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UNITED STATES DISTRICT COURT  
Northern District of California

DIWAN WILLIAMS,

No. C 10-03760 MEJ

Plaintiff,

**ORDER RE MOTIONS IN LIMINE**

v.

SYSCO SAN FRANCISCO, INC.  
TEAMSTERS LOCAL 853,

Defendants.

On March 14, 2013, the Court held a pre-trial conference in this case, at which time it heard oral argument on the parties' motions in limine. After carefully considering the parties' arguments and controlling authorities, the Court now rules as follows.

**1. Plaintiff's Motion in Limine #1 [Dkt. No. 77]**

Plaintiff seeks to exclude testimony and argument referring to Plaintiff lying, committing fraud, falsifying or misrepresenting his absence on March 7, 2010, to Defendant. Plaintiff argues that "the use of such loaded terms are irrelevant under Federal Rule of Evidence 401 and unfairly prejudicial under Federal Rule of Evidence 403 because characterizing Plaintiff's absence on March 7, 2010 and/or failure to provide a verbal or written notice to Sysco about the cancellation as fraud or misrepresentation is factually inaccurate and therefore an inflammatory characterization of Plaintiff's conduct."

Defendant responds that it intends to introduce evidence to support an after-acquired evidence defense in the event that the jury finds liability for damages.<sup>1</sup> It asserts that in order to meet its burden of proof on this defense, it must be permitted to present evidence of its disciplinary policies, prior application of the policies in similar circumstances, and whether relevant decision makers

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<sup>1</sup> Defendant indicates that it does not intend to argue that Plaintiff committed "fraud."

1 would have terminated Plaintiff based on those policies. Thus, Defendant seeks to introduce  
2 evidence showing that Plaintiff's absence from work on March 7 involved a misrepresentation and  
3 dishonesty and therefore justified termination under its policies. Defendant thus argues that such  
4 evidence is relevant and not unfairly prejudicial.

5         The Court agrees with Defendant. The facts indicate that Defendant had approved military  
6 leave for Plaintiff for March 4 and 7, and that after Plaintiff was notified that the training had been  
7 cancelled, Plaintiff did not show up for work on March 7, and did not personally inform Defendant  
8 that the training had been cancelled. As part of its after-acquired evidence defense, Defendant may  
9 present such evidence and argue that by withholding such information, Plaintiff misled Defendant  
10 into thinking he was on approved leave when he was not and that its policy states that dishonesty,  
11 including falsification of payroll records, provided grounds for termination on that basis. Thus, the  
12 Court finds that the evidence is relevant and that the probative value outweighs the danger of unfair  
13 prejudice. Accordingly, the Court **DENIES** Plaintiff's motion.

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15 **2. Plaintiff's Motion in Limine #2 [Dkt. No. 78]**

16         Plaintiff seeks to exclude evidence, argument, and testimony regarding Defendant's  
17 allegations of fraud against other Sysco employees, particularly, relating to falsification of leave on  
18 the grounds that such evidence is irrelevant and unfairly prejudicial. Plaintiff also argues that  
19 because Defendant has not identified these individuals, he has been deprived of the opportunity to  
20 conduct discovery regarding the relevancy of the circumstances of their termination and that such  
21 evidence would constitute unfair surprise.

22         Defendant responds that to meet its burden of proof on its after-acquired evidence defense, it  
23 must show that its decision makers would have terminated Plaintiff for taking a day off as military  
24 leave, when in fact he was not on military leave, based on the company's employee policies.  
25 Evidence that Defendant terminated other employees for similarly misrepresenting or falsifying  
26 leaves of absences is highly relevant to its defense and to show that it consistently applied its policies  
27 in circumstances of misrepresented or falsified leave. Defendant also argues that it produced relevant  
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1 documents referencing termination actions taken against Sysco employees between September 2006  
2 and March 15, 2010 that were responsive to Plaintiff’s Request for Production of Documents No. 9,  
3 including documents containing termination notices to employees based on falsification of FMLA  
4 leave. Defendant also included these documents in its exhibit list in the parties’ pretrial conference  
5 statement. Defendant states that, pursuant to the parties’ agreement, it redacted the names of  
6 employees from the produced documents. Defendant explains that it does not intend to produce  
7 undisclosed witnesses, but only seeks to present evidence indicating that other employees were  
8 terminated by the relevant decision makers for falsifying or misrepresenting leave. Thus, Defendant  
9 argues that the evidence is relevant and Plaintiff has no basis to claim unfair surprise.

10 The Court has considered the parties’ arguments and agrees with Defendants that such  
11 evidence is relevant to the issue of how it treated other similarly-situated employees. Accordingly,  
12 the Court will allow such evidence, provided that the circumstances of the terminations of each of the  
13 individuals were properly disclosed to Plaintiff during discovery. The Court therefore **DENIES**  
14 Plaintiff’s motion.

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16 **3. Plaintiff’s Motion in Limine #3: Excluding Evidence of Undisclosed Employee Witness**  
17 **Allegedly Provided Military Leave by Defendant**

18 Plaintiff seeks to preclude Defendant from presenting any testimony from an undisclosed  
19 employee who was allegedly provided military leave by Defendant. At the hearing, Defendant  
20 indicated that it is not calling any undisclosed employee regarding military leave. Accordingly, the  
21 Court **DENIES** this motion as **MOOT**.

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23 **4. Plaintiff’s Motion in Limine #4: Exclude Evidence of Military Leaves Provided to Other**  
24 **Sysco San Francisco Employees and Other Sysco-Related Entities**

25 Plaintiff seeks to exclude evidence, argument, or testimony or military leaves provided to  
26 other employees of Sysco San Francisco or any other Sysco-related entity. Plaintiff argues that “the  
27 undisclosed evidence of Defendant and other Sysco-related entities providing military leave to other  
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1 employees is completely irrelevant to Plaintiff’s claim that Defendant took adverse actions against  
2 Plaintiff because of his status as a military service member and because of his military obligations.”  
3 Particularly, Plaintiff argues that the testimony produced during discovery shows that these military  
4 leaves involved different decision makers, different corporate entities, different types of employees,  
5 and different time periods. At the hearing, Plaintiff also argued that evidence of other employees’  
6 treatment is irrelevant to the inquiry under § 4111(c) of USERRA applicable to his claim. Plaintiff  
7 further argues that the probative value of such evidence is outweighed by the danger of unfair  
8 prejudice. Finally, Plaintiff argues that Defendant failed to identify other employees of Sysco and  
9 Sysco-related entities who were granted military leave requests in response to Plaintiff’s discovery  
10 requests and such witnesses should therefore be excluded pursuant to Federal Rule of Civil Procedure  
11 37(c).

12 In response, Defendant first indicates that it does not intend to present evidence or testimony  
13 regarding military leaves granted to employees at other Sysco-related entities. Thus, Plaintiff’s  
14 motion as to such evidence is moot.

15 With respect to evidence related to military leaves granted to other employees at Sysco San  
16 Francisco, Defendant argues that such evidence is relevant to the issue of whether Defendant  
17 harbored discriminatory animus towards military service member employees. Specifically,  
18 Defendant asserts that “the key question for the jury will be whether Plaintiff’s military service  
19 member status was a ‘motivating factor’ in the decision to terminate him. Accordingly, evidence  
20 regarding an employer’s treatment of other members of the protected class (here, other military  
21 service members) is especially relevant to the issue of the employer’s discriminatory intent.”

22 The Court has considered the parties’ arguments, and rules as follows. Defendant may  
23 present evidence regarding military leaves granted to employees at Sysco San Francisco by the same  
24 decision makers (Judith LaFrentz and Jeff Szostak), provided Defendant properly produced such  
25 evidence to Plaintiff during discovery. Such evidence is relevant to the issue of whether Defendant  
26 acted with discriminatory animus in an USERRA case. *See Velazquez-Garcia v. Horizon Lines of*  
27 *Puerto Rico, Inc.*, 473 F.3d 11, 20 (1st Cir. 2007). Accordingly, the Court **DENIES** this motion.

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1 **5. Defendant’s Motion in Limine #1: Preclude Admission of Evidence of Last Chance**  
2 **Agreements**

3 Defendant seeks to preclude Plaintiff from introducing evidence regarding Sysco’s provision  
4 of last chance agreements to other Sysco employees who were not military service members.  
5 Defendant argues that the only evidence of provision of last chance policies relates to individuals  
6 who were covered by a prior attendance policy, which Plaintiff was not under, and thus were not  
7 “similarly situated” to Plaintiff. Defendant thus argues that the evidence is irrelevant and unfairly  
8 prejudicial.

9 Plaintiff responds that the individuals who were offered last chance agreements were similarly  
10 situated in that they were terminated for violation of company policy and such evidence demonstrates  
11 that Defendant treated other non-military more favorable than Plaintiff.

12 The Court has considered the parties’ arguments, and rules as follows. Plaintiff may present  
13 evidence that other employees who, like Plaintiff, were *exclusively* under the new attendance policy  
14 (*i.e.*, they were not covered under the previous attendance policy) were provided last chance  
15 agreements after they accrued sufficient points for termination.<sup>2</sup> Accordingly, the Court **GRANTS**  
16 this motion **IN PART** and **DENIES** the motion **IN PART**.

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18 **6. Defendant’s Motion in Limine #2: Preclude Admission of Evidence or Argument re**  
19 **Decisions and Opinions by the California Employment Development Department**

20 Defendant seeks to preclude Plaintiff from introducing into evidence the decision by the ALJ  
21 at the California Unemployment Insurance Appeal Board proceeding. It asserts that under California  
22 law, findings of fact or law by the California Unemployment Insurance Appeals Board regarding an  
23 employee’s eligibility for unemployment benefits are inadmissible in “any separate or subsequent  
24 action or proceeding . . . before a judge of this state of the United States.” Cal. Unempl. Ins. Code §  
25 1960. Defendant further argues that the only district court case that has admitted a California

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27 <sup>2</sup> Defendant shall provide to Plaintiff any discovery necessary regarding whether individuals  
28 who were offered last chance agreements were under Defendant’s old or new attendance policy.

1 unemployment decision, *Baldwin v. Rice*, 144 F.R.D. 102 (E.D. Cal. 1992) is neither binding nor  
2 applicable and has been criticized by later decisions.

3 Plaintiff responds that FRE 501 establishes that a state legislature cannot purport to make  
4 binding pronouncements of law concerning what evidence may be privileged or otherwise  
5 inadmissible in a federal court action involving claims based on federal law. Plaintiff also argues that  
6 the fact Defendant contested his right to unemployment benefits constitutes evidence of adversarial  
7 action against him and is therefore relevant to his discrimination claim. Plaintiff further contends  
8 that, as in *Baldwin*, the decision by the ALJ discusses facts directly pertinent to issues in this case:  
9 namely, Defendant's alleged reasons for discharge and Plaintiff's military service obligations.  
10 Finally, Plaintiff argues that even if § 1960 applies, it applies only to the ALJ's findings of fact and  
11 law, and does not preclude evidence that: (1) plaintiff filed a claim; (2) defendant contested the claim;  
12 (3) any testimony submitted that falls outside the scope of § 1960.

13 The Court has considered the parties' arguments and agrees with Defendant that the ALJ's  
14 decision is not relevant to Plaintiff's USERRA claim. Further, the Court finds that any probative  
15 value would be outweighed by the danger of unfair prejudice to Defendant and a risk that the jury  
16 would misconstrue the decision or any findings as evidence in this case. Accordingly, the Court  
17 **GRANTS** Defendant's motion.

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19 **IT IS SO ORDERED.**

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21 Dated: April 1, 2013

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24 Maria-Elen James  
25 United States Magistrate Judge  
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