

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS HOLMAN : CIVIL ACTION
 :
 v. :
 :
 TRAMMELL CROW CO. : NO. 03-3603

ORDER AND OPINION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: March 7, 2005

In this case, Thomas Holman claims that his former employer, Trammell Crow Co., (“TCC”), subjected him to racial discrimination in his work conditions (he is African-American), and also retaliated against him for complaining about racial discrimination. TCC has filed six motion *in limine*, which have been docketed as documents 43-48. As explained below, numbers 46, 47 and 48 will be granted, while 43 and 44 will be denied and number 45 will be granted, but with a caveat.

I. Discussion

A. Motion 43

In its first motion *in limine*, TCC asks that Holman and his witnesses be precluded from making conclusory statements that they believe Holman was subject to racial discrimination or retaliation. It argues that such statements would amount to speculation as to the ultimate issue in the case, and that they would unduly prejudice TCC.

I cannot grant this motion. Clearly, a lay witnesses cannot give extended testimony upon his personal theories of what does, and what does not, constitute discrimination. Nevertheless, Federal Rule of Evidence 602 permits a witness to testify about all matters to which that witness has personal knowledge. As the Court of Appeals for the Seventh Circuit has said, “[b]ecause

most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences.” United States v. Joy, 192 F.3d 761, 767 (7th Cir. 1999). Moreover, the jury would be confused if Holman could not explicitly state his theory of this case. TCC is entitled to explore upon cross-examination any weakness in Holman’s, or another witness’s, basis for his or her testimony.

B. Motion 44

Secondly, TCC seeks an order precluding any evidence of the injury Holman sustained on December 11, 2002, when he fell from a ladder while painting a fire tower without assistance at the direction of his employer. TCC argues that the issue is whether the assignment was retaliatory or not, and that this cannot depend on whether Holman was injured.

I will deny this motion as well. If the jury believes that the assignment constituted an adverse action, it will be, in part, because Holman was denied the assistance he requested. Holman’s injury would therefore be relevant as to the damages he suffered as a result of TCC’s retaliatory actions. TCC claims that it requires undue speculation to assume that a work partner would have been steadying the ladder from which Holman fell. However, a jury could reasonably infer that the possibility of an accident such as the one suffered by Holman is one of the dangers of working alone. In any event, a jury could believe that a work partner would have assisted Holman to safety after the accident, sparing Holman the need to wait on the ground for help to arrive.

C. Motion 45

In its third motion, TCC asks that Holman be precluded from offering evidence of the existence of lead or asbestos in the fire towers he was assigned to paint, and also that he be precluded from testifying that a visit to the emergency room he made while painting one of the towers was the result of lead poisoning. I will grant this motion in so far as it excludes testimony which is unsupported by evidence that asbestos or lead were actually present in the fire towers.

As TCC points out, there is no way to know from looking at paint whether it contains lead. Although it is possible that Holman could recognize asbestos, he has not suggested that this was the case. Moreover, TCC has quoted deposition testimony in which Holman admitted that he never obtained the results of medical tests taken at the hospital to determine whether he was exposed to lead.

However, I do not agree with TCC that its knowledge regarding the existence of lead or asbestos is irrelevant to Holman's case. If TCC knew, or even believed wrongly, that Holman would be exposed to these toxins, this would be relevant to the jury's consideration of whether his assignment to paint the towers was an adverse action.

In his response to TCC's motion, Holman maintains that he possesses a violation notice from the City of Philadelphia predating his accident, which warned of the existence of lead and asbestos in the towers. However, the violation notice he has attached does not mention either lead or asbestos, and does not even mention the fire towers. Holman also asserts that "the Defendant posted an e-mail indicating that it knew that there was lead-based paint in the fire towers when it assigned Plaintiff to do the work," but he has not attached a copy of this e-mail.

If Holman had come forward with the violation notice or e-mail he claims to have, I might have denied this motion. I might also have allowed Holman to testify regarding his trip to the emergency room, and let TCC elicit on cross-examination his failure to obtain his test results. However, in the absence of any evidence which could support Holman's personal belief that TCC exposed him to lead and/or asbestos, I will exclude his testimony on the subject, with the caveat that I will reconsider this ruling if presented with the appropriate evidence.

D. Motion 46

This motion seeks a ruling excluding evidence of any alleged discriminatory treatment by TCC of employees other than Holman, or of any subcontractors. I will grant this motion. Holman's deposition testimony as to individuals whom he believed were terminated or transferred for discriminatory reasons, which TCC has attached as an exhibit to its motion shows his personal knowledge is far from adequate. Holman named a number of people he believed were subject to discrimination, but in most cases he did not know the reason the person he named was fired or transferred, and in many cases, he only heard about the terminations and transfers second-hand. Any testimony Holman might offer in this vein would be inadmissible under FRE 402 regarding relevance, FRE 602, which requires personal knowledge, and FRE 802, which precludes hearsay.

Even if some or all of the individuals named by Holman were to appear personally, however, their testimony would still be excluded under FRE 402. Their experiences with TCC do not make any of the events which are of consequence to this case any more or less probable. See FRE 401.

Nevertheless, Holman will be permitted to testify that he personally believed Mark Brady was racist in his attitude toward the Cors Company. This is necessary factual background to his claim of retaliation.

E. Motion 47

TCC here seeks the exclusion of evidence pertaining to claims which were not asserted in Holman's Amended Complaint, administrative complaint, or responses to discovery. Specifically, Holman has lately claimed that TCC discriminated against him on the basis of the disability he claims from the December 11, 2002, accident, and in retaliation for his application for Workers' Compensation. However, these allegations have never officially been made a part of this case.

Holman has not asked for permission to amend his complaint to add these theories to his complaint, and he would be unlikely to receive it. Undue delay and undue prejudice to the opposing party are factors justifying a denial of leave to amend. Averbach v. Rival Mfg. Co., 879 F.2d 1196, 1203 (3d Cir. 1989). They would be found here. Accordingly, I will grant this motion.

F. Motion 48

Finally, TCC asks that Holman be precluded from introducing evidence about his ongoing Workers' Compensation case against TCC. I agree that such evidence can shed no light on the issues in this case. Holman has not formally alleged that the Workers' Compensation disputes with TCC are part of its discrimination or retaliatory conduct. As discussed above, this would not be an appropriate time for Holman to amend his complaint, even if he had asked to do so. This motion, too, will be granted.

II. Conclusion

For the reasons discussed herein, I now enter the following:

ORDER

AND NOW, this 7th day of March, 2005, in consideration of Defendant's Motions in Limine, docketed in this case as Documents 43, 44, 45, 46, 47, and 48, and the responses thereto, it is hereby ORDERED that:

1. Motion No. 43 is DENIED;
2. Motion No. 44 is DENIED;
3. Motion No. 45 is GRANTED with the caveat stated therein, that it will be reconsidered upon the presentation of appropriate evidence;
4. Motion No. 46 is GRANTED;
5. Motion No. 47 is GRANTED;
6. Motion No. 48 is GRANTED.

BY THE COURT:

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE