

CV 00-01596 #00000042

Honorable John C. Coughenour
CC TO JUDGE ~~DJ~~
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LODGED _____ RECEIVED _____
OCT 18 2001 DJ
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v

AMERICAN SEAFOODS COMPANY,

Defendant

CONNIE L. MARTIN,

Plaintiff-in-Intervention.

NO C00-1596C

DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION IN LIMINE RE:
EXCLUDING REFERENCE TO
POTENTIAL INSURANCE COVERAGE

Noted for November 2, 2001

At trial, plaintiffs may attempt to refer to evidence of potential insurance coverage for one or more of plaintiffs' claims. Since Fed. R. Evid. 411 and other applicable law bar the use of such evidence to establish liability or damages, defendant, American Seafoods Company ("ASC"), requests that any mention or evidence of such coverage be excluded.

ARGUMENT & AUTHORITIES

Any mention or evidence of potential insurance coverage in this matter should be excluded. Such evidence is inadmissible for the purpose of proving fault. Fed.

DEFENDANT'S MEMORANDUM IN SUPPORT OF
MOTION IN LIMINE RE EXCLUDING REFERENCE
TO POTENTIAL INSURANCE COVERAGE - 1

MUNDT MACGREGOR LLP
ATTORNEYS AT LAW

999 Third Avenue Suite 4200 Seattle, Washington 98104-4082
Telephone (206) 624-5950

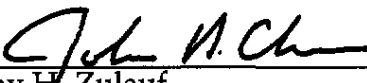
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2 R Evid 411 ("Rule 411"), Larez v. Holcumb, 16 F 3d 1513, 1520 n.6 (9th Cir 1994) Nor can
3 such evidence be admitted with respect to damages issues Larez, 16 F 3d at 1519-20 Such
4 use would likely constitute reversible error. Id at 1520 In a recent employment
5 discrimination matter against ASC, Judge Dwyer of this Court granted ASC's motion to
6 exclude any mention of insurance coverage See Order on Defendant's Motions In Limine
7 dated June 19, 1999, Nguyen v ASC, No C98-525WD (attached as Exhibit K to Chun
8 Declaration)

9 CONCLUSION

10 In light of the foregoing, ASC respectfully requests that the Court exclude
11 any mention or evidence of the fact that ASC may have insurance coverage for any of
12 plaintiffs' claims

13 DATED this 18th day of October, 2001

14 MUNDT MacGREGOR L L P

15
16 By 
17 Jay H. Zulauf
WSB No. 2277
18 John H. Chun
WSB No. 24767
19 Attorneys for Defendant
American Seafoods Company

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Honorable John C. Coughenour

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AT SEATTLE
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EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v

AMERICAN SEAFOODS COMPANY,

Defendant

CONNIE L. MARTIN,

Plaintiff-in-Intervention.

NO. C00-1596C

DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION IN LIMINE RE:
EXCLUDING REFERENCE TO
UNRELATED LAWSUITS AND CLAIMS

Noted for: November 2, 2001

It is anticipated that, at trial in this matter, plaintiffs will attempt to offer evidence regarding lawsuits and claims unrelated to this matter. Because such evidence is irrelevant and prejudicial, defendant, American Seafoods Company ("ASC"), requests that it be excluded. Furthermore, ASC submits that admitting such evidence would needlessly lengthen and complicate trial of this matter.

ARGUMENT & AUTHORITIES

ASC anticipates that, at trial, plaintiffs will attempt to introduce evidence regarding unrelated lawsuits and claims, possibly including references to consent decrees in other lawsuits brought by the EEOC and references to a presently pending lawsuit. See

1 Plaintiffs' Pretrial Statement (attached as Exhibit A to Declaration of John H. Chun in
 2 Support of Motions In Limine ("Chun Declaration")). For example, in their Pretrial
 3 Statement, plaintiffs contend that "ASC is a company with a history of violations of Title
 4 VII of the Civil Right Act " Also, for example, with respect to witness Shawna Willis,
 5 plaintiffs indicate that she may testify regarding "ASC's improper conduct in wage and
 6 hour case " Id. Presently, there is a wage claim pending in this Court against ASC, Flores
 7 v. ASC, Cause No. COO-740Z.

8 Evidence of lawsuits or claims unrelated to the present matter is
 9 inadmissible unless relevant to plaintiffs' claims. Fed. R. Evid. 402. Furthermore, such
 10 evidence should be excluded if its admission would be substantially more prejudicial than
 11 probative, likely to confuse issues, mislead the jury, create undue delay, or be cumulative
 12 in nature. Fed. R. Evid. 403; United States v. Satterfield, 548 F.2d 1341, 1346 (9th Cir. 1977)

13 ASC submits that, in this matter, which primarily involves a claim of
 14 pregnancy discrimination, evidence relating to other lawsuits or claims against ASC bears
 15 no relevance whatsoever to plaintiffs' claims. Plaintiffs do not seek to present any
 16 evidence of another lawsuit or claim against ASC involving an allegation of pregnancy
 17 discrimination.¹ Evidence of the unrelated lawsuits and claims is thus irrelevant, of no
 18 probative value, and should be excluded under Rules 403 and 404(b). Also, evidence of
 19 consent decrees is barred by Fed. R. Evid. 408 (regarding Compromise and Offers to
 20 Compromise).

21 Admission of evidence regarding unrelated lawsuits and claims against ASC
 22 would be highly prejudicial, likely confuse issues, and waste the Court's time. As these
 23 matters are irrelevant to plaintiffs' claims, their admission would only serve to improperly
 24

25 ¹ In a recent employment discrimination matter against ASC, Judge Dwyer of this Court excluded
 26 evidence of alleged instances of discrimination or harassment based on protected categories not at
 issue in that case. See Order on Defendant's Motions In Limine dated June 19, 1999, Nguyen v.
ASC, No. C98-525WD (attached as Exhibit L to Chun Declaration).


1 disparage ASC. See Wright & Graham, Federal Practice and Procedure: Evidence § 5239
2 (1980) Further, admission of such evidence would lead to a "mini-trial" of each of the
3 unrelated matters. See Kinan v. City of Brockton, 876 F.2d 1029, 1034 (1st Cir. 1989)
4 (excluding evidence of unrelated matters in a Section 1983 action).

5 CONCLUSION

6 In light of the foregoing, ASC requests that the Court exclude any mention or
7 evidence of any other lawsuits or claims against ASC, including any mention of any
8 consent decrees and any mention of the presently pending wage matter in this Court
9 against ASC, Flores v. ASC, Cause No. COO-740Z

10 DATED this 18th day of October, 2001.

11 MUNDT MacGREGOR L.L.P.

12
13 By 
14 Jay H. Zulauf
WSB No. 2277
15 John H. Chun
WSB No. 24767
16 Attorneys for Defendant
American Seafoods Company
17

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Honorable John C Coughenour

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v

AMERICAN SEAFOODS COMPANY,

Defendant.

CONNIE L. MARTIN,

Plaintiff-in-Intervention.

NO. C00-1596C

DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION IN LIMINE RE:
EXCLUDING REFERENCE TO
EXECUTIVE COMPENSATION

Noted for November 2, 2001

At trial, plaintiffs may attempt to refer to the compensation of executive employees of defendant, American Seafoods Company ("ASC") Because such information is irrelevant to the present matter, and its admission would be prejudicial, ASC requests that it be excluded.

ARGUMENT & AUTHORITIES

ASC anticipates that, at trial, plaintiffs may attempt to introduce evidence relating to the compensation paid to its executive employees.¹ Evidence regarding such

¹ As the Court may recall, earlier in this matter, in a telephonic motion, plaintiffs sought to compel counsel ASC's President to disclose his compensation at ASC.

1 compensation is inadmissible unless relevant to plaintiffs' claims. Fed. R. Evid. 402.
 2 Relevant evidence is that which tends to make the existence of any fact that is of
 3 consequence to the determination of the action more or less probable Fed. R. Evid. 401.
 4 That evidence which would be substantially more prejudicial than probative, likely
 5 confuse issues, mislead the jury, or be cumulative should be excluded. Fed. R. Evid. 403;
 6 United States v. Satterfield, 548 F.2d 1341, 1346 (9th Cir. 1977).

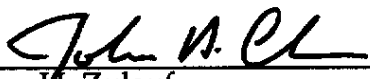
7 Evidence regarding compensation of ASC's executive employees is irrelevant
 8 to the issues in this case and its admission would be prejudicial. Such information does
 9 not concern defendant's potential liability and the alleged damages suffered by plaintiff.
 10 Admission of such information could only serve to prejudice ASC. As this prejudice
 11 clearly outweighs any probative value of the evidence, it should be excluded.

12 CONCLUSION

13 In light of the foregoing, ASC requests that the Court exclude any mention or
 14 evidence regarding compensation of ASC's executives.

15 DATED this 18th day of October, 2001.

16 MUNDT MacGREGOR L.L.P.

17
 18 By 
 19 Jay H. Zulauf
 20 WSB No. 2277
 21 John H. Chun
 22 WSB No. 24767
 23 Attorneys for Defendant
 24 American Seafoods Company

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Honorable John C. Coughenour

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v

AMERICAN SEAFOODS COMPANY,

Defendant

CONNIE L. MARTIN,

Plaintiff-in-Intervention

NO C00-1596C

DEFENDANT'S MEMORANDUM
IN SUPPORT OF MOTION IN LIMINE
RE: LIMITING TESTIMONY OF
PLAINTIFFS' EXPERT,
DANIEL HARPER

Noted for November 2, 2001

Until well after the extended discovery cutoff in this matter, plaintiffs failed to disclose that their expert on economic damages, Dan Harper, would also testify regarding the finances of defendant, American Seafoods Company ("ASC"). Accordingly, ASC moves to limit Mr. Harper's testimony to Ms. Martin's alleged economic loss, and to exclude any testimony relating to the finances of the company. Otherwise, ASC would be prejudiced.

BACKGROUND

In this matter, plaintiffs claim employment discrimination. In connection with their claims, plaintiffs seek, among other things, Connie Martin's alleged economic loss.

1 On June 11, 2001, Ms Martin disclosed Daniel Harper as an expert witness
2 on the issue of economic loss

3 Mr. Harper will present testimony regarding Ms Martin's
4 economic damages including back pay and front pay
5 Counsel for Ms Martin will supplement Ms. Martin's
6 response to this Interrogatory to provide further information
7 responsive to this interrogatory with respect to Mr Harper

8 Connie Martin's First Supplemental Response to Defendant's First Set of Interrogatories
9 (attached as Exhibit B to Declaration of John H. Chun in Support of Motions In Limine
10 ("Chun Declaration")). This response did not indicate in any way that Mr Harper would
11 testify regarding the finances of ASC

12 On June 26, 2001, in response to written discovery relating to expert
13 witnesses, plaintiff Equal Employment Opportunity Commission ("EEOC") disclosed Mr
14 Harper as follows

15 Dan Harper, economist-will testify on Connie Martin's damages
16 Defendant American Seafoods Company's Second Set of Discovery Requests to the EEOC
17 and Responses Thereto (attached as Exhibit C to Chun Declaration). The EEOC did not
18 disclose that Mr Harper would testify regarding the finances of ASC.

19 The original discovery cutoff date in this matter was July 6, 2001. This cutoff
20 was extended to August 6, 2001. See Stipulation, Joint Motion and Order Regarding
21 Limited Extension on Discovery Cutoff (attached as Exhibit D to Chun Declaration).

22 On July 5, 2001, in response to an interrogatory seeking identities of
23 witnesses and summaries of anticipated testimony, with respect to Harper, Ms Martin
24 responded as follows:

25 Daniel Harper, CPA - further information to be provided
26 Connie Martin's Response to Second Set of Discovery (attached as Exhibit E to Chun
Declaration). This response did not indicate that Mr Harper would testify regarding the
finances of the company

1 On July 17, 2001, Mr Harper presented his first report in this matter See
2 Letter from Daniel Harper to Scott McKay dated July 17, 2001 (attached as Exhibit I to
3 Chun Declaration) This report does not mention anything regarding the finances of ASC

4 Unbeknownst to ASC, on July 30, 2001, in a letter, Ms Martin's counsel
5 advised Mr Harper that he may be asked to testify with ASC finances in addition to
6 economic loss.

7 [P]lease review the financial statement for the Company
8 As we are seeking punitive damages in this case, the
9 earnings and revenues of the Company are relevant should
10 the jury decide to award punitive damages. We may ask
11 you to testify regarding various line items on the financial
12 statements.

13 Letter from Scott McKay to Dan Harper dated July 30, 2001 (attached as Exhibit F to Chun
14 Declaration) A copy of this letter was not sent to ASC's counsel, and was provided for the
15 first time to ASC at Mr Harper's deposition on August 21, 2001 Chun Declaration, ¶7
16 Accordingly, ASC remained unaware that Mr. Harper might testify with respect to the
17 finances of the company

18 As of August 6, 2001, the extended discovery cutoff date, Ms Martin did not
19 reveal that Harper would testify regarding any topic other than Martin's claimed
20 economic loss On August 21, 2001, Ms. Martin made Mr Harper available for deposition.
21 At the deposition, ASC learned for the first time in this matter that Mr. Harper intended to
22 testify regarding subjects in addition to economic loss Harper Dep. at 42-45 (attached as
23 Exhibit G to Chun Declaration) Mr. Harper testified that he might testify at trial
24 regarding ASC's profitability, but that he had not prepared any report or analysis
25 regarding that issue. Id. at 43 ll 3-11 He testified that he had not even been asked to do
26 an analysis of that particular issue. Id. at ll 12-17 He testified that he had not formulated

any opinion about the profitability of the company.¹ Id. at 45 ll 10-13

Over five weeks after the extended discovery cutoff in this matter, on September 12, 2001, Ms Martin, disclosed that her economic expert, Dan Harper, would testify regarding the finances of defendant, American Seafoods Company ("ASC")

Mr Harper will present testimony concerning the finances of American Seafoods Company, including the Company's profitability, insofar as this testimony is relevant to Plaintiff's punitive damage claim.

Connie Martin's Fifth Supplemental Response to Defendant's First Set of Interrogatories (attached as Exhibit H to Chun Declaration).

On September 25, 2001, Mr. Harper presented an updated report in this matter See Letter from Daniel Harper to Scott McKay dated September 25, 2001 (attached as Exhibit J to Chun Declaration). This updated report does not mention anything with respect to the finances of ASC As of the date of this motion, ASC is not aware of Mr Harper's expert opinion with respect to the finances of the company

ARGUMENT & AUTHORITIES

The identity of expert witnesses must be disclosed to opposing counsel Fed R Civ P 26(a)(2). Those experts "retained or specifically employed to provide expert testimony" must also provide opposing counsel with a report that states that expert's opinion and the basis and reasoning therefor Id. Under Rule 26, materials not otherwise made known to the other parties through the discovery process or in writing require supplemental disclosure Fed R Civ P. 26(e)(1)

The automatic penalty for failing to disclose an expert witness per Rule 26 is exclusion of that witness, unless the failure to disclose is harmless or substantially justified Fed R Civ P 37(c)(1), Yeti By Molly Ltd v Decker Outdoors Corporation, 259

¹ Near the end of Mr Harper's deposition, plaintiffs' counsel did ask Mr Harper some questions regarding ASC's finances But no meaningful or complete expert testimony was elicited Harper Deposition at 77-81

1 F 3d 1101, 1106 (9th Cir 2001).² The party in violation of Rule 26 bears the burden of
 2 establishing that no harm has resulted from the violation. Id. at 1107

3 Plaintiffs' ongoing failure to provide information about the scope and
 4 content of Mr. Harper's expert opinion on ASC's finances prejudices ASC's ability to
 5 challenge that opinion. ASC has never been provided a report of Mr. Harper's opinion on
 6 ASC's finances. Indeed, the only expert report and supplement provided does not
 7 mention ASC finances. Further, ASC was not informed that Mr. Harper intended to offer
 8 an expert opinion with respect to ASC's finances until after expiration of the discovery
 9 cutoff date and well into the course of Mr. Harper's deposition. And as ASC was not
 10 informed of this testimony until more than two weeks after the discovery cutoff date, and
 11 no expert opinion having been proffered, ASC is prevented from engaging its own
 12 expert to challenge Mr. Harper's potential testimony.

13 The opportunity to depose Mr. Harper did not mitigate the prejudice
 14 resulting from Ms. Martin's failure to provide notice of his testimony. Plaintiffs gave no
 15 prior notice that Mr. Harper's testimony would include ASC's financial position. Further,
 16 at deposition, Mr. Harper was likewise unprepared to discuss his expert opinion, since he
 17 admittedly had not yet formed it. With respect to that issue, the opportunity to depose
 18 was meaningless. See Jenkins v. Kaneko, 785 F.2d 720, 728 (9th Cir. 1986) (opportunity to
 19 depose witness later identified as an expert was insufficient to mitigate the prejudicial
 20 effect that lack of notice had). Likewise, Ms. Martin's failure to give notice prejudices
 21 ASC's ability to challenge any opinion Mr. Harper may offer at trial. See Pacific Sun, 1981
 22 U.S. Dist. LEXIS 18477 at *5 (noting the importance of expert deposition to challenge the
 23 opinions and assumptions of expert witnesses). As no justification for the failure to give
 24

25 ² The Court also has the discretion to impose additional or substitute sanctions when
 26 warranted. Fed. R. Civ. P. 37(c)(1), Pacific Sun Publishing Company Inc., et al. v. the Chronicle
 Publishing Company, Inc., et al., 1981 U.S. Dist. LEXIS 18477, at *4-*6 (N.D. Cal. 1981) (attached to
 Chun Declaration as Exhibit N).


1 notice has been offered, and the prejudice to ASC is clear, Mr. Harper should not be
2 permitted to offer testimony regarding ASC's finances.

3 CONCLUSION

4 In light of the foregoing, ASC respectfully requests that the Court limit Mr.
5 Harper's testimony to Connie Martin's alleged economic loss, and that the Court exclude
6 any testimony by Mr Harper relating to the finances of ASC

7 DATED this 18th day of October, 2001.

8 MUNDT MacGREGOR L.L.P.

9
10 By 
11 Jay H. Zulauf
12 WSB No 2277
13 John H. Chun
14 WSB No 24767
15 Attorneys for Defendant
16 American Seafoods Company

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Honorable John C. Coughenour

CO TO JUDGE, D.J.

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY
BY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v

AMERICAN SEAFOODS COMPANY,

Defendant.

CONNIE L. MARTIN,

Plaintiff-in-Intervention.

NO C00-1596C

DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION IN LIMINE RE
BIFURCATION

Noted for: November 2, 2001

At trial, plaintiffs will likely introduce evidence relating to punitive damages issues, as well as evidence relating to issues of liability and compensatory loss. See Complaint by Plaintiff In Intervention Connie Martin (seeking punitive damages) (on file). Evidence relating to punitive damages issues will likely prejudice defendant, American Seafoods Company ("ASC"), with respect to the issues of liability and compensatory damages. Accordingly, pursuant to Fed. R. Civ. P. 42(b), trial should be bifurcated into the following phases: (1) a liability and compensatory damages phase, and (2) if necessary, a punitive damage phase.

///

DEFENDANT'S MEMORANDUM IN SUPPORT
OF MOTION IN LIMINE RE BIFURCATION- 1

MUNDT MACGREGOR LLP
ATTORNEYS AT LAW

999 Third Avenue Suite 4200 Seattle Washington 98104-4082
Telephone (206) 624-5950

ARGUMENT & AUTHORITIES

Bifurcation is necessary because punitive damages issues should be considered independent of questions relating to liability and compensatory damages. Bifurcation is discretionary, and employed to avoid prejudice or promote expedition and economy. Fed R Civ P 42(b), Exxon v Sofec, Inc., 54 F.3d 570, 576 (9th Cir 1995). Five factors focus the bifurcation inquiry (1) prejudice; (2) risk of confusion, (3) convenience, (4) judicial economy; and, (5) separability of issues. Siddiqi v. Regents of the University of California, 2000 WL 33190435 at *9 (N D. Cal. 2000), attached as Exhibit O to Chun Declaration.

Evidence relevant to punitive damages questions will unduly prejudice ASC with respect to liability and compensatory damages. Such information is irrelevant to the question of ASC's potential liability and the damages suffered by Connie Martin. Further, the jury may mistakenly consider punitive damage factors in its liability/compensatory damages determination. See Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 459 (N D Cal 1994) (bifurcating liability and class damages issues to avoid "the risk of jury misunderstanding"). Such consideration would be prejudicial to ASC as it would make the jury more sympathetic to plaintiff's claims. In contrast, bifurcation would not prejudice plaintiffs in any way. Accordingly, in a recent discrimination case against ASC, Judge Dwyer of this Court ordered bifurcation of the trial in the manner herein requested. See Order on Defendant's Motion to Bifurcate, Nguyen v American Seafoods Company, No C98-525WD (attached as Exhibit K to Declaration of John H. Chun in Support of Motions In Limine).

Bifurcation will also promote expediency and efficiency. Separating the consideration of punitive damages will eliminate the admission of irrelevant evidence in the first phase. The evidence will be considered only if the second phase is necessary.


1 Also, because evidence relevant to punitive damages issues includes
2 information such as company finances, it is easily separated from the evidence relating to
3 liability and compensatory damages Further, as the issues in the two phases will not
4 overlap, bifurcation will cause little to no redundancy in the presentation of evidence

5 CONCLUSION

6 For the foregoing reasons, ASC respectfully requests that the Court bifurcate
7 trial of this matter as follows (1) the liability and compensatory damages issues should be
8 tried together, (2) then, if necessary, there should be a separate punitive damages phase

9 DATED this 18th day of October, 2001.

10 MUNDT MacGREGOR L L.P

11
12 By 
13 Jay H. Zulauf
WSB No 2277
14 John H. Chun
WSB No 24767
15 Attorneys for Defendant
American Seafoods Company

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Honorable John C. Coughenour

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v

AMERICAN SEAFOODS COMPANY,

Defendant.

CONNIE L. MARTIN,

Plaintiff-in-Intervention.

NO. C00-1596C

DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION IN LIMINE RE:
EXCLUDING REFERENCE TO EEOC
CAUSE DETERMINATION

Noted for: November 2, 2001

It is anticipated that, at trial, plaintiffs will attempt to refer to the Equal Employment Opportunity Commission's Determination dated January 12, 2000 in this matter (Determination attached as Exhibit M to Declaration of John H. Chun in Support of Motions In Limine ("Chun Declaration")). Because admission of, or reference to, the Determination would be more prejudicial than probative, defendant, American Seafoods Company ("ASC"), requests that the Determination be deemed inadmissible at trial, and all reference to it excluded.

ARGUMENT & AUTHORITIES

ASC anticipates that, at trial, plaintiffs will attempt to introduce the

DEFENDANT'S MEMORANDUM IN SUPPORT OF
MOTION IN LIMINE RE EXCLUSION OF EEOC CAUSE
DETERMINATION- 1

MUNDT MACGREGOR LLP
ATTORNEYS AT LAW

999 Third Avenue Suite 4200 Seattle, Washington 98104-4082
Telephone (206) 624-5950

Determination as evidence or make reference to it. See Plaintiffs' Pretrial Statement (attached as Exhibit A to Chun Declaration). The Determination is listed as Exhibit 70 in the Plaintiffs' Pretrial Statement. As the minimal probative value of this document is greatly outweighed by its prejudicial nature, however, it should be deemed inadmissible

The Determination should be excluded if its admission would be substantially more prejudicial than probative, likely to confuse issues, mislead the jury, create undue delay, or be cumulative in nature. Fed. R. Evid. 403; United States v. Satterfield, 548 F.2d 1341, 1346 (9th Cir. 1977). In the Ninth Circuit, an EEOC determination of probable cause is generally admissible. Plummer v. Western International Hotels Company, Inc., 656 F.2d 502, 506 (9th Cir. 1981) (holding that probable cause determination based on "lengthy investigation" by the EEOC was presumptively admissible in a jury trial under Title VII).

The Plummer case, however, does not provide carte blanche approval of all EEOC determinations. The court there noted the growing swell of precedent favoring discretion in admitting EEOC Cause Determinations.¹ Id. at 504 n.5. And subsequent Ninth Circuit interpretation of Plummer has limited that case's holding. See, e.g., Beachy v. Boise Cascade Corporation, 191 F.3d 1010, 1015 (9th Cir. 1999) (holding that an EEOC determination of no probable cause is not per se admissible); Gilchrist v. Jim Slemmons Import, Inc., 803 F.2d 1488, 1500 (9th Cir. 1986) (holding that an EEOC letter of violation is not per se admissible). Moreover, Plummer does not account for the varying quality of EEOC cause determinations. See Walker v. Nationsbank of Florida N.A., 53 F.3d 1548, 1554 (11th Cir. 1995) (noting that EEOC determinations greatly vary in quality and factual detail).

¹ Indeed, only the Ninth and Fifth Circuits have adopted rules favoring the admission of EEOC cause determinations. The Second, Fourth, Sixth, and Tenth Circuits instead permit courts the discretion to weigh the prejudicial and probative nature of these determinations. See Michail v. Fluor Mining and Metals, Inc., 180 Cal. App. 3d 284, 286 n.1 (1986).

Here, in contrast to the cause determination at issue in Plummer, the probative value of the Determination is minimized by its lack of documentation and reason. Facts and reason, not unsupported assertion, form the probative value of an EEOC determination. Bierlein v. Byrne, 103 Wash. App. 865, 870, 14 P.2d 823, 825 (2000) (admission without facts and reasoning "would amount to admitting the opinion of an expert witness" even though the jury could draw its own conclusions from the evidence). Indeed, the complex reasoning preceding an EEOC probable cause determination is why Plummer deemed such determinations per se admissible. See Fitzsimons v. JC Penney Company, Inc., 1994 WL 46316 at *2 (9th Cir. 1994) (unpublished opinion) attached as Exhibit P to Chun Declaration (holding that EEOC determination of no probable cause was not per se admissible because it was not "based on the type of searching and reliable investigation which preceeds an EEOC probable cause determination"). Accordingly, the Court should consider the deficiencies in the Determination and weigh its probative value against the potential prejudice to ASC if it is admitted.

The Determination has no probative value because it is conclusory and undocumented. It states that the EEOC interviewed "all relevant, available witnesses" and reviewed "all relevant documents" yet does not indicate who or what those were. Further, the Determination asserts that "other similarly situated pregnant women may have been affected" (emphasis supplied), and later more confidently concludes that ASC's actions had adverse employment consequences "against similarly situated female employees." Id. No reasoning or evidence is offered in connection with either of these statements. Furthermore, the Determination makes no mention whatsoever of ASC's position on the facts in this matter. Indeed, the Determination does not rise to the level of thoroughness contemplated by Plummer. Accordingly, its non-probative nature should preclude its admission.

The potential prejudice to ASC that would result from admission of the

1 Determination is great. A jury is likely to give undue weight to the Determination,
 2 viewing it as a finding of discrimination. Williams v. the Nashville Network, 132 F.2d 123,
 3 1129 (6th Cir. 1997); Walker, 53 F.3d at 1554. The Determination itself fosters this
 4 misperception, asserting five times that ASC "discriminated" and "retaliated" against
 5 Martin or similarly situated employees, but mentioning that its findings are only a
 6 determination of "reasonable cause" but once. In this respect, the Determination is more
 7 appropriately considered a determination of liability. See Hairston v. WMATA, 1997 WL
 8 411946 at *4 (D.D.C. 1997) (excluding EEOC determination that opined on the merits of the
 9 charge) attached as Exhibit Q to Chun Declaration. Furthermore, the fact that the EEOC is
 10 an adversary of ASC in this litigation will likely impute greater significance to the
 11 Determination as a final determination of ASC's liability, and for that reason, should be
 12 excluded


13 Exclusion of the Determination is also warranted by concerns of judicial
 14 efficiency. The Court may exclude otherwise relevant evidence that creates undue delay,
 15 wastes time, or would be needlessly cumulative. Fed. R. Evid. 403. Admission of the
 16 Determination risks drawing the jury into an irrelevant inquiry about the procedural
 17 adequacy of the EEOC investigation. Walker, 53 F.3d at 1555. As the EEOC is
 18 participating in this action and thus has the opportunity to present evidence with respect
 19 to the conclusions contained in the Determination, such an inquiry would not only be
 20 unnecessarily cumulative, but raise an array of issues otherwise avoidable. Hairston, 1997
 21 WL 411946 at *3. This point alone distinguishes Plummer and its progeny; the EEOC was
 22 not a party to those cases, increasing the probative value of its cause determination. In
 23 contrast, the participation of the EEOC as an adversary to ASC in this matter will render
 24 its determination redundant. Thus, in the interest of judicial efficiency, the Court should
 25 exercise its discretion to exclude the Determination.
 26

CONCLUSION

In light of the foregoing, ASC respectfully requests that the Court exclude any mention or reference to the EEOC's Determination

DATED this 18th day of October, 2001.

MUNDT MacGREGOR L.L.P.

By 
Jay H. Zulauf
WSB No. 2277
John H. Chun
WSB No. 24767
Attorneys for Defendant
American Seafoods Company

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