IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARYLEE ARRIGO,

FINAL PRETRIAL CONFERENCE ORDER

Plaintiff,

12-cv-700-bbc

v.

LINK STOP, INC. and
JAY E. LINK,

Defendants.

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A final pretrial conference was held in this case on April 24, 2014 before United States District Judge Barbara B. Crabb. Plaintiff appeared by Bonnie Smith and James Kaster. Defendants appeared by Daniel Kaplan and Krista Sterken.

Counsel predicted that the case would take no more than 5 days to try. (To be on the safe side, however, I will tell the prospective jurors that it may last longer, in which case it will resume on Wednesday, May14.) It will be bifurcated. Counsel understand that trial days will begin at 9:00 and will run until 5:30, with at least an hour for lunch, a short break in the morning and another in the afternoon.

Counsel agreed to the voir dire questions in the form distributed to them at the conference, with one exception. Plaintiff's counsel wanted questions about the perception of the court system. Accordingly, I have added a question asking whether the prospective

jurors have any strong opinions, whether positive or negative, about the court system. The jury will consist of eight jurors to be selected from a qualified panel of fourteen. Each side will exercise three peremptory challenges against the panel. After the jury is selected, the court will read the introductory instructions to the jury.

All non-expert witnesses will be sequestered for the liability phase of trial with the exception of a corporate representative of Link Stop, Inc. Defendants want a corporate representative in addition to Jay Link, which is appropriate. Counsel have made arrangements to learn the court's visual presentation system.

No later than noon on Friday, May 2, 2014, plaintiff's counsel will advise defendants' counsel of the witnesses plaintiff will be calling on Monday and the order in which they will be called. Counsel are to give similar advice at the end of each trial day; defendants' counsel shall have the same responsibility in advance of defendant's case. Also, no later than noon on May 2, 2014, counsel shall meet to agree on any exhibits that either side wishes to use in opening statements. Any disputes over the use of exhibits are to be raised with the court before the start of opening statements.

Counsel should use the microphones at all times and address the bench with all objections. If counsel need to consult with one another, they should ask for permission to do so. Only the lawyer questioning a particular witness may raise objections to questions put to the witness by the opposing party and argue the objection at any bench conference.

If counsel call the opposing party's witnesses as adverse witnesses, counsel for the opposing party may choose whether to ask only clarifying questions of the witness and call

the witness in its own case or do all its questioning during its opponent's case, in which case the party calling the witness will have an opportunity to ask additional questions. If counsel choose the first option, they may are free to call the witness during their case.

Counsel are to provide copies of documentary evidence to the court before the start of the first day of trial.

Defendants' counsel intends to call Deborah Fringer as a witness; plaintiff objects because she did not learn that Fringer was a possible witness for defendants until they filed their witness lists. They did not notify plaintiff of their intention in a Rule 26(e) filing as the rules require. However, plaintiff listed Fringer on her own Rule 26(a) disclosures so she had advance knowledge that Fringer had relevant information about plaintiff's job performance and responsibilities. However, because defendants' filing was deficient, I will limit defendants to questions within the scope of the topics listed by plaintiff in her Rule 26(a) filing. In other words, Fringer may testify about plaintiff's job responsibilities and performance and about defendants' practices, but may not testify about any other matters, including any that occurred after plaintiff was terminated.

Defendants reported that one of their witness may be too sick to testify. If they intend to ask for a continuance, they should arrange for a conference call with the court no later than noon on Wednesday, April 30.

Defendants objected to the ruling in the court's April 22 ruling that plaintiff may testify about her calendar entries of time worked at her job. The ruling is reaffirmed; if defendants think that her entries are unreliable, they may question her about those entries.

Defendants asked the court to reconsider the ruling in the April 22 order that they could not introduce evidence of a Facebook posting relayed to Lydia Cook by her husband. The request was denied.

Plaintiff wants to introduce evidence that defendant Jay Link told her not to tell a visiting IRS agent that she was a bookkeeper; that evidence will not be allowed, because it has a tendency to suggest that Link was in trouble with the IRS. However, she can introduce evidence that Link told her not to admit she was the bookkeeper, without identifying the other person involved. I repeat that plaintiff may not go into the size or number of the Link companies in an effort to show that Jay Link has unlimited financial resources.

Counsel discussed at length the type of evidence that may be elicited about Jay Link's reaction to plaintiff's FMLA leave for her anxiety disorder. Plaintiff may put in evidence of Link's objecting to her return to work once she had her doctor's certificate for two reasons only: to show Link's antipathy to her taking any leave at all and to refute Link's contention that she could not finish her work on time. She may not introduce evidence of his attitude about mental illness except as it relates to his alleged refusal to believe that she was really sick. In other words, she may not put in evidence that Link wanted to make his own determination of her sanity. Finally, she may introduce evidence of Link's response to her November accident as evidence of his opposition to the idea of her using her FMLA leave.

Counsel discussed the form of the verdict and the instructions. A number of questions arose, beginning with defendants' objection to the wording of the first question on the liability verdict. They maintain that the question should use the term "motivating

reason" in place of "one of the reasons" that plaintiff was terminated. Their request to change the wording was denied. The "one of the reasons" language comes from the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989). See also Hossack v. Floor Covering Associates of Joliet, Inc., 492 F.3d 853, 860 (2007).

Next, counsel discussed whether all the named defendants may be treated as one for liability and for damages and whether Jay Link may be grouped with the other defendants. This question was the subject of the court's April 22, 2014 order, to which the parties responded in writing. The attached order addresses the two issues and explains why the answers to the first question is no and the answer to the second one is yes. Accordingly, the verdict forms and instructions will refer only to defendants Link Stop, Inc. and Jay E. Link in the caption and the jurors will be considering only Jay E. Link in the liability verdict, although they will consider both defendants in answering the damages verdict.

Defendants want a question in the liability verdict asking whether plaintiff had asked for maternity leave before she was terminated, but no such question is necessary. The first question asks whether Jay Link terminated her for her request for leave for anxiety or because she had notified him that she needed to take leave in connection with her pregnancy. If the evidence shows that Link never knew plaintiff was pregnant, as he has suggested, then the jury cannot answer yes to the first question unless it finds that he terminated her for her earlier leave.

Finally, plaintiff objects to the wording of the questions in the proposed damages verdict, contending that they track defendants' proposed damages exhibit. Plaintiff does not

object to the exhibit itself, which defendants may use during the damages trial. If she continues to object to the verdict form, she can raise her objections during the final jury instruction conference.

Entered this 25th day of April, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge