EXHIBIT B

*1997 U.S. Dist. LEXIS 547, **

BEVERLY A. EICHLER, Plaintiff, v. RIDDELL, INC., Defendant.

Case No. 95 C 3782

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1997 U.S. Dist. LEXIS 547

January 10, 1997, Decided
January 14, 1997, DOCKETED

DISPOSITION: [*1] Plaintiff's Motions in Limine be, and the same hereby are, GRANTED in part and DENIED in part. Defendant's Motions in Limine be, and the same hereby are, GRANTED in part and DENIED in part.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff former employee and defendant former employer filed motions in limine in the employee's wrongful termination suit that alleged discrimination.

OVERVIEW: The employee and the employer filed motions in limine in a wrongful termination suit, in which the employee claimed age or sex discrimination and retaliation for a discrimination complaint. The court granted in part and denied in part those motions. The court reasoned that allowing the employee to support her retaliation claim by testifying that she was not offered lower level jobs but not allowing the employer to use the rejection of one such job as evidence of not mitigating damages was not inconsistent, but that evidence of the rejection could have been used for other purposes. The court also held that not including a retaliation charge in her EEOC complaint did not bar the employee from making that claim in the suit because her claim of a failure to offer her jobs that were available after her termination related to her discrimination claim. The court further found that the undue prejudice of any evidence regarding discrimination charges by anyone other than the employee outweighed its probative value, and that evidence of the performance of the younger male in the position from which the employee claimed she was wrongfully discharged was relevant.

OUTCOME: The court granted some of the motions in limine that the employee and the employer filed in a wrongful termination suit and denied others, holding that none of the evidence that was relevant to the employee's claims of discrimination and retaliation should have been excluded at that stage of the proceedings.

CORE TERMS: retaliation, termination, evidence relating, limine, unemployment compensation, non-supervisory, terminated, consolidated, comparable, filled, exclude evidence, pertaining, motion in limine, post-termination, failure to rehire, probative value, vacancy, morons, fill, actionable, demeaning, overrule, proffer, separate corporate entity, customer service, damages awarded, prior to filing, amount received, job offer, reorganization

LexisNexis(R) Headnotes ♦ Hide Headnotes

Civil Procedure > Trials > Motions In Limine

HN1 Pursuant to its power to manage trials, the trial court can exclude evidence in limine. Motions in limine can be used to prevent an opponent from introducing potentially inadmissible evidence until after the trial court has an opportunity to rule on its admissibility. Motions in limine are primarily intended to prevent unfair prejudice to the objecting party, usually arising from an irrelevant but compelling inference. Evidence must be excluded on a motion in limine only when evidence is clearly inadmissible on all potential grounds and unless evidence meets this high standard, evidentiary rulings must be deferred until trial. More Like This Headnote

Torts > Business & Employment Torts > Wrongful Termination
Labor & Employment Law > Discrimination > Retaliation
Labor & Employment Law > Wrongful Termination

HN2 Post-termination acts of retaliation that have a nexus to employment are actionable. More Like This Headnote

Civil Procedure > Trials > Motions In Limine

HN3 The denial of a motion in limine does not mean that all evidence contemplated by the motion is admitted at trial. Instead, denial merely means that, without the context of trial, the trial court cannot determine whether the evidence in question must be excluded. More Like This Headnote

COUNSEL: For BEVERLY A EICHLER, plaintiff: Darlene A. Vorachek, Vicki Lafer Abrahamson, Oscar Enrique Romero, Abrahamson Vorachek & Mikva, Chicago, IL.

For RIDDELL, INC., defendant: Adrianne Clarise Mazura, Charles Robert McKirdy, Sally J McDonald, Tracy Lee Bradford, Rudnick & Wolfe, Chicago, IL.

JUDGES: ARLANDER KEYS, United States Magistrate Judge

OPINIONBY: ARLANDER KEYS

OPINION: MEMORANDUM OPINION AND ORDER

Before the Court are both parties' Motions In Limine. For the following reasons, this Court grants in part and denies in part Plaintiff's Motions. Also, for the following reasons, this Court grants in part and denies in part Defendant's Motions.

Background

Plaintiff, Beverly A. Eichler, alleges that Defendant, Riddell, Inc., unlawfully discriminated against her on the basis of her sex and/or age by terminating her employment on December 1, 1993. More specifically, Plaintiff alleges that, pursuant to a reorganization, which resulted in the merger of her position with other positions, **[*2]** a less qualified, younger, male was selected to head the consolidated department, while she was terminated. Plaintiff alleges further that, despite the subsequent existence of several job openings which she was qualified to fill, Defendant failed and refused to reinstate her to any of those jobs as retaliation for her having filed her discrimination complaint.

Plaintiff has moved to exclude evidence regarding the following areas: (a) information pertaining to derogatory and racial statements allegedly made by Plaintiff during her employment; (2) information pertaining to an offer of employment by Defendant to Plaintiff to a position which she alleges was not comparable to her prior position; and (3) information pertaining to Plaintiff's receipt of unemployment compensation after her termination.

Defendant has moved to exclude evidence regarding the following areas: (1) evidence relating to positions filled prior to Plaintiff's filing of her EEOC charge; (2) evidence relating to claims of discrimination and settlement of other charges; (3) evidence relating to allegations of discriminatory failure to rehire, as such allegations were not encompassed in the EEOC charge; (4) evidence **[*3]** relating to the work performance of Harry Hightman, the employee who was selected, over Plaintiff, to head the consolidated department; (5) evidence relating to eight non-supervisory positions that became available subsequent to Plaintiff's termination; (6) evidence relating to retaliation against Plaintiff after her termination, and (7) evidence relating to All-American, Inc., a separate corporate entity of Defendant. n1

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n1 In response to Defendant's Motion to bar the testimony of Oscar Romero, Plaintiff states that she does not intend to call Mr. Romero as a witness. Therefore, said Motion is denied as moot. Defendant's Motion to bar evidence relating to front pay or benefits is denied as moot, as Plaintiff concedes that the determination as to the issue of such benefits lies with the Court, not the jury.

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DISCUSSION

HN1 "Pursuant to its power to manage trials, the court may exclude evidence in limine." *Aguilar v. Dixon,* 1995 U.S. Dist. LEXIS 7195, No. 93 C 1936, 1995 WL 319621, at *3 (N.D. Ill. May 25, 1995) (citing *Luce* **[*4]** *v. United States,* 469 U.S. 38, 41 n.4, 83 L. Ed. 2d 443, 105 S. Ct. 460 (1984)). Motions in limine may be used to prevent an opponent from introducing potentially inadmissible evidence until after the court has had an opportunity to rule on its admissibility. See CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5037 (1977). Motions in limine are primarily intended to prevent unfair prejudice to the objecting party, usually arising from an irrelevant but compelling inference. *Id.*

Stringent guidelines governing motions in limine were set forth in *Hawthorne Partners v. AT & T Technologies, Inc.,* 831 F. Supp. 1398 at 1400 where the Court reasoned that evidence should be excluded on a motion in limine ". . . only when evidence is clearly inadmissible on all potential grounds. . . . [and] unless evidence meets this high standard, evidentiary rulings should be deferred until trial. . . ." 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); see also *Medley v. Turner,* 1995 U.S. Dist. LEXIS 6453, No. 93 C 322, 1995 WL 296942, at *1 (N.D. Ill. May 12, 1995).

A. Plaintiff's Motions in Limine

1. Motion to Bar Evidence that Plaintiff made racial comments or inappropriate comments [*5] about management officials

Plaintiff anticipates that, during the course of discussing their reasons for not selecting Plaintiff for the Director of Customer Development position (the newly-created position),

certain management officials will testify that, on one occasion, Plaintiff inappropriately referred to a heavy-set African-American female manager as "Oprah" (an apparent reference to the immensely popular talk-show host, Oprah Winfrey). On another occasion, she allegedly referred to the former President and then-President of Defendant as "morons." Plaintiff points out that neither of Defendant's decisionmakers cited her utterances of these allegedly inappropriate comments as a reason for her non-selection and that, therefore, the prejudicial effect of the admission of such comments outweighs any probative value which they might have.

Considering the national--if not worldwide--popularity of Ms. Winfrey, as measured by her television ratings, the Court is not convinced that a reference to another African-American female as "Oprah" would be considered racist or otherwise derogatory in the sense that certain jurors would be offended thereby and would, therefore, view Plaintiff **[*6]** negatively for having made such comparison. In fact, in view of Ms. Winfrey's immense wealth, popularity and her success in losing a great deal of weight and, apparently, maintaining her weight loss, such a comparison might be considered complimentary.

With respect to Plaintiff's having allegedly referred to management officials as "morons", the context within which such remarks were allegedly made is not shown in the pleadings. For example, it is not known whether such remarks were allegedly made to subordinates, fellow managers or her supervisors or whether it was intended that they be published to others. In its opposition to the instant Motion, Defendant indicates that, at least part of the reason it did not select Plaintiff for the new job was that she was "abrasive" and had difficulties interacting with others. While it would appear that such statements, if made by Plaintiff, would not carry much weight when considering Plaintiff's long tenure and acknowledged competence, the Court finds that they are relevant to the issue as to why she was not selected. Moreover, the probative value of such alleged utterances is not outweighed by the possible prejudicial nature thereof, if **[*7]** any.

Accordingly, Plaintiff's Motion to bar testimony regarding the "Oprah" and "morons" comments is denied.

2. Offer of Employment at Elk Grove Village Facility

The parties agree that, in May and June, 1996, Defendant offered Plaintiff a position as a non-supervisory customer service representative at its Elk Grove Village facility, which position would have paid $ 27,000 per year. Plaintiff's salary, in her supervisory position, at the time of her termination, was almost $ 50,000 per year. Plaintiff declined the Elk Grove Village job because of the vast difference in salary, the commuting time involved, because the job responsibilities were not comparable to her former position, and because she had already secured another job with another company. n2

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n2 Defendant states that Plaintiff's new job pays less than the $ 27,000 that the Elk Grove Village would have paid.

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Plaintiff asserts that, because the job that was offered was not comparable to the position from which she was terminated, **[*8]** she had no obligation to accept that job, and her

refusal to accept it should not reduce her damages. Therefore, she argues, Defendant should be barred from introducing evidence concerning that job offer.

Defendant notes that Plaintiff, in support of her retaliation argument, cites several non-supervisory jobs as examples of positions that she was not re-hired to fill, and that some of those positions, in terms of compensation and responsibility, are comparable to the job she was offered at Elk Grove Village. In fact, they pay less than the $ 27,000 per year offered in that job. Defendant also notes that Plaintiff's current or most recent job pays less than $ 27,000 per year.

Considering the nearly $ 50,000 per year which Plaintiff had been paid in the job from which she was terminated, the Court finds that it was not unreasonable for her to reject Defendant's offer of the Elk Grove Village job. It is noted that Plaintiff already was working at another job at the time of the offer. Plaintiff was not obligated to accept the relatively demeaning job of customer service representative, after having served in the much higher-paying, management-level position for many years. See *Ward* **[*9]** *v. Tipton County Sheriff Department,* 937 F. Supp. 791, 797 (S.D. Ind. 1996), citing *Wheeler v. Snyder Buick, Inc.,* 794 F.2d 1228, 1235 (7th Cir. 1986).

There is nothing inconsistent about allowing Plaintiff to testify that she was not offered even these lower level, demeaning jobs in an attempt to show retaliation, but not allowing Defendant to use its offer and her rejection of these jobs as evidence of a failure to mitigate damages. Of course, the interim earnings from the job that Plaintiff was performing at the time of her rejection of Defendant's offer may be set off against Defendant's liability in the event she is successful.

Accordingly, Plaintiff's Motion to bar evidence of the offer and rejection of the Elk Grove Village job is granted, but only to the extent that such evidence may not be used to argue that Plaintiff failed to mitigate her damages by rejection of the offer. Such evidence may be used for other purposes, however.

3. Plaintiff's receipt of Interim Unemployment Compensation

Defendant asserts that, since her termination in 1993, Plaintiff has received $ 10,551.00 in unemployment compensation, and that it should be able to deduct that **[*10]** amount from any damages awarded to her. Plaintiff seeks to bar any testimony pertaining to her receipt of unemployment compensation.

The record does not show whether the amount received by Plaintiff was paid out over a consecutive time period, or whether she was unemployed initially, received unemployment compensation, obtained another job, and was again terminated and received more unemployment compensation. Considering the total amount of the unemployment compensation received by Plaintiff, and, depending on the circumstances, the Court can envision an argument that the amount of unemployment compensation received is an indication that she was not seriously seeking other employment.

The Court grants Plaintiff's Motion only to the extent that Defendant may not argue that the amount received in unemployment compensation should be deducted from any damages awarded.

B. Defendant's Motions in Limine

1. Evidence relating to Positions filled by Defendant Prior to Plaintiff's

EEOC Charge

Defendant notes that Plaintiff did not include in her EEOC charge an allegation that Defendant had retaliated against her for filing the charges by not offering her several **[*11]** positions which Defendant had filled prior to filing the charge on May 11, 1994. Indeed, the EEOC charge did not allege a retaliation claim. Plaintiff's response to Defendant's Motion to exclude evidence about the jobs filled prior to Plaintiff's filing of the EEOC charge is simple: she did not know, at that time, that the jobs had been announced and filled.

Motion denied.

2. Evidence relating to Allegations of Discriminatory Failure to Rehire

Defendant asserts that, as Plaintiff did not first make the charges of retaliation to the EEOC, as required by Title VII and ADEA, she is barred from including that allegation in the Complaint. The Court finds that Plaintiff's claim of failure to rehire her to other positions that became available after her termination, is reasonably related to her claim that she was discriminatorily discharged. Therefore, it was not necessary that she file a separate charge with the EEOC prior to filing the Complaint herein.

Motion denied.

3. Evidence relating to other Claims of Discrimination and Settlement

The position of Jack Sargent, age 66, was consolidated, along with that of Plaintiff, into the newly-created position **[*12]** for which Mr. Hightman was selected. Plaintiff has reason to believe that Mr. Sargent also made allegations of age discrimination against Defendant, and that Defendant settled those charges, although she does not know whether formal charges were filed. Plaintiff seeks to inquire into the matter of the charges and the settlement agreement.

"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 Mr. Sargent, or persons other than Plaintiff, would be outweighed **[*13]** by the undue prejudice that would result thereby. *See* *Scaramuzzo v. Glenmore Distilleries Co.*, 501 F. Supp. 727, 733 (N.D. Ill. 1980).

Motion granted. n3

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n3 This ruling does not preclude Plaintiff's introduction of evidence or testimony regarding

the fact that other individuals were terminated by Defendant, including their ages and other relevant information.

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4. Evidence relating to Harry Hightman's Work Performance and the Reorganization of the Consolidated Department subsequent to Plaintiff's Termination

Plaintiff will attempt to show that any objective comparison of her work history and demonstrated abilities with those of Mr. Hightman would have led to the conclusion that she was the person best qualified to take over the newly-consolidated department, and that Mr. Hightman was selected over her only because of his gender and younger age. In support of her argument, Plaintiff intends to offer evidence concerning Mr. Hightman's performance in the consolidated department, including the **[*14]** fact that some of his new responsibilities were later taken away--presumably due to his lack of competence to perform them--and that the consolidated department was reorganized. Such evidence certainly is relevant to Plaintiff's contention.

Motion is denied.

5. Evidence relating to Non-Supervisory Positions

Plaintiff alleges that, after her termination, several positions--including eight non-supervisory positions--became available which she was qualified to fill. However, she was not notified of these vacancies and was not offered any of them. This, she contends, lends credence to her charge that she was discharged because of her sex and age, and that Defendant was retaliating against her because she had filed the charges. Defendant argues that, since Plaintiff had expressed no interest in any non-supervisory jobs, and since her prayer for relief in the Complaint indicated that she sought only the award of the consolidated supervisory position or a "comparable" job, she should not now be allowed to present any evidence relating to the non-supervisory positions.

Defendant appears to take the position that it is the responsibility of an alleged discriminatee to specify **[*15]** which jobs she would be willing to accept in order to rectify the alleged discriminatory conduct. The non-supervisory jobs cited by Plaintiff are jobs which she has identified as jobs that she contend that Defendant could or would have offered her (even though she might have rejected them) if it really had terminated her for non-discriminatory reasons. Such evidence is relevant for that purpose.

Motion is denied. n4

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n4 The Court's ruling herein is not inconsistent with its ruling on Plaintiff's Motion regarding the Elk Grove Village job offer.

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6. Evidence relating to Retaliation

Defendant moves to bar any evidence relating to Plaintiff's allegation that Defendant's failure to rehire or recall her after her termination was retaliatory. In support of its Motion, Defendant cites three Seventh Circuit cases which, it contends, stand for the proposition that actions taken by an employer after the employment relationship has terminated are not adverse employment actions and are not, therefore, **[*16]** actionable under the retaliation provisions of Title VII and the ADEA. See *Koelsch v. Beltone Electronics Corp.*, 46 F.3d 705, 709 (7th Cir. 1995), citing *Reed v. Shepard*, 939 F.2d 484, 492 (7th Cir. 1991) and *Dranchak v. Akzo America, Inc.*, 1995 U.S. Dist. LEXIS 11241, 1995 WL 470245 (N.D. Ill. Aug. 7, 1995). Defendant notes that certiorari was granted in *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), *cert. granted* 134 L. Ed. 2d 645, 116 S. Ct. 1541, 64 U.S.L.W. 3707 (1996), and anticipates that the United States Supreme Court will uphold the principles for which it contends the three cited cases stand, contrary to the most recent Seventh Circuit case, which, it contends, disagreed with the earlier holdings in this regard. See *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881 (7th Cir. 1996).

In Veprinsky, the EEOC urged the Seventh Circuit to overrule its holding in Reed, which it read as holding that all post-termination acts of retaliation are beyond the reach of the anti-retaliation clauses of Title VII and the ADEA. The Court, in declining to overrule Reed, specifically disavowed any intention, in Reed, of precluding action on all post-termination retaliation allegations. In this regard, it noted its "important **[*17]** qualification" in Reed that it is the post-employment retaliation which is unrelated to a former employee's employment that is beyond the reach of the Statutes, and specifically held that HN2 post-termination acts of retaliation that have a nexus to employment are actionable. 87 F.3d at 888. Clearly, if Plaintiff is able to show that Defendant retaliated against her for having filed these charges by not offering jobs to her for which she was qualified after her termination, such retaliation action would relate to her employment.

The Court rejects Defendant's assertion that Plaintiff cannot sustain her charge of retaliation because she did not apply for reinstatement.

Motion denied.

7. Evidence relating to All-American, Inc.

Defendant states that All-American, Inc. is its sister corporation, with a distinct and separate corporate entity. It seeks to bar any reference to All-American. Defendant believes that Plaintiff will introduce evidence concerning a vacancy for a clerk/receptionist position at All-American subsequent to her termination, and that she will argue that Defendant's refusal to offer her that job is further evidence of its discriminatory motivation **[*18]** and retaliation.

Plaintiff asserts that she does not contend that the vacancy at All-American is one of the positions that she should have been offered. Rather, she contends that one of the jobs she was offered involved coordinating activities between Plaintiff and All-American. The Court will not bar all testimony or evidence concerning All-American, as some of such evidence may be relevant.

Motion denied.

Conclusion

Plaintiff's and Defendant's Motions in Limine are granted in part and denied in part, as set forth above.

HN3 The denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. *Hawthorne,* 831 F. Supp. at 1401. Instead, denial merely means that, without the context of trial, the Court cannot determine whether the evidence in question should be excluded. *Id.* Thus, the Court will entertain objections on individual proffers as they arise at trial, despite the fact that the proffer falls within the scope of a denied motion in limine. *Id.*

IT IS THEREFORE ORDERED that Plaintiff's Motions in Limine be, and the same hereby are, GRANTED in part and DENIED in part, consistent with this Opinion.

IT IS FURTHER **[*19]** ORDERED that Defendant's Motions in Limine be, and the same hereby are, GRANTED in part and DENIED in part, consistent with this Opinion.

Dated: **January 10, 1997**

ENTER:

ARLANDER KEYS

United States Magistrate Judge