

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

MARKIE L. FARNHAM,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:13-cv-00305-JDL
)	
WALMART STORES EAST, LP,)	
)	
Defendant.)	

ORDER ON PLAINTIFF’S MOTION FOR A NEW TRIAL

Following an unfavorable jury verdict in her case against defendant Walmart Stores East, LP, plaintiff Markie L. Farnham moves for a new trial pursuant to Federal Rule of Civil Procedure 59(a)(1). ECF No. 110 at 1. Arguments on the motion were heard on June 17, 2015. *See* ECF No. 132. After careful consideration, I deny Farnham’s motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Markie L. Farnham was a pharmacy technician at Walmart’s Calais, Maine store until Walmart terminated her employment in January 2012. *See* ECF No. 1-1 at 1. Farnham sued in July 2013, alleging that Walmart terminated her because of her disability and had failed to accommodate her disability. *Id.* at 1-3. Specifically, Farnham claimed that Walmart would not make modifications to her work conditions following a workplace injury, and then fired her because of her need to take prescription painkillers related to the injury. *See* ECF No. 46 at 9, 13. Walmart denied that any failure to accommodate occurred, and asserted that Farnham was

actually fired for being impaired on the job after misusing her painkillers. *See* ECF No. 42 at 1-2.

A five-day trial took place in March. The jury returned a verdict for Walmart on both of Farnham's claims. ECF No. 107 at 2. Farnham now attacks that verdict, arguing that Walmart's introduction of certain evidence relevant to her claim of wrongful termination merits a new trial. *See* ECF No. 110 at 1.

II. DISCUSSION

A motion for a new trial on the basis of wrongly admitted evidence involves two steps. *See Jones ex rel. United States v. Mass. Gen. Hosp.*, 780 F.3d 479, 493 (1st Cir. 2015). First, the party challenging the verdict must show that evidence was admitted in error at trial. *Id.* Next, the party must show that any error was harmful. *Id.* "An error in the admission of evidence is harmless as long as the reviewing court can say with fair assurance that the jury would in all likelihood have reached an identical verdict had the contested evidence been excluded." *Ira Green, Inc. v. Military Sales & Serv. Co.*, 775 F.3d 12, 20 (1st Cir. 2014). Accordingly, tainted evidence does not necessitate a new trial if it is merely cumulative of properly admitted evidence. *Id.* at 20-21.

A. Error in the Admission of Evidence

Farnham objects to the admission of seven pieces of evidence: (1) a pharmacist's testimony that Farnham exhibited "drug seeking behavior" at work; (2) Walmart's Exhibit 15, notes taken by the store manager during an interview with Farnham; (3) Walmart's Exhibit 10, an e-mail from a pharmacist describing

Farnham’s “drug seeking behavior”; (4) Walmart’s Exhibit 14A, a written statement from one manager to another about Farnham’s behavior; (5) Walmart’s Exhibit 29, a record of Farnham’s prescription refill history; (6) Walmart’s Exhibit 11, another e-mail chain in which the same pharmacist refers to “drug seeking behavior”; and (7) Walmart’s Exhibit 14, another copy of notes from Farnham’s interview with management. ECF No. 110 at 1-2.

After Walmart responded to each of these objections in its memorandum, Farnham conceded in her reply brief that she did not, in fact, object to Exhibit 14, and that the admission of Exhibit 11 – which is largely duplicative of Exhibit 10 – was “harmless[.]” ECF No. 126 at 4-5. Farnham’s remaining objections, then, are to the pharmacist’s testimony and to Exhibits 10, 14A, 15, and 29.

1. Pharmacist Ryan Frost’s Testimony

Farnham objects to pharmacist Ryan Frost’s use of the phrase “drug seeking behavior” on the grounds that the term is “based on scientific, technical, or otherwise specialized knowledge” and so may be used only by a qualified expert, not by a lay witness like Frost. ECF No. 110 at 3 (quoting Fed. R. Evid. 701(c)). At trial, I concluded that the phrase is not the exclusive province of expert testimony. ECF No. 111 at 2. Farnham offers no controlling authority to the contrary. ECF No. 110 at 4-5. Her effort to identify cases where experts have been permitted to employ the phrase notably does not reveal a circumstance in which lay witnesses were prohibited from the same. *See id.*

The fact that Frost was a licensed pharmacist does not preclude him from offering a lay opinion based on his work experience. The same witness may be qualified to provide both lay and expert testimony in a single case. *See United States v. Valdivia*, 680 F.3d 33, 50 (1st Cir. 2012). In addition, “Rule 701 lets in testimony based on the lay expertise a witness personally acquires through experience, often on the job.” *United States v. George*, 761 F.3d 42, 59 (1st Cir. 2014) (citation and quotations omitted).

Here, Frost was not asked whether he concluded that Farnham had engaged in drug-seeking behavior based on the standards of his profession or other scientific criteria. Rather, in both his e-mail and trial testimony, Frost reported Farnham’s actions regarding her prescription and the impression he drew from it based on what he had observed. Frost did not present the phrase as his expert conclusion about Farnham’s state of mind, but as an observation rationally based on his perception. That Frost might have also been qualified to offer an expert opinion on the issues does not bar the introduction of his lay opinion based on personal observation and experience. *See United States v. Habibi*, 783 F.3d 1, 5 (1st Cir. 2015) (concluding that it was not error to question an FBI agent as to the probability of DNA residue being on a gun after it was handled, based on the agent’s experience).

2. Exhibit 15 – Laura Donovan’s Notes

Exhibit 15, notes taken by Laura Donovan, the manager of the Calais Walmart store, during a meeting with Farnham prior to her termination, was admitted as a present sense impression. ECF No. 121 at 2. This exception permits the admission

of what would otherwise be hearsay if it is a “statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.” Fed. R. Evid. 803(1). The notes taken by Donovan described the conversation between Farnham, Chad Tozier, and others, which constitutes an event. Further, the notes were written contemporaneously with the conversation, while Donovan was perceiving the event. *See* ECF No. 131 at 2-3; *see also Kenney v. Floyd*, 700 F.3d 604, 609 (1st Cir. 2012) (the requirements of Rule 803(1) were not met where the out-of-court statement was made one month after the event and was, therefore, “too removed in time to qualify as a present sense impression[.]”). The requirements of Rule 803(1) were satisfied.

Farnham’s arguments to the contrary are unpersuasive.¹ She asserts that written notes cannot qualify for this exception, *see* ECF No. 110 at 8-10, but offers no explanation for the fact that “statement,” as defined in the Federal Rules of Evidence, includes “written assertion.” *See* Fed. R. Evid. 801(a). She cites a treatise for the proposition that the Rule 803(1) exception excludes “narratives,” failing to emphasize that the treatise’s full explanation refers to “[n]arratives *of past events*[.]” ECF No. 110 at 10 (citing 4 Weinstein’s Federal Evidence § 803(1)(01)) (emphasis added). Farnham offers one case in support of her argument, *see* ECF No. 110 at 7-11, which is distinguishable. In *Vitek Sys., Inc. v. Abbott Labs.*, 675 F.2d 190, 194 (8th Cir. 1982), the court found that a handwritten memorandum constituting an employee’s

¹ Farnham also suggests that, apart from the notes themselves being hearsay, the notes contain additional layers of hearsay. ECF No. 110 at 13. At trial, Farnham did not object to any of these layers beyond the notes themselves. ECF No. 121 at 2.

recollection of a meeting was not a present sense impression. There was no evidence, as there is here, that the employee took the notes contemporaneously with the meeting. See ECF No. 131 at 2. Moreover, there is precedent within this circuit for admission of contemporaneous interview notes as a present sense impression. See *United States v. Ferber*, 966 F. Supp. 90, 96-97 (D. Mass. 1997). I find no error in the admission of Exhibit 15.

3. Exhibit 10 – Ryan Frost’s E-mail

I turn next to Walmart’s Exhibit 10, an e-mail from Frost which reports that Farnham exhibited “drug seeking behavior.” The e-mail was admitted under the business record exception to the rule against hearsay. ECF No. 116 at 10-11. Prior to admission, counsel for Walmart elicited the necessary foundation from Frost – that he wrote the e-mail near the time of the activity it described, that his regular practice was to e-mail management whenever anything out of the ordinary occurred in the pharmacy, and that this type of reporting was part of Walmart’s regular business conduct. See Fed. R. Evid. 803(6). Farnham does not adequately demonstrate that the e-mail lacked trustworthiness, see ECF No. 126 at 6, and her attempt to characterize an e-mail written several hours after the events it describes as not “near the time” of the event is unavailing, see *id.* This admission was proper.

4. Exhibit 14A – Amanda Craig’s E-mail

Farnham did not preserve her final hearsay objection – to the admission of Exhibit 14A. When the exhibit was originally offered, Farnham objected that it contained a “chain of e-mails,” but then suggested “if they want to blank out e-mails

before or after, I have no objection.” ECF No. 120 at 16. In response, a redacted copy of the exhibit was prepared and Farnham did not renew her objection to the exhibit. *Id.* at 16-17.

5. Exhibit 29 – Farnham’s Prescription History

Lastly, Farnham protests that Walmart’s Exhibit 29, a copy of Farnham’s prescription history for the period of November 1, 2011 to December 30, 2011, was improperly admitted because it was produced and identified by Walmart before trial but after the deadlines for exchanging trial exhibits and filing motions in limine had expired. ECF No. 110 at 14. Walmart contends that Farnham waived any objection to the exhibit. ECF No. 119 at 14.

At trial, Farnham’s primary objection to Exhibit 29 was that its introduction violated HIPAA, a claim that she does not repeat in her present motion. *See* ECF No. 112 at 11. While acknowledging that Exhibit 29 qualified as a business record for purpose of admissibility, she did briefly mention “surprise,” in addition to HIPAA, as a basis for her objection. *See id.* at 14.² She later failed to renew her HIPAA objection when invited to do so. ECF No. 115 at 2-3 (“Attorney Grief, if you wish to maintain your objection to the exhibit . . . I am going to give you that opportunity’ . . . ‘No, Your Honor . . . I am not going to chase that rabbit down the hole.’”) Although Walmart is not without justification for arguing that the surprise objection was waived, I will err

² “[T]he problem here is surprise. If you have the – if this exhibit was faxed from Pleasant Point Health Center 2/24/15, so the – the earliest we got this, I think was February 25 after we had any opportunity to file a motion in limine. This has never been identified as an exhibit. It’s never been identified in the initial disclosure. It’s never been identified as an exhibit in the pretrial memoranda.”

on the side of treating the surprise objection as preserved. Nonetheless, the objection was without merit.

Walmart provided a copy of its Exhibit 29 on or about February 25, 2015, almost as soon as its counsel received it, *see* ECF No. 110 at 14 and the exhibit was listed in the joint exhibit list filed by the parties with the court prior to trial, *see* ECF No. 97 at 5. The trial commenced on March 2, 2015. Farnham had ample opportunity to review the exhibit and account for it in her trial preparation. Moreover, the passage of the deadline for pretrial motions in limine was no bar to Farnham raising her objection with the court at any time prior to Farnham's trial testimony and Walmart's use of the exhibit. In addition, Farnham could have, but failed to, request a continuance in order to cope with the alleged surprise. *See Portland Natural Gas Transmission Sys. v. 19.2 Acres of Land*, 318 F.3d 279, 283 n.3 (1st Cir. 2003) (noting that "failure to ask for a continuance may be fatal to [a] claim of unfair surprise."); *Szeliga v. General Motors Corp.*, 728 F.2d 566, 568 (1st Cir. 1984) ("[T]he remedy for coping with surprise is not to seek reversal after an unfavorable verdict, but a request for continuance at the time the surprise occurs.").

Farnham has also not demonstrated how she was prejudiced in her trial preparation by her receipt of the exhibit in advance of the trial and prior to her testimony, other than to emphasize that it was harmful in the sense that it supported Walmart's theory of the case. *See Perez-Perez v. Popular Leasing Rental, Inc.*, 993 F.2d 281, 287 (1st Cir. 1993) (noting that a new trial may only be granted on the basis

of unfair surprise if the surprise “actually prejudiced” the movant’s case) (quoting *Conway v. Chem. Leaman Tank Lines, Inc.*, 687 F.2d 108, 111-12 (5th Cir. 1982).

Even if Farnham’s Exhibit 29 had not been produced by Walmart prior to trial, the document would have still have been available for Walmart to impeach Farnham’s testimony about the amount of her prescription drug use. *See* Fed. R. Civ. P. 26(a)(3)(A) (excluding documents used solely for impeachment purposes from the pretrial disclosure of exhibits). In fact, Walmart made extensive use of Farnham’s prescription history in its cross-examination of Farnham to impeach her testimony, without objection from Farnham on the ground of surprise. *See* ECF No. 112 at 2-8. Because Farnham had been cross-examined extensively regarding the contents of Exhibit 29, Walmart’s later introduction of the document as part of its case-in-chief did not prejudice Farnham to any appreciable degree.

In short, there is no basis to find that the timing and manner of Exhibit 29’s production was an unfair surprise.³

B. Whether Any Error was Harmful

Assuming, for the sake of argument, that the evidence to which Farnham objects was all admitted in error, the errors were harmless. The body of evidence in question relates to whether Farnham worked while impaired or whether her

³ At oral argument, Farnham’s counsel suggested that Exhibit 29 should have been produced by Walmart during discovery in response to several of its requests for production of documents. Counsel followed up on this argument with a post-hearing docket submission. *See* ECF No. 133. The argument that the late exchange of an exhibit caused Farnham to suffer unfair surprise is separate and distinct from the argument that Walmart committed a discovery violation by failing to provide a requested document. Prior to oral argument, Farnham had not challenged Exhibit 29 for not having been exchanged in discovery. *See* ECF No. 112 at 12-14. The argument that Walmart was non-responsive to Farnham’s requests for production of documents was not raised at trial, and as such, I consider the argument unpreserved.

termination was based on her disability. The evidence that Farnham protests, however, was far from the only evidence on this issue. In the absence of the objected-to evidence, the jury still would have had before it: Ryan Frost's testimony that Farnham repeatedly asked him to refill her painkiller prescription early; Amanda Craig's testimony that Farnham miss-filled a prescription, was slurring her words, and appeared drug impaired on the job; video evidence of Farnham appearing to miss-fill a prescription while allegedly impaired; Chad Tozier's testimony that he recommended that Farnham be terminated for violating Walmart's drug use policy; Farnham's own admission that it was possible she took too many pills too close together while working; and Walmart's impeachment of Farnham, which demonstrated that, in her testimony on the first day of trial, she had either unwittingly or intentionally misrepresented both the quantity and strength of the painkillers she had been taking, *see* ECF No. 112 at 2-8.

This evidence provides ample support for the jury's finding that Farnham was not discharged because of her disability. In all likelihood, the jury's verdict in favor of Walmart would still have been reached had the evidence to which Farnham objects been excluded.

For all of the foregoing reasons, Farnham's motion for a new trial is **DENIED**.
SO ORDERED.

Dated: June 29, 2015

/s/ Jon D. Levy
U.S. District Judge

United States District Court
District of Maine (Bangor)
Civil Docket No. 1:13-cv-305-JDL

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