

FACTS

Plaintiff, the EEOC, is the agency of the United states of America charged with the administration, interpretation and enforcement of Title VII. Defendant, Union Pacific, is a Delaware corporation doing business in the State of Texas and the City of El Paso. Plaintiff-Intervenor, DeMarco Howard, is a resident and citizen of Texas.

Mr. Howard submitted an application for employment with Union Pacific in El Paso, Texas, on May 4, 1998. On April 1998 Union Pacific began to perform criminal background checks on applicants for employment. When Union Pacific conducted the background check on Mr. Howard, the report revealed that Mr. Howard had been convicted of felony theft in August 1993. According to Union Pacific, this would have precluded his employment. However, although background checks were conducted on all new hires, Union Pacific did not act on that information. Mr. Howard was hired on August 3, 1998.

Subsequent to that, Jolene Gabel Jefferies, who was hired as Union Pacific's Director of Sourcing in July of 1998, began looking at the completed criminal background checks for new hires. She learned that there were a number of background checks that revealed convictions which would have precluded employment with Union Pacific. Ms. Jefferies prepared a written Background Investigation Program which provided, among other things, that potential employees with felony convictions on their records within the seven year period preceding their application for employment would not be offered employment by Union Pacific. According to Union Pacific, the Background Investigation Program reflected the Company's existing, although unwritten policy. Ms. Jefferies also began investigating the possibility of implementing the Program with respect to those employees like Mr. Howard who should not

have been offered employment based on the felony convictions revealed by their criminal background checks. Ms. Jefferies forwarded a list of names of employees, which included Mr. Howard, to Union Pacific's Labor Relations group ("LRG") recommending termination of their employment. The LRG, the group responsible for administering the collective agreements in effect between Union Pacific and its various Unions, limited the process to employees in the operating crafts in all states, such as Mr. Howard, whose criminal background checks revealed felony convictions within the preceding seven year period prior to the date of their application for employment, and who had not disclosed the convictions on their applications.

According to Union Pacific, the Company may refuse to hire new applicants without implicating Union rights, however, once they are hired into Union-represented positions they acquire rights under the various collective bargaining agreements. During their first sixty days of employment, they can be terminated at will. Once that initial period has passed, Union Pacific must proceed in accordance with provisions of applicable collective bargaining agreements in order to terminate the employment of Union-represented employees. Under the applicable provisions, Union Pacific must first charge the employee with conduct that violates the Company's General Operating Rules and, thereafter, conduct an Investigation, a hearing where the employee and the Company each have the opportunity to present testimony from witnesses and documentary evidence. The local Superintendent thereafter reviews the transcript of the Investigation and makes the decision of whether to terminate the employment based on the evidence presented. If the decision is to terminate the employment, the terminated employee and/or the Union may challenge the decision with the Public Law Board, which is responsible for overseeing the arbitration process provided for under the collective bargaining agreements. An

arbitrator ultimately decides whether to uphold the decision to terminate or reinstate the employee and whether to award back pay.

Mr. Howard was charged by the Labor Relations group with falsifying their employment applications, a violation of General Operating Rule 1.6, and was given a notice to appear at the Investigation. As a result of Mr. Howard's Investigation, Union Pacific terminated his employment. Mr. Howard challenged the outcome with the Public Law Board, which decided that Mr. Howard should be reinstated. The Board, however, decided to that Mr. Howard would not receive back pay.

In addition to challenging the outcome with Union Pacific's Public Law Board, Mr. Howard, an African-American, filed a Charge of Discrimination with the EEOC, alleging that the decision to terminate him was based on his race. The EEOC found reasonable cause to believe the allegation was true and attempted, unsuccessfully, to resolve the cause through the informal conciliation process. Thereafter, on September 19, 2002, the EEOC filed the instant cause of action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3), and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, asserting that Defendant discriminated against him on the basis of race. Plaintiff seeks back pay with prejudgment interest for Mr. Howard, in addition to pecuniary, nonpecuniary, and punitive damages. Plaintiff-Intervenor DeMarco Howard filed a "Complaint in Intervention" on March 7, 2003. The instant Motion for Summary Judgment was filed on July 21, 2003.

AUTHORITIES

Summary judgment should be granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). The party that moves for summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). “If the moving party fails to meet this burden, the motion must be denied, regardless of the nonmovant’s response.” *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). If the movant does meet this burden, however, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. The party opposing a motion supported by evidence cannot discharge his burden by alleging mere legal conclusions. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). Instead, the party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id.* “If the non-movant fails to meet this burden, then summary judgment is appropriate.” *Tubacex*, 45 F.3d at 954. When making a determination under Rule 56, factual questions and inferences are viewed in a light most favorable to the nonmovant. *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1272 (5th Cir. 1994).

DISCUSSION

A. DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

I. Evidentiary Matters

As an initial matter, the Court addresses EEOC’s challenges to the documentary evidence Union Pacific submits in support of its Motion for Summary Judgment. Specifically, the

EEOC challenges the affidavit of Jolene Gabel-Jefferies on the basis that it is unsigned and not notarized. The EEOC also asserts challenges to the “Criminal History Faxed Response,” “Background Investigation,” “Final Disposition-Applicant Result,” the Public Law Board decisions, in addition to a three-part chart and a copy of an email message. The EEOC argues that these various documents should not be considered at the summary judgment stage because they lack authenticating testimony. The Court disagrees.

In a “Supplement to Motion for Summary Judgment,” filed with the Court on August 5, 2003, Union Pacific attached Jolene Gabel-Jefferies’s Affidavit, signed and notarized. The Affidavit was filed well in advance of the August 20, 2003, deadline for filing dispositive motions in this case. Thus, Ms. Jefferies’s Affidavit is proper evidence to consider in determining the instant Motion. With regards to the Public Law Board Decisions, the Court agrees with Union Pacific in that they are like court decisions which do not necessitate authenticating testimony to be admissible. Finally, EEOC’s challenges to the remaining documents must also fail. As Union Pacific points out, these documents were authenticated during the deposition taken by the EEOC of William L. Chandler. The Court is of the opinion, therefore, that these documents are all proper evidence for the Court to consider in determining merits of Union Pacific’s Motion for Summary Judgment.

II. Plaintiff’s Title VII Race Discrimination Claim

In employment discrimination cases, it is imperative that a nonmovant plaintiff “present evidence – not just conjecture and speculation” that the defendant discriminated against the plaintiff on the basis of a protected trait. *See Grimes v. Tex. Dep’t of Mental Health*, 102 F.3d 137, 140 (5th Cir. 1996). The focus is on whether a genuine issue exists as to whether the defendant intentionally discriminated against the plaintiff. *Id.* at 139. A plaintiff can prove such

discriminatory animus by direct evidence or by an indirect or inferential method of proof. *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995). Absent direct proof, the plaintiff bears an initial burden of establishing a *prima facie* case of discrimination by a preponderance of the evidence to raise an inference of intentional discrimination. *See McDonnell Douglas*, 411 U.S. at 792, 802, 93 S. Ct. at 1824; *Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 (5th Cir. 1999).

The *prima facie* case, once established, raises a presumption of discrimination, which the defendant must rebut by articulating a legitimate, nondiscriminatory reason for its action. *See Meinecke v. H & R Block*, 66 F.3d 77, 83 (5th Cir. 1995) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1981)). Thus, a defendant must merely set forth, through admissible evidence, "reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 113 S. Ct. 2742, L. Ed. 2d 40 (1993) (emphasis in original). The employer need only articulate a legitimate, nondiscriminatory reason for its actions, regardless of that reason's ultimate persuasiveness. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir. 1993). If the defendant articulates such a reason, the inference of discrimination drops out. *See Bauer*, 169 F.3d at 966. The ultimate burden of persuasion remains with the plaintiff, who then must prove by a preponderance of the evidence that the reasons asserted by the defendant are pretext for discrimination. *Burdine*, 450 U.S. at 253, 101 S. Ct. at 1093. This may be accomplished either directly, by showing that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the asserted reason is unworthy of credence. *Id.* at 256, 101 S. Ct. at

1095. In attempting to satisfy this burden, the plaintiff must be afforded the “opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” *Id.* The Fifth Circuit has held that a plaintiff must produce substantial evidence of pretext. *See Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 402 (5th Cir. 2001). An employee’s “subjective belief of discrimination” alone is not sufficient to warrant judicial relief. *Bauer*, 169 F.3d at 967 (quoting *E.E.O.C. v. La, Office of Cmty. Servs.*, 47 F.3d 1438, 1443-44, 1448 (5th Cir. 1995)) (citation omitted).

a. *Prima Facie* Case

In order to establish a *prima facie* case there must be a showing that Mr. Howard: (1) is a member of a protected class; (2) was qualified for his position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class. *Okoye v. Univ. of Tex. Hous. Health Sci. Ctr.*, 245 F.3d 507, 512 (5th Cir. 2001) (citing to *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 (5th Cir. 1999)).

Apparently, Union Pacific concedes that Plaintiff has met the initial burden of establishing a *prima facie* case of discrimination. The Court agrees. The Parties do not seem to dispute that Mr. Howard, an African-American, is a member of a protected class, that he was qualified for the position of switchman, and that the discharge from employment constituted an adverse employment action. Because Union Pacific was forced to reinstate Mr. Howard to his previous position after the Public Law Board issued the decision to reinstate him without pay, for purposes of the instant Motion, the Court will assume that Plaintiff has also met the fourth prong of the *prima facie* case.

b. Legitimate Non-Discriminatory Reason / Pretext for Discrimination

Having assumed that the EEOC has met its initial burden, the burden of production now shifts to Union Pacific to articulate a legitimate, nondiscriminatory reason for terminating Mr. Howard's employment. Union Pacific's stated reason is that the Company began conducting criminal background checks in April 1998, shortly before Mr. Howard applied for employment, and that applicants with felony convictions on their records within the seven year period preceding the date of their application would be precluded from receiving an offer of employment. Union Pacific decided to terminate the employment of those employees, such as Mr. Howard, whose background checks revealed a felony conviction within the preceding seven year period and who had not disclosed the convictions on their applications, but were nonetheless offered employment because Union Pacific was not initially acting on the information received from the checks. Union Pacific argues that it is entitled to summary judgment because the EEOC cannot rebut its proffered, legitimate, non-discriminatory reason for taking the challenged action, and hence, that the EEOC cannot sustain its ultimate burden of proof.

The Court must now determine whether the EEOC has raised genuine issues of material fact as to the pretextual nature of Union Pacific's proffered non-discriminatory reason, and if so, summary judgment in favor of Union Pacific must be denied. The EEOC contends that there exist genuine issues of material fact regarding whether Union Pacific in fact had a policy requiring discharge of all employees whose background investigation revealed them to have a felony conviction in the seven year period preceding their application for employment and who did not disclose that information in their application.

Plaintiff puts forth various reasons in support of this contention. One of the reasons proffered is that Union Pacific's alleged policy does not coincide with the stated goals for the policy. Jolene Jefferies, Union Pacific's Director of Sourcing, states that the driving force behind the background investigation process is to ensure the safety of its employees by minimizing workplace violence. Presumably, employees who have been convicted of felonies are more prone to engage in workplace violence than employees who have not been convicted of felonies. It follows, then, that employees who were wrongly labeled would not be more likely than other employees to create workplace violence issues, and thus, Union Pacific would not gain anything by discharging them. Yet, Union Pacific's policy required that these employees also be terminated because the background checks, without concern as to their accuracy, revealed them to have felony convictions in the preceding seven years. The EEOC argues that this raises a genuine issue of material fact as to whether Union Pacific had such a policy since it does not coincide with the stated goals of the policy.

Union Pacific's stated reason for discharging Mr. Howard is also brought into question when we analyze how some applicants whose background reports reveal felony convictions are not discharged. According to Ms. Jefferies, if the felony conviction is not a "crime of concern" as defined by Union Pacific, those applications are subjected to further review to determine whether an offer of employment will be revoked. Presumably, some of these employees who have felony convictions, but whose felonies are not "crimes of concern," might survive further scrutiny. Yet, Mr. Howard, who was not convicted of a felony, was terminated because, apparently, the policy required Union Pacific to discharge all employees whose criminal background checks *revealed* them to have felony convictions, irrespective of whether they were accurate or not, and who failed to disclose those convictions in their applications. The EEOC

argues, and the Court agrees, that these questions raise genuine issues of material fact as to the pretextual nature of Union Pacific's stated reason for taking the challenged action.

An additional fact that supports the EEOC's contention that Union Pacific's stated reason for terminating Mr. Howard's employment is a pretext for discrimination is that Mr. Howard was not given the opportunity that others had to correct mistaken background investigation results. According to Union Pacific, if a decision has been made to not hire an applicant because their background check revealed a felony conviction, a letter is sent informing the applicant of the decision to not tender an offer of employment. The letter also informs them that they have 14 days to contact Union Pacific and inform the Company that they will attempt to prove the information to be incorrect. After that, they are given additional time to prove their case. However, Mr. Howard was pulled out of his job when he received the letter charging him with a violation of the General Operating Rules and summoning him to appear at the Investigation hearing. According to the EEOC, Mr. Howard made repeated attempts to inform Union Pacific that the criminal background check was incorrect but such efforts proved fruitless. Mr. Graham, the person who represented him during the Investigation process, pointed to Superintendent Daniel Shudak, who was in charge of making the decision of whether to terminate his employment, that the evidence presented at the Investigation showed that Mr. Howard was not convicted of a felony. According to Mr. Howard, Mr. Shudak responded that he did not care. It was not until Mr. Howard challenged the decision to terminate him through the arbitration process that Union Pacific was forced to reinstate him. The EEOC argues that this treatment of Mr. Howard raises genuine issues of material fact as to Union Pacific's stated reason for discharging him. The Court agrees.

Having carefully reviewed the arguments of the Parties and the record in this case, the Court concludes that Plaintiff's evidence is sufficient to raise genuine issues of material fact as

to the pretextual nature of the stated reason given by Union Pacific for terminating Mr. Howard's employment.

III. Plaintiff's Section 1981a Claim

Union Pacific avers that Plaintiff's 42 U.S.C. § 1981 claim is subject to a two-year statute of limitations and, thus, that it is time-barred. The Court agrees.

"Under Texas law, §§ 1981 claims are subject to a two-year statute of limitations period." *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000) (citing to *Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 713 n. 22. (5th Cir. 1994)). Plaintiff's § 1981 racial discrimination in employment claim began accruing in August of 1999, when Mr. Howard was discharged. Plaintiff was required to bring suit on his claim by August of 2001. This suit was filed on September 19, 2002. Thus, Plaintiff's claim is patently untimely.

Plaintiff-Intervenor counters that § 1981 claims are subject to a four-year statute of limitations, pursuant to 28 U.S.C. § 1658, and thus, that the claim was timely filed. Unfortunately for Plaintiff, this Court is bound by Fifth Circuit precedent which holds that under Texas law, racial discrimination in employment claims pursuant to 42 U.S.C. § 1981 are subject to a two-year statute of limitations. *Byers*, 209 F.3d at 424. That holding was recently reaffirmed in *Jones v. Alcoa, Inc.*, 339 F.3d 359, 364 (5th Cir. 2003) (holding that "where a Section 1981 claim is brought in Texas, the two-year statute of limitations for personal injury actions in Texas controls."). Accordingly, the Court is of the opinion that Plaintiff's § 1981 claim is time-barred and should be dismissed.

IV. Attorney Fees

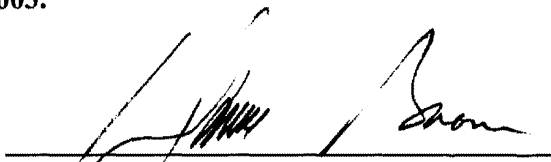
Mr. Howard, in his "Complaint in Intervention," requests for reasonable attorney fees from Defendant Union Pacific. Because Union Pacific's Motion for Summary Judgment is being denied with regards to Plaintiff's Title VII claims, the Court is of the opinion that a request for attorney fees is premature at this time.

CONCLUSION

Because there are genuine issues of material fact with regards to the pretextual nature of Union Pacific's stated reason for discharging Mr. Howard, the Court is of the opinion that Defendants' Motion for Summary Judgment should be denied as to Plaintiff's Title VII claims. However, with regards to Plaintiff's racial discrimination in employment claim, filed pursuant to 42 U.S.C. § 1981, the Court is of the opinion that it should be dismissed as being barred by the applicable two-year statute of limitations. The Court is further of the opinion that Plaintiff-Intervenor's request for attorney fees is premature and will not be considered at this point.

Accordingly, **IT IS HEREBY ORDERED** that the "Motion for Summary Judgment," filed on July 21, 2003, by Defendant Union Pacific Railroad Company is **GRANTED IN PART** and **DENIED IN PART** as set forth herein.

SIGNED this 2nd day of **October, 2003**.



THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE