IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RUDY BARLOW,

Plaintiff,

v.

KRAFT FOODS GLOBAL, INC.,

Defendant.

FINAL PRETRIAL CONFERENCE ORDER

10-cv-319-bbc

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A final pretrial conference was held in this case on July 28, 2011, before United States District Judge Barbara B. Crabb. Plaintiff Rudy Barlow appeared by Douglas Phebus. Daniel Kaplan represented defendant Kraft Foods.

Counsel predicted that the case would take 4-5 days to try. 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 relating to the witnesses that are to be called at trial. I removed the names of two witnesses, Shavey Barlow and Michael Rice, because plaintiff did

not give timely notification to defendant that he wanted to call these two witnesses. 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. Before counsel give their opening statements, the court will give the jury introductory instructions on the way in which the trial will proceed and their responsibilities as jurors.

Counsel agreed that all witnesses would be sequestered. Counsel are either familiar with the court's visual presentation system or will make arrangements with the clerk for instruction on the system.

No later than noon on the Friday before trial, plaintiff's counsel will advise defendant's counsel of the witnesses plaintiff will be calling on Monday and the order in which they will be called. Counsel should give similar advice at the end of each trial day; defendant's counsel shall have the same responsibility in advance of defendant's case. Also, no later than noon on the Friday before trial, 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. Counsel are to provide copies of documentary evidence to the court before the start of the first day of trial.

Counsel discussed the form of the verdict and the instructions on liability. Mr. Kaplan asked for three additional instructions, which I agreed to. A statement about intent has now been incorporated into the instruction on Special Verdict; a statement on good faith has been added to the instruction on Punitive Damages; and an instruction on equal standing, which should have been included in the proposed instructions but was not, has been added to the instructions. Counsel will not be calling any experts, so no instruction on experts is necessary in the introductory instructions.

On the special verdict, the biggest question is whether to use the "motivating factor" standard or the "but for" standard or both, as I have done in the proposed verdict form. It is clear that the "motivating factor" standard applies to Title VII claims; it is less clear what standard applies to § 1981 claims. Unless counsel can show a compelling reason to give an instruction on only one standard, I will include both.

I have included a question about when plaintiff would have known about the allegedly discriminatory nature of his continuing as the vacation backup in the pretreatment department. At this point, my tentative thinking is that unless plaintiff can prove that defendant made a new decision about keeping plaintiff in that position after 2006, plaintiff will be barred by the statute of limitations from pursuing that aspect of his discrimination case.

Final decisions on the instructions and form of verdict will be made at the instruction

conference once the parties have presented all of their evidence on liability.

The following rulings were made on the parties' motions in limine.

Plaintiff's Motions

1. Motion to exclude evidence of plaintiff's grievance history

Plaintiff wants to prohibit defendant from putting in evidence that plaintiff did or did not file grievances about the matters he is challenging in this case. Defendant has two reasons for wanting to introduce this evidence. First, it undermines plaintiff's credibility when he says he believed the assignment to the pretreatment department was discriminatory. Second, it is relevant to defendant's disciplinary system and may explain why plaintiff was given the discipline he was for the incident in the hard salami department. I find the first reason unpersuasive. Plaintiff's personal and subjective beliefs about the discriminatory nature of his long stay in the backup vacation spot for the pretreatment department are not relevant. The question is an objective one. It is settled law that plaintiffs cannot use their subjective belief as evidence of discrimination. Horwitz v. Board of Educ. of Avoca School Dist. Not. 37, 260 F.3d 602, 615-16 (7th Cir. 2001). It follows that defendants should not be able to use a plaintiff's subjective belief as evidence of nondiscrimination. Thus, plaintiff's subjective belief about interest in avoiding the pretreatment plant is irrelevant. Moser v. Indiana Dept. of Corrections, 406 F.3d 895, 904 (7th Cir. 2005) ("A subjective

preference for the former position, without more, does not demonstrate an adverse employment action.").

As to the second reason, the lack of grievances filed in response to disciplinary actions is tangentially relevant to showing that plaintiff's employment record included pre-existing, ungrieved disciplinary actions. If defendant relied on these previous actions in making its decision to discipline plaintiff for the incident in the hard salami department, the fact that they were not contested by plaintiff would be relevant to show that it was not error to rely upon them. The necessary assumption is that defendant relied on the previous discipline in making its decision to discipline plaintiff. Otherwise the discipline is irrelevant. Of course, defendant must also prove that in relying on the previous discipline, it was proceeding in conformity to defendant's procedures for disciplinary action. Any deviation from the stated procedures could be used as evidence that defendant's decision was made for an improper reason, such as race discrimination.

2. Motion to exclude evidence of plaintiff's discipline that was no longer in effect when he was suspended

This motion is DENIED to the extent that defendant's witnesses will testify that they relied on past discipline in making the relevant decision and that in doing so, they acted in conformity with defendant's procedures for discipline. As I noted, if defendant did rely on

past discipline and plaintiff can show that this reliance violated the terms of the collective bargaining agreement, he can use that as evidence of discrimination.

Defendant's Motions

1. Motion to exclude evidence related to alleged acts of retaliation

This motion is GRANTED as unopposed.

2. Motion to exclude evidence of the April 2008 petition

This motion is GRANTED. The petition was relevant to the dismissed retaliation claim. It is not relevant to the remaining claim for race discrimination.

3. Motion to exclude evidence of defendant's conduct after plaintiff returned to work on February 6, 2009

This motion is GRANTED because plaintiff has not shown how defendant's alleged conduct (failing to include a one-year expiration clause on his condition of employment and subjected him to heightened scrutiny) after he returned to work is probative of discrimination.

4. Motion to exclude evidence of adverse employment actions other than assignment to

pretreatment department and suspension

This motion is GRANTED with the exception of plaintiff's past discipline to the extent that discipline is relevant to defendant's decision to suspend plaintiff, that is, that defendant can show it relied on it in making its decision.

5. Motion to exclude testimony of Joseph Jerzewski about plaintiff's job performance

This motion is GRANTED because Jerzewski's testimony is too vague to have any probative value on the issue of plaintiff's job performance.

6. Motion to exclude evidence that other employees have not been disciplined for damaging property

This motion is GRANTED with the exception of other employees involved in the same incident for which plaintiff was suspended.

7. Motion to exclude evidence of other African-American employees who were fired

This motion is GRANTED as unopposed.

8. Motion to exclude evidence that Kevin Bacon did not want plaintiff around

This motion is GRANTED. The evidence is hearsay and it is irrelevant because there

is no evidence that the remark was racially motivated.

9. Motion to exclude statements by Bob West if West does not testify

This motion is GRANTED. Without knowing the reasons West had for his opinion that plaintiff should not have been disciplined, the jury could not evaluate his testimony.

10. Motion to exclude evidence that defendant's food production is done in a manner that is unsafe for consumers

This motion is GRANTED. Plaintiff will not be allowed to offer evidence that defendant allows leaky pipes to go unrepaired for long periods of time.

11. Motion to exclude evidence about the emotional distress that plaintiff suffered and about punitive damages

This motion is GRANTED as to any evidence on these topics during the liability phase of the trial. However, plaintiff can rely on his own testimony to support his claim of emotional distress. I will reserve a decision on the propriety of punitive damages until the end of the liability phase. Neither party may introduce any evidence relating to emotional

distress or punitive damages during the liability phase.

Entered this 29th day of July, 2011.

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