IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RENAE EKSTRAND,

Plaintiff,

v.

SCHOOL DISTRICT OF SOMERSET,

Defendant.

ORDER

08-cv-193-bbc

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This civil case was brought under the Americans with Disability Act, 42 U.S.C. § 12112-12114(b). It went to trial on September 29, 2010 before a jury, which found in favor of plaintiff Renae Ekstrand on her claim that defendant School District of Somerset had discriminated against her because of her disability. At the close of trial, counsel for both parties stipulated on the record that the school district employed 150-160 persons, which meant that under 42 U.S.C. 1981a(b)(3), the maximum amount of plaintiff's compensatory damages would be $100,000. Plaintiff agreed to the stipulation because the superintendent of the school district, Randal Rosburg, represented that it was correct.

Upon her return to her office, plaintiff's counsel consulted public records to verify the information and discovered that although the school district had fewer than 200 full-time

employees in the years 2004-08, it had used substitute teachers in each of those years that would have brought its numbers over 200 in 2006-07 and 2007-08. She learned that in addition the school district has contracts with vendors that supply food service and cleaning services and that the persons who perform those services under contract were not included in the 160 number. Plaintiff then moved to set aside the stipulation, arguing that it was based upon a mistake of fact.

Defendant opposes the motion on the grounds that the stipulation was not based on a mistake of fact, that it was plaintiff's responsibility to undertake discovery before trial to determine the number of employees and that defendant would be severely prejudiced if the motion were to be granted. I conclude that it is premature to say whether the basis for stipulation was a mistake because this determination cannot be made without deciding whether certain part-time and contract employees are to be included in the employee count under the ADA. It was a mistake for the parties to rely on Superintendent Rosburg's representation without knowing more about the basis for the representation or his understanding of the requirements of 42 U.S.C. § 1981a(b)(3).

It is not clear to me whether defendant or plaintiff bears the burden of production on the statutory cap. Defendant has not cited any case law holding that it is plaintiff''s burden. For her part, plaintiff has cited Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996), in which the court of appeals held that the defendant bears the burden of proving that he lacks the money

to pay any significant amount of punitive damages, both because it would make no sense to have the plaintiff plead poverty on behalf of the defendant and because the defendant is better positioned to know the details of his financial situation. Id. at 36. Although Kemezy involved punitive damages and the cap at issue in this case relates to compensatory damages, the reasoning seems equally applicable to this case.

Defendant's final point is that it would be prejudiced if the stipulation were not upheld. It is hard to see why. It suggests that it is too late to put Superintendent Rosburg on the stand, where plaintiff's lack of pretrial discovery would have failed to undermine his position that the school district had fewer than 201 employees at trial during the relevant time. In other words, if plaintiff had not been willing to stipulate, defendant could have gotten away with its claim about the number of employees because plaintiff was unprepared to cross examine on the issue. Even if defendant is correct that plaintiff would have been unprepared to cross examine, which I doubt, its assertion hardly establishes "severe prejudice."

As a general rule, issues such as damages caps are taken up outside the presence of the jury. Defendant has not lost any opportunity to be heard on its argument that under 42 U.S.C. § 1981a(b)(3), it did not have more than 200 employees in any of the relevant years. It is not as if it had relied to its detriment on the stipulated issue. It still has a full opportunity to try to prove that its employment level never exceeded 200 in the years at

issue.

Courts are free to relieve a party of a stipulation entered into mistakenly. In this instance, despite defendant's insistence that the stipulation was not a mistake, it is appropriate to decide whether it was. If, for purposes of the Americans with Disabilities Act, the term "employees" includes part-time employees and employees of contractors who work under the supervision and direction of the school district, then Superintendent Rosburg was mistaken when he reported only the full-time employees and the stipulation should be voided. The issue should be briefed and, if necessary, further developed in an evidentiary hearing.

Plaintiff may have until December 15, 2010 in which to file her brief in support of her position on the number of employees to be attributed to defendant. Defendant may have until January 5, 2011 in which to respond; plaintiff may have until January 15, 2011 in which to reply. Counsel should address the question of the need for an evidentiary hearing in their briefs.

ORDER

IT IS ORDERED that the parties are to brief the issue of the number of employees attributable to defendant School District of Somerset for ADA purposes according to the

briefing schedule set out above.

Entered this 24th day of November, 2010.

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