

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Warren K. Urbom	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	99 C 3356	DATE	9/17/2002
CASE TITLE	EEOC vs. Dial Corp.		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) Filed motion of [use listing in "Motion" box above.]

(2) Brief in support of motion due _____.

(3) Answer brief to motion due _____. Reply to answer brief due _____.

(4) Ruling/Hearing on _____ set for _____ at _____.

(5) Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) Trial[set for/re-set for] on _____ at _____.

(8) [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
 FRCP4(m) Local Rule 41.1 FRCP41(a)(1) FRCP41(a)(2).

(10) [Other docket entry] Enter Memorandum and Order: Defendant's motion in limine to exclude evidence of sex-based harassment, retaliation, or other forms of discrimination (232-1) is denied.

(11) [For further detail see order attached to the original minute order.]

	No notices required, advised in open court.			Document Number
	No notices required.		number of notices	
<input checked="" type="checkbox"/>	Notices mailed by judge's staff.		SEP 30 2002	
	Notified counsel by telephone.		date docketed	
	Docketing to mail notices.		<i>[Signature]</i>	285
	Mail AO 450 form.		docketing deputy initials	
	Copy to judge/magistrate judge.		9/17/2002	
			date mailed notice	
GL	courtroom deputy's initials	Date/time received in central Clerk's Office	GL	
			mailing deputy initials	

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKETED
SEP 30 2002

EQUAL EMPLOYMENT OPPORTUNITY)	CIVIL ACTION NO. 99 C 3356
COMMISSION,)
)
Plaintiff,)
)
vs.)
)
DIAL CORPORATION,)
)
Defendant.)
)

MEMORANDUM AND ORDER ON
DEFENDANT'S MOTION *IN LIMINE*
TO EXCLUDE EVIDENCE OF
SEX-BASED HARASSMENT,
RETALIATION, OR OTHER FORMS
OF DISCRIMINATION

Before me are four motions by the defendant *in limine*. They are:

1. Defendant's Motion *In Limine* to Exclude Evidence of Sex-Based Harassment, Retaliation, or Other Forms of Discrimination, filing 232;
2. Defendant's Motion *In Limine* to Exclude Evidence Relating to Allegations of Class Member 80, filing 233 and 237;
3. Defendant's Motion *In Limine* to Exclude Plaintiff's Expert's Testimony, filing 235 and 243; and
4. Defendant's Motion *In Limine* to Exclude Evidence of Alleged Harassment Before 1994, or Alternatively, before 1991, filing 236 and 240.

These motions are extensive and I have decided to choose between writing a full explanation over a fairly substantial period of time or writing briefly in a much shorter period of time. I have elected the second in the spirit of expediency, although the thought process has not and will not be restricted.

The defendant's first motion *in limine* asks simply that the court exclude from evidence at trial any testimony or documentary exhibits relating to sex-based harassment, retaliation, or other forms of discrimination. This memorandum and order will deal only with that motion. The motion will be denied.

Motions *in limine* are not explicitly authorized by the Federal Rules of Evidence, but, according to the Supreme Court:

[T]he practice has developed pursuant to the district court's inherent authority to manage the course of trials. See generally Fed. Rule Evid. 103(c); *c.f.* Fed. Rule

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Crim. Proc. 12(e).

Luce v. United States, 469 U.S. 38, 41, n. 4 (1984).

Understandably, the defendant prefers that I rule now on what may be substantial blocks of evidence that describe incidents that Judge Posner has referred to as being “remote” from sexual harassment, such as:

a simple refusal to hire women, from holding them to higher standards than their male coworkers, or from refusing to make accommodations for differences in upper-body strength or other characteristics that differ systematically between the sexes . . .

DeClue v. Central Illinois Light Co., 223 F.3d 434 (7th Cir. 2000). Judge Posner was not deciding what evidence could be received and a common requirement for granting a motion *in limine* to exclude evidence is that the evidence sought to be excluded is clearly inadmissible for any purpose. *See*, for example, *Jonasson v. Lutheran Child and Family Services*, 1995 WL 579510 (N.D. Ill.).

Some evidence may be admissible as background evidence that provides context for other evidence of discrimination. *McClelland v. Montgomery Ward & Co., Inc.* 1995 WL 571324 (N.D. Ill.) (“It is well-established that evidence relating to acts that are not the subject of a viable claim may be admissible as background evidence that provides context for the discrimination alleged. (Citations omitted).”

Because I do not specifically know what evidence the plaintiff proposes to put forward and I do not know what specific evidence the defendant is concerned about, I cannot say that any identifiable evidence is clearly inadmissible for any purpose. Hence, I must await until the trial and make a ruling in light of the developments at the trial.

The defendant argues that in my opinion of August 9, found now at 156 F. Supp. 2nd 926, 963, 964, and n. 30, I dismissed the individual claims of twelve class members and in doing so gave rationale for excluding testimony regarding sex discrimination, retaliation, or other forms of discrimination. However, I was not making evidentiary rulings in that opinion and I cannot make the sweeping request that the defendant asks. To be sure, awaiting proffers at the trial will mean some occasions of delay, but I shall be alert to moving with reasonable dispatch in dealing with the evidentiary issues.

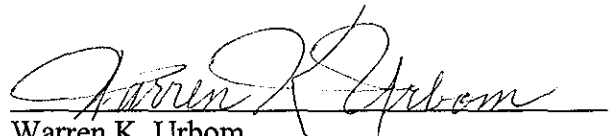
I am mindful that Rule 403 of the Federal Rules of Evidence is a guard against “unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, and cumulative evidence.” I hope to employ appropriately that rule, as well as Rule 402 which insists upon the proffered evidence being relevant. For reasons explained in my Memorandum and Order on Defendant’s Motion for Summary Judgment, dated August 9, 2001, filing 204,

pages 35 ff., resulting in dismissal of some class members' claims based upon allegations of "sex-based harassment," rather than "sexual harassment," the distinction between "sex-based harassment" and "sexual harassment," is real and appropriate. While I cannot rule that all evidence of witnesses who may have been victims of sex-based harassment can at this point be ruled inadmissible, because their testimony may be admissible for some purpose, I do expect to exclude evidence of sex-based harassment under Rule 403 or 402 or both, in the absence of some persuasive showing that the testimony is admissible for some purpose directly relating to a pattern or practice of tolerating sexual harassment as distinguished from sex-based harassment.

IT IS ORDERED that the defendant's Motion *In Limine* to Exclude Evidence of Sex-Based Harassment, Retaliation, or Other Forms of Discrimination, filing 232, is denied.

Dated September 17, 2002.

BY THE COURT

A handwritten signature in cursive script, reading "Warren K. Urbom", written over a horizontal line.

Warren K. Urbom

United States Senior District Judge