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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JEFFREY GUNCHICK,)	CV 14-1162 RSWL (PJWx)
)	
Plaintiff,)	ORDER Re: DEFENDANT
)	FIC'S MOTIONS IN LIMINE
)	NOS. 1-12
v.)	
)	
FEDERAL INSURANCE COMPANY;)	
and DOES 1 through 20,)	
inclusive,)	
)	
Defendants.)	
)	
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I. INTRODUCTION

Currently before the Court are Defendant Federal Insurance Company's ("Defendant" or "FIC") Motions in Limine Nos. 1-12. Having reviewed the arguments pertaining to each Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:** The Court

- 1 1. **DENIES** Defendant's Motion in Limine No. 1 [59] to
2 Exclude Evidence of or References to Stray Remarks
- 3 2. **GRANTS** Defendant's Motion in Limine No. 2 [60] to
4 Exclude Improper Comparator Evidence of Employees Not
5 Similarly Situated with Plaintiff
- 6 3. **VACATES AS MOOT** Defendant's Motion in Limine No. 3
7 [61] for an Order Offsetting Disability Related
8 Payments
- 9 4. **DENIES** Defendant's Motion in Limine No. 4 [62] to
10 Exclude All Evidence of Or Testimony Relating to Claims
11 or Causes of Action that are not at Issue at the Time
12 of Trial
- 13 5. **GRANTS** Defendant's Motion in Limine No. 5 [63] to
14 Quash Plaintiff's Anticipated Trial Subpoenas and/or
15 Exclude Testimony of Drs. William H. Mouradian and
16 Michael Blumenfield
- 17 6. **GRANTS** Defendant's Motion in Limine No. 6 [64] to
18 Quash Plaintiff's Anticipated Trial Subpoena and/or
19 Exclude Testimony of Federal Insurance Company's
20 Custodian of Records
- 21 7. **DENIES** Defendant's Motion in Limine No. 7 [65] to
22 Exclude Improper Lay Opinions, Speculation, or
23 Conclusions Regarding Personnel Actions Taken Against
24 Plaintiff
- 25 8. **DENIES** Defendant's Motion in Limine No. 8 [66] to
26 Preclude the Use of the Terms and Phrases
27 "Discrimination," "Retaliation," "Harassment," etc.
- 28 9. **GRANTS** Defendant's Motion in Limine No. 9 [67] to

1 Exclude Evidence of or References to Plaintiff's
2 Alleged Complaint of Sexual Harassment in 2005
3 10. **DENIES** Defendant's Motion in Limine No. 10 [68] to
4 Exclude all Evidence and Testimony Regarding
5 Speculative Economic Damages
6 11. **GRANTS** Defendant's Motion in Limine No. 11 [69] to
7 Bifurcate Trial Pursuant to Fed. R. Civ. Proc. 42(b)
8 12. **GRANTS** Defendant's Motion in Limine No. 12 [70] to
9 Exclude Evidence Concerning Defendant's Financial Worth
10 or Condition
11 all subject to the limitations described below.

12 13 **II. DISCUSSION**

14 1. **Defendant's Motion in Limine No. 1**

15 Defendant FIC seeks to preclude the following
16 statements, allegedly made by non-decisionmakers, from
17 being admitted as evidence:

- 18 • On April 25, 2011, Zegel and Fisher met with
19 Plaintiff. Zegel told Plaintiff that neither she
20 nor Fisher nor anyone else at FIC wanted to hear
21 about Plaintiff's physical pain, medical
22 information, or inability to complete his heavy
23 work load with his modified work schedule due to
24 his disability. (03/04/2015 Declaration of Jeffrey
25 Gunchick "(Gunchick MSJ Decl.)", ¶ 10, this Court's
26 Docket Document ("Dkt. Doc.") # 31, p. 5); Motion
27 in Limine no. 1.

1 • In April or May 2011, Plaintiff helped Fisher move
2 Plaintiff's files and exacerbated his lower back
3 and neck pain, so he asked Fisher to let him take
4 the rest of the day off using accrued vacation
5 time. Fisher said, "No you don't! That is what your
6 afternoons are for!" (Gunchick MSJ Decl., ¶ 12,
7 Dkt. Doc. # 31, p. 6); Motion in Limine no. 1.

8
9 • At a May 12, 2011 meeting with Zegel and Fisher,
10 Zegel in a loud and angry voice repeatedly told
11 Plaintiff that he was not allowed to tell anyone at
12 FIC including Zegel and Fisher verbally or in
13 writing ever again that he suffered from physical
14 pain and could not complete his workload with his
15 modified work schedule or he would be subject to
16 immediate termination from employment, repeatedly
17 asking Plaintiff if she had made herself clear and
18 if Plaintiff had understood her. (Gunchick MSJ
19 Decl., ¶ 13, Dkt. Doc. # 31, p. 6); Motion in
20 Limine no. 1.

21
22 • On at least 15 occasions from September through
23 December 2011, Fisher complained to Plaintiff that
24 everyone else in the department had to "pick up
25 your slack" while he was working on a modified 4
26 hour work schedule due to his disability. (Gunchick
27 MSJ Decl., ¶¶ 15, 28, Dkt. Doc. # 31, pp. 7, 10);
28 Motion in Limine no. 1.

1
2 • On September 19, 2011, Fisher told Plaintiff that
3 he was to meet with Fisher, Zegel and Axel the next
4 day. Plaintiff told Fisher he felt very
5 uncomfortable and afraid to hear what would happen
6 next, and Fisher replied, "It's not fear. It's just
7 that you have a lot of issues." (Gunchick MSJ
8 Decl., ¶ 16, Dkt. Doc. # 31, p. 7); Motion in
9 Limine no. 1.

10
11 • On November 3, 2011, Axel told Plaintiff that Zegel
12 and Fisher had stated that others were having to do
13 additional work due to Plaintiff's modified four
14 hour work schedule to his disability. (Gunchick MSJ
15 Decl., ¶ 20, Dkt. Doc. # 31, p. 8); Motion in
16 Limine no. 1.

17
18 • On November 15, 2011, Fisher told Plaintiff he was
19 "sick and tired of hearing about your frickin'
20 disability for the past frickin' year." By November
21 15, 2011, Fisher had told Plaintiff this on at
22 least 7 occasions. (Gunchick MSJ Decl., ¶¶ 23, 29,
23 Dkt. Doc. # 31, pp. 9, 10); 12/22/2013 Complaint,
24 ¶¶ 15-16, Ex. A to Declaration of Elizabeth James
25 in support of Defendant's Petition and Notice of
26 Removal, Dkt. Doc. # 2, p. 12)); Motion in Limine
27 no. 1.
28

1 • On December 13, 2011, Plaintiff met with Fisher in
2 Fisher's office and asked him about an e-mail
3 Fisher sent him, and Fisher put his right index and
4 middle fingers on his left wrist and replied in an
5 angry raised voice, "I'm just checking to see if
6 you've got a pulse or something going on up there."
7 (Gunchick MSJ Decl., ¶¶ 25, 28; Dkt. Doc. # 31, p.
8 9, 10); 12/22/2013 Complaint, ¶¶ 15-16, Dkt. Doc. #
9 2, p. 12.); Motion in Limine no. 1.

10
11 Defendant argues that the above comments should be
12 excluded from evidence because they are irrelevant
13 according to Fed. R. Evid. 402, inadmissible character
14 evidence pursuant to Fed. R. Evid. 404(b), and unduly
15 prejudicial per Fed. R. Evid. 403. Def.'s Mot. in
16 Limine No. 1 ("Mot. 1") 6:11-9:22.

17 Plaintiff contends that the above comments are
18 relevant because they "tend to make it more likely than
19 not Fisher and Zengel harbored discriminatory animus
20 toward Plaintiff, which led to their issuing discipline
21 relied on as a basis to terminate Plaintiff's
22 employment." Opposition ("Opp'n.") 2:18-21.

23 "[S]tray' remarks are insufficient to establish
24 discrimination." Merrick v. Farmers Ins. Grp., 892
25 F.2d 1434, 1438 (9th Cir. 1990). Comments are not
26 "stray remarks" if they were said by people in the
27 decision making process and directly related to the
28 termination decision. Desimone v. Allstate Ins. Co.,

1 1999 U.S. Dist. LEXIS 20059, at *40-*41 (N.D. Cal.
2 Sept. 14, 1999).

3 Here, the comments were all said by Zengel or
4 Fisher. While Lalor, Axel, and Braitling made the
5 final decision to terminate Plaintiff, Zengel and
6 Fisher were Plaintiff's direct supervisors and their
7 opinions and/or recommendations may have been relevant
8 to the decision to terminate Plaintiff. 03/02/15
9 Gunchick Declaration ("Pl. Decl.") ¶ 27, ECF. 90; Ex. A
10 to Freiman Decl., Karen Axel Deposition ("Axel Depo.")
11 11:16-12:2, ECF 90. The alleged consistency of the
12 statements by Plaintiff's direct supervisors indicates
13 that these statements may have been acted upon and thus
14 may not have been "stray remarks" irrelevant to the
15 decision to terminate Plaintiff. See, e.g., Mondero v.
16 Salt River Project, 400 F.3d 1207, 1213 (9th Cir. 2005)
17 ("An agent's biased remarks against an employee . . .
18 are admissible to show an employer's discriminatory
19 animus if the agent was involved in the employment
20 decision."); Godwin v. Hunt Wesson, Inc., 150 F.3d
21 1217, 1221 (9th Cir.1998).

22 Accordingly, the Court finds that the remarks
23 described above are not excludable as stray remarks.
24 The Court thus **DENIES** Defendant's Motion in Limine No.
25 1.

26
27 2. **Defendant's Motion in Limine No. 2**

28 Defendant seeks to exclude evidence of instances

1 where other employees engaged in conduct which violated
2 Defendant's Code of Business Conduct, such as evidence
3 of other employees yelling and exhibiting disrespectful
4 behavior, because Defendant believes that the evidence
5 Plaintiff wishes to introduce includes statements made
6 by people in positions dissimilar to Plaintiff's.

7 Def.'s Mot. in Limine No. 2. 5:1-10. Plaintiff argues
8 simply that the statements are relevant pursuant to
9 Fed. R. Evid. 401 because "the statements tend to make
10 it more likely than not Fisher and Zegal Harbored
11 discriminatory animus toward Plaintiff, which led to
12 their issuing discipline relied on as a basis to
13 terminate Plaintiff's employment." Opp'n 2:15-18.

14 In a discrimination claim, in order for evidence
15 of allegedly similar treatment to be admissible as
16 relevant to proving or disproving a fact of
17 consequence, "a plaintiff must show that the employer
18 gave preferential treatment to another employee under
19 nearly identical circumstances; that is, that the
20 misconduct for which the plaintiff was discharged was
21 nearly identical to that engaged in by other
22 employees." Okoye v. Univ. of Texas Houston Health
23 Science Ctr., 245 F.3d 507 (5th Cir. 2001) (internal
24 punctuation and citations omitted). Plaintiff's
25 Opposition cites to no authority that indicates
26 individuals in supervisory positions are "similarly
27 situated" sufficient to serve as a comparison for
28 behavior. The Court finds that the individuals who

1 exhibited the conduct that is the subject of this
2 motion—i.e., those individuals Plaintiff believes to
3 have violated Defendant's Code of Business conduct, are
4 not sufficiently similarly situated to Plaintiff for
5 their remarks to be admissible. Accordingly, evidence
6 of this conduct is inadmissible for attempting to prove
7 disparate treatment and Defendant's Motion is **GRANTED**.

8
9 **3. Defendant's Motion in Limine No. 3**

10 Defendant seeks an Order requiring that evidence of
11 at least \$314,312.99 in payments made to Plaintiff,
12 including disability, unemployment, and workers
13 compensation benefits, be used to to offset Plaintiff's
14 damages. Defendant argues that these payments are not
15 subject to the collateral source rule. See generally
16 Def.'s Mot. in Limine No. 3. The Court has already
17 ruled that it will use its discretion to determine
18 whether to offset claimed lost earnings and benefits
19 after evidence of the source of the payments has been
20 presented at trial. See Order re: Pl.'s Motion in
21 Limine No. 1-3. Accordingly, Defendant's Motion in
22 Limine No. 3 is **VACATED AS MOOT**.

23
24 **4. Defendant's Motion in Limine No. 4**

25 Defendant seeks to preclude Plaintiff, Plaintiff's
26 counsel, and Plaintiff's witnesses from making any
27 comments relating to misconduct not alleged in the
28 operative Complaint. Defendant argues that Plaintiff

1 failed to amend his complaint to allege new claims or
2 causes of action that were not alleged in the operative
3 Complaint. Def.'s Mot. in Limine No. 4 ("Mot. 4") 2:8-
4 23. While it is true that Plaintiff's evidence
5 presented at trial must be limited to the claims and
6 issues raised in his operative complaint, that does not
7 mean that Plaintiff's evidence must have been wholly
8 covered by the complaint. Defendant's Motion No. 4 is
9 excessively broad in attempting to preclude *evidence*
10 and not simply new claims. To the extent that
11 Plaintiff, his counsel, or his witnesses attempt to
12 raise new *claims* (e.g., failure to accommodate) at
13 trial, Defendant may do so. Thus, Defendant's Motion
14 in Limine No. 4 is **DENIED**.

15
16 **5. Defendant's Motion in Limine No. 5**

17 Defendant seeks an order quashing the anticipated
18 trial subpoenas and/or excluding the testimony of Dr.
19 William H. Mouradian and Michael Blumenfield on the
20 grounds that Plaintiff failed to disclose these
21 witnesses in his requisite initial or supplemental Rule
22 26 disclosures. Rule 26 "excludes evidence from an
23 untimely disclosed witness unless 'the parties failure
24 to disclose the required information is substantially
25 justified or harmless.'" Wong v. Regents of Univ. of
26 California, 410 F.3d 1052, 1062 (9th Cir. 2006)
27 (quoting Yeti by Molly, Ltd. v. Deckers Outdoor Corp.,
28 259 F.3d 1101, 1106 (9th Cir. 2001). Rule 26 requires

1 a party to provide to the opposing party "the name and,
2 if known, the address and telephone number of each
3 individual likely to have discoverable
4 information-along with the subjects of that
5 information-that the disclosing party may use to
6 support its claims or defenses, unless the use would be
7 solely for impeachment." Fed. R. Civ. P.
8 26(a)(1)(A)(i).

9 Plaintiff did not disclose that it would call
10 either Mouradian or Blumenfield in its Rule 26
11 disclosure. Plaintiff argues that it disclosed that it
12 would rely on "any and all medical providers seen by
13 Plaintiff related to his employment with Defendant."
14 Opp'n 2:7-10 (quoting Decl. of Michael J. Freiman ¶ 3).
15 Plaintiff also claims that this information was
16 discoverable and that Defendant had notice that
17 Plaintiff was seen by Dr. Mouridian "as Plaintiff
18 provided Defendant with a note from Dr. Mouridian
19 during his employment with Defendant." Id. at 2:12-20.

20 "[T]he mere mention of a name in a deposition is
21 insufficient to give notice to the opposing party that
22 defendants intend to present that person at trial."
23 Rule 26 is clear in its requirement that each party
24 list with specific information anyone a party may use
25 to support its claims or defenses. Plaintiff is in
26 clear violation of this rule, and offers no substantial
27 justification for its failure. Further, Plaintiff's
28 argument that the doctors are merely "percipient

1 witnesses testifying about their involvement in the
2 events leading up to the termination" and are not
3 experts does not establish that the failure to disclose
4 them pursuant to Rule 26 was harmless. To the
5 contrary, it establishes that the failure to disclose
6 may have precluded Defendant from deposing witnesses
7 with valuable information.

8 Furthermore, Plaintiff argues that he "intends to
9 call Dr. Mouradian to authenticate and verify his note
10 stating Plaintiff was still under a four hour per day
11 work restriction" and that he "intends to call Dr.
12 Blumenfield to authenticate and verify his fitness for
13 duty evaluation, which provides evidence that Plaintiff
14 was competent to perform his job and instructed
15 Defendant to further accommodate Plaintiff's disability
16 in close proximity to Defendant's terminating
17 Plaintiff." Opp'n 2:21-5:3. The question of
18 accommodation, however, is not at issue where Plaintiff
19 has only claimed wrongful termination in violation of
20 public policy. Accordingly, Defendant's Motion in
21 Limine No. 5 is **GRANTED** and the Court will exclude the
22 testimony of Dr. William H. Mouradian and Dr. Michael
23 Blumenfield.

24
25 **6. Defendant's Motion in Limine No. 6**

26 Defendant seeks an order to quash anticipated trial
27 subpoenas and to exclude testimony of FIC's Custodian
28 of Records. The Court has already granted Defendant's

1 request to quash the subpoena of FIC's Custodian of
2 Records/Person Most Knowledgeable via its Order re
3 Defendant's *Ex Parte* Application to Quash Trial
4 Subpoenas of Person Most Knowledgeable Regarding
5 Defendant's Financial Condition and Custodian of
6 Records [115]. See Dkt. No. 115. Accordingly,
7 Defendant's Motion in Limine No. 6 is **GRANTED** and the
8 trial subpoena issued by Plaintiff Jeffrey Gunchick
9 ordering the Custodian of Records/Person Most
10 Knowledgeable shall be quashed.

11
12 **7. Defendant's Motion in Limine No. 7**

13 Defendant seeks to preclude Plaintiff, his
14 counsel and any witness they may call or examine, from
15 presenting improper lay opinions, speculation, or
16 conclusions regarding any personnel actions taken
17 against Plaintiff. Defendant argues that Plaintiff
18 "will attempt to introduce the thoughts, feelings,
19 opinions and other similar and related testimony of
20 current and former employees of FIC and other
21 individuals to establish the appearance of impropriety
22 on the part of [Defendant]. Def.'s Mot. in Limine No.
23 7 ("Mot. 7"). While it is true that Plaintiff's
24 evidence presented at trial must not include improper
25 lay opinions, speculation, or conclusions regarding any
26 personnel actions taken against Plaintiff, the Court
27 finds Defendant's concerns too speculative to be ruled
28 on at this point. To the extent that Plaintiff, his

1 counsel, or his witnesses attempt to present improper
2 lay opinions, speculation, or conclusions, Defendant
3 may object to them as such. Thus, Defendant's Motion
4 in Limine No. 7 is **DENIED**.

5
6 **8. Defendant's Motion in Limine No. 8**

7 Defendant seeks to preclude Plaintiff, along with
8 his counsel and witnesses, from the use of the
9 terms/phrases "discrimination," "retaliation,"
10 "harassment," "refusal to accommodate," "failure to
11 accommodate," "failure to engage in the interactive
12 process," "false and pretextual reason," or any
13 substantially similar and related terms/phrases in
14 examining witnesses. While it is true that Plaintiff's
15 evidence presented at trial must not include improper
16 legal characterizations, the Court finds Defendant's
17 concerns too speculative to be ruled on at this point.
18 To the extent that Plaintiff, his counsel, or his
19 witnesses use the above-discussed language to present
20 an improper legal conclusion, Defendant may object to
21 their use at trial. Accordingly, Defendant's Motion in
22 Limine No. 8 is **DENIED**.

23
24 **9. Defendant's Motion in Limine No. 9**

25 Defendant seeks to exclude evidence of or
26 references to Plaintiff's alleged complaint of sexual
27 harassment against Cindy Zegel made in 2005. Defendant
28 argues that Plaintiff's claim for wrongful termination

1 in violation of public policy relies on Plaintiff's
2 belief that he was terminated on account of his
3 disability, not for any other reason, and as such, "any
4 alleged conduct unrelated to Plaintiff's termination
5 and his disability is simply not probative of any issue
6 in this case." Def.'s Mot. in Limine No. 9 ("Mot. 9")
7 3:8-25. Defendant argues that the introduction of this
8 evidence "will only create a side-show that has nothing
9 to do with Plaintiff's wrongful termination claim
10 premised on his disability." Id. at 4:10-13.

11 Plaintiff claims that this alleged complaint is
12 relevant to Zegel's credibility as a trial witness, "as
13 the complaint may have caused her to become biased
14 against Plaintiff." While Plaintiff cites to general
15 evidence that the existence of a romantic relationship
16 between a witness and a party may be a proper area of
17 inquiry, it does not establish that a sexual harassment
18 claim Plaintiff allegedly made against a non-
19 decisionmaker years ago is relevant to whether or not
20 the decisionmakers at the Defendant corporation
21 dismissed Plaintiff as a result of his disability.
22 Courts regularly exclude harassment issues that do not
23 appear to have a causal link to the operative claim.
24 See Tennison v. Circus Enterprises, Inc., 244 F.3d 684,
25 689-90 (9th Cir. 2001) (where evidence of alleged
26 harassment would result in a "mini-trial" regarding
27 irrelevant individuals and claims, motion in limine was
28 proper); Kelly v. Boeing Petroleum Servs., Inc., 61

1 F.3d 350, 357-360 (5th Cir. 1995) (motion in limine to
2 exclude "alleged discriminatory or bigoted acts or
3 statements regarding race, sex and other categories
4 besides handicap or disability" was correctly granted
5 because of the "tenuous relationship" between the types
6 of discrimination"). Accordingly, Defendant's Motion
7 in Limine No. 9 is **GRANTED** and references to
8 Plaintiff's alleged complaint of sexual harassment in
9 2005 shall be excluded.

10
11 **10. Defendant's Motion in Limine No. 10**

12 Defendant seeks to exclude "evidence and testimony
13 regarding or relating to speculative, non-existent
14 economic damages such as those speculated upon by
15 Plaintiff in his discovery responses." Def.'s Mot. in
16 Limine No. 10 ("Mot. 10") 2:18-21. While it is true
17 that Plaintiff's evidence presented at trial must not
18 include speculative and/or non-existent economic
19 damages, the Court finds Defendant's concerns too
20 speculative to be ruled on at this point. To the
21 extent that Plaintiff, his counsel, or his witnesses
22 attempt to use improper evidence to establish damages,
23 Defendant may object to their use during the course of
24 trial. Accordingly, Defendant's Motion in Limine No.
25 10 is **DENIED**.

26
27 **11. Defendant's Motion in Limine No. 11**

28 Defendant has sought to bifurcate the trial into

1 liability and damages phases. The Court granted this
2 request in its Final Pretrial Conference Order. See
3 Dkt. No. 116. Accordingly, Defendant's Motion in
4 Limine No. 11 is **GRANTED** and the trial shall be
5 bifurcated into liability and damages phases.

6
7 **12. Defendant's Motion in Limine No. 12**

8 Defendant seeks to prevent Plaintiff, his witnesses,
9 and his counsel from making any reference to
10 Defendant's "putative wealth until such time as
11 Plaintiff has met his burden of establishing malice,
12 oppression or fraud sufficient to enable the trier of
13 fact to contemplate an award of punitive damages."
14 Def.'s Mot. in Limine No. 12 ("Mot. 12") 3:20-23.
15 Plaintiff has filed a Notice of Non-Opposition to
16 Defendant's Motion in Limine No. 12 [92]. Accordingly,
17 Defendant's Motion is **GRANTED**. Plaintiff, his counsel,
18 and his witness are ordered not to make any reference
19 to Defendant's putative wealth until such time as
20 Plaintiff has met his burden of establishing malice,
21 oppression or fraud sufficient to enable the trier of
22 fact to contemplate an award of punitive damages.

23
24
25 **IT IS SO ORDERED.**

26 DATED: April 20, 2015

RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge