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Recurring Nightmares? Evidence Issues that Keep Coming Back in Employment Cases

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Recurring Nightmares? Evidence Issues that Keep Coming Back in Employment Cases
ALI-ABA Santa Fe, NM
July 23, 2010
The Hon. Paul W. Grimm, Moderator
Panel: The Hon. Bernice B. Donald, The Hon. Rebecca R. Pallmeyer,
Edward T. Ellis, Esq., and Prof. Lynn McLain¹

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¹ Any errors are Prof. McLain’s alone, as some of the panelists had no opportunity to review these materials.

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I. THE INTERSECTION (MULTI-CAR COLLISION?) OF RELEVANCE, CHARACTER EVIDENCE, HEARSAY, AND AUTHENTICATION IN THE “SOCIAL NETWORKING” ERA

A. Hypothetical Fact Patterns

Scenario 1: Employee Alleges Harassment by Her Co-Worker

The alleged harasser, Alan, and the plaintiff, Vicky, were co-workers at XYZ, Inc. They had been acquaintances at work for approximately a year before Vicky went to her supervisor to complain of sexual harassment by Alan. Vicky wishes to introduce evidence at trial that Alan harassed her by posting repeated and unwelcome comments under several photos that she had uploaded to her Facebook page, such as “nice shoes,”² “looking so hot,” and “why don’t you wear that to work?”

She also claims that Alan posted inappropriate comments to her “Facebook Wall” regarding the music she listens to. In reference to her listing the popular Rihanna song “Rude Boy,” Alan sent Vicky a Facebook message that “[I am] big enough and can get it up.”

Alan also allegedly printed out and showed several pictures of Vicky to other male employees of XYZ. The photos show Vicky wearing a short red dress at a party, wearing a bikini during her vacation to Cancun, and riding a mechanical bull at a bar. After Vicky learned of this, because the other co-workers started commenting on how she looked in a bikini—and how she’d look without it—she “de-friended” Alan.

Vicky admits that she was Facebook “friends” with Alan, but claims that she accepted his “friend request” soon after she met him and that it would have been extremely rude to deny his friend request at that time. Alan claims that he was just flirting and joking with Vicky and that he thought it was welcomed by her. He claims that Vicky could have “de-friended” him or asked him to stop earlier.

In response to Vicky’s complaint, their supervisor called them both in and told them to “be professional at work” and “keep their personal lives personal.” Vicky does not feel that this was an adequate response. She felt insulted, and that Alan “got away” with his actions. She wanted Alan to be transferred, or at least disciplined in some way.

Scenario 2: Employee Alleges Harassment by Her Supervisor

Art is the supervisor of the plaintiff, Vicky, at XYZ, Inc. Art had been Vicky’s supervisor for approximately two years and had been her primary performance evaluator before Vicky filed a sexual harassment complaint against him to HR. Vicky wishes to introduce evidence at trial that Art repeatedly harassed her at work by making lewd comments about what she was wearing in the photos she posted to Facebook. Several times, Art told Vicky that he

² This comment is ambiguous on its face. It might mean “nice shoes” or it might be a nod to one of the reputedly worst pick-up lines, “Nice shoes, wanna f___?” In the picture to which it was posted, Vicky was in her bathing suit and barefoot.

would like better a certain outfit she was wearing at work “if she hiked up her skirt a bit,” or “if she wore high heels instead of flats,” like she had worn shorter dresses and high heels in a couple of the photos on Facebook.

Vicky and Art were never Facebook “friends,” but Vicky states that Art would come to her desk during the lunch hour and look over her shoulder while she was viewing her Facebook account. While he was doing this, he would occasionally place his hands on her shoulders and give her a hasty massage. She didn’t say anything the first time, because she knew she wasn’t supposed to be on Facebook on the company computer. The second time it happened, she objected, and he told her she’d “better not complain,” because she had violated company rules.

When a female co-worker and friend of Vicky was viewing Vicky’s page on her company computer, Art took over the mouse and zoomed in on Vicky’s bust and derriere in the photos taken and said “Ooh boy, looky at that package! I’d like to get some of that! You think they sell that on e-Bay?”

According to some workers, Art would often ask other employees who were “Facebook friends” with Vicky to bring up her profile so that he could view pictures of her partying on the weekends. When this came to Vicky’s attention, she became very uncomfortable at work and went to HR to complain.

Vicky also wishes to testify that one of her co-workers told her that Art said to the co-worker that he didn’t know why Vicky was so “holier than thou,” because she listened to “slutty music,” like Rihanna’s “Rude Boy.” Vicky claims that Art himself would sing or hum, in her presence in the workplace, certain songs that feature misogynistic and sexual lyrics.

In response to Vicky’s complaint, the head of HR told her that he had “spoken to” Art and told him to “grow up and get out of middle school,” but that his best advice was for Vicky to “ignore it, consider the source, and get your work done.” Vicky alleges that after this, Art’s level of harassment increased to such an unbearable level that she was forced to quit her job. She felt that HR could not be effective at controlling Art.

Vicky and Art have a mutual male acquaintance (not an XYZ employee) who is willing to testify that he once attended a party at Art’s home, and that Art was showing sexually explicit “home movies” in his den, and making passes at all the women present.

B. Evidence Questions Raised by the Hypotheticals

All evidentiary issues boil down to three questions:

1. **Rule 401:** Is the evidence relevant to the case?
2. Do any more **specific rules** of evidence (e.g., the propensity rule; 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?

The hypothetical fact patterns above raise interrelated questions of relevance, character evidence, hearsay, nonhearsay, authentication, and the degree of likelihood of unfair prejudice. Should the employer wish to prove postings on Vicky's Facebook page, for example, all of these areas of evidence law would be implicated.

II. GENERAL RELEVANCE RULES: RULES 401-403

A. Rules 401-402

By virtue of Rules 401-402, *the threshold question for any evidence* is whether the evidence is relevant to a “fact that is of consequence to the determination of the action.” I.e., would the evidence *help* – in even the smallest way – *to prove or disprove* any such fact?

This hurdle is not very high: it will be met if the evidence has *any* probative value regarding a fact that matters with regard to the issues, under the law and the pleadings, in the case.

- In *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008), an ADEA case, the Court held that discriminatory action by *other* supervisors, against *other* employees than the plaintiff is not per se irrelevant, and its admissibility must be determined on a case by case basis under Rules 401 and 403.
- *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (per curiam) (vacating and remanding the 11th Circuit's decision on relevance):

[T]here was evidence that Tyson's plant manager, who made the disputed hiring decisions, had referred on some occasions to each of the petitioners as “boy.” Petitioners argued this was evidence of discriminatory animus. The Court of Appeals disagreed, holding that “[w]hile the use of ‘boy’ when modified by a racial classification like ‘black’ or ‘white’ is evidence of discriminatory intent, the use of ‘boy’ alone is not evidence of discrimination.” Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous.

Q1: **Is the Rule 401-402 requirement met by evidence of a sexual harassment plaintiff's social interaction and sexual conduct, off work-site, with people who are not employed by and have no connection with the defendant?**

- If it is offered to show whether she welcomed the alleged harasser's conduct, it likely meets Rule 401. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 68-69 (1986) (question is whether sexual harassment plaintiff “by her conduct

indicated that the alleged advances were ‘unwelcome,’” and on this point her “sexually provocative speech or dress” is “obviously relevant”; court of appeals erred in holding that there was a “per se rule against admissibility” of evidence of such matters).

- If the evidence is to be excluded, its exclusion would have to be based on a more specific relevance rule, **Rule 412**, which was amended post-*Meritor*.

Q2: Is the Rule 401-402 requirement met by off-worksite conduct by the alleged harasser, including his choice of provocative music, X-rated movies, reading materials, etc., that have nothing directly to do with the plaintiff?

- Such evidence would pass the low bar created by Rules 401-402.
- If it is to be excluded, its exclusion would have to be based on a more specific relevance rule, the “propensity rule” codified in **Rule 404**, or, if it passes the admissibility test on other acts evidence to show intent under **Rule 404(b)**, its exclusion would have to be based on **Rule 403**.

B. The “Clean-Up Batter”: Rule 403

Rule 403 provides that the court, in its discretion, may exclude relevant evidence if the court makes a finding (under Rule 104(a)) that the evidence’s “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.”

The 403 considerations may be summarized as: **How much probative value does this evidence add to the case? Does it carry a high risk of unfair prejudice? Is it worth the time it will take or the distraction it may cause?**

Many “rules” established by the employment discrimination case law result from a Rule 403-type analysis.

For example, under the “**stray remarks**” doctrine, the courts weigh the probative value of the remark against the risk that its admission would unfairly prejudice the fact-finder against the employer. Thus, generally, the courts consider the following when evaluating the relevance of “stray remarks” to an allegedly discriminatory employment decision:

- (a) Whether the disputed remark was made by the decision-maker (not merely an agent of the employer uninvolved in the challenged decision);
- (b) Whether the disputed remark was isolated or part of a pattern of biased comments;

- (c) Whether the disputed remark was made close in time to the challenged decision; and
- (d) Whether the disputed remark was ambiguous or clearly reflective of discriminatory bias.

See, e.g., Annot., 155 A.L.R. Fed. 283 (ADEA cases); *Tooson v. Roadway Express, Inc.*, 47 Fed. Appx. 370, 375 (6th Cir. 2002); *McMillan v. Massachusetts SPCA*, 140 F.3d 288, 300 (1st Cir. 1998).

Q3: Should evidence of the alleged harasser’s reading materials, etc. be admissible on the issue of his intent when making comments to the plaintiff? Assuming that the evidence passes Rule 404, should it be excluded under Rule 403?

- Is the evidence’s probative value that it “adds to the pot” significant? Are his interests unambiguous? Undisputed? If either of the latter, is the proffered evidence worth the time? Likely to result only in unfair prejudice against the employer?

Cf. United States v. Curtin, 489 F.3d 935 (9th Cir. 2007) (en banc) (defendant’s reading material regarding sex with children was relevant to his intent to commit sex crime against a minor, when defense was that he thought person who would meet him was an adult); Morse, *Maryland Women is Convicted of Killing, Freezing Adopted Girls*, BALTIMORE SUN, Feb. 23, 2010, at A3 (“Prosecutors . . . described how police found a lengthy printout of testimony from a D.C. child abuse case in [defendant] Bowman’s house. Prosecutor John Maloney suggested that she was preparing her defense should her crimes be discovered. ‘Who has night reading of grand-jury testimony, over an inch thick, from a D.C. child abuse case?’ Maloney asked jurors, holding up the court document.”); Note, *Books as Weapons: Reading Materials and Unfairly Prejudicial Character Evidence*, 31 WASH. U. J.L. & POL’Y 257 (2009); Note, *The Admissibility of an Accused’s Choice of Reading Material as Evidence under Federal Rule of Evidence 404(b): What Are the Constitutional Implications of This Type of Evidence?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 349 (2008).

III. CHARTS OF SPECIFIC RULES REGARDING CHARACTER EVIDENCE AND EVIDENCE OF OTHER ACTS

As the following charts illustrate, **character evidence may be offered either as substantive evidence** (Rules 404-406 and 412-415) **or only as to credibility** (impeachment or rehabilitation, Rules 608-609, and 806).

CHARACTER EVIDENCE RULES ROAD MAP

<p>Substantive Evidence: Helps to Actually Prove Who Did What</p> <ol style="list-style-type: none"> 1. <u>General rule of exclusion</u>: the “propensity rule” (1st parts of 404(a) & (b)) 2. <u>Exceptions to propensity rule</u> <ol style="list-style-type: none"> a. 406: individual’s repeated, <i>specific</i> habit/routine of a business b. 413-415: sexual assault defendants’ other acts of sexual assault/child molestation (only 415 applies in civil cases) c. 412: sexual offense/harassment victims’ prior sex <i>with defendant</i> d. 404(a)(1) & (2): only criminal cases and only when accused opens door 3. <u>Purposes other than proving propensity</u> <ol style="list-style-type: none"> a. 404(b): limited permissible purpose of evidence of a person’s “other acts”, subject to 403 (see also 105 as to limiting instruction): <ul style="list-style-type: none"> - Motive - Intent - Knowledge - Opportunity - Absence of mistake or accident - Preparation - Common scheme/plan - Identity b. 405(b): character an essential element . . . (party must prove not merely an act, but character of a person . . .) (applicable in <i>very few</i> situations, including regarding employee’s relevant character trait when employer is sued for negligent hiring or retention) 	<p>Character as to Truthfulness Only: Credibility Evidence Goes Only to Weight to be Given Substantive Evidence</p> <ol style="list-style-type: none"> 1. 608(b): ”prior bad acts” for which the witness (or hearsay declarant) was not convicted, but which are probative of untruthfulness 2. 608(a): character witnesses to give opinion or reputation evidence re: a witness’s or a hearsay declarant’s character for truthfulness or untruthfulness (on cross, character witness’s awareness of specific instances of principal witness may be inquired into, but only for limited purpose of impeaching the character witness, 405) 3. 609: prior convictions of the witness or of a hearsay declarant 4. 806: impeachment of hearsay declarants <p style="text-align: center;"><u>Methods of Proving Character When It Is Admissible</u></p> <p>405: Generally, opinion or reputation testimony OK. But see 412.</p> <p>Specific acts maybe proved only under 404(b), 608(b), or 609 (or under 405(b), in rare cases where character is an “essential element” of the claim or defense, <i>i.e.</i>, character is directly at issue). Otherwise, inquiry into specific instances is permitted only on cross of and only to impeach a 404(a) or 608(a) character witness (reputation or opinion witness).</p>
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JUDGE GRIMM'S CHARACTER EVIDENCE FLOWCHART

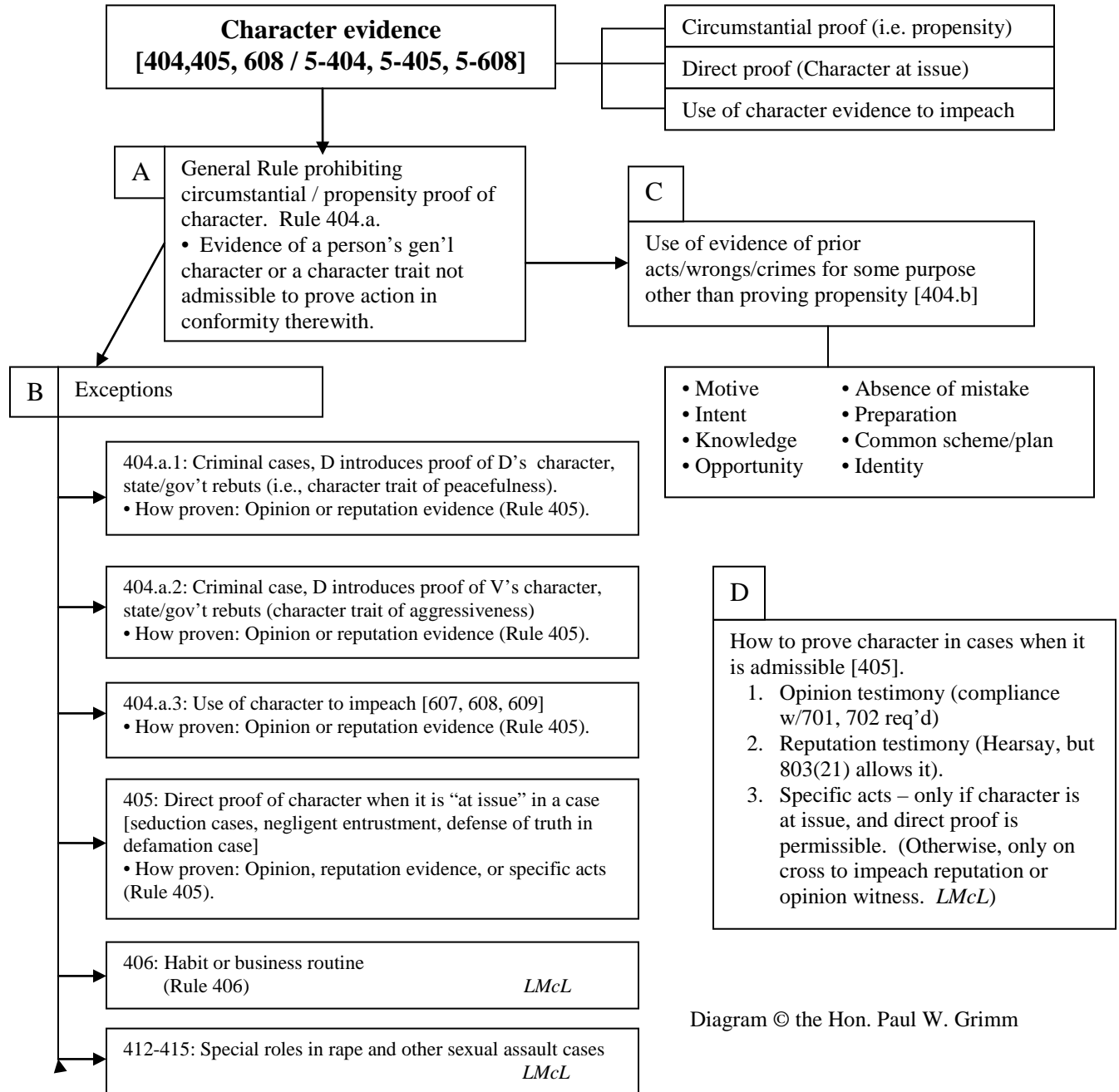


Diagram © the Hon. Paul W. Grimm

Analysis of Diagram.

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- A →** Is the proposed use of evidence to prove propensity / circumstantial proof of character, as described in **A**?
- IF YES →** Then it is NOT admissible unless one of the exceptions in **B** applies. If one of the exceptions in **B** applies, character may only be proved in one of the ways permitted in **D**.
- IF NO →** Then is use of proposed evidence relevant for some non-propensity purpose as described in **C**?
 - IF NO →** Evidence is not admissible.
 - IF YES →** Evidence is admissible for non-propensity purpose subject to 403 balancing, and a limiting instruction under Rule 105. And any otherwise admissible evidence of the prior crime, wrong, or act may be admitted.

IV. SUBSTANTIVE USE OF CHARACTER EVIDENCE: RULES 404-406 AND 412-415

A. “Me, Too”

Q4: Suppose for example, that plaintiff Vicky wants to introduce evidence that Alan (or Art) had also harassed others? Or that others had at least alleged that Alan (or Art) had harassed them? And he denies it?

- Now it’s generally a **Rule 401/Rule 404/Rule 403** issue. Rules 415 and 406 come into play only in very limited circumstances.

B. Rule 415: Other Sexual Assaults by the Alleged Harasser

Rule 415 will apply, to permit the evidence (subject to Rule 403) *only if the prior* events were sexual assaults, as defined in Rule 413(d) (see also 18 U.S.C. §§ 2241-2245).

The Congressional analysis supporting Rule 415 explained that such evidence

could be considered as evidence that the defendant has the motivation or disposition to commit sexual assaults, and a lack of effective inhibitions against acting on such impulses, and as evidence bearing on the probability or improbability that the defendant was falsely implicated in the offense of which he or she is presently accused.

137 Cong. Rec. at S3239 (daily ed. Mar. 1991).

Rule 415 tips toward admissibility, but the evidence may be excluded under Rule 403, when its probative value is *substantially* outweighed by the risks of unfair prejudice, confusion or distraction of the jury, or by undue consumption of trial time.

- *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).
- *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”).

Rule 415 contains a *notice requirement*.

- *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 512 (6th Cir. 2001) (EEOC complied with notice requirement under Rule 415 in same-sex sexual harassment case).

C. Rule 406: Habit or Business Routine

- **Rule 406** will *not* apply to admit the evidence addressed in Q4 above, because, even though one might say, colloquially that Alan (or Art) was “in the habit” of harassing females, his actions are not of the semi-automatic nature embraced by Rule 406. Examples of Rule 406-type evidence would be, *e.g.*, always smoking cigarettes to the filter; always putting one’s belt on from left to right; routinely optically scanning certain records and destroying paper copies. . . .

D. Rule 404: both the first clause of 404(a) and the first sentence of 404(b) codify the “propensity rule” of exclusion.

When proof of character is offered merely to show that a person is a “good” or “bad person, either in general or with regard to a particular trait, and thus as circumstantial evidence that the person acted “in character” and did the “right” or “wrong” thing in the incident at issue at trial, it is inadmissible.

- Beware: The protection of the propensity rule may be **waived** by making a **sweeping claim of innocence** in opening statement or by testifying on direct, *e.g.*, “I’ve never touched a woman other than my wife.” Such a claim may well open the door to other acts evidence that would not otherwise have been admissible. *E.g.*, *Walder v. United States*, 347 U.S. 62 (1954); *United States v. Johnson*, 634 F.2d 735, 737-38 (4th Cir. 1980).

E. Rule 404(b): Evidence of “other acts” (either **good or bad acts, and either **prior or subsequent** to the conduct at issue at trial), is not excluded by the propensity rule when it has special relevance to a contested, narrower issue in the case, “such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.”**

- *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515 (3d Cir. 2003) (evidence of subsequent “good” act properly admitted to prove non-discriminatory intent); in ADEA case, evidence was properly admitted that foreman who had fired plaintiff subsequently hired an employee of the same age as plaintiff).

1. *Intent* (a/k/a absence of mistake, accident, or nondiscriminatory purpose) is critical to the resolution of an employment discrimination claim.

- *Johnson v. Hugo’s Skateway*, 974 F.2d 1408, 1413 (4th Cir. 1992) (en banc) (no abuse of discretion to admit evidence of a 1979 consent order on limited question whether defendant had posted signs or instructed its employers as to

nondiscriminatory practices, as required by the order; evidence was relevant to defendant's motive and intent in actions taken against plaintiffs).

- *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130 (4th Cir. 1988) (racial slurs were relevant to show racial animus; their exclusion was harmless error).
- *Zubulake v. UBS Warburg LLC*, 382 F.Supp.2d 536 (S.D.N.Y. 2005) (alleged harasser's similar acts with regard to others may be relevant to his or her intent).
- *Cf. Morgan v. Foretich*, 846 F.2d 941, 945 (4th Cir. 1988) (in civil suit for injuries caused by alleged sexual abuse of child of third marriage, reversible error to exclude evidence of sexual abuse of defendant's child by second marriage, which negated several defenses, including that child plaintiff's injuries were self-inflicted).

2. **Identity** can also be an issue, particularly where the plaintiff needs to prove from whom harassment, such as hang-up calls or intrusion of her personal workspace or belongings came.

- *Cf. Morgan v. Foretich*, 846 F.2d 941, 945 (4th Cir. 1988) (in civil suit for injuries caused by alleged sexual abuse of child of third marriage, reversible error to exclude evidence of sexual abuse of a defendant's child by second marriage, which tended to identify defendants as the abusers since only they had access to both girls).

Q5: Is the special relevance requirement of Rule 404(b) met by the evidence regarding off-worksite conduct by Art at his party?

- In response to an objection, "improper character evidence," the plaintiff should respond that the evidence is relevant to Art's intent in his actions toward her.

F. Remember Rule 403

Even if evidence is relevant for a permissible purpose under **Rule 404(b)**, a party may seek its exclusion under **Rule 403**.

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

1. ***How compelling is the proof of the other acts?***

N.B. *Huddleston v. United States*, 485 U.S. 681, 689 (1988) held that the proponent of the evidence must present only enough evidence *to permit a reasonable jury to find, under Rule 104(b), by a preponderance of the evidence*, that the other acts were committed by the person in question. The trial judge need not be persuaded of the truth of the evidence. (The

strength of proof, however, may influence the trial court’s Rule 403 ruling.)

2. ***If the other events allegedly happened long ago, how probative are they?***
3. ***Can the alleged perpetrator be expected to adequately defend against them?***
4. ***How long would hearing the evidence on these matters take?***
5. ***Of how much help will this evidence likely be to the jury in properly resolving the issue before it?***

- *See, e.g., Wyatt v. Horkley 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).
- *Rudin v. Lincoln Land Community College*, 420 F.3d 712 (7th Cir. 2005) (discussing “direct evidence” of discriminatory intent—an admission that defendant is acting based on prohibited classification—and “circumstantial evidence” of discriminatory motivation).
- *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 the corollary 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).

Q6: In response to a Rule 403 objection, should the court admit the evidence regarding Art’s party at his home?

Q7: “Me, too.” If Vicky calls other women who worked for Art, either as employees or providers of contractual services, to show that he also made inappropriate sexual remarks to them, should this be admitted to show Art’s intent, over a Rule 403 objection?

- *King v. McMillan*, 594 F.3d 301, 308, 310-11 (4th Cir. 2010) (no abuse of discretion in admitting “me, too” evidence during same time frame of plaintiff’s employment, both to show that the supervisor’s unwelcoming conduct was due to plaintiff’s gender and to show that it was sufficiently severe or pervasive to create a hostile work environment).

As to **the plaintiff’s acts**, see, *e.g., Stover v. Hattiesburg Public School Dist.*, 549 F.3d 988, 993-94 (5th Cir. 2008) (no abuse of discretion, in case alleging retaliation, to permit plaintiff to be impeached by evidence that she deleted her work computer files on the day she resigned).

G. Limiting Instructions: Rule 105

If the evidence is admitted under Rule 404(b) or for any other limited purpose, a limiting jury instruction *should be given on request*.

- *United States v. Cooper*, 577 F.2d 1079, 1088-89 (6th Cir. 1978) (finding no plain error in trial judge's failure to sua sponte give limiting instruction regarding evidence properly admitted under Rule 404(b)).

A jury instruction regarding the limited purpose of evidence admitted under Rule 404(b) should not be a mere laundry list of categories under that rule; it should be focused, so as to help the jury to use the evidence only for the proper purpose.

- *See, e.g., United States v. Teague*, 737 F.2d 378, 381 (4th Cir. 1984) (no error in admission of other crimes evidence; inter alia, "immediately after receipt of this testimony before the jury, the court gave an excellent charge instructing the jury that it could consider such testimony only in trying to determine the defendant's motive, intent, knowledge or state of mind and such testimony could not be considered in determining whether the defendant committed the act or acts charged in the indictment. This is in keeping with this court's suggested procedure. This charge was also repeated in the final jury instructions.") (citations omitted).

H. When, if Ever, is a Person's "Character" an "Essential Element" of a Claim or Defense, Under Rule 405(b)?

Rule 405(b) provides that reputation testimony, opinion testimony, and evidence of specific instances are all admissible to prove a person's character or character trait, **when that person's character is an "essential element of a [criminal] charge, [civil] claim, or defense. . . ."** N.B. *Character is not an "essential element" just because only persons "of a certain character" might do an act of the kind charged. See Gibson v. Mayor & Council*, 355 F.3d 215, 232-33 (3d Cir. 2004). If proof that the party did the alleged act would suffice to prove the case, then character is not an essential element.

Rather, *for 405(b) to apply, the substantive law requires that someone's character must be proven, as an element of the charge, claim, or defense. In the very rare situation that character is such an essential element, the most probative—and the most time-consuming—method of proof is permitted: proof by specific instances. One might reasonably wonder why Rule 404 says nothing on this topic and instead it is hidden away in 405(b). The answer is that Rule 404 does not exclude such "essential element" evidence, because it is not offered to prove action in conformity with character, but to prove character itself.*

In **negligent hiring or retention** cases, the plaintiff must show that the employer knew or should have known of the employee's bad character for the pertinent trait. In such cases, the

plaintiff may prove the employee's character by reputation or opinion evidence or by evidence of specific acts by the employee, or any combination of the three.

I. Other Sexual Conduct of Plaintiff: Rule 412's "Rape Shield," Extended in 1994 to Civil Cases

1. *Was the sexual advance by the alleged harasser unwelcome to the plaintiff?*

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.

Rule 412(b)(2)'s *balancing test is the opposite of Rule 403's* (if probative value and risk of unfair prejudice are equal, the Rule 403 test would keep the evidence in, but Rule 412 excludes it; Rule 412, the more specific of the two, governs as to 412 issues). As under Rule 609(b), the evidence is in under 412 only if its proponent shows that its probative value "*substantially outweighs*" the countervailing risks. See Note, *But She Spoke in an Un-Ladylike Fashion!: Parsing Through the Standards of Evidentiary Admissibility in Civil Lawsuits After the 1994 Amendments to the Rape Shield Law*, 70 OHIO ST. L.J. 661 (2009).

Evidence of a **plaintiff's behavior at the defendant's workplace is the type most likely to be admissible.**

- *Wilson v. City of Des Moines*, 442 F.3d 637, 643-47 (8th Cir. 2006) (district court's admission of plaintiff's workplace behavior including her "sexually explicit language," her comments about "vibrators and men's sex organs," and her speaking in a "rude, lewd, and unlady-like fashion," while she worked with alleged harassers was proper).
- *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091 (9th Cir. 2002) (reversible error to admit evidence of sexual harassment plaintiff's out-of-workplace speech to coworker and her conduct at her home in front of him and a fellow officer; instruction to disregard did not cure error).
- *Wolak v. Spucci*, 217 F.3d 157, 160-61 (2d Cir. 2000) (harmless error to admit evidence, on issue whether plaintiff was injured by display of pornography at work, that she had voluntarily viewed pornography outside the workplace).
- *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 855-56 (1st Cir. 1998) (district court did not abuse its discretion in excluding evidence of plaintiff's

alleged promiscuity and the marital status of her boyfriend, but *admitting* evidence that her relationship distracted her from work and, on issue whether advances were unwelcome, evidence that she flirted with allegedly harassing customer).

- *Saffa v. Oklahoma Oncology, Inc.*, 405 F.Supp.2d 1280, 1285-86, 1290-91 (D. Utah 2005) (pretrial ruling *excluding evidence of sexual harassment plaintiff's consensual sexual relationship with another doctor five years earlier, before plaintiff was employed by defendant*, when doctor was separated from his wife; there was no evidence that alleged harasser knew of this relationship, *but ruling that if plaintiff called the earlier doctor to testify*, their relationship would be relevant to credibility; also ruling that *if plaintiff testified at trial that "she never thinks in terms of affairs,"* as she has in deposition testimony, the testimony [will be] relevant for impeachment"; further, *evidence of plaintiff's conduct, and statements regarding the alleged harasser at the employer's Christmas party, will be admissible*, with regard to whether his remarks had offended her and with regard to her claim of emotional distress).

As to a plaintiff's having previously made similar but *false* allegations, *cf. Note, The Girl Who Cried Wolf: Missouri's New Approach to Evidence of Prior False Allegations*, 70 MO. L. REV. 813 (2005) (suggesting balancing test that would have been appropriate for the court to have adopted in *State v. Long*, 140 S.W.3d 27 (Mo. 2004) (en banc)).

2. What is "sexual behavior or sexual predisposition"?

The Advisory Committee note to Rule 412 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.

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

3. *Notice and Procedure*

- *Sheffield v. Hilltop Sand & Gravel Co.*, 895 F. Supp. 105 (E.D. Va. 1995) (sanctioning defendant for failing to follow procedural requirement of submitting matters under seal by excluding evidence of co-workers' testimony regarding plaintiff's sexual conversations at workplace other than with alleged harasser).

4. *How does Rule 412 affect discovery?*

The Advisory Committee Note states:

[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); *Herchenroeder v. 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).

5. *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 412 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. . .").

V. HEARSAY

A. Is the Evidence Offered for a Hearsay Purpose? Rules 801(a)-(c)

Hearsay = an *out-of-court statement* (by the "hearsay declarant") + that is **offered today at trial to prove that what the declarant said when making that statement was factually accurate** ("OCS" + "TOMA" = HS).

- *Mack v. ST Mobile Aerospace Engineering, Inc.*, 195 Fed. Appx. 829, 842 (11th Cir. 2006) (plaintiff's testimony that supervisor did *not* tell him he was required to

see someone else about harassment policy was not hearsay, as he did not testify to a statement).

“Out-of-court” means that the evidence offered today at trial is of a statement made by any person somewhere else at another time. The other place may even have been another court proceeding. **It is still “out-of-court” EVEN IF THE DECLARANT IS AT TRIAL TESTIFYING TO HIS OR HER OWN EARLIER STATEMENT.**

If the evidence offered includes an “OCS” of a person, it is hearsay only if it is offered at trial to prove “TOMA.” **TOMA = the truth of some fact, or matter, that was being asserted by the declarant before trial, at the time the declarant made the out-of-court statement.**

“Statement” may include an implied assertion from an utterance in words, if the utterance appears to have been *intended by the declarant*, at the time the declarant made the utterances, as an assertion of the fact the evidence is offered at trial to prove.

Steps in analysis:

1. Identify all the out-of-court declarants in the evidence being offered.
2. What was each declarant asserting *at the time s/he made the OCS*?
3. **For what purpose, to help to prove what relevant fact, is the proponent offering the evidence at trial?**
4. **It’s hearsay only if the proponent is asking the jury to rely on what the declarant said in his/her OCS as true, accurate, correct.**

See, e.g., Matthews v. Wisconsin Energy Corp., 534 F.3d 547, 557 (7th Cir. 2008).

5. Evidence of an OCS is hearsay if it will help to prove what it is offered to prove, **only if our thought process to make the OCS relevant must be “Declarant wouldn’t have said this, unless it was true.”**
6. On the other hand, **if it is relevant simply that the OCS was made, regardless whether the OCS was true, it is nonhearsay.** In this event, the person testifying to the OCS can be fully cross-examined as to whether the OCS was made as s/he has testified.

B. Significant Relevance for a Nonhearsay Purpose Avoids the Exclusionary Hearsay Rule 802

If a hearsay objection is made, and the evidence appears to contain an OCS of a person, the burden falls to the proponent of the evidence to explain to the court how the evidence either (1) is nonhearsay or (2) falls within a hearsay exception.

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 the nonhearsay purpose goes to a significant, and not-stipulated-to-, issue in the case, the evidence should come in.

C. Frequently Relevant Nonhearsay Purposes

If offered for a nonhearsay purpose, a limiting instruction under Rule 105 is appropriate.

1. *Notice to, or effect on, hearer or reader*

a. *To show reader or hearer's knowledge and thus how that knowledge affected his or her conduct*

- *See Socks-Brunot v. Hirschvogel, Inc.*, 184 F.R.D. 113, 120-24 (S.D. Ohio 1999) (reversing its decision to admit evidence of plaintiff's extra-marital affair with supervisor at an earlier place of employment, when it was not shown that the alleged harasser had heard of it).
- *U.S. E.E.O.C. v. Olsten Staffing Servs. Corp.*, 657 F.Supp.2d 1029, 1035 (W.D. Wis. 2009) (e-mail sent by a client of the defendant temporary staffing agency, declining to hire hearing-impaired worker, in response to agency's e-mail referring hearing-impaired worker as potential job candidate and warning client-employer about hearing impairment, was not inadmissible hearsay in ADA action filed by EEOC; it was not being offered for the truth of the matter asserted by the client, but rather to show the effect the e-mail had on the agency).
- *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1095-97 (9th Cir. 2002) (statements made by plaintiff of which alleged harasser was aware)

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.

- *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). *See Holbrook v. Reno*, 196 F.3d 255 (D.C. Cir. 1999) (affirming summary judgment for employee, where plaintiff had made no showing that person who took adverse action against her knew of her complaint).

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, evidence that the employer had been told of the earlier acts is relevant for a nonhearsay purpose.

- *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").

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. Thermo King 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).

b. *Statements made to plaintiff, creating an abusive work environment*

- *E.g., Wilson v. City of Des Moines*, 442 F.3d 637, 641 (8th Cir. 2006) (co-worker's references to plaintiff as a "bitch," etc., were not offered for their truth; exclusion was harmless error).
- *Excel Corp. v. Bosley*, 165 F.3d 635, 638 (8th Cir. 1999).
- *Ellison v. Brady*, 924 F.2d 872, 874 (9th Cir. 1991) (co-worker had given plaintiff an anonymous note that stated, "I cried over you last night and I'm totally drained today," and mailed her a letter that stated: "I know that you are worth knowing with or without sex. . . . I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away.>").
- *Socks-Brunot v. Hirschvogel, Inc.*, 184 F.R.D. 113, 115-16 (S.D. Ohio 1999).

2. *Circumstantial evidence of out-of-court declarant’s state of mind or knowledge*

- *E.g., Bailey v. USF Holland, Inc.*, 444 F.Supp.2d 831, 844 n.5 & 848 (M.D. Tenn. 2006).
- *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (evidence of employer’s treatment of employees of different race than plaintiff is “[e]specially relevant” to whether employer’s proffered explanation is pretextual).

Q8: Does the hearsay rule exclude this evidence? HR director: “[Job applicant’s] mother died from colon cancer.”

- *See Genetic Information Nondiscrimination Act (GINA)*, 42 U.S.C. §§ 300gg *et seq.*, which went into effect in late 2009.

Q9: Constructive discharge case: plaintiff offers her statements, “You all are so vicious to me. Working here is like working in hell!”

- *See, e.g., Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).
- *Bailey v. USF Holland, Inc.*, 444 F.Supp.2d 831, 850 (M.D. Tenn. 2006) (hostile work environment plaintiffs’ statements circumstantially showing their awareness of use of racial epithets).

3. *The prior statement is inconsistent with the declarant’s testimony at trial and is offered only to impeach the declarant (Rule 613)*

- *E.g., United States v. Watkins*, 591 F.3d 780, 787 (5th Cir. 2009).

4. *The making of the prior statement is itself an improper discriminatory act, and is offered not for its truth, but as a “verbal act” or legally operative fact*

- *Bailey v. USF Holland, Inc.*, 444 F.Supp.2d 831, 847, 849 (M.D. Tenn. 2006) (racial epithets used against the plaintiffs at the workplace).

D. Out-of-Court Statements Admissible for Their Truth: Rules 801(d), 803-804, 807

1. *Rule 801(d)(2): Statement of a Party Opponent*

The defense may offer plaintiff’s statements for their truth and vice-versa.

- a. *When are a co-worker's or supervisor's statements admissible against the employer, for their truth, under 801(d)(2)(D) as statements made during the employment or agency relationship and concerning a matter within the scope of that employment or agency?*

Admissible: *E.g., Tisa v. Beasley FM Acquisition Corp.*, 343 Fed. Appx. 793 (3d Cir. 2009) (unpublished) (declarant was employee's " 'agent independent contractor,' see *American Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1434-39 (3d Cir. 1994), who had a 'heavy hand in operations' ").

- *Bailey v. USF Holland, Inc.*, 444 F.Supp.2d 831, 850 (M.D. Tenn. 2006) (supervisor's statement, refusing to take action about co-workers' use of racial epithets against plaintiffs).

Inadmissible: *E.g., Ramirez v. The GEO Group, Inc.*, 655 F.Supp.2d 1170, 1179-80 (D. Colo. 2009) (no evidence that declarant commenting as to ground for plaintiff's termination had any part in the decision-making process).

- *Di Giovanna v. Beth Israel Med. Ctr.*, 651 F.Supp.2d 193, 202 (S.D.N.Y. 2009) (in employee's suit alleging FMLA violation, statement of co-worker who had nothing to do with any decisions regarding plaintiff's FMLA leave).
- *Young v. James Green Management, Inc.*, 327 F.3d 616, 622-23 (7th Cir. 2003) (Rule 801(d)(2)(D) not applicable to statements made by defendant's employee in letter of resignation).

- b. *Under Rule 801(d)(2)(B), a party also may adopt another's statement as his or her own*

E.g., United States v. McKinney, 345 Fed. Appx. 206 (8th Cir. 2009) (per curiam) (unpublished) (defendant adopted truth of child's statement, by admitting that he had molested her).

2. *Rule 803(3): Statements by declarant directly asserting his or her present state of mind at the time of the statement*

In hostile environment cases, not only must the plaintiff show that a "reasonable person" would find the environment abusive, but that also must have been the plaintiff's subjective feeling. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991).

Q10: Hostile work environment plaintiff complains to co-worker, "I can't stand it here. I am upset all the time." Response to a hearsay objection?

E. Rule 805: Double/Multiple Hearsay

If the statement offered is that of one out-of-court declarant who was repeating another out-of-court statement by himself or another person, a hearsay exception (or relevant nonhearsay purpose) must be shown to apply for each statement in order to admit both.

- *E.g., Nyack v. Southern Connecticut State Univ.*, 424 F.Supp.2d 370, 374-76 (D. Conn. 2006) (three proffered “double hearsay” statements were admissible against defendant as statements by its agent, under Rule 801(d)(2)(D), because both declarants exercised supervisory authority over the plaintiff; a fourth was excluded, because the employee who repeated the supervisor’s statement was “outside the personnel decisionmaking hierarchy governing [plaintiff’s] conduct”).

Double hearsay, multiple-declarant issues often arise as to documents offered as business records under **Rule 803(6)**. If a person whose statement is offered for its truth is not a part of the business, another route around the hearsay rule must be found for that statement.

The same is true for EEOC determinations offered under **Rule 803(8)(C)**. The term “factual findings” in 803(8)(C) has been interpreted not to embrace hearsay that was the basis for such findings. *E.g., Federal Deposit Ins. Corp. v. Mmahat*, 907 F.2d 546, 551 n.6 (5th Cir. 1990) (“Though factual findings are admitted by Fed. R. Evid. 803(8)(C), hearsay statements contained in the report are not.”). To admit such other hearsay, another hearsay exception or a nonhearsay purpose must be cited.

Of course, factual findings appearing to be unreliable ought be excluded either under the final clause at the end of **Rule 803(8)(C)** if the opponent shows that they are unreliable, *e.g., Clark v. Clabaugh*, 20 F.3d 1290 (3d Cir. 1994), or, in the court’s discretion, the EEOC determination may be excluded under **Rule 403**. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988).

Q11: Are EEOC personnel *experts*, so that hearsay that they “reasonably relied on” may be admitted, in their reports, for a limited purpose under Rule 703?

- *See Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1345 (3d Cir. 2002) (EEOC reports are not “expert opinion evidence”; no abuse of discretion in excluding report under Rule 403).

VI. AUTHENTICATION IN THE DIGITAL ERA: RULES 901-902

A. Lorraine

For a complete run-down, see Judge Grimm’s opinion in *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007).

B. E-Mail

- *U.S. E.E.O.C. v. Olsten Staffing Servs. Corp.*, 657 F.Supp.2d 1029, 1033-34 (W.D. Wis. 2009) (testimony of human resources manager of employer, who personally retrieved from employee's computer an e-mail purporting to come from defendant, adequately authenticated it; "[Defendant] Olsten argues that only the *author* of the e-mails may authenticate them, but cites no authority for this proposition and assumes incorrectly that a witness must have personal knowledge of the *contents* of a document in order to authenticate it. If Olsten were correct, then e-mails would be inadmissible in any case in which the purported author denied their accuracy. The rules of evidence are not so punctilious. * * * Testimony from someone who personally retrieved the e-mail from the computer to which the e-mail was allegedly sent is sufficient for this purpose. further, as the EEOC observes, even without a custodian, e-mails may be authenticated through the e-mail addresses in the headers and other circumstantial evidence, such as the location where the e-mail was found.") (emphasis in original; citations omitted).
- See Rules 901(b)(1) and (4).

C. Internet

- *Safer, Inc. v. OMS Investments, Inc.*, 94 U.S.P.Q.2d 1031, 1039 (U.S. Pat. & Trademark Office, Trademark Trial & Appeal Bd. 2010) (Board will deem a document obtained from the Internet, "identifying its date of publication or date that it was accessed and printed, and its source (*e.g.*, the URL)," as genuine).
- *Griffin v. State*, ___ A.2d ___, 2010 WL ____ (Md. App. May 27, 2010) (Sept. Term 2008, No. 1132) (no error in admitting MySpace page as sufficiently authenticated by circumstantial evidence, including photo, birth date, and nickname, as belonging to murder defendant's girlfriend; page contained a threat against "snitches," and was admitted to corroborate state's witness's testimony as to why he had not identified defendant at his first trial).
- See Rule 901(b)(4).

VII. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

A. Interlocutory Appeal of Privilege Rulings

Mohawk Industries, Inc. v. Carpenter, 130 S. Ct. 599 (U.S. Dec. 8, 2009), held 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 *Mohawk Industries*, 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.

Q12. 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) (affirming contempt sanction for failure to comply with discovery deadline).

B. Applicability of Work Product

The circuits remain divided on the applicability of the work product doctrine to papers like **tax-accrual documents**, which provide legal assessments of how much money a company should put aside for possible tax liability.

The First Circuit held, en banc, that such papers and others are unprotected as attorney work product (they had been too widely distributed to be protected by the attorney-client privilege), **unless they were prepared specifically for litigation**, and the Supreme Court denied certiorari in that case. *United States v. Textron Inc. & Subsidiaries*, 577 F.3d 21 (1st Cir. 2009) (en banc), cert. denied, 2010 WL 2025145 (U.S. May 24, 2010).

VIII. SPOILIATION OF EVIDENCE: ADVERSE INFERENCE – EMPLOYER'S OBLIGATION TO PRESERVE POSSIBLE E-MAIL EVIDENCE WHEN FACING LITIGATION

A person's spoliation of evidence gives rise to a permissible adverse inference of "guilty knowledge," offered to prove the truth of that person's implied assertion, "I did something wrong, and I need to hide it."

Fed. R. Civ. P. 37(f), as amended effective December 1, 2006, precludes an adverse inference when loss of evidence was "a result of the routine, good-faith operation of an electronic information system."

- *Pension Committee of University of Montreal Pension Plan v. Bank of Am. Sec. Litig.*, 685 F.Supp.2d 456 (S.D.N.Y. 2010) (imposing sanctions on plaintiffs who all were either negligent or grossly negligent due to their failure "to timely institute written litigation holds and engag[ing] in careless and indifferent collection efforts after the duty to preserve arose," which caused loss or destruction of some documents). Judge Sheila Scheindlin wrote:

After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of **gross negligence**, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of e-mail or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

She imposed *monetary sanctions on and adverse inferences as to all the plaintiffs*. The jury instruction regarding only those plaintiffs she found to be grossly negligent informed the jury that it might "presume" that any lost evidence would have been favorable to the defendants (but that the presumption was rebuttable).

- *Rimkus Consulting Group, Inc. v. Cammarata*, ___ F. Supp.2d ___, 2010 WL 645 253 (S.D. Tex. Feb. 19, 2010) (in Fifth Circuit, unlike in Second Circuit, no adverse inference arises when party is negligent or grossly negligent; "As a general rule, *in this circuit, the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of 'bad faith.'*") (emphasis added). Judge Rosenthal found that the defendants, former employees, had intentionally and in bad faith spoliated documents, reviewed the varying rules among all the other circuits, as well (nn. 10-13 and accompanying text).
- *Thompson v. HUD*, 219 F.R.D. 93 (D. Md. 2003) (imposing sanctions but not adverse inference instruction).
- *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004), subsequent proceeding, 382 F.Supp.2d 536 (S.D.N.Y. 2005). Defendant's personnel deleted e-mails after a gender discrimination lawsuit had been filed, "even though they had received at least two directions from counsel not to." The court imposed an adverse inference instruction, awarded reimbursement of costs of redepousing individuals, and awarded attorneys' fees for a sanctions motion. Counsel has a duty "to effectively communicate" discovery obligations to the client, and "once the duty to preserve attaches, counsel must identify sources of discoverable information." Counsel "must put in place a litigation hold, and make that known to all relevant employees by communicating with them directly." This includes stopping any routine e-mail deletion, as well as routine destruction of "back up tapes."

IX. *QUON'S EVIDENTIARY IMPLICATIONS*

A. Cert. Granted in *Quon*, a Text Messaging Case

As stated by Judge Wardlaw, writing for a panel of the United States Court of Appeals for the Ninth Circuit in *Quon*:

The recently minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisdiction that has been little explored. Here, we must first answer the threshold question: Do users of text messaging services . . . have a reasonable expectation of privacy in their text messages stored on the service provider's network? We hold that they do.

Quon v. Arch Wireless Operating Co., 529 F.3d 892, 904, 91 Empl. Prac. Dec. P. 43,233, 155 Lab.Cas. P 60,628 (9th Cir. 2008), *reh'g en banc denied*, 554 F.3d 769 (9th Cir. 2009), cert. denied *sub nom. USA Mobility Wireless, Inc. v. Quon*, 130 S. Ct. 1011 (U.S. Dec. 14, 2009) (No. 08-1472), cert. granted *sub nom. City of Ontario v. Quon*, 130 S. Ct. 1011 (U.S. Dec. 14, 2009) (No. 08-1332), oral argument, 2010 WL 154005 (U.S. Apr. 19, 2010).

B. The Decision Below

The Ninth Circuit held that a public employer, a California city police department, had, as a matter of law, violated its employees' Fourth Amendment rights under the facts of the case.

The city contracted with Arch Wireless to provide text-messaging services, and issued pagers to twenty-two employees, including police sergeant Quon. Under the contract, the city would have to pay monthly overage charges for any pager that texted more than 25,000 characters that month. Sergeant Quon was told that they city's "Computer Usage, Internet, and E-Mail Policy," which he had earlier signed, and which provided that the users "should have no expectation of privacy or confidentiality when using these resources," extended to the pager text messages. But when he exceeded 25,000 characters, the police lieutenant in charge told him that he would not audit his messages if Sgt. Quon personally paid for the overage.

After several months in which Sgt. Quon had overages and the lieutenant's informal policy was followed, the police chief decided to see whether the department should contract for a higher monthly allotment than 25,000 characters. He ordered the lieutenant to obtain and audit transcripts to see how many characters were being used for official, rather than personal, matters.

In response to the city's (the subscriber's) request, Arch Wireless released to the city transcripts of Sgt. Quon's sent and received messages—including sexually explicit messages among the sergeant, his wife, a fellow male sergeant, and a female police dispatcher. Sgt. Quon and the people with whom he "texted" sued.

The Ninth Circuit first held that the district court had erred as a matter of law in not granting the plaintiffs' summary judgment against Arch Wireless under the Stored

Communications Act, 18 U.S.C. §§ 2701-2711 (1986), part of the Electronic Communications Privacy Act. The district court had erroneously held that Arch Wireless was a “remote computing service,” so that it could release private communication with the consent of the subscriber. Rather, Arch was an “electronic communication service,” which under the Act could release private information only to, or with the lawful consent of, “an addressee or intended recipient of such communication.”

Next—and this is the issue on which the Supreme Court granted certiorari—the **Ninth Circuit held that the district court erred in not having granted summary judgment for Sgt. Quon and the others on the ground that their Fourth Amendment rights** (and their privacy rights under the California Constitution, construed *in pari material*) **had been violated by the city and their employer, the police department.**

The Ninth Circuit reached the following decisions:

1. *Reasonableness of expectation of privacy*

The plaintiffs had “a reasonable expectation of privacy in the content of their text messages vis-a-vis the service provider.” They could not reasonably expect privacy as to the “address” of their messages (analogizing to the address on a mailed envelope or the numbers dialed on a phone). And had Sgt. Quon consented to the audit, his correspondents would have had no claim. But they “had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages.”

Due to the informal policy followed within the police department, Sgt. Quon had a reasonable expectation of privacy from intrusion by his employer. “[T]he fact that a hypothetical member of the public [might] request Quon’s text messages [under the California Public Records Act] might slightly diminish his expectation of privacy in the messages, [but] it does not make his belief in the privacy of the text messages objectively unreasonable.”

2. *Reasonableness of the search*

The jury had found that the department’s purpose in auditing the text messages was to determine whether the character limit should be raised above 25,000, so as “to ensure that officers were not being required to pay for work-related expenses.” The Ninth Circuit found this to be “a legitimate work-related rationale. . . .” But it found that, as a matter of law, “the search was not reasonable in scope,” as there was:

a host of simple ways to verify the efficacy of the 25,000 character limit (if that, indeed, was the intended purpose) without intruding on Appellants’ Fourth Amendment rights. For example, the Department could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame. Alternatively, if the Department wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal

messages and grant permission to the Department to review the redacted transcript. Under this process, Quon would have an incentive to be truthful because he may have previously paid for work-related overages and presumably would want the limit increased to avoid paying for such overages in the future. * * * Instead, the Department opted to review the contents of all the messages, work-related and personal, without the consent of Quon or the remaining Appellants. This was excessively intrusive in light of the noninvestigatory object of the search, and because Appellants had a reasonable expectation of privacy in those messages, the search violated their Fourth Amendment rights.

C. Arizona Public Records Requests: Metadata is to Be Disclosed

In *Lake v. City of Phoenix*, 222 Ariz. 547, 218 P.3d 1004, 107 Fair Empl. Prac. Cas. (BNA) 1142 (2009) (en banc), the Supreme Court of Arizona held that a police officer seeking the electronic version of public records, his supervisor's notes on the officer's work performance, is entitled to disclosure, under the Arizona public records statute, of the electronic version of the record, *including any embedded "inherent or 'application' metadata."* The officer suspected that the paper copies provided to him had been backdated.

Justice Bales, writing for a unanimous court, reasoned:

The metadata in an electronic document is part of the underlying document; it does not stand on its own. When a public officer uses a computer to make a public record, the metadata forms part of the document as much as the words on the page. Arizona's public records law requires that the requestor be allowed to review a copy of the "real record." It would be illogical, and contrary to the policy of openness underlying the public records laws, to conclude that public entities can withhold information embedded in an electronic document, such as the date of creation, while they would be required to produce the same information if it were written manually on a paper public record.

We accordingly hold that when a public entity maintains a public record in an electronic format, the electronic version of the record, including any embedded metadata, is subject to disclosure under our public records law.

Our decision is unlikely to result in the "administrative nightmare" that the City envisions. A public entity is not required to spend "countless hours" identifying metadata; instead, it can satisfy a public records request merely by providing the requestor with a copy of the record in its native format. Additionally, not every public records request will require disclosure of the native file. Public entities may provide paper copies if the nature of the request precludes any need for the electronic version. Public records requests that are unduly burdensome or harassing can be addressed under existing law, which recognizes that disclosure may be refused based on concerns of privacy, confidentiality, or the best interests of the state.

We do not here decide when a public entity is required to retain public records in electronic format. That a public record currently exists in an electronic format, and is subject to disclosure in that format, does not itself determine whether there is a statutory obligation to preserve it electronically.

(Citations omitted.)

D. More on Discovery—and Privacy—in the Digital Age

Was the alleged harasser or the plaintiff where he or she claims to have been? *See* Wong, *Online Trail Fraught with Risks*, BALTIMORE SUN, Mar. 19, 2010, at 18A (“Experts say it’s one thing to use social media to talk about a movie or your meal. It’s another to let the digital universe know that you are, say, at New York’s LaGuardia Airport right now and not at home. Many people remain complacent about using online privacy settings. An added complication of these applications is that they link up with Facebook and Twitter, allowing a larger audience to see location-based updates. This month, Twitter introduced its own location-based feature and Facebook is expected to do the same.”).

- *See* also Bahadur, *Electronic Discovery, Informational Privacy, Facebook and Utopian Civil Justice*, 79 MISS. L.J. 317 (2009) (proposing an expansion of “the information-sharing model” created by Rule 502(d) and the related amendments to the Fed.R.Civ.P.).