

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANIEL IMPEY,
Plaintiff,
v.
THE OFFICE DEPOT, INC.
Defendant.

No. C-09-01973 EDL

**ORDER FOLLOWING PRE-TRIAL
CONFERENCE**

On August 9, 2011, the Court held a pretrial conference in this case. For the reasons stated at the conference and in this Order, the Court orders as follows.

TRIAL SCHEDULE AND PROCEDURE

1. Trial in this case will begin on September 6, 2011 at 9:00 a.m. The first day of trial will consist of “mini opening statements” (five minutes or less), jury selection, opening statements, and reading of the preliminary jury instructions. Counsel shall report to the courtroom no later than 8:30 a.m.
2. Generally, the trial schedule shall be from 9:00 a.m. to 4:00 p.m. with two 15 minute breaks and a 45 minute lunch. Counsel shall arrive by no later than 8:30 a.m. to set up and discuss any outstanding issues with the Court outside of the presence of the jury.
3. Plaintiff shall have 22 hours of trial time to present his case, and Defendant shall have 15 hours of trial time to present its defense. The trial shall be completed (at least as to everything except, if necessary, presentation of evidence of Office Depot’s financial condition for consideration of punitive

1 damages, which has been bifurcated), and the case turned over to the jury by no later than Friday,
2 September 16, 2011.

3 4. The parties agree that the jury will consist of eight jurors and no alternates.

4 5. The parties shall meet and confer on an agreed-upon jury questionnaire and provide an electronic
5 copy of the questionnaire to the Court by no later than August 12, 2011. If possible, the questionnaire
6 will be presented to the jury during an early hardship screening the week before trial begins. If this is
7 not possible, the questionnaire will be presented to the jury the morning of September 6, 2011. The
8 parties shall also meet and confer on what, if any, modifications to the agreed-upon voir dire questions
9 are necessary in light of the jury questionnaire. The parties shall provide the Court with blind electronic
10 copies of the jury questionnaire and the voir dire questions.

11 6. The parties shall meet and confer and submit a joint, neutral statement of the case to be read to
12 the jury during voir dire.

13 7. The parties agree that during jury selection, each side will be able to exercise three peremptory
14 challenges and three “for cause” challenges to take place outside of the presence of the jury.

15 WITNESSES AND EVIDENTIARY OBJECTIONS

16 1. Defendant’s objection to eight of Plaintiff’s non-expert witnesses (Bob Harris, Sherly Vallot,
17 Emma Millan, Charles Coleman, Serafin Miranda, Jaime Riblett, Rick Larson, and Vivian Fernandez)
18 is SUSTAINED, and Plaintiff shall not call these witnesses at trial.

19 2. The parties shall meet and confer regarding Defendant’s objections to Plaintiff’s exhibits, and
20 determine which exhibits will be withdrawn. The parties will notify the Court by no later than Friday,
21 August 12, 2011 of the results of this meet and confer effort.

22 3. The parties shall meet and confer to reach a stipulation summarizing Mr. Impey’s earlier
23 performance evaluations so that Plaintiff need not introduce each of his performance evaluations as a
24 separate exhibit.

25 4. The parties shall meet and confer regarding Defendant’s objections to Plaintiff’s designation of
26 various portions of the deposition of Cheryl Coulombe. Defendant will confer with Ms. Coulombe to
27 determine whether she will appear voluntarily for Plaintiff’s case. The parties will notify the Court by
28 no later than Friday, August 12, 2011 of the results of this meet and confer effort.

1 5. Defendant's objections to Exhibits 3 through 7 of Ms. Coulombe's deposition, its responses to
2 discovery requests, is OVERRULED.

3 MOTIONS IN LIMINE

4 1. The Court rules on the parties' Motions in Limine as follows:

5 a. Plaintiff's Motion in Limine to exclude evidence of non-discrimination of two similarly
6 situated employees is DENIED.

7 b. The Court requires further briefing before ruling on Defendant's Motion in Limine 1 to
8 exclude Plaintiff's evidence of claims of discrimination by other employees. Plaintiff shall file a brief
9 of no more than ten pages by Friday, August 12, explaining who made the other alleged claims of
10 discrimination and how they are similar to Plaintiff's claims such that the evidence could be admissible
11 as appropriate "me too" evidence and where this information was previously disclosed. Defendant shall
12 have until August 26, 2011 to respond to Plaintiff's brief.

13 c. Defendant's Motion in Limine 2 to exclude evidence of its financial condition is
14 GRANTED as unopposed.

15 d. Defendant's Motion in Limine 3 to exclude evidence of statements made during
16 settlement or mediation is GRANTED.

17 e. Defendant's Motion in Limine 4 to exclude evidence of conduct that occurred more than
18 one year prior to Plaintiff's administrative charge is DENIED.

19 e. Defendant's Motion in Limine 5 to exclude opinion evidence of Jose Felix's
20 qualifications is GRANTED as unopposed.

21 f. Defendant's Motion in Limine 6 to exclude non-party witnesses from viewing the trial
22 is GRANTED as unopposed.

23 g. Defendant's Motion in Limine 7 to exclude evidence of the Dublin store not being
24 certified as a training store is DENIED.

25 h. Defendant's Motion in Limine 8 to exclude evidence of the Court's prior rulings on pre-
26 trial motions is GRANTED as unopposed.

27 i. Defendant's Motion in Limine 9 to exclude evidence of Plaintiff's expert Barry Ben-
28 Zion's "tax neutralization" theory is DENIED.

1 j. Defendant's Motion in Limine 10 to exclude evidence or argument to establish Plaintiff's
2 claim for punitive damages is DENIED. However, the Court may reconsider its position on this issue
3 on a Rule 50 motion after all of the evidence is presented.

4 k. Defendant's Motion in Limine 11 to exclude evidence of Plaintiff's previous
5 payment of meal period penalties to employees is DENIED.

6 l. Defendant's Motion in Limine 12 to exclude evidence of Defendant's decision not to
7 involve Greg Lindo or the loss prevention department in its investigation of Plaintiff is DENIED.

8 m. Defendant's Motion in Limine 13 to exclude evidence of Plaintiff's economic
9 damages due to his failure to mitigate is DENIED.

10 JURY INSTRUCTIONS

11 1. The Court shall adopt the parties' jointly proposed jury instructions with a few limited
12 exceptions discussed during the pre-trial conference and below.

13 2. The parties agree that Ninth Circuit Model Jury Instruction 2.8 (Impeachment Evidence-
14 Witness) is unnecessary and shall not be read unless it becomes necessary during trial.

15 3. The parties agree that CACI Form Instruction 3904B as well as its Worksheet and Table A shall
16 not be presented to the jury.

17 4. The parties agree that the following additional instructions proposed by the Court may be read
18 to the jury: Ninth Circuit Model Jury Instruction 3.4 (Additional Instructions of Law); CACI Form
19 Instruction 221 (Conflicting Expert Testimony); and "Prohibition on Use of Electronic Technology."

20 5. The parties shall meet and confer on a modification to Ninth Circuit Model Jury Instruction 1.3
21 (Burden of Proof - Preponderance of the Evidence) to include additional information on which issues
22 this instruction relates to.

23 6. The parties shall meet and confer on a dispute over CACI Form Instruction 3962, which was
24 previously jointly proposed, and Plaintiff's newly proposed CACI Form Instruction s 2400 and 2407
25 that he contends should be given instead. The parties will notify the Court by no later than Friday,
26 August 12, 2011 of the results of this meet and confer effort.

27 7. The parties shall meet and confer regarding two additional or alternative instructions proposed
28 by the Court relating to "Compensatory Damages - Proof/Measure of Types of Damages" and an
alternative to the parties' jointly proposed instruction on punitive damages which includes the names

1 of individuals whom Plaintiff's claims may subject Office Depot to punitive damages. The parties will
2 notify the Court by no later than Friday, August 12, 2011 of the results of this meet and confer effort
3 and whether they will agree to these additional or alternative instructions.

4 8. The parties shall meet and confer regarding two additional procedural instructions proposed by
5 the Court that would allow for interim jury deliberations when all jurors are present during trial, and
6 would allow jurors to propose questions for witnesses during trial. The parties will notify the Court by
7 no later than Friday, August 12, 2011 of the results of this meet and confer effort and whether they will
8 agree to these additional instructions.

9 9. The Court will not read Defendant's proposed Special Instructions 1 through 9 to the jury.
10 However, the Court will read Plaintiff's proposed alternative instead: "You are not being asked to
11 determine the wisdom of Office Depot's business decisions. It does not violate California law for an
12 employer to make decisions adverse to an employee for a reason that is incorrect or even mistakenly
13 believed to be correct, as long as the decision is not a violation of law." The Court will also advise the
14 jury that "Conjecture and speculation do not constitute evidence."

15 10. The Court will not read Plaintiff's proposed Special Instruction 2 to the jury. The parties shall
16 meet and confer regarding Plaintiff's Special Instruction 1, and particularly whether the title of the
17 instruction should be included in the information given to the jury.

18 VERDICT FORM

19 1. The parties shall meet and confer regarding their dispute over the verdict form, and specifically
20 whether it should include a place for the jury to name the individual or individuals, if any, whose
21 conduct gives rise to an award of punitive damages. The parties will notify the Court by no later than
22 Friday, August 12, 2011 of the results of this meet and confer effort and submit an electronic blind copy
23 of any agreed-upon verdict form.

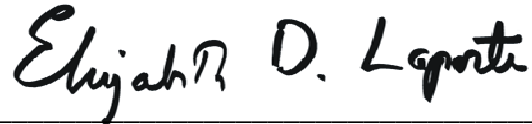
24 12. The parties shall meet and confer on a joint proposal for a subset of the substantive jury
25 instructions to be given to the jury at the beginning of the trial. The parties will notify the Court by no
26 later than Friday, August 12, 2011 of the results of this meet and confer effort and provide the Court
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a copy of this subset of instructions.

IT IS SO ORDERED.

Dated: August 11, 2010



ELIZABETH D. LAPORTE
United States Magistrate Judge