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U.S. COURT OF APPEALS

NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

PETE S. GUINAN,

Plaintiff - Appellant,

v.

JOHN E. POTTER, Postmaster General of  
the United States Postal Service,

Defendant - Appellee.

No. 07-56207

D.C. No. CV-05-08869-VBF

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Valerie Baker Fairbank, District Judge, Presiding

Argued and Submitted December 11, 2008  
Pasadena, California

Before: FARRIS and WARDLAW, Circuit Judges, and SCHWARZER,\*\* District  
Judge.

Following an adverse jury verdict in a Title VII retaliation suit, Pete Guinan  
appeals the district court's exclusion of the testimony of seven witnesses and of a

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

\*\* The Honorable William W Schwarzer, Senior United States District  
Judge for the Northern District of California, sitting by designation.

Notice documenting an Equal Employment Opportunity Commission (“EEOC”) finding of discrimination at Guinan’s workplace. We review the district court’s evidentiary rulings for abuse of discretion. *Obrey v. Johnson*, 400 F.3d 691, 694 (9th Cir. 2005). We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

1. The district court did not err in excluding the testimony of the seven witnesses as irrelevant under Federal Rules of Evidence 401 and 402 and substantially more prejudicial than probative under Rule 403. The court properly required that “similarly situated” employee-witnesses “have similar jobs and display similar conduct” to the plaintiff. *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003). It properly excluded the testimony of C. W. Ash, T. N. Dang, T. J. McCarthy, and J. Bell when Guinan was unable to proffer that they engaged in misconduct of comparable seriousness to Guinan’s. Further, the district court did not violate Federal Rule of Evidence 103 when it requested that Guinan proffer “the substance and purpose of the testimony” of those witnesses and of J. Deveau, W. Montgomery, and C. Braden, *Heyne v. Caruso*, 69 F.3d 1475, 1481 (9th Cir. 1995), and concluded that the proffered evidence did not meet the admissibility threshold of Rules 401, 402, and 403.

Nor did the court improperly establish a rule of “*per se* inadmissib[ility]” for “testimony by nonparties alleging discrimination at the hands of supervisors . . .

who played no role in the adverse employment decision,” in contravention of *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 1143 (2008). To the contrary; the court allowed Guinan multiple opportunities to make an offer of proof as to each witness’s individual testimony.

2. Because we address Guinan’s arguments with respect to the exclusion of testimony on the merits, and because we would not benefit from allowing the United States Postal Service to respond to the specific authorities cited in Guinan’s Reply Brief, we deny Guinan’s Motion to Treat His Reply Brief as a Supplemental Brief.

3. Guinan has waived on appeal his argument that the district court erred in excluding a Notice to Employees of an EEOC finding of discrimination at Guinan’s workplace. Guinan fails to “discuss[ the issue] in the body of the opening brief,” *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996), and does not cite “to the authorities and parts of the record” necessary to explain why the Notice should have been admitted, Fed. R. App. P. 28(a)(9)(A).

**AFFIRMED.**