

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

DAVID CLARK,)	
)	
Plaintiff,)	
)	
VS.)	No. 00-1011
)	
TENNESSEE VALLEY)	
ELECTRIC COOPERATIVE,)	
)	
Defendant.)	

ORDER DENYING DEFENDANT’S SECOND MOTION IN LIMINE,
PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANT’S
THIRD MOTION IN LIMINE, AND
DENYING PLAINTIFF’S MOTION IN LIMINE

Plaintiff has filed suit against his former employer, Tennessee Valley Electric Cooperative (“TVEC”), for allegedly terminating him from his employment on the basis of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., the Tennessee Human Rights Act, T.C.A. § 4-21-101 et seq., and the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. In preparation for trial, the parties have filed several motions in limine.¹ Plaintiff has moved the court to exclude evidence at trial about his termination from his prior employment, including but not limited to his employment at Suwanee Valley [Docket # 104]. Defendant has moved the court to

¹ The trial that had been set for May 13, 2002, has been continued until July 8, 2002.

exclude (1) evidence and testimony relating to Odell Franks' 1994 lawsuit, including evidence of any settlement agreement or settlement negotiations; (2) testimony regarding alleged age-related comments by two deceased TVEC board members; (3) all testimony that is hearsay and not based on personal knowledge; (4) objectionable portions of the videotape deposition of Candace Donegan; (5) documents that were improperly withheld from Defendant during discovery and testimony about those documents; and (6) evidence of front pay [Docket # 74]. Defendant has also moved the court to exclude (1) the decision by the Tennessee Department of Employment Security awarding unemployment compensation to Plaintiff; (2) an article regard Plaintiff's termination of employment that appeared in *The Courier*; (3) post-termination discussions by the TVEC board of directors to change the target benefit plan; and (4) documents that were improperly withheld from Defendant during discovery and any testimony relating to them [Docket # 106]. The parties have fully briefed the court. For the reasons set forth below, Plaintiff's motion in limine and Defendants' motions in limine are DENIED.

Plaintiff's Motion in Limine

Plaintiff seeks to exclude evidence at trial about his termination from his prior employment, including but not limited to his employment at Suwanee Valley. According to Plaintiff, this evidence is not relevant to the reasons for his termination from TVEC. Plaintiff also asserts that, even if the evidence is relevant, the resulting prejudice to Plaintiff would outweigh any probative value under Rule 403 of the Federal Rules of Evidence.

Defendant responds that evidence that Plaintiff was terminated from his prior employment for unsatisfactory job performance may be relevant to the issue of whether Plaintiff performed satisfactorily at TVEC and whether he was qualified for the position of general manager at TVEC. Additionally, Defendant states that evidence of Plaintiff's termination from his prior employment is relevant to the issue of Plaintiff's credibility. According to Defendant, Plaintiff represented to TVEC's board of directors that he resigned from his prior employment because of policy differences while documentation from the previous employer shows that he was terminated for good cause.

In Sperberg v. Goodyear Tire & Rubber Co., the Sixth Circuit warned against "orders in limine that exclude broad categories of evidence" and advised that the "better practice is to deal with questions of admissibility of evidence as they arise." 519 F.2d 708, 712 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975). Deferring admissibility decisions until trial is the better practice because "there are countervailing considerations, especially with respect to . . . rulings under Rule 403 which [if] made pre-trial [would be] without the benefit of the flavor of the record developed at trial." In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 260 (3rd Cir. 1983), *rev'd sub nom. on other grounds*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); *see also* Hunter v. Blair, 120 F.R.D. 667, 667 (S.D. Ohio 1987) ("[o]nly after the evidence is actually offered can this Court balance any prejudicial effect or probative value in determining the admissibility of that evidence"). A motion in limine seeks "essentially an advisory opinion" as to evidentiary questions since the court may "change its ruling, for whatever reason, when the evidence is actually offered and objected to at trial." United States v. Luce, 713 F.2d 1236, 1239 (6th Cir. 1983). The court may

decline to make pretrial rulings because they “are not provided for in the Federal Rules of Civil Procedure and are merely requests for the Court's guidance.” Hunter, 120 F.R.D. at 667.

In this case, objections to evidence about Plaintiff's prior employment are better suited for trial than in a pretrial motion. If Defendant does, in fact, attempt to introduce such evidence at trial, the court will be able to determine if the evidence is relevant to the issues in dispute, including Plaintiff's credibility, after hearing the evidence in context. See Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* §§ 5177 (1980) (The “rule of thumb” is that “evidence of credibility is relevant.”) Consequently, Plaintiff's motion in limine is denied without prejudice to its being renewed at trial.

Defendant's Second Motion in Limine

Defendant seeks to exclude evidence and testimony relating to Odell Franks' 1994 lawsuit, including evidence of any settlement agreement or settlement negotiations. Franks, a former TVEC employee and later board member and board president, sued TVEC after his disability, pension, and insurance benefits were terminated. The lawsuit was settled, with Franks' health insurance being reinstated but not his pension benefits. Plaintiff contends that evidence of the lawsuit is relevant to show TVEC's knowledge of the cost of the pension plan and to refute TVEC's expected defense that it was ignorant of how money could be saved by terminating an older employee's pension plan.

If TVEC raises the defense that it was ignorant of the cost of the pension plan, then evidence of Franks' lawsuit may be relevant to refute TVEC's defense. However, the court

has not way of knowing whether this defense will be raised. The court cannot make a ruling until and unless the issue is raised at trial.

Next, Defendant objects to anticipated testimony regarding alleged age-related comments by two deceased TVEC board members. According to Defendant, there is no evidence that the deceased members were authorized to make the statements or that the statements made concerned a matter within the scope of their agency or employment.

At trial, Plaintiff will have an opportunity to show that the statements are admissible under an exception to the hearsay rule. Defendant may raise its objection at that time. The court cannot hold at this time that Plaintiff cannot make such a showing.

Defendant asks the court to exclude all testimony that is hearsay and not based on personal knowledge. As noted by Defendant, Federal Rule of Evidence 802 provides that hearsay is not admissible except as otherwise provided by the rules. At this juncture, the court cannot determine whether Plaintiff will, in fact, attempt to offer hearsay testimony and whether an exception to the hearsay rule applies.

Defendant asserts that portions of the videotape deposition of Candace Donegan are objectionable. According to Defendant, Plaintiff's counsel misstated either Donegan's prior testimony or the facts in his questioning. Plaintiff's counsel denies Defendant's assertion. Defendant also makes hearsay and best evidence objections to the deposition.

It is unclear at this point whether Plaintiff will attempt to introduce into evidence Donegan's videotape deposition. If so, Defendant may present its objections at that time,

within the context of the trial.

Defendant asks the court to exclude certain documents on the grounds that they were allegedly improperly withheld from Defendant during discovery and are inadmissible hearsay. The issue of whether certain documents were improperly withheld from Defendant was referred to Magistrate Judge J. Daniel Breen. Magistrate Judge Breen issued a report and recommendation on March 29, 2002. To the extent that Defendant raises the same arguments as those raised in the motion to compel that was previously referred to Magistrate Judge Breen, this portion of the motion in limine is denied as duplicative. To the extent that Defendant raises hearsay objections to the documents, these objections are better suited for trial.

Defendant objects to the introduction of evidence of front pay. While the “determination of the propriety of an award of front pay is a matter for the court,” the jury determines the amount of an award of front pay. See Roush v. KFC Nat’l Mgmt. Co., 10 F.3d 392, 398 (6th Cir.1993). Therefore, this argument is without merit.

For all these reasons, Defendant’s second motion in limine is denied.

Defendant’s Third Motion in Limine

Defendant asks the court to exclude evidence of the decision by the Tennessee Department of Employment Security awarding unemployment compensation to Plaintiff and an article regarding Plaintiff’s termination of employment that appeared in *The Courier*. Plaintiff states that he does not intend to offer such evidence. Therefore, this portion of

Defendant's motion is denied as moot.

The portion of Defendant's motion seeking to exclude evidence of post-termination discussions by the TVEC board of directors to change the target pension plan is granted. Plaintiff maintains that evidence that Defendant changed its target pension plan to a 401(k) plan is relevant to show that Defendant was willing to take actions to save money at the expense of its older employees. In reply, Defendant states that it did not eliminate the target pension plan but, instead, added a self-funded, voluntary 401(k) plan. Because the addition of a 401(k) plan is not relevant to the issue of Plaintiff's termination, evidence of such will not be admissible at trial.

Defendant again raises the issue of documents that were allegedly improperly withheld from Defendant during discovery. As noted above, this matter was referred to Magistrate Judge Breen who issued a report and recommendation on March 29, 2002. Therefore, this portion of Defendant's motion is denied as duplicative.

Accordingly, Plaintiff's motion in limine and Defendant's second motion in limine are DENIED without prejudice to being renewed at trial. Defendant's third motion in limine is GRANTED as to the portion of the motion seeking to exclude evidence as to post-termination discussions by the TVEC board of directors to change the target pension plan. The remaining portions of Defendant's third motion in limine are DENIED without prejudice to being renewed at trial.

IT IS SO ORDERED.

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

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