2-19-2010

# Selected Salient Evidentiary Issues in Employment Discrimination Cases

Lynn McLain
*University of Baltimore*, lmclain@ubalt.edu

**Selected Salient Evidentiary Issues in Employment Discrimination Cases**

**ALI-ABA and Georgetown CLS**
**Georgetown University Law Center**

**February 19, 2010**

Panel Discussion by the Hon. John Facciola; the Hon. Paul Grimm; Robert Fitzpatrick, Esq.; and Prof. Lynn McLain,[1] University of Baltimore School of Law

Table of Contents



[1] These materials were prepared by Prof. McLain , and any errors are her own.

## I. Significant Relevance for a Nonhearsay Purpose Avoids the Exclusionary Hearsay Rule

All evidentiary issues boil down to three questions:

(1) **Rule 401**: Is the evidence relevant to the case?

(2) Do any **specific rules** of evidence (e.g., the hearsay rule; privileges; or the rules regarding subsequent remedial measures or compromise negotiations) exclude the evidence?

(3) **Rule 403**: Should the trial court exercise its discretion to exclude the evidence for reasons of efficiency or the likelihood of unfair prejudice?

If counsel can come up with a significant, relevant, nonhearsay purpose for admitting an out-of-court statement, **the hearsay rule** (Rules 802 and 801(a)-(c)) will not exclude it.

The judge will consider the effectiveness of a Rule 105 limiting instruction in determining whether to exclude the evidence under Rule 403, but if *notice to the hearer* is a significant, and not-stipulated-to, issue in the case, the evidence should come in.

*When is notice, or effect on the hearer or reader, rather than "the truth of the matter asserted," significant?* For example:

(1) **When the plaintiff alleges retaliation for her complaint about illegal activity.**

Her complaint is relevant to show that the defendant knew she had complained, rather than to prove that her complaint was true. *See, e.g., Cones v. Shalala*, 199 F.3d 512, 521 (D.C. Cir. 2000); *Iweala v. Operational Technologies Services, Inc.*, 634 F.Supp.2d 73, 83 (D.D.C. 2009).

(2) **When the plaintiff alleges that the employer was on notice that the allegedly discriminating supervisor or co-worker had committed similar acts against others in the past and the employer had taken inadequate curative steps.**

*See Green v. Administration of Tulane Educational Fund*, 284 F.3d 642, 660 (5th Cir. 2002); *Griffin v. City of Opa-Locka*, 261 F.3d 1295 (11th Cir. 2001) (evidence of supervisor's sexual harassment of others was properly admitted as relevant to issue of defendant-employer's deliberate indifference to and condonation of his conduct, as well as arguably relevant to one or more Rule 404(b) purposes with regard to defendant-supervisor himself); *Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262 (10th Cir. 2000) (evidence of perpetrator's sexual harassment of another female employee than plaintiff was properly admitted to show notice to employer); *Bailey v. USF Holland, Inc.*, 444 F. Supp. 2d 831 (M.D. Tenn. 2006) (inadequate steps taken to remedy hostile work environment); *Cleveland v. KFC National Management Co.*, 948 F. Supp.

62, 66 (N.D. Ga. 1996) (in a Title VII sexual harassment suit against a corporate employer, in order for evidence of defendant's agent's prior sexual misconduct to be admissible under Rule 415, the "evidence of defendant's agent's misconduct must be both probative in that it proves corporate knowledge of similar misconduct and it must corroborate plaintiff's story; otherwise, the prejudicial effect on the jury is not substantially outweighed").

*Suppose the defendant **offers to stipulate** to the fact that it had notice?* Must the plaintiff and the court accept the stipulation, rather than presenting the evidence in question?

See *Old Chief v. United States*, 519 U.S. 172 (1997) (In assessing the probative value of a particular piece of evidence, "evidentiary alternatives" may be compared, but "with an appreciation of the offering party's need for evidentiary richness and narrative integrity in presenting a case. . . ."); *Briggs v. Dalkon Shield Claimants Trust*, 174 F.R.D. 369 (D.Md. 1997) (setting out similar factors regarding whether the court should accept a proffered stipulation by the defendant in a civil case) (Grimm, J.).

(3) **The defendant also may offer evidence of complaints it received about the plaintiff, not for the truth of the matter asserted, but to show its good faith.**

*E.g.*, *Velez v. ThermoKing de Puerto Rico, Inc.*, 585 F.3d 441, 445 n.1 (1st Cir. 2009); *Maday v. Public Libraries*, 480 F.3d 815 (6th Cir. 2007).

## II. "Me, Too," "He's Done It Before," "Not Me": Evidence of Character and of Other Acts

*Suppose for example, that plaintiff Yoder (in the trial this morning) had tried to introduce evidence that Yablonski had also harassed others? Or that others had at least alleged that Yablonski had harassed them? And he denies it?*

Now it's generally a **Rule 401/Rule 404/Rule 403** issue.

**Rule 406** will not apply to admit the evidence, because, even though one might say Yablonski was "in the habit" of harassing females, his actions are not of the semi-automatic nature embraced by Rule 406.

Note: **Rule 415** will apply, to admit the evidence (subject to Rule 403) only if the prior events were sexual assaults, as defined in Rule 413(d). *See Johnson v. Elk Lake School Dist.*, 283 F.3d 138, 149-59 (3d Cir. 2002) (no abuse of discretion in exclusion of evidence, in sexual harassment suit, regarding touching of another female by defendant, when second female's testimony was equivocal as to whether touching seemed intentional).

## CHARACTER EVIDENCE RULES ROAD MAP

| **Substantive Evidence: Who Did What** | **Credibility Only:** |
|---|---|
| 1. General rule of exclusion: the "propensity rule" (1st parts of 404(a) & (b)) | **Character as to Truthfulness** |
| 2. Exceptions to propensity rule | 1. 608(b): "prior bad acts" for which the witness was not convicted |
| a. 406: individual's repeated, specific habit/routine of a business | 2. 608(a): character witnesses re: a witness' or hearsay declarant's truthfulness (on cross, character witness's awareness of specific instances of principal witness may be inquired into, for limited purpose of impeaching the character witness, 405) |
| b. 413-415: sexual assault defendants' other acts of sexual assault/child molestation (415 applies in civil cases) | 3. 609: prior convictions of the witness |
| c. 412: sexual offense/harassment victims' prior sex with defendant | 4. 806: impeachment of hearsay declarants |
| d. 404(a)(1) & (2): criminal cases only and only when accused opens door | Methods of Proving Character When It Is Admissible |
| 3. Purposes other than proving propensity | 405: Generally, opinion or reputation testimony OK. But see 412. |
| a. 404(b): limited permissible purpose, subject to 403 (see also 105):<br>- Motive<br>- Intent<br>- Knowledge<br>- Opportunity<br>- Absence of mistake or accident<br>- Preparation<br>- Common scheme/plan<br>- Identity | Specific acts – only under 608(b) or 609, or under 405(b) if character is an "essential element" of the claim or defense, *i.e.*, character is directly at issue. (Otherwise, inquiry only on cross and only to impeach a 404(a) or 608(a) reputation or opinion witness.) |
| b. 405(b): character an essential element . . . (party must prove not merely an act, but character of a person . . .) (applicable in very few situations, including negligent hiring or retention cases) | |

If Yablonski's *intent* is relevant, evidence of his similar acts with regard to others may be offered under **Rule 404(b)**. *See Zubulake v.UBS Warburg LLC*, 382 F.Supp.2d 536 (S.D.N.Y. 2005). The other acts may have been either prior or subsequent to the conduct at issue at trial.

"Me, too!" The relevance of discriminatory action by *other* supervisors, against *other* employees than the plaintiff, must be determined on a case by case basis. *Sprint/United Management Co. v. Mendolsohn*, 552 U.S. 379 (2008) (ADEA case).

In making a determination whether to exclude other acts evidence under **Rule 403**, a judge should consider questions of the following type:

- How compelling is the proof of the other acts?
- If the other events allegedly happened long ago, how probative are they?
- Can the alleged perpetrator be expected to adequately defend against them?
- How long would hearing the evidence on these matters take?
- Of how much help will this evidence likely be to the jury in properly resolving the issue before it?

*See, e.g., Wyatt v. Horkeley Self Serve, Inc.*, 325 Fed. Appx. 488 (9th Cir. 2009) (unpublished) (mem.) (evidence was properly admitted as relevant to alleged harasser's motive and intent, and plaintiff's lack of consent); *Gasper v. Ruffin Hotel Corp.*, 960 A.2d 1228, 1234-37 (Md. App. 2008), *cert. granted*, 968 A.2d 1064 (Md. 2009) (no abuse of discretion, in excluding under Md. Rule 5-403, evidence of plaintiff's supervisor's previous termination by same employer for sexual harassment, offered as relevant to his motive and intent in retaliatory discharge of plaintiff, who had complained to him of sexual harassment by another employee).

## III. Other Sexual Conduct of Plaintiff

(1) *May the defendant in this morning's trial properly prove that Ms. Yoder, the sexual harassment plaintiff, kissed and flirted with prisoners?*

**Rule 412(b)(2)** tips strongly against admissibility of other sexual conduct by the plaintiff. The Rule provides:

> In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

The accompanying Advisory Committee note explains:

> Past sexual behavior connotes all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. * * * In addition, the word 'behavior' should be construed to include activities of the mind, such as fantasies or dreams. * * * This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible.

*See Jaros v. Lodgenet Entertainment Corp.*, 294 F.3d 960, 965 (8th Cir. 2002) (evidence of harassment plaintiff's "suggestive clothes" was excluded), *abrogated on other grounds, Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

Evidence of a plaintiff's behavior at the defendant's workplace is the type most likely to be admitted. *Wilson v. City of Des Moines*, 442 F.3d 637, 643-47 (8th Cir. 2006) (district court's admission of plaintiff's workplace behavior and her statements made there while she worked with alleged harassers was proper).

(2) *How does Rule 412 affect discovery?*

The Advisory Committee Note continues:

> [D]iscovery of a victim's past sexual conduct or predisposition in civil cases . . . will be continued to be governed by Fed. R. Civ. P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed. R. Civ. P. 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality. * * * In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant.

*See* Note, *Unfolding Discovery Issues that Plague Sexual Harassment Cases*, 57 HASTINGS L.J. 991 (2006) (discussing, inter alia, Rule 25 court-ordered mental examinations); *Herschenroeder vg. Johns Hopkins Univ. Applied Physics Laboratory*, 171 F.R.D. 179 (D.Md. 1997) (Grimm, J.); *Barta v. City & County of Honolulu*, 169 F.R.D. 132 (D. Hawaii 1996) (granting motion for protective order); *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983) (granting motion for protective order).

(3) *May the defense circumvent the protections of Rule 412 by offering evidence of what the alleged harasser had heard about the plaintiff, to show the alleged harasser's absence of invidious intent when, say, making a sexually explicit remark?*

*See United States v. Saunders*, 943 F.2d 388, 391 & 392 n.1 (4th Cir; 1991) (Rule 42 plainly "manifests the policy that it is unreasonable for a defendant to base his belief of consent on the victim's past sexual experiences with third persons. . . .").

## IV. Rulings as to Waiver of Attorney-Client Privilege

On December 8, 2009 the United States Supreme Court held, in *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599 (2009), that trial court orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In the 2009 case, the employee had sued his employer, alleging that he had been fired to prevent him from testifying about the employer's hiring of illegal aliens. The trial court had ordered the employer to disclose information related to the employee's pre-termination interview with the employer's attorney.

*What are the ramifications of the* Mohawk Industries *decision?* If the trial court finds, for example, that a defendant employer's reliance on an internal investigation has waived its attorney-client privilege, what can defense counsel do?

And what are counsel's *ethical obligations*, if counsel believes that the trial court's ruling is legally incorrect? Should counsel refuse to comply, so as to be held in civil contempt? *See, e.g., In re Fannie Mae Securities Litig.*, 552 F.3d 814 (D.C. Cir. 2009).

.