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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BOBBI COUGHLIN,)	
)	
Plaintiff,)	2:08-cv-02772-GEB-JFM
)	
v.)	<u>TENATIVE PRETRIAL ORDER</u>
)	
CALIFORNIA DEPARTMENT OF)	
CORRECTIONS AND REHABILITATION)	
and TOM MAUGERI,)	
)	
Defendants.)	
_____)	

This is a tentative final pretrial order and a warning concerning a pending default matter, and Defendant California Department of Corrections and Rehabilitation's ("CDCR") indication that it will be without counsel when trial is scheduled to commence. The final pretrial conference is scheduled for May 24, 2010. Nevertheless, CDCR's counsel indicated in the parties' Joint Pretrial Conference Statement ("JPTC") that CDCR's counsel is unavailable for this duly scheduled trial. However, CDCR failed to file a timely motion to change the trial date, still has not filed

1 a motion under the applicable standard, and CDCR's late indication
2 that it will be without counsel when trial is scheduled to commence
3 suggests that CDCR's answer should be stricken and this action
4 considered a default matter against CDCR. This is because CDCR has
5 known since February 26, 2009, that trial is scheduled to commence
6 at 9:00 a.m. on August 31, 2010, and yet CDCR indicates it can
7 disregard the Status Order in which the trial commencement date is
8 prescribed. (See Status Order filed February 26, 2009, in which
9 the judge states: "Trial is set for August 31, 2010, commencing at
10 9:00 a.m.," and "[t]he parties are cautioned that the lead attorney
11 who WILL TRY THE CASE for each party shall attend the final
12 pretrial conference.").

13 I. DEFAULTED PARTY

14 The Clerk of Court entered default as to Defendant Tom
15 Maugeri on September 15, 2009. Plaintiff has not prosecuted the
16 default, says nothing about prosecuting the default in the JPTC,
17 and thus indicates this defendant should be dismissed for failure
18 of prosecution.

19 Plaintiff alleges three claims against Maugeri:

20 (1) sexual harassment under Title VII of the Civil Rights Act of
21 1964, §§ 701 *et seq.*, 42 U.S.C. §§ 2000e *et seq.* ("Title VII");

22 (2) sexual harassment under the California Fair Employment and
23 Housing Act, California Government Code §§ 12940 *et seq.* ("FEHA");

24 and (3) retaliatory harassment under FEHA. However, Plaintiff's
25 retaliatory harassment claim against Maugeri is not a cognizable
26 claim and is therefore dismissed.

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1 II. PLAINTIFF'S CLAIMS AND DEFENDANT CDCR'S AFFIRMATIVE DEFENSES

2 A. Plaintiff alleges under Title VII that Defendant is
3 vicariously liable for Maugeri's sexual harassment of her
4 occurring on and after October 13, 2007, premised on
5 Plaintiff's assertion that she reasonably believed Maugeri was
6 her supervisor commencing on October 13, 2007.

7 1. CDCR asserts the "reasonable care" affirmative defense,
8 premised on its contention that Plaintiff unreasonably
9 failed to take advantage of any preventive or corrective
10 opportunities that CDCR provided, or to otherwise avoid
11 harm.

12 B. Plaintiff also alleges under FEHA that CDCR is vicariously
13 liable for Maugeri's sexual harassment occurring on and after
14 October 13, 2007, premised on Plaintiff's assertion that she
15 reasonably believed Maugeri was her supervisor commencing on
16 October 13, 2007.

17 1. CDCR asserts that should Plaintiff prevail on this claim,
18 Plaintiff's damages should be reduced or eliminated due
19 to her failure to take advantage of available
20 preventative or corrective mechanisms.

21 III. DISPUTED EVIDENTIARY ISSUES

22 The parties shall meet and confer for the purpose of
23 resolving evidentiary disputes. Any unresolved evidentiary dispute
24 capable of being resolved in limine shall be set forth in an in
25 limine motion filed no later than June 14, 2010 at 4:30 p.m. An
26 opposition or non-opposition statement to any filed in limine
27 motion shall be filed no later than June 23, 2010 at 4:30 p.m. A
28 hearing on any in limine motions is hereby scheduled for August 2,

1 2010 at 9:00 a.m. **Failure to state a basis for admissibility or**
2 **non-admissibility of disputed evidence constitutes a waiver or**
3 **abandonment of that basis.**

4 IV. TRIAL BRIEFS

5 Trial briefs shall be filed no later than twenty-eight
6 (28) days prior to the trial commencement date. **The trial brief(s)**
7 **must include "a summary of points of law, including reasonably**
8 **anticipated disputes concerning admissibility of evidence, legal**
9 **arguments, and citations of authority in support thereof."** E.D.
10 Cal. R. 285(a)(3). Although not required to do so, opposing
11 counsel may file and serve on all other parties an answering brief
12 no later than twenty-one days prior to the trial commencement

13 V. WITNESSES¹

- 14 A. Plaintiff anticipates calling the witnesses listed in
15 section ten of the JPTC. Defendant objects to the
16 following witnesses because they were not included in
17 Plaintiff's initial disclosure: Carolyn Fowle, Craig
18 Enos, Dr. Edward Duncan, and Dr. Ira Fishman.
- 19 B. Defendants anticipate calling the witnesses listed in
20 section ten of the JPTC.
- 21 C. Each party may call a witness designated by the opposing
22 party who has not been objected to.
- 23 D. No person, other than those named on these witness lists,
24 will be permitted to testify unless:

25
26 _____
27 ¹ This portion of the Order does not affect the parties'
28 obligations to timely comply with witness disclosure requirements
provided in the Federal Rules of Civil Procedure, the Local Rules,
or by Order of this Court.

- 1 (1) The party offering the witness demonstrates that the
2 witness is for the purpose of rebutting evidence
3 which could not reasonably be anticipated at the
4 pretrial conference; or
- 5 (2) The witness was discovered after the pretrial
6 conference and the proffering party makes the
7 showing required in "E", below.

8 E. If a witness is discovered after the pretrial conference,
9 counsel for the party offering the witness shall promptly
10 inform the Court and the opposing party of the existence
11 of the unlisted witness so that the Court may consider at
12 trial whether the witness shall be permitted to testify.

13 The witness will be not be permitted to testify unless:

- 14 (1) The witness could not reasonably have been
15 discovered prior to the pretrial conference;
- 16 (2) The Court and opposing counsel were promptly
17 notified upon discovery of the witness;
- 18 (3) If time permitted, counsel offered the witness for
19 deposition; and
- 20 (4) If time did not permit, a reasonable summary of the
21 witness' testimony was provided to opposing counsel.

22 VI. EXHIBITS²

23 A. Plaintiff anticipates offering the exhibits listed on
24 Plaintiff's Exhibit List attached to the JPTC.

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27 ² This portion of the Order does not affect the parties'
28 obligations to timely comply with disclosure requirements provided
in the Federal Rules of Civil Procedure, the Local Rules, or by
Order of this Court.

- 1 B. Defendants anticipate offering the exhibits listed on
2 Defendant's Exhibit List attached to the JPTC.
- 3 C. No other exhibits will be permitted to be introduced
4 unless:
- 5 (1) The party seeking to use the unlisted exhibit
6 demonstrates that the exhibit is being used to rebut
7 evidence which could not reasonably have been
8 anticipated at the pretrial conference; or
- 9 (2) The unlisted exhibit was discovered after the
10 pretrial conference and the offering party makes the
11 showing required in paragraph "D", below.
- 12 D. Any party proposing to introduce an exhibit which was
13 discovered after the pretrial conference shall promptly
14 notify the Court and opposing counsel of the existence of
15 such exhibit. The Court will not permit any such exhibit
16 to be introduced unless it finds:
- 17 (1) That the exhibit could not reasonably have been
18 discovered prior to the pretrial conference;
- 19 (2) The Court and counsel were promptly informed of the
20 exhibit's existence; and
- 21 (3) That the offering party has delivered a copy of the
22 exhibit to opposing counsel, or, if the exhibit may
23 not be copied, that the offering counsel has made
24 the exhibit reasonably available for inspection by
25 opposing counsel.
- 26 E. Plaintiff's exhibits shall be numbered and marked with
27 colored stickers provided by the Court while Defendants'
28 exhibits shall be designated by alphabetical letter also

1 marked with colored stickers provided by the Court. To
2 obtain stickers, parties should contact the Clerk of
3 Court at (916) 930-4000.

4 F. The parties are directed to exchange with each other, at
5 least thirty (30) court days prior to the trial
6 commencement date, copies of all of their respective
7 exhibits, marked with exhibit stickers provided by the
8 Court. Within five (5) court days after receipt and
9 examination of the exhibits, each party shall file with
10 the Court and serve upon opposing counsel objections, if
11 any, to the exhibits, referencing the exhibits as marked
12 by exhibit sticker and specifying the basis for each
13 objection.³ Failure to exchange exhibits as ordered
14 could result in the exhibit not being used at trial
15 and/or the imposition of sanctions. The failure to make
16 objections in the manner prescribed by this section shall
17 constitute a waiver of objections. A party seeking to
18 admit into evidence an exhibit to which no objection was
19 made must identify said exhibit for the record and then
20 move it into evidence.

21 G. Counsel shall produce all exhibits to the Clerk's Office
22 no later than 4:00 p.m. on the Friday before the trial
23 commencement date. At that time, the parties shall also
24 furnish the Court with a copy of each exhibit, unless the
25 exhibit is physically incapable of being reproduced.
26 Failure to produce exhibits as ordered could result in
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28 ³ The parties have leave to file joint exhibits. The above
procedure is designed for separate exhibits.

1 waiver of the right to offer those exhibits. Each party
2 submitting exhibits shall furnish a list to the Court,
3 the courtroom deputy and opposing counsel itemizing the
4 exhibits.

5 VII. FURTHER PREPARATION FOR USE OF DISCOVERY DOCUMENTS

6 A. It is the duty of counsel to ensure that any depositions
7 which are to be used at trial for any purpose shall have
8 been filed with the Clerk, and counsel are cautioned that
9 a failure to discharge this duty may result in preclusion
10 of the use of the unfiled depositions or in the
11 imposition of such other sanctions as the Court deems
12 appropriate.

13 B. No later than twenty (20) court days before the trial
14 commencement date, counsel for each party shall serve on
15 the other parties a statement designating all answers to
16 interrogatories and all portions of depositions (except
17 for passages to be used solely for refreshing
18 recollection, impeachment or rebuttal). No later than
19 ten (10) court days before the trial commencement date,
20 counter-designations of other portions of these discovery
21 documents may be served. No later than five (5) court
22 days before the trial commencement date, the parties
23 shall file and serve any preserved evidentiary objections
24 to any designated discovery, or said objections are
25 waived.

26 VIII. FURTHER DISCOVERY OR MOTIONS

27 Pursuant to the Court's Pretrial Scheduling Order, all
28 discovery and law and motion was to have been completed prior to

1 the date of the final pretrial conference. That order is
2 confirmed. The parties are, of course, free to conduct any
3 additional discovery they desire pursuant to informal agreement.
4 However, any such agreement will not be enforceable in this Court.

5 IX. AGREED STATEMENT

6 The parties shall submit a short, jointly-prepared
7 statement concerning the nature of this case that can be read to
8 the jury at the commencement of trial. The statement shall be
9 provided to the Court no later than seven (7) court days before the
10 trial commencement date. If the parties fail to do this, they may
11 be required to give their respective opening statements before voir
12 dire. Separate statements shall be submitted if agreement is not
13 reached.

14 X. JURY INSTRUCTIONS, VOIR DIRE, AND VERDICT FORMS

- 15 A. Jury instructions shall be filed no later than twenty-
16 eight (28) days before trial. Proposed voir dire and a
17 verdict form shall be filed no later than seven (7) court
18 days before trial. A special verdict or interrogatories
19 shall be included for all factual disputes submitted to
20 the jury that must be resolved before questions of law
21 can be decided.
- 22 B. The parties are directed to confer and to attempt to
23 agree upon a joint set of jury instructions and verdict
24 form. As to instructions on which there is dispute, the
25 parties shall adhere to the following procedure: the
26 party offering the disputed instruction(s) shall submit
27 the instruction(s) as its proposed jury instruction(s),
28 shall submit authority in support of the proposed

1 instruction(s) and shall number the disputed
2 instruction(s) in a manner that shows where each disputed
3 instruction should be placed in the tendered agreed upon
4 instructions.

5 C. At the time of electronic filing of the jury instructions
6 and verdict forms, the parties shall also submit a copy
7 of the sanitized joint jury instructions, the sanitized
8 disputed jury instructions, and the joint verdict forms
9 to the Court by email to geborders@caed.uscourts.gov in
10 accordance with L.R. 163(b)(1).

11 D. Most of the examination of prospective jurors will be
12 conducted by the Court. The parties are directed to meet
13 and confer and attempt to agree upon a joint set of
14 proposed voir dire questions and shall file proposed voir
15 dire questions no later than seven (7) court days prior
16 to the trial commencement date. Each side is granted
17 twenty (20) minutes to conduct voir dire following the
18 Court's questioning of prospective jurors.

19 XI. USE OF STRUCK JURY SELECTION SYSTEM

20 Eight jurors will be impaneled. The "struck jury" system
21 will be used to select the jury.⁴ At the beginning of the voir
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24 ⁴ As explained in United States v. Blouin, 666 F.2d 796,
25 798 (2d Cir. 1981), "the goal of the 'struck jury' system is to
26 whittle down an initially selected group . . . [to the amount of
27 jurors] who will serve as the petit jury." The selected group
28 consists of the jurors who will hear the case, plus the number of
jurors required to enable the parties to use the combined number of
peremptory challenges allotted to both sides for striking jurors
from the group. Typically extra jurors are included in the select
group in the event the minimum amount of jurors required for the
"struck system" is reduced "for cause" or some other reason.

1 | dire process, approximately twenty prospective jurors, randomly
2 | selected by the Jury Administrator, will be seated for voir dire.
3 | The order of the jurors' random selection is reflected by the order
4 | in which they will be seated. The first randomly selected juror
5 | will be in jury seat number one, which is at the extreme right-hand
6 | side of the jury box in the top row as the jury box is viewed from
7 | the well of the courtroom. The eighth juror will be in the eighth
8 | seat. The ninth selected juror will occupy the seat located at the
9 | extreme right-hand side of the jury box in the bottom row. The
10 | fifteenth seat will be in the left-hand side of that row. Three
11 | chairs will be placed in front of the jury box. The sixteenth
12 | juror will occupy the seat on the right and the eighteenth juror
13 | will occupy the seat on the left. The parties were informed at the
14 | final pretrial conference where the remaining prospective jurors
15 | will be seated. The first eight jurors on a list, which shall be
16 | given to counsel, will constitute the petit jury unless one or more
17 | of those eight is excused for some reason. Assuming that the first
18 | and fifth jurors on the list are excused, the second listed juror
19 | becomes the first, and the other jurors' numbers are changed
20 | accordingly, with the ninth juror on the list becoming the seventh
21 | on the list; however, the jurors continue to be identified by their
22 | original numbers.

23 | Following the voir dire questioning, each side will take
24 | turns exercising its three (3) allotted peremptory strikes. If a
25 | side elects to pass rather than exercise a particular peremptory
26 | challenge, that challenge is waived.

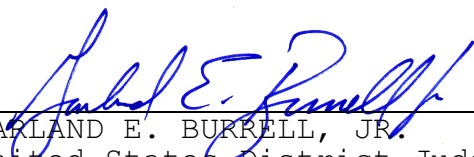
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XII. TRIAL DATE

Trial to a jury will commence on August 31, 2010. A trial day will commence at 9:00 a.m. and will adjourn at approximately 4:30 p.m. Each side has twenty (20) minutes within which to make an opening statement to the jury and sixty (60) minutes within which to make a closing argument. Counsel are to call Shani Furstenau, Courtroom Deputy, at (916) 930-4114, one week prior to the trial commencement date to ascertain the status of the trial date.

Dated: May 21, 2010



GARLAND E. BURRELL, JR.
United States District Judge