IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SCOTT GAGNER, Plaintiff, v. AUTONATION, INC. a Delaware corporation, AN/MF ACQUISITION CORP. a Delaware corporation, d/b/a Joe Madden Ford and AUTONATION USA CORPORATION, a Florida corporation, Defendants.	)	No. 04 C 1152 Jury Demand Judge Shadur Magistrate Judge Nolan

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* TO BAR EVIDENCE RELATING TO THE AGE DISCRIMINATION CLAIMS OF FORMER EMPLOYEES JAMES JASTROWSKI, JOHN LYDON, AND WILLIAM ZLOCH

Defendants AutoNation, Inc., AN/MF Acquisition Corp. d/b/a Joe Madden Ford (hereinafter "Madden"), and AutoNation USA Corporation (collectively referred to as "Defendants"), by their attorneys, submit this Memorandum in Support of their Motion *In Limine* to bar evidence relating to the employment, termination and age discrimination claims of former employees James Jastrowski, John Lydon, and William Zloch.

INTRODUCTION

At trial, Plaintiff Scott Gagner may attempt to introduce evidence regarding the circumstances under which three former employees over the age of 40 left employment at Madden, the subsequent assignment of those employees' duties, or evidence relating to the alleged discriminatory treatment of those employees prior to their leaving Madden. Based on a review of Gagner's proposed witness list, these employees may include the following: James

Jastrowski, John Lydon, and William Zloch. In addition, Gagner may call David Cannizaro as a witness to testify regarding Jastrowski's, Lydon's, Zloch's employment, terminations or age discrimination claims. Based on a review of Gagner's proposed exhibit list, Plaintiff may seek to offer the following documents into evidence: Lydon and Zloch Charge of Discrimination; Complaint in United States District Court, *Lydon and Zloch v. AutoNation, Inc., et al*., Case No. 01-C-6861; Jastrowski Charges of Discrimination (Nos. 1, 2, and 3); and Complaint in United States District Court, *Jastrowski v. AutoNation, Inc., et al.*, Case No. 01-C-3538.

The anticipated testimony of these individuals, their charges, and lawsuits have absolutely no relevance to the highly individualized circumstances leading to Gagner's termination. Indeed, none of these individuals was employed by Madden at the time of Gagner's termination. Further, Cannizaro, who made the decision to terminate Jastrowski, Lydon, and Zloch, was no longer employed by Madden at the time of Gagner's termination. Rather, Madden General Manager Eric Soto made the decision to terminate Gagner. Soto was not employed at Madden when Jastrowski, Lydon, and Zloch were terminated and played no role whatsoever in their terminations (Gagner Tr. at 101-03). [1]

The testimony of Jastrowski, Lydon, and Zloch and evidence relating to their charges and lawsuits and the testimony of Cannizaro should be barred for the following reasons. First, none of these individuals has any personal knowledge about the central issue in this case, namely whether Gagner was terminated because of his age. It is undisputed that Cannizaro, Jastrowski, Lydon, and Zloch were not employed at Madden when Gagner was terminated and they played absolutely no role whatsoever in Gagner's termination. Second, the fact that Jastrowski, Lydon, and Zloch filed charges and lawsuits alleging age discrimination, which were ultimately settled,

[1] Plaintiff's deposition transcript is referred to as "Gagner Tr. at __." Relevant portions of Plaintiff's deposition transcript are attached as Exhibit A.

is irrelevant to Gagner's age discrimination claim. Third, Gagner was not similarly situated to Jastrowski, Lydon, and Zloch because each were terminated by different decision makers. Finally, evidence concerning the charges and lawsuits filed by Jastrowski, Lydon, and Zloch is highly prejudicial, of no probative value, and would require a "trial within a trial." For all these reasons, the Court should bar the testimony of Cannizaro, Jastrowski, Lydon, and Zloch and exclude all evidence relating to Jastrowski's, Lydon's, and Zloch's charges and lawsuits against Defendants alleging age discrimination.

ARGUMENT

I. The Testimony Of Jastrowski, Lydon, And Zloch Should Be Barred Because They Have No Personal Knowledge Of Plaintiff's Termination.

Rule 602 provides, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. Similarly, Rule 701 requires: "[i]f a witness is not testifying as an expert, the witness' testimony is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. Even if a witness' testimony is based on personal knowledge, that testimony must still be relevant or it will be excluded pursuant to Rules 401 and 402. Fed. R. Evid. 401, 402.

In this case, the testimony of Cannizaro, Jastrowski, Lydon, and Zloch should be barred pursuant to Rule 602 because they lack personal knowledge about Gagner's claims. It is undisputed that none of these individuals was employed at Madden when Gagner was terminated in November 2001. Indeed, Jastrowski was terminated in February 2001, and Lydon and Zloch

were terminated in November 2000. Simply put, Cannizaro, Jastrowski, Lydon, and Zloch have no personal knowledge of *any* fact relating to Plaintiff's termination and, therefore, their testimony should be barred.

II. Evidence Of The Charges And Lawsuits Filed By Jastrowski, Lydon, And Zloch Should Be Barred Because It Is Irrelevant To Plaintiff's Claim.

A. Evidence Of The Charges And Lawsuits Filed By Jastrowski, Lydon, And Zloch Should Be Barred Because It Does Not Make Plaintiff's Claim More Or Less Probable.

Evidence of Jastrowski's, Lydon's and Zloch's claims of discrimination are completely irrelevant to Gagner's case and, therefore, must be excluded under Rule 402. Rule 402 provides in pertinent part "[e]vidence which is not relevant is not admissible." Fed. R. Evid. 402. Rule 401 defines relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. The fact that Jastrowski, Lydon, and Zloch filed age discrimination claims against Madden has absolutely no bearing whatsoever on whether Gagner was terminated because of his age; these individuals' claims simply do not make it more or less probable that Plaintiff's employment was terminated because of his age. Courts have recognized the mere fact that other employees have filed charges of discrimination is not probative of anything. *Eichler v. Ridell, Inc.*, 1997 U.S. Dist. LEXIS 547 (N.D.Ill. 1997) (attached as Exhibit B). Courts have routinely barred evidence concerning other employees' discrimination claims, recognizing that this evidence has little, if any, probative value. *Scaramuzzo v. Glenmore Distilleries, Co.*, 501 F.Supp. 727, 733 (N.D.Ill. 1980) (finding that the fact that other employees other than plaintiff filed age discrimination charges against the employer was of "minimal probative value"); *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 929 (7th Cir. 1984) (affirming district court's exclusion of evidence regarding alleged

discrimination against female employees other than the plaintiff because such evidence would have little probative value regarding the alleged discriminatory action against the plaintiff); *see also Haskell v. Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984) (holding that the trial court committed reversible error in ADEA case by allowing six other former employees to testify concerning the circumstances of their own terminations and terminations of fellow employees). Therefore, evidence of the charges and lawsuits filed by Jastrowski, Lydon, and Zloch should be barred because it is not relevant to Plaintiff's case.

B. Evidence Of The Charges And Lawsuits Filed By Jastrowski, Lydon, And Zloch Should Be Barred Because They Are Not Similarly Situated To Plaintiff.

The lack of relevance of the claims of Jastrowski, Lydon, and Zloch is heightened because they are not similarly situated to Gagner. In order for employees to be considered similarly situated for employment discrimination claims, they must be "directly comparable in all material aspects." *Gage v. Metropolitan Water Reclamation Dist. Of Chicago*, 365 F. Supp. 2d 919, 934 (N.D. Ill. 2005); *Ajayi v. Aramark Bus. Servs., Inc.*, 336 F.3d 520 (7th Cir. 2003). Courts have excluded evidence of other employee's claims of discrimination that were unrelated to the plaintiff's case. *Sims v. Mulcahy*, 902 F.2d 524, 531 (7th Cir. 1990) (excluding evidence of another employee's claim of race discrimination finding that the allegations were "far afield and unrelated to the facts and circumstances in this case.") In this case, the circumstances surrounding Gagner's termination are very unique – he was terminated for refusing to repay an overpayment and being insubordinate to his manager. Unlike Gagner, none of these three individuals was terminated for refusing to repay an overpayment and being insubordinate to their manager.

The complete lack of relevance of this evidence is more apparent in this case because there were different decision makers involved in the termination decisions. Courts have held that where there are different supervisors or decision makers involved in employment decisions, the employees affected by those decisions are not comparable. *See Frazier v. Ind. Dep't of Labor*, 2003 U.S. Dist. LEXIS 9073 *1, *8 (S.D. Ind. 2003) (attached as Exhibit C); *see also Snipes v. Ill. Dep't of Corr.*, 291 F.3d 460, 463 (7th Cir. 2002) (finding that plaintiff was not similarly situated to other employees who had different supervisors); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir. 2001) (finding that employees to which plaintiff sought to compare himself to were not similarly situated because they had different supervisors). Courts have recognized that common supervision is important because "[d]ifferent employment decisions, concerning different employees, made by different supervisors, are seldom sufficiently comparable…for the simple reason that different supervisors may exercise their discretion differently." *Radue*, 219 F.3d at 618; *see also Stanback v. Best Diversified Products, Inc.*, 180 F.3d 903, 910 (8th Cir. 1999).

As discussed above, Soto made the decision to terminate Gagner (Gagner Tr. at 101-02). It is undisputed that Soto played no role whatsoever in the termination of Jastrowski, Lydon, and Zloch. Indeed, Gagner admitted that Soto was not employed by Madden when Jastrowski, Lydon, and Zloch were terminated (Gagner Tr. at 102-03). David Cannizaro was the General Manager at Madden when Jastrowski, Lydon, and Zloch were terminated. It is undisputed that Cannizaro did not play any role whatsoever in Gagner's termination because he was no longer employed by Madden at that time (Gagner Tr. at 98). The fact that there were different decision makers involved in the termination decisions demonstrates the complete lack of relevance of evidence regarding the discrimination claims of Jastrowski, Lydon, and Zloch. Therefore,

evidence regarding the charges and lawsuits filed against Madden by Jastrowski, Lydon, and Zloch should be barred because it is not relevant to Gagner's case.

III. Evidence Of The Charges And Lawsuits Filed By Jastrowski, Lydon, And Zloch Should Be Barred Because It Is Of Little Or No Probative Value And Is Highly Prejudicial.

Gagner's anticipated evidence concerning Jastrowski, Lydon, and Zloch should also be excluded under Rule 403 because whatever minimal probative value it may have is substantially outweighed by the danger of unfair prejudice, waste of time and confusion of the issues if such evidence is introduced. Fed. R. Evid. 403. As discussed above, the anticipated testimony of Cannizaro, Jastrowski, Lydon, and Zloch and evidence relating to Jastrowski's, Lydon's, and Zloch's charges and lawsuits filed against Madden should be barred because they are simply not probative of whether Gagner was terminated because of his age. Courts have consistently rebuked plaintiffs' attempts to introduce evidence of other employees' claims, charges or lawsuits alleging discrimination because whatever minimal probative value this evidence may have is far outweighed by its prejudicial impact. *Eichler*, 1997 U.S. Dist. LEXIS 547 (finding that any probative value of evidence regarding an employee's claim of age discrimination, other than plaintiff, is outweighed by the undue prejudice to the employer); *Scaramuzzo*, 501 F.Supp. at 733 (finding that the minimal probative value of prior charges of discrimination filed against the employer is outweighed by the undue prejudice to the employer).

Importantly, courts have recognized the possibility that jurors could make unwarranted inferences by the mere fact that other employees may have filed charges against the employer, which would lead to undue prejudice. Significantly, the court in *Eichler*, 1997 U.S. Dist. LEXIS 547, held that:

> "Charges" of discrimination may be filed by any aggrieved employee, *whether meritorious or not, and are, therefore, not probative of anything.* However, the knowledge that charges were filed, in and of itself, could lead jurors to infer that the allegations were true and that, therefore, it is likely that Defendant also discriminated against Plaintiff. The fact that such charges were settled by Defendant could strengthen that inference. The Court is of the opinion that the likely effect of such evidence or testimony would be to raise potentially damaging inferences against Defendant that are not warranted by the mere fact that charges were brought and/or settled. Accordingly, any probative value of such evidence or testimony regarding the filing of discrimination charges by …persons other than Plaintiff, would be outweighed by the undue prejudice that would result thereby. (emphasis added).

In this case, the charges and lawsuits filed by Jastrowski, Lydon, and Zloch are completely unrelated to Gagner's case. Jastrowski, Lydon, and Zloch were terminated by different individuals than Gagner, under different Madden management. Furthermore, Gagner was terminated for entirely different reasons than Jastrowski, Lydon, and Zloch. None of these individuals refused to repay an overpayment and was insubordinate to their manager. Simply put, evidence regarding the claims of Jastrowski, Lydon, and Zloch has nothing to do with Gagner's case, and has no probative value.

Further, this evidence should be excluded because of the highly prejudicial effect it would have on a jury. Courts have consistently recognized that jurors may simply conclude that an employer discriminated against a plaintiff because other employees filed charges alleging discrimination. *See Eichler*, 1997 U.S. Dist. LEXIS 547. The fact that these claims were ultimately settled could further support this highly prejudicial and unwarranted inference. Gagner is unable to demonstrate that his age had anything to do with his termination and now seeks to offer this irrelevant and highly prejudicial evidence in the hopes that the jury will ignore the facts and infer discrimination just because other former employees filed and settled claims of age discrimination. This is exactly the inference courts have sought to prevent in barring this

type of evidence. Accordingly, any probative value these unrelated allegations of discrimination may have is far outweighed by the danger of unfair prejudice to Defendants.

Finally, if evidence regarding the charges and lawsuits filed by Jastrowski, Lydon, and Zloch were admitted, it would require a "trial within a trial" over these claims. This would needlessly and significantly expand this litigation, as Madden would be forced to call witnesses and introduce exhibits to refute these individuals' claims of discrimination. Courts have consistently excluded evidence of discrimination claims of employees other than the plaintiff because it would result in a "trial within a trial." *See Sims*, 902 F.2d at 531 (affirming district court's exclusion of evidence regarding termination of black employee other than plaintiff because it was of slight probative value and would have created a "trial within a trial" to determine the legitimacy of that employment decision); *McCluney*, 728 F.2d at 929 (affirming district court's exclusion of evidence regarding alleged discrimination against female employees other than plaintiff because it would have required the court to determine whether the plaintiff reasonably believed each instance involved discrimination and would require the defendant to counter each incident; such evidence would have little probative value regarding the alleged discriminatory action against the plaintiff).

In this case, if this evidence were admitted, it would have the effect of *three additional trials* within Gagner's trial. The significant time at trial Madden would be forced to spend defending against Jastrowski's, Lydon's and Zloch's claims would draw attention away from Gagner's case and would likely result in confusing the jury as to the real issue in this case—whether Gagner's age had anything to do with his termination. In the interest of judicial economy and because of the highly prejudicial nature of this evidence and the real possibility of

confusing the jury, evidence relating to the charges and lawsuits filed by Jastrowski, Lydon, and Zloch should be barred.

WHEREFORE, Defendants respectfully request that this Court grant their motion to exclude at trial all evidence regarding the employment, termination and charges and lawsuits filed by Jastrowski, Lydon, and Zloch against Defendants.

Respectfully submitted,

AUTONATION, INC., AN/MF ACQUISITION CORP. D/B/A JOE MADDEN FORD AND AUTONATION USA CORPORATION

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Dated: October 3, 2005

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2005 I electronically filed the foregoing **Memorandum In Support of Defendants' Motion *In Limine* to Bar Evidence Relating to the Claims of Age Discrimination of Former Employees James Jastrowski, John Lydon, and William Zloch** using the CM/ECF system which will send notification of such filing to the following:

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