

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Greenlaw v. Micone

Greenlaw · No. 18-cv-04932-VKD · Decided February 27, 2025

SUMMARY

This is an order from the U.S. District Court for the Northern District of California resolving the parties’ motions in limine in a Rehabilitation Act employment-discrimination case. The court grants, denies, or defers rulings on evidentiary issues involving prior conviction and disbarment, other litigation, employment declarations, late discovery, damages calculations, medical letters, post-termination employment, and related emails. The order states that the sole claim for trial concerns whether OSHA terminated Ms. Greenlaw because of her disability.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	Virginia K. DeMarchi
DECIDED	February 27, 2025
DOCKET	18-cv-04932-VKD
DISPOSITION	other
PROCEDURAL POSTURE	Pretrial order resolving most of the parties' motions in limine in an employment-discrimination action scheduled for jury trial.
STANDARD OF REVIEW	Evidentiary motions in limine were decided under the Federal Rules of Evidence and Federal Rules of Civil Procedure governing admissibility, discovery disclosures, hearsay, impeachment, relevance, prejudice, and expert testimony.
PRECEDENTIAL VALUE	unpublished

TOPICS

- motion in limine
- evidence
- hearsay
- impeachment
- civil procedure

PRACTICE AREAS

- evidence
- civil procedure
- federal employment law
- disability discrimination
- civil rights

QUESTIONS PRESENTED

1. Whether evidence of Greenlaw's more-than-ten-year-old felony conviction and related disbarment was admissible for impeachment or another purpose.
2. Whether evidence of Greenlaw's other litigation, withdrawn claims, union-related activities, and unsuccessful theories could be used to suggest litigiousness, general lack of credibility, or absence of disability discrimination.
3. Whether Greenlaw could be cross-examined about statements in federal employment declarations concerning probation and prior termination, and whether extrinsic evidence could be used to prove those matters.
4. Whether late-produced discovery materials and damages evidence concerning other employment opportunities, federal salaries, and benefits should be excluded.
5. Whether medical letters and testimony concerning medical providers' statements were admissible as evidence of disability or for a non-hearsay purpose.
6. Whether Greenlaw could present evidence of post-termination federal employment and testimony about her own symptoms and impairments.
7. Whether emails concerning Greenlaw's dog and reasonable accommodation could be admitted through witnesses who participated in the communications.

HOLDINGS

1. A felony conviction more than ten years old was excluded because its probative value concerning credibility did not substantially outweigh its prejudicial effect under Federal Rule of Evidence 609(b)(1).
2. Evidence of Greenlaw's law degree and disbarment was excluded as irrelevant, and the disbarment was additionally excluded because its probative value was substantially outweighed by its prejudicial effect.
3. Evidence of Greenlaw's other claims or complaints could not be offered to show that she had a propensity to sue or complain, and unsuccessful claims asserted in the present action could not be used for that purpose. The court deferred ruling on factual testimony or interrogatory answers offered to explain why Greenlaw believed her employment was terminated.
4. Greenlaw could be cross-examined about whether she truthfully represented her probation and prior termination history in federal employment declarations. The Secretary could not introduce extrinsic evidence of her probation status to prove specific conduct under Rule 608(b), but could use Greenlaw's own prior inconsistent statements under Rule 613 if she denied being on probation.
5. When a party fails to disclose information required by Rule 26, Rule 37(c)(1) generally bars use of that information at trial unless the failure was substantially justified or harmless. Applying that principle, the court excluded one late-produced dog photograph, allowed Exhibit 85, denied the motion as to unidentified supplemental interrogatory information, and deferred ruling on the purported government pay-scale exhibits.
6. The Dr. Alsan letter was admissible for the non-hearsay purpose of showing that Greenlaw submitted it in support of an accommodation request and that OSHA reviewed it and acted on the request, but it was inadmissible to prove the truth of the medical diagnosis or conclusion stated in the letter.

7. Greenlaw could testify about post-termination federal employment, including its duties and responsibilities, but could not speculate about why other employers hired her or permitted her to perform particular work.
8. Greenlaw could testify about her own symptoms, impairments, workplace limitations, and understanding of her condition, diagnoses, and treatment, but could not testify to hearsay concerning what her doctors said or to her doctors' opinions about her impairments and limitations.

KEY QUOTATIONS

“This motion is denied. While the Court agrees that evidence of Ms. Greenlaw’s underlying felony conviction itself is not admissible, evidence that she was untruthful in her representations to the federal agencies with which she sought employment, including OSHA, about whether she was on probation within the last seven years, or had been fired within the last five years, is relevant to her character for truthfulness or untruthfulness, pursuant to Rule 608.” (at 5)

“The letter is admissible for a non-hearsay purpose: Ms. Greenlaw submitted the letter in support of her request for an accommodation; OSHA reviewed the letter and acted upon it by granting her request for an accommodation.” (at 10)

“However, Ms. Greenlaw may testify about her own symptoms and impairments, how they limit what she can do in the workplace, and her understanding of her condition, diagnoses, and treatment.” (at 13)

FACTUAL BACKGROUND

Greenlaw claimed that OSHA terminated her employment in October 2016 because of her disability. The parties disputed the admissibility of evidence concerning her prior felony conviction and probation, prior litigation and employment applications, post-termination federal employment, medical letters, emails concerning her service animal and accommodation, and alleged damages. The sole claim remaining for trial was whether OSHA violated the Rehabilitation Act by terminating her because of her disability.

PROCEDURAL HISTORY

Greenlaw sued a federal employer alleging that OSHA violated the Rehabilitation Act by terminating her employment because of her disability. The court had previously granted summary judgment for the Secretary on certain claims, including retaliation and claims concerning the Census Bureau and an OSHA whistleblower position. After a February 19, 2025 pretrial conference, the court ruled on most of the parties' motions in limine and deferred certain evidentiary issues for further submissions or trial.

DISPOSITION

other

CASES CITED

- Greenlaw v. Mitchell, No. 12-cv-1598, 2013 WL 5718531, at *1 (N.D. Cal. Oct. 21, 2013)
- United States v. Higa, 55 F.3d 448, 451-52 (9th Cir. 1995)

- United States v. Jackson, 882 F.2d 1444, 1448-49 (9th Cir. 1989)
- Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001)

OPINION

Greenlaw v. Su

PER CURIAM.

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4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6 SAN JOSE DIVISION

7 8 ROSEMARY GREENLAW, Case No. 18-cv-04932-VKD 9 Plaintiff,

ORDER RE PARTIES' MOTIONS IN

10 v. LIMINE

11 VINCENT N. MICONE, Re: Dkt. Nos. 135, 136 Defendant. 12 13 14 The Court held a pretrial conference on February 19, 2025. Dkt. No. 143. This order 15 resolves most of the parties' respective motions in limine and defers ruling on others. Dkt. Nos. 16 135, 136. The Court will issue separate orders regarding the parties' proposed jury instructions 17 and other matters discussed during the pretrial conference. 18 The sole claim to be tried is whether the Occupational Safety and Health Administration 19 ("OSHA") violated the Rehabilitation Act by terminating Ms. Greenlaw's employment because of 20 her disability.

21 I. MS. GREENLAW'S MOTIONS IN LIMINE

22 A. Motion No. 1 re Ms. Greenlaw's Felony Conviction 23 Ms. Greenlaw moves to exclude all evidence and argument regarding her prior felony 24 conviction and subsequent probation arising out of a dispute with her homeowners' association. 25 She argues that those matters are irrelevant to any issues to be tried concerning her employment 26 with the Department of Labor, her disability, or her termination, and that any probative value such 27 evidence may have is substantially outweighed by the risk of unfair prejudice, confusion of the 1 that such evidence is inadmissible character evidence, see Fed. R. Evid. 404(b)(1), and that her 2 conviction is inadmissible as impeachment evidence, see Fed. R. Evid. 609(b). The Acting 3 Secretary of Labor ("Secretary") argues that Ms. Greenlaw's felony conviction is relevant to her 4 credibility and is admissible under Federal Rules of Evidence 608 and 609. 5 The Court grants Ms. Greenlaw's motion to exclude evidence of her felony conviction, as 6 that conviction is more than 10 years old, and its probative value with respect to the question of 7 her credibility does not substantially outweigh its prejudicial effect. Fed. R. Evid. 609(b)(1). This 8 ruling does not prohibit the Secretary's cross-examining Ms. Greenlaw regarding her statements 9 about whether she was on probation, as discussed below with respect to Ms. Greenlaw's Motion

10 No. 6.

11 B. Motion No. 2 re Ms. Greenlaw's Law Degree and Disbarment 12 Ms. Greenlaw moves to

exclude evidence and argument regarding her law degree and her 13 disbarment resulting from her felony conviction. She argues that such evidence is irrelevant and 14 that any probative value is substantially outweighed by the risk of unfair prejudice and jury 15 confusion. Fed. R. Evid. 401, 402, 403. She also argues that such evidence is inadmissible 16 character evidence. Fed. R. Evid. 404(a), 608(b). The Secretary argues that Ms. Greenlaw's law 17 degree and disbarment are relevant to her general background and credibility and is admissible 18 under Federal Rule of Evidence 608(b). 19 The motion is granted. The fact that Ms. Greenlaw has a law degree is not relevant to any 20 matter at issue in the case. Fed. R. Evid. 401, 402. The fact that Ms. Greenlaw was disbarred and 21 is no longer licensed to practice law as a result of her prior felony conviction also is not relevant to 22 any matter at issue in the case, and like the conviction itself, any probative value of the disbarment 23 is substantially outweighed by its prejudicial effect. Fed. R. Evid. 401, 402, 403. 24 C. Motion No. 3 re Evidence of Other Litigation or Claims 25 Ms. Greenlaw moves to exclude evidence and argument referring or relating to her other 26 litigation matters, claims, EEOC actions, and MSPB actions, including any argument or 27 suggestion that she is litigious. She argues that such evidence is irrelevant, that any probative 1 such evidence for impeachment purposes. Fed. R. Evid. 401, 402, 403, 404. The Secretary 2 disclaims any intent to use such evidence to argue or suggest that Ms. Greenlaw has a propensity 3 to sue her employers or that such evidence establishes her character as such a person. However, 4 the Secretary maintains that evidence of Ms. Greenlaw's other legal matters and litigation is 5 relevant to her credibility. Specifically, the Secretary argues that the use of such evidence is 6 permitted by Federal Rule of Evidence 404(b)(2), which provides, in relevant part, that 7 "[e]vidence of any other crime, wrong, or act . . . may be admissible for another purpose, such as 8 proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or 9 lack of accident." Additionally, the Secretary argues that such evidence may be used on cross- 10 examination to probe Ms. Greenlaw's "character for truthfulness" under Federal Rule of Evidence 11 608(b). 12 Additionally, Ms. Greenlaw argues that the Secretary should be precluded from using any 13 evidence that was not produced by the Secretary, including any records that were voluntarily 14 disclosed by Ms. Greenlaw in discovery. The Secretary responds that he is not required to 15 disclose evidence to be used solely for impeachment, and that the sanction for exclusion of 16 evidence under Federal Rule of Civil Procedure 37 does not apply. 17 To the extent the Secretary wishes to offer evidence of Ms. Greenlaw's claims or 18 complaints asserted in other proceedings to show that she has a propensity to sue or complain 19 whenever she suffers an adverse employment action, Ms. Greenlaw's motion is granted. In 20 addition, to the extent the Secretary wishes to offer evidence of the unsuccessful claims Ms. 21 Greenlaw has asserted in this action, Ms. Greenlaw's motion is granted. However, this in limine 22 ruling does not extend to testimony or interrogatory answers by Ms. Greenlaw where she responds 23 to factual questions regarding, for example, why she believes her employment was terminated. 24 The Court will defer ruling on any objections to such evidence until trial. 25 With respect to the parties' separate

dispute regarding the application of Rule 37 sanctions, 26 the Court reminds the parties that if a party has an obligation to disclose evidence under Rule 27 26(a) or any of the other discovery rules, such as Rules 30, 33, or 34, and the party fails to disclose 1 disclose was substantially justified or is harmless. Fed. R. Civ. P. 37(c); see id. advisory 2 committee's note, 2000 amendments, subsection (c). 3 D. Motion No. 4 re Evidence of Withdrawn or Dismissed Claims 4 Ms. Greenlaw moves to exclude all evidence and argument regarding her claims under 5 Title VII and the Age Discrimination in Employment Act ("ADEA"). She argues that such 6 evidence is irrelevant and is prone to misuse as a basis to suggest that she is litigious. 7 Additionally, Ms. Greenlaw argues that such evidence is improper character evidence and that any 8 probative value is substantially outweighed by the risk of unfair prejudice. Fed. R. Evid. 403, 404. 9 The Secretary confirms that he does not intend to introduce evidence that Ms. Greenlaw 10 previously asserted other claims that have since been withdrawn or dismissed from this action. 11 Accordingly, this motion in limine is granted as unopposed. 12 E. Motion No. 5 re Ms. Greenlaw's Union-Related Activities and Claims 13 Ms. Greenlaw moves to exclude all evidence and arguments regarding her union-related 14 activities and claims. She says that while she previously contended that the Secretary retaliated 15 against her for such activities, her retaliation claim is no longer at issue for trial.1 Ms. Greenlaw 16 argues that such evidence therefore is irrelevant and that any probative value of such evidence is 17 substantially outweighed by the risk of unfair prejudice. Fed. R. Evid. 401-403. She also argues 18 that such evidence is inadmissible character evidence. Fed. R. Evid. 404. Noting that Ms. 19 Greenlaw has "offered as many as six different reasons why OSHA terminated her," the Secretary 20 contends that Ms. Greenlaw's union-related activities are admissible as evidence of "alternate 21 theories about why she was terminated" and are directly relevant to an element of her 22 Rehabilitation Act claim, i.e., that she was terminated because of her disability. Dkt. No. 137 at 23 ECF 9. Additionally, the Secretary argues that Ms. Greenlaw's alternate termination theories, 24 including those concerning her union-related activities, are relevant to Ms. Greenlaw's credibility. 25 This motion is granted, except as noted herein. The Court will not permit the Secretary to 26 introduce evidence of Ms. Greenlaw's unsuccessful claims and theories to suggest that she 27 1 generally is not credible or as affirmative evidence that she was not discriminated against on the 2 basis of disability. However, this in limine ruling does not extend to testimony or interrogatory 3 answers by Ms. Greenlaw where she responds to factual questions regarding, for example, why 4 she believes her employment was terminated. The Court will defer ruling on any objections to 5 such evidence until trial. 6 F. Motion No. 6 re Ms. Greenlaw's Responses to Questions on Declarations for Federal Employment 7 8 Ms. Greenlaw moves to exclude evidence about whether she was truthful in filling out a 9 Declaration for Federal Employment for two positions, i.e., (1) declarations Ms. Greenlaw filled 10 out in 2016 for the OSHA Administrative Assistant position and (2) declarations she filled out in 11 2018 for a position with the Census Bureau. In addition to these declarations, the Secretary 12 contends that in November 2019, Ms. Greenlaw also lied on a third declaration for federal 13 employment. See

Dkt. No. 137-1, Ex. I. 14 With respect to Ms. Greenlaw's OSHA Administrative Assistant position, Ms. Greenlaw 15 answered "No" to a question that asked whether she had been convicted or on probation "[d]uring 16 the last 7 years." See Dkt. No. 137-1, Ex. C. There appears to be no dispute that as of 2016 when 17 Ms. Greenlaw filled out the declarations, her felony conviction fell outside the seven-year period. 18 However, the Secretary maintains that Ms. Greenlaw was still on probation in 2012 (see Dkt. No. 19 137-1, Ex. B), which was within the seven-year period preceding the declaration she submitted for 20 the OSHA Administrative Assistant position. Ms. Greenlaw argues that allowing evidence 21 relating to her 2016 declarations would require introducing evidence regarding her felony 22 conviction, which she maintains is irrelevant, unduly prejudicial, and inadmissible character 23 evidence. See Fed. R. Evid. 401, 402, 403, 404, 608, 609. Additionally, Ms. Greenlaw argues that 24 permitting such evidence would derail the trial on her Rehabilitation Act claim, by requiring a 25 trial-within-a-trial on exactly when her probation for her felony conviction ended. The Secretary 26 argues that evidence concerning whether Ms. Greenlaw truthfully filled out the declarations for 27 federal employment in the OSHA Administrative Assistant position is relevant to Ms. Greenlaw's 1 With respect to the federal employment declarations Ms. Greenlaw filled out in 2018 for a 2 position with the Census Bureau, that form asked whether she had been convicted or on probation 3 "[d]uring the last 7 years," and also asked whether "[d]uring the last 5 years, [Ms. Greenlaw had] 4 been fired from any job for any reason." See Dkt. No. 137-1, Ex. D. Ms. Greenlaw answered both 5 questions "No." Id. Ms. Greenlaw says that in deposition, she explained that she believes there is 6 a distinction between a "termination" and "being fired or any misconduct." See Dkt. No. 136-2 7 (Greenlaw dep. at 43:17-25). Ms. Greenlaw argues that evidence regarding whether she properly 8 filled out the declarations for the Census Bureau position, two years after her termination from 9 OSHA, is irrelevant to the issue of whether her OSHA termination was based on disability 10 discrimination. She further argues that such evidence is also unduly prejudicial and constitutes 11 inadmissible character evidence. See Fed. R. Evid. 401, 402, 403, 404, 608. The Secretary 12 maintains that whether Ms. Greenlaw truthfully filled out the declarations for federal employment 13 with the Census Bureau (as well as the declaration she filled out in November 2019 for another 14 federal position) as to questions about her probation and prior termination from OSHA is relevant 15 to Ms. Greenlaw's credibility and is admissible under Federal Rule of Evidence 608. 16 This motion is denied. While the Court agrees that evidence of Ms. Greenlaw's underlying 17 felony conviction itself is not admissible, evidence that she was untruthful in her representations to 18 the federal agencies with which she sought employment, including OSHA, about whether she was 19 on probation within the last seven years, or had been fired within the last five years, is relevant to 20 her character for truthfulness or untruthfulness, pursuant to Rule 608. If Ms. Greenlaw testifies at 21 trial, such evidence is relevant to the jury's assessment of her credibility. 22 It is undisputed that Ms. Greenlaw made the statements in question in 2016 and 2018. See 23 Dkt. No. 149 at 3-4. These statements were made in connection with her applications for federal 24 employment within

the past 10 years. In his supplemental briefing, the Secretary demonstrates 25 that Ms. Greenlaw was sentenced to two years of probation on December 2, 2010, such that she 26 would have been on probation until December 1, 2012. See *id.* at 3, Ex. C (transcript of December 27 2, 2010 re-sentencing proceeding wherein state court sentenced Ms. Greenlaw to “two years 1 appealed this sentence, the sentence was affirmed, and the California Supreme Court denied Ms. 2 Greenlaw’s petition for review. See *Greenlaw v. Mitchell*, No. 12-cv-1598, 2013 WL 5718531, at 3 *1 (N.D. Cal., Oct. 21, 2013) (summarizing history of state court criminal proceedings). Although 4 Ms. Greenlaw asked the state court on re-sentencing for a “record clearance,” there is no 5 indication that this request was ever granted or that her criminal conviction was ever expunged. 6 See Dkt. No. 149, Ex. C. Indeed, in her federal habeas petition, filed on March 30, 2012, Ms. 7 Greenlaw stated: “Petitioner has filed several requests to dismiss/expunge the remaining 8 conviction [re Count 3], with the trial court, between January and October 2011, but hearing on 9 said motions has been denied to date.” Dkt. No. 137, Ex. A. The Court gave Ms. Greenlaw an 10 opportunity to show that she was not, in fact, on probation within seven years of the dates she 11 made the statements at issue. She has not done so, and her suggestion that the record is “unclear” 12 on this point is not persuasive. 13 Accordingly, the Secretary may cross-examine Ms. Greenlaw regarding the statements in 14 question. The Secretary may not introduce extrinsic evidence of Ms. Greenlaw’s probation status. 15 Fed. R. Evid. 608(b) (“extrinsic evidence is not admissible to prove specific instances of a 16 witness’s conduct in order to attack or support the witness’s character for truthfulness”). 17 However, if Ms. Greenlaw denies being on probation during the time in question, she may be 18 impeached, if necessary, by her own prior inconsistent statements under Rule 613. See *United 19 States v. Higa*, 55 F.3d 448, 451-52 (9th Cir. 1995); *United States v. Jackson*, 882 F.2d 1444, 20 1448-49 (9th Cir. 1989); see also Fed. R. Evid. 801(d)(2)(A) (opposing party statement). Ms. 21 Greenlaw is, of course, free to explain her statements. 22 If Ms. Greenlaw wishes the Court to give a limiting instruction that the evidence 23 concerning the statements in question shall be considered only for purposes of assessing Ms. 24 Greenlaw’s character for truthfulness or untruthfulness, and not for any other purpose, Ms. 25 Greenlaw shall propose a limiting instruction for the Court’s consideration in advance of Ms. 26 Greenlaw commencing her testimony at trial. 27

1 II. SECRETARY’S MOTIONS IN LIMINE

2 A. Motion No. 1 re Documents and Discovery Responses Served after the Discovery Cutoff 3 4 The Secretary moves to exclude documents and discovery responses that Ms. Greenlaw 5 provided after the close of discovery. Specifically, the Secretary moves to exclude two photos of 6 Ms. Greenlaw’s dog produced on September 4, 2024; supplemental interrogatory responses served 7 on September 12, 2024; and an additional 15 pages of documents produced on October 2, 2024. 8 “If a party fails to provide information or identify a witness as required by Rule 26(a) or 9 (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a 10 hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 11

37(c)(1); Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001). 12 For the reasons discussed during the hearing on this motion, the Court grants this motion in 13 part and denies it in part, as follows: 14 1. With respect to the photographs of her dog, Ms. Greenlaw is not prohibited from 15 offering in evidence the photograph identified as Exhibit 85 by virtue of the late production of that 16 photograph; she may not offer in evidence the other photograph of her dog. 17 2. With respect to Ms. Greenlaw's supplemental interrogatory responses, the 18 Secretary acknowledges that no party has identified the supplemental interrogatory responses as 19 proposed trial exhibits. As the Secretary has entirely failed to identify the "new information" 20 purportedly contained in these interrogatory responses that he wishes the Court to exclude, the 21 motion is denied on this point. 22 3. With respect to the purported government "pay scales" identified as Exhibits 87-95, 23 the Court defers ruling on this aspect of the motion until after the Court has an opportunity to 24 consider the parties' further submissions due to be filed by February 28, 2025. See Dkt. No. 144 25 at 2 (para. 5). 26 B. Motion No. 2 re Economic Damage Calculations 27 The Secretary moves to exclude Ms. Greenlaw's economic damages calculations as 1 summary judgment in his favor on Ms. Greenlaw's claims concerning employment with the 2 Census Bureau, and argues that any damages theory based on potential salaries from the Census 3 Bureau is irrelevant. Additionally, the Secretary points out (and Ms. Greenlaw does not dispute) 4 that after her termination from OSHA, and before any employment opportunity with the Census 5 Bureau arose, she was hired at a higher-paying position, and thus, Ms. Greenlaw mitigated her 6 damages. Ms. Greenlaw does not dispute that any damages theory based on the Census Bureau is 7 irrelevant. See Dkt. No. 138 at ECF 4-5. Accordingly, as to any damages evidence based on the 8 Census Bureau position, the Secretary's motion in limine is granted as unopposed. 9 With respect to evidence concerning promotions at OSHA or the Whistleblower position 10 for which Ms. Greenlaw was not selected, the Secretary argues that such evidence was not timely 11 disclosed and also lacks foundation, as Ms. Greenlaw has not disclosed any witnesses who could 12 testify about what promotions could occur at OSHA, whether any such promotion would come 13 with a salary increase, and whether Ms. Greenlaw would have been promoted. Ms. Greenlaw 14 responds that to the extent the Secretary's motion is based on the Whistleblower Position for 15 which Ms. Greenlaw was not selected, she agrees that any damages based on that position is 16 irrelevant in view of the Court's summary judgment ruling. See Dkt. No. 138 at ECF 5. 17 Accordingly, as to any damages evidence based on the Whistleblower Position with OSHA, the 18 Secretary's motion in limine is granted as unopposed. 19 With respect to evidence concerning federal salaries and benefits, the Secretary argues that 20 such evidence is untimely and inadmissible. The Secretary says that Ms. Greenlaw did not 21 produce this evidence until after the August 29, 2024 discovery cutoff. The Secretary says that he 22 had already made strategic decisions about disclosing witnesses and experts, and did not have the 23 opportunity to investigate Ms. Greenlaw's untimely disclosures. Additionally, the Secretary 24 argues that Ms. Greenlaw's evidence regarding federal salaries and benefits is inadmissible 25 because it requires expert

testimony, and Ms. Greenlaw has not disclosed any experts. Ms. 26 Greenlaw says that she disclosed her lost wages theory (and referred to the publicly available 27 government pay scales in question) prior to the close of discovery. She argues that she properly 1 understanding of the government pay scales (i.e., that her salary would have increased every year 2 for inflation), and what salary and benefits she reasonably expected to receive had her 3 employment not been terminated. She contends that such evidence does not require any expert 4 testimony, as the only necessary calculation would be simple addition of sums from 2017 and 5 2018. 6 The Court is inclined to permit Ms. Greenlaw to testify regarding wages that she allegedly 7 lost between the date of her termination and the date of her next employment, which the Court 8 understands will be based on the pay scale(s) applicable to the position with OSHA from which 9 she was terminated in October 2016. This testimony does not appear to require any specialized 10 expertise and is, therefore, not expert testimony subject to Rule 702. However, the Court defers 11 ruling on this aspect of the motion until after the Court has an opportunity to consider the parties' 12 further submissions due to be filed by February 28, 2025. See Dkt. No. 144 at 2 (para. 5). 13 C. Motion No. 3 re Ms. Greenlaw's Dog 14 The Secretary moves for an order precluding Ms. Greenlaw from arguing or suggesting to 15 the jury that her dog was her disability or that she should be considered disabled because of her 16 dog. Additionally, the Secretary argues that Ms. Greenlaw should be prohibited from arguing or 17 suggesting that OSHA retaliated against her because of her dog, as the Court granted summary 18 judgment for the Secretary on Ms. Greenlaw's retaliation claim. Ms. Greenlaw responds that she 19 does not intend to argue retaliation, or to argue or suggest that she was disabled because she 20 owned a dog. She agrees that her dog was a reasonable accommodation for her disability and that 21 the two are distinct. However, she argues that she should be permitted to argue that Ms. Delicana 22 recommended her termination because Ms. Delicana disliked Ms. Greenlaw's dog, and that this is 23 no different from firing someone because of their disability. 24 The Secretary's motion in limine is not directed to an evidentiary matter, but rather reflects 25 a dispute regarding Ms. Greenlaw's theory of the case and the Secretary's defense. For this 26 reason, the Court will address the legal framework for resolving Ms. Greenlaw's Rehabilitation 27 Act claim in deciding the parties' disputes concerning jury instructions. 1 D. Motion No. 4 re Dr. Burak Alsan's Letter 2 In support of her request for a reasonable accommodation at OSHA, Ms. Greenlaw 3 submitted a letter from Dr. Burak Alsan stating that she "has a chronic medical condition that 4 causes pain and anxiety; she has a therapy service animal who helps in times of stressor and would 5 ask that she be allowed to bring her pet with her as allowed by policy." Dkt. No. 135-1, Ex. E. 6 The Secretary moves for an order precluding Ms. Greenlaw from offering Dr. Alsan's letter to 7 prove that she is a person with a disability under the Rehabilitation Act, arguing that the letter is in 8 admissible hearsay. Fed. R. Evid. 801, 802. Additionally, the Secretary argues that Dr. Alsan's 9 letter lacks foundation because Ms. Greenlaw has not disclosed him as an expert or as a witness 10 who will testify at trial. Ms. Greenlaw argues that she can provide sufficient foundation for Dr. 11 Alsan's letter

based on her own personal knowledge of the circumstances in which the letter was created. Additionally, Ms. Greenlaw says that Ms. Delicana can also testify that she saw the letter along with Ms. Greenlaw's request for reasonable accommodation. Ms. Greenlaw argues that the letter qualifies under several hearsay exceptions, including Federal Rule of Evidence 803(4) (statement made for medical diagnosis or treatment), Rule 803(6) (record of regularly conducted activity), or Rule 803(8) (public records). Even if the letter is hearsay, Ms. Greenlaw argues she may offer the letter for a non-hearsay purpose, i.e., that OSHA regarded her as disabled, whether or not she actually was disabled. This motion is denied. The letter is admissible for a non-hearsay purpose: Ms. Greenlaw submitted the letter in support of her request for an accommodation; OSHA reviewed the letter and acted upon it by granting her request for an accommodation. However, the letter is not admissible for the truth of the matters asserted in it. Fed. R. Evid. 802. The letter contains a purported diagnosis or medical conclusion by an out of court declarant; it does not contain a statement made for purposes of diagnosis or treatment and a description of medical history, symptoms, and causes, and is therefore not admissible under an exception to the rule against hearsay. See Fed. R. Evid. 803(4). The Court is also not persuaded that Ms. Greenlaw could establish admissibility under Rules 803(6) or 803(8).

1 E. Motion No. 5 re Dr. Marcie Levine's Letter

2 The Secretary moves to exclude an October 16, 2018 letter purportedly prepared by Dr. Marcie Levine that states Ms. Greenlaw "is an individual with a severe physical, intellectual, or psychiatric disability[.]" Dkt. No. 135-1, Ex. D. The Secretary argues that the letter is irrelevant and unduly prejudicial, as it was created two years after OSHA fired Ms. Greenlaw. Fed. R. Evid. 6 402, 403. Additionally, pointing out that Ms. Greenlaw has not disclosed Dr. Levine or any other medical provider as a witness, the Secretary argues that the letter is inadmissible hearsay, lacks foundation or authentication, and requires expert testimony. Fed. R. Evid. 602, 702, 801, 802.

9 Ms. Greenlaw argues that the letter is not unduly prejudicial to the Secretary because she herself can testify about her cancer, how long she has had cancer, and about the symptoms of cancer and its treatment. Additionally, Ms. Greenlaw argues that she can lay a proper evidentiary foundation for the letter based on her own personal knowledge; that the letter qualifies as an exception to hearsay under Federal Rules of Evidence 803(4) and 803(6); and that the letter does not require expert testimony.

15 The motion is granted. Ms. Greenlaw wishes to offer the letter as evidence of the truth of the matters asserted in it—i.e. that she is disabled. The letter is hearsay and no exception applies. Even if the letter were not inadmissible hearsay, the Court finds that it is also not relevant evidence, as it post-dates the events at issue in this action, and is not specific to Ms. Greenlaw's disability, but refers instead to a generic "physical, intellectual, or psychiatric disability that qualified him/her" for certain hiring consideration.

21 F. Motion No. 6 re Post-Termination Federal Service

22 The Secretary moves to exclude evidence or argument that Ms. Greenlaw was qualified for the Administrative Assistant position with OSHA based on her post-termination federal service, including her employment with the U.S. Department of the Army ("Army") beginning in October 25 2018. The Secretary

argues that such evidence and argument is irrelevant to the issue of whether 26 Ms. Greenlaw was qualified to perform the Administrative Assistant position during her 27 employment with OSHA in 2016, and would in any event be unduly prejudicial, confuse the 1 disclosed any witnesses who can testify about her post-termination federal service, the Secretary 2 argues that post-termination evidence and argument are also inadmissible hearsay. Fed. R. Evid. 3 801, 802. 4 Ms. Greenlaw maintains that her post-termination federal service provides context and a 5 reasonable basis for the jury to find that she was qualified for her Administrative Assistant 6 position while employed at OSHA. She argues that she herself properly can testify about her 7 positions at OSHA and the Army, and how those positions were similar. 8 The motion is denied. Ms. Greenlaw may testify regarding her post-termination 9 employment, including the duties and responsibilities of such employment. However, she may not 10 speculate about why she was hired by other employers or why she was permitted by other 11 employers to do particular work. The Secretary may cross-examine Ms. Greenlaw regarding her 12 post-termination employment. 13 G. Motion No. 7 re Janet Callwood-Jackson's Emails 14 The Secretary moves to exclude any emails from Dr. Janet Callwood-Jackson regarding 15 Ms. Greenlaw's dog and her reasonable accommodation. The Secretary argues that as Ms. 16 Greenlaw has not disclosed Dr. Callwood-Jackson as a witness, any statements by Dr. Callwood- 17 Jackson in those emails lack foundation, and any argument regarding Dr. Callwood-Jackson's 18 intent is speculative. Fed. R. Evid. 602; see also Fed. R. Civ. P. 37(c). Ms. Greenlaw argues that 19 the subject emails were produced from OSHA's own files and that she, Ms. Delicana and Mr. 20 Dement (with whom these emails were exchanged) may testify about the emails at trial. 21 As no party intends to call Dr. Callwood-Jackson as a witness, the motion is granted as 22 unopposed on this point. 23 The motion is denied with respect to email communications with Dr. Callwood-Jackson. 24 These emails may be admissible if a proper foundation is established through the testimony of 25 witnesses who participated in the email communications. 26 H. Motion No. 8 re Expert Testimony re Disability 27 The Secretary moves to preclude Ms. Greenlaw from offering evidence from "undisclosed 1 The Secretary argues that such evidence is inadmissible hearsay. Fed. R. Evid. 801, 802. Ms. 2 Greenlaw argues that she should be permitted to offer her own testimony about her cancer, 3 including information conveyed to her by medical providers in the course of her diagnosis or 4 treatment. 5 The motion is granted to the extent Ms. Greenlaw proposes to testify regarding what her 6 || doctors told her. However, Ms. Greenlaw may testify about her own symptoms and impairments, 7 how they limit what she can do in the workplace, and her understanding of her condition, 8 diagnoses, and treatment. She may not testify to hearsay, such as what her doctors said or what 9 || her doctors' opinions are about her impairments and limitations. 10 I. Motion No. 9 re Mr. Dement's Alleged Prior Acts of Discrimination 11 The Secretary moves to exclude any evidence pertaining to prior complaints alleging 12 || discrimination against Mr. Dement. The Secretary argues that such evidence is irrelevant, unduly 5 13 prejudicial, and would waste time, confuse the issues, and cause delay. See Fed. R. Evid. 402, 14 || 403. Ms. Greenlaw confirms that she "does not intend to

raise prior complaints brough[t] against 3 15 Mr. Dement[.]” Dkt. No. 138 at ECF 11. This motion in limine is granted as unopposed. 16 J. Motion No. 10 re Emotional Distress 3 17 The Secretary moves to exclude any testimony regarding Ms. Greenlaw’s claimed 18 emotional distress as a result of her termination by OSHA, arguing that emotional distress 19 damages are not recoverable under the Rehabilitation Act and therefore are irrelevant. Ms. 20 || Greenlaw agrees that “emotional distress damages are not available under the Rehabilitation Act” 21 and confirms that she “has no intention of seeking such damages.” Dkt. No. 138 at ECF 11. 22 || Accordingly, this motion in limine is granted as unopposed. 23 IT IS SO ORDERED. 24 Dated: February 27, 2025 25 26 Vryuin®, Qc □□□□□□ Virginia K. DeMarchi United States Magistrate Judge 28