UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIO PEREZ,

Plaintiff,

- v -

PROGENICS PHARMACEUTICALS, INC.,

Defendant.

10-cv-08278 (LAP)

MEMORANDUM & ORDER

LORETTA A. PRESKA, U.S.D.J.:

In anticipation of trial, Plaintiff has filed a number of motions in limine, several of which remain pending. Specifically, he seeks to call Nicole Williams to testify at trial [dkt. no. 229], to exclude evidence of prior litigation with his former employer and disputes with his attorney in this case [dkt. nos. 198, 199], and to limit the issues to be decided at trial [dkt. no. 222]. For the reasons below, Plaintiff's request to call Ms. Williams is denied, his request to exclude prior acts evidence is granted, and his request to limit the issues at trial is denied.

I. BACKGROUND

The facts of this case are detailed in Judge Karas's previous Opinion & Order of July 24, 2013 [dkt. no. 107] as well as his Opinion & Order of September 8, 2014 [dkt. no. 123], with which the Court assumes familiarity. This section accordingly

presents only a brief summary of the case as it relates to the pending motions.

Plaintiff was previously employed by Defendant, a publicly traded biotechnology company, beginning in 2004. During his employment, Plaintiff's primary responsibility involved working on the development of a drug called Relistor, which Defendant was developing together with another pharmaceutical company called Wyeth Pharmaceuticals Division. In 2008, Defendant and Wyeth completed the second phase of clinical trials on an oral tablet form of Relistor. On May 22, 2008, Wyeth and Defendant issued a joint press release stating, among other things, that the second phase of trials "showed positive activity" and that the two companies were "pleased by the preliminary findings of this oral formulation" of Relistor. Subsequently, executives at Wyeth presented a Relistor Development Strategy Update (the "Wyeth Update"), which noted, among other things, that the second phase of clinical trials did not reflect "sufficient activity" to justify a third round of trials and recommended that the tablet not advance to a third phase of trials.

Defendant alleges that the Wyeth Update was a confidential document that its General Counsel, Mark Baker, shared with five members of the senior management team, not including Plaintiff. Nevertheless, Plaintiff somehow came to review a copy of the Wyeth Update, and in response he drafted a Memorandum dated

August 4, 2008, in which he informed Defendant that it was "committing fraud against shareholders since representations made to the public were not consistent with the actual results of the relevant clinical trial, and [Plaintiff] think[s] this is illegal." Plaintiff delivered the Memorandum to Baker and Dr. Thomas Boyd, Senior Vice-President of Product Development, with certain slides from the Wyeth Update, the joint press release, and an article written by Wyeth employees attached.

Later that same day, Robert MicKinney, Defendant's CFO, asked Plaintiff how he obtained a copy of the Wyeth Update. Plaintiff asked to speak with his attorney, and McKinney agreed. The next morning, Plaintiff met with McKinney and Baker, who presented Plaintiff with two letters indicating that the Memorandum's allegations were "without foundation" and that because Plaintiff refused to reveal how he came to possess the Wyeth Update, Baker concluded that he had "obtained the document through inappropriate or illicit means." At the end of the meeting, Baker terminated Plaintiff's employment with Defendant effective immediately. Later that same day, the Audit Committee of the Board of Directors for Defendant held a meeting, at which Baker reported the circumstances surrounding the Memorandum and Plaintiff's termination.

On September 12, 2008, Plaintiff filed a complaint with the U.S. Department of Labor/Occupational Safety and Health

Administration alleging that Defendant fired him in retaliation for the Memorandum. On December 5, 2008, the Secretary of Labor issued an order dismissing Plaintiff's allegations. After objecting to that order, Plaintiff filed the present suit alleging that Defendant violated the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), 18 U.S.C. § 1514A, by terminating him in retaliation for the Memorandum, which he alleges constituted protected activity under that statute.

II. NICOLE WILLIAMS

Plaintiff seeks to call Nicole Williams, who is the Chair of Defendant's Audit Committee and a member of Defendant's Board of Directors, as a live witness at trial. Specifically, Plaintiff argues that because Ms. Williams's position includes overseeing compliance, she witnessed Baker's report to the Audit Committee on August 5, 2008 and can testify concerning the details of the decision to terminate Plaintiff. (See Letter dated Nov. 20, 2014 [dkt. no. 185] at 2-3; Letter dated Apr. 14, 2015 [dkt. no. 229].)

Defendant opposes the request, arguing both that Ms. Williams has no personal knowledge of any relevant events and that she resides in Chicago and is therefore beyond the geographical limits of the Court's subpoena power. (See Letter dated Apr. 28, 2015 [dkt. no. 216].) Moreover, Defendant notes that Plaintiff had the opportunity to depose Ms. Williams and

may therefore present her deposition testimony at trial even if she is unavailable to testify.

That Defendant listed Ms. Williams on its Witness List contradicts its contention that her testimony would be irrelevant. Indeed, Defendant's Witness List notes that Defendant expects to introduce deposition testimony from Ms. Williams concerning, among other topics, "the Perez termination, the Perez litigation, [and] the Joint Press Release." (See Witness List, dated Apr. 28, 2015 [dkt. no. 215] at 2.) Accordingly, Defendant's only colorable objection to Ms. Williams offering live testimony at trial hinges on her residence in Chicago, more than 100 miles from the location of trial. See FED. R. CIV. P. 45(c)(1)(A).

In response, Plaintiff notes that Ms. Williams is required to attend, either in person or telephonically, Audit Committee and Board meetings at least quarterly, which suggests that she is periodically physically present at Defendant's headquarters in Tarrytown, New York, within the 100 mile limit of Rule 45(c)(1)(A). Yet such infrequent trips do not appear to fit within the meaning of Rule 45(c)(1)(A)'s requirement that a witness only be forced to appear at trial in person within 100 miles of where she "regularly transacts business in person." Id. Although the Court is not aware of a specific number of days per year that Ms. Williams spends in New York to conduct

business, it appears a stretch to say that she opened herself up to testifying in New York by virtue of her occasional meetings in Tarrytown. See M'Baye v. New Jersey Sports Prod., Inc., 246 F.R.D. 205, 207-08 (S.D.N.Y. 2007); see also Price Waterhouse LLP v. First Am. Corp., 182 F.R.D. 56, 62 (S.D.N.Y. 1998) ("Rule 45's goal is to prevent inconvenience to the flesh-and-blood human beings who are asked to testify, not the legal entity for whom those human beings work."). Given the apparent infrequency with which Ms. Williams conducts in-person business in New York, as well as the availability of her deposition testimony for Plaintiff's use at trial, the Court denies Plaintiff's request to call Ms. Williams in person.

Furthermore, Plaintiff's request for an adverse inference instruction concerning Ms. Williams's absence from trial is denied. Such an instruction lies in the discretion of the trial court and should be given where a party "fail[s] to call a witness when the witness's testimony would be material and the witness is peculiarly within the control of that party." United States v. Caccia, 122 F.3d 136, 138 (2d Cir. 1997). "No instruction is necessary where the unpresented testimony would be merely cumulative." United States v. Torres, 845 F.2d 1165, 1169 (2d Cir. 1988). Here, although Ms. Williams appears to be within Defendant's control for purposes of this standard, her testimony, though relevant, would be cumulative of evidence

available through introduction of the Audit Committee's minutes as well as her own deposition testimony. Indeed, it appears that Ms. Williams' testimony would do little to elucidate the key disputed issues at trial, as she had no involvement in Plaintiff's termination other than receiving a report from Baker after the fact. Because Ms. Williams' live testimony would be cumulative and nonmaterial, the Court declines to issue an adverse inference instruction concerning her absence from trial.

III. PRIOR ACTS EVIDNECE

Defendant seeks to introduce evidence at trial concerning two of Plaintiff's prior acts. First, Defendant wishes to present evidence of Plaintiff's accusations that his prior attorney in this case engaged in misconduct. Second, Defendant wishes to raise Plaintiff's previous litigation against another former employer, Purdue Pharma L.P. ("Purdue"), which involved Plaintiff's removal of confidential documents without permission and accusations against his employer of, among other things, retaliation, discrimination, slander, and libel in 2005. The Purdue litigation was ultimately resolved through a consent judgment and permanent injunction that required Plaintiff to return the documents he took.

Defendant argues that both instances reflect Plaintiff's state of mind at the time that he drafted the Memorandum, which is directly at issue when determining whether he engaged in

protected activity. Specifically, Defendant suggests that these incidents tend to show that Plaintiff either did not truly believe that Defendant had made misrepresentations or that Plaintiff's belief was not reasonable, either of which would mean that Plaintiff did not engage in protected activity. See Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 221 (2d Cir. 2014) ("[T]he plaintiff must have a subjective belief that the challenged conduct violates a provision listed in § 1514A, and . . . this belief must be objectively reasonable."). Plaintiff objects to the introduction of this evidence as irrelevant, impermissible propensity evidence, and prejudicial.

A. Applicable Law

Under Federal Rule of Evidence 404(b), evidence of "other act[s] is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." FED. R. EVID. 404(b)(1). Such evidence may, however, "be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." FED. R. EVID. 404(b)(2). The Court of Appeals has indicated that courts should apply "an inclusionary approach" to 404(b), which "allows evidence for any purpose other than to show . . . propensity." United States v. Garcia, 291 F.3d 127, 136 (2d Cir. 2002) (quoting United States v. Pitre, 960 F.2d 1112, 1118

(2d Cir. 1992) (internal quotation marks omitted). "Courts may admit evidence of prior bad acts if the evidence is relevant to an issue at trial other than the defendant's character, and if the probative value of the evidence is not substantially outweighed by the risk of unfair prejudice." Id. (quoting United States v. Tubol, 191 F.3d 88, 95 (2d Cir. 1999)) (internal quotation marks omitted). Under this standard, courts "consider whether: (1) the prior act evidence was offered for a proper purpose; (2) the evidence was relevant to a disputed issue; (3) the probative value of the prior act evidence substantially outweighed the danger of its unfair prejudice; and (4) the court [can administer] an appropriate limiting instruction." Id.

Even if evidence is permissible and relevant under 404(b), however, the Court may still exclude it "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

B. Plaintiff's Prior Attorney

Turning first to Plaintiff's conflict with his attorney, Defendant has failed to demonstrate the relevance of that incident to Plaintiff's state of mind when he drafted the Memorandum years earlier. See Garcia, 291 F.3d at 137-38.

Plaintiff's recent accusations reveal nothing about what was in his mind at the time that he engaged in the allegedly protected activity at issue here, and Defendant has not explained with any particularity how Plaintiff's conflict with his attorney parallels his 2008 Memorandum. See United States v. Curley, 639 F.3d 50, 61 (2d Cir. 2011) ("This Circuit has upheld the admission of subsequent act evidence to prove a state of mind only when it so closely paralleled the charged conduct that it was probative regardless of the temporal difference."); Dallas v. Goldberg, 143 F. Supp. 2d 312, 318 (S.D.N.Y. 2001). Rather, Defendant's desire to raise Plaintiff's conflict with his attorney strikes the Court as an attempt to suggest that Plaintiff made supposedly frivolous accusations of misconduct against his attorney, which makes it more likely that his accusations in the Memorandum were frivolous. This reasoning falls squarely into the category of propensity evidence that Rule 404(b) prohibits.

Although Defendant correctly points out that this Circuit applies an inclusionary approach to Rule 404(b), merely saying the magic words "state of mind" does not satisfy this standard. See Garcia, 291 F.3d at 137 ("The government may not invoke Rule 404(b) and proceed to offer, carte blanche, any prior act of the defendant in the same category of crime."). Instead, Defendant must demonstrate that Plaintiff's conflict with his former

attorney in fact bears some connection to his state of mind at the time of his allegedly protected activity several years beforehand. See id. at 137-38. This it cannot do. Accordingly, Defendant is prohibited from raising or presenting any evidence concerning Plaintiff's conflict with and allegations against his attorney at trial.

C. Purdue Litigation

Defendant faces similar difficulty explaining the relevance of the Purdue litigation to Plaintiff's state of mind at the time he drafted the Memorandum. Although Defendant again claims to present this evidence for a proper purpose, it does not explain how the existence of this 2005 litigation is relevant to the reasonableness of Plaintiff's belief three years later that he he was identifying illegal conduct when drafting the Memorandum. See id. at 136. The only probative value that might be gleaned from the Purdue litigation is a demonstration that Plaintiff made potentially frivolous allegations against a different employer in the past that were of a different kind and in a different context. This limited value is further diminished because the Purdue litigation ultimately settled without any resolution determining whether Plaintiff's allegations were in fact accurate. It is thus difficult to grasp how Plaintiff's prior accusations against a completely different company of discrimination, slander, and "deception"

offer any insight into Plaintiff's state of mind when accusing Defendant of defrauding its shareholders three years later.

Although Plaintiff's retention of confidential documents without permission in the Purdue litigation presents a possible parallel to his use of the Wyeth Update, that prior act would, at most, only bear upon his state of mind when procuring the Wyeth Update. Plaintiff's potential awareness that he should not access confidential documents without permission, however, has nothing to do with the "disputed issue" of whether Plaintiff reasonably believed that Defendant violated federal law. Id. at 136. Rather, it appears as though Defendant wishes to raise this prior act to illustrate Plaintiff's supposed propensity to make unfounded allegations against his employers. Again, such evidence is barred by 404(b). Furthermore, this evidence of other litigation risks "confusing the issues" and even "misleading the jury" with a distracting point of limited probative value that may run awry of Rule 403. FED. R. EVID. 403. Accordingly, Defendant is barred from presenting evidence of the Purdue litigation at trial.

IV. ISSUES FOR TRIAL

Finally, Plaintiff seeks to limit further the issues to be decided at trial. Based on the mutual agreement of the parties, the Court previously ordered that the only disputed issues for trial are the first and fourth elements of Plaintiff's Sarbanes-

Oxley claim (i.e., whether Plaintiff engaged in protected activity and whether that activity was a contributing factor to Plaintiff's termination). (See Order dated Apr. 2, 2015 [dkt. no. 211] at 1-2.) Plaintiff now suggests that the first element should no longer be disputed based on one of the Department of Labor's findings in its 2008 decision, which determined that Plaintiff engaged in protected activity but ultimately concluded that activity was not a contributing factor to his termination. (See Letter dated Apr. 28, 2015 [dkt. no. 222]; Letter dated May 1, 2015 [dkt. no. 221].) As Defendant correctly points out, however, Plaintiff cannot expect the Court to accept the first portion of those findings while ignoring the ultimate conclusion. Indeed, were the Court to credit the Department of Labor's findings as dispositive, there would be no need for trial at all. The Court declines to rely on this agency decision to determine the issues for trial and the proper resolution of this case.

Plaintiff's other evidence to support his assertion that the protected activity element cannot be disputed rests on his own characterization and interpretation of witness deposition testimony. (See Letter dated Apr. 28, 2015.) Yet as demonstrated by Defendant's letter response, these witnesses' statements are open to interpretation and do not constitute dispositive evidence that Plaintiff in fact engaged in protected

activity. (See Letter dated May 1, 2015.) If anything, Plaintiff's letter and Defendant's response demonstrate that this issue is a contested factual issue that is best left to the jury. As such, Plaintiff's request for a pre-motion conference on this issue is denied.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Plaintiff's request to call Nicole Williams as a live witness at trial [dkt. no. 229] is DENIED.

2. Plaintiff's motions to exclude evidence [dkt. nos. 198, 199] are GRANTED in part and DENIED in part. Specifically, they are granted with respect to the Purdue litigation and Plaintiff's former counsel. Defendant will not be permitted to present evidence of these events at trial. As indicated in the Court's April 2, 2015 Order [dkt. no. 211], however, these motions are denied with respect to Plaintiff's resume, unemployment compensation, and admissions in his 56.1 Statement or Response.

3. Plaintiff's request to limit the issues to be decided at trial [dkt. no. 222] is DENIED. Concomitantly, Defendant's motions opposing this request [dkt. nos. 220, 221] are GRANTED.

4. The parties are instructed to confer and attempt to resolve their remaining disputes concerning objections to proposed exhibits, witnesses, and deposition designations for

trial. Plaintiff is also reminded that the time for additional motions in limine has now passed. The Court will address any disputes that cannot be resolved by the parties themselves at the final pretrial conference scheduled to take place on July 8, 2015 at 10:00 AM.

SO ORDERED.

Dated: New York, New York
June 24, 2015

LORETTA A. PRESKA
Chief United States District Judge