IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARVIN PROCHASKA,

OPINION and ORDER

Plaintiff,

10-cv-686-bbc

v.

MENARD, INC.,

Defendant.

- -

Plaintiff Marvin Prochaska contends that defendant Menard, Inc. fired him because of his age, in violation of the Age Discrimination in Employment Act. Trial is scheduled for February 21, 2012 and the parties' motions in limine are now before the court.

A. Plaintiff's Motions in Limine

1. Motion to exclude spreadsheets related to after-acquired evidence defense, dkt. #229

Defendant wishes to limit its potential damages by relying on the "after-acquired evidence" defense. McKennon v. Nashville Banner Publication Co., 513 U.S. 352 (1995). In particular, defendant says it discovered during the proceedings in this case that plaintiff had violated the company's nonfraternization and conflict of interest policies by socializing

with clients and allowing them to pay for his meals. To prevail on its defense, defendant must prove that it would have fired plaintiff if it had known that plaintiff had violated this policy. Id. at 362-63.

One of the ways that defendant wishes to prove its defense is with spreadsheets that show the names of employees who were fired for violating the same policies. Plaintiff objects to the spreadsheets on multiple grounds.

Even if I assume that the spreadsheet is a summary under Fed. R. Evid. 1006 of other business records that meet the exception to the hearsay rule under Fed. R. Evid. 803(6), the spreadsheets are not admissible because they do not identify the circumstances under which any of these employees were fired. Plaintiff sought discovery on those circumstances, but defendant objected on the ground that it would be too burdensome to produce that information. The magistrate judge denied plaintiff's motion to compel and I upheld his ruling, but we both emphasized that ultimately it would be defendant's burden to show why these other employees were terminated. Dkt. #186, at 3. In the summary judgment opinion, I noted that defendant had discretion to overlook violations of the policy, so the other terminations had little probative value without information regarding the surrounding circumstances of each termination. Dkt. #194, at 37-38.

I am granting plaintiff's motion to exclude the spreadsheets because the probative value of the spreadsheets is substantially outweighed by the unfair prejudice that admitting

them would cause plaintiff. Defendant cannot have it both ways. It would be unfair to allow defendant to rely on these spreadsheets when it refused to provide information to plaintiff that would allow him to show that the circumstances of the other violations were dissimilar to his.

2. Motion to exclude evidence that plaintiff engaged in gambling, dkt. #234

Plaintiff wants to exclude evidence that he went to casinos with business associates on the grounds that it is irrelevant and unfairly prejudicial. Although I understand plaintiff's concerns, I do not believe that defendant can be precluded from making any references to gambling or casinos. Part of defendant's "after-acquired evidence" defense is that plaintiff socialized with business associates at casinos. Plaintiff fails to explain how defendant can assert this defense without identifying the conduct at issue.

That being said, the references to casinos or gambling should be kept to a minimum. Defendant may not present evidence on this issue beyond what is necessary to show that plaintiff violated a company policy. I see no reason to discuss the details of these activities.

3. Motion to sequester witnesses, dkt. #236

I am granting this motion as unopposed. Dkt. #299.

4. Motion regarding jury instructions on damages, dkt. #238

I am denying this motion without prejudice. Plaintiff may raise arguments about the jury instructions at the instruction conference.

B. Defendant's Motions in Limine

1. Motion to exclude the testimony of Debra Sands, dkt. #230

Defendant seeks to exclude the testimony of Debra Sands because it is covered by the attorney-client privilege and violates various rules of evidence. I considered and rejected defendant's first objection in the summary judgment order. In particular, I concluded that defendant failed to establish that Sands had a lawyer-client relationship with defendant or that any information Sands obtained was the result of an attorney-client relationship rather than of her status as John Menard's fiancée. In addition, I noted that defendant likely had waived any privilege by taking Sands's deposition and eliciting much of the testimony it wished to strike. Because defendant raises no new arguments in its motion or cites any new authority regarding the attorney-client privilege, I decline to revisit the ruling from the summary judgment motion.

Defendant's second objection requires me to look at each piece of proposed testimony separately:

- Scott Collette (the chief operating officer, who told plaintiff he was

fired) has a reputation for being a "yes man," dkt. #111, at ¶ 4;

- John Menard was "negative towards older employees in the company" because he "was having increasing difficulty with age-related issues," dkt. #58, at 18, and they "reminded him of his own progressing age," id. at 63-64;
- Menard's "ideal employee is a white married man with a wife on his ass or bitching at him," id. at 65;
- older employees were "fat and lazy," no longer "had fire in their belly" and were "too big for their britches," id. at 21, 28-29 and 35;
- Menard "thought younger people were the performers" and he "viewed himself" as much younger, id. at 32 and 64;
- Menard called plaintiff an "old fart," commented on his gray hair and stated, "that's the problem when you get old, you fall apart, you can't get the work done";
- Menard asked members of top management to identify their successors, id. at 41-47.

I concluded in the summary judgment opinion that Sands may testify about age-related comments she heard John Menard make. Defendant repeats its objections that the alleged statements are not relevant because they were not made in the context of the decision

to fire plaintiff. However, as I explained in the summary judgment opinion, the timing of Sands's testimony about discriminatory comments made by John Menard goes to the weight of the testimony, not its admissibility.

The primary question in this case is whether John Menard fired plaintiff because of his age. Obviously, any comments Menard made disparaging plaintiff or other workers because of their age is relevant to showing discriminatory intent generally. E.g., Duncan v. Fleetwood Motor Homes of Indiana, Inc., 518 F.3d 486, 490 (7th Cir. 2008) (comment that older workers "no longer could do many things" was relevant to age discrimination claim). Although older comments are less probative than more recent ones, they would lose all force only if there were evidence that the speaker no longer held the same views reflected in the comments. Because defendant cites no such evidence, I cannot say that any potential for unfair prejudice substantially outweighs the probative value of the comments.

Defendant cites Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (O'Connor, J., concurring) (1989), for the proposition that comments are not admissible unless they are made at the same time as the employment decision. However, I rejected this interpretation of Justice O'Connor's opinion in Lust v. Sealy, Inc., 277 F. Supp. 2d 973, 984 (W.D. Wis. 2003):

> In Price Waterhouse, Justice O'Connor focused on comments that are direct evidence of discrimination, meaning that they prove without inference that an illegitimate criterion was a substantial factor in the employer's decision. There

> is nothing in her opinion suggesting that remarks that fail to meet the standard for direct evidence become irrelevant. Indeed, the plurality suggested that even if a comment does not prove discrimination by itself, it may be circumstantial evidence "that gender played a part." See id. at 251 (plurality opinion). In more recent cases, the Court of Appeals for the Seventh Circuit has recognized that even comments not made "in temporal proximity to the employment action" or "in reference to that action" may be probative of discrimination, though, standing alone, they are insufficient to prove the plaintiff's case or even to shift the burden of persuasion to the defendant. Schuster v. Lucent Technologies, 327 F.3d 569, 576 (7th Cir. 2003); Gorence v. Eagle Food Centers, Inc., 242 F.3d 759, 762 (7th Cir. 2001); see also Futrell, 38 F.3d at 347 (rejecting view that discriminatory remarks are not probative unless made "within the context of the employment decision in question").

Further, as I pointed out in the summary judgment opinion, the Supreme Court made it clear in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), that comments may be probative of discrimination even if they are not contemporaneous with the employment decision at issue. Id. at 152–53 (criticizing lower court for discounting age-related comments that "were not made in the direct context of Reeves's termination"). See also Nagle v. Village of Calumet Park, 554 F.3d 1106, 1115 (7th Cir. 2009) (courts "must consider evidence of discriminatory remarks, despite being attenuated from the adverse employment action, in conjunction with all of the other evidence of discrimination"); Paz v. Wauconda Healthcare and Rehabilitation Centre, LLC, 464 F.3d 659, 666 (7th Cir. 2006) ("how recent the comments were, how extreme, and who made the remarks are pieces of evidence that inform whether there was a 'mosaic of

discrimination.' "). Although I cited all of these cases in the summary judgment opinion, defendant fails to distinguish or even discuss them in its motions in limine.

Finally, it makes no sense to suggest that ageist comments have no relevance to a claim for age discrimination unless the decision maker made them at the time he was firing the plaintiff. Few sophisticated business people would be so careless as to make explicitly discriminatory comments at that time. As the Supreme Court has noted, "the question facing triers of fact in discrimination cases is both sensitive and difficult" because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). To prove discriminatory intent, an employee generally will have to present circumstantial evidence that tends to show that the employer was motivated by a protected characteristic rather than a legitimate business concern. Of course, the fact that an employer is ageist does not mean that he relied on an employee's age with respect to a particular decision, but I cannot agree with defendant's suggestion that a generally ageist attitude is not relevant evidence of age discrimination.

With respect to Sands's testimony about Menard's general attitudes about aging and older workers, I stated in the summary judgment opinion that most of it "seems to be inadmissible for the reasons described in Visser v. Packer Engineering Associates, Inc., 924 F.2d 655, 659 (7th Cir. 1991)." In that case, the court held that, when a lay witness draws

inferences or offers opinions, they "must be grounded in observation or other first-hand personal experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience." Id.

In her deposition, Sands does not lay any foundation for the opinions she gave about Menard's attitudes toward older workers; they seem to be nothing more than speculation. In his brief, plaintiff says that Sands's testimony comes directly from statements she heard by Menard. As I stated above, Sands may testify about age-related comments she heard, but in their current form, these opinions are inadmissible.

This leaves testimony that Collette was a "yes man" and that Menard required managers to choose their successor. The first topic suffers from the same problem of lack of foundation; Sands does not explain how she knows this. In any event, I agree with defendant that plaintiff has failed to show that either subject is relevant to this case. Plaintiff wants to use the "yes man" testimony to show that Menard was involved in the decision to fire him, but I do not see the connection. Even if it is true that Collette agreed with everything Mendard said, it does not follow that Collette was required to consult with Menard before making a firing decision. With respect to the succession plans, plaintiff wants the jury to infer that Menard was trying to get rid of older workers. However, plaintiff has not shown this to be anything but speculation thus far. Plaintiff does not point to any statements by Menard in which he identified that as the reason behind the plan and he does

not point to any testimony by Sands in which she identified any managers other than plaintiff who were fired and replaced with a younger a worker.

Alternatively, defendant asks for permission to "impeach" Sands with evidence of "bias, animosity and dishonesty." Dkt. #230, at 10. It identifies several grounds for impeachment:

- The fact that Debra Sands is currently suing John Menard and Menard, Inc. for hundreds of millions of dollars in a pending state court proceeding.

- The fact that Debra Sands claims to be John Menard and Menard, Inc.'s previous counsel, yet now testifies freely regarding information related to the representation, in violation of Rule 1.9(c) of the Wisconsin and Minnesota Rules of Professional Conduct.

- The fact that Debra Sands disregarded a state court order that prohibited her from providing testimony about her sister's case after harassing and threatening John Menard and his family.

- The fact that Debra Sands openly disparaged John Menard in front of their church congregation after he terminated their relationship and she instituted litigation against him.

A witness's potential bias against another party is generally fair game for cross examination. United States v. Abel, 469 U.S. 45, 50–51 (1984). Thus, defendant is free to elicit testimony that Sands is Menard's ex-fiancée and that they are engaged in litigation regarding other matters in state court. However, the remaining topics identified by defendant are not admissible. With respect to the Rules of Professional Conduct and the

court order, defendant has not established that Sands has violated either. In any event, defendant fails to explain how these alleged violations are relevant to showing bias or dishonesty. The alleged incident in the church seems to be less about showing potential bias and more about embarrassing the witness. Accordingly, I conclude that any probative value that evidence might have is substantially outweighed by its prejudicial nature.

2. Motion to exclude evidence that John Menard was a decision maker, dkt. #231

In the summary judgment opinion, I concluded that a reasonable jury could find that John Menard was involved in the decision to fire plaintiff because the former chief operating officer, Charles Menard, testified that he did not have authority to fire anyone without John Menard's approval and defendant pointed to no evidence that the policy had changed since Collette became chief operating officer. Defendant challenges this conclusion on the ground that Charles Menard's testimony is "evidence of a person's character" that is inadmissible under Fed. R. Evid. 404(a), but it cites no authority for this proposition and it fails to explain why it is accurate to classify involvement in termination decisions as a character trait within the meaning of Rule 404. In any event, I agree with plaintiff that this evidence is admissible as habit. Under Fed. R. Evid. 406, a party may establish habit "through evidence of practice sufficiently uniform and regular that finder of fact could conclude that practice was undertaken almost always." Malen v. MTD Products, Inc., 628 F.3d 296, 305 (7th Cir.

2010). Because that is what Charles Menard testified, that evidence is admissible under Rule 406.

3. Motion to exclude evidence of Scott Collette's relationship with a subordinate, dkt. #237

To rebut defendant's "after-acquired evidence" defense, plaintiff wishes to offer evidence that Scott Collette had a romantic relationship with one of his subordinates, in violation of the nonfraternization policy, but was not disciplined for it. Although defendant did not dispute this fact at summary judgment, dkt. #120, at ¶ 213, it now says that the fact is not relevant because this conduct would not be covered by the nonfraternization policy, but by the company's dating policy.

Defendant is free to take this position at trial if it wishes, but I cannot exclude the evidence of Collette's relationship on this ground. The document defendant cites to support its argument states under the heading "Non-fraternization" that "[p]ersonal relationships between managers and subordinates are prohibited." Dkt. #44, at 14. Although dating may be prohibited by a separate policy as well, that does not change the scope of the non-fraternization policy.

In any event, even if Collette's and plaintiff's conduct are not covered by the same policy, this would not render inadmissible evidence regarding defendant's response to Collette's conduct. "[E]mployees may be similarly situated to the plaintiff even if they have

not engaged in conduct identical to that of the plaintiff." Peirick v. Indiana University-Purdue University Indianapolis Athletics Dept., 510 F.3d 681, 689 (7th Cir. 2007). The question is whether the other employee engaged in conduct of comparable or greater seriousness but received better treatment from the employer. E.g., Ezell v. Potter, 400 F.3d 1041, 1050 (7th Cir. 2005) (two mail carriers similarly situated when plaintiff was fired for taking long lunch but other employee was not fired for losing piece of certified mail); Peirick, 510 F.3d at 690-91 (coaches similarly situated when plaintiff was fired for "using abusive language, unsafe driving, leaving students behind during a road trip, and pitting the students against the administration during the Tennis Center scheduling conflict" but other coaches were not fired for "repeated complaints of verbal abuse" or for "receiv[ing] extremely low marks . . . in the following areas: being organized in practice and game preparations, developing the potential of student-athletes, providing strong leadership and discipline, establishing clear team and individual goals, and displaying exemplary conduct at all times when with the team").

Because a reasonable jury could find that fathering a child with a subordinate is at least as serious as allowing a business associate to purchase a meal, I am denying this motion.

4. Motion to exclude probable cause finding of Wisconsin Equal Rights Division, dkt. #239

I am granting this motion as unopposed. Dkt. #274.

5. Motion to exclude newspaper articles, dkt. #240

Defendant wishes to exclude newspaper articles about John Menard. I am granting this motion as unopposed. Dkt. #275.

6. Motion to exclude evidence related to "1998 tax dispute," dkt. #241

The document at issue in this motion is a statement by defendant's counsel to the IRS regarding John Menard's involvement in the company in 1997 and 1998. Plaintiff seeks to rely on this document as evidence that Menard was involved in the decision to fire plaintiff, but he fails to respond to defendant's argument that the document is too old to be probative of Menard's involvement with the company in 2009. Accordingly, I am granting this motion.

7. Motion to preclude Debra Sands from testifying about John Menard's "honesty," dkt. #242

Defendant wishes to preclude Debra Sands from testifying about specific instances of alleged dishonesty by John Menard. Because defendant is correct that such testimony is prohibited by Fed. R. Evid. 608(b), I am granting this motion. However, under Fed. R. Evid. 608(a), Sands is free give an opinion about Menard's truthfulness, if she has one.

8. Motion to preclude testimony regarding "stray remarks," dkt. #244

This motion overlaps somewhat with defendant's motion to preclude the testimony of Debra Sands. To the extent that defendant is objecting to evidence of statements simply because they were not made in the context of the decision to fire plaintiff, I need not address that issue further.

However, defendant raises other objections in this motion as well. As I suggested in the summary judgment opinion, plaintiff may not testify generally that John Menard made comments that were "critical of his age." If he cannot identify what those comments were, that testimony is too vague to be probative of discrimination. Further, I agree with defendant that alleged comments by Menard to Jamie Radabaugh that "we're both getting older, or we're not getting any younger" do not suggest any bias against older workers and are irrelevant.

9. Motion to exclude "stray remarks" unrelated to age, dkt. #245

Defendant wishes to exclude testimony by Jeffrey Engedal regarding alleged statements by John Menard disparaging women and racial minorities. I agree with defendant that any probative value of such testimony on the issue of age discrimination is substantially outweighed by the danger of unfair prejudice. Plaintiff does not develop an argument in opposition to this view, but says that Debra Sands should be permitted to testify about

Menard's view of an "ideal employee." Because that is outside the scope of this motion, I need not consider it. However, I repeat my general observation that Sands may not testify about her beliefs of Menard's attitude toward older workers without first establishing a foundation for doing so.

10. Motion to exclude testimony related to emotional distress or damage to plaintiff's reputation, dkt. #246

I am granting this motion as unopposed. Dkt. #280.

11. Motion to exclude testimony of certain witnesses, dkt. #247

Defendant seeks to exclude the testimony of the following seven witnesses on the ground that plaintiff failed to describe their potential testimony in his disclosures under Fed. R. Civ. P. 26: Brian Hilderman, Rob Geske, Sarah Caffee, Garett Caffe, Mike Bauer, Robert Corey and John Fox. Because plaintiff says he has no intention of calling these witnesses except for impeachment, I am granting this motion as unopposed.

12. Motion to exclude evidence regarding "succession planning," dkt. #249

Defendant titles this motion broadly, but the substance of the motion is limited to the testimony of one witness, Jamie Radabaugh, so I limit consideration to that testimony.

In his deposition, Radabaugh testified that he believed that "old vets were required to announce a successor." Dkt. #38, at 83. However, he identified only two people who were required to do this. Dkt. #38, at 97. More important, plaintiff points to no testimony from Radabaugh that he had any reason to believe that any succession plan by defendant was motivated by a desire to get rid of older workers. I am granting this motion because plaintiff has failed to show that any testimony by Radabaugh on this issue will have any probative value.

13. Motion regarding the "cat's paw theory," dkt. #250

It is difficult to discern from this motion exactly what defendant wants the court to exclude. In the text of the motion, defendant says that plaintiff should be precluded from "introducing evidence at trial regarding John Menard's alleged role in Plaintiff's termination which is inconsistent with the applicable 'but for' causation standard applicable to ADEA claims." It later says that "[e]vidence which suggests that Mr. Menard merely influenced, played a role in, or was aware of Plaintiff's termination is . . . irrelevant."

Defendant does not identify any particular evidence it wishes to exclude, so it is impossible to rule on this motion. Further, defendant fails to explain how the court can distinguish between evidence that shows "but for" causation and evidence that shows a lesser degree of influence. The evidence of either is likely to be the same; ultimately, it will be for

the jury to determine whether Menard was sufficiently involved in the decision to fire plaintiff.

Distilled, defendant's argument is not about the evidence that may be presented, but the way that the jury will be instructed on causation. That is an issue that defendant may raise at the instruction conference.

In one part of its motion, defendant says that plaintiff has "waived" an argument regarding what the standard of causation should be. That makes no sense. This court has an independent obligation to instruct the jury on the appropriate standard, regardless what the parties have argued up until this point. Both sides may present their views at the instruction conference.

14. Motion to preclude Dawn Sands from testifying, dkt. #251

Dawn Sands (Debra Sands's sister) was a lawyer for defendant from 1999 to 2006. Defendant seeks to preclude Dawn Sands from testifying at trial on the ground that her testimony is irrelevant and protected by the attorney-client privilege. Plaintiff does not identify any nonprivileged, relevant testimony of Dawn Sands, so I will grant this motion. Plaintiff says that she may offer "impeachment evidence," but he does not identify what that might be. Before plaintiff may call Dawn Sands at trial, he will have to show that any testimony she will offer is admissible for the purpose of impeachment.

15. Motion to exclude references to Dawn Sands litigation, dkt. #252

I am granting this motion as unopposed. Dkt. #284

16. Motion to exclude evidence regarding John Menard's "propensity to micromanage and make hiring decisions," dkt. #253

As discussed with respect to defendant's motion in limine no. 2, if a witness has personal knowledge that John Menard generally was involved in making important decisions for defendant, particularly those decisions related to firing employees, that testimony is admissible under Fed. R. Evid. 406. However, before any witness may give that testimony, he or she will have to demonstrate a foundation for that opinion.

17. Motion to exclude evidence of prior complaints of discrimination, dkt. #254

Defendant wishes to exclude evidence of any complaints of discrimination by other employees against defendant. I cannot grant this motion because defendant fails to identify any particular evidence it wants to exclude. To the extent defendant means to argue that other acts of discrimination are categorically inadmissible, defendant is wrong. The court of appeals has explained the proper approach:

> "[B]ehavior toward or comments directed at other employees in the protected group" is one type of circumstantial evidence that can support an inference of discrimination. Hemsworth, 476 F.3d at 491; see also Phelan v. Cook County,

> 463 F.3d 773, 781 (7th Cir. 2006). The Supreme Court also has held that this kind of "me too" evidence can be relevant to a discrimination claim. See Sprint/United Mgmt. Co. v. Mendelsohn, — U.S. —, 128 S. Ct. 1140, 1147 (2008) (discussing evidence of discrimination by other supervisors in the context of an ADEA suit); Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1285-86 (11th Cir.2008) (upholding admission of evidence of racial discrimination against other employees to prove an employer's intent to discriminate). The Court made clear that the relevance of "me too" evidence cannot be resolved by application of a per se rule. Sprint, 128 S.Ct. at 1147. Instead, whether such evidence is relevant depends on a variety of factors, including "how closely related the evidence is to the plaintiff's circumstances and theory of the case." Id.; see also Fed. R. Evid. 401, 403. Rather than dismiss this evidence as irrelevant per se, the district court should have analyzed whether, if proven, the fact that Foley fired or transferred all other Muslim associates from its Business Law Department would be a relevant component of the "mosaic" of evidence.

Hasan v. Foley & Lardner LLP, 552 F.3d 520, 529 (7th Cir. 2008).

Defendant may be correct that any alleged past discriminatory conduct in this case is inadmissible because it is too speculative or involved different decision makers. However, I cannot make this determination without knowing the specific evidence at issue.

18. Motion to exclude testimony by expert Bruce Niendorf, dkt. #255

Defendant argues that any testimony by Bruce Niendorf should be excluded from trial because plaintiff did not serve defendant Niendorf's expert report until one day before discovery ended, on January 19, 2012. Plaintiff does not deny that the report was late and he does not dispute defendant's representation that he did not give defendant any indication

before January 19 that he was going to file an expert report. Nevertheless, he asks the court to excuse his untimeliness because "[p]laintiff's counsel was under the impression that the expert disclosures would be due on or before the discovery deadline." The problem with this argument is that plaintiff fails to explain *why* he held this belief.

It is true that the preliminary pretrial conference order did not impose a deadline for disclosing experts, instead leaving it "To be Decided by the Parties." Dkt. #12. However, plaintiff does not cite any evidence that the parties ever agreed to make the last day of discovery the deadline for disclosing experts and he does not identify any reason he would have thought that to be the case. In the absence of a court order or agreement of the parties, Fed. R. Civ. P. 26(a)(2)(D)(i) is clear that "the disclosures must be made . . . at least 90 days before the date set for trial or for the case to be ready for trial."

Plaintiff argues that defendant was not prejudiced by the late disclosure because "Mr. Niendorf's report is based on simple calculations of evidence that has been in this case since the beginning" and because plaintiff offered to make Niendorf available to be deposed before trial. I cannot evaluate plaintiff's first argument because he cites no evidence to support it and did not file the expert report with the court. His second argument is unpersuasive. Any time that defendant spent preparing for and taking Niendorf's deposition would be time it could not spend preparing for trial. Plaintiff gave defendant no notice of this witness, so it would not be fair to require defendant to drop everything to take an unplanned deposition.

Because plaintiff failed to show that his untimely expert report was justified or harmless, I am granting this motion.

19. Motion to exclude evidence of plaintiff's performance before 2007, dkt. #256

Defendant argues that any evidence of plaintiff's work performance is irrelevant unless it shows that "plaintiff was performing his job satisfactorily shortly prior to his termination." I disagree, as should have been clear from the summary judgment opinion. I stated that plaintiff's long history with the company is relevant to a showing of pretext because it calls into question defendant's position "that plaintiff went from 'outstanding' to unemployed over the course of a few months." In other words, it is "plaintiff's long history with the company and the lack of evidence that he had performance deficiencies in the past" that makes it "surprising that defendant would reach such a quick conclusion that plaintiff should be fired without giving him an opportunity to improve." Dkt. #194, at 26, 32. Again, defendant ignores case law cited in that opinion that undermines its position. Valentino v. Village of South Chicago Heights, 575 F.3d 664, 673-74 (7th Cir. 2009) (summary judgment inappropriate when "termination occurred without warning after nearly fifteen years of uninterrupted service").

I agree with defendant that the focus of the trial should be on more recent events, but I will allow plaintiff to put on limited testimony of his past performance with the company.

If defendant believes it has evidence that plaintiff's performance over the years was poor, it is free to offer that evidence as well.

20. Motion to hold the trial in three phases, dkt. #268

On February 2, 2012, two weeks after the deadline for filing motions in limine, defendant filed a motion to hold two separate liability phases in the trial. In the first phase, the jury would decide whether John Menard was "the" decision maker in this case. In the second phase, the jury would decide whether defendant discriminated against plaintiff because of his age. If the jury found in favor of plaintiff on the second phase, it would decide damages in a third phase.

This court rarely divides liability into multiple phases. Defendant justifies its unusual request on the ground that it will make the trial more efficient, but that is unlikely. Even if the jury agreed with defendant that Menard played no role in firing plaintiff, that would not alleviate the need for the second liability phase. I already determined in the summary judgment opinion that plaintiff adduced sufficient evidence of pretext to justify a trial even without the evidence of Menard's age-related comments. Thus, the primary result of granting defendant's motion simply would be to add another period of jury deliberation. Further, defendant's proposal likely would require a number of witnesses to be called in both phases, increasing the inconvenience to them. Concerns of efficiency do not justify the

granting of this request.

In addition, defendant says that Menard's comments are prejudicial. That may be true, but I cannot conclude that is sufficient reason to restructure the entire trial. Many cases involve prejudicial evidence that one side or the other would like to segregate into a separate proceeding. Particularly because defendant's motion is coming at the 11th hour after the parties have submitted all their pretrial materials, I decline to divide the trial any further.

ORDER

IT IS ORDERED that

1. Plaintiff Marvin Prochaska's motion to exclude spreadsheets related to defendant Menard, Inc.'s after-acquired evidence defense, dkt. #229, is GRANTED.

2. Plaintiff's motion to exclude evidence that plaintiff engaged in gambling, dkt. #234, is DENIED. Defendant may present evidence on this subject to the extent it is necessary to show that plaintiff violated a company policy.

3. Plaintiff's motion to sequester witnesses, dkt. #236, is GRANTED as unopposed.

4. Plaintiff's motion regarding jury instructions on damages, dkt. #238, is DENIED WITHOUT PREJUDICE. Plaintiff may raise arguments about jury instructions at the instruction conference.

5. Defendant's motion to exclude the testimony of Debra Sands, dkt. #230, is GRANTED IN PART. Sands may not testify: (1) about her opinions on John Menard's attitude toward older workers without first laying an adequate foundation for these opinions; (2) that Scott Collette was a "yes man"; or (3) that Menard required managers to choose their successor. Defendant's motion is DENIED in all other respects.

6. Defendant's motion to be permitted to cross-examine Debra Sands on topics showing bias is GRANTED IN PART. Defendant may elicit testimony that Sands is Menard's ex-fiancée and that they are engaged in litigation regarding other matters in state court. The motion is DENIED in all other respects.

7. Defendant's motion to exclude evidence that John Menard was a decision maker, dkt. #231, is DENIED.

8. Defendant's motion to exclude evidence of Scott Collette's relationship with a subordinate, dkt. #237, is DENIED.

9. Defendant's motion to exclude the probable cause finding of Wisconsin Equal Rights Division, dkt. #239, is GRANTED as unopposed.

10. Defendant's motion to exclude newspaper articles about John Menard, dkt. #240, is GRANTED as unopposed.

11. Defendant's motion to exclude evidence related to the "1998 tax dispute," dkt. #241, is GRANTED.

12. Defendant's motion to preclude Debra Sands from testifying about John Menard's "honesty," dkt. #242, is GRANTED with respect to specific instances of conduct. Sands may testify about her opinion regarding Menard's honesty, if she has one.

13. Defendant's motion to preclude testimony regarding "stray remarks," dkt. #244, is GRANTED IN PART. Plaintiff may not testify generally that John Menard made comments that were "critical of his age." Jamie Radabaugh may not testify that Menard said, "we're both getting older, or we're not getting any younger." This motion is DENIED in all other respects.

14. Defendant's motion to exclude alleged remarks by John Menard disparaging women and racial minorities, dkt. #245, is GRANTED.

15. Defendant's motion to exclude testimony related to emotional distress or damage to plaintiff's reputation, dkt. #246, is GRANTED as unopposed.

16. Defendant's motion to exclude testimony of, Brian Hilderman, Rob Geske, Sarah Caffee, Garett Caffe, Mike Bauer, Robert Corey and John Fox, dkt. #247, is GRANTED as unopposed with respect to any matter but impeachment.

17. Defendant's motion to exclude Jamie Radabaugh's testimony regarding "succession planning," dkt. #249, is GRANTED.

18. Defendant's motion regarding the "cat's paw theory," dkt. #250, is DENIED.

19. Defendant's motion to preclude Dawn Sands from testifying, dkt. #251, is

GRANTED with respect to any purpose but impeachment.

20. Defendant's motion to exclude references to Dawn Sands litigation, dkt. #252, is GRANTED as unopposed.

21. Defendant's motion to exclude evidence regarding John Menard's "propensity to micromanage and make hiring decisions," dkt. #253, is DENIED. Witnesses may testify about Menard's general practices as they relate to his involvement with important decisions if they lay a foundation for that testimony.

22. Defendant's motion to exclude evidence of prior complaints of discrimination, dkt. #254, is DENIED.

23. Defendant's motion to exclude testimony by expert Bruce Niendorf, dkt. #255, is GRANTED.

24. Defendant's motion to exclude evidence of plaintiff's performance before 2007, dkt. #256, is DENIED.

25. Defendant's motion to hold the trial in three phases, dkt. #268, is DENIED.

Entered this 7th day of February, 2012.

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