No.

IN THE

Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

NICHOLAS DEFRIES, JAMES BLANKINSHIP, JUSTIN DONAHUE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Scott P. Moore
BAIRD HOLM LLP
1700 Farnam Street
Suite 1500
Omaha, NE 68102
(402) 636-8268
spmoore@bairdholm.com

Thomas H. Dupree, Jr.
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NICHOLAS DEFRIES,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Case No. 3:21-cv-00205-SB

FINDINGS AND RECOMMENDATION

BECKERMAN, U.S. Magistrate Judge.

Plaintiff Nicholas DeFries ("DeFries") filed this case against defendant Union Pacific Railroad Company ("Union Pacific") alleging violations of the Americans with Disabilities Act ("ADA"). (ECF No. 11.) Now before the Court is Union Pacific's motion for summary judgment. (ECF No. 49.) The Court heard oral argument on Union Pacific's motion on November 18, 2022.

The Court has jurisdiction over DeFries's claims pursuant to 28 U.S.C. § 1331, but not all parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636. For the reasons discussed below, the Court recommends that the district judge grant Union Pacific's motion for summary judgment.

BACKGROUND[1]

I. DEFRIES'S FAILED VISION ACUITY EXAMINATIONS

DeFries began working as a conductor and brakeman for Union Pacific in 2004. (Decl. of William Walsh Supp. Def.'s Mot. Summ. J. ("Walsh Decl."), Ex. L, Pl.'s Resp. Def.'s Interrog. at 3.)

Federal Railroad Administration ("FRA") regulations require railroad conductors to pass a vision acuity examination to ensure the conductor can "recognize and distinguish between the colors of railroad signals[.]" 49 C.F.R. § 242.117(h)(3). The regulations require Union Pacific to determine whether each conductor meets the FRA visual acuity standards before certifying or recertifying that individual as a conductor. 49 C.F.R. § 242.117(b). Union Pacific does so under its Fitness-for-Duty program. (*See* Walsh Decl., Ex. U, Depo. Steven Mitchell at 99:22-100:2.) In the first step toward meeting the FRA visual acuity standard, the conductor must pass a vision acuity test using an accepted scientific testing method, in Union Pacific's case, the Ishihara Test.[2] *See* 49 C.F.R. § 242.117(h)(2). If a conductor fails this threshold test, they can request "further medical examination by a

---

[1] Unless otherwise noted, the following facts are either undisputed or viewed in the light most favorable to DeFries.

[2] "The Ishihara test utilizes a series of plates, each of which include a combination of colors with an image on them [and t]he test subject is asked to identify the object or number on each plate." (Def.'s Mot. Summ. J. ("Def.'s Mot.") at 1 n.1.) "For instance, a red number 7 in red dots may be shown on a background of green dots [and t]he subject's ability to distinguish colors determines the ability to see the number or object." (*Id*.)

railroad's medical examiner to determine a person's ability to safely perform as a conductor" in the form of a color vision field test ("CVFT"). 49 C.F.R. § 242.117(j). If the conductor fails both the Ishihara Test and the subsequent CVFT, Union Pacific cannot certify or recertify that person as a conductor. *See* 49 C.F.R. § 242.117(g).

In 2012, two Union Pacific freight trains collided head-on in what is now known as the Goodwell Train Collision. (*See* Walsh Decl., Ex. B, Nat'l Transp. Safety Bd. Accident Report at iv.) The National Transportation Safety Board ("NTSB") investigated the collision and found that it was caused, in part, by a "lack of response to wayside signals because of the engineer's inability to see and correctly interpret the signals[.]" (*Id*.) In 2009, the engineer had failed the Ishihara Test but passed Union Pacific's CVFT. (*Id*. at 22.) The NTSB found that the CVFT then in use "by Union Pacific fail[ed] to ensure that Union Pacific [] employees have adequate color perception to perform in safety-sensitive positions." (*Id*. at 44.)

Following the collision, NTSB findings, and related guidance from the FRA, Union Pacific began to develop a new CVFT, the Light Cannon Test, that "would be more representative of the wayside signal lights that were being put up on the railroads[.]" (*See* Walsh Decl., Ex. F, Depo. Douglas Ivan at 59:12-20.) Union Pacific implemented the Light Cannon Test as its CVFT in 2016. (*See id*., Ex. E, Depo. John Holland at 63:15-19.)

From 2004 until 2015, DeFries passed only one color vision acuity test, a CVFT administered in March 2015, the same CVFT that the NTSB had

referenced in its findings related to the collision.[3] (*See id*., Ex. P at UP229.)

On March 29, 2018, DeFries underwent vision acuity screening as part of his FRA recertification and again failed the Ishihara Test. (*Id*., Ex. Q.) This negative test triggered a Fitness-for-Duty program evaluation whereby Union Pacific required DeFries to submit to the Light Cannon Test. (*Id*., Ex. S.) DeFries failed the Light Cannon Test, but complained at the time that weather conditions had affected his ability properly to complete the test. (*Id*.) On July 11, 2018, Union Pacific allowed DeFries to retake the Light Cannon Test, and again DeFries failed the test. (*Id*., Ex. T.)

As a result, on July 23, 2018, Union Pacific issued DeFries a Notification of FRA Certification Denial, informing DeFries that he had "failed to meet the required thresholds for vision[.]" (*Id*., Ex. V at UP308.) Union Pacific issued permanent restrictions on DeFries, prohibiting him from doing jobs or tasks "which require accurate identification of colored railroad wayside signals." (*Id*. at UP309.)

II. *HARRIS* CLASS ACTION

Before DeFries filed this action, he was a putative class member of a class action lawsuit against Union Pacific in the District of Nebraska. *See Quinton Harris et al., v. Union Pac. R.R. Co.*, Case No. 8:16-cv-

---

[3] The record includes one ambiguous test result from 2004 taken as part of DeFries's initial hiring examination, where both the "pass" and "fail" areas are marked for DeFries's Ishihara Test results. (*Id*., Ex. M; Def.'s Mot. at 12.) The record demonstrates that DeFries failed the Ishihara Test in 2009, 2012, and 2015. (*See id*., Ex. K, Depo. Nicholas DeFries ("DeFries Depo.") at 48-:15-49:3; Walsh Decl., Exs. N-O.)

381 (D. Neb.). The class action was filed in February 2016, and the plaintiffs asserted ADA claims of (1) disparate treatment, (2) disparate impact, and (3) unlawful medical inquiry, based on Union Pacific's Fitness-for-Duty program.[4] (*See* Decl. of Gavin S. Barney ("Barney Decl.") Supp. Pl.'s Opp'n Def.'s Mot. Summ. J., Ex. 23, ("*Harris* First Am. Compl.") ¶¶ 136-158.) The *Harris* plaintiffs initially defined the class as "[i]ndividuals who were removed from service over their objection, and/or suffered another adverse employment action, during their employment with Union Pacific for reasons related to a Fitness-for-Duty evaluation at any time from 300 days before the earliest date that a named Plaintiff filed an administrative charge of discrimination to the resolution of this action." (*Id*. ¶ 116.) The Harris plaintiffs narrowed the scope of the class when they filed their motion to certify. (*See* Walsh Decl., Ex. W, ("*Harris* Memo. Supp. Mot. Class Cert.") at 22 n.5, "The class definition has been narrowed from the Amended Complaint.").

On February 5, 2019, the *Harris* court certified a disparate treatment claim on behalf of "[a]ll individuals who have been or will be subject to a [F]itness-for-[D]uty examination as a result of a reportable health event at any time from September 18, 2014[,] until the final resolution of this action." *Harris v. Union Pac. R.R. Co*., 329 F.R.D. 616, 628 (D. Neb. 2019), *rev'd* 953 F.3d 1030 (8th Cir. 2020). On March 24, 2020, the Eighth Circuit Court of Appeals reversed the district court's class certification

---

[4] The Court may take judicial notice of records in other cases. *See United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) ("[A] court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases.").

decision, decertifying the class. *See Harris*, 953 F.3d at 1038 (finding the class could not be certified where "the district court cannot determine whether the [Fitness-for-Duty] policy is unlawfully discriminatory under the ADA without considering whether it is job related and consistent with business necessity in each [class member's] situation.").

Shortly after the Eighth Circuit's decision in *Harris*, the parties in *Harris* entered into a tolling agreement, extending the time for putative class members to file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") by an additional sixty days.

On April 24, 2020, DeFries filed a charge with the EEOC alleging disability discrimination. On February 8, 2021, DeFries filed this action, alleging three ADA claims for disability discrimination based on (1) disparate treatment; (2) disparate impact; and (3) failure to accommodate. (*See* First. Am. Compl. ("FAC").) The Court dismissed DeFries's failure to accommodate claim as time-barred. (*See* ECF Nos. 25, 34.)

STANDARD OF REVIEW

Summary judgment is proper if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). At the summary judgment stage, the court views the facts in the light most favorable to the non-moving party, and draws all reasonable inferences in favor of that party. *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 891 (9th Cir. 2005). The court does not assess the credibility of witnesses, weigh evidence, or determine the truth of matters in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

255 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

DISCUSSION

I. LEGAL STANDARDS

A. ADA Statute of Limitations

An ADA plaintiff must file an EEOC charge of discrimination "within 300 days after the alleged unlawful employment practice occurred[.]" 42 U.S.C. § 2000e-5(e)(1); *see also Logan v. W. Coast Benson Hotel*, 981 F. Supp. 1301, 1310 n.5 (D. Or. 1997) ("[P]laintiffs had 300 days from the date of the alleged offenses to file with the EEOC pursuant to 42 U.S.C. § 2000e-5(e)(1)."). "The filing of a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to filing suit, but is a requirement subject to equitable doctrines such as waiver and tolling." *Josephs v. Pac. Bell*, 443 F.3d 1050, 1061 (9th Cir. 2006).

B. Class Action Equitable Tolling

"[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 554 (1974). "For purposes of tolling under *American Pipe*, where individuals are members of the putative class alleged in the complaint, but the named plaintiff narrows the proposed class when later moving for class certification, tolling ceases for individuals who

are not members of the proposed, narrowed class." *Donahue v. Union Pac. R.R. Co.*, No. 21-cv-00448-MMC, 2022 WL 4292963, at *4 (N.D. Cal. Sept. 16, 2022) (citing *Smith v. Pennington*, 352 F.3d 884, 894-96 (4th Cir. 2003) and *Sawtell v. E.I. du Pont de Nemours and Co.*, 22 F.3d 248, 253-54 & n.11 (10th Cir. 1994)).[5]

II. ANALYSIS

Union Pacific moves for summary judgment on DeFries's two remaining ADA claims on several grounds, including that (1) DeFries cannot establish that he is a "qualified individual" under the ADA; (2) Union Pacific has an absolute defense to the claims because it was bound by FRA regulations; (3) Union Pacific satisfies the direct threat and business necessity affirmative defenses to DeFries's ADA claims; and (4) DeFries's claims are time-barred because he was not a member of the *Harris* class and therefore equitable tolling does not apply. (*See generally* Def.'s Mot.) For the following reasons, the Court finds that DeFries's claims are time-barred and therefore recommends that the district judge grant Union Pacific's motion for summary judgment.

///

Union Pacific imposed a permanent restriction on DeFries on July 23, 2018. (Walsh Decl., Ex. V at 309.) DeFries did not file his EEOC charge until April 24, 2020. It is undisputed that DeFries did not file an

---

[5] "The Ninth Circuit has cited *Sawtell* favorably, but has not addressed the precise issue of whether a motion for class certification may narrow a class for purposes of *American Pipe* tolling." *Blankinship v. Union Pac. R.R. Co.*, No. cv-21-00072-TUC-RM, 2022 WL 4079425, at *4 (D. Ariz. Sept. 6, 2022) (citing *In re Syntax Corp. Sec. Litig.*, 95 F.3d 922, 936 (9th Cir. 1996)).

EEOC charge within 300 days of the permanent restriction, and that absent tolling his claims are untimely. *See* 42 U.S.C. § 2000e-5(e)(1). However, if DeFries was a putative member of the *Harris* class until the Eighth Circuit decertified the class on March 24, 2020, equitable tolling applies to toll the limitations period. *See Am. Pipe*, 414 U.S. at 554.

Union Pacific argues that DeFries cannot benefit from tolling after the *Harris* plaintiffs filed their motion for class certification on August 17, 2018. (Def.'s Mot. at 32.) Specifically, Union Pacific argues that once the *Harris* plaintiffs moved to certify the class, they narrowed the class and DeFries was no longer a putative class member because he was not subject to a Fitness-for-Duty examination as a result of a reportable health event, but rather as required by conductor recertification. (*Id.*)

Relevant here, the plaintiffs in *Harris* asserted claims of ADA disparate treatment and impact in their February 19, 2016, first amended complaint on behalf of a putative class of Union Pacific employees initially defined as "[i]ndividuals who were removed from service over their objection, and/or suffered another adverse employment action, during their employment with Union Pacific for reasons related to a Fitness-for-Duty evaluation at any time from 300 days before the earliest date that a named [p]laintiff filed an administrative charge of discrimination to the resolution of [the] action." (*Harris* First Am. Compl. ¶ 116.) There appears to be no dispute that DeFries qualified as a class member under this definition.

However, on August 17, 2018, the *Harris* plaintiffs moved for class certification on only their disparate treatment claim, and redefined the class as "[a]ll individuals who have been or will be subject to a

[F]itness-for-[D]uty examination as a result of a reportable health event at any time from September 18, 2014[,] until the final resolution of this action." (*Harris* Memo. Supp. Mot. Class Cert. at 22.) The *Harris* plaintiffs relied on Union Pacific's medical rules to define a "reportable health event" as "any new diagnosis, recent event[], and/or change in [] condition[.]" (*Harris* First Am. Compl. at 4.) The *Harris* plaintiffs acknowledged in their certification motion that "[t]he class definition ha[d] been narrowed from the [first a]mended [c]omplaint[.]" (*Harris* Memo. Supp. Mot. Class Cert. at 22 n.5.)

Union Pacific argues that DeFries was not a member of the class the *Harris* plaintiffs sought to, and ultimately did, certify, because he was not subject to a Fitness-for-Duty examination "as a result of a reportable health event." (*See* Def.'s Mot. at 32.) Rather, DeFries alleges—and the parties do not dispute—that he was subject to the examination to "recertify as a conductor." (*See* FAC ¶ 28.) Further, the record demonstrates that DeFries was aware he had color vision deficiency at a young age, many years prior to his employment with Union Pacific. (DeFries Depo. at 23:1422, when asked whether he knew "before he joined Union Pacific that [he] had any kind of color vision deficiency, DeFries responded, "[n]ot to the point of being tested, no" but acknowledged, "[a]s a young kid . . . color crayons and coloring . . . some of them would look the same"). Thus, DeFries's color vision acuity was not a new diagnosis, recent event, or change in condition, and therefore he did not experience a "reportable health event" as defined by the *Harris* plaintiffs.

DeFries relies on the broader class definition alleged by the *Harris* plaintiffs in their first amended

complaint and—despite the *Harris* plaintiffs' express acknowledgment in their motion that they narrowed the scope of the class—argues that "the *Harris* plaintiffs' motion for class certification did nothing to unambiguously narrow that scope." (Pl.'s Opp'n at 30.) DeFries claims that the "*Harris* plaintiffs explicitly continued to include color-vision plaintiffs with the class via numerous references to Union Pacific's color-testing policies and the Light Cannon [Test]." (*Id*. at 30-31.) DeFries asserts that the *Harris* plaintiffs' continued "reference to not only Union Pacific's color-vision policies, but to the Light Cannon [T]est itself means that the *Harris* class certification briefing hardly asserts an 'unambiguous definition' removing DeFries from the class." (*Id*. at 31-32.)

Other district courts in the Ninth Circuit in related post-*Harris* decertification cases have addressed, and rejected, the same argument DeFries advances here. In *Donahue*, three former Union Pacific conductors brought ADA claims alleging disparate treatment and disparate impact. (*See generally* Compl., *Donahue et al. v. Union Pac. R.R. Co*., No. 3:21-cv-00448-MMC (N.D. Cal.), ECF No. 1.) The *Donahue* plaintiffs each had to submit to "a periodic color-vision test" and each plaintiff failed the Ishihara Test and Light Cannon Test, leading Union Pacific to issue permanent work restrictions. (*See id.*) Union Pacific argued that the *Donahue* plaintiffs' claims were untimely because they were not part of the narrowed class as defined in the *Harris* motion for class certification, and therefore equitable tolling did not apply. (Def.'s Mot. for Summ. J., *Donahue*, No. 3:21-cv-00448, ECF No. 60.)

The district court in *Donahue* agreed with Union Pacific and entered summary judgment in its favor.

See Donahue, 2022 WL 4292963, at *5. Like here, the court found that the *Donahue* plaintiffs "were subject to examination as a result of FRA's periodic certification requirements" and not because of a "reportable health event[.]" *Id*. at *4. As such, the court held that the plaintiffs "were not included in the narrowed class definition set forth in the *Harris* plaintiffs' motion for class certification, [and] they are not entitled to tolling beyond August 17, 2018, the date on which the *Harris* plaintiffs filed their motion for class certification." *Id*. at *5 (citation omitted).

Similarly in *Blankinship*, the plaintiff railroad conductor sued Union Pacific under the ADA alleging disparate treatment and impact after he failed the Light Cannon Test as part of his recertification as a conductor. *See Blankinship*, 2022 WL 4079425, at *2. In *Blankinship*, like here, Union Pacific did not dispute that Blankinship was initially a putative class member, but argued that any equitable tolling ceased once "the *Harris* plaintiffs moved for class certification on the disparate treatment claim only and proffered a class definition that excluded [Blankinship]." *Id*. at *4. The district court agreed that while the class identified in the *Harris* first amended complaint "was broad enough to encompass" Blankinship, the "motion for class certification made clear that the intended class consisted only of those individuals 'subject to a [F]itness-for-[D]uty examination as a result of a reportable health event.'" *Id*. at *5. Like the *Donahue* court, the court found that Blankinship was subject to the examination "as part of the FRA recertification process" and thus "there [wa]s no genuine dispute that [he] was not included in the class definition set forth in the *Harris* plaintiffs' motion for class certification on August 17, 2018" *Id*. "After that date, [Blankinship] had no reason to

assume his rights were being protected by the *Harris* class action, and [Union Pacific] had no reason to believe that plaintiffs who were not subject to [F]itness-for-[D]uty evaluations as a result of reportable health events might participate in the *Harris* judgment." *Id*. The court concluded that because Blankinship "did not file an EEOC charge of discrimination within 300 days of the filing of the motion for class certification in *Harris* . . . his ADA claims are time-barred."[6] *Id*.; *cf. Carrillo v. Union Pac. R.R. Co*., No. EP-21-cv-00026-FM, 2021 WL 3023407, at *2 (W.D. Tex. July 16, 2021) ("Tolling ended for [the p]laintiff' s disparate impact claim when the *Harris* plaintiffs voluntarily abandoned its class certification.").

DeFries argues that "[t]he court's holding in *Blankinship* was incorrect and its analysis was based on two patently false arguments." (Pl.'s Sur-Reply at 2.) DeFries asserts that "the *Harris* record shows that

---

[6] In so finding, the *Blankinship* court relied on *Smith* and *Sawtell* (*see id*. at *5), but acknowledged in a footnote that "[t]he Southern District of New York has found that a motion for class certification cannot trigger the end of [] tolling[.]" *Id*. (citing *Choquette v. City of N. Y*., 839 F. Supp. 2d 692, 699-702 (S.D.N.Y. 2012)). However, "[e]ven assuming that the Ninth Circuit would reject *Sawtell* and *Smith* and instead hold, consistent with *Choquette*, that the actions of class counsel cannot trigger the end of [] tolling, the *Harris* court certified the class as defined in the plaintiffs' motion for class certification—thereby issuing a class certification decision that unambiguously excluded [the plaintiff]—on February 5, 2019." *Id*. (citing *Harris*, 329 F.R.D. at 628). "Therefore, as of February 5, 2019[,] at the latest, [the plaintiff] had no reason to believe his rights were being protected by the *Harris* class action." *Id*. Similarly here, even under the *Choquette* court's analysis, DeFries's ADA claims are time-barred because he did not file his EEOC charge until April 4, 2020, 424 days after the *Harris* court certified the class.

color vision plaintiffs such as [] Blankinship and [] DeFries were clearly intended to be included as class members within the August 17, 2018, class definition" and further that a "reportable health event" "does not, as the *Blankinship* court mistakenly believed, require a *change* in an employee's health condition." (*Id*.)

To support his argument, DeFries points to a list of putative class members Union Pacific produced in *Harris*, which included employees subject to a Fitness-For-Duty examination for reasons other than a "Reportable Health Event." (*See id*. at 3.) After the *Blankinship* court entered summary judgment for Union Pacific, the plaintiff filed a motion for relief from judgment citing the same putative class member list DeFries cites here. The *Blankinship* court denied the motion for relief from judgment, acknowledging Union Pacific's representations that it had created the list of potential class members before the *Harris* plaintiffs narrowed the class definition, the list was meant to be overinclusive, and the *Harris* parties understood the list was not intended to be the operative class list.[7] (*See Blankinship*, 4:21-cv-72 (D. Ariz.), ECF Nos. 82-83; Decl. of William Walsh Supp. Def.'s Resp. Pl.'s Sur-Reply, Ex. A, *Blankinship* Order at 1.) The Court agrees that Union Pacific's list of potential class members, generated prior to the *Harris* plaintiffs' narrowing of the class, is not dispositive of DeFries's membership in the class the *Harris* plaintiffs moved to certify. On the contrary, the narrowed definition of the *Harris* class clearly excludes DeFries.

---

[7] The parties agree that DeFries's name did not appear on that putative class member list, which predated his removal from service. (Pl.'s Sur-Reply at 4.)

The *Blankinship* court also rejected DeFries's argument that "reportable health event," as used in the narrowed *Harris* class definition, did not require a change in an employee's health condition. (*See id.*) Indeed, contrary to DeFries's position here, the *Harris* plaintiffs clearly defined "reportable health event" in their amended complaint, as well as their motion for class certification, as "any *new* diagnosis, *recent* event[], and/or *change* in [] condition[.]" (*Harris* First Am. Compl. at 4 (emphasis added); *see also Harris* Memo. Supp. Mot. Class Cert. at 7, representing that Union Pacific's Fitness-for-Duty policy requires employees in "safety sensitive" positions "to disclose *new* diagnoses, events, or *changes* in certain conditions, which the company refers to as 'reportable health events'" (emphasis added)).

Joining the other district courts discussed herein, the Court finds that DeFries was no longer a member of the *Harris* class as of August 17, 2018, the date the *Harris* plaintiffs moved for class certification and narrowed the class definition, and therefore any equitable tolling of the statute of limitations ceased on August 17, 2018. DeFries filed his EEOC charge on April 24, 2020, more than 600 days later. Accordingly, DeFries's ADA claims are time-barred and the district judge should grant Union Pacific's motion for summary judgment.

CONCLUSION

For the reasons stated, the Court recommends that the district judge GRANT Union Pacific's motion for summary judgment. (ECF No. 49.)

SCHEDULING ORDER

The Court will refer its Findings and Recommendation to a district judge. Objections, if any, are due within fourteen (14) days. If no objections are filed, the Findings and Recommendation will go under advisement on that date. If objections are filed, a response is due within fourteen (14) days. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 23rd day of November, 2022.

/s/ Stacie F. Beckerman
HON. STACIE F. BECKERMAN
United States Magistrate Judge