MWELA Annual Conference
March 9, 2007

Discovery Conundra,* and Potentially Useful Citations

by

Richard T. Seymour†

* For a delightful discussion on the proper plural of "conundrum," go to http://www.guardian.co.uk/notesandqueries/query/0,5753,-5253,00.html, visited on February 28, 2007.

† Law Office of Richard T. Seymour, P.L.L.C., 1150 Connecticut Avenue N.W., Suite 900, Washington, D.C. 20036-4129. Telephone: 202-862-4320. Cell: 202-549-1454. Facsimile: 800-805-1065. E-mail: rick@rickseymourlaw.net. Some of my CLE papers can be downloaded from my web site, www.rickseymourlaw.com.

Table of Contents

I. Rule 33 Interrogatories 2
A. Permissibility of Interrogatories Seeking Bases of Contentions 2
B. Duty of Parties in Answering Interrogatories 2
C. Verification of Interrogatory Answers 3
1. Plaintiffs' Verification Problems 3
2. Organizations' Verification Problems 3
II. Rule 35 Defense Mental Examinations, a/k/a Independent Mental Examinations 4
A. Large Claims for Damages 4
B. "Garden Variety" Claims for Emotional Distress 4
C. Independence of the Examiner 5
D. Procedural Questions 5
III. Privilege Questions When Counsel Meet with the Personnel Committee 5
IV. Electronic Discovery 6
A. *Zubulake* 6
B. Local Cases 8
V. Rule 412, Fed. R. Evid. 10
A. Applicability to Discovery 10
B. Rulings 11
1. Local Cases 11
2. Cases from Outside Our Area 13
VI. Other Discovery and Evidentiary Problems 16
A. Ethnic References in a Sexual Harassment Case 16
B. Lay Testimony that Plaintiff Seemed Depressed 16
C. Evidence of What Happened to Others 17
D. Admissions 18
E. Deposition Testimony As Limiting Trial Testimony 19
F. Other Employees' Claims of Discrimination 19
G. Summaries of Incidents in Plaintiff's Medical Treatment Records 19
H. Evidence of Post-Event Occurrences 20

I. Rule 33 Interrogatories

A. Permissibility of Interrogatories Seeking Bases of Contentions

Chubb Integrated Systems Ltd. v. National Bank of Washington, 103 F.R.D. 52, 60 (D.D.C. 1984), a patent case, held that plaintiff was required to answer interrogatories seeking the basis of the allegations in particular pleadings.

B. Duty of Parties in Answering Interrogatories

Chubb Integrated Systems Ltd. v. National Bank of Washington, 103 F.R.D. 52, 61 (D.D.C. 1984), a patent case, provided a useful quotation:

> We remind the parties that they have a duty to provide true, explicit, responsive, complete and candid answers to interrogatories. *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 616, (5th Cir. 1977), *cert. denied*, 435 U.S. 996, 98 S. Ct. 1648, 56 L. Ed. 2d 85 (1978); *Evanson v. Union Oil Co. of California*, 85 F.R.D. 274, 277 (D. Minn.1979), *appeal dismissed*, 619 F.2d 72 (Emer. Ct. App.), *cert. denied*, 449 U.S. 832, 101 S. Ct. 102, 66 L. Ed. 2d 38 (1980) (the court found an implicit condition in any order to answer interrogatories is that the answer be true, responsive and complete); *Milner v. National School of Health Technology*, 73 F.R.D. 628, 632 (E.D. Pa. 1977).

Accord, Alexander v. F.B.I., 192 F.R.D. 50, 52 (D.D.C. 2000).

C. Verification of Interrogatory Answers

1. Plaintiffs' Verification Problems

Answers sworn "on information and belief" are subject to being disregarded on a contested motion for summary judgment or other contested motion, because there is no way for the court to determine what is admissible first-hand information and what is speculation or hearsay.

2. Organizations' Verification Problems

Shepherd v. American Broadcasting Companies, Inc., 62 F.3d 1469, 1482, 314 U.S. App. D.C. 137, 150 (D.C. Cir. 1995), set forth the local ground rules:

> Federal Rule of Civil Procedure 33 expressly permits a representative of a corporate party to verify the corporation's answers without personal knowledge of every response by "furnish[ing] such information as is available to the party." Fed. R. Civ. P. 33(a) (emphasis added); *see, e.g., General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162, 94 S. Ct. 926, 39 L. Ed. 2d 116 (1974); *United States v. 42 Jars*, 264 F.2d 666, 670 (3d Cir. 1959); *Chapman & Cole v. Itel Container Int'l B.V.*, 116 F.R.D. 550, 558 (S.D. Tex.1987), *aff'd*, 865 F.2d 676 (5th Cir.), *cert. denied*, 493 U.S. 872, 110 S. Ct. 201, 107 L. Ed. 2d 155 (1989); *In re Folding Carton Antitrust Litigation*, 76 F.R.D. 417, 419 (N.D. Ill.1977). Of course, the representative must have a basis for signing the responses and for thereby stating on behalf of the corporation that the responses are accurate. *See Folding Carton*, 76 F.R.D. at 419. The representative may accomplish this through whatever internal process the corporation has chosen, including discussions with counsel. *Cf. Wilson*, 561 F.2d at 508 (corporate attorneys authorized to sign corporation's interrogatory responses). The fact that years later the representative may not recall the process she used to ascertain the truthfulness of the corporation's responses, as apparently happened here, does not necessarily undermine the veracity of the original interrogatory answers.
>
> If the party propounding the interrogatories wants to know the names of the individuals with personal knowledge of each response, it can always ask for them as part of the interrogatories.

An organization that states in its answers or in the body of the verification that it cannot vouch for the accuracy of the answers may not have met its Rule 33 burden, where the information in question came from its own files and not from third parties it does not control, and where the information in question is central to the litigation. *Alexander v. F.B.I.*, 192 F.R.D. 50, 52–53 (D.D.C. 2000), stated:

> Common sense dictates that a party is responsible for ensuring the accuracy of its own records. Accordingly, the EOP has a duty to verify the accuracy of its answers. If the EOP cannot warrant the complete accuracy of its own records, it must state under oath that it took all steps necessary to ensure the accuracy of the information provided to the best of its ability and clearly explain the steps that it took to do so. See 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2174 (2d ed. 1994)("The burden is on the party objecting to interrogatories to show that the information sought is not readily available to it.")

II. Rule 35 Defense Mental Examinations, a/k/a Independent Mental Examinations

A. Large Claims for Damages

The failure to submit to a requested IME in a personal-injury case in which brain injury was alleged justified exclusion of all evidence as to the brain injury. *Croley v. Republican Nat'l Committee*, 759 A.2d 682 (D.C. 2000).

B. "Garden Variety" Claims for Emotional Distress

Benham v. Rice, 238 F.R.D. 15, 66 Fed.R.Serv.3d 292 (D.D.C. 2006) (Facciola, M.J.), held that the *pro se* plaintiff placed her mental condition in issue simply by requesting emotional-distress damages, and rejected any exception for "garden variety" claims. The court recognized that it was in the minority of courts, but adhered to its previously-expressed views. *Id.* at 28. The court explained its refusal to recognize the exception:

> To divide claims, as plaintiff would have me do, between those that only allege "garden variety" emotional distress and those that allege a specific or severe form of emotional distress is no more than a game of semantics and has nothing whatsoever to do with defendant's obligation to show good cause for the ordering of an IME. In other words, no matter what changes plaintiff makes to the wording of her two complaints, the underlying truth remains: plaintiff seeks compensatory damages for the emotional pain she claims to have suffered as a result of defendant's actions. Without the information obtained through a court-ordered IME, defendant would have no means to rebut plaintiff's claims. I cannot fairly deprive defendant of the opportunity to examine plaintiff's claims of emotional distress from a scientific vantage point. In other words, defendant has the right to challenge plaintiff's claim that she was harmed and that defendant was the source of that harm. To preclude defendant from being able to mount its defense in this manner would be to allow plaintiff to unilaterally determine which evidence will and which evidence will not be admissible. The defendant is no more bound by plaintiff's articulation of the issues in this case at it would be in any other case.

Id. at 28–29.

C. Independence of the Examiner

The independence of an examiner was not undermined by evidence that the examining psychiatrist had conducted three mental examinations in three years, by a small number of contacts with the defendant employer, or by the fact that an internal employer e-mail referred to the psychiatrist as someone with whom the company had had good results in the past. The court stated:

> Even viewed in the light most favorable to plaintiff, however, these statements do not indicate a lack of independence on the part of Dr. Ovington, much less one sufficient to defeat summary judgment. Furthermore, the appointment with Dr. Ovington was scheduled only after two other appointments with Dr. Kelley were rescheduled because of plaintiff's failure to have his medical records released in time. The fact that the IME was originally scheduled with Dr. Kelley supports a reasonable inference that there was no conspiracy between Dr. Ovington and defendants to terminate plaintiff's benefits.

Christen v. Consol Energy, 2005 WL 2877740 (S.D. W.Va., Oct. 31, 2005, No. CIV.A. 1:03–2027) at *6.

D. Procedural Questions

A plaintiff who failed to appear for an IME on the agreed date and time was required to pay the examiner's $500 cancellation fee although she had a pending objection to the previously-ordered examination, because she did not move to stay the order requiring the IME or to continue the examination. *Rachel-Smith v. Ftdata, Inc.*, 247 F.Supp.2d 734, 739–40, 91 FEP Cases 559 (D. Md. 2003). In that case, the court noted the following as to the conduct of the examination:

> As a result, Judge Day issued an Order on May 23, 2002 clearly instructing that an unobtrusive tape recording device may be used during the IME but that there would be no technician to monitor the examination, no transmission from inside the examination room to the outside, and anyone who might set up the tape recording device would need to leave the examination area during the course of the examination.

Id. at 739.

III. Privilege Questions When Counsel Meet with the Personnel Committee

There is no bright-line rule that personnel decisions made by a committee that routinely includes counsel as a member, or that are made with ad hoc participation of counsel are or are not privileged. It depends on the role of counsel in connection with the decision. If counsel is present to provide legal advice, the discussion with counsel is privileged. If not, the discussion is not privileged.

United States ex rel. Fago v. M & T Mortg. Corp., 238 F.R.D. 3, 11 (D.D.C. 2006) (Facciola, M.J.), stated:

> The cases that plaintiff relies on to support her argument that personnel decisions were business decisions do not actually so hold. Rather, those cases examined the role that a particular attorney played in the decision making process to determine whether he was acting in a legal or business capacity. *See Nesse v. Shaw Pittman*, 202 F.R.D. 344 (D.D.C. 2001); *Neuder v. Battelle Pacific Northwest Nat'l Laboratory*, 194 F.R.D. 289 (D.D.C. 2000). In *Nesse*, the court found that a partner at a law firm was not acting in a legal role when he met with the firm's management committee to decide whether a particular attorney should remain at the firm. *Nesse*, 202 F.R.D. at 358. Similarly, in *Neuder*, the court found that a lawyer who participated in a standing personnel committee was serving on that committee in a business role and not for the purpose of providing legal services or advice. *Neuder*, 194 F.R.D. at 293–95. Unlike both of those cases, M & T's counsel appears to have been acting as a legal advisor when it investigated and made recommendations regarding the personnel decisions at issue. M & T's communications to counsel in pursuit of and in receipt of legal advice regarding personnel decisions would be privileged. The question that needs to be asked is not whether personnel decisions are business decisions, but rather whether the deposition questions at issue would reveal confidential communications from M & T and its employees to its counsel that were made for the purpose of securing legal advice.

The court then quoted a Connecticut case, and continued:

> Applying this reasoning to the case at hand, to the extent that M & T relied solely on advice from counsel in making the personnel decisions and to the extent that counsel based his advice solely on information gathered in confidential employee interviews, the basis of such decisions would be privileged.
>
> However, I cannot make such a nuanced determination on the information presently before me. The deposition questions and testimony provided to the Court in the parties' briefs do not provide enough information for me to ascertain the extent or nature of M & T's counsel's involvement in the personnel decisions at issue. It is clear that M & T's counsel was involved, to some extent, in the personnel decisions as a legal advisor and the conversations that occurred as part of that involvement would be privileged. However, there may be some information about which plaintiff would be entitled to inquire at the deposition. Accordingly, I will order that the corporate deposition be resumed before me on Thursday, September 7, 2006 at 10:30 a.m. in my chambers. The deposition shall last no more than one hour and I reserve the right to ask questions *ex parte* if necessary to determine the scope and nature of counsel's involvement. Plaintiff's counsel shall be responsible for arranging to have a court reporter present.

Id. at 12.

IV. Electronic Discovery

A. *Zubulake*

Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 91 FEP Cases 1574 (**S.D. N.Y.** 2003), a Title VII sex discrimination case, ordered the defendant to produce in discovery e-mails that had

been deleted and that now resided only on 94 back-up tapes, at its own expense, estimated to be about $175,000. The court noted that requiring plaintiff to pay the expenses of such discovery could often make the discovery inaccessible regardless of its relevance:

> Courts must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases. This will both undermine the "strong public policy favor[ing] resolving disputes on their merits," and may ultimately deter the filing of potentially meritorious claims."

Id. at 317–18 (footnote omitted). The court stated that the production of electronic discovery can be cheaper than the production of paper discovery:

> Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. This makes no sense. Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying.

Id. at 318 (footnotes omitted). Finally, the court announced a new seven-factor test to determine who should pay for the discovery of electronic records:

> Set forth below is a new seven-factor test based on the modifications to Rowe discussed in the preceding sections.
>
> 1. The extent to which the request is specifically tailored to discover relevant information;
>
> 2. The availability of such information from other sources;
>
> 3. The total cost of production, compared to the amount in controversy;
>
> 4. The total cost of production, compared to the resources available to each party;
>
> 5. The relative ability of each party to control costs and its incentive to do so;
>
> 6. The importance of the issues at stake in the litigation; and
>
> 7. The relative benefits to the parties of obtaining the information.

Id. at 322. The court elaborated:

> Whenever a court applies a multi-factor test, there is a temptation to treat the factors as a check-list, resolving the issue in favor of whichever column has the most checks. But "we do not just add up the factors." When evaluating cost-shifting, the central question must be, does the request impose an "undue burden or expense" on the responding party? Put another way, "how important is the sought-after evidence in

comparison to the cost of production?" The seven-factor test articulated above provide some guidance in answering this question, but the test cannot be mechanically applied at the risk of losing sight of its purpose.

Id. at 322–23.

B. Local Cases

Hopson v. Mayor and City Council of Baltimore, 232 F.R.D. 228, 97 Fair Empl.Prac.Cas. (BNA) 617, 63 Fed.R.Serv.3d 582 (**D. Md.** 2005) (Grimm, M.J.), stated at 239–40:

> Despite the uncertainty regarding which approach to inadvertent disclosure of attorney-client privileged material would be adopted by the Fourth Circuit, there is a viable method of dealing with the practical challenges to privilege review of electronically stored information without running an unacceptable risk of subject-matter waiver. It lies with the courts issuing scheduling orders under Fed.R.Civ.P. 16, protective orders under Fed.R.Civ.P. 26(c), or discovery management orders under Fed.R.Civ.P. 26(b)(2) that incorporate procedures under which electronic records will be produced without waiving privilege or work product that the courts have determined to be reasonable given the nature of the case, and that have been agreed to by the parties. This practice, already commonly followed in cases where discovery of electronic records is anticipated, is specifically encouraged by the proposed rule changes to the discovery rules now under review by the Supreme Court. As will be seen, it is essential to the success of this approach in avoiding waiver that the production of inadvertently produced privileged electronic data must be at the compulsion of the court, rather than solely by the voluntary act of the producing party, and that the procedures agreed to by the parties and ordered by the court demonstrate that reasonable measures were taken to protect against waiver of privilege and work product protection.

(Footnote omitted.) The court relied on the "cost-benefit balancing factors listed in Rule 26(b)(2)," *id.* at 244, stated that the extent of e-discovery permitted "will be a function of the issues in the litigation, the resources of the parties, whether the discovery sought is available from alternative sources that are less burdensome, and the importance of the evidence sought to be discovered by the requesting party to its ability to prove its claims." *Id.* The court emphasized that "the parties must get beyond the posturing that all too often takes place and provide the court with particularized information and reasonable suggestions how to do so." *Id.* at 245. The court criticized the limited information provided by the defendant in seeking a protective order, stating: "A party that seeks an order from the court that will allow it to lessen the burden of responding to allegedly burdensome electronic records discovery bears the burden of particularly demonstrating that burden and of providing suggested alternatives that reasonably accommodate the requesting party's legitimate discovery needs." The court added:

> It cannot be emphasized enough that the goal of the meeting to discuss discovery is to reach an agreement that then can be proposed to the court. The days when the requesting party can expect to "get it all" and the producing party to produce whatever they feel like producing are long gone. In many cases, such as employment discrimination cases or civil rights cases, electronic discovery is not played on a level

field. The plaintiff typically has relatively few electronically stored records, while the defendant often has an immense volume of it. In such cases, it is incumbent upon the plaintiff to have reasonable expectations as to what should be produced by the defendant.

Id.

Washington v. Thurgood Marshall Academy, 232 F.R.D. 6, 11, 63 Fed.R.Serv.3d 754 (D.D.C. Oct 31, 2005), denied plaintiff's motion to compel production of further e-mails, holding that it is not enough for plaintiff to speculate that more e-mails exist than were produced.

Thompson v. U.S. Dept. of Housing and Urban Development, 219 F.R.D. 93 (D. Md. 2003) (Grimm, J.), sanctioned the Local defendants for waiting until long after the discovery cutoff to produce 80,000 e-mails, but refused plaintiff's request for an adverse inference instruction. The court rejected defendants' argument that plaintiffs' failure to seek a preservation order meant that they were under no duty to preserve the e-mails of key officials who ended their employment while discovery requests for e-mails were pending. The court summarized the principles for granting an adverse inference instruction:

> One sanction that courts have imposed pursuant to their inherent authority upon finding that spoliation of evidence has occurred is to give an adverse inference instruction to the jury. *Residential Funding Corporation v. Degeorge Financial Corp.*, 306 F.3d 99, 108 (2d Cir.2002); Zubulake IV, 2003 WL 22410619 at *6. This sanction, however, is not to be given lightly. As the Zubulake court stated:
>
> > In practice, an adverse inference instruction often ends the litigation--it is too difficult a hurdle for the spoliator to overcome. The in terrorem effect of an adverse inference is obvious. When a jury is instructed that it may "infer that the party who destroyed potentially relevant evidence did so out of a realization that the [evidence was] unfavorable," the party suffering this instruction will be hard-pressed to prevail on the merits.
>
> *Zubulake IV*, 2003 WL 22410619 at *5. Accordingly, because it is an extreme sanction, three things must be shown to warrant an adverse inference instruction for spoliation of evidence: (1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a "culpable state of mind;" and (3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it. *Residential Funding v. Degeorge Financial Corp.*, 306 F.3d at 107-8; *Zubulake IV*, 2003 WL 22410619 at *6.
>
> In *Residential Funding*, *supra*, the court clarified that there were three possible states of mind that would satisfy the culpability requirement: bad faith/knowing destruction; gross negligence, and ordinary negligence. 306 F.3d at 108; see also *Zubulake IV*, 2003 WL 22410619 at *6. The more culpable the state of mind, the easier it is for the party seeking a spoliation adverse inference instruction to demonstrate the third

element--relevance. "When evidence is destroyed in bad faith (i.e. intentionally or willfully), that fact alone is sufficient to demonstrate relevance. By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions." *Zubulake IV*, 2003 WL 22410619 at *6, *Residential Funding v. Degeorge* Financial Corp., 306 F.3d at 108-09. [FN6]

_____

FN6. Although the case did not involve the destruction of electronic records, the Fourth Circuit has addressed the issue of spoliation and likewise concluded that the party's degree of culpability will determine the extent of the adverse inference, if any, to be drawn. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir.1995).

Id. at 100–01. The court noted that an instruction would also not be appropriate because the case was scheduled for a bench trial, and noted that the trial judge would be able to draw any inferences from the Local Defendants' conduct as were appropriate. The sanction, as modified, was quite strong:

> Accordingly, the Rule 37(b)(2) sanctions were modified by: (1) precluding the Local Defendants from introducing into evidence in their case any of the 80,000 e-mail records that were "discovered" during the last minute; (2) ordering that counsel for the Local Defendants were forbidden to use any of these e-mail records to prepare any of their witnesses for testimony at trial, and that at *105 trial counsel for the Local Defendants were forbidden from attempting to refresh the recollection of any of their witnesses by using any of the 80,000 undisclosed e-mail records; (3) ordering that the Plaintiffs were permitted to use any of the 80,000 e-mail records during their case and in cross-examining any of the Local Defendants witnesses, (4) ordering that, if the Plaintiffs incurred any additional expense and attorney's fees in connection with reviewing the 80,000 records and analyzing them for possible use at trial, this could be recovered from the Local Defendants upon further motion to the court; and finally (5) ordering that if, at trial, the evidence revealed additional information regarding the non-production of the e-mail records to clear up the many uncertainties that existed as of the resolution of this issue, that the Plaintiffs were free to make a motion to the court that the failure to produce e-mail records as ordered by this court constituted a contempt of court, under Rule 37(b)(2)(D).

Id. at 105.

V. Rule 412, Fed. R. Evid.

A. Applicability to Discovery

See my paper on Depositions at this conference, for authority that the policy of Rule 412 should be followed in discovery as well as at trial.

A local case supporting that proposition is *Howard v. Historic Tours of America*, 177 F.R.D. 48, 50, 49 Fed. R. Evid. Serv. 76 (D.D.C. 1997) (Facciola. M.J.):

> It could be said, that, since the standards for discovery are more indulgent, the discoverability of information pertaining to the sexual behavior of victims of sexual

harassment [FN4] should not be guided by the policies animating a rule pertaining to the admissibility of evidence. The advisory committee's note to Fed.R.Evid. 412 makes clear, however, that the policies underlying Fed.R.Evid. 412 must inform the application of Fed.R.Civ.P. 26 when information subject to Fed. R. Evid 412, if offered at trial, is sought by discovery:

_____

FN4. It is clear from the advisory committee's note to the 1994 amendment to Fed.R.Evid. 412 that the rule applies to victims of sexual harassment. Fed.R.Evid. 412 advisory committee's note.

B. Rulings

1. Local Cases

Chief Judge Hogan took a useful approach to Rule 412 problems in *Wade v. Washington Metropolitan Area Transit Authority*, 2006 WL 890679, 69 Fed. R. Evid. Serv. 1000 (**D.D.C.** April 5, 2006, No. CIV. 01–0334(TFH), CIV. 01-2385(TFH)):

> Even though the challenged testimony passes the test of admissibility set forth in Rule 412, some may be excluded or limited, depending upon the evidence and testimony presented at trial. First, testimony or evidence regarding Plaintiff's alleged sexual behavior or predisposition of which the alleged perpetrators of the harassment in this case were unaware, shall not be admitted at trial. Testimony or evidence about any such conduct would have little, if any, probative value. Accordingly, such evidence is inadmissible. *See* Fed. R. Evid. 412(b)(2). Along those same lines, evidence regarding any activity outside of the workplace shall be barred, unless the alleged perpetrators of the harassment were present or involved. *See Burns v. McGregor Electronic Indus., Inc.*, 989 F.2d 959, 963 (8th Cir.1993) (holding plaintiff's "private life, regardless how reprehensible the trier of fact might find it to be, did not provide lawful acquiescence to unwanted sexual advances at her work place by her employer"). Finally, it should be noted that the defense theory thus far has been fabrication. WMATA denies that the incidents Plaintiff alleges ever actually occurred. If the defense chooses to pursue this theory at trial, the issue of unwelcomeness would drop out of the picture, eviscerating the probative value of the contested evidence on that issue. The evidence may still be allowed on the issues of credibility and/or damages, subject to a limiting instruction.

Id. at *1. The court continued:

> Testimony of an alleged relationship between Plaintiff and Michael Austin shall be allowed at trial. The Court finds that such evidence is admissible under Rule 412, as its probative value on the issues of unwelcomeness, damages, and credibility substantially outweighs the danger of harm or unfair prejudice its admission would pose to Plaintiff. See Fed.R.Evid. 412(b)(2). Again, if at trial Defendant pursues its theory of fabrication with regard to the incidents alleged of Michael Austin, this evidence will not be admitted on the issue of unwelcomeness. The testimony may still be allowed on the issues of credibility and damages, subject to a limiting instruction.

Id. at *2.

Howard v. Historic Tours of America, 177 F.R.D. 48, 52, 49 Fed. R. Evid. Serv. 76 (**D.D.C.** 1997) (Facciola. M.J.), granted a protective order barring defendant's interrogatories asking about the plaintiffs' sexual relations with co-workers who had not been named as harassers. The court stated: "While religious and other leaders condemn it, sexual behavior, outside of married life, between consenting adults is so common and so commonly accepted by the society, that it is absurd to think that any man in 1997 can be justified in believing that a woman who engages in it is so degraded morally that she will welcome his sexual advances without protest." The court continued:

> Moreover, even if one could argue the legitimacy of deducing from a woman's having a sexual relationship with one co-worker a willingness to accept an invitation for a similar relationship from another co-worker, there is a striking disproportion in this case between any consensual behavior by the victims and the sexual harassment of which they complain. A woman who does not resist a co-worker's request for a date, leading to a sexual relationship, may welcome another co-worker's similar request but it is absurd to suggest that she would also welcome his cruder and bolder sexual advances. In this case, the harassment complained of is coarse, brutish and assaultive to the point of a violation of the criminal law. Defendants cannot seriously be contending that a woman who voluntarily has a sexual relationship with a co-worker thereby welcomes the kind of behavior to which these women claim to be subject. There is such a gross disproportion between their voluntary sexual behavior and what they claim to have been subjected to that no reasonable jury could possibly find that they welcomed what they were subjected to, unless one is ready to concede the illogical—that a woman who engages in voluntary sexual behavior with one co-worker welcomes the sexual behavior of other co-workers no matter how reprehensible and gross it is.

Herchenroeder v. Johns Hopkins University, 171 F.R.D. 179, 182 (**D. Md.** 1997), ultimately held that there was some relevance to the requested discovery, but in light of defendant's representation that it only needed answers to two precise questions, required that the information be obtained by interrogatories under a confidentiality order.

Delaney v. City of Hampton, 999 F. Supp. 794, 796 (**E.D. Va.** 1997), *aff'd*, 135 F.3d 769 (**4th Cir.** 1998) (table), allowed discovery of the sexual harassment plaintiff's sexual history, rejecting her reliance on Rule 412. The court stated:

> In a recent decision on this issue, the Eleventh Circuit held admissible evidence of sexual history related to causation of a plaintiff's alleged harm. *Judd v. Rodman*, 105 F.3d 1339, 1343 (11th Cir.1997) (holding that because whether the plaintiff in that case contracted genital herpes from the defendant was a central issue to the case, evidence of prior sexual relationships and the type of protection used during sexual intercourse was highly relevant to the defendant's liability). This Court finds that such evidence should be available to the jury in this case. It is clear from Delaney's psychiatric file that she has had numerous stressors in her life besides the alleged incident with Parker including a history of sexual abuse and other incidents such as an automobile accident. The City has experts who will testify that these stressors may have contributed to her current

psychiatric problems. Therefore, evidence of such past abuse that is found in Delaney's psychiatric medical file should be admitted in this case.

2. Cases from Outside Our Area

Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 855–56, 75 FEP Cases 1228 (**1st Cir.** 1998), affirmed the Title VII judgment of liability against the defendant employer and its owner. "Defendants continually sought to make an issue of plaintiff's sexual history. In the course of this litigation, defendants attempted to paint the plaintiff as sexually insatiable, as engaging in multiple affairs with married men, as a lesbian, and as suffering from a sexually transmitted disease. Defendants claimed that plaintiff had an affair with a married man that caused her to become distracted from work, and led to the lapses for which she was fired." (Footnote omitted). Nor was this all. "During discovery, defendants requested that plaintiff submit to an AIDS test, apparently to substantiate their allegations of promiscuity. The request was denied." *Id.* at 856 n.2. The court stated that Rule 412 "reverses the usual approach . . . by requiring that the evidence's probative value 'substantially outweigh' its prejudicial effect." *Id.* at 856. The district court excluded "evidence concerning plaintiff's moral character or promiscuity and the marital status of her boyfriend," but "allowed defendants to introduce evidence directly relevant to their theory that plaintiff's relationship distracted her from work" and allowed evidence "concerning plaintiff's allegedly flirtatious behavior toward Miranda . . . to determine whether Miranda's advances were in fact 'unwanted.'" *Id.* The court of appeals held that these rulings "were well within the district court's discretion." *Id.* The court rejected the defendants' claim of a double standard on evidentiary rulings, because "Fed. R. Evid. 412 required the district court to apply a stricter standard with regard to admission of evidence of plaintiff's sexual history than to the evidence admitted under the more liberal standard of Fed. R. Evid. 402 & 403." *Id.* at 857 (emphasis in original). The court's discussion of the $500 fine imposed on a defense attorney for violating the court's Rule 412 rulings at trial is described in Chapter 56 (Sanctions).

Wolak v. Spucci, 217 F.3d 157, 161, 83 FEP Cases 253 (**2d Cir.** 2000), affirmed the judgment for the Title VII sexual harassment defendant on a jury verdict, holding that the lower court violated Rule 412, FED. R. EVID., by admitting evidence of the plaintiff's sexual behavior. The lower court stated that Rule 412 "is not by its terms directly applicable to this case" and allowed inquiry into plaintiff's sexual behavior outside work. Although the Magistrate Judge denied the defense's discovery request for allegedly sexually explicit photographs of plaintiff and her boyfriend, the district court declared the need for "balance and practicality in dealing with . . . plaintiff's sexual sophistication in the context of a hostile environment case. At least for purposes of computing her damages for shame and humiliation and the like, no plaintiff should be permitted to portray herself to the trial jury falsely, as some sort of shrinking violet or as a novice in a nunnery." *Id.* at 159. "Over objection at trial, the defense attorney asked plaintiff about two parties at which pornographic videos were shown while she was present, and two or three other occasions on which she watched sexual acts as they were performed. *Id.* The court of appeals held that Rule 412 "encompasses sexual harassment lawsuits." *Id.* at 160. The court rejected the defendant's attempt to distinguish its inquiries from inquiries into sexual behavior or predisposition. "The Advisory Committee Notes, however, explain that 'behavior' encompasses 'activities of the mind, such as fantasies.' . . . Because viewing pornography falls within Rule

412's broad definition of behavior, defendants' extensive questions were subject to the Rule." *Id.* The court continued:

> Moreover, the evidence elicited in response to defendant's questions should not have been admitted under the criteria set forth in the Rule. Defendants argue that questions regarding Wolak's viewing of pornography were relevant to the subjective prong of the hostile work environment test whether she was actually offended and to damages. We conclude that the evidence was of, at best, marginal relevance. Whether a sexual advance was welcome, or whether an alleged victim in fact perceived an environment to be sexually offensive, does not turn on the private sexual behavior of the alleged victim, because a woman's expectations about her work environment cannot be said to change depending upon her sexual sophistication. . . . Even if a woman's out-of-work sexual experiences were such that she could perhaps be expected to suffer less harm from viewing run-of-the-mill pornographic images displayed in the office, pornography might still alter her status in the workplace, causing injury, regardless of the trauma inflicted by the pornographic images alone. Thus, defendants failed to establish that "the probative value" of Wolak's admissions concerning her activities outside the office, "substantially outweighed the danger of harm . . . and of unfair prejudice," and the evidence was not admissible. FED. R. EVID. 412(6)(2).

Id. at 160–61 (citations omitted). The court held that the error was harmless because the plaintiff failed to introduce any evidence of injury, including evidence that she took offense at the pictures, thus failing to establish an essential element of her claim. *Id.* at 161–62.

Beard v. Flying J, Inc., 266 F.3d 792, 801–02, 87 FEP Cases 1836 (**8th Cir.** 2001), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff, and the judgment on a jury verdict for the defendant on plaintiff's constructive-discharge claim. The court stated that it was an open question whether Rule 412 applied to sexual harassment cases, but held in any event that the defendant's failure to follow the procedures set forth in Rule 412 was harmless in light of the plaintiff's knowledge that the material on her non-intimate sexual conduct would be offered, and in light of the fact that the conduct took place in a public area.

Excel Corp. v. Bosley, 165 F.3d 635, 640–41, 78 FEP Cases 1844 (**8th Cir.** 1999), affirmed the judgment on a jury verdict for the sexual harassment plaintiff. The plaintiff had been harassed at work by her former husband, and the defendant appealed the exclusion under Rule 412, Fed. R. Evid., of the former husband's testimony that the plaintiff had had sexual relations on several occasions with him, outside of the workplace, during the same time period in which she was complaining of harassment. The defendant also challenged the exclusion of the testimony of Dr. Patrick Barrett, a clinical psychologist whom the former husband saw twice during the same time period. The plaintiff attended the second session, at Dr. Barrett's request. "Dr. Barrett testified that Bosley may have acknowledged sending Johnson mixed signals. Dr. Barrett could not recall whether Bosley acknowledged sleeping with Johnson." *Id.* at 640. The court noted that the defendant sought admission of the evidence solely under Rule 412, and not under any other rule. *Id.* at 641. It described Rule 412 as allowing "admission of evidence of an alleged victim's past sexual behavior or alleged sexual predisposition in sex offense cases. Specifically Rule 412(b)(2) allows for the admission of such evidence in a civil case if it is otherwise admissible under the Rules of Evidence and its probative value substantially outweighs

the danger of harm to any victim and of unfair prejudice to any party." *Id.* The court noted that it had never decided the applicability of Rule 412 to evidence proffered in a Title VII case, but stated without explanation that it did not need to decide the question because the defendant rested solely on Rule 412. The court held that the lower court had not "manifestly erred." It explained: "The alleged sexual activity took place outside the workplace. There was no allegation that Excel was aware of it or that it informed Excel's actions regarding the sexual harassment about which Bosley complained. This was the issue before the jury not Bosley's actions outside the workplace. Further the danger of harm and unfair prejudice to Bosley was great." *Id.*

B.K.B. v. Maui Police Department, 276 F.3d 1091, 1103–06, 87 FEP Cases 1306 (**9th Cir.** 2002), reversed the lower court's denial of plaintiff's motion for a new trial after defense counsel introduced trial testimony as to the plaintiff's sexually-oriented statements and conduct, without complying with Rule 412. "Having failed in two previous motions to obtain the court's approval to introduce Rule 412 material, the defendants instead simply sprang the offending testimony upon the court and then misrepresented the nature of Becraft's testimony to the trial judge in response to plaintiff's objections that the defense intended to violate Rule 412." *Id.* at 1104–05. The court held that Becraft's testimony as to the plaintiff's sexual practices did not involve any admissions by the plaintiff as to the advances she rejected, and "Plaintiff's alleged statements regarding her sexual habits were not probative as to the welcomeness of any harassing conduct by her coworkers." *Id.* at 1105. The court held that no instruction could have cured the prejudice of Becraft's "lurid" testimony, but that the lower court's curative instruction was in any event not forceful and was diminished in effect by its having been prefaced with a jocular reference to its being nearly lunchtime. *Id.* at 1105–06 & n.7. The court affirmed the award of $5,000 in attorney's fee sanctions against both the defendant and its counsel under 28 U.S.C. § 1927 and the court's inherent power for knowing and reckless violation of Rule 412 and having misled the court about the testimony after plaintiff's counsel had made an anticipatory objection. The court also affirmed the sanction of $5,000 in emotional-distress damages for the plaintiff because of the emotional stress caused by the humiliation of hearing this evidence come in. *Id.* at 1106–09.

Judd v. Rodman, 105 F.3d 1339, 1341 (**11th Cir.** 1997), assumed without deciding that Rule 412, Fed. R. Evid., applied to a case seeking damages for transmission of genital herpes, a sexually transmitted disease. The court held that the admission of evidence of plaintiff's prior sexual history was not an abuse of discretion, because the record showed that "the herpes virus can be dormant for long periods of time and the infected person can be asymptomatic. Consequently, evidence of prior sexual relationships and the type of protection used during sexual intercourse is highly relevant to Rodman's liability." *Id.* at 1343. The court also held that the plaintiff did not waive her objection by bringing out her sexual history on her own direct examination, because this was a "valid trial strategy" to minimize the importance of the evidence after the court had denied plaintiff's motion in limine and stated that it considered Rule 412 inapplicable. *Id.* at 1342. A party is not required to object to her own testimony in order to preserve the point made in her motion in limine. *Id.* The court also held that plaintiff failed to show a substantial right was affected by the trial court's admission of evidence that plaintiff was a nude dancer both before and after she contracted genital herpes. While this was a closer question, the court held that the district court did not commit reversible error in admitting this potentially prejudicial evidence because the plaintiff had testified that she felt "dirty" after she

contracted herpes, and continued: "The court determined that Judd's employment as a nude dancer before and after she contracted herpes was probative as to damages for emotional distress because it suggested an absence of change in her body image caused by the herpes infection." *Id.* at 1343. The court also reached its decision in light of "the specific facts of this case and the considerable evidence of sexual history and predisposition which were appropriately admitted." *Id.* Finally, because plaintiff cited Rule 402 but failed to cite Rule 412 in her objection to the introduction of evidence on her breast augmentation surgery, the court held that she waived her right to object to this evidence under Rule 412. *Id.* at 1342.

VI. Other Discovery and Evidentiary Problems

A. Ethnic References in a Sexual Harassment Case

Farfaras v. Citizens Bank and Trust of Chicago, 433 F.3d 558, 564–65, 97 FEP Cases 391 (**7th Cir.** 2006), affirmed the judgment on a jury verdict for the Title VII and State-law sex discrimination and sexual harassment plaintiff for $200,000 in compensatory damages and $100,000 in punitive damages against the individual State-law defendants, $50,000 against the corporate Title VII defendant, $9,314.48 in lost wages, and $436,766.75 in attorneys' fees and costs. The court rejected defendant's argument that the lower court erroneously admitted evidence of ethnic references in a case in which no ethnic discrimination was claimed, because the ethnic references were demeaning, were intertwined with the sexually harassing statements and actions, and served to "legitimize" in defendants' eyes the targeting of plaintiff for their lewd conduct. The court stated:

> In the instant case, however, the comments concerning Farfaras's Greek ancestry were intertwined with sexual harassment. The defendants used her heritage as a qualifier in the course of their harassment ("[H]e would tell me again about me being the most beautiful Greek woman that he's ever met, and he told me that, again, most Greek women are—look like Greek men [.]"), as a method of belittling Farfaras and leaving her susceptible to sexual attacks (insulting Greek Town directly before crudely propositioning Farfaras to have sex on the defendant's boat), and claiming that her country of origin was the only thing keeping her from him ("[I]f only I was a little younger and Greek."). We find that the district court acted properly in allowing this testimony.

The court also relied on the fact that the ethnic references were not as bad as the sexually harassing statements and conduct, and stated that it was unlikely that the remarks would have substantially swayed the jury. Finally, the court held that the ethnic references were relevant to plaintiff's claim for the intentional infliction of emotional distress.

B. Lay Testimony that Plaintiff Seemed Depressed

Farfaras v. Citizens Bank and Trust of Chicago, 433 F.3d 558, 565, 97 FEP Cases 391 (**7th Cir.** 2006), affirmed the judgment on a jury verdict for the Title VII and State-law sex discrimination and sexual harassment plaintiff for $200,000 in compensatory damages and $100,000 in punitive damages against the individual State-law defendants, $50,000 against the corporate Title VII defendant, $9,314.48 in lost wages, and $436,766.75 in attorneys' fees and

costs. The court rejected defendant's argument that the lower court erroneously admitted lay witness testimony that plaintiff was depressed: "Not only was Yonan's description of Farfaras elicited from the defendants' own cross-examination . . . but there is nothing in the record to indicate the jury would have believed Yonan was offering a clinical opinion or professional evaluation." The court added: "While 'depressed' does have a medical definition, a reasonable jury can be expected to understand the difference between lay use of an adjective and an expert's use of the same word to describe a specific psychological condition." (Footnote omitted.) For the same reasons, the court held that the lower court did not abuse its discretion in refusing to give defendant's proposed instruction that the jury should disregard the term, and rejected "the defendants' claim that the use of the word 'depressed' represented an outcome-determinative legal conclusion on the issue of intentional infliction of emotional distress." *Id.* at 466.

C. Evidence of What Happened to Others

Williams v. ConAgra Poultry Co., 378 F.3d 790, 794, 94 FEP Cases 266 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII, § 1981, and Arkansas Civil Rights Act racial harassment and termination plaintiff, including the remitted awards of $173,156 in compensatory damages and $500,000 in punitive damages on the termination claim and compensatory damages of $600,000 on the harassment claim, but ordered that the punitive-damage award on the harassment claim be remitted to $600,000 from the jury's verdict of $6,063,750. The court held that plaintiff could not rely, for purposes of his harassment claim, on discriminatory actions of which he was unaware, because that would violate his duty to show that the working environment was subjectively hostile. The court held that such evidence is still relevant, because it adds to the credibility of plaintiff's testimony of the hostile environment to which he was subjected. In addition, the court held that such evidence bears on plaintiff's termination and retaliation claims, as well as on punitive damages:

> Evidence of widespread toleration of racial harassment and disparate treatment condoned by management was relevant to its motive in firing Mr. Williams. We believe that evidence of racial bias in other employment situations could permissibly lead to the inference that management was similarly biased in the case of Mr. Williams's firing. Furthermore, Mr. Williams alleged that part of the motivation for firing him was that he had complained about the racially hostile environment at the plant and that management wished to silence him in order to avoid addressing the issue. Evidence of the extent of the hostile environment was thus probative on the matter of managerial motives. . . . Furthermore, as we discuss below, the issue of motive was relevant to Mr. Williams's eligibility for punitive damages on his harassment claim . . . even if the conduct of which he was unaware was not relevant to the question of whether he experienced actionable harassment.

(Citations omitted.)

Obrey v. Johnson, 400 F.3d 691, 697–99, 95 FEP Cases 531 (**9th Cir.** 2005), reversed the judgment on a jury verdict for the Title VII defendant. Plaintiff is an Asian-Pacific Islander who claimed that persons of his race were systematically excluded from senior management positions at the Pearl Harbor Naval Shipyard. The lower court excluded the anecdotal evidence of three shipyard employees who believed they had suffered from racial discrimination in promotions.

The court held that this was an abuse of discretion. It noted that anecdotal testimony is important in establishing a pattern and practice of discrimination, and that the proffered testimony made plaintiff's claim more credible. It rejected the lower court's rationale that allowing the testimony would have resulted in time-wasting mini-trials, and that this justified exclusion of the testimony:

> We recognize, however, that the district court retains broad discretion to determine whether the probative value of the evidence at issue is substantially outweighed by considerations of "undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403 . . . . Nevertheless, none of the testimony that the appellant attempted to offer into evidence so clearly involved delay that was "undue" or a "waste of time" or was cumulative of other evidence that it was excludable. Rather, the testimony was offered to show that the defendant had a discriminatory motive when it denied his promotion because it had unlawfully rejected other applicants in circumstances similar to his, and tended to support his pattern or practice theory. While the jury naturally has to determine the credibility of witness testimony in order to assess the weight it should be accorded, this is not the sort of undue delay and waste of time that the Rules contemplate.
>
> We acknowledge that the trial court was properly concerned with the prospect of mini-trials on the witnesses' own claims of discrimination. The trial court should have first addressed these concerns with the parties through other, less restrictive means. On balance, we believe that this proposed testimony was likely to be relevant, and Rule 403 considerations do not warrant exclusion in this case. Consequently, we find that the district court abused its discretion when it excluded this testimony. On remand, the district court, of course, will retain discretion to decide that the witnesses' claims so overwhelm the issues in the trial that their testimony must be excluded under Rule 403.

Id. at 698–69 (citations omitted). The court held that there is a presumption of prejudice and that, because the testimony had not yet been adduced, it was not possible to find that the exclusion caused no prejudice. *Id.* at 699–702.

D. Admissions

Allen v. Chicago Transit Authority, 317 F.3d 696, 700, 90 FEP Cases 1229 (**7th Cir.** 2003), reversed the grant of summary judgment to the defendant. The court held that the lower court erred by failing to consider the defendant's investigator's stated disbelief of the decisionmaker as a nonbinding evidentiary admission. The court explained:

> The district court refused to give any weight to the finding by the CTA's own investigator that Tapling's explanation for Reilly's promotion was not credible. This was another error. The finding was admissible as an admission made by an employee of a party opponent within the scope of his employment, Fed. R. Evid. 801(d)(2)(D) . . . ; and as an investigative report of a public agency. Fed. R. Evid. 803(8)(C) . . . . How much weight to give such admissions (for they are evidentiary rather than judicial admissions and hence not binding . . . is for the jury to decide, not the judge in ruling on a motion for summary judgment.

(Citations omitted.)

E. Deposition Testimony As Limiting Trial Testimony

Fine v. Ryan International Airlines, 305 F.3d 746, 753, 89 FEP Cases 1543 (**7th Cir.** 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The court rejected defendant's argument that plaintiff's deposition testimony limited her claim. The court explained:

> Ryan also seems to believe that Fine cannot now argue that any of the events she complained about in her October 2 letter were discriminatory because she stated in her deposition that there were no incidents that she considered sexually harassing from April 25, 1996, until the date of her termination. But why not? A party is free to contradict her deposition testimony at trial, although her opponent may then introduce the prior statement as impeachment. . . . The jury could have reasonably believed that Fine's earlier statement was an error or that her statement referred only to workplace harassment and not to disparate treatment in regard to training and personnel files. There was enough evidence for the jury to find that Fine had a good-faith, objectively reasonable belief that Ryan was discriminating against her on the basis of her sex, and we will not disturb its finding.

(Citation omitted.)

F. Other Employees' Claims of Discrimination

Hatley v. Hilton Hotels Corp., 308 F.3d 473, 475–76, 89 FEP Cases 1861 **(5th Cir.** 2002), reversed the grant of judgment as a matter of law on plaintiffs' Title VII sexual harassment claims. The court relied in part on the defendant's inadequate investigation and failure to provide relief on earlier complaints. The court held that the testimony of other employees was relevant to show that defendant had earlier been placed on notice that particular employees, who had harassed the plaintiffs, might be harassing women. *Id.* at 476 n.1.

Fine v. Ryan International Airlines, 305 F.3d 746, 753, 89 FEP Cases 1543 (**7th Cir.** 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The court rejected defendant's argument that the lower court erred in admitting the testimony of two other female employees who testified to numerous instances of sexual harassment and discrimination. The court held that this testimony was relevant to Ryan's good-faith belief that she was complaining of actionable sexual discrimination. *Id.* at 753–54.

G. Summaries of Incidents in Plaintiff's Medical Treatment Records

Swinton v. Potomac Corp., 270 F.3d 794, 807–08, 87 FEP Cases 65 (**9th Cir.** 2001), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The court held that the trial court did not err in admitting summaries of the plaintiff's accounts of the harassment as part of exhibits prepared by psychologists he consulted, because these records came under the hearsay exception in FED. R. EVID. 803(4) for "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or

present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

H. Evidence of Post-Event Occurrences

Swinton v. Potomac Corp., 270 F.3d 794, 811–17, 87 FEP Cases 65 (**9th Cir.** 2001), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The plaintiff was subjected to a frequent barrage of racist slurs and jokes, some of them in the presence of a member of management. The defendant argued that it was entitled to a new trial because the lower court had excluded evidence of one of the post-suit steps it had taken to remedy discrimination. The court distinguished a number of cases excluding evidence of post-event occurrences because they involved the issue of liability, and evidence irrelevant to liability may still be relevant to the imposition of punitive damages. After surveying the law in Federal and State courts, the court held that lower courts have the discretion to decide whether to allow evidence of post-event remedial actions, "as a means to mitigate punitive damages." *Id.* at 814. The court stated that, under *Faragher* and *Ellerth*, the employer has the right to show that it took prompt and effective remedial action, and that this right cannot be cut off by the plaintiff's simultaneous quitting under a contention of constructive discharge and filing of suit under § 1981. "The point is that the timing and nature of remedial action are case-specific and will not always fit in a neat box." *Id.* at 815.