

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHRIS BORRESON,

Plaintiff,

v.

AL SCHUMACHER and THE CITY OF MADISON,

Defendants.

OPINION AND ORDER

10-cv-521-bbc

SHANE MOSEL,

Plaintiff,

v.

AL SCHUMACHER and THE CITY OF MADISON,

Defendants.

10-cv-523-bbc

Plaintiffs Chris Borreson and Shane Mosel contend that defendants City of Madison and Al Schumacher terminated them because they opposed discriminatory treatment of one of their coworkers, in violation of the First Amendment and Title VII of the Civil Rights Act. Trial in both cases is scheduled for January 30, 2012 and the parties' motions in limine are

now before the court.

A. Plaintiffs' Motions in Limine

The following motions are GRANTED as unopposed: (1) plaintiffs' motion to exclude any references to prior civil or criminal litigation in which either plaintiff was a party, dkt. #45; (2) plaintiffs' motion to exclude any reference to the fact that plaintiff Mosel has a child from a non-marital relationship, dkt. #46; (3) plaintiffs' motion to preclude defendants from informing the jury that defendants may have to pay plaintiffs' attorney fees, dkt. #47; (4) plaintiffs' motion to exclude evidence of defendant Schumacher's personal wealth, dkt. #48; and (5) plaintiffs' motion to exclude evidence of postings on Facebook or other social media about plaintiffs' alleged involvement in vandalizing a city truck. Dkt. #50.

Defendants oppose two motions filed by plaintiffs. The first is plaintiffs' motion to exclude evidence defendants learned about plaintiffs after they were terminated. Defendants do not argue that such evidence is relevant to limit plaintiffs' damages, as in McKennon v. Nashville Banner Publication Co., 513 U.S. 352 (1995). Rather, defendants argue that they wish to submit evidence learned after plaintiffs' termination to rebut plaintiffs' allegations that defendants' stated reason for firing plaintiffs (vandalizing a city truck) is a pretext for discrimination. However, the task for the jury will be to determine defendants' intent *at the time plaintiffs were terminated*. If defendants were not aware of a particular fact, then it is not

relevant to proving that intent. Defendants could not have been influenced by a fact they had no knowledge of. Although information learned later may provide objective evidence that plaintiffs engaged in misconduct, it does not provide evidence of defendants' state of mind at the relevant time, which is all that matters. This motion, dkt. #49, is GRANTED.

The second motion is to exclude any statements by Matt Dewar and Jeff Cass, two other city employees, because they are not relevant. Defendants say that it would be "premature" to exclude statements by these two witnesses, but they fail to identify any potential relevance that the statements would have. Accordingly, this motion, dkt. #51, is GRANTED. If defendants believe any statements by these two witnesses are admissible, they will have to seek permission from the court before offering those statements.

B. Defendants' Motions in Limine

Defendants have filed motions in limine to exclude three pieces of evidence: (1) an arbitration decision from November 2009 that ordered the city to reinstate plaintiff Borreson; (2) a settlement agreement between the city and plaintiff Mosel; and (3) any reference to the settlement between the city and Michelle Heimann. Plaintiffs oppose each of these motions.

I agree with defendants that the arbitration decision is not admissible for the purpose of determining liability. (The parties agree it is relevant to damages.) The arbitrator did not

consider the issue of retaliation, so it could not be helpful to the jury in that respect. Even if the arbitrator had considered that issue, the jury must make its own assessment of the facts. The arbitration decision likely would be unfairly prejudicial to defendants.

Plaintiffs say that the arbitration decision is “relevant as evidence of a witness’s prior statement under FRE 613” because “[p]laintiffs’ counsel anticipates using the transcript from the arbitration hearing to cross-examine witnesses.” This is a non sequitur. Defendants’ motion is limited to the arbitration decision itself. Excluding the decision does not prohibit plaintiffs from using statements from the arbitration hearing for the purpose of impeachment. Accordingly, defendants’ motion to exclude the arbitration decision, dkt. #53, is GRANTED.

The same conclusion follows with respect to the settlement agreement. Plaintiffs raise no new arguments for the admissibility of that document, so defendants’ motion to exclude the settlement agreement between Mosel and the city, dkt. 53, is GRANTED.

Finally, with respect to Heimann’s settlement agreement with the city, I agree with plaintiffs that it is admissible. Plaintiffs allege that defendants retaliated against them for making statements in support of Heimann. Because some of those statements were made in the context of discussions about the settlement agreement, it is impossible to exclude any references to the agreement from the case. Accordingly, defendants’ motion to exclude any

reference to Heimann's settlement, dkt. #53, is DENIED

Entered this 9th day of January, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge