UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FRANKIE ANTOINE,

Plaintiffs,

v.

CAPITOL DEL GRANDE 2, INC., et al.,

Defendants.

Case No. 17-CV-00542-LHK

ORDER RE: MOTIONS IN LIMINE AND PRE-TRIAL DISPUTES

Re: Dkt. Nos. 55, 56, 57, 58, 59, 60

Before the Court are the motions in limine of Plaintiff Frankie Antoine ("Plaintiff"), ECF Nos. 55, 56, 57; and the motions in limine of Defendants Capitol Del Grande 2, Inc. and Del Grande Dealer Group (collectively, "Defendants"), ECF Nos. 58, 59, 60. After reviewing the parties' briefing, the case law, and the record in this case, and balancing the considerations set forth in Federal Rule of Evidence ("Fed. R. Evid.") 403, the Court rules as follows:

Plaintiff's Motions in Limine ("MILs")

MIL #1: Admit co-workers' testimony that they were harassed and complained about the harassment.

Ruling: Granted in part and denied in part. Plaintiff claims that two supervisors—Isaac Amaya and David Azimi (collectively, "supervisors")—created a hostile work environment through their racially motivated harassment. Consequently, testimony from Carlos Thomas (a coworker) that the

supervisors also verbally and physically harassed Thomas because he was African American or because the supervisors perceived Thomas to be Mexican is highly probative, as it suggests Plaintiff's claim is accurate. *See Metoyer v. Chassman*, 504 F.3d 919, 937 (9th Cir. 2007) ("We have held that bigoted remarks by a member of senior management may tend to show discrimination, even if directed at someone other than the plaintiff."); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1117 (9th Cir. 2004) ("[I]f racial hostility pervades a workplace, a plaintiff may establish a violation of Title VII, even if such hostility was not directly targeted at the plaintiff."); *Alvarado v. Fed. Express Corp.*, 384 F. App'x 585, 588 (9th Cir. 2010) (testimony of plaintiff's coworkers that supervisor also sexually harassed them properly admitted in plaintiff's hostile work environment suit). For the same reasons, testimony from Thomas that he resigned owing to this harassment is highly probative, because it suggests Plaintiff's claim is accurate. Thus, under Fed. R. Evid. 403 balancing, the probative value of Thomas's testimony that the supervisors made offensive remarks, punched him, and slapped him, and that Thomas resigned due to this conduct, outweighs any danger of unfair prejudice.

On the other hand, the Court excludes any testimony from Thomas or his family about the mental or emotional harm that the alleged harassment caused. Testimony from Thomas and Thomas's family about Thomas's experience is not probative of how *Plaintiff* reacted to the supervisors' harassment. There is also a substantial risk of unfair prejudice because testimony about any harm Thomas suffered could bias the jury against Defendants, and there is a risk of confusing the issues and wasting time because this trial is about Plaintiff's harassment claim, not Thomas's. Thus, the Court finds that under Fed. R. Evid. 403 balancing, the probative value of admitting this testimony is substantially outweighed by the danger of unfair prejudice, confusing the issues, and wasting time.

The Court also excludes testimony from Thomas about the supervisors' treatment of female employees, and testimony from Plaintiff's co-workers Ray Endemann and Enrique Recalde that the supervisors mocked the pair based on a perception that they were insufficiently masculine and, in Endemann's case, for being Canadian. This testimony is not very probative of Plaintiff's

hostile work environment claim because Plaintiff alleges harassment based on race, not based on sex, gender, or national origin. There is also a substantial danger of unfair prejudice. The jury might infer from the testimony that the supervisors had a propensity for bigoted remarks, and admitting such testimony could bias the jurors against Defendants. There is also a substantial danger that this testimony will confuse the issues and waste time because this trial is about Plaintiff's claim of racially based harassment, not the experiences of Plaintiff's coworkers. Thus, the Court finds that under Fed. R. Evid. 403 balancing, the probative value of admitting this testimony is substantially outweighed by the danger of unfair prejudice, confusing the issues, and wasting time.

MIL #2: Exclude job performance evidence.

Ruling: Denied. Evidence about Plaintiff's job performance and the reasons for Plaintiff's termination are relevant to determining the extent of Plaintiff's damages because much of Plaintiff's emotional distress derives from his allegedly unlawful termination. As Plaintiff states in the First Amended Complaint ("FAC"), Plaintiff "continues to have trouble sleeping *because he makes substantially less money due to his unlawful termination*." ECF No. 54 at 10 (emphasis added). Plaintiff's lone cause of action further alleges that: "The harassment … caused him emotional pain and suffering. Antoine lost wages due to the harassment and continues to do so." *Id.* In addition, the evidence is relevant under Rule 404(b) as motive evidence. Plaintiff's poor job performance and termination may provide Plaintiff a motive to complain about harassment, and Plaintiff himself repeatedly notes that this is a "he-said/she said" case in which "credibility is paramount." ECF No. 55 at 3; ECF No. 56 at 3 (again noting this case is "he-said/she said"). Given Plaintiff's own statements, the Court concludes that this evidence is highly probative. Furthermore, the Court sees no unfair prejudice to Plaintiff in admitting evidence of his job performance in a case that is explicitly centered on Plaintiff's employment. The Court therefore finds that under Fed. R. Evid. 403 balancing, the probative value of Plaintiff's job performance outweighs the danger of unfair prejudice.

MIL #3: Exclude Plaintiff's prior lawsuits against Nordstrom, Inc. and BAE Systems, Inc.

Ruling: Granted in part and denied in part. Defendants do not oppose exclusion of Plaintiff's lawsuit against Nordstrom. The Court therefore excludes any reference to that lawsuit. However, the Court finds that Plaintiff's testimony during the deposition in the BAE Systems, Inc. case is a prior inconsistent statement admissible as impeachment evidence because the testimony—which was given under oath—directly contradicts Plaintiff's claim that Defendants caused him to lose sleep. *Robinson v. Cambra*, 15 F. App'x 452, 453 (9th Cir. 2001) (finding a defendant's "prior statement was admissible to prove impeachment by contradiction"). Moreover, the evidence is directly relevant to the jury's assessment of damages for Plaintiff's emotional distress and loss of sleep because Plaintiff has testified that it was BAE, not Defendants, that is responsible for these harms. The Court therefore finds that under Fed. R. Evid. 403 balancing, the probative value of Plaintiff's prior testimony under oath in his lawsuit against BAE outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury. However, to ensure the jury only considers the evidence for credibility and damages and does not draw any impermissible inferences about Plaintiff's propensity to sue employers or complain of discrimination, the Court instructs the parties to propose a curative jury instruction.

Defendant's Motions in Limine ("MIL")

MIL #1: Exclude evidence of severance offer, agreement and release.

Ruling: Granted. Plaintiff largely agrees with Defendants that evidence of a severance agreement offered to Plaintiff when Plaintiff was fired is inadmissible as an offer to compromise under Fed. R. Evid. 408.

MIL #2: Exclude evidence of alleged racial harassment of Carlos Thomas and its effect.

Ruling: Granted in part and denied in part. The Court refers the parties to the Court's ruling on Plaintiff's first motion in limine, as it addresses the same issues.

MIL #3: Exclude evidence of non-race based "inappropriate conduct" by Defendants.

Ruling: Granted. The Court refers the parties to the Court's ruling on Plaintiff's first motion in limine, as it addresses the same issues.

Pre-Trial Disputes

After reviewing the parties' briefing, the case law, and the record in this case, and balancing the considerations set forth in Federal Rule of Evidence ("Fed. R. Evid.") 403, the Court rules as follows.

Affirmative Defense

A key threshold issue here is whether or not Defendants waived an *Ellerth/Faragher* affirmative defense to Plaintiff's Title VII claim by failing to assert it in the answer. The *Ellerth/Faragher* affirmative defense protects an employer from hostile work environment claims if a defendant can show that it (1) exercised reasonable care and promptly corrected the harassing behavior, and (2) a plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise unreasonably failed to avoid harm.

Defendants argue they did not waive the *Ellerth/Faragher* affirmative defense because they (1) raised a state law corollary in the answer, (2) stated in the answer that they reserved a right to raise further affirmative defenses; and (3) they should get to file a substantively amended answer because Plaintiff filed a new complaint after dropping 3 of 4 claims.

The Court is not persuaded. First, raising a state law corollary is not the same as raising the actual defense. If anything, the fact that Defendants raised a state law defense and not the federal one suggests they consciously decided not to argue an *Ellerth/Faragher* theory. Second, if a generic statement reserving the right to raise future affirmative defenses was sufficient to avoid waiver, then the rule that affirmative defenses are required to be raised in the first responsive pleading would be rendered meaningless. *See Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005) ("Under the Federal Rules of Civil Procedure, a party, with limited exceptions, is

required to raise every defense in its first responsive pleading, and defenses not so raised are deemed waived."). Third, Plaintiff's amendment of the complaint only deleted causes of action and added no new allegations. That point is made unambiguously clear by the redlined version Plaintiff submitted alongside the amended complaint. Finally, Plaintiff makes a good case that prejudice will result because Plaintiff contends that he dismissed his other causes of action on the assumption that he would not have to deal with the *Ellerth/Faragher* defense on his hostile work environment claim. Accordingly, Defendants have waived an *Ellerth/Faragher* affirmative defense and are precluded from raising it for the first time on the eve of trial.

Punitive Damages

As to punitive damages, the Court requires briefing from the parties. The parties shall therefore file briefs regarding (1) the availability of punitive damages, and (2) whether DGDG Management and Capitol Chevrolet are liable as an integrated enterprise or a joint employer, or on an alter ego theory. Plaintiff's opening brief shall not exceed 8 pages, Defendant's opposition shall not exceed 8 pages, and Plaintiff's reply shall not exceed 3 pages. Plaintiff's opening brief is due April 23, 2018. Defendant's opposition is due April 27, 2018. Plaintiff's reply is due May 1, 2018.

IT IS SO ORDERED.

Dated: April 18, 2018

Lucy H. Koh

LUCY H. KOH
United States District Judge