 2000) ("[A] plaintiff can prove pretext in
19 two ways: (1) indirectly, by showing that the employer's proffered explanation is 'unworthy of
20 credence' because it is internally inconsistent or otherwise not believable, or (2) directly, by showing
21 that unlawful discrimination more likely motivated the employer.") (citation omitted). The Ninth Circuit
22 has held that "there will always be a question for the factfinder once a plaintiff establishes a *prima facie*
23 case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a
24 question cannot be resolved on summary judgment." *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th
25 Cir. 1993). "Once a *prima facie* case is established either by the introduction of actual evidence or
26 reliance on the *McDonnell Douglas* presumption, summary judgment for the defendant will ordinarily
27 not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the
28 'elusive factual question of intentional discrimination.'" *Lindsey v. SLTLA., LLC*, 447 F.3d 1138, 1148

1 (9th Cir. 2006) (quoting *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1985), amended by 784
2 F.2d 1407 (1986) (citation omitted)). The Ninth Circuit has also noted, however, that

3 in deciding whether an issue of fact has been created about the credibility of the
4 employer's nondiscriminatory reasons, the district court must look at the evidence
5 supporting the *prima facie* case, as well as the other evidence offered by the plaintiff to
6 rebut the employer's offered reasons. And, in those cases where the *prima facie* case
7 consists of no more than the minimum necessary to create a presumption of
8 discrimination . . . , plaintiff has failed to raise a triable issue of fact.

9 *Wallis v. J.R. Simplot, Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (quoted with approval in *Lindsey*, 447 F.3d
10 at 1148.

11 Here, as an initial matter, it is necessary to clarify precisely what treatment or actions by
12 defendant should be analyzed for signs of disparity. Plaintiff repeatedly compares his termination with
13 the short suspension waivers received by other employees for allegedly similar infractions. In doing so,
14 plaintiff ignores the fact that his termination occurred only after he refused a suspension waiver, and
15 proceeded through the full disciplinary hearing process. For purposes of establishing disparate impact,
16 the Court must compare either the suspension waivers offered plaintiff to the suspension waivers offered
17 similarly situated employees, or plaintiff's termination to the treatment of other employees who went
18 through the entire disciplinary hearing process.

19 As compared with employees who engage in the entire disciplinary hearing process, plaintiff has
20 presented no evidence of disparate treatment. Plaintiff presents no evidence of any employee who had
21 a disciplinary hearing for similar conduct and was treated more favorably than plaintiff. His treatment
22 by the disciplinary panel therefore cannot serve as the basis for his disparate treatment claim. Absent
23 the evidence regarding Mr. Deely, plaintiff has thus failed to establish a *prima facie* case of
24 discriminatory *termination*.

25 Nonetheless, with respect to the 2003 incident, plaintiff's disparate treatment claim may survive,
26 based solely on the suspension waiver he was originally offered. To do so, plaintiff must establish that
27 the suspension waiver he was offered after the 2003 derailment was more harsh than the discipline given
28 to others for similar infractions, and that the discrepancy was motivated by race. The Court finds that
plaintiff has presented sufficient evidence to establish a *prima facie* case of disparate treatment in
relation to the 2003 derailment. In response to the derailment, defendant offered plaintiff a 15 day

1 suspension waiver. Plaintiff has presented evidence that a non-African-American employee responsible
2 for a derailment, engineer Martin Jaeger, was not disciplined at all. *See* Gallo Decl. ¶ 26; Campbell
3 Decl. ¶ 6.

4 The burden thus shifts to defendant to present a legitimate, non-discriminatory reason for
5 offering plaintiff a 15 day suspension waiver, and not disciplining Martin Jaeger at all. First, defendant
6 provides evidence that the person in charge of determining the length of plaintiff's suspension waiver,
7 Charlie Miller, considered plaintiff's extensive disciplinary record in doing so. *See* Miller Decl. ¶ 10.
8 Furthermore, defendants present evidence that the 15 day suspension waiver offer fell in the middle of
9 the range of suspension waivers offered for derailments between November of 1999 and October of
10 2003. *See* Shim Decl., Ex. B ("Chart of Derailment Discipline"). At least one of the individuals who
11 was offered a longer suspension waiver, Ryan Peterson, is caucasian. *See id.*, Price Decl., Ex. F, Exs.
12 10 & 12. With this evidence defendant sufficiently explains why plaintiff was offered a fifteen day
13 suspension waiver.

14 Defendant fails, however, to present evidence explaining why Martin Jaeger was not disciplined
15 at all for a similar incident. Though Jaeger's derailment was due to a faulty switch, *see* Gallo Decl. ¶
16 26; Campbell Decl. ¶ 6, there is evidence that plaintiff's derailment was also due, at least in part, to
17 faulty equipment. *See* Price Decl., Ex. E at 56:17-23, 57:24-25. Defendant's failure to explain the
18 discrepancy between the punishment arising out of the two incidents casts sufficient doubt on
19 defendant's proffered explanation for plaintiff's punishment to defeat summary judgment.

20 Furthermore, plaintiff presents evidence of non-derailment rules violations for which caucasian
21 conductors and engineers were not punished. For example, Robert Castiglioni was not disciplined at
22 all for running a train through a station without stopping. *See* Hardeman Decl. ¶ 14. Similarly, Mike
23 Cecconi was neither investigated nor disciplined for seriously damaging an engine while executing a
24 "drop" at an excessively high speed. *See* Gallo Decl. ¶¶ 18-23. Mike Cecconi also was not punished
25 for splitting a switch in February 2003. *See id.* ¶¶ 7-16. Mike Shanahan was not disciplined for
26 allowing a non-licensed individual to operate an engine. *See* Price Decl., Ex. D at 133:10-20. Though
27 these incidents did not involve a derailment, there is some evidence that they were of comparable
28 seriousness, and should have warranted discipline. Failure to discipline the caucasian individuals

1 involved in these incidents therefore also casts doubt on the credibility of defendant's legitimate non-
2 discriminatory justifications.

3 For the foregoing reasons, the Court GRANTS IN PART defendant's motion for
4 reconsideration. Plaintiff has failed to raise a triable issue as to whether his termination was the result
5 of disparate treatment. Plaintiff's disparate treatment claim survives, however, with respect to the
6 suspension waivers he was offered in response to the 2002 "split switch" incident and to the 2003
7 derailment. (Docket No. 210)

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9 **IT IS SO ORDERED.**

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11 Dated: February 12 , 2007

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13 SUSAN ILLSTON
14 United States District Judge
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