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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CHARLES MATTHEW ERHART,
Plaintiff,

v.

BOFI HOLDING, INC.,
Defendant.

Case No. 15-cv-02287-BAS-NLS
consolidated with
15-cv-02353-BAS-NLS

**ORDER GRANTING IN PART
BOFI'S MOTION IN LIMINE
NO. 2 TO EXCLUDE
INFLAMMATORY EVIDENCE
THAT IS UNTETHERED TO
ERHART'S CLAIMS
(ECF Nos. 215, 232)**

And Consolidated Case

Presently before the Court is Boff Holding, Inc.'s Motion in Limine No. 2 to Exclude Inflammatory Evidence that Is Untethered to Erhart's Claims. (ECF Nos. 215, 232.) Erhart opposes. (ECF No. 223.) The Court heard argument on the motion. (ECF No. 230.) For the following reasons, the Court **GRANTS IN PART** Boff's Motion in Limine No. 2.

1 **I. BACKGROUND**

2 The Court and the parties are familiar with the story behind these consolidated
3 cases awaiting trial. Early on in this case, the Court discussed the scope of Erhart’s
4 federal whistleblower retaliation causes of action, explaining:

5 the federal statutes Erhart now seeks to invoke are not general compliance
6 statutes. They do not police all employee grievances and suspicions of
7 wrongdoing. Erhart’s alleged beliefs must be at least tethered to the
8 conduct Sarbanes–Oxley and Dodd–Frank seek to uncover and prevent—
9 fraud against shareholders, wire fraud, bank fraud, and the other
10 violations of law these statutes encompass. He need not prove these laws
11 were being violated, but he must plausibly allege a reasonable belief that
12 they were being violated or that he was providing information relating to
13 a possible securities law violation.

14 (ECF No. 44.)

15 At summary judgment, the Court recognized a few of Erhart’s beliefs may be
16 actionable for his federal claims. (ECF No. 192.) These are: BofI allegedly giving
17 a false or misleading response to an SEC subpoena investigating securities fraud; and
18 BofI allegedly making unauthorized, risky loans to politically exposed persons and
19 criminals, which could impact the Bank’s financial condition.

20 Similarly, at summary judgment, the Court recognized Erhart’s California
21 whistleblower retaliation claim was broader than his federal claims. This claim can
22 encompass retaliation against an employee for reporting *any* believed violation of
23 law. (ECF No. 192.) The Court reasoned Erhart’s various allegations about BofI
24 hiding information from regulators at the Office of the Comptroller of the Currency
25 (“OCC”) could be actionable because laws require the Bank to comply with any
26 request for information from the agency’s examiners. Erhart’s alleged belief that the
27 Bank was not making timely 401(k) contributions in violation of federal labor
28 regulations and that its CEO was potentially engaging in tax fraud or money
laundry could also be actionable under his California retaliation claim.

1 Throughout discovery, Erhart deposed current and former BofI employees
2 about their time at the Bank. Their testimony concerned a range of workplace
3 conduct, including individuals making inappropriate jokes and engaging in crude
4 behavior, BofI having a “fear-based” culture, the Bank being a “boys’ club,” and
5 BofI’s management allegedly lying to a regulator. (ECF Nos. 232-2 to 232-7.) BofI
6 now moves to exclude this evidence.

7 **II. LEGAL STANDARD**

8 A party may use a motion in limine to exclude inadmissible or prejudicial
9 evidence before it is introduced at trial. *Luce v. United States*, 469 U.S. 38, 40 n.2
10 (1984). Only relevant evidence is admissible. Fed. R. Evid. 402. Evidence is
11 relevant if it has any tendency to make a fact more or less probable than it would be
12 without the evidence, and the fact is of consequence in determining the action. *Id.*
13 401(a)–(b).

14 Relevant evidence may be excluded if its probative value is substantially
15 outweighed by, among other things, the danger of unfair prejudice or wasting
16 time. Fed. R. Evid. 403. The Rule 403 balancing inquiry is made on a case-by-case
17 basis, requiring an examination of the surrounding facts, circumstances, and
18 issues. *United States v. Lloyd*, 807 F.3d 1128, 1152 (9th Cir. 2015).

19 **III. ANALYSIS**

20 The Bank argues evidence of generalized grievances about BofI’s purported
21 culture, managerial style, and unrelated misconduct should be excluded because the
22 evidence is irrelevant to Erhart’s claims. (ECF No. 215.) BofI further argues that
23 actions and statements of individuals not involved in the Bank’s decision-making
24 process are not probative for Erhart’s employment retaliation claims. (*Id.*)

25 In addition, the Bank argues that even if evidence about BofI’s purported
26 culture or miscellaneous misconduct is relevant, that evidence should be excluded
27 under Rule 403 as unduly prejudicial, confusing, and a waste of time. Erhart
28 responds that evidence regarding the “hostile work environment and culture present

1 at Boff . . . speaks to the Bank’s purported reason for firing Mr. Erhart—that he was
2 not completing work—and whether it was a pretext for discrimination because of his
3 whistleblowing.” (ECF No. 233.)

4 The Court agrees that most of the evidence submitted with Boff’s motion is
5 irrelevant or should be excluded under Rule 403. The Bank is not on trial for any
6 possible grievance. Whether former employees, many of whom apparently did not
7 work with Erhart, witnessed sexual harassment or made distasteful comments is not
8 relevant to the believed violations of law Erhart has advanced throughout this case.
9 The fact that the Bank was purportedly a “boys’ club” likewise is not relevant to
10 Erhart’s retaliation claims.

11 To that end, Erhart’s argument that any evidence of any type of discrimination
12 supports his retaliation claims is not convincing. The cases he cites are ones where
13 evidence regarding other employees was relevant because they suffered similar
14 discrimination—such as where a court found evidence that other employees were
15 subject to race-based harassment supported the plaintiffs’ racial discrimination
16 claims. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996).
17 There is not a comparable connection here for much of the evidence Boff seeks to
18 exclude. Therefore, the Court grants Boff’s request to exclude testimony about
19 potential sexual harassment, inappropriate jokes, employees being unhappy,
20 generalized complaints about a “hostile” or “toxic” work environment, and similar
21 matters. (*See* Ex. 1 – Heather Michaud Dep. Excerpts, ECF No. 232-2; Ex. 2 –
22 Jeffrey Smith Dep. Excerpts, ECF No. 232-3; Ex. 3 – Jacob Gantos Dep. Excerpts
23 (ECF No. 232-4); Ex. 6 – Daniel Crescitelli Dep. Excerpts (ECF No. 232-7).)

24 The Court declines, however, to exclude any evidence that Boff had a “fear-
25 based culture,” discouraged the reporting of wrongdoing, or reprimanded employees
26 for raising concerns. (*See* Ex. 4 – Michael Sisk. Dep. Excerpts 55–56 (ECF No. 232-
27 5) (testifying that employees were “suppressed,” and he was told he “wasn’t
28 supposed to talk to the SEC”). This evidence may be relevant to Erhart’s retaliation

1 claims. (*See* ECF No. 192 (setting forth the elements of Erhart’s claims).) *Cf.*
2 *Lawson v. FMR LLC*, 571 U.S. 429, 435 (2014) (explaining that in passing Sarbanes–
3 Oxley, Congress was particularly concerned about a “corporate code of silence,”
4 which discouraged employees from reporting fraudulent behavior not only to the
5 proper authorities, but also even internally). Specifically, BofI’s purported practices
6 go to whether BofI allegedly retaliated against Erhart for reporting believed
7 wrongdoing to his supervisor and regulators. *See* Fed. R. Evid. 404(b)(2) (providing
8 character evidence may be admissible to prove motive or intent); *cf. Houserman v.*
9 *Comtech Telecommunications Corp.*, 519 F. Supp. 3d 863, 871–72 (W.D. Wash.
10 2021) (reasoning evidence of non-parties’ comparable complaints could be
11 admissible to prove intent of the employer to discriminate under Rule 404(b), but the
12 evidence can be excluded under Rule 403 as prejudicial under a fact-based inquiry).
13 In addition, the Court finds this evidence is relevant to BofI’s broad-sweeping
14 countersuit claims and Erhart’s defenses to those claims. (*See* ECF No. 85
15 (discussing Erhart’s statements that he was “fearful that the Bank would delete or
16 alter material information” and that he took steps “in case something happened to
17 [him]”).)

18 The Court turns to the testimony of Cynthia Brickey, which the parties
19 discussed at oral argument. Brickey, who left the Bank in 2013, testified that she
20 believed BofI covered up items from OCC regulators and bank management lied to
21 regulators. Erhart’s allegations regarding the OCC occurred in 2015.

22 Brickey’s testimony about specific prior acts is not admissible to establish BofI
23 engaged in the same conduct while Erhart was an employee. *See* Fed. R. Evid.
24 404(b)(1). If Erhart had knowledge of these events when he encountered comparable
25 conduct in 2015, this evidence could go to whether he reasonably believed BofI was
26 violating the law. (*See* ECF No. 192 (analyzing reasonable belief standard on
27 summary judgment).) But in opposing the Bank’s motion, Erhart failed to establish
28 he was aware of these allegations or interacted with Brickey. (*See* ECF No. 233.)


1 Hence, without a showing from Erhart, the Court grants the Bank’s request to exclude
2 Brickey’s testimony concerning prior specific acts where the Bank allegedly lied or
3 hid information from OCC regulators. *See United States v. Bensimon*, 172 F.3d 1121,
4 1127 (9th Cir. 1999) (noting testimony at trial “may bring facts to the district court’s
5 attention that it did not anticipate at the time of its initial [motion in limine] ruling”).
6 That said, like above, the Court will permit Brickey to testify that Boff discouraged
7 the reporting of wrongdoing or reprimanded employees for raising concerns. (*See*
8 Ex. 5 – Cynthia Brickey Dep. Excerpts 23:22–24 (ECF No. 232-6).)

9 **IV. CONCLUSION**

10 For the foregoing reasons, the Court **GRANTS IN PART** Boff’s Motion in
11 Limine No. 2 to Exclude Inflammatory Evidence that Is Untethered to Erhart’s
12 Claims. (ECF Nos. 215, 232.) The Court grants Boff’s request to exclude testimony
13 about potential sexual harassment, inappropriate jokes, employees being unhappy,
14 and generalized complaints about a hostile or “toxic” work environment. The Court
15 also grants in part the request to exclude Brickey’s testimony. The Court declines,
16 however, to exclude any evidence that Boff had a “fear-based culture,” discouraged
17 the reporting of wrongdoing, or reprimanded employees for raising concerns.

18 **IT IS SO ORDERED.**

19
20 **DATED: January 10, 2022**


Hon. Cynthia Bashant
United States District Judge

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