

Tentative Minute Order re Motions *in Limine*

PPG Architectural Finishes, Inc. (“PPG”) moves the Court for relief by way of Motions *in Limine*. Wallen Lawson (“Lawson”) has filed a single opposition to all three Motions. (Docket No. 132.) PPG has filed a consolidate reply to all three motions. (Docket No. 140.) The Court now enters its rulings.

I. PPG’s Motion *in Limine* No. 1: Discipline re Moore.

PPG seeks an order to exclude evidence regarding discipline issued or not issued to Clarence Moore (“Moore”). (Docket No 126.) PPG has filed a reply to Lawson’s response.

This is a wrongful discharge action brought by Lawson. Lawson reported to Moore. Among other things, he contends that Moore engaged in a scheme to mistint PPG products, specifically RescueIt. Mistinting refers to modifying or adulterating the color of the product with inappropriate color material. Lawson complained to management about the practice.

A. Rule 402.

PPG contends that Moore’s disciplinary history is not relevant, and thus should be excluded. (Fed. R. Evid. 402.). PPG further contends that any disparity in treatment between Lawson and Moore is not relevant because Lawson was not terminated for mistinting. (Motion, p. 7.) See Vasquez v. County of Los Angeles, 649 F.3d 634, 641 (9th Cir. 2003, as amended Jan. 2, 2004). Moreover, the two worked at different levels of management. Moreover, unlike Lawson, Moore was not fired but rather promoted, in contrast to Lawson’s discharge for poor performance.

Whether Moore participated in the actual mistinting, the scheme is near the heart of the case. The jury could well find that Lawson was discharged for reporting a fraud on customer Lowe’s to save PPG money, while the architect of the fraud was ultimately rewarded. This could support a finding of animus toward Lawson and undermine the assertions that there were legitimate grounds

for Lawson's termination. Obviously, that is for the jury.

This portion of the Motion is denied.

B. Rule 403.

Rule 403 of the Federal Rules of Evidence provides:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

(Federal Rule of Evidence 403.)

PPG also contends the evidence with regard to the treatment of Moore is more prejudicial and probative, would prove confusing the jury, and would result in a time-consuming "trial within a trial." (Motion, pp. 8-9.)

The Court disagrees. The facts surrounding Moore's employment, including discipline or lack thereof, are relevant. Much of the story would come in through documents. There is little likelihood for confusion or an undue expenditure of time. As noted above, the Court finds the testimony relevant.

This portion of the Motion is denied.

II. PPG's Motion in Limine No. 2: Evidence of Defrauding Loew's and Others re Moore.

PPG seeks an order to exclude evidence that PPG's mis-tinting practice resulted in defrauding Loew's and other paint customers. (Docket No. 127.) Lawson has filed an opposition, and PPG has filed a consolidated reply.

This motion requires only brief attention. At the heart of this case is the contention that Lawson was wrongfully discharged because he complained about the practice of mis-tinting which was unlawful, and he refused to go along with the practice.

Lawson's reporting that mis-tainting was wrongful and possibly illegal is the alleged basis for his termination. This is a classic claim for termination for refusal to go along with an alleged illegal practice. Cal. Labor Code § 1102.5.

The fact that PPG conducted an investigation and reimbursed Loew's is corroborative of the wrongful nature of the PPG conduct which Lawson challenged, and is thus relevant.

While the evidence does not put PPG in a flattering light, it is quintessentially relevant. Any prejudice is in the nature of the claim, and is not unduly prejudicial. (Fed. R. Evid. 403.)

Nevertheless, the Court will exclude evidence that PPG intentionally attempted to defraud its customers. That is separate from the claim that PPG intentionally sold mis-tinted paint. At this time, the Court will impose not further restrictions. However, should Lawson's examinations on the elements of the scheme prove prolix to the point of prejudice, the Court is prepared to entertain appropriate objections.

Except as noted, the Motion is denied.

III. PPG's Motion in Limine in Limine No. 3: Exclusion of Belloso Testimonio..

PPG seeks an order to exclude the testimony of Lawson's daughter, Ann Belloso ("Belloso") regarding whether PPG properly investigated Lawson's complaint. (Docket No. 128.) Lawson filed a consolidated opposition, and PPG replied. PPG offers a number of ground for exclusion.

First, Belloso's opinions are improper expert opinions under Federal Rule of Evidence Rules 701 and 702. (Motion, pp. 5-6.) Lawson counters that he will not offer Belloso as an expert. (Opposition, p. 5.) The failure to provide an expert report or otherwise make the required disclosures would disqualify her in any event. (Fed. R. Civ. P. 26(a)(1). Nor could she be allowed to testify as a non-expert under Rule 701 because her testimony would in fact involve specialized human relations knowledge, and it would not assist the jury. (Fed. R. Evid. 701(b), (c).)

Second, PPG challenges the relevance of her testimony. (Fed. R. Evid. 801, 802.) Lawson proffers that she will testify concerning the advice she gave her father, which goes to Lawson's state of mind as a whistle blower. (Opposition, pp 5-6.) The Court agrees with PPG. Lawson's state of mind forms not part of any of the claim's he is advancing. The facts of the case will decide the claims whether he had the utmost good faith or something less in his complaints.

Third, and most crucial, even if there were some kernel of relevance, the prejudice would be out weigh any evidentiary value. Even with a limiting purpose instruction, the jury would hear Belloso's experiences as an Human Relations Manager and her assessment of PPG's practices and investigation in this case.

Given that there is no proper exception to the hearsay rule, Lawson's recitation of his daughter's advice would be pure hearsay, and excludable on that basis in any event. (Fed. R. Evid. 801(c).

No matter how offered—whether directly by Belloso or through her father—her testimony is excluded. The Motion is granted.

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Counsel are ordered to advise the parties and all witnesses of the Court's rulings so that there are no inadvertent violations of this Order.