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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Gary Despain,  
  
Plaintiff,  
  
v.  
  
BNSF Railway Company,  
  
Defendant.

No. CV-15-08294-PCT-NVW

**ORDER**

Before the Court are Plaintiff’s Motions *In Limine* Nos. 1-8 (Doc. 97) and the Response (Doc. 110.) Also before the Court are Defendant’s Motions *In Limine* Nos. 1-15 (Doc. 98) and the Response (Doc. 112.) The rulings, where they can be made at this stage of the proceedings, are as follows.

**Plaintiff’s Motions *In Limine* Nos. 1-8**

No. 1. The Public Law Board award is excluded as evidence that Plaintiff was untruthful, except as it may be admissible on punitive damages, which is reserved for decision at trial. The finding merely concluded there was evidence, not that Plaintiff was untruthful. Like the preliminary findings in these OSHA proceedings on de novo review, the PLB finding has no legal effect in this proceeding and is just a third person’s opinion about some of the matters committed to the jury’s decision. It does not matter what other people think on those questions. Defendant’s concern about “completeness” can be met with an instruction that does not include the prejudicial and irrelevant (to the jury’s task) opinion about evidence about untruthfulness. The Motion is granted.

No. 2. Whether Plaintiff’s termination was retaliatory, pretextual, or even

1 reasonable is grounded in the evidence and circumstances of this case. The “comparator”  
2 opinions of Ms. Maglisceau will be excluded for multiple reasons. First, the evidence is  
3 not focused on the only probative comparators, workers who were terminated for  
4 untruthfulness in reporting a safety problem. She encompasses anyone who was  
5 disciplined within six months of an injury, not just terminated, for any violation,  
6 including untruthfulness, in Plaintiff’s division. Her separate data for workers dismissed  
7 for untruthful conduct is not connected to untruthfulness in making the injury claim.

8         These data do not meet the tests of helpfulness to the jury and reliability in the  
9 circumstances of this inquiry. They will greatly multiply the proceedings with dissimilar  
10 cases with an unwarranted appearance of statistical value, expanding the trial to  
11 numerous other dissimilar cases. Maglisceau does not offer any specific comparator as to  
12 the nature and circumstances of the alleged untruthfulness in connection with the  
13 injury/safety report itself with similar discipline. In this case the Court is familiar with  
14 the weakness of the evidence of alleged untruthfulness from the proceedings on summary  
15 judgment, and a true comparator should have similarity to those circumstances. A true  
16 comparator may well be admissible, but none is offered. The Motion is granted.

17         No. 3. If there is proper foundation for the exhibit, the train sheet is relevant and  
18 admissible, and the motion to exclude it is denied. Defendant may attempt to show that  
19 error in Plaintiff’s recollection and report was lying, and Plaintiff may attempt to show  
20 that, if mistaken, it was unintentional, inconsequential, and suggestive of retaliation to  
21 terminate Plaintiff for that.

22         No. 4. Defendant offers its Code of Conduct with its prohibition of retaliation  
23 only as to punitive damages. The Code of Conduct is admissible for that purpose.  
24 Contrary to Defendant’s suggestion, it does not insulate Defendant from liability for  
25 punitive damages. The Motion to exclude is denied.

26         No. 5. Defendant’s Workplace Harassment Policy is not relevant and is excluded.  
27 To the extent that Policy also mentions non-retaliation, it is about retaliation concerning  
28 employment discrimination, not retaliation concerning safety. If it has any arguable

1 reference to safety retaliation, is it also excluded as cumulative. The Motion to exclude is  
2 granted.

3 No. 6. Evidence of the amount of Plaintiff's pension is inadmissible as irrelevant  
4 and alternatively as collateral source. It will be excluded, but not the fact the Plaintiff is  
5 in retirement and on pension. This will be managed at trial in the admission of evidence  
6 of what damages Plaintiff is entitled to. Plaintiff will not suggest that his emotional  
7 suffering is affected by lack of retirement income. That would open the door.

8 No. 7. Evidence of Plaintiff's prior work injuries is irrelevant and will be  
9 excluded. Plaintiff does not contend the Defendant retaliates against workers for every  
10 injury, so Defendant does not need to rebut that. Such evidence would also fail the test of  
11 Rule 403, as it would be very confusing as to the issues and a waste of time.

12 No. 8. Plaintiff may try to prove damages and that he adequately mitigated  
13 damages. It cannot be known in advance of trial whether he will do so. The motion does  
14 not address Defendant's vocational expert's testimony. Whether the evidence is  
15 sufficient to excuse mitigation of damages or sufficient to allow a finding of mitigation  
16 cannot be determined until the close of evidence. Plaintiff's Motion No. 8 to exclude  
17 evidence and argument of failure to mitigate damages is denied.

18 **Defendant's Motions *In Limine* Nos. 1-15**

19 No. 1. Plaintiff does not oppose the motion, and Defendant's motion to exclude  
20 the preliminary OSHA finds is granted.

21 No. 2. Defendant's motion to exclude argument and evidence that Plaintiff was  
22 dishonest is denied. The jury instructions will address what Plaintiff may or must prove.  
23 But Plaintiff may argue and present evidence that he was truthful, that Defendant knew or  
24 believed he was truthful, that a contrary conclusion was unreasonable, that any error was  
25 not intentional, and that any error was so unreasonable or insignificant as to exclude an  
26 inference of lying and sufficient to support an inference of retaliation in any event.

27 In this objection as in others, Defendant does not say what specifically Plaintiff  
28 was found to be lying about—the injury, the timing of his trip and of the injury, his

1 medical treatment, the advice of his medical providers, or other details. Rather,  
2 Defendant sweeps everything into unarticulated untruthfulness, though the  
3 reasonableness, believability, and accuracy of such conclusions would vary.

4 No. 3. Evidence of retaliatory motive or conduct by persons who recommended  
5 the termination is admissible. The responsibility of Defendant's decision-makers is not  
6 absolved because someone agreed with the decision or recommended it. But retaliatory  
7 motive of a recommender is relevant and admissible even if conjoined with a personal  
8 grudge. Plaintiff is not prohibited from trying to prove that. Cat's paw retaliation taints  
9 later decision-makers' reliance on the recommendation. The motion will be denied.

10 No. 4. The motion concerning "evidence not available to the decision makers" is  
11 too vague and general to be considered in advance of trial. It is not clear what such a  
12 ruling in advance of trial would mean. Plaintiff does not suggest evidence that might  
13 warrant prohibition. The motion is denied at this time.

14 No. 5. Mr. Cunningham may testify to facts within his knowledge, such as that  
15 Plaintiff's report broke an "injury free streak" in his division. But he may not opine that  
16 that was the motive for Plaintiff's termination. The jury can weigh the persuasiveness of  
17 that inference without need for help from Mr. Cunningham. That is not the kind of lay  
18 opinion permitted by Rule 701. The motion is granted as to opinion of Mr. Cunningham.

19 No. 6. Evidence and argument that Plaintiff would not lie because of his religion  
20 is excluded as irrelevant, highly prejudicial, and confusing. The Motion to exclude is  
21 granted.

22 Nos. 7 and 8. Evidence of other claims and settlements, including the OSHA  
23 Accord, is not probative of intent or motive, and the existence of other claims is not  
24 relevant. The settlements are not admissions and would be confusing, unfairly  
25 prejudicial, and a waste of time under Rule 403. They are also propensity evidence, and  
26 disputed propensity evidence at that, and no exception allowing admission under Rule  
27 404(b) has been suggested. However, because of the general, non-specific nature of the  
28 objection, it cannot be decided in every possible particular before trial. If Ms.

1 Maglisceau's testimony and charts were admitted, it would open the door to specific  
2 proof of other retaliation claims. The motions are denied at this time.

3 No. 9. Defendant's contention and Plaintiff's response are not explained well  
4 enough to resolve on these briefs. The motion may be renewed at trial. It is denied at  
5 this time.

6 No. 10. Plaintiff does not offer any relevance for OSHA and FRSA claims  
7 statistics, and they are not relevant. The motion is granted. The Court does not foreclose  
8 such evidence as relevant rebuttal.

9 No. 11. Legislative history and intent is inadmissible and will be excluded. The  
10 Court will instruct the jury on the applicable law.

11 No. 12. The timing, similarity, actors, and circumstances of other acts of  
12 retaliation will determine whether they are admissible in this trial. The motion to exclude  
13 them is denied at this time. If offered, they should first be presented out of the hearing of  
14 the jury to determine if they are admissible.

15 No. 13. It is efficient to seek pre-trial determination of permissible argument  
16 where it is feasible to do so. Plaintiff is precluded from arguing "delay of justice" since it  
17 was inherent in the OSHA process or brought on by Plaintiff's last-minute election of de  
18 novo review.

19 No. 14. Financial condition is relevant to punitive damages if the trial proceeds  
20 that far. The financial condition of a shareholder of a corporation is not. The trial will be  
21 managed in such a way that financial condition evidence will not be admitted until after  
22 Plaintiff has made a sufficient showing of punitive damages. Evidence of the financial  
23 condition of Mr. Buffet is excluded. The motion is otherwise denied at this time.

24 No. 15. The motion to exclude evidence of back pay damages is not a motion in  
25 limine. It is an unacknowledged motion for partial summary judgment. As such, it is  
26 denied. The time to assess the sufficiency of the evidence is at the close of the evidence,  
27 not before the beginning of the trial, regardless of who has the burden of proof.

28 IT IS THEREFORE ORDERED that Plaintiff's Motions *In Limine* Nos. 1, 2, 5, 6

1 and 7 (Doc. 97.) are granted.

2 IT IS FURTHER ORDERED that Plaintiff's Motions *In Limine* Nos. 3, 4, and 8  
3 (Doc. 97.) are denied.

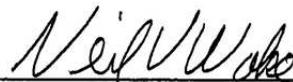
4 IT IS FURTHER ORDERED that Defendant's Motions *In Limine* Nos. 1, 5 (as to  
5 Mr. Cunningham's opinion), 6, 10, 11, 13, and 14 (as to the financial condition of Mr.  
6 Buffet) (Doc. 98) are granted.

7 IT IS FURTHER ORDERED that Defendant's Motions *In Limine* Nos. 2, 3, 5 (as  
8 to Mr. Cunningham's facts), and 15 (Doc. 98) are denied.

9 IT IS FURTHER ORDERED that Defendant's Motions *In Limine* Nos. 4, 7, 8, 9,  
10 12, and 14 (Doc. 98) are denied at this time.

11 Dated this 30th day of May, 2018.

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Neil V. Wake  
Senior United States District Judge