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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EDWARD ALVARADO, JOHN AZZAM, CHARLOTTE BOSWELL, TANDA BROWN, BERTHA DUENAS, PERNELL EVANS, CHARLES GIBBS, JANICE LEWIS, MARIA MUNOZ, KEVIN NEELY, LORE PAOGOFIE, DYRONN THEODORE, LASONIA WALKER and CHRISTOPHER WILKERSON,

Plaintiffs,

v.

FEDEX CORPORATION, a Delaware corporation, dba FEDEX EXPRESS,

Defendant.

Case No. C04-0098 SI

DEFENDANT'S NOTICE OF MOTION FOR NEW TRIAL OR ALTERNATIVELY FOR AMENDMENT OF THE JUDGMENT AND MEMORANDUM IN SUPPORT (PERNELL EVANS)

Date: April 18, 2007

Time: 9:00 a.m.

Judge: Hon. Susan Illston

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NOTICE OF DEFENDANT'S MOTION FOR NEW TRIAL OR ALTERNATIVELY FOR AMENDMENT OF THE JUDGMENT

PLEASE TAKE NOTICE that Federal Express Corporation's ("FedEx") Motion for New Trial or Alternatively for Amendment of the Judgment is to come on for hearing before this Honorable Court on April 18, 2007 at 9:00 a.m. in Courtroom 10 on the 19th floor of the United States District Courthouse for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102.

In the event the Court denies Defendant's Renewed Motion for Judgment as a Matter of Law, brought pursuant to Fed. R. Civ. P. 50 (Docket No. 718), FedEx moves the Court pursuant to Fed. R. Civ. P. 59 for an Order granting a new trial, or in the alternative, for an Order amending the judgment dismissing all liability against FedEx. For those reasons more fully stated herein, FedEx respectfully requests that the Court grant its motion and order a new trial, or in the alternative, amend the judgment.

DATED: March 14, 2006.

FEDERAL EXPRESS CORPORATION

By: /s/ David A. Billions
David A. Billions
Senior Attorney
Attorneys for Defendant
Federal Express Corporation

MEMORANDUM OF LAW

I. INTRODUCTION

A jury trial was held in this matter on November 13 – 21, 2006. A verdict for Plaintiff in the amount of $475,000 in compensatory damages and $475,000 in punitive damages was returned on November 21, 2006. The Court entered a final judgment on February 28, 2007.

For the reasons stated more fully below, the Court should enter an Order granting a new trial or in the alternative, amending the judgment dismissing all liability against FedEx.

II. RULE 59 STANDARD

A motion for new trial brought pursuant to Fed. R. Civ. P. 59 may be granted because, *inter alia*, the verdict is contrary to the clear weight of the evidence, errors were committed at trial, or the ultimate damage award is excessive. See Fed. R. Civ. P. 59. In reviewing such a motion, [t]he trial court may grant a new trial, even though the verdict is supported by substantial evidence, if the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." Roy v. Volkswagen of America, 896 F.2d 1174, 1176 (9th Cir. 1990) (citing Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976)).

A finding that there is substantial evidence to uphold the verdict on a Motion for Judgment as a Matter of Law does not prevent a court from ordering a new trial. Id.; see also Landes Const. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1371 (9th Cir. 1987)("If there is substantial evidence presented at trial to create an issue for the jury, a trial court may not grant a motion for a directed verdict or for judgment notwithstanding the verdict. The existence of substantial evidence does not, however, prevent the court from granting a motion for a new trial

pursuant to Fed. R. Civ. P. 59 if the verdict is against the clear weight of the evidence."). Moreover, "[t]he judge can weigh evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." Sussel v. Wynne, 2007 U.S. Dist. LEXIS 1523 at *10 (D. Haw. 2007)[1] (citing Landes Const. Co., 833 F.2d at 1371-72).

III. LAW/ARGUMENT

A. A new trial is warranted as the verdict is contrary to the clear weight of the evidence.

In support of its motion for a new trial or alternatively for amendment of the judgment, FedEx relies on and incorporates each of the arguments more fully set forth in its Renewed Motion for Judgment as a Matter of Law and Memorandum in Support (Docket No. 718). Without restating each argument, none of Plaintiff's four retaliation, disparate treatment or punitive damages claims, should have been considered by the jury as Plaintiff failed to present sufficient proof to establish the essential elements of each claim. Accordingly, the Court should order a new trial as the verdict is contrary to the clear weight of the evidence.

B. The Court abused its discretion in denying FedEx's motions to exclude the testimony of Dave Perry, Robert Montez and Sharon McNeal.

1. Dave Perry

The Court erred in denying FedEx's Motion *in Limine* No. 1- Exclusion of Alleged

[1] Copies of unpublished decision are attached as Exhibits to the Declaration of Betty J. Saylors ("Saylors Decl.") filed contemporaneously herewith.

Comments of Dave Perry.[2] See Doc. No. 619, p. 3:14-16. Perry's testimony was completely irrelevant to the four limited issues for trial and served no purpose other than to unfairly prejudice FedEx, confuse the issues before the Court, and mislead the jury. See Fed. R. Evid. 401 and 403.

None of Perry's testimony related in any way to the four issues for trial.[3] Specifically, the events involving Perry all occurred in 1999, nearly **three years** before Evans filed a DFEH complaint, and four years before he filed the EEOC charge. Perry testified he was not involved in and had no knowledge of the 55 hour e-mail, the scale trailer e-mail, the 2004 SFA memo, or the shift bid in November 2003. Plaintiff did not even report to Perry when any of these four challenged decisions occurred. FedEx repeatedly objected to Perry's testimony.[4]

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[2] In denying the motion, the Court ruled that the comments "may go to bias and in any event are not so prejudicial as to outweigh their probative value." See Doc. No. 619, p. 3:5-16. Not only did the alleged 1999 events have no probative value to the four remaining trial issues, but bias was not an issue because Perry was not a decision-maker who had anything to do with the four challenged decisions.

[3] Over FedEx's timely objection, the Court allowed Plaintiff's counsel to examine Perry at length concerning two meetings he held with the Oakland drivers in 1999 when he was Managing Director over the facility. Plaintiff testified and Perry was asked whether he said he would "kick the asses" of all drivers at the Oakland Hub if the drivers did not properly report safety problems to their respective managers. Plaintiff further testified and Perry was asked whether he referred to "the people" at the Oakland facility as "stupid." Finally, Perry was questioned about the contents of a memo signed by a number of drivers before the meetings, and he was asked whether his boss threw a copy of the memo in the trash in the presence of the drivers.

[4] Prior to the beginning of trial on November 13, 2006, FedEx raised an objection to Perry's entire proposed testimony and also asked the Court to reconsider its denial of the motion *in limine*. FedEx explained that based on Plaintiff's witness list, it appeared that Plaintiff intended to devote a substantial portion of his case to events that occurred in 1999 involving Perry and other managers who had nothing to do with the four issues for trial. The Court denied the motion. Before Perry took the stand, FedEx again objected to his testimony pursuant to Fed. R. Evid. 401 and 403. The Court, once again, overruled these objections.

After two full days of testimony from Plaintiff, Perry, Robert Montez (another manager who had no knowledge of the four issues for trial), and Sharon McNeal (a former Human Resources representative who had no knowledge of the four issues for trial), FedEx again asked

Because the Court, in effect, allowed Plaintiff to try never before pled claims against Perry rather than limit the evidence to the four issues for trial, there can be no question that the jury was improperly misled and confused. Relying on the Court's summary judgment and pretrial orders, FedEx appropriately prepared defenses to the four trial issues, not to comments allegedly made by Perry in the late 1990's. As a result, FedEx was unfairly prejudiced by the admission of testimony concerning Perry and the events that allegedly occurred in 1999.

2. Robert Montez

The Court also erred in denying Defendant's Motion *in Limine* No. 3- Exclusion of Alleged Incident Involving Robert Montez. FedEx objected to Montez's proposed testimony on grounds similar to those asserted in opposition to Perry's proposed testimony.[5] FedEx repeatedly objected to the inappropriate Montez testimony.[6]

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the Court to prohibit Plaintiff from calling any further witnesses to testify to events that occurred in the late 1990's which had no bearing on Plaintiff's retaliation and/or disparate treatment claims. The Court overruled FedEx's objection, but noted it was concerned about the implications of Rule 403. The Court then instructed the jury that in making its decision, it should only focus on the time period of July 2002 (filing of initial DFEH Complaints) to 2004. This limiting instruction was useless because obviously the jury had already heard nearly two days of evidence dealing with the unrelated, irrelevant and unfairly prejudicial, events involving Perry, Montez and McNeal.

[5] At trial, Plaintiff elicited testimony from Montez concerning an incident that had no bearing on any of the four issues for trial. Plaintiff asserted Montez received anonymous letters accusing Evans of being vindictive. In order to determine who wrote the letters, Montez posted a memo at the RTD requesting employees to come forward with information concerning the letters. Plaintiff testified he allegedly complained to Sharon McNeal because Montez posted the memo, and in Plaintiff's opinion, Montez had no authority to pursue the matter because the letters were unsigned.

[6] FedEx again objected to this proposed testimony *in limine*, on the morning of the first day of trial, and again before Montez took the stand. FedEx asserted that the testimony was irrelevant because Montez resigned his employment at FedEx in June 2002, one month before Plaintiff filed his first DFEH complaint on July 6, 2002, and eleven months before he filed his EEOC charge in May 2003. Furthermore, Montez was not a decision-maker who Plaintiff claims retaliated against him nor did he have knowledge of any of the four issues for trial.

After Montez testified and FedEx raised the Rule 401 and Rule 403 objections for a third time, the Court expressed concern that the jury may be misled and attempted to cure the prejudice by issuing the limiting instruction which directed the jury to only focus on events that occurred after July 2002.[7] As evidenced by the unjustified amount of the verdict, the limiting instruction failed to cure the unfair prejudice to FedEx. As such, a new trial should be granted as the Court's ruling on this matter was erroneous.

3. Sharon McNeal

FedEx also repeatedly objected to Sharon McNeal's proposed testimony prior at the beginning of the first day of trial pursuant to Rules 401 and 403.[8] The Court overruled the objection. McNeal's testimony served no purpose other than to mislead the jury and to confuse the issues before the Court. As such, the Court erred in refusing to exclude or limit her testimony.

By allowing Plaintiff to parade these witnesses before the jury for the first half of the trial and to testify to matters that were in no way related to the four trial issues, the Court abused its discretion. Clearly, the jury was misled; otherwise they would not have returned a verdict in Plaintiff's favor given the facts presented at trial on the four underlying claims. On these grounds, the Court should order a new trial.

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[7] Montez retired from FedEx in June 2002, and therefore had no direct knowledge of any event the jury was instructed to consider.

[8] McNeal, a former Human Resources Representative, had no knowledge of the four issues for trial. She retired before any of the four events occurred. Nevertheless, Plaintiff's counsel was permitted to examine her on totally irrelevant issues such as the term "OCB" which was used at the Oakland facility in the late 1990's.

C. **The Court abused its discretion by permitting Plaintiff to present inadmissible "Me Too" evidence.**

The Court erred by allowing Plaintiff's counsel, over Defendant's objection, to reference claims asserted by Kalini Boykin and Kevin Neely in his opening statement. Counsel stated that Neely and Boykin were suspended by FedEx in retaliation for filing DFEH complaints alleging racial discrimination. The Court also improperly permitted Plaintiff to testify to these claims over FedEx's objection. Importantly, Evans **did not** engage in any protected activity as to Boykin or Neely. Inexplicably, the Court permitted Plaintiff to present this evidence despite its pretrial ruling which provided that testimony and exhibits relevant only to dismissed claims or other person's lawsuits would not be allowed. See Doc. No. 619, p. 5:11-12. Neither the Court, nor Plaintiff, provided any factual or legal basis supporting the Court's ruling on this issue.

Testimony concerning the alleged discriminatory treatment of other employees should have been excluded as it is neither relevant nor material to the issues in this case, and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice, likely confusion of the issues, and risks that the jury would be misled regarding whether Plaintiff suffered discrimination or retaliation in this matter. See Fed. R. Evid. 402 & 403.

In Tennison v. Circus Circus Enters., 244 F.3d 684 (9th Cir. 2001), the Ninth Circuit held that the District Court properly excluded testimony of the plaintiffs' coworkers that they had also suffered sexual harassment at the hands of the same alleged harasser because the probative value was far outweighed by the risk of unfair prejudice and jury confusion. Id. at 689-90. In doing so, the Court stated:

> Although the testimony is probative for this purpose, the trial court enjoys considerable discretion in determining whether to exclude evidence under Rule 403 for unfair prejudice. Here, admitting [the coworkers'] testimony might have resulted in a "mini trial,"

> considering that much of their testimony was disputed by Defendants. The trial court could reasonably conclude this would be an inefficient allocation of trial time. **In addition, the trial court could reasonably conclude that admitting [this] testimony, along with Defendants' rebuttal evidence, would create a significant danger that the jury would base its assessment of liability on remote events involving other employees, instead of recent events concerning Plaintiffs. . . .While [the coworkers'] testimony may be probative, it also presented a legitimate and substantial risk of unfair prejudice to Defendants.**

Id. (emphasis added, citations omitted).

Such "me too" testimony is frequently excluded on the grounds that the minimal probative value is far outweighed by the danger of unfair prejudice to the defendant and confusion of the jury.[9]

In light of this precedent, the Court clearly abused its discretion by allowing testimony and statements of counsel concerning the irrelevant and unfairly prejudicial claims of Boykin and Neely.

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[9] See e.g., Williams v. The Nashville Network, 132 F.3d 1123 (6th Cir. 1997) (finding that testimony of the plaintiff's co-workers regarding the employer's alleged acts of race discrimination directed at them was irrelevant to the plaintiff's case), rehearing en banc denied (Jan. 22, 1998); Schrand v. Federal Pacific Elec. Co., 851 F.2d 152 (6th Cir. 1988) (finding that the district court committed an abuse of discretion in admitting testimony of two of the plaintiff's co-workers that they were terminated due to age because it was not relevant to issue of whether plaintiff was terminated due to age and the prejudice outweighed any probative value); Manuel v. City of Chicago, 335 F.3d 592 (7th Cir. 2003) (court properly excluded evidence of similar acts of discrimination because allowance of the evidence would require a 'trial within the trial' and the probative value was outweighed by risk of undue delay and jury confusion); Wingfield v. United Technologies Corp., 678 F. Supp. 973 (D. Conn. 1988) (evidence of discriminatory acts before statute of limitations not admissible because they did not establish a continuous practice or policy of discrimination, and because such evidence would likely confuse the jury, unfairly prejudice the defendant and unduly delay the trial); Moorehouse v. Boeing Co., 501 F. Supp. 390 (E.D. Penn.) affirmed, 639 F.2d 774 (3rd Cir. 1980) (court refused to allow the testimony of six other employees as to the circumstances of their own allegedly discriminatory layoffs on the grounds that such evidence was not related to the plaintiff's discrimination claim); Scaramuzzo v. Glenmore Distilleries Co., 501 F. Supp. 727 (N. D. Ill. 1980) (court excluded all evidence or testimony presented to show that charges of age discrimination had been filed and/or settled against the defendant by persons other than the plaintiff).

D. The Court abused its discretion in allowing the admission of hearsay testimony.

Over FedEx's objection, the Court permitted Plaintiff to testify to hearsay statements allegedly made by Tanisha Torres. Plaintiff testified he attended a meeting in 2002 with Tanisha Torres, Kalini Boykin, Kevin Neely, Carl Bowersmith, and Ev Rey. According to Plaintiff, Torres told Rey he should not hire Jim Freese as an Operations Manager because the Oakland location had an excess of managers at that time. When the statements were allegedly made, Torres was a Project Engineer Specialist. She was not a member of management. In fact, she has never been employed as a manager at FedEx. The Court overruled FedEx's hearsay objection and allowed Plaintiff to testify to the comments, reasoning that the statements were admissible as party opponent admissions under Fed. R. Evid. 801(d)(2)(D). That ruling is contrary to the plain language of the rule and applicable law.

Under Rule 801, the proffering party must lay a foundation to show that an otherwise excludable statement relates to a matter within the scope of the agent's employment. See Brendeman v. Kennecott Corp., 799 F.2d 470, 473 (9th Cir. 1986). "As the proponent of the evidence, [the] plaintiff has the burden to demonstrate this foundational requirement." United States v. Chang, 207 F.2d 1169, 1176 (9th Cir.), cert. denied, 531 U.S. 860 (2000); Walker v. Boeing Corp., 218 F. Supp.2d 1177, 1193 (C.D. Cal. 2002). If the proponent of the evidence does not show that the declarant is an agent whose statements "concerned a matter within the scope of the agency," the statement is properly excluded as hearsay. Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1440 (9th Cir. 1990).

Although federal courts do not define "agent," the courts have held that "Congress intended Rule 801(d)(2)(D) `to describe the traditional master-servant relationship as understood

by common law agency doctrine.'" American Eagle Ins. Co. v. Thompson, 85 F.3d 327, 333 (8th Cir. 1996) (quoting Lippay v. Christos, 996 F.2d 1490, 1497 (3rd Cir. 1993)); see also United States v. Saks, 964 F.2d 1514, 1523-24 (5th Cir. 1992). The Restatement explains the nature of agency:

> (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

Restatement (Second) of Agency § 1. In considering whether statements are admissible under Fed. R. Evid. 801(d)(2)(D), a court must determine "if the employee was authorized by his employer regarding the matter about which he allegedly spoke." Stagman v. Ryan, 176 F.3d 986, 996 (7th Cir. 1999).

A non-management employee, such as an engineer, is not an agent authorized to speak on behalf of the company. Plaintiff failed to meet his burden of establishing that Torres was a managing agent as opposed to a low level employee; nor did he show that Torres's alleged out of court statements concerned a matter within the scope of her employment. There was no testimony establishing that Torres was responsible for determining whether the Oakland location had excess managers. As such, the Court erred in admitting Plaintiff's hearsay testimony into evidence.

E. The Court erred by permitting Plaintiff to conduct discovery over one year after the close of discovery and by allowing the admission of documents into evidence which were never disclosed by Plaintiff in compliance with Fed. R. Civ. P. 26.

On November 10, 2006, three days prior to trial, FedEx received a copy of an "amended" subpoena *duces tecum* issued and served by Plaintiff on Tanisha Torres. The subpoena required

Torres to testify at trial on November 14, 2006 and to produce all documents in her possession relevant to FedEx's Redeployment and I-Service programs from 2000 to 2005. The subpoena demanded the production of FedEx documents from a current FedEx employee.

FedEx immediately filed a motion to quash and for sanctions on November 11, 2006.[10] Prior to the first day of trial on the morning of November 13, 2006, FedEx raised the issue with the Court and requested a ruling on its pending motion. The Court refused to rule and instead directed Plaintiff's counsel to brief the issue. Counsel ignored this directive and never filed a brief on the matter.

Torres did not testify on November 14, 2006. Prior to trial on November 15, 2006, FedEx again raised the issue and requested a ruling on the motion to quash. The Court denied the motion and allowed Torres to testify. Minutes before her testimony, Torres produced an e-mail to Plaintiff's counsel which was in turn shown to FedEx's counsel. FedEx moved to exclude the e-mail because it was obtained over a year after discovery had closed; it had never been produced; it was not being offered solely for impeachment purposes; it was not identified on Plaintiff's exhibit list; and the introduction of the e-mail was unfairly prejudicial because FedEx had no knowledge of the document at any time prior to trial which obviously prevented FedEx from cross-examining Torres during her deposition on its substance or from adequately preparing for her cross-examination at trial. The Court denied the motion and permitted Plaintiff to introduce the e-mail into evidence through Torres's testimony.

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[10] In its motion, FedEx argued the subpoena was improper because: (1) Plaintiff's request for production of documents was made one business day prior to trial and over a year after discovery had closed; (2) the request was a veiled attempt to circumvent the requirements of Fed. R. Civ. P. 34 because discovery was closed; (3) none of the requested documents were identified on Plaintiff's newly revised exhibit list; (4) the subpoena was unenforceable because it failed to allow reasonable time for compliance under Fed. R. Civ. P. 45(c)(3)(A)(i); and (5) Plaintiff failed to take reasonable steps to avoid imposing an undue burden or expense on Torres. See Doc. No. 637.

This decision was clear error and contradicts several of the Court's prior rulings. For example, in the pretrial order, the Court ruled that "witnesses never previously disclosed will not be allowed in plaintiff's case in chief." See Doc. No. 619, p. 5:13-14. Additionally, the Court excluded the SFA memos sent by Van Galder to Freese and Jordan which it determined were untimely disclosed by FedEx. Again, FedEx had no knowledge of the Torres document until the third day of trial only minutes before Torres testified. The Court committed clear error by initially refusing to rule on FedEx's motion; by denying the motions; and by allowing Plaintiff to introduce the e-mail as an exhibit at trial.

F. The Court abused its discretion in allowing Plaintiff to introduce two e-mails which supported his underlying claims that were never produced during discovery.

Without providing any factual or legal basis for its rulings, the Court further abused its discretion in allowing Plaintiff to introduce the following documents at trial: (1) an e-mail from Robin Van Galder to Plaintiff dated June 26, 2002 asking Plaintiff to take corrective action against a driver who reported to him because the employee violated company policy by working in excess of 55 hours per week without management approval; and (2) a February 7, 2003 e-mail from Ev Rey to Plaintiff requesting Evans to take corrective action against a driver who failed to properly operate a scale trailer. On October 17, 2006, FedEx filed a motion *in limine* to exclude the e-mails which the Court denied.[11] See Doc. No. 585 (Motion *in Limine* No. 4- Exclusion of

[11] In denying the motion, the Court initially ruled that due to Plaintiff's confusion of the issue, only the e-mail attached to Plaintiff's counsel's declaration in opposition to the motion would be allowed. See Doc. No. 619:2-11. However, between this ruling and the trial date (13 days), Plaintiff "discovered" the other e-mail and included it on his exhibit list. Again, FedEx objected to this new e-mail; however the Court nevertheless permitted Plaintiff to introduce it into evidence at trial.

Alleged February 2003 E-Mail from Ev Rey and Alleged Late 2002 or Early 2003 E-Mail from Robin Van Galder); see also Doc. No. 619 (Pretrial Order).

The e-mails were not disclosed during discovery. As a result, FedEx was prevented from showing the Court at the summary judgment level that the e-mails on their face did not constitute adverse employment actions as alleged by Plaintiff. Further, during his deposition, Plaintiff testified to the Van Galder e-mail but conveniently failed to recall its date. If Plaintiff had disclosed the e-mail during discovery in compliance with Rule 26, FedEx would have been able to show the Court at the summary judgment level that the e-mail was sent ten (10) days before Plaintiff ever engaged in protected activity. The e-mail was sent on June 26, 2002, and Plaintiff filed his first DFEH complaint on July 6, 2002. As the e-mail was sent **before** Plaintiff ever filed a DFEH complaint, it could not have been retaliatory. The Court was denied this information at the summary judgment level solely because Plaintiff refused to comply with Rule 26.[12]

In its motion *in limine*, FedEx argued that it would be unfairly prejudiced by the late disclosure because it did not have an opportunity to properly cross-examine Plaintiff regarding the contents of the e-mails during his deposition. Since discovery had long since closed, the prejudice against FedEx could not be cured. The Court's rejection of this argument was clear error.

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[12] Plaintiff never offered any justification for failing to timely disclose the documents. In response to the motion *in limine*, Plaintiff's counsel suggested to the Court that FedEx had the e-mails; and therefore, Evans was not required to produce them. This statement was false, and no evidence was ever produced demonstrating that FedEx maintained the e-mails. The e-mails were not kept by FedEx because they were not included in Plaintiff's station file or any other part of his personnel record. As the e-mails were of such a routine nature, there was no reason for Rey or Van Galder to maintain them. At trial, when FedEx again objected, the Court stated that FedEx possessed the e-mails all along, and as such, Plaintiff had no duty to produce the documents during discovery. Again, FedEx did not have the e-mails and no evidence (other than Plaintiff's counsel's unsupported allegation) was ever presented which demonstrated that FedEx possessed the documents.

Fed. R. Civ. P. 26(a)(1)(B) requires a party to disclose a copy or description of all documents the party may use to support its claims or defenses. Fed. R. Civ. P. 37(c)(1) outlines the appropriate sanction for a party's failure to comply with Rule 26(a): preclusion at trial.[13]

FedEx was unfairly prejudiced by the untimely disclosure of the e-mails because it was prevented from cross-examining Plaintiff during his deposition on their content, and it was barred from showing the Court at the summary judgment level that the e-mails were insufficient to support Plaintiff's retaliation or disparate treatment claims. Plaintiff offered no evidence which justified his failure to comply with Rule 26. As such, the Court's ruling on this matter was clear error.

G. The Court abused its discretion by excluding the SFA memos sent to James Freese and Jack Jordan.

The Court improperly excluded two documents untimely produced by FedEx. In preparing for trial in October 2006, counsel for FedEx discovered that Van Galder sent SFA memos to Jim Freese and Jack Jordan in April 2004 which were identical in every respect to the SFA memo he forwarded to Evans. See Plaintiff's Exhibit 7a. At trial, Evans claimed Van Galder retaliated and discriminated against him by sending him the SFA memo. Obviously, if

[13] The Rule further provides that the Court may impose sanctions under Rule 37(b)(2)(A), (B), and (C), or, after affording an opportunity to be heard, other appropriate sanctions. Rule 37(b)(2) provides various forms of sanctions including, without limitation, an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence, an order striking pleadings or parts thereof, dismissing the action or any part thereof, establishing designated facts in according with the claim of the party obtaining the order, awarding attorneys fees and costs. See Fed. R. Civ. P. 37(b)(2). Generally, "the sanction of exclusion is … automatic and mandatory unless the party to be sanctioned can show that its violation of Rule 26(a) was either justified or harmless." Finley v. Marathon Oil Co., 75 F.3d 1225, 1230 (7th Cir. 1996). In ruling on a motion to exclude information not previously identified in compliance with Rule 26(a)(1)(A), the district court should consider prejudice and surprise to the opposing party, the ability of the party to cure the prejudice, the likelihood of disruption, and the party's bad faith or unwillingness to comply with the rule. See Bronk v. Ineichen, 54 F.3d 425, 432 (7th Cir. 1995).

Freese (similarly-situated Caucasian Operations Manager) and Jordan (African-American Operations Manager) received the same memo, Plaintiff's retaliation and disparate treatment allegations on this issue are completely unfounded.

After discovering the documents, FedEx immediately produced copies to Plaintiff. Plaintiff objected to their introduction at trial. While Plaintiff did not articulate any factual or legal basis for his objection, the Court sustained the objection ruling that the documents were not disclosed in accordance with Rule 26. Not only did the Court exclude the Freese and Jordan SFA memos but it prohibited Freese from testifying to the substance of the memo he received. Without providing any factual or legal basis, the Court went further and issued sanctions against FedEx by granting Plaintiff an additional forty-five (45) minutes to complete his case over the 6.5 hour limit. After Plaintiff's counsel complained that these sanctions **against FedEx** were insufficient and unfairly prejudicial **to his** client, the Court agreed, altered its ruling, and granted Plaintiff an additional 1/2 day over the 6.5 hour limit to conclude his case in chief.

On its face, this ruling is inherently inconsistent with the Court's decision to allow Plaintiff to introduce the Van Galder and Rey e-mails which he never disclosed during the course of discovery. There is no difference between these two sets of circumstances. As such, a new trial should be granted as the Court's ruling on this matter was a clear abuse of discretion.[14]

[14] The Court further committed error by excluding the following documents on similar grounds: Defendant's Exhibit 313 (E-mail from Robert Speroff explaining Redeployment); Defendant's Exhibit 314 (E-mail from Robert Speroff explaining Redeployment); Defendant's Exhibit 321 (E-Mail from David Rebholz announcing I-Service); and Defendant's Exhibit 357 (PRISM Screen proving that Jim Freese replaced Phillip Senecal).

H. The Court abused its discretion by preventing FedEx from interviewing *Satchell* class members as part of its trial preparation.

The Court committed error by prohibiting FedEx from interviewing *Satchell* class members in preparation for trial. After the individual *Alvarado* cases were severed, FedEx moved the Court for permission to interview *Satchell* class members in preparation for each of the individual trials. See Doc. Nos. 408 & 421. In its briefing, FedEx identified each class member it sought to interview and specified the reasons supporting its need. FedEx did not seek to depose class members or conduct any discovery. The Court denied the motion holding that the request was improper because "fact discovery had long since closed." See Doc. No. 426. Defendant asked the Court to reconsider its order because at no point did FedEx ever indicate it intended to conduct discovery. Again, the request was denied. See Doc. No. 426.

At the pretrial conference for *Boswell* on October 10, 2006, FedEx asked the Court to reconsider its ruling explaining, once again, that it did not seek to conduct discovery but rather simply wanted Court approval to interview *Satchell* class members as part of its trial preparation since all class members were represented by counsel. FedEx again explained that its trial preparation was greatly hindered by the Court's refusal to allow it to interview witnesses before trial.[15] At this time, the Court appeared to understand the issue, stating:

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[15] Federal courts have explained the significant differences between informal witness interviews and depositions. See International Business Machines Corp. v. Edelstein, 526 F.2d 37, 41 n. 4 (2nd Cir. 1975) (stating that a lawyer talks to a witness informally to ascertain whether the witness possesses information relevant to his case, while a deposition serves an entirely different purpose-- to perpetuate testimony). Prohibiting counsel from interviewing witnesses obviously hinders counsel's preparation for trial. See Kaveny v. Murphy, 97 F.Supp. 2d 88, 94 (D. Mass. 2000) (by barring ex parte contact with the employee-witness, the search for the truth is frustrated and counsel is hindered in preparing for trial).

> ... it's a matter of trial prep now as opposed to discovery under the limit, for example. The concern before was that if discovery had closed, there ought not be discovery particularly involving class members, but what she's saying is I need to prepare for trial, and if these are witnesses, I ought to be able to talk to them. That's all she's saying. So I don't know. I'm going to have to think about it.

See Boswell Pretrial Conference Transcript, p. 35:5-12.[16] However after considering the matter, the Court again denied FedEx's request on the erroneous basis that discovery had closed. See Doc. No. 579, p. 6.

The Court abused it discretion in refusing to allow FedEx to interview class members before trial. Three times, the Court ruled (without providing any factual or legal basis) FedEx could not informally speak with a trial witness because "discovery had closed." Interviewing witnesses for trial has nothing to do with discovery. If it did, then Plaintiff's counsel should have been barred from talking to any witnesses as part of his trial preparation because the preparation would have taken place long after discovery closed. This nonsensical ruling greatly undermined FedEx's trial preparation by preventing it from interviewing and ultimately calling key witnesses, Jack Jordan and Don Porter. As there is no legal basis to support the Court's ruling on this issue, a new trial should be granted.

I. The Court abused its discretion by allowing Plaintiff to exceed the 6.5 hour limit set forth in the Pretrial Order.

In the Final Pretrial Scheduling Order (Pernell Evans), the Court granted each party 6.5 hours for presentation of evidence at trial. See Doc. No. 619, p. 2:11-19. FedEx prepared for trial based on this limitation and assumed Plaintiff also would be held to the 6.5 hour limit. This

[16] Attached as an Exhibit to the Saylors Decl.

was not the case. The Court permitted Plaintiff to exceed the limit without any consequence.[17] If FedEx had known the Court did not intend to enforce the 6.5 hour limit against Plaintiff, it would have prepared differently for trial by calling additional witnesses, conducting more lengthy cross-examinations of Plaintiff's witnesses, and conducting more lengthy direct examinations of its own witnesses. The Court's refusal to enforce its own rule not only provided Plaintiff with substantially more time to present his case in chief, but unfairly prejudiced FedEx by hindering the preparation and presentation of its case. As the Court's unequal administration of the time limitation was clear error, a new trial should be granted.

J. The Court erred in taking judicial notice of the wrong entity's entire 2006 SEC filing.

The Court erred in taking judicial notice of FedEx Corporation's 2006 SEC filing. See Doc. No. 644 (Plaintiff's Request for Judicial Notice). Federal Express Corporation is a directly wholly owned subsidiary of FedEx Corporation. See Declaration of Shahram A. Eslami (Docket No. 711), ¶ 2. Evans was employed by Federal Express Corporation d/b/a FedEx Express.

At trial before the commencement of the punitive damages phase, FedEx objected to the Court taking judicial notice of the entire SEC filing of FedEx Corporation as the figures presented in the filing reflect FedEx Corporation's financial condition which is substantially greater than Federal Express Corporation d/b/a FedEx Express's net worth. Nevertheless, the Court overruled the objection and took judicial notice of the entire SEC filing. The Court erred because the jury was permitted to consider the net worth of an entity that was a not a proper defendant to this action.

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[17] Prior to trial, the Court repeatedly warned Plaintiff's counsel that he would be held to the 6.5 hour limit because he blatantly violated the rule in the *Alvarado* trial by exceeding the limit by several hours. Despite these admonitions, the Court did nothing during the *Evans* trial to ensure Plaintiff's compliance with the rule.

K. A new trial should be granted as the Court improperly instructed the jury.

Over FedEx's objections, the Court improperly excluded certain jury instructions requested by Defendant from the final set of instructions. These instructions were necessary to provide the jury with a clear statement of the law and their exclusion was error. "Jury instructions must fairly and adequately cover the issues presented, correctly state the law, and must not be misleading." Desrosiers v. Flight Int'l, 156 F.3d 952, 958-959 (9th Cir. 1998) (citing Abromson v. American Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997), cert. denied, 140 L. Ed. 2d 105, 118 S. Ct. 1040 (1998)). Although a court has discretion in deciding which instructions to provide the jury, an error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless. See Coursen v. A.H. Robins Co., Inc., 764 F.2d 1329, 1337 (9th Cir. 1985). Moreover, in reviewing a civil jury instruction, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party. See Caballero v. City of Concord, 956 F.2d 204, 206-07 (9th Cir. 1992).

In the present case, FedEx requested the Court instruct the jury on (1) the required showing that similarly-situated employees were treated differently, (2) the business judgment rule, and (3) the punitive damages burden of proof under FEHA. See Doc. No. 525. The Court abused its discretion in declining to instruct the jury on these key points of law.

1. Similarly-Situated Instruction

The Court's refusal to give the Similarly-Situated instruction was error. In a discrimination case, a showing that the employer "treated 'similarly situated' employees more favorably than the plaintiff is probative of the employer's discriminatory motivation." Vasquez v.

County of Los Angeles, 349 F.3d 634, 641 (9th Cir. 2003). Plaintiff was required to show a discriminatory motivation to prove that Defendant's stated reasons for its actions were pretextual. Id.; see also Josephs v. Pac. Bell, 443 F.3d 1050, 1065 (9th Cir. 2006). This instruction was particularly important in light of the Court's earlier decision to allow Plaintiff to present testimony regarding other employee's allegations of discrimination.

2. Business Judgment Rule Instruction

Defendant was entitled to an instruction explaining to the jury that it was not required to agree with FedEx's employment decisions, but rather was only required to decide whether FedEx considered discriminatory criteria in making its decisions. Failure to instruct the jury on this issue was clear error.[18]

3. FEHA Punitive Damages Standard

Plaintiff sought punitive damages under both Title VII and FEHA. The Court erred in failing to properly instruct the jury as to the correct standard of proof required for an award of punitive damages.[19]

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[18] "Title VII does not demand that an employer give preferential treatment to minorities or women." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). Rather, the focus of Title VII is to ensure neutral employment and personnel decisions. Thus, "the employer has the discretion to choose among equally qualified candidates, provided that the decision is not based upon unlawful criteria." Id. Moreover, "the fact that a court may think that an employer misjudged the qualifications of the applicant does not in itself expose [the employer] to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." Odima v. Westin Tucson Hotel Co., 991 F.2d 595, 601 (9th Cir. 1993) (citing Burdine, 450 U.S at 259 (1981)).

[19] Under Title VII, punitive damages are available only where the Plaintiff proves malice or reckless indifference by a **preponderance of the evidence**. See 42 U.S.C. §1981a(b)(1); see also Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (holding that Title VII's silence with respect to an evidentiary standard suggests that a conventional preponderance of the evidence standard applies.). However, under FEHA, a plaintiff must demonstrate culpable conduct by "**clear and convincing evidence**." Cal Civ Code § 3294(a). Title VII offers a lower standard for recovery of punitive damages, but compensates for doing so by imposing a cap on the

Over FedEx's objection, the Court provided the jury with only one punitive damages instruction which required proof by a preponderance of the evidence. Because this is the standard for punitive damages under Title VII, this Court should have applied the cap on damages as required by 42 U.S.C. §1981(a). If, however, this Court did not intend to apply a cap on the damage award, it should have properly instructed the jury that proof by clear and convincing evidence was required to make an award of punitive damages.[20]

Use of the FEHA standard for punitive damages would have eliminated the application of the cap without sidestepping the intent of Title VII because it requires a higher level of proof before a jury awards punitive damages. This is particularly important because an award of punitive damages under FEHA might exceed those available under Title VII's cap. In effect, this Court allowed Plaintiff to have full access to the uncapped punitive damages permitted under FEHA without requiring the higher standard of proof it requires. Such a jury instruction clearly does not represent the requirements of Federal and California law and was erroneous.

L. A new trial should be granted based upon the misconduct of opposing counsel.

Defendant is entitled to a new trial based upon the misconduct and prejudicial actions of Plaintiff's counsel during trial. See Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d

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amount of damages that can be awarded pursuant to §1981(a). See 42 U.S.C. §1981a (b)(1). These caps ameliorate the risk of an improper punitive damage award pursuant to the lower standard by limiting the ultimate exposure a defendant faces. In the case *sub judice,* any such damages (punitive damages combined with compensatory damages under §1981(a)) should have been capped at $300,000.00.

[20] See Zamora v. Sacramento Rendering Company, 2007 U.S. Dist. LEXIS 3305 (E.D. Cal. 2007) (applying FEHA's "clear and convincing" standard for punitive damages where plaintiff brought both Title VII and FEHA claims of sexual harassment); Erdmann v. Tranquility, Inc., 155 F.Supp 2d 1152 (N.D. Ca. 2001) (applying both FEHA's "clear and convincing" standard and Title VII's "preponderance of the evidence" standard where plaintiff brought both federal and state law claims).

337, 345-47 (9th Cir. 1995). Specifically, Plaintiff's counsel made improper remarks during argument and introduced evidence in contravention of the Court's pretrial rulings. These actions were improper and prejudiced the jury against FedEx.

Attorney misconduct warrants a new trial where the "'flavor of misconduct . . . sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" Anheuser-Busch, 69 F.3d at 346 (quoting Kehr v. Smith Barney, Harris Upham & Co., Inc., 736 F.2d 1283, 1286 (9th Cir. 1984) (quoting Standard Oil Co. of Cal. v. Perkins, 347 F.2d 379, 388 (9th Cir. 1965)).[21]

In the present case, Plaintiff's counsel made the following improper and inflammatory comments during the punitive damages phase argument: "FedEx and its counsel mislead you, tricked you and were deceitful." "They created a lie." "Counsel lied to you." "They fabricated documents." Counsel also told the jury that the SFA memos to Freese and Jordan never existed and that Van Galder lied about this point. This statement was false as counsel was fully aware of the memos' existence because he objected to their introduction during trial. The Court erred in overruling FedEx's multiple objections to these statements and denying its motion for mistrial.

Additionally, Plaintiff's counsel improperly commented on evidence that the Court previously excluded *in limine* (i.e. the claims of Boykin and Neely). "It is . . . clear that 'counsel should not introduce extraneous matters before a jury or, by questions or remarks, endeavor to bring before it unrelated subjects, and, where there is a reasonable probability that the verdict of

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[21] "'Misconduct' does not demand proof of nefarious intent or purpose as a prerequisite to redress. . . . The term can cover even accidental omissions - elsewise it would be pleonastic, because 'fraud' and 'misrepresentation' would likely subsume it. . . . Accidents -- at least avoidable ones -- should not be immune from the reach of the rule." Jones v. Aero/Chem Corp., 921 F.2d 875, 879 (9th Cir. 1990) (finding that the test to be applied when discovery misconduct is alleged in a Rule 59 motion should be borrowed from cases interpreting Rule 60(b)(3)).

a jury has been influenced by such conduct, it should be set aside.'" Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756 (6th Cir. 1980) (quoting Twachtman v. Connelly, 106 F.3d 501, 508-509 (6th Cir. 1939)).

As Plaintiff's counsel's improper comments and false claims inflamed the jury and unfairly prejudiced FedEx, the Court should grant a new trial.

M. A new trial should be granted or the verdict should be remitted as the jury's verdict was excessive and was not supported by the clear weight of the evidence.

While a new trial is warranted based on the excessiveness of the jury's verdict (which can only be based upon uncorroborated emotional distress damages of Plaintiff who was never even denied an hour of pay), this Court must offer Plaintiff a remittitur award of $10,000.00, including fees and costs. Where there is no evidence that passion and prejudice affected the liability finding, remittitur of damages "which the court considers justified" is an appropriate method of reducing an excessive verdict.[22]

The Ninth Circuit has previously upheld an award of compensatory damages in an amount of $10,000 for emotional distress damages for discrimination far more insidious than the

[22] See e.g., Snyder v. Freight, Constr., Gen. Drivers, Warehousemen & Helpers, Local No 287, 175 F.3d 680, 689 (9th Cir. 1999). When the court, after viewing the evidence concerning damages in a light most favorable to the prevailing party, determines that the damages award is excessive, it has two alternatives: (1) it may grant defendant's motion for a new trial; or (2) deny the motion conditional upon the prevailing party accepting a remittitur. See e.g., Fenner v. Dependable Trucking Co., 716 F.2d 598, 603 (9th Cir. 1983). The prevailing party is given the option of either submitting to a new trial or of accepting a reduced amount of damage which the court considers justified. Id. If the prevailing party does not consent to the reduced amount, a new trial must be granted. Id. The proper amount of a remittitur is the maximum amount sustainable by the evidence. See e.g., D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co., 692 F.2d 1245, 1249 (9th Cir. 1982).

proof in this case--Plaintiff testified that he suffered stomach pains and he felt nervous.[23] See generally Odima v. Westin Tucson Hotel, 53 F.3d 1484 (9th Cir. 1994). Specifically, the Court upheld an award for pain and suffering where the plaintiff testified to feelings of frustration, helplessness, and isolation after defendant rejected his six transfer applications and made racial comments about him. Id.

In 2003, the District Court for the Southern District of New York offered a remittitur amount of $10,000 from the jury award of $140,000 to a plaintiff whom complained of feeling "nervous, anxious, tense, on edge, clammy" when he was transferred to a job with a different title. See Reiter v. MTA of New York, 2003 U.S. Dist. Lexis 17391 (S.D.N.Y. Sep. 30, 2003). Since Evans did not lose any pay, was not demoted and did not receive any discipline, the Court should at a minimum order a remittitur in the amount of $10,000.

CONCLUSION

For the reasons articulated above, FedEx requests that the Court issue an order granting a new trial or in the alternative amending the judgment.

[23] Plaintiff Evans offered no medical testimony or other expert proof to support his emotional distress claim. The only evidence presented on this point was the uncorroborated testimony of Evans and his wife that he was nervous; his appetite decreased; and he had trouble sleeping. Despite these alleged problems, Plaintiff admitted in the four years since he filed his first DFEH complaint, he may have only missed a day or so of work. This evidence is plainly insufficient to support an award of $475,000 in compensatory damages.

DATED: March 14, 2006.

FEDERAL EXPRESS CORPORATION

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