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

No. C 05-5434 CW

JOHN EARL CAMPBELL,
Plaintiff,

v.

NATIONAL PASSENGER RAILROAD
CORPORATION,
Defendant.

ORDER DENYING
DEFENDANT'S MOTION FOR
JUDGMENT AS A MATTER
OF LAW OR A NEW TRIAL,
AND GRANTING IN PART
PLAINTIFF'S MOTION FOR
PRE-JUDGMENT INTEREST
AND INJUNCTIVE RELIEF

_____ /

United States District Court
For the Northern District of California

On March 3, 2009, a jury returned a verdict in favor of Plaintiff John Campbell on his claims for race discrimination against Defendant National Passenger Railroad Corporation (Amtrak). Amtrak now moves for judgment as a matter of law or, in the alternative, a new trial. Plaintiff opposes this motion and moves for an award of back pay; reinstatement or, in the alternative, front pay; an injunction prohibiting Amtrak from retaliating against him or further discriminating against him; and pre-judgment interest. The matter was heard on June 11, 2009. Having considered oral argument and all of the materials submitted by the parties, the Court denies Amtrak's motion and grants Plaintiff's motion in part.

BACKGROUND

1
2 Plaintiff was employed by Amtrak between 1998 and 2004,
3 serving as a yard conductor at all relevant times. In May, 2004,
4 he applied for a position as an engineer trainee. In July of that
5 year, Amtrak decided not to select him for one of the open
6 positions. Plaintiff, who is African-American, asserts that
7 Amtrak's denial of his application was motivated by discriminatory
8 intent. He notes that he received the highest score of any
9 applicant, yet three white applicants were selected for the
10 positions instead of him. Although Amtrak claims that it did not
11 select Plaintiff because of his poor safety record, Plaintiff
12 asserts that this explanation is a pretext for discrimination. In
13 support of this assertion, Plaintiff notes that his safety record
14 was as good or better than that of other applicants who were
15 selected to become engineer trainees.

16 In September, 2004, Plaintiff was disciplined for disabling
17 the brakes on a locomotive and leaving it unsecured in the course
18 of coupling it to other railroad cars, which caused the locomotive
19 to roll slowly away on its own. As a consequence, Plaintiff's
20 employment was terminated. Plaintiff claims that his termination
21 was motivated by discriminatory intent. He does not deny
22 committing the rule violation, but asserts that other employees who
23 committed rule violations of similar severity were not punished as
24 harshly.

25 Plaintiff brought this lawsuit under 42 U.S.C. § 1981,
26 challenging the denial of his application for promotion and his
27 subsequent termination as discriminatory on the basis of race.
28 After trial, the jury rendered a verdict for Plaintiff on both of

1 his claims. The jury awarded Plaintiff \$297,716 in back pay,
2 \$259,200 in front pay and \$120,000 in non-economic damages.

3 DISCUSSION

4 I. Amtrak's Motion

5 A. Legal Standard

6 1. Judgment as a Matter of Law

7 A motion for judgment as a matter of law after the verdict
8 renews the moving party's prior Rule 50(a) motion for judgment as a
9 matter of law at the close of all the evidence. Fed. R. Civ.
10 P. 50(b). Judgment as a matter of law after the verdict may be
11 granted only when the evidence and its inferences, construed in the
12 light most favorable to the non-moving party, permits only one
13 reasonable conclusion as to the verdict. Where there is sufficient
14 conflicting evidence, or if reasonable minds could differ over the
15 verdict, judgment as a matter of law after the verdict is improper.
16 See, e.g., Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 775 (9th
17 Cir. 1990); Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176,
18 181 (9th Cir. 1989).

19 2. New Trial

20 A new trial may be granted if the verdict is not supported by
21 the evidence. There is no easily articulated formula for ruling on
22 such motions. Perhaps the best that can be said is that the motion
23 should be granted "[i]f, having given full respect to the jury's
24 findings, the judge on the entire evidence is left with the
25 definite and firm conviction that a mistake has been committed."
26 Landes Constr. Co., Inc. v. Royal Bank of Canada, 833 F.2d 1365,
27 1371-72 (9th Cir. 1987) (quoting 11 Wright & Miller, Fed. Prac. &
28 Proc. § 2806, at 48-49).

1 The Ninth Circuit has found that the existence of substantial
2 evidence in support of the verdict does not prevent the court from
3 granting a new trial if the verdict is against the clear weight of
4 the evidence. Landes, 833 F.2d at 1371. "The judge can weigh the
5 evidence and assess the credibility of witnesses, and need not view
6 the evidence from the perspective most favorable to the prevailing
7 party." Id. Therefore, the standard for evaluating the
8 sufficiency of the evidence is less stringent than that governing
9 Rule 50(b) motions for judgment as a matter of law after the
10 verdict.

11 B. Evidence of Discriminatory Intent

12 Amtrak argues that judgment as a matter of law or, in the
13 alternative, a new trial is warranted because there was
14 insufficient evidence to permit the jury to conclude that the
15 adverse actions against Plaintiff were motivated by discriminatory
16 animus. Specifically, Amtrak argues that two types of evidence
17 were not probative of discriminatory intent: evidence of racial
18 slurs by the Amtrak regional manager, Joseph Deely, and others that
19 pre-dated the events at issue in this case; and evidence of the
20 treatment of other Amtrak employees who were not African-American.
21 Defendant argues that, absent this evidence, the evidence of
22 discriminatory intent was insufficient. In the alternative, Amtrak
23 argues that this evidence was improperly admitted and more probably
24 than not resulted in the verdict for Plaintiff, and thus a new
25 trial is warranted.

26 1. Evidence of Racial Slurs

27 Amtrak asserts that evidence of racial slurs by Mr. Deely and
28 others between 1991 and 1999 was not probative of discriminatory

1 motive due to the lack of a direct connection between the comments
2 and the actions challenged in this lawsuit. On this basis, Amtrak
3 argues both that the evidence was inadmissible and that, even if it
4 was admissible, the evidence was not sufficient to permit the jury
5 to infer that the challenged employment actions were
6 discriminatory.

7 In particular, Amtrak objects to the testimony of Mary
8 Fontaine, who worked for Amtrak until 1992 and was a union
9 representative for Amtrak conductors until 1994. Ms. Fontaine
10 testified that the use of racial slurs was common at the Oakland
11 yard, and that she heard Mr. Deely refer to another employee using
12 a common racial slur sometime in 1991. She also testified that Mr.
13 Deely's interactions with African-American employees were "a little
14 harsher or stricter in nature" than those with white employees.

15 Amtrak also objects to the testimony of Mary Gotthardt, who,
16 according to Amtrak's recollection,¹ testified that she heard Mr.
17 Deely say in 1995 that he "hates hiring" African-Americans, using a
18 common racial slur, because they leave soon after they are trained.
19 Ms. Gotthardt also testified that, in 1995, another Amtrak manager
20 stated in Mr. Deely's presence that he was going to "give something
21 to those ni--er bitches" to have typed and Mr. Deely did not
22 reprimand him.

23 Finally, Amtrak objects to the testimony of Mark Schulthies, a
24 manager who worked under Mr. Deely in 1998 and 1999. Mr.
25 Schulthies testified that Mr. Deely used racial slurs "many times."

26
27 ¹Neither party has submitted a transcript of Ms. Gotthardt's
28 testimony. Amtrak's contention is based on its counsel's
recollection of the trial testimony.

1 On one occasion, Mr. Deely told Mr. Schulthies that he chose not to
2 attend Amtrak's 1998 Christmas party because he did not want to
3 associate with African-American employees on his own time after
4 having to "deal with" them all day. According to Mr. Schulthies,
5 Mr. Deely used a common racial slur to refer to African-American
6 employees during the conversation and expressed a distaste for the
7 type of music and food at the party because it was associated with
8 African-Americans. Mr. Schulthies also testified that Mr. Deely
9 told him numerous times to keep African-American employees "in
10 their place" and, on more than one occasion, that Plaintiff "didn't
11 know his place" and needed to be "put down."

12 Under Ninth Circuit law, "[i]t is clear that an employer's
13 conduct tending to demonstrate hostility towards a certain group is
14 both relevant and admissible where the employer's general hostility
15 towards that group is the true reason behind firing an employee who
16 is a member of that group." Heyne v. Caruso, 69 F.3d 1475, 1479
17 (9th Cir. 1995); see also U.S. Postal Serv. Bd. of Governors v.
18 Aikens, 460 U.S. 711, 713-14 n.2 (1983) (evidence of a decision-
19 maker's generalized derogatory remarks about a particular group is
20 relevant and admissible to prove race discrimination);
21 Dominquez-Curry v. Nev. Transp. Dep't, 424 F.3d 1027, 1038 (9th
22 Cir. 2005) ("Where a decisionmaker makes a discriminatory remark
23 against a member of the plaintiff's class, a reasonable factfinder
24 may conclude that discriminatory animus played a role in the
25 challenged decision."); Warren v. City of Carlsbad, 58 F.3d 439,
26 443 (9th Cir. 1995) (holding that a supervisor's general derogatory
27 comment about Hispanics supported an inference of discriminatory
28 motive). Notwithstanding this general principle, there does not

1 appear to be any Ninth Circuit law addressing whether conduct
2 probative of racial hostility is relevant to a discrimination claim
3 when the conduct occurred a number of years before the challenged
4 employment actions, as is the case here.

5 Amtrak cites two Ninth Circuit employment discrimination cases
6 in which the court found that certain remarks by supervisors were
7 insufficient to create an issue of fact adequate to withstand
8 summary judgment. The first, Merrick v. Farmers Ins. Group, 892
9 F.2d 1434 (9th Cir. 1990), does not address the timing of the
10 remarks, but rather deals with their nature. In Merrick, the
11 plaintiff alleged that he had been passed over for a promotion
12 because of his age. The supervisor responsible for the promotion
13 decision had remarked that the employee who was promoted was "a
14 bright, intelligent, knowledgeable young man." Id. at 1438. The
15 court found that this statement was a "stray remark" that,
16 "[w]ithout more," was insufficient to create a triable issue of
17 fact on the issue of discriminatory animus. Id. at 1438-39.

18 It is not clear whether Amtrak argues that Mr. Deely's
19 comments were "stray remarks" that are by their very nature
20 incapable of establishing discriminatory animus, but it should go
21 without saying that the "young man" statement is not comparable to
22 the remarks Mr. Deely is alleged to have made. Three witnesses
23 testified that Mr. Deely used what is probably the most offensive
24 word in the English language to refer to African-Americans. His
25 remarks are much more probative of bias against African-Americans
26 than the remark in Merrick was probative of bias against older
27 individuals. In addition, Mr. Deely is alleged to have made
28 multiple remarks over the course of several years, and thus they

1 cannot be characterized as "stray."

2 The second case cited by Amtrak in which the Ninth Circuit
3 affirmed summary judgment despite evidence of biased remarks is
4 Nesbit v. Pepsico, Inc., 994 F.2d 703 (9th Cir. 1993). In Nesbit,
5 which also involved a claim of age discrimination, the court
6 considered whether the following evidence was sufficient to give
7 rise to an inference of discrimination: 1) statistical evidence
8 that some older workers were laid off while some younger workers
9 were retained and that employees hired after the layoffs were
10 generally younger than those who had been terminated; 2) a comment
11 by the plaintiff's direct superior that "we don't necessarily like
12 grey hair"; and 3) an article in which the defendant's Senior Vice
13 President of Personnel was quoted as saying, "We don't want
14 unpromotable fifty-year olds around." The court found that the
15 statistical evidence did not tend to demonstrate that the layoffs
16 were marked by any pattern of discrimination. Turning to the
17 comments, the court found that the "grey hair" remark, which it
18 characterized as "more than the 'stray remark' involved in
19 Merrick," was "at best weak circumstantial evidence of
20 discriminatory animus" toward the plaintiff because it was "uttered
21 in an ambivalent manner and was not tied directly to [the
22 plaintiff's] termination." Id. at 705. Similarly, the court found
23 that the "unpromotable fifty-year olds" comment was "very general
24 and did not relate in any way, directly or indirectly," to the
25 plaintiff's termination. Id. The court concluded that there was
26 insufficient evidence to create a triable issue of fact on the
27 issue of discriminatory motive.

28 Amtrak is correct that Mr. Deely's remarks were not directly

1 connected to Plaintiff's termination. Nonetheless, they are not
2 "ambivalent" or ambiguous, and are probative of a general hostility
3 to a protected class in a way that the remarks in Nesbit are not.
4 Amtrak has cited no case holding that similar comments that evince
5 racial bias are per se inadmissible or not probative of
6 discriminatory motive simply because they are unrelated to the
7 employment decision in question. Indeed, requiring racist remarks
8 to relate directly to the employment decision in order to be
9 admissible would eviscerate the broad principle that an employer's
10 conduct tending to demonstrate general hostility towards a certain
11 group is admissible as evidence that the decision was
12 discriminatory. In addition, the question before the Nesbit court
13 was whether the two remarks, standing alone, were sufficient to
14 defeat summary judgment. Nesbit did not hold that the remarks were
15 inadmissible. Here, there was evidence of multiple remarks that
16 are probative of Mr. Deely's racial hostility, as well as other
17 evidence of discriminatory intent, as discussed below. The Court
18 need not determine whether one or two comments, without more, would
19 permit an inference that the actions taken against Plaintiff were
20 discriminatory.

21 Amtrak also contrasts two discrimination cases in which the
22 Ninth Circuit reversed the district court's grant of summary
23 judgment in the defendant's favor. The first, Cordova v. State
24 Farm Ins. Cos., 124 F.3d 1145 (9th Cir. 1997), held that the
25 plaintiff had established a triable issue of fact on her claim for
26 discriminatory failure to promote. Included in the evidence that
27 supported the plaintiff's position was a statement by the
28 individual in charge of hiring decisions that another employee was

1 a "dumb Mexican." Even though the remark referred to an employee
2 other than plaintiff and was made after the hiring decision at
3 issue, the court found that it was "direct evidence of . . .
4 discriminatory animus." Id. at 1149. Amtrak notes that, in
5 support of its conclusion, the Cordova court stated that "the
6 timing of [the] alleged remarks is not so far removed from the
7 contested hiring decision so as to render them completely unrelated
8 to that decision." Id. However, this statement was not central to
9 the court's discussion and is dictum. In addition, the court's
10 statement does not compel the conclusion that any racist remark
11 that is removed in time from the hiring decision is necessarily
12 inadmissible or not probative of discriminatory animus.

13 The second case in which the Ninth Circuit reversed the
14 district court's grant of summary judgment is Lam v. University of
15 Hawaii, 40 F.3d 1551 (9th Cir. 1994). The Lam court considered the
16 Seventh Circuit's statement in Hunter v. Allis-Chalmers Corp., 797
17 F.2d 1417, 1423 (7th Cir. 1986), that "acts 'remote in time or
18 place' may be excluded under Fed. R. Evid. 403." Lam, 40 F.3d at
19 1562. The Ninth Circuit stated that, even if Hunter were "read
20 broadly," it would not be helpful to the defendants because the
21 plaintiff "testified not to remote acts but to a consistent pattern
22 of behavior on the part of Professor A. -- a member of the relevant
23 department -- with one manifestation of his alleged discriminatory
24 attitude having occurred only a few months before the directorship
25 search." Id. at 1563. The court did not adopt a rule that would
26 absolutely bar evidence of racist conduct occurring a number of
27 years before the challenged employment actions, and thus Lam does
28 not indicate that the evidence of Mr. Deely's past comments was

1 inadmissible.

2 Although Amtrak has cited some out-of-circuit cases in support
3 of its position that temporally removed racist statements are not
4 admissible to show discriminatory intent, the Court is not bound to
5 follow these cases. The Court rejects the argument that, simply
6 because Mr. Deely's alleged comments were made a number of years
7 before the employment decisions at issue, they should have been
8 excluded at trial. Although more recent statements may have been
9 more probative of discriminatory animus, the jury was entitled to
10 evaluate the persuasiveness of the evidence for itself. Amtrak's
11 counsel highlighted the age of the statements, and the jury could
12 very well have come to the conclusion that Mr. Deely had changed
13 his opinion of African-Americans between 1999 and 2004. But the
14 probative value of the evidence was substantial, particularly given
15 the nature of the statements at issue. And, even though the
16 statements may have been "inflammatory," to use Amtrak's word,
17 racist statements are by their very nature inflammatory. This does
18 not provide a basis to exclude them as evidence.

19 The Court concludes that evidence of the racist remarks
20 between 1991 and 1999 was probative of discriminatory intent, was
21 admissible and was sufficient, combined with the other evidence, to
22 permit the jury to conclude that the actions taken against
23 Plaintiff were motivated by discriminatory animus.

24 2. Evidence of Treatment of Similarly Situated
25 Employees

26 It is undisputed that evidence of disparate treatment of
27 employees who are of a different race than the plaintiff but who
28 are otherwise similarly situated may be introduced as evidence that

1 an adverse employment action was discriminatory. See, e.g.,
2 Vasquez v. County of Los Angeles, 349 F.3d 634, 641 (9th Cir.
3 2003). At trial, Plaintiff offered evidence that employees with
4 similar disciplinary backgrounds who were not African-American were
5 not terminated for committing rule violations similar to the
6 violation for which Plaintiff was terminated. Amtrak argues that
7 this evidence should not have been admitted and, in any event, was
8 not probative of discriminatory motive because the other employees
9 were not situated similarly to Plaintiff in two respects: they did
10 not engage in conduct of comparable seriousness, and they were not
11 disciplined by the same supervisors. This argument is directed
12 exclusively at Plaintiff's termination claim; the relevant portions
13 of Amtrak's briefs do not discuss employees who were promoted in
14 lieu of Plaintiff, let alone attempt to show that any such
15 employees were not situated similarly to Plaintiff.

16 Amtrak notes that, in order for two employees to be considered
17 similarly situated, they must "have similar jobs and display
18 similar conduct." Id. at 641. Amtrak asserts that the violation
19 of the safety rules for which Plaintiff was terminated was more
20 serious than those of other employees because only Plaintiff
21 "knowingly and intentionally violated a safety rule by failing to
22 secure a locomotive prior to coupling," and thus the discipline of
23 the other employees is not probative of discriminatory intent. The
24 "intentional violation" distinction, however, appears to be the
25 product of post hoc rationalization, as Amtrak has not pointed to
26 any formal policy that mandates different consequences for
27 intentional rule violations and what it characterizes as simply
28 poor judgment calls. Nor would it make sense to terminate one

1 employee for engaging in an intentional rule violation the
2 consequence of which was relatively minor, while merely
3 reprimanding someone who made a poor judgment call that resulted in
4 more serious consequences. As for the seriousness of the safety
5 consequences of the rule violations, while none of the other
6 employees committed exactly the same rule violation as Plaintiff,
7 the other employees engaged in rule violations that caused
8 collisions and derailments. While the safety risks of collisions
9 and derailments are not precisely the same as the risk of a
10 locomotive rolling down the tracks on its own, they are
11 sufficiently similar to enable the jury to determine whether the
12 fact that the other employees were not terminated suggested a
13 discriminatory intent.

14 As for Amtrak's argument that the employees who were used as
15 comparators were not similarly situated because they were
16 disciplined by other supervisors, Amtrak has pointed to no Ninth
17 Circuit case that provides that only employees with the same
18 supervisor are similarly situated. Moreover, Plaintiff's theory of
19 the case is that Mr. Deely had the last word on all significant
20 disciplinary decisions, regardless of the supervisor who signed the
21 disciplinary report. In addition, the fact that some of the
22 disciplinary actions were imposed on other employees between June,
23 1999 and November, 2002, during which time Mr. Deely was not
24 employed by Amtrak, does not mean that the employees were not
25 similarly situated. Plaintiff used the example of these employees,
26 all of whom were disciplined after Mr. Deely returned as well, to
27 demonstrate that Amtrak's purported "three strikes" rule was a
28 pretext for discrimination because other employees were not

1 terminated on their third or higher strike when Mr. Deely was in
2 charge.²

3 In short, there may be cases where it is so clear that another
4 employee is not situated similarly to the plaintiff that it is
5 appropriate to decide the issue as a matter of law. In those
6 cases, it would be appropriate to exclude evidence of the
7 comparator employee's treatment as a means of showing
8 discriminatory intent. Absent such clarity, however, the issue of
9 is one of fact, which is appropriately left to the jury. Bowden v.
10 Potter, 308 F. Supp. 2d 1108, 1117 (N.D. Cal. 2004) ("The Court
11 first notes that not only must all inferences be drawn in Mr.
12 Bowden's favor but also that the question of similarly situated is
13 generally an issue of fact.") (citing Mandell v. County of Suffolk,
14 316 F.3d 368, 379 (2d Cir. 2003); Graham v. Long Island R.R., 230
15 F.3d 34, 39 (2d Cir. 2000)); Gifford v. Atchison, Topeka and Santa
16 Fe Ry. Co., 685 F.2d 1149, 1156 (9th Cir. 1982) ("We conclude that
17 Gifford offered sufficient evidence to raise an issue of fact. The
18 district court erred in deciding as a matter of law that Gifford
19 and the two male employees who were not fired were not similarly
20 situated."). Here, there was a triable issue of fact as to whether
21 the other employees were situated similarly to Plaintiff. Amtrak
22 argued to the jury that Plaintiff's infractions were more serious
23 than those of the other employees and were otherwise
24 distinguishable, but the jury apparently rejected this explanation
25 of Plaintiff's treatment, as it was entitled to do. The issue of

26
27 ²Similarly, the fact that Mr. Deely did not work for Amtrak
28 when Plaintiff received his first two disciplinary actions is
irrelevant. Those actions are not being challenged in this
lawsuit.

1 similar situation provides no basis for overturning the jury's
2 verdict or ordering a new trial.

3 C. Weight of the Evidence

4 Amtrak argues that, in the alternative to granting judgment as
5 a matter of law or ordering a new trial for the reasons described
6 above, the Court should order a new trial because the jury's
7 verdict was against the clear weight of the evidence.

8 First, Amtrak argues that there is "no persuasive evidence"
9 that Mr. Deely or Mr. Shelton knew Plaintiff. Plaintiff, however,
10 points out that there is evidence that Mr. Shelton was on the panel
11 that interviewed him in connection with a previous application for
12 engineer trainee. There is also evidence that Mr. Shelton met with
13 another employee to discuss Plaintiff, which implies that Mr.
14 Shelton knew who Plaintiff was. As for Mr. Deely, there is
15 evidence that he was introduced to Plaintiff when he was introduced
16 to the members of Plaintiff's yard crew. There is also evidence
17 that Plaintiff left a memorable telephone message for Mr. Deely on
18 one occasion and that, on another occasion, Mr. Deely told Mr.
19 Schulthies to keep Plaintiff "in his place." There was thus
20 sufficient evidence at trial for the jury to conclude that Mr.
21 Deely and Mr. Shelton knew who Plaintiff was and were aware of his
22 race. Amtrak argues that Plaintiff's testimony should not be
23 credited because, as discussed further below, he lied at his
24 deposition about whether he had disengaged the locomotive's brakes.
25 Nonetheless, the Court is not the finder of fact, and cannot in its
26 rulings simply "ignore every material word that [Plaintiff] said,"
27 as Amtrak requests. Def.'s Mot. at 15.

28 Amtrak also argues that there was "no persuasive evidence"

1 that Mr. Deely participated in the decision to terminate Plaintiff.
2 Although Mr. Deely denied having any involvement in the decision,
3 there was evidence that he was required to be involved in any
4 personnel decision of this type. The jury was entitled to discount
5 the testimony that Mr. Deely happened not to be involved on this
6 particular occasion.

7 Amtrak repeats its argument that the evidence of racial slurs
8 and similarly situated employees, discussed above, does not support
9 the inference that the challenged employment decisions were
10 discriminatory. As discussed, this evidence was relevant and
11 supports the jury's verdict. Amtrak further argues that much of
12 the testimony about racial slurs was weak. In particular, Amtrak
13 argues that, even though Mr. Schulthies testified that Mr. Deely
14 told him to keep African-American employees "in their place," there
15 is no evidence that Mr. Deely knew which employees were African-
16 American. As explained above, the jury was entitled to conclude
17 that Mr. Deely knew Plaintiff and, by extension, knew that
18 Plaintiff was African-American. Amtrak's argument concerning the
19 race of other employees is not clear; Mr. Deely's instruction to
20 keep African-Americans in their place is probative of racial bias,
21 regardless of whether he knew the race of any given employee at any
22 given point in time. Amtrak also argues that Ms. Gotthardt's
23 testimony about Mr. Deely's racial slurs is weak because Mr.
24 Deely's office, where the alleged exchanges that Ms. Gotthardt
25 identified took place, was not in the building that she described.
26 The jury was presented with this evidence and was entitled to draw
27 its own conclusions about a discrepancy it could have viewed as
28 minor.

1 Amtrak also casts doubt on Mr. Schulthies' testimony about Mr.
2 Deely's expressed reasons for not attending the Christmas party.
3 At trial, Mr. Schulthies testified that, when discussing these
4 reasons, Mr. Deely referred to African-American employees using an
5 offensive racial slur, whereas at his deposition, Mr. Schulthies
6 testified that Mr. Deely had used the phrase "those people" to
7 refer to African-American employees. When confronted with this
8 inconsistency, Mr. Schulthies explained that at his deposition, he
9 had refrained from using the slur because he was uncomfortable
10 saying the word, and that his omission of this detail at the
11 deposition was "not a material lie." Amtrak takes the last portion
12 of this explanation to mean that Mr. Schulthies admitted lying
13 about Mr. Deely's use of the slur, but did not consider the lie to
14 be material. This interpretation is not supportable. And, in any
15 event, the jury was presented with evidence of the inconsistency
16 and was free to draw its own conclusion about Mr. Schulthies'
17 credibility.

18 Amtrak further argues that, even if race was a motivating
19 factor for its termination of Plaintiff, the jury was required to
20 conclude that Amtrak would have made the same decision even if race
21 had not been a motivating factor. Amtrak bases this argument on
22 the fact that the officer at Plaintiff's disciplinary hearing
23 sustained the charges against Plaintiff and that Mr. Shelton
24 testified that he would make the same decision today. The jury was
25 not required to credit Mr. Shelton's testimony, and there was
26 evidence that other employees with similar disciplinary histories
27 and who had committed similarly serious rule violations were not
28 terminated.

1 In sum, the jury's verdict is not clearly contrary to the
2 clear weight of the evidence so as to warrant a new trial.

3 II. Plaintiff's Motion

4 A. Back Pay

5 Although the jury awarded Plaintiff \$297,716 in back pay, the
6 parties now agree that back pay is an equitable remedy for the
7 Court to decide. See Lutz v. Glendale Union High Sch., 403 F.3d
8 1061, 1068-69 (9th Cir. 2005). Amtrak argues that Plaintiff should
9 not be awarded back pay because he lied at his deposition,
10 testifying that he had not disabled the brakes on the locomotive.
11 At trial, Plaintiff admitted that he had disabled the brakes and
12 that he had perjured himself at his deposition. As Amtrak notes,
13 it is within a court's discretion to deny equitable remedies on the
14 basis that the plaintiff has lied under oath. See NLRB v.
15 Magnusen, 523 F.2d 643, 645-46 (9th Cir. 1975).

16 Although the Court does not condone Plaintiff's conduct, it
17 will not deny equitable relief because of that conduct. Plaintiff
18 admitted at trial that he had committed the rule violation that led
19 to his termination, and it was this testimony that the jury
20 considered when it reached its decision that the termination was
21 discriminatory. Plaintiff was also forthcoming at trial about his
22 past falsehood.

23 The Court will therefore order back pay to compensate
24 Plaintiff for his termination. The Court will defer to the jury's
25 calculation of back pay.

26 B. Reinstatement or Front Pay

27 Plaintiff requests that the Court order that Amtrak reinstate
28 him to the position of engineer trainee or, in the alternative,

1 award him front pay. The Ninth Circuit has held that
2 "reinstatement, when it is feasible, is the preferred remedy in a
3 discrimination suit." Gotthardt v. National R.R. Passenger Corp.,
4 191 F.3d 1148, 1156 (9th Cir. 1999) (internal quotation marks
5 omitted). However, "awards of front pay are appropriate when it is
6 impossible to reinstate the plaintiff." Id. (quoting Thorne v.
7 City of El Segundo, 802 F.2d 1131, 1137 (9th Cir. 1986)).

8 Because reinstatement is feasible here, the Court will order
9 Plaintiff reinstated as an Amtrak employee. However, although the
10 jury concluded that Plaintiff would have been selected as an
11 engineer trainee if it had not been for his race, the Court cannot
12 overlook that, subsequent to being denied the promotion, Plaintiff
13 left a locomotive unsecured during a coupling procedure in clear
14 violation of safety rules. Plaintiff now acknowledges committing
15 the violation, notwithstanding his deposition testimony to the
16 contrary. This rule violation was not on Plaintiff's disciplinary
17 history when he was considered for the engineer trainee position.
18 If it had been, Amtrak may have been justified in denying his
19 application. And while the jury found that the violation did not
20 warrant terminating Plaintiff, the violation was nonetheless
21 serious.

22 Considering the potentially disastrous consequences that could
23 result from a mistake on the part of a locomotive engineer, the
24 Court cannot in good conscience order Plaintiff promoted to an
25 engineer trainee given the rule violation he committed subsequent
26 to being denied the promotion in the first instance. Accordingly,
27 having considered the equities, the Court concludes that, while it
28 is appropriate to reinstate Plaintiff as a yard conductor, it is

1 not appropriate to order Amtrak to promote him to the position of
2 engineer trainee.

3 In order to place Plaintiff in a position similar to that in
4 which he would be had he not been terminated, Amtrak must afford
5 him seniority rights as if he had been an Amtrak employee for the
6 period of time between his termination and the present date.
7 Because the Court is ordering Plaintiff reinstated, his request for
8 an award of front-pay is denied as moot.

9 C. Other Injunctive Relief

10 Plaintiff seeks an injunction prohibiting Amtrak from
11 discriminating against him in the future or retaliating against him
12 for bringing this lawsuit. "Generally, a person subjected to
13 employment discrimination is entitled to an injunction against
14 future discrimination, unless the employer proves it is unlikely to
15 repeat the practice." EEOC v. Goodyear Aerospace Corp., 813 F.2d
16 1539, 1544 (9th Cir. 1987) (citations omitted). Far from offering
17 assurances that it will not engage in discrimination or retaliation
18 in the future, Amtrak continues to deny that it discriminated
19 against Mr. Campbell to begin with. Accordingly, an injunction is
20 warranted.

21 D. Pre-judgment Interest

22 Although Plaintiff has not cited any Ninth Circuit case
23 holding that pre-judgment interest should be awarded on back pay in
24 § 1981 cases, the Ninth Circuit has held that pre-judgment interest
25 should be awarded in cases brought under the Fair Labor Standards
26 Act:

27 The reason for awarding pre-judgment interest is to make
28 whole those employees who have been deprived of wages
unlawfully. An award of pre-judgment interest also

1 serves to discourage unlawful employment practices by
2 denying to employers the interest-free use of money that
3 is being delayed by administrative and judicial process.
4 For these reasons, we conclude that it is ordinarily an
abuse of discretion not to include pre-judgment interest
in back-pay awards under the FLSA. Affected employees,
therefore, are entitled to pre-judgment interest.

5 Ford v. Alfaro, 785 F.2d 835, 842 (9th Cir. 1986). The Ninth
6 Circuit's rationale applies equally to back pay awarded under
7 § 1981. Accordingly, the Court will order Amtrak to pay pre-
8 judgment interest.

9 "Generally, the interest rate prescribed for post-judgment
10 interest under 28 U.S.C. § 1961 is appropriate for fixing the rate
11 of pre-judgment interest" Blankenship v. Liberty Life
12 Assurance Co. of Boston, 486 F.3d 620, 628 (9th Cir. 2007). This
13 statute provides that interest is calculated "at a rate equal to
14 the weekly average 1-year constant maturity Treasury yield, as
15 published by the Board of Governors of the Federal Reserve System,
16 for the calendar week preceding. [sic] the date of the judgment."
17 In Nelson v. EG & G Energy Measurements Group, Inc., 37 F.3d 1384,
18 1391 (9th Cir. 1994), the court stated:

19 EG & G argues that the pre-judgment interest rate should
20 have been calculated at the 52-week Treasury bill rate³
21 as of the time of judgment, which was 3.51 percent. This
22 does not correspond with the approach taken in Western
23 Pacific Fisheries[, Inc. v. S.S. President Grant], 730
24 F.2d 1280, 1289 (9th Cir. 1984)]. In that case,
insurance underwriters had paid out funds for which they
sought reimbursement. The interest rate utilized for the
pre-judgment interest was the average 52-week Treasury
bill rate operative immediately prior to the date of
payment by the underwriters. This makes good sense

25
26 ³At the time Nelson was decided, 28 U.S.C. § 1961(a) provided
27 that the applicable interest rate was "the coupon issue yield
28 equivalent (as determined by the Secretary of the Treasury) of the
average accepted auction price for the last auction of fifty-two
week United States Treasury bills settled immediately prior to the
date of the judgment."

1 because pre-judgment interest is intended to cover the
2 lost investment potential of funds to which the plaintiff
3 was entitled, from the time of entitlement to the date of
4 judgment. It is the Treasury bill rate during this
5 interim that is pertinent, not the Treasury bill rate at
6 the time of judgment. The Treasury bill rate at the time
7 of judgment has no bearing on what could have been earned
8 prior to judgment.

9 The method of calculating the pre-judgment interest
10 utilized by the district court reasonably reflected this
11 approach. The interest due was calculated as though the
12 plaintiffs had invested the withheld funds at the 52-week
13 Treasury bill rate and then reinvested the proceeds
14 annually at the new rate. This reasonably reflects the
15 conservative investment income the plaintiffs would have
16 been able to have earned had they received the funds on
17 September 30, 1987.

18 37 F.3d at 1391-92.

19 Plaintiff's proposed method of calculating pre-judgment
20 interest is erroneous because it assumes that Plaintiff would have
21 been paid his entire amount of back wages -- and begun earning
22 interest on the sum -- on the date of his termination. In reality,
23 he would have been paid only a portion of the back wages at that
24 time, with additional payments occurring on a periodic basis.
25 Thus, Plaintiff is due interest equivalent to that which would have
26 accrued if he had invested his back wages, at the time they would
27 have been paid, at a rate equal to the weekly average one-year
28 constant maturity Treasury yield on the date the wages were due to
him, and then reinvested the proceeds annually at a rate equal to
the weekly average one-year constant maturity Treasury yield at the
time of the reinvestment, up to the date on which Amtrak satisfies
the judgment. In practice, this calculation may be difficult to
perform with precision. Accordingly, the parties should attempt to
stipulate to a figure for pre-judgment interest that approximates
the result that would obtain under this approach, based on

1 prorating the total back pay award of \$297,716 over a set number of
2 intervals between the date of Plaintiff's termination and the
3 present. If a dispute arises, the parties may seek the Court's
4 intervention.

5 CONCLUSION

6 For the foregoing reasons, the Court DENIES Amtrak's motion
7 for judgment as a matter of law or a new trial (Docket No. 252),
8 and GRANTS Plaintiff's motion for pre-judgment interest and
9 equitable relief, as modified herein (Docket No. 243). Amtrak's
10 motion to strike (Docket No. 254) the declaration of Richard
11 Palfin, which contains calculations for an award of front pay, is
12 DENIED; this motion is moot in light of the fact that the Court has
13 not granted an award of front pay.

14 IT IS SO ORDERED.

15
16 Dated: 8/21/09



CLAUDIA WILKEN
United States District Judge