IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MISTY N. SORENSON,

Plaintiff,

v.

SENTRY INSURANCE, A MUTUAL COMPANY,

Defendant.

FINAL PRETRIAL CONFERENCE ORDER

11-cv-161-bbc

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A final pretrial conference was held in this case on August 10, 2012, before United States District Judge Barbara B. Crabb. Plaintiff appeared by Brian Formella and Dan Schmeeckle. Defendant appeared by John Murray.

Counsel predicted that the case would take 5 days to try. They 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. 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 with the exception of experts, 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. 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.

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

Plaintiff's motion for reconsideration of the order excluding all evidence relating to

her ERISA claim is GRANTED. She may put in evidence of the cost of her medical treatment paid by the benefit plan and evidence that any decision makers knew of the costs, so long as she can show that this evidence is relevant to her ADA claim.

Objections to proposed exhibits

1. Defendant has objected to plaintiff's production of cell phone records she did not produce in discovery; this objection is SUSTAINED. Plaintiff was aware that defendant had asked about these records at her deposition and should have produced them to defendant once she obtained them.

2. Defendant has objected to Tami Hurrish's weekly reports to Bob Reko as irrelevant because Reko was not involved in 2009 reorganization; this objection is SUSTAINED unless plaintiff can show that his successor, Tom Whittington, reviewed the reports before plaintiff was terminated.

3. Defendant's objection to introduction of correspondence between counsel about discovery matters is SUSTAINED. If plaintiff's counsel wish to use the review of which employees worked for which periods of time, defendant is willing to stipulate to that listing separate from the rest of the correspondence.

4. Defendant has objected to introduction of notices given to other employees as part of reduction-in-force decisions, arguing that it is irrelevant because the previous notices

reflect criteria used by unit managers to make layoff decisions at other times. This objection is OVERRULED. If defendant believes that the differences can be explained, they may do so in testimony. (Defendant does not object to introduction of September 2009 Selection List, which it admits may have relevance to plaintiff's claims.)

5. Defendant's objection to introduction of memos discussing criteria considered for the 2008 reorganization because they are not relevant to the 2009 reorganization is SUSTAINED.

6. Defendant's objection to audits of defendant's health plan conducted after plaintiff's termination and issued in June 2009 and January 19, 2010 is SUSTAINED because these audits would not have been in existence when defendant made the decision to terminate plaintiff.

Plaintiff's motion to exclude Exhibit 542

Defendant has withdrawn its request to introduce this exhibit so the motion is moot.

Defendant's motion to exclude Ms. Gause-Bemis as an expert

Plaintiff may call Gause-Bemis as a lay witness only; she may not be asked any questions that would elicit expert opinion.

Verdicts and instructions

Counsel discussed the form of the verdict and the instructions on liability. Defendant's counsel suggested that the liability verdict form would be easier to follow if question 1 were broken up into two separate questions. That suggestion will be adopted.

Another issue that arose at the conference relates to the decision makers involved in terminating plaintiff. At summary judgment, it was undisputed that Tom Whittington had the final say but received varying levels of input from others at the company. At the conference, plaintiff's counsel struggled to articulate who should be considered a decision maker and why. If plaintiff intends to rely on the knowledge and intent of anyone other than Whittington, it may be necessary to instruct the jury on the "cat's paw" doctrine and incorporate that issue into the verdict form, Staub v. Proctor Hospital, 131 S. Ct. 1186, 1193 (2011); Cook v. IPC International Corp., 673 F.3d 625, 629 (7th Cir. 2012), that is, it may be necessary to explain to the jury the extent to which it may consider the knowledge and intent of individuals who discussed the decision or made recommendations, but did not make the final decision to terminate plaintiff.

The parties should file a short brief with the court by August 15, 2012, explaining their position on the question whether the jury should be instructed on the cat's paw doctrine and whether the jury should be asked to determine exactly which person or persons made the decision. If either party believes an instruction is necessary, that party should

submit a proposed instruction and special verdict question.

Final decisions on the instructions and form of verdict will be made at the instruction conference once all the evidence has been presented.

Clerk of Court Peter Oppeneer is available to discuss settlement of the case at any time next week, by telephone or in person, as the parties prefer.

Entered this 10th day of August, 2012.

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