

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANDREA GORDON,)
)
Plaintiff,) No. C08-3630 BZ
)
v.)
) **FINAL PRETRIAL ORDER**
THE BAY AREA AIR QUALITY)
MANAGEMENT DISTRICT,)
)
Defendant.)
_____)

The pretrial conference in this case was held on April 22, 2010. Andrea Gordon ("Gordon") was represented at the conference by Howard Moore, Jr. Esq. and Pamela Price, Esq. The Bay Area Air Quality Management District ("defendant") was represented by Richard Schneider, Esq and Sandra Dawes Esq.

This Order shall control the subsequent conduct of the case and be modified only to prevent manifest injustice. See Fed. R. Civ. P. 16(e).

1. LENGTH AND TIME OF TRIAL

Trial shall begin on **Monday, May 10, 2010, at 8:30 a.m.** in Courtroom G, 15th Floor, Federal Building, 450 Golden Gate

1 Avenue, San Francisco, California 94102. The trial schedule
2 is as follows: 8:30 a.m. - 1:30 p.m.

3 Plaintiff shall be prepared to call witnesses **Monday, May**
4 **10, 2010**. Each side shall schedule witnesses to avoid any
5 interruption in the presentation of testimony. Plaintiff will
6 have 13 hours to present evidence. Defendant shall have 9
7 hours. Time will be kept consistent with the method described
8 during the pretrial conference.

9 **2. CLAIMS TO BE TRIED**

10 The following claims will be tried to a jury: retaliation
11 and race and sex discrimination in the hiring of Young,
12 Fournier, and Wiley, and retaliation.

13 In the event plaintiff prevails, issues of equitable
14 relief will be tried to the Court, directly after the jury
15 verdict. The Court has time available on Tuesday, May 18,
16 2010. The parties are directed to try to stipulate to as many
17 of the equitable relief issues as they can.

18 **3. VOIR DIRE**

19 Any objections to the proposed voir dire questions
20 distributed at the conference should be filed by no later than
21 **Friday, April 30, 2010**.

22 **4. MOTIONS**

23 Plaintiff's Motion No. 1 is **DENIED** subject to it being
24 renewed at trial if defendant seeks to introduce a document
25 that was not previously produced or call a witness which was
26 not properly identified in pretrial proceedings.

27 Plaintiff's Motion No. 2 is **DENIED** to the extent that
28 plaintiff may testify concerning her personal belief about

1 discrimination in her work place so long as it is grounded in
2 her personal knowledge. See Gossett v. Oklahoma, 245 F.3d
3 1172, 1179 (10th Cir. 2001); Lee v. TRW, Inc., 2006 WL
4 5105273, *2 (C.D. Cal. 2006)

5 Plaintiff's Motion No. 3 is **DENIED**. Many of plaintiff's
6 proposed questions will be included in the court's voir dire.

7 Plaintiff's Motion No. 4 is **GRANTED** subject to being
8 reconsidered should plaintiff introduce evidence about
9 defendant's ongoing "institutional bias."

10 Plaintiff's Motion Nos. 5 and 6 are **GRANTED** as unopposed.

11 Plaintiff's Motion No. 7 to exclude reference to
12 plaintiff's counsels' prior and current representations of
13 plaintiff in other cases is **GRANTED** subject to being
14 reconsidered should plaintiff try to introduce evidence of the
15 sort of concerns mentioned at the bottom of page 1 in
16 defendant's opposition.

17 Plaintiff's Motion No. 8 is **GRANTED** subject to being
18 reconsidered if plaintiff's testimony places this matter at
19 issue.

20 Defendant's Motion No. 1 is **DENIED**. Evidence of Mr.
21 Wiley's harassment is relevant to the issue of whether Mr.
22 Wiley retaliated against plaintiff. It may also be relevant
23 to plaintiff's sex discrimination claim to the extent that it
24 establishes that the District tolerated sexually harassing
25 conduct. If the timing of any of the acts of alleged
26 harassment is such that the act cannot have constituted
27 retaliation, then the motion will likely be granted.

28 Defendant's Motion No. 2 is **DENIED**. The evidence is

1 relevant to plaintiff's § 1981 claim for race discrimination
2 and retaliation in the selection of David Wiley.

3 Defendant's Motion Nos. 3 and 4 are **GRANTED** as unopposed.

4 Defendant's Motion No. 5 is **GRANTED IN PART AND DENIED IN**
5 **PART**. The motion is **GRANTED** as to the "hooligan" comment. I
6 do not construe plaintiff's testimony as establishing that
7 this is a racist comment, as opposed to being an offensive
8 comment. In any event, Mr. Ortellado apologized immediately,
9 so the testimony would tend to be more prejudicial than
10 probative. The motion is also **GRANTED** as to the testimony
11 about comments Mr. Hilken is alleged to have made in 1994.
12 The motion is **DENIED** as to the other comments.

13 Defendant's Motion No. 6 is **GRANTED** to the extent that
14 evidence which is relevant only to Wiley's post-hiring
15 performance is excluded. See McDougal-Wilson v. Goodyear Tire
16 and Rubber Co., 427 F.Supp.2d 595, 608 n.4 (E.D.N.C. 2006)
17 (finding that "such 'post-decision' performance is irrelevant
18 to the decision maker's original promotion decision").
19 Evidence of his post-hiring performance which is relevant to
20 issues such as whether Mr. Wiley engaged in retaliation or
21 whether the District harbors racial or sexual animus will not
22 be excluded. Nor will evidence of post-hiring performance
23 that bears directly on issues about Mr. Wiley's background and
24 experience that were known to the District at the time it made
25 the hiring decision. See Rifkinson v. CBS, 1997 WL 634514, *6
26 (S.D.N.Y. 1997) (finding that such evidence may be admissible
27 if a plaintiff can establish a specific nexus demonstrating
28 how "performance evaluations lead to an inference of

1 discriminatory intent at the time of the hiring").

2 **5. EXHIBITS AND EVIDENCE**

3 Exhibits shall not be a part of the record or go to the
4 jury unless sponsored by a witness or otherwise brought to the
5 jury's attention. The parties must lodge the entire
6 transcript of all depositions they anticipate using at trial
7 by the start of trial. The parties are to meet and confer in
8 an effort to agree on exhibits consistent with the rulings I
9 provided during the pretrial conference. The parties are to
10 submit joint and, if necessary, separate lists of exhibits by
11 **MAY 6, 2010**. Further rulings on exhibits will be made at a
12 conference to be conducted on May 10, 2010 after the
13 conclusion of testimony, unless a specific ruling is needed
14 before trial begins.

15 **6. JURY INSTRUCTIONS**

16 Rulings on the instructions were made on the record at
17 the pretrial conference on April 22, 2010. The Court
18 distributed a proposed set of final instructions.

19 **7. MISCELLANEOUS**

20 Any party who desires a transcript of the trial must make
21 arrangements with the court reporter. Any party who needs an
22 interpreter or audio or visual equipment shall make its own
23 arrangements for same and clear all such equipment with court
24 security personnel.

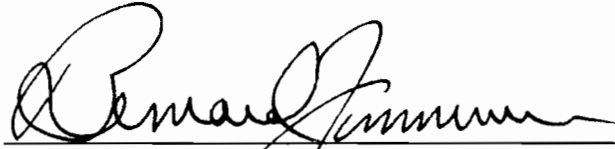
25 The parties are instructed to notify the Court
26 immediately if this action should settle before the

27 ///

28 ///

1 commencement of trial.

2 Dated: April 26, 2010



3
4 Bernard Zimmerman
5 United States Magistrate Judge

6 G:\BZALL\BZCASES\GORDON\PreTrial\PRETRIAL ORDER.wpd

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28