

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON**

C. MARTIN GASKELL,)
)
 Plaintiff,)
) CIVIL ACTION NO. 09-244-KSF
 vs.)
)
 UNIVERSITY OF KENTUCKY,)
)
 Defendant.)

**PLAINTIFF’S RESPONSE TO DEFENDANT’S WITNESS LIST, EXHIBIT LIST,
AND PRE-TRIAL MEMORANDUM**

Pursuant to the Court’s Amended Scheduling Order [DE #17] and Fed. R. Civ. P. 26(a)(3), Plaintiff C. Martin Gaskell, by and through undersigned counsel, submits the following response to Defendant’s Witness List, Exhibit List, and Pre-Trial Memorandum [DE #52].

A. OBJECTIONS TO DEFENDANT’S EXHIBITS

Plaintiff respectfully makes the following objections to those exhibits Defendant intends to use at trial (DE #17(4)(b)).

1.) Plaintiff objects to Defendant’s use of “[a]ny and all documents, correspondence, tangible things, and electronically stored information concerning and supporting Defendant’s affirmative defenses...” Request No. 17 in Plaintiff’s “First Set of Requests for Production of Documents, Electronically Stored Information, and Tangible Things,” states as follows: “Any and all documents, correspondence, tangible things, and electronically stored information concerning and supporting Defendant’s affirmative defenses in its Answer filed in this action.” In response, Defendant stated in full that “The University has no documents responsive to Request for Production of Documents No. 17.” (UK’s Response to Plaintiff’s Request for Production is attached hereto as Exhibit 1.)

2.) Subject to the aforementioned objection, Plaintiff objects to the following exhibits on grounds set forth in each objection:

a.) Plaintiff objects to Defendant's Exhibit #6. Defendant has never provided Plaintiff a copy of this exhibit, which Plaintiff believes would have been covered by Plaintiff's discovery requests to Defendant.

b.) Plaintiff objects to Defendant's Exhibit #7. Defendant has never provided Plaintiff a copy of this exhibit, which Plaintiff believes would have been covered by Plaintiff's discovery requests to Defendant.

c.) Plaintiff objects to Defendant's Exhibit #61. Plaintiff is unaware of any document produced in discovery in this case which bears this date.

d.) Plaintiff objects to Defendant's Exhibit #95. Defendant has never provided Plaintiff a copy of this exhibit, which Plaintiff believes would have been covered by Plaintiff's discovery requests to Defendant.

e.) Plaintiff objects to Defendant's Exhibit #103. Defendant has never provided Plaintiff a copy of this exhibit, which Plaintiff believes would have been covered by Plaintiff's discovery requests to Defendant.

f.) Plaintiff objects to Defendant's Exhibit #104 (attached hereto as Exhibit #2). The list of employers referred to in this exhibit are subject to plaintiff's current pending motion *in limine* [DE #51].

B. RESPONSE TO DEFENDANT'S "EXPECTED EVIDENTIARY OBJECTIONS"

Defendant has filed no motions *in limine*. According to the Court's Scheduling Order of May 17, 2010, any such motion was to have been filed with the Court no later than December 16, 2010 [DE #17(4)(d)].

Defendant has submitted, however, a number of expected evidentiary objections. Plaintiff wishes to apprise the court that if and when these objections are presented by way of formal motion or objection at trial, plaintiff will respond accordingly.

At this time, plaintiff wishes to point out that the court has already ruled on the most far-reaching of UK's expected evidentiary objections, namely, that the court prohibit any witness from testifying that he or she believes religion was a factor in the employment decision [DE #52 at 19-20].

As the Court held, in reference to what is undoubtedly the clearest statement in the record by a UK agent that Gaskell's religion led to his rejection as an applicant [DE #38, Troland Dep., Ex. 35]:

Although UK contends that these comments are inadmissible hearsay, the Court finds that they are admissible under Rule 801(d)(2) of the Federal Rules of Evidence, defining as non-hearsay a statement "offered against a party" that is "a statement by the party's agent or servant concerning a matter within the scope of agency or employment" Additionally, these statements are admissible under Rule 803(3) of the Federal Rules of Evidence.

[DE #47 at 14-15.]

Moreover, there are additional applicable Federal Rules of Evidence which clearly favor plaintiff's, and not UK's, position on the admissibility question raised by UK. *See, e.g.*, Fed. R. Evid. 704(a) ("Opinion on Ultimate Issue").

Finally, UK expects to object to any hearsay testimony by witnesses Kovash and Ferland on the general grounds that they had no involvement in the search process. To begin with, UK does not cite any specific statements to which it is objecting. Further, in answer to Plaintiff's Interrogatory No. 6, UK identified Ferland as one of the persons "who participated in the decision not to hire plaintiff..." (UK's Answers to Plaintiff's Interrogatories is attached hereto as Exhibit #3). In answer to interrogatory No. 11, UK states that "Dr. Cavaganero consulted Steven

Hoch of the UK College of Arts and Sciences, and Professor Michael A. Kovash, Director of Undergraduate Studies in Physics and Astronomy.” (*Id.*)

As noted above, plaintiff reserves the right to respond to defendant’s expected evidentiary objections in a more comprehensive fashion at the appropriate time.

Respectfully submitted,

/s/ Francis J. Manion

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2010, I electronically filed the foregoing Plaintiff’s Response to Defendant’s Witness List, Exhibit List, and Pre-Trial Memorandum with the Clerk of Court using the CM/ECF filing system, which will send notification of such filing to the following:

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