MOTIONS

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RULES

Fed. R. Evid. 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Fed. R. Evid. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) **Character Evidence Generally**. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

> (1) **Character of Accused**. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) **Character of Alleged Victim**. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) **Character of Witness**. Evidence of the character of a witness, as provided in 607, 608, and 609.

(b) **Other Crimes, Wrongs, or Acts**. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 405. Methods of Proving Character

(a) **Reputation or Opinion**. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) **Specific Instances of Conduct**. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Fed. R. Evid. 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

CASES

Hitt v. Connell, 301 F.3d 240 (5th Cir. 2002)

[243] EDITH H. JONES, Circuit Judge:

In this 42 U.S.C. § 1983 action, the jury found that Bexar County, Texas, Constable Jerry Connell fired deputy constable Harold Merritt Hitt in retaliation for Hitt's exercise of his First Amendment right to freedom of association. The jury awarded Hitt $ 300,000 in compensatory damages, three-fourths of which was for non-pecuniary harms like "mental and emotional distress". The district court subsequently awarded Hitt approximately $ 88,500 in attorney's fees and costs pursuant to 42 U.S.C. § 1988. Connell has appealed both the judgment and the award of attorney's fees.

We hold principally that the Bexar County Civil Service Commission's decision upholding Hitt's termination did not break the causal connection between the protected activity and the adverse employment action, and Connell was not entitled to qualified immunity. However, Hitt introduced insufficient evidence to support an award of nonpecuniary damages, so [244] that a portion of his damages must be vacated and the attorney's fee award remanded for reconsideration.

I. BACKGROUND

Harold Merritt Hitt was employed as a deputy constable in precinct 2 of Bexar County from 1993 until March 1997, when he was fired by Constable Connell. Hitt alleged, and a jury found, that his employment was terminated because Connell disapproved of Hitt's involvement with two affiliated labor unions, the Alamo Area Peace Officers' Association and the Texas Conference of Police and Sheriffs ("TCOPS").

The dispute between Connell and Hitt began in October 1995 when Connell ordered his deputies to start reporting to the office 15 minutes before their shifts were scheduled to begin. Deputy Hitt, who was serving as the secretary of the local union, wrote to TCOPS for advice about getting paid for these extra 15 minutes. Connell learned of Hitt's letter and called a general meeting of his deputies, one of whom surreptitiously tape-recorded what was said. Connell reiterated that his deputies would not be paid for the 15 minutes before their shifts, but his main

point was that salary grievances should not be aired outside the constable's office. Connell suggested that deputies who continued to complain to the union were in danger of losing their commissions.

Three deputies -- Ray Mullins, Joe Algueseva, and Robert Whitney -- testified at trial that Constable Connell spoke to each of them privately not long after this meeting and told them that he would not tolerate union activity in his office. Each deputy testified that Connell referred specifically to Hitt and said that he intended to fire Hitt because he was a "troublemaker." One of the deputies, Ray Mullins, served as president of the local union. Mullins tape-recorded a conversation in which Connell said several times that they would have a "running gun battle" if Mullins did not quit the union. Connell threatened to "play dirty" and said he would start by taking away Mullins's $ 500 monthly car allowance. During this recorded conversation, Connell observed in passing that he could fire Hitt with impunity.

Connell fired Hitt in March 1997. Connell testified that he harbored no ill will toward the deputies who were active in the union. Moreover, Connell insisted that Hitt would have lost his job regardless of his union activity because Hitt had made a "bomb threat" in a January 1997 telephone conversation with his immediate supervisor, Deputy Robert North.

The gist of the telephone conversation is not in dispute. Hitt was angry that North had assigned a first-year constable to patrol traffic in a certain neighborhood. In his account of the conversation, which was written approximately three weeks after the telephone conversation, Deputy North wrote:

Sgt. Hitt stated, was I trying to get him (Sgt. Hitt) in trouble or fired. Sgt. Hitt stated, he knew what was going on and that I (Sgt. North) was fixing to be in the war. . . .

Sgt. Hitt stated, that when the bomb went off with Horn (Asst. Chief Horn) that it might get my (Sgt. North) legs also.

As Sgt. Hitt and myself (Sgt. North) are both Vietnam veterans, it could have meant that the bomb, when it went off, [245] would take out Asst. Chief Horn, and possibly my (Sgt. North) legs, as we both had seen in Vietnam.

This statement could have only meant to be taken figuratively. But I don't know this for sure. Sgt. Hitt's tone of voice was filled with a lot of anger.

Hitt concedes that Deputy North's account of the conversation is generally accurate. Hitt argues, however, that violent figures of speech were used regularly around the office (e.g., Connell's "running gun battle") and that "the war" and "the bomb" referred to an ongoing criminal investigation of the constable's department.

Sergeant Gerardo De Los Santos of the Texas Rangers testified at trial that he had been investigating the constable's office since Deputy Mullins had contacted him in December 1995. At the time of the telephone conversation between Hitt and North, Sergeant De Los Santos was completing his investigation and had decided that there was sufficient evidence of retaliation and discrimination to file a report with the Bexar County District Attorney's Office. (He interviewed and took statements from Hitt in January and February of 1997, and then filed his report in late February.)

Deputy North admitted at trial that he had never really believed that Hitt was making a legitimate bomb threat. Consequently, North waited three weeks before informing Constable Connell and Chief Deputy Chuck Horn of the conversation, and one reason why he submitted the report was that he had been ordered "to look for things to write Hitt up about." Then, after North submitted the memorandum quoted above, Chief Deputy Horn instructed North to revise his memo and omit any suggestion that Hitt's reference to a "bomb" should be taken figuratively.

In February 1997, Constable Connell delivered a proposed notice of termination to Hitt. Citing the telephone conversation between Hitt and North, Connell wrote that such "unprofessionalism . . . cannot and will not be tolerated." On March 5, Connell informed Hitt that his employment was terminated. Hitt appealed his dismissal to the Bexar County Civil Service Commission, but the commissioners who heard the appeal voted to uphold Constable Connell's decision.

Hitt filed this 42 U.S.C. § 1983 action in February 1999. Before trial, the district court dismissed all claims except for Hitt's free speech and free association claims against Connell in his individual capacity. Then, at the close of evidence, the district court granted judgment as a matter of law for Connell on the free speech claim. The jury returned a verdict for Hitt on the First Amendment association claim and awarded him $ 300,000 in compensatory damages.

The district court entered judgment for Hitt and, pursuant to 42 U.S.C. § 1988, awarded Hitt $88,487.94 in attorney's fees and expenses. Connell's appeals of both awards have been consolidated.

II. DISCUSSION

The First Amendment protects a public employee's right to associate with a union. As this court has stated,

This right of association encompasses the right of public employees to join unions and the right of their unions to engage in advocacy and to petition government in their behalf. Thus, the first amendment is violated by state action whose purpose is either to intimidate public employees from joining a union or from taking an active part in its affairs or to retaliate against those who do. Boddie v. City of Columbus, Miss., 989 F.2d 745, 749 (5th Cir. 1993), (quoting Professional Ass'n of College Educators v. El [246] Paso County Community College Dist., 730 F.2d 258, 262 (5th Cir. 1984) (citations omitted)).

To prevail on his First Amendment retaliation claim, Hitt had to show that (1) he suffered an adverse employment action, (2) his interest in "associating" outweighed the constable's interest in efficiency, and (3) his protected activity was a substantial or motivating factor in the adverse employment action. Breaux v. City of Garland, 205 F.3d 150, 156, 157 n.12 (5th Cir. 2000); Boddie, 989 F.2d at 747. Connell's principal arguments on the merits focus on the third element of causation. He contends that Hitt's participation in union activity was not a motivating factor in his discharge because the county civil service commissioners (who had no retaliatory animus) actually made the decision or, alternatively, Connell fired Hitt because of the bomb threat. The jury concluded, however, that Constable Connell made the decision to fire Hitt and that he did so in retaliation for Hitt's protected activity. Their verdict may be overturned only if, "after viewing the trial record in the light most favorable to the verdict, there is no legally sufficient evidentiary basis for a reasonable jury to have found for the prevailing party." Mato v. Baldauf, 267 F.3d 444, 450-51 (5th Cir. 2001) (quotations and citations omitted).

A. Statute of Limitations

Connell's contention that this suit was time-barred is easily rejected. While Texas's two-year statute of limitations applied to Hitt's constitutional injury claims, Piotrowski v. City of Houston, 237 F.3d 567, 576 (5th Cir. 2001), the date a § 1983 claim accrues is governed by federal, not

state law. The limitations period begins to run when the plaintiff "becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." Helton v. Clements, 832 F.2d 332, 335 (5th Cir. 1987).

Connell tries to argue that Hitt's retaliation claim accrued at some time before his March 1997 termination, either when Hitt "felt his job was threatened" at the October 1995 office meeting; or when Hitt acknowledged in a December 1995 memo that he was afraid he was going to be fired; or when Hitt received a proposed notice of termination on February 14, 1997. If the cause of action accrued on any of these dates, then Hitt's lawsuit -- filed on February 16, 1999 -- would not be timely.

But neither the perception of a threat to one's job, nor fear of being fired, nor even the proposed notice of firing constitutes an actionable *injury*. In this context, the injury is unlawful retaliation resulting in an "adverse employment action," such as a discharge, demotion, or formal reprimand. See Breaux, 205 F.3d at 157-58. Hitt was injured, and his cause of action accrued, when his employment was terminated on March 5, 1997. The lawsuit was timely.

[247] B. The Civil Service Commission

The second (and most difficult) question in this case is the legal effect of the Bexar County Civil Service Commission's decision upholding the termination of Hitt's employment. Connell recognized the importance of this fact, but he vacillated between characterizing the commission, on one hand, as a quasi-judicial body whose findings of fact were entitled to preclusive effect in this § 1983 action; and, on the other, as an executive board, which has the final decision-making power with respect to all personnel matters in Bexar County.

In his motion for summary judgment, Connell urged the court to give issue or claim preclusive effect to the commission's finding that Hitt made a credible bomb threat that warranted dismissal. As Connell pointed out, the Supreme Court has "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." Astoria Fed. Sav. & Loan Ass'n. v. Solimino, 501 U.S. 104, 107, 111 S. Ct. 2166, 2169, 115 L. Ed. 2d 96 (1991). Further, federal courts must ordinarily give a state agency's decision "the same preclusive effect to which it would be entitled in the state's courts." Univ. of Tennessee v. Elliott, 478 U.S. 788, 799, 106 S. Ct. 3220, 3226, 92 L. Ed. 2d 635 (1986). This court has implied, however, that federal rules of claim preclusion may apply to determine whether § 1983 claims are barred from litigation in federal court by the outcome of prior unreviewed state administrative adjudications. Frazier v. King, 873 F.2d 820, 823-25 (5th Cir. 1989). The magistrate judge found, in a ruling adopted by

the district court, that the civil service commission's decision was entitled neither to claim nor issue preclusive effect on Hitt's subsequent § 1983 action. Whether those conclusions were correct or not is of no moment, since Connell has not appealed them.

Instead, the argument Connell ultimately adopted at trial and now pursues on appeal is that the Bexar County Civil Service Commission -- rather than Constable Connell -- is the final decision-maker with respect to employment decisions in the constables' offices. It is beyond dispute that the commissioners conducted an independent inquiry into Hitt's discharge and were not motivated by any improper motive. Consequently, if the commission is the final decision-maker, then the causal [248] connection between Hitt's constitutionally protected activity and the adverse employment action is broken, and Connell may not be held liable. See Mato v. Baldauf, 267 F.3d 444, 450 (5th Cir. 2001); Long v. Eastfield College, 88 F.3d 300, 307 (5th Cir. 1996).

In most "causal connection" cases, the determinative question is whether the discriminatory or retaliatory motive of a subordinate employee may be imputed to the titular decision-maker. Id. A decision-maker may serve as the conduit of the subordinate's improper motive, for example, if he merely "rubber-stamps" the recommendation of a subordinate. This case, however, poses the logically antecedent question how to identify the official decision-maker.

The official or formal decision-maker may often be identified by a rule, e.g., an employee handbook or a company organizational chart. For public entity employers, it is appropriate to look to the statutory authority of the official or board that is alleged to have made the decision. Unlike a Texas school board, for example, a county civil service commission does not have express statutory responsibility to act as the final decision-maker with respect to individual employment decisions. The relevant statute requires only that each civil service commission "adopt, publish, and enforce rules" regarding the selection of county employees; promotions, seniority, and tenure; layoffs and dismissals; disciplinary actions; grievance procedures; and similar matters. TEX. LOCAL GOVT. CODE § 158.009(a). But the statute imposes no superintending responsibility over individual employment decisions. While it is conceivable that a commission could promulgate a rule that no employment decision becomes final until approved by the commission, no such rule is present here.

Under its governing rules, the commission is authorized to review and approve, reverse or modify an adverse employment decision if an employee elects to appeal it. But the mere authority to review an employment decision is not decisive. The commission became involved as an adjudicative tribunal after Hitt chose to appeal his notice of termination. Its task was to review Constable Connell's decision for conformity with applicable law and regulations, not to initiate Connell's action or generally superintend Connell's employment practices.

In light of these procedures, Connell's reliance on the Eleventh Circuit's decision in Stimpson v. City of Tuscaloosa, 186 F.3d 1328 (11th Cir. 1999), is misplaced. In that Title VII retaliation case, Stimpson, a police officer, alleged that the City of Tuscaloosa was motivated unlawfully when it fired her. The Eleventh Circuit emphasized three times in its brief opinion that Alabama law unequivocally deprives the city of power to discharge a police officer and that the authority to terminate employment rests solely with a statutorily-created civil service board. Id. at 1330, 1331, 1332. Stimpson thus held that the City of Tuscaloosa could not be liable for retaliation because the civil service board was, as a matter of law, the actual decision-maker, and there was no evidence that the board was a mere conduit for the city's supposed discriminatory motive.

Just as clearly, the Bexar County Civil Service Commission did not assume final decisionmaking authority. The commission did not *finalize* a decision that Constable Connell had merely recommended or proposed. Although the commission [249] did conduct its own review of Hitt's termination, it did so in a quasi- judicial capacity.

C. Qualified Immunity and *Mt. Healthy*

In the third issue raised on appeal, Constable Connell seeks to avail himself of the principle that a public employer may escape liability by proving that it would have taken the same adverse employment action "even in the absence of the protected conduct." Gerhart v. Hayes, 217 F.3d 320, 321 (5th Cir. 2000) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)). Connell contends that he is entitled to qualified immunity because an objectively reasonable officer would have believed that he could lawfully terminate Hitt's employment -- notwithstanding Hitt's involvement with the union -- because of the bomb threat against Deputy North and Chief Deputy Horn. Cf. Gonzales v. Dallas County, Texas, 249 F.3d 406, 412 (5th Cir. 2001).

Connell fails to apprehend the significance of the jury finding that he fired Hitt because of Hitt's union membership and not because of the bomb threat. The jury was instructed on Connell's Mt. Healthy defense: In order to find a violation of Hitt's rights, they had to decide, *inter alia*, whether the defendant has shown by a preponderance of the evidence that the action he took against the plaintiff was for other reasons, regardless of whether or not the plaintiff exercised his protected association activity. If you find that the defendant would have taken the same action against the plaintiff for reasons apart from the association activity, then your verdict should be for the defendant.

The jury verdict rejects Connell's explanation of the employment decision. Their factual finding is supported in the record. See Boddie v. City of Columbus, Miss., 989 F.2d 745, 748 (5th Cir. 1993). No reasonable officer could have concluded that firing Hitt because of his union affiliation was legally permissible. Id. Further, because the jury discredited Connell's explanation, the basis for his qualified immunity contention was vitiated.

D. Evidentiary Rulings

Connell contends that the district court committed reversible error in admitting into evidence (1) testimony regarding disciplinary actions that Connell took against Mullins and other deputies and (2) the audiotape recordings of several meetings and conversations involving Connell. We review the district court's decision to admit this evidence for an abuse of discretion. United States v. Vega, 221 F.3d 789, 803 (5th Cir. 2000).

Other deputies, including Ray Mullins, were allowed to testify that they were discharged or otherwise discriminated against because of their participation in the union. Connell contends that admitting this evidence violated Federal Rules of Evidence 404 and 403, inasmuch as the other deputies' testimony was used "to show that Connell's actions with other employees supposedly proves [sic] his conduct in Hitt's case is improper"; and, even assuming this testimony was admissible, the danger of unfair prejudice outweighed its probative value. This testimony was admissible, however, as proof of Connell's [250] motive in firing Hitt. FED. R. EVID. 404(b). Moreover, the testimony was admissible to impeach Connell's statements on multiple occasions that he was "a union man" and that he had no animus against TCOPS or any other police union. The district court did not abuse its discretion in admitting this evidence.

Connell's second argument is that the district court erred in admitting two audiotapes (as well as transcripts of those tapes) that were not properly authenticated. We disagree. Both deputies who recorded Connell's statements testified about how they made the recordings, and Connell does not dispute their identification of his voice on the tapes. Connell has not produced sufficient evidence to cast doubt on the reliability of the tapes or the transcripts prepared from them.

E. Compensatory Damages

Connell challenges the jury's award of $ 300,000 in compensatory damages as excessive because Hitt presented little or no evidence of his nonpecuniary damages. We agree.

The verdict form did not separate pecuniary and non-pecuniary damages. However, during his closing argument, Hitt's attorney argued that lost earnings, both past and future, amounted to $76,000. Hitt's attorney then explained the jury question on damages:

Interrogatory Number 3 is the money issue. . . I think you start there with the basic lost income of $76,000, and then whatever you ladies feel the loss of retirement, loss of job satisfaction, worry about no job, embarrassment within the law enforcement field. What's all that worth in addition to the $76,000? I'll leave that to you. But it should be a reasonably large sum of money.

Based on this representation to the jury, there is no plausible alternative but that the jury awarded Hitt $ 224,000 in non-pecuniary damages for mental anguish, loss of job satisfaction and prestige, and embarrassment.

The question, therefore, is whether Hitt's evidence of non-pecuniary damages is legally sufficient to warrant an award of $ 224,000. Our review of non-pecuniary damages is for abuse of discretion. Migis v. Pearle Vision, Inc., 135 F.3d 1041, 1046 (5th Cir. 1998).

This court has articulated in detail the kind of evidence needed to support compensatory damages for mental anguish or emotional distress. See, e.g., Vadie v. Mississippi State Univ., 218 F.3d 365, 376 (5th Cir. 2000); Brady v. Fort Bend County, 145 F.3d 691, 718-20 (5th Cir. 1998); Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 940 (5th Cir. 1996). The same principles would logically apply to other nonpecuniary types of damages such as those urged by Hitt. For starters, we have emphasized that "hurt feelings, anger and frustration are part of life," and are not the types of emotional harm that could support an award of damages. Patterson, 90 F.3d at 940. The plaintiff must instead present *specific* evidence of emotional damage: "There must be a 'specific discernable injury to the claimant's emotional state,' proven with evidence regarding the 'nature and extent' of the harm." Brady, 145 F.3d at 718 (quoting Patterson, 90 F.3d at 938, 940). To meet this burden, a plaintiff is not absolutely required to submit corroborating testimony (from a spouse or family member, for example) or medical or psychological evidence. Brady, 145 F.3d at 718, 720. The plaintiff's own testimony, standing alone, may be sufficient to prove mental damages but only if the testimony is "particularized and extensive" enough to [251] meet the specificity requirement discussed above: "'Neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a constitutional violation occurred supports an award of compensatory damages.'" Brady, 145 F.3d at 720, 718 (quoting Price v. City of Charlotte, 93 F.3d 1241, 1254 (4th Cir. 1996)).

Hitt did not satisfy these standards. The record is devoid of any corroborating evidence with respect to Hitt's emotional distress or other elements of nonpecuniary damage. There is no

medical evidence, no testimony from family members or co- workers, no evidence of physical manifestations of distress. In sum, all the evidence that the jury heard was Hitt's testimony that his discharge was emotionally trying. I was depressed. I was out of work. I was embarrassed because it never should have happened. And it made me very defensive in terms of applying for jobs and having to go through and explain, if it got to that point what had gone on and why I was out looking for work.

I've been around law enforcement in Bexar County for a number of years. And people ask you, hey, what's going on. You know, how come you got fired. It's kind of a blight on your reputation, and it does affect you emotionally.

At that point, Hitt's attorney turned to the question of lost income. Aside from a few other scattered statements, the quoted testimony is all the evidence of mental anguish that Hitt presented.

Our conclusion in Brady applies equally well to this case: The plaintiff's testimony is "vague, conclusory, and uncorroborated . . . . [and] cannot legally support mental anguish damages." Brady, 145 F.3d at 720. The district court thus abused its discretion in entering judgment for Hitt in the amount of $300,000. The evidence presented at trial supports the $76,000 in damages for lost income but not the remaining $224,000 in non-pecuniary damages.

F. Attorney's fees

In a consolidated appeal, Connell challenges the district court's decision to award attorney's fees and expenses in the amount of $ 88,487.94 to Hitt's attorney. See 42 U.S.C. § 1988. Appellate review of this award would have been hampered in any event by appellant's apparent failure to include the district court decision in the appellate record. But because we have substantially reduced the judgment, it is prudent to remand the fee award for reconsideration. We express no opinion on the award.

III. CONCLUSION

In Cause No. 01-50117, we AFFIRM the judgment of liability, but VACATE the award of damages and REMAND with Instructions to enter judgment for $ 76,000. In Cause No. 01-51010, the district court's judgment awarding attorney's fees is VACATED and REMANDED for reconsideration in light of this opinion.

Huddleston v. United States, 415 U.S. 814 (1974).

[***777] [*682] [**1497] CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[***LEdHR1A] [1A] Federal Rule of Evidence 404(b) provides:

"Other crimes, wrongs, or acts. -- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for [***778] other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

This case presents the question whether the district court must itself make a preliminary finding that the Government has proved the "other act" by a preponderance of the evidence before it submits the evidence to the jury. We hold that it need not do so.

Petitioner, Guy Rufus Huddleston, was charged with one count of selling stolen goods in interstate commerce, 18 U. S. C. § 2315, and one count of possessing stolen property in interstate commerce, 18 U. S. C. § 659. The two counts related to two portions of a shipment of stolen Memorex video cassette tapes that petitioner was alleged to have possessed and sold, knowing that they were stolen.

The evidence at trial showed that a trailer containing over 32,000 blank Memorex video cassette tapes with a manufacturing cost of $ 4.53 per tape was stolen from the Overnight Express yard in South Holland, Illinois, sometime between April 11 and 15, 1985. On April 17, 1985, petitioner contacted Karen Curry, the manager of the Magic Rent-to-Own [*683] in Ypsilanti, Michigan, [**1498] seeking her assistance in selling a large number of blank Memorex video cassette tapes. After assuring Curry that the tapes were not stolen, he told her he wished to sell them in lots of at least 500 at $ 2.75 to $ 3 per tape. Curry subsequently arranged for the sale of a total of 5,000 tapes, which petitioner delivered to the various purchasers -- who apparently believed the sales were legitimate.

There was no dispute that the tapes which petitioner sold were stolen; the only material issue at trial was whether petitioner knew they were stolen. The District Court allowed the Government to introduce evidence of "similar acts" under Rule 404(b), concluding that such evidence had "clear relevance as to [petitioner's knowledge]." App. 11. The first piece of similar act evidence offered by the Government was the testimony of Paul Toney, a record store owner. He testified that in February 1985, petitioner offered to sell new 12" black and white televisions for $ 28 a piece. According to Toney, petitioner indicated that he could obtain several thousand of these televisions. Petitioner and Toney eventually traveled to the Magic Rent-to-Own, where Toney purchased 20 of the televisions. Several days later, Toney purchased 18 more televisions.

The second piece of similar act evidence was the testimony of Robert Nelson, an undercover FBI agent posing as a buyer for an appliance store. Nelson testified that in May 1985, petitioner offered to sell him a large quantity of Amana appliances -- 28 refrigerators, 2 ranges, and 40 icemakers. Nelson

agreed to pay $ 8,000 for the appliances. Petitioner was arrested shortly after he arrived at the parking lot where he and Nelson had agreed to transfer the appliances. A truck containing the appliances was stopped a short distance from the parking lot, and Leroy Wesby, who was driving the truck, was also arrested. It was determined that the appliances had a value of approximately $ 20,000 and were part of a shipment that had been stolen.

[*684] Petitioner testified that the Memorex [***779] tapes, the televisions, and the appliances had all been provided by Leroy Wesby, who had represented that all of the merchandise was obtained legitimately. Petitioner stated that he had sold 6,500 Memorex tapes for Wesby on a commission basis. Petitioner maintained that all of the sales for Wesby had been on a commission basis and that he had no knowledge that any of the goods were stolen.

In closing, the prosecution explained that petitioner was not on trial for his dealings with the appliances or the televisions. The District Court instructed the jury that the similar acts evidence was to be used only to establish petitioner's knowledge, and not to prove his character. The jury convicted petitioner on the possession count only.

A divided panel of the United States Court of Appeals for the Sixth Circuit initially reversed the conviction, concluding that because the Government had failed to prove by clear and convincing evidence that the televisions were stolen, the District Court erred in admitting the testimony concerning the televisions. 802 F.2d 874 (1986). [1] The panel subsequently granted rehearing to address the decision in *United States* v. *Ebens*, 800 F.2d 1422 (CA6 1986), in which a different panel had held: "Courts may admit evidence of prior bad acts if the proof shows by a preponderance of the evidence that the defendant did in fact commit the act." *Id*., at 1432. On rehearing, the court affirmed the conviction. "Applying the preponderance of the evidence standard adopted in *Ebens*, we cannot say that the district court abused its discretion in admitting evidence of the similar acts in question here." 811 F.2d 974, 975 (1987) *(per curiam)*. The court noted that the evidence concerning the televisions [**1499] was admitted for a proper purpose and that the probative value of this evidence was not outweighed by its potential prejudicial effect.

1 "The government's only support for the assertion that the televisions were stolen was [petitioner's] failure to produce a bill of sale at trial and the fact that the televisions were sold at a low price." 802 F.2d, at 876, n. 5.

[*685] [***LEdHR1B] [1B]We granted certiorari, 484 U.S. 894 (1987), to resolve a conflict among the Courts of Appeals as to whether the trial court must make a preliminary finding before "similar act" and other Rule 404(b) evidence is submitted to the jury. [2] We conclude that [***780] such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.

2 The First, Fourth, Fifth, and Eleventh Circuits allow the admission of similar act evidence if the evidence is sufficient to allow the jury to find that the defendant committed the act. *United States* v. *Ingraham*, 832 F.2d 229, 235 (CA1 1987); *United States* v. *Martin*, 773 F.2d 579, 582 (CA4 1985); *United States* v. *Beechum*, 582 F.2d 898, 914 (CA5 1978) (en banc), cert. denied, 440 U.S. 920 (1979); *United States* v. *Dothard*, 666 F.2d 498, 502 (CA11 1982). Consistent with the Sixth Circuit, the Second Circuit prohibits the introduction of similar act evidence unless the trial court finds by a preponderance of the evidence that the defendant committed the act. *United States* v. *Leonard*, 524 F.2d 1076, 1090-1091 (CA2 1975). The Seventh, Eighth, Ninth, and District of Columbia Circuits require the Government to prove to the court by clear and convincing evidence that the defendant committed the similar act. *United States* v. *Leight*, 818 F.2d 1297, 1302 (CA7), cert. denied, 484 U.S. 958 (1987); *United States* v. *Weber*, 818 F.2d 14 (CA8 1987); *United States* v. *Vaccaro*, 816 F.2d 443, 452 (CA9), cert denied *sub nom.* *Alvis* v. *United States*, 484 U.S. 914 (1987); *United States* v. *Lavelle*, 243 U. S. App. D. C. 47, 57, 751 F.2d 1266, 1276, cert. denied, 474 U.S. 817 (1985).

[***LEdHR1C] [1C] [***LEdHR2A] [2A] [***LEdHR3A] [3A] Federal Rule of Evidence 404(b) -- which applies in both civil and criminal cases -- generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge. Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct. The actor in the instant case was a criminal defendant, and the act in question was "similar" to the one with which he was charged. Our use of these terms [*686] is not meant to suggest that our analysis is limited to such circumstances.

[***LEdHR2B] [2B] [***LEdHR3B] [3B] [***LEdHR4A] [4A]Before this Court, petitioner argues that the District Court erred in admitting Toney's testimony as to petitioner's sale of the televisions. [3] The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character. The Government's theory of relevance was that the televisions were stolen, and proof that petitioner had engaged in a series of sales of stolen merchandise from the same suspicious source would be strong evidence that he was aware that each of these items, including the Memorex tapes, was stolen. [4] As such, the sale of the televisions was a "similar act" only if the televisions were stolen. Petitioner acknowledges that this evidence was admitted for the proper purpose of showing his knowledge that the Memorex tapes were stolen. He asserts, however, that the evidence should not have been admitted because the Government failed to prove to the District Court that the televisions were in fact stolen.

3 Petitioner does not dispute that Nelson's testimony concerning the Amana appliances was properly admitted under Rule 404(b).

[***LEdHR4B] [4B]

4 The Government also argues before this Court that the evidence concerning the televisions is relevant even if the jury could not conclude that the sets were stolen. We have found nothing in the record indicating that this theory was suggested to or relied upon by the courts below, and in light of our ruling, we need not address this alternative theory.

Petitioner argues from the premise that evidence of similar acts has a grave potential for causing improper prejudice. For instance, the jury may choose to punish [**1500] the defendant for the similar rather than the charged act, or the jury may infer that the defendant is an evil person inclined to violate the law. Because of this danger, petitioner maintains, the jury ought not to be exposed to similar act evidence until the trial court has heard the evidence and made a determination under Federal Rule of Evidence 104(a) that the defendant [*687] committed the similar act. Rule 104(a) provides that "preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)." According to petitioner, the trial court must make this preliminary [***781] finding by at least a preponderance of the evidence. [5]

5 In his brief, petitioner argued that the Government was required to prove to the trial court the commission of the similar act by clear and convincing proof. At oral argument, his counsel conceded that such a position is untenable in light of our decision last Term in *Bourjaily* v. *United States*, 483 U.S. 171 (1987), in which we concluded that preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard. Tr. of Oral Arg. 12. Petitioner now asserts that although the Sixth Circuit correctly held that the Government must prove the similar act by preponderant evidence before it is admitted, the court erred in applying that test to these facts. We consider first what preliminary finding, if any, the trial court must make before letting similar acts evidence go to the jury.

[***LEdHR1D] [1D] [***LEdHR5] [5]We reject petitioner's position, for it is inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b). Article IV of the Rules of Evidence deals with the relevancy of evidence. Rules 401 and 402 establish the broad principle that relevant evidence -- evidence that makes the existence of any fact at issue more or less probable -- is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice." Rules 404 through 412 address specific types of evidence that have generated problems. Generally, these latter Rules do not flatly prohibit the introduction of such evidence but instead limit the purpose for which it may be introduced. Rule 404(b), for example, protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character. The text contains no intimation, however, that any preliminary showing is necessary before such evidence may be [*688]

introduced for a proper purpose. If offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403.

[***LEdHR1E] [1E]Petitioner's reading of Rule 404(b) as mandating a preliminary finding by the trial court that the act in question occurred not only superimposes a level of judicial oversight that is nowhere apparent from the language of that provision, but it is simply inconsistent with the legislative history behind Rule 404(b). The Advisory Committee specifically declined to offer any "mechanical solution" to the admission of evidence under 404(b). Advisory Committee's Notes on Fed. Rule Evid. 404(b), 28 U. S. C. App., p. 691. Rather, the Committee indicated that the trial court should assess such evidence under the usual rules for admissibility: "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availibility of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." *Ibid*.; see also S. Rep. No. 93-1277, p. 25 (1974) ("It is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, *i. e*. prejudice, confusion or waste of time").

Petitioner's suggestion that a preliminary finding is necessary to protect the defendant from the potential for unfair prejudice is also belied by the Reports of the House of Representatives [***782] and the Senate. The House made clear that the version of Rule 404(b) which became law was [**1501] intended to "place greater emphasis on admissibility than did the final Court version." H. R. Rep. No. 93-650, p. 7 (1973). The Senate echoed this theme: "The use of the discretionary word 'may' with respect to the admissibility of evidence of crimes, wrongs, or other acts is not intended to confer any arbitrary discretion on the trial judge." S. Rep. No. 93-1277, at 24. Thus, Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence [*689] as it was with ensuring that restrictions would not be placed on the admission of such evidence.

[***LEdHR1F] [1F] [***LEdHR6] [6] [***LEdHR7] [7] [***LEdHR8A] [8A]We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a). [6] This is not to say, however, that the Government may parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo. Evidence is admissible under Rule 404(b) only if it is relevant. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U. S. C. App., p. 688. In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. See *United States* v. *Beechum*, 582 F.2d 898, 912-913 (CA5 1978) (en banc). In the instant case, the evidence that petitioner was selling the televisions was relevant under the Government's theory only if the jury could reasonably find that the televisions were stolen.

[***LEdHR8B] [8B]

6 Petitioner also suggests that in performing the balancing prescribed by Federal Rule of Evidence 403, the trial court must find that the prejudicial potential of similar acts evidence substantially outweighs its probative value unless the court concludes by a preponderance of the evidence that the defendant committed the similar act. We reject this suggestion because Rule 403 admits of no such gloss and because such a holding would be erroneous for the same reasons that a preliminary finding under Rule 104(a) is inappropriate. We do, however, agree with the Government's concession at oral argument that the strength of the evidence establishing the similar act is one of the factors the court may consider when conducting the Rule 403 balancing. Tr. of Oral Arg. 26.

[***LEdHR9A] [9A]Such questions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b). *Beechum, supra*, at 912-913; see also E. Imwinkelried, Uncharged Misconduct Evidence § 2.06 (1984). Rule 104(b) provides:

[*690] "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the [***783] evidence in the case and decides whether the jury could reasonably find the conditional fact -- here, that the televisions were stolen -- by a preponderance of the evidence. See 21 C. Wright & K. Graham, Federal Practice and Procedure § 5054, p. 269 (1977). The trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial, and we see nothing in the Rules of Evidence that would change this practice. Often the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding. [7] If [**1502] the proponent has failed to meet this minimal standard of proof, the trial court must instruct the jury to disregard the evidence.

[***LEdHR9B] [9B]

7 "When an item of evidence is conditionally relevant, it is often not possible for the offeror to prove the fact upon which relevance is conditioned at the time the evidence is offered. In such cases it is customary to permit him to introduce the evidence and 'connect it up' later. Rule 104(b) continues this practice, specifically authorizing the judge to admit the evidence 'subject to' proof of the preliminary fact. It is, of course, not the responsibility of the judge sua sponte to insure that the

foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition." 21 C. Wright & K. Graham, Federal Practice and Procedure § 5054, pp. 269-270 (1977) (footnotes omitted).

[***LEdHR2C] [2C] [***LEdHR9C] [9C]We emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all [*691] evidence presented to the jury. "Individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily* v. *United States*, 483 U.S. 171, 179-180 (1987).In assessing whether the evidence was sufficient to support a finding that the televisions were stolen, the court here was required to consider not only the direct evidence on that point -- the low price of the televisions, the large quantity offered for sale, and petitioner's inability to produce a bill of sale -- but also the evidence concerning petitioner's involvement in the sales of other stolen merchandise obtained from Wesby, such as the Memorex tapes and the Amana appliances. Given this evidence, the jury reasonably could have concluded that the televisions were stolen, and the trial court therefore properly allowed the evidence to go to the jury.

[***LEdHR1G] [1G] [***LEdHR2D] [2D]We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). See *Michelson* v. *United States*, 335 U.S. 469, 475-476 (1948). We think, however, that the protection against such [***784] unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402 -- as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, [8] see Advisory Committee's Notes on Fed. Rule Evid. 404(b), 28 U. S. C. App., p. 691; S. Rep. No. 93-1277, at 25; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to [*692] be considered only for the proper purpose for which it was admitted. See *United States* v. *Ingraham*, 832 F.2d 229, 235 (CA1 1987).

[***LEdHR2E] [2E]

8 As petitioner's counsel conceded at oral argument, petitioner did not seek review of the Rule 403 balancing performed by the courts below. Tr. of Oral Arg. 14. We therefore do not address that issue.

Affirmed.

O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067 (1st Cir. 1986)

[1070] TORRUELLA, Circuit Judge.

This is an appeal from a jury verdict awarding plaintiff/appellee $448,200 in damages arising from his dismissal from the defendant/appellant's employment. The appellant claims error in the district court's refusal to direct a verdict in its favor, grant a judgment notwithstanding the verdict, or allow a new trial.

The lawsuit arose from the following set of facts. In 1973 appellee John O'Brien was hired by appellant Papa Gino's of America, Inc., a "fast food" restaurant chain. O'Brien continued working there for approximately nine and a half years, up until September 1982. At that time O'Brien was an area supervisor for 28 stores and 450-550 employees, and was earning a salary of approximately $37,000.

Sometime during 1982 O'Brien had a falling out with higher level management which ultimately led to his discharge on September 7, 1982. Testimony by the parties and their witnesses was sharply contrasting in regard to the events leading to O'Brien's dismissal. O'Brien contended he was fired for failing to promote an employee under his supervision who was the son of one of plaintiff's superiors, and godson to the president of Papa Gino's. The appellee on the other hand contended that O'Brien was dismissed solely for poor job performance and for violating a company policy prohibiting employees from using illegal drugs.

After O'Brien was confronted by a superior with rumors that he had been seen using drugs outside of work, O'Brien took a polygraph examination and answered questions relating to his alleged drug use. O'Brien later claimed he was forced to take [1071] the test under the threat of losing his job. He also stated that during the examination he was asked about matters that were unrelated to his employment and which he was entitled to keep private. Appellant on the other hand claimed that O'Brien took the polygraph examination completely voluntarily to dispel the suspicion that he used drugs. When the examiner's report from the polygraph test indicated that he believed O'Brien was lying about using drugs, O'Brien was dismissed.

O'Brien filed a complaint in the Hillsborough County Superior Court of the State of New Hampshire, and the defendant requested removal to federal court. Following a week-long trial, the jury answered seven special verdict questions, finding in favor of O'Brien on his claims of defamation and invasion of privacy, and in favor of Papa Gino's on the wrongful discharge claim.

Papa Gino's appeals the verdicts on several grounds. First, it argues that the jury's answers to two of the seven special verdict questions are "hopelessly inconsistent" with each other, thus requiring a remand for clarification of the jury's findings. See Andrasko v. Chamberlain Mfg. Corp., 608 F.2d 944, 947 (3d Cir. 1979). Appellant refers to the following two special verdict questions:

Question No. 2:

Based on a preponderance of the evidence, do you find that the discharge of the plaintiff O'Brien was in violation of public policy in that Mr. O'Brien was discharged for either performing an act which public policy favors or for refusing to perform an act which public policy condemns?

Answer: No.

Question No. 3:

Based on a preponderance of the evidence, do you find that the actions of the defendant, Papa Gino's of America, Inc., with reference to allegations of drug abuse by plaintiff O'Brien and the methods adopted by the defendant in its investigation of such allegations would be highly offensive to a reasonable person and were invasive of the plaintiff's privacy?

Answer: Yes.

Appellant engages in an exercise of analytical acrobatics to construe these answers in a manner that will make them contradict each other. Our inquiry with respect to potentially conflicting special verdicts, however, is not whether *any possible* construction exists that would tend to show jury confusion. The court must attempt to harmonize the jury's answers if it is possible to do so under a fair reading of them. Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 119, 9 L. Ed. 2d 618, 83 S. Ct. 659 (1963); Andrasko, supra at 947.

Special verdict question number two was posited by the court to determine whether the necessary elements for a claim of wrongful discharge had been established. Under New Hampshire law, a plaintiff must show, first, that the defendant was motivated by bad faith, malice, or retaliation and, second, that the plaintiff was discharged because he performed an act that public policy would encourage, or refused to do something that public policy would condemn. Cloutier v. Great Atlantic & Pacific Tea Co., Inc., 121 N.H. 915, 436 A.2d 1140, 1143, 1144 (1981). At trial, the plaintiff's attorney tried to prove this second element by

arguing to the jury that O'Brien had acted in accordance with public policy when he resisted taking and answering truthfully an invasive polygraph test. The defense, on the other hand, argued that O'Brien's attempt to deceive the polygraph examiner by visiting a hypnotist beforehand was actually against public policy.

In its answer to special verdict question one, the jury found that O'Brien's discharge was motivated by bad faith, malice, or retaliation. This satisfied the first [1072] element of the *Cloutier* test for wrongful discharge. In its answer to special verdict question two, however, the jury indicated that O'Brien had failed to establish the second, public policy element. Thus, in effect the jury held for defendant on the wrongful discharge issue.

Special verdict question three related to a separate cause of action, O'Brien's invasion of privacy claim. Here the jury was asked to state whether Papa Gino's investigative techniques "would be highly offensive to a reasonable person and were invasive of plaintiff's privacy." This question received an affirmative answer, indicating the jury's belief that O'Brien had been coerced into taking the polygraph examination. We see no logical difficulty in accepting together the jury's findings that O'Brien's action regarding the polygraph was not favored by public policy while at the same time the defendant had improperly pressured O'Brien into taking the examination. Consequently we decline to rule these special verdict questions irreconcilable.

Papa Gino's second claim of error is that it was entitled to a directed verdict because the plaintiff presented no evidence at all that he was discharged for a retaliatory motive, which was essential to proving all his claims. The transcript belies such an assertion. At least two witnesses, Michael Valerio and William Kindler, gave testimony from which a jury could infer that O'Brien was fired for his failure to promote the particular Papa Gino's employees mentioned above. If the jury chose to give this testimony full credence, it was well within its province to do so. Oxford Shipping Co., Ltd. v. New Hampshire Trading Corp., 697 F.2d 1, 5 (1st Cir. 1982).

Papa Gino's third claim is that O'Brien's right to privacy could not have been invaded since he essentially contracted away such rights with regard to his use of drugs. Because the company personnel manual forbids drug use by employees, and appellant reasons that O'Brien impliedly gave permission in his employment contract for the company to make whatever investigations it deemed necessary, including the polygraph examination. Even if we were to read O'Brien's agreement with Papa Gino's so broadly as to give implied permission for polygraph examinations generally, it would not negate the jury's finding that the particular investigation conducted was "highly offensive" and invasive of plaintiff's privacy. Such a finding of

egregious offensiveness in the particular case would indicate that the defendant's conduct exceeded the scope of any consent O'Brien had arguably given by accepting employment at Papa Gino's.

Appellant's fourth argument relates to the requirement of proximate cause for a finding of liability. It asserts that the report from the polygraph examination was not the proximate cause of O'Brien's damages, because, by O'Brien's own allegation, he was fired not for failing the polygraph test, but rather for not promoting the son of his supervisor. O'Brien responds that the promotion issue was indeed the *motive* for his dismissal, but it was the results of the offensive polygraph test that ultimately convinced the executive committee to vote to dismiss him. Papa Gino's own witnesses testified that the committee's decision was made very shortly *after* O'Brien failed the test. In this context, it was a factual question for the jury to decide whether, according to proximate cause analysis, the polygraph results were a "substantial factor" in the committee's decision to terminate O'Brien. Such findings by the jury are conclusive unless they are clearly against the weight of the evidence. We do not find them to be so here and, therefore, reject appellant's argument on this issue. See Coffran v. Hitchcock Clinic, Inc., 683 F.2d 5, 11 (1st Cir. 1982) (citing New Hampshire rule that causation [1073] is a question for the jury); Tullgren v. Amoskeag Manufacturing Co., 82 N.H. 268, 133 A. 4 (1926) (same).

Appellant's fifth claim is that it cannot be held liable under the defamation charge because (i) the statement "O'Brien was terminated for drug use" was true, and (ii) even if false, the statement was conditionally privileged and not made with malice, recklessness or ill will. We address each assertion in turn.

As to appellant's defense of truth, it is first necessary to examine the jury's affirmative answer to special verdict question one, which states, "based on a preponderance of the evidence, do you find that the discharge of plaintiff, John J. O'Brien, was motivated by bad faith, malice or retaliation?" The form of this question is important, for it does not ask whether the discharge was *only* motivated by retaliation. Rather, it merely asks whether retaliation served as a motive for the discharge, the implication being that other motives or causes of the discharge could likewise have been present. Thus, it appears that while on the one hand the jury found O'Brien's discharge to be substantially caused by the polygraph test results -- indeed, such a finding was necessary for the jury to award lost wage damages for the invasive polygraph test -- the jury *also* found retaliatory motives to be present, as evidenced by its answer to special verdict question one.

Beginning with the premise of a jury finding of two factors as contributing to O'Brien's discharge, we find it necessary to reject Papa Gino's claim regarding the truthfulness of its

assertion as well as the claim to conditional privilege. As to the defense of truth, it is first necessary to examine the statement at issue, that "O'Brien was terminated for drug (cocaine) use." The truth, however, under the apparent jury finding of two causes, goes as follows: "O'Brien's termination was *largely* due to drug use, *but we also had retaliatory motives arising from a personal grudge*." So, while Papa Gino's actual statement was *substantially* true -- indeed, the above proximate cause analysis requires this conclusion -- it was not the *whole* truth. And, the jury apparently concluded that, under the circumstances, not to tell the whole truth was in effect to lie. Thus, the jury, based on its factual findings as to the actual causes of O'Brien's termination, regarded the employer's explanation as *not* conveying all the facts, and hence, as false. Given that this jury finding of falsity is inextricably tied to its defensible factual findings as to the cause of termination, we see no basis for overturning it on appeal. Accordingly, we reject appellant's defense of truth.

[1074] As to the conditional privilege issue, we note the jury's answer to special verdict questions one and six. As stated above, the jury's answer to special verdict question one indicated a general finding of retaliatory motives or malice in O'Brien's discharge. In it's instructions on question six, the district court, after explaining the elements of a conditional privilege, noted that such privilege would not exist if the jury found "malice." The court then defined malice as making statements "with knowledge that they were false, with a high degree of awareness of their probable falsity, or with serious doubts as to their truth." These instructions generally comport with the case law. See, e.g., Arsenault v. Allegheny Airlines, Inc., 485 F. Supp. 1373, 1379 (D. Mass.), aff'd, 636 F.2d 1199 (1st Cir. 1980), cert. denied, 454 U.S. 821, 70 L. Ed. 2d 93, 102 S. Ct. 105 (1981); Thomson v. Cash, 119 N.H. 371, 402 A.2d 651 (1979); Jones v. Walsh, 107 N.H. 379, 222 A.2d 830 (1966); Baer v. Rosenblatt, 106 N.H. 26, 203 A.2d 773, rev'd on other grounds, 383 U.S. 75, 15 L. Ed. 2d 597, 86 S. Ct. 669 (1964); Blanchard v. Claremont Eagle, 95 N.H. 375, 63 A.2d 791 (1949); Bander v. Metropolitan Life Ins. Co., 313 Mass. 337, 344, 47 N.E.2d 595 (1943).

After the above instructions, special verdict question six posed the issue to the jury, "Based on a preponderance of the evidence, do you find that such defamatory statement was privileged?" The jury answered "no." Thus, the jury apparently concluded that, given Papa Gino's knowledge of its own retaliatory motives against O'Brien, Papa Gino's omission to explain such motives could only be regarded as a *purposeful* misrepresentation, and hence, not only to convey a falsity but to act in reckless disregard for the truth. There is sufficient testimony in the record to support a jury finding of knowledge on Papa Gino's part that *both* retaliatory motives and the polygraph results brought about O'Brien's discharge. It follows that the omission to explain retaliatory motives could be rationally viewed as a purposeful misrepresentation, and hence as infected with malice. We further note that the question of

defendant's entitlement to a claim of conditional or qualified immunity is clearly one for the trier of fact. Pickering v. Frink, 123 N.H. 326, 461 A.2d 117 (1983). Accordingly, based on the jury's rational answers to special verdict questions one and six, we reject appellant's claim of entitlement to a conditional privilege.

We turn now to Papa Gino's sixth assertion, that the district court's denial of defendant's motion for a new trial was clearly in error. Appellant raises four grounds for this claim.

First, appellant claims error in the court's refusal to allow its counsel to inquire about the reason one witness was asked to take a polygraph test. Under examination by plaintiff's counsel, John Mackor, defendant's witness and employee, testified that he had taken two polygraph examinations, one sometime regarding his employment, and one the night before he testified. At a side bar conference, defendant's counsel explained that he had asked Mackor to take the polygraph test after Mackor told him, among other things, that O'Brien had tried to bribe him in return for favorable testimony. Defendant's counsel stated that he would only let Mackor testify if he passed the polygraph examination. He then asked the court's permission to question Mackor about the events leading to the administration of the second polygraph examination, which the court denied. Appellant's objection on appeal, therefore, is that the court "left unexplained on the record, for the jury to consider, the fact that one of the defendant's key witnesses had, on the eve of trial, been subjected to a polygraph examination." This, appellant contends, severely prejudiced its case because it implied, in combination with other [1075] testimony, that Papa Gino's routinely and improperly subjected its employees to polygraph examinations.

Papa Gino's argument has failed to convince us that there was reversible error in the court's handling of this matter. Papa Gino's counsel did not object to the line of questioning about the second polygraph examination until plaintiff's counsel inquired as to *who* had asked Mackor to take it. At this point Papa Gino's counsel objected on grounds of relevancy. If appellant's concern had been that the questioning implied Papa Gino's routinely subjected its employees to polygraph examinations, the question put to Mackor would have served instead to assuage such implication by identifying Papa Gino's counsel as the inquisitor in this instance rather than Papa Gino's. Moreover, assuming that Papa Gino's counsel is regarded as Papa Gino's agent (and hence that it nonetheless appears Papa Gino ordered the test), the implication of the polygraph test on the eve of trial seems much more strongly to be one of revealing a desire to corroborate proposed testimony, and thus seems hardly arbitrary but rather indicative of sound precautions with respect to the veracity of one's own witness. The polygraph test, in other words, was not in connection with Mackor's fitness as an employee, but rather with his testifying at a trial unrelated to his own employment. Accordingly, we do not accept Papa

Gino's characterization of this testimony as so damaging as to render its admission grounds for a new trial.

Appellant's second assertion that the court, at the very least, should have given the jury a limiting instruction on this matter comes too late because that request should have been addressed to the trial court in the first instance. Fed. R. Civ. P. 51. When counsel fails to object to jury instructions in a timely manner, we will not reconsider them on appeal except in cases where clear error or obvious injustice exists. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981); Morris v. Travisono, 528 F.2d 856 (1st Cir. 1976).

Appellant's third ground for requesting a new trial is an objection to the admission of testimony by two former Papa Gino's employees that they had been asked to take polygraph examinations in connection with suspected drug use and employee theft. Papa Gino's argues that the prejudicial effect of this testimony far outweighed any probative value in that it caused the jury to deliver a verdict that punished Papa Gino's for what the jury considered past mistreatment of employees other than the plaintiff.

Since appellant concedes that the testimony of the former employees had at least some relevance to the case, we begin with the assumption that it was admissible so long as not prohibited by statute, the Constitution, or judicial rules. Fed. R. Evid. 402. Appellant argues that Rule 403 does exclude its admissibility because it allows relevant evidence to be excluded when it poses a danger of unfair prejudice that substantially outweighs its probative value. See, e.g., Bowden v. McKenna, 600 F.2d 282, 284-85 (1st Cir.), cert. denied, 444 U.S. 899, 62 L. Ed. 2d 135, 100 S. Ct. 208 (1979); Fed. R. Evid. 403.

The probative value of the employees' testimony here was threefold: (1) it tended to establish that Papa Gino's had a regular practice of asking employees to take polygraph examinations, Fed. R. Evid. 406; (2) it was relevant to showing the defendant's intent and motive in requesting that O'Brien take the examination, Fed. R. Evid. 404(b); and (3) it contradicted testimony by defendant's witness that Papa Gino's did not ask its employees to take polygraph examinations. Naturally, this testimony was unfavorable to the defendant's case, but we must keep in mind that it is only unfair prejudice with which we are concerned. United States v. McRae, 593 F.2d 700 (5th Cir.), cert. denied, 444 U.S. 862, 62 L. Ed. 2d 83, 100 S. Ct. 128 (1979). [1076] Additionally, we note that a trial judge has broad discretion in ruling on the admissibility of evidence. See, e.g., United States v. Serlin, 707 F.2d 953 (7th Cir. 1983). We, therefore, conclude that the court did not err in admitting the testimony of the former employees as to their previous polygraph examinations.

As a fourth and final ground for seeking a new trial, appellant asks us to find that the jury's verdict was against the weight of the evidence and should be set aside. Papa Gino's lists six items it feels are incompatible with the jury's findings, and nine instances allegedly demonstrating appellee O'Brien's tendency toward dishonest and/or illegal conduct.

The common thread running through all of these items is the issue of credibility. No subject matter is more clearly within the exclusive province of the fact-finder than this. See, e.g., Anderson v. City of Bessemer City, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985); Oxford Shipping Co., Ltd. v. New Hampshire Trading Corp., 697 F.2d 1, 5 (1st Cir. 1982); N.L.R.B. v. Mass. Machine & Stamping, Inc., 578 F.2d 15 (1st Cir. 1978). Questions of credibility are factual findings that must on appeal be resolved in favor of affirming the trial court's findings, unless shown to be clearly erroneous. United States v. United States Gypsum, 333 U.S. 364, 92 L. Ed. 746, 68 S. Ct. 525 (1948); Codex Corp. v. Milgo Electronic Corp., 717 F.2d 622, 627 (1st Cir. 1983), cert. denied, 466 U.S. 931, 104 S. Ct. 1719, 80 L. Ed. 2d 191 (1984); Holmes v. Bateson, 583 F.2d 542, 552 (1st Cir. 1978); Fed. R. Civ. P. 52(a). In this context, clear error should be found if the factual findings are against the clear weight of the evidence, Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974), and, if we are "left with the definite and firm conviction that a mistake has been committed." Evans v. United States, 319 F.2d 751, 753 (1st Cir. 1963).

We cannot say that the record here leaves us with such an impression. Although the appellant cites numerous items it believes supports its version of the facts, the appellee has set out an entirely different but equally plausible version. When there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. Anderson v. City of Bessemer City, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). Particularly because the findings in this case turn on the credibility of witnesses whom the jury had full opportunity to see and hear, see General Dynamics Corp. v. Occupational Safety and Health Review Comm'n, 599 F.2d 453 (1st Cir. 1979), we refuse to overturn the jury's findings.

Appellant's final point raised in this appeal relates to the jury's award of damages, which amounted to $448,200. The jury awarded $398,200 on the invasion of privacy claim, of which $358,000 was for lost wages, and $50,000 on the defamation claim. Papa Gino's asserts, first, that the lost wages figure is greatly in excess of the actual wages O'Brien lost and will lose as a result of his dismissal. Second, it argues that the defamation award is clearly excessive because the challenged statements were not widely publicized (i.e., not beyond Papa Gino's employees) and because O'Brien's damages simply could not have amounted to the figure awarded.

In a challenge to a jury award, we are limited to examining whether evidence in the record supports the verdict. If the jury award has a rational basis in evidence, we must affirm it. See Computer Systems Engineering, Inc., v. Qantel Corp., 740 F.2d 59, 67 (1st Cir. 1984).

At trial, O'Brien called as an expert witness an economist who testified that O'Brien had lost past wages and benefits in the amount of $186,461, and future wages and benefits in the amount of $699,968. The economist was cross examined, and Papa Gino's did not rebut his testimony with its own expert. Since the jury ultimately awarded $358,000 for lost wages and benefits, less than half the amount calculated by plaintiff's economist, we cannot say the award was clearly against the [1077] weight of the evidence. See Thomson v. Cash, 119 N.H. 371, 402 A.2d 651 (1979). Furthermore, although Papa Gino's flatly states that the $50,000 award for defamation was excessive, we find no authority that holds that such an amount, on its face, should be found excessive. See generally Chagnon v. Union Leader Corp., 103 N.H. 426, 174 A.2d 825 (1961), cert. denied, 369 U.S. 830, 7 L. Ed. 2d 795, 82 S. Ct. 846 (1962). Since it was not against the weight of the evidence offered by O'Brien on the issue of damages and emotional suffering, we will not disturb the jury's award.
In light of the foregoing analysis, we affirm all aspects of the trial court's judgment.

Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986)

[1043] LOGAN, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

This is a 42 U.S.C. § 1983 civil rights action for compensatory and punitive damages arising from the death of Terry Kim Perrin. Plaintiff, administratrix of Perrin's estate and guardian of his son, alleged that defendants, Donnie Anderson and Roland Von Schriltz, members of the Oklahoma Highway Patrol, deprived Perrin of his civil rights when they shot and killed him while attempting to obtain information concerning a traffic accident in which he had been involved. The jury found in favor of defendants.

In this appeal plaintiff contends that the district court erred in admitting: (1) testimony by four police officers recounting previous violent encounters they had had with Perrin; (2) a report by the Shooting Review Board of the Oklahoma Department of Public Safety; (3) a defense attorney's statement in closing argument that defendants would be personally liable for any judgment; and (4) evidence that Perrin's home contained many pornographic drawings, sketches, books, and materials.

A simple highway accident set off the bizarre chain of events that culminated in Perrin's death. The incident began when Perrin drove his car into the back of another car on an Oklahoma highway. After determining that the occupants of the car he had hit were uninjured, Perrin walked to his home, which was close to the highway.

Trooper Von Schriltz went to Perrin's home to obtain information concerning the accident. He was joined there by Trooper Anderson. They knocked on and off for ten to twenty minutes before persuading Perrin to open the door. Once Perrin opened the door, the defendant officers noticed Perrin's erratic behavior. The troopers testified that his moods would change quickly and that he was yelling that the accident was not his fault. Von Schriltz testified that he sensed a possibly dangerous situation and slowly moved his hand to his gun in order to secure its hammer with a leather thong. This action apparently provoked Perrin who then slammed the door. The door bounced open and Perrin then attacked Anderson. A fierce battle ensued between Perrin and the two officers, who unsuccessfully applied several chokeholds to Perrin in an attempt to subdue him. Eventually Anderson, who testified that he feared he was about to lose consciousness as a result of having been kicked repeatedly in the face and chest by Perrin, took out his gun, and, without issuing a warning, shot and killed Perrin. Anderson stated that he was convinced Perrin would have killed both officers had he not fired.

I.

At trial the court permitted four police officers to testify that they had been involved previously in violent encounters with Perrin. These officers testified to Perrin's apparent hatred or fear of uniformed officers and his consistently violent response to any contact with them. For example, defendants presented evidence that on earlier occasions Perrin was completely uncontrollable and violent in the presence of uniformed officers. On one occasion he rammed his head into the bars and walls of his cell, requiring administration of a tranquilizer. Another time while barefoot, Perrin kicked loose a porcelain toilet bowl that was bolted to the floor. One officer testified that he encountered Perrin while responding to a public drunk call. Perrin attacked him, and during the following struggle Perrin tried to reach for the officer's weapon. The officer and his back-up had to carry Perrin handcuffed, kicking and screaming, to the squad car, where Perrin then kicked the windshield out of the car. Another officer testified that Perrin attacked him after Perrin was stopped at a vehicle checkpoint. During the ensuing struggle three policemen were [1044] needed to subdue Perrin, including one 6'2" officer weighing 250 pounds and one 6'6" officer weighing 350 pounds.

Defendants introduced this evidence to prove that Perrin was the first aggressor in the fight -- a key element in defendants' self-defense claim. The court admitted the evidence over objection, under Federal Rules of Evidence provisions treating both character and habit evidence. Plaintiff contends this was error.

A

Section 404(a) of the Federal Rules of Evidence carefully limits the circumstances under which character evidence may be admitted to prove that an individual, at the time in question, acted in conformity with his character. This rule is necessary because of the high degree of prejudice that inheres in character evidence. See Fed. R. Evid. 404 advisory committee note. In most instances we are unwilling to permit a jury to infer that an individual performed the alleged acts based on a particular character trait. The exceptions to Rule 404(a)'s general ban on the use of character evidence permit criminal defendants to offer evidence of their own character or of their victim's character. Fed. R. Evid. 404(a) (1)-(2). Not until such a defendant takes this initial step may the prosecution rebut by offering contrary character evidence. Id. advisory committee note. Although the Advisory Committee on the Rules of Evidence has observed that this rule "lies more in history and experience than in logic," Id., it does seem desirable to afford a criminal defendant every opportunity to exonerate himself. In offering such potentially prejudicial testimony, the defendant of course proceeds at his own risk. Once he offers evidence of his or his victim's character, the prosecution may offer contrary evidence. Fed. R. Evid. 404 (a) (1)-(2).

Although the literal language of the exceptions to Rule 404(a) applies only to criminal cases, we agree with the district court here that, when the central issue involved in a civil case is in nature criminal, the defendant may invoke the exceptions to Rule 404(a). Accord

Polley, 689 F.2d 562, 575-76 (5th Cir. 1982) (exceptions to Rule 404(a) apply in 42 U.S.C. § 1983 action alleging assault and battery); Crumpton v. Confederation Life Insurance Co., 672 F.2d 1248, 1253 (5th Cir. 1982) (exceptions to Rule 404(a) apply in civil action focusing on whether a rape had occurred); see also Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 525-26 (10th Cir.) (considering Rule 404(a) exceptions in civil action examining whether plaintiff was a "dirty football player"), cert. denied, 444 U.S. 931, 100 S. Ct. 275, 62 L. Ed. 2d 188 (1979).

In a case of this kind, the civil defendant, like the criminal defendant, stands in a position of great peril. See E. Cleary, McCormick on Evidence § 192, at 570-71 (3d ed. 1984) (hereinafter McCormick). A verdict against the defendants in this case would be tantamount to finding that they killed Perrin without cause. The [1045] resulting stigma warrants giving them the same opportunity to present a defense that a criminal defendant could present. Accordingly we hold that defendants were entitled to present evidence of Perrin's character from which the jury could infer that Perrin was the aggressor. The self-defense claim raised in this case is not functionally different from a self-defense claim raised in a criminal case.

Although we agree with the district court that character evidence was admissible in this case, we hold that the district court should not have permitted testimony about prior specific incidents.

Federal Rule of Evidence 405 establishes the permissible methods of proving character:
"(a) **Reputation or opinion**. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) **Specific instances of conduct**. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct."

Testimony concerning specific instances of conduct is the most convincing, of course, but it also "possesses the greatest capacity to arouse prejudice, to confuse, to surprise and to consume time." Fed. R. Evid. 405 advisory committee note. Rule 405 therefore concludes that such evidence may be used only when character is in issue "in the strict sense." Id.

Character is directly in issue in the strict sense when it is "a material fact that under the substantive law determines rights and liabilities of the parties." McCormick § 187, at 551. In such a case the evidence is not being offered to prove that the defendant acted in conformity with the character trait, instead, the existence or nonexistence of the character trait itself "determines the rights and liabilities of the parties." Id. at 552 n.5. In a defamation action, for example, the plaintiff's reputation for honesty is directly at issue when the defendant has called the plaintiff dishonest. See Uviller, Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in

the Courtroom, 130 U. Pa. L. Rev. 845, 852 (1982).

Defendants here offered character evidence for the purpose of proving that Perrin was the aggressor. "Evidence of a violent disposition to prove that the person was the aggressor in an affray" is given as an example of the circumstantial use of character evidence in the advisory committee notes for Fed. R. Evid. 404(a). When character is used circumstantially, only reputation and opinion are acceptable forms of proof. Fed. R. Evid. 405 advisory committee note. We therefore find that the district court erroneously relied upon the character evidence rules in permitting testimony about specific violent incidents involving Perrin.

B

Character and habit are closely akin. The district court found, alternatively, that the testimony recounting Perrin's previous violent encounters with police officers was [1046] admissible as evidence of a habit under Fed. R. Evid. 406. Here, we concur.

Rule 406 provides:
"Evidence of the habit of a person . . ., whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit. . . ."

The limitations on the methods of proving character set out in Rule 405 do not apply to proof of habit. Testimony concerning prior specific incidents is allowed. See McCormick § 195, at 577.

This court has defined "habit" as "a regular practice of meeting a particular kind of situation with a certain type of conduct, or a reflex behavior in a specific set of circumstances." Frase v. Henry, 444 F.2d 1228, 1232 (10th Cir. 1971) (defining "habit" under Kansas law). The advisory committee notes to Rule 406 state that, "while adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated." Fed. R. Evid. 406 advisory committee note. That Perrin might be proved to have a "habit" of reacting violently to uniformed police officers seems rather extraordinary. We believe, however, that defendants did in fact demonstrate that Perrin repeatedly reacted with extreme aggression when dealing with uniformed police officers.

Four police officers testified to at least five separate violent incidents, and plaintiff offered no evidence of any peaceful encounter between Perrin and the police. Five incidents ordinarily would be insufficient to establish the existence of a habit. See Reyes v. Missouri Pacific Railway Co., 589 F.2d 791, 794-95 (5th Cir. 1979) (four convictions for public intoxication in three and one-half years insufficient to prove habit). But defendants here had made an offer of proof of testimony from eight police officers concerning numerous different incidents. To prevent undue prejudice to plaintiff, the district court permitted only four of these witnesses to testify, and it explicitly stated that it thought the testimony of the four officers had been sufficient to establish a habit. Id. We hold that the district court properly admitted this evidence pursuant to

There was adequate testimony to establish that Perrin invariably reacted with extreme violence to any contact with a uniformed police officer.

II

Plaintiff asserts that the district court should not have admitted a report by the Shooting Review Board. This report concluded that there was "no doubt that [Anderson] acted within the guidelines set forth in the Policies and Procedures Manual." The Shooting Review Board consisted of five members of the Oklahoma State police and was convened under the auspices of the Oklahoma Department of Public Safety. In reaching its conclusion the Board interviewed defendants and their superior officers.

The district court admitted the shooting report pursuant to Fed. R. Evid. 803(8)(C). Rule 803(8) admits "records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions . . ., factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

Several factors must be addressed in determining the applicability of Rule 803(8)(C). First, the report must have been prepared "pursuant to authority granted by law." This requirement helps to ensure that the report is reliable. See Franklin v. Skelly Oil Co., 141 F.2d 568, 572 (10th Cir. 1944). The Shooting Review Board was a properly constituted body of the Department of Public Safety pursuant to Okla. Stat. Ann. tit. 47, §1023 (Commissioner of Public Safety has authority to organize department in manner he "may deem necessary").

Second, the rule applies only to "factual findings." Courts have construed [1047] this term broadly, however, and regularly have admitted conclusions and opinions found in evaluative reports of public agencies. See, e.g., Wilson v. Beebe, 743 F.2d 342, 346-47 (6th Cir. 1984) (admitting report by police captain that officer's conduct was contrary to department training); Litton Systems, Inc. v. American Telephone and Telegraph Co., 700 F.2d 785, 818-19 (2d Cir. 1983) (admitting findings of FCC that tariffs were "unreasonable" and "discriminatory"), cert. denied, 464 U.S. 1073, 104 S. Ct. 984, 79 L. Ed. 2d 220 (1985); see also Zenith Radio Corp. v. Matsushita Electric Industrial Co., 505 F. Supp. 1125, 1144-45 (E.D. Pa. 1980) (reports "rendering normative judgments or opinions" admissible). Therefore, although the Shooting Report contained conclusions concerning the propriety of defendants' conduct, the report comes within the scope of Rule 803(8) (C).

Finally, Rule 803(8) (C) also declares that circumstances must not indicate the report is untrustworthy. We have stated that, in determining whether an evaluative report is trustworthy, the court should consider at least the following factors: the timeliness of the investigation; the special skill or experience of the investigator; whether a hearing was held and the level at which it was conducted; and any possible motivation problems in the preparation of the report. Denny v. Hutchinson Sales Corp., 649 F.2d 816, 821 (10th Cir. 1981) (citing

advisory committee note).

Plaintiff here has not offered any convincing evidence that this report is untrustworthy. It was prepared approximately five weeks after the incident by high-ranking officers. Hearings, although not adversarial, were held. Moreover we are unwilling to conclude that an internal investigation is necessarily biased, absent specific evidence. That an investigation was conducted internally should affect the weight to be given the report, not its admissibility. The district court therefore did not abuse its discretion in finding this report admissible. See Nulf v. International Paper Co. , 656 F.2d 553, 563 (10th Cir. 1981) (admission of report is within trial court's discretion); Franklin v. Skelly Oil Co., 141 F.2d at 572 (trial court is "first and best judge . . . of trustworthiness and reliability").

In addition, the district court instructed the jury that the report was "an agency hearing of its own personnel and for its own purpose" and was to have no "determinative effect on any issue in the case." R. VI, 492. WE believe that this cautionary instruction mitigated any prejudice the report may have had. See Litton Systems, Inc., 700 F.2d at 818-19; see also 4 J. Weinstein & M. Berger, Weinstein's Evidence para. 803(8)[03], at 803-257 (1985) (judge may caution jurors against substituting official's judgment for their own).

III

Plaintiff's third claim of error is based on a defense attorney comment during closing argument. Counsel stated:
"I think that there is one matter that I would like to leave you with. My clients are being asked to account in money damages. And incidentally, this is an action against them, personally, not against the State of Oklahoma, not against anyone else. A judgment against them is their individual judgment to be paid by them and no one else."
R. VI, 510. Plaintiff claims that this remark was equivalent to an assertion that defendants were uninsured.

Statements that a defendant in a negligence action is insured or uninsured typically have been forbidden. See Fed. R. Evid. 411; McCormick § 201, at 593. Such remarks are irrelevant to the issue of whether a defendant acted negligently or otherwise wrongfully.

Here, however, punitive damages were requested; the ultimate source [1048] of payment therefor is relevant. See Rodgers v. Fisher Body Division, General Motors Corp., 739 F.2d 1102, 1105 (6th Cir. 1984) (approving district court holding that remarks concerning defendant's size and wealth are relevant when punitive damages are at issue). The jury must know the impact an award will have on the defendant to properly assess punitive damages. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1980) (punitive damages in 42 U.S.C. §1983 action should be based on official's "personal financial resources"). We therefore hold that defendants' counsel's remarks were not improper.

IV

Plaintiff's final assertion is that the trial court erred in admitting testimony about numerous sexually explicit pornographic items that were strewn about Perrin's home and were readily accessible to his six-year-old son. Defendants offered evidence that approximately fifty magazines containing pictures of "kinky-type sex" were in the bathroom, a bedroom, and the living room. There also was evidence that hand-drawn pictures signed by Perrin depicting oral sodomy and nude women with straps on them were in every room but the kitchen and one bedroom. Plaintiff contends that this testimony was irrelevant, and, even if relevant, unduly prejudicial. Defendants counter that this testimony was permissible rebuttal to plaintiff's contention that Perrin was a good father and that his son's loss of his companionship should be valued by the jury at $1,000,000.

We agree with defendants that this testimony was relevant on the damages issue. In determining the amount to which Perrin's son was entitled, the jury properly could have considered the nature of the influence Perrin was having on his son. See, e.g., Smith v. United States, 587 F.2d 1013, 1017 (3d Cir. 1978) (admitting evidence that defendant's mental condition precluded award of damages for loss of services and nurture); Solomon v. Warren, 540 F.2d 777, 788 (5th Cir. 1976) (evidence must be admitted that deceased parent furnished physical, intellectual, and moral training to child); In re Paris Air Crash of March 3, 1974, 423 F. Supp. 367, 373 (C.D. Cal. 1976) (instructing jury to consider factors such as the disposition of the decedent in assessing loss to child).

We do not hold, however, that because Perrin exposed his child to pornography, the value of his relationship to the child diminished. We only state that it was within the discretion of the trial judge to admit such evidence. See Blim v. Western Electric Company, Inc., 731 F.2d 1473, 1477 (10th Cir. 1984) (trial court has broad discretion to balance probity versus prejudice). Regarding the possible prejudice to plaintiff's case, we would be more convinced that this evidence might have prejudiced plaintiff if the jury had found in plaintiff's favor but rendered only a small award.

AFFIRMED.

Zubulake v. UBS Warburg LLC, 382 F. Supp. 2d 536 (S.D.N.Y. 2005)

[539] Laura Zubulake is suing her former employer, UBS Warburg LLC (hereinafter "UBS"), for sex discrimination, including disparate treatment and wrongful termination, and retaliation in violation of, inter alia, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Both parties have filed motions in limine that are addressed in this Opinion and Order.

I. PLAINTIFF'S MOTION TO PRECLUDE EVIDENCE OF HER PRIOR EMPLOYMENT

Plaintiff seeks to preclude defendants from using evidence of plaintiff's prior employment to show that she had a propensity for certain performance deficiencies. Defendants intend to proffer two categories of evidence. First, UBS seeks to introduce evidence of plaintiff's employment history, specifically the fact that she worked for ten different securities firms in a period of less than twenty years. Because [540] this evidence is relevant to plaintiff's ability to find subsequent employment it is admissible.

The second category of evidence involves plaintiff's poor work performance at Credit Suisse First Boston ("CSFB") and, in particular, the performance appraisal she received shortly before negotiating a severance package. See May 5th 1999 Memorandum from Jay Plourde entitled "Performance Deficiencies." Plaintiff claims that this is character evidence which is inadmissible under Federal Rule of Evidence 404(b). Defendants claim that this evidence is admissible because: (1) plaintiff's character is in issue; (2) the evidence is proffered to prove matters other than plaintiff's character, specifically to rebut her contention that she was not insubordinate and uncooperative; and (3) the evidence is admissible to prove habit pursuant to Rule 406. Defendants' arguments are rejected.

An almost identical issue involving previous employment was addressed in Neuren v. Adduci, Mastriani, Meeks & Schill, 310 U.S. App. D.C. 82, 43 F.3d 1507 (D.C. Cir. 1995). In that case, plaintiff sued her employer Adduci, Mastriani, Meeks & Schill ("AMM&S"), a Washington D.C. law firm, for sex discrimination in violation of Title VII. In addition to introducing evidence of plaintiff's performance problems at AMM&S, defendants introduced evidence concerning plaintiff's prior employment with another law firm, Dow, Lohnes & Albertson ("DL&A"). See

id. at 85 (defendants introduced written evaluations of plaintiff's work at DL&A and related testimony regarding plaintiff's difficulties in getting along with staff and meeting deadlines while an associate at DL&A).

Defendants argued that the DL&A evidence was admissible to demonstrate that plaintiff had the same difficulties at a previous law firm that she had at AMM&S or, failing that, to impeach her testimony regarding her reasons for leaving DL&A. The court rejected the argument that the DL&A evidence was admissible because it demonstrated that plaintiff displayed similar work-related problems in her former employment. In finding that the district court abused its discretion in admitting this evidence, the court stated:

Both AMM&S and the district court misapprehend the Federal Rules' treatment of character evidence. Under Federal Rule of Evidence 404, "evidence of a person's character or a trait of [her] character is not admissible for the purpose of proving that [she] acted in conformity therewith on a particular occasion," except in certain defined circumstances none of which is present here. Fed. R. Evid. 404(a). Additionally, Rule 404(a) provides specifically that evidence of prior acts cannot be introduced to prove the character of a person in order to show that she acted in conformity therewith. Fed. R. Evid. 404(b). When the district court admitted the DL&A evidence relating to Neuren's difficulties with personal relationships at that firm, it noted that the evidence was "relevant with respect to how she performed at another firm . . .. [AMM&S is] just showing that this is the same problem that this woman had." (citation [541] omitted). Thus, the district court admitted the evidence for the purpose specifically prohibited by Rule 404 -- as evidence that she acted in conformity with her behavior at DL&A while working for AMM&S.

The DL&A character evidence does not fall within any of the exceptions expressly contemplated by Rule 404(b). See Fed. R. Evid. 404(b) (exceptions for proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident). Moreover, appellee's argument that this evidence is admissible because character was "in issue" in the case is equally unavailing. Under the "character in issue" doctrine, character evidence is admissible where character itself is "an element of a crime, claim, or defense." Fed. R. Evid. 404(a), Notes of Advisory Committee on Proposed Rules. An example of evidence admissible where character is "in issue" is evidence of the chastity of a victim in a prosecution for the crime of seduction where chastity is an element of that crime. Id. In this case, AMM&S has not offered a plausible theory under which Neuren's character could be considered an element of its defense. AMM&S's business justification for Neuren's termination was that she had difficulty in interpersonal relationships with co-workers and in meeting deadlines. Strictly speaking, this defense is based on Neuren's behavior at the firm, not her character. Consequently, her character was not "in issue" in the sense contemplated by the exception to the rule.

Id. at 1511. Several lower courts in the District of Columbia have reached similar conclusions. In Zenian v. District of Columbia, 283 F. Supp. 2d 36 (D.D.C. 2003), the District wanted to introduce documentary evidence pertaining to plaintiff's performance problems prior to July 1995. The district court precluded such use, stating:

If the District is offering the evidence to show that plaintiff has always been a bad employee, it is doing exactly what it cannot do: introduce evidence of a person's character to prove that his behavior on one or more occasions was consistent with that character. Fed. R. Evid. 404(a). The only purpose of proving that plaintiff was a bad employee before 1995 is to prove that he was an equally bad employee after 1995. That, of course, is exactly what a litigant cannot do.

Id. at 40. See also Rauh v. Coyne, 744 F. Supp. 1181 (D.D.C. 1990) (holding inadmissible evidence concerning plaintiff's job performance before and after her employment at defendants' establishment).

The reasoning found in these cases is persuasive. Because this is an employment discrimination case, plaintiff's character is not in issue, either as an essential element of a claim or defense. See EEOC v. HBE Corp. 135 F.3d 543, 553 (8th Cir. 1998) (plaintiff's moral character was not an essential element of his retaliatory discharge claim). And no matter how defendants try to frame their intended use - whether to rebut plaintiff's contention that she was not insubordinate and uncooperative or whether to prove that she was insubordinate and uncooperative outright - they are seeking to introduce inadmissible propensity evidence. Because none of the exceptions found in Rule 404(b) apply here, such evidence is inadmissible to prove that plaintiff acted insubordinately at UBS.

Finally, defendants argue that the evidence at issue is admissible under Rule 406 as evidence of plaintiff's habit of behaving insubordinately in response to conflicts in the workplace. Rule 406 provides as follows: "Evidence of the habit of a [542] person or of the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." The Advisory Committee Note to Rule 406 of the Federal Rules of Evidence defines "habit" as follows: "'A habit . . . is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.'" Fed. R. Evid. 406, Advisory Committee Note (quoting McCormick on Evidence, § 195 at 462-63 (2d. ed. 1972)).

Habit is conduct that is situation-specific, i.e., specific, particularized conduct capable of almost

identical repetition. Character, on the other hand, is a generalized description of a person's disposition or a general trait such as honesty, violence or peacefulness. There is a tension between Rule 404 (character) and Rule 406 (habit) which stems from the difficulty in distinguishing between admissible evidence of habit and inadmissible character evidence. See Simplex, Inc. v. Diversified Energy Sys., Inc., 847 F.2d 1290, 1293 (7th Cir. 1988) ("We are cautious in permitting the admission of habit or pattern-of-conduct evidence under Rule 406 because it necessarily engenders the very real possibility that such evidence will be used to establish a party's propensity to act in conformity with its general character, thereby thwarting Rule 404's prohibition against the use of character evidence except for narrowly prescribed purposes.").

"Before a court may admit evidence of habit, the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere 'tendency' to act in a given manner, but rather, conduct that is 'semi-automatic' in nature." Id. "Although a precise formula cannot be proposed for determining when the behavior may become so consistent as to rise to the level of habit, 'adequacy of sampling and uniformity of response' are controlling considerations." Reyes v. Missouri Pac. R.R. Co., 589 F.2d 791, 795 (5th Cir. 1979) (quoting Notes of Advisory Committee). "It is only when examples offered to establish such pattern of conduct or habit are numerous enough to base an inference of systematic conduct, that examples are admissible." Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519, 1524 (11th Cir. 1985) (internal quotation marks and citation omitted).

These principles have been applied to exclude evidence of conduct that falls short of the definition of habit. One such case is Becker v. ARCO Chem. Co., 207 F.3d 176 (3d Cir. 2000), an age discrimination case. In that case, defendant offered a legitimate non-discriminatory reason for its termination of Becker. To rebut that defense, Becker offered evidence that ARCO had previously fabricated evidence of a legitimate reason for terminating one of Becker's co-employees, Linwood Seaver. See id. at 183, 185. Specifically, Becker testified that two of his supervisors solicited his assistance in fabricating evidence of Seaver's poor performance on a particular project to facilitate Seaver's termination. See id. at 185.

"The district court found Becker's testimony admissible under Rule 404(b) because it was evidence of a scheme or plan of fabricating reasons used by the decisionmaker in terminating employees." Id. at 189 (internal quotation marks and citation omitted). The appellate court rejected this reasoning. See id. at 201 ("We hold that standing alone, the similarities between the Seaver evidence and the allegation of fact in this case do not provide [543] a sufficient foundation from which the existence of ARCO's 'scheme or plan' of fabricating reasons in terminating its employees may be inferred so as to justify admitting the Seaver evidence on that

basis.").

The district court also found the Seaver evidence admissible "under the theory that it tended to show ARCO's 'habit' when confronted with the task of having to terminate its employees." Id. at 204. The appellate court disagreed:

Clearly, Rule 406 does not support the introduction of the Seaver evidence on the basis that it was ARCO's "habit" to fabricate reasons for terminating its employees. The Seaver evidence did not show ARCO's "regular response to a specific situation," as the nature of the alleged conduct -- the fabrication of reasons to justify its employees' dismissals -- is not the sort of semi-automatic, situation-specific conduct admitted under the rule. Moreover, the Seaver evidence ostensibly showed only, at best, one other instance in which ARCO exhibited its alleged repetitive behavior. Id.

Similarly, in McCarrick v. New York City Off-Track Betting Corp., 1995 U.S. Dist. LEXIS 5849, No. 91 Civ. 5626, 1995 WL 261516, [**12] at *5 (S.D.N.Y. May 3, 1995), the plaintiff argued that witnesses should have been allowed to testify as to OTB's policy of discriminating against its employees on the ground that OTB's conduct constituted habit evidence admissible under Rule 406. The court rejected this argument stating that "in order to be admissible under this rule . . . the conduct at issue must constitute a 'regular response to a repeated specific situation.'" Id. (quoting Thompson v. Boggs, 33 F.3d 847, 854 (7th Cir. 1994)). The court found that "evidence of an employer's overall policy of discrimination against several individuals under varying circumstances is not the sort of repeated conduct covered by Rule 406." Id.

Here, plaintiff's alleged insubordination and lack of teamwork at CSFB was in response to the specific circumstances plaintiff confronted at that job. In other words, plaintiff's conduct at CSFB resulted from many factors, including her interaction with supervisors and other employees, within the CSFB working environment. Plaintiff's experience at UBS was necessarily different because UBS had a working environment distinct from that at CSFB. Plaintiff's alleged insubordination and lack of teamwork at UBS therefore cannot be seen as habit because it is not "a regular response to a repeated specific situation." In any event, insubordination at two securities firms is not of sufficient frequency to show the type of semi-automatic conduct envisioned in Rule 406. The CSFB Performance Deficiency Memorandum is therefore not admissible as habit evidence under Rule 406.

In addition to the prohibition found in Rule 404(b) and the inapplicability of Rule 406, there is another reason to preclude the admission of the CSFB Memorandum. To admit the Memorandum would, in effect, create a trial within a trial. Absent a stipulation, documents must

be authenticated before they are admitted. That means that someone from CSFB would have to testify as to the Memorandum's authenticity. Then, both sides would likely call witnesses to testify regarding plaintiff's performance at CSFB. Weighing the slight probative value of this evidence against the confusion it would cause the jury and the inevitable delay in the core trial proceedings, I also find the proferred evidence inadmissible under Rule 403.

[544] II. DEFENDANTS' MOTIONS

A. To Preclude Alleged Acts of Discrimination Against Another UBS Employee

Defendants seek to preclude plaintiff from introducing evidence of alleged acts of discrimination directed at sales assistant Peggy Yeh by Matthew Chapin, the Manager of the U.S. Asia Equities Sales Desk. These acts include: (1) use of the expressions "chicks" and "yellow fever" when referring to Asian women; (2) asking whether Yeh planned to wear a one-piece or two-piece bathing suit on vacation; (3) asking whether Yeh had any "weekend exploits;" (4) stating his belief that extramarital affairs between consenting adults were acceptable; and (5) his suggestion that Yeh use her feminine charms to improve client relationships. Defendants also seek to preclude an alleged statement made by co-worker Robert Hrabchak, who responded to Yeh's comments belittling him at an employee dinner by saying "fuck me, Peggy." [2] Finally, defendants also seek to preclude any evidence concerning Yeh's exit interview at UBS, in which Yeh allegedly described discriminatory comments and conduct by Chapin and Hrabchak.

"As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent." Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990) (collecting cases). The Ninth Circuit cited Spulak in stating that "it is clear that an employer's conduct tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility towards that group is the true reason behind firing an employee who is a member of that group." Heyne v. Caruso, 69 F.3d 1475, 1479 (9th Cir. 1995). In addition, the Third Circuit has recognized that, as a general rule, "evidence of a defendant's prior discriminatory treatment of a plaintiff or other employees is relevant and admissible under the Federal Rules of Evidence to establish whether a defendant's employment action against an employee was motivated by invidious discrimination." Becker, 207 F.3d at 194, n.8.

The type of discrimination directed at other employees must be similar in nature to that experienced by the plaintiff in order to make the "other employee" conduct admissible. In Heyne, for example, the plaintiff claimed she was fired for rejecting the sexual advances of her

employer, Mario Caruso. See Heyne, 69 F.3d at 1477. The court admitted evidence of the employer's sexual harassment of other female employees, stating as follows:

Evidence of Caruso's sexual harassment of other female workers may be used, however, to prove his motive or intent in discharging Heyne. The sexual harassment of others, if shown to have occurred, is relevant and probative of Caruso's general attitude of disrespect toward his female employees, and his sexual objectification of them. That attitude is relevant to the question of Caruso's motive for discharging Heyne.

Id. at 1480 (citation omitted). The court found that the probative value of this evidence outweighed the danger of unfair prejudice.

[545] There is no unfair prejudice, however, if the jury were to believe that an employer's sexual harassment of other female employees made it more likely that an employer viewed his female workers as sexual objects, and that, in turn, convinced the jury that an employer was more likely to fire an employee in retaliation for her refusal of his sexual advances. There is a direct link between the issue before the jury -- the employer's motive behind firing the plaintiff -- and the factor on which the jury's decision is based -- the employer's harassment of other female employees.

Id. at 1481.

Two types of discrimination are at play: (1) the sexual harassment experienced by Yeh because of Chapin's attraction to her; and (2) the alleged unfavorable treatment of plaintiff by Chapin because she is a woman. Facially, the two types of discrimination appear to differ, one being the kind of harassment seen in hostile work environment cases and the other being disparate treament. But there is a common thread -- both result from Chapin's non-performance based reaction to individuals based on their gender and they both degrade individuals because of their sex, albeit in different ways.

In Becker, the Third Circuit noted that the courts that admitted other employee evidence did so because the discriminatory nature of the conduct tended to show the employer's state of mind or attitude toward members of the protected class. See id., 207 F.3d at 194, n.8. Similarly, the Eighth Circuit reversed a jury verdict for defendant in an age and race discrimination suit where the district court excluded, on relevance grounds, "evidence which tended to show a climate of race and age bias at [defendant's company]." Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1102 (8th Cir. 1988), abrogated on other grounds by Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989). In Estes, the court noted that an employer's prior or ongoing discriminatory conduct is indeed relevant to proving a particular instance of

discrimination. See id. at 1102. See also Phillip v. ANR Freight Sys., Inc., 945 F.2d 1054 (8th Cir. 1991) (stating that "'background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive'") (quoting Estes, 856 F.2d at 1103).

Accordingly, plaintiff may introduce evidence of Chapin's allegedly discriminatory treatment of Yeh, including use of the phrase "yellow fever." In addition, defendants [546] will likely offer evidence that four of the seven people Chapin hired were women, albeit all of them were Asian. Chapin's comments to Yeh, particularly his use of the phrase "yellow fever," indicate his attraction to Asian women. The fact that he hired and promoted four women, all from the group he finds sexually attractive, does not negate the possibility of discrimination against non-Asian women. Thus, plaintiff would be allowed to offer the Yeh evidence, in any event, to rebut this defense.

B. To Preclude Irrelevant Testimony

1. Court Decisions and Discovery

Defendants contend that this Court's previous decisions in this case, including the imposition of sanctions on UBS, are irrelevant to plaintiff's discrimination claims and would unfairly prejudice UBS. Defendants are right. Placing the five previous decisions in this case before the jury would serve no legitimate purpose. The jurors will be told all they need to know through the evidence admitted at trial and my charge. There is no need to reference my earlier decisions.

Defendants also argue that none of the correspondence between counsel on discovery matters is relevant to plaintiff's claims or the adverse inference instruction and seek to preclude plaintiff from introducing this evidence. In Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 2004 U.S. Dist. LEXIS 13574, No. 02 Civ. 1243, 2004 WL 1620866, at 5 (S.D.N.Y. July 20, 2004) ("Zubulake V"), I found that "UBS personnel unquestionably deleted relevant e-mails from their computers after August 2001, even though they had received at least two directions from counsel not to." I also found that "UBS acted wilfully in destroying potentially relevant information, which resulted either in the absence of such information or its tardy production . . . ." 2004 U.S. Dist. LEXIS 13574, [WL] at 12. I therefore concluded that the appropriate remedy was an adverse inference instruction with respect to e-mails deleted after August 2001. See 2004 U.S. Dist. LEXIS 13574, [WL] at 13. The text of the adverse inference instruction I intend to give the jury in this case is set forth at the end of Zubulake V. It states, in pertinent part, as follows: "You may also consider whether you are satisfied that UBS's failure to produce this information was reasonable."

In light of the above, plaintiff may introduce correspondence between counsel on discovery matters if defendants open the door by introducing evidence as to whether their failure to produce was reasonable. If defendants decide not to offer proof that their failure to produce certain e-mails (or late production of other e-mails) was justified, plaintiff will not be permitted to introduce any of the correspondence between counsel in her case in chief.

2. Back-Up Tapes

Defendants seek to preclude any evidence concerning the failure by UBS to preserve several monthly back-up tapes. In Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, (S.D.N.Y. 2003) ("Zubulake IV"), I stated the following:

Whether a company's duty to preserve extends to backup tapes has been a grey area. As a result, it is not terribly surprising that a company would think that it did not have a duty to preserve all of its backup tapes, even when it reasonably anticipated the onset of litigation. Thus, UBS's failure to preserve all potentially relevant backup tapes was merely negligent, as opposed to grossly negligent or reckless.

Id. at 220. The destruction of some of the backup tapes may be relevant to UBS's justification for failing to produce some of the e-mails sent or received in August and September 2001. However, for the reasons stated with regard to attorney correspondence, the choice as to whether to [547] introduce such evidence is left to defendants. Plaintiff can introduce evidence of backup tape destruction if, and only if, defendants first open the door to such evidence.

3. Securities Exchange Commission Compliance

According to defendants, any testimony about UBS's compliance with Securities Exchange Commission ("SEC") Rule 17a-4 is irrelevant and should be excluded. Defendants correctly point out that this case does not arise out of any alleged failure by UBS to comply with SEC Rule 17a-4. Admitting testimony of UBS's noncompliance with the Rule would only serve to unfairly prejudice the jury against UBS. I previously noted that "in the absence of a clear professional duty, the only obvious reason for Zubulake to disclose this material to regulators is to gain leverage against UBS in this action." Zubulake v. UBS Warburg LLC, 230 F.R.D. 290, 2003 U.S. Dist. LEXIS 7940, No. 02 Civ. 1243, 2003 WL 21087136, at 2 (S.D.N.Y. May 13, 2003) ("Zubulake II"). This same observation applies to plaintiff presenting evidence of alleged violations of SEC Rule 17a-4 to the jury, which could cause undue prejudice. This evidence is excluded even if defendants seek to prove the reasonableness of their non-production of certain e-mails.

4. Chapin's Arrest

Defendants also seek to prevent plaintiff from introducing testimony and documents concerning Chapin's arrest for disorderly conduct which occurred during a client outing with Leland Timblick. In her initial opposition papers, plaintiff states that she does not intend to present evidence of Chapin's arrest at trial. See Pl. Opp. at 3, n.3. However, in her supplemental opposition papers, plaintiff reserves the right to testify as to Chapin's arrest should defendants raise the issue of plaintiff's perceived lack of respect for Chapin as her manager. See Plaintiff's Supplemental Memorandum of Law in Opposition to Defendants' Motions in Limine. Plaintiff's request is denied. The resulting prejudice from proof of this arrest would outweigh its probative value. Furthermore, the conduct resulting in the arrest does not relate in any way to the truthfulness of the witness. See Fed. R. Evid. 608(b).

5. Chapin's Alleged Prior Conduct

Defendants seek to preclude testimony of Chapin's alleged discriminatory conduct at other firms. Such evidence includes rumors that Chapin sexually harassed a former colleague at HSBC, allegations that he discriminated against women at his prior place or places of employment, and a former colleague's reference to him as a "misogynist." Defendants argue that such hearsay testimony is barred by Rule 602 as plaintiff has no personal knowledge of Chapin's prior conduct. In response, plaintiff has stated that although she herself will not give such testimony, she may call individuals who do have actual knowledge, including Raymond Tam and Michael Bugel, both of whom were formerly employed by HSBC. See Pl. Opp. at 5-6.

In a telephone conference held on March 15, 2005, plaintiff conceded that she does not intend to call either witness in her direct case. Whether she is entitled to call either witness on rebuttal is an open question, but it is highly unlikely that this Court would permit such testimony for the same reasons discussed in Part I, supra, with regard to character evidence.

6. Demographics of Senior Management

Defendants anticipate that plaintiff will proffer her own testimony concerning the number of women in senior positions at UBS. Plaintiff has stated that she [548] does not intend to provide such testimony unless UBS opens the door. See id. at 6. Plaintiff is permitted to testify to her own observations.

7. September 2001 Conference

Defendants seek to preclude evidence of Chapin's decision not to cancel a conference in New York attended by visitors from China during the wake of the September 11, 2001 tragedy. Plaintiff claims that such evidence is relevant to discrediting an e-mail in which Chapin describes as false Zubulake's statement to another salesperson that Peggy Yeh was forced to attend the conference. This is surely a collateral issue. The e-mail, in fact, is favorable to defendants as it highlights plaintiff's alleged insubordination in saying negative things about Chapin to others.

Whether or not Yeh, in fact, felt pressured to attend the conference is irrelevant. Furthermore, the probative value of this evidence, if any, is completely outweighed by the danger of unfair prejudice given the emotions associated with the attacks of September 11th. This evidence is therefore excluded.

8. Client Functions

Defendants argue that evidence that plaintiff's co-workers organized client trips to strip clubs is irrelevant to plaintiff's claims. Although plaintiff has not alleged a hostile work environment, she has alleged discriminatory treatment, including the purposeful exclusion from client outings. Having client outings at strip clubs, knowing that women would obviously not want to attend, is one such method of exclusion. Therefore, evidence of these outings is relevant and will be admitted.

C. To Preclude Certain Stray Remarks

Defendants anticipate that plaintiff will seek to admit evidence that: (1) Derek Hillen, a UBS employee, referred to a male contact as a "dickhead" in an e-mail to Chapin and plaintiff; and (2) an e-mail from Andrew Clarke, a co-worker on the Desk, in which he stated that plaintiff and a co-worker, Lisa Marrapodi, were engaging in a "mutual bitch session." [7] Clarke, however, was not a decision-maker, nor was he accused by plaintiff of discriminating against her. Accordingly, Clarke's stray remark is not evidence of discrimination and is therefore excluded. See Minton v. Lenox Hill Hosp., 160 F. Supp. 2d 687, 695 (S.D.N.Y. 2001) (stating that it is well established that "as a general matter, stray comments are not evidence of discrimination if . . . they are made by individuals without decision-making authority") (internal quotation marks and citation omitted, ellipsis in original).

D. To Preclude Testimony from Defendants' Attorneys

Plaintiff has indicated that she intends to elicit testimony from defendants' counsel, including Kevin LeBlang, Norman Simon and Robert Salzberg, regarding the preservation of e-mails and back-up tapes. Defendants claim that such testimony would be cumulative as defendants have already produced documents regarding UBS's official retention policies and the requests made to employees to retain documents. Moreover, the risk that privileged communications could be probed during trial is arguably too great to permit plaintiff to call opposing counsel to testify. I do not see any legitimate need plaintiff [549] may have for calling opposing counsel given the extensive discovery on the issue of e-mail and back-up tape preservation and retention. Plaintiff is therefore precluded from calling LeBlang, Simon and Salzberg as witnesses. See In re Grand Jury Subpoena Dated October 22, 2001, 282 F.3d 156, 160 (2d Cir. 2002) (quashing grand jury subpoena directed to attorney and finding that work product establishes a "zone of privacy for an attorney's preparation to represent a client in anticipation of litigation"); ResQNet.com, Inc. v. Lansa, Inc., 2004 U.S. Dist. LEXIS 13579, No. 01 Civ. 3578, 2004 WL 1627170, at 6 (S.D.N.Y. July, 23, 2004) (holding that the risk of encountering work product and privilege issues and the

amount of discovery already conducted are factors courts must consider in determining whether counsel may be deposed).